

REPUBLIC OF UGANDA

WATER MANAGEMENT AND DEVELOPMENT PROJECT (P123204) AND ENERGY FOR RURAL TRANSFORMATION PHASE III PROJECT (P133312)

INVESTIGATION REPORT



MAY 2, 2019



ip The
Inspection
Panel

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Abbreviations and Acronyms

AES	AES Corporation
AIA	Amended Indemnity Agreement
BBOP	Business and Biodiversity Offsets Program
BEL	Bujagali Energy Limited
BP	Bank Procedure
BTOR	Back to Office Report
CFR	Central Forest Reserve
CSO	Civil Society Organization
DEA	Directorate of Environmental Affairs
EA	Environmental Assessment
EIA	Environmental Impact Assessment
EKFS	Extended Kalagala Falls Site
EKOA	Extended Kalagala Offset Area
EMP	Environmental Management Plan
ERT-III	Energy for Rural Transformation Phase III Project
ESF	Environmental and Social Framework
ESIA	Environmental and Social Impact Assessment
ESMF	Environmental and Social Management Framework
GoU	Government of Uganda
HPP	Hydropower Project
IA	Indemnity Agreement
IDA	International Development Association
IFC	International Finance Corporation
IHPP	Isimba Hydropower Project
IPN	Inspection Panel
JICA	Japan International Cooperation Agency
KFS	Kalagala Falls Site
KOA	Kalagala Offset Area
KOSMP	Kalagala Offset Sustainable Management Plan
LTCO	Long-Term Conservation Options Report
MoEMD	Ministry of Energy and Mineral Development
MoFPED	Ministry of Finance, Planning and Economic Development
MoGLSD	Ministry of Gender, Labor, and Social Development
MoWE	Ministry of Water and Environment
MoTWA	Ministry of Tourism, Wildlife, and Antiquities
MOU	Memorandum of Understanding
MW	Megawatt
NARO	National Agricultural Research Organization
NaFIRRI	National Fisheries Resources Research Institute
NEA	Uganda National Environment Act
NEMA	National Environmental Management Authority
NFA	National Forestry Authority
NGO	Non-Governmental Organization
OP/BP	Operational Policy/Bank Procedure

PAD	Project Appraisal Document
PS	Performance Standard
RAP	Resettlement Action Plan
RPF	Resettlement Policy Framework
SATU	Save Adventure Tourism Uganda
SCA	Special Conservation Area
SEA	Strategic Environmental Assessment
SMP	Sustainable Management Plan
TOR	Terms of Reference
TTL	Task Team Leader
UETC	Uganda Electricity Transmission Company
WB	World Bank
WBG	World Bank Group
WMDP	Water Management and Development Project

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Executive Summary

Background to the Requests

1. On May 1, 2016, and September 19, 2016, respectively, the Inspection Panel received two Requests regarding the Uganda Private Power Generation (Bujagali) Project, the Water Management and Development Project (WMDP), and the Energy for Rural Transformation Phase III Project (ERT-III). For reasons of efficiency, the Panel decided to process these Requests jointly. The Requesters alleged harm caused by the construction of the Isimba Dam and the consequent flooding of the Kalagala Falls Site (KFS) on the Victoria Nile River in Uganda, which forms part of the Kalagala Offset Area (KOA). While the World Bank Group is not financing the Isimba hydropower project, the Requesters alleged that the flooding caused by the filling of its reservoir would undermine the management of protected natural resources in the KOA and adversely affect livelihoods. Establishing and maintaining the KOA was a requirement for World Bank support for the earlier Bujagali Project under the Bank's Natural Habitats Policy, since the Bujagali reservoir inundated the Bujagali Falls, river islands, and pristine natural habitat. An Indemnity Agreement (IA) between the International Development Association (IDA) and the Government of Uganda (GoU) for the Bujagali Project includes specific provisions related to the KOA for these purposes, including a sustainable management program and budget.

2. The Panel registered the Requests on September 22, 2016, and Management submitted its Response on October 31, 2016, arguing that the Requests were not eligible. Management claimed that the Bujagali Project was closed as it had been implemented, commercial operations had begun in 2012, and the commercial loans under the Bank guarantee were fully disbursed by 2012. Management also argued that the WMDP and ERT-III Projects did not relate to the harm alleged in the Requests. On December 16, 2016, the Panel issued its first Report and Recommendation, which concluded that all three projects fulfilled the Panel's eligibility criteria and recommended deferring – by up to one year – the Panel's recommendation as to whether an investigation was warranted. The Panel stated that the deferral would allow time for the completion of an Addendum to Isimba's Environmental and Social Impact Assessment (ESIA) that the Bank was supporting at the time, and any possible follow-up actions. On April 4, 2017, the Bank's Board of Executive Directors decided that, although the IDA guarantee of the Bujagali Project was still active, this project would be deemed closed for purposes of the Inspection Panel process, and thus ineligible for investigation. The Board, however, approved the Panel's deferral recommendation for the WMDP and the ERT-III Project.

3. Following a visit to Uganda in February 2018, the Panel recommended an investigation into the WMDP and the ERT-III Project. The Panel noted the importance of investigating the timing and adequacy of Management's actions in response to the GoU's decision to build Isimba, which threatened the integrity of the KOA, and the potential non-compliance of these actions with the Kalagala Offset Sustainable Management Plan (KOSMP) under the WMDP. The Panel added that the timing, sequencing, and adequacy of the ESIA Addendum financed under the ERT-III Project could constitute potential non-compliance with Bank policies. On September 19, 2018, the Board approved the Panel's recommendation to investigate, and a Panel team conducted its investigation visit to Uganda in November 2018.

Projects Covered in the Report

4. The Bujagali Project included a 250-megawatt (MW) run-of-river hydropower plant on the Victoria Nile River, a reservoir, and a dam with a maximum height of about 30 meters. The World Bank Group's support for the Project included an IDA Partial Risk Guarantee of up to US\$115 million equivalent approved in April 2007. Assessments of the Bujagali Project had concluded it would adversely affect natural habitats and areas of specific cultural relevance to local communities, which lead to the establishment of the KOA as a requirement for Bank support, as reflected in the IA. In 2010, the GoU adopted the KOSMP, which the Bank had accepted. The Panel notes that the KOSMP repeats and operationalizes the commitments of the IA to maintain and manage the KOA. Bujagali construction was completed and the plant started operating in August 2012. The IA remains in effect until the commercial loans guaranteed by IDA are fully repaid, which is expected to occur in November 2023.

5. The WMDP, approved in June 2012, for an amount of US\$135 million equivalent, included a sub-component to support priority investments related to the implementation of the KOSMP. According to Management, this sub-component “*partially complements the resources and efforts of the GoU to comply with its obligations under the IA for the Bujagali project through the implementation of the KOSMP.*”

6. The Isimba Hydropower Project (IHPP), financed by the GoU and the Export-Import Bank of China, includes a 183.2 MW run-of-river hydropower plant with a dam located on the Victoria Nile River several kilometers downstream of the Isimba Falls and approximately 36 kilometers downstream of the Bujagali HPP. Assessment studies for Isimba were conducted between 2012 and 2014, construction started in April 2015 and was completed in November 2018. The Panel understands that test flooding of the reservoir and the start of inundation of the KFS took place between November 2018 and February 2019, and the plant was scheduled to start full operations in March 2019. The World Bank Group is not financing Isimba.

7. The ERT-III Project was approved in June 2015 for an amount of US\$135 million equivalent. It financed the preparation of the ESIA Addendum to assess the environmental and social impact of Isimba on the KOA and corresponding mitigation options, as the original Isimba assessments lacked sufficient critical information. The Addendum was finalized in November 2017.

Requests for Inspection and Management Response

8. The Requesters argued that people living in and deriving sustenance from the KOA were likely to suffer environmental, economic, cultural, and health-related harm due to the Bank's failure to ensure the protection of the KOA. They claimed that the construction of the Isimba Dam at the highest level would heavily and irrevocably impact this area and would undermine the management of protected resources such as forest reserves, river banks, and wetlands. According to the Requesters, the tourism industry around the KOA provides a living for many Busoga people, and the section of the Victoria Nile that would be submerged directly supports the livelihoods of fishermen, subsistence farmers, and people operating small ferryboats on the river. The Requesters also claimed that this section of the Victoria Nile contains many unique species of plants and

animals that would be lost forever without the protection of the KOA, and they expressed concern about the health impact of the flooding.

9. The Management Response argued that the Requests were ineligible for investigation on various grounds. It argued that the potential harm alleged by the Requesters would not stem from a Bank-supported project but be related to the development of Isimba, which is not financed by the Bank and thus cannot be subject to Panel review. Management also contended that the Bujagali Project was closed and thus ineligible for Panel review. It further maintained that the two Bank-supported projects – the WMDP and ERT-III Project – did not relate to the harm alleged in the Requests: the WMDP was financing implementation of specific, afforestation-related activities as part of the KOSMP developed under the Bujagali Project and did not support any intervention that could create or contribute to the alleged harm; the ERT-III Project included a component that financed the preparation of an Addendum to the GoU’s ESIA for Isimba to evaluate the potential impact of the dam on the KOA. Finally, Management stated that the issues raised in these Requests were addressed in the Panel’s recommendations relating to prior Requests in 2001 and 2007.

Context and History of the Case

10. The Bank’s involvement with the issues raised in the Requests dates back to at least 2001, when the Bank supported the development of a hydropower plant (Bujagali 1) at the site of the Bujagali Falls, which was later cancelled following the withdrawal of the project sponsor. In 2007, the Bank then supported a plant in the same location through the Bujagali Project (Bujagali 2). Since then, the Bank has pursued activities relating to various aspects of the Bujagali Project, including the establishment and management of the KOA, and subsequent actions responding to the GoU’s decision to build Isimba, and its resulting impact on the KOA. Owing to the long-term nature of the Bank’s involvement and the existence of several Bank operations relating to these actions, it is useful to understand the connections between these interventions. The Panel considers it important to treat the projects subject to this investigation in the context of one another and other Bank actions; they represent continuous and connected efforts by the Bank to address the chain of events following its support to Bujagali almost two decades ago.

11. The Panel conducted two investigations, in 2001 and 2007, responding to concerns raised about Bujagali and the establishment and management of the KOA. In 2001, the Panel found that there was no obligation in the IA to preserve the KFS in perpetuity as an environmental offset. Following the Panel investigation, the GoU asserted its commitment to the KFS and the IA was revised to include that the site would not be developed for power generation without the agreement of the Bank. In 2007, the Panel’s investigation found that the KOA was not subject to appropriate conservation and mitigation measures and given institutional weaknesses and lack of proper training arrangements, the capacity to plan and manage the KOA had not been developed. The Panel therefore noted that the KOA might not accomplish the purpose for which it had been set aside. In response to the Panel’s investigation, an Action Plan was developed, which included the preparation of the KOSMP and monitoring of its implementation, and Management submitted Progress Reports on the Action Plan to the Board up until 2018.

12. From 2012 onwards, the Bank supported certain activities under the KOSMP through the WMDP. In 2015, the Bank observed that the ESIA for Isimba, for which construction had already

started, did not include sufficient information on its impact on the KOA and therefore compliance with the IA could not be determined. The Bank and GoU consequently agreed that additional studies would be undertaken. Due to funding constraints on the part of the GoU, the Bank then funded an Addendum to the ESIA and a Long-Term Conservation Options (LTCO) Report under the ERT- III Project. Both studies were completed in 2017, when the construction of Isimba was almost complete.

Bank Supervision and Harms Caused by the Flooding of the KFS

13. During its visit to Uganda, the Panel met with different groups of people affected by Isimba's flooding of the KFS and learned about different types of impact. These include harms to the livelihoods of locals engaged in sand mining, fishing, river transport and agriculture. The Panel also learned of impact on forests and wetland conservation, health and spiritual values. The Panel met with tourism operators, several of which had been active in the area for many years, including prior to the construction of Bujagali. They explained to the Panel team that a diverse local economy had developed around the whitewater adventure tourism industry over the past 30 years, offering direct and indirect employment opportunities to locals.

14. The Panel notes that the harms caused by the flooding of the KFS are associated with the timing and adequacy of the Bank's response to the GoU's decision to build Isimba, and relate to the Bank's oversight of ensuring that the KOA is maintained, which requires an adequate management plan, funding arrangements, and capacity. Since the KOA was established in 2007, the Bank has followed up with the GoU regarding its commitments in the IA throughout the Bujagali Project, the WMDP, and the ERT-III Project. The financing of priority KOSMP activities under the WMDP demonstrated the continued involvement of the Bank with the original offset-related issues that arose from its development of Bujagali 1, its support to Bujagali 2, the resulting provisions in the IA, and the associated Inspection Panel cases. The Panel notes that the Bank is not expected to supervise the implementation of all activities under the KOSMP. However, the WMDP became the vehicle to supervise at least part of the implementation of the KOSMP and thus should have followed up to ensure that adequate management, institutional capacity and funding arrangements were in place for effective implementation of the KOSMP and continued protection of the KOA.

15. The KOSMP goes beyond the geographic area of the KOA and encompasses several additional forest reserves. The ESIA Addendum and Implementation Completion Report for Bujagali concluded that the implementation of the KOSMP was not satisfactory as its scope was too broad to be actionable. The KOSMP was to be funded by the GoU with support from development partners and global biodiversity conservation financing mechanisms. However, a lack of funding and capacity constraints were identified as weaknesses from the outset and flagged repeatedly. The LTCO Report cites inadequate resource allocation from the central government and budget constraints as key reasons why regular annual meetings were not held and monitoring reports not prepared; strategies for the creation of outside funds to meet the financial gaps and ensure financial sustainability of the KOSMP were not paid due attention.

16. The WMDP's KOSMP subcomponent also faced challenges, including a lack of clarity on the roles of different stakeholders and unforeseen issues in the implementation of certain activities.

In May 2016, KOSMP sub-component activities were refined to focus on restoration in the Central Forest Reserves (CFRs) and community tree planting, and it was agreed that a revised implementation plan would be prepared with a feasible schedule and realistic budget. The Panel has reviewed the WMDP supervision reports over the years and has only found reference to Isimba in the October 2016 Aide Memoire, which mentioned it in passing in the context of the Inspection Panel case. The Panel notes that WMDP supervision reports do not discuss the potential impact of Isimba on the KOA and KOSMP implementation and there appears to be limited communication between the different project teams.

17. The Panel notes that the establishment of the KOA constituted an ad hoc form of compensation rather than a well-designed offset, as it does not comply with the minimum requirements of an offset. The KOA was set aside without clearly defining explicit or measurable outcomes and without ensuring adequate funding and capacity to implement. While World Bank Policy on Natural Habitats requires “*establishing and maintaining an ecologically similar protected area*,” insufficient provision was made for specific and sustained arrangements over time to ensure that the KOA is maintained. The KOSMP, with its extensive scope, multiple objectives, wide range of institutional responsibilities, and funding requirements, was not suitable for adequately managing the KOA. **Although funding and capacity constraints relating to the KOSMP became evident through WMDP supervision, Management did not address these issues to ensure the maintenance of the KOA. Thus, the Panel finds Management in non-compliance with World Bank Policies on Project Supervision (OP/BP 13.05), Investment Project Financing (OP/BP 10.00), and Natural Habitats (OP/BP 4.04).**

18. Project documentation shows that the Bank became formally aware of Isimba at least as early as May 2012. In May 2013, the Bank noted in its Progress Report to the Board that feasibility and due diligence studies indicated that Isimba would likely affect two-thirds of the Nile River stretch in the KOA. In January 2014, the Bank was considering the possibility of amending the offset boundaries, also referred to as “*offsetting the offset*” by the Bank, and recommending this approach to the GoU. In November 2014 and January 2015, the Bank urged the GoU to hold off on the final approval of the Isimba ESIA or other approvals needed for it to proceed. The Bank received the revised Isimba ESIA for review in February 2015 and considered that it lacked sufficient information to determine compliance with the IA. The Bank consequently requested that several studies be undertaken, including an Addendum to Isimba’s ESIA to determine the project’s impact on the KOA and propose mitigation measures.

19. The construction of Isimba officially commenced in April 2015, and its Certificate of Approval was issued by the National Environmental Management Authority (NEMA) to the Ministry of Energy and Mineral Development (MoEMD) in May 2015, with the condition that the Addendum be prepared. In October 2015, the GoU requested that the required studies be financed by the Bank due to funding constraints on the part of the GoU, and the Bank consequently agreed to finance the Addendum and LTCO Report. In January 2016, the Bank noted in a letter to the GoU that the construction of Isimba had started although an agreement with the Bank on its development, as required by the IA, was yet to be reached.

20. The Panel notes that several communications between the Bank and GoU regarding the impact of Isimba on the KOA took place between 2012 and 2016, but it appears that the Bank did

not communicate the possibility of deploying remedies although the IA explicitly stated that there would be no development of power generation that could affect the ability to maintain the KFS without the prior agreement of the Bank. Supervision documentation shows the Bank gave little, if any, consideration to options to minimize the impact of Isimba on the KFS. The Panel observes that this type of Bank engagement contrasts with Bank actions taken when the Mabira CFR, which is part of the KOA, was threatened in 2011. After the Bank became aware of plans allowing an investor to grow sugarcane in part of Mabira, the Bank advised the GoU of the potential inconsistency of such action with the IA and KOSMP implementation. Subsequently, the GoU did not proceed with its plans.

21. At the time of public hearings on the ESIA Addendum in September 2017, shortly before it was finalized, the excavation of the Isimba dam and powerhouse had been finished, concrete works were 90 percent complete and overall works 76 percent complete. In September 2017, a letter from the GoU stated that reservoir clearance was anticipated to start in December 2017 and flooding in May 2018.

22. **The Panel notes that the ESIA Addendum, financed under the ERT-III Project, started when the construction of Isimba was already well underway, and was completed when Isimba was almost finished. The Panel thus finds that the ESIA Addendum could not influence the design of Isimba, improve decision making, or help ensure that the Project was sustainable and that its mitigation measures were environmentally sound, as required by the Bank. The Panel therefore finds Management in non-compliance with the World Bank Policy on Environmental Assessment (OP/BP 4.01).**

23. The ESIA Addendum found that substantial parts of the KFS area of the KOA would indeed be flooded, including a loss of free-flowing river length by 56 percent and three rapids, and that the main socioeconomic impact of the flooding was on tourism businesses. While the ESIA Addendum confirms many types of adverse impact alleged by the Requesters and proposes some mitigation measures, the implementation of many of these measures is expected to be done by the Isimba developer or the GoU. The Panel understands that the Bank does not intend to support the mitigation measures, beyond assisting the GoU to create an Extended Kalagala Falls Site (EKFS) and updating the KOSMP. It is not clear to the Panel how the Bank will ensure that mitigation measures are implemented adequately.

24. **The Panel finds that Management did not take adequate, timely and effective measures in response to the threats posed by the construction of Isimba Dam and failed to ensure the protection of the KOA as provided for in the KOSMP. These omissions led to harm and Management's non-compliance with Bank Policy on Natural Habitat (OP/BP 4.04) and with Bank Policies on Project Supervision (OP/BP 13.05) and Investment Project Financing (OP/BP 10.00), which require the identification of key risks to project sustainability and recommendation of appropriate risk management strategies.**

The ESIA Addendum and the Impact of the Proposed Mitigation Strategies

25. *The ESIA Addendum as a Tool to Address the Impact on the KOA.* The ESIA Addendum proposed extending the KFS upstream by approximately 10.5 kilometers as the key mitigation

measure to compensate for the loss of 5.7 kilometers of free-flowing river. This EKFS would include a stretch of the Victoria Nile River approximately 15 kilometers long and would begin 2.5 kilometers below the Bujagali Dam and run downstream, ending at Isimba Dam. The Requesters claim the creation of the EKFS is exacerbating the harm caused by the flooding of the KFS, rather than mitigating it.

26. Rather than conducting its own due diligence to determine the potential impact of Isimba on the KOA, the Bank asked the GoU to prepare an Addendum to Isimba's ESIA. When the GoU encountered funding constraints, the Bank agreed to fund the Addendum. The Panel notes that the Addendum is an environmental impact assessment tool that is meant to influence decision making. Since the Bank is not financing Isimba it was supporting an instrument for a project over which it has no leverage.

27. In setting the Terms of Reference (TOR) for the ESIA Addendum, the Bank stipulated that the analysis of alternatives contained in the ESIA must be expanded and justified with more factual data and greater detail. However, the Panel finds that the analysis of alternatives in the ESIA Addendum simply imported the limited analysis that prompted the commissioning of the Addendum in the first place. The Panel notes that the Bank failed to ensure systematic and rigorous assessment of the Isimba project alternatives and the ESIA Addendum supported the option that would impinge most severely on the KFS. Old analyses were used without ensuring their accuracy. The ESIA Addendum did not explain the assumptions nor the methodology for basing its analysis on the 2012 feasibility study. Furthermore, the methodology seems to have prioritized maximizing hydropower at the expense of due consideration of non-energy factors such as social dimensions, livelihoods, the tourism industry and other economic activities, biodiversity, and the environment. The Panel also notes that the comparative assessment of project alternatives was futile at this late stage, since any ESIA Addendum findings in conflict with the Isimba ESIA, on which the project authorization was based, could not influence this decision retroactively and would thus be moot.

28. Lacking leverage over Isimba and not conducting an adequate analysis of alternatives, Management, through the Addendum, gave implicit support to the alternative that would have the greatest impact on the KFS. The only effect the ESIA Addendum could have had on Isimba and its partial inundation of the KFS was to formulate compensatory measures to address impact, rather than the preventive measures preferred by World Bank Policy on Environmental Assessment (OP/BP 4.01). **The Panel notes that Management, rather than conducting its own due diligence of the potential impact on the KOA caused by Isimba, asked the GoU to commission the ESIA Addendum, and only agreed to finance it later when the GoU experienced funding constraints. Management, by funding the ESIA Addendum, chose to support an environmental assessment tool for a project the Bank was not financing and over which it has no leverage. The Panel finds that the Management, through the Addendum, provided its implicit support to the project alternative with the most severe impact on the KFS without a robust scientific basis and adequate analysis. The Panel therefore finds Management in non-compliance with World Bank Policy on Environmental Assessment (OP/BP 4.01).**

29. *Required Assessments for the Establishment of the Extended Kalagala Offset Area (EKOA).* The Panel notes a biodiversity offset cannot be established or extended without properly

assessing its impact upon people and the environment, as well as considering mitigation measures, management and funding needs, and capacity for effective implementation.

30. The Panel notes that there is a major risk that the livelihoods of a range of people, many of whom are particularly vulnerable and below the poverty line, will be severely harmed by the extension. The Addendum noted that extension of the KFS will place new restrictions on existing agro-economic and fishing activities and would likely have a substantial adverse effect on livelihoods. The Panel notes that measures in the ESIA Addendum to provide alternative livelihoods and compensation and to address the risk of displacement due to the EKFS are too generic and not well-defined. No socioeconomic census of land owners in the remaining KFS and extended KFS area has been carried out. The ESIA Addendum calls for a process to look at protection options during revision of the KOSMP and additional socioeconomic studies regarding appropriate mitigation. The Panel has not seen any of these studies.

31. The Panel notes that while an Environmental Impact Assessment (EIA) process for the EKFS was planned by the GoU for February 2018, it has not seen evidence of an adequate assessment being carried out with Bank support or input prior to the establishment of the extension of the KFS and signing of the amended IA in January 2018, in line with Bank Policy on Environmental Assessment (OP/BP 4.01). A “precautionary approach,” as required by Bank policy, was not apparent in the accelerated process of supporting the GoU with the extension and signing the amended IA without an appropriate EIA.

32. By recommending an extension to the KFS without a detailed assessment of the impact on affected parties and creating appropriate mitigation measures before impact occurs to ensure their well-being, the Bank is not fulfilling the letter or spirit of its safeguards. The Panel has not seen evidence that an adequate EIA was carried out prior to the establishment of the EKFS.

33. **Management, based on the ESIA Addendum, recommended the creation of the EKFS to the GoU as a mitigation measure for the partial flooding of the KFS. The Panel finds that the impact of the establishment of the EKFS was not systematically assessed and adequately mitigated, in line with Bank policies, in non-compliance with Bank Policies on Environmental Assessment (OP/BP 4.01) and Natural Habitats (OP/BP 4.04).**

34. *The Design, Protection and Management of the EKOA.* The stated goal for legal protection of the EKFS is to create a Special Conservation Area with a primary focus on conservation of water resources and aquatic biodiversity. There is, however, no clear rationale for the shift in focus to water resources and aquatic biodiversity and away from conserving both terrestrial and aquatic ecosystems in the EKFS, as was the principal intention of the offset.

35. The Panel has found little evidence that the EKFS counterbalances the loss of other natural habitats and other biodiversity features affected by Isimba and has found no robust scientific justification for determining the boundaries of the EKFS. The ESIA Addendum identifies several types of “*large, negative, and irreversible*” impact associated with Isimba, because of flooding part of the KFS: loss of natural fish habitat, loss of island groups, loss of free-flowing river length, and loss of rapids for adventure tourism. The ESIA Addendum provides counts – e.g., rocks and islands – and broad categories of habitats – e.g., dense trees, sparse trees, and water bodies –

affected by Isimba and represented in the EKFS. The Addendum appears to assume they are of equal biodiversity value, without presenting any scientific evidence based on field studies. There was no adequate consideration to livelihood impact and consequent impact on natural habitats elsewhere due to the partial flooding of KFS and establishment of the EKFS; these types of impact should inform the offset design.

36. The Panel notes that there seems to be a paucity of information on the planned institutional, funding, and management arrangements for the EKFS, except – as far as the Panel understands – that it will be managed primarily by the National Forestry Authority (NFA) as a CFR according to three management zones: (i) an ecotourism-protection zone (in which recreation and ecotourism are to be promoted); (ii) a production zone; and (iii) a community use-partnership zone. The Addendum is largely silent regarding estimates of costs or a budget for extending the offset area and ensuring its effective management.

37. Numerous shortcomings in implementing the KOSMP as the main management tool to protect the KOA have already been recognized by Management. The KOSMP's scope was inadequately broad, there were conflicting land use objectives that could jeopardize the offset, and implementation suffered from institutional weaknesses, gaps in funding, and little monitoring. Extending the KOA without providing assurance that these shortcomings would be fully remedied and dependent on plans yet to be formulated to deliver the required compensation thus becomes a major risk. Management seems to be relying on the preparation of plans as the solution, rather than evaluating their outcomes or requiring firm assurance of their effective implementation.

38. The Panel emphasizes that, as was evident with the original KOA, the use of an offset as a mitigation mechanism requires precise descriptions of the intended biodiversity outcomes, acceptable land and natural resource uses to deliver those outcomes, effective institutional and management arrangements (including for monitoring and adaptive management), adequate financial provision for management in the long term, and protection. However, as explained above, these requirements were not satisfied in the original KOA.

39. The Panel notes that the creation of the EKFS as a mitigation measure requires adequate and effective institutional and management arrangements, financial provision in the long term, and effective legal protection beyond the required changes to the legal framework. **The Panel finds that, in spite of the challenges faced by the original KOA, Management did not assess the institutional capacity and funding arrangements to implement the appropriate conservation measures for the EKFS, in non-compliance with World Bank Policies on Environmental Assessment (OP/BP 4.01) and Natural Habitats (OP/BP 4.04).**

Conclusions

40. Because of the long-term nature of the Bank's involvement with the KOA and the existence of several Bank projects, the history of this engagement is important, as it represents continuous and connected efforts by the Bank to address the issues emerging following its financing of Bujagali almost two decades ago.

41. The Panel emphasizes that biodiversity offsets can be an important mechanism to achieve biodiversity conservation but need to be well-designed and adequately managed and funded to be able to achieve their objectives. The Bank's piecemeal KOA supervision approach through the WMDP did not create a system of continuity by which Management could be informed of the weaknesses in the maintenance of the KOA. Management failed to establish a system to systematically monitor commitments made in the IA and KOSMP and to secure them.

42. The Panel is concerned about the Bank's decision to offset an offset. Mitigating the partial loss of one offset by creating another erodes the underlying principles of offsetting, levels a serious blow to the credibility of the offset concept and has reputational risks for the Bank.

43. The creation of the EKFS is producing new and additional harm, similar to the harm associated with the partial flooding of the KFS. The Panel notes that by advising the GoU on the extension of the offset without first assessing its impact on people's livelihoods and the environment and ensuring that adequate mitigation measures could and would be implemented, the Bank continues to play a central role in a decision-making process leading to adverse impact without adequate mitigation measures in place.

Chapter 1

Introduction

1.1. Background to the Requests

1. On May 1, 2016, and September 19, 2016, respectively, the Inspection Panel received two Requests for Inspection regarding the Uganda Private Power Generation Project (Bujagali Project), the Water Management and Development Project (WMDP), and the Energy for Rural Transformation Phase III Project (ERT-III).¹ For reasons of economy and efficiency, the Panel decided to process these Requests jointly. The complaints were submitted by three residents of Uganda's Jinja District and three residents of the Busoga region of Uganda, respectively (jointly referred to as the "Requesters"). The Requesters asked the Panel to keep their identities confidential.

2. The Requesters raised concerns about potential social and environmental harm caused by the construction of Isimba Dam and the consequent partial flooding of the Kalagala Falls Site (KFS) on the Victoria Nile River of Uganda, which forms part of the Kalagala Offset Area (KOA). While the World Bank Group is not financing Isimba, the Requesters alleged that the flooding caused by the filling of its reservoir would undermine the management of protected natural resources in the KOA and adversely affect livelihoods. Establishing and maintaining the KOA was a requirement for World Bank support for the Bujagali Project under the Bank's Natural Habitats Policy, since the Bujagali reservoir inundated the Bujagali Falls. An Indemnity Agreement (IA) between the International Development Association (IDA) and the Government of Uganda (GoU) for the Bujagali Project includes specific provisions related to the KOA for these purposes, including a sustainable management program and budget.

3. The Panel registered the Requests on September 22, 2016, and Management submitted its Response on October 31, 2016. In its response, Management argued that the Bujagali Project was closed as it had been implemented, commercial operations had begun in 2012, and the commercial loans under the Bank guarantee were fully disbursed by 2012. Management also argued that the WMDP and ERT-III Project did not relate to the harm alleged in the Requests.² On December 16, 2016, the Inspection Panel issued its first Report and Recommendation. It concluded that all three projects fulfilled the Panel's eligibility criteria and recommended deferring – by up to one year – its recommendation on whether an investigation was warranted. Based on the Management Response, the Panel noted the deferral would allow time for completion of an Addendum to Isimba's Environmental and Social Impact Assessment (ESIA) that the Bank was supporting and any possible follow-up actions.

4. On April 4, 2017, the World Bank's Board of Executive Directors (the "Board") decided that, although the IDA Guarantee of the Bujagali Project was still active, the project would be deemed closed for purposes of the Inspection Panel process, and thus ineligible for investigation.

¹ The Requests and other case-related documents are available on the Panel's website at: <http://www.inspectionpanel.org/panel-cases/private-power-generation-bujagali-water-management-and-development-and-energy-rural>

² Management Response, p. v.

The Board, however, approved the Panel's recommendation to defer by up to one year its decision regarding an investigation for the WMDP and the ERT-III Project.

5. On February 4, 2018, Management updated the Board and the Panel about progress on the actions specified in its earlier Management Response. From February 7-11, 2018, a Panel Team visited Uganda and met with various stakeholders to gather information for its upcoming recommendation to the Board. On May 3, 2018, the Panel submitted to the Board a second Report and Recommendation, which noted a plausible link between the alleged harm and related potential non-compliance and recommended an investigation of the WMDP and the ERT-III Project. The Panel noted the importance of investigating the timing and adequacy of Management's actions in response to the GoU's decision to build the Isimba Dam, which threatened the integrity of the KOA, and the potential non-compliance of these actions with the Kalagala Offset Sustainable Management Plan (KOSMP) under the WMDP.³ The Panel added that the timing, sequencing, and adequacy of the ESIA Addendum financed under the ERT-III Project could constitute potential non-compliance with World Bank Policies on Environmental Assessment (OP/BP 4.01) and Natural Habitats (OP/BP 4.04), among others.⁴

6. On September 19, 2018, the Board approved the Panel's recommendation to investigate. On October 9, 2018, the Panel published its investigation plan on its website. The Panel then conducted extensive document review and staff interviews, and visited Uganda from November 25-30, 2018, for its investigation visit.

1.2. Projects Covered in the Report

7. Chapter 2 provides a historic overview of the Bank's involvement with the issues raised in the Requests, including the background and description of the various projects involved. The following sections provide a brief introduction to these projects.

8. The Bujagali Project included a 250 megawatt (MW) run-of-river hydropower plant on the Victoria Nile River, a reservoir, and a dam with a maximum height of about 30 meters.⁵ The World Bank Group support for the Project included an IDA Partial Risk Guarantee in the amount of up to US\$115 million equivalent, approved on April 26, 2007.⁶ Assessments of the Bujagali Project had concluded it would adversely affect natural habitats and areas of specific cultural relevance to local communities,⁷ leading to the establishment of the KOA, as a requirement for Bank support, as reflected in an Indemnity Agreement (IA)⁸ between IDA and the GoU. In the IA the GoU agreed to set aside the KFS "to *protect its natural habitat and environmental and spiritual values in*

³ The Inspection Panel Second Report and Recommendation, p. 10.

⁴ Ibid., p. 12.

⁵ Bujagali Project Appraisal Document (PAD), p. 9.

⁶ Ibid., p.12. The PAD explains that "*the proposed IDA PRG will provide a guarantee to commercial lenders against debt service payment defaults resulting from the Government's failure to meet its payment obligations as stipulated under the IA and the Government Guarantee.*" The WBG support also included IFC loans totaling US\$130 million equivalent, and a MIGA political risk insurance for up to US\$115 million equivalent.

⁷ Ibid.

⁸ Indemnity Agreement, Partial Risk Guarantee for the Private Power Generation (Bujagali) Project, between International Development Association and Republic of Uganda, dated July 18, 2007.

*conformity with sound social and environmental standards acceptable to the Association.”*⁹ The IA also states that the GOU will conserve, through a sustainable management program and budget mutually agreed by the Government and the Bank, the present ecosystem of the Mabira Central Forest Reserve (CFR), as well as the Kalagala CFR and the Nile Bank CFR. In 2010, the GoU adopted the KOSMP to manage the KOA, which the Bank had accepted. The Panel notes that the KOSMP repeats and operationalizes the commitments of the IA to maintain and manage the KOA. The construction of the Bujagali Hydropower Project (HPP) was completed, and it started operating in August 2012.¹⁰ The IA remains in effect until the commercial loans guaranteed by IDA are fully repaid, which is expected to occur in November 2023.¹¹

9. The WMDP, approved on June 26, 2012, for an amount of US\$135 million equivalent, aimed to (i) improve integrated water resources planning, management, and development, and (ii) improve access to water and sanitation services in priority urban areas.¹² The KOSMP sub-component of the project (US\$4.8 million equivalent) sought to “*support priority investments related to the implementation of the environmental offset that complements the Bujagali Hydropower Project.*”¹³ According to Management, this sub-component, which included several activities, “*partially complements the resources and efforts of the GoU to comply with its obligations under the IA for the Bujagali project through the implementation of the KOSMP.*”¹⁴

10. The Isimba Hydropower Project (IHPP)¹⁵, financed by the GoU and the Export-Import Bank of China, includes a 183.2 MW run-of-river hydropower plant with a dam located on the Victoria Nile River several kilometers downstream of Isimba Falls and approximately 36 kilometers downstream of the Bujagali HPP. A technical feasibility study, as well as a Resettlement Action Plan (RAP), Environmental Impact Assessment (EIA) and Social Impact Assessment (SIA) for the power plant and transmission line were completed between 2012 and 2014.¹⁶ Construction started in April 2015 and finished in November 2018. The Panel understands that test flooding of the reservoir and the start of inundation of the KFS took place between November 2018 and February 2019, and the plant was scheduled to start full operations in March 2019. As mentioned above, the World Bank Group is not financing Isimba.

11. The ERT-III Project was approved on June 5, 2015, for an amount of US\$135 million equivalent, to increase access to electricity in rural areas of Uganda.¹⁷ It financed the preparation of an Addendum to the Environmental and Social Impact Assessment (ESIA) to assess the environmental and social impact of Isimba on the KOA and corresponding mitigation options, as the original Isimba assessments lacked sufficient critical information to confirm whether Isimba would be in compliance with the IA. The Addendum was finalized in November 2017.

⁹ Indemnity Agreement, Partial Risk Guarantee for the Private Power Generation (Bujagali) Project, between International Development Association and Republic of Uganda, dated July 18, 2007, Section 3.06 (a).

¹⁰ Management Response, p. 29.

¹¹ Management Response, p. 5.

¹² Water Management and Development Project (WMDP), Project Appraisal Document (PAD), June 1, 2012, p. viii.

¹³ *Ibid.*, p. 7.

¹⁴ Management Response, p. 31.

¹⁵ In this report, the term Isimba is used to refer to the hydropower plant (IHPP) and the Isimba dam.

¹⁶ Management Response, p. 27.

¹⁷ ERT-III Project, PAD, p. 19.

1.3. Requests for Inspection

12. As mentioned earlier, this Investigation Report addresses the two Requests received by the Panel on May 1, 2016, and September 19, 2016, respectively. The first Request argued that people living and deriving sustenance from the KOA were likely to suffer grave harm as a result of the Bank's failure to ensure the protection of the KOA.¹⁸ The Request noted that the development of Isimba Dam would undermine the management of protected resources such as forest reserves, river banks, and wetlands, and would undermine and eliminate benefits from the wider socioeconomic development framework of the Bujagali Project.¹⁹ The Requesters also alleged that “immense” opportunities for sustainable development would be “extinguished.”²⁰ According to the Request, the flooding of the KFS would negatively impact the ecological and social functioning of the river section set aside for conservation. The Request alleged Bank's non-compliance with World Bank Policies on Environmental Assessment (OP/BP 4.01), Forests (OP/BP 4.36), Safety of Dams (OP/BP 4.37), and Physical Cultural Resources (OP/BP 4.11). The Requesters asked that “*the Inspection Panel recommend to the World Bank's Executive Directors that an investigation of these matters be carried out [...]*.”²¹

13. The second Request argued that the residents in the vicinity of the KOA were likely to suffer environmental, economic, cultural, and health-related harm from the failure to protect the “*biologically diverse and culturally significant section of the Nile River and its riverbanks.*”²² It claimed that construction of Isimba Dam to its tallest proposed height would “*heavily and irrevocably*” impact this area in “*direct violation*” of the IA.²³ The Requesters explained that they were supporting the construction of a smaller dam that would protect the KOA.²⁴

14. The Request argued that the tourism industry around the KOA provided a living for many Busoga people, and the section of the Victoria Nile that would be submerged directly supported the livelihoods of many fishermen and subsistence farmers, as well as people operating small ferryboats on the river. The Requesters noted that after the Bujagali Dam was built, the owners of restaurants, arts and crafts businesses, local fruit and vegetable stores, and taxis, as well as local tour guides and entertainers in the area had seen their businesses “*slow down or disappear.*”²⁵ The business owners who remained there feared the flooding caused by Isimba Dam would harm them again. According to the Request, the decline in tourism would also affect the amount of taxes collected, national revenues, and ultimately the maintenance of public infrastructure in the area. The Requesters were concerned about political implications and feared joblessness would rise, leading to problems “*such as theft and gambling, excessive drinking, drug abuse, and other social ills.*”²⁶

¹⁸ First Request for Inspection, pp. 2 and 3.

¹⁹ Ibid., p. 2.

²⁰ Ibid., p. 3.

²¹ Ibid.

²² Second Request for Inspection, p. 1.

²³ Ibid.

²⁴ Ibid., pp. 1 and 4.

²⁵ Ibid., p. 1.

²⁶ Ibid., p. 2.

15. The Requesters also indicated that the affected section of the Victoria Nile River contained many unique plant and animal species that would be “*lost forever*” if the KOA was not protected. Furthermore, according to them, this area was also home to important local spiritual and cultural figures.²⁷ The Requesters explained that the “*Busoga gods and spirits that used to guard the Bujagali falls*”²⁸ had moved away when Bujagali Dam was built, and they were concerned that the Busoga people would suffer if the gods moved away again after the flooding of the Itanda Falls and Nile section below. Moreover, the Requesters expressed concern about possible adverse health effects due to sewage and industrial waste in the stagnant water, leading to an increase in deadly diseases. They worried that crocodiles could inhabit the newly created stagnant waters and attack people and animals.²⁹

1.4. Management Response

16. The October 2016 Management Response argued that the Requests were ineligible for investigation because (i) the potential harm alleged by the Requesters would be related to the development of Isimba Dam, which was not financed by the Bank and hence could not be subject to Panel review, (ii) the Bank-financed Bujagali Project was closed and, as such, ineligible for Panel review, and (iii) the two additional Bank-supported operations mentioned in the Inspection Panel’s registration did not relate to the harm alleged in the Requests.³⁰ Management also claimed the issues raised in the Requests had been addressed in the Panel’s recommendation relating to prior Requests in 2001 and 2007.³¹

17. Management noted that the Panel’s jurisdiction over any legal agreement – whether loan, grant, or guarantee – ends when the project closes.³² Management argued that the Bujagali Project “*has been implemented, commercial operations began in August 2012, and the guaranteed commercial loans were fully disbursed by 2012.*”³³ Management stated that, “*as defined by Bank policy, the Bujagali project had closed.*”³⁴

18. The Management Response noted that the WMDP was financing implementation of specific, afforestation-related activities as part of the KOSMP developed under the Bujagali Project and did not support any intervention that could create or contribute to the alleged harm.³⁵ The Response also stated that the Bank is “*financing the following priority activities set forth in the KOSMP activities supported by the WMDP*”³⁶ such as afforestation, conservation of sensitive

²⁷ Ibid., p. 1.

²⁸ Ibid., p. 2.

²⁹ Ibid., p. 3.

³⁰ Management Response, p. v.

³¹ Ibid., p. 8.

³² Ibid., p. v.

³³ Ibid., p. v.

³⁴ Ibid.

³⁵ Ibid.

³⁶ The Management Response noted that under the WMDP, the Bank is only financing the following priority activities set forth in the KOSMP: (i) implementation of an integrated approach to afforestation and reforestation, including, inter alia, restoration of native vegetation, conservation of habitats, and restoration and protection of riverbanks; (ii) training, facilitation, and provision of technical support to community and commercial agriculture enterprises in support of environmentally sustainable livelihood strategies, and (iii) strengthening the technical and institutional capacities of the Ministry of Water and Environment and National Forestry Authority for implementing the KOSMP.

habitats and specific “*livelihood measures elaborated in the KOSMP.*”³⁷ The Response explained that the ERT-III Project included a component that financed preparation of an Addendum to the Government’s EIA and SIA Isimba Dam to evaluate the potential impact of the dam on the KOA.³⁸

19. According to the Response, in early 2015 the Bank noted that the design of Isimba Dam could affect the KOA and that there was potential for non-compliance with the IA. The GoU confirmed its commitment to comply with the IA and shared the draft Isimba Dam EIA and SIA with the Bank. The Bank then informed the GoU on March 17, 2015, that the draft EIA lacked sufficient critical information to confirm whether Isimba would be in compliance with the IA.³⁹ The GoU consequently asked the Bank to finance the ESIA Addendum.⁴⁰ According to Management, by meeting this request the Bank has “*gone out of its way*”⁴¹ to enable the GoU to identify and manage the specific impact on the KOA. The Response argued that, based on the findings of the ESIA Addendum, the Bank would determine whether any adjustments to the KOSMP might be appropriate to continue protecting the ecosystem as agreed in the IA.⁴²

20. Management contended that the Requesters’ claim that Isimba Dam would adversely affect the KOA was premature, since the ESIA Addendum was still under preparation.⁴³ The Response said the KOA could only be affected during the inundation process, which at that time (October 2016) was expected to occur in 2018. According to the Management Response, there was no breach of the IA at that point.⁴⁴ The Response also explained that the Bank had requested further studies to analyze additional concerns regarding biodiversity, and specifically fish species endemic to the part of the Victoria Nile River threatened by Isimba. The Management Response further argued that tourism and related income were not protected under the IA, which sought to limit tourism developments in the KOA, and that the claims relating to cumulative health and environmental and cultural impact were unsubstantiated and premature.⁴⁵

(Ibid., p. 6.) The Response detailed the KOSMP activities supported by WMDP: procuring a service provider to map degraded areas, survey, and demarcate boundaries of CFRs and River Banks; coordinating, supervising, and providing technical backstopping to the service provider; procuring a service provider to plant and tend the plantings in the degraded areas of Mabira and its boundaries and within the Victoria Nile River banks; signing an MoU with the National Forestry Authority on raising seedlings, supervision, and technical backstopping of the service provider on enrichment planting; mapping out small-scale and commercial tree growers, facilitating them, and technically supporting them to grow trees on their land; training, facilitating, and providing technical support to 20 community groups within the catchments of the Victoria Nile River to engage in high-value sustainable agriculture; identifying and opening trails to high-value sites within the Mabira ecosystem to promote tourism; procuring a consultant to conduct the ecological and socioeconomic survey for Mabira ecosystem and to update the management plan accordingly, and procuring a consultant to establish a digital data base for Mabira, and to train staff on how to collect data and update the database. Ibid., Annex 2, pp. 31 and 32.

³⁷ Ibid., p. 12.

³⁸ Ibid., p. 15.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid., p. vi.

⁴² Ibid., p. 13.

⁴³ Ibid., p. vi.

⁴⁴ Ibid., p. 10.

⁴⁵ Ibid., pp. 10 and 11.

21. The Response noted the Bank's commitment to continue working with the GoU to finalize the assessment of impact on the KOA to ascertain compliance with the IA.⁴⁶ According to Management, if the ESIA Addendum revealed threats to the KOA and the GoU refused to undertake remedial measures, that might merit Bank intervention.⁴⁷ The Response also added that the Bank would work with the GoU on appropriate mitigation actions and advise the GoU regarding livelihood restoration measures and compensation provided to people affected by Isimba Dam.⁴⁸ Management noted that the Bank's Board had been informed of the issues regarding the dam and its potential impact on the KOA and the IA.⁴⁹

22. Management, on February 4, 2018, submitted an update to its Management Response to inform the Board and the Panel of recent developments regarding the following actions to which it had committed in its October 2016 Response: (i) supporting the GoU to establish appropriate mitigation measures to manage identified negative impact; (ii) advising the GoU regarding livelihood restoration measures and compensation provided to people affected by Isimba; and (iii) determining, on the basis of the findings of the ESIA Addendum once it is completed, whether any adjustments to the KOSMP might be appropriate to continue the protection of the ecosystem of the CFRs as agreed in the IA. It explained that the ESIA Addendum and Long-Term Conservation Options (LTCO) Report had been finalized and the GoU had prepared an Action Plan with Bank support to ensure the implementation of mitigation measures, which included issuing the EIA certificate, strengthening the legal protection of the Extended Kalagala Offset Area (EKO), establishing institutional and funding arrangements for the EKO, managing Isimba construction activities, and preparing and adopting a sustainable management program for the EKO. Management in its update also explained that, as envisaged under the GoU's Action Plan, the Bank and the GoU signed an amendment to the IA on January 24, 2018, and the GoU was in the process of updating the Community Development Action Plan for Isimba to reflect measures identified in the ESIA Addendum.⁵⁰

1.5. Focus and Design of the Investigation

23. The Panel's investigation was conducted in two parts. The first phase involved extensive examination of documentation and interviews with Bank staff and consultants, both in Washington, D.C., and in Uganda. Two expert consultants were retained by the Panel to assist the investigation: Susan Brownlie and Richard Fuggle (biographies included in Annex 4).

24. The second part of the investigation involved a fact-finding trip to Uganda during November 25-30, 2018, that included then Panel Chairman Gonzalo Castro de la Mata, Panel Member Imrana Jalal, Senior Operations Officer Reinett Erkan, Operations Officer Birgit Kuba, Research Assistant Alice Schoonejans, and the two expert consultants. The Panel Team visited Kampala and the KOA and met with community members in the surrounding areas. In Kampala,

⁴⁶ Ibid., p. vi.

⁴⁷ Ibid., p. 9.

⁴⁸ Ibid., p. vi.

⁴⁹ Ibid., p. 12. The Management Response explains that as part of Management's progress reporting on the implementation of the action plan responding to the previous Inspection Panel investigations of the Bujagali project, these issues have been raised. In Management's view there is clear accountability to the Board regarding the implementation of Action Plans following Panel investigations.

⁵⁰ Update on Management Actions, February 4, 2018.

the team met with Government officials from the Ministry of Finance, Planning and Economic Development (MoFPED), the Ministry of Water and Environment (MoWE), the Ministry of Energy and Mineral Development (MoEMD), the Uganda Electricity Generation Company, the National Environment Management Authority (NEMA), the National Forestry Authority (NFA), and Kaggwa & Partners, as well as staff from the World Bank Country Office. In the project area the Panel team met with the officials of the district offices of Buikwe, Kayunga, and Jinja, the Requesters, and other potentially affected people – including fishermen, small ferryboat operators, traditional medicine practitioners, sand miners, tourism operators, and professional rafters, kayakers and guides.

25. The Panel team expresses its gratitude to all those it met for sharing their views and providing information. The Panel also thanks the staff of the World Bank Country Office in Uganda for its assistance, and Bank Management and the project teams for sharing information and providing several updates.

26. In this report the Panel assesses whether the Bank complied with its Operational Policies and Procedures, including:

- Environmental Assessment (OP/BP 4.01),
- Natural Habitats (OP/BP 4.04),
- Project Supervision (OP/BP 13.05), and
- Investment Project Financing (OP/BP 10.00).

27. Given the long-term nature of the Bank's involvement with the issues raised in the Requests and the existence of several projects and other Bank interventions relating to them, the structure of this document departs somewhat from traditional Panel reports. The Panel considers it important to emphasize the history and context of the Bank's interventions and the linkage between these various interventions. For these reasons, this report is structured as follows:

- Chapter 1 (this chapter) introduces the report and briefly presents the background of the case and the projects involved. It summarizes the Requests and the Management Response, outlines the Panel's investigation process, and explains the design and focus of the investigation.
- Chapter 2 presents a brief historic overview of Bank activity regarding the issues raised by the Requesters, dating back to initial Bank efforts to finance a Bujagali project almost two decades ago. It presents the events linking these early Bank interventions to the subsequent financing of Bujagali, the establishment of the KOA, and the financing of the WMDP and the ERT-III Project, to the Bank's present-day involvement.
- Chapter 3 analyzes the alleged harms caused by the flooding of the KFS, and related issues of the Bank's supervision and oversight activities of the KOA and KOSMP. It also discusses the Bank's response to the GoU's decision to build Isimba.
- Chapter 4 describes the use of the ESIA Addendum as a tool to address the impact on the KOA with a focus on the analysis of alternatives and the required assessments for the

establishment of the EKOA. It examines the creation of the EKOA and its implications on the natural environment and affected peoples' livelihoods. Finally, it examines the design, protection and management of the EKOA.

- Chapter 5 presents the conclusions of the report.

Chapter 2

Context of the Requests

2.1. Introduction

28. The Bank's involvement with the issues raised in the Requests dates back to at least 2001. Since then, the Bank has pursued activities relating to various aspects of the Bujagali Project, the ensuing establishment and management of the KOA, the subsequent actions responding to the GoU's decision to build Isimba Dam, and the resulting impact on the KOA.

29. Owing to the long-term nature of this involvement and the existence of several Bank operations relating to these actions, it is useful to understand the connections between these interventions. The Panel considers it important to treat the projects subject to this investigation in the context of one another and of other Bank actions; they represent continuous and connected efforts by the Bank to address the chain of events following its support to Bujagali almost two decades ago. Figure 1 at the end of this chapter illustrates the timeline of events.

2.2. The 2001 Bujagali Hydropower Project (Bujagali 1) and the First Inspection Panel Case

30. Original 2001 Bujagali Project. The original Bujagali Hydropower Project (referred to as "Bujagali 1") was identified by the GoU in the early 1990s as an important option to meet Uganda's medium- to long-term power generation requirements. The World Bank Group sought to support Bujagali 1 through a combined IDA/International Finance Corporation (IFC) operation comprising (i) an IDA Partial Risk Guarantee (US\$115 million equivalent), (ii) an IFC "A" loan (up to US\$60 million equivalent), (iii) an IFC "B" loan (up to US\$40 million equivalent), and (iv) an IFC risk management instrument (up to US\$10 million equivalent), all approved during a joint IDA/IFC Board meeting on December 18, 2001.⁵¹

31. The Bujagali Hydropower Project's objective was "*to promote growth through developing least-cost power generation for domestic use in an environmentally sustainable and efficient manner.*"⁵² The project involved construction of a 200 MW run-of-river power plant at the Bujagali Falls site, as well as the construction of some 100 kilometers of transmission lines and associated substations.⁵³ The AES Corporation (AES) formed AES Nile Power, a privately owned and operated company, to build the hydropower plant and to sell electricity to the Uganda Electricity Transmission Company (UETC).⁵⁴

32. The Social and Environmental Assessment documentation prepared by AES Nile Power and approved by NEMA required that, in accordance with World Bank Policy on Natural Habitats (OP/BP 4.04), the KFS would be set aside to compensate for the loss of natural habitats on the islands and banks of the Victoria Nile River that would be inundated by the Bujagali Project. The Project's PAD stated:

⁵¹ Bujagali Hydropower Project, PAD, Report No: 22963-UG, November 14, 2001.

⁵² Bujagali Hydropower Project, PAD, Report No: 22963-UG, November 14, 2001, p. 2.

⁵³ Ibid., p. 2.

⁵⁴ Ibid., p. 2, 15.

“The loss of Bujagali Falls resulting from reservoir inundation would be an irreversible conversion of a natural habitat (OP 4.04 on Natural Habitats) and result in the elimination of a significant stretch of free flowing water on the Nile River ... In circumstances such as these, OP 4.04 allows for an “offset,” i.e., protection of an area similar to the area lost as a result of a project. ... Approximately 35 hectares of islands in the Nile will be submerged (this includes islands located within the Jinja Animal Sanctuary) when the reservoir is filled. The inundation will result in the loss of terrestrial vegetation and habitat in the submerged areas. Enrichment plantings will be done on island areas not inundated and land along the main shoreline. AESNP will assist the Forest Department in gazettement of the remaining islands and riverbank as a Forest Reserve, with the Forest Department assuming responsibility for the management of the newly created Reserve. Approximately 15.8 hectares of land on islands and 12.8 hectares of riverbank land within the Jinja Animal Sanctuary will be inundated. Mitigation measures include enhancement planting to be undertaken on the residual islands using a variety of indigenous tree species. The Forest Department has expressed interest in having the residual islands gazetted, or added to, a Central or District Forest Reserve.”⁵⁵

33. GoU’s commitment to this effect was incorporated in the Bujagali Project’s 2001 Indemnity Agreement.⁵⁶

34. Inspection Panel Case under Bujagali 1. On July 27, 2001, and prior to the Board’s approval of Bujagali 1, the Inspection Panel received a Request for Inspection contending, among other things, that the *“construction of Bujagali dam [would] inundate the falls, which [was] a major tourist attraction; the camp sites on the banks of the river, and eliminate substantial revenues that accrue from tourism activities like White Water Rafting along the Nile.”*⁵⁷

35. On this matter, Management agreed that the proposed project would affect tourism, but noted that *“an agreement [was] in place to develop a downstream site at Kalagala for purposes*

⁵⁵ Ibid., p. 36.

⁵⁶ Indemnity Agreement, NUMBER B-003-0 UG, December 20, 2001. Section 3.08 stated that *“Uganda undertakes that any future proposal which contemplates a hydropower development at Kalagala Falls will be conditional upon a satisfactory Environmental Impact Assessment being carried out which will meet the World Bank Safeguard Policies as complied with in the Bujagali Hydroelectric Project. Uganda and the Association will jointly review and jointly clear such an Environmental Impact Assessment. [...] Uganda undertakes to conserve through a sustainable management program satisfactory to the Association the present ecosystem of the Mabira Forest Reserve and those portions of the Mabira Forest Reserve on both banks of the Kalagala Falls that have been de-gazetted. [...] For the term of this Indemnity Agreement, the Multi-stakeholder Task Force for the Kalagala-Itanda Offset will identify, review, implement and monitor environmentally sustainable investment programs with appropriate mitigation measures at Kalagala Falls satisfactory to the Association.”* Section 3.08 (a) and (b).

⁵⁷ Request for Inspection on the 2001 Bujagali Project, p. 4.

*other than hydropower production.”*⁵⁸ Management stated that “*the Kalagala Falls site [would] be preserved in its present state as per the agreement between the Government of Uganda, IFC and IDA as an environmental off-set.*”⁵⁹ Indeed, the World Bank spelled out this commitment to the GoU in a letter dated April 25, 2001, citing the Bank policy requirement that “*as the implementation of the Bujagali project will inundate Bujagali Falls [...] the Kalagala Falls must be conserved in perpetuity [emphasis added] for its spiritual, natural habitat, environmental, tourism and cultural values [...].*”⁶⁰

36. During its investigation, the Panel requested a legal opinion from the Bank’s Legal Department⁶¹ regarding its concerns on the validity and enforceability of the GoU’s obligation to conserve the KOA as described in the IA. On March 5, 2002, IDA’s Vice President and General Counsel issued “Legal Advice in Response to Request by Inspection Panel” which confirmed the Panel’s concerns, stating that “*the [...] provisions of the [...] Indemnity Agreement [...] do not give rise to a valid, binding, and enforceable obligation of The Republic of Uganda to conserve in perpetuity the Kalagala Falls as an environmental and cultural offset.*”⁶²

37. The Panel issued its Investigation Report on May 23, 2002.⁶³ In line with the General Counsel’s legal advice, the Panel concluded there was no obligation in the IA to preserve Kalagala Falls Site in perpetuity as an environmental offset.⁶⁴ It also found that “*...the Agreement contains a direct expression of potential development of the Kalagala site subject to the joint clearance of the EIA with IDA*”⁶⁵

38. Management’s Response to the investigation (“Management Report and Recommendation”) was submitted on June 7, 2002, with an Action Plan to address the concerns raised.⁶⁶ These actions included the Government’s commitment to “*set aside Kalagala exclusively to protect its natural habitat, environmental and spiritual values and for tourism development, and not subject the site to hydropower development.*”⁶⁷ The Response also included a revision of the of IA text, Section 3.08a of which read: “*Uganda will set aside the Kalagala Falls site exclusively to protect its natural habitat and environmental and spiritual values and to develop tourism, and will not*

⁵⁸ Management Response on the 2001 Bujagali Project, p. xi.

⁵⁹ Ibid., p. 46.

⁶⁰ Ibid.

⁶¹ See the Resolution establishing the Inspection Panel (Resolution No. IBRD 93-10 and IDA 93-9), paragraph 15.

⁶² Legal Advice in Response to Request by Inspection Panel, March 5, 2002. This document stated that the Indemnity Agreement not only omits a provision regarding conservation of Kalagala Falls in perpetuity, but “*to the contrary – the Indemnity Agreement – like the Mitigation for Loss Agreement – contains a provision that expressly recognizes the possibility that Uganda may develop Kalagala Falls.*” Furthermore, the Bank’s Legal Opinion interprets the provisions of the Indemnity Agreement and finds the following: “*by providing in subsection (a) that any hydropower development activity at Kalagala Falls would be subject to the completion of an EIA process in which the Association would have a joint decision-making role, the Indemnity Agreement makes clear that both parties recognized the possibility that Kalagala Falls could be developed under the Agreement. This provision thus directly controverts the argument that Uganda was committed under the Indemnity Agreement to conserve Kalagala Falls in perpetuity.*”

⁶³ Investigation Report on the 2001 Bujagali Project.

⁶⁴ Ibid., p. 43.

⁶⁵ Ibid.

⁶⁶ Management Report and Recommendation on the 2001 Bujagali Project.

⁶⁷ Ibid., p. 8.

*develop the site for power generation, without the Agreement of the [International Development] Association.”*⁶⁸

39. The Bujagali 1 project failed to become effective and was cancelled in 2003, following the withdrawal of AES from the project in August of that year.⁶⁹ Upon cancellation, the obligations set out in the IA signed for Bujagali 1 and any outstanding actions in the Management Report and Recommendation became moot. In September 2003, the GoU began to pursue selection of new sponsors for development of a hydropower project at Bujagali, with private-sector participation and World Bank Group support.⁷⁰

2.3. The 2007 Private Power Project (Bujagali 2) and the Second Inspection Panel Case

40. 2007 Private Power Project. In 2007 the Bujagali Hydropower Project re-emerged as the Private Power Generation (Bujagali) Project (referred to as “Bujagali 2”). Bujagali 2 was supported by the World Bank Group through (i) an IDA guarantee in the amount of US\$115 million equivalent, backstopping debt service repayment of commercial loans, (ii) IFC “A” and “C” loans in a total amount of US\$130 million equivalent, and (iii) a Multilateral Investment Guarantee Agency (MIGA) political risk insurance for up to US\$150 million equivalent.⁷¹ The project was developed by BEL, a privately owned, special-purpose company incorporated in Uganda.⁷²

41. Inspection Panel Case under Bujagali 2. On March 5, 2007, the Panel received a new Request for Inspection raising various concerns relating to Bujagali 2 and similar in nature to the Request submitted under Bujagali 1. The Requesters claimed the GoU’s commitment to establish the Kalagala Falls Site as an offset for development of Bujagali Falls was not binding.⁷³ They cited the following paragraph from the IA signed between the Bank and the GoU in the context of Bujagali 2: “[The] Government of Uganda undertakes that any future proposals which contemplates [sic] a hydropower development at Kalagala will be conditional upon [a] satisfactory EIA being carried out which will meet the World Bank Safeguard Policies as complied with in the Bujagali project.” The Requesters said this language did not guarantee the KOA would never be developed for hydropower.⁷⁴

42. In its Response to the Panel’s Registration of the Request, Management claimed that the Kalagala Falls offset provision to be included in the IA would “[...] be binding throughout the life of the Indemnity.”⁷⁵ It also noted that the GoU had reiterated its commitment to the KOA made under the previous effort to develop Bujagali 1.⁷⁶

⁶⁸ Ibid.

⁶⁹ Management Response to the 2016 Request for Inspection, p. 28.

⁷⁰ Management Response on the 2007 Private Power Generation (Bujagali) Project, p. 8.

⁷¹ Private Power Generation (Bujagali) Project in the Republic of Uganda, PAD, Report No 38421-UG, April 2, 2007.

⁷² Ibid., p. 29.

⁷³ Request for Inspection on the 2007 Private Power Generation (Bujagali) Project, p. 5.

⁷⁴ Ibid.

⁷⁵ Management Response on the 2007 Private Power Generation (Bujagali) Project, p. 10.

⁷⁶ Ibid.

43. The Board of Executive Directors approved the Panel's recommendation to conduct a second Bujagali investigation. This investigation found evidence that an offset had been created to meet the requirements of World Bank Policy on Natural Habitats (OP/BP 4.04).⁷⁷ However, the Panel also concluded that the KOA was not being subjected to appropriate conservation and mitigation measures in conformity with sound social and environmental standards. In addition, the Panel found that, despite the institutional weaknesses of local institutions and their lack of proper training arrangements, their capacity to plan and manage the KOA had not been developed and no provision had been made to rectify this. The Panel therefore believed the KOA might not achieve the purpose for which it had been set aside.⁷⁸

44. In November 2007 Management issued its Response to the Panel's Bujagali 2 investigation. This included an Action Plan to strengthen the institutional capacity of the various authorities responsible for the Project and completion of a KOSMP.⁷⁹ The Management Report and Recommendation also stated that the July 18, 2007 IA includes the Government's commitment to "...set aside the Kalagala Falls Site exclusively to protect its natural habitat and environmental and spiritual values in conformity with sound social and environmental standards acceptable to the [International Development] Association" and that "any tourism development at the Kalagala Falls Site [would] be carried out only in a manner acceptable to the Association." Uganda also agreed, through the IA, that it would "not develop power generation that could adversely affect the ability to maintain the above-stated protection at the Kalagala Falls Site without the prior agreement of the Association."⁸⁰

45. Management further stated that the cross-default provisions of the IA – which would, in case of a default, allow the Bank to suspend its lending program, including the existing portfolio – provided powerful recourse should this be required.⁸¹

2.4. The Establishment of the Kalagala Offset Area

46. The IA indicates that the KOA includes the KFS and the Mabira CFR. The IA states that the KFS area is designated as such on a map attached to the IA.⁸² In accordance with this map, the KFS consists of the Kalagala-Itanda Falls, the Kalagala CFR and the Nile Bank CFR on the banks of Kalagala Falls. Please see Map 1 below for a description of the KOA.

47. The Panel uses "the KOA" as the generic term for the Kalagala Offset Area. Where impact is specific to the KFS portion of the KOA, this report uses the term "KFS."

⁷⁷ Investigation Report on the 2007 Private Power Generation (Bujagali) Project, p. xxv.

⁷⁸ Ibid.

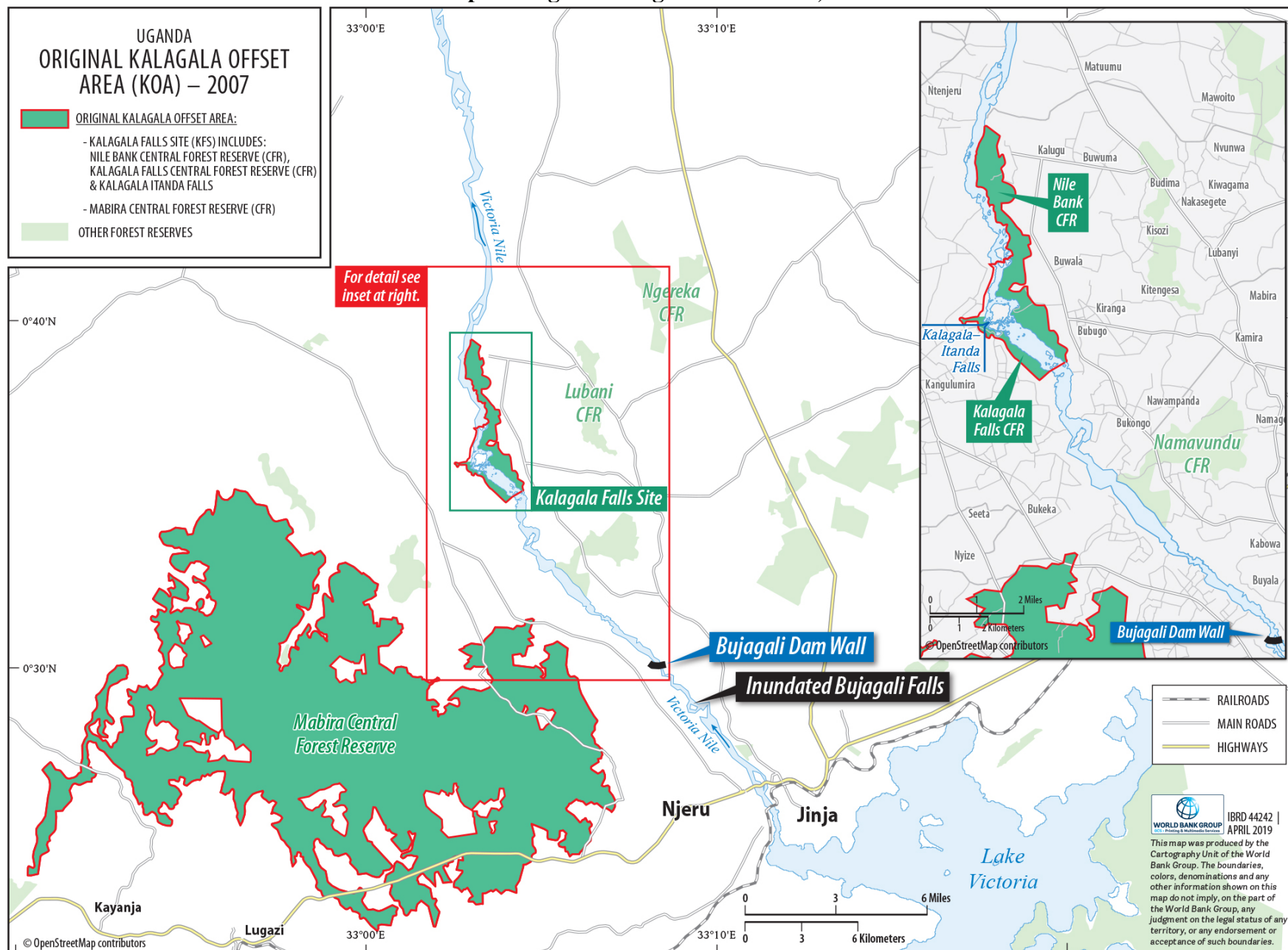
⁷⁹ Management Report and Recommendation on the 2007 Private Power Generation (Bujagali) Project, p. 20.

⁸⁰ Ibid., p. 47.

⁸¹ Ibid.

⁸² Indemnity Agreement, p. 4 (xi).

Map 1: Original Kalagala Offset Area, 2007



48. The GoU made a clear commitment to abide by the provisions of the revised IA and clarified its intention to set aside the KFS to protect its natural habitats and its environmental and spiritual values, and not to develop power generation that could adversely affect the protection of the KFS without the prior agreement of the International Development Association.⁸³

49. Legal Provisions to Protect the KOA. The IA lays out the requirements for the protection of the KOA. No other laws or regulations were adopted for this purpose. Section 3.06 of the 2007 IA reads:

“Uganda shall: (a) set aside the Kalagala Falls Site exclusively to protect its natural habitat and environmental and spiritual values in conformity with sound social and environmental standards acceptable to the [International Development] Association. Any tourism development at the Kalagala Falls Site will be carried out only in a manner acceptable to the Association and in accordance with the aforementioned standards. Uganda also agrees that it will not develop power generation that could adversely affect the ability to maintain the above-stated protection at the Kalagala Falls Site without the prior agreement of the Association. In addition, GoU undertakes to conserve through a sustainable management program and budget mutually agreed by the Government and the Association [...] the present ecosystem of the Mabira Central Forest Reserve, as well as the Kalagala Central Forest Reserve and the Nile Bank Central Forest Reserve on the banks of Kalagala Falls (as such Reserves are included within the Kalagala Falls Site). [...]”⁸⁴

50. Regarding any potential breach of the obligations of the IA, Section 4.01 of the 2007 IA provides that:

“In the event that: [...] (ii) Uganda defaults in the performance of any of its obligations hereunder and such failure or default continues and remains uncured in the opinion of the Association for sixty (60) days or more after notice thereof shall have been given to Uganda by the Association; [...] the Association shall be entitled, in addition to any other rights and remedies it may have, to suspend or cancel in whole or in part Uganda’s right to make withdrawals under any development credit agreement or financing agreement between the Association and Uganda or under any loan or guarantee between the Bank and Uganda, or to declare the outstanding principal and interest of any such credit or loan due and payable immediately.”⁸⁵

51. Section 1.02 (c) (v) of the 2007 IA allows that actions, measures, and arrangements undertaken in the Environmental Management Plans to mitigate adverse environmental and social impact, and offset or reduce them to acceptable levels, “*may be amended from time to time with the prior agreement of the Association.*”⁸⁶ Section 5.01 stipulates that “*the Indemnity Agreement*

⁸³ Indemnity Agreement, 2007, Section 3.06 (a).

⁸⁴ Indemnity Agreement, 2007, Section 3.06 (a).

⁸⁵ Ibid., Section 4.01.

⁸⁶ Ibid., Section 1.02 (c) (v).

(...) save as otherwise may be provided hereunder, shall have no force or effect following the Government's satisfaction of all Guaranteed Obligations and the termination of the IDA Guarantee Agreement.”⁸⁷

52. The IDA Guarantee and 2007 IA were set to expire in 2023.⁸⁸ The IA included a provision that, prior to its termination, the Bank and the GoU will enter into discussions “*regarding an extension (and the terms of any extension) of the afore-mentioned setting aside of and undertakings in respect of the Kalagala Falls Site (including the Kalagala Central Forest Reserve and the Nile Bank Central Forest Reserve) and the Mabira Central Forest Reserve.*”⁸⁹

2.5. A Description of the KOA

53. Offset Definition and Features. The setting aside of the KOA has been loosely referred to as an “*environmental offset*” since as early as 2001. The Panel notes that biodiversity offsets are intended to compensate for unavoidable negative impact that remains after efforts to avoid, minimize, and to rehabilitate or restore ecosystems have been exhausted, and are considered “mitigation efforts of last resort.”⁹⁰ There are limits to what can be offset; offsets cannot compensate for the loss of irreplaceable biodiversity. Offsets strive to result in “no net loss” and preferably to yield a “net gain” in biodiversity, and to leave people who rely on biodiversity for their well-being at least as well off as before the impact. An offset is considered one possibility among other compensation tools that can be more generic. Measures not intended to yield “no net loss” or a “net gain” and that do not involve quantitative biodiversity accounting are better described as “compensation” or “reduced net loss,” rather than as offsets.⁹¹

54. Regardless of the precise definition or standard used, a biodiversity offset must possess a set of defining characteristics (see Annex 2 below for details). Offset design must be informed by explicitly defined objectives and scope. Results to offset residual negative impact on biodiversity can be accomplished by:

- *Improving ecosystem protection status,*
- *Improving the condition of affected biodiversity, and/or*
- *Including compensation packages to stakeholders affected by the development project or the offset.*

55. An offset must be designed to deliver gains in the same type of biodiversity as that which is negatively affected (i.e., a “like-for-like” exchange). Its size and location must consider its

⁸⁷ Ibid., Section 5.01.

⁸⁸ Private Power Generation (Bujagali) Project, PAD, April 2, 2007, p. 100.

⁸⁹ 2007 Indemnity Agreement, Section 3.06 (a).

⁹⁰ The International Business and Biodiversity Offsets Program (BBOP), established in 2004, is a recognized leader on biodiversity offsets. Its first Handbooks and Principles for Biodiversity Offsets were published in 2009, together with resource papers and case studies. The BBOP Standard was published in 2012, together with additional guidance. IFC's Performance Standards 6 (PS6) and the BBOP Standard are complementary, and the IFC definitions and requirements align with those of the BBOP Standard. Similar provisions are now found in the safeguard policies of other financial institutions, including the World Bank's newly approved Environmental and Social Framework. The World Bank published its own “User Guide” on biodiversity offsets in 2016.

⁹¹ World Bank and ProFor, 2016. Biodiversity Offsets: A User Guide, p. 3.

ecological, geographical, and social context, and the threats to its status and condition. In this context, the flooding of Bujagali Falls arguably constituted the loss of unique features with cultural heritage values and spiritual significance to the Kingdom of Busoga, as the Falls “*are considered a place inhabited by spirits.*”⁹² In its 2008 Investigation Report, the Panel found that Management failed to adequately consider or implement alternatives to avoid project-related impact on Busoga spirituality and culture, and cumulative impact was not addressed in a meaningful way.⁹³

56. The Kalagala Falls Site (as part of the KOA) aimed to compensate for the loss of the Bujagali waterfall and several islands in the Victoria Nile, because the project caused disturbance to – and loss of – land and islands that fall within the Jinja Wildlife Sanctuary.⁹⁴ The site’s clear purpose was to establish and maintain an ecologically similar protected area as per World Bank Policy on Natural Habitats (OP/BP 4.04), i.e., to set aside the KFS “*exclusively to protect its natural habitat and environmental and spiritual values in conformity with sound social and environmental standards acceptable to the Association.*”⁹⁵

57. The KFS was identified as having “*ecologically similar*” waterfalls, islands, and stretch of river. However, it cannot be deemed an exact “like-for-like” exchange with certainty due to deficient biodiversity data. No clear outcome for the offset was defined; there was no stated intention to achieve either “no net loss” or a “net gain” as is usually expected in an offset. Gains in biodiversity were to be achieved through a combination of protecting the KFS against any imminent threat of hydropower development at Kalagala-Itanda Falls, restoration of natural habitat, and effective management. Neither the measures of residual negative impact of the project, nor the expected gains in biodiversity or natural habitats were provided, and therefore it is not possible to determine whether the gains realized could counterbalance losses.

58. Regarding the size and geographic location of the offset, the Panel notes that Management concluded the boundaries were selected without a firm scientific basis and that there was no rigorous identification of a baseline on the natural habitats, environmental, and spiritual values.⁹⁶

59. Good practice requires an offset to last at least until a project’s residual negative impact on biodiversity has been mitigated, and preferably in perpetuity.⁹⁷ The Panel notes the Bank’s early intention for the KOA to be protected in perpetuity. A letter dated April 25, 2001, from the World Bank to the GoU cited World Bank policy requirements and stated that “*the Kalagala Falls must be conserved in perpetuity [emphasis added] for its spiritual, natural habitat, environmental, tourism and cultural values.*”⁹⁸ As mentioned in Chapter 2, following a request by the Inspection

⁹² IP Investigation Report, August 29, 2008, p. 50.

⁹³ Ibid., p. xxiii.

⁹⁴ KOSMP 2010-2019, Annex 1.

⁹⁵ IP Investigation Report, August 29, 2008, para 163.

⁹⁶ Implementation completion and results report (IDA guarantee no. B0130) the Private Power Generation (Bujagali) project, Uganda, dated September 21, 2018, para 119.

⁹⁷ BBOP, Business and Biodiversity Offsets Programme (2012), *Standard on Biodiversity Offsets*, Washington DC <https://www.forest-trends.org/publications/standard-on-biodiversity-offsets/>; IUCN, 2016b, IUCN Policy on Biodiversity Offsets (WCC-2016-Resolution-059-EN); https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC_2016_RES_059_EN.pdf, and Biodiversity User Guide, p. 31, <http://documents.worldbank.org/curated/en/344901481176051661/pdf/110820-WP-BiodiversityOffsetsUserGuideFinalWebRevised-PUBLIC.pdf>

⁹⁸ Management Response on the 2001 Bujagali Project, Attachment 9.

Panel during its 2001 investigation of the Bujagali Project, the Bank's General Counsel confirmed the Panel's concerns about this and stated that "*the provisions of the Indemnity Agreement do not give rise to a valid, binding, and enforceable obligation of The Republic of Uganda to conserve in perpetuity [emphasis added] the Kalagala Falls as an environmental and cultural offset.*"⁹⁹ In response to the first Panel investigation, Management reaffirmed the GoU's commitment to protect the KOA, but this time it did not explicitly refer to protection in perpetuity. The Bank also did not require the formal protection of the KOA under Ugandan law.

60. The Panel notes that the IA includes a provision that, prior to its termination, the World Bank and the GoU would pursue discussions "*regarding an extension (and the terms of any extension) of the afore-mentioned setting aside of and undertakings in respect of the Kalagala Falls Site (including the Kalagala Central Forest Reserve and the Nile Bank Central Forest Reserve) and the Mabira Central Forest Reserve.*"¹⁰⁰ This provision includes the intention by both parties to explore options to honor earlier commitments – going back as early as Bujagali 1 – to maintain the offset beyond the expiration of the IA in 2023 and possibly in perpetuity.

61. The Kalagala Offset Sustainable Management Plan. Following the IA requirement that the GoU "*undertakes to conserve through a sustainable management program and budget mutually agreed by the Government and the Association*"¹⁰¹ the ecosystems of the Mabira CFR and the KFS (including the Kalagala CFR and the Nile Bank CFR), the GoU developed the KOSMP, which was accepted by IDA.

62. The KOSMP provided the management goals, actions and means for addressing the obligations under the IA and covered the period 2010 through 2019.¹⁰² It was adopted in 2010 and formally launched in 2011. The scope of the KOSMP extended beyond the requirements of the IA and also included the more distant Namavundu, Namawanyi, Namananga, Nadagi, and Namakupa CFRs.¹⁰³ Please see Map 2 below for a description of the KOSMP areas.

63. As is extensively discussed in the following chapters, the management of the KOA through the KOSMP suffered from a lack of funding, capacity constraints, and an overly broad management plan that was not actionable.

64. World Bank Support for the KOSMP through the WMDP. In 2012 the Bank committed – through the WMDP – to "*support priority investments related to the implementation of the environmental offset.*"¹⁰⁴ The KOSMP sub-component of the WMDP is described as supporting and funding activities specified in the KOSMP such as reforestation, afforestation, restoration and conservation of sensitive and native habitats, restoration and protection of riverbanks, promotion of environmentally sustainable livelihood strategies, and development of capacity of implementing agencies.¹⁰⁵

⁹⁹ Legal Advice in Response to Request by Inspection Panel, March 5, 2002.

¹⁰⁰ IA, 2007, p. 9 Section 3.06 (a).

¹⁰¹ Indemnity Agreement, 2007, Section 3.06 (a).

¹⁰² KOSMP 2010-2019, p. 9.

¹⁰³ Ibid., p. 16.

¹⁰⁴ WMDP PAD, June 2012, p. 7.

¹⁰⁵ Ibid.

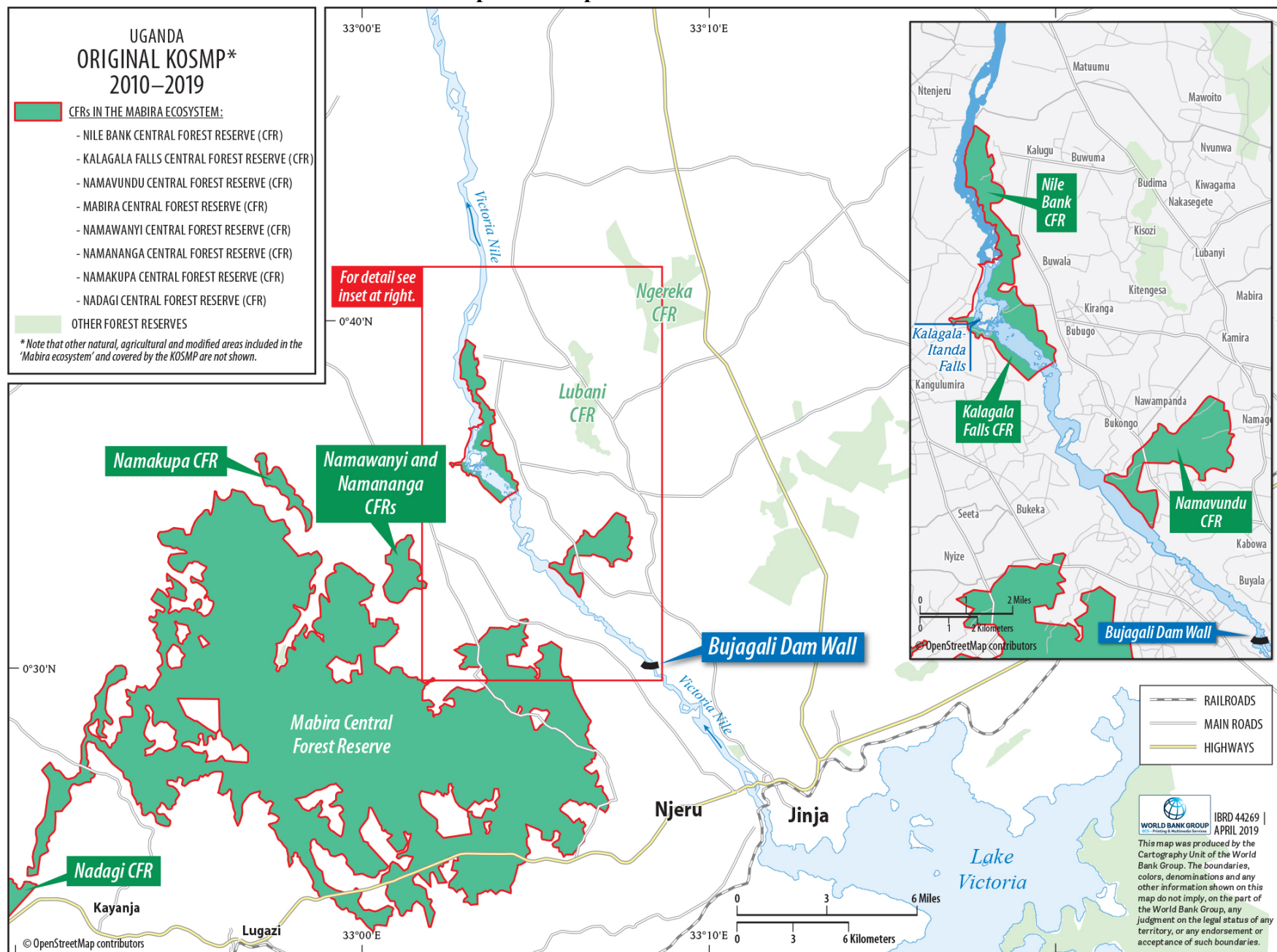
65. During the WMDP Mid-Term Review in 2016,¹⁰⁶ the WMDP component relating to the KOSMP was redesigned due to serious implementation delays and shortcomings, including *“unforeseen issues [that] have arisen and/or were overlooked at the planning stage, such as the potential need for resettlement of affected communities in the River Nile protection zone.”*¹⁰⁷ The Bank at that time further noted that *“restoration of the River Nile Banks protection zone has been excluded from the project because of the unforeseen land-use conflicts and need for compensation.”*¹⁰⁸ The activities covered by the WMDP component were redefined to focus on community tree planting.

¹⁰⁶ WMDP Aide Memoire, May 2016, p. 3.

¹⁰⁷ Here “protection zone” refers to the terrestrial area in the KFS falling within the two CFRs, and the “100-meter from the HWM” corridor in terms of the Wetlands, River Banks, and Lake Shores Management regulations.

¹⁰⁸ WMDP Aide Memoire, May 2016, p. 13.

Map 2: Description of the KOSMP Areas



2.6. The Construction of Isimba Dam and its Impact on the KOA

66. The Isimba Dam site, located 15 kilometers downstream from Kalagala Falls, has been considered a potential site for hydropower development for many years,¹⁰⁹ but was not mentioned as a possible location in the Hydropower Master Plan of 1997. Although the Kalagala site had been evaluated as a dominant prospective site in the GoU's 1997 Hydropower Master Plan, it was not considered in the 2011 Master Plan because of the KOA.¹¹⁰

67. The Panel understands that the first feasibility studies for Isimba were envisioned in 2008. The 2011 Master Plan records that the MoEMD intended to develop the Isimba site as a dam-type hydropower project, and that a German feasibility study was already being undertaken.¹¹¹ In 2011 the final report on a "*Project for Master Plan Study on Hydropower Development in the Republic of Uganda*," confirmed both Karuma and Isimba on the Victoria Nile as priority sites for hydropower development.¹¹²

68. The World Bank has not been involved in the financing or construction of Isimba Dam. The SIA undertaken for Isimba by the GoU shows that public consultations concerning the project were held in the Kayunga, Kamuli, and Jinja Districts between October and December 2012.¹¹³ The same period is cited for consultations held in connection with the EIA. Field studies of flora and fauna were conducted in March 2013.¹¹⁴ The ground-breaking ceremony for the dam took place on October 5, 2013, and at that time construction was expected to be completed within 40 months.¹¹⁵ The Panel understands that the EIA was only finished in November 2014 and NEMA granted approval of it on May 19, 2015.

69. Bank Intervention through the ERT-III Project. Project documentation shows that Management became formally aware of Isimba at least as early as May 2012, during a "Bujagali Joint Lenders" supervision meeting.¹¹⁶ In February 2015, almost three years after this information and one-and-a-half years after groundbreaking, the Bank reviewed the EIA and found it did not adequately study the impact of Isimba on the KOA, and that it lacked sufficient information to allow judgment of compliance with the IA.¹¹⁷ The Bank and the GoU therefore agreed that additional studies would be undertaken. Due to GoU funding constraints, the Bank agreed to

¹⁰⁹ During its visit to Uganda, the Panel learned that Isimba has been discussed as a potential site since at least as early as the 1950s.

¹¹⁰ Project for Master Plan Study on Hydropower Development in The Republic of Uganda, Final Summary Report, March 2011, Japan International Cooperation Agency, p. 29.

¹¹¹ Project for Master Plan Study on Hydropower Development in the Republic of Uganda, Final Report Summary, March 2011, p. 5.

¹¹² Ibid., p. 4.

¹¹³ Kagga & Partners Ltd on behalf of AWE Environmental Engineers, Social Impact Assessment for Proposed Isimba HPP (Dam and Reservoir), September 2013, Annex 1.

¹¹⁴ Submitted to Ministry of Energy and Mineral Development by AWE Environmental Engineers, on behalf of Fitchner GmbH & Co. KG, Norplan Nedra Skøyen Ve, and Kagga & Partners Ltd Consulting Engineers, November 2014, Section 4.2.2.

¹¹⁵ Available at: <http://www.statehouse.go.ug/media/news/2013/10/06/ground-breaking-ceremony-183mw-isimba-hydro-power-project>

¹¹⁶ Aide Memoire, 9th Joint Lenders Supervision Mission, 9-11 May 2012, p. 7.

¹¹⁷ Letter from World Bank to GoU, March 17, 2015.

finance an addendum to the Isimba ESIA and a LTCO Report under the ERT-III Project.¹¹⁸ The LTCO Report was finalized in July 2017, and the ESIA Addendum was finalized in November 2017. The ESIA addendum recommended extension of the KOA as a mitigation measure, i.e., “offsetting of the offset.”

70. The LTCO Report was prepared following the provision in the IA¹¹⁹ that the GoU and Bank would discuss a possible extension – and the terms of same – for the long-term protection and conservation of the KOA. The LTCO Report was prepared in order to inform these discussions, with a view to evaluating available legal options and establishing the legal status and financial sustainability of the KOA’s implementation and management.

71. Action Plan for the Extended Kalagala Falls Site (EKFS). On October 12, 2017, a draft Action Plan titled “Bujagali Indemnity Agreement: Agreed Action Plan on Mitigating the Impacts of Isimba Hydropower Project on the Kalagala Falls Site (KFS)” was agreed between the Bank and the GoU. The Action Plan proposed legal protection for the Extended Kalagala Falls Site that would be acceptable to the World Bank, and GoU committed to:

- i. Establish the EKFS¹²⁰ as a special conservation area with a primary focus on conserving water resources and aquatic biodiversity;
- ii. Provide a clear and accurate geographic definition of the area;
- iii. Include specific and unambiguous prohibitions against building new hydropower facilities or other major infrastructure in the EKFS or in the areas affecting it;
- iv. Provide a clear framework for developing a Sustainable Management Plan for the EKFS and Mabira CFR within the EKOA and viable institutional and financial mechanisms for implementing it; and
- v. Include provisions to ensure that this conservation area cannot be easily rescinded or downsized through executive action alone – for example, it should be impossible to remove the official status of the EKFS without Parliamentary action.¹²¹

72. The Action Plan also proposed draft amendments to the Uganda National Environment Act (NEA) to provide for the declaration of Special Conservation Areas and stipulated the amendments to the KOSMP required to make the KOSMP appropriate to the new boundaries of the EKFS.¹²² These actions sought to ensure the conservation of the EKFS and to strengthen legal protection for the free-flowing river and adjacent land parcels within EKFS boundaries. As an interim measure, the GoU indicated it would prepare and approve under the Forestry Act a Statutory Instrument “to establish the EKFS as a Strict Natural Reserve for purposes of protecting the river and aquatic

¹¹⁸ Letter from GoU to World Bank, October 26, 2015.

¹¹⁹ Section 3.06 a) of the Indemnity Agreement July 18, 2007.

¹²⁰ The EKFS would include the original KFS (comprising the Kalagala Falls and the Kalagala and Nile Bank CFRs), plus the new areas. These new areas encompass the stretch of the Victoria Nile River approximately 15 kilometers long beginning upstream at 2.5 kilometers below the Bujagali Dam wall and ending downstream at the tail of the Isimba Dam reservoir, including the entire Victoria Nile River aquatic area within these limits, all islands within these limits, all land within 100 meters of the river banks from the annual maximum high-water line, and the Namavundu, Kalagala Falls and Nile Bank CFRs (Amended Indemnity Agreement, January 24, 2018)

¹²¹ Draft Action Plan: Bujagali Indemnity Agreement: Agreed Action Plan On Mitigating The Impacts Of Isimba Hydropower Project On The Kalagala Falls Site (KFS), Note 1.

¹²² Ibid. Notes 2 and 3.

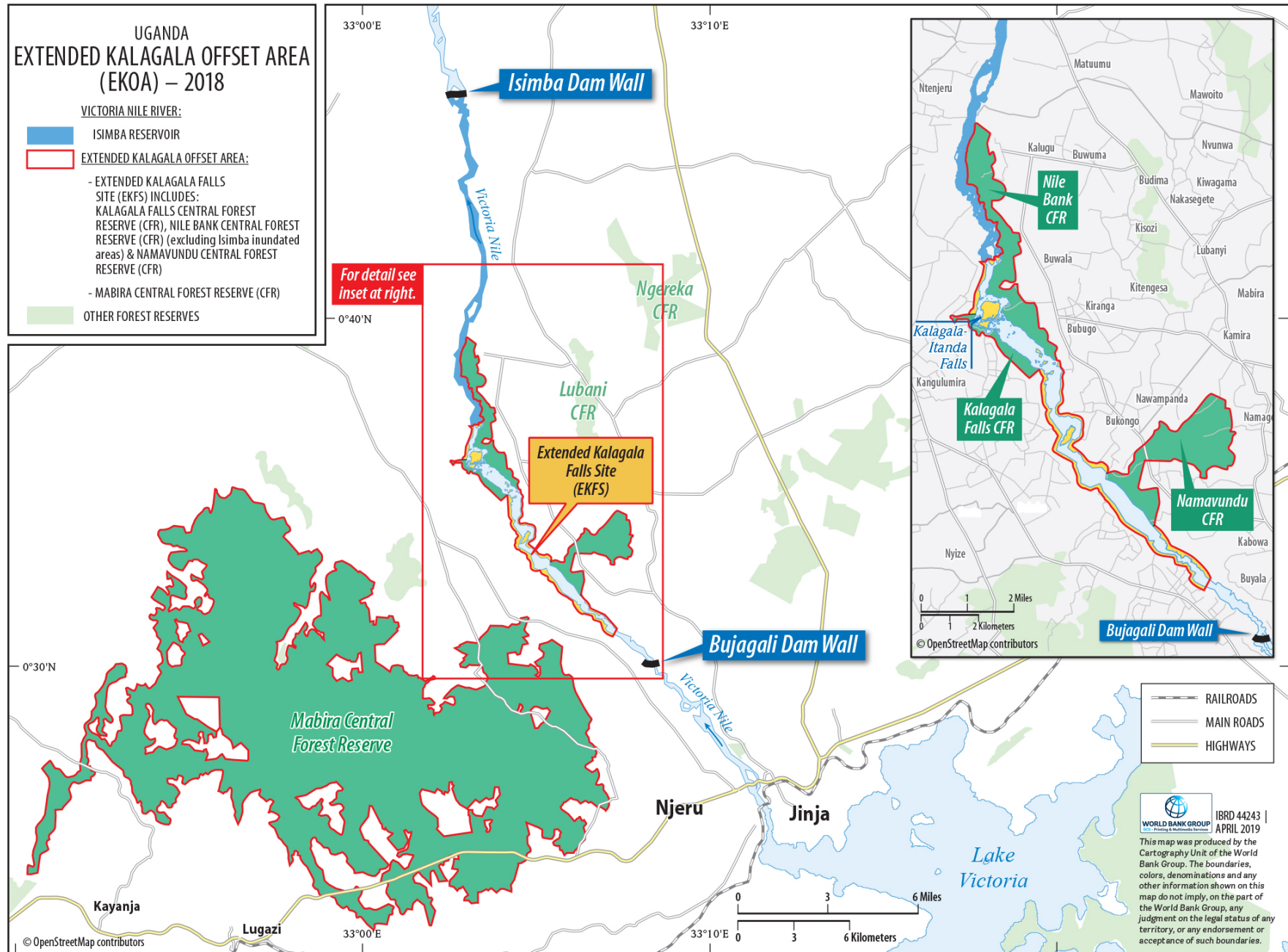
biodiversity.”¹²³ The Panel understands the GoU’s intention to extend the boundaries of the KFS and upgrade its conservation status was publicized by the MoWE on December 8, 2017. The NEA was passed into law on March 7, 2019; the draft statutory instrument under the NEA to declare the EKOAs as Areas of Special Conservation was drafted and is being reviewed.

73. An Amendment to the Indemnity Agreement (AIA) was signed on January 24, 2018. Minor revisions to the AIA, mostly relating to the KOSMP deadline, were subsequently made in June and November 2018. The intent of the AIA remains to conserve the KOA through a sustainable management program and long-term funding; it refers to preparing and adopting a management plan for the EKFS as part of the sustainable management program. Map 3 provides an illustration of the EKFS.

74. The AIA primarily differs from the 2007 Bujagali IA by redefining and extending the boundaries of the KFS, and by stipulating that a legally binding mechanism must be adopted to ensure the legal protection and management of the EKFS.

¹²³ Ibid., Comment on Action 3.

Map 3: Extended Kalagala Falls Site



2.7. Remaining Steps to Operationalize the EKOA

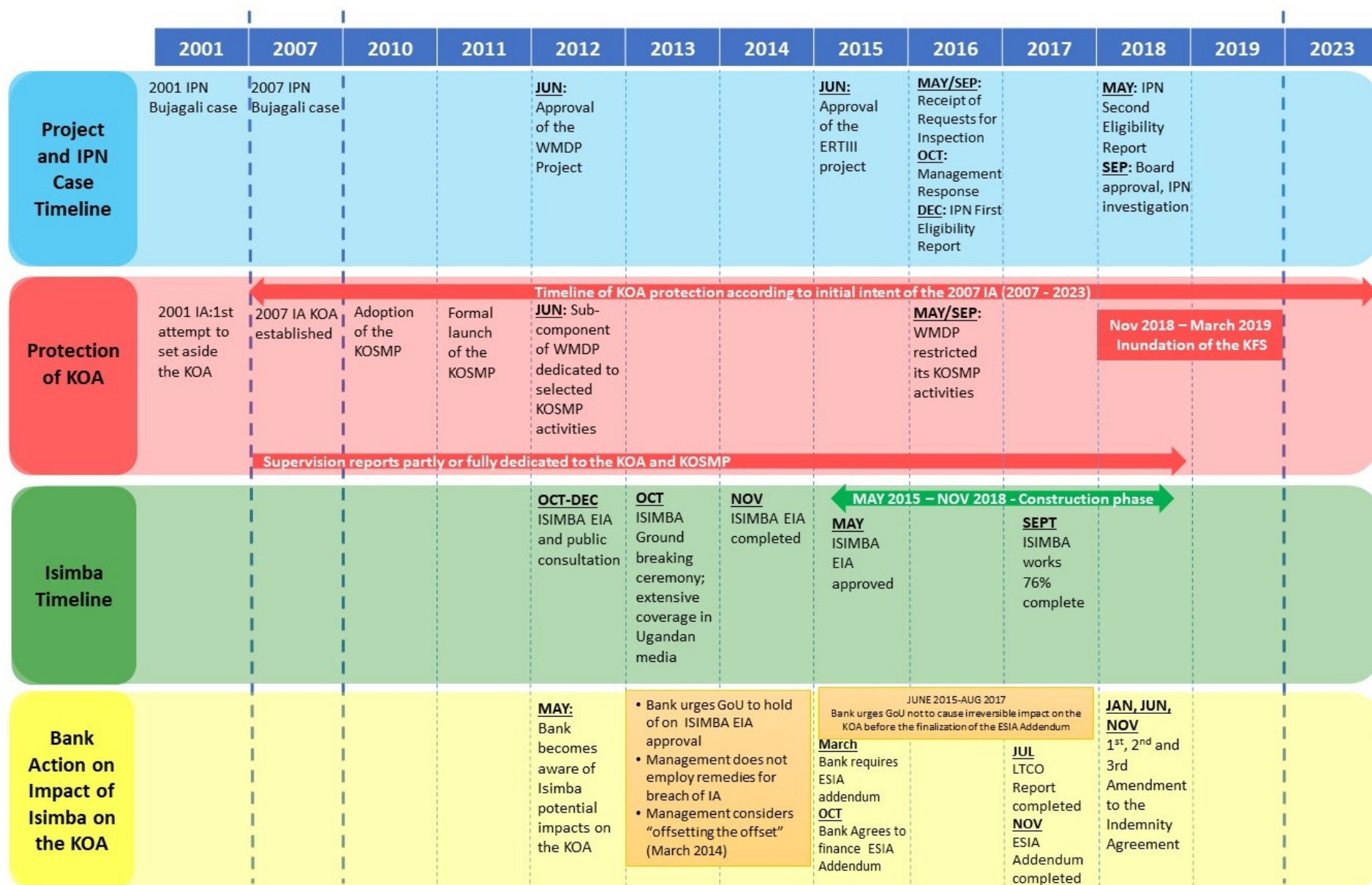
75. The Panel notes that the third amendment of the Indemnity Agreement (November 30, 2018) states that the mechanism to ensure legally binding and long-term conservation, protection, and management of the Kalagala Falls site (as extended), as well as its Management Plan, will be concluded by December 31, 2019. Annexes to the Management Plan will include an Ecotourism Plan and a Kalagala-Itanda Falls Forest Management Plan. The Panel understands that these plans are still in preparation and will be subject to Bank review. As of April 2019, the status of activities necessary to complete the requirements of the third amendment of the Indemnity Agreement (December 31, 2019) are as follows:

Item	Expected by/completed	Comments
<i>Third Amended Indemnity Agreement</i>	November 30, 2018	Revised completion dates for the mechanism of the protection and management plan for EKFS as a protected area
<i>Revised KOSMP</i>	December 31, 2019	Per the third Amendment of the Indemnity Agreement November 30, 2018
<i>Ecotourism Plan</i>	December 31, 2019	Annex to KOSMP 2010-2019, December 31, 2019
<i>National Environmental Act</i>	Passed on March 7, 2019	Draft Statutory Instrument under the Environmental Act not yet approved and under review
<i>Approval of EKFS Project Brief/EIA</i>	Certificate of Approval issued by NEMA on April 12, 2019	

76. In summary, the ESIA Addendum and the LTCO Report were prepared in response to the partial flooding of the KFS.¹²⁴ The Bank played a critical role in the process to “offset the offset” to mitigate this flooding and its resulting impact upon biodiversity, the tourism industry, and livelihoods.

¹²⁴ This refers to the portion of the KOA excluding the Mabira CFR.

Figure 1: Timeline of the establishment of the KOA and the response to the Isimba KOA impact



Chapter 3

Bank Supervision and Harms Caused by the Flooding of the KFS

3.1. Introduction

77. This chapter analyzes the alleged harms caused by the flooding of the KFS and the Bank's supervision and oversight activities of the KOA and KOSMP. It also discusses the Bank's response to the GoU's decision to build Isimba.

3.2. Requests for Inspection

78. The Requesters argued that people living in and deriving sustenance from the KOA were likely to suffer environmental, economic, cultural, and health-related harm due to the Bank's failure to hold the GoU to the commitments it made in the IA.¹²⁵ They claimed construction of Isimba Dam at its tallest proposed height would “*heavily and irrevocably*”¹²⁶ affect this area and would undermine the management of protected resources such as forest reserves, river banks, and wetlands. The Requesters argued that Isimba would also negatively impact the ecological and social functioning of the river section set aside for conservation.¹²⁷

79. According to the Requesters, the tourism industry around the KFS provides a living for many Busoga people; the section of the Victoria Nile that would be submerged directly supports the livelihoods of many fishermen and subsistence farmers, as well as people operating small ferryboats on the river. The Requesters also claim this section of the river contains many unique plant and animal species that would be lost forever without the protection of the KOA. The Requesters expressed concern about health issues resulting from sewage and industrial waste in the reservoir, and a possible associated increase in deadly diseases. They also argued that crocodiles could inhabit the reservoir and attack people and animals.¹²⁸

3.3. Management Response

80. The Management Response stated that the WMDP is financing the implementation of specific, forestation-related activities as part of the KOSMP developed under the Bujagali Project and does not support any intervention that could create or contribute to the harm alleged by the Requesters. The ERT-III Project includes a component that finances the preparation of an Addendum to the GoU's ESIA for Isimba to evaluate its potential impact on the KOA.¹²⁹

81. According to the Response, in early 2015 the Bank noted that the design of Isimba could affect the KOA and there was potential for non-compliance with the IA. The GoU confirmed its commitment to comply with the IA and shared the draft Isimba ESIA with the Bank. The Bank then informed the GoU that the draft ESIA lacked sufficient information to confirm compliance

¹²⁵ Request for Inspection, April 15, 2016.

¹²⁶ Request for Inspection, September 9, 2016.

¹²⁷ Request for Inspection, April 15, 2016.

¹²⁸ Request for Inspection, September 9, 2016.

¹²⁹ Management Response, p. v.

with the IA. The GoU consequently asked the Bank to finance the ESIA Addendum.¹³⁰ According to Management, the Bank has “gone out of its way”¹³¹ by financing this Addendum under the ERT-III Project to support the GoU in identifying and managing impact on the KOA. The Response explained that, based on the ESIA Addendum findings, the Bank would determine whether any adjustments to the KOSMP might be appropriate to continue the protection of the ecosystem as agreed in the IA.¹³²

82. According to Management, at this point there was no breach of the IA. The Management Response explained that the Bank also requested additional studies to analyze further concerns regarding biodiversity, specifically fish species endemic to this part of the Victoria Nile. It argued that the claims related to cumulative health, and environmental and cultural impact were unsubstantiated and premature.¹³³

83. The Response explained that the Bank committed to continue working with the GoU to finalize the assessment of impact on the KOA to ascertain compliance with the IA.¹³⁴ According to Management, if the ESIA Addendum demonstrated that the KOA was under threat, the Bank would work with the GoU on appropriate mitigation measures or consider other remedies.¹³⁵ The Response also noted that the Bank’s Board had been informed of the issues regarding Isimba and its potential effects on the KOA and the IA.¹³⁶

3.4. Bank Policies

84. World Bank Policy on Environmental Assessment (OP/BP 4.01) states that “*the Bank requires environmental assessment (EA) of projects proposed for Bank financing to help ensure that they are environmentally sound and sustainable, and thus to improve decision making.*”¹³⁷ The World Bank’s Environmental Assessment Sourcebook¹³⁸ is explicit about the policy requirements and the proper timing of an EA in order to influence decision making, and states that “*the Bank directive integrates EA or other environmental analysis into project preparation, including project selection, siting, and design decisions. In most cases, an EA should form part of the overall feasibility study. This facilitates incorporation of the findings into selection of sites and technology, designs and implementation plans.*” Furthermore, “[t]he Bank’s environmental review is intimately linked to the project cycle. ... [E]nvironmental review begins with screening at the time of project identification. Scoping and preparation of the EA occur in tandem with or as integral parts of the pre-feasibility and feasibility studies.”

85. Per World Bank Policy on Natural Habitats (OP/BP 4.04), the Bank does not support projects involving the significant conversion of natural habitats “*unless there are no feasible alternatives for the project and its siting, and comprehensive analysis demonstrates that overall*

¹³⁰ Ibid., p. 15.

¹³¹ Ibid., p. iii.

¹³² Ibid., p. 13.

¹³³ Ibid., p. 10, 11.

¹³⁴ Ibid., p. vi.

¹³⁵ Ibid., p. 10.

¹³⁶ Ibid., p. 12.

¹³⁷ World Bank Policy OP/BP 4.01, para 1.

¹³⁸ Environmental Assessment Sourcebook, Volume 1, The World Bank, 1991, Washington, DC., p.2.

*benefits from the project substantially outweigh the environmental costs.*¹³⁹ According to the policy, if the assessment finds that a project would significantly convert or degrade natural habitats, mitigation measures, acceptable to the Bank, are included in the project. The policy notes that mitigation measures include, as appropriate, minimizing habitat loss and “*establishing and maintaining an ecologically similar protected area*”¹⁴⁰ – also referred to as an “*offset*”. The policy explains that in deciding whether to support a project with potential adverse impact on natural habitats, the Bank takes into account “*the borrower’s ability to implement the appropriate conservation and mitigation measures*” and must develop the capacity of national and local institutions if there are potential institutional capacity problems.¹⁴¹

86. According to World Bank Policy on Project Supervision (OP/BP 13.05), supervision requires, among other actions, that the Bank must “*identify problems promptly as they arise during implementation and recommend to the borrower ways to resolve them, ... recommend changes in project concept or design, as appropriate, as the project evolves or circumstances change,*” and “*identify the key risks to project sustainability and recommend appropriate risk management strategies and actions to the borrower.*”¹⁴²

87. World Bank Policy on Investment Project Financing (OP/BP 10.00)¹⁴³ explains that during project implementation, the Bank monitors borrower compliance with its obligations as per the legal agreements and provides implementation support. The Bank reviews the borrower’s information on project implementation progress, progress toward achievement of the project’s development objectives and related results and updates the risks and related management measures.¹⁴⁴

3.5. Panel Analysis and Findings

3.5.1 Harm Caused by the Flooding of the KFS

88. During its February and November 2018 visits to Uganda, the Panel team met with different groups of people affected by Isimba’s flooding of the KFS. Many of them told the team they had repeatedly asked the GoU and the Bank for copies of the ESIA, the ESIA Addendum, and other documents, but often went many months without a response. Repeated requests for information about when the reservoir filling would occur, and exactly which areas would be inundated, also remained unanswered, causing great frustration and anxiety among those living and working in and around the KFS.

89. Several people who the Panel team met during its November 2018 visit explained they learned about the testing of the first turbines and related flooding only a few days before it happened, in some cases on the day of the flooding itself, leaving them little or no time to take appropriate action. Tourism operators told the team about last-minute efforts to rescue pangolins

¹³⁹ Ibid., para 5.

¹⁴⁰ Ibid., para 5.

¹⁴¹ Ibid., para. 6.

¹⁴² World Bank Policy OP/BP 13.05, para 2.

¹⁴³ In April 2013, OP/BP 10.00 became effective and replaced several policies, including OP/BP 13.05. While OP 13.05 still applies to the WMDP, ERT-III is being implemented under OP/BP 10.00.

¹⁴⁴ OP 10.00, para. 19.

as one of the Victoria Nile River islands was submerged. While they had received general information about planned inundation, they explained they had also been given numerous false warnings about imminent flooding and received inadequate warning when the flooding actually happened.

90. The Panel team spoke with many people who believed that viable alternatives, such as avoiding the maximum dam height, could have minimized the adverse social and environmental impact of Isimba. Several people believed the ESIA and its Addendum failed to adequately assess whether a different dam height would have left the KFS intact or at least reduced its impact while remaining economically viable.¹⁴⁵ Various people told the team that the way compensation was decided and calculated seemed arbitrary and lacked transparency and clarity. The Panel team repeatedly heard that most requests for information, or for meetings with relevant officials, government agencies, or the World Bank to discuss compensation-related concerns were unsuccessful.

91. *Sand Mining, Fishing, and River Transport.* The Panel team met with various groups of sand miners who explained they are now prohibited from accessing sand within the inundated portion of the KFS. However, since they lack other employment opportunities, have mined in these areas for many years and have derived their livelihoods from this activity, they continue mining despite the prohibition. During the November 2018 visit, several sand miners told the team that the change in water levels after the testing of the first turbines had already made many sand mining locations inaccessible. They explained that without diving equipment it was impossible to reach locations now at greater depths. The Panel team noted the loss of mining camps it had seen during its February 2018 visit, and spoke to many miners who explained that they were unemployed. These miners said they are now impoverished and must rely on handouts from neighbors to cover their basic needs, including food.

¹⁴⁵ The Panel reviewed a 2013 independent tourism and economic impact assessment of Isimba, commissioned by tourism operators, which noted that Isimba, with the dam height alternative identified as the optimum development option, will have significant tourism and economic impact which has not been adequately considered. See: E&D Consulting Services, Jinja Adventure-Tourism Operators, Independent Tourism and Economic Impact Assessment of the proposed Isimba Hydropower Project Nile River, Uganda Final Report, December 2013.



Picture 1: Local sand miners

92. The Panel team also met with fishermen who said they had been similarly prohibited from fishing inside the inundated portion of the KFS. According to them, patrol boats of the Isimba contractor frequent the river section to ensure that no fishing is taking place. Like the sand miners, the fishermen explained to the team that, lacking other opportunities to make a living, they continued fishing despite the risk of being caught or chased away. The fishermen also raised concerns with the team about the decreased numbers and variety of fish species in the river, attributing these problems to the rise in water levels.

93. Operators of small ferryboats whom the Panel team met during its February 2018 visit expressed anxiety about losing their incomes due to restrictions along the river. In November 2018, the team spoke to some operators who explained that, due to increased water levels and river width, as well as change in flows, they now needed much more time and physical strength to cross the river, and could thus make fewer trips per day, which reduced their earnings and made their occupation less viable. The Panel team was told that only those who could afford an outboard motor were still operating.

94. *Agriculture.* The Requesters and other locals told the Team about impact on small-scale agriculture within the KOA, particularly along the riverbanks. They said many poor families who depended on subsistence agricultural activities on the banks of the Victoria Nile have now lost access to some of these lands due to the flooding. The team also heard concerns that several boreholes were contaminated or no longer accessible due to inundation, thereby making drinking water difficult for local community members to obtain.

95. *Forest and Wetland Conservation.* The Panel team spoke to residents who explained that a part of the Nile Bank CFR would be flooded. They expressed concern about the cumulative loss of natural habitat on the islands, which provides refuge for water birds, raptors, and mammals.

Some of these animals are globally threatened, like the pangolin.¹⁴⁶ They also worried about further loss of remaining large native trees such as the African Teak, which is highly prized, and the likely spread of the invasive, alien, water hyacinth on the river, which affects water quality, navigability, and fishing. The likely change in river fish species – particularly local endemic fish – caused by changes in water flow was also a concern, as were the potential barriers to their migration and consequent impact on fish populations.

96. *Health Impact and Traditional Medicine.* The team heard concerns that the altered river flow would lead to extensive areas of the river becoming lentic.¹⁴⁷ Local residents also feared this change would increase already widespread diseases, such as cerebral malaria and bilharzia, both of which cause severe suffering to local communities. The team spoke to several practitioners of traditional medicine who explained the river’s importance as home to local spirits and gods. They expressed concern that the flooding would upset these spirits and gods, negatively affecting healers’ ability to practice medicine successfully.

97. *Spiritual Values.* The Panel team heard from several residents concerned about restrictions on access to the river, which is widely used for spiritual purposes. The Requesters explained people travel from different parts of the country to benefit from the spiritual values of the Victoria Nile River in this area.

98. *Tourism and the Local Economy.* The team spoke to tourism operators active in the area for many years, several of whom operated prior to the construction of Bujagali Dam. Many of them cater to international whitewater kayaking and rafting tourists who venture long distances to run the Victoria Nile rapids. They told the team that the particular section of the Victoria Nile River affected by the flooding ranked among the world’s best whitewater rafting and kayaking spots. They said many of the world’s professional kayakers come to this area every year to train.

¹⁴⁶ The pangolin is considered “endangered” at the national level (Wildlife Conservation Society, Nationally Threatened Species for Uganda, 2016), and “vulnerable” at the global level (IUCN Red List).

¹⁴⁷ In ecological terms “lentic” means relatively still or hardly flowing.



Picture 2: Whitewater rapids



Picture 3: Tourism activities in the Kalagala Offset Area *Picture 4: Tourism activities in the Kalagala Offset Area*

99. The operators explained to the team that a diverse local economy had developed around the whitewater kayaking industry over the past 30 years, offering direct and indirect employment opportunities to many locals. The Panel understands that any such losses caused by the flooding would have wide-reaching adverse impact, as the tourism industry supports numerous associated businesses, including restaurants, bars and hotels and catering, bicycle-rental, and horse-riding operations, etc.

100. Several tourism operators claimed they had invested their life savings in tourism-related infrastructure based on the belief that, given the IA between the World Bank and the GoU, the KOA would be protected. In February 2018, the Panel team visited several tourism facilities, including lodges and associated infrastructure, whose owners claimed they would be affected by the flooding. Other tourism operators told the team that the industry had already suffered; bookings were down and thus income was lower than in previous years.

101. In February 2018, affected people explained to the team that, in addition to the loss of many rapids, the unique *Nile Special* standing wave, which is internationally renowned, would be lost forever. During its November 2018 visit, shortly after some flooding had already taken place for the testing of the first turbines of Isimba, the team viewed the spot where the *Nile Special* used to be, which by then had been inundated.

102. The team spoke to many who claimed the essence of whitewater rafting in that portion of the Victoria Nile would be irreversibly harmed because many tourists from all over the world expect to enjoy a full-day rafting experience, which is a function of the length of the river and the number of rapids encountered. The team heard that reducing the number of rapids and the length of the river that can be traversed would cut rafting trips to half a day at most, making the river far less attractive to tourists, especially those traveling internationally. The arrival of fewer kayakers and rafters would have a negative ripple effect on the local economy.

103. Tour guides and those providing restaurant services that rely on adventure tourism feared they would lose their jobs. In February 2018, many operators told the Panel team they were unable to take future bookings because they did not know how much they would be affected by inundation. They explained it was unclear how they would be compensated. The Panel team was told that the compensation proposals they had received ignored future loss of income. The team was told that operators were asked several times to submit their business information and financial details within a very short deadline of three days, which they struggled to meet. They said that afterwards they would receive neither feedback nor information in return. During the team's investigation visit in November 2018, operators claimed they had received no compensation for loss of income, had been unable to review the new compensation methodology despite promises they would receive it several months earlier and, because of uncertainties, were unable to plan for the future.

104. Many of the tourism operators with whom the Panel team spoke explained they wished to stay active in Uganda's tourism industry, shifting their focus if need be, and to continue reinvesting in the same area, but required reliable information about compensation and future restrictions affecting the EKFS to be able to do so. They also stressed the need for a comprehensive marketing strategy and help changing the public perception that there was no tourism left in Jinja after the flooding. Some tourism operators also emphasized the need for a long-term, effective approach to conserve the riverbank CFRs as natural tropical forest and not as exotic timber plantations.

105. The Panel notes that the harms caused by the partial flooding of the KFS are associated with the timing and adequacy of the Bank's response to the GoU's decision to build Isimba, and relate to the Bank's oversight of ensuring the protection of the KOA. The next section will discuss the Bank's supervision approach, focusing on management, funding, and capacity arrangements in relation to the KOA. The Panel notes that the premise of the WMDP's support to priority KOSMP activities is the continued protection of the KOA, and that the KOSMP repeats and operationalizes the IA commitments to maintain and manage the KOA. The following sections also discuss the Bank's response to GoU's decision to build Isimba.

3.5.2. Supervision and Oversight Activities of the KOA and KOSMP

106. *Key Aspects of Effective Offset Implementation and the Bank's Supervision.* Effective offset implementation requires the preparation of a management plan specifying the activities needed to realize the offset objectives, the identification of adequate institutional, budget and funding sources, as well as clarity on the roles and responsibilities of all actors to implement the activities.¹⁴⁸ The active involvement of affected communities is also an important component. Explicit monitoring and evaluation timelines with measurable indicators of performance are needed, and both implementation performance – i.e., use of funds, staffing, reporting, etc. – and impact performance – i.e., a measure of biodiversity status – must be monitored.¹⁴⁹ Finally, independent audits and verification of the offset's performance are desirable to enhance credibility and transparency.¹⁵⁰

107. In the context of mitigation measures, World Bank Policy on Natural Habitats (OP/BP 4.04) includes the option of “*establishing and maintaining an ecologically similar protected area*” if the Bank-supported project would significantly convert or degrade natural habitats.¹⁵¹ The policy adds that the Bank takes into account the borrower's ability to implement the appropriate conservation and mitigation measures when deciding to support a project with potential adverse impact on natural habitat. According to the policy, “*if there are potential institutional capacity problems, the project includes components that develop the capacity of national and local institutions for effective environmental planning and management.*”¹⁵² Thus, the maintenance of an offset area requires the Bank to ensure that adequate management plans, funding arrangements, and capacity are in place for effective implementation. In addition to setting aside the KFS in conformity with sound social and environmental standards acceptable to the Bank, the GoU committed to conserve the KOA through a sustainable management program and a budget mutually agreed by the GoU and the Bank.

108. *The KOA Management Plan and its Scope.* The KOSMP was prepared with support from IUCN Uganda, completed in 2010 and launched by the GoU in 2011 after being accepted by the Bank. The KOSMP explains that it “*is an ecosystem level plan developed by applying ecosystem management approach to provide information on the strategies and actions that will be implemented as means to achieve the obligations stated in the Indemnity Agreement.*”¹⁵³ Namely, the KOSMP operationalizes the IA commitments to maintain and manage the KOA. The purpose of the KOSMP is described as follows:

“The main purpose of the SMP for Kalagala Offset is to provide management strategies, actions and means for addressing the obligations in the Indemnity agreement vis: safeguarding the integrity of Kalagala and Itanda falls and associated ecological, social and economic values, promoting sustainable utilization and development of the natural resources associated with Kalagala and Itanda falls and, securing the integrity of the

¹⁴⁸ BBOP, Biodiversity Offset Implementation Handbook, 2009, Washington, D.C. Available from: <https://www.forest-trends.org/publications/biodiversity-offset-implementation-handbook/>

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ OP/BP 4.04, para. 5.

¹⁵² Ibid., para 6.

¹⁵³ KOSMP, p. 14.

*Central Forest Reserves associated with the Kalagala and Itanda Offset. This will ensure that Mabira ecosystem is ecologically secure and productive. Central to this purpose is the implementation of Forest management plans for the targeted Central Forests Reserves, integrated development plans for the environment around Kalagala and Itanda Falls, ecotourism and land use in adjacent landscape.”*¹⁵⁴

109. The scope of the KOSMP goes beyond the geographic area of the KOA to encompass the “Mabira ecosystem” and includes the Namavundu, Namawanyi, Namananga and Namakupa CFRs. The KOSMP’s core objectives include “*protect[ing] the natural habitat, environmental and spiritual/cultural values of the Kalagala-Itanda Falls and their environs,*” and “*promot[ing] social-economic and environmentally sound eco-tourism activities*” at these sites.¹⁵⁵ The KOSMP covers ecotourism development at the Kalagala-Itanda Falls, forestry, and district-level development within the Mabira ecosystem. It also deals with ongoing management and utilization of natural resources – land, water, forests, and wetlands – and adopts a generalized ecosystem-level planning and development framework.¹⁵⁶ The Panel notes that the KOSMP gives a high-level inventory of targeted outputs and lists of activities, but there are no measurable targets, indicators, or timelines by which to gauge implementation or impact performance. The KOSMP was not prepared in order to meet any requirements of national legislation and thus its enforcement was limited.¹⁵⁷

110. *Supervision Arrangements.* Since the KOA was established in 2007, the Bank has followed up with the GoU regarding its commitments in the IA throughout the Bujagali Project, the WMDP, and the ERT-III Project. Supervision under the Bujagali Project took place through “Joint Lenders” missions. The WMDP and the ERT-III Project undertook regular, biannual supervision missions as per Bank’s practice.

111. In response to the Panel’s second Bujagali investigation in 2007, the Board approved a Management Action Plan on November 7, 2008. That plan referred to the ongoing supervision of BEL’s afforestation activities and included the completion of a sustainable management plan (SMP)¹⁵⁸ with a tourism development program, and the assessment of the NFA’s capacity to implement the SMP.¹⁵⁹ Management at that time stated that “*an intense supervision regime has been established for this Project, including semi-annual Lenders’ Supervision Missions (March*

¹⁵⁴ Ibid., p. 9.

¹⁵⁵ Ibid., Objectives #1 and 2, pp. 10-11.

¹⁵⁶ Ibid., p. 17.

¹⁵⁷ Ibid., Section 1.2.8. Regarding the recognized shortcomings of this expanded approach, “*unlike other Management Plans for Protected Areas such as Forest Reserves and National Parks, whose management is regulated under respective Sectoral Laws, the Kalagala SMP does not have such law that would regulate its implementation, although the goal and some of the objectives lend it close to the Environment law.*” p. 19.

¹⁵⁸ “Sustainable Management Plan (SMP)” and “KOSMP” refer to the same document.

¹⁵⁹ Management Report and Recommendation in Response to the Inspection Panel Investigation Report, Management Action Plan, Uganda Private Power Generation (Bujagali) Project (IDA Guarantee No. B0130-UG), November 7, 2008, p. 48. The Plan states that “[i]n the course of ongoing supervision, Management will monitor progress of BEL’s ongoing afforestation activities as part of the EMP [...]. Management will also follow up on completion by the NFA of the SMP for the Kalagala Offset, which includes the Mabira Central Forest Reserve, by June 2009, including tourism development program. Such follow up will include an assessment of NFA’s implementation capacity for the SMP. If the SMP is not completed by the agreed deadline, Management reserves the right to take action similar to that set out in the IA.”

and October) in which all Project lenders may participate. At least two more Uganda energy missions are conducted annually during which Bujagali issues are addressed as required. Management has also fielded additional targeted missions on an as-needed basis to address specific issues as they arise.”¹⁶⁰

112. The Board asked Management to submit Progress Reports on the implementation of the Action Plan. Management submitted to the Board seven Progress Reports, including the final one submitted in February 2018. A specific focus of these reports was the preparation of the KOSMP, which was a requirement under the IA. The Progress Reports subsequently focused on monitoring the implementation of the KOSMP. The IA stated that “the GoU undertakes to conserve through a sustainable management program and budget mutually agreed by the Government and the Association” the Mabira, Kalagala, and Nile Bank CFRs.¹⁶¹

113. The Second Progress Report (2011) lists the activities of the Action Plan that “comprise the priority programs that continue to be monitored” and includes the “Implementation of the Sustainable Management Plan (SMP) for the Kalagala Falls Offset.”¹⁶² It explains that the Bank will continue to monitor KOSMP implementation through participation in an Annual Conference, and that “the Bank will supervise progress in SMP implementation, including capacities and monitoring of progress, and will work with GoU to resolve its long-term financing of SMP activities.”¹⁶³ The Third (2012) and Fourth (2013) Progress Reports also explicitly state that the “continued and satisfactory implementation of the Sustainable Management Plan (SMP) for the Kalagala Falls” will “continue to be monitored as part of the MAP [Management Action Plan].”¹⁶⁴

114. While the Third Progress Report states that the Bank will continue to monitor KOSMP implementation through the supervision of the Bujagali Project,¹⁶⁵ a shift occurred in September 2013, when the Fourth Progress Report explained that the “Bank will continue to monitor SMP implementation through the WMDP and provide necessary implementation support.”¹⁶⁶ Indeed, the Panel notes that from the end of June 2012, priority KOSMP activities were financed by the WMDP.¹⁶⁷ The Fifth Progress Report (2015) states that, with support from the WMDP, “monitoring of the implementation of part of the SMP has been undertaken and will continue.”¹⁶⁸

¹⁶⁰ Ibid., p. 39.

¹⁶¹ Indemnity Agreement, section 3.06.

¹⁶² Response to the Inspection Panel Investigation Report on the Uganda Private Power Generation (Bujagali) Project, Second Progress Report to the Board of Executive Directors on the Implementation of Management’s Action Plan, p. 1.

¹⁶³ Ibid., p. 12.

¹⁶⁴ Response to the Inspection Panel Investigation Report on the Uganda Private Power Generation (Bujagali) Project, Third and Fourth Progress Reports to the Board of Executive Directors on the Implementation of Management’s Action Plan, pp. 1 and v.

¹⁶⁵ Response to the Inspection Panel Investigation Report on the Uganda Private Power Generation (Bujagali) Project, Third Progress Report to the Board of Executive Directors on the Implementation of Management’s Action Plan, p. 11.

¹⁶⁶ Response to the Inspection Panel Investigation Report on the Uganda Private Power Generation (Bujagali) Project, Fourth Progress Report to the Board of Executive Directors on the Implementation of Management’s Action Plan, p. 10.

¹⁶⁷ Ibid.

¹⁶⁸ Response to the Inspection Panel Investigation Report on the Uganda Private Power Generation (Bujagali) Project, Fifth Progress Report to the Board of Executive Directors on the Implementation of Management’s Action Plan, p. 2.

115. The WMDP Project Appraisal Document (PAD) refers to the KOSMP as “*an environmental and social safeguard instrument*,” together with the Environmental and Social Management Framework and Resettlement Policy Framework.¹⁶⁹ The KOSMP itself also states its main purpose is to address the obligations in the IA, namely by “*safeguarding the integrity of Kalagala and Itanda falls*.”¹⁷⁰ The Management Response expresses the view that the KOSMP is a safeguard instrument to mitigate impact from Bujagali, and not a safeguard instrument to mitigate impact from the WMDP.¹⁷¹ Management also emphasizes that while the WMDP financing agreement provides funds for specific KOSMP activities, it does not include any obligation for the GoU to implement the KOSMP.¹⁷² In Panel team interviews, some staff expressed the opinion that reference to the KOSMP as a safeguard instrument was “an editorial error,” but others stated the KOSMP was indeed a safeguard instrument.

116. The Panel notes that the classification of a document as a safeguard instrument makes it part of the legal obligations of the borrower, and therefore means it must be supervised by the Bank accordingly. While the KOSMP is not defined in the WMDP’s legal agreement as a safeguard instrument, it is explicitly referred to as such in the publicly available WMDP PAD. Since the premise of the KOSMP, and the activities related to it in the WMDP, is the continued protection of the KOA, the Bank is expected to supervise and ensure the KOA is conserved as stated in the KOSMP, whether the KOSMP qualified as a safeguard instrument or not. The Management Response noted that WMDP’s KOSMP sub-component “*partially complement[ed] the resources and efforts of the GoU to comply with its obligations under the IA for the Bujagali project through the implementation of the KOSMP*.”¹⁷³ Furthermore, the WMDP PAD explicitly states that this sub-component “*will support priority investments related to the implementation of the environmental offset that complements [emphasis added] the Bujagali Hydropower Project*” and includes “*afforestation and reforestation, restoration of native vegetation, conservation of sensitive habitats, restoration and protection of river banks, promotion of environmentally sustainable livelihood strategies, and enhancement of the capacities of the national and sub-national entities responsible for implementation of the management plan*.”¹⁷⁴ The Bank’s role in the KOSMP and the financing provided for certain KOSMP activities through the WMDP demonstrate continued involvement by the Bank with the original offset-related issues that arose from its development of Bujagali 1, its support to Bujagali 2, the resulting provisions in the IA, and the associated Inspection Panel cases.

117. The Management Response to the current Requests states that “[t]here is no requirement under the WMDP or the IA obliging the GoU to fully implement all activities set out in the

¹⁶⁹ WMDP PAD, June 2012, pp. 32 and 33, and p. 65, para 66 (c).

¹⁷⁰ Section 2.3.3 of the KOSMP states, “[t]he main purpose of the SMP for Kalagala Offset is to provide management strategies, actions and means for addressing the obligations in the Indemnity agreement vis: safeguarding the integrity of Kalagala and Itanda falls and associated ecological, social and economic values, promoting sustainable utilization and development of the natural resources associated with Kalagala and Itanda falls and, securing the integrity of the Central Forest Reserves associated with the Kalagala and Itanda Offset.” KOSMP, p. 15.

¹⁷¹ Management Response, pp. 5, 6.

¹⁷² Ibid., p. 6.

¹⁷³ Ibid., p. 31.

¹⁷⁴ WMDP PAD, June 2012, p. 7.

KOSMP.”¹⁷⁵ The Panel agrees that the Bank is not expected to supervise the implementation of all activities under the KOSMP, besides the ones supported by the WMDP sub-component. However, the WMDP became the vehicle to supervise at least part of the implementation of the KOSMP and thus should have followed up to ensure that adequate management, institutional capacity and funding arrangements were in place for effective implementation of the KOSMP and continued protection of the KOA in accordance with Bank Policy on Natural Habitats (OP/BP 4.04).

118. The 2017 ESIA Addendum found that KOSMP implementation was not satisfactory to ensure the protection of the KFS and that the KOSMP “*covered large areas which were not relevant for the protection of the KFS natural habitat, environmental and spiritual values.*”¹⁷⁶ In the Bujagali Implementation Completion Report (ICR) of 2018, the Bank acknowledged that the KOSMP was “*too broad, covering areas outside the KFS, to be actionable.*”¹⁷⁷

119. *Funding and Capacity for KOSMP Implementation.* The KOSMP was to be funded by the GoU with support from development partners and global biodiversity conservation financing mechanisms.¹⁷⁸ The KOSMP explained that a more detailed financing strategy would be developed and applied by the mid-term of implementation.¹⁷⁹

120. Lack of funding and capacity constraints were identified as weaknesses from the outset. The GoU committed UGX400 million for KOSMP implementation (about US\$154,000) for the fiscal year 2012.¹⁸⁰ The Second Progress Report states that there was an 85 percent funding gap for KOSMP implementation that would be discussed in the November 2010 Lenders Mission.¹⁸¹ In 2011, it was noted that the Government entities that should contribute to the funding of the SMP had not done so.¹⁸² In 2012, a Joint Lenders report stated that implementation of the KOSMP continued primarily through the routine management activities of the NFA in the KOA’s CFRs, and only limited – and insufficient – incremental financing had been provided by the Government through the MoWE.¹⁸³ In 2012, US\$4.8 million equivalent were made available under the WMDP, which supported the implementation of KOSMP’s priority activities.¹⁸⁴

121. In the following years, funding constraints and capacity issues were flagged repeatedly. Despite this, the Fourth Progress Report in 2013 stated that the Bujagali Project was assessed as

¹⁷⁵ Management Response, p. 12, para 42 (ii).

¹⁷⁶ ESIA Addendum, November 2017, p. 226, Section 9.2.

¹⁷⁷ ICR, September 20, 2018, p. 30, para 119.

¹⁷⁸ KOSMP 2010-2019, p. 72, Section 4.6.

¹⁷⁹ Ibid., p. 73.

¹⁸⁰ WMDP PAD, June 2012, p. 32.

¹⁸¹ Response to the Inspection Panel Investigation Report on the Uganda Private Power Generation (Bujagali) Project, Second Progress Report to the Board of Executive Directors on the Implementation of Management’s Action Plan, Annex 1.

¹⁸² 8th Joint Lenders Supervision Mission. November 7-10, 2011, para 36.

¹⁸³ 9th Joint Lenders Supervision Mission, May 9-11, 2012, para 18.

¹⁸⁴ WMDP PAD, June 2012, p. 32: “Activities under this component will support the Kalagala Offset Sustainable Management Plan (KOSMP) that was launched on May 5, 2011. Specifically, they will address gaps identified for effective implementation of the plan, beyond the UGX 400 million (approximately US\$ 154,000) already committed by the GoU for FY12. The additional funds will support an integrated approach to the Nile catchment area and related ecosystems, promote environmental sustainable livelihood strategies, and develop the capacities of the various institutions involved in the implementation of the management plan. These include the NFA and local governments.”

satisfactorily implementing the programs outlined in the project's SMP, but no reference is made as to how the funding or capacity situation had improved.¹⁸⁵ The Panel notes that there was no update regarding habitats or biodiversity of the KOA, or how the KOSMP was advancing their protection and management. No information about the basis for finding the KOSMP implementation "*satisfactory*" was given and there is no comprehensive scorecard or indicator for determining progress.

122. Supervision reports for the WMDP note efforts to improve capacity and explain that an environmental specialist was recruited for the WMDP in early 2014 as part of the Project Support Team to coordinate and support implementation of the sub-component activities.¹⁸⁶ Management also stated that staff had been assigned duties on specific activities or contracts. The KOSMP sub-component of the WMDP was to be coordinated by the newly recruited environmental specialist with inputs from NFA.¹⁸⁷ In May 2014, the WMDP reported that the KOSMP sub-component team would meet on a monthly basis to "*address issues as they arise*" and "*improve activity implementation,*" and additional monthly meetings would be held by the World Bank team.¹⁸⁸ However, none of the WMDP Aides Memoires systematically tracked implementation matters concerning the KOSMP as a whole and which could affect the KOSMP sub-component.

123. A January 2015 supervision report reiterated that the MoWE was facing several challenges implementing the KOSMP – including lack of funds, limited resources to mainstream KOSMP components in implementing institutions, and resettling people who had encroached upon forests and reserve areas.¹⁸⁹ The report noted the GoU was relying on the WMDP for activities such as community mobilization and sensitization, surveying, marking boundaries, restoration of river banks and appointing consultants for studies.¹⁹⁰

124. The WMDP Aide Memoire of May 2016 indicated that the roles of different stakeholders for the KOSMP sub-component remained unclear, and activities were still being discussed.¹⁹¹ A pattern emerges in the supervision reports indicating that the WMDP's KOSMP sub-component never delivered as expected. In May 2016, Management stated that challenges included "*implementation arrangements*" and "*unforeseen issues [which had] arisen and/or were overlooked at the planning stage, such as the potential need for resettlement of affected communities in the River Nile protection zone.*"¹⁹²

125. KOSMP sub-component activities were refined in May 2016, and the Bank and the GoU agreed that the Directorate of Environmental Affairs (DEA) would prepare a revised implementation plan for this sub-component, with a feasible schedule and realistic budget indicating how all costs will be met (whether under the project or through counterpart funding),

¹⁸⁵ Response to the Inspection Panel Investigation Report on the Uganda Private Power Generation (Bujagali) Project, Fourth Progress Report to the Board of Executive Directors on the Implementation of Management's Action Plan, p. 13.

¹⁸⁶ WMDP Aide Memoire, May 12-20, 2014, pp. 3 and 5.

¹⁸⁷ Ibid., p. 5.

¹⁸⁸ Ibid., p. 3.

¹⁸⁹ Uganda Private Power Project IFC Aide Memoire of January 2015, pp. 3 and 4.

¹⁹⁰ Ibid., p. 3.

¹⁹¹ WMDP Aide Memoire, May 2016, p. 8.

¹⁹² Ibid., p. 3.

and noted that this plan should include details on the sequencing of activities – e.g., the tree planting schedule, the community engagement plan, co-financing of activities, and how sustainability beyond the life of the project will be ensured.¹⁹³

126. The Panel observes that the delays with this sub-component and the challenges to define its arrangements and activities from 2012 to at least 2016, contributed to the weak implementation of the KOSMP. From 2016 onwards, WMDP activities were refined to focus on restoration in the CFRs and community tree planting.¹⁹⁴ The Panel has reviewed the WMDP supervision reports over the years and has only found reference to Isimba in the October 2016 Aide Memoire, which mentioned it in passing in the context of the Inspection Panel case.¹⁹⁵ The Panel notes that WMDP supervision reports do not discuss the potential impact of Isimba on the KOA and KOSMP implementation and there appears to be limited communication between the different project teams.

127. The ESIA Addendum (November 2017) stated that “*most of the KO-SMP [sic] plan is yet to be implemented,*” and only a small fraction of the KOSMP’s estimated budget had been used.¹⁹⁶ The LTCO Report cites inadequate resource allocation from the central government and budget constraints as key reasons why regular annual meetings were not held and monitoring reports not prepared; lead institutions assumed MoFPED had to provide the needed budget, contrary to the financial strategy as established under the KOSMP.¹⁹⁷ The report card of the KOSMP plans and programs implemented shows that only the MoWE’s KOSMP Implementation Unit was involved in the execution of the KOSMP, while other partnering institutions – including NEMA, NFA, the Ministry of Tourism, Wildlife and Antiquities (MoTWA), the Ministry of Gender, Labor and Social Development (MoGLSD), district local governments, non-governmental organizations (NGOs), and the private sector – have not played execution roles as envisioned.¹⁹⁸ According to the LTCO Report there was a “*total dependency on the Government budget for KOSMP implementation. Other strategies for the creation of outside funds to meet the financial gaps and ensure financial sustainability of the KOSMP were not paid due attention.*”¹⁹⁹

128. The Panel notes that the establishment of the KOA constituted an ad hoc form of compensation rather than a well-designed offset, as it does not comply with the minimum requirements of an offset. As discussed, the KOA was set aside without clearly defining explicit or measurable outcomes and without adequate funding and capacity. While World Bank policy on Natural Habitats (OP/BP 4.04) requires “*establishing and maintaining an ecologically similar protected area,*” insufficient provision was made for specific and sustained arrangements over time to ensure the protection and maintenance of the KOA. The KOSMP, with its extensive scope,

¹⁹³ Ibid., pp. 3, 12, 18.

¹⁹⁴ Ibid., p. 3.

¹⁹⁵ The October 2016 Aide Memoire stated that “*the mission also discussed the potential implication of a possible World Bank inspection panel case related to the Isimba Dam project, which may have linkages with the WMDP. The MWE agreed to prepare documentation that provides the background information and detailed scope of activities under this sub-component.*” P. 4.

¹⁹⁶ ESIA Addendum, November 2017, p. 225, Section 8.6.

¹⁹⁷ Report on Long-term Conservation Options, July 2017, pp. 16, 17, Section 2.2.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

multiple objectives, wide range of institutional responsibilities, and funding requirements, was not suitable for adequately managing the KOA.

129. To conclude, the Panel notes that the KOSMP operationalizes the IA commitments to maintain and manage the KOA and the premise of the WMDP's support to priority KOSMP activities is the continued protection of the KOA. **Although funding and capacity constraints relating to the KOSMP became evident through WMDP supervision, Management did not address these issues to ensure the maintenance of the KOA. Thus, the Panel finds Management in non-compliance with World Bank Policies on Project Supervision (OP/BP 13.05), Investment Project Financing (OP/BP 10.00), and Natural Habitats (OP/BP 4.04).**

130. The Panel stresses it is not the intention of this analysis to negate the value of an offset as a mitigation tool; rather, the Panel emphasizes that the design and implementation of a potentially valuable tool was inadequate in this case.

3.5.3. The World Bank's Response to the GoU's Decision to Build Isimba

131. The Panel has reviewed documents dating back to May 2012, as well as numerous communications between the Bank and GoU over the years. Project documentation shows that Management became formally aware of Isimba at least as early as May 2012, during a Bujagali Joint Lenders supervision meeting. The May 2012 Aide Memoire recorded that the planned Isimba Dam downstream of the Kalagala Falls, if developed at the largest and economically preferred option, would inundate a small portion of the KOA along the Victoria Nile (but not the Kalagala Falls or any area within sight of the falls). It also mentioned that a special study had been commissioned as part of feasibility studies to assess the potential impact and interaction of Isimba with the KOA, and that the GoU was expected to formally approach the World Bank in this regard in the context of the IA.²⁰⁰

132. In May 2013, the Bank noted in its Fourth Progress Report in response to the earlier Panel investigation, that *"the feasibility and due diligence studies [were] ongoing and [indicated] that with the largest development option the reservoir would likely inundate about 8% of the Kalagala Offset area, and affect about two[-]thirds of the stretch of the Nile River that [was] in the Offset area."*²⁰¹ The Progress Report states that the Isimba "zero draft" ESIA of April 2013 indicated that there may be (i) negligible to minor impact on hydrology and hydrogeology, (ii) minor impact on terrestrial ecology, (iii) moderate impact on aquatic ecology/fish feeding and spawning habitat, water quality, air quality, noise levels, aesthetics, and temporary land take, and (iv) major impact on agriculture, as about 80 percent of the land to be permanently inundated is under agricultural production.²⁰²

²⁰⁰ Bujagali Aide Memoire, 9th Joint Lenders Supervision Mission, May 9-11, 2012, p. 7.

²⁰¹ Response to the Inspection Panel Investigation Report (Report # 44977-UG) on the Republic of Uganda Private Power Generation (Bujagali) Project (IDA Guarantee No. B0130-UG), Fourth Progress Report on the Implementation of Management's Action Plan, May 2013, p. 11.

²⁰² Ibid.

133. During the Bujagali Joint Lenders supervision mission of October 21-23, 2013, the GoU explained that the ESIA for Isimba had been submitted to NEMA for approval.²⁰³ The mission team was informed that planned mitigation measures had been prepared with the NFA that would provide an offset for any affected land in accordance with provisions of the KOSMP.²⁰⁴ During October and November 2013, there was extensive coverage in Ugandan media about the plans to construct Isimba, and the Bank received repeated communications from Ugandan citizens and NGO representatives expressing concerns about Isimba and its impact on the KOA.²⁰⁵

134. The Bank's review of the environmental and social reports for Isimba in 2013 and 2014 confirmed that its impact on the Victoria Nile River within the KOA would be highly significant, as it would inundate 40 to 60 percent of the free-flowing stretch of river in the KOA.²⁰⁶ The preliminary assessment by Management concluded that Isimba's Alternative 1²⁰⁷ would violate the IA, unless the Bank were to agree in advance to the loss of a major portion of the KFS aquatic area.²⁰⁸ It was discussed that proceeding with Isimba without an amendment to the IA would violate the terms of the current IA, triggering possible use of the Bank's available legal remedies.²⁰⁹

135. In January 2014, the Bank was considering the possibility of amending the offset boundaries and recommending this approach to the GoU.²¹⁰ From February 2014 onwards, Management sent letters to the GoU requesting information on the GoU's preferred option and proposing senior level discussions between the Bank and the GoU.²¹¹ Meetings between Bank staff to discuss Isimba's impact on the KOA took place in March 2014 and it was agreed that the "offsetting the offset" approach was "*a possible solution to the potential non-compliance with the Indemnity Agreement by the Isimba Project.*"²¹² It was noted that before these details would be discussed with the GoU it would be important to emphasize that the IA remains a binding commitment signed by the GoU and that Isimba, as planned, would significantly impinge on the KOA.²¹³

136. The Bank informed the GoU in August and November 2014 of the possibility of adjusting the boundaries of the KOA and amending the IA, subject to certain conditions that would preserve

²⁰³ Bujagali Aide Memoire, 10th Joint Lenders Supervision Mission, October 21-23, 2013, p. 2.

²⁰⁴ Ibid.

²⁰⁵ Communications dated October 24, 2013 and November 1, 2013.

²⁰⁶ Communications dated December 22, 2013, January 26, 2014, and February 10, 2014.

²⁰⁷ In 2013, Management noted that the possible alternatives of the upstream reservoir level for Isimba were investigated by the GoU, which presented three alternative solutions:

(a) Alternative 1: An approximately 188 MW HPP with its reservoir restricted up to the first rapid downstream of the Kalagala Falls, about two kilometers downstream from the Falls itself,

(b) Alternative 2: An approximately 102 MW HPP with its reservoir restricted up to the northern border of the Nile Bank central forest reserve, and

(c) Alternative 3: An approximately 43 MW HPP with its reservoir restricted up to the northern border of the Kalagala Offset area.

²⁰⁸ Communication dated December 22, 2013.

²⁰⁹ Communication dated February 10, 2014.

²¹⁰ Communication dated February 10, 2014, para 8.

²¹¹ Letters from the World Bank to the GoU, February 3, 2014 and April 29, 2014.

²¹² Communications dated February 10, 2014 and March 11, 2014.

²¹³ Communication dated March 11, 2014.

the original spirit and intent of the offset and strengthen its legal protection.²¹⁴ The Bank requested additional information from the GoU but did not make any definitive decisions on amending the boundaries of the offset at that stage.²¹⁵

137. Around that time, the Bank also met with Save Adventure Tourism Uganda (SATU), which argued that Isimba would have far-reaching consequences for local communities, including fishermen, subsistence farmers, taxi drivers, and small shops and kiosks that depend on the tourism industry.²¹⁶ SATU explained that investments in the tourism industry were made based on the assurances provided by the Bujagali IA regarding long-term protection of the KOA.²¹⁷ A few months later, a letter from the Bank to the GoU explained that while protection of tourism activities was not directly identified in the environmental protection goals of the IA, the GoU should review more closely the economic tradeoffs between tourism losses and electricity, taking into account different power generation alternatives.²¹⁸

138. In November 2014, the Bank urged the GoU to hold off on the final approval of the Isimba ESIA or other approvals needed for Isimba to proceed.²¹⁹ The Bank received the revised Isimba ESIA for review on February 9, 2015, and considered that it lacked sufficient information to determine compliance with the IA.²²⁰ In March 2015, the Bank shared with the GoU the TOR for studies it deemed necessary to continue discussions on the matter, and stressed the urgency of this additional work.²²¹

139. Construction of Isimba officially commenced on April 30, 2015, and its Certificate of Approval was issued by NEMA to MoEMD on May 19, 2015. The Certificate included the condition that an addendum focusing on Isimba's impact on the KFS and its mitigation be prepared.²²² It explained that the Addendum should cover analysis of alternatives, and mitigation options, including specifically the modification of the KOA boundaries to compensate for the inundation.²²³ In a letter of June 24, 2015, the Bank emphasized that the Isimba construction should not cause any irreversible impact on the KFS that would violate the IA.²²⁴

140. Despite the intention that the GoU would finance consulting services for the ESIA Addendum and associated studies, on October 20, 2015, the GoU requested that the studies be financed by the Bank due to funding constraints.²²⁵ The Bank agreed to provide the required funds under the existing ERT-III Project which had been approved by the World Bank in June 2015, and this was confirmed by the MoFPED.²²⁶ At the same time the Bank decided to fund the LTCO Report, as requested by the GoU. In January 2016, the Bank noted in a letter to the GoU that the

²¹⁴ Letter from the World Bank to the GoU, August 29, 2014.

²¹⁵ Letter from the World Bank to the GoU, November 24, 2014.

²¹⁶ BTOR, August 2014.

²¹⁷ Ibid.

²¹⁸ Letter from the World Bank to the GoU, November 21, 2014.

²¹⁹ Ibid.

²²⁰ Letter from World Bank to the GoU, March 17, 2015.

²²¹ Ibid.

²²² NEMA Certificate of Approval for Environmental Impact Assessment, Number NEMA/EIA 6240.

²²³ Ibid. Appendix 2 Section 1(a)(ii).

²²⁴ Letter from the World Bank to MoEMD, June 24, 2015.

²²⁵ Letter from MoFPED to the World Bank, October 20, 2015.

²²⁶ Letter from MoFPED to the World Bank, October 26, 2015.

construction of Isimba had started although an agreement with the Bank on its development, as required by the IA, was yet to be reached.²²⁷ On March 31, 2016, Bank Management commented on and gave no objection to the appointment of a consultant to prepare the ESIA Addendum.²²⁸

141. As noted in this section, several communications between the Bank and GoU regarding the impact of Isimba on the KOA took place between 2012 and 2016. The Panel notes, however, that it has not seen evidence that the Bank had communicated the possibility of deploying remedies although the IA explicitly stated that there would be no development of power generation that could affect the ability to maintain the KFS without the prior agreement of the Bank. Supervision documentation shows the Bank gave little, if any, consideration to options to minimize the impact of Isimba on the original KFS.²²⁹

142. The Panel observes that this type of Bank engagement contrasts with the Bank actions taken when the Mabira CFR, which is part of the KOA, was threatened in 2011. The Third Progress Report explained that “[i]n August 2011, there was a report in the public media that the President of Uganda had resumed his 2007 initiative to degazette parts of Mabira Central Forest Reserve and make these accessible to a private investor for sugarcane growing. In response, Bank Management wrote to the GoU and met with the Ugandan Delegation to the Annual Meetings to advise of a potential inconsistency of such action with the Indemnity Agreement and with the implementation of the SMP.”²³⁰ An August 2011 Bank letter to the GoU noted that allowing an investor to grow sugar cane in part of the Mabira CFR “would obviously be in contradiction with the undertakings of the Government that framed [the Bank’s] involvement in the Uganda Private Sector Project (Bujagali).” The letter further urges the GoU to reconfirm that “it has no intention of deviating from the agreements concerning the Mabira forest [sic]” mentioning that these agreements “led to the participatory preparation and approval of the [KOSMP].”²³¹ Management’s Third Progress Report further explains that “subsequently, the GoU did not proceed with the degazettement process. The Bank will continue to monitor the situation for any indication that GoU is considering resuming degazettement and advise about the continued need to comply with the provisions of the Indemnity Agreement.”²³² The Bank’s approach to Isimba was instead to request that an Addendum to the ESIA be undertaken to establish the extent of the impact within the KOA. The Bank refrained from applying pressure similar to that used in the Mabira case to protect the IA and the KOA.

143. A draft of the ESIA Addendum was presented to the MoEMD on September 22, 2016. The Bank held follow-up meetings with MoEMD, the consultant and NEMA, at which time it was emphasized that the report would need to be strengthened – particularly the analysis of impact on the natural habitat and environmental and spiritual values of the KFS – and that “the analysis of

²²⁷ Letter from the World Bank to the GoU, January 27, 2016.

²²⁸ Communication dated March 31, 2016.

²²⁹ Aides Memoires of Missions 7-11 March 2016, March 2-3, 2017, and September 21-22, 2017.

²³⁰ Response to the Inspection Panel Investigation Report on the Uganda Private Power Generation (Bujagali) Project, Third Progress Report to the Board of Executive Directors on the Implementation of Management’s Action Plan, p. 11.

²³¹ Letter from the World Bank to the GoU, August 23, 2011.

²³² Response to the Inspection Panel Investigation Report on the Uganda Private Power Generation (Bujagali) Project, Third Progress Report to the Board of Executive Directors on the Implementation of Management’s Action Plan, p. 11.

the impacts and of the mitigation measures should be evidence-based.”²³³ A March 2017 World Bank mission, dedicated to the preparation of the ESIA Addendum for Isimba and the LTCO Report for the Kalagala Falls Site, found that Isimba would flood 5.7 of the 10 kilometers of free-flowing river within the KFS, and that this would affect some fish species and adventure tourism activities.²³⁴ Further technical discussions were held between the GoU and the Bank in March²³⁵ and September 2017.²³⁶

144. The June 2017 draft version of the ESIA Addendum indicated that the required excavation works for Isimba Dam and its powerhouse, the concreting works of the structures, and the overall construction work were 100 percent, 79 percent, and 45 percent complete, respectively.²³⁷ In August 2017, the Bank reiterated the importance of not taking any actions under Isimba that could irreversibly and adversely affect the KFS before the ESIA Addendum was finalized and subsequent discussions between the Bank and GoU completed.²³⁸ The Bank specified that such actions with irreversible or difficult-to-reverse adverse impact included clearing of the KFS area in preparation for filling the Isimba reservoir, flooding of any portions of the KFS, etc.²³⁹

145. At the time of public hearings on the ESIA Addendum in September 2017, shortly before it was finalized, the excavation of the dam and powerhouse had been finished, concrete works were 90 percent complete and overall works 76 percent complete.²⁴⁰ In September 2017, a letter from the GoU stated that reservoir clearance was anticipated to start in December 2017 and flooding in May 2018. The letter also stated that “*the Government of Uganda [was] committed to working with the World Bank to address any actions that could adversely affect the Kalagala Falls Site.*”²⁴¹

146. The Panel notes that the ESIA Addendum, financed under the ERT-III Project, started when the construction of Isimba was already well underway, and was completed when Isimba was almost finished. The Panel thus finds that the ESIA Addendum could not influence the design of Isimba, improve decision making, or help ensure that the Project was sustainable and that its mitigation measures were environmentally sound, as required by the Bank. The Panel therefore finds Management in non-compliance with the World Bank Policy on Environmental Assessment (OP/BP 4.01).

²³³ Aide Memoire, ERT-II and ERT-III Projects, October 24-November 4, 2016, Annex 5, p. 23.

²³⁴ Aide Memoire, World Bank technical visit, March 2-3, 2017, Preparation of the ESIA Addendum for the Isimba Hydropower Project on the Kalagala Falls Site.

²³⁵ Aide Memoire, World Bank technical visit, March 2-3, 2017, Preparation of ESIA Addendum for the Isimba hydropower project and Long-Term Conservation Option Report (LTCO Report) for the Kalagala Falls Site.

²³⁶ Aide Memoire, World Bank Mission, September 21-22, 2017, Impacts of the Isimba Hydropower Project on the Kalagala Offset Area.

²³⁷ Draft ESIA Addendum, June 2017, p. 191.

²³⁸ Letter from the World Bank to the GoU, August 8, 2017.

²³⁹ Ibid.

²⁴⁰ ESIA Addendum, Volume 2, Appendix, October 26, 2017, p. 209.

²⁴¹ Letter from the GoU to the World Bank, September 9, 2017.

3.5.4. The ESIA Addendum's Identification of Impact and Proposed Mitigation Measures

147. The ESIA Addendum concluded that the main impact of Isimba would be a 22.62 percent reduction of the KFS's geographical area, a 56.1 percent (5.7-kilometer) loss of free-flowing river length, a 58.41 percent loss of free-flowing water body area – with a corresponding 12.42 percent (288.89-hectare) increase in the lentic habitat, a 1.68 percent (11.9-hectare) loss of the Nile Bank CFR, a 42.85 percent (three rapids) loss of rapids and falls, a 57.14 percent loss of island groups (four groups of islands), and the inundation of 47.15 percent (21.52 hectares) of existing wetlands and 33.75 percent (2.15 hectares) of existing woodlands.²⁴² The ESIA Addendum acknowledges that the main socioeconomic impact of flooding the KFS was on the tourism businesses of the Upper Victoria Nile, as discussed in more detail below.

Impact on Natural Habitats

148. The ESIA Addendum concludes that because 90 to 95 percent of the original natural habitat in the area to be inundated has been modified by human activity, effects on terrestrial flora and fauna would be low.²⁴³ It notes, however, that Isimba “*will cause significant impacts on the KFS natural habitats and environmental values.*”²⁴⁴ The Addendum states that Isimba Alternative 1 would have the most severe impact on existing conservation areas, island groups, free-flowing river, falls and rapids, and endemic and migratory fish species, and that the residual impact is “*too high to be ignored and need protection outside the KFS boundary for conservation.*”²⁴⁵ The main mitigation measures proposed are the extension of the offset area and the monitoring of fish species.

Impact on Tourism

149. The ESIA Addendum recognizes there are various tourist attractions in the KFS that have enjoyed steady growth and contributed to the national economy. It states that the year-round large water volumes and sequence of rapids provide an “*excellent*” whitewater rafting and kayaking experience, and that some rapids in the area are considered among the world's best large-wave rapids. The Addendum also refers to other adventure tourism activities and cultural tourism yet to be exploited. The Addendum greatly attributes the development of Jinja Town to the socioeconomic opportunities provided by the adventure tourism industry since the 1990s, and states that the Jinja region provides competitive and diversified tourism, which no other country in eastern Africa can match.²⁴⁶

150. The ESIA Addendum explains that, prior to the construction of Bujagali Dam, two-day packages for rafting and kayaking were the general arrangement. After construction, packages were limited to one day due to the loss of rapids. The Addendum argues that despite this, the area has enjoyed an increase in tourism activities, but explains that as more rapids are lost with the completion of Isimba Dam, total turnover may drastically decline. According to the Addendum,

²⁴² ESIA Addendum, November 2017, p. iv.

²⁴³ Ibid., pp. 42, 43.

²⁴⁴ Ibid., p. 226.

²⁴⁵ Ibid., p. 157.

²⁴⁶ Ibid., p. 110.

*“some operators have projected they may fail to break even and close their operations since selling half day trips will not be viable.”*²⁴⁷ The Addendum highlights the importance of diversifying the packaging and marketing of adventure tourism on the Victoria Nile River.²⁴⁸ It points to the lack of available official data on how many tourists visit and in what activities they engage; the total value and revenue generated from tourism businesses in the Jinja area is also not fully known.²⁴⁹

151. The ESIA Addendum notes that the contribution of the tourism industry to the livelihoods of the local community has never been fully ascertained, but is generally considered to be *“very miniscule.”*²⁵⁰ According to the Addendum, the tourism operators provide limited job opportunities to local households, no local community members owned or had shares in any of the major businesses operating in the upper Victoria Nile region, and employment of locals is often informal and low-paying.²⁵¹ The Addendum mentions tourism-related social responsibility initiatives and support to education and health initiatives, as well as conservation efforts made by tourism operators and tourists over the years.²⁵² The Addendum explains that involving local communities in tourism opportunities and developing tourism infrastructure *“will have unprecedented impacts on the quality of life and economic situation of the KFS communities.”*²⁵³

152. According to the ESIA Addendum, the main socioeconomic impact of the partial flooding of the KFS would be on tourism businesses. Nine of the 17 accessible falls or rapids between the Bujagali and Isimba dams – three of which are located within the KFS – would be inundated. Furthermore, of the 36.5 kilometers of free-flowing river accessible between both dams, only 17.5 kilometers would remain for whitewater rafting – of which 5.7 kilometers lie within the KFS. Since whitewater rafting utilized the river section from Bujagali downstream to Isimba, losses incurred by the tourism economy could not be isolated to any particular segment of the river. Therefore, the collective loss to the whitewater rafting tourism business in the upper Victoria Nile was estimated to be 40 to 50 percent.²⁵⁴

153. The ESIA Addendum explains that landowners and settlers affected by Isimba Dam are compensated under the Isimba RAP. Tourism operators seeking compensation for lost revenue may apply to the GoU under the Community Development Action Plan.²⁵⁵ The Addendum calls the inclusion of tourism diversification, infrastructure development, and tourism asset development programs key to mitigating impact on tourism resources and businesses and to enhancing sustainable tourism development. It explains that such programs need to align with the KOSMP and Kalagala Ecotourism Development Plan. The Panel understands that both documents are currently being reviewed and updated (see Chapter 2).

154. The Management Response argued that tourism and related income is not protected under the IA. It states that, on the contrary, the IA clearly seeks to limit tourism in the KOA to prevent

²⁴⁷ Ibid., p. 111.

²⁴⁸ Ibid., p. 111.

²⁴⁹ Ibid., p. 122.

²⁵⁰ Ibid., p. 110.

²⁵¹ Ibid., p. 123.

²⁵² Ibid., p. 124.

²⁵³ Ibid., p. 65.

²⁵⁴ Ibid., p. vi.

²⁵⁵ Ibid., p. 191.

adverse effects on the environment.²⁵⁶ The Management Report and Recommendation submitted on June 7, 2002, in response to the 2001 Panel investigation of Bujagali includes an Action Plan to address the various concerns raised. The Bank's actions included the reassertion of the Government's commitment "*to set aside Kalagala exclusively to protect its natural habitat, environmental and spiritual values and for tourism development, and not use the site for hydropower development purposes.*"²⁵⁷ The Report and Recommendation also included the revised Section 3.08a of the IA which read: "*Uganda will set aside the Kalagala Falls site exclusively to protect its natural habitat and environmental and spiritual values and to develop tourism, and will not develop the site for power generation, without the Agreement of the Association.*"²⁵⁸

155. The 2007 IA stated that "*any tourism development at the Kalagala Falls Site [would] be carried out only in a manner acceptable to the Association.*" The Panel notes that the mechanism for ensuring that tourism development would occur only if acceptable to the Bank is unclear. Bank staff told the Panel team that the Bank knew of the tourism developments in the KFS but did not regard them as problematic as they were environmentally sustainable. The Panel has seen no evidence that the Bank objected to tourism development in the KFS but did see documentation showing the Bank proactively engaging with ecotourism operators in the development of the KOSMP.²⁵⁹

156. The Panel notes the clear intention in the KOSMP that tourism would be integral to the KOA; it would generate revenue directly, but also create opportunities for other livelihoods that depend on KOA's unique biodiversity. When addressing livelihoods – and particularly the tourism industry, the KOSMP states that "*[according] to the Integrated Tourism Master Plan, 1993, Mabira ecosystem is classified under the Capital Area Zone of the Secondary Tourism Zone.*"²⁶⁰ It explains that the area is ideal for visitors due to its association with the source of the Victoria Nile and its proximity to the Kampala-Jinja-Mukono-Entebbe urban areas.²⁶¹ The KOSMP describes in detail various outputs and objectives associated with ecotourism, including its regulation.²⁶² The WMDP included identifying and opening trails in the Mabira ecosystem to promote tourism as one of the activities supported under the KOSMP.²⁶³ The Panel therefore concludes that tourism operators had legitimate reasons to expect the KOA would be protected at least until 2023.

Livelihood Impact Beyond Tourism

157. The Addendum notes that the KFS is used for diverse socio-economic activities, including agriculture, and Isimba directly impacts on the land owned and operated by the local

²⁵⁶ Management Response, p. 11.

²⁵⁷ Management Report and Recommendation, June 7, 2002, p. 8.

²⁵⁸ Ibid.

²⁵⁹ Aide Memoires of Joint Lenders missions: September 29-October 8, 2008, p. 6; April 12-15, 2010, p. 4; November 8-10, 2010, p. 3; May 9-11, 2012, p. 7; BTOR, August 2014.

²⁶⁰ KOSMP 2010-2019, p. 29.

²⁶¹ Ibid.

²⁶² Ibid., pp. 56-58.

²⁶³ Management Response, pp. 31 and 32.

communities.²⁶⁴ In the rural parts of the KFS neighborhood, agriculture is one of the key economic activities among households. The other economic livelihood activities are fishing in the Victoria Nile and extraction of non-timber forest products for various household uses.²⁶⁵ According to the Addendum, any new restrictions on existing agro-economic and fishery activities would likely have a substantial, negative effect on livelihoods; this impact can be analysed only after a detailed, targeted, socio-economic census and survey of all affected persons.²⁶⁶

158. Little information is available on fishing income, and the precise number of fishermen in the KFS is unknown. The Addendum proposes a survey of residents whose livelihoods partly or wholly depend on fishing income. The Addendum also highlights the importance of diversifying the economic activities in the KFS.²⁶⁷

159. The Addendum explains that, by increasing the area of the waterbody and wetlands, the partial flooding of the KFS will increase fish habitats, and villagers dependent on fishing in the KFS may thus benefit. It states, however, that imposing the restrictions described in the adaptive management strategy will directly affect communities. In that case, affected fishermen would have to be paid for environmental services, and the hydropower developer should be made responsible for such payments.²⁶⁸

160. The Addendum concluded that Isimba does not affect the cultural and spiritual values of Buganda and Busoga heritage connected to Kalagala and Itanda Falls within the KFS. It acknowledges that some spiritual sites of local significance will be closer to the reservoir shoreline after flooding and recommends that spiritual leaders be consulted.²⁶⁹ The Addendum does not assess whether the flooding and resulting lentic water bodies will adversely affect health by, for example, increasing water-borne diseases such as bilharzia.

161. The Panel notes that changes in natural habitat often affect the socioeconomic and cultural benefits provided by that habitat, with major implications for livelihoods. The original intention to protect the natural, spiritual, and cultural value of the KFS reflected the symbiotic relationship between the area and those who depend on it for their livelihoods. Operators and others whose livelihoods depend on the tourism industry, sand miners, fishermen, and the underlying socioeconomic structure all rely on the KFS just as the KFS needs the revenue created by these activities and the oversight and support of its users to be sustained.

162. The Panel notes that while the ESIA Addendum confirms many types of adverse impact alleged by the Requesters and proposes some mitigation measures, the implementation of many of these measures is expected to be done by the Isimba developer or the GoU. The Panel understands that the Bank does not intend to support the mitigation measures, beyond assisting the GoU to create the EKFS and updating the KOSMP. It is not clear to the Panel how the Bank will ensure that mitigation measures are implemented adequately.

²⁶⁴ ESIA Addendum, November 2017, p. 156.

²⁶⁵ Ibid., p. 60.

²⁶⁶ Ibid., p. 204.

²⁶⁷ Ibid., pp. 65, 193.

²⁶⁸ Ibid., pp. 192, 193.

²⁶⁹ Ibid., p. 201.

163. The Panel finds that Management did not take adequate, timely and effective measures in response to the threats posed by the construction of Isimba Dam and failed to ensure the protection of the KOA as provided for in the KOSMP. These omissions led to harm and Management's non-compliance with Bank Policy on Natural Habitat (OP/BP 4.04) and with Bank Policies on Project Supervision (OP/BP 13.05) and Investment Project Financing (OP/BP 10.00), which require the identification of key risks to project sustainability and recommendation of appropriate risk management strategies.

Chapter 4

The ESIA Addendum and the Impact of the Proposed Mitigation Strategies

4.1. Introduction

164. This chapter examines the creation of the EKOA and its implications on the natural environment and affected peoples' livelihoods. It describes the use of the ESIA Addendum as a tool to address the impact on the KOA with a focus on the analysis of alternatives and the required assessments for the establishment of the EKOA. Finally, it examines the design, protection and management of the EKOA.

4.2. Requests for Inspection

165. The Requests argued that people living in and deriving sustenance from the KOA were likely to suffer grave harm as a result of the Bank's failure to ensure the protection of the KOA and claimed that it should have been protected in line with Bank policies and procedures.

4.3. Management Response

166. Management explained that the ERT-III Project financed the preparation of an addendum to the GoU's ESIA for Isimba to evaluate its potential impact on the KOA, but that these actions did not support any intervention that could create or contribute to the alleged harm.²⁷⁰ The Response noted the Bank's commitment to continue working with the GoU to finalize the assessment of impact on the KOA to ascertain compliance with the IA.²⁷¹ The Response also added that the Bank would work with the GoU on appropriate mitigation actions and advise the GoU regarding livelihood restoration measures and compensation provided to people affected by Isimba.²⁷²

4.4. Bank Policies

167. World Bank Policy on Natural Habitats (OP/BP 4.04) states that the Bank does not support projects involving the significant conversion of natural habitats unless there are no feasible alternatives and it can be demonstrated that overall benefits from the project substantially outweigh the environmental costs.²⁷³ It also states that if the environmental assessment finds that a project would significantly convert or degrade natural habitats, the project must include mitigation measures. As well as minimizing habitat loss, the policy lists "*establishing and maintaining an ecologically similar protected area*" – also referred to as an "offset" – as one possible option. OP/BP 4.04 further states that the Bank supports a precautionary approach to managing natural resources and needs to take into account the borrower's capacity to implement the proposed mitigation measures, and to include components within the project to deal with capacity issues.²⁷⁴

²⁷⁰ Management Response, p. v.

²⁷¹ Ibid., p. vi.

²⁷² Ibid., p. vi.

²⁷³ World Bank Policy on Natural Habitats (OP/BP 4.04), para 5.

²⁷⁴ OP/BP 4.04, para 6, reads that "[i]n deciding whether to support a project with potential adverse impacts on a natural habitat, the Bank takes into account the borrower's ability to implement the appropriate conservation and mitigation."

168. World Bank Policy on Environmental Assessment (OP/BP 4.01) states that environmental assessments should “*improve decision making.*”²⁷⁵ The environmental assessment considers natural and social aspects in an integrated way.²⁷⁶ According to the policy, it evaluates potential risks and impact in a project’s area of influence, examines project alternatives, and identifies ways to improve project selection, siting, planning, design, and implementation “*by preventing, minimizing, mitigating, or compensating for adverse environmental impacts and enhancing positive impacts.*”²⁷⁷ The Bank favors preventive measures over mitigatory or compensatory measures, whenever feasible.²⁷⁸

4.5. Panel Analysis and Findings

4.5.1. The Creation of the EKOA and its Implications

169. The ESIA Addendum proposed extending the KFS upstream by approximately 10.5 kilometers as the key mitigation measure to compensate for the loss of 5.7 kilometers of free-flowing river. This EKFS would include a stretch of the Victoria Nile River approximately 15 kilometers long and would begin 2.5 kilometers below the Bujagali Dam and run downstream, ending at Isimba Dam. It would include (i) the entire Victoria Nile River aquatic area within these limits, (ii) all river islands within these limits, (iii) all land within 100 meters of the river banks from the annual maximum high-water line, and (iv) the entire area of the Namavundu, Kalagala Falls, and Nile Bank CFRs except those portions inundated by the Isimba Dam reservoir.

170. Three options for redefining the boundaries of the KFS were considered. Expanding the KFS upstream along the river towards Bujagali Dam would provide features similar to those being lost and was deemed the most suitable. The 15 kilometers of protected river in the EKFS would create a net gain of about 4.8 kilometers of river (the original KFS had 10.2 kilometers). According to the ESIA Addendum, the new protected river area generally enjoys higher biodiversity value than the original KFS area to be affected by inundation; for example, based on fish species surveys, an additional 33 fish species – including four of global conservation significance – would inhabit the EKFS.²⁷⁹

171. The Requesters and others who the Panel team met in the KFS and EKFS claim the creation of the EKFS is exacerbating the harm caused by the flooding of the KFS, rather than mitigating it. The Panel takes these assertions seriously, given that *prima facie* and in the context of the analyses cited above these new allegations would seem simply to repeat the types of harm and non-compliance already identified by the Panel - i.e., establishing or extending, a biodiversity offset without properly considering its mitigation objectives, management and funding needs, and capacity for effective implementation, or its impact upon people and the environment.

²⁷⁵ World Bank Policy on Environmental Assessment OP/BP 4.01, para 1.

²⁷⁶ Ibid., para 3.

²⁷⁷ Ibid., para 2.

²⁷⁸ Ibid., para 2.

²⁷⁹ ESIA Addendum, November 2017, Table 71.

172. *Restrictions to Land Use and River Access.* The Panel team met with several people living on or using land near the shores of the river within the KFS and EKFS. They claimed their access to the river and adjacent lands, as well as their use of the lands, would be limited or fully prohibited. Many told the team they have farmed close to the river for many years and their livelihoods depended on it. Some told the team they felt threatened by NFA officials who asked them to sign agreements they did not understand. The Panel team also spoke to women who said they were never asked about their use of the river and riverbanks and did not know how the new EKFS regulations would affect them. Several people believed they would be denied access to land within the 100-meter line from the river since this land was owned by the Government. The team also met people who claimed that some demarcation stones had been placed beyond the 100-meter line. Most of those interviewed by the Panel team raised concerns regarding poor information and consultation about implementation of the EKFS and how it would affect locals who have used the river and riverbanks for generations.



Picture 5: Agricultural activities on the Nile River bank

173. *Sand Miners and Fishermen.* Sand miners and fishermen told the Panel team they lacked detailed information about new restrictions on the use of the river in the EKFS that had been implemented over the previous months. They feared they would be excluded from the river and lose access to it.

174. *Biodiversity Values.* The team also spoke with some who, after reviewing the ESIA Addendum, felt it incorrectly deemed the extended offset to be of equivalent biodiversity value as the original one. They feared an overall loss of biodiversity despite the steps to protect additional stretches of the river, since protecting the river was not seen as compensation for the loss of many islands, rocky outcrops, and other habitats flooded by the Isimba reservoir within the KFS.

175. *Tourism.* As explained above, at the time of the Panel team’s investigation visit, tourism operators lacked compensation for income losses, had been unable to review the compensation methodology despite being promised it, and claimed they therefore could not plan for the future. Many of them told the team they remained interested in staying active in Uganda’s tourism industry – re-shifting their focus if need be – and reinvesting in it but required information about compensation and future restrictions affecting the EKFS. They were specifically and considerably worried by their inability to plan ahead. Several tourism operators said they would like the World Bank to be more actively involved in the offset to ensure that measures for its protection are adequately implemented.

176. Tourism operators also told the Panel team they were concerned about the public perception that, due to the flooding of the rapids there was nothing valuable left in the area for the kayaking industry and tourism more broadly. Many operators believed that a well-developed marketing strategy and support were needed to counter these concerns. They told the team about three possible funding streams for this effort: The Ministry of Tourism’s pre-established marketing budget, the Isimba Community Development Action Plan and the new KOSMP. The tourism operators also voiced support for reforestation activities along the riverbanks and argued that the causes of deforestation needed to be properly identified and addressed. They told the team of several initiatives to support reforestation activities.



Picture 6: Afforestation along the riverbanks.

4.5.2. The ESIA Addendum as a Tool to Address the Impact on the KOA

177. As discussed in Chapter 3 of this report, in response to the potential partial flooding of the KFS the Bank asked the GoU to conduct additional studies to assess the impact of Isimba on the KOA and recommend mitigation measures. When the GoU asked the Bank to finance these studies due to funding constraints, the Bank agreed to fund the ESIA Addendum and LTCO Report under

the ERT-III Project. It is unclear why the mechanism of an ESIA Addendum was selected as a “firm basis for engagement” between GoU and the Bank on “ensuring compliance with the Indemnity Agreement,”²⁸⁰ instead of taking other approaches to address the partial inundation of the KFS by Isimba. The Panel is of the view that the Bank should have done its own due diligence of the potential violation of the IA, rather than request the GoU to prepare an Addendum to Isimba’s ESIA. By funding the ESIA Addendum, the Bank implicitly condoned the ongoing construction of Isimba.

178. The Panel observes that the Bank-funded Addendum cannot be regarded as an appropriate instrument if the Bank intended to influence Isimba. The ESIA, and any Addendum to it, is an environmental impact assessment tool that is meant to influence decision making. Since the Bank is not financing Isimba it was supporting an instrument for a project over which it has no leverage. The Panel has found no documentation showing that the Bank considered the ramifications of its financing additional work on an ESIA unrelated to a Bank project, and which it had found inadequate for Bank purposes to assess compliance with the IA.

179. *ESIA Addendum TOR*. The TOR for the Isimba ESIA Addendum were agreed and signed on May 17, 2016.²⁸¹ According to them, the Addendum’s purpose was to further strengthen the ESIA for Isimba to ensure that it “meets international standards in addressing all impacts of the project on the KOA” – i.e., KFS – and “provides a firm basis for engagement” between the GoU and the Bank for ensuring compliance with the IA.²⁸² The ESIA Addendum was expected to include:

- An analysis of alternatives with different Isimba Dam heights, reservoir operating levels, and water-release regimes, and how they would differentially affect the KFS: The TOR noted that the ESIA did not provide “substantiating data and analysis” for the selection of Alternative 1 over Alternative 2, and that the Addendum should provide “key basic data” on resettlement, compensation, and environmental mitigation costs for each of the alternatives considered, as well as explain more clearly the numerical ratings of each alternative and complement it with more complete economic analysis, including tradeoffs.²⁸³
- The expected environmental and social impact of Isimba within the land and water boundaries of the KFS – including the inundation area – on aquatic biodiversity, spiritual values, tourism, and recreation.
- Mitigation options: The TOR stated that “the most important part of the Addendum will be a clear and systematic presentation of concrete, specific recommended options for mitigating any adverse impacts.”²⁸⁴ A number of mitigation elements were to be addressed,

²⁸⁰ Terms of Reference for Preparation of Kalagala Offset Area (1) Addendum to the Environmental and Social Impact Assessment for the Isimba Hydropower Project and (2) Long-term Conservation Options Report, Terms of Reference (undated), p. 1.

²⁸¹ ESIA Addendum, November 2017, p 1.

²⁸² Terms of Reference for Preparation of Kalagala Offset Area (1) Addendum to the Environmental and Social Impact Assessment for the Isimba Hydropower Project and (2) Long-term Conservation Options Report, Terms of Reference (undated), p. 1.

²⁸³ Ibid., p. 2.

²⁸⁴ Ibid., p. 3.

including modifying the KFS as an option to compensate for its partial inundation. According to the TOR *“the boundaries of the KOA could be adjusted to encompass an upstream segment of the Nile River for example, along with adjacent river-edge lands (some of which would need to be reforested) and associated protected areas, if any.”*²⁸⁵ Other mitigation options included aquatic biodiversity monitoring, alternative tourism development, spiritual values, reservoir clearing, rules for contractors, and compensation for affected persons.

180. In setting the TOR for the ESIA Addendum, the Bank stipulated that the analysis of alternatives contained in the ESIA must be expanded and justified with more factual data and greater detail. The TOR specifically required that *“the implications of each alternative reservoir operating level for the conservation of the KOA and associated human uses should be clearly explained.”* The TOR stipulated that *“the Analysis of Alternatives should include economic analysis, which, inter alia, should reflect the trade-offs between the benefits of increased electricity generation and the net losses from other economic activities”* and *“provide the substantiating data and analysis.”*²⁸⁶

181. The TOR also required that *“The Addendum’s Analysis of Alternatives should make use of and expand upon the relevant information contained in the existing Isimba EIA (Sections 9.4.3 and 9.5), taking care to be more detailed, transparent, and clearly written than in the current EIA and SIA. ... The Addendum should also explain more clearly the numerical ratings of each alternative than has been done so far in Table 36 of the existing EIA and complement it with a more complete economic analysis.”*²⁸⁷

182. *Assessment of Alternatives.* Section 5 of the ESIA Addendum is devoted to a more detailed assessment of alternatives. Section 5.1 raises the “No Project Alternative” but does so without addressing the fact that the Karuma HPP is being developed simultaneously with Isimba. There is consequently no assessment or explanation of how Ugandan domestic electricity supply would be affected if Karuma became operational, but not Isimba.

183. Section 5.2 considers alternative sources of power but does not analyze the realistic alternative of meeting Uganda’s medium-term electricity demands with another large-scale hydropower plant – i.e., Karuma. Furthermore, there is no justification for the concluding statement that *“Isimba HPP with an installed capacity of 183.2 MW generating 1063 (gigawatt hours) of annual energy will be one of the best from an environmental and economic point of view.”*²⁸⁸ No analysis is provided on whether other Isimba configurations might be better from a balanced environmental, social, and economic perspective.

184. In the analysis of possible dam sites and alternative reservoir levels (Section 5.3), no explanation or justification is provided for the scoring system used to weight these alternatives, and the system used for the 2012 feasibility study remains unchanged and unexamined (e.g., Table 45), despite the TOR requiring expansion and justification of alternatives. Similarly, there is no

²⁸⁵ Ibid., p. 3.

²⁸⁶ Ibid., p. 2.

²⁸⁷ Ibid. p. 2.

²⁸⁸ ESIA Addendum, November 2017, Section 5.2.

explanation of how the numerical values for alternative scores (Figures 59 to 63) were determined, and thus the final overall scores allocated to alternatives (Table 59) are unchanged from the 2012 feasibility study. Table 59 provides the uncritical basis for the subsequent weighted scenarios (Appendix 23). In this way, the consequent ranking of alternative scenarios (Table 61) in the Bank-funded Addendum have been carried unchanged and without justification from the feasibility study to the Isimba ESIA, and then to the ESIA Addendum. The basis for the table and the subjective judgments from which the rankings have been determined do not seem to have been examined with due diligence by Management.

185. Section 5.4 describes the effects that the alternative reservoir levels would have on the KFS. The section starts with a technical analysis (5.4.2.1) that asserts that Alternative 1 (the tallest dam) is the alternative that will contribute to “...*development opportunities such as: industrial development, service sector development, etc. adding to the overall socio-economic development of the country. Apart from this, comparatively, it will also reduce the current use of dirty fuels for electrical energy saving hard currency, reducing greenhouse gas generation and improving the overall living conditions of the people.*”²⁸⁹ This statement seems to imply that only the largest dam will provide the benefits listed, while there is no discussion of the contributions the other alternatives could make to this list.

186. The Panel concludes that the analysis of alternatives in the ESIA Addendum has simply imported the limited analysis that prompted the commissioning of the Addendum in the first place. If Management had applied proper due diligence to the Addendum results, as required by the TOR, this would have identified the pros and cons of other options that allowed both power generation and preservation of the KFS – i.e., either Alternative 2 or 3. This would have provided the basis for informed decision making as required by World Bank Policy on Environmental Assessment (OP/BP 4.01).

187. Based on the above, the Panel notes that the Bank failed to ensure systematic and rigorous assessment of the Isimba Project alternatives in the Bank-funded ESIA Addendum. The Bank neglected to insist on a neutral but robust assessment of alternatives to selecting the option that would impinge most severely on the KFS. Old analyses were used without ensuring their accuracy. Neither the assumptions nor the methodology used for the original 2012 feasibility study are shown, and the methodology seems to have prioritized maximizing hydropower at the expense of due consideration of non-energy factors such as social dimensions, livelihoods, the tourism industry and other economic activities, biodiversity and the environment. The comparative assessment of project options was futile at this late stage in any event, since any ESIA Addendum findings in conflict with the Isimba ESIA, on which the project authorization was based, could not influence this decision retroactively and would thus be moot.

188. Lacking leverage over Isimba and not conducting an adequate analysis of alternatives, Management, through the Addendum, gave implicit support to the alternative that would have the greatest impact on the KFS. The only effect the ESIA Addendum could have had on Isimba and its partial inundation of the KFS was to formulate compensatory measures to address impact, rather than the preventive measures preferred by World Bank Policy on Environmental Assessment (OP/BP 4.01). **The Panel notes that Management, rather than conducting its own due**

²⁸⁹ ESIA Addendum, November 2017, Section 5.4.2.1.

diligence of the potential impact on the KOA caused by Isimba, asked the GoU to commission the ESIA Addendum, and only agreed to finance it later when the GoU experienced funding constraints. Management, by funding the ESIA Addendum, chose to support an environmental assessment tool for a project the Bank was not financing and over which it has no leverage. The Panel finds that the Management, through the Addendum, provided its implicit support to the project alternative with the most severe impact on the KFS without a robust scientific basis and adequate analysis. The Panel therefore finds Management in non-compliance with World Bank Policy on Environmental Assessment (OP/BP 4.01).

4.5.3. Required Assessments for the Establishment of the EKOA

189. The Panel notes that the purpose of the ESIA Addendum was to assess the impact of Isimba on the KFS, and to identify specific, concrete options for mitigating them. It recommended the extension of the KFS; however, it did not assess impact of the extension and mitigation measures in detail but rather called for a process to look at protection options during revision of the KOSMP,²⁹⁰ and additional socio-economic studies regarding appropriate mitigation.²⁹¹

190. The ESIA Addendum stated that the protection of the EKFS would “*likely impose some restrictions or regulations on the currently ongoing socio-economic activities.*”²⁹² New restrictions on existing agro-economic and fishing activities, as explained in the Addendum, would be likely to have a substantial adverse effect on livelihoods.²⁹³ The Addendum notes that surveys and interactions with communities in the EKFS revealed that the protected areas included private land and properties. The Addendum discusses three mitigation options: the acquisition of all community or privately-owned lands, providing annual benefits equal to the production potential of those lands, or providing replacement income-earning opportunities. The Addendum states that these options need to be further explored during the updating of the KOSMP. According to the Addendum, potential impact due to the modification of the KFS boundaries shall be mitigated in compliance with existing policies on resettlement and rehabilitation for Isimba.²⁹⁴ The Panel notes that no socioeconomic census of land owners in the remaining KFS and modified KFS area has been carried out.²⁹⁵ The Addendum also recommended that a “*framework*” be designed outlining “*the participatory process by which appropriate livelihood restoration measures will be identified and implemented.*”²⁹⁶ The Panel has not seen any of these studies.

191. The Panel notes that those affected are “*mostly poor people below the poverty line*”²⁹⁷ and any new restrictions on existing natural resource-based activities are likely to have a “*substantial*

²⁹⁰ Ibid., Section 7.3. II.

²⁹¹ The ESIA Addendum recommended that “*prior socio-economic studies are carried out to identify the impacts of restriction/regulation plans and Tourism Development Plans within the modified KFS to enable development and implementation of appropriate mitigation measures to safeguard the livelihood activities and assets of the communities.*”, p. viii.

²⁹² Ibid., p. viii.

²⁹³ Ibid., p. 204.

²⁹⁴ Ibid., Section 9.2.

²⁹⁵ Ibid.

²⁹⁶ Ibid., p. 206.

²⁹⁷ Ibid, p. 204.

negative impact on the livelihoods”²⁹⁸ and “*acquisition will ultimately lead to the impoverishment of the [affected parties] in a variety of ways.*”²⁹⁹ While the EKFS will protect the targeted stretch of fast-flowing river, such protective action compounds – rather than mitigates – the impact on people who earn livelihoods from the KFS affected by the Isimba and who will thus suffer from the declaration of the EKFS as a CFR.



Picture 7: Agricultural activities in the vicinity of the Nile River

192. The ESIA Addendum, finalised in November 2017, emphasizes the need for several further studies to identify impacts and appropriate mitigation measures.³⁰⁰ The intention to declare the EKFS a CFR under the National Forestry and Tree Planting Act 2003 was published on December 8, 2017,³⁰¹ one month after the Addendum was finalized. The proposed summary of the management plan and a map showing the proposed extension were available for viewing at two venues in Kampala. The notice gave 90 days for comments and representations on the planned declaration. While the ESIA Addendum was shared at public meetings in September 2017,³⁰² the LTCO Report was not subject to public consultation or disclosure; it was “*intended to facilitate agreement between the GoU and the Bank on the longer-term conservation issues associated with the KOA.*”³⁰³

²⁹⁸ Ibid., p. 204.

²⁹⁹ Ibid., p. 204.

³⁰⁰ ESIA Addendum, November 2017, pp. viii and 192.

³⁰¹ Advertisement in New Vision, General Notice 1047 of 2017.

³⁰² September 14-15, 2017, according to ESIA Addendum, October 2017, Appendix 28.

³⁰³ Aide Memoire and BTOR for mission dated, March 31-April 2, 2015, para 18.

193. The Panel observes that the preparation of an EIA for the EKFS was planned for November 24, 2017 to February 21, 2018.³⁰⁴ As required by Section s7 (1) (c) of the National Forestry and Tree Planting Act 2003, an EIA needs to be done to declare the EKFS a CFR.

194. The Panel notes that NEMA issued a Certificate of Approval of the Environmental Impact Assessment on November 30, 2017, which refers to a Project Brief and EIA for the “*Proposed New Kalagala-Itanda Falls Site*”³⁰⁵ as the basis for the Certificate of Approval. It refers to “*the proposed new Kalagala-Itanda Falls Site*”, as “*having been reviewed*”³⁰⁶ and was found to have significant environmental impact for which conditions of mitigation are set out. The Panel could not determine to which Project Brief and EIA this certificate refers, and/ or if this Certificate was intended to constitute the final approval for Isimba.³⁰⁷

195. The Panel received a draft Project Brief dated November 2018³⁰⁸ prepared one year after the November 2017 NEMA Certificate of Approval was issued, which had not been reviewed by the Bank. The Panel understands that, on April 12, 2019, NEMA approved the EKFS Project Brief. The Panel has not seen the final Project Brief and understands that the Bank was not involved in its preparation. The Panel is of the view that, since the EKFS has been proposed by the Bank on the basis of the ESIA Addendum, the Bank should be providing guidance on the development of the EIA in line with Bank policies.

196. The Panel notes that while it seems that an EIA process for the EKFS was planned by the GoU, it has not seen evidence of an adequate assessment being carried out with Bank support or input prior to the establishment of the extension of the KFS and signing of the amended IA in January 2018, in line with Bank Policy on Environmental Assessment (OP/BP 4.01). The Panel notes, that since areas in the modified KFS comprise private land,³⁰⁹ establishing the EKFS could necessitate expropriation of land³¹⁰ and restrictions on permissible uses of the area, with potentially serious effects on people’s livelihoods. In addition, displacement of livelihood activities to other areas could result in additional impacts on natural habitats. Bank Policy on Natural Habitats (OP/BP 4.04) states that the Bank supports and expects borrowers to apply a precautionary approach to managing natural resources. A precautionary approach, as required by Bank policy, was not apparent in the accelerated process of supporting GoU with the extension and signing the AIA without an appropriate EIA.

³⁰⁴ MFPED letter to the World Bank, December 21, 2017, Table A: Timeline for statutory order on KFS under Forestry Act.

³⁰⁵ NEMA Certificate of Approval of Environmental Impact Assessment. November 30, 2017.

³⁰⁶ Ibid.

³⁰⁷ MFPED letter to the World Bank, December 21, 2017, Table A: Timeline for statutory order on KFS under Forestry Act.

³⁰⁸ Ministry of Energy and Mineral Development, November 2018: Project Brief for the proposed declaration of the 100 metres of the Victoria Nile River Bank in the Extended Kalagala-Itanda Offset Area as Kalagala-Itanda Falls Central Forest Reserve and a Special Conservation Area. The stated purpose of this Project Brief included assessing the impact of declaring the extended offset area, strengthening the environmental and social impact studies, identifying mitigation measures, preparing an environmental and social management plan, and indicating budgets, among others.

³⁰⁹ ESIA Addendum, November 2017, Section 7.3.

³¹⁰ Government of Uganda, National Forestry and Tree Planting Act 2003, Section 7 (1) (d). “Where the land on which the proposed forest reserve is to be situated is private land or land in which any person has an interest, acquire the land in accordance with the Constitution,” the Land Acquisition Act 1965 and the Land Act 1998.

197. To conclude, there is a major risk that the livelihoods of a range of people, many of whom are particularly vulnerable and below the poverty line, will be severely harmed because of the partial flooding of the KFS, exacerbated by the intended declaration of the EKFS as a CFR. The EKFS could require expropriation and will involve curbing livelihood activities in the area, with likely involuntary displacement to other areas, with potential additional impacts on natural habitat. By recommending an extension to the KFS without a detailed assessment of the impact on affected parties and creating appropriate mitigation measures before impact occurs to ensure their well-being, the Bank is not fulfilling the letter or spirit of its safeguards. The Panel has not seen evidence that an adequate EIA was carried out prior to the establishment of the EKFS.

198. Management, based on the ESIA Addendum, recommended the creation of the EKFS to the GoU as a mitigation measure for the partial flooding of the KFS. The Panel finds that the impact of the establishment of the EKFS was not systematically assessed and adequately mitigated, in line with Bank policies, in non-compliance with Bank Policies on Environmental Assessment (OP/BP 4.01) and Natural Habitats (OP/BP 4.04).

4.5.4. The Design, Protection and Management of the EKOA

199. *Biodiversity Values in the EKFS.* The stated goal for legal protection of the EKFS is to establish it “as a special conservation area with a primary focus on conservation of water resources and aquatic biodiversity.”³¹¹ The valued environmental features of the KFS are described as riverine features – such as free-flowing river, rapids, and islands – that provide habitats for the endemic or endangered haplochromine cichlid fish species.³¹² There is, however, no clear rationale for the shift in focus to water resources and aquatic biodiversity and away from conserving both terrestrial and aquatic ecosystems in the KFS, as was the principal intention of the offset.

200. The ESIA Addendum noted that there is a risk of loss of irreplaceable fish biodiversity, and residual negative impact is deemed to be large and irreversible. In such situations, the use of an offset to mitigate negative impact is not in line with good practice. Moreover, a precautionary approach to managing natural resources, as required by World Bank Policy on Natural Habitats (OP/BP 4.04), is not evident. The 2016 Fish Study by the National Fisheries Resources Research Institute (NaFIRRI) highlights the potentially significant negative effects of the Isimba Dam on in-river migration of endemic fish species. This impact is likely to be highly significant to fish migrating upstream to spawn due to the loss of spawning grounds.³¹³ The ESIA Addendum identifies several types of “large, negative, and irreversible” impact associated with Isimba Alternative 1, as a result of flooding part of the KFS: loss of natural fish habitat, loss of island groups, loss of free-flowing river length, and loss of rapids for adventure tourism.³¹⁴

201. The Panel has found little evidence that the EKFS counterbalances the loss of other natural habitats and other biodiversity features affected by Isimba. According to the ESIA Addendum, the

³¹¹ MoFPED letter to the World Bank on mitigating the impacts of IHPP on the KFS, December 21, 2017.

³¹² ESIA Addendum, November 2017, Section 5.5.

³¹³ Ibid., p. v.

³¹⁴ Ibid., Section 5.4.2.2.

biological evaluation is said to be based on “*indicators such as terrestrial and aquatic flora and fauna, overall habitat conditions and presence or absence of endemic and flora of conservation significance as per the IUCN Red List.*”³¹⁵ However, it does not distinguish between indigenous and exotic habitats, and incorrectly assumes that all features – e.g., islands – are of equal biodiversity value. Data on the EKFS comprise species lists from a “*reconnaissance survey,*” but no information on the duration, intensity, or season(s) of the field survey is given,³¹⁶ therefore the adequacy of this survey cannot be determined.

202. Conversations in Uganda revealed that threatened pangolins³¹⁷ are found on some of the Victoria Nile islands and on the KOA mainland, but this species is not recorded in the baseline information. Although an additional fish survey was undertaken in 2016,³¹⁸ available studies do not fully characterize the fish diversity – many of which are native to the Victoria Nile and listed in the IUCN Red List under various categories of threat, their habitat conditions, and their behaviors.³¹⁹

203. The Panel has found no robust scientific justification for determining the boundaries of the EKFS. Coarse screening of three offset options resulted in the EKFS being chosen for its “*similar features of environmental values,*” but without defensible accounting of how the inclusion of existing natural features in the extended offset will counterbalance biodiversity loss. The ESIA Addendum gives counts – e.g., rocks and islands – and broad categories of habitats – e.g., dense trees, sparse trees, and water bodies – affected by Isimba and represented in the EKFS. The Addendum appears to assume they are of equal biodiversity value, without presenting any scientific evidence based on field studies. For example, the inclusion of Namavundu CFR, which comprises predominantly pine and eucalyptus plantations and constitutes 46.14 percent of the total land of EKFS, contributes little to compensate for the loss of natural habitat. It appears from sampling sites that no river islands were surveyed for biodiversity, although 57.14 percent of the KFS islands will be submerged by Isimba and the impact of island loss is described as “*very large negative and irreversible.*”³²⁰ There is a net loss of rapids and falls in the EKFS compared with the KFS³²¹ and, given the coarse screening and deficiencies in biodiversity data, there is no assurance of full equivalence between the flooded area and the EKFS.

204. The Panel believes that the narrow focus in the ESIA Addendum on KFS features “*lost*” as a result of Isimba inundation and “*gained*” through the EKFS³²² in seeking mitigation of partial inundation of the KFS ignores the indirect and cumulative effects of extending the offset area on the Victoria Nile River, the natural habitats in the wider area, and people’s livelihoods; e.g. no adequate consideration has been given to the displacement of livelihood activities and consequent impacts on natural habitats elsewhere due to the partial flooding of KFS and establishment of the

³¹⁵ Ibid. Section 5.3.2.2.

³¹⁶ Ibid. and Appendices 7-9, October 2017.

³¹⁷ The pangolin is considered endangered at the national level (Wildlife Conservation Society, 2016. Nationally Threatened Species for Uganda), and Vulnerable at the global level (IUCN Red List).

³¹⁸ NaFIRRI, Draft Technical Report: Habitat Characteristics and Haplochromine Fish Diversity of the Upper Victoria Nile: Towards the Development of Biodiversity Friendly Hydropower Projects, December 2016.

³¹⁹ ESIA Addendum, November 2017, p.54.

³²⁰ Ibid., Section 5.4.2.2.

³²¹ Ibid., Table 70.

³²² Ibid.

EKFS, and the need for the offset to provide for such loss. Addressing these types of impact should have formed an integral part of the assessment of impact of Isimba on the KFS, the consideration of project alternatives, and mitigation.

205. The Panel notes that most components of the EKFS – except the riverbed, aquatic habitat, and some river islands – already have strong protected status as CFRs, and activities within 100 meters of the high-water mark of the Victoria Nile are regulated (even if, as seems apparent to the Panel, ineffectively enforced).

206. *Legal Protection.* The LTCO Report concludes that amendments to existing legislation to declare the EKFS a permanent “*protected conservation area under the National Forestry and Tree Planting Act is the most preferred option*” to protect this area.³²³ A decision was made to consolidate and declare the Kalagala CFR, Nile Bank CFR, Namavundu CFR, a stretch of the Victoria Nile River and the related riverbanks as a CFR,³²⁴ and later as a “*special conservation area*” in terms of Section 50 of the National Environmental Act.³²⁵ In this context, the Panel commends Management for championing changes to the legal framework that governs the EKFS.

207. *Management and Funding of the EKOA.* The LTCO Report states that “*the successful management of the modified KFS will depend on ensuring that an effective institutional and management structure is put in place and that there is adequate financial flow*” to ensure that the objectives of the extended KFS are achieved.³²⁶ Yet previous experience based on the KOSMP shows that its extensive scope – with multiple high-level objectives, a wide range of institutional responsibilities, and funding requirements – was not suitable for the purposes of day-to-day management of the KOA (see Chapter 3).

208. There seems to be a paucity of information on the planned institutional, funding, and management arrangements for the EKFS, except – as far as the Panel understands – that it will be managed primarily by the NFA as a CFR according to three management zones: (i) an ecotourism-protection zone (in which recreation and ecotourism are to be promoted); (ii) a production zone; and (iii) a community use-partnership zone. There is, however, no assurance that the KOSMP’s identified shortcomings will be remedied, or that lessons have been learned. Although the Bank funded the ESIA Addendum and LTCO Report, there is no indication whether any of their recommendations will be reflected in the new KOSMP. The LTCO Report contains specific alternatives and recommended options for implementation and management, as well as for funding arrangements, but if – and how – they will be adopted is unclear.

209. The Addendum is largely silent regarding estimates of costs or a budget for extending the offset area and ensuring its effective management, and the few figures provided are unreliable.³²⁷

³²³ Report on Long-term Conservation Options, July 2017, p. iii.

³²⁴ Bujagali ICR, September 2018, para 67. Public notice of intent to declare the extended KFS as a special conservation forest area was issued by MWE on December 8, 2017, in New Vision.

³²⁵ National Environment Bill 2018, Bill 17, November 24, 2018. The Panel understands that the NEA was passed into law on March 7, 2019; the draft statutory instrument under the NEA to declare the EKOA as an Area of Special Conservation was drafted and is being reviewed.

³²⁶ Report on Long-term Conservation Options, July 2017, Section 2.4.5.

³²⁷ The costs of mitigating the impact on the “land area,” “*free-flowing river length*,” “*rapids and falls*,” and “*island groups*” are given “*as per the ESIA Addendum approval conditions*” in which no detailed costing was undertaken “or

Information on the sources of funding are vague, and there is no evaluation of the adequacy of institutional capacity to ensure effective implementation.

210. Numerous shortcomings in implementing the KOSMP as the main management tool to protect the KOA have already been recognized by Management. The KOSMP's scope was inadequately broad, there were conflicting land-use objectives that could jeopardize the offset, and implementation suffered from institutional weaknesses, gaps in funding, and little monitoring. Extending the KOA without providing assurance that these shortcomings would be fully remedied and dependent on plans yet to be formulated to deliver the required compensation thus becomes a major risk. Management seems to be relying on the preparation of plans as a solution, rather than on checking and evaluating the outcomes of implementing these plans or requiring firm assurance of their effective implementation.

211. Regarding land use, the competing use of resources in the EKFS – e.g., plantation forestry, tourism, and nature conservation – in the absence of explicit and required conservation outcomes, presents a major risk to further loss of natural habitats. There is no assurance of improved management, or financial and institutional arrangements, for the original and extended offset, particularly since the AIA will end in 2023 and many of the promised action plans will only be finalized by the end of 2019.

212. The Panel concludes that, given the likely conflicting use of land and natural resources within the EKFS, the poor record of restoration and management in the KOA, the cumulative negative impact on river islands and rapids, and the increased delay in mitigating harm from Bujagali, there is little assurance that extending the offset will compensate for the loss of that part of the KFS flooded by Isimba. The Panel further notes that potentially significant, cumulative impact on affected parties' livelihoods from partial flooding of the KFS and extending the offset area are imminent, while mitigation measures including compensation have not yet been formulated, and there is no clear indication of their likely adequacy, or the timing of their formulation or implementation.

213. The Panel understands that the Bank does not intend to remain involved in the EKOA beyond the supervision of the AIA set to expire in 2023. To date, there are no Bank plans to support the implementation of the extended KFS offset area's management. The Panel understands that supervision will entail the same format as was used after the 2007 IA. As the Panel notes in Chapter 3, supervision of the maintenance and management of the KOA was weak, with the Bank maintaining a hands-off approach. The Panel has determined that the Bank has not supervised in a way that would protect natural habitats and thus satisfy the intention of the offset. Furthermore, Management has not taken steps to ensure that failures to manage the original KOA effectively will not be repeated in the AIA, the Kalagala-Itanda Falls Forest Management Plan, or the updated KOSMP.

214. The Panel emphasizes that, the use of an offset as a mitigation mechanism requires precise descriptions of the intended biodiversity outcomes, acceptable land and natural resource uses to deliver those outcomes, effective institutional and management arrangements (including for

as agreed between the parties of association of the Bujagali IA." *Costs of mitigating impacts on physical and economic displacement are given as "included in the RAP and livelihood study,"* which is still to be prepared.

monitoring and adaptive management), adequate financial provision for management in the long term, and protection. Explicit monitoring and evaluation timelines with measurable indicators of performance are needed, and both implementation performance (i.e. use of funds, staffing, reporting, etc.), and impact performance (i.e. a measure of biodiversity gains), need to be monitored.³²⁸ Finally, independent audits and verification of the offset's performance are desirable to enhance credibility and transparency. The Panel notes that these were lacking in the KOA and has not seen evidence that these shortcomings will be corrected in the EKOA. The Panel notes that no provision was made to ensure independent oversight of – and accountability for – the original KOA's nor the EKOA's implementation/management to take on the longer-term role of checking and managing offset performance.

215. The Panel notes that the creation of the EKFS as a mitigation measure requires adequate and effective institutional and management arrangements, financial provision in the long term, and effective legal protection beyond the required changes to the legal framework. **The Panel finds that, in spite of the challenges faced by the original KOA, Management did not assess the institutional capacity and funding arrangements to implement the appropriate conservation measures for the EKFS, in non-compliance with World Bank Policies on Environmental Assessment (OP/BP 4.01) and Natural Habitats (OP/BP 4.04).**

³²⁸ BBOP 2009. Biodiversity Offset Implementation Handbook. BBOP, Washington, D.C. Available from: <https://www.forest-trends.org/publications/biodiversity-offset-implementation-handbook/>

Chapter 5

Conclusions

216. As described above, the Bank's involvement with the issues raised in the Requests dates back to at least 2001. Since then, the Bank has participated in various aspects of the Bujagali Project and the resulting establishment and management of the KOA and taken actions in response to the GoU's decision to build Isimba and to address its consequent impact on the KFS. The Panel conducted two earlier investigations, in 2001 and 2007, responding to Requesters' concerns as well as the establishment and management of the KOA. Owing to the long-term nature of the Bank's involvement and the existence of several Bank projects related to these actions, this report has emphasized the history connecting these interventions. The Panel considered it important to treat the projects subject to this investigation in the context of one another and other Bank actions; taken together they represent continuous and connected efforts by the Bank to address the issues emerging following its financing of the Bujagali Hydropower Plant almost two decades ago.

217. The original Bujagali Project (Bujagali 1) would have inundated natural habitats along the Victoria Nile River and, as a result, the Bank sought a GoU commitment to compensate ("offset") this loss by establishing the KOA. The Bujagali 1 Project did not proceed, but a few years later, under the subsequent Bujagali 2 Project, the GoU entered into an agreement to set aside and manage the KOA in accordance with the Bank's Policy on Natural Habitats.

218. The Bank supported some management efforts within the KOA – through the WMDP – but did not prevent its partial flooding when the GoU decided to build Isimba. The Bank chose to finance additional studies, including the Addendum to Isimba's ESIA, through the ERT-III Project, despite knowing this choice would provide little opportunity to influence any decisions, since Isimba was already well under construction.

219. Although no doubt well-intentioned, these latter actions are creating additional harm as described in Chapter 4. Throughout the KOA process, it becomes evident that the dialogue between the Bank and the GoU has lacked a long-term, comprehensive approach to addressing the impact of Bujagali on this stretch of the Victoria Nile River. Instead, this history reveals piecemeal efforts that attempted to correct harm resulting from previous actions. The Panel highlights the following as important issues, both because of their past compliance consequences, but also because they provide important lessons for the future:

220. Lack of Enforcement. Management failed to ensure the protection and management of the KOA under the IA and KOSMP. Several communications between the Bank and GoU between 2012 and 2016 reveal that the Bank was aware of the potential impact of Isimba on the KOA. The Panel notes however, that it has not seen evidence that the Bank had communicated the possibility of deploying remedies although the IA explicitly stated that there would be no development of power generation that could adversely affect the ability to maintain the KFS without the prior agreement of the Bank. Supervision documentation shows the Bank gave little, if any, consideration to options to minimize the impact of Isimba on the original KFS. Numerous tourism businesses invested heavily to benefit from the KFS under the assumption of the continuing conservation of the KOA. Many of these businesses, the local people who rely on the employment opportunities they bring, and the tourism industry more broadly, have suffered losses due to the

flooding of the KFS. The Panel highlights the critical importance of the Bank upholding its commitments to maintain its credibility. The Bank's piecemeal KOA supervision approach through the WMDP did not create a system of continuity by which Management could be informed of the weaknesses in the maintenance of the KOA. Management failed to establish a system to systematically monitor commitments made in the IA and KOSMP and to secure them.

221. A Biodiversity Offset Must Protect Biodiversity Effectively. The Panel's analysis shows that the KOA was poorly designed and lacked a clear focus and well-conceived biodiversity objectives. It also faced institutional, legal, financial, and maintenance weaknesses. Offset implementation requires the preparation of a management plan specifying the activities needed to deliver the offset objectives. Institutional, budget and funding sources need to be secured, roles and responsibilities of all actors need to be allocated, and provision made for the active involvement of affected communities. Explicit monitoring and evaluation timelines are also required, with measurable indicators of performance. Both implementation performance (i.e. use of funds, staffing, reporting, etc.), and impact performance (i.e. a measure of biodiversity gains), need to be monitored. These were all lacking in the KOA.

222. The Panel emphasizes that while a well-designed and well-executed biodiversity offset can be an important mechanism to achieve biodiversity conservation, the KOA was not an effective tool. Furthermore, the Panel is not assured that the design of the EKOA and plans and capacity for its implementation have taken the lessons of the KOA into account and will protect biodiversity effectively. The Panel, for example, notes that no provision was made to ensure independent oversight of – and accountability for – the offset's implementation; lessons that are evident from the previous management of the KOA and not carried forward into the EKOA. The idea of requiring an independent oversight body to take on the longer-term role of checking offset performance has potential that can be explored. The Panel notes that such a body could include strong conservation or environmental local NGOs in Uganda, and other bodies, as relevant. The setting up of this independent body could be embedded in implementation/ management plans for the offset.

223. Offsetting an Offset. This report has pointed out the concern over the concept of “*offsetting the offset*.” An offset is expected to protect biodiversity in the long term. Mitigating the partial loss of one offset by creating another erodes the underlying principles of offsetting, and levels a serious blow to the credibility of the offset concept. The Panel thus has grave concerns regarding the reputational risks that the Bank incurs by introducing this novel concept, which undermines both the offset approach and the Bank's own guidance on biodiversity offsetting.³²⁹

224. The Panel also notes with concern that Bank policies provide no means of ensuring that borrowers' commitments extend beyond the duration of a Bank-funded project, as is required in the case of offsets. This shortcoming also undermines confidence in the World Bank's commitment to the Universal Goals and particularly to the Sustainable Development Goal 15 which aims to “*Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss.*”³³⁰

³²⁹ World Bank and ProFor, 2016. Biodiversity Offsets: A User Guide.

³³⁰ <https://sustainabledevelopment.un.org/sdg15>

225. Creation of the EKOA in Line with Bank Policies. The ERT-III Project financed the Addendum to Isimba's ESIA to analyze the impact of various alternatives to the design of the Isimba Dam on the KFS, even though the Bank was not involved in the Isimba Project itself. However, the Bank found itself in a position where the only realistic effect the ESIA Addendum could have had on Isimba and its partial inundation of the KFS was to formulate compensatory measures to address the impact, rather than the preferred preventive measures required by World Bank Policy on Environmental Assessment (OP/BP 4.01). That policy states clearly that the EIA process must inform the project design, including its siting. Furthermore, the policy acts as a screening tool for triggering the additional safeguard policies required to address characteristics and risks particular to the project. The Bank's financing of the Addendum to the ESIA constitutes a serious violation of the EIA process and its rationale. Environmental and social impact of extending the offset area was not assessed or mitigated in line with Bank safeguard policies.

226. Persistent and Compounding Harm. The report shows that the creation of the EKFS is producing new and additional harm, similar to the harm associated with the partial flooding of the KFS. The new harm results from failing to identify, assess, plan, and ensure implementation of appropriate mitigation measures for livelihood and other environmental and economic impact before they occur. Furthermore, there are no assurances that the institutional, management, and financial arrangements for the EKFS are sufficient to ensure its success in the long term. These issues are complicated by the remaining uncertainty associated with the process, plans yet to be prepared, and a lack of transparency during the creation of the EKFS.

227. The Panel notes that by advising the GoU on the extension of the offset without first assessing its impact on people's livelihoods and the environment and ensuring that adequate mitigation measures could and would be implemented, the Bank continues to play a central role in a decision-making process leading to adverse impact without adequate mitigation measures in place.

Annex 1: Table of Findings

Issue Area	Panel Observations and Findings
Bank supervision	The KOSMP operationalizes the IA commitments to maintain and manage the KOA and the premise of the WMDP's support to priority KOSMP activities is the continued protection of the KOA. Although funding and capacity constraints relating to the KOSMP became evident through WMDP supervision, Management did not address these issues to ensure the maintenance of the KOA. Thus, the Panel finds Management in non-compliance with World Bank Policies on Project Supervision (OP/BP 13.05), Investment Project Financing (OP/BP 10.00), and Natural Habitats (OP/BP 4.04).
Timeliness of the ESIA Addendum	The Panel notes that the ESIA Addendum, financed under the ERT-III Project, started when the construction of Isimba was already well underway, and was completed when Isimba was almost finished. The Panel thus finds that the ESIA Addendum could not influence the design of Isimba, improve decision making, or help ensure that the Project was sustainable and that its mitigation measures were environmentally sound, as required by the Bank. The Panel therefore finds Management in non-compliance with the World Bank Policy on Environmental Assessment (OP/BP 4.01).
Harms Caused by the Flooding of the KFS	The Panel finds that Management did not take adequate, timely and effective measures in response to the threats posed by the construction of Isimba Dam and failed to ensure the protection of the KOA as provided for in the KOSMP. These omissions led to harm and Management's non-compliance with Bank Policy on Natural Habitat (OP/BP 4.04) and with Bank Policies on Project Supervision (OP/BP 13.05) and Investment Project Financing (OP/BP 10.00), which require the identification of key risks to project sustainability and recommendation of appropriate risk management strategies.
The ESIA Addendum as a Tool to Address the Impact on the KOA	Lacking leverage over Isimba and not conducting an adequate analysis of alternatives, Management, through the Addendum, gave implicit support to the alternative that would have the greatest impact on the KFS. The only effect the ESIA Addendum could have had on Isimba and its partial

Issue Area	Panel Observations and Findings
	<p>inundation of the KFS was to formulate compensatory measures to address impact, rather than the preventive measures preferred by World Bank Policy on Environmental Assessment (OP/BP 4.01). The Panel notes that Management, rather than conducting its own due diligence of the potential impact on the KOA caused by Isimba, asked the GoU to commission the ESIA Addendum, and only agreed to finance it later when the GoU experienced funding constraints. Management, by funding the ESIA Addendum, chose to support an environmental assessment tool for a project the Bank was not financing and over which it has no leverage. The Panel finds that the Management, through the Addendum, provided its implicit support to the project alternative with the most severe impact on the KFS without a robust scientific basis and adequate analysis. The Panel therefore finds Management in non-compliance with World Bank Policy on Environmental Assessment (OP/BP 4.01).</p>
<p>Required Assessments for the Establishment of the EKOA</p>	<p>Management, based on the ESIA Addendum, recommended the creation of the EKFS to the GoU as a mitigation measure for the partial flooding of the KFS. The Panel finds that the impact of the establishment of the EKFS was not systematically assessed and adequately mitigated, in line with Bank policies, in non-compliance with Bank Policies on Environmental Assessment (OP/BP 4.01) and Natural Habitats (OP/BP 4.04).</p>
<p>Design, Protection and Management of the EKOA</p>	<p>The Panel notes that the creation of the EKFS as a mitigation measure requires adequate and effective institutional and management arrangements, financial provision in the long term, and effective legal protection beyond the required changes to the legal framework. The Panel finds that, in spite of the challenges faced by the original KOA, Management did not assess the institutional capacity and funding arrangements to implement the appropriate conservation measures for the EKFS, in non-compliance with World Bank Policies on Environmental Assessment (OP/BP 4.01) and Natural Habitats (OP/BP 4.04).</p>

Annex 2: Biodiversity Offsets – Design and Implementation Aspects

The design of an offset is informed by explicitly defined objectives and its intended scope. Offsets can take into account species composition, habitat structure, ecosystem function, and/or people's use and cultural values associated with biodiversity.

The main ways to offset residual negative impact on biodiversity are by:

- *Improving the protection status of an area* under threat of imminent or projected loss (i.e., a security gain). Protection offsets rely on background decline – otherwise there is no gain from protecting existing biodiversity;
- *Improving the condition of affected biodiversity* relative to a “without-the-offset” situation through conservation management actions, such as restoration, threat reduction, or arrested degradation; and/or
- *Including compensation packages to stakeholders affected by the development project and the offset* where socioeconomic and cultural uses of biodiversity cannot be compensated by improvements to biodiversity.

A reliable measure of residual negative impact on biodiversity is needed as the basis for designing an offset with commensurate gains that would counterbalance biodiversity losses. In addition, the way in which gains will be achieved must be clear. As with the residual losses, a measure of predicted gains in biodiversity must be provided.

An offset must be designed to deliver gains in the same biodiversity as that negatively affected by the project – i.e., be a “like-for-like” exchange. Moreover, the conservation outcomes must exceed what would have happened without the project or offset – i.e., be additional. An offset is intended to last at least as long as the project's residual negative impact on biodiversity, and preferably in perpetuity.

The choice of geographic location and design of an offset must take into consideration its context – ecological, geographical, and social – and threats to its status and condition. It must also factor political and economic risks and uncertainties likely to affect the success of the offset, as well as any delays in achieving the planned biodiversity gains.

In some cases, an offset may deliver gains in biodiversity which benefit people affected by a project – e.g., restoration of degraded wetlands can improve water supply and quality. In other cases, where access to natural resources is restricted, an offset for a project may create additional negative impact on people adversely affected by that project³³¹ that would need to be mitigated.³³² In these situations, additional measures such as livelihood restoration initiatives and other forms

³³¹ Sonter *et al* 2018 found that 34% of offsets displaced people and negatively affected livelihoods. Therefore, when biodiversity and ecosystem services are linked, current practices may not actually improve outcomes, instead incurring additional costs to communities and companies. [Sonter, L.J., Gourevitch, J., Koh, I., Nicholson, C.C., Richardson, L.L. *et al.*, 2018. Biodiversity offsets may miss opportunities to mitigate impacts on ecosystem services, *Front Ecol Environ*, 2018.]

³³² World Bank and ProFor, Biodiversity Offsets: A User Guide, 2016, p. 20.

of compensation that enable access to affordable, accessible, and acceptable alternatives must be provided to ensure “no net loss for people and biodiversity.”³³³

The implementation of an offset requires careful planning and the preparation of an “offset management plan” that sets out the specific activities needed to deliver biodiversity gains – the “what,” “where,” “how” and “when.” Implementation must comply with all applicable legal and policy requirements. The institutional, budget, and funding sources and mechanisms must be determined to ensure that the offset achieves its intended outcomes. The roles and responsibilities of different parties must be clearly defined in the offset management plan.

Active involvement of affected communities in helping to implement an offset has merit. Payment to affected people to deliver specific conservation outcomes needed to achieve the offset – e.g., restoring degraded area – can help compensate for negative impact.

Provision must be made for checking the progress of offset implementation over time and enabling corrective or adaptive management changes to keep the offset “on track.” To this end, measurable indicators of performance must be identified, and timelines given for monitoring. Both implementation performance (i.e., use of funds, staffing, reporting, number of patrols or visits to the site, etc.) and impact performance (i.e., a measure of gains in those key biodiversity components that must be tracked to demonstrate that the offset is successful) must be monitored.³³⁴ Independent audits and verification of the offset’s performance are important for credibility and transparency.

³³³ Bull, J.W.1, Baker, J.2, Griffiths, V.F3, Jones, J.P.G.4, and Milner-Gulland, E.J.5. 2018. Ensuring No Net Loss for people and biodiversity: good practice principles. Oxford, UK.

³³⁴ BBOP, Biodiversity Offset Implementation Handbook, 2009, Washington, D.C. Available from: <https://www.forest-trends.org/publications/biodiversity-offset-implementation-handbook/>

Annex 3: Expert Biographies

Panel members

Imrana Jalal was appointed to the Inspection Panel on January 1, 2018 and became chair on December 16, 2018. A Fiji national, Ms. Jalal brings to the Panel more than 30 years of experience across diverse geopolitical and multicultural environments in the private and public sectors.

As a Principal Social Development Specialist (Gender and Development) for the Asian Development Bank from 2010-2017, Ms. Jalal gained intimate knowledge of multilateral development bank operations in various sectors and demonstrated her ability to engage and build rapport and trust with stakeholders around various and complex issues. She was Chief Technical Adviser at the Pacific Regional Rights Resource Team Office from 1995-2010.

A lawyer by profession, Ms. Jalal was a Commissioner from 1999-2001 on the initial Fiji Human Rights Commission, the first of its kind in the Pacific Island countries. She is the author of the “Law for Pacific Women: A Legal Rights Handbook,” architect of the Fiji Family Law Act 2003, and was a founding member of the Fiji Women’s Rights Movement. She was elected a Commissioner on the Geneva-based International Commission of Jurists (ICJ) in 2006 and served on the Commission’s Executive Board from 2011-2017. The ICJ was established to protect the independence of judges and lawyers.

Ms. Jalal earned a Master of Arts with a focus on Gender and Development from the University of Sydney, and an LLB and LLM (Hons.) in International Law from the University of Auckland. Her term on the Panel runs through December 31, 2022.

Jan Mattsson was appointed to the Inspection Panel on November 17, 2014. A Swedish national, he brings to the Panel more than three decades of experience in the public and private sectors, as well as in academia. His career has included operational field work, policy advice, program management, and leadership roles at the United Nations where he established robust systems for results-based management, transparency and accountability. Throughout his career he has demonstrated the ability to engage and build trust with multiple stakeholders around complex issues, risk management and innovation. He is passionate about social justice and behavioural ethics.

Mr. Mattsson held positions in several UN agencies – including the United Nations Development Programme, the United Nations Industrial Development Organization, the United Nations Population Fund, the United Nations World Food Programme and the United Nations Office on Drugs and Crime. In his final UN assignment, he was under-secretary-general and executive director of the United Nations Office for Project Services, an organization specializing in the implementation of development, humanitarian and peace-building operations on behalf of multiple partners. After leaving the UN, he founded M-Trust Leadership, an advisory firm promoting socially responsible investments and partnerships among business, government and civil society in pursuit of sustainable development. He has a Ph.D. in engineering from the University of Linköping, Sweden, with a multi-disciplinary thesis on management of technological change. His term runs through November 16, 2019.

Ms. Kunanayagam, a Sri Lankan-born Australian citizen, was appointed on December 16, 2018. She brings to the Panel more than 25 years of experience across diverse geopolitical and multicultural environments in the private and public sectors. Ms. Kunanayagam's leadership experience spans the private, public and non-profit sectors.

Ms. Kunanayagam spent more than 10 years doing fieldwork in a remote part of East Kalimantan, Indonesia. She has held leadership positions in sustainability in both the private sector, (working for two FTSE 10 companies) and the non-profit sector. Most recently she was the Global Head for Social Performance and Human Rights for BG Group. She is a member of the Board of two international non-profit development organizations – RESOLVE and Youth Business International. In addition, Ms. Kunanayagam is a Fellow at the University of Queensland, Australia, and an Executive Session member at Columbia University's Centre for Sustainable Investment.

With her ability to distill information and cross-cutting sector experience, she brings valuable insights and a contemporary perspective to the Inspection Panel along with good judgment and the ability to balance complex issues and consider the competing demands of diverse stakeholders while remaining independent and objective.

Ms. Kunanayagam has strong operational experience working across the entire project cycle. Her experience with multinational and international organizations and valuable experience living and working in more than 30 countries make evident her people skills and ability to broker trust relationships. Her appointment as a secondee to the World Bank very early in her career also gave her insights and knowledge of the organization's operations that complement the expertise she has developed working alongside civil society, multilaterals, bi-laterals and communities affected by World Bank projects.

She earned a Masters in Anthropology from Monash University, Australia.

Her appointment runs through December 15, 2023.

Expert Consultants

Richard Fuggle undertook graduate studies at Louisiana State University and obtained his Ph.D. from McGill University, Canada, in 1971 for a thesis dealing with the warming and cooling of urban atmosphere. A South Africa national, Dr. Fuggle is a Member of the Academy of Science of South Africa, a Registered Natural Scientist, and a Certified Environmental Impact Assessment Practitioner. He is a past President of the International Association for Impact Assessment. He also held the Shell Chair of Environmental Studies at the University of Cape Town from 1973 until his retirement in 2006.

With Andre Rabie he produced two iconic books on environmental management in South Africa. He has published many academic papers on aspects of environmental management and, as a consultant, has written numerous environmental impact reports and reviews. He has wide international experience, having been involved with the World Bank's Inspection Panel in environmental reviews in Albania, Argentina, China, Colombia, Ghana, India, Kenya, Nigeria,

Uganda, and Paraguay. He was also Environmental Advisor to the Caspian Development Panel and reviewed and inspected the environmental and social impact components of the Baku- Tbilisi-Ceyhan pipeline in Azerbaijan, Georgia, and Turkey. He has also served on international advisory panels for projects in Israel, Jordan, Palestine, Tanzania, and Tajikistan.

Dr. Fuggle was closely involved with the establishment of the South African Institute of Ecologists and Environmental Scientists and served on their Boards. He was also instrumental in the formation of the South African affiliate of the International Association for Impact Assessment. He chaired the committee of the Council for the Environment that pioneered Integrated Environmental Management in South Africa and was responsible for the team that produced the first set of guideline documents for IEM. Dr. Fuggle has also served on several South African Commissions of Enquiry.

Susie Brownlie completed her BSc Honours degree in Zoology in 1978, and her MSc degree in Environmental Studies in 1982 (awarded with distinction), at the University of Cape Town, South Africa.

Ms. Brownlie is a South Africa national, a professionally Registered Natural Scientist in the field of Environmental Science, and a Certified Environmental Assessment Practitioner. She is a past co-chair of the Biodiversity and Ecology Section of the International Association for Impact Assessment, and member of the Advisory Group for the international Business and Biodiversity Offsets Programme (BBOP).

Ms. Brownlie has worked in both the public and private sectors in the field of environmental assessment and management, and as an independent environmental consultant for the past 25 years. She has worked in a number of African countries, in Russia, India and England. She teaches at two universities in South Africa, and has contributed to books on environmental assessment, biodiversity mainstreaming and biodiversity-inclusive impact assessment, as well as biodiversity offsets. She has also contributed to several international guidelines (e.g. for the Convention on Biological Diversity, Ramsar Convention, IUCN), handbooks (e.g. for BBOP) and working papers on biodiversity and ecosystem services in impact assessment. Ms. Brownlie has published numerous peer-reviewed papers on biodiversity offsets and acts as an independent peer reviewer for a number of scientific and environmental journals.

Ms. Brownlie was instrumental in the development of a professional certification system for environmental assessment practitioners in South Africa, to promote quality assurance in the field. She continues to play an active role in championing environmental rights in South Africa and is a member of the Civil Society Environmental Expert Panel for the Centre for Environmental Rights in South Africa. With her focus on biodiversity, Ms. Brownlie has been a Board Member of several conservation bodies, including the Southern African Institute of Ecologists and Environmental Scientists CapeNature (a provincial conservation body), and member of the Advisory Committee of the Botanical Society of South Africa. She was a member of the Advisory Group responsible for formulating South Africa's Environmental Impact Assessment and Management Strategy.

Ms. Brownlie was a member of the Inspection Panel team that investigated the Eskom Investment Support Project (Medupi power station) and has acted in an advisory capacity on projects to a number of international bodies, including the UNDP, WWF, IUCN and IOC.