

# THE ENVIRONMENTAL ACCOUNTABILITY OF THE WORLD BANK TO NON-STATE ACTORS: INSIGHTS FROM THE INSPECTION PANEL

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## INTRODUCTION

The international legal order has seen over recent decades the proliferation of international organizations, and the expansion of their functions in, and impacts on, all spheres of international affairs, not always with beneficial results. In particular, the operations of international organizations with a financial and development mandate, such as the World Bank,<sup>1</sup> have been targeted as contributing to serious adverse environmental and social conditions in borrowing countries, mostly through the funding of large infrastructure projects.<sup>2</sup> As international organizations acquire increasing responsibilities, there are demands for the establishment of mechanisms enabling those potentially affected by their acts or omissions to call the organizations to account. It has been observed that:

There is no reason at all, as a matter of principle, why [international organizations] could or should not be held accountable for disadvantages and repercussions resulting from their acts or omissions and normally based upon the authority and power granted to them.<sup>3</sup>

While the relevance of the attribution of accountability to international organizations is clear, the legal parameters of the concept

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<sup>1</sup> The term 'World Bank' or 'Bank' is used here to encompass the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). 'World Bank Group' is usually used to cover, in addition, the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID). For lack of space, the present article is limited to the IBRD and IDA.

<sup>2</sup> The article focuses on environmental issues, leaving aside other policy areas such as human rights. The new lending commitments from the World Bank to client countries reached US\$29 billion in Fiscal Year (FY) 1999, with disbursements at US\$24.2 billion. See World Bank, *Annual Report* (FY 1999), iii. The Bank has an extended membership, with 183 States parties.

<sup>3</sup> International Law Association (ILA), Committee on Accountability of International Organisations, *First Report* (1998), p. 14.

are still emerging, and no consensus on its meaning exists.<sup>4</sup> Accountability is concerned with questions of compliance with procedures and rules relating to the exercise of public power. It is a broad and flexible concept. Questions of accountability may be raised through a wide range of measures by member states, other organizations, or non-state actors. The concept covers on the one hand the international responsibility of organizations. According to the dominant doctrine, the principles of state responsibility are applicable by analogy, albeit with some variation, to the responsibility of international organization for internationally wrongful acts.<sup>5</sup> This topic remains so far largely uncharted, as the International Law Commission (ILC) has to date limited its work to the question of state responsibility. The attribution of responsibility encounters further obstacles, in particular when applied to the nexus between environmental harm and the activities of international financial organizations. These include the absence of international judicial or non-judicial fora in which claims against organizations can be brought (especially by non-state actors), the difficulties of identifying international environmental obligations binding upon the organization and of attributing wrongful acts or omissions to it, and the existence of procedural bars in domestic jurisdictions.<sup>6</sup> Consequently, there have been no cases in which an international or national court has decided on the merits of a claim brought by a third party alleging environmental harm arising from World Bank actions or omissions in the course of its lending operations.

By contrast the concept of accountability extends to a variety of measures aimed at monitoring the conduct of organizations, particularly by means of information dissemination, public participation, submission of reports, and the undertaking of inspections.<sup>7</sup> As these latter measures can become engaged before as well as after harm occurs, such a broad concept of accountability is of particular relevance in the environmental context. It caters well to the emphasis put on the prevention principle, i.e., the avoidance rather than the remediation of environmental damage. It also allows for non-state actors to play a role in representing environmental interests on the international level.

<sup>4</sup> See Wellens, 'The Primary Model Rules of Accountability of International Organizations: The Principles and Rules Governing their Conduct or the Yardsticks for their Accountability' in Schermers and Blokker (eds.), *Proliferation of IOs: Legal Issues* (2001) p. 433.

<sup>5</sup> For studies on the attribution of responsibility to international organizations see Hirsch, *The Responsibility of International Organizations toward Third Parties: Some Basic Principles* (1995); P. Klein, *La responsabilité des organisations internationales* (1998).

<sup>6</sup> See Reinisch, *International Organizations before National Courts* (Cambridge Studies in International and Comparative Law, 2000).

<sup>7</sup> The ILA similarly distinguishes 3 components of the accountability of international organizations, namely (1) forms of internal and external monitoring, (2) tortious liability for injurious consequences arising out of acts or omissions not involving a breach of international and/or institutional law; and (3) responsibility arising out of acts or omissions which do constitute such a breach. See ILA First Report on Accountability, above nn. 13, 17.

The present article is concerned with this broader dimension of accountability.<sup>8</sup> It explores the question of the environmental accountability of international financial organizations to third party non-state actors by focusing on the World Bank Inspection Panel.<sup>9</sup> The endorsement by the international community of sustainable development objectives has resulted in expanding the mandate of the Bank and other organizations, which are now expected to include consideration of environmental factors in their operations. It has also fostered calls for 'good governance' and greater legitimisation of international decision-making processes, including accountability.<sup>10</sup> A significant trend in the development of the accountability of international financial organizations has been its extension to third party non-state actors, such as individuals, interest groups, non-governmental organizations, and local communities affected or concerned by the acts or omissions of the organizations, thereby belying the traditional notion that international organizations are exclusively accountable to their member states.<sup>11</sup> As illustrative of these developments, the Inspection Panel provides a forum for non-state entities to hold the World Bank accountable for the way in which it conducts its project lending activities with regard to, *inter alia*, environmental conservation.

The first part examines the applicable law governing the lending activities of the Bank with respect to environmental conservation, which represents the necessary prerequisite for the *mise en œuvre* of accountability by means of the Inspection Panel. The second is devoted to the Panel's procedural and substantive features. In order to illustrate these features, the third part provides a brief inquiry into the 1999 request on the *China Western Poverty Reduction Project* ('China Request'). The fourth part draws from the foregoing analyses insights into the contours of the Bank's environmental accountability. For this purpose, it assesses the Panel according to several criteria, *viz.*, jurisdictional issues, procedural aspects, and consequences of the process. There follow some concluding observations on the characteristics of the mechanism.

<sup>8</sup> We do not, therefore, address here the question whether the Bank's loan development activities could raise its responsibility when harm is caused to people or the environment.

<sup>9</sup> The article does not deal with the internal hierarchical system of accountability within the Bank, that is, accountability to its member States, which remains a primary conduit for supervision of the Bank's implementation of, and compliance with, rules and policies.

<sup>10</sup> See Fox and Brown (eds.), *The Struggle for Accountability: The World Bank, NGOs, and Grassroots Movements* (1998).

<sup>11</sup> See 'The Accountability of International Organizations to Non-State Actors' in Proceedings of the 92nd Annual Meeting of the American Society of International Law (ASIL) (1998) p. 359. Analysing the development of NGO action in the international arena, and the questions surrounding the legitimacy of non-state entities see Cullen and Morrow, 'International Civil Society in International Law: The Growth of NGO Participation' (2001) 1 *Non-State Actors & Intl L* p. 7.

SOURCES OF ENVIRONMENT-RELATED NORMS RELEVANT TO  
WORLD BANK LOAN DEVELOPMENT ACTIVITIES

*The Evolution of the World Bank's Mandate in Light of the Concept of  
Sustainable Development*

The World Bank's Articles of Agreement do not require environmental considerations to be taken into account in the organization's operations,<sup>12</sup> unlike the constituent instrument of the European Bank for Reconstruction and Development (EBRD).<sup>13</sup> Indeed they explicitly forbid the consideration in the lending process of non-economic factors. Drafted during the UN International Monetary and Financial Conference held at Bretton Woods in 1944, the Bank's initial mandate of reconstructing war-torn Europe<sup>14</sup> gave way, in the path of decolonization, to the promotion of 'development'.<sup>15</sup> The notion of development was initially understood in purely economic terms. The Articles of Agreement stipulate that '[t]he Bank shall make arrangements to ensure that the proceeds of any loan are used . . . *without regard to political or other non-economic influences or considerations*'.<sup>16</sup> This provision has been considered to mean that 'the only considerations which, under the Articles, are relevant to the decisions of the Bank and its officers are those which qualify as "economic considerations"'.<sup>17</sup>

The Bank's mandate has adjusted to changes in the international law of development. The concept of sustainable development 'aptly expresse[s]' the 'need to reconcile economic development with protection of the environment'.<sup>18</sup> Sustainable development is prominently endorsed in the non-binding instruments that resulted from the 1992 UN Conference on Environment and Development (UNCED),<sup>19</sup>

<sup>12</sup> See IBRD, *Articles of Agreement of the International Bank for Reconstruction and Development* (IBRD Articles of Agreement) (22 July 1944; 2 UNTS (1947) p. 134, as amended 606 UNTS (1967) p. 294); IDA, *Articles of Agreement of the International Development Association* (IDA Articles of Agreement) (16 February 1960; 439 UNTS (1962) p. 249).

<sup>13</sup> See *Agreement Establishing the European Bank for Reconstruction and Development* (29 May 1990; 29 ILM (1990) p. 1077), Preamble and Art II (i) (vii).

<sup>14</sup> See IBRD Articles of Agreement, (above n. 12), Art I (i).

<sup>15</sup> See *ibid.*, Art I(i) and (iii), and III (1)(a); IDA Articles of Agreement, above n. 12, Arts I and V(1)(a) and (b).

<sup>16</sup> IBRD Articles of Agreement, above n. 12, Art III (5)(b) (emphasis added). See also Art. IV(10), Arts. V (1)(g), V(6), and VI (5)(c) of the IDA Articles of Agreement, above n. 12 contain similar language.

<sup>17</sup> Shihata, *The World Bank in a Changing World: Selected Essays* (1991) p. 66. *Contra*, see Bowles and Kormos, 'Environmental Reform at the World Bank: The Role of the U.S. Congress' (1995) 35 *Virginia J Intl L* p. 777, 809–13.

<sup>18</sup> ICJ, *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*; *ICJ Reports*, 1997, p. 7, para. 140.

<sup>19</sup> See the *Rio Declaration on Environment and Development* (Rio Declaration), Rio de Janeiro, 13 June 1992; UN Doc A/CONF.151/26 (Vol I) (1992); 31 ILM (1992) p. 874, Principles 4, 11, and 25; *Agenda 21*, Rio de Janeiro, 13 June 1992; UN Doc A/CONF.151/26 (Vols I, II, & III) (1992); and *Non-legally Binding*

as well as in several major environmental treaties,<sup>20</sup> and has been referred to in decisions of international courts.<sup>21</sup> Its legal status, however, remains debated.<sup>22</sup> The endorsement of sustainable development, with its 'integrated' conception of development,<sup>23</sup> has led to evolving expectations on the part of the international community of the role of international financial organizations.<sup>24</sup> The latter are now called upon both to contribute to the funding of sustainable development and environmental conservation,<sup>25</sup> and to integrate related considerations in their operations.<sup>26</sup> General Assembly resolution 47/191 highlights the role of international financial organizations in sustainable development by calling upon the World Bank and other international, regional, and subregional organizations to report to the UN Commission on Sustainable Development (CSD) on their implementation of Agenda 21.<sup>27</sup>

In the wake of UNCED, and following mounting concern over the adverse impact of its lending activities on the environmental and social

*Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forest*, Rio de Janeiro, 13 June 1992; UN Doc UNCED Report, A/CONF.151/26 (Vol III) (1992); 31 ILM (1992) 881.

<sup>20</sup> See, e.g., the UN Framework Convention on Climate Change (UNFCCC), New York, 9 May 1992; 31 ILM (1992) p. 849, Preamble and Art 2; and Convention on Biological Diversity (CBD), Rio de Janeiro, 5 June 1992; 31 ILM (1992) p. 818, Art 1.

<sup>21</sup> See ICJ, *Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Reports, 1996, 66; Separate Opinion of Vice-President Weeramantry, para. 30; *ibid.*, *Gabčíkovo Case*, above n. 18, para. 140 and Part A. WTO, Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, 12 October 1998; WT/DS58/AB/R, para. 129, International Tribunal for the Law of the Sea (ITLOS), *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, *Order concerning the Requests for provisional measures*, 27 August 1999. See generally Sands, 'International Courts and the Application of the Concept of "Sustainable Development"' (1999) 3 *Max Planck UN Ybk* p. 389.

<sup>22</sup> See Lowe, 'Sustainable Development and Unsustainable Arguments' in Boyle and Freestone (eds.), *International Law and Sustainable Development* (1999) 19.

<sup>23</sup> Sands, 'International Law in the Field of Sustainable Development' (1994) 65 *BYBIL* p. 303, 338–9.

<sup>24</sup> Para. 1.3 of Agenda 21, above n. 19, emphasizes the critical need for a global partnership for sustainable development centred on the United Nations system and involving other international, regional, and subregional organizations. See also Handl, *Multilateral Development Banking: Environmental Principles and Concepts Reflecting General International Law and Public Policy* (2000). The adoption of the UNCED instruments, as well as subsequent environmental treaties, has resulted in the progressive integration of environmental norms in international organizations generally. See Werksman (ed.), *Greening International Institutions* (1996).

<sup>25</sup> Para. 33.14 of Agenda 21, above n. 19, stipulates, for instance, that '[f]unding for Agenda 21 and other outcomes of the Conference should be provided in a way that maximizes the availability of new and additional resources and uses all available funding sources and mechanisms. That include, among others: a. The multilateral development banks and funds.' See also UNGA Res S-19/2, *Programme for the Further Implementation of Agenda 21*, 28 June 1997; 36 ILM (1997) p. 1639, para. 78.

<sup>26</sup> Para. 38.7 of Agenda 21, for example, recognizes that '[t]he overall objective is the integration of environment and development issues at national, subregional, regional and international levels, including in the United Nations system institutional arrangements'.

<sup>27</sup> See UNGA Res 47/191, *Institutional arrangements to follow up the United Nations Conference on Environment and Development* (A/Res/47/191); 22 December 1992, para. 23.

conditions in borrowing states,<sup>28</sup> the World Bank has explicitly adopted a sustainable development mandate.<sup>29</sup> This new mandate is reconciled with the organization's constituent instrument by means of a purposive interpretation,<sup>30</sup> which dictates that the Bank's original mandate must be interpreted in light of the shifts in the development paradigm, embodied by the international recognition of the concept of sustainable development.<sup>31</sup> Hence, the Articles of Agreement, while they are not as such a source of environmental standards applicable to lending operations, have provided the framework for the expansion of the Bank's mandate to include broad objectives relating, *inter alia*, to environmental issues.<sup>32</sup> The contours of this mandate have been shaped in part by the development of subsequent practice of the organization through the adoption of environment-related operational policies and procedures.

<sup>28</sup> See, e.g., Ayres, *Banking on the Poor: The World Bank and World Poverty* (1983); Paul, 'International Development Agencies, Human Rights and Humane Development Projects' (1988) 17 *Denver J Intl. L & Practice* p. 67; Plater, 'Damming the Third World: Multilateral Development Banks, Environmental Diseconomies, and International Reform Pressures on the Lending Process' (1988) 17 *Denver J Intl. L & Policy* p. 121; Rich, *Mortgaging the Earth: The World Bank, Environmental Impoverishment, and the Crisis of Development* (1994); Werksman, 'Greening Bretton Woods' in Sands (ed.), *Greening International Law* (1993) p. 65. A recent report by an external Advisory Panel convened by the World Bank's Operations Evaluation Department (OED) in March 2000 has been highly critical of the Bank's performance on the environment. See World Bank, *Report of the Advisory Panel*, 2 July 2001 (available at URL <<http://www.worldbank.org>>).

<sup>29</sup> See, e.g., World Bank, *Making Development Sustainable: The World Bank Group and the Environment* (1994); *ibid.*, *Advancing Sustainable Development: The World Bank and Agenda 21* (1997); *ibid.*, *Making Sustainable Commitments. An Environment Strategy for the World Bank*, 17 July 2001. See also Mucklow, 'The Integration of Environmental Principles into the World Bank' (2000) 9 *Rev. EC Intl. Envtl. L* p. 100.

<sup>30</sup> Purposive interpretation is built in Art. 31 of the Vienna Convention on the Law of Treaties, and has been recognized by international judicial fora. See, e.g., the WTO Appellate Body report in the *Shrimp-Turtle Case*, above n. 21, paras. 129–130 (stating that the term 'exhaustible natural resources' is 'evolutionary' and must be read 'in the light of contemporary concerns over the community of nations about the protection and conservation of the environment').

<sup>31</sup> See Giorciari, 'The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement' (2000) 33 *Cornell Intl. LJ* p. 331; Schlemmer-Schulte, 'The World Bank Inspection Panel: A Model for Other International Organizations?' in Schermers and Blokker, above n. 4, pp. 483, 501 (observing that the Bank has been able, 'based on a purposive interpretation of its mandate, to move into new areas beyond the narrow literal meaning of its charter provisions, while, at the same time, respecting its charter's express limitations'). On the limits put on an extensive interpretation of constituent instruments, in particular those dictated by the functional specialization of international organizations, see, e.g., Amerasinghe, *Principles of the Institutional Law of International Organisations* (1996) p. 24; Leary, 'The WHO Case: Implications for Specialised Agencies' in Boisson de Chazournes and Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999) pp. 112, 117; Schermers and Blokker, *International Institutional Law: Unity Within Diversity* (3rd rev. edn., 1995), paras. 15–21 and 209.

<sup>32</sup> The narrowness of the mandate has also led to calls for an amendment of the Bank's Articles of Agreement. See, e.g., Levinson, 'Multilateral Financing Institutions: What Form of Accountability?' (1992) 8 *American UJ Intl. L & Policy* pp. 47, 59.

*Operational Policies and Procedures*

Within the framework of its charter, the World Bank has since the 1970s undertaken a noteworthy programme of environmental reform.<sup>33</sup> The pursuance of environmental goals by the Bank reflects the twofold approach found in Agenda 21.<sup>34</sup> It comprises on the one hand the funding of 'self-standing' environmental projects (i.e., projects that have as their primary aim the protection of the environment), and on the other the integration of environmental considerations in the Bank's overall loan development activities (sometimes referred to as 'mainstreaming' sustainable development).<sup>35</sup> Other activities include the Bank's participation in a number of multilateral environmental trust funds, such as the Global Environment Facility (GEF),<sup>36</sup> the Multilateral Fund for the Montreal Protocol (MFMP),<sup>37</sup> and the Prototype Carbon Fund (PCF).<sup>38</sup>

The process of integration of environmental considerations in the Bank's loan development activities has been accomplished primarily through the enactment of internal environmental 'safeguard' policies and procedures.<sup>39</sup> The format of these instruments has varied since their inception. They were first issued in the mid-1980s in the form of 'Operational Manual Statements' (OMSs) and 'Operations Policy Notes' (OPNs), and were after 1987 gradually reflected in 'Operational Directives' (ODs).<sup>40</sup> In the early 1990s, a process was initiated to convert the latter into 'Operational Policies' (OPs), 'Bank Procedures' (BPs), and 'Good Practices' (GPs). A clear distinction has been established between standards included in OPs and BPs, which are mandatory upon Bank staff, and those found in GPs, which are merely advisory. This new format was intended to remedy the perceived shortcomings of previous policies, which could embody within the same document both binding and non-binding standards. While introduced as a simple 'streamlining' and 'simplification' process,<sup>41</sup> this conversion has also been seen as

<sup>33</sup> The Bank's environmental reform most effectively occurred after 1992. See further Wade, 'Greening the Bank: The Struggle over the Environment, 1970-1995' in Kapur, Lewis, and Webb (eds.), *The World Bank: Its First Half-Century: Perspectives* (1997). The mandates of the IFC and MIGA have experienced a similar evolution, albeit more recently.

<sup>34</sup> See above nn. 25 and 26.

<sup>35</sup> See, *inter alia*, World Bank, *Mainstreaming the Environment: The World Bank and the Environment Since the Rio Earth Summit* (FY 1995).

<sup>36</sup> See GEF, *Instrument for the Establishment of the Restructured Global Environment Facility*, 16 March 1994, 33 ILM (1994) p. 1283.

<sup>37</sup> See 4th Meeting of the Parties of the Montreal Protocol, *Decision IV/18*, Copenhagen, 25 November 1992; UNEP/OzL.Pro.4/15.

<sup>38</sup> See URL <<http://www.prototypecarbonfund.org>>.

<sup>39</sup> See Di Leva, 'International Environmental Law and Development' (1998) 10 *Georgetown Intl. Envtl. L. Rev.* p. 501. On the adoption process of safeguard policies see Boisson de Chazournes, 'Policy Guidance and Compliance: The World Bank Operational Standards' in Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000) pp. 281, 284.

<sup>40</sup> For a comprehensive account of the various instruments embodying Bank policies and procedures see Shihata, *The World Bank Inspection Panel* (1994), pp. 42-7.

<sup>41</sup> See *ibid.*, pp. 45-6.

watering down certain environmental standards in order for them to escape the jurisdiction of the Inspection Panel, which expressly excludes non-binding operational policies and procedures.<sup>42</sup>

These internal, quasi-administrative documents<sup>43</sup> are intended to provide standards for the Bank's staff to deal with environmental issues<sup>44</sup> raised during the project cycle of Bank-funded projects.<sup>45</sup> Such issues are addressed primarily through the policies and procedures on environmental assessment, which represent the keystone for the evaluation of the environmental soundness of a project.<sup>46</sup> Additional standards complement environmental assessment requirements with respect to protection measures for the global commons.<sup>47</sup> Other Bank safeguard policies and procedures provide specifications, instructions, and guidance in respect of a range of environmental sectors that the Bank has determined affect project development. They concern dam and reservoir projects;<sup>48</sup> natural habitats and endangered species;<sup>49</sup> forestry;<sup>50</sup> water management and international waterways;<sup>51</sup> cultural property;<sup>52</sup> and agricultural pest management.<sup>53</sup> In general terms, these environmental policies and procedures require that the Bank apply certain standards during the preparation and appraisal of projects, primarily through environmental covenants found in the loan or credit agreements.<sup>54</sup> They also demand that the Bank supervises project

<sup>42</sup> See Hunter and McCrae, 'Multilateral Lending Activities' (1995) 6 *Ybk. Intl. Envtl. L* pp. 354, 356; Kingsbury, 'Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples' in Goodwin-Gill and Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* (1999) pp. 323, 331; Nathan, 'The World Bank Inspection Panel—Court or Quango?' (1995) 12 *J Intl. Arbitration* pp. 135, 141–8. See also below n. 144 and related text.

<sup>43</sup> See Boisson de Chazournes, above n. 39, p. 281.

<sup>44</sup> The policies on indigenous peoples and involuntary resettlement are treated in the context of requirements on transparency and participation. See below n. 82 and related text.

<sup>45</sup> The World Bank project cycle typically comprises the following phases: (a) project identification and preparation; (b) project appraisal; and (c) project implementation.

<sup>46</sup> See World Bank, *Operational Policies, Bank Procedures, and Good Practices, Environmental Assessment* (OP, BP, and GP 4.01) (January 1999). These policies are applicable to all Bank projects, including those funded under the GEF, but not structural adjustment loans or debt and debt service operations.

<sup>47</sup> See *ibid.*, *Operational Policies, Economic Evaluation of Investment Operations* (OP 10.04) (September 1994).

<sup>48</sup> See *ibid.*, *Safety of Dams* (OP 4.37) (September 1996), para. 8.

<sup>49</sup> See *ibid.*, *Operational Policies and Bank Procedures, Natural Habitats* (OP and BP 4.04) (September 1995); *ibid.*, *Environmental Assessment Sourcebook Update, Biodiversity and Environmental Assessment* (October 1997).

<sup>50</sup> See *ibid.*, *Operational Policies, Forestry* (OP 4.36) (September 1993).

<sup>51</sup> See *ibid.*, *Water Resources Management* (OP 4.07) (February 2000); *ibid.*, *Operational Policies and Bank Procedures, Projects on International Waterways* (OP and BP 7.50) (October 1994).

<sup>52</sup> See *ibid.*, *Operational Policies, Cultural Property* (OP 4.11) (August 1999).

<sup>53</sup> See *ibid.*, *Pest Management* (OP 4.09) (December 1998).

<sup>54</sup> Thus, operational policies and procedures become binding only upon borrower countries when they are incorporated in loan or credit agreements. On environmental conditionality see Bekhechi, 'Some Observations Regarding Environmental Covenants and Conditionalities in World Bank Lending Activities' (1999) 3 *Max Planck UN Ybk* p. 287; Shihata, *The World Bank in a Changing World* (2000), pp. 500–4.



implementation to ensure that borrower States comply with their contractual obligations.<sup>55</sup> In case of non-compliance, the Bank has the discretion to impose sanctions, such as, for instance, to suspend or cancel the right of the borrower to make withdrawals from the loan account or even to suspend a member State's membership.<sup>56</sup>

The Bank's policies and procedures are to be viewed in a wider context than the internal legal order of the organization.<sup>57</sup> As an organization with international legal personality, the World Bank operates within the framework of international law. It has accordingly committed itself to pursue its activities in compliance with international environmental instruments. The Bank 'does not finance project activities that would contravene [the obligations of the borrowing country under relevant international environmental treaties and agreements]'.<sup>58</sup> Irrespective of the participation of borrowing States in particular environmental treaties or agreements, a policy directive of the organization stipulates that:

The World Bank, an organization created and governed by public international law, undertakes its operations in compliance with applicable public international law principles and rules. These principles and rules are set forth in instruments such as treaties, conventions, or other multilateral, regional, or bilateral agreements. In addition, certain legally significant non-binding instruments, such as statements of policy reflected in Agenda 21 of the U.N. Conference on Environment and Development . . . reflect other international law principles and obligations.<sup>59</sup>

Hence, the Bank undertakes its mandate in compliance with any international environmental instrument to which the borrower is a party, as well as other international environmental principles and rules, including those couched in instruments to which the borrower is not a party, and non-binding instruments.<sup>60</sup> While the Bank is not a party to multilateral environmental agreements, and is thus not bound by them

<sup>55</sup> See World Bank, *Operational Directive, Project Supervision* (OD 13.05) (March 1989); *ibid.*, *Project Monitoring and Evaluation* (OD 10.70) (November 1989).

<sup>56</sup> See IBRD, *General Conditions Applicable to Bank Loan and Guarantee Agreements*, 30 May 1995, Art VI; IDA, *General Conditions Applicable to Development Credit Agreements*, 1 January 1985, as amended on 6 October 1999, Art VI; IBRD Articles of Agreement, above n. 12, Art VI(2); IDA Articles of Agreement, Art VII(2).

<sup>57</sup> See Wirth, 'Economic Assistance, the World Bank, and Nonbinding Instruments' in E. Brown Weiss (ed.), *International Compliance with Nonbinding Accords* (1997) p. 219.

<sup>58</sup> OP 4.01, above n. 46, para. 3.

<sup>59</sup> World Bank, *Environmental Assessment Sourcebook Update, International Agreements on Environment and Natural Resources: Relevance and Application in Environmental Assessment*, March 1996, 1.

<sup>60</sup> Emphasizing such an undertaking, the World Bank's President stressed in his 1997 speech before the UN General Assembly that the Bank would help to promote the goals of international environmental conventions. See Wolfensohn, President, The World Bank, 'Towards Global Sustainability. Remarks to the United Nations General Assembly Special Session on the Environment', New York, 25 June 1997.

under the law of treaties,<sup>61</sup> international environmental standards represent fundamental yardsticks in the elaboration, interpretation, and application of internal policies and procedures.<sup>62</sup> Certain internal policies and procedures do indeed explicitly refer to multilateral standards.<sup>63</sup>

### *Transparency and Participatory Requirements*

As a recent trend in international decision-making,<sup>64</sup> a number of international agreements embody requirements for transparency and public participation in international fora as necessary means to realize sustainable development.<sup>65</sup> Increased transparency and public participation are considered to fulfil the idea that international governance needs to attain certain standards of democratization and accountability, thereby enhancing its legitimacy.<sup>66</sup> They also have a role to play in ensuring state compliance with their international environmental obligations.<sup>67</sup> Principles on transparency and participation are found in the non-binding instruments adopted at the 1992 UNCED. The Rio Declaration proclaims that '[e]nvironmental

<sup>61</sup> For lack of space, the present article does not examine the international obligations incumbent upon the Bank. A systematic study of the international environmental rules, as well as public policy criteria, that apply to multilateral development banks' operations is found in Handl, above n. 24.

<sup>62</sup> See Boisson de Chazournes, above n. 39, p. 297; Shih, 'The World Bank and Climate Change' (2000) 3 *J Intl. Economic L* p. 633. This process operates both ways, as Bank policies can in turn potentially influence the development of international law. On such a contribution see Kingsbury, above n. 42; Shihata, above n. 54, pp. 487-512.

<sup>63</sup> See, e.g., OP 4.04, above n. 49, Annex A, para. (b)(i) (standards elaborated by the International Union for the Conservation of Nature (IUCN) for protected areas); OP 4.09, above n. 53, para. 6 ('World Health Organization's Recommended Classification of Pesticides by Hazard and Guidelines to Classification').

<sup>64</sup> See Wirth, 'Reexamining Decision-Making Processes in International Environmental Law' (1994) 79 *Iowa L Rev.* p. 769. See also ILC, Rao, Special Rapporteur, *Third Report on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law (Prevention of Transboundary Damage from Hazardous Activities)*, 9 June 2000; A/CN.4/510, Annex, Revised draft articles, Art. 8[9] (setting forth a generally defined duty of States to provide the public with relevant environmental information).

<sup>65</sup> See Sands, *Principles of International Environmental Law. Volume I* (1995), pp. 355-60. See also World Bank, *The World Bank Policy on Disclosure of Information (Disclosure of Information Policy)* (March 1994), para. 3; World Bank, *Annual Report FY 1998* (1998), p. 73.

<sup>66</sup> For a discussion of the various legal and sociological theories applicable to the linkage between participation and legitimacy in environmental law and policy see Ebbesson, 'The Notion of Public Participation in International Environmental Law' (1997) 8 *Ybk Intl. Envtl. L* p. 51. Generally, see Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 *AJIL* p. 596, 613-22. A recent report has found that '[t]ransparency is an important means of enhancing the performance and public accountability of international financial institutions': G-22, *Report of the Working Group on Transparency and Accountability*, October 1998 (under the heading 'Preface').

<sup>67</sup> See Bothe, 'The Evaluation of Enforcement Mechanisms in International Environmental Law' in Wolfrum (ed.), *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?* (1996) pp. 13, 19; Sachariew, 'Promoting Compliance with International Environmental Legal Standards: Reflections on Monitoring and Reporting Mechanisms' (1991) 2 *Ybk. Intl. Envtl. L* pp. 31, 33.

issues are best handled with the participation of all concerned citizens, at the relevant level'.<sup>68</sup> Building on this provision, Agenda 21 reaffirms that '[o]ne of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making',<sup>69</sup> and sets forth recommendations for broader access of civil society to environmental information and a greater role in international fora.<sup>70</sup> These principles have been concretized in the Aarhus Convention on Access to Information.<sup>71</sup> They are also found in several multilateral environmental treaties, including the UN Conventions on Climate Change and Biodiversity.<sup>72</sup> Transparency and participatory procedures are aimed at a wide range of beneficiaries, primarily the general public, interest groups, non-governmental organizations, and local communities. The entities or persons concerned may be entitled to receive environmental information and have the opportunity to provide input in decision- and rule-making processes on a broader basis than is ordinarily the case in the context of dispute-settlement mechanisms, where a legal interest has to be shown. From this stems a broader understanding of the rights of non-state actors to act on behalf of public interests, as, with respect to such norms, 'the need to show a private interest in the issue at stake is even further reduced'.<sup>73</sup>

International organizations such as the World Bank have become addressees of transparency and participatory requirements. For example, Agenda 21 calls upon 'international finance and development agencies', amongst others to, 'in consultation with non-governmental organizations, take measures to . . . [p]rovide access for non-governmental organizations to accurate and timely data and information to promote the effectiveness of their programmes and activities and their roles in support of sustainable development'.<sup>74</sup> The Aarhus Convention,

<sup>68</sup> Rio Declaration, above n. 19, Principle 10. See also Principle 22.

<sup>69</sup> Agenda 21, above n. 19, para. 23-2. See also UNGA Res. S-19/2, above n. 25, para. 108.

<sup>70</sup> See Agenda 21, above n. 19, paras. 8.2-8.3, 8.4(f) 8.11, and chap. 40.

<sup>71</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), 25 June 1998, UN Doc ECE/CEP/43; 38 ILM (1999) p. 517.

<sup>72</sup> See UNFCCC, above n. 20, Arts. 6, 7(2)(f), 7(6), 12(9) and (10); CBD, above n. 20, Preamble and Arts. 12(a), 13, and 23(5). For a survey of the incorporation of transparency and participatory principles in multilateral environmental treaties see Wisner, Center for International Environmental Law (CIEL), *Transparency in 21<sup>st</sup> Century Fisheries Management* (July 2000). In the European context, the consolidated EC Treaty gives any EU citizen or resident a right of access to documents of the Council, Commission, and Parliament, subject to 'general principles and limits on grounds of public or private interest', to be drawn up by the Council. See Treaty Establishing the European Community (EC Treaty), Art. 255.

<sup>73</sup> Ebbesson, above n. 66, p. 57.

<sup>74</sup> Agenda 21, above n. 19, para. 27.9(g). See also UNGA Res. S-19/2, above n. 25, para. 112. Arguing that the development of formal and transparent mechanisms allowing for a minimum level of participation in all their operations is indeed an *obligation* incumbent upon international financial organizations, see Bradlow and Grossman, 'Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF' (1995) 17 *Human Rights Q* pp. 411, 428-9.

while it does not bind such organizations, requires States parties to 'promote the application of the principles of this Convention in international environmental decision-making processes and *within the framework of international organizations in matters relating to the environment*'.<sup>75</sup> By way of response, the Bank, which has historically shown secrecy and lack of openness in its operations,<sup>76</sup> has initiated the process of setting up a legal and policy framework for increased transparency and public participation. It aims primarily at improving the quality of loan development operations, by encouraging a better understanding of the conditions pertaining to a given project, permitting a wider representation of the interests at stake, and fostering public support and a sense of 'ownership' of the project amongst local populations.<sup>77</sup> Policies and procedures relate first to the disclosure of information, in particular environmental information, in the course of the Bank's operations.<sup>78</sup> Significant exceptions to disclosure stem however from confidentiality considerations.<sup>79</sup> Secondly, a policy has been adopted that sets out general standards for involving non-governmental organizations and individuals at various stages of Bank operations.<sup>80</sup> But because it is set out in the 'good practices' format, it is not binding upon Bank staff and thus escapes the Inspection Panel's jurisdiction.<sup>81</sup> Transparency and participatory requirements apply also in the context of the Bank policies on indigenous peoples and involuntary resettlement, where they aim to assist in the elaboration of protective measures for indigenous peoples and the application of adequate resettlement measures.<sup>82</sup>

<sup>75</sup> Aarhus Convention, above n. 71, Art. 3(7) (emphasis added). It is interesting to note that the EBRD is the only international financial organization to have explicitly implemented this provision. It has committed itself to 'take into account the Aarhus Convention, the general spirit, purpose and ultimate goals of which are subscribed to by the EBRD in the implementation of its Environmental Policy, along with other relevant international conventions': EBRD, *Public Information Policy* (2000), para. 1(d).

<sup>76</sup> See, e.g., Rich 'The Emperor's New Clothes: The World Bank and Environmental Reform' (1990) 7 *World Policy J* p. 305.

<sup>77</sup> See Aarhus Convention, above n. 71, Preamble. See also Annual Report (FY 1999), above n. 2, pp. 139–40; World Bank, *Environmental Assessment Sourcebook Update, Public Consultation in the EA Process: A Strategic Approach* (May 1999), p. 1.

<sup>78</sup> See World Bank, *Bank Procedures, Disclosure of Operational Information* (BP 17.50) (September 1993); Disclosure of Information Policy, above n. 65. These documents cover IBRD and IDA operations, as well as activities undertaken in connection with projects funded under the global trust funds.

<sup>79</sup> See Disclosure of Information Policy, above n. 65, paras. 49–56. The World Bank indeed considers that 'the effective functioning of the Bank necessarily requires some derogation from complete openness': *ibid.*, para. 49.

<sup>80</sup> See World Bank, *Good Practices, Involving Nongovernmental Organizations in Bank-Supported Activities* (GP 14.70) (February 2000).

<sup>81</sup> See below n. 144 and related text.

<sup>82</sup> See World Bank, *Operational Directive, Indigenous Peoples* (OD 4.20) (September 1991), paras. 8 and 13–18; *ibid.*, *Involuntary Resettlement* (OD 4.30) (June 1990), paras. 3(c), 6, 8–9, and 30.

PROCEDURAL AND SUBSTANTIVE FEATURES OF THE WORLD BANK  
INSPECTION PANEL

*Origins and Institutional Coverage*

The accountability of the World Bank for its compliance with the environment-related norms described in the above part of this paper may be raised before an Inspection Panel. The Panel, a permanent body set up in 1993, is a novel mechanism in international institutional law. It allows private actors to hold an international organization directly accountable for its non-compliance with internal rules and procedures. The Panel cannot address the issue of the non-compliance of (borrowing) States with environmental norms. The World Bank model has been followed in two regional multilateral development banks, the Inter-American Development Bank (IADB) and the Asian Development Bank (ADB), which set up 'Independent Inspection Mechanisms' in 1994 and 1995, respectively.<sup>83</sup> Surprisingly in view of its sustainable development mandate, the EBRD has yet to implement an equivalent independent supervisory body.<sup>84</sup>

The Inspection Panel was created primarily in response to concerns, both internal and external to the World Bank, over the adverse environmental effects stemming from Bank activities, as well as a marked lack of transparency and accountability.<sup>85</sup> While there 'is little question that the World Bank's environmental and social rhetoric and procedures are

<sup>83</sup> See IADB, *The IADB Independent Investigation Mechanism* (as amended August 2000); ADB, *ADB's Inspection Policy. A Guidebook* (October 1996). The Independent Inspection Mechanisms are modelled after the Panel in terms of their overall objectives and jurisdiction, in that, broadly speaking, they aim to provide fora for local groups in borrowing countries to bring claims of the organizations' non-compliance with internal rules and procedures in the context of specific projects. They nevertheless present important institutional and procedural differences. Most significantly, the IADB and ADB maintain a roster of independent experts from which *ad hoc* inspection panels are drawn on the basis of a decision of the Boards of Directors of the Banks. Furthermore, both mechanisms have been virtually inactive: as yet, the IADB's Inspection Mechanism has dealt with one request only (see IADB, *Independent Investigation Mechanism, Report of the Review Panel—Yacuyretá Hydroelectric Project*, 15 September 1997), while the ADB's is in the process of considering its first request, concerning the *Samut Prokarn Wastewater Management Treatment Project* in Thailand.

<sup>84</sup> See above n. 13. Criticizing the EBRD's environmental record, see Goldberg, *The European Bank for Reconstruction and Development: An Environmental Progress Report* (1995); Saladin and Van Dyke (CIEL), *Implementing the Principles of the Public Participation Convention in International Organizations* (CIEL Working Paper 1998), pp. 27–33.

<sup>85</sup> For an account of the initial propositions for an inspection function at the Bank see Bradlow, 'International Organizations and Private Complaints: The Case of the World Bank Inspection Panel' (1994) 34 *Virginia J Intl. L* pp. 553, 565–71. See also Cahn, 'Challenging the New Imperial Authority: The World Bank and the Democratization of Development' (1993) 6 *Harvard Human Rights J* pp. 159, 190 (proposing the establishment of an external 'watchdog agency' to the Bank); Wirth, 'Legitimacy, Accountability, and Partnership: A Model for Advocacy on Third World Environmental Issues' (1991) 100 *Yale L J* pp. 2645, 2664 (recommending that of a 'private attorney general' model). See also, above n. 28.

exemplary [w]hat is controversial is how well it follows them'.<sup>86</sup> Two reports mandated by the Bank in the early 1990s shed light on the existence of serious flaws in the loan development process, namely the Morse Commission Report<sup>87</sup> and the Wapenhans Report.<sup>88</sup> External pressures for an improvement in the Bank's loan development activities came most strongly from non-governmental organizations, as well as influential member countries such as the United States.<sup>89</sup> These pressures crystallized during the finalization in 1993 of the Tenth Replenishment of the resources of the IDA by donor countries, where the United States made its financial contribution to the IDA conditional upon the establishment of an independent scrutiny function by the World Bank.<sup>90</sup> These circumstances prompted the Board of Executive Directors to establish an Inspection Panel, by means of resolutions Nos. 93-10 and 93-6 (hereafter referred to collectively as the 'Resolution'), in order to provide a body competent to review, and if appropriate investigate, complaints against the Bank.<sup>91</sup>

The Inspection Panel is located within the World Bank, and has its own secretariat and budget.<sup>92</sup> By July 2001, there had been twenty-three formal requests for inspections, of which three were not registered because they clearly fell outside the scope of the Panel's jurisdiction.<sup>93</sup> Two reviews of

<sup>86</sup> Gillespie, *The Illusion of Progress: Sustainable Development in International Law and Policy* (2001), p. 12. For an assessment of the Bank's environmental record see World Bank, Sector and Thematic Evaluation Group, OED, *OED Review of the Bank's Performance on the Environment* (2001) (OED Environmental Review) (5 July 2001).

<sup>87</sup> See Morse and Berger, *Sardar Sarovar: Report of the Independent Review. Morse Commission* (1992). See further Khan, 'Sustainable Development, Human Rights and Good Governance—A Case Study of India's Narmada Dam' in Ginther, Denters, and De Waart (eds.), *Sustainable Development and Good Governance* (1995), p. 420.

<sup>88</sup> See World Bank, Wapenhans, *Report of the World Bank's Portfolio Management Task Force—Effective Implementation: Key to Development* (1992). See further Fauteux, 'Multilateral Lending Activities' (1993) 4 *Ybk. Intl. Envtl. L* pp. 286, 287.

<sup>89</sup> See generally Bowles and Kormos, above n. 17. See also the US International Institutions Act as amended by the 1989 International Development and Finance Act (so-called Pelosi Amendment), under which the US Executive Director must abstain from any vote on a project that would have a significant impact on the environment unless an environmental assessment has been made available to local project-affected groups and non-governmental organizations, as well as to the Board of Executive Directors, 120 days in advance of the vote. This requirement is however not applicable when there are compelling reasons to believe that disclosure would jeopardize the confidential relationship between the borrowing country and the Bank. See IDFA ¶521, 103 Stat at 2511 (codified as amended at 22 USC ¶262m-7 (1988)).

<sup>90</sup> See Shihata, above n. 40, p. 9.

<sup>91</sup> See IBRD Resolution No. 93-10 and IDA Resolution No. 93-6, *The World Bank Inspection Panel*, 22 September 1993, 34 ILM (1995) p. 520. See also *ibid.*, IBRD/IDA, *Operating Procedures as adopted by the Panel on August 19, 1994* (Operating Procedures); *ibid.*, *Administrative Procedures of the Inspection Panel* (Administrative Procedures) (as amended by the Panel 10 July 1998).

<sup>92</sup> See Resolution, above n. 91, para. 11. The Panel's budget from 1 August 1999 to 31 July 2000 amounted to approximately US\$2.2 million. See Inspection Panel, *Annual Report. August 1, 1999 to July 31, 2000* (2001), p. 68.

<sup>93</sup> For an updated status, see URL <<http://www.worldbank.org>>. Accounts of the Panel's first 4 years have been made by its two former Chairmen: Bissell, 'Recent Practice of the Inspection Panel of the World Bank' (1997) 91 AJIL p. 741; and Umaña Quesada (ed.), *The Inspection Panel: The First Four Years* (1998).

the Panel's work by the Executive Directors have taken place, in 1996 and 1999, resulting in the adoption of 'clarifications' (hereafter the '1996 and 1999 Clarifications').<sup>94</sup> These clarifications are considered, from a legal standpoint, 'authoritative commentaries' on specific points of the Resolution establishing the Panel, including general interpretations of notions found in the text, and flexible practices developed under it and approved of by the Board, which is vested with the authority to interpret the Panel's governing text.<sup>95</sup> As seen below, the 1999 review, which was initiated as a result of serious tensions within the organization's Board of Executive Directors over matters related to the Panel, was particularly significant, as the resulting clarifications represented an overall endorsement of the Panel by the Bank.

The Inspection Panel's institutional coverage is limited to the IBRD and the IDA. It does not currently extend to private sector activities within the IFC and the MIGA,<sup>96</sup> for which a Compliance Adviser/Ombudsman (CAO) was established in 1998.<sup>97</sup> Under the Ombudsman role, the CAO can respond to complaints by persons who are affected, or are likely to be affected, by the social and environmental impacts of IFC and/or MIGA funded projects, and address the issues raised using a flexible and problem-solving approach.<sup>98</sup> In this capacity the CAO has to date received a total of nine formal complaints, of which seven have been accepted, and one has been closed.<sup>99</sup> Complaints may be received that are being dealt with in parallel by the Inspection Panel, in cases where projects are jointly financed by IFC or MIGA and the World Bank. The CAO, unlike the Panel, has been granted the additional function of undertaking compliance audits of IFC and MIGA's social and environmental performance, as well as advising and assisting both institutions on

<sup>94</sup> See World Bank, *Review of the Resolution Establishing the Inspection Panel: Clarification of Certain Aspects of the Resolution* (17 October 1996); *ibid.*, *Conclusions of the Board's Second Review of the Inspection Panel* (20 April 1999).

<sup>95</sup> See Schlemmer-Schulte, 'Introductory Note to the Conclusions of the Second Review of the World Bank Inspection Panel' 39 ILM (2000) p. 243, 244; Shihata, *The World Bank Inspection Panel: In Practice*, 2nd edn. (2000), pp. 155–203.

<sup>96</sup> The IFC engages in financing for private enterprises without government guarantee, while the MIGA provides guarantees against various types of non-commercial risks faced by foreign private investors in developing countries.

<sup>97</sup> See IFC, *Operational Guidelines for the Office of the IFC/MIGA Compliance Adviser Ombudsman (CAO Operational Guidelines)* (2000). The CAO was created following an independent review mandated by the Bank's President to assess the IFC's compliance with applicable social and environmental guidelines in the Pangu/Ralco hydroelectric project, which was deemed to fall outside the Inspection Panel's jurisdiction. See Inspection Panel, *Request for Inspection—IFC Financing of Hydroelectric Dams in the BioBio River in Chile (INSP/SecM95-8)*, 1 December 1995; Hair, *Pangu Project Jay Hair Review Report* (IFC Report No. 2067) (15 July 1997).

<sup>98</sup> See CAO Operational Guidelines, above n. 97, para. 1.1.2 (1) and Section 2.

<sup>99</sup> The complaint concerned the *Jordan Gateway Project*, and was submitted in December 2000. At the time of writing, the CAO report was not yet available. See URL <<http://www.ifc.org/cao/>>.

controversial projects or on specific policies and procedures (Compliance and Advisory roles).<sup>100</sup>

While the Resolution contains no explicit mention of the point, the functions of the Panel apply to the Bank's role as trustee and main implementing agency of the GEF and other multilateral environmental trust funds such as the MFMP.<sup>101</sup> This interpretation is confirmed by the Board's implicit acceptance of the Panel's assertion of jurisdiction in requests involving GEF-financed projects.<sup>102</sup> The establishment of the Inspection Panel thereby widens the possibilities for establishing accountability in the context of global trust funds. The fact that 'secondary' trust beneficiaries other than States, such as locally affected groups and non-governmental organizations, have standing to invoke the Bank's duties as trustee and implementing agency—to the extent that they are embodied in rules subject to review by the Panel—may evidence an evolution toward the wider recognition of beneficiaries' rights in the context of the ownership of trust funds.<sup>103</sup>

### *Composition*

The Inspection Panel is composed of three panellists of different nationalities from Bank member countries.<sup>104</sup> The Resolution does not require more specific geographic representativeness, nor gender balance. The Panel has until now traditionally consisted of two Westerners and one national of a developing country. The first woman panellist was elected in July 1999. Panel members are nominated by the Bank's President after consultation with the Executive Directors.<sup>105</sup> Candidates for appointment to the Panel are required to possess an 'exposure to developmental issues and to living conditions in developing countries', an 'ability to deal thoroughly and fairly with the requests brought to them', as well as 'integrity and . . . independence from the Bank's Management'.<sup>106</sup> While there are no requirements concerning the legal, technical, or scientific expertise of panellists, they have the

<sup>100</sup> See CAO Operational Guidelines, above n. 97, para. 1.1.2(2) and (3) and Sections 5 and 6.

<sup>101</sup> See Shihata, above n. 95, pp. 34–5 (specifying that the Panel's jurisdiction does not extend to issues of compliance with other policies and procedures adopted separately by the GEF Council, unless the Bank agrees otherwise or these policies and procedures are integrated in Bank documents).

<sup>102</sup> See Inspection Panel, *Report and Recommendation on Request for Inspection concerning India: Ecodevelopment Project Rajiv Gandhi (Nagarahole) National Park (Credit No. 2916-IN, GEF Trust Fund Grant No. TF028479 IN)*, 21 October 1998; *ibid.*, *Investigation Report on Kenya: Lake Victoria Environmental Management Project (IDA Credit 2907-KE and GEF TF 23819)*, 20 December 2000.

<sup>103</sup> See Redgwell, *Intergenerational Trusts and Environmental Protection* (1999), p. 171; Sand, 'Trusts for the Earth: New International Financial Mechanisms for Sustainable Development' in Lang (ed.), *Sustainable Development and International Law* (1995) pp. 167, 180.

<sup>104</sup> See Resolution, above n. 91, para. 2.

<sup>105</sup> See *ibid.*

<sup>106</sup> See *ibid.*, para. 4.



possibility to consult external experts.<sup>107</sup> Panellists are however required under the Resolution to seek the advice of the Bank's Legal Department on matters related to the Bank's rights and obligations.<sup>108</sup> Bank staff cannot serve on the Panel until two years have elapsed since the end of their service in the World Bank Group, and panellists cannot be re-employed thereon at the end of their term.<sup>109</sup> Panel members serve a non-renewable five-year term of office.<sup>110</sup> The Executive Directors decide on their remuneration and removal from office 'for cause'.<sup>111</sup>

Panel members work on a full-time basis when the workload justifies such an arrangement, as recommended by the Panel and approved by the Bank's Board of Executive Directors.<sup>112</sup> Normally, however, only the Chairperson works on a full-time basis, and the other two members are called upon when actual requests for inspection or other Panel business require their presence.<sup>113</sup> Panellists are considered Bank officials. They thus enjoy related privileges and immunities and are subject to the 'requirements of the Bank's Articles of Agreement concerning their exclusive loyalty to the Bank' and to the Bank's applicable Staff Principles.<sup>114</sup>

### *Jurisdiction*

The jurisdiction of the Inspection Panel is assessed during the first phase of its functions, that is, when determining on a *prima facie* basis the eligibility of submitted requests.<sup>115</sup> This determination enables the Panel to make a recommendation to the Executive Directors on whether or not the matter should be investigated.<sup>116</sup> The Panel's jurisdiction is tested with regard to considerations of time, standing, and applicable law.

### *Temporal Jurisdiction*

The Inspection Panel's jurisdiction is subject to three limitations in terms of time. First, the Panel represents a mechanism of 'last recourse'. It has jurisdiction only after the requester has exhausted other avenues within the Bank,<sup>117</sup> i.e., has submitted the request to the Bank's

<sup>107</sup> See Operating Procedures, above n. 91, para. 45(e); Administrative Procedures, above n. 91, paras. 49–50.

<sup>108</sup> See Resolution, above n. 91, para. 15; 1999 Clarifications, above n. 94, para. 6.

<sup>109</sup> See Resolution, above n. 91, paras. 5 and 10, respectively.

<sup>110</sup> See *ibid.*, para. 3.

<sup>111</sup> See *ibid.*, paras. 10 and 8, respectively.

<sup>112</sup> See Administrative Procedures, above n. 91, para. 18.

<sup>113</sup> See Resolution, above n. 91, para. 9.

<sup>114</sup> *Ibid.*, para. 10.

<sup>115</sup> The second phase of the Panel's functions consists in the investigation process, which is treated below. It is only at that time that the merits of the request are dealt with.

<sup>116</sup> See Resolution, above n. 91, para. 19; Operating Procedures, above n. 91, para. 37.

<sup>117</sup> Under the Resolution, the exhaustion of *local* remedies is not a requirement for bringing a claim to the Panel. However, in determining the alleged harm, the Panel has found that requesters need to exhaust all possible legal remedies available to them prior to bringing a complaint. See

Management, which has then failed to provide the Panel, within twenty-one days, with evidence that that it has complied, or intends to comply, with the applicable norms.<sup>118</sup> The Panel begins its review of the eligibility of the request within twenty-one days from the response of Management.<sup>119</sup> Secondly, the Panel is not competent to receive requests '[r]elated to a particular matter or matters over which the Panel has already made its recommendation upon having received a prior request, unless justified by new evidence or circumstances not known at the time of the prior request'.<sup>120</sup> Thirdly, only requests involving the allegation of harm which has occurred or is likely to occur as a result of proposed or on-going projects—that is, during the design, appraisal, and implementation phases of the project cycle—can be brought before the Panel.<sup>121</sup> The Panel's jurisdiction, accordingly, does not extend to requests filed after the closing date of the loan financing the project with respect to which the request is filed, or after the loan financing the project has been substantially disbursed.<sup>122</sup> In the case of complex projects involving several loans, both the Panel and the Bank's General Counsel have confirmed that a request is not time barred if a project initially funded by a Bank loan which has been fully disbursed is subsequently financed by a supplemental loan which has yet not been disbursed.<sup>123</sup>

### *Personal Jurisdiction*

One of the most important features of the Panel's jurisdiction is that it gives standing to third parties, including private parties. Traditionally, international financial organizations such as the World Bank have been perceived as having no direct relationship with individuals, interest groups, and local communities in borrowing countries, and thus no direct accountability to them. Non-state actors have also been generally denied access to international judicial or quasi-judicial fora.<sup>124</sup> Consequently, the

Inspection Panel, *Report and Recommendation on Request of Inspection concerning Lesotho: Lesotho Highlands Water Project (Loan No. 4339-LSO)*, 23 July 1999.

<sup>118</sup> See Resolution, above n. 91, paras. 13 and 16–18; 1999 Clarifications, above n. 94, para. 4.

<sup>119</sup> See Resolution, above n. 91, para. 19; 1999 Clarifications, above n. 94, para. 8.

<sup>120</sup> Resolution, above n. 91, para. 14(d).

<sup>121</sup> See *ibid.*, para. 12.

<sup>122</sup> Disbursement is considered to have taken place when at least 95% of the loan proceeds have been disbursed. See *ibid.*, para. 14(c) (n. 1).

<sup>123</sup> See Inspection Panel, *Request for Inspection—Brazil: Itaparica Resettlement and Irrigation Project (INSP/R97-7)*, 27 June 1997; Legal Opinion of the Senior Vice President and General Counsel, *Time-Limits on the Eligibility of Complaints Submitted to the Inspection Panel (SecM97-693)*, 28 July 1997, internal document cited in Schlemmer-Schulte 'The World Bank's Experience With Its Inspection Panel' (1998) 58 *Zeitschrift für ausländischer öffentliches Recht* pp. 353, 371, n. 84.

<sup>124</sup> See Nguyen, Dailler, and Pellet, *Droit international public* (6th edn., 1999), para. 444. There are of course a number of exceptions. Under the law of international organizations, administrative tribunals may be established, as is the case within the World Bank, to address disputes between the organizations and their staffs on the application of internal staff regulations. See Amerasinghe, *The Law of the International Civil Service* (2nd edn., 1994). While the European Community remains a unique case, the EC Treaty grants remedies for individuals against actions and omissions of

right for such actors to '[e]ffective access to judicial and administrative proceedings, including redress and remedy', in the international context as well as the domestic one, has been anchored in the UNCED instruments.<sup>125</sup> This principle is implemented in the Aarhus Convention.<sup>126</sup> The establishment of the Inspection Panel responds to such calls and creates a legally significant relationship between third parties and the Bank, i.e., without the intervening presence of the member States.<sup>127</sup>

The standing of non-state actors before the Panel depends upon three conditions. First, requesters cannot be a single individual, but must be a 'community of persons such as an organization, association, society or other grouping of individuals'.<sup>128</sup> This community of persons must moreover represent a 'commonality of interests', that is, the persons must share some 'common interests or concerns'.<sup>129</sup> The community of interest need not precede the events that led to the request for inspection, but may result from the sharing in the alleged harm that causes affected parties to act together.<sup>130</sup> (In contrast, the IFC/MIGA CAO's jurisdiction extends to submissions by single individuals who are affected, as well as by loose aggregations of individuals that do not necessarily have a 'commonality of interests').<sup>131</sup> Secondly, requesters must be located 'in the territory of the borrower'.<sup>132</sup> This means that such

Community institutions. See EC Treaty, Arts 230(3), 232(3), and 235 in connection with Art. 288(2). Furthermore, non-state actors are granted the right to file complaints before international tribunals under international and regional international human rights instruments, albeit only with regard to claims against States. Finally, it is noteworthy to mention here that under the North American Free Trade Agreement (NAFTA), different forms of direct access by private parties to inter-state settlement procedures are provided. See North American Free Trade Agreement, 8 December 1992, 32 ILM (1993) p. 289. See in particular the process of 'Submissions on Enforcement Matters' established by the North American Agreement on Environmental Cooperation (NAAEC) concluded under NAFTA, which provides a forum for residents including non-governmental organizations of any of the parties to allege a party's 'failure to effectively enforce its environmental laws'. North American Agreement on Environmental Cooperation, 8 September 1993, found at URL <<http://naaec.gc.ca/english/naaec/naaec.htm>>, Arts. 14-15.

<sup>125</sup> Rio Declaration, above n. 19, Principle 10. See also Agenda 21, above n. 19, paras. 8.18 and 27.13. See generally Cameron and Mackenzie 'Access to Environmental Justice and Procedural Rights in International Institutions' in Boyle and Anderson (eds.), *Human Rights Approaches to Environmental Protection* (1996) p. 129.

<sup>126</sup> See Aarhus Convention, above n. 71, Art 9.

<sup>127</sup> On the impact of the Panel on the position of individuals in international law, see Bradlow and Schlemmer-Schulte, 'The World Bank's New Inspection Panel: A Constructive Step in the Transformation of the International Legal Order' (1994) 54 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* pp. 392, 402-6; Hey, 'The World Bank Inspection Panel: Towards the Recognition of a New Legally Relevant Relationship in International Law' (1997) 2 *Hofstra L. & Policy Symposium* p. 61.

<sup>128</sup> Resolution, above n. 91, para. 12. This provision makes clear that both legal and natural persons are concerned.

<sup>129</sup> 1996 Clarifications, above n. 94, (under the heading 'Eligibility and Access'). See also Shihata, Legal Opinion of the Senior Vice President and General Counsel, 'Role of the Inspection Panel in the Preliminary Assessment of Whether to Recommend Inspection', 34 ILM (1995) pp. 525, 527-8.

<sup>130</sup> See Shihata, above n. 95, p. 60.

<sup>131</sup> See Operational Guidelines, above n. 97, para. 2.2.1.

<sup>132</sup> Resolution, above n. 91, para. 12.

groups must have a real territorial presence, which, in the case of associations and other incorporated entities, implies that they should have substantive activities in the territory.<sup>133</sup> Thirdly, requesters must be ‘affected’ parties, i.e., parties whose ‘rights or interests have been or are likely to be directly affected by an action or omission of the Bank’ which has had, or threatens to have, a ‘material adverse effect’.<sup>134</sup> According to the Bank’s former General Counsel, the terms ‘rights’ and ‘interests’ should be given their usual legal meanings.<sup>135</sup> In other words, they include not only titles, powers, and privileges granted by law, but also the avoidance of physical, financial, or intangible harm that otherwise affects the requester. For assessing the material adverse effect, ‘the without-project situation should be used as the base case for comparison, taking into account what baseline information may be available’.<sup>136</sup>

Requesters can be represented before the Panel either by local representatives, or, upon authorization of the Executive Directors, by foreign representatives in the ‘exceptional cases’ where appropriate representation is not locally available.<sup>137</sup> This provides the opportunity for requesters from developing nations to be represented by Western non-governmental organizations with better resources. For instance, a US-based organization represented the local project-affected people before the Panel in the *China Request*.<sup>138</sup>

In addition to external requesters, requests for inspection can be submitted by any individual Executive Director of the Bank, or by the Executive Directors acting as a Board. This competence arises ‘[i]n view of the institutional responsibilities of Executive Directors in the observance by the Bank of its operational policies and procedures’.<sup>139</sup> When an Executive Director acts alone, an investigation may be requested only ‘in special cases of serious alleged violations of policies and procedures’, whereas when the Directors act as a Board, they may ‘at any time instruct the Panel to conduct an investigation’.<sup>140</sup>

<sup>133</sup> See Shihata, above n. 95, p. 62.

<sup>134</sup> Resolution, above n. 91, para. 12. Note that the ‘affected party’ cannot be the borrower itself, as disputes arising between the Bank and borrowing states are to be settled by negotiation or arbitration under the general conditions applicable to loan agreements. See IBRD, *General Conditions Applicable to Loan and Guarantee Agreements* (1995). Furthermore, complaints from suppliers, contractors, or losing bidders against procurement decisions under Bank-financed projects are excluded. See Resolution, above n. 91, para. 14(b); 1996 Clarifications, above n. 94, (under the heading ‘Eligibility and Access’).

<sup>135</sup> See Shihata, above n. 95, pp. 56–57.

<sup>136</sup> 1999 Clarifications, above n. 94, para. 14.

<sup>137</sup> See Resolution, above n. 91, para. 12; Operating Procedures, above n. 91, para. 39.

<sup>138</sup> See below n. 201 and related text.

<sup>139</sup> See Resolution, above n. 91, para. 12. See also IBRD Articles of Agreement, above n. 12, Art V(4) (providing that the Executive Directors of the Bank are responsible collectively for the conduct of the general operations of the Bank).

<sup>140</sup> See below n. 204 and related text.

*Subject-matter Jurisdiction*

The Resolution establishing the Panel provides that a request is admissible only when it invokes a causal link between the alleged harm and a 'failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank (including situations where the Bank is alleged to have failed in its follow-up on the borrower's obligations under loan agreements with respect to such policies and procedures)'.<sup>141</sup> The alleged violation must, furthermore, be of 'a serious character'.<sup>142</sup> The Resolution thus expressly limits the scope of the applicable law to internal Bank norms that have a binding character, namely OPs, BPs, ODs, and 'similar documents before these series started'.<sup>143</sup> Non-binding documents such as 'Guidelines and Best Practices and similar documents or statements' are excluded from the Panel's jurisdiction.<sup>144</sup> They may however be used by the Panel in interpreting and assessing levels of compliance with binding instruments.<sup>145</sup>

The scope of the applicable law is also curbed in that requests can allege only violations of binding operational policies and procedures when they apply to a Bank 'project'. The latter term has its ordinary meaning in Bank practice. It thus includes all types of programmes and development-assistance activities.<sup>146</sup> The determination of what constitutes a 'policy related to a Bank project' may be ambiguous in two instances. In the case of expropriation, the Panel found eligible a request alleging Bank non-compliance with its policies on expropriation.<sup>147</sup> Management in that case did not contest the Panel's jurisdiction over the complaint.<sup>148</sup> The second instance concerns Bank policies arising in the course of adjustment operations, which involve the financing of broad macro-economic policy, structural or sectoral adjustment measures

<sup>141</sup> Resolution, above n. 91, para. 12. See also *ibid.*, para. 14(a); 1999 Clarifications, above n. 94, paras. 3(ii–iv) and 12.

<sup>142</sup> Resolution, above n. 91, para. 13.

<sup>143</sup> *Ibid.*, para. 12. As described earlier in this article, there exist some ambiguities with regard to the binding force of standards embodied in the documents that preceded the OP/BP/GP format.

<sup>144</sup> Resolution, above n. 91, para. 12.

<sup>145</sup> See Kingsbury, above n. 42, 331.

<sup>146</sup> See 1996 Clarifications on the interpretation of the term 'project', above n. 94 (under the heading 'Eligibility and Access'). See also IBRD Articles of Agreement, Art. III(4)(vii); IDA Articles of Agreement, Art. V(1)(b), above n. 12.

<sup>147</sup> See Inspection Panel, *Report and Recommendation on Request of Inspection concerning Lesotho: Lesotho Highlands Water Project (Loan No. 4339-LSO)*, 23 July 1999. The Panel did however not recommend an inspection, in the absence of a direct link between any actions or omissions of the Bank and the harm claimed by the requesters.

<sup>148</sup> Management thereby departed from its prior position, which held that expropriation fell outside the scope of the Panel's mandate. See Inspection Panel, *Request for Inspection—Compensation for Expropriation and Extension of IDA Credits to Ethiopia*, March 1995 (the request was not registered by the Panel on the basis that the requesters had not shown that the failure of the government to compensate them was caused by IDA's continued lending to Ethiopia).

rather than a specific project.<sup>149</sup> In one request involving adjustment lending, the Panel made clear that the term 'project' as used in the Resolution means that adjustment operations fall under the scope of its mandate, although Bank Management disagreed.<sup>150</sup> The Panel found the request eligible but did not recommend an inspection, thereby precluding discussion of the matter by the Board. There nevertheless appears to be a consensus amongst commentators that the term 'project' as used in the Resolution is understood in Bank practice to include programme or sectoral loans.<sup>151</sup>

### *The Investigation Process*

Once a request for inspection has been deemed *prima facie* eligible, the Panel is competent to consider its merits by conducting an investigation into the facts. Under the Resolution, the initiation of the investigation process is not a matter for the Panel itself to decide. It may only recommend an investigation: the decision-making power belongs to the Executive Directors upon receipt of the Panel's recommendation, and there is no specific time-limit for the Board's decision to be made.<sup>152</sup> During the first five years of the Panel's existence, the Executive Directors seldom authorized investigations. Between 1994 and 1999, the Panel recommended six investigations, of which only two were authorized (limited in scope). As a result, the Board's competence to authorize investigations was perceived to undermine the mechanism's independence, effectiveness, and credibility.<sup>153</sup> The Panel's former Chairman remarked that '[t]he formation of 'alliances' among [borrowing countries] to block investigations has been effective and represents one of the most fundamental threats to the effectiveness of the inspection function'.<sup>154</sup>

The scarcity of Panel investigations was also due to the practice developed by Management of proposing remedial action plans addressing the deficiencies of the project in question before the Board had taken a decision on a Panel recommendation, thereby averting an inspection. In these cases, the Board, instead of authorizing an

<sup>149</sup> See IBRD Articles of Agreement, Art III(4) (vii); IDA Articles of Agreement, Art V(1) (b), above n. 12.

<sup>150</sup> See Inspection Panel, *Request for Inspection—Bangladesh: Jute Sector Adjustment Credit, Panel Report and Recommendation (INSP/R97-3)*, 20 March 1997.

<sup>151</sup> See Forget, 'Le 'panel d'inspection' de la Banque Mondiale' [1996] *Annuaire français de Droit International* pp. 645, 655; Shihata, above n. 95, pp. 37-41.

<sup>152</sup> See Resolution, above n. 91, para. 19. See also 1996 Clarifications, above n. 94 (under the heading 'Role of the Board').

<sup>153</sup> See, e.g., Hunter (CIEL) and Udall (International Rivers Network), *The World Bank's New Inspection Panel: Will it Increase the Bank's Accountability?* (CIEL Working Papers 1994).

<sup>154</sup> Umaña Quesada, above n. 93, p. 325.

inspection, adopted the action plan while giving the Panel a role in supervising its implementation. Although these action plans provided some relief to requesters, and allowed the Panel to have a role in monitoring, they were criticized by the Panel itself as well as outside commentators as non-participatory, aimed at avoiding investigations, and undermining the body's independence from the Bank.<sup>155</sup>

The above mentioned trends were reversed as a consequence of the 1999 review. The Board agreed that it would authorize investigations recommended by the Panel without questioning the merits of the claim and without discussion except with respect to certain eligibility criteria,<sup>156</sup> thus 'further reduc[ing] any impediment to the authorization by the Board of investigations by the Panel through making an investigation the *normal and automatic result* of a Panel recommendation in favor of such investigation'.<sup>157</sup> The Board has, since the approval of the 1999 Clarifications, authorized all three investigations recommended by the Panel.<sup>158</sup> The second review furthermore resulted in the prohibition of the submission of remedial action plans by Management during the eligibility phase;<sup>159</sup> it however also banned any involvement of the Panel in the follow-up of remedial measures.<sup>160</sup>

Once an investigation has been authorized by the Board, the Resolution determines that the Panel is to conduct the investigation of all relevant facts, allowing it to reach conclusions on whether the Bank has been in serious violation of its operational policies and procedures with respect to the design, appraisal, and/or implementation of the project.<sup>161</sup> The Resolution does not expressly provide for provisional measures pending the outcome of the investigation, even though such measures could potentially prevent the prospective continuation of the project work from making the alleged harm irreversible. Unusually, provisional measures were adopted by the Board in the *China Request*.<sup>162</sup> In the conduct of an investigation, Panel members have access to Bank staff who may contribute information, and to all pertinent Bank records.<sup>163</sup> They can also carry out field visits, subject to the consent of the borrowing state.<sup>164</sup> Public hearings

<sup>155</sup> See *ibid.*, 324 ('[b]y introducing these Action (or reaction) Plans, Management effectively preempts or delays . . . the Panel's further involvement').

<sup>156</sup> See 1999 Clarifications, above n. 94, para. 9.

<sup>157</sup> Schlemmer-Schulte, above n. 95, p. 246 (emphasis added).

<sup>158</sup> At the time of writing, the Panel's recommendations on the three subsequent requests (which concern the *Chad Petroleum Development and Pipeline Project*, the *India Coal Sector Environmental and Social Mitigation Project*, and the *Uganda Third and Fourth Power Project*, respectively) are still pending.

<sup>159</sup> See 1999 Clarifications, above n. 94, para. 16.

<sup>160</sup> See below n. 259 and related text.

<sup>161</sup> See Resolution, above n. 91, para. 22; 1999 Clarifications, above n. 94, para. 13.

<sup>162</sup> See below n. 199 and related text.

<sup>163</sup> See Resolution, above n. 91, para. 21.

<sup>164</sup> *Ibid.*, para. 21. Under para. 36 of the Operating Procedures, above n. 91, field visits can also take place for purposes of determining the eligibility of requests. See Inspection Panel, *Investigation Report on Ecuador Mining Development and Environmental Control Technical Assistance Project (Loan Number 3655-EC)*, 23 February 2001.

in the project area may be conducted.<sup>165</sup> Panel members can seek written or oral submissions from the requesting party, Bank staff, and other entities.<sup>166</sup> The Panel is also entitled to use ‘any other reasonable methods the Inspector(s) consider appropriate to the specific investigation’.<sup>167</sup>

The Panel concludes its investigation with a report comprising ‘findings’. If consensus cannot be reached, the Panel’s report states the ‘majority and minority views’.<sup>168</sup> Panel reports consist of a discussion of the relevant facts and steps taken to conduct the investigation, conclusions on the degree of compliance on the part of the Bank with relevant policies and procedures, and an appendix of supporting documents.<sup>169</sup> Findings are not binding,<sup>170</sup> nor can they encompass recommendations on further action. The power to submit to the Board recommendations for remedial action belongs to Management, which must submit a report within six weeks from the receipt of the Panel’s findings.<sup>171</sup> The final decision on the adoption of remedial action is taken by the Board itself, on the basis of both the Panel’s and Management’s reports.<sup>172</sup>

#### *Transparency and Participatory Requirements*

The Resolution provides for certain requirements in terms of transparency and public participation during the Panel process. With respect to information disclosure, first, the Bank must make publicly available certain categories of documents arising during the Panel process. These documents include requests for inspection, Panel recommendations and reports on investigations, Management responses and reports, and Board decisions thereon.<sup>173</sup> Panel-related documents are, however, kept confidential until after they have been considered by the Board. The opinions of the General Counsel related to inspection matters are made publicly available ‘promptly’ after the Executive Directors have dealt with the issues involved, ‘unless the Board decides otherwise in a specific case’.<sup>174</sup> The annual report furnished by the Panel

<sup>165</sup> See Operating Procedures, above n. 91, para. 45(b).

<sup>166</sup> See *ibid.*, para. 45(a) and (d).

<sup>167</sup> *Ibid.*, para. 45(g).

<sup>168</sup> Resolution, above n. 91, para. 24.

<sup>169</sup> See Operating Procedures, above n. 91, para. 52.

<sup>170</sup> The Panel has decision-making powers regarding procedural matters related to its work. It has adopted in this regard its Operating Procedures and Administrative Procedures. See Resolution, above n. 91, para. 24.

<sup>171</sup> See *ibid.*, para. 23. Management’s report to the Board provided here must be distinguished from ‘action plans’ agreed between the borrower and the Bank, in consultation with the requesters, that seek to improve project implementation. See 1999 Clarifications, above n. 94, para. 15.

<sup>172</sup> See Resolution, above n. 91, para. 23.

<sup>173</sup> See *ibid.*, para. 25; 1996 Clarifications, above n. 94, (under the heading ‘Outreach’).

<sup>174</sup> See 1996 Clarifications, above n. 94, (under the heading ‘Outreach’).



to the Bank's President and the Executive Directors is also made publicly available.<sup>175</sup> More generally, the Resolution requires the Bank to make the Inspection Panel better known in borrowing countries.<sup>176</sup>

Provisions in the Resolution granting participatory rights to requesters during the Panel procedure are limited.<sup>177</sup> Requesters are notified of the Panel reports and Board decisions only at the same time that these documents are disclosed to the public.<sup>178</sup> Furthermore, the Resolution does not explicitly refer to any rights of complainants to receive and respond to communications between the Panel and other interested parties, nor to participate in the Panel proceedings after the submission of the request. While it mandates the Panel to consult with both the Bank and the borrower country before it issues its recommendation on inspection, and during the investigation itself, the Resolution makes no reference to consultation with the requester.<sup>179</sup> The Operating Procedures, on the other hand, allow the requester to provide the Panel with supplemental information that is relevant to evaluating the request.<sup>180</sup> The 1999 Clarifications furthermore encourage the Panel to consult affected parties during on-site visits,<sup>181</sup> and require that information provided to requesters must be in their language, to the extent possible.<sup>182</sup> The Panel has in practice consulted with affected individuals and local communities or groups before reaching its conclusions, most recently in the *China*,<sup>183</sup> *Ecuador*,<sup>184</sup> and *Kenya Requests*.<sup>185</sup>

The Resolution does not mention the existence of participatory rights for third parties to the procedure. The Panel's Operating Procedures do, however, enable external observers to submit *amicus curiae* briefs during the processing of requests, if they show that they have an interest in the results of the inspection.<sup>186</sup> This was the case, for instance, in the course

<sup>175</sup> See Resolution, above n. 91, para. 26.

<sup>176</sup> See 1999 Clarifications, above n. 94, para. 17. See also Operating Procedures, above n. 91, para. 57.

<sup>177</sup> On the inadequacies of the rights of the requester in the procedure see Bradlow, above n. 85, pp. 584–5 and 591.

<sup>178</sup> See Resolution, above n. 91, paras. 19 and 23, respectively.

<sup>179</sup> See *ibid.*, para. 21.

<sup>180</sup> See Operating Procedures, above n. 91, para. 47.

<sup>181</sup> See 1999 Clarifications, above n. 94, para. 12. Para. 16 also allows the Panel to submit to the Executive Directors a report on the adequacy of consultations with affected parties in the preparation of action plans.

<sup>182</sup> See *ibid.*, para. 18.

<sup>183</sup> See below.

<sup>184</sup> See *Ecuador Request*, above n. 164.

<sup>185</sup> See *Kenya Request*, above n. 102.

<sup>186</sup> See Operating Procedures, above n. 91, Preamble. On the involvement of non-governmental organizations in international litigation by means of the submission of *amicus* briefs, see generally Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings' (1994) 88 *AJIL* p. 611. For comparative purposes, it is noteworthy that the submission of *amicus curiae* briefs to the WTO adjudicating bodies has been very restrictive. See CIEL, 'A Court Without Friends?', Press release of 22 November 2000; Marceau and Stilwell, 'Practical Suggestions for *Amicus Curiae* Briefs Before WTO Adjudicating Bodies' (2001) 4 *J Intl. Economic L* p. 155.

of the *NTPC*<sup>187</sup> and *China Requests*.<sup>188</sup> The Panel can also request parties, such as requesters, governmental officials, or NGO representatives, to attend meetings and submit written or oral submissions on specific issues.<sup>189</sup> Any member of the public may, without having to show a direct interest, provide the Panel with a brief written document containing information relevant to the investigation.<sup>190</sup> A further significant role for third parties relates to the participation of external observers in the periodic reviews of the Inspection Panel. During the 1999 review, the undertaking of an informal meeting between members of the Working Group established to conduct the review and some United States and United Kingdom NGO representatives marked the first time that a report submitted by a Board Committee to the Board was discussed with private parties outside the Bank before presentation to the Board.<sup>191</sup> Another unprecedented step was the setting up of an informal meeting between the full Board and several NGO representatives.<sup>192</sup>

#### A CASE STUDY: THE *CHINA WESTERN POVERTY REDUCTION PROJECT*

##### *Issues at Stake and Submission of Request*

The sixteenth request brought to the Inspection Panel was a landmark case, which usefully illustrates the mechanism's procedural and substantive features. It also raises fundamental questions regarding the interpretation and application of the Bank's safeguard policies, as well as compliance control. The main objective of the *China Western Poverty Reduction Project* was, according to the Bank, 'to reduce the incidence of absolute poverty in remote and inaccessible villages of Gansu and Qinghai Provinces and Inner Mongolia Autonomous Region'.<sup>193</sup> The Qinghai component (hereafter referred to as the 'Project'), which was the one challenged before the Panel, aimed to alleviate poverty through the voluntary resettlement of 57,775 poor farmers from the so-called 'move-out area' into an area covered by a new irrigation project in the Tibetan and Mongolian Autonomous Prefecture in Dulan County, inhabited by 4,000 people (the 'move-in' area).<sup>194</sup> Within the move-in

<sup>187</sup> Inspection Panel, *Request for Inspection—India: NTPC Power Generation Project, Panel Report and Recommendation (INSP/R97-9)*, 25 July 1997. See Bissell, above n. 93, p. 743.

<sup>188</sup> See below n. 207 and related text.

<sup>189</sup> See Operating Procedure above n. 91, para. 45 (a) and (d).

<sup>190</sup> See *ibid.*, paras. 50–1.

<sup>191</sup> CIEL and the Bank Information Center (BIC) were two of the main organizations involved.

<sup>192</sup> See Bradlow, 'Precedent-Setting NGO Campaign Saves the World Bank's Inspection Panel', 6 *Human Rights Brief* (1999).

<sup>193</sup> World Bank, *Project Appraisal Document for the Western Poverty Reduction Project*, 1 June 1999, Report No 18982-CHA, p. 3.

<sup>194</sup> See *ibid.*, *World Bank Approves China Western Poverty Reduction Project*, Press Release, 24 June 1999.

area, the Project would renovate an existing eight metre dam, and construct a new forty metre one; it also involved the construction of two canals to supply water for irrigation. The Bank was to finance the equivalent of US\$ 160 million of the total US\$ 311 million for the project, of which US\$ 40 million were intended for the Qinghai component.

The Project clearly raised issues of the assessment of the consequences of resettlement, the impacts upon the lives and culture of indigenous peoples and minorities, ecological damage resulting from resettlement and major agricultural and construction programmes, as well as the importance of effective transparency and public participation. The Bank was bound by certain obligations under its internal policies and procedures to ensure that these factors were adequately taken into consideration during project preparation and appraisal, to provide China with the means to do so during project implementation, and to supervise the country's compliance with the terms of the loan agreement. A counter-balancing factor was the Bank's will to limit its mandate in terms of non-interference in domestic political affairs, particularly with regard to human rights issues.<sup>195</sup>

Mounting public criticism of the Qinghai Project arose in 1999, spurred by Tibet support groups, as well as human rights and environmental organizations. Despite proposals for improvement by Bank Management, a request for inspection was submitted on 18 June 1999 to the Inspection Panel by the International Campaign for Tibet (ICT), a US-based non-governmental organization acting on behalf of affected people living in the project area.<sup>196</sup> The requesters claimed that the implementation of the Project would adversely affect the lives and livelihoods of Tibetan and Mongolian ethnic peoples, and cause irreparable environmental damage. Moreover, they alleged that it would cause a serious risk of escalation of ethnic tension and resource conflicts in the area. The request argued that the alleged harm was the result of actions and omissions in the preparation and appraisal of the project by Bank staff, in violation of several policies and procedures, including those on information disclosure, environmental assessment, indigenous peoples, involuntary resettlement, agricultural pest management, and safety of dams.<sup>197</sup> The requesters affirmed that they had repeatedly raised their concerns with Bank Management. Management's response<sup>198</sup> to the request argued that the Project was in compliance with all relevant Bank policies, save for those on information disclosure. Management also pointed out that a number of improvements had been made to the

<sup>195</sup> See IBRD Articles of Agreement, above n. 12, Arts III(5)(b) and IV(10), discussed above at n. 16.

<sup>196</sup> See International Campaign for Tibet (ICT), *Request for Inspection: China Western Poverty Reduction Project (Credit No 32550 CHA and Loan No 4501-CHA)*, 18 June 1999, INSP/R99-6.

<sup>197</sup> On these documents, see above nn. 46–53 and related text.

<sup>198</sup> See World Bank, *Management Response to the Request for Inspection Submitted to the Inspection Panel: China Western Poverty Reduction Project (Credit No 32550 CHA and Loan No 4501-CHA)*, 19 July 1999.

Project since public concerns had been raised. The Bank's Board of Executive Directors decided on 24 June 1999 to proceed with the financing of the Project notwithstanding the request, but applied what amounted to provisional measures by making its decision conditional upon the fact that no work was to be done and no funds disbursed for the Qinghai component pending the Board's decision on the results of any review by the Panel.<sup>199</sup>

*Jurisdictional Aspects and Investigation Process*

On the basis of the request for inspection and Management's response thereto, the Panel first addressed the threshold issue of the eligibility of the complaint.<sup>200</sup> For the first time, a request involved the representation of the project-affected people by an international non-governmental organization, the ICT, on the grounds that no appropriate local representation was available. ICT's representational authority, which was based on the organization's 'long-standing involvement in the project area and its mandate to advocate on behalf of the interests of the Tibetan people', was endorsed by the Board.<sup>201</sup> Having verified the eligibility of the request, the Panel recommended the undertaking of an investigation, stating that the request and Management's response 'contain a wide range of conflicting assertions and interpretations about the issues, the underlying assumptions, the facts, compliance and harm'.<sup>202</sup> On 9 September 1999, in accordance with the Panel's conclusions, the Board authorized an investigation.<sup>203</sup> The authorization was for the first time based not directly on the Panel's recommendation, but on the Executive Directors' own power to mandate the body to conduct an investigation.<sup>204</sup>

During what was its first fully-fledged investigation, the Panel resorted to external experts for assistance and advice,<sup>205</sup> as well as to a set of interpreters from outside China. The investigation involved the conduct of interviews of Bank staff, consultants, and outside experts in

<sup>199</sup> See Press Release, above n. 194.

<sup>200</sup> See Inspection Panel, *Report and Recommendation on Request for Inspection China: Western Poverty Reduction Project (Credit No 3255-CHA and Loan No 4501-CHA)* (Panel Report on Eligibility), 18 August 1999.

<sup>201</sup> *Ibid.*, *Investigation Report—China: Western Poverty Reduction Project (Credit No. 3255-CHA and Loan No. 4501-CHA)* (Panel Investigation Report), 28 April 2000, Annex B1, *International Campaign for Tibet Representational Authority*.

<sup>202</sup> Panel Report on Eligibility, above n. 200, para. 28. See also *ibid.*, para. 30.

<sup>203</sup> See World Bank, *Board wants Panel to investigate whether the Bank has observed its policies and procedures in the preparation of the China Western Poverty Reduction Project*, Press Release, 17 September 1999.

<sup>204</sup> See Resolution, above n. 91, para. 12.

<sup>205</sup> See Panel Investigation Report, above n. 201, para. 19. The team of senior consultants was comprised of experts in a range of subjects such as the environment, anthropology, the economy, and development.

Washington, DC, as well as the examination of available Bank documentation on the project.<sup>206</sup> Several non-governmental organizations were included in this process by means of consultations with the Panel, as well as the receipt of *amicus curiae* briefs.<sup>207</sup> The investigation also consisted of a three-week field visit by Panellists and a team of consultants in the Qinghai Province to carry out interviews of Chinese officials as well as project-affected people and local groups.<sup>208</sup> The Panel noted that such field visits ‘were extremely important for assessing formal and substantive compliance with Bank policies and procedures’.<sup>209</sup>

#### *Panel Investigation Report and Findings*

The Panel issued an investigation report detailing its findings.<sup>210</sup> Overall, the report identified serious generic problems in the interpretation and application by Bank staff of safeguard policies in the course of the project-cycle. Indeed, the Panel revealed an ‘unusually and disturbingly wide range of divergent, and even opposing, views among staff on how the operational policies and procedures should be applied’ that raised, in its opinion, ‘serious questions about the ability of Management to apply them with any reasonable degree of consistency’.<sup>211</sup> The Panel noted that safeguard policies could not be taken to authorize ‘a level of “interpretation” and “flexibility” that would permit those who must follow these directives to simply override the portions of the directives that are clearly binding’.<sup>212</sup> It also remarked that precedents in the borrower country, as well as political and social conditions therein, should not serve to influence the application of the requirements found in policies and procedures.<sup>213</sup>

The investigation report also focused on the legal issues surrounding the Bank’s alleged violations of specific policies and procedures. The Panel concluded that there had been non-compliance on several grounds, including with respect to the policies on environmental assessment,<sup>214</sup> conservation of natural habitats and endangered species,<sup>215</sup> and pest management.<sup>216</sup> The Panel also identified violations

<sup>206</sup> See *ibid.*

<sup>207</sup> See Panel Report on Eligibility, above n. 200, Annexes B4–6.

<sup>208</sup> See World Bank, *Panel to Visit Qinghai in October*, Press Release, 21 September 1999; *ibid.*, *Inspection Panel Returns from China*, Press Release, 28 October 1999.

<sup>209</sup> Panel Investigation Report, above n. 201, para. 23.

<sup>210</sup> See Panel Investigation Report, above n. 201.

<sup>211</sup> *Ibid.*, para. 25.

<sup>212</sup> *Ibid.*, para. 37.

<sup>213</sup> *Ibid.*, para. 43.

<sup>214</sup> See *ibid.*, paras. 81 and 237.

<sup>215</sup> See *ibid.*, para. 254.

<sup>216</sup> See *ibid.*, para. 244.

of the policies on indigenous peoples and involuntarily resettled persons.<sup>217</sup> Finally, it found that the Bank had not complied with the applicable requirements on transparency and public participation, although it had made some progress in this area.<sup>218</sup>

In accordance with the Resolution, the investigation report was not binding, nor did it make any recommendations on remedial action. Certain recommendations for further action were elaborated in the report by Management that followed the submission of the Panel's findings to the Board.<sup>219</sup> Management's report also comprised annexes providing specifications on the relevant safeguard policies and outlining the issues of broader implications identified by the Panel. According to the report, 'both ODs and OPs/BPs provide general operational guidelines intended to apply in different situations within the limits of the flexibility provided in the directives. Many of the Panel's findings appear, however, to be based on an application of elements of each policy as legally binding rules, allowing for little or no flexibility or room for judgement'.<sup>220</sup> Management also criticised the Panel for its 'rigorous definition of compliance'.<sup>221</sup>

While the Panel's investigation report led to the Bank's commitment to certain remedial measures, its findings that the organization was in violation of seven out of ten of its most important social and environmental policies in the design and appraisal of the Qinghai Project heightened public pressure for the cancellation of the Project or of the Bank's financial involvement in it.<sup>222</sup> As a consequence, the Board of Executive Directors, in a highly unusual move, rejected Management's support of the Project and recommendations. The Chinese authorities subsequently announced that they were withdrawing the Project from consideration and intended to use their own resources to implement it.<sup>223</sup>

<sup>217</sup> See *ibid.*, paras. 280, 293, 340, and 408.

<sup>218</sup> See *ibid.*, para. 420–22.

<sup>219</sup> See IBRD/IDA, *Management Report and Recommendation in Response to the Inspection Panel Investigation Report—China: Western Poverty Reduction Project Qinghai Component (Credit No 3255-CHA; Loan No 4501-CHA)* (Management Report), 19 June 2000, INSP/R2000-4/1, para. 9.

<sup>220</sup> *Ibid.*, para. 20. See also the covering letter to the Report, where the Bank's President, James Wolfensohn, emphasized that the efforts pursued by Management in response to the Panel's findings 'are pushing us into a literal and mechanistic application of the OPs and ODs that was never intended when they were written'.

<sup>221</sup> *Ibid.*, Annex, *Background Paper on the Management Report and Recommendation in Response to the Inspection Panel Investigation Report*, para. 11.

<sup>222</sup> See BIC, *Summary of events leading to the cancellation of the China Western Poverty Reduction Project*, available at URL <<http://www.bicusa.org>>.

<sup>223</sup> See World Bank, *China to Implement Qinghai Component of the China Western Poverty Reduction Project with its Own Resources*, Press Release, 7 July 2000; *ibid.*, *Chinese Government's Statement on the Inspection Panel Investigation Report for the China: Western Poverty Reduction Project (Qinghai Component)* Press Release, 6 July 2000.

ASSESSMENT OF THE INSPECTION PANEL AS AN  
ACCOUNTABILITY MECHANISM*Jurisdictional Issues**Extent of Standing*

As seen above, one of the Inspection Panel's innovative characteristics is that standing is granted to individuals and non-governmental organizations adversely affected by Bank-funded projects. The resulting extension of accountability of the World Bank to non-state entities is of particular importance where the activities of the organization have the potential to result in environmental harm. Not only are individuals often the first victims of ecological damage, but actors such as non-governmental organizations may be more likely to represent environmental interests (especially global ones) than States.<sup>224</sup> The Resolution permits 'affected parties' to submit a request. The question is whether requests alleging infringements not of the requesters' own rights or interests but rather those of the public at large, or harm to the environment *per se*, are admissible even in the absence of potential damage to the requesters.<sup>225</sup>

The Resolution appears on its face to reject as inadmissible requests in the nature of an *actio popularis*.<sup>226</sup> It does so by requiring the existence of

<sup>224</sup> Concurring see Grossman and Bradlow, 'Are We Being Propelled Towards a People-Centered Transnational Legal Order?' (1993) 9 *American U J Intl. L. & Policy* 1, p. 22. See also above n. 11 and related text. On the growing role of non-state actors in the enforcement of international environmental obligations, see, e.g., Boisson de Chazournes, 'La mise en œuvre du droit international dans le domaine de la protection de l'environnement: Enjeux et défis' (1995) 99 *Revue générale de droit international public* pp. 37, 68–72; French, 'The Role of Non-State Actors' in Werksman, above n. 24, p. 251; O'Connell, 'Enforcing the New International Law of the Environment' (1992) 35 *German Ybk. Intl. L.* pp. 293, 311–13.

<sup>225</sup> On the recognition of public interests of the international community whose protection constitutes an obligation of individual States to the international community as a whole, see ICJ, *South West Africa Cases (Ethiopia v. South Africa, Libya v. South Africa)*, ICJ Reports, 1950, p. 148; *ibid.*, *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* ICJ Reports, 1970, 3, paras. 33–4; *ibid.*, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide. Bosnia and Herzegovina v. Yugoslavia (Preliminary Objections)* (ICJ Reports, 1996, 625), para. 6. See also ILC, *Titles and texts of the draft articles on Responsibility of States for internationally wrongful acts adopted by the Drafting Committee on second reading* (26 July 2001; A/CN.4/L.602/Rev1), Part Two, Chapter III and Part Three, Chapter I (in particular Arts. 42 and 48) (addressing state responsibility for serious breaches of peremptory norms and *erga omnes* obligations). On this topic, see ILC, Crawford, Special Rapporteur, *Third report on state responsibility* (10 March 2000; A/CN.4/507), paras. 106–117; *ibid.*, *Fourth report on state responsibility* (31 March 2000; A/CN.4/517), para. 49. See also Crawford 'The Standing of States: A Critique of Article 40 of the ILC's Draft Articles on State Responsibility' in Andenas and Fairgrieve (eds.), *Liber Amicorum in Honour of Lord Slynn of Hadley. Volume II* (2000) p. 23. For insights into the representation of public interests in cases involving environmental harm see further Fitzmaurice, 'International Environmental Law as a Special Field' (1994) 25 *Netherlands J Intl. L.* p. 181, 223–4; Sands, 'Access to Environmental Justice in the European Community: Principles, Practice and Proposals' (1994) 3 *Rev. EC Intl. Envtl. L.* (1994) p. 206.

<sup>226</sup> This is also the opinion of the Bank's former General Counsel. See Shihata, above n. 95, p. 56–9.

a personal link between the requester and the affected rights or interests ('its' rights or interests), as well as a territorial link between the requester and the borrowing country, and by limiting foreign representation of requesters to exceptional cases.<sup>227</sup> Nevertheless, a teleological interpretation of the Resolution, allowing the submission of requests based on public interests as well as private interests of requesters, can be defended.<sup>228</sup> Such an interpretation understands the notion of 'interest' in a progressive manner that encompasses environmental interests, taking into account their collective nature. This approach is reflected, for example, in the Aarhus Convention, which asserts the right for non-governmental organizations to act in respect of public environmental interests. Rather than using the terms 'private' or 'public' interests, the Convention refers to the 'public concerned', which is defined as 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest'.<sup>229</sup> In domestic legal systems, mechanisms have been instituted that allow for environmental organizations to initiate administrative or judicial proceedings on behalf of public environmental interests, for instance by undertaking class actions or instituting public law proceedings.<sup>230</sup>

A broader interpretation of the Resolution, and especially of the notion of 'interest', is buttressed by the fact that the Panel's jurisdiction permits inquiries into Bank operational policies and procedures, several of which, such as those on the protection of natural sites and endangered species, or the global commons, have the object of protecting the environment as such. It can also be inferred from the Bank's commitment to pursue its activities in accordance with instruments of international environmental law that embody similar conservation goals.<sup>231</sup> In practice, better observance of these standards in loan

<sup>227</sup> According to Shihata, the conditions regarding the territorial link and foreign representations were intended by the Board to avoid the submission of requests by external (Western) non-governmental organizations acting on their own. See *ibid.*, pp. 61 and 65.

<sup>228</sup> Another conduit for invoking public interests before the Panel is through the submission of a request by an Executive Director, as the Executive Directors do not have to show that their rights or interests have been affected. In this eventuality, environmental non-governmental organizations could lobby the Executive Director of their country to act before the Panel. To date, this however has not been the case.

<sup>229</sup> Aarhus Convention, above n. 71, Art 2(5) (emphasis added). Proposing a broader understanding of the meaning of 'interests' and 'being affected', see Ebbesson, above n. 66.

<sup>230</sup> On the limitations put on the *locus standi* of individuals and non-governmental organizations upholding the protection of the environment in the case law of the European Court of Justice (ECJ), see Case C-321/95 P, *Greenpeace and Others v. Commission* [1998] ECR I-1651. See however Case 294/83, *Parti écologiste 'Les Verts' v. Parliament* [1986] ECR 1339.

<sup>231</sup> See above n. 59 and related text.



development operations will be secured only if the Bank may be challenged before the Panel by requesters acting on the basis of an extensive conception of ‘interest’. While a case based exclusively on the allegation of public interests has not yet arisen, the Panel has found eligible requests filed not only on behalf of local communities affected by a project, but also with regard to harm to biodiversity and the environment caused by a violation of Bank policy, even in the absence of damage to people.<sup>232</sup>

#### *Breadth of the Applicable Law*

The Panel’s subject-matter jurisdiction is, according to the Resolution, strictly limited to reviewing Bank compliance with internal Bank standards.<sup>233</sup> This raises two concerns—on the one hand, the normative force of the safeguard policies from an internal point of view and, on the other, the role of international environmental principles in the interpretation and application of safeguard policies.

On the first point, the *China Request* provides guidance on the legal nature of Bank safeguard policies. It reveals a tension between the Bank’s view that these documents are flexible guidelines applicable with a certain margin of discretion, and the Panel’s reasoning that they set out quasi-legal norms that require uniform application. An emphasis on the greater normative force of safeguard policies can be based on several arguments. First, the purpose of the process of converting policies into the OP/BP/GP format examined above was to distinguish mandatory policies from good practices. This indicates that, despite the need for a certain flexibility to accommodate particular circumstances, the application of environmental standards is not discretionary, and those which are contained in binding documents should be treated as such by staff. Secondly, as the World Bank, by instituting the Panel, has granted certain rights to affected parties to raise the question of the organization’s compliance, these parties could benefit from a degree of certainty about the content of safeguard policies. If these instruments are drafted, interpreted, and applied by the Bank in as consistent and precise a manner as possible, this will enhance the procedural rights of third parties to submit complaints.

With regard to the second point, the Bank has stated that it aims to conduct its operations in accordance with multilaterally-agreed environmental standards. Do such standards intervene to any extent in Panel proceedings?<sup>234</sup> While the Resolution clearly determines that a

<sup>232</sup> See Inspection Panel, *Request for Inspection—Argentina/Paraguay: Yacyretá Hydroelectric Project, Panel Recommendation (INSP/R06-2)*, 26 December 1996. Presumably, the environmental interests still have to be in—although not confined to—the State concerned.

<sup>233</sup> See above n. 143 and related text.

<sup>234</sup> In keeping with the scope of the Panel’s mandate, which is limited to Bank non-compliance, the question here is not about overseeing the compliance of borrower States with their international obligations.

request before the Panel could not allege Bank non-compliance with norms of international law, it does not specify that the Panel cannot consider information other than that included in requests. In view of the Bank's environmental and sustainable development commitments, internal policies and procedures must be understood as aiming to uphold standards embodied in at least some international environmental instruments.<sup>235</sup> Furthermore, certain policies and procedures reflect general principles of international environmental law, including, for instance, the preventive and precautionary principles,<sup>236</sup> the principle of prior notification,<sup>237</sup> and the prohibition of environmental harm beyond national jurisdiction.<sup>238</sup> It can be argued that the Panel, like the requester, should use environmental standards found in international customary and treaty law, general principles of international law, and non-binding instruments to fill potential gaps in Bank policies and procedures, and to interpret the rights and responsibilities arising out of these documents.<sup>239</sup> This reflects the fact that, while remaining within the confines of the Resolution, the interpretation of safeguard policies and procedures can take place within the wider normative framework in which the Bank operates on the international level.<sup>240</sup>

### *Procedural Aspects*

#### *Degree of Independence*

In order to be credible, the Inspection Panel must be sufficiently independent from the organization that created it. The body 'is an independent forum' and '[r]ecommendations and findings of the Panel shall be strictly impartial: only facts relevant to the Request or

<sup>235</sup> See above n. 60 and related text.

<sup>236</sup> See, e.g., OP 4.04, above n. 49, para. 1 ('The Bank supports, and expects borrowers to apply, a precautionary approach to natural resource management to ensure opportunities for environmentally sustainable development').

<sup>237</sup> See OP 7.50, above n. 51, para. 4 ('the Bank requires the beneficiary state . . . formally to notify the other riparians of the proposed project').

<sup>238</sup> See World Bank, *Operational Manual Statement, Environmental Aspects of Bank Work* (OMS 2.36) (May 1984) para. 9(f) ('[The World Bank] will not finance projects that could significantly harm the environment or a neighboring country without the consent of that country').

<sup>239</sup> Concurring see Bradlow and Schlemmer-Schulte, above n. 127, p. 405 (stating that over time 'the Panel, like the complainant, may use *jus cogens* and customary international law, and general principles of international law to interpret the rights and responsibilities of international law') (emphasis in text); Kingsbury, above n. 42, p. 331 (arguing that that international law standards 'might properly be invoked as part of the corpus of norms and practice that may guide the Panel in making useful recommendations'). The background of Panellists can of course play a role in the degree of emphasis placed upon international law. For an interesting comparison see the references to international environmental law in recent reports of the WTO Appellate Body, in particular in the *Shrimp-Turtle Case*, above n. 21.

<sup>240</sup> Interesting insights can be gained in this regard from the reasoning of the 1992 Morse Commission, which, to evaluate the Bank's compliance in the context of the *Sardar Sarovar Water Project*, took a broad approach by using international standards, namely the International Labour Organization (ILO) Convention No 107, in addition to the Bank's own policies and loan agreements. See Morse Commission Report, above n. 87, p. 357.

investigation under consideration shall be relevant to their decisions'.<sup>241</sup> The Resolution conceives the Panel as a functionally independent body from the Bank that is nevertheless assisted by the organization's administrative facilities and is located at the organization's headquarters. While it lays down certain safeguards for the Panel's independence, other arrangements aim to preserve close links between the Panel and the Bank.

The criteria applicable to the nomination and employment of Panellists represent a first test for an assessment of independence.<sup>242</sup> The Panel's independence is served, for instance, by requirements of the Panellists' autonomy from the Bank's managerial structure, and prohibition of re-employment by the World Bank Group at the end of their term. Panellists are proscribed from participating in hearings or investigations of requests related to matters in which they have a personal interest or significant involvement.<sup>243</sup> In this case, the other Panel members constitute the Panel until a new member is appointed.<sup>244</sup> Certain requirements in terms of the independence of the Panel Secretariat are also provided for.<sup>245</sup> On the other hand, Panellists are Bank employees with an exclusive loyalty to the organization. Pressures on Panel members may arise from the Executive Directors' power to decide on their remuneration and removal from office.

Panel proceedings provide additional insights in terms of independence. That the Panel is a mechanism of last recourse<sup>246</sup> suggests a strong presumption towards the resolution of disputes within the Bank's managerial structure rather than by means of a Panel investigation. As mentioned above, this presumption was evidenced by the Board's (rather than the Panel's) competence to authorise an investigation into the merits of a request,<sup>247</sup> as well as by the practice of Management prematurely to submit remedial action plans leading to the avoidance of investigations.<sup>248</sup> The Panel's independence, in terms of its competence to undertake investigations when it judges necessary, appears to have been strengthened after the adoption of the 1999 Clarifications.

A balance should therefore be sought between the preservation of sufficient independence for Panellists and the Bank's will to maintain a certain level of control over the procedure. The conditions for the nomination and employment of Panellists have apparently not generated any major threats to the independence of the mechanism. Current Panel

<sup>241</sup> Administrative Procedures, above n. 91, paras. 10 and 12, respectively.

<sup>242</sup> See above nn. 105–114 and related text.

<sup>243</sup> See Resolution, above n. 91, para. 6.

<sup>244</sup> See Administrative Procedures, above n. 91, para. 16. See also *ibid.*, paras. 26–8.

<sup>245</sup> See *ibid.*, para. 34.

<sup>246</sup> See above n. 117, and related text.

<sup>247</sup> See above n. 153, and related text.

<sup>248</sup> See above n. 155, and related text.

members have no prior links to the World Bank, and only one former Panellist had been previously employed by the Bank. Neither has the Panel been shy of finding against the Bank during investigations, and of expressing its disagreement with the Board and Management on issues related to both specific requests and conceptual issues. The independence of the mechanism has been stressed by its former Chairman, according to which the Panel 'has, despite tremendous pressure, functioned as an independent structure, as it was intended, consistently providing the Board with an independent view of projects with potentially harmful impacts on local populations and the environment'.<sup>249</sup>

#### *Levels of Transparency and Participation*

Rigorous requirements in terms of transparency and the participation of requesters, as well as external observers, ensure a fair, credible, and effective process.<sup>250</sup> The timely disclosure of relevant information to both the requester and the public is necessary during Panel proceedings to ensure their adequate participation in the procedure. It also enables the dissemination of Panel findings on the types of deficiencies found in particular projects and on pervasive problems in the Bank project cycle. In all these cases, it is important that information be made widely accessible; this entails, for instance, that Panel documents are translated into languages used in borrowing countries by actual or potential requesters. While demands for greater information disclosure are balanced against confidentiality considerations, in particular as they concern Board proceedings,<sup>251</sup> greater weight should be given to the timely disclosure of environmental information at all stages of Panel proceedings, and the grounds for refusal applied restrictively.

Adequate participation of requesters in the Panel procedure should also be ensured, in order to provide all parties with equivalent opportunities to present their case. This implies that requesters should be notified of all stages of the procedure, and have access to all relevant documents at the time of their issue. The identity of requesters should be confidential if they so desire.<sup>252</sup> The participation and input of third

<sup>249</sup> Umaña Quesada, above n. 93, p. 323.

<sup>250</sup> For valuable insights into the contribution made by the creation of the Inspection Panel to greater transparency and public participation in international processes see Boisson de Chazournes, 'Public Participation in Decision-Making: The World Bank Inspection Panel' in Brown Weiss, Rigo Sureda, and Boisson de Chazournes (eds.), *The World Bank, International Financial Institutions, and the Development of International Law* (1999) p. 84.

<sup>251</sup> See World Bank, *Rules of Procedures of the Executive Directors of IBRD and IDA*, Section 7 (requiring the preservation of the integrity of the deliberative process of the Board proceedings and protection of Executive Directors against undue pressure from other parties). See also above n. 79 and related text.

<sup>252</sup> See Operating Procedures, above n. 91, para. 18 (b). Requests cannot however be anonymous. See *ibid.*, para. 22(e).

parties in the procedure ensures the consideration of additional and diverse information in the evaluation of requests, and provides opportunities for monitoring both the Panel's and the Bank's actions. It can be strengthened through their submission of *amicus curiae* briefs or other documents, and attendance during the periodic reviews of the Panel. Another venue for external commentators to participate in the Panel's work could conceivably be through the Annual Meetings held by the Panel members, to which the Panel 'may invite any other persons' than Panel members, the Executive Secretary, and Bank staff.<sup>253</sup>

### *Consequences*

The consequences of an investigation undertaken by the Inspection Panel relate to the types of remedies and redress that are potentially available to those adversely affected by the acts or omissions of the World Bank, as well as to the potential for changes in the Bank's development operations in terms of environmental protection. As mentioned, the Panel cannot take decisions or even recommendations on further action stemming from investigation reports.<sup>254</sup> This may represent a drawback to the mechanism's ability to lead to remedial measures and/or improvements to project and policy implementation.<sup>255</sup> Nevertheless, Panel reports represent a non-negligible constraint on the Board of Executive Directors in the event of findings of Bank violations of safeguard policies and procedures.

Consequences of the Panel process can be identified at two levels. On the one hand, the direct outcome of the particular project that is the focus of the request can be affected by means of several types of mitigatory or remedial measures.<sup>256</sup> It should be underscored that since the 1999 Clarifications, the Panel no longer has functions in the supervision of the implementation of such measures, despite the fact that such a role could be valuable to further monitor Bank compliance.<sup>257</sup> Mitigatory or remedial measures may first consist in cessation of the Bank's funding of the project, as was the case in the *Arun III*<sup>258</sup> and *China Requests*.<sup>259</sup> Bank withdrawal does not, however, necessarily imply

<sup>253</sup> See Administrative Procedures, above n. 91, paras. 1 and 5(b).

<sup>254</sup> See above nn. 170–172 and related text.

<sup>255</sup> See, e.g., Bradlow, above n. 85, p. 610 (stating that the Panel should be given the competence to make general recommendations on the Bank's operational policies).

<sup>256</sup> The Panel does however not give a *right* to remedial measures.

<sup>257</sup> See above n. 159 and related text.

<sup>258</sup> The continuation of the *Planned Arun III Hydroelectric Project* was unilaterally cancelled by the Bank as a result of the Panel's findings of non-compliance. See Inspection Panel, *Request for Inspection: Panel Investigation Report—Nepal Arun III Proposed Hydroelectric Project (INSP/SecM95-3)*, 22 June 1995; World Bank, *Nepal Arun III Proposed Hydroelectric Project—Management Response to the Inspection Panel's Investigation Report (INSP/SecM95-5)*, 5 August 1995.

<sup>259</sup> See above n. 223 and related text.

cessation of the project itself; in both of these cases, the borrowing countries (Nepal and China respectively) are planning to continue project implementation,<sup>260</sup> albeit without benefiting from Bank support. In such cases, it is debatable whether environmental interests are indeed best being served. This point highlights that the Panel process does not resolve the problems surrounding *state* compliance, nor the accountability of borrower countries for their integration of environmental considerations in the development process,<sup>261</sup> an issue not addressed in the scope of the present article. Secondly, measures aimed at the Bank's return to compliance can be adopted. For instance, following the recent *Ecuador Request*, Management has agreed to greater NGO participation and consultation in the implementation of actions taken under the project in question.<sup>262</sup> Thirdly, it is conceivable that Panel findings of non-compliance may impact upon the availability of remedies in other dispute-resolution procedures, especially in the context of claims brought against the Bank in national courts, although such findings do not pre-empt any decision on liability under the applicable domestic law.<sup>263</sup> An important domestic procedural bar to claims against the Bank remains, however, the organization's immunity from jurisdiction.

On the other hand, a second category of consequences can be seen as broader in scope and less project-specific. Panel reports can influence the development of the applicable law, by providing significant guidelines on the interpretation and implementation of, and compliance with, Bank environmental safeguard policies and procedures. Indeed, according to the Bank's Operations Evaluation Department (OED), '[r]ecent Inspection Panel reports have highlighted a significant problem with the implementation of [environmental assessment] structure in the Bank due to perceived ambiguities in the scope, intent, and requirements of the policies among staff responsible for the implementation'.<sup>264</sup> Moreover, the establishment of the Panel has enhanced transparency in Bank operations, as in order for the mechanism to operate parties external to the Bank must be made aware of, and have unfettered access to, relevant Bank documents. As seen in the context of the *China Request*, Panel reports also disclose the environmental and social consequences of project deficiencies stemming

<sup>260</sup> No final decision has yet been made with respect to the continuation of the *Arun III Hydroelectric Project*, although proposals by private investors have been made.

<sup>261</sup> Borrower States are legally bound by the terms of the loan or credit agreement entered into with the Bank.

<sup>262</sup> See World Bank, *Management Report and Recommendation in Response to the Inspection Panel Investigation Report—Ecuador Development and Environmental Control Technical Assistance Project (Loan No 3655-EC)*, 23 February 2001.

<sup>263</sup> On the pending law suits filed in February 1997 in Argentinan courts against several defendants including the World Bank for damages suffered as a result of the *Yacretá Hydroelectric Project*, which was also the object of a 1996 request before the Panel, see Shihata, above n. 95, pp. 122–3.

<sup>264</sup> OED Environmental Review, above n. 86, para. 63.

from Bank non-compliance with internal standards, as well as generic problems in the project cycle of financed projects.<sup>265</sup> In terms of public participation in Bank operations, the Panel fosters external input by individuals, non-governmental organizations, and local communities. Beyond the internal level, Panel reports can encourage legal developments in areas of international law, such as institutional, environmental, and human rights law.<sup>266</sup>

This review of the possible consequences of the Panel process reveals an important feature of the mechanism, that is, its emphasis on prevention. That environmental harm should be prevented rather than repaired or compensated *ex post* indeed represents a mantra of environmental law, because such harm is often irreversible and/or difficult to assess in terms of monetary compensation.<sup>267</sup> This has led, in the field of state compliance with environmental obligations, to an emphasis on monitoring, reporting, and non-compliance procedures, which favour avoidance of environmental damage over reparation or compensation.<sup>268</sup> The Inspection Panel mechanism responds to the principle of prevention in two ways. In project-specific terms, it allows for requests to be brought prior to the commission of environmental harm, as they can concern projects in the preparation and appraisal stages of the project cycle.<sup>269</sup> Requesters can thus allege *potential* harm.<sup>270</sup> In a more general perspective, the Panel process may contribute to the prevention of future harm, by laying the ground for greater compliance of the Bank with environmental policies and procedures in loan development operations, through both positive measures (for instance, the clarification of policies and procedures) and deterrence.

## CONCLUSION

This article has examined substantive and procedural features of the World Bank Inspection Panel, in order to explore some of the shifts that

<sup>265</sup> The Panel has generally identified two systemic issues in the Bank's operations; the first is the imbalance that develops in projects that have infrastructure as well as social and environmental components, and the second the unequal status that social and environmental components seem to have *vis-à-vis* other policies in the preparation and implementation of projects. See Umaña Quesada, above n. 93, p. 326.

<sup>266</sup> See Bradlow and Schlemmer-Schulte, above n. 127, pp. 402–14.

<sup>267</sup> See Boyle, 'Remedying Harm to International Common Spaces and Resources: Compensation and Other Approaches' in Wetterstein (ed.), *Harm to the Environment: The Right to Compensation and Assessment of Damages* (1997) p. 83.

<sup>268</sup> See, e.g., Bothe, above n. 67, pp. 21–2; Fitzmaurice and Redgwell, 'Environmental Non-Compliance Procedures and International Law' (2001) 31 *Netherlands Ybk. Intl. L* 35; Koskenniemi 'Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol' (1992) 3 *Ybk. Intl. Envtl. L* p. 123; Sachariew, above n. 67.

<sup>269</sup> See above n. 121 and related text.

<sup>270</sup> See above n. 134 and related text.

are occurring towards greater accountability of international financial organizations. The creation of the Panel can be seen as one response to the obstacles to the application of traditional responsibility and/or liability principles to organizations, especially when development institutions are concerned.<sup>271</sup> The Panel is not a court of law where the responsibility or liability of the World Bank can be invoked.<sup>272</sup> It does not have binding decision-making powers and does not reach an enforceable judgment. The Panel fits into a more flexible concept of compliance and dispute settlement, which aims to monitor and enhance compliance with certain environmental standards, while establishing a soft framework to address events of non-compliance. A parallel can be made with soft compliance procedures in inter-state relations, which aim to remedy the inadequacies of traditional enforcement mechanisms when international environmental obligations are concerned.<sup>273</sup>

As a corollary to its more informal and flexible nature, however, the Panel is a mechanism lacking teeth, for instance because of its relative lack of independence and inability to adopt remedial action. Competing conceptions of the scope of its functions have been promoted, in turn by the text of the Resolution, the practice of the Panel, the decisions of the Bank's Board of Executive Directors, and interpretations on the part of external observers. The Panel may be viewed as a body with either limited investigatory and/or mediatory competence, undertaken by means of relatively flexible procedures, or as having functions of a quasi-judicial nature accomplished through a formalized process. The Board has sought a strictly non-judicial mechanism. During its first five years, the Panel's competencies were restricted to advisory and fact-finding ones, as it was in the majority of cases not authorized to undertake investigations into the merits of requests. In this sense, the Panel resembled the IFC/MIGA's CAO, which, in its Ombudsman role, is a conciliatory mechanism aimed primarily at securing an amicable arrangement between parties in dispute.<sup>274</sup>

On the other hand, NGOs and external commentators, as well as some sections of Bank staff, have leaned towards the 'judicialization' of the Panel. The Resolution indeed grants the Panel quasi-judicial functions during the eligibility and investigation phases, such as to determine its jurisdiction, examine the merits of a request by applying legal norms to facts, and arrive at a determination on the issue of non-compliance after an inquiry conducted in accordance with legal rules and on the basis of principles of fairness and equity. The adoption of the 1999 Clarifications

<sup>271</sup> See the literature cited above in n. 5 and related text.

<sup>272</sup> See also Schlemmer-Schulte, 'The World Bank, its Operations, and its Inspection Panel' (1999) 3 *Recht der internationalen Wirtschaft* pp. 175, 179.

<sup>273</sup> See above n. 271 and related text.

<sup>274</sup> See above n. 98 and related text.



have marked a trend towards emphasizing the quasi-judicial characteristics of the Panel with regard to the body's *de facto* competence to decide on the initiation of investigations. The *China Request* represents the first full investigation undertaken thereafter, which allowed the Panel to exercise its full competences as determined by the Resolution. While the Inspection Panel should remain a flexible and pragmatic dispute resolution mechanism, strengthening its quasi-judicial functions has the potential to give the mechanism greater teeth. From the point of view of environmental conservation, long-term shifts in the development loan process pursued by international organizations such as the World Bank can indeed be furthered by the establishment of more formal supervisory processes, allowing an independent body such as the Panel to intervene between the organization and the complainant, with the goal of ascertaining the law and assessing compliance with existing obligations. The mechanism's impacts in this regard can be reinforced by, *inter alia*, the Board continuing to authorize investigations when recommended by the Panel, the Panel benefiting from greater leeway in the conduct of investigations, all parties in the procedure being granted equal procedural rights, and by the Bank's consistent implementation of adequate remedial and mitigatory measures on the basis of Panel findings.

In conclusion, the development of accountability mechanisms such as the Panel suggests that States can no longer evade certain fundamental principles of public policy behind the 'veil' of international organizations, because the latter's collective decisions may be subjected to accountability standards. That the World Bank, amongst other organizations, has committed itself to pursue its operations in accordance with multilateral environmental norms evidences the progressive externalization of the activities of international organizations. Originally conceived as operating exclusively *en vase clos*, they are now expected to take full account of developments in international law and policy. In a comprehensive and integrated international legal order, international financial organizations have become the addressees of normative and policy standards stemming from sustainable development. Participatory requirements also dictate that non-state actors—whether individuals, interest groups, non-governmental organizations, or local communities—should be legally protected against the adverse consequences that can result from the loan development operations of organizations. The Inspection Panel, as illustrative of these developments, represents 'an important step towards securing transparency and fairness in the operations of international organisations, bold in its involvement of "communities" in the process'.<sup>275</sup>

<sup>275</sup> Collier and Lowe, *The Settlement of Disputes in International Law* (1999), p. 121.