

The World Bank Inspection Panel in its Seventh Year: An Analysis of its Process, Mandate, and Desirability with special reference to the China (Tibet) case

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I. Introduction

The world of international law saw the establishment of a variety of new types of entities during the last decade of the twentieth century. One such entity is the World Bank¹ Inspection Panel which has the competence to investigate complaints brought by private parties in borrowing countries alleging that the World Bank has failed to follow its own policies and procedures when designing, appraising and/or implementing Bank-financed projects. The Inspection Panel was created by the Bank's Executive Directors² on 22 September 1993³ in an attempt to increase the World Bank's accountability *vis-à-vis* non-state actors, and to improve compliance with, *inter alia*, its social and environmental policies.⁴ Since Panel operations began in September 1994,⁵ the Inspection Panel has received 21 Requests for Inspection of Bank-financed projects in Nepal, Ethiopia, Tanzania, Brazil, Chile, Bangladesh, Ar-

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- ¹ As used in this article, the term "World Bank" or "Bank" covers both the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA).
 - ² There are 24 Executive Directors. Five Directors are appointed by members with the largest number of shares. These are France, Germany, Japan, the United Kingdom, and the United States. The other 19 are elected every two years by the Governors of the remaining members. Normally, the Executive Directors meet twice a week to oversee the Bank's business.
 - ³ Resolution establishing the Inspection Panel (No. 93-10 for the IBRD and 93-6 for IDA) of 22 September 1993, circulated as document No. SecM93-988 (IBRD) and SecM93-313 (IDA), hereinafter the Resolution. The Resolution was published in *ILM* 34 (1995), 520 et seq. with an introductory note by M. Ragazzi, and is available on the Bank's website at (<http://www.worldbank.org>). For a detailed account of the discussions on and motives for the establishment of the Inspection Panel, see I.F.I. Shihata, *The World Bank Inspection Panel: In Practice*, 2nd edition, 2000, 1 et seq.
 - ⁴ Cf. The Centre for International Environmental Law (CIEL), "The World Bank Inspection Panel," available at (<http://www.ciel.org>); also S. Schlemmer-Schulte, "Introductory note to the conclusions of the second review of the World Bank Inspection Panel," *ILM* 39 (2000), 243 et seq.; The Inspection Panel Annual Report 1998-1999, 3.
 - ⁵ The first three Panel Members were appointed in April 1994; they took office in August 1994, and the Inspection Panel's office opened for business in September 1994. Cf. S. Schlemmer-Schulte, "The World Bank Inspection Panel: A Record of the First International Accountability Mechanism and Its Role for Human Rights," *Human Rights Brief* 6 No. 2 (1998), available at (<http://www.wcl.american.edu>)

gentina/Paraguay, India, Lesotho/South Africa, Nigeria, China, Kenya, and Ecuador.⁶ Most requests concerned infrastructure and environmental and land reform projects, and two requests were on adjustment operations.⁷

This article covers the period up to March 2001. It examines the general functioning of the Panel mechanism, the Panel's mandate, and its costs and benefits through a case study of the Quinghai component of the *China: Western Poverty Reduction Project* (China-Tibet). The Quinghai Project, which was challenged by a Request for Inspection in June 1999, was chosen for various reasons. First, it is one of the Bank's most controversial projects because of its serious social and environmental effects. The Request for Inspection regarding the Quinghai Project does not only deserve closer examination because of the attention it has attracted, but also because it was the first request that went through a full investigation process. Second, the Panel review of the Quinghai Project makes an interesting case study because of the outcome: In the end, China withdrew its loan application and announced that it would pay for the project itself. Finally, and most importantly, the Quinghai Project has not been the subject of significant academic analysis to date unlike earlier Inspection Panel cases. This is despite the fact that the Panel, in its Investigation Report, deals with fundamental questions concerning, *inter alia*, the interpretation and application of Bank policies and procedures, and the approach it has taken in this regard is worth examining more closely.

The following section summarizes the background to the Quinghai case. Part III describes the Inspection Panel mechanism, and discusses special issues and developments regarding the assessment of the eligibility of a Request for Inspection. It will also deal with the Panel's mandate and its legal nature in general. A succeeding section will address the limits of the Panel's mandate, particularly with regard to the interpretation, application, and enforcement of Bank policies and procedures. Part V considers the consequences of Inspection Panel Investi-

⁶ For a list of all Panel Requests, see The Inspection Panel, "Panel Request: Notices of Registration from requests received by the Inspection Panel," available at the World Bank's website.

⁷ For a summary of the Panel's cases covering the period until 30 June 1999, see Shihata, see note 3, 99 et seq. See also S. Schlemmer-Schulte, "The World Bank's Experience With Its Inspection Panel," *ZaöRV* 58 (1998), 353 et seq.; R.E. Bissel, "Recent Practice of the Inspection Panel of the World Bank," *AJIL* 91 (1997), 741 et seq.

gations and Recommendations, particularly for cases resulting in the cancellation of the Bank's support of specific projects. A concluding section assesses the Panel's desirability.

II. China: Western Poverty Reduction Project (Quinghai Component)

The *China: Western Poverty Reduction Project*, which is the 6th World Bank-assisted poverty reduction program in China,⁸ aims at reducing absolute poverty in remote and inaccessible villages of three Chinese provinces: the Inner Mongolia Autonomous Region, Gansu and Quinghai, the latter being located in western China.⁹ Only the Quinghai component of the Poverty Reduction Project (henceforth: Quinghai Project) was the subject of both a Request for Inspection and an investigation by the Inspection Panel. The Quinghai Project aims to alleviate poverty through the resettlement of 57,775 farmers who currently practice high-altitude rain-fed agriculture in the mountainous areas of five counties in Haidong Prefecture and one county in Xining City Prefecture (Move-out area). The farmers are to be resettled to the dry-land area of the Haixi Tibetan and Mongolian Autonomous Prefecture in Dulan County (Move-in area), where the renovation of an existing eight meter dam, the construction of a new 40 meter dam and of two canals, 29 and 56 km, respectively, are planned to supply water to irrigate some 26,500 ha of land.¹⁰

In late spring 1999, the World Bank Management, responding to harsh external criticism of the Quinghai Project by environmental activists, human rights advocates, Tibet Support Groups, and other civil society groups opposed to the Bank's involvement in the Quinghai

⁸ Previous programs were supported in the Southwest, the Gansu-Hexi Corridor, the Quinba Mountains, Shanxi and the Ningxia Hui Autonomous Region. Cf. *The Inspection Panel Investigation Report: The Quinghai Project – A Component of the China: Western Poverty Reduction Project*, Credit No. 3255-CHA and Loan No. 4501-CHA of 28 April 2000, 2, note 1. The *China: Western Poverty Reduction Project* became part of the Bank's China portfolio in January 1997; preparatory work on the project began early in the 1990s. Cf. The World Bank, *China: Strategies for Reducing Poverty in the 1990s*, Report No. 10409-CHA of 29 June 1992.

⁹ Cf. The Inspection Panel Investigation Report, see note 8, 2.

¹⁰ *Ibid.*, 3–4.

Project, primarily because of the project's severe social and environmental effects,¹¹ conducted an internal review of the project's environmental and social aspects. The review resulted in the proposal of refinements and improvements, fresh negotiations with the Chinese Government, and, following agreement on modifications, a revised loan package.¹² On 18 June 1999, however, after a series of meetings with the Bank Management and a barrage of complaints from concerned individuals, organizations, and parliamentarians failed to result in the Bank's withdrawal from the Quinghai Project, a Request for Inspection was filed with the Inspection Panel.¹³ The Requester's main claim was that "the resettlement of the new migrants... [would] directly and adversely impact 4.000 local people..., [and] have indirect impacts on the entire county, including a serious risk of escalation of ethnic tension and conflicts over resources."¹⁴ They attributed the alleged harm to Management's failure to comply with Bank policies and procedures, in particular those on Indigenous Peoples, Involuntary Resettlement, and Environmental Assessment.¹⁵

Notwithstanding the Request for Inspection, the World Bank, on 24 June 1999, decided to finance with US\$ 160 million the entire *Western Poverty Reduction Project*,¹⁶ US\$ 40 million of which were intended for

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- ¹¹ Public controversy regarding the Quinghai Project was triggered by the publication of an article by the Tibet Information Network (TIN), criticising particularly the proposed resettlement of non-Tibetans into the Tulan Mongolian and Tibetan Autonomous Prefecture in Quinghai Province. Cf. Tibet Information Network, "World Bank Funds Controversial Population Transfer Scheme," *News Update* of 27 April 1999.
- ¹² Cf. The Inspection Panel Investigation Report, see note 8, 6.
- ¹³ Cf. Press Release by the International Campaign for Tibet, "World Bank Approves Chinese Population Transfer ICT Inspection Panel Claim Delays Project Implementation & Funding," 24 June 1999, available at (<http://www.tibet.com>)
- ¹⁴ Cf. The Inspection Panel, *Report and Recommendation on Request for Inspection; Re: Request for Inspection China: Western Poverty Reduction Project*, Credit No. 3255-CHA and Loan No. 4501-CHA of 24 August 1999, 2, para. 6.
- ¹⁵ *Ibid.*, 2 et seq., paras. 6 et seq.
- ¹⁶ Of this amount, US\$ 100 million were to be provided in concessional funds through a credit by IDA, No. 3255-CHA and US\$ 60 million through a loan by IBRD, No. 4501-CHA. For the entire poverty reduction project, US\$ 311 million were required. Cf. The Inspection Panel Investigation Report, see note 8, 6.

the benefit of people in Quinghai, for the people who were being resettled, those who were staying, and those who live in and around the Move-in area.¹⁷ It is important to note, however, that the Executive Directors "in an unusual move"¹⁸ approved this loan and credit with the proviso "that no work be done and no funds be disbursed for the ... Quinghai component of the project until the Board decides on the results of any review by the ... Inspection Panel."¹⁹ On 9 September 1999, the Executive Directors, following the Inspection Panel's Recommendation of 24 August 1999, authorized the Panel to investigate whether the Bank has violated one or more of the following operational directives (OD) and procedures (OP) in the preparation (design and appraisal) of the Quinghai Project: Disclosure of Information (Bank Procedure (BP) 17.50), Environmental Assessment (OD 4.01), Indigenous Peoples (OD 4.20), Involuntary Resettlement (OD 4.30), Pest Management (OP 4.09), Safety of Dams (OP/BP 4.37), Retroactive Financing (OD 12.10), and Investment Lending: Identification to Board Presentation (OD 10.00).²⁰ The investigation was undertaken between September 1999 and January 2000 and included a field visit to Beijing and Quinghai Province.²¹ The Inspection Panel Investigation Report, which was presented to the Executive Directors on 28 April 2000, concluded that Bank Management had violated seven of ten safeguard policies, *inter alia*, Operational Directives regarding Environmental Assessment, Indigenous Peoples, and Involuntary Resettlement, as well as Operational Procedures concerning Pest Management and Investment Lending, and Bank Procedure 17.50 regarding Disclosure of Information.²²

¹⁷ Ibid.

¹⁸ Cf. The World Bank, "World Bank approves China Western Poverty Reduction Project: Quinghai Component Delayed for Inspection Panel Review," *Press Release* of 24 June 1999, para. 1.

¹⁹ Ibid.

²⁰ IDA and IBRD, *Proposed Decision on Request for Inspection – China Western Poverty Reduction Project (Credit No. 32550 CHA and Loan No. 4501 – CHA)*, INSP/R99-6/2, of 7 September 1999.

²¹ For further information on the investigation process, see The Inspection Panel Investigation Report, see note 8, 9–14.

²² With regard to the provisions of OD 4.00 Environmental Policy for Dam and Reservoir Projects; OP/BP 4.37 Safety of Dams; BP 10.00 Investment Lending: Identification of Board Presentation; and OP/BP 12.10 Retroactive Financing, no violation was noticed.

In a statement issued on 6 July 2000, the Chinese Government harshly criticized the Inspection Panel Report, putting, *inter alia*, forward, that “[t]he Panel [in the investigation of the Quinghai component] takes on the role of a critic of the Chinese government and the social and political system of China, rather than carry out a review of Bank staff and Management’s compliance with Bank policies,” and that it “is being used as an instrument to oppose China politically, acting as a proxy for those who are waging a campaign against the sovereignty and integrity of the country.”²³

The World Bank Executive Directors, after an extensive debate on 6 July 2000,²⁴ failed to reach a decision on the Inspection Panel’s recommendation and agreed to resume talks the following day. The choices the Directors faced were (a.) to go ahead with the project, (b.) to cancel it, or (c.) to carry out further environmental and social studies over the following 15 to 18 months before providing any funds.²⁵ On 7 July 2000, however, before the Executive Directors were able to reach a consensus, China withdrew its application for the US\$ 40 million Quinghai loan on the grounds that new conditions were unacceptable as the loan conditions had already been agreed upon, and noted that it would pay for the project itself.²⁶ China’s withdrawal led to the Bank’s departure from the Quinghai Project.²⁷

²³ *Chinese Government’s Statement on the Inspection Panel Investigation Report for the China: Western Poverty Reduction Project (Quinghai Component)* of 6 July 2000, 1 and 3 et seq.

²⁴ Cf. San José Mercury News, “World Bank still mulling resettlement loan to China” of 7 July 2000.

²⁵ The Bank’s President, James Wolfensohn, favored the third choice. Cf. *ibid.*

²⁶ The Chinese Executive Director, Zhu Xian, read the following statement to the Executive Directors on behalf of his authorities: “China accepts no conditions beyond Management’s original recommendations that had been agreed between Management and my authorities It is unacceptable to my authorities that other Bank shareholders would insist on imposing additional conditions on Management’s recommendations – namely coming back to the Board for approval again for a project that was already approved last year. If that is the case, China will therefore turn to its own resources to implement the Quinghai Component of the project, and in its own way. ... We regret that because of political opposition from some shareholders the World Bank has lost a good opportunity to assist some of the poorest people in China, probably in the world.” The World Bank Group, “China to Implement Quinghai Component of the China Western

III. The Inspection Panel Mechanism and the Panel's Mandate

The Inspection Panel's mandate and the Panel's basic operating principles are laid out in the Resolution which founded the Panel and the two Clarifications thereto.²⁸ The Panel's Operating Procedures, adopted by the Panel members on 19 August 1994 to implement the Resolution, provide details of the Resolution's operational provisions.²⁹

1. Panel Membership and Independence

As required by the Resolution, the Panel is composed of three members of different nationalities from Bank member countries, who are appointed by the Executive Directors upon nomination by the Bank's President.³⁰ Minimum qualifications relating to the expertise of the

Poverty Reduction Project with its own Resources," News Release No. 2001/004/EAP of 7 July 2000.

- ²⁷ See, e.g. J. Peterson, "Tibet supporters celebrate decision," Los Angeles Times of 8 July 2000 in the San José Mercury News.
- ²⁸ Pursuant to para. 27 of the Resolution, the Executive Directors shall review the experience of the inspection function. Thus far, the Inspection Panel has been subject to two general reviews by the Bank's Executive Directors. The first review was concluded on 17 October 1996 with the approval of the 1996 Clarifications of the Resolution. In April 1999, the second review of the Panel's operations which had been launched by the Executive Directors in March 1998, ended with the approval of the second Clarifications of the Resolution. For the full text of the 1996 and 1999 Clarifications, see: The Inspection Panel, "Resolution – Review of the Resolution Establishing the Inspection Panel: Clarifications of Certain Aspects of the Resolution" of 17 October 1996, and "Resolution – Conclusions of the Board's Second Review of the Inspection Panel" of 20 April 1999, respectively, available at the World Bank's website. For a comprehensive analysis of the 1996 Clarifications, see Shihata, see note 3, 156–172. For a discussion of the 1999 Clarifications, see Schlemmer-Schulte, see note 4, 243 et seq.
- ²⁹ Operating Procedures as adopted by the Panel on 19 August 1994, available at the World Bank's website. The Operating Procedures comprise, *inter alia*, guidance on how to prepare a request (Annex 2), together with an attached model form.
- ³⁰ Resolution, see note 3, para 2. The first three Panel Members were Mr. Ernst-Günther Bröder (Germany), who served as the Panel's first Chairperson from August 1994 to July 1996, Mr. Richard E. Bissell (United

Panelists are stipulated in the Resolution.³¹ Thus far, one Inspector, the Chairperson, works on a full-time basis, and the other two Inspectors work part-time.³²

Since the creation of the Inspection Panel, the Executive Directors repeatedly affirmed the importance of the Panel's independence.³³ Their concern in this respect is reflected in the Resolution which contains various requirements to assure the independence of the Panelists.³⁴ The Resolution provides, first, that former Executive Directors, Alternate Executive Directors, Advisors and staff members of the Bank Group may only serve on the Inspection Panel, if two years have passed since the end of their service in the World Bank Group.³⁵ Secondly, Panelists shall serve a single non-renewable five year term of office.³⁶ Thirdly,

States), Chairman from 1 August 1996 to 31 July 1997, and Mr. Alvaro Umaña Quesada (Costa Rica), Chairman from 1 August 1997 to 31 July 1998, who was replaced by Mr. Edward S. Ayensu in 1998. Mr. Bissell was replaced by Mr. Jim MacNeill on 1 August 1998. The current Panel Members are Mr. MacNeill, who was unanimously re-elected by the members of the Inspection Panel to serve as Chairman of the Panel effective 1 March 2001 until 28 February 2002, (cf. The Inspection Panel, Press Release, "Canadian Continues to head the World Bank's Inspection Panel" of 1 March 2001), Mr. Ayensu, and Ms. Maartje van Putten who was appointed October 1999.

³¹ These minimum qualifications are that the Panel Members (a.) are able to "deal thoroughly and fairly with the request," (b.) have integrity and be independent of Bank's management, and (c.) that they have "exposure to developmental issues and to living conditions in developing countries." Finally, it would be "desirable" for the Panelists to have knowledge and experience of the Bank's operations. Resolution, see note 3, para.4.

³² See Operating Procedures, see note 29, Composition.

³³ See, e.g. the 1999 Resolution-Conclusions of the Board ..., see note 28.

³⁴ Cf. D. D. Bradlow, "The World Bank's Independent Inspection Panel," *IJIL* 33 (1993), 59 et seq., (61).

³⁵ Resolution, see note 3, para. 5. Current Inspection Panel Members, prior to serving on the Panel, have been, *inter alia*, policy advisor on the environment, energy, management, and sustainable development to international organizations, governments, and industry, Mr. MacNeill; Senior Advisor to the President of the African Development Bank and the Bank's Director for Central Projects, Mr. Ayensu, and both a member of the European Parliament and of the Committee on Development and Cooperation, Ms. van Putten. Cf. The World Bank Group, The Inspection Panel, "Member Biographies," available at the World Bank's website.

³⁶ Resolution, see note 3, para. 3.

Panel Members, after their term of office expires, will be ineligible for employment with the World Bank Group.³⁷ And fourthly, Panelists may only be removed from office by a decision of the Executive Directors.³⁸ It must be emphasized from the outset, however, that unlike national or international courts of law, the Panel is not a truly independent body despite these safeguards for independence. The Panel's independence is primarily "counterbalanced by the fact that it only has advisory powers."³⁹ As will be explained later in this paper, the Panel has only the power to make a recommendation to the Executive Directors as to whether the matter of request should be investigated.⁴⁰ It can not start an investigation of the request without prior approval by the Executive Directors.⁴¹

2. The General Functioning of the Panel Mechanism

The inspection process is to be performed in two phases. In the first phase, the Panel determines the eligibility of the requesters and the registered⁴² Request for Inspection after Management has responded to the

³⁷ Ibid., para. 10.

³⁸ Ibid., para. 8.

³⁹ Cf. Bradlow, see note 34, 61.

⁴⁰ Cf. Resolution, see note 3, para. 19.

⁴¹ Cf. Th. Buß, "Zwischen Immunität und Rechtsschutz: Das Inspection Panel innerhalb der Weltbankgruppe," *Recht der internationalen Wirtschaft* 5 (1998), 352 et seq., (357). Buß argues that, although the Panel's independence would have further been emphasized if the final decision on whether to investigate the matter lied with the Panel, this distribution of competences is acceptable as long as the Executive Directors do not simply ignore or disregard the final Inspection Panel Report.

⁴² Pursuant to para. 16 of the Panel's Operating Procedures "(w)hen the Panel receives a Request the Chairperson, on the basis of the information contained in the Request, shall either promptly register the Request, or ask for additional information, or find the Request outside the Panel's mandate." The wording of this provision suggests that the Panel registers the request only after having decided that it is *prima facie* not barred from Panel consideration. This assumption is confirmed by para. 22 of the Operating Procedures which stipulates that the Panel's Chairperson notifies the Requesters of his/her refusal to register the Request if he/she finds "that the matter is without doubt manifestly outside the Panel's mandate." In its Notices of Registration, the Panel's current Chairperson, Mr. MacNeill, pointing to the fact "that the Panel's 'registration' process is often misunderstood,"

concerns expressed in the claim.⁴³ If the Panel decides the request is meritorious, this phase concludes with a Panel Recommendation to the Executive Directors, to be followed by a decision of them on whether or not to approve an investigation.⁴⁴ If the Panel does not recommend an investigation and the Executive Directors agreed, the case is considered closed. The Executive Directors may, however, authorize an investigation against the Panel's recommendation if it so warrants.⁴⁵

If the Board approves an investigation, the second phase begins. In this phase, the Inspection Panel carries out a formal investigation on the merits of the request. The investigation stage⁴⁶ ends with the submission of a Panel Report to the Bank's President and the Executive Directors. The Report includes the Inspectors' findings on whether the Bank has complied with the relevant Bank policies and procedures, as

emphasizes that "registration" is a purely administrative procedure established by the Panel which implies no judgment whatsoever concerning the eligibility of the request. Cf., e.g. The Inspection Panel, *Notice of Registration – Re: Request for Inspection – Proposed China: Western Poverty Reduction Project* of 18 June 1999.

⁴³ Bank Management has 21 working days to respond to the allegations of the Requesters, Resolution, see note 3, para. 18. Pursuant to para. 3 of the 1999 Clarifications, Management, in its initial response to the Request for Inspection, must provide evidence that "it has complied with the relevant Bank operational policies and procedures; or that there are serious failures attributable exclusively to its own actions or omissions in complying, but that it intends to comply with the relevant policies and procedures, or that the serious failures that may exist are exclusively attributable to the borrower or to other factors external to the Bank, or that the serious failures that may exist are attributable both to the Bank's non-compliance with the relevant operational policies and procedures and to the borrower or other external factors." As required by the Resolution, a Request for Inspection presupposes that the Requester has already taken actions to bring the issue to the attention of the Management. The – necessarily – written request must explain Management's response to such action. Cf. Resolution, see note 3, para. 16.

⁴⁴ In nine registered cases, the Inspection Panel recommended investigations. In five cases, the Executive Directors approved the recommendations for investigation, which had subsequently been conducted. The Panel's Report (including the Request for Inspection and Management's Response) is made publicly available at the Bank's InfoShop and the respective Bank Country Office three days after the Board's decision on whether to approve an investigation or not. See The Inspection Panel Annual Report 1998–1999, 3.

⁴⁵ Cf. *ibid.*

⁴⁶ Panel investigations are not time-bound. Cf. *ibid.*

well as all relevant facts.⁴⁷ Within six weeks from receiving the Panel Report, Bank Management has to provide the Executive Directors with its recommendations regarding the Panel's findings.⁴⁸ Based on both the Panel and the Management Report, they then make a final decision on how to respond to the investigation report.⁴⁹ The Executive Directors must inform the complainants about the Panel Report and subsequent actions taken by the Bank.⁵⁰

As the Complaint Process has been well described elsewhere,⁵¹ only some aspects of the Panel's assessment of the eligibility of a complaint ("admissibility" stage) will be discussed in the following section.

a. Eligibility Criteria in General

The Resolution provides for certain eligibility criteria which, in any case, must be fulfilled to establish the Panel's competence or "jurisdiction."⁵² The 1999 Clarifications for the application of the Resolution⁵³ expressly stipulate the following "technical eligibility criteria":

- (1) The affected party consists of two or more persons with common interests or concerns, who are in the borrower's territory (Resolution para. 12).
- (2) The request asserts in substance that a serious violation by the Bank of its operational policies and procedures has or is likely to have a material adverse effect on the requester (Resolution paras. 12 and 14 lit.(a)).

⁴⁷ Resolution, see note 3, para. 22.

⁴⁸ *Ibid.*, para. 23.

⁴⁹ Pursuant to the Resolution, "the Bank shall, within two weeks of the Executive Directors' consideration of the matter, inform such party of the results of the investigation and the action taken in its respect, if any." *Ibid.*

⁵⁰ *Ibid.*

⁵¹ See e.g. I.F.I. Shihata, *The World Bank Inspection Panel*, 1994, 53 et seq.; *id.*, see note 3, 55 et seq.; Bradlow, see note 34, 59 et seq.; *id.*, "International Organizations and Private Complaints: The Case of the World Bank Inspection Panel," *Va. J. Int'l L.* 34 (1994), 553 et seq., (581 et seq.); D. D. Bradlow/S. Schlemmer-Schulte, "The World Bank's New Inspection Panel: A Constructive Step in the Transformation of the International Legal Order," *ZaöRV* 54 (1994), 392 et seq., (396 et seq.).

⁵² Resolution, see note 3, paras. 12–14.

⁵³ See note 28.

- (3) The request asserts that its subject matter has been brought to Management's attention and that, in the requester's view, Management has failed to respond adequately by demonstrating that it has followed or is taking steps to follow the Bank's policies and procedures (Resolution para. 13).
- (4) The matter is not related to procurement (Resolution para. 14 lit.(b)).
- (5) The related loan has not been closed or substantially disbursed (Resolution para. 14 lit.(c)).
- (6) The Panel has not previously made a recommendation on the subject matter or, if it has, the request asserts that there is new evidence or circumstances not known at the time of the prior request (Resolution para. 14 lit.(d)).

Pursuant to para. 7 of the 1999 Clarifications, the Panel visits the project country if it believes that this is necessary to establish the eligibility of the request.⁵⁴

b. The Eligibility of the Requesters: Representation of Affected People

Under the Resolution, the term "affected party ... which is not a single individual" covers "a community of persons such as an organization, association, society or other grouping of individuals" living in the project area, but not a single individual.⁵⁵ The Request for Inspection can either be submitted by the affected party itself or by a representative acting for and on behalf of the affected party.⁵⁶ Although the representative should, as a rule, be local, foreign representatives may be allowed to file a claim if appropriate representation is not locally available.⁵⁷ Complaints by external NGOs acting on their own are, however, not eligible.⁵⁸

Although the question of "non-local" representation concerns the admissibility of the complaint, it is not the Panel which decides on whether the Requester's contention that appropriate local representation is not available is convincing, but the World Bank's Executive Di-

⁵⁴ Ibid.

⁵⁵ Resolution, see note 3, para. 12.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Cf. Shihata, 1994, see note 51, 58.

rectors.⁵⁹ The agreement on the requirement of the Executive Directors' approval of foreign representation as embodied in the Resolution was a compromise solution. The Executive Directors who, in August 1993, considered draft resolutions in a Committee of the Whole,⁶⁰ were split on the question whether an affected party may have a foreign representative, with some Executive Directors representing developed countries being in favour of such representation and other Executive Directors representing borrowing countries opposing it.⁶¹ The Panel's legal architect, Ibrahim Shihata, remarked on this discussion:

"The issue was obviously of great importance to the concerned NGOs in developed countries which wanted to be in a position to represent affected parties in borrowing countries who, in the judgment of these NGOs, may not always be able to present their case against the Bank. It was also an important issue for some of the governments of borrowing countries which feared intervention of foreign parties in the relationship between these governments and their citizens and the increased politicization and internationalization of their domestic issues."⁶²

According to Shihata, the solution was "meant to assure those who feared abuse of this arrangement that the Board remained the final arbiter on whether the situation justified it."⁶³ Notwithstanding the reasons for the agreement on the current solution, the decision of the Executive Directors drafting the Resolution to have the politically motivated Executive Directors, who are, *inter alia*, responsible for *policy* decisions affecting the Bank's operations,⁶⁴ rather than the independent

⁵⁹ Resolution, see note 3, para. 12.

⁶⁰ For a detailed account on the preparatory work in the Bank's Management and Board leading to the adoption of the Resolution, see Shihata, 1994, see note 51, 30 et seq.

⁶¹ Cf. *ibid.*, 57. It may be interesting to note that in earlier draft resolutions, no reference was made to representation of the affected party in the submission of Requests for Inspection to the Panel. Cf. *ibid.*

⁶² *Ibid.*, 57 et seq.

⁶³ *Ibid.*, 58.

⁶⁴ See The World Bank Group, "Executive Directors and Voting Power," available at the Bank's website. The Executive Directors primary responsibility is to conduct the general operations of the Bank, and, for this purpose, to exercise all the powers delegated to them by the Board of Governors. The Executive Directors are also responsible for the approval of loans. Cf. IBRD, Articles of Agreement (as amended effective 16 February

Inspection Panel determine whether the exceptional circumstances requirement for non-local representation has been met shows, that the Inspection Panel cannot be regarded as a truly judicial, independent body, but as a “quasi-judicial supervisory body”⁶⁵ at best.⁶⁶

An examination of the Requests for Inspection received by the Panel to date depicts an interesting development, which not only regards the Inspection Panel complaint process, but a universal evolution concerning growing participation of non-governmental organizations (NGOs) and other organizations of civil society⁶⁷ in international institutions and processes.⁶⁸ Although the majority of the altogether 21 formal Requests for Inspection submitted to the Panel as of 1 March 2001⁶⁹ were filed by individuals — groups of citizens/residents living in the borrower’s territory,⁷⁰ or associations and organizations representing them-

1989), Article V, Section 4. Executive Directors, IDA, Articles of Agreement (effective 24 September 1960), Article VI, Section 4.

⁶⁵ Bradlow, see note 51, 602. Cf. also B. Kingsbury, “Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples,” in: G. S. Goodwin-Gill/ St. Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie*, 1999, 323 et seq., (330).

⁶⁶ Cf. infra III. 3.b.

⁶⁷ As to the terminological differences between these two groups, see, e.g., the World Bank’s definition of NGOs and civil society organisations. According to GP 14.70, “(t)he term ‘NGO’ refers to a myriad of different types of organizations. At its broadest, it includes all groupings of individuals that fall outside the public and non-profit sectors, whether legally constituted or informal, established or transient.” In contrast, “civil society,” is understood by the Bank to consist of “non-profit organizations and special interest groups, either formal or informal, working to improve the lives of their constituents. Civil society organizations (CSOs) include local parliamentarians, media, and policy development and research institutes.” GP 14.70 – Involving Nongovernmental Organizations in Bank-Supported Activities (February 2000) (note 1 of GP 14.70).

⁶⁸ For an analysis of the emergence of NGO’s in general, see Ch. Ku, “The Developing Role of NGO’s in Global Policy and Law-Making,” *Proceedings of the International Law Association – First Asian-Pacific Regional Conference*, 1996, 408 et seq.

⁶⁹ Cf. The Inspection Panel, Press Release, “Canadian Continues to head the World Bank’s Inspection Panel” of 1 March 2001, available at the World Bank’s website.

⁷⁰ In the following cases, Requests for Inspection were submitted by a group of citizens or individuals residing in the project area: The very first Request

selves⁷¹ — who claimed that their rights/interests had been adversely affected by acts and omissions of either the IDA or the IBRD, the more recent claims have been filed by NGOs acting for and on behalf of af-

for Inspection, concerning the *Nepal: Arun III Hydroelectric Project* was filed by citizens of Nepal, two of whom had been represented by individuals as they wished to remain anonymous, see The Inspection Panel, *Notice of Registration – Re: Request for Inspection – Nepal: Arun III Hydroelectric Project* of 3 November 1994; the second Request for Inspection regarding the *Tanzania: Power VI Project* was submitted by six residents of Tanzania representing themselves, see: The Inspection Panel, *Notice of Registration – Re: Request for Inspection – Tanzania: Power VI Project (Cr.2489-TA)* of 16 June 1995; and the request regarding the *Bangladesh: Jute Sector Adjustment Credit* was submitted by a group of citizens of Bangladesh who are shareholders/CEOs of private sector jute mills, see: The Inspection Panel, *Notice of Registration – Re: Request for Inspection – Bangladesh: Jute Sector Adjustment Credit 2567-BD* of 13 November 1996. In addition, Requests for Inspection regarding the following projects were submitted by a group of about 121 Brazilian individuals; by residents of Singrauli, India; by residents of the township of Alexandria, Guateng Province, South Africa; and by, *inter alia*, 853 individuals living in the project area, respectively: The *Brazil: Itaparica Resettlement and Irrigation Project, Loan 2883-1-BR* of 12 March 1997; the *India: NTPC Power Generation Project, Loan 3632-IN* of 1 May 1997; the *Lesotho/South Africa: Proposed Loan for Phase 1B of Lesotho Highlands Water Project* of 6 May 1998, and the *Brazil: Land Reform and Poverty Alleviation Pilot Project*, first Request for Inspection: 14 December 1998; second Request for Inspection: 14 September 1999, respectively. All documents are available at the World Bank's website.

⁷¹ This was the case for the Requests for Inspection regarding (a.) the *Nigeria: Lagos Drainage and Sanitation Project* which was submitted by an organization called the Social and Economic Right Action Center (SERAC) which represented, *inter alia*, themselves, see: The Inspection Panel, *Notice of Registration – Re: Request for Inspection – Nigeria: Lagos Drainage and Sanitation Project*, IDA Credit No. 2517 of 25 June 1998; and (b.) the *Brazil: Land Reform and Poverty Alleviation Pilot Project* see: The Inspection Panel *Notice of Registration – Re: Request for Inspection – Brazil: Land Reform and Poverty Alleviation Pilot Project*, Loan No. 4147 BR of 14 December 1998. The third Request for Inspection concerning the *Brazil: Rondonia Natural Resources Management Project* was submitted by various Brazilian associations, community centres, and institutes as well as by “Seringueiros de Machandinho”, see The Inspection Panel, *Notice of Registration – Re: Request for Inspection – Rondonia Natural Resources Management Project*, Loan 3444-BR of 19 June 1995, available at the World Bank's website.

fectured parties in the project area.⁷² The most noteworthy request in this connection is, as already mentioned, the Request for Inspection regarding the Quinghai Project. Whereas in the preceding cases of representation, the requests were submitted by local representatives, in the Quinghai case, the inspection process was triggered by a U.S.-based NGO, the International Campaign for Tibet (ICT), which acted for and on behalf of "Tibetan and Mongolian ethnic peoples" living in the project area.⁷³ ICT claimed that its representational authority was:

⁷² These Requests are the following: The Request for Inspection concerning the controversial *China: Western Poverty Reduction Project*, submitted by the International Campaign for Tibet (ICT) on 18 June 1999; the Request regarding the *Argentina: Special Structural Adjustment Loan*, Loan 4405-AR of 26 July 1999 which was filed by a group of attorneys of the Centro de Estudios Legales y Sociales – CELS (Center for Legal and Social Studies), a distinguished Argentine NGO, representing about 418 beneficiaries of the Pro-Huerta program which provides food and nutrition assistance to the absolute poor; the request concerning the *Kenya: Lake Victoria Environmental Management Project* which was submitted by RECONCILE (Resources Conflict Institute), a Kenyan NGO, which also represented a OSIENALA (Friends of Lake Victoria), an NGO located in Kisumu, and the Kenya Chapter of Ecovic (the East African Communities Organization for Management of Lake Victoria Resources) which represent communities living along the Kenya side of Lake Victoria; and the request concerning the *Ecuador: Mining Development and Environmental Control Technical Assistance Project* filed by DECOIN, Defensa y Conservación Ecológica de Intag (Defense and Ecological Conservation of Intag), an Ecuadorian NGO, which submitted the request together with four representatives of the Asociación de Caficultores Rio Intag (Association of the Coffee Growers of Rio Intag), all residents in the project area. See: The Inspection Panel, *Notice of Registration – Re: Request for Inspection – Proposed China Western Poverty Reduction Project*; *Notice of Registration – Re: Request for Inspection – Argentina: Special Structural Adjustment Loan*, Loan 4405-AR; The Inspection Panel, "Press Release – Kenya Lake Victoria Environmental Management Project: Inspection Panel Investigation to begin 8 May 2000, and The Inspection Panel, Press Release – *World Bank Authorizes an Inspection Panel Investigation of 16 May 2000*, respectively. All documents are available at the Bank's website.

⁷³ See International Campaign for Tibet (ICT), *Request for Inspection: China Western Poverty Reduction Project*, Credit No. 32550 CHA and Loan No. 4501-CHA, INSP/R99-6 of 18 June 1999. With regard to that case, the Inspection Panel also received a letter from the International Committee of Lawyers for Tibet (ICLT) to which a 5 page report was attached detailing legal arguments against the project. Cf. The Inspection Panel, Report and

“based on its long-standing involvement in the project area and its mandate to advocate on behalf of the interests of the Tibetan people. In this capacity, the ICT has received letters from inside the project area seeking international assistance in raising concerns about the devastating impacts of this project on local peoples. In addition, the Tibetan Government in Exile and a Tibetan spiritual center in New York have sought ITC’s assistance in filing a claim to the World Bank Inspection Panel. Given the location of this project and the situation faced by local people, this claim meets the exceptional circumstances requirement for non-local representation.”⁷⁴

The Inspection Panel, in its Report on the eligibility of the Request and the Requesters concluded “that the Request met all eligibility criteria required under the Resolution ..., except that the Board itself had to decide on whether external representation was appropriate.”⁷⁵ In its August 1999 Memorandum to the Executive Directors, the Chairman of the Inspection Panel did, therefore, request that the Executive Directors agreed that “appropriate representation” was not locally available “for purposes of eligibility of the requesters under paragraph 12 of the Resolution.”⁷⁶ Interestingly, the Executive Directors authorized the Panel to conduct an investigation into the Quinghai Project without deciding on the question of appropriate representation on the grounds that:

“Board determination of the issue of eligibility of the requesters...[would] require obtaining and considering additional information and the careful analysis of a number of important issues. This process... [was] likely to delay investigation by the Panel. Consequently, in order to expedite Panel investigation, it... [was] proposed that [...] the Executive Directors ... instruct the Panel to conduct an investigation”⁷⁷

Recommendation on Request for Inspection, *Re: Request for Inspection – China: Western Poverty Reduction Project*, Credit No. 3255-CHA and Loan No. 4501-CHA, 2 (note 1).

⁷⁴ Cf. The Inspection Panel, *Notice of Registration – Re: Request for Inspection – Proposed China Western Poverty Reduction Project* of 18 June 1999, available at the World Bank’s website.

⁷⁵ See The Inspection Panel Investigation Report, see note 8, 8, para.15.

⁷⁶ Cf. Request for Inspection – *Panel Report and Recommendation*, INSP/R99-6 of 24 August 1999.

⁷⁷ IDA and IBRD, *Proposed Decision on Request for Inspection – China: Western Poverty Reduction Project*, Credit No. 32550 CHA and Loan No.

The above example calls attention to a number of interesting points: First, it clearly illustrates the growing role that NGO's play at the beginning of the twenty-first century both in international law in general, as regards, *inter alia*, their participation in international dispute settlement,⁷⁸ judicial⁷⁹ and quasi-judicial proceedings, and their participation in global policy and the operations of international organisations. Their "mandates" are no longer limited to mere advocacy work,⁸⁰ but extend to legal representation, such as in the Inspection Panel process, partici-

4501 – CHA, INSP/R99-6/2 of 7 September 1999. By way of contrast, the Inspection Panel in its Report and Recommendation on Request for Inspection found that the ICT, "(a)s required by the Resolution ... presented the Panel with 'written evidence that (it) is acting as agent of the party on behalf of which the request is made.' Several Requesters living in the Project area have signed letters appointing the ICT to so act on their behalf. Based on this information, the Panel is satisfied that the ICT is acting on behalf of a group of people living in the Project area who feel that they may be seriously and adversely affected as a result of the design and execution of the Project." The ICT offered "evidence of why, in its judgment, the people in the Project area are not able to present their own case or use local representatives to do so. In light of the information received, the Panel believes that the Requesters genuinely feel that 'appropriate representation is not locally available.'" *Panel Report and Recommendation*, see note 76, 6, paras. 23, 25–26.

⁷⁸ Cf. the participation of NGOs in the WTO dispute settlement process, in particular NGO participation in procedures of the Appellate Body through the submission of an *amicus curiae* brief. Cf. also *Amicus Curiae* Status of NGOs in arbitrations under Chapter eleven of the North American Free Trade Agreement (NAFTA). See, e.g. the 16 January 2001 preliminary ruling by a NAFTA tribunal in the *Methanex-US Case* on its authority to accept third party *amicus curiae* briefs, available at (http://www.iisd.org/trade/investment_regime.htm)

⁷⁹ Both the European and the Inter-American Court of Human Rights have accepted *amicus curiae* briefs from NGOs, the latter since 1982. Cf. CH. Moyer, "The Role of *Amicus Curiae* in the Inter-American Court of Human Rights," in: Corte Interamericana de Derechos Humanos (ed.), *La Corte Interamericana de Derechos Humanos – Estudios y Documentos*, 1999, 119 et seq.

⁸⁰ It may be interesting to note in this context that NGOs, in particular the Washington D.C. based environmental protection group "Friends of the Earth," played an instrumental role in the World Bank's development of the Inspection Panel. Cf., e.g. Friends of the Earth, "Accountability to the Public – The World Bank's Inspection Panel," available at (<http://www.foe.org>)

pation in international rule- and law-making processes,⁸¹ and in decision-making processes, particularly the policy and internal law design of international institutions.⁸²

The World Bank has, for example, been increasing the inclusion of NGO's in the Bank's rule-making processes in recent years. Examples of this are the participation of NGOs in (a.) the process of modifying the Panel's Operating Procedures in order to create an "effective, independent, and impartial" Panel process, and (b.) the invitation for NGOs to submit comments on proposed draft Bank policies and procedures. Whereas Operational Manual Statements (OMSs) and Operational Policy Notes (OPNs), which contained the Bank's earlier operational policies, were, with the exception of OMS 2.32 (1985) on *Projects on International Waterways*, not even discussed by the Executive Directors,⁸³ external consultations on Operational Policy and Bank Procedure drafts are the rule today.⁸⁴ Representative of this trend are the recent external consultations on the draft OP/BP 4.12, regarding the Bank's converted policy on involuntary resettlement. The Bank has received about three hundred substantive comments from, *inter alia*, NGOs from around the world. The draft Operational Policy was revised in light of the comments received, and a summary of the comments together with the Bank's response thereto is posted on the Bank's website.⁸⁵ With regard to the modification of the Panel's Operating Procedures, the Bank did not only ask interested parties to submit comments on the proposal of the Working Group of the Bank's Executive Directors to correct the inadequacies in the Panel's Operating Pro-

⁸¹ Cf., e.g. Ku, see note 68, 408 et seq.

⁸² For a comprehensive analysis of the legal nature, mandate, and competencies of NGOs, see W. Hummer, "Internationale Nichtstaatliche Organisationen im Zeitalter der Globalisierung – Abgrenzung, Handlungsbefugnisse, Rechtsnatur," in: K. Dicke (ed.), *Völkerrecht und Internationales Privatrecht in einem sich globalisierenden System – Auswirkungen der Entstaatlichung transnationaler Rechtsbeziehungen*, 2000, 45 et seq.

⁸³ Shihata, 1994, see note 51, 42 et seq.

⁸⁴ Cf. Kingsbury, see note 65, 325. As to the difference between OMSs, OPs and BPs, see *infra* IV. 2. a.

⁸⁵ The World Bank, "World Bank's Revised Draft Policy on Involuntary Resettlement (OP/BP 4.12)," available at (<http://www.worldbank.org>)

cedures, but also held an unprecedented meeting with NGOs to discuss the proposal.⁸⁶

Second, the Request for Inspection submitted by the International Campaign for Tibet is representative for the phenomenon of globalization and its implications for an international organization's work in a particular country: Whereas in the past, information disadvantageous to the organization's international reputation was concealed from the public, in the age of information technology, which is characterized by an increase in transborder communication and activity, such information can no longer be suppressed. In this respect, the fear of the opponents of foreign representation of affected parties, namely that "non-local" representation might lead to the intervention of foreign parties in the internal affairs of the borrowing countries as well as to the "increased politicization and internationalization of their domestic issues,"⁸⁷ was not unfounded.

The third interesting aspect of the Quinghai Project case is the Executive Directors' authorization of an investigation without final determination of all eligibility criteria. This could favourably be interpreted as demonstrating the Directors' basic attitude of not preventing an investigation from being conducted because of mere formal, or rather procedural requirements. If this interpretation is correct, the Executive Directors' conduct would be a welcome development. It contrasts with their earlier practice of requiring the Panel to undertake an extensive preliminary investigation of each Request for Inspection to determine its eligibility.⁸⁸

It is hoped that the Inspection Panel will, in future cases, interpret the right of complainants to make use of "non-local" representatives, which can be regarded as being analogous to the granting of the right to counsel in legal proceedings,⁸⁹ as generously as it did with regard to the claim filed by the International Campaign for Tibet. Such an interpretation would, as has rightly been put forward by Bradlow in an article

⁸⁶ Cf. D.D. Bradlow, "Precedent-Setting NGO Campaign Saves the World Bank's Inspection Panel," *Human Rights Brief* 6 No. 3 (1999), available at (<http://www.wcl.american.edu>)

⁸⁷ Shihata, 1994, see note 51, 57 et seq.

⁸⁸ The result of such a preliminary investigation was often that the Bank's Management submitted a remedial action plan directly to the Executive Directors before the Directors had had an opportunity to decide whether to authorize a full investigation.

⁸⁹ Cf. Bradlow, see note 34, 63.

published before the Panel became operational, "advance the Bank's objective of creating a forum which is available to the largest possible number of potential complainants. It also may help to reduce the risk of reprisals against vulnerable complainants."⁹⁰

c. Affected Rights and Interests

Pursuant to the Resolution, the affected party must demonstrate "that its rights or interests have been or are likely to be directly affected" by the Bank's failure to follow its operational rules and procedures.⁹¹ The function of this eligibility requirement is two-fold. First, it is meant to exclude requests which are based on an alleged public interest in which the requester has no personal stake.⁹² In this respect, it is analogous to the exclusion of the so-called *actio popularis*, as known, for example, in administrative law claims. Second, its purpose is:

"to broaden the scope of coverage ... so as to include not only titles, powers, and privileges protected by law but also substantiated claims to such titles, powers, and privileges and the avoidance of harm (in the sense of bodily injury or financial loss) that otherwise may affect the requester. Alleged rights by an affected party have to be based on the law applicable in the territory where the alleged harm has taken place, including treaties incorporated in that law to the extent that they directly extend rights to private parties."⁹³

Thus far, the requirement to demonstrate an affected right or interest hardly played a role in the Panel's assessment of the eligibility of complaints. In most cases, such as in its conclusions regarding eligibility of Requests for Inspection concerning the Quinghai Project, the Panel did

⁹⁰ Ibid. The Panel's procedures attempt to make private complaints as easy as possible. A Request for Inspection can be submitted any-time up to the closing date of the project, i.e. the date on which the last part of the Bank's loan is disbursed. Although English is the preferred language, the Request can be filed in any language either at the Bank's headquarters in Washington, D.C., or at any regional office. Finally, the complaint need not be in any special form, although using the sample form prepared by the Panel is recommended. Cf. A. Escher, "World Bank Withdraws from Arun III Project at Inspection Panel's Recommendation," *Human Rights Brief* 3 No.1 (1995), available at (<http://www.american.edu>)

⁹¹ Resolution, see note 3, para. 12.

⁹² Cf. Shihata, see note 3, 56 et seq.

⁹³ Ibid., 57.

not even mention this requirement.⁹⁴ The Panel's neglect of this requirement fits with its change of focus in the assessment. The Panel now places more emphasis on the alleged non-compliance by the Bank with its policies and procedures and less on harm suffered by the Requesters, as prescribed by the 1999 Clarifications.⁹⁵ It also highlights the fact that a complaint brought to the Inspection Panel is different from a complaint filed with a court of law as in the latter, the successful demonstration of an "affected right or interest" is a crucial requirement both for the admissibility and the merits of the case. This requirement is a corollary to the general outcome of a court procedure, which — unlike in a Panel investigation — is the redress of harm.⁹⁶

3. The Mandate and Legal Nature of the Inspection Panel

a. Compliance Monitoring within the World Bank

With the World Bank Inspection Panel a new mechanism of accountability⁹⁷ of and supervision in international organizations was created. The precedent set by the World Bank with the creation of an operations inspection function was shortly after followed by multilateral development banks.⁹⁸ Within the World Bank, the Inspection Panel is not the

⁹⁴ Cf. *Report and Recommendation*, see note 76, 5, para. 21.

⁹⁵ Cf. Schlemmer-Schulte, see note 4, 243 et seq. By means of the 1999 Clarification, the Board of Executive Directors reinforced the distinction to be made between the Bank's failures and the Borrowers' failures in the Management Response to a Request for Inspection and in the Panel's eligibility Report. Cf. The Inspection Panel Annual Report 1998–1999, 5.

⁹⁶ Cf. The Inspection Panel Annual Report, *ibid*.

⁹⁷ For an analysis of the distinction between the three concepts "accountability," "legal liability," and "international responsibility," see S. Schlemmer-Schulte, "The World Bank, its Operations, and its Inspection Panel," *Recht der internationalen Wirtschaft* 3 (1999), 175 et seq., (180 et seq.). The discussion of accountability of large multilateral financial organizations which led to the creation of the World Bank Inspection Panel, has been regarded as being the counterpart to the "current debate on legal restraints concerning the activities of international organizations," such as, in particular, the United Nations. See A. Reinisch, *International Organizations Before National Courts*, 2000, 320 et seq.

⁹⁸ The Inter-American Development Bank (IDB) and the Asian Development Bank (ADB) established an inspection function in 1994 and 1995, respec-

only mechanism for supervision of Bank staff implementation and compliance with Bank policy. Compliance Monitoring is, for example, also the responsibility of the Operations Policy and Strategy Vice Presidency (OPS), which, in 1997, launched a policy reform program to, *inter alia*, strengthen the systems for monitoring compliance.⁹⁹ Furthermore, in 1998, in a significant move to address the issue of staff accountability, the Quality Assurance and Compliance Unit was established. Its responsibility is to review Bank projects brought to the Unit's attention by NGOs and others to determine the level of compliance with the Bank's safeguard policies.¹⁰⁰ Finally, some internal review of Bank staff implementation and compliance with Bank policy is also provided by the Operations Evaluation Department, and the Legal Department.¹⁰¹

Pursuant to the Inspection Panel's Operating Procedures, "[t]he role of the Panel is to carry out independent investigations. [...] Its function

tively. The inspection mechanisms set up by those Banks have been patterned on the World Bank's Inspection Panel in most respects. They do, however, differ from the Panel in that, unlike the Bank's Panel, they do not consist of a standing panel with a separate Secretariat, but a roster of names from which, in an actual case, members of the Panel will be selected to investigate a complaint. The IDB Investigation Mechanism procedures can be found on the web at (<http://www.iadb.org>)

As to the ADB's Inspection Committee, see Asian Development Bank, "ADB's Inspection Policy: A Guidebook," 2000, available at (<http://www.adb.org>). For a brief description of both investigation mechanisms, see D.L. Clark, *A Citizen's Guide to the World Bank Inspection Panel*, 2nd edition, 1999, 23 et seq.

⁹⁹ OPS has thus far worked to strengthen compliance monitoring by the Bank units responsible for safeguard and fiduciary policies. Cf. The World Bank Group, "What We Do: Policies," available at the Bank's website.

¹⁰⁰ The detection of non compliance with a safeguard policy leads to the issuance of a prompt resolution by the Bank's regional team, and can result in sanctions. For a more detailed account on and analysis of the Quality Assurance and Compliance Unit, see Bank Information Center, "The World Bank's Policy Framework: The 'Safeguard' Policies, Compliance and the Independent Inspection Panel," available at (<http://www.bicusa.org>)

¹⁰¹ Kingsbury, see note 65, 329. The Bank's Legal Vice Presidency monitors compliance with the policies addressing international waterways and disputed areas. Cf. The World Bank Group, "What We Do: Policies," see note 99.

[...] is to inquire and recommend.”¹⁰² In this regard, supervision of Bank compliance with its operational policies and procedures by the Inspection Panel differs from internal supervision “through direct lines of managerial authority and through involvement of different departments and units,” such as the Legal Department or the Operations Evaluation Department in that the former “has an important role in authorizing project documents and certain types of decisions,”¹⁰³ but, unlike the Inspection Panel, is not an investigating body, and the latter “is oriented toward lessons to be drawn from the experience, rather than strict accountability.”¹⁰⁴

b. The Inspection Panel as a “quasi-judicial supervisory body”

In an explanatory memorandum of 3 January 1995, the Senior Vice President and (then-) General Counsel of the World Bank, Ibrahim Shihata, emphasized that the Inspection Panel is not a judicial body.¹⁰⁵ In light of the Panel’s legal mandate as laid down in the Resolution, the Clarifications and the Panel’s Operating Procedures, and the Panel’s operations thus far, this position must be followed. As has already been pointed out, the Panel can be viewed as a “quasi-judicial supervisory body”¹⁰⁶ at best. According to Bradlow, quasi-judicial supervision as compared to judicial and non-judicial supervision¹⁰⁷ includes elements of both of the latter categories. “It usually involves a relatively independent body that reaches either binding or non-binding decisions by

¹⁰² “Introduction,” Operating Procedures, The Inspection Panel for the International Bank for Reconstruction and Development/International Development Association, *ILM* 34 (1995), 510 et seq., (511).

¹⁰³ Kingsbury, see note 65.

¹⁰⁴ Ibid.

¹⁰⁵ “Role of the Inspection Panel in the Preliminary Assessment of Whether to Recommend Inspection – A Memorandum of the Senior Vice President and General Counsel,” *ILM* 34 (1995), 525 et seq., (526). The same argument has been put forward by ILM Corresponding Editor for the World Bank, M. Ragazzi, see M. Ragazzi, “Introductory Note,” *ILM* 34 (1995), 503 et seq.

¹⁰⁶ Bradlow, see note 51, 602.

¹⁰⁷ For an analysis of the three recognized mechanisms of international supervision – judicial, quasi-judicial, and non-judicial supervision –, cf. G.J.H. van Hoof/ K. de Vey Mestdagh, “Mechanisms of International Supervision,” in: P. van Dijk (ed.), *Supervisory Mechanisms in International Financial Organisations*, 1984, 1 et seq., (15–20).

applying law to facts.”¹⁰⁸ According to this description, the Panel is still a rather weak quasi-judicial supervisory body “lying closer to the non-judicial end of the supervisory spectrum than to the judicial end”¹⁰⁹: The Panel’s mandate is limited to (a.) recommending to the Executive Directors that the challenged project be formally investigated, and (b.) when such a recommendation had been approved by the Board and an investigation is conducted, to submit an Investigation Report including the Panel’s findings and recommendations to the Board. Unlike the findings of a court of law, the Panel’s findings and recommendations are, however, not binding on the parties.

IV. The Applicable Standards in the Inspection Panel Process, their Legal Effects and Proper Interpretation

The Panel’s supervisory power is clearly defined in the Resolution pursuant to which the Inspection Panel can only investigate complaints that the Bank has failed to follow its *own* policies and procedures in its operational work.¹¹⁰ Accordingly, the substantive standards against which the Panel reviews Bank performance, are internal rules only.¹¹¹ Unlike local or international courts, the Panel does not apply domestic or general international law.¹¹²

One may well argue that it would be desirable for the Panel to review a Bank project not only against internal but also against international law standards. In other words, “such standards might properly be invoked as part of the corpus of norms and practice that may guide

¹⁰⁸ Bradlow, see note 51, 602.

¹⁰⁹ Ibid.

¹¹⁰ Resolution, see note 3, para. 12.

¹¹¹ The authorization by the Executive Directors to investigate a request (cf. Resolution, see note 3, paras. 19 and 20) usually prescribes the focus of the investigation, i.e. what exactly the Panel has to determine. The Executive Directors enumerate the Bank policies and procedures, the violation of which the Panel is to investigate. Cf., e.g., Press Release of 17 September 1999, “Board wants Panel to investigate whether the Bank has observed its policies and procedures in the preparation of the China Western Poverty Reduction Project,” *Proposed Decision on Request for Inspection*, see note 20. Cf. also *supra*, part II.

¹¹² Cf. Schlemmer-Schulte, see note 7, 387.

the Panel in making useful recommendations"¹¹³ to the Board of Directors. Such a broad approach has been taken by Bradford Morse¹¹⁴ and Thomas Berger¹¹⁵ in the *Morse-Berger Report* of 1992¹¹⁶ which contained the findings of the very first independent review of World Bank projects, a panel which examined the controversial Sardar Sarovar Projects in India,¹¹⁷ and which contributed to the process culminating in the creation of the Inspection Panel.¹¹⁸ According to the Terms of Reference of 14 March 1991 issued by the then President of the World

¹¹³ Kingsbury, see note 65, 331.

¹¹⁴ Mr. Morse is a retired Administrator of the United Nations Development Programme (UNDP) and former U.S. Congressman.

¹¹⁵ Mr. Berger headed the British Columbia Commission on Family and Children's Law 1973–1974; the Mackenzie Valley Pipeline Inquiry, 1974–1977; the Alaska Native Review Commission, 1983–1985; and served on the Supreme Court of British Columbia, 1971–1983.

¹¹⁶ B. Morse/ T.R. Berger, *Sardar Sarovar: The Report of the Independent Review*, 1992.

¹¹⁷ The Sardar Sarovar Project (SSP) in India is an enormous irrigation and hydroelectric project, including the 535-foot-high Sardar Sarovar dam and more than 3,000 others, 47,000 miles of canals and a plan to provide 1.450 megawatts of power. According to a *New York Times* article, the irrigation and hydroelectric project could produce enough energy "to provide electricity to 1.4 million American homes for a year, irrigation for 4.4 million acres of land and drinking water to 40 million people" (St.A. Holmes, "India Cancels Dam Loan from World Bank," *The New York Times International* of 31 March 1993, A 5). The World Bank approved financial support for the project in 1985 without having conducted a full environmental study. Concerns raised by environmental groups forced the bank to undertake its first independent review of a bank-financed development project. The Morse-Berger review cited a number of environmental and resettlement problems and called the Bank to step back from the project and consider it anew. The Bank Board, while it kept funding for the project alive, gave India until 31 March 1993 to meet a series of standards regarding environmental and social concerns. The World Bank finally withdrew from the project after the Indian government cancelled much of the US\$ 450 million Bank loan on the grounds that it could not meet the Bank's environmental and resettlement standards. Cf. *ibid.* For an analysis of the Morse/ Berger panel review, see Th.R. Berger, "The World Bank's Independent Review of India's Sardar Sarovar Projects," *Am. U. J. Int'l L. & Pol'y* 9 (1993), 33 et seq.

¹¹⁸ Kingsbury, see note 65, 330.

Bank, Barber Conable,¹¹⁹ the objective of the review was “to conduct an assessment of the implementation of the ongoing Sardar Sarovar projects as regards (a.) the resettlement and rehabilitation of the population displaced/affected ... and (b.) the amelioration of the environmental impact of all aspects of the project, with reference to “existing Bank operational directives and guidelines.”¹²⁰ In their Report, Morse and Berger departed from the Terms of Reference and did not simply assess compliance with the Bank’s own policies and with the terms of loan agreements and other project documents, but applied Bank policies “in the context of wider public international law standards to which they relate.”¹²¹ In considering impacts on tribal peoples, for example, the report referred to standards prescribed in ILO Convention No. 107, and advocated evaluation of Bank policies by reference to relevant standards of general international law.¹²² As desirable as the broad approach taken by Morse and Berger might be, it must be borne in mind that the Inspection Panel neither is nor was intended to be an international court, but that it was set up as an internal inspection mechanism to achieve accountability and transparency in Bank operations. However, the current status of the Panel does not preclude it from gradually developing into a true international judicial body.

In the following sections, the substantive standards against which the Inspection Panel reviews Bank performance, the legal effects of those standards, and their interpretation by the Panel will be examined.

1. The Substantive Standards against which a Bank Project is Reviewed by the Panel

Thus far, the Inspection Panel has not followed the approach recommended by the *Morse-Berger Report*, but has operated strictly within its formal mandate as regards the applicable set of rules. The standards to be and having been invoked by the Panel in the investigation process, that are operational policies and procedures, are defined in the Resolu-

¹¹⁹ Mr. Morse was appointed Chairman of the Independent Review of the Sardar Sarovar Project in June 1991. Mr. Berger was appointed Deputy Chairman in September 1991.

¹²⁰ Cf. Shihata, 1994, see note 51, 11.

¹²¹ See Kingsbury, see note 65, 330.

¹²² Ibid.

tion to consist of the Bank's Operational Policies (OPs),¹²³ Bank Procedures (BPs),¹²⁴ and Operational Directives (ODs),¹²⁵ as well as earlier similar documents.¹²⁶ Compliance with Guidelines, Good or Best Practices,¹²⁷ and comparable documents is not subject to Panel investigation.¹²⁸ Most of the cases the Panel has dealt with to date have revolved

¹²³ Operational Policies "are short, focused statements that follow from the Bank's Articles of Agreement, the general conditions, and policies approved by the Board. OPs establish the parameters for the conduct of the operations; they also describe the circumstances under which exceptions to policy are admissible and spell out who authorizes exceptions." OPs "aim to ensure that Bank-financed operations are economically, financially, socially, and environmentally sound." See The World Bank Group, "What we do: Policies," see note 99. Currently, there are 49 Operational Policies.

¹²⁴ Bank Procedures "explain how Bank staff carry out the policies set out in the OPs. They spell out the procedures and documentation required to ensure Bank-wide consistency and quality." See The World Bank Group, *The World Bank Operational Manual*, available at the Bank's website. Currently, 45 Bank Procedures are in force.

¹²⁵ Sixteen Operational Directives are still in effect. They are: 2.00 – Country Economic and Sector Work; 4.15 – Poverty Reduction; 4.20 – Indigenous Peoples; 4.30 – Involuntary Resettlement; 8.60 – Adjustment Lending Policy; 9.01 – Procedures for Investment Operations under the Global Environment Facility; 10.70 – Project Monitoring and Evaluation; 11.00 – Procurement; 11.01 – Country Procurement Assessment Reports; 11.02 – Procurement Arrangements for Investment Operations; 11.03 – Procurement Arrangements for Adjustment Operations; 11.04 – Review of Procurement Documentation and Decisions for Lending Operations; 11.10 – Use of Consultants; 13.05 – Project Supervision; 13.60 – Dissemination and Utilization of the Operations Evaluation Department (OED) Findings; and 14.30 – Aid Coordination Groups.

¹²⁶ Resolution, see note 3, para. 12.

¹²⁷ Pursuant to the World Bank's Operational Manual, "Good Practices (GPs) contain advice and guidance on policy implementation for example, the history of the issue, the sectoral context, analytical framework, best practice examples." *The World Bank Operational Manual*, see note 124.

¹²⁸ This exclusion has been criticized because of its possible negative implications: "In empowering the inspection panel to investigate the Bank's project performance by reference to Bank policies and procedures [only], ... the Bank arrangements appear to provide some incentive for management to try to attenuate policies by, for example, incorporating the more demanding provisions in statements of good practice rather than in operational policies, or including phrasing to add wide managerial discretions in obligatory provisions." Kingsbury, see note 65, 331. It should be recalled in

around four sets of operational policies and procedures: Environment, Resettlement, Indigenous Peoples and Project Supervision. The policies against which Bank performance is primarily reviewed are the Bank's so-called "safeguard policies." This category of policies and procedures which has only recently been created,¹²⁹ consists of ten of the Bank's environmental and social policies "which together are designed to protect the environment and vulnerable populations from negative effects of Bank-financed operations."¹³⁰ The safeguard policies include: OP 4.01 Environmental Assessment, OP 4.04 Natural Habitats, OP 4.36 Forestry, OP 4.09 Pest Management, OD 4.30 Involuntary Resettlement, OD 4.20 Indigenous Peoples, OPN 11.03 Cultural Property, OP 4.37 Safety of Dams, OP 7.50 Projects on International Waterways, and OP 7.60 Projects in Disputed Areas.¹³¹ Most of these policies, many of which have been in place for almost ten years, were developed in response to world-wide criticism, primarily by NGOs and some donor governments, that Bank projects often irreversibly harm the environment, displace people and negatively affect their livelihoods.¹³² The policies undoubtedly have the potential to mitigate damage which might be and often has been caused by economic development as promoted by the Bank. They are necessary for the Bank to bridge the traditional contradiction between environmental sustainability and social protection on the one hand and economic development on the other, even if this means that they increase the costs of projects. The Panel's record shows that the project requirements prescribed in the "safeguard policies" are of supreme concern to project-affected groups that might have previously been neglected.

this respect that under the Terms of Reference of the Morse-Berger Panel, the Sardar Sarovar Projects were to be evaluated by guidelines also.

¹²⁹ Cf. Bank Information Center, "The World Bank's Policy Framework - The 'Safeguard' Policies, Compliance and the Independent Inspection Panel," available at the Centre's website (<http://www.bicusa.org>)

¹³⁰ Ibid.

¹³¹ For a table of the safeguard policies, their key features, and conversion status, see *ibid.*

¹³² Cf. *ibid.*

2. Interpretation, Application and Enforcement of Bank Policies and Procedures

Throughout its work, the Inspection Panel has been faced with the serious problem that there is still no consensus among the World Bank staff as to how the Bank's operational policies and procedures should be interpreted, applied, and enforced. According to the Panel, the differences on this issue do not only "pervade all ranks of the staff, from senior management to front-line professionals," but also apply to "virtually all of the major decisions required by the policies."¹³³

a. Flexibility of Interpretation, Application and Enforcement

One of the issues on which opinions diverge, is the question of whether the Bank's policies allow for flexibility of interpretation, application and enforcement, and if so, to what degree. As Benedict Kingsbury has stated in the context of operational policies on issues affecting indigenous peoples: "Episodes of non-compliance with policies relating to indigenous peoples and involuntary resettlement seem often to have been dealt with flexibly by superiors as part of the overall structure of management, with the focus usually on ameliorating project failures and learning for the future. The Operational Directives have thus been understood to be 'binding' on Bank staff within the Bank management structure, but applied and enforced flexibly rather than 'legalistically'".¹³⁴ This approach to the implementation of and compliance with Bank policies was adopted most commonly before the Inspection Panel was created. It was, however, widely followed after 1993 as well, as can be seen from the Panel's most recent Investigation Report regarding the Quinghai Project. According to that Report, the views among Bank staff on the extent of the binding force of Bank policies and procedures still range from arguments that "the Bank's Operational Directives and other policies were simply idealized policy statements, and should be seen largely as a set of goals to be striven after"¹³⁵ with little, if any

¹³³ The Inspection Panel, *Inspection Panel's Report And Findings on the Quinghai Project – Executive Summary* of 28 April 2000, xiv, para. 9.

¹³⁴ Kingsbury, see note 65, 329.

¹³⁵ The Inspection Panel Investigation Report, see note 8, 19 et seq., para. 35. According to proponents of this view, "(w)hat would be more important is the overall trend in the Bank, which should work toward the achievement of these goals. In the meantime, one may have to accept what might appear

mandatory effect, to opposing views by more senior ranks that such an interpretation “could render the policies virtually meaningless and certainly incapable of being employed as benchmarks against which to measure compliance.”¹³⁶

The Inspection Panel raised serious concerns about the implications of such wide divergencies of opinion for Bank Management’s ability to apply the policies “with any reasonable degree of consistency.”¹³⁷ In view of these differences, the Panel deemed it necessary to re-examine its approach towards and experience with Bank policies and compliance.¹³⁸ It carefully studied the arguments put forward by Bank Management, staff and consultants in defence of the actions or omissions under review, such as claims of “precedent,” a point which will be discussed in more detail later. In the end, the Panel followed the same approach to compliance as in its earlier reports.¹³⁹ As regards the flexibility of interpretation in general, the Panel adopted the position taken by Ibrahim Shihata, that there was room for some flexibility of interpretation but that operational directives themselves provided the limits of flexibility with regard to their application, and that “[t]he staff are accountable to management for the observance of the ODs, with such latitude as their text may explicitly indicate”.¹⁴⁰

Whereas Shihata’s approach to the question of flexibility of interpretation is widely followed by scholars who have written on this subject-matter,¹⁴¹ the question whether the standards provided for in the ODs are legally binding is still disputed. Making reference to the preambular paragraph of the ODs, Shihata has maintained that “ODs are general instructions from management to staff issued for their guidance”.¹⁴² According to Shihata “not all the standards provided for in the ODs are binding (it depends on the wording of each standard), those stated in binding terms create a duty for the staff to exert their best ef-

to be failures in achieving the sometimes high standards embodied in the policies.” See *ibid.*

¹³⁶ *Ibid.*, 20, para. 35.

¹³⁷ *Ibid.*, 16, para. 25; 19, para. 34; and Executive Summary, see note 133, xiv, para. 9.

¹³⁸ Cf. *ibid.*, Executive Summary, see note 133, xv, para. 15.

¹³⁹ Cf. *ibid.*, xv, para. 15, and The Inspection Panel Investigation Report, see note 8, 22, para. 45.

¹⁴⁰ Shihata, 1994, see note 51, 44.

¹⁴¹ See, e.g., S. Schlemmer-Schulte, see note 97, 178.

¹⁴² Shihata, 1994, see note 51, 43 et seq.

forts to achieve them. The actual achievement of these standards may depend on the action of other parties, notably the potential borrower or the borrower, as the case may be."¹⁴³ Unlike Shihata, Schlemmer-Schulte argues, that Bank policies and procedures "are binding on staff and must, therefore, be followed by staff."¹⁴⁴

The Chinese Government, in its statement of 6 July 2000 on the Inspection Panel Investigation Report for the Quinghai Project, criticized the Panel for its approach on the legal effect of safeguard policies. In the view of the Chinese Government, "[t]he safeguard policies have not been written as strict law to be applied mechanically,"¹⁴⁵ as — according to the Chinese Government — the Panel had suggested. The Panel members did not "distinguish between mandatory procedures and best practices,"¹⁴⁶ but did nevertheless pretend that there was a clear understanding of what was mandatory.¹⁴⁷

The uncertainty about the legally binding effect of Operational Directives is mainly due to the fact that ODs include a mixture of policies, procedures, and guidance which are not always easy to differentiate.¹⁴⁸ However, in order to facilitate the work both of the Bank staff and the Inspection Panel, as well as for the benefit of outside parties, the Bank initiated a process in the early 1990s with the aim of gradually converting ODs into a new system of Operational Policies (OPs) and Bank Procedures (BPs), both mandatory rules, on the one hand, and Good Practices (GPs) — that is guidelines which clarify what is international best practice¹⁴⁹ and which are not necessarily mandatory — on the other hand. This process is expected to result in more certainty.

b. Methods of Interpretation of Bank Policies and Procedures

The Inspection Panel, in reviewing the Bank's project performance by reference to Bank policies and procedures, is confronted with the difficult question of what determines what exactly is required substantively

¹⁴³ Ibid., 45.

¹⁴⁴ Schlemmer-Schulte, see note 97, 178.

¹⁴⁵ Chinese Government's Statement on the Inspection Panel Investigation Report for the *China: Western Poverty Reduction Project* (Quinghai Component) of 6 July 2000, 3.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ See The World Bank Group, *What we do: Policies*, see note 99.

¹⁴⁹ See The Inspection Panel Investigation Report, see note 8, 18, para. 30.

by the applicable policies. In other words, the Panel must decide which methods of interpretation to apply in order to work out the exact project requirements spelt out in the policies and procedures. In the Quinghai Project Investigation Report, the Panel stated that “[d]uring the course of examining some 20 projects over the past five years, ... [it] has gained much experience in determining how the Bank’s operational policies and procedures should be applied.”¹⁵⁰ In the following section, the methods most frequently used by the Panel will be analyzed.¹⁵¹

aa. The Grammatical, Systematic, and Teleological Approach

One of the approaches of interpretation used by the Inspection Panel in determining the project requirements of the applicable policies and procedures is the “letter and intent” interpretation. When this method is adopted, the Panel follows the approach regarding the interpretation of international treaties which is supported by the jurisprudence of the ICJ¹⁵² and adopted in substance in the relevant provisions of the Vienna Convention on the Law of Treaties.¹⁵³ In the Quinghai Project Investigation Report, the Panel members, referring to the meaning of the Operational Directives on Environmental Assessment (OD 4.01), Indigenous Peoples (OD 4.20), and Involuntary Resettlement (OD 4.30) concluded that:

“[i]n the Panel’s view, given the letter and intent of ODs 4.01, 4.20 and 4.30, the actual scale of the area to be impacted by the Quinghai Project, the ethnic composition of the Project’s impacted populations, the boundaries of the ‘project area’ were far too narrowly defined by Management. As a result, the assessments fail to address

¹⁵⁰ Ibid. 16, para. 25.

¹⁵¹ In this context it should be noted that it is not clear from the Panel’s past Investigation Reports whether, as may be presumed (cf. Kingsbury, see note 65, 329), Guidelines, Best Practices, and comparable Bank documents which, pursuant to the Resolution, are not subject to Panel investigation, may nevertheless be consulted in interpreting and assessing compliance with Operational Policies and Procedures.

¹⁵² Cf. I. Brownlie, *Principles of Public International Law*, 4th edition, 1990, 627.

¹⁵³ Article 31 of the Vienna Convention on the Law of Treaties states as a general rule of interpretation that “1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” (*ILM* 8 (1969), 679 et seq.).

many of the most significant social and environmental impacts of the Project on the potentially affected populations, including those who are members of minority nationalities. The Panel finds that this is not in compliance with these ODs."¹⁵⁴

In the same case, the Panel, in reviewing the Bank's social compliance, determined what was required by OD 4.20 on Indigenous Peoples by adopting both the systematic and the teleological approach of interpretation, to which, in the context of treaty law interpretation reference is usually only made if the textual approach leaves the meaning ambiguous.¹⁵⁵ In the Quinghai case, the central question regarding social compliance was whether the Quinghai Project as a whole constituted the Indigenous Peoples Development Plan (IPDP) required by Operational Directive 4.20 or whether separate, free-standing IPDPs were required to bring the Project into compliance with OD 4.20. The relevant para. 13 of said Directive states that:

"[f]or an investment project that affects indigenous peoples, the borrower should prepare an indigenous development plan that is consistent with the Bank's policy. Any project that affects indigenous peoples is expected to include components or provisions that incorporate such a plan. When the bulk of the direct project beneficiaries are indigenous peoples, the Bank's concerns would be addressed by the project itself and the provisions of this OD would thus apply to the project in its entirety."¹⁵⁶

The Bank Management, while acknowledging that an IPDP was required for the Quinghai Project, referred to the letter of the last sentence of para. 13 quoted above and asserted that the Project as a whole constituted the necessary IDPD as a majority of the Project's beneficiaries were minorities.¹⁵⁷ The Panel, however, was of the view that, irrespective of the clear wording, Management's interpretation of this one sentence of para. 13 "cannot be accepted."¹⁵⁸ It based its conclusion both on the system and the objective of OD 4.30 and argued that Management's interpretation was "inconsistent with other parts of the OD and especially inconsistent with the objective of Bank policy towards

¹⁵⁴ The Inspection Panel, *Executive Summary*, see note 133, xvii, para. 23.

¹⁵⁵ As to the teleological approach in the context of treaty interpretation, see, e.g. Brownlie, see note 152, 631.

¹⁵⁶ IBRD/IDA, OD 4.20 on Indigenous Peoples (September 1991), published in: Shihata, see note 3, 401 et seq.

¹⁵⁷ Cf. The Inspection Panel, *Executive Summary*, see note 133, xxvi, para. 62.

¹⁵⁸ *Ibid.*, para. 63.

indigenous people,¹⁵⁹ the latter being "... to ensure that the development process fosters full respect for their dignity, human rights, and cultural uniqueness ..." and to "ensure that indigenous peoples do not suffer adverse effects during the development process ..., and that they receive culturally compatible social and economic benefits."¹⁶⁰ The Panel argued that "as a result of Management's choice not to develop self-standing IPDPs for the different minority groups" which are affected by the Quinghai Project, "the cultural uniqueness and needs of some groups ... seem inadequately to have been addressed."¹⁶¹ Management's interpretation of the last sentence of para. 13 of OD 4.20 "was never intended and should not be allowed to stand,"¹⁶² as the result of such an approach may be "that a Bank-financed project could legitimately overwhelm the hopes and aspirations of an indigenous population, so long as the project benefits a larger population of some other indigenous people. And the 'project in its entirety' could constitute the ... IPDP required by the OD since 'the bulk of the direct project beneficiaries' would be indigenous people."¹⁶³

This example illustrates that the Inspection Panel, even in cases in which the meaning of a Bank provision seems to be clear, nevertheless has recourse to the teleological approach trying to determine the true project requirements as set out by the applicable policies and procedures by implementing the objectives of a Bank policy as determined by the Panel.

bb. Experience or Precedent in the Country in Question or Elsewhere

In the Investigation Report on the Quinghai Project, the Panel dealt at length with the question whether past experience or precedent can be seen as evidence that Bank policies and procedures were followed in the case under review. The starting point of this analysis was the question whether the Bank was in compliance with OD 4.01, Environmental Assessment,¹⁶⁴ which has been replaced by OP and BP 4.01, Environ-

¹⁵⁹ The Inspection Panel Investigation Report, see note 8, 110, para. 280.

¹⁶⁰ IBRD/IDA, OD 4.20 on Indigenous Peoples (September 1991), para. 6.

¹⁶¹ The Inspection Panel Investigation Report, see note 8, 108, para. 275.

¹⁶² *Ibid.*, para. 276.

¹⁶³ *Ibid.*

¹⁶⁴ OD 4.01, Environmental Assessment (October 1991), published in: Shihata, 1994, see note 51, 149 et seq.

mental Assessment of January 1999 together,¹⁶⁵ but was nevertheless the standard against which Bank performance regarding the Quinghai project had to be reviewed given that the Bank actions and omissions at issue fell within a period of time prior to the conversion of OD 4.01. Pursuant to OD 4.01, the Bank requires environmental assessment (EA) of projects proposed for Bank financing to help ensure “that the project options under consideration are environmentally sound and sustainable.”¹⁶⁶ According to the Inspection Panel “[o]ne of the most important decisions (perhaps the most crucial) that Management must make concerning the environmental assessment of any project is the category of the assessment that will be undertaken,”¹⁶⁷ as this determines the appropriate extent and type of EA:

Under OD 4.01, a project can either be classified a Category “A”, “B”, or “C”.¹⁶⁸ The first category regards projects which are “likely to have significant adverse impacts that may be sensitive, irreversible, and diverse. The impacts are likely to be comprehensive, broad, sector-wide, or precedent-setting.”¹⁶⁹ In such a case, a full EA is required.¹⁷⁰ A proposed project is classified a Category “B” if it “may have adverse environmental impacts that are less significant than category A impacts.”¹⁷¹ For a Category B project, no full EA, but an environmental analysis is required.¹⁷² For a Category C project, which is unlikely to have adverse impacts,¹⁷³ no EA or environmental analysis is required.¹⁷⁴ An Annex to OD 4.01 provides illustrative lists of the types of projects best classified in each category.¹⁷⁵

In the Quinghai case, a Category “B” was assigned to the project although several components of the Project fell within the list of “A”

¹⁶⁵ IBRD/IDA, OP 4.01, Environmental Assessment (January 1999), Note, published in: Shihata, see note 3, 345 et seq.

¹⁶⁶ Paragraph 2 of OD 4.01, Environmental Assessment.

¹⁶⁷ The Inspection Panel, *Executive Summary*, see note 133, xx-xxi, para. 38.

¹⁶⁸ Cf. para. 17 of OD 4.01, and para. 1 of OD 4.01 – Annex E, Environmental Screening (October 3, 1991), published in: Shihata, 1994, see note 51, 172 et seq.

¹⁶⁹ Para. 5 of OD 4.01 – Annex E.

¹⁷⁰ Para. 17 of OD 4.01, and para. 1 of OD 4.01 – Annex E.

¹⁷¹ Para. 6 of OD 4.01 – Annex E.

¹⁷² Para. 17 of OD 4.01.

¹⁷³ Para. 7 of OD 4.01 – Annex E.

¹⁷⁴ Para. 17 of OD 4.01.

¹⁷⁵ OD 4.01 – Annex E, *supra*.

projects, e.g. dams and reservoirs, irrigation, resettlement and all projects with potentially major impacts on people.¹⁷⁶ The Panel also found that the impacts qualified as “sensitive” since vulnerable ethnic minorities were affected and involuntary resettlement was involved.¹⁷⁷ It concluded that the Environmental Assessment of the Quinghai Project was not in compliance with Bank policies as set out in OD 4.01.¹⁷⁸

The interesting point, in the context of policy interpretation, is that the Inspection Panel, in making its recommendation regarding the Quinghai Project, was confronted with both the Management Response and views expressed by Bank staff and consultants that Management’s past experience and precedents from other approved projects in China, or from other social and environmental assessments within China, could be cited as sufficient evidence that Bank policies and procedures concerning Environmental Assessment were followed in the case of the Quinghai Project as well. The Bank Management, in defense of the criticised assignment of a Category “B” rather than “A”, referred to “... past practice with ... a large number of similar integrated agricultural development projects financed by the Bank in China over the last 10 years.”¹⁷⁹ The Panel did, however, reject the view that precedent could determine what is required by Bank policies and procedure. It concluded that:

“Management’s past experience in a country is obviously important. It can provide the basis for a certain level of comfort that the work that is required by the policies will be undertaken successfully. It is an entirely different matter, however, to suggest that experience and precedent can determine what is required by the policies.¹⁸⁰... The Panel has carefully examined the policies and has failed to find any grounds for the view that precedents in a country... can in any way determine what is required by the policies.”¹⁸¹

The Panel likewise disapproved of a similar argument regarding the significance of precedents for the interpretation and application of policies

¹⁷⁶ Cf. The Inspection Panel, *Executive Summary*, see note 133, xxiii, para. 46.

¹⁷⁷ Ibid. Footnote 18 to para. 1 of OD 4.01 – Annex E explains that impacts qualify, *inter alia*, as sensitive if they “affect vulnerable ethnic minorities, or involve involuntary resettlement.”

¹⁷⁸ The Inspection Panel, *Executive Summary*, see note 133, xxv, para. 56.

¹⁷⁹ IDA and IBRD, *Management Response to the Request for Inspection Submitted to the Inspection Panel* of 18 June 1999, 18, footnote 21.

¹⁸⁰ The Inspection Panel Investigation Report, see note 8, 22, para. 42.

¹⁸¹ Ibid., para. 43.

and procedures, namely the assertion that precedents in a country, or a country's political and social system could determine the content of the rules under review.¹⁸² The Panel refused to make exceptions to what was otherwise required by the policies and procedures based on precedents within a country as "[n]either the OD nor the Annex provide[d] for exceptions on the basis of past experience or precedent in the country in question, or the area of the project relative to the area of the geographic or political jurisdiction involved."¹⁸³ In this regard, the Panel followed Shihata who stated that:

"[e]xceptions which are not authorized by the text of the OD must be kept to a minimum, if the ODs are to serve their purpose and if the Bank is to avoid undue differentiation among its borrowers. After all, the ODs are not meant to be "marching orders" for a specific operation but a "general operational code" which is written to apply in different situations and allows for the differentiations and exceptions deemed acceptable at the time of its issuance."¹⁸⁴

c. The Panel's Role in Assessing and Interpreting the Bank's Policies and Procedures

Unlike judges in various national and supra-national legal systems who are called to judge decisions of the legislator and to, if and where necessary, correct them,¹⁸⁵ the Inspection Panel, under its formal mandate, is to investigate the Bank's project performance and to make recommendations, but not to assess the adequacy of Bank policies and procedures

¹⁸² Ibid. The Panel stated that "(I)nterviews with some staff were punctuated by the refrain that 'in China things are done differently', and that what may not be accepted elsewhere as compliance had always been accepted for China. This refrain echoed the Management Response where, on page 1, Management states that: 'The level and quality of preparation and analysis for this Project were very much in line with Bank practice in applying social and environmental policies and projects in China in the context of its political and social system.'" Ibid.

¹⁸³ The Inspection Panel, *Executive Summary*, see note 133, xxi, para. 39.

¹⁸⁴ Shihata, see note 3, 45.

¹⁸⁵ This is, for example, the approach taken by the German Federal Constitutional Court, the *Bundesverfassungsgericht*. See, e.g., G. Schwerdtfeger, *Öffentliches Recht in der Fallbearbeitung*, 9th edition, 1993, 201, para. 481, with further references. This function becomes especially relevant where so-called political law is questioned.

themselves.¹⁸⁶ Up to now, the Inspection Panel exercised its powers within its formal mandate and has, accordingly, not gone so far as to evaluate the content of the Bank policies and procedures in question or to recommend amendment thereof.

As regards the Panel's interpretation of the applicable Bank rules one may join Bradlow in speculating that "[t]he role of the Panel in interpreting the Bank's operating policies and procedures could increase as the Bank converts its Operational Directives into Operational Policies."¹⁸⁷ As the conversion process has not been concluded yet, it is still too early to determine whether the Panel's practice will confirm this prediction which was made in 1996. The Panel's most recent Investigation Report regarding the Quinghai Project does, in part, support Bradlow's prediction; it does, however, also suggest that guarded optimism may be appropriate. Bradlow's prediction is confirmed by the Panel's approach with regard to the Bank policies on indigenous peoples as described above: The Panel seems to have felt bound to ignore the wording of the policy provision in question, and instead to interpret it according to the apparent objective of the policy on indigenous peoples.

The Panel's approach regarding the interpretation and implementation of Bank Safeguard Policies has been harshly criticized by the Chinese Government. In its statement of 6 July 2000, the Chinese Government alleged that "the Inspection Panel has grossly overstepped its authority by seeking to interpret and establish policy requirements — a matter that falls into the prerogative of the Board." In the view of the Chinese Government, "[t]he Panel sets new and unimplementable standards for safeguard policies," and "gives instructions to the Board and Management as to how poverty reduction projects are prepared and implemented."¹⁸⁸

¹⁸⁶ Cf. Kingsbury, see note 65, 331. Kingsbury argues that "it is conceivable that it would be proper for the panel to make a general recommendation for amendment if requested by the board to consider such a question or even, as practice evolves and new understanding emerge, if its work on a specific case discloses such a need." *Ibid.*

¹⁸⁷ D.D. Bradlow, "A Test Case for the World Bank," *Am. U. J. Int'l L. & Pol'y* 11 (1996), 247 et seq., (287, note 297).

¹⁸⁸ Chinese Government's Statement on the Inspection Panel Investigation Report for the *China: Western Poverty Reduction Project* (Qinghai Component) of 6 July 2000, 3.

The Chinese Government's criticism is, however, invalid in light of the Panel's rather cautious approach to determine compliance with policies on involuntary resettlement. In the Quinghai Project investigation, one of the core issues regarding involuntary resettlement was whether the nearly 60,000 migrants from the Move-out area were "voluntary" resettlers, as Bank Management contended,¹⁸⁹ or whether they were "involuntarily" affected. This distinction is crucial as OD 4.30 on involuntary resettlement applies only to involuntary resettlement.¹⁹⁰ The Panel, in determining Bank compliance with OD 4.30, had to decide which requirements had to be fulfilled for a resettlement to be considered "voluntary." The impression which the Panel got from its discussions with people in the Move-out area was that "they felt they had a choice whether they could move or not, and most interviewed wanted to move."¹⁹¹ The Panel did, however, also find that most people "were not informed ... of the desert climate, poor soils, danger of salinization, and the long start-up time needed before farms would be functioning in the new irrigation areas."¹⁹² For this reason, the Panel called into question whether the resettlers' choice was an "informed" one and whether, therefore, the resettlement could be considered "voluntary." It must be noted in connection to this that OD 4.30 does not contain a definition of "involuntary." The Panel, therefore, oriented itself by the definition of Draft OP 4.12: Involuntary Resettlement, according to which "involuntary" means "without the displaced person's informed consent or power of choice, or where that consent or choice is being exercised in the absence of reasonable alternative options."¹⁹³ This definition did, however, not help the Panel. Instead of using this opportunity to further interpret the meaning of "involuntary," for example by making recourse to the teleological approach, the Panel simply concluded that "[i]n any event, OD 4.30 does not give clear guidance on the quality of full and informed choice that is needed to consider a resettlement as

¹⁸⁹ See The Inspection Panel Investigation Report, see note 8, 137, para. 353.

¹⁹⁰ Cf. para. 1 of OD 4.30: "This directive describes Bank policy and procedures on involuntary resettlement, as well as the conditions that borrowers are expected to meet in operations involving involuntary resettlement." IDA/IBRD OD 4.30 on Involuntary Resettlement (June 1990), published in: Shihata, see note 3, 413 et seq.

¹⁹¹ The Inspection Panel Investigation Report, see note 8, 137, para. 354.

¹⁹² Ibid.

¹⁹³ Draft OP 4.12: Involuntary Resettlement, note 9.

'voluntary'.¹⁹⁴ It did, therefore, accept the Bank Management's view that OD 4.30 did not apply to the migrants from the Move-out area.¹⁹⁵

As stated at the outset, the Resolution seems neither to envisage the Panel assessing the adequacy of a Bank policy, nor does it authorise the Panel to enter into policy-making activities, such as the establishment of policy requirements. It does, however, not prevent the Panel from interpreting the policies and procedures, the compliance of which it has to review. The Panel's future challenge will be to, on the one hand, provide for reasoned interpretations of key aspects of the applicable Operational Directives and Policies in their analysis of the Bank performance under investigation without, on the other hand, overstepping its authority by seeking to read policy requirements into the safeguard policies which might be very desirable, but not intended by the Bank's policy makers. By failing to find reasoned interpretations in cases in which the operational policies and procedures do not give clear guidance, the Panel stresses its non-judicial, technical nature instead of enhancing its jurisprudence and its own role. By seeking to establish policy requirements not intended by the policies' authors, however, it clearly oversteps its authority. Given this inconsistency, the Board should review and clarify the Panel's role in the interpretation and implementation of Bank policies and procedures.

V. Consequences of Inspection Panel Investigations and Recommendations: Benefits and Challenges

Roughly half of all complaints filed with the Inspection Panel to date resulted in some favourable outcome not only for the Requesters, but also for other project-affected people, and often the environment, too. In some cases, the Request for Inspection ended in the World Bank or the borrowing country taking some remedial actions, such as the development of action plans, the appointment of independent investigators other than the Panel Inspectors,¹⁹⁶ or the creation of a local monitoring

¹⁹⁴ The Inspection Panel Investigation Report, see note 8, 138, para. 355.

¹⁹⁵ *Ibid.*, 139, para. 356, and Inspection Panel, *Executive Summary*, see note 133, xxviii, para. 69.

¹⁹⁶ In November 1995, a claim was submitted to the Inspection Panel regarding the Pangué Dam in Chile. As the case concerned an IFC project for which the Panel has no jurisdiction, the Request was not eligible. Hence, the Panel did not recommend an investigation. World Bank President

panel.¹⁹⁷ It is important to note that the Requesters did not only receive benefits if the request resulted in the Panel recommending an investigation. In the case regarding a project to build a bridge over the Jamuna River in Bangladesh, for example, Bank Management did not recognize violations and the Inspection Panel refrained from recommending an investigation. The claim, nevertheless, resulted in the development of an action plan to remedy obvious problems in the project: *Inter alia*, approximately 70,000 people who were originally excluded from the resettlement plan were included.¹⁹⁸ A second category of Panel proceedings lead to additional financing to address adverse social and environmental impacts of Bank-funded projects in Argentina and Brazil.¹⁹⁹ Finally, two Panel proceedings ended in the Bank cancelling or withdrawing from an offer of funding: The proceeding regarding the controversial Arun III Proposed Hydroelectric Project in Nepal,²⁰⁰ and the proceeding concerning the aforementioned Quinghai Project.

Wolfensohn did, however, appoint Dr. Jay Hair as independent investigator to examine the situation. Cf. Bank Information Center, Table 1: Official Responses to the World Bank Inspection Panel Claims, available at (<http://www.bicusa.org>)

- ¹⁹⁷ In the Singrauli Coal Case (India), a local monitoring panel was created after the Panel had recommended an investigation which had been approved by the Executive Directors with the restriction, however, that a limited desk review was permitted only. Cf. *ibid*.
- ¹⁹⁸ Bradlow, see note 86. See also Bank Information Center, Table 1, see note 196.
- ¹⁹⁹ Cf. Bradlow, see note 86.
- ²⁰⁰ Cf. Escher, see note 90. The Arun III Proposed Hydroelectric Project in Nepal was the very first claim filed with the Inspection Panel. The planned Arun III Project was expected to produce about 200 megawatts of electricity for consumption in the capital and urban areas. The World Bank had originally offered a US\$ 175 million loan to go toward the US\$ 770 million project. The Request for Inspection (filed in October 1994) which triggered the investigation process alleged, *inter alia*, non-compliance by IDA with its Operational Directives on environmental assessment, indigenous peoples, and involuntary resettlement during the preparation and appraisal of the project. Following the Panel's submission of its Investigation Report, in which it validated most of the complaints submitted by the local people (cf. Arun Concerned Group, Request for Inspection, submitted to the Inspection Panel on 21 October 1994), the Bank Management reassessed the project as proposed and, in June 1995, decided to withdraw its support for financing. Before the Executive Board reached the stage of designing a remedy in response to the Panel's Investigation Report, World Bank President

The cancellation of the Bank's support for the Arun III Project has been regarded by scholars as a "benefit" which the Requesters received,²⁰¹ or even as "an extraordinary success which illustrated both the significance and the necessity of the Panel."²⁰² There is certainly some truth in this assessment, and the argument may be made that, as Handl has put it in the context of multilateral development banks and their contribution to sustainable development,

"a refusal by an MDB to participate in an environmentally questionable project can undeniably carry a potent symbolic message: it may well, and indeed should, discourage other potential lenders, be they private or public entities, from going ahead with an investment project that has been found wanting in light of the environmental and social development criteria that the bank is obliged to follow as a matter of public international law and policy."²⁰³

However, effusive optimism — which, of course, not all academics cited express —²⁰⁴ should be warned against. The cancellation of a Bank offer gives rise to the question whether withdrawal is really desirable given that the government in charge of the project will complete the project on its own, that is without surveillance from the World Bank, as in the case of the Quinghai Project. In response to China's withdrawal of its loan application, Clare Short, the UK Secretary of State for International Development, regarded the termination of World Bank financing as a "pyrrhic" victory won by pro-Tibet protesters, because China would now go ahead with the project with its own cash under its own terms. Short put forward, however, that they regretted that the project "will no longer be taken forward with the support of World Bank [which] would have ensured that high social and environmental stan-

Wolfensohn cancelled the Bank's support for the project. Cf. Inspection Panel, Investigation Report, Nepal: Arun III Proposed Hydroelectric Project and Restructuring of IDA Credit – 2029 – NEP, Doc. INSP/SecM95-3 of 21 June 1995; and World Bank, President's Memorandum to the Executive Directors on "Management Response to the Inspection Panel's Investigation Report dated June 21, 1995," Doc. INSP/SecM95-5 of 2 August 1995; cf. also Clark, see note 98, 15. For a comprehensive discussion of the Arun III-case, see also Bradlow, see note 187, 247 et seq.

²⁰¹ This view is expressed by, Bradlow, see note 86.

²⁰² Translation by the author. Buß, see note 41, 352 et seq., (357).

²⁰³ G. Handl, "The Legal Mandate of Multilateral Development Banks As Agents For Change Toward Sustainable Development," *AJIL* 92 (1998), 642 et seq., (665).

²⁰⁴ Cf., in particular the critical comments made by Buß, see note 41, (357).

dards were adhered to.”²⁰⁵ Buß questions, with regard to this problem, whether the Bank should be content with lower standards in such sensitive areas as environment, involuntary resettlement, indigenous peoples, protection of cultural heritage, etc., when there is a clear risk that if the Bank withdraws, the project in question will be sponsored by private investors who do not, or do only to a much lesser extent, adhere to the Bank’s principles as enshrined in its safeguard policies.²⁰⁶ The question points to a fundamental dilemma with which the World Bank is confronted in cases like this. On the one hand, the Bank’s discretion is restricted by the environmental and social development criteria that it is obliged to follow as a matter of public international law and policy.²⁰⁷ These international law standards restrain the Bank from funding projects that are in flagrant violation of the project requirements set out in the Bank’s policies and procedures in so far as they, themselves, reflect international law standards. On the other hand, the Bank, if it continued to finance projects that are — in some respect — inconsistent with established Bank policies, could at least exercise some control over the projects to prevent them from being executed with little or no regard to safeguard policies. In light of the current criticism that the Bank’s strict social and environmental requirements not only make its projects more complicated, but also more costly — leading to a loss of the Bank’s competitive position²⁰⁸ — it will be interesting to see how the Bank will find a solution to the dilemma described above.

²⁰⁵ See S. Sanghera/ N. Dunne, “China drops request to World Bank for Tibetan scheme,” *Financial Times* of 7 July 2000.

²⁰⁶ Buß, see note 41.

²⁰⁷ Cf. Handl, see note 203. For a detailed account and analysis of the question to which extent the World Bank is bound by international human rights standards, see U. Suchsland-Maser, *Menschenrechte und die Politik multilateraler Finanzinstitute*, 1999, 9 et seq.

²⁰⁸ See, e.g. P. Pinzler, “Der Reformator duldet keinen Widerspruch: Mitarbeiter der Weltbank rebellieren gegen den Führungsstil von Präsident James Wolfensohn,” *Die Zeit*, 07/2001, available at (<http://www.de/2001/07/weltbank>)

VI. Assessment and Concluding Observations

With the exception of the complaint mechanisms set up by Human Rights Instruments,²⁰⁹ individuals still lack direct access to international judicial petition procedures to vindicate their basic rights.²¹⁰ In particular, victims of human rights abuses, which can and at times do occur in projects funded by multilateral financial institutions such as the IBRD and the IDA, were often left without effective protection and remedies. As international development banks do not enter into contractual relationships with the people who are potentially affected by bank-financed projects, the Bank's policies do not provide for enforceable rights against the Bank.²¹¹ Individuals can only rely on domestic remedies which are often not available for the asserted infringements. Any attempt to find a foreign state to champion the victims' cause —

²⁰⁹ E.g. European Convention on Human Rights, text in: I. Brownlie (ed.), *Basic Documents in International Law*, 4th edition, 1995, 328 et seq., American Convention on Human Rights, Organization of American States (OAS) Treaty Series No. 36 (1), OAS Official Records OEA, Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1 (1970), reprinted in: OAS Handbook of Existing Rules Pertaining to Human Rights (Handbook) OEA. Ser. L/V/11.50, Doc. 6 (1980), 27–52. For an analysis of the complaint mechanism under the European Convention on Human Rights, see, e.g. E. Klein (ed.), *The European Court of Human Rights—Organisation and Procedure: Questions concerning the Implementation of Protocol No. 11 to the European Convention on Human Rights*, 1997. For an analysis of the complaint mechanism under the American Convention on Human Rights, see, e.g. D. Shelton, "Implementation Procedures of the American Convention on Human Rights," *GYIL* 26 (1984), 238 et seq. It should be noted that unlike the European Convention on Human Rights — on 1 November 1998 a full-time Court was established, replacing the original two-tier system of a part-time Court and Commission —, the American Convention on Human Rights does not allow for a direct application of an individual to the Inter-American Court of Human Rights, but for the lodging of petitions with the Commission only.

²¹⁰ See, e.g. P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th edition, 1997, 217, for an explanation of the reasons for this lacuna. Malanczuk puts forward that: "Conflicting ideologies and interests, and mutual distrust, make it difficult to reach agreement at the United Nations about human rights" and that: "Agreement is easier to reach at the regional level, where states are more likely to trust one another and to have common values and interests."

²¹¹ Cf. Schlemmer-Schulte, see note 5.

assuming that such a possibility exists in law —²¹² will most likely be in vain: states generally refrain from bringing complaints of human rights violations by another state under any international procedure.²¹³

These circumstances have not changed with the creation of the World Bank Inspection Panel. With the establishment of the Panel, the World Bank has set an important precedent for offering non-state actors the possibility of triggering a compliance monitoring mechanism which may, in the end, result in the correction of failures resulting from non-compliance with its own environmental and social project requirements. The Panel does not, however, represent “a legal remedy mechanism through which positions described in the Bank’s policies or rights referred to in the Resolution could be enforced against the Bank.”²¹⁴ The Resolution grants individuals standing before an independent investigatory body or accountability mechanism. It does not accord them the remedy of a legal action in a court.²¹⁵

The creation of the Panel was the World Bank’s response to a growing international movement demanding greater transparency, accountability, and citizen participation at international financial institutions such as the World Bank, the IMF, and the World Trade Organization, which are accused of making decisions that affect the lives of people all over the world, in particular the lives and livelihoods of the poor and defenceless, without a clear system for accountability and demo-

²¹² Cf. Th. Hutchins, “Using the International Court of Justice to Check Human Rights Abuses in World Bank Projects,” *Colum. Hum. Rts. L. Rev.* 23 (1991-92), 487 et seq., who argues that, in theory, there are various avenues open to states championing the cause of victims of human rights abuses in projects funded by the IBRD to bring their case before the ICJ, namely “(1) a suit against members of the World Bank who have signed the compulsory jurisdiction clause of the Court’s Statute, claiming that the World Bank violates international law when human rights abuses take place in its projects, and that member states share responsibility for those abuses; (2) a suit against members of the World Bank which have become parties to international human rights covenants with compromissory clauses granting jurisdiction to the Court, making the same claim as in (1); and (3) a plea to members of the World Bank to pressure the Bank into requesting an advisory opinion of the Court on whether the Bank and its members violate international law when human rights abuses occur in its projects.” *Ibid.*, 488.

²¹³ Shelton, see note 209.

²¹⁴ Schlemmer-Schulte, see note 5.

²¹⁵ Cf. *ibid.*

cratic participation.²¹⁶ The Inspection Panel demonstrates the World Bank's willingness to increase its accountability and transparency. According to the Panel members themselves, the mere existence of the Panel has already enhanced Bank staff awareness that they are accountable for the Bank's compliance with its own policies and procedures.²¹⁷

Currently, the Panel's authority encompasses only the operations of the IBRD and the IDA. Private sector projects by the IFC and the Multilateral Investment Guarantee Agency (MIGA) are not subject to Panel review.²¹⁸ Various non-governmental organisations including Friends of the Earth, a US-based NGO, as well as some scholars are demanding that the Panel's authority expand to encompass the operations of the entire World Bank.²¹⁹ An alternative suggestion is for a separate, independent review panel for the IFC/MIGA to be established.²²⁰ Either solution seems to be not only desirable but also necessary in order to extend the concept of accountability of international financial institutions to the public.²²¹

The creation of the World Bank's Inspection Panel could, *inter alia*, be seen as a serious attempt by the World Bank to create a convincing solution to a fundamental dilemma that development finance institutions which provide funding and advice for development projects are faced with — a dilemma that has traditionally been considered to be irreconcilable. The dilemma is caused by two seemingly conflicting mandates — to help developing countries allocate and use their resources to maximise public welfare, and to ensure that the majority does not advance at the expense of a minority group or the environment. The underlying problem has been poignantly summarised by Bradlow:

“[A]ll development projects, whether they be the building of new dams, highways, power systems, or sports stadiums, involve conflict

²¹⁶ Cf., e.g., Manifesto of the World Social Forum on 25th to 30th January 2001 in Porto Alegre, Southern Brazil, (<http://www.forumsocialmundial.org>)

²¹⁷ Cf. Escher, see note 90.

²¹⁸ For the IFC and MIGA, a Compliance Advisor/Ombudsman (CAO) was created. It can be reached at (<http://www.ifc.org>)

²¹⁹ Cf. Center for International Environmental Law (CIEL), “Discussion Paper on Extension of Inspection Panel to IFC and MIGA,” (<http://www.igc.apc.org>)

²²⁰ Cf. *ibid.*

²²¹ For a discussion of the proposed models for an IFC/MIGA inspection mechanism, see Buß, see note 41.

between those who believe that legitimately chosen policy makers have the right to except that their decisions regarding development will be respected and those who believe that development projects imposing an unfair burden on any specific group of people are unacceptable. This dispute often also becomes a dispute between national policy makers, who believe that sovereignty should protect their decisions from outside interference, and those who believe that certain internationally recognized standards of good practice are universally applicable. This latter group also contends that project decision makers who fall below these standards in their decisions and actions should be held internationally accountable.²²²

Although the Inspection Panel, thus far, has not specifically invoked international law standards other than Bank policies and procedures, as would be desirable, the Panel is an important means of holding an international finance organisation directly accountable for compliance with its own policies, and for the adverse effects that their decisions and actions may have on the environment and the people who live in the project areas.

²²² Bradlow, see note 86.