

PART III

ARTICLES ON ACCOUNTABILITY IN INTERNATIONAL FINANCIAL INSTITUTIONS

International organizations and Private complainants: The case of the World Bank Inspection Panel

Private complainants and International organizations: A comparative study of the Independent Inspection Mechanisms in International Financial Institutions

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ARTICLE: International Organizations and Private Complaints: The Case of the **World Bank Inspection Panel**

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LEXISNEXIS SUMMARY:

... The three-member **Panel**, which will be independent of Bank staff, will be appointed by, and report directly to, the Executive Directors. ... Moreover, critics contend that the Bank's staff has used these procedures, which are not well understood by outsiders, along with the Bank's great respect for the borrower state's sovereignty to avoid being held accountable by either the Executive Directors or those individuals most directly affected by Bank operations. ... The primary benefit of this proposal was that it would have enhanced the Directors' oversight of the Bank's staff. ... (d) The **Panel** is required, before making its recommendation, to consult with the Bank's legal department regarding rights of the Bank that might be implicated by the request for an **inspection**, and with the borrower and the Executive Director representing the borrower. ... The Resolution also leaves unresolved the issue of which party, either the **Panel** or the Bank's staff, has the power to determine which records are "pertinent" to a particular investigation. ... Those private actors who contended that they had been harmed by the actions of the international organization were expected to have the member state, of which they were a citizen, bring a complaint to the international organization on their behalf. ...

TEXT:
[*553]

I. Introduction

On September 22, 1993, the Executive Directors of the **World Bank** decided to establish an independent **Inspection Panel (the Panel)**. ¹ The three-member **Panel**, which will be independent of Bank staff, will be appointed by, and report directly to, the Executive Directors. ² It will have the power to investigate complaints received from any group of private complainants who allege that they have been directly and adversely affected by the failure of the International Bank for Reconstruction and Development or the International Development Association (known, collectively, as the Bank) to comply with its operational policies and procedures. ³ In addition, the **Panel** will advise the Bank's Executive Directors on which complaints to investigate. The Bank will make publicly available the complaints that the **Panel** receives, the **Panel's** findings and recommendations, and the subsequent decisions of the Executive Directors. ⁴ The Bank will also publish the **Panel's** annual report to the President and Executive Directors of the Bank. ⁵

The creation of the **Panel** is an important legal development. It is the first forum in which private actors can hold an international organization directly accountable for the consequences of its failure to follow its own rules and procedures. ⁶ The Executive Directors' decision, therefore, constitutes the first formal acknowledgement that international organizations have a legally significant non-contractual relationship with private parties that is independent of either the organization's or the private actor's relationship with a member state.

The Executive Directors, in their decision to create an independent **inspection panel**, have carefully defined the scope and nature of the relationship between the Bank and private actors. There are three aspects to this relationship. First, the Executive Directors have decided that the Bank's legally significant relationship is limited to those private actors who can demonstrate that their rights or interests have been, or are likely to be, directly affected by Bank operations. ⁷ Second, the Executive Directors have determined that private actors can hold the Bank publicly accountable for its conduct in this relationship. Pursuant to this determination, they have provided private actors with a forum for raising qualified **[*555]** complaints about the Bank's conduct. ⁸ Third, the Executive Directors have defined the legally significant aspect of this relationship to be the manner in which the Bank implements its mandatory operating policies and practices. ⁹ These rules and procedures cover all aspects of the Bank's operations, including such issues as participation by non-governmental actors in Bank operations, ¹⁰ the treatment of involuntarily resettled communities, ¹¹ the Bank's treatment of indigenous peoples, ¹² and the procedures to be followed in undertaking environmental impact assessments. ¹³

Due to the broad scope of the Bank's operating rules and procedures, the **Panel's** findings and recommendations have the potential to influence substantive areas of international law. For example, the **Panel's** findings on the adequacy of the Bank's actions in implementing its policies and procedures for dealing with indigenous peoples, involuntarily resettled communities, and other non-governmental actors directly affected by Bank operations could influence the development of international human rights law. Similarly, the **Panel's** findings regarding the Bank's rules for conducting environmental impact assessments will be of interest to international environmental lawyers.

The work of the **Panel** should also influence the development of international administrative law. Currently, this branch of law is primarily concerned with the internal rules of international organizations and the adjudication of disputes between these organizations and their respective employees. ¹⁴ The Bank's creation of the **Panel** could expand the scope of international administrative law to include the adjudication of disputes between international organizations and private parties regarding an international organization's compliance with its own internal operating rules and procedures. **[*556]**

In the course of this newly created complaint process, the complainant, the **Panel**, and the Bank will each need to advance an interpretation of the operational rule or procedure that governs the contested Bank action. Because the Resolution provides that, at a minimum, both the complainant and the **Panel's** interpretations will become public, the work of the **Panel** should stimulate public debate over Bank rules and practices. In addition, the **Panel's** work should spark debate over the process the Bank follows in formulating its rules and procedures. Consequently, over time, the **Panel's** influence can be expected to extend beyond the adjudicatory aspects of international administrative law to include the Bank's own rule-making procedures.

The work of the **Panel** should also have a positive influence over the overall efficiency and governance of the Bank. By providing Bank management with timely, independent, and objective information about the actual and potential effects of its operations, the **Panel** should improve management's ability to identify and correct, or at least mitigate, problems caused by on-going operations. It will also enhance the ability of those private actors most directly affected by Bank operations to communicate with decision-makers within the Bank. This may ultimately encourage the Bank and its staff to be more responsive to the needs and concerns of those touched by Bank operations. In short, by increasing the transparency of Bank operations and the accountability of the Bank's staff, the **Panel** should improve the Bank's ability to alleviate poverty and promote sustainable development. ¹⁵

This Article will first describe the developments that resulted in the Bank's adoption of this resolution. It will then describe and analyze the **Panel's** powers and procedures. This discussion includes several proposals for strengthening the **Panel's** procedures and some suggestions for making effective use of the **Panel**. The final section will discuss the legal and operational significance of the **Panel** in greater detail. [*557]

II. Developments Leading to the **Panel**

The general mandate of the Bank is to promote "development." ¹⁶ Each succeeding generation of Bank leaders, in seeking to define this mandate in light of the perceived needs of the times, has expanded the scope of the Bank's operations. ¹⁷ The result is that the operations of the Bank now include the financing of both discrete investment projects and of programs and projects that include such broad objectives as capacity building, poverty alleviation, popular participation in development, and environmentally sustainable development. In addition, the Bank makes adjustment loans by which the Bank extends credits in exchange for the borrower's commitment to adopt certain policy measures that are designed to produce structural changes in the borrower's economy. ¹⁸ These measures may address such issues as trade and investment liberalization, public sector management, the transparency and accountability of government administration, the administration of justice, and the creation of social safety nets to [*558] protect vulnerable population groups from the effects of adjustment. ¹⁹

Each new expansion has complicated the Bank's decision-making processes. In particular, the division between the borrower's and the Bank's respective responsibilities for Bank-funded operations has become blurred. When Bank operations were limited to funding the construction of discrete development projects, the Bank's lending decisions were based on technical and financial considerations relevant to each individual Project's feasibility. These decisions were based on the Bank staff's analysis of a given project. ²⁰ The Bank treated the trade-offs between different policy objectives and the interests of different social groups in a country as the sovereign prerogative of borrower states. As such, the Bank formally viewed these issues as external to its own decisions regarding a

project's feasibility and, ultimately, to the Executive Directors' decision to fund the project. ²¹

The evolution of the Bank's operations has made it increasingly difficult for the Bank to maintain such formal distinctions. For example, it is not possible to evaluate a project designed to meet the needs of the rural poor without making some judgments about the acceptability of the project's associated trade-offs between the interests of urban and rural communities, between rich and poor rural population groups, and possibly between men and women. The Bank also needs to make some assessment of the priorities that should be attached to the borrower state's various development objectives. **[*559]**

Structural adjustment and systemic transformation operations require further analysis. Such lending decisions must include a judgment about the appropriate sequence of adjustment measures, the appropriate time-frame within which these measures must operate, and the social and political acceptability of proposed adjustment measures. In addition, the Bank cannot realistically condition its loans on the adoption of certain policy measures without passing judgment on the ability of borrower governments, and specific government officials, to actually implement and sustain these policy measures. ²²

The expansion of the Bank's operations has therefore forced it into a broad-ranging policy dialogue with its member countries that encompasses many aspects of the governance of these societies. ²³ Because the Bank translates the conclusions drawn from these discussions into the binding conditions attached to future loan transactions, these developments have turned the Bank into an actor in the formulation and implementation of policy in its borrower countries.

In the course of expanding its operations, the Bank has sought to respect the sovereignty of its member countries by ensuring that all substantive decisions are formally made by the borrower. ²⁴ Consequently, under the terms of all Bank loan agreements, the borrower remains legally responsible for the implementation of Bank-**[*560]** funded projects or adjustment programs. ²⁵ This legal formalism does not alter the fact that the decisions the Bank makes in the course of structuring and negotiating loan transactions, approving loan agreements, and disbursing loan proceeds directly affect the lives of millions of people. Such decisions influence who will benefit from the transaction and who will suffer injury, either because of the transaction itself or as a result of the Bank's decision to allocate resources to a particular operation rather than to other projects.

Given the potential consequences of its actions, the way in which the Bank makes its operational decisions is of significance to all those affected by Bank operations. Its decision-making rules and procedures influence which voices are heard in the Bank's deliberations and, as a result, which interests are likely to be served by Bank operations. In addition, they determine how the Bank allocates its resources and, thus, whether the Bank makes effective use of the public resources with which it has been entrusted. ²⁶

Unfortunately, the Bank's decision-making procedures appear to have been overwhelmed by the expansion of the Bank's functions and by the increasing complexity of its operations. According to existing procedures, all **World Bank** loans must be approved by the Bank's 24-member Board of Directors. ²⁷ In fiscal year 1993, these Executive Directors and their small staff, in addition to overseeing the Bank's general operations, were required to understand, assess, and approve a total of 245 IBRD loans and IDA credits; ²⁸ review 277 completion reports and seven studies submitted by the Operations and Evaluations Department (OED); ²⁹ and develop and refine the policies of the Bank.

The Directors are heavily dependent on the services of the Bank's staff to adequately perform their present responsibilities. **[*561]** The Bank's staff, which numbered 6,197

at the end of fiscal year 1993, ³⁰ is responsible for gathering relevant information, negotiating project design and implementation strategy with the borrower, and making accurate and objective appraisals of loan proposals. In most cases, the Bank's Directors do not see the project documentation until a loan proposal is formally presented for Board approval. At that time, the Directors only have a few weeks to review the proposal and decide whether to approve or reject the loan request. ³¹

This operating procedure gives the Bank's staff enormous power. First, staff members determine which loan requests develop into negotiable loan proposals. In addition, by deciding who to consult and how much weight to attach to the information available to them, the staff influences both the issues and the range of opinions that are incorporated into the loan appraisal reports presented to the Directors. In essence, the Bank's staff influences the form and substance of the information that Board members ultimately receive about each loan proposal. The staff also can influence the Executive Directors' decisions on loan proposals through the timing of their loan presentations to the Board.

The ability of the staff to objectively make all of these decisions must be questioned. Bank staff from the country department for each borrower state are involved in policy dialogues with that country, as well as in the design, negotiation, and implementation of all Bank-funded projects in that country. The officials who make many of the Bank's decisions on a project have often had a direct, personal involvement in the project under consideration or have colleagues and superiors who were involved in the project's design, appraisal, and negotiation. This makes it difficult for Bank officials to be objective about projects or programs that they themselves or their colleagues and supervisors have helped design and negotiate.

Prior to the creation of the **Panel**, the power of the Bank's staff was further enhanced by the lack of formal and independent channels through which the Directors could receive information directly from private actors affected by proposed or on-going bank operations. ³² The lack of such a formal channel deprived the Directors of an independent and knowledgeable source of information on specific Bank operations. It also meant that private actors were only able to communicate their concerns to the Directors through sympathetic staff or through those non-governmental actors with the resources and influence to gain access to the Directors. Consequently, even indirect communications between the Bank and private actors took place in a highly politicized atmosphere, significantly complicating any dialogue between the two parties.

Until recently, the result of this loan approval process was that, except in those unusual cases where the Board as a whole, or an individual Director, took a special interest in a loan proposal, the Board was reduced to acting as little more than a rubber stamp of staff decisions. The result is that, in effect, the Bank's staff has operated without effective accountability.

The power of the Bank's staff continues after the Board decides to approve a loan. Staff members determine whether a borrower has complied with loan provisions and, as a result, whether the borrower is entitled to have loan proceeds disbursed. ³³ Staff members also decide whether to excuse a borrower's failure to comply with the terms of the loan agreement. ³⁴

Many observers and critics of the Bank have expressed concern about this modus operandi. ³⁵ They argue that these operating procedures have created an institution that is insufficiently responsive to the concerns of those most directly affected by Bank operations, as well as one that often funds projects and programs of questionable quality. ³⁶ Moreover, critics contend that the Bank's staff has used these procedures, which are not well understood by outsiders, along with the Bank's great respect for the borrower state's sovereignty to avoid being held accountable by either

the Executive Directors or those individuals most directly affected by Bank operations.

The critics' arguments have gained substantial support from two recent developments. The first is the case of the Bank's participation in the Sardar Sarovar Water Project in India. The construction of this dam project, which, if completed, will be one of the largest water projects in human history, involves the forced removal of approximately 250,000 people and the expropriation of approximately 117,000 hectares of land. ³⁷ In 1984, despite widespread opposition to the dam, the Bank agreed to lend U.S. \$ 450 million to the project. Following continued opposition and a concerted international campaign against the project, the Bank finally appointed an independent commission in 1991 to study the Bank's role in the project.

The commission, whose report was released in July 1992, ³⁸ found that the Bank had violated its own rules and procedures both in its decision to lend money to the Sardar Sarovar project and, following the Board's approval, in actually disbursing funds for the project. It found, for example, that the Bank had failed to complete, or require the borrower to complete, the environmental impact studies required by Bank procedures. ³⁹ The commission also determined that the Bank's staff had failed to enforce loan provisions requiring the Indian government to make adequate arrangements for compensation payments before the government began forcibly relocating residents from the project site. ⁴⁰ In fact, the commission found the quality of the technical and environmental studies completed for this project to be so inadequate that it could **[*564]** not make recommendations on how to correct problems with the project. ⁴¹ In addition, the commission expressed concern that the project might actually cause worse public health problems than those it was intended to solve. ⁴²

The second development was an internal review of the Bank's management of its loan portfolio. ⁴³ This review found that nearly one-third of all Bank-supported projects failed to perform as well as expected and that the quality of the Bank's loan portfolio has steadily deteriorated over the past ten years. ⁴⁴ According to the report, the share of problem projects increased from 11% in fiscal year 1981, to 13% in fiscal year 1989, to 20% in fiscal year 1991. ⁴⁵ Worldwide, the report determined that 39% of all borrower countries were experiencing problems with more than 25% of their Bank-funded projects. ⁴⁶

The report made clear that, while there were many causes for the deterioration in the Bank's loan portfolio, the Bank's administrative procedures were an important contributing factor. ⁴⁷ In particular, the report suggested that "the Bank's pervasive preoccupation with new lending" ⁴⁸ and its emphasis on loan approval rather than on loan implementation had encouraged both staff and borrowers to view loan appraisal as a promotional rather than a prudential process, whose major purpose was to convince the Executive Directors to support the loan proposal. ⁴⁹ The report indicated that this problem was exacerbated by inadequate monitoring of project implementation and by "startlingly low" compliance with covenants in Bank loan agreements. ⁵⁰ Citing another recent **World Bank** study, the report estimated that borrowers were complying with only 22% of the financial covenants in loan/credit agreements. ⁵¹ This, the task force concluded, had adversely **[*565]** affected the credibility of the binding nature of the Bank's loan agreements. ⁵²

The findings of these recent reports suggest that outsiders cannot be confident that loan agreements, which are the most important public documents describing specific Bank operations, accurately describe the plan of action the Bank and the borrower will follow in implementing Bank-funded operations. ⁵³ They also indicate a reduction in the transparency of Bank operations which adversely affects the ability of those directly affected by these operations to comprehend the Bank's activities and to hold the Bank accountable for its actions.

The reports also demonstrate that the Bank's lending process was fundamentally flawed and that Executive Directors were basing their lending decisions on information whose objectivity and adequacy was questionable. The information available to the Executive Directors was often compromised by the perception, on the part of both borrower states and the Bank's own staff, that project documents were marketing tools rather than documents to be used in forming objective decisions on project proposals. Moreover, because neither the Bank nor borrower governments appeared to treat loan agreements as binding and enforceable, non-Bank stakeholders in Bank operations could not be confident that they knew the real terms of the Bank's loan transactions.

These developments encouraged both Bank officials and non-Bank commentators to begin thinking of ways to improve the monitoring of Bank operations. Three types of solutions were proposed. ⁵⁴ The first set of proposals called for an independent commission that would constitute a permanent version of the ad hoc review **panel** established in the Sardar Sarovar case. ⁵⁵ These **[*566]** proposals generally called for a permanent review **panel**, independent of the Bank's staff and substantially independent of the Bank's Executive Directors. The **panel**, as it was envisioned in these proposals, would hear complaints from private actors regarding nearly any aspect of a proposed or on-going Bank operation. ⁵⁶ Private parties, therefore, would have been able to complain to the **panel** about the Bank's own conduct and about possible developmental, environmental, or human rights issues raised during the design and implementation of Bank-funded operations. Furthermore, these proposals would have granted the **panel** binding decision-making powers. ⁵⁷

The creation of such a **panel** would undoubtedly have increased the confidence of many private actors in Bank operations. It would also have had a profound impact on the responsiveness of the Bank's staff to the needs of the intended beneficiaries of Bank operations. Nonetheless, these proposals had several flaws.

The most important problem with these proposals was that they failed to distinguish between those complaints that relate exclusively to the Bank's own responsibilities and those that pertain to either the Bank's shared responsibilities or to the exclusive respon **[*567]** sibilities of other participants in the project, including member states in whose territory operations were taking place. This failing meant that the **panel** would find it difficult to act effectively within the confines of the Bank's mandate, which requires the Bank to refrain from interfering in the internal affairs of its member countries. ⁵⁸ It would also have created problems relating to the Bank's respect for the sovereignty of member states and to the relationship between the Bank and its members.

For example, in cases where the actions of a borrower or member state were directly implicated, the **panel** would have been unable to conduct its investigations or to enforce its decisions without either the member state agreeing to the **panel's** review of the Bank's operations, or the Bank agreeing to ignore its mandate and support the **panel's** interference in the sovereign affairs of the borrower country. Similarly, in cases where actions by project participants other than member states were directly implicated, the **panel** would not have been able to fully resolve the complaints unless those actors agreed to participate in the **panel** proceedings, or the Bank was willing to assume exclusive responsibility for issues in which it shared responsibility with the other participants.

These proposals would also have raised questions relating to the legal limits of the Bank's ability to intervene in issues involving the political affairs of member states. For example, complaints that implicated the borrower state's treatment of its own citizens, even where this treatment did not involve violations of their human rights, would require the **panel** to sit in judgment of the political decisions of a borrower state. This could result in the **panel** forcing the Bank to substantially alter the meaning of its Articles of

Agreement. ⁵⁹ Although the Bank should become more sensitive to human rights concerns, it is not clear that such a fundamental reinterpretation of the Bank's Articles of Agreement should occur in such a manner, without the direct participation of the Bank's various stakeholders.

A second type of recommendation was to create an independent evaluation unit within the Bank. ⁶⁰ This unit would have been **[*568]** independent of the Bank's staff and would have reported directly to the Bank's Executive Directors. Its mandate would have allowed it to investigate on-going Bank operations at the request of the Executive Directors or the borrowers, and to make non-binding recommendations to the Directors and the Bank's management on how to correct problems in the operations. The unit would also have been empowered to initiate its own evaluation of specific on-going Bank operations.

The primary benefit of this proposal was that it would have enhanced the Directors' oversight of the Bank's staff. It would also have provided them with independent and timely advice on how to respond to perceived problems in Bank operations.

The major problem with this proposal was that the evaluation unit would not have had the explicit authority to receive complaints from directly affected private actors. Consequently, it would not have significantly improved the transparency of Bank operations. In addition, lack of public access to the unit would have undermined the public's confidence in its work. Furthermore, the proposal would not have addressed the issue of direct Bank responsibility to private actors adversely affected by the Bank's operations.

A third proposal, made by the author, was to establish a Bank ombudsman with a mandate to investigate complaints from the public about the Bank's implementation of its own operating rules and procedures. ⁶¹ This official, who would have enjoyed security of tenure and independence from Bank staff, would have made recommendations to the Executive Directors on which complaints to investigate and on how to respond to the findings of any investigations. The ombudsman would also have published these findings **[*569]** and recommendations, as well as an annual report discussing the ombudsman's operations.

The primary benefit of this proposal was that it defined the zone of exclusive Bank responsibility as being the manner in which the Bank implements its operational rules and policies, and sought to limit the activities of the ombudsman to that area. This would have provided the Bank and the public with a number of advantages. First, this proposal would have enhanced public faith in Bank operations by providing private parties with a transparent procedure for raising qualifying complaints. They could do so with the confidence that petitioners would receive a fair hearing based on the merits of a complaint and not on the basis of the identity or political influence of the complainants. Second, it would have opened up to public scrutiny the administrative practices of the Bank. This would have stimulated public debate on these practices and, over time, could have led to a more open process for designing, implementing, and interpreting the Bank's administrative practices. Finally, this proposal would have provided the Directors with timely, independent, and impartial information and advice on problems in Bank operations and on the actual impact of the Bank's operating rules and procedures. Ultimately, such transparency would likely have had a beneficial effect on the overall quality of Bank operations.

Like most ombudsmen, however, the Bank ombudsman would only have had advisory powers. ⁶² Nevertheless, this limitation would have been mitigated by the fact that all of the findings and recommendations of the ombudsman would have been public. In addition, the ombudsman could have used the annual report to signal dissatisfaction with the Bank's response to the ombudsman's findings and recommendations.

To its credit, the Bank responded constructively to these reports and proposals. The Executive Directors have authorized three important actions. First, the Bank has adopted a program of action that, when fully implemented, is expected to result in the staff's placing greater emphasis on the monitoring of loan implementation and project maintenance rather than focusing on the quantity [***570**] of money being loaned. ⁶³ This program should also shift portfolio management from the project to the country level. ⁶⁴

The Bank expects its new loan management program to provide borrowers and the Bank with greater flexibility in the use of Bank funds. It hopes that this flexibility will foster Bank-funded operations that are more responsive to the needs of the borrower country. ⁶⁵ It should also improve the Bank's ability to manage its loan portfolio.

Second, the Board adopted a new information policy that should result in a substantial improvement in the public's access to Bank information. ⁶⁶ Pursuant to this new policy, the Bank has expanded the categories of documents that it will make publicly available. It has also created a new document, known as the Public Information Document (the "PID"), which is designed to provide the public with more detailed and timely information on Bank operations. ⁶⁷ This development should enhance the public's ability to influence the final design and implementation strategy for specific Bank operations. In addition, the Bank has opened a Public Information Center that, while based in Washington D.C., has the capacity to make documents available anywhere in the world through Bank field offices or through the Internet. ⁶⁸

The third measure adopted by the Board was the September 1993 resolution establishing the **Inspection Panel**. ⁶⁹ The resolution is substantially influenced by the ombudsman proposal, adopting its proposed scope of jurisdiction and operating procedures. Fur [***571**] thermore, the resolution adopts the other two proposals' suggestion that the entity reviewing complaints have several members, rather than a single ombudsman, and adopts the inspectorate's suggestion that Executive Directors retain all final decision-making power.

In addition to its other benefits, the **Panel** will provide the public with a means to enforce the Bank's other two reform measures: the new loan management program and the information disclosure policy. In principle, the Bank's failure to enforce either of these reforms could become the subject of a complaint to the **Panel**. This possibility will be discussed in greater detail following a discussion of the **Panel** and its procedures.

III. The Procedures of the **World Bank Inspection Panel**

A. Introduction

The Resolution provides considerable information on the powers of the **Panel** and the procedural rules that will govern its work. Although the Resolution fails to resolve a number of critical issues, it provides sufficient detail to establish the basic operating principles of the **Panel**. These principles are:

- (a) **Panel** members should have strong incentives to provide the Executive Directors with independent, impartial advice that is based only on the merits of the complaints that they receive and on the findings of their investigations;
- (b) The Bank's staff should be given adequate opportunity to handle problems before they become the subject of an investigation;
- (c) The **Panel** should take care to consult with the Bank's staff and the borrower country when they review a request for an investigation or conduct an investigation; and
- (d) The Board and the staff of the Bank should be given adequate opportunity to respond to the recommendations and findings of the **Panel** before they are made public.

Although these operating principles are not inherently contradictory, they are not necessarily compatible with each other. The independence of the **Panel's** advice to the Executive Directors can be undermined by the other three principles' strong bias in favor of avoiding investigations. The Executive Directors appear to have **[*572]** had three reasons for creating this tension in the **Panel's** operating principles. Two of these reasons are a concern with ensuring that Bank officials have adequate flexibility and autonomy to perform their responsibilities and a desire to maintain intra-organizational accountability. The third is respect for the sovereignty of the borrower state. Although these are important considerations, it is to be hoped that neither the Bank nor the **Panel** will allow them to undermine the independence of the **Panel** or unduly limit the public's ability to hold the Bank's staff accountable for its actions.

The following sections discuss the procedural requirements established by the Resolution and indicate the issues that have not yet been resolved by the Bank. The sections also include some proposals for resolving these difficulties.

B. **Panel** Membership

The members of the **Panel** shall be selected by the Executive Directors from nominations submitted by the President of the Bank "after consultation with the Executive Directors." ²⁰ The Board has assured the geographic diversity of the **Panel** by requiring that each member of the **Panel** have a different nationality. ²¹

The Resolution does not require that the **Panel** include both men and women, nor does it require that **Panel** members possess diverse substantive expertise. The Board's lack of attention to the gender balance of the **Panel** is lamentable. It undermines the impression that the **Panel** will provide access to those private actors, such as women, who have traditionally lacked the power to effectively convey their concerns about the Bank's operations to Bank officials.

Failure to specify that Panelists should have a diversity of substantive expertise is also problematic in that it raises doubts about the ability of the **Panel** to competently and independently assess and investigate certain types of complaints. This could be a particularly relevant consideration in those cases that raise complex human rights and environmental issues. For example, the **Panel** may need a specialist with environmental, human rights, legal, or anthropological expertise if it is to fairly resolve a complaint

brought by a group of people forcibly removed in the course of a Bank-funded dam project. The President of the Bank and the **[*573]** Executive Directors should be more sensitive to these considerations when selecting Panelists than they were when they adopted the Resolution. [72](#)

Despite their lack of attention to the diversity of expertise among Panelists, the Executive Directors have stipulated minimum qualifications required of all **Panel** members. Although these qualifications are broad and grant the President a great deal of discretion, they are sufficient to produce a **Panel** that is capable of gaining the confidence and respect of both Bank and non-Bank actors. The Executive Directors have established the following requirements that pertain to the expertise of the Panelists:

- (a) They must be able to deal "thoroughly and fairly" with requests for **inspection**; [73](#)
- (b) They must have integrity and be independent of the Bank's management; [74](#)
- (c) They must have "exposure to developmental issues and to living conditions in developing countries;" [75](#) and
- (d) It would be "desirable" for them to have knowledge and experience of Bank operations. [76](#)

The Board has also established the following requirements which are designed to assure the independence of the Panelists:

- (a) Panelists must not have served as an Executive Director, Alternate Executive Director, advisor to an Executive Director, or a member of the Bank's Staff within the past two years. For these purposes, the Bank's Staff has been defined to include Bank consultants; [77](#)
- (b) Panelists serve a non-renewable five-year term of office [78](#) and members of the **Panel** will be ineligible for **[*574]** employment with the Bank once their term of office expires; [79](#) and
- (c) Panelists may only be removed from office for cause by a decision of the Executive Directors. [80](#)

These requirements should maximize the Panelists' interest in reaching decisions that are universally viewed as being fair and competent. [81](#) For example, the fact that Panelists cannot be reappointed and are not eligible for any other position within the Bank suggests that the Panelists' own best interests will be served by producing findings and recommendations that are universally respected by both Bank and non-Bank actors. This will only occur if the Panelists possess the expertise and independence to base their decisions on the merits of a complaint, rather than on the identity of the complainant or the interests of the Bank or specific member states.

The **Panel's** independence is counterbalanced by the fact that it only has advisory

powers. This combination poses a challenge to both the **Panel** and the Bank. The Bank's staff may attempt to marginalize the **Panel** and undermine its efficacy if it views the **Panel** as being too responsive to the interests of the complainants and insufficiently sensitive to the constraints under which the Bank's staff operates. On the other hand, the **Panel** will suffer a loss of public confidence if it is too sensitive to the concerns of the Bank and develops a reputation for being unwilling to make recommendations that are contrary to the Bank's interests.

These risks can be minimized in two ways. First, Panelists must issue reasoned opinions that justify their findings and recommendations. The Bank is required to publish the full record of the **Panel's** findings and recommendations, including the Board's responses to these findings. ⁸² Outside observers will be able to use these reports and opinions to hold the **Panel** accountable for its [*575] work and the Bank accountable for its responses to the work of the **Panel**. ⁸³ Second, the **Panel** should adopt procedures that are as transparent and participatory as possible. This will reduce the number of opportunities for the Bank's staff to engage in efforts that could undermine the efficacy of the **Panel**, such as ex parte communications with the **Panel** or the Executive Directors. ⁸⁴

C. Powers of the **Panel**

The Panel shall have the following powers:

(a) INVESTIGATORY: The **Panel** shall have the power to investigate complaints involving the Bank's failure, through act or omission, to follow its operational policies and procedures. ⁸⁵ The **Panel** shall then make findings about the Bank's compliance with the relevant operational policies and procedures on the basis of this investigation. ⁸⁶ The **Panel** will submit its report on the investigation to the Bank's Executive Directors and the Bank's President. ⁸⁷

(b) ADVISORY: The **Panel** shall review all complaints and make recommendations to the Executive Directors about which complaints to investigate. ⁸⁸

(c) RULE-MAKING: The **Panel** shall make decisions on all procedural matters relating to the work of the **Panel**. ⁸⁹ This means that the **Panel** has the power to formulate the procedural rules applicable to the complaints process and to resolve issues that were not clarified in the Resolution. ⁹⁰

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Paragraph twelve of the Resolution defines operational policies and procedures to include the Bank's operational policies, Bank procedures, and operational directives. ⁹¹ The Resolution expressly excludes guidelines and "Best Practices" from this definition. ⁹² An analysis of these different categories of Bank rules and procedures suggests that the **Panel's** jurisdiction is limited to those Bank policies and procedures that impose binding obligations on the Bank's staff. This is consistent with the notion that the **Panel** should not deprive the Bank of the flexibility and autonomy that staff members need in order to perform their responsibilities. ⁹³

The Bank's mandatory policies and procedures include Bank procedures relating to the treatment of involuntarily resettled communities, the Bank's relations with indigenous peoples, public participation in Bank operations, information disclosure, environmental

impact assessments, and rules applicable to loan disbursements and contract management. ⁹⁴ Thus, the work of the **Panel** could affect the Bank's relations with most of the non-governmental stakeholders in its operations.

1. An Example

The following example is designed to demonstrate the types of complaints that could be brought under the Bank's operational policies and procedures. Operational Directive 4.30 deals with the Bank's policy on involuntary resettlement. ⁹⁵ The Directive states that displaced people should receive benefits from the projects that **[*577]** displace them. ⁹⁶ In addition, it stipulates that, at least in large-scale displacements, "a detailed resettlement plan, timetable, and budget are required." ⁹⁷ The Directive specifies the factors that a borrower's resettlement plan should address and the obligations of the Bank's Task Managers in projects involving large-scale resettlements. ⁹⁸ The Directive also requires Bank Task Managers to inform borrowers of the Bank's policies regarding large-scale relocations. ⁹⁹ Finally, the Directive notes that the "responsibility for resettlement rests with the borrower." ¹⁰⁰

Complaints that could arise under this Directive can be divided into three categories. The first of these categories, involving complaints that relate to the staff's non-compliance with the obligations imposed on them by Directive 4.30, clearly falls within the scope of the **Inspection Panel's** jurisdiction. For example, the Directive specifies that the Task Manager should inform the borrower of the Bank's resettlement policy and must "ensure that involuntary resettlement is avoided or minimized." ¹⁰¹ The Directive also states that the Task Manager should consult legal, social, and technical experts and that specialists should visit possible resettlement locations. ¹⁰² The staff's failure, therefore, to inform the borrower of the Bank's resettlement policy, to consult with the requisite experts, or to visit resettlement sites could serve as the basis for a complaint against the Bank by inadequately resettled individuals.

The second category consists of complaints arising under Operational Directive 4.30, which are clearly outside the scope of the **Panel's** jurisdiction. These include complaints relating to actions that are not the exclusive responsibility of the Bank. For example, the Operational Directive makes clear that the borrower is responsible for the resettlement plan. ¹⁰³ This means that the **Panel** lacks **[*578]** the authority to sit in judgment of the borrower's implementation of these resettlement plans. Consequently, any involuntarily resettled group that feels that the borrower has treated it unfairly or inadequately compensated it cannot complain to the **Panel**. Instead, the group must take its complaint to the borrower government or, if appropriate, to another international forum. ¹⁰⁴

The third category consists of those complaints that arguably arise from the Bank's mandatory responsibilities under the Operational Directive. The success of these complaints will depend on the way in which groups characterize their complaints and on the willingness of the **Panel** to creatively and aggressively use its powers. ¹⁰⁵

For example, complaints in this category might arise from the fact that Directive 4.30 stipulates the issues that should be considered in a borrower's resettlement plan. According to the Bank's Directive, resettlement plans must include: an analysis of the legal framework for resettlement, an assessment of alternate resettlement sites, consideration of management capabilities, a valuation of compensation, environmental assessments, and a discussion of the services that should be provided to ensure that resettled individuals are restored to a socially and economically viable position. ¹⁰⁶

Because resettlement is the borrower's responsibility, the borrower retains responsibility for designing a plan that addresses each of these issues. In a case where the resettlement plan does not include an adequate response to each of the factors listed in the Directive, it may be possible to draft a complaint alleging that, given the deficiencies of the resettlement plan, the Bank, in its assessment of the plan, could not have adequately considered each of the factors specified in the Operational Directive.

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In this type of complaint, the complainant would argue that what the **Panel** is being asked to consider is the adequacy of Bank staff compliance with the Operational Directives, and not the adequacy of the borrower's plan itself. Because such a claim is clearly a challenge to the actions of the Bank's staff in light of relevant Operational Directives, the complaint would fall within the **Panel's** jurisdiction and the **Panel** should be willing to investigate.

This type of complaint is likely to be rejected by a timid or insecure **Panel** on the grounds that its role is limited to determining whether the Bank formally complied with the Operational Directives; not the adequacy of its compliance with the Directives. The fact that the **Panel** would be required to publicize the complaint, its review of the complaint, and the decision of the Board means that the public will be able to hold the **Panel** accountable for such a narrow decision. This could generate pressure for the **Panel** to expand the scope of its review in future complaints.

2. Disclosure of the **Panel's** Work

The adequacy of the **Panel's** advisory and investigatory powers must be evaluated in light of the Resolution's requirements regarding publication of the work of the **Panel**. According to the Resolution, the Bank will make the complaints it receives, the recommendations and findings of the **Panel**, and the decisions of the Executive Directors in response to the **Panel's** findings and recommendations "publicly available." [108](#) This means that there will be a public record of the **Panel's** work that can be used to hold the Bank's Directors and staff accountable for their actions in response to the **Panel**. It can also be used to hold the **Panel** accountable for the quality of its work.

The **Panel** will also influence Bank operations through its impact on the interpretation of the rules and procedures the Bank follows. Complainants, in seeking to demonstrate that the Bank failed to follow its operating rules and procedures, will necessarily base their claims on their own interpretation of these operating rules and procedures. Because the complaint, the **Panel's** recommendation, and the Executive Director's response to the complaint will all form part of the public record, the complainant's interpretation will encourage the Bank's staff to advance its own interpretations of Bank policies and procedures in response to the complaint. Eventually, both the **Panel** and the Executive Directors will need [***580**] to resolve any conflicts between these interpretations in the course of their deliberations. The publication of these various interpretations should stimulate public debate on the best interpretation of these policies and procedures. [109](#) This debate, in turn, should encourage public discussion of the adequacy of the Bank's procedures. It could also lead to public proposals for improving specific policies or procedures within the Bank. These discussions and proposals could ultimately influence the content of the Bank's operating rules and procedures. [110](#)

In the course of its review of some complaints and its investigations, the **Panel** will need to judge the actions of specific Bank officials. The **Panel's** complaint process thus should result in individual Bank officials being held publicly accountable for their actions. While

highlighting shortcomings in the performance of some officials, the **Panel's** work should also vindicate Bank officials who are properly implementing controversial Bank operating policies and procedures. These findings should educate both the Bank's staff and private actors about the "best practices" for implementing Bank policies and procedures. Thus, the ultimate effect of holding individual Bank officials publicly accountable for their actions is likely to be an improvement in staff performance, measured both in terms of the efficacy of their work and in terms of their sensitivity to the interests and concerns of those borrowers and private actors whose interests they are supposed to be serving.

Nevertheless, the fact that the **Panel** has only advisory powers does pose an important challenge to the members of the **Panel** and the Bank. If the recommendations and findings of the **Panel** are not respected or generally adopted by the Board, the **Panel** runs the risk of being viewed as irrelevant by non-Bank actors. On the other hand, if all the **Panel's** recommendations are accepted by the Board without debate, the **Panel** runs the risk of being viewed as too subservient to the Bank. The publication of the **Panel's** findings and reports will help non-Bank actors evaluate how seriously the Executive Directors take the **Panel's** advice and how independent this advice actually is. **[*581]**

D. The Complaint Process

1. The Complaint

The following requirements for a successful request for **inspection** can be deduced from the Resolution establishing the **Inspection Panel**:

(a) **Inspections** can be initiated in three ways. First, a request for **inspection** can be brought by any "affected party in the territory of the borrower" that is not a single individual or by that party's local representative. ¹¹¹ The Representative needs to present the **Panel** with written evidence demonstrating that "he is acting as agent of the party on behalf of which the request is made." ¹¹² Second, the Executive Directors, acting in their individual capacities, may request an investigation of serious violations of Bank policies and procedures. ¹¹³ In addition, the Executive Directors "acting as a Board" can instruct the **Panel** to conduct investigations. ¹¹⁴

(b) In "exceptional cases," a non-local representative can bring a complaint on behalf of an affected party. ¹¹⁵ In these cases, the complainant, presumably through the representative, needs to show that no appropriate local representative is available and the Executive Directors must agree to the non-local representation. ¹¹⁶

(c) Complaints must:
[sp'(c)'+n](1) be in writing and state all relevant facts, including harm suffered or threatened as a result of the Bank's failure to follow its operational rules and procedures; ¹¹⁷

(2) allege that the rights or interests of the affected party "have been or are likely to be directly affected by an action or omission of the Bank" that is inconsis **[*582]** tent with

the Bank's "operational policies and procedures"; [118](#)

(3) allege that the Bank's failure to follow its operational policies and procedures relates to "the design, appraisal and/or implementation" of a Bank-funded project. [119](#) The challenged Bank action can include a failure to "follow-up" on the borrower's obligations under the loan agreement, provided that the obligation relates to operational policies and procedures; [120](#)

(4) allege that the Bank's failure to follow its operational policies and procedures has had or threatens to have a "material adverse effect" on the affected party; [121](#)

(5) specify the steps that the requesting party has taken to communicate with the management of the Bank about the request and the response that it has received from the Bank's management; [122](#) and

(6) limited to the acts of the Bank. It cannot relate to actions which are the responsibility of the borrower, guarantor, or any other party besides the Bank. [123](#) In addition, the complaint cannot relate to procurement issues, and cannot be filed after the closing date of the loan or after the loan has been "substantially disbursed." [124](#)

A number of conclusions can be deduced from the above list of requirements. First, the jurisdiction of the **Panel** is limited to proposed and on-going Bank operations. Thus, the **Panel** is empowered to hear complaints related to the design, appraisal, and implementation phases of Bank projects and programs. Its authority ends once the Bank operations are "substantially" completed. [125](#)

This delineation of the **Panel's** jurisdiction means that the **Panel's** authority ends when the Operations Evaluation Department's (OED) authority begins. [126](#) This division of authority protects the independence and objectivity of both the **Panel** and the OED and ensures that both are capable of rendering independent judgments within the spheres of their operations. [127](#)

Second, the Board, by allowing any "affected party" except a single individual to bring a complaint, has indicated that it recognizes the need for a complaint process that is accessible to as many affected people as possible. [128](#) This suggests both a serious intent to improve public access to the Bank and an interest in obtaining accurate and timely information on problems related to on-going or proposed Bank operations.

The Resolution does not define "affected party." [129](#) Consequently, it is not clear if juridical persons have standing to bring complaints. The Bank's apparent interest in opening the process to as many complainants as possible would suggest, however, that the term should be read to include both natural and juridical persons.

Third, the Board's decision to allow affected people to rely on representatives to bring their complaints is analogous to the granting of the right to counsel in legal proceedings. It should be noted that while the Resolution expressly states that the complainant cannot be a single individual, it imposes no such limitation on the representative. It therefore can be presumed that the representative may be a single individual. **[*584]**

The decision to allow representatives to bring complaints is most welcome. The ability to use representatives should help relieve the financial and technical constraints that may impair the ability of affected people, particularly the weakest and most vulnerable, to bring complaints. In addition, in some cases the use of representatives may help reduce the risk of reprisals against complainants from either the borrower or those who stand to benefit from the proposed Bank-funded operation.

This risk of reprisals would also be significantly reduced if the **Panel** established a procedure enabling complainants to request the **Panel** to protect their anonymity, especially in any communications with other parties, including Bank officials, interested in the complaint. ¹³⁰ This procedure would diminish the inhibiting effect such threats could have on affected people's willingness to use the **Panel**. ¹³¹ In this regard, it is to be hoped that the **Panel** and the Board will interpret the right of complainants to make use of "non-local" representatives generously. ¹³² Such an interpretation would enable the largest possible number of affected people to make use of the **Panel**. It would also advance the Bank's objective of creating a forum in which issues are decided on the merits of the complaints, rather than on the identity and political influence of the complainants. Finally, it would help ensure that Bank decision-makers receive comprehensive information on all projects.

Although the Resolution is a major step forward, there are a number of important issues that the Resolution fails to address. Most significantly, the Resolution fails to explicitly establish the complainant's right to receive and respond to communications **[*585]** between the **Panel** and other interested parties, particularly Bank staff. ¹³³ There are three reasons that complainants should be granted this right, subject to reasonable safeguards for confidential Bank information. ¹³⁴ Perhaps most importantly, considerations of due process suggest that both the Bank and the complainant should be given an opportunity to respond to each other's arguments. In particular, those who may suffer irreversible harm in a Bank operation should be given a full and fair opportunity to make their case. This will only be possible if they are informed of the Bank's reasons for undertaking the challenged action.

Second, many Bank-funded operations produce profound and often irreversible changes in the lives of affected people. Consequently, if the Bank is genuinely interested in producing sustainable projects that maximize benefits and minimize the harm to affected individuals, it should ensure that all efforts are made to base Bank decisions on comprehensive and objective information. In addition, if the Bank is interested in promoting transparent and accountable governance to its member countries, it should set a good example in its own operations. This will not occur if the Bank does not make every effort to understand the arguments and concerns of those opposed to its actions, including their response to specific issues raised by the Bank's staff.

Third, the **Panel's** review of the complaint provides an opportunity to educate the complainant and other interested parties about the Bank's interpretation of its operating rules and procedures. This opportunity will be lost if the complainants are not given access to communications between the Bank's staff and the **Panel**.

Another important concern is that the Resolution does not stipulate what information a complainant should include in a successful request for an **inspection**. ¹³⁵ Complainants should use the opportunity created by this lack of specificity to make their complaints as **[*586]** comprehensive as possible. Because the complaint will ultimately become part of the public record, it may be the complainant's best opportunity to make its case to both the **Panel** and the public. In this regard, it should also be noted that the Resolution does not explicitly grant complainants the right to participate in the **Panel's** proceedings at any point after the initial filing of the complaint. ¹³⁶

Complainants, therefore, should consider including information in their complaint from non-directly affected parties inside the complainant's home country, as well as from local and foreign technical experts. In addition, if it is appropriate, they should include information about other countries and other projects which might indicate that the complaint is raising a generalized problem with Bank operating rules and procedures. In fact, if the basis for the complaint is an allegedly flawed operational rule or procedure, complainants should consider filing transnational complaints, incorporating related claims

from a number of different countries. Furthermore, until the role that complainants will play in the investigatory work of the **Panel** is clarified, complainants should expressly request that they be allowed to participate in the investigation and to supplement their complaints with additional information after the complaint is filed.

The Resolution's lack of specificity may also create a number of practical problems for complainants. The first is whether the complaint can only be filed with the **Panel** in Washington, D.C. An alternative, which would be particularly beneficial to poorer complainants, would allow affected parties to file the complaint with the Bank's resident representatives in member states. ¹³⁷ If the **Panel** does allow complaints to be submitted outside of Washington, D.C., the **Panel** will need to establish clear rules to guide resident representatives in their treatment of complaints. These rules should provide that Bank representatives have an obligation to forward complaints to the **Panel** in an expeditious manner, with full **[*587]** protection for the integrity and confidentiality of the complaint. Resident representatives should be subject to severe sanction for breach of such rules.

Another unresolved practical consideration regards the permissible languages in which complaints may be drafted and the identity of the party that should bear the costs of translation. ¹³⁸ These issues are important because they will affect the ability of poor complainants to file complaints. A restrictive decision on this issue could be counterbalanced by an expansive interpretation of the circumstances justifying reliance on non-local representatives.

Based on these observations, it would seem advisable, where possible, for complainants to include the following information in their written requests for investigations:

(a) Information on the Complainant: This should include the name and address of the complainant and proof that the complainant is not a single individual. It should also contain sufficient information to establish that the complainant is directly affected by the on-going or proposed Bank-funded project.

(b) Information on the Representative: If the complaint is being brought by a representative, the complaint should include proof that the representative has the authority to represent the affected party, and the name and address of the representative. If the representative is "non-local," the complaint should contain an explanation of the need for such "non-local" representation. ¹³⁹

(c) The Operational Policy: The complaint should refer to the specific operational policy or procedure that the Bank has failed to follow. The complaint should identify which parts of the policy or procedure the Bank has not followed and should explain why the Bank's actions are inconsistent with the policy. This part of the complaint will therefore provide the complainant with an opportunity **[*588]** to get its interpretation of the Bank's policy or procedure into the public record. ¹⁴⁰

(d) Information on Injury: The complaint should describe the harm that the complainant has suffered, is suffering, or will suffer if the challenged Bank activity is not corrected.

(e) Information on Causation: The complaint should contain information on the link between the harm being suffered and the Bank's failure to follow the cited operational policies and procedures.

(f) Information on Contacts with the **World Bank**: The complaint should describe all communications between the complainant or its representative and the staff of the **World Bank** relating to the substance of the complaint. Ideally this information should

include the dates of all communications, the names of the people spoken to, copies of any letters sent or received, statements of people who undertook these efforts, and an explanation of why the Bank's response was inadequate.

(g) Request for Relief: The complaint should conclude with a request for the types of actions the complainant would like the **Panel** to take. These requests should include the obvious request for an investigation, but should also relate to the **Panel's** review of the complaint and to the procedures to be followed during the investigation. The complainant should consider requesting that:

(1) the **Panel** inform the complainant of all communications between the **Panel** and the Bank's staff and between both the **Panel** and the Board of Directors, and, where possible, provide it with copies of all written communications;

(2) the complainant be given an opportunity to respond to these communications;

(3) the complainant, acting through the **Panel**, be given an opportunity to request information from the Bank because in many cases the Bank will be the **[*589]** only source of information on pertinent aspects of the complaint; [141](#) and

(4) the **Panel's** investigation include any investigatory procedures the complainant deems desirable. These could include a public hearing, an on-site investigation, the opportunity to present additional evidence, such as expert testimony, and evidence about similar problems in other Bank-funded operations.

Finally, potential complainants should recognize that the resolution establishing the **Inspection Panel** states that the Board will review its decision in two years. [142](#) Thus, the Board has the authority to modify the **Panel's** powers if it finds the work of the **Panel** to be too burdensome or if it finds the **Panel's** impact too trivial to justify the expense. This means that the **Panel** may feel compelled to be prudent and deliberate in its actions. Non-governmental actors will also need to carefully select the complaints they bring to the **Panel**. These complaints need to demonstrate both the need for an independent **inspection panel** and the contribution that the **Panel** can make to improving the operations of the Bank.

2. Complaint Review Procedures

The purpose of the **Panel's** review of a complaint is to enable it to make a recommendation to the Executive Directors on whether to authorize an investigation. In making this determination, the **Panel** must assess the adequacy of the complaint and determine whether the Bank has taken or intends to take adequate measures to address

the concerns of the complainant. The complaint review procedures are designed to conform to the general principle that the Bank should be given every opportunity to avoid investigations.

The Resolution stipulates the following complaint review procedures: **[*590]**

- (a) The Chair of the **Panel** must inform the President and the Executive Directors "promptly" of any requests for **inspection** received by the **Panel**. ¹⁴³
- (b) The Bank Management has twenty-one days after this notification to provide the **Panel** with evidence that it has complied with or "intends to comply" with the relevant policies and procedures. ¹⁴⁴
- (c) The **Panel** must decide whether the request meets the requisite standards for acceptance for investigation ¹⁴⁵ and whether the **Panel** will recommend an investigation to the Executive Directors within twenty-one days of receiving the Management's response. ¹⁴⁶ It is important to note that the Resolution does not stipulate that the **Panel** is required to recommend an investigation for all complaints that meet the standards of acceptance for investigation.
- (d) The **Panel** is required, before making its recommendation, to consult with the Bank's legal department regarding rights of the Bank that might be implicated by the request for an **inspection**, ¹⁴⁷ and with the borrower and the Executive Director representing the borrower. ¹⁴⁸
- (e) The **Panel's** recommendation shall be circulated to all Executive Directors "within the normal distribution period" ¹⁴⁹ and the Executive Directors will then decide whether to investigate. ¹⁵⁰
- (f) The affected party, if it initiated the request, shall be informed of the Executive Director's decision within two weeks of the decision. ¹⁵¹
- (g) The decision of the Executive Director, the recommendation of the **Panel**, and the request for investigation shall be made publicly available. ¹⁵² Presumably this will happen no sooner than two weeks after the Executive Directors' decisions. ¹⁵³ **[*591]**

These procedures leave a number of critical issues unresolved. They can be expected to remain unresolved until the **Panel** uses its powers to formulate a complete set of procedural rules. ¹⁵⁴ These issues, however, are sufficiently serious that the adequacy of the **Panel's** work depends, to a significant extent, on how the **Panel** resolves them.

The first issue of concern is that the procedures provide too many opportunities for ex parte communications between the **Panel** and the Bank's staff, the borrower, and the Executive Director representing the borrower state. This makes it difficult for complainants to have unqualified confidence in the impartiality and fairness of the complaint review process. The **Panel** could rectify this deficiency by granting complainants the right to be informed of all communications between the **Panel** and the Bank's staff, the Executive Directors, and the borrower. Complainants also need an opportunity to respond to such communications. If necessary, the **Panel** could review the information in these communications in light of the Bank's information disclosure policy and "sanitize" them to protect confidential information. ¹⁵⁵

The second issue that needs clarification is the nature of the information the **Panel** can consider in making its recommendations. The Resolution does not explicitly state that the **Panel** is required to base its decisions exclusively on information contained in either a complaint or the Bank staff's response to a complaint. Thus, it is at least theoretically possible that the **Panel** could request additional information from the complainant, the Bank, the borrower, and the general public. ¹⁵⁶

This possibility raises the issue of the **Panel's** obligation to publicize the fact that it has received a specific complaint. The Resolution states that the **Panel** will make the complaint publicly available at the time its own recommendation and the determination of the Board are made public. However, if the **Panel** decides **[*592]** to seek or accept information from additional sources, it must make the existence of the complaint publicly known at an earlier stage. Its failure to do so could result in some parties being denied a fair opportunity to present information to the **Panel**. This would compromise the integrity of the **Panel's** review of a complaint.

If, in the course of its deliberations, the **Panel** does decide to accept such information, it should be required to provide the complainant and the Bank with a meaningful opportunity to respond to the additional information. The **Panel's** failure to provide such an opportunity would raise concerns similar to those associated with ex parte communications with the **Panel**.

Another important issue in this regard involves the information that the Board of Directors can use in its deliberations. The Resolution does not state whether the Board is limited to making its decision based on information provided by the **Panel** or whether it can seek additional information. In the latter case, clear rules would need to be established to guide the Directors in their request for additional information and in their treatment of such information. These rules should also identify the sources the Board may approach for additional information. For example, the Board could consider allowing other interested parties to file amicus curiae briefs and to seek joinder of related complaints. The **Panel** and the Board, however, would need to clarify the rights of both the complainant and the Bank to receive and respond to such additional information.

A third unresolved issue involves the time period within which the Executive Directors must act on the **Panel's** recommendations. Paragraph nineteen of the Resolution states that the **Panel's** recommendation "shall be circulated to the Executive Directors for decision within the normal distribution period." ¹⁵⁷ The Resolution, however, fails to specify what the "normal distribution period" is, nor does it indicate whether the Board is obliged to make a final determination within a specific time period after distribution. ¹⁵⁸

This lack of clarity would seem to make it possible for the Board to delay action on the complaint and the **Panel's** recommendation for an undue period of time. Such a possibility would be particularly troubling if the **Panel** had not publicized its receipt of the complaint. In addition, it should be noted that in controversial **[*593]** cases the complainant may also have chosen, for prudential reasons, not to publicize the complaint.

A fourth unresolved issue relates to the nature of the report that the Bank will make publicly available after the Board's decision. Paragraph twenty-five of the Resolution states that the Bank shall make public the complaint, the recommendation of the **Panel**, and the decision of the Executive Directors. ¹⁵⁹ However, the Resolution does not specify that the full, unedited text of each of these documents must be made public. In fact, the Resolution does not provide any guidance as to how much detail the Bank must make public. ¹⁶⁰ Consequently, the possibility exists that the Bank could decide to publish edited summaries of the **Panel's** proceedings.

The **Panel** would best serve the interests of both the complainants and the Bank if it publishes the full texts of the complaint, the **Panel's** reasoned recommendation (including any report prepared by a dissenting panelist), [161](#) and the reasoned decision of the Board. The publication of edited versions of these documents would only raise questions about what the Bank decided not to publish.

3. Standards for Review of the Complaint

The **Panel** will only recommend that the Executive Directors authorize an investigation if it can make an affirmative finding on all four of the following issues:

- (a) The request for **inspection** states sufficient grounds to recommend an investigation. It would appear from paragraph twelve of the Resolution that "sufficient grounds" exist if the complaint is made by a party alleging that its "rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures" and that this failure "has had, or threat **[*594]** ens to have, a material adverse effect" on the complainant. [162](#)
- (b) The Bank's staff has failed to adequately respond to the complaint. [163](#)
- (c) The violation of the Bank's policies and procedures is of a "serious character." [164](#) This term is not defined in the Resolution. [165](#)
- (d) The request has not already been the subject of **Panel** review, unless new facts or evidence justify a second review. [166](#)

In the course of reviewing the complaint, the **Panel** must also "seek the advice of the Bank's legal department on matters related to the Bank's rights and obligations with respect to the request under consideration." [167](#) The Resolution provides no guidance as to the scope of these consultations nor to the weight the **Panel** must attach to the views of the legal department. The Resolution also fails to establish who should initiate the consultations. Thus, it is not clear how the **Panel** is obliged to respond to requests for consultation from the legal department, which may have been informed by other Bank departments that the **Panel** was in the process of considering a specific complaint.

The precise nature of the relationship between the **Panel** and the legal department is an important consideration in assessing this consultation requirement. If, in paragraph fifteen, the Executive Directors intended "seek the advice" to mean that the legal department should act as the legal advisor to the **Panel**, the need for the complainant to be informed of communications between the **Panel** and the legal department would appear to be diminished. However, such an interpretation would create a conflict between the legal department's role as counsel to the Bank and its role as advisor to the independent **Panel** reviewing the actions of the legal department's client - the Bank. **[*595]**

On the other hand, if the Board intended the **Panel** to consult with the legal department so that it would better understand the position of the Bank, then the legal department would be acting as the Bank's advocate before the **Panel**. In this case, the complainant's need to be informed of such communications and to have an opportunity to respond is

more acute.

Because all complaints are likely to implicate the rights and obligations of the Bank, consultations with the legal department could become an essential element of all **Panel** reviews. In light of this, the issue of the complainant's right to be informed of and to respond to all communications between the Bank and the **Panel** takes on added significance. In many cases, the complainant's interpretation of Bank rules and procedures will form the basis of the request for an **inspection**. Complainants, therefore, cannot be confident that they will receive fair treatment if they do not have an opportunity to respond to the legal department's interpretation of both the Bank's and their rights and obligations in the matter under consideration.

The standards the **Panel** will use in evaluating the Bank's response to pre-complaint communications between Bank staff and complainants also require clarification. If the **Panel** is given unrestricted discretion in evaluating the adequacy of the Bank's response, the complainant will find it difficult to predict the sufficiency of a potential complaint. The **Panel** can also use this discretion to avoid reviewing difficult or controversial, but nevertheless meritorious, complaints.

This suggests the need for some rules to guide the **Panel** in evaluating the Bank's response. The Bank should not be able to avoid an investigation merely by showing that it responded in some way to a complainant's communication. Instead, the **Panel's** review should focus on the adequacy of the Bank's response to the communication. Additionally, in cases alleging that the Bank failed to take appropriate action in a particular situation, the **Panel** should be required to review the adequacy of the Bank's explanation for its failure to act.

4. The Investigation

The purpose of the investigation is for the **Panel** to make a finding, based on "all relevant facts," indicating "whether the Bank has [*596] complied with all relevant Bank policies and procedures." ¹⁶⁸ The Resolution establishes general guidelines that the **Panel** must follow when conducting an investigation. These guidelines, however, are so vague that the potential reach of the **Panel's** investigatory powers will not be fully determined until the **Panel** finalizes its own procedural rules governing investigations. ¹⁶⁹

Nonetheless, the Resolution does establish the following procedures for investigations:

(a) The Chairperson shall designate one or more of the three Panelists as having primary responsibility to conduct the investigation. ¹⁷⁰ This person(s) shall report his or her findings to the **Panel** within a period of time to be determined by the **Panel**. ¹⁷¹

(b) The investigator shall have access to all Bank staff who may have information, as well as to all pertinent Bank records. ¹⁷²

(c) The investigator, if necessary, "shall consult as needed" with the Director General of the Operations Evaluation Department (OED) and the Internal Auditor. ¹⁷³ In addition, he or she must consult with the borrower and the Executive Director representing the borrower/guarantor. ¹⁷⁴

(d) The **Panel** can conduct an on-site investigation with the prior consent of the

borrower country. [175](#)

(e) The **Panel** shall either make its finding and recommendations by consensus or include both majority and minority recommendations and findings in its report. [176](#)

(f) The **Panel** shall submit its report to the Executive Directors and to the President. The report must include all relevant facts and the **Panel's** findings on whether the **[*597]** Bank has complied with the relevant policies and procedures. [177](#)

(g) The management, within six weeks of receiving the **Panel's** findings, must submit a report to the Executive Directors indicating its recommendations in light of the findings. [178](#) In the case of projects in preparation, the findings of the **Panel** and the actions taken in response thereto must be discussed in the Staff Appraisal Report when the project is ultimately submitted to the Executive Directors for approval. [179](#)

(h) The affected party must be informed of the findings of the investigation and any actions taken by the Bank in response to the findings, within two weeks of the Executive Directors' decision. [180](#)

(i) The report of the **Panel** and the Bank's response thereto shall be made publicly available within two weeks of the Executive Directors' decision. [181](#)

There are again a number of issues that the Resolution leaves unresolved. Some of these issues, such as the problems of ex parte communications or the ability of the **Panel** and the Board to collect information on their own initiative, are similar to those discussed in regard to the **Panel's** review of the complaint. [182](#) Other issues are more specific to the procedures used in the investigation phase of the complaint process. Only the latter will be discussed in this section.

The first of these issues involves the **Panel's** access to Bank personnel. Paragraph twenty-one of the Resolution states that the **Panel** "shall have access to all staff who may contribute information." [183](#) This wording suggests both that the **Panel** has broad access to the Bank's staff and that it lacks the power to compel staff members to cooperate with its investigations. This formulation, therefore, appears to give Bank staff the option of declining to contribute information, creating a risk that staff members could effectively hinder **Panel** investigations by exercising this option. **[*598]**

This problem is compounded by the failure of the drafters to define the term "access" as it is used in the Resolution. Thus, it remains unclear whether the **Panel's** access includes the right to orally question staff members or if it is limited to merely seeking written responses to questions submitted in writing to staff members.

This is not to suggest that the Bank's staff will act in bad faith towards the **Panel**. In fact, it is reasonable to assume that in most cases the staff will cooperate with the **Panel**. However, it is also realistic to assume that many staff members, feeling that investigations could undermine or challenge their work, either individually or institutionally, would have an incentive to be uncooperative. Consequently, the **Panel's** ability to conduct adequate investigations of complex and controversial complaints may depend on the adoption of clear rules establishing the staff's duty to cooperate. Such rules would also need to specify the sanctions staff members would face if they failed to cooperate with the **Panel**. Problems relating to the staff's failure to cooperate with the **Panel** could be particularly significant if the complainant is not given the opportunity to receive and to respond to all communications between the Bank and the **Panel**.

Similar issues arise in regard to the **Panel's** access to Bank records. Paragraph twenty-one of the Resolution states that the **Panel** "shall have access to ... all pertinent Bank records." ¹⁸⁴ However, it fails to define the terms "access" or "pertinent." Thus, it is not clear whether "access" actually means unrestricted access to the raw data in the files of the Bank. It is conceivable that the requirement could be satisfied by the staff providing the **Panel** with summaries of the Bank's data. The Resolution also leaves unresolved the issue of which party, either the **Panel** or the Bank's staff, has the power to determine which records are "pertinent" to a particular investigation.

These two issues are of significance because they strike at the heart of the independence and transparency of the **Panel's** investigations. The **Panel** will not retain the confidence of the public if it lacks the power to determine what information is relevant to its investigations, the ability to gain unrestricted access to this information, and the authority to compel Bank staff to cooperate with its investigations. The only potential counterbalance to such a situation would be for the **Panel** to use its reports to signal to the general public that its findings are based on limited access to the Bank's staff and records.

A second unresolved issue concerns the form of **Panel** investigations. The fact that the Resolution does not provide clear guidance on this issue suggests that the Executive Directors intended to grant the **Panel** discretion in this regard. Although there is much to recommend this approach, the resulting lack of certainty may be problematic. For instance, the Resolution does not expressly grant the complainant the right to participate in the investigation. It cannot be taken for granted that the **Panel** will deem the complainant's participation to be a necessary or even a desirable element of every investigation. Similarly, there is no assurance that other interested parties will be permitted to present evidence to the **Panel**. ¹⁸⁵

Another important issue left unresolved relates to the substantive content of the **Panel** reports which will be made publicly available. Paragraph twenty-two merely states that the report "shall consider all relevant facts, and shall conclude with the **Panel's** findings." ¹⁸⁶ Once again, the Resolution fails to define "relevant facts." Consequently, it would be consistent with the letter of the Resolution for the Bank to publish an edited summary of the evidence presented to the **Panel** as well as a condensed version of the **Panel's** findings. The problem is compounded by the fact that the Resolution does not stipulate whether it is the **Panel** or the Board which has the power to determine which facts are "relevant" and therefore need to be included in the published report. The Bank, however, should realize that the publication of an edited report will undermine the credibility of both the **Panel** and the Bank. ¹⁸⁷

A final issue that requires clarification pertains to the amount of time the Executive Directors are permitted in responding to the findings of the **Panel** and the report of the Bank's management. To **[*600]** begin with, the Resolution provides no guidance on when the **Panel's** findings or the Bank management's response to the finding should be distributed to the Executive Directors. ¹⁸⁸ In addition, it is silent as to the time period within which the Board must act. Consequently there is a substantial risk that, in difficult or controversial cases, the Board could indefinitely delay action on the **Panel's** findings. This would also delay publication of the **Panel's** findings. Some guidance on this point is needed if the public is to have confidence in the efficacy and transparency of the **inspection** process.

Paragraph twenty-six states that the **Panel** is required to submit an annual report of its activities to the Bank's President and Executive Directors. ¹⁸⁹ The Resolution also requires the Bank to publish the **Panel's** annual report. ¹⁹⁰

This requirement is one of the most positive aspects of the **inspection** process. The report will enable the public to assess the independence and competence of the **Panel** and the Bank's response to the recommendations of the **Panel**. Moreover, the public can use this information to hold the Bank accountable for its responses to the findings and recommendations of the **Panel**. The report also provides the public with an opportunity to evaluate the work of the **Panel** and to hold it accountable for shortcomings in its own operations. This includes an opportunity for the public to assess the quality and utility of the annual report itself. In addition, the **Panel** can use the annual report to stimulate public debate relating to problems in the Bank's operating rules and procedures. Interested parties can then use the report to argue for changes in the rules and procedures. Finally, the annual report offers the Panelists an opportunity to make observations about the types of complaints it receives and about its relationship with the Bank. **[*601]**

IV. The Significance of the **Panel**

There are two bases for testing the **Panel's** significance. The first focuses on the nature of the legal precedent being set by the establishment of the **Panel**. The second evaluates the **Panel's** impact on the operations of the Bank. The latter will obviously depend on how potential complainants choose to use the **Panel's** complaint process and on the quality of the **Panel's** work. Nevertheless, it is possible to make some preliminary observations about the effect that the **Panel** could have on the Bank.

A. Legal Significance

The **Panel** is the first international forum with the mandate to use complaints from private actors to supervise the activities of an international organization. Its establishment sets a precedent that has the potential to influence three areas of international law: the law of international organizations, substantive areas of international law such as international human rights and environmental law, and international administrative law. After a brief discussion of the **Panel** as a supervisory mechanism, the impact of the **Panel** on each of these areas will be discussed below.

1. The **Panel** as a Supervisory Mechanism

The concept of supervision refers to the methods that both national and international societies use to ensure that the actions of all participating members conform to society's rules of conduct. The supervisory mechanisms that the international community uses can be classified into three categories: judicial supervision, quasi-judicial supervision, and non-judicial supervision. ¹⁹¹

Judicial supervision is exercised by an independent and impartial body that is competent to give legally binding judgments based on the facts as determined by due process. ¹⁹² Non-judicial supervision, on the other hand, is exercised by a politically dependent body that reaches either a binding decision or a non-binding recommendation by way of an ill-defined, but often politicized, procedure. This supervisory mechanism generally includes a technical **[*602]** phase in which experts, who may or may not be independent of the politicized decision-makers, perform a fact-finding function. ¹⁹³

Quasi-judicial supervision includes elements of both judicial and non-judicial supervision. It usually involves a relatively independent body that reaches either binding or non-binding decisions by applying law to facts. The essential elements of quasi-judicial supervision include procedures that are both transparent and fair and the ability to make a final decision. ¹⁹⁴

The **World Bank Inspection Panel** can be classified as a quasi-judicial supervisory body. The Resolution establishes procedures that provide groups with the ability to present complaints and have them reviewed on the merits by a relatively independent body. Furthermore, the Resolution provides that complainants will be presented with a final decision in which the facts will be applied to the Bank's operational policies and procedures.

Based on the wording of the Resolution, the **Panel** may be viewed as a weak, quasi-judicial supervisory body lying closer to the non-judicial end of the supervisory spectrum than to the judicial end. ¹⁹⁵ This is because the **Panel's** procedures leave final decisions to the relatively more politicized Board of Executive Directors ¹⁹⁶ and because the Bank's staff is allowed to play a role in its own supervision. ¹⁹⁷ However, if the **Panel** uses its powers to issue reasoned opinions and to broadly interpret its jurisdiction to review complaints, it has the potential to strengthen its position as a quasi-judicial supervisory body. **[*603]**

Supervision in international organizations should perform three functions. First, it should encompass a review function that tests the conduct of the supervised entity against the standards established in the applicable rules. ¹⁹⁸ Second, it should have a corrective function that entails enforcing the law and ensuring that the supervised entity corrects any infringements of the applicable rules. ¹⁹⁹ Finally, it should have the creative function of contributing to the development of the rules and laws applicable to the supervised international organization. ²⁰⁰ The **Panel** can perform all three functions. It performs the review and corrective functions by reviewing complaints and by making findings and recommendations to the Board. It will perform the creative function by using its advisory and investigatory powers to both clarify and further delineate the standards of conduct and obligations established under the Bank's operational rules and procedures.

2. Law of International Organizations

The creation of the **Panel** promises to alter the legal relationships between the Bank, its member states, and the citizens of the member states. Prior to the establishment of the **Panel**, international organizations were viewed as being directly accountable only to their member states. ²⁰¹ Private parties were expected to relate to these organizations through member states. Those private actors who contended that they had been harmed by the actions of the international organization were expected to have the member state, of which they were a citizen, bring a complaint to the international organization on their behalf. Private actors, therefore, were forced to rely on domestic opportunities to

encourage their sovereign to adequately protect their interests in dealings with international organizations. [202](#)

One major exception to this general rule relates to those international organizations where member states, in establishing or joining the organization, have expressly agreed to allow private actors to **[*604]** participate in the affairs of the international organization. [203](#) In these cases the private actors' involvement is limited to participating in the formulation and enforcement of standards of conduct for member states. They are not involved in formulating and enforcing the standards of conduct applicable to the international organization's operations. [204](#)

The **World Bank**, by establishing the **Inspection Panel**, has challenged this set of legal relationships. It has acknowledged that it has a legally significant relationship with private parties that is distinct from either its relationship with its member states or a state's relationships with its own citizens. Moreover, it has recognized that it can be held accountable for its conduct within the scope of this distinct relationship.

The source of the Bank's distinct relationship with private actors is its operations in its member countries. In the course of its operations, the Bank must decide which of the borrower country's development projects or programs to fund and what conditions to attach to the use of those funds. As demonstrated above, these decisions can have a direct and often irreversible effect on the lives of the citizens in member countries. Traditionally, responsibility for these effects rested solely with the sovereign state of which the affected person was a citizen. **[*605]**

The Bank, in its decision to establish the **Panel**, has implicitly divided the responsibility for these effects into two categories. In the first category, which is limited to the substance of lending decisions, the traditional relationships between international organizations, member states, and citizens apply. Thus, even though decisions within this category are reached jointly by the Bank and the borrower country, the borrower state assumes legal responsibility for the decision. This principle is implemented through various covenants and conditions in Bank loan agreements that explicitly make the borrower and/or guarantor responsible for the implementation of these decisions. [205](#) Consequently, private actors must look to member states for redress for any harm caused by these decisions.

The second category, which consists of the manner in which the Bank makes and implements its decisions about which projects and programs to support, is the sole responsibility of the Bank. The Bank determines for itself how to collect and analyze the information upon which these decisions are made and whom it allows to participate in these decisions. The borrower state's involvement in these issues is limited and non-essential. [206](#)

With the adoption of this resolution, the Executive Directors have decided that directly affected private parties can hold the Bank accountable for these actions. The borrower state is not a necessary party to these proceedings. This means that the Executive Directors have defined a legal relationship between the Bank and private actors that is distinct from the relationship the Bank has with its member states.

The Executive Directors have also determined that private actors should be able to initiate the complaint process. They, therefore, have granted individuals the opportunity to use the preparation and submission of complaints to influence the evolution of the **Panel's** interpretation of its own jurisdiction and the **[*606]** Bank's operational rules. This represents a potentially significant improvement in the ability of private actors to influence the work of the Bank and the legal environment within which the Bank functions.

Furthermore, because the **World Bank** is not the only international organization to have this type of independent relationship with the citizens of its member countries, the **Panel** establishes an important precedent. All international organizations with a mandate to use public resources to promote economic, social, and cultural development within their member states have similar relationships with the private actors in their member countries. Consequently, the example set by the **World Bank** is directly applicable to all such international organizations. [207](#)

The Resolution establishing the **Panel** also defines the scope of the Bank's responsibility within this Bank-private actor relationship. There are two elements to the Bank's definition of its responsibilities. The first is the identity of the parties to whom the Bank is accountable. The Resolution stipulates that the Bank is only accountable to private actors who are directly and materially affected by acts or omissions by the Bank that are inconsistent with its operating rules and procedures. [208](#)

This suggests that, as a general rule, the Bank's responsibility will be limited to citizens in its borrower countries. It also suggests that the Bank does not recognize any direct accountability to private actors simply because their governments allow the Bank to use their tax dollars to fund Bank operations. [209](#) These private parties can only seek to hold the Bank accountable through the member state of which they are citizens.

The Executive Directors' decision does not affect the Bank's responsibility to member states for the way in which it uses their **[*607]** contributions. Furthermore, taxpayers in creditor countries may have access to either political or legal means to influence their governments' decisions regarding the Bank. For example, public interest groups have persuaded the U.S. Congress to pass legislation influencing the manner in which U.S. administrations use their voice and vote within the Bank. [210](#)

One possible exception to this general rule would arise where citizens of wealthier countries can show that they are included in the class of intended beneficiaries of a particular operational rule or procedure. An example of such an exception would be a complaint dealing with the Bank's implementation of its new information disclosure policy. This policy, embodied in a Bank procedure, seeks to open Bank information to all interested parties, including those in non-borrower member states. [211](#) Because Bank procedures fall squarely within the **Panel's** jurisdiction, the information disclosure policy could form the basis for a complaint brought by citizens of both borrower and non-borrower states who have been directly and adversely affected by the Bank's failure to comply with these procedures.

The second element of the Bank's responsibility relates to its identification of the actions for which it can be held accountable. In the Resolution, the Bank has limited its responsibility to the implementation of its operating rules and procedures. These rules and procedures pertain to how the Bank makes and implements decisions, rather than to the actual content of the decisions. As discussed above, the Bank alone controls that process. [212](#) **[*608]**

The Bank's definition of its unique area of responsibility helps to clarify the respective responsibilities of borrowers, member states, and all other participants in Bank-funded operations. This should facilitate the efforts of groups adversely affected by Bank projects to identify those responsible for special aspects of their problems and to hold them accountable for their actions. Thus, the **Panel's** work in defining and elaborating the contours of the Bank-private actor relationship may also affect the relationship between the Bank and its member states. In addition, it may affect the relationship between member states and private complainants who are citizens of that state.

3. Substantive Areas of International Law

Because the Bank's operational rules and procedures cover the full range of Bank activities, the **Panel's** findings and recommendations have the potential to influence the development of substantive areas of law applicable to the Bank's operations. For example, the **Panel's** findings and recommendations pertaining to complaints involving the rights of indigenous peoples and groups involuntarily resettled in the course of Bank-funded operations could influence the development of international human rights law. Similarly, **Panel** decisions on complaints pertaining to environmental rules may affect the evolution of international environmental law.

The potential for the **Panel** to influence substantive human rights law can be gauged by examining a potential complaint arising under Operational Directive 4.30. ²¹³ Consider a complaint alleging that the Bank failed to adequately review a borrower's resettlement policy and that, as a result, the Bank approved a project which would lead to the forced resettlement of people in a manner that is inconsistent with the policies spelled out in Directive 4.30. Regardless of whether the **Panel** accepts or rejects such a complaint, its response could influence laws governing the rights of resettled people. First, the **Panel's** reasoned recommendation to investigate or not investigate will clarify the Bank's responsibilities under Directive 4.30 and should make more specific the factors the Bank should consider in assessing a borrower's proposed resettlement plan. Second, if the **Panel** chose to investigate the adequacy [***609**] of the Bank's review of the borrower's resettlement plan, it would have to begin by defining the nature of the Bank's obligations toward resettled populations and the rights of resettled groups to hold the Bank accountable for its failure to comply with these obligations.

Third, the complainants, in drafting their complaint, would need to rely on applicable general principles of international law to interpret the requirements of the Operational Directive and to build its case regarding the adequacy of the Bank's assessment of the resettlement plan. The **Panel** would also need to engage in a similar exercise in its review of the complaint. Thus, the complaint process can lead to the further incorporation of general principles of international law into the regulation of Bank operations. The manner in which the **Panel** interprets and applies relevant international legal principles should also influence the interpretation of these principles in other international fora.

4. International Administrative Law

The Bank's identification of the implementation of its operating rules and procedures as the substance of its unique relationship to qualifying private actors should have an impact on the administrative law of international organizations. Prior to the establishment of the **Panel**, this area of administrative law was limited to issues pertaining to the internal arrangements of international organizations. ²¹⁴ The Bank's creation of the **Panel**, however, should expand the scope of this area of law to include the conduct of international organizations in their dealings with those private parties most directly affected by their actions.

Initially, the effects of the **Panel's** decisions will be limited to the resolution of qualifying disputes between the Bank and the public. However, over time complainants may be able to use the **Panel** to influence the Bank's rule-making procedures. The reason is that in order to successfully bring a complaint before the **Panel**, complainants will need to

propose their own interpretations of the Bank's operating rules and procedures. The **Panel**, in reviewing the complaint, will need to evaluate these interpretations and provide its own interpretation in response thereto. Publication of these various interpretations should stimulate public debate about the Bank's rules and procedures and the process the Bank follows in **[*610]** drafting them. This, in turn, should encourage the Bank to make public its own interpretation of its rules and procedures to justify why its interpretation is "superior" to those of the **Panel** or the complainant.

Hopefully, this exchange will encourage the Bank to consider establishing a more open and participatory rule-making procedure. Such a procedure could include formal opportunities for interested parties to submit comments on proposed rules. It could also include a requirement that the Bank publish a response to these comments together with the text of, and the rationale for, all new rules and procedures.

In addition, these developments should be of interest to other international organizations that have been entrusted with the management of public resources. All such organizations have rules and procedures that have a substantial and direct impact on communities around the world. Consequently, they have as much need as the **World Bank** for an **inspection panel** to investigate public complaints concerning their failure to follow their own operating rules and procedures. The creation of such **panels** would have a profound and salutary effect on the administrative practices of all international organizations.

B. Effect on Bank Operations

The work of the **Panel** should enhance the accountability and efficacy of Bank operations. Each of these issues is discussed below.

1. Accountability

The **Panel** will improve the Bank's public accountability by providing a forum in which qualifying private actors can initiate investigations into the manner in which the Bank implements its operating rules and procedures. The **Panel's** independence and the qualification of its members should give complainants confidence that their claims will receive a fair hearing based on the merits of each complaint.

The possibility that Bank staff could be held personally accountable for the manner in which they make and implement decisions should also encourage the staff to be more responsive to and respectful of those who are affected by their decisions. In this sense, the **Panel** should encourage the Bank's staff to incorporate more of the principles of good governance - principles they advocate **[*611]** - into their own operations. ²¹⁵ Thus, the **Panel** can help make the Bank's staff a more open and accountable civil service.

2. Efficacy

The complaint process will improve the efficacy of the Bank in a number of ways. First, qualifying complainants can use this forum to ensure that they have some say in the issues receiving **World Bank** attention. This should improve the Bank's understanding of the needs and concerns of the intended beneficiaries of its operations. It should also enhance the Bank's ability to serve the poor and powerless and achieve its objective of alleviating poverty.

Second, the complaint process and the work of the **Panel** should also provide the Bank with a timely and independent appraisal of claimed deficiencies in Bank operations. The Bank can use this information to correct deficiencies in the design or implementation of its on-going operations and mitigate the effects of hardships caused by such operations.

Third, the fact that the **Panel's** findings and its recommendations to the Executive Directors will be published means that the complaint process will create a public record documenting the actual effects of on-going Bank operations. This record can be used by non-governmental actors to help affected people better understand how to make the Bank more responsive to their needs. In addition, non-governmental organizations can use the empirical data included in the record to stimulate a more informed and focused discussion with the Bank on its policies and procedures. This knowledge, and the discussions it generates, should eventually result in Bank operations that more precisely meet the needs of their intended beneficiaries.

Fourth, the findings of the **Panel** will provide the Bank's Directors with independent information on the staff's compliance with their rules and procedures. The Board can use this information to identify the "best practice" to follow in implementing these rules and procedures and the type of circumstances that may justify deviations from these practices.

The **Panel** may also protect Bank staff and Directors from having to deal with complaints that fall outside of the Bank's area of exclusive responsibility or that lack merit. However, the work of **[*612]** the **Panel** should also make it harder for the Bank to avoid accepting responsibility for those complaints that arise from aspects of its operations that are subject to its exclusive dominion.

Finally, it should be recognized that the operational impact of the **Panel** will be influenced by the size of its budget, which will be determined by the Bank's Executive Directors. If the **Panel's** budget proves to be inadequate or too tightly controlled by the Executive Directors, the independence of the **Panel's** decision-making will be called into question. Furthermore, a fear of financial repercussions could cause the **Panel** to make decisions on the basis of budgetary considerations. It is to be hoped that the Bank will be sensitive to these potential problems and ensure that the **Panel** has adequate resources to avoid them. [216](#)

V. Conclusion

The **Inspection Panel** is an important forum for people affected by **World Bank** operations. Their ability to effectively and successfully exploit this opportunity depends on the careful selection and preparation of complaints, the **Panel's** adoption of fair and transparent procedures, and the quality of the **Panel's** findings and published reports.

The creation of the **Panel** is also an important development in international law. The **Panel** will be the first forum in which private actors can hold an international

organization directly accountable for its actions. If presented with well-prepared complaints, the **Panel** has the potential to affect the legal relationships between international organizations, their member states, and private actors. It can also influence the development of the administrative law of international organizations. In addition, it provides private actors with the opportunity to influence the evolution of international human rights and environmental law.

By defining the exclusive responsibilities of the **World Bank**, the decisions of the Executive Directors will help clarify the responsibilities of both the Bank and its member states toward private actors. Over time this should also enhance the ability of private **[*613]** actors to hold both the Bank and its member states more accountable for their actions.

The **Panel** will also make a positive contribution to the governance of the Bank and the efficacy of its operations. Its findings and recommendations will provide the Executive Directors with timely information on problems in Bank operations. This information can be used to improve the quality of the Bank's services. In addition, the example set by the **World Bank** in establishing the **Panel** may compel other international organizations to create their own **inspection panels**.

The complaint process will also generate empirical data on the actual effect of Bank policies and procedures. This data can be used both to improve Bank operations and policies and to educate both the Bank's staff and the public about the "best practices" to follow in designing and implementing Bank-funded operations.

Finally, lawyers and other advocates who work with communities directly affected by the Bank's operations should exploit the opportunities created by the establishment of the **Panel** for the benefit of their clients. The success of this historic development depends on their doing so.

Legal Topics:

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FOOTNOTES:

ⁿ¹. The **World Bank Inspection Panel**, Res. 93-10, International Bank for Reconstruction and Development, Res. 93-6, International Development Association, Sept. 22, 1993 [hereinafter Resolution].

ⁿ². Id. 1-2.

ⁿ³. Id. 12.

ⁿ⁴. Id. 25.

ⁿ⁵. Id. 26.

¶n6. The treaties establishing the institutions of the European Union do allow private actors to sue the institutions of the Community in the European Court of Justice on non-contract claims. See, e.g., Treaty Establishing the European Economic Community [EEC Treaty] arts. 173, 215; Treaty Establishing the European Atomic Energy Community [Euratom Treaty] arts. 136, 188; Treaty Establishing the European Coal and Steel Community [ECSC Treaty] arts. 31, 33, 40. However, these supranational communities have a different purpose and focus from international organizations like the **World Bank**. Their objective is to create an integrated community. The purpose of international organizations, such as the **World Bank**, is to promote international cooperation while respecting the sovereignty of each member state. Interestingly, the European Union does not allow citizens of non-EU countries to sue the institutions of the European Union in the European Court of Justice. In addition, the European Investment Bank does not allow private actors directly affected by the Bank's actions who do not have a contractual relationship with the Bank to seek legal redress through the European Court. See J. Steiner, Textbook on EEC Law (3d ed. 1992).

¶n7. Resolution, supra note 1, 12; see also infra notes 129-132 and accompanying text.

¶n8. The **Panel** has the power to investigate qualifying complaints and to make findings regarding the Bank's compliance with its rules and procedures. Resolution, supra note 1, 12, 20-22; see discussion infra part III.C.

¶n9. Resolution, supra note 1, 12; see discussion infra part III.D.

¶n10. See The **World Bank** Operational Manual, Operational Directive 14.70: Involving Nongovernmental Organizations in Bank-Supported Activities (Aug. 1989).

¶n11. See The **World Bank** Operational Manual, Operational Directive 4.30: Involuntary Resettlement (June 1990).

¶n12. See The **World Bank** Operational Manual, Operational Directive 4.20: Indigenous Peoples (Sept. 1991).

¶n13. See The **World Bank** Operational Manual, Operational Directive 4.01: Environmental Assessment (Oct. 1991); The **World Bank** Operational Manual, Operational Directive 4.00 Annex A: Environmental Assessment (Oct. 1989).

¶n14. See, e.g., C.F. Amerasinghe, The Law of the International Civil Service 3-25 (1988).

¶n15. The **World Bank** has stated that it views alleviating poverty as its most important task. See The **World Bank**, Implementing the **World Bank's** Strategy to Reduce Poverty: Progress and Challenges (1993).

¶n16. Article I(i) of the Articles of Agreement of the International Bank for Reconstruction and Development states that one of its purposes is "to assist in the ... development of territories of members by facilitating the investment of capital for productive purposes, including ... the encouragement of the development of productive facilities and resources in less developed countries." Article I(iii) states that the Bank should use its resources in such a way that it will assist in raising the "productivity, the standard of living and conditions of labor" in member states. Articles of Agreement of the International Bank for Reconstruction and Development, opened for signature, Dec. 27, 1945, [60 Stat. 1440](#), 2 U.N.T.S. 134.

Article I of the Articles of Agreement of the International Development Association states that its purpose is "to promote economic development, increase productivity and thus raise standards of living in the less-developed areas of the world . . . thereby furthering

the developmental objectives of the International Bank for Reconstruction and Development." Articles of Agreement of the International Development Association, Sept. 24, 1960, [11 U.S.T. 2284, 2285-86](#), 439 U.N.T.S. 249, 252.

ⁿ¹⁷. There is an extensive literature discussing the Bank's activities. See, e.g., Robert L. Ayers, *Banking on the Poor* (1983) (discussing the expansion of Bank operations during the 1970s); Jonathan Cahn, *Challenging the New Imperial Authority: The **World Bank** and the Democratization of Development*, [6 Harv. Hum. Rts. J. 159 \(1993\)](#) (discussing the Bank's growing role in the governance of its member countries); Edward S. Mason & Robert E. Asher, *The **World Bank** Since Bretton Woods* (1973) (analyzing the Bank's development during its first quarter century); Paul Mosley et al., *Aid and Power* (1991) (discussing the development of structural adjustment lending and the evolution of policy dialogues between the Bank and its borrower countries); Cheryl Payer, *The **World Bank**: A Critical Analysis* 344-356 (1982); Bruce Rich, *The Emperor's New Clothes: The **World Bank** and Environmental Reform*, 7 *World Pol'y J.* 305 (1990); Bruce Rich, *Mortgaging the Earth: The **World Bank**, Environmental Impoverishment, and the Crisis of Development* (1994); Ibrahim F.I. Shihata, *The Bank in a Changing World* (1991).

ⁿ¹⁸. See Cahn, *supra* note 17, at 161; Mosley, *supra* note 17, at xiii.

ⁿ¹⁹. See William A. McCleary, *The Design and Implementation of Conditionality in Restructuring Economies in Distress* 197, 197-215 (Vinod Thomas et al. eds., 1991); Mosley, *supra* note 17, at 134-78 (discussing the implementation of various conditional lending requirements). See generally Shihata, *supra* note 17.

ⁿ²⁰. See Warren C. Baum, *The Project Cycle* 11-17 (1982). See generally Warren C. Baum & Stokes M. Tolbert, *Investing in Development: Lessons of **World Bank** Experience* 393-568 (1985).

ⁿ²¹. This does not mean that these issues were not considered informally within the Bank. However, based on its interpretation of the political prohibitions in its own Articles, the Bank generally contended that it was legally required to treat these issues as part of the sovereign prerogatives of its borrower countries. See Aron Broches, *International Legal Aspects of the Operations of the **World Bank***, 98 *Recueil des Cours* 297, 385-408 (1959) (discussing legal implications of loan agreements between sovereign states and the Bank); Shihata, *supra* note 17; *The **World Bank**, Governance and Development* 50-52 (1992); Lawyers Committee for Human Rights, *The **World Bank**: Governance and Human Rights* 16-19 (1993). See generally Baum, *The Project Cycle*, *supra* note 20, at 11-17 (discussing project analysis).

ⁿ²². These issues are relevant to project loans as well. However, they become more pertinent in the case of structural adjustment loans because the success of the loan depends on the government's ability to design and implement policy. See McCleary, *supra* note 19; Shihata, *supra* note 17; Mosley, *supra* note 17, at 81, 145-61.

ⁿ²³. For a discussion of **World Bank** policies on governance, see Shihata, *supra* note 17, at 53-96; *The **World Bank**, Governance and Development*, *supra* note 21; Lawyers Committee for Human Rights, *supra* note 21, at 43-60.

ⁿ²⁴. This is mandated by the Articles of the Bank which require the Bank to refrain from taking the political character of a borrower state into consideration. In addition, the Articles require the Bank to base all of its lending decisions on economic considerations. See Articles of Agreement of the International Bank for Reconstruction and Development, *supra* note 16, art. III, 5(b), art. V, 5(c); Articles of Agreement of the International Development Association, *supra* note 16, art. V, 1(g), 6, art. VI, 5(c). But see Bartram S. Brown, *The United States and the Politicization of the **World Bank***

(1992) (discussing the legal and practical implications of the politicization which occurs when the United States uses its voting power in the **World Bank** to serve political purposes). The Bank's practice is based on traditional international legal concepts of sovereignty. See generally Broches, *supra* note 21, at 385-408 (discussing international legal aspects of loan agreements and state sovereignty). These notions are, however, under challenge. See Claudio Grossman & Daniel D. **Bradlow**, Are We Being Propelled Towards a People-Centered Transnational Legal Order?, 9 *Am. U. J. Int'l L. & P.* 1, 6 (1993) (addressing changing notions of sovereignty and the role of private actors in international law).

¶n25. See sample IBRD loan agreement in Daniel D. **Bradlow**, *International Borrowing* (3d ed. Int'l Law Inst., 1994).

¶n26. The International Bank for Reconstruction and Development (IBRD) funds its operations either from the capital provided by its shareholder member states or from private investors who rely on the commitment member states have made to contribute additional capital to the Bank when called upon to do so. International Development Association (IDA) funds are contributed by member states and are periodically replenished. In the final analysis, this means that the Bank is utilizing the availability of public funds to finance its operations. See Shihata, *supra* note 17.

¶n27. See Baum, *The Project Cycle*, *supra* note 20, at 18. The number of Executive Directors was increased from 22 to 24 on November 1, 1992. See *The World Bank*, 1993 Annual Report 17 (1994).

¶n28. *The World Bank*, 1993 Annual Report, *supra* note 27, at 166-67.

¶n29. *Id.* at 85-86.

¶n30. *Id.* at 99.

¶n31. But see, [22 U.S.C. 262m-7](#) (requiring the United States Executive Director not to vote in favor of any project that would have a "significant effect on human environment" unless the project reports are made available to the Executive Director at least 120 days before the vote).

¶n32. In recent years, the Bank has taken a number of steps to improve its interactions with non-governmental organizations and actors (NGOs). See Operational Directive 14.70, *supra* note 10, at 8, 10, 18. Bank staff are now encouraged to consult with NGOs about Bank-funded operations, and the Bank makes more of an effort to solicit the views of NGOs on a broader range of issues. The Bank has also established an NGO-**World Bank** Committee, which consists of equal numbers of Bank officials and representatives of NGOs. This committee meets to discuss issues of mutual concern to the Bank and the NGOs. However, the Executive Directors are not formally required to participate in these consultations and their knowledge of the consultations is often filtered through the Bank's staff. See Ibrahim F.I. Shihata, *The World Bank and Non-Governmental Organizations*, 25 *Cornell Int'l L.J.* 623 (1992); Marcos Arruda, *NGOs and the World Bank: Possibilities and Limits of Cooperation* (1992); Paul and Israel, *Nongovernmental Organizations and the World Bank: Cooperation for Development* (1991).

¶n33. See Baum, *The Project Cycle*, *supra* note 20, at 19-21.

¶n34. *Id.* The Bank staff's influence over the disbursement of funds will not be altered by the **Inspection Panel. However, the Panel** will have the ability to investigate the exercise of this power.

¶n35. See, e.g., Bettina S. Hurni, *The Lending Policies of the World Bank in the 1970s:*

Analysis and Evaluation 83-90 (1980) (discussing the staff's strong influence in the lending process); Payer, *supra* note 17; Rich, *Mortgaging the Earth*, *supra* note 17, at 194, 307; The Sierra Club, *Bankrolling Disasters: International Development Banks and the Global Environment* 4, 13 (1986).

³⁶ See sources cited *supra* note 35; see also Raymond Mikesell and Larry Williams, *The International Banks and the Environment: From Growth to Sustainability: An Unfinished Agenda* 13-16 (1991) (arguing that the Bank's operational procedures do not adequately take environmental objectives into consideration).

³⁷ B. Morse & T. Berger, *Sardar Sarovar: The Report of the Independent Review* (1992).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ The **World Bank**, *Effective Implementation: Key to Development Impact*, Report of the Portfolio Management Task Force (1992).

⁴⁴ *Id.* at ii-iii, 3-4.

⁴⁵ *Id.*

⁴⁶ *Id.* at ii, 3.

⁴⁷ *Id.* at iii.

⁴⁸ *Id.*

⁴⁹ *Id.* at iii, 12.

⁵⁰ *Id.* at ii; see also *id.* at 7-8.

⁵¹ *Id.* at 8.

⁵² *Id.* at ii.

⁵³ **World Bank** project reports, which provide more detail than loan agreements, are available through the U.S. Department of Commerce. They are not, however, easily accessible to people in borrower countries. The amount of publicly available information on Bank projects should increase as the Bank begins issuing its new Public Information Documents. These documents are available through the Bank's new Public Information Center in Washington, D.C. See The **World Bank** Operational Manual, Bank Procedure 17.50: Disclosure of Operational Information (Sept. 1993); The **World Bank, The World Bank** Policy on Disclosure of Information (1994); see also *infra* notes 66-68 and accompanying text.

⁵⁴ See Ibrahim F.I. Shihata, *The World Bank Inspection Panel* 1-28 (forthcoming 1994) (manuscript on file with the Virginia Journal of International Law) (discussing the evolution of an independent **inspection** function at the Bank).

⁴n55. See Eric Christensen, Natural Resources Defense Council, Green Appeal: A Proposal for an Environmental Commission of Inquiry at the **World Bank** (1990); Memorandum from Lori Udall, Environmental Defense Fund, & David Hunter, CIEL, to interested Parties (Apr. 6, 1993) (on file with the Virginia Journal of International Law) (proposing draft provisions for an independent appeals commission to monitor the **World Bank**). There are several differences between these two proposals. Nonetheless, the proposals are substantially similar in respect to the issues under discussion. See also Cahn, *supra* note 17, at 190 (proposing the establishment of an institutionally independent "watchdog agency" to monitor Bank operations); David A. Wirth, Legitimacy, Accountability and Partnership: A Model for Advocacy on Third World Environmental Issues, [100 Yale L.J. 2645, 2664](#) (calling for a neutral adjudicatory mechanism and a "private attorney general" model of citizen enforcement of Bank and borrower state compliance with applicable standards). These proposals are similar to the proposals for a permanent review **panel** in that they seek to establish a body with the authority to review almost all aspects of Bank operation. See also C. Wald and D. Zaelke, Establishing an Independent Review Board at the European Bank for Reconstruction and Development: A Model for Improving Decisionmaking, 2 Duke Env'tl. L. & Pol'y F. 59 (1992).

⁴n56. See Christensen, *supra* note 55, at 5 (arguing that an environmental commission of inquiry at the **World Bank** should "be empowered to determine whether a particular project meets the Bank's Articles of Agreement, by-laws, operational directives, and other internal guidelines, as well as whether specific conditions contained in the loan agreement for the project have been fulfilled"); Udall, *supra* note 55, at 1-2 (arguing that an **inspection panel** should be competent "to investigate and pass judgment on complaints regarding violations of all **World Bank** policies, procedures, loan and credit agreements, the **World Bank's** articles of agreement, by-laws and violations of international human rights and environmental law").

⁴n57. See Christensen, *supra* note 55, at 5; Udall, *supra* note 55, at 3. This proposal, however, would have granted the Executive Directors the ability to overturn decisions of the **panel** based on a two-thirds vote for reversal.

⁴n58. Articles of Agreement of the International Bank for Reconstruction and Development, *supra* note 16, art. IV, 10 (prohibiting the Bank from interfering in the political affairs of member countries and from taking political issues into consideration); see also *id.* arts. III 5(b), V 5(c).

⁴n59. See *supra* note 58 and accompanying text.

⁴n60. This proposal was advanced by a number of the Bank's Directors and was discussed in internal Bank memoranda. Although details on various versions of this proposal have been made available to some outside parties, the Bank has not published the text of this proposal. The discussion here based on an internal memorandum provided informally to author. (unpublished memorandum is on file with the author). For a further discussion of this proposal, see Shihata, *supra* note 54, at 22-23.

⁴n61. See Daniel **Bradlow**, Opening Statement of Professor Daniel **Bradlow** to the Sub-Committee on International Financial Institutions of the Standing Committee on Finance, House of Commons, Canada (Feb. 18, 1993) (unpublished transcript on file with the Virginia Journal of International Law); Daniel **Bradlow**, The Case for a **World Bank** Ombudsman, Submitted to the Sub-Committee on International Development, Finance, Trade, and Monetary Policy of the Banking, Finance, and Urban Affairs Committee, U.S. House of Representatives (May, 1993) (unpublished manuscript on file with the Virginia Journal of International Law); Daniel **Bradlow**, **Why the World Bank** Needs an Ombudsman, *Fin. Times*, July 14, 1993, at 13.

⁶². See W. Gelhorn, *Ombudsmen and Others* (1966); I. al-Wabab, *The Swedish Institution of Ombudsmen* (1979).

⁶³. See The **World Bank**, *Getting Results: The World Bank's Agenda for Improving Development Effectiveness* 7 (1993).

⁶⁴. *Id.* at 8.

⁶⁵. See *id.* at 7.

⁶⁶. See The **World Bank** Operational Manual, Bank Procedure 17.50: Disclosure of Operational Information, *supra* note 53; The **World Bank, The World Bank** Policy on Disclosure of Information, *supra* note 53, at 2-3.

⁶⁷. See The **World Bank** Operational Manual, Bank Procedure 17.50: Disclosure of Operational Information, *supra* note 53, at 1; The **World Bank, The World Bank** Policy on Disclosure of Information, *supra* note 53, at 5.

⁶⁸. The **World Bank** Operational Manual, Bank Procedure 17.50 Annex B: The Public Information Center (Sept. 1993); The **World Bank, The World Bank** Policy on Disclosure of Information, *supra* note 53, at 4.

⁶⁹. See Shihata, *supra* note 54, at 30-36 (describing the Executive Board's discussions of this Resolution). The **Inspection Panel** officially opened its offices in Washington, D.C. on September 7, 1994. New Independent **Inspection Panel** Office Opens, **Inspection Panel** News Release No. 1 (The **Inspection Panel**, Sept. 7, 1994). The first complaint was filed on October 26, 1994 by the Arun Concerned Group, which represents the residents of the Sankhuwa-Sava District in Nepal. It concerns the proposed Arun III Hydroelectric Project, which will be built in this district.

⁷⁰. Resolution, *supra* note 1, 2.

⁷¹. *Id.* This consideration also suggests that two of the members of the **Panel** should be citizens of borrower countries.

⁷². The Bank does not appear to have taken these factors into consideration when selecting the first members of the **Inspection Panel** in April 1994. The Chairperson of the **Panel** is Ernst Gunther-Broder, a former President of the European Investment Bank and Governor of the European Bank for Reconstruction and Development. Alvero Umana Quesada, the former Minister of Natural Resources for Costa Rica, and Richard E. Bissell, a former official of the United States Agency for International Development, were also selected to serve on the **Panel**. See Independent **World Bank Inspection Panel** Appointed, **World Bank** News Release, No. 94553 (Apr. 22, 1994).

⁷³. Resolution, *supra* note 1, 4.

⁷⁴. *Id.*

⁷⁵. *Id.*

⁷⁶. *Id.*

⁷⁷. *Id.* 5.

⁷⁸. *Id.* 3. The first members of the **Panel** shall be selected as follows: one for three years, one for four years, and one for five years. *Id.* The Panelist selected for five years

shall serve a one-year term as the Chair of the **Panel**. Thereafter, the members of the **Panel** shall select a Chairperson who shall serve a one-year term. Id. 7. Only the Chairperson shall work on a full-time basis. Other panelists will work full-time only if this is justified by the **Panel's** workload. Id. 9. Ernst Gunther-Broder was selected to serve the five-year term, Alvero Umana Quesada the four-year term, and Richard Bissell the three-year term. See supra note 72 and accompanying text.

ⁿ79. Resolution, supra note 1, 10.

ⁿ80. Id. 8.

ⁿ81. The Resolution further emphasizes the importance of the Panelists' independence by stipulating that Panelists cannot participate in hearings or investigations in which they have a personal interest or involvement. Id. 6.

ⁿ82. Id. 25.

ⁿ83. See infra note 161 and accompanying text.

ⁿ84. See discussion infra part III.D.2 (discussing ex parte communications); parts III.D.2, .D.4 (discussing the staff's ability to control information flows to the **Panel** and the potential for the staff to inhibit the **Panel's** efforts to review and investigate complaints).

ⁿ85. See Resolution, supra note 1, 20-22; id. 12 (defining operational policies and procedures).

ⁿ86. Id. 22.

ⁿ87. Id.

ⁿ88. Id. 19.

ⁿ89. Id. 24.

ⁿ90. On August 19, 1994, the **Inspection Panel** adopted provisional operating procedures, which it will review within the next 12 months. The **Inspection Panel**, Operating Procedures 4 (Aug. 1994) [hereinafter Operating Procedures]. Although it is too early to assess the adequacy of these procedures, they appear to provide useful guidance on filing complaints and creating a process that is reasonably sensitive to the needs of potential complainants. However, they also appear to impose an additional requirement on the complainant, which has the potential to undermine the transparency of the complaints process. The procedures empower the Chairperson of the **Panel**, acting in his or her own capacity, to refuse to register any request for investigation which he or she finds to be "manifestly outside the scope of the **Panel's** mandate" on the grounds, inter alia, that the request is "manifestly frivolous, absurd or anonymous." Id. 22. The **Panel** will note the number of complaints handled in this manner in its annual report, but it is not required to publish either the text of the complaint or the Chairperson's rationale for rejecting the complaint as this is "manifestly outside the **Panel's** mandate." Id. 23. The Chairperson, however, is required to provide the complainant with his or her reasons for refusing to register the complaint. Id. 22. Copies of the Operating Procedures can be obtained from the **Inspection Panel's** office in Washington, D.C.

ⁿ91. Id. 12.

ⁿ92. Id.

ⁿ93. See supra part III.A (discussing the operating principles of the **Panel**).

ⁿ94. There are at least two binders of Operational Directives, Operational Policies, and Bank Procedures. These are made available to all Bank employees, but are not readily available to the public. It is to be hoped that this situation will change under the Bank's new information disclosure policy. See supra notes 66-68 and accompanying text (discussing the Bank's new policy on disclosure of information).

ⁿ95. The **World Bank** Operational Manual, Operational Directive 4.30: Involuntary Resettlement, supra note 11.

ⁿ96. Id. 3.

ⁿ97. Id. 4. The Operational Directive notes that large-scale relocations involve more than 200 individuals. See id. at 2 n.8.

ⁿ98. Task Managers "should assess government policies, experiences, institutions, and the legal framework covering resettlement." Id. 24. In addition, the Task Manager "needs to ensure ... that laws and regulations concerning displaced people provide compensation sufficient to replace all lost assets, and that displaced persons are assisted to improve, or at least restore, their former living standards, income earning capacity, and production levels." Id.

ⁿ99. Id.

ⁿ100. Id. 6.

ⁿ101. Id. 24.

ⁿ102. Id. 25.

ⁿ103. Id. 6.

ⁿ104. If they have been unfairly treated, the injured parties may be able to argue that the borrower state has violated their human rights in contravention of the state's international treaty obligations. For a discussion of the procedures for bringing complaints before international human rights fora, see generally Guide to International Human Rights Practice (Hurst Hannum ed., 1984).

ⁿ105. This suggests that these types of complaints are not likely to succeed until the **Panel** has clearly established its basic operating procedures and has gained confidence in its powers.

ⁿ106. The **World Bank** Operational Manual, Operational Directive 4.30: Involuntary Resettlement, supra note 11, 5.

ⁿ107. Similar complaints might address the adequacy of site visits by Bank specialists or of a compensation law which is so clearly deficient that the Bank's staff could not possibly have reviewed the law with the level of care and attention required by the Directive. See id. 14, 24, 25 (establishing standards for determining fair compensation rates, reviewing compensation laws, and conducting site visits).

ⁿ108. Resolution, supra note 1, 25.

ⁿ109. If the **Panel** cannot reach a decision by consensus, it is required to include both majority and minority views in its reports. Id. 24. The publication of both views should

also help stimulate public debate.

ⁿ¹¹⁰. At present, the Bank does informally engage some outside parties in discussion about the content of proposed operational policies and procedures. However, it selects which private actors to consult and when to consult them. See supra note 32 (discussing the **World Bank's** relations with non-governmental actors).

ⁿ¹¹¹. Resolution, supra note 1, 12.

ⁿ¹¹². Id.

ⁿ¹¹³. Id.

ⁿ¹¹⁴. Id.

ⁿ¹¹⁵. Id.

ⁿ¹¹⁶. Id. (stating that non-local representatives may present requests for **inspection** in "exceptional cases where the party submitting the request contends that appropriate representation is not legally available and the Executive Directors so agree at the time they consider the request for **inspection**").

ⁿ¹¹⁷. Id.

ⁿ¹¹⁸. Id.

ⁿ¹¹⁹. Id.

ⁿ¹²⁰. Id.

ⁿ¹²¹. Id.

ⁿ¹²². Id. 16.

ⁿ¹²³. Id. 14.

ⁿ¹²⁴. Id.

ⁿ¹²⁵. A footnote to the Resolution defines the term "substantially disbursed" to mean that at least 95% of the loan proceeds have been disbursed. Id. 14 n.1.

ⁿ¹²⁶. The OED provides the Bank with an objective evaluation of completed operations and a mechanism for determining how to improve the design, appraisal, and implementation of future projects. The objectivity and credibility of OED reports depends on the fact that the OED has no interest or operational involvement in the projects it evaluates.

ⁿ¹²⁷. The **Panel** offers the Bank an independent mechanism for receiving timely information on problems in on-going operations, a means for monitoring the efficacy and adequacy of the Bank's operating rules and procedures, and a formal mechanism for handling complaints from the public. The credibility and efficacy of the **Panel** depends on its independence, which dictates that the **Panel** must not have a stake in the Bank's evaluation of its own performance in completed operations. Confidence in the **Panel** would be weakened if it had an institutional affiliation to the OED, which conducts ex post evaluations of Bank operations, or if the two had overlapping jurisdictions. Such an affiliation with the OED would be especially problematic if the **Panel**, in investigating specific complaints, were required either to evaluate the extent to which the Bank had

implemented the findings of its OED-affiliate or to take the OED's findings and recommendations into account in a particular decision. In either case, confidence in the objectivity of the **Panel** would be severely diminished.

¶n128. See Resolution, *supra* note 1, 12.

¶n129. Usually in Bank parlance, "affected party" refers to those persons who, in their daily lives, feel the direct impact of a Bank operation.

¶n130. The provisional Operating Procedures offer complainants some protection in that documents and portions of documents will not be released without the express written consent of the party concerned. Operating Procedures, *supra* note 90, 63. It is not clear, however, whether the protection provided by this provision is limited to the release of documents to the public or if it also includes the anonymity of the complainant in communications between the **Panel** and Bank officials, including the Executive Directors.

¶n131. Procedures protecting a complainant's anonymity would be consistent with procedures in other international fora in which private complainants are allowed to bring complaints against official actors. See Guide to International Human Rights Practice, *supra* note 104, at 59-162 (explaining the procedures for making human rights complaints in the United Nations, the ILO, UNESCO, the Inter-American Center for the Protection of Human Rights, and the African Commission on Human and Peoples' Rights).

¶n132. The Bank's rationale for limiting the role non-local representatives can play in the complaints process is unclear. However, the Bank may have been motivated by an interest in limiting the role global non-governmental organizations, such as Washington-based environmental groups, can play in the work of the **Panel**. See Shihata, *supra* note 54, at 57-58. This is unfortunate because potential complainants may need to draw on the human and financial resources of these organizations in preparing their complaints.

¶n133. This issue is not adequately addressed in the provisional Operating Procedures of the **Panel**. The Procedures merely provide that the **Panel** "may" notify the Requestor of any "new material facts" provided to it by officials of the Bank or the borrower. See Operating Procedures, *supra* note 90, 48.

¶n134. For further discussion of the confidentiality issue, see the Bank's new information disclosure policy, *supra* note 53 and accompanying text.

¶n135. The provisional Operating Procedures of the **Panel** do provide some general guidance in this regard, including, in an annex to the procedures, a model form for requesting an **inspection**. Operating Procedures, *supra* note 90, Annex 2. This annex suggests that the **Panel** will require detailed information about the complainant. However, it will only be possible to determine the minimum standards for an adequate complaint once the **Panel** has had the opportunity to review some complaints.

¶n136. The provisional Operating Procedures provide that the complainant "may" provide the **Panel** with supplemental information, but does not grant the complainant a formal right to participate in the **Panel's** proceeding. See *id.* 47-49.

¶n137. The provisional Operating Procedures provide that a complaint can be filed with the Bank's Resident Representative in the country where the project is located. The Resident Representative is expected to forward the complaint to the **Panel** in the next pouch. *Id.* 14. The provisional procedures do not, however, explicitly impose an obligation to protect the confidentiality of the complaint on the Resident Representative. In addition, they do not allow complainants, who may fear reprisals in their own countries or who come from countries that may not have a Resident Representative, to file complaints with any Resident Representative.

¶n138. The provisional Operating Procedures allow complainants to submit requests for **inspection** in their local languages but do not discuss the cost of translation. Id. 8.

¶n139. An example of reasons that might justify the use of a "non-local representative" would include cases where bringing the complaint would place the complainant at risk of reprisals from the borrower state.

¶n140. This suggests that the more successful complainants will require the services of a lawyer. As this imposes an undue burden on poor complainants, the **Panel** should assume some of the burden of linking a complaint to the applicable operational policy.

¶n141. The Resolution does not contain any rules of discovery.

¶n142. Resolution, supra note 1, 27. One issue the Bank might consider in this review is an extension of the **Panel's** jurisdiction to include other members of the **World Bank** Group, besides the IBRD and IDA. The International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) both have operating rules and procedures that directly affect people's lives. Consequently, there do not appear to be any good reasons for excluding them from the jurisdiction of the **Panel**. There may be a need for some special procedural rules, however, because their operations do differ in some significant respects from those of the IBRD and IDA.

¶n143. Id. 17.

¶n144. Id. 18.

¶n145. See discussion of these standards infra part III.D.3.

¶n146. Resolution, supra note 1, 19.

¶n147. Id. 15.

¶n148. Id. 21.

¶n149. Id. 19.

¶n150. Id. 20.

¶n151. Id. 19.

¶n152. Id. 25.

¶n153. Id.

¶n154. The **Panel** released provisional Operating Procedures in early September 1994. See supra note 90. These provisional rules do not address the issue of ex parte communications, but they do appear to offer the complainant and interested third parties an opportunity to submit information to the **Panel** during the course of **Panel** investigations. Operating Procedures, supra note 90, 47-51; see also supra note 137.

¶n155. For further discussion of the ability of complainants to comment on ex parte communications, see supra part III.D.1. For a discussion of the ability of complainants to respond to advice the **Panel** receives from the Bank's legal department, see infra part III.D.3.

¶n156. The provisional Operating Procedures provide for this possibility. Operating

Procedures, supra note 90, 47-51.

¶n157. Resolution, supra note 1, 19.

¶n158. The General Counsel of the Bank estimates the normal distribution period to be about three weeks. See Shihata, supra note 54, at 73 n.75.

¶n159. Resolution, supra note 1, 25.

¶n160. The provisional Operating Procedures provide that the **Panel** shall make its recommendation to the Board public, but leave unclear whether this includes the attachments to the recommendation, which, according to the procedures, could include relevant information provided by the requestor, the text of the Management's responses to the **Panel**, and the text of any advice received from the Legal Department of the Bank. Operating Procedures, supra note 90, 37, 41.

¶n161. Pursuant to paragraph 24 of the Resolution, any panelist who disagrees with the finding of the majority can be expected to prepare a report explaining the grounds for his or her dissent. Resolution, supra note 1, 24 (noting that "in the absence of a consensus, the majority and minority views shall be stated").

¶n162. Id. 12.

¶n163. Id. 16.

¶n164. Id. 13.

¶n165. One possibility is to construe this expression in light of the language of paragraph 12. Thus the term may reinforce the notion that the Bank's actions must have had a "material adverse effect" on the rights or interests of the complainant. Another possibility is that the term stipulates that the **Panel** should focus on the severity of the violation, rather than on the injury to the complainant.

¶n166. Resolution, supra note 1, 14(d).

¶n167. Id. 15.

¶n168. Id. 22.

¶n169. The provisional Operating Procedures provide the **Panel** with broad discretion in determining the form of any investigation. See Operating Procedures, supra note 90, 42-45.

¶n170. Resolution, supra note 1, 20.

¶n171. Id.

¶n172. Id. 21.

¶n173. Id.

¶n174. Id.

¶n175. Id. The Bank could consider obtaining permission for such investigations as a term of its loan agreements.

¶n176. Id. 24.

ⁿ177. Id. 22.

ⁿ178. Id. 23.

ⁿ179. Id.

ⁿ180. Id.

ⁿ181. Id. 25.

ⁿ182. For a detailed discussion of these issues, see supra part III.D.2.

ⁿ183. Resolution, supra note 1, 21.

ⁿ184. Id.

ⁿ185. Complainants can seek to mitigate the effects of these issues by including an express request that the investigation be conducted according to procedures stipulated in the complaint. The eventual publication of such a request would force the **Panel** to explain any refusal to follow requested procedures. See discussion supra part III.D.1. The provisional Operating Procedures do allow third parties to provide the **Panel** with supplemental information relating to the Request for Investigation. Operating Procedures, supra note 90, 50-51.

ⁿ186. Resolution, supra note 1, 22.

ⁿ187. The provisional Operating Procedures state that the **Panel's** report will include a "summary discussion of the relevant facts," the **Panel's** findings, and a list of supporting documents available on request from the Office of the **Inspection Panel**. Operating Procedures, supra note 90, 52.

ⁿ188. This is different from the procedure established for the **Panel's** recommendation on whether to investigate a complaint. In that case, the **Panel's** recommendation shall be circulated "within the normal distribution period." Id. 19. See supra part III.D.2. for an analysis of this requirement.

ⁿ189. Resolution, supra note 1, 26.

ⁿ190. Id.

ⁿ191. See G.J.H. van Hoof & K. de Vey Mestdagh, Mechanisms of International Supervision, in Supervisory Mechanisms in International Economic Organisations 1, 15-20 (P. van Dijk ed., 1984) (describing the characteristics of judicial, quasi-judicial, and non-judicial supervision).

ⁿ192. Id. at 15. The International Court of Justice is an example of a body engaged in judicial supervision.

ⁿ193. Id. at 18. The Security Council of the United Nations is a non-judicial supervisory body.

ⁿ194. Id. at 18 (noting that "essential to ... quasi-judicial supervision is the notion of due process and the finality of the decision"). The European and Inter-American Commissions of Human Rights are examples of quasi-judicial supervisory bodies.

ⁿ195. But see Shihata, supra note 54, at 98-100 (characterizing the **Inspection Panel**

as a non-adjudicatory process).

¹⁹⁶. The Board, however, should not be viewed as a political body. The Executive Directors, as officers of the Bank, are required to comply with the clauses in the Bank's Articles of Agreement that preclude the Bank and its officers from relying on political considerations in their decision-making. In addition, the Bank's member states are required to respect the international character of the duty of all officers of the Bank and to refrain from attempting to influence them in the discharge of their duty. See Articles of Agreement of the International Bank for Reconstruction and Development, *supra* note 16, art. IV, 10, art. V, 5 (c); Shihata, *supra* note 17, at 105-107; see also *supra* note 24.

¹⁹⁷. See *supra* part III, discussing pre-complaint communications, *ex parte* communications in **Panel** proceedings, and the staff's lack of any direct obligation to provide information to the **Panel** during investigations.

¹⁹⁸. See van Hoof & de Vey Mestdagh, *supra* note 191, at 11.

¹⁹⁹. *Id.*

²⁰⁰. *Id.* at 11-14.

²⁰¹. See 2 Henry G. Schermers, *International Institutional Law* 574 (1980). But see discussion of European Union, *supra* note 6.

²⁰². See Ian Brownlie, *Principles of Public International Law* 590-91 (3d ed. 1979); Schermers, *supra* note 201, at 311.

²⁰³. The International Labor Organization is an example of such an organization. See Schermers, *supra* note 201, at 89; van Hoof & de Vey Mestdagh, *supra* note 191, at 22-23. But see Brownlie, *supra* note 202, at 591 (noting that these recent exceptions have not significantly affected the general rule).

There are two other exceptions to this general rule. The first is that international organizations can be directly liable for breaches of their contractual arrangements with private actors. For example, the Bank can be held liable by investors who purchase **World Bank** bonds. See Broches, *supra* note 21, at 308-12.

The second exception arises from those international treaties in which the signatory states have explicitly provided that an international organization can be held responsible for the injuries caused by its conduct. In all such cases, the international organization is undertaking the same action as a sovereign state. Consequently, the treaty signatories are expecting the organization to waive immunity to the same extent they do. See Convention on the Law of the Sea, opened for signature Dec. 10, 1982, art. 139, U.N. Doc. A/CONF.62/122 (1982); Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, opened for signature Dec. 18, 1979, arts. 14, 16, U.N. GAOR, 34th Sess., Supp. 46, at 77, U.N. Doc. A/34/46; Convention on International Liability for Damage Caused by Space Objects, opened for signature Mar. 29, 1972, art. XXII, [24 U.S.T. 2389](#), 961 U.N.T.S. 187; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, opened for signature Jan. 27, 1967, arts. VI, VII, 18 U.S.T.S. 2410, 961 U.N.T.S. 187.

²⁰⁴. See, e.g., Frederick J. Kirgis, Jr., *International Organizations in their Legal Settings* 274-80 (1993) (discussing the case of the ILO).

²⁰⁵. See generally Broches, *supra* note 21; Baum, *The Project Cycle*, *supra* note 20,

at 19. For a sample loan agreement, see **Bradlow**, supra note 25.

¶n206. See Baum and Tolbert, Investing in Development, supra note 20, at 353; Report of the Portfolio Management Task Force, supra note 43, at 12. It should be noted that the Bank is required to deal with its borrowers through their Ministries of Finance or their Central Bank. This requirement may complicate the Bank's interactions with private actors in the borrower country. It does not, however, preclude such interactions. See Articles of Agreement of the International Bank for Reconstruction and Development, supra note 16, art. III, 2; Articles of Agreement of the International Development Agency, supra note 16, art. VI, 10 (stating that each member state "shall designate an appropriate authority" for communication with the IDA).

¶n207. On August 10, 1994, the Executive Directors of the Inter-American Development Bank decided to establish an independent investigative **panel** that will investigate complaints from affected groups alleging that the Bank had "failed to follow its own policies and norms" and that such failures had produced "adverse effects in its borrowing member countries." See IDB to Have Independent Investigative **Panels**, Press Release NR/135-94 (Inter-American Development Bank, Aug. 10, 1994). The Asian Development Bank has also stated that it is considering creating an independent **inspection** unit. See John Chalmers, Asian Aid Bank Comes Under Fire at Annual Meeting, Reuters, May 2, 1994.

¶n208. Resolution, supra note 1, 12.

¶n209. Nonetheless, the Bank remains contractually liable to investors who purchase its bonds. This liability arises out of the contractual relationship established between the Bank as borrower and its investors and is outside the scope of the **Panel's** purview. See Broches, supra note 21, at 308-12.

¶n210. See, e.g., U.S. International Financial Institutions Act, [22 U.S.C. 262d](#)(f) (1988) (instructing U.S. Executive Directors of the **World Bank** "to oppose any loan, any extension of financial assistance, or any technical assistance to any country" whose government is engaged in a pattern of gross violations of internationally recognized human rights unless the assistance "is directed specifically to programs which serve the basic human needs of the citizens of such country").

¶n211. See supra notes 66-68 and accompanying text for a description of the Bank's new disclosure policy.

¶n212. In fact, the Bank's staff has the authority to formulate its own operational rules and policies. Normally, the Executive Directors do not review the operational rules before they become effective. This means, in effect, that the member states do not play a role in the way in which the Bank makes and implements its operational decisions. See Ibrahim F.I. Shihata, The **World Bank** and the Environment: A Legal Perspective, 16 Md. J. Int'l L. & Trade 1, 9 (1992) (explaining that Annex A to Operational Directive 4.0 and Operational Directive 4.01 on Environmental Assessment were discussed in the draft by the Executive Directors prior to finalization and this was an unusual step because operational directives fall "clearly within the prerogative of Bank management in the implementation of policies determined by the Board"). The Bank's staff is presently engaged in an extensive review of its operational directives. Revised directives are being issued as Operational Policies. It is not yet clear how this review process will affect the **Panel's** jurisdiction.

¶n213. See supra notes 95-107 and accompanying text for a discussion of Operational Directive 4.30 and the categories of permissible and impermissible complaints that could arise thereunder.

n214. See generally Amerasinghe, supra note 14 (discussing dispute resolution between employees of international organizations and their employers).

n215. For a more detailed discussion of the Bank's view of governance, see supra note 23.

n216. Although an inadequate budget would be undesirable, it would, nonetheless, present an opportunity for interested non-governmental actors to provide the **Panel** with information and investigatory assistance. The experiences of human rights groups are particularly relevant in this regard. See generally Guide to International Human Rights Practice, supra note 104, at 81 (analyzing the International Labor Organization's investigatory procedures).

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PRIVATE COMPLAINANTS AND INTERNATIONAL ORGANIZATIONS: A COMPARATIVE STUDY OF THE INDEPENDENT INSPECTION MECHANISMS IN INTERNATIONAL FINANCIAL INSTITUTIONS

DANIEL D. BRADLOW*

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I. INTRODUCTION

It is a general principle that those with power must be accountable for the way in which they exercise it.¹ The form of the accountability can vary, depending on the circumstances. The holders of power can be held accountable through legal, political, administrative or financial means.

Applying this general principle to international organizations is complicated because international organizations are the creations of their member states and have organizational immunity.² As a result, international organizations are usually viewed as being accountable to only a limited range of actors. They are directly accountable to their member states for the way in which they implement the mandates that

1. See, e.g., 2004 Final Report of the Committee on the Accountability of International Organizations to the Berlin Conference 5 (2004) [hereinafter *Final Report*].

2. KAREL WELLENS, REMEDIES AGAINST INTERNATIONAL ORGANISATIONS 120 (2002); HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW §§1610-1612 (3d ed. 1999); *Final Report*, *supra* note 1, at 50-51.

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the member states have given them.³ Member states can hold international organizations accountable through the various governance structures that exist in the organization and through whatever dispute settlement forums might be available to the member states and the organization. In addition, such organizations are directly accountable to those states and international organizations with whom they have concluded treaties or other international agreements and to those private legal and natural persons with whom they enter into contractual relations (usually only after they have waived their immunity).⁴ These actors can hold the organizations accountable through the dispute settlement mechanisms established in the agreements. International organizations also have some international legal responsibility to non-member states that are harmed by their actions and decisions. Such non-member states may be able to hold the organizations accountable through either formal or informal means.⁵

The one group that historically has not been able to hold international organizations accountable is non-state actors who are adversely affected by the actions of an international organization but who have no contractual relationships with it.⁶ In principle, there are four possible means through which these actors can try and hold the international organization accountable.⁷ First, the non-state actors can seek to persuade their home state to exercise its diplomatic protection and to hold the organization accountable on their behalf. Second, they can try and persuade the international organization to waive its immunity and agree to submit to suit in one of its member states. Third, they can try and persuade a court that the international organization has acted *ultra vires* or with such gross negligence or willful recklessness that it should set aside the organization's immunity and hear their case. Fourth, they can seek to persuade a domestic or international court to "pierce the veil" of the international organization and hold the member states responsible for the acts of the international organization.

3. WELLENS, *supra* note 2, at 29-33; SCHERMERS & BLOKKER, *supra* note 2, §1885.

4. Final Report, *supra* note 1, at 23-25; SCHERMERS & BLOKKER, *supra* note 2, §1612(a).

5. SCHERMERS & BLOKKER, *supra* note 2, §1687.

6. Daniel D. Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, 34 VA. J. INT'L L. 553, 554 (1994) [hereinafter Bradlow, *Inspection Panel*]; Daniel Bradlow & Sabine Schlemmer-Schulte, *The World Bank's New Inspection Panel: A Constructive Step in the Transformation of the International Legal Order*, 54 ZEITSCHRIFT FÜR AUSLÄNDISCHES OFFENTLICHES RECHT UND VOLKERRECHT (THE HEIDELBERG J. INT'L L.) 353, 395 (1994).

7. See WELLENS, *supra* note 2, at 114-32. See generally AUGUST REINISCH, INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS (2000) (analyzing whether international organizations should be immune to national jurisdictions).

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None of these options are likely to be successful, except in the most unusual of circumstances. The result, therefore, has been that, in fact, non-state actors have not been able to hold international organizations accountable.

This gap in international organizational accountability was not perceived to be significant until the last quarter of the twentieth century when two parallel developments began to change this view. The first development was that the scope of the activities of international organizations broadened. The impact of this change is seen most clearly in the case of the international financial institutions (IFIs), particularly the World Bank Group (World Bank) and the International Monetary Fund (IMF). The World Bank began to expand its range of operations beyond financing physical infrastructure projects to include such matters as providing both financing and advisory services related to the structural adjustment of its member states' economies and to improving the governance of their societies.⁸ Similarly, the IMF began to get involved in poverty alleviation and the governance of its member states.⁹ This "mission creep," combined with changes in the international financial system, altered the nature of the IFIs' relations with their developing country member states, shifting the balance of bargaining power between international financial institutions and their client states in favor of the IFIs.¹⁰ This meant that the developing countries had limited scope to negotiate over the conditions that the IFIs attached to their financing and could not ignore the policy advice from the IFIs. The net effect was that, de facto, the IFIs became important participants in the policy-making process of their member states. However, because of the organizations' immunity and their member states' lack of interest in holding them accountable, the international organizations, unlike most actors in the policy-making process, were not directly accountable to those most affected by their decisions and actions.¹¹

The second development was that perceptions began changing

8. Daniel D. Bradlow, *The World Bank, the IMF, and Human Rights*, 6 *TRANSNAT'L L. & CONTEMP. PROBS.* 48, 49 (1996) [hereinafter Bradlow, *Human Rights*]; Bradlow, *Inspection Panel*, *supra* note 6, at 557-58 and sources cited therein.

9. Daniel D. Bradlow, *Stuffing New Wine into Old Bottles: The Troubling Case of the IMF*, 3 *J. INT'L BANKING REG.* 9, 9 (2001) [hereinafter Bradlow, *IMF*].

10. *Id.* (citing to D. Kapur & R. Webb, *Governance Related Conditionalities of the International Financial Institutions* (G24 Discussion Paper Series No. 6, 2000)); see Bradlow, *Human Rights*, *supra* note 8, at 66-72.

11. Bradlow, *Inspection Panel*, *supra* note 6, at 567; Bradlow, *IMF*, *supra* note 9, at 24-25.

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about the responsibilities of decision-makers in large-scale projects and development programs. The change was happening because of developments in human rights law and changing views about the environmental and social responsibilities of key decision-makers and actors.¹² The result was that those who were adversely affected by the projects began to advocate more vigorously that all decision-makers, including funding sources, be held accountable for their decisions relating to these projects. Since the World Bank and the regional development banks were often key lenders and providers of technical assistance for projects, they were the first targets of these calls for greater accountability.

The ability of the multilateral development banks (MDBs) to escape liability was particularly upsetting to non-state actors because MDBs, despite their formal role as lenders rather than sponsors of development projects or programs, were perceived to be directly and exclusively responsible for at least part of the harm caused by their operations.¹³ Non-state actors further argued that the MDBs' ability to escape accountability was incompatible with the principles of good governance being advocated by the institutions themselves.¹⁴

It is important to note that these developments in the relationships between international organizations, their member states and non-state actors are not limited to the IFIs. Other international organizations or entities in organizations, such as the United Nations Children's Fund (UNICEF), United Nations Development Programme (UNDP), World Food Programme (WFP) and United Nations High Commission for Refugees (UNHCR), engage in activities in their member states that bring them into direct interaction with the citizens of their member states and for which they could be held exclusively accountable.¹⁵ In

12. Daniel D. Bradlow, *The World Commission on Dams' Contribution to the Broader Debate on Development Decision-Making*, 16 AM. U. INT'L L. REV. 1531, 1541-45 (2001) and sources cited therein.

13. Bradlow, *Inspection Panel*, *supra* note 6, at 560.

14. Dana Clark, *Understanding the World Bank Inspection Panel*, in DEMANDING ACCOUNTABILITY 2, 6 (Dana Clark, Jonathan Fox & Kay Treakle eds., 2003); Kunibert Raffer, *Good Governance, Accountability, and Official Development Co-operation: Analyzing OECD-Demands at The Example of the IBRD*, in SUSTAINABLE DEVELOPMENT AND GOOD GOVERNANCE 343-59 (Konrad Gintler et al. eds., 1995) (describing the increasing demand for good management by public institutions including sensible economic and social policies and financial accountability); *see also* WORLD BANK, 2003 ANNUAL REPORT 6-7 (2003) (calling for openness, transparency and accountability in the Bank).

15. UNICEF, 2002 ANNUAL REPORT 38 (2003) (noting that UNICEF worked in 162 countries and territories in 2002), *available at* <http://www.unicef.org> (last visited June 28, 2004); About UNDP, *available at* <http://www.undp.org> (last visited June 28, 2004); UNDP, 2003 HUMAN DEVELOPMENT REPORT (displaying the UNDP's programs to eradicate poverty, reduce gender

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addition, the United Nations itself has undertaken operations in places like Cambodia,¹⁶ East Timor¹⁷ and Namibia,¹⁸ that, because of their broad scope, have a direct impact on citizens in these countries.

The World Bank became the first international organization to respond to these demands for accountability. In 1993 the World Bank created the Inspection Panel,¹⁹ the first mechanism in which qualifying non-state actors could hold an international organization directly accountable for its actions. The Inspection Panel allows these non-state actors to hold the Bank accountable for actions that cause or threaten to cause serious harm to the complaining non-state actors and are inconsistent with the Bank's own operational policies and procedures. Since that time, a number of other international financial institutions have established their own inspection mechanisms. They are the Asian Development Bank, the Inter-American Development Bank, the International Finance Corporation, the Multilateral Investment Guarantee Agency and the European Bank for Reconstruction and Development. The African Development Bank has approved and is in the process of setting up an independent inspection mechanism for the Bank. In addition, two national development financing organizations, the Japanese Bank for International Cooperation and Export Development Canada, have created similar mechanisms.²⁰

These inspection mechanisms have both practical and legal significance. At a practical level, they have resulted in thousands of people receiving compensation for the adverse consequences of projects being funded by these institutions, in the cancellation of at least one project, in instructions from the Board to the management to make changes in projects in order to provide people with the intended benefits or to mitigate the harm caused by the project and in much greater sensitivity

inequality and reduce child mortality and other social programs); WFP (showing that WFP has emergency and development projects in 81 countries), *available at* <http://www.wfp.org> (last visited June 28, 2004); UN High Commission for Refugees (estimating that as of January 1, 2004, there are 17,093,400 asylum seekers, refugees, and others of concern to the UNHCR), *available at* <http://www.unhcr.ch> (last visited June 28, 2004).

16. Frederic Megret & Florian Hoffmann, *The UN as a Human Rights Violator?: Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 HUM. RTS. Q. 314, 327 (2003).

17. *Id.* at 327.

18. *Id.* at 333.

19. See International Bank for Reconstruction and Development (IBRD), *Resolution 93-10* (1993); International Development Association (IDA), *Resolution 93-6* (1993). The two Resolutions are identical and are reprinted in WORLD BANK, WORLD BANK OPERATIONAL MANUAL: BANK PROCEDURES 17.55, Annex A (1997) [hereinafter *Resolutions*].

20. See discussion *infra* Section II.C.2.

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in the institutions to their own operational policies and procedures.²¹ Legally, these mechanisms have turned out to be effective forums in which adversely affected persons can raise claims that relate to their rights as indigenous people or as involuntarily resettled people and in which they can challenge the interpretation and implementation of the internal policies and procedures of the MDBs. Consequently, inspection mechanisms are slowly beginning to provide data and precedents that can influence the evolution of international human rights law, international environmental law and international administrative law.²² The inspection mechanisms may also ultimately influence the development of international financial law, as they investigate cases in which they are trying to determine the obligations of creditors towards those harmed by the projects they finance.

Given the legal and practical significance of these inspection mechanisms, they deserve more systematic examination. This Paper is intended to provide such examination. This Paper is a comparative study of the inspection mechanisms at the MDBs and comparable mechanisms at other international institutions. The goal of the study is to see what lessons can be learned about the structuring of inspection mechanisms at international organizations. Thus, the Paper is an analysis of the institutional arrangements that have been developed to promote international organizational accountability to non-state actors. It is not a study of their “jurisprudence” or, more accurately, the lessons that can be learned from the reports of their inspections and recommendations.

For the purposes of this study, an “inspection function” refers to an independent mechanism that investigates complaints from affected people who allege either one or both of the following: that they have been harmed or will be harmed by an operation of an international organization, and that the harm has been caused by the failure of the organization to follow its own operating rules and procedures in the operation. The “independence” of the mechanism references that the mechanism is independent from the organization’s management and

21. See WORLD BANK, ACCOUNTABILITY AT THE WORLD BANK: THE INSPECTION PANEL 10 YEARS ON (2003) [hereinafter WORLD BANK, INSPECTION PANEL] (discussing cases received and investigated in which non-state actors registered complaints to the Inspection Panel). *But see* Jonathan Fox & Kay Treakle, *Concluding Propositions*, in DEMANDING ACCOUNTABILITY, *supra* note 14, at 283-86 (criticizing the Inspection Panel as lacking powers of enforcement and of restitution and noting that the number of Panel claims only represents a fraction of potentially controversial projects).

22. Bradlow, *Inspection Panel*, *supra* note 6, at 601, 608-10; WORLD BANK, INSPECTION PANEL, *supra* note 21.

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reports directly to the relevant decision-making body representing its member states. “Affected people” refers to non-state actors who have no contractual relationship with the organization but whose living conditions are directly or indirectly affected by the bank-financed operation or operationally related decision. “Operation” refers to any project, program or other activity of the international organization that brings it into direct interaction with non-state actors in those member states in which it is active.

The structure of the Paper is as follows. Section II discusses the inspection mechanisms at the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank and the World Bank Group, in the order in which they were established. In addition, the Section contains some information on inspection mechanisms in other national and international organizations that have similar functions to the inspection mechanisms at the international development banks. Section III follows with a comparative analysis of the mechanisms discussed in the previous Section and a discussion of the general principles that should guide the structuring of an inspection function. Section IV contains a description of the options that are available to any international organization interested in creating an inspection mechanism. The final Section draws some lessons about inspection mechanisms and contains a recommendation as to which option is the best for international organizations that need to create inspection mechanisms.

II. DESCRIPTIONS OF EXISTING INSPECTION MECHANISMS

A. *Mechanisms at Multilateral Development Banks*

These mechanisms are discussed in the order in which they were first established.

1. World Bank Inspection Panel

The World Bank Inspection Panel (Panel), which has three members, was established by a resolution of the World Bank’s Board of Executive Directors in 1993 (Resolution).²³ Its structure and procedures are described in more detail below, followed by a brief description of the experience of the Panel.

23. See *Resolutions*, *supra* note 19.

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a. *Structure*

The three members of the Panel are appointed to non-renewable 5-year terms by, and are responsible to, the Board of Executive Directors of the World Bank.²⁴ The Directors make their appointments based on nominations from the President of the Bank. The President makes these nominations after consultation with the Executive Directors²⁵ and other stakeholders. The Panel members are selected on the bases of their ability to deal “thoroughly and fairly” with the requests brought to them, their integrity, independence from Bank management and exposure to development issues and living conditions in developing countries.²⁶

The Resolution establishes a number of requirements designed to protect the independence of the members of the Panel. First, the Resolution stipulates that members cannot have worked in any capacity for the Bank for the two years prior to their appointment.²⁷ Second, the members of the Panel can only be removed from office “for cause” and by a decision of the Executive Directors.²⁸ Third, a Panel member is barred from participating in any hearing or investigation relating to any matter in which the Panel member has a personal interest or a significant involvement.²⁹ Fourth, Panel members are not eligible to work for the Bank in any capacity following the end of their term on the Panel.³⁰

The Panel members select their own chair.³¹ The chair is expected to work full-time for the Panel, while the other Panel members work part-time with their work-load, depending on the demand for their services.³² The Resolution provides that the Panel will be assisted in its work by an Executive Secretary,³³ who is a staff member of the Bank and is assigned to the Panel by the President of the Bank after consultations with the Executive Directors. The current Executive Secretary of the Panel previously worked in the legal department of the Bank. His staff consists of two assistant executive secretaries, who

24. *See id.* ¶¶ 2-3

25. *See id.* ¶ 2.

26. *Id.* ¶ 4.

27. *See id.* ¶ 5.

28. *See id.* ¶ 8.

29. *See id.* ¶ 6.

30. *See id.* ¶ 10.

31. *See id.* ¶ 7.

32. *See id.* ¶ 9.

33. *See id.* ¶ 11.

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originally worked in the legal department, and two support staff. In addition, for the past few years, the Panel has employed two long-term consultants who are both lawyers.

The annual budget of the Panel in both 2001 and 2002 was slightly over \$2 million. In 2000, the budget was \$2.23 million. Interestingly, in 2000 actual Panel expenses were \$2.20 million, and in 2001 actual expenses were \$1.8 million. It is more difficult to obtain information on the cost to the Bank of the staff time and resources used in responding to cases before the Panel. However, in the China Western Poverty Reduction Project (Credit No. 3255-CHA and 450-CHA), which was probably the Panel's most difficult case, the World Bank consumed about \$1.5 million in staff time and resources.³⁴

b. *Procedures*

The Panel process is initiated by a request for inspection. These requests can be submitted by:³⁵

- (i) "an affected party in the territory of the borrower which is not a single individual (i.e., a community of persons such as an organization, association, society or other grouping of individuals);"³⁶
- (ii) the local representatives of such an affected party;
- (iii) another representative of the affected party in exceptional circumstances. This can occur when the party submitting the request asserts that appropriate representation is not locally available and the Executive Directors agree at the time they consider the request;
- (iv) an Executive Director in "special cases of serious alleged violations"³⁷ of operational policies and procedures; and
- (v) the Executive Directors acting as a Board.

In practice, most requests for inspection have been submitted by affected parties or their local representatives. In one case the request

34. This information was obtained from the second draft of the report to the Asian Development Bank reviewing its inspection function, dated 31 July 2002. The report is available at the Asian Development Bank (ADB) website, <http://www.adb.org>. It should be noted that some have questioned the accuracy of this figure, contending that it over-estimates the cost of local consultants.

35. *See Resolutions, supra* note 19, ¶ 12.

36. *Id.*

37. *Id.*

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was filed by a non-local representative of the affected party.³⁸

In the request for inspection, the affected party:

[M]ust demonstrate that its rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal, and/or implementation of a project financed by the Bank (including situations where the Bank is alleged to have failed in its follow-up on the borrower's obligations under loan agreements with respect to such policies and procedures) provided in all cases that such failure has had, or threatens to have, a material adverse effect.³⁹

The Resolution defines “operational policies and procedures” as including all “the Bank’s Operational Policies, Bank Procedures and Operational Directives, and similar documents issued before these series were started, and does not include Guidelines and Best Practices and similar documents or statements.”⁴⁰

Once the Panel receives the request, it must satisfy itself that the subject matter of the request has been dealt with by the Bank management, but that the Bank management failed to follow or take adequate steps in conformity with the Bank’s policies and procedures to deal with the issues raised in the request. In addition, the Panel should satisfy itself that the alleged violations of the Bank’s policies and procedures are of a serious character.⁴¹ The Panel should also determine if the matter is “without doubt manifestly outside the Panel’s mandate.”⁴²

38. See WORLD BANK INSPECTION PANEL, INVESTIGATION REPORT: THE QINGHAI PROJECT, A COMPONENT OF THE CHINA WESTERN POVERTY REDUCTION PROJECT (Credit No. 3255-CHA and Loan No. 4501-CHA) ¶ 4 (2000).

39. *Resolutions*, *supra* note 19, ¶ 12.

40. *Id.*

41. *See id.* ¶ 13.

42. WORLD BANK INSPECTION PANEL, OPERATING PROCEDURES ¶ 22 (1994) [hereinafter OPERATING PROCEDURES].

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There are certain matters that the Panel is not authorized to entertain. They are:

- (i) requests dealing with actions that are the responsibility of other parties and which do not involve an action or omission of the Bank;
- (ii) requests dealing with procurement decisions;
- (iii) requests filed after the closing date of the loan financing the project with respect to which the request for inspection was filed;
- (iv) requests filed after the loan is substantially disbursed, which is deemed to mean that the proceeds of the loan are ninety-five percent disbursed; and
- (v) requests relating to matters over which the Panel has already made a recommendation based on a prior request for inspection, unless there is new evidence or circumstances that were not known at the time of the prior request.⁴³

In addition, the Panel only has jurisdiction to deal with requests for inspection relating to International Bank for Reconstruction and Development (IBRD) and International Development Association (IDA) operations.

If the request contains the required information and is not manifestly outside the Panel's mandate, the chair of the Panel promptly registers it and notifies the requester, the Executive Directors and the Bank President that the request has been registered.⁴⁴ Within twenty-one days of being notified of the request, management must submit a response to the Panel.⁴⁵

The Panel must make a recommendation to the Executive Directors on whether or not they should grant the request for an inspection within twenty-one days of receiving the management response.⁴⁶ The Panel may visit the country in which the project or operation is based during this time in order to verify information and help determine the eligibility of the request.⁴⁷ In making this recommendation, the Panel should consider whether the request meets all the eligibility requirements set out in the Resolution.⁴⁸ In this regard, it should be noted that in addition to the requirements discussed above, a successful requester

43. See *Resolutions*, *supra* note 19, ¶ 14 & n.1.

44. See OPERATING PROCEDURES, *supra* note 42, ¶ 17.

45. See *id.* ¶ 30; *Resolutions*, *supra* note 19, ¶ 18.

46. See OPERATING PROCEDURES, *supra* note 42, ¶ 30.

47. See *id.* ¶ 36.

48. See *Resolutions*, *supra* note 19, ¶ 19.

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must show that its “rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures.”⁴⁹ Pursuant to paragraph 15 of the Resolution, the Panel is required to seek the advice of the Legal Department in matters related to the Bank’s rights and obligations with respect to the request under consideration.

After receiving the Panel’s report, the Board of Executive Directors meets to consider the Panel’s recommendation and decide whether or not to grant the request for an inspection. Following the second review of the Resolution establishing the Panel, conducted in 1999,⁵⁰ the Board has limited discretion in deciding whether or not to adopt the Panel’s recommendation. Pursuant to this clarification, the Board can only challenge the Panel’s recommendation on clearly stipulated “technical” grounds.⁵¹ In fact, the Board usually decides this issue on a “no objection” basis.⁵²

The Resolution does not specify a time period within which the Board must reach this decision. It does, however, require that the requester be informed of the Executive Directors’ decision within two weeks of the date of the decision.⁵³ The decision, together with the request and the Panel’s recommendation, must also be made public within this time period.⁵⁴ Pursuant to the first clarification of the Resolution, the management’s response is also made public.⁵⁵

If the Board of Executive Directors decides to authorize an investigation, the investigation is conducted by the Panel, or more specifically the Panelist or Panelists selected by the chair of the Panel to lead the investigation.⁵⁶ In conducting the investigation, the responsible Panel-

49. *Id.* ¶ 12.

50. See WORLD BANK, CONCLUSIONS OF THE BOARD’S SECOND REVIEW OF THE INSPECTION PANEL ¶ 9 (1999), available at <http://www.worldbank.org/html/extdr/ipwg/secondreview.htm> (last visited Apr. 28, 2005).

51. These technical grounds are derived from the requirements established in the Resolution and relate to factual matters. All matters that require judgment are treated as “non-technical” matters and cannot be challenged by the Board. See *id.*

52. See WORLD BANK INSPECTION PANEL, PANEL REGISTER, available at <http://wbln0018.worldbank.org/ipn/ipnweb.nsf/WRegister?openview&count=500000> (last visited July 16, 2004).

53. See *Resolutions*, *supra* note 19, ¶ 19.

54. See *id.* ¶¶ 19, 25.

55. See WORLD BANK, WORLD BANK OPERATIONAL MANUAL: BANK PROCEDURES 17.55, ¶ 10 (1999).

56. See *Resolutions*, *supra* note 19, ¶ 20.

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ist(s) have access to all staff, who may contribute information, and to all pertinent Bank records. With the prior consent of the involved borrower or guaranteeing member state, the Panel may visit the country in which the project or operation is located. The Panel may also consult with the Director General of the Operations Evaluation Department and the Internal Auditor of the Bank.⁵⁷

Once the investigation is complete, the Panel submits its report to the Executive Directors and the President of the Bank. The report should contain all relevant facts and conclude with the Panel's findings on whether the Bank has complied with all relevant operational policies and procedures.⁵⁸

Within six weeks of receiving the Panel's report, the Bank's management must submit a report to the Board of Executive Directors indicating its recommendations in response to the Panel's findings.⁵⁹ The Board of Executive Directors makes the final decision on whether to adopt the management's recommendations and on how to respond to the Panel's findings.

The Panel's report containing its findings and the management's response thereto shall be made public within two weeks of the Board's decision on these reports.⁶⁰ The Panel is required to submit an annual report to the President and Executive Directors concerning its activities.⁶¹

c. *Experience*

As of December 2004, the Panel had received a total of thirty requests for inspection. Eight of these requests have been from Africa, nine from South Asia, ten from Latin America and three from East Asia and the Pacific.⁶² The majority of these requests have raised issues relating to the Bank's safeguard policies, particularly its policies related to environmental assessment, indigenous people and involuntary resettlement. Other policies that have been commonly cited relate to information disclosure, economic evaluation of projects, consultation and project supervision. The Panel has recommended an investigation in fifteen of the cases it received, and the Executive Directors approved

57. *See id.* ¶ 21.

58. *See id.* ¶ 22.

59. *See id.* ¶ 23.

60. *See id.* ¶ 25.

61. *See id.* ¶ 26.

62. For a list of formal requests and investigations, see WORLD BANK INSPECTION PANEL, *supra* note 52.

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ten of these recommendations.

The Resolution establishing the Panel required the Board to conduct a review of the Panel two years after its establishment. This review was conducted in 1996. The review reconfirmed the importance of the Panel and addressed issues that had arisen in the course of the first years of the Panel's operations. The main issues dealt with were:

- (i) the scope of the preliminary assessment of the request for inspection conducted by the Panel before it decides whether or not to recommend an inspection;
- (ii) the definition of key terms, "affected party" and "project," in the Resolution; and
- (iii) public disclosure of the management's response to the Panel's recommendation to the Board and of the General Counsel's opinions on Panel issues.

In addition, this review reaffirmed the Board's role as the interpreter of the Resolution establishing the Panel.

In 1997, the Board decided to initiate a second review of the Panel to deal with problems that had arisen in the Panel process, particularly relating to the preliminary phase. The most significant of these problems were the bitter disputes at the Board level regarding the Panel's recommendations of an investigation and the efforts of Bank management to enter into "extra-procedural"⁶³ communications with the Board that appeared designed to undermine the Panel's recommendation of an inspection. These disputes tended to divide Board members according to whether or not they represented borrower countries on the Board. In addition, the disputes were frustrating affected communities and their NGO representatives, creating a serious public relations challenge for the Bank.

63. This means that the management was seeking to communicate with the Board in ways that were not explicitly provided for in the procedures established by the Resolution or the Panel's own operating procedures. These procedures only provide for the management to communicate its views on the issues raised in the request through its formal submissions to the Panel. They do not contemplate any direct communications between the Board and management regarding the Inspection Panel case in advance of the Board's receipt of and discussion of the Panel's recommendation. In a number of cases, however, the Bank management directly informed the Board that it had developed with the borrower, but without any consultations with the affected party, an action plan for resolving the problems with the project and that therefore an investigation was not necessary. Since the Board learned this information before it had had a chance to consider the Panel's recommendation and before the Panel had a chance to comment on the management's proposed plan of action to correct the problem, the management's extra-procedural communications tended to undermine the Panel's relations with the Board and to complicate Board discussions about the Panel's recommendation.

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The second review concluded in 1999 with a “conclusion” that resulted in some streamlining of the Panel process.⁶⁴ The Board decided to narrow the scope of the assessments conducted by the Panel in the preliminary phase of the process and to make the adoption of its recommendation at the end of this phase more certain by limiting Board discretion to reject the recommendation to objective technical grounds. In addition, the Board provided an interpretation for the term “material adverse harm” within the meaning of the Resolution. The clarification also placed limits on the communications that can take place between management and the Board during the course of a Panel proceeding on matters relating to the substance of the request under consideration by the Panel. Since the “conclusion” of the second review, the Panel process appears to be working more smoothly. In fact, the Board has approved all investigations recommended by the Panel on a “non-objection” basis.

The Panel and outside commentators have both identified one important problem with the working of the Panel. As noted above, the Panel does not play any role in monitoring implementation of the Board’s final decision regarding the Panel’s report on its investigation and the management’s recommendations in response thereto. The Resolution does not explicitly state whether or not the Panel should play any role regarding the Panel’s findings and the management’s recommendations. After some uncertainty, the Board decided that the Panel should not play any role in monitoring implementation of its final decision.⁶⁵ This has caused problems because it means that there is no entity in the World Bank that can give the Board an independent assessment of whether its final decision is actually being implemented as intended. According to some observers, in a number of cases the Board’s decisions have not been implemented and the original complainants have not seen the improvements in their conditions promised by the Board’s decision.⁶⁶

In this regard, it is interesting to note that the Panel received a

64. See WORLD BANK, *supra* note 50; Daniel D. Bradlow, *Lessons from the NGO Campaign Against the Second Review of the World Bank Inspection Panel: A Participant’s Perspective*, 7 ILSA J. INT’L & COMP. L. 247 (2001) (discussing the campaign waged around the second review).

65. This issue was resolved in the second clarification of the Resolution.

66. This information is based on conversations with staff of the Panel and the editors of a recently released book on the experience of the Panel, DEMANDING ACCOUNTABILITY: CIVIL SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL (D. Clark, J. Fox & K. Treakle eds., 2003).

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second request regarding the Yacyreta Dam Project in Argentina.⁶⁷ The World Bank Board of Directors' final decision in the first case authorized some actions to correct the problems identified in the case. The second request alleges that the World Bank has failed to implement these actions. The continuing problems with this project indicate the importance of monitoring implementation of the final decisions in the inspection function.

2. Inter-American Development Bank's Independent Investigation Mechanism⁶⁸

The Inter-American Development Bank established an Independent Investigation Mechanism in 1994. This Mechanism was reviewed in 2001 and some amendments were made. The following discussion describes the current situation.

a. *Structure*

This Mechanism consists of a permanent Coordinator and a Roster of Investigators. The rules provide for fifteen individuals to be appointed to the Roster.⁶⁹ They must come from at least ten different Bank-member countries, must represent a broad range of technical expertise and skills, cannot have worked in any capacity for the Inter-American Development Bank for two years prior to their appointment to the Roster and must be recognized as individuals of integrity and recognized competence in areas related to development and to Latin America and the Caribbean.⁷⁰ The members of this Roster are appointed by the Executive Directors based on nominations by the

67. For a description of the Yacyreta Dam Project, see generally David Hunter, *Using the World Bank Inspection Panel to Defend the Interests of Project-Affected People*, 4 CHIL. J. INT'L L. 201 (2003); Richard E. Bissell, *Current Development: Recent Practice of the Inspection Panel of the World Bank*, 91 AM. J. INT'L L. 741 (1997).

68. The Inter-American Development Bank is currently reviewing its inspection function and is considering options for restructuring the mechanism. Since the review is still being conducted, it is not possible to provide information on what changes, if any, the Bank will decide to make to the mechanism. See INDEPENDENT INVESTIGATION MECHANISM, 2003 ANNUAL REPORT, available at <http://www.iadb.org>.

69. It is my understanding, based on conversations with the mechanism's coordinator, that, in fact, the Bank has experienced problems in finding fifteen qualified people to serve on the Roster and that currently there are less than fifteen serving members of the Roster.

70. INTER-AMERICAN DEVELOPMENT BANK (IDB), THE IDB INDEPENDENT INVESTIGATION MECHANISM ¶ 2.2 (2000), available at <http://www.iadb.org/cont/poli/mecanism.pdf> (last visited Apr. 28, 2005).

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President after consultation with the Executive Directors.⁷¹ The members of the Roster are appointed for a non-renewable five-year term.⁷² They do not work full-time for the Bank. Instead, they represent a pool of people whose services can be tapped when needed.⁷³

In order to protect the independence of the members of the Roster, the members can only be removed for cause by a decision of the Board of Executive Directors.⁷⁴ In addition, a member of the Roster cannot be employed by the Bank for a period of two years following the termination of his or her appointment to the Roster.⁷⁵

The Coordinator is a staff position. The Coordinator's responsibility is to receive complaints, make an initial determination on eligibility in conjunction with the Legal Department and advise the President on whether or not to appoint an individual from the Roster to review the request. The Coordinator also acts as a coordinating center during the investigation process.

b. *Procedures*

The Mechanism is mandated to receive complaints from affected parties that allege that:

[T]he Bank has failed in the design, analysis or implementation of proposed or ongoing operations to follow its own established operational policies, or norms formally adopted for the execution of those policies (including enforcement of compliance with borrower's obligations required by such policies and/or norms), when material adverse effects have or might reasonably be expected to occur as a result of such failure by the Bank.⁷⁶

Requests for investigation can also be filed by a representative of the affected party. Usually, this will be a local representative. However, in exceptional cases when no local representative is available and the Executive Directors agree, another representative can act for the affected party.⁷⁷

71. *See id.* ¶ 2.3.

72. *See id.* ¶ 2.5.

73. *See id.*; IDB, INDEPENDENT INVESTIGATION MECHANISM: ROSTER (2000), available at <http://www.iadb.org/cont/poli/investing/roster.htm>.

74. *See id.* ¶ 2.6.

75. *See id.* ¶ 2.8.

76. *Id.* ¶ 1.1.

77. *See id.* ¶ 3.3.

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For the purposes of this Mechanism:

- (i) “affected party” is defined to mean “a community of persons such as an organization, association, society or other groupings of individuals;”⁷⁸ and
- (ii) “operational policies or norms” consist of those “which apply to the design, appraisal, and/or implementation of Bank operations, funded in whole or part by loans or grants from Bank funds or funds administered by the Bank.”⁷⁹

The requests for investigation must be filed with the Coordinator for the Mechanism. The Coordinator, in conjunction with the Legal Department, makes a preliminary determination on eligibility and advises the President on whether or not to appoint an individual from the Roster as a consultant to review the request.⁸⁰ It is important to note that the regulations contain no deadlines for any of these actions.

If the consulting member of the Roster concludes that the request is not frivolous and is substantive, the Coordinator forwards the request to the Board of Executive Directors, the President and, through the President, to the management for a response.⁸¹ In this regard, it should be noted that a successful requester must show that its “rights or interests have been or are likely to be directly and materially affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and norms.”⁸²

Management is required to give its response to the Coordinator within thirty days of receipt of the request.⁸³ The Coordinator forwards the management response to the consulting member of the Roster, who is required to prepare a recommendation to the Board on whether or not to authorize an investigation.⁸⁴ This recommendation is submitted to the Board through the Coordinator. There are no deadlines for when the consulting member must submit the recommendation to the Coordinator, nor for when the Coordinator must submit the recommendation to the Board.⁸⁵ Similarly, there is no stipulated time period within which the Board must act on the recommendation.⁸⁶ The only

78. *Id.* ¶ 3.2.

79. *Id.* ¶ 1.2.

80. *See id.* ¶¶ 4.3(a)-(b).

81. *See id.* ¶ 4.3(c).

82. *Id.* ¶ 3.2.

83. *See id.* ¶ 4.4.

84. *See id.* ¶¶ 4.4-4.5.

85. *See id.* ¶ 4.8.

86. *See id.* ¶ 5.1.

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deadline is that the Coordinator is required to inform the requester of the Board's decision on whether to proceed with the investigation within fifteen days of the decision.⁸⁷

If the Board does decide to authorize an investigation, it must name a Panel consisting of no less than three individuals from the Roster.⁸⁸ The members of this Panel should have different nationalities. The Board, in consultation with the President, selects the chair of the Panel.⁸⁹

The Panel, in conducting the investigation, shall establish its own procedures,⁹⁰ but it will have access to all staff and to all relevant records.⁹¹ The Panel may only visit the territory of the member state in whose country the Bank operation is located with the prior consent of the member state.⁹² The Office of the Secretary of the Bank acts as the Secretariat of the Panel.⁹³ Further, the Panel may seek the advice of the Legal Department of the Bank on matters related to the Bank's rights and obligations with respect to the request and to other questions concerning the Mechanism policy.⁹⁴

At the end of the investigation, the Panel submits its findings and recommendations⁹⁵ in a written report to the Board of Executive Directors and to the President.⁹⁶ The Bank's management has thirty days from receipt of the report to respond to the Executive Directors.⁹⁷ Based on the Panel report and the management's response, the Board shall decide on what action, if any, should be taken.⁹⁸ There is no time period within which the Board must make this determination. Once the Board makes its determination, the management must implement the decision and must report to the Board on its implementation of the decision.⁹⁹ Neither the Panel nor the Coordinator is assigned any explicit role in monitoring implementation of the Board's decision.

The Bank is required to publicly disclose the investigation report and

87. *See id.* ¶ 4.8.

88. *See id.* ¶¶ 5.1-5.2.

89. *See id.* ¶ 5.2.

90. *See id.* ¶ 5.3.

91. *See id.* ¶ 5.5.

92. *See id.* ¶ 5.9.

93. *See id.* ¶ 5.4.

94. *See id.* ¶ 5.11.

95. *See id.* ¶ 6.1.

96. *See id.* ¶ 6.2.

97. *See id.* ¶ 6.3.

98. *See id.* ¶ 7.1.

99. *See id.* ¶ 7.2.

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the management response thereto within ninety days of the Board's receipt of these two documents.¹⁰⁰ Similarly, the management's reports on the implementation of the Board's decision must be disclosed within fifteen days of the Board's approval of this report.¹⁰¹ Finally, the Coordinator is required to issue an annual report discussing any requests received and the investigations undertaken and their results to the President and the Board of Executive Directors.¹⁰² The annual report will also be made publicly available.

c. Experience

As of December 2004, the Mechanism had received four requests involving three different projects.¹⁰³ The first resulted in a full investigation. However, the project that formed the basis for this first request also involved World Bank financing. Consequently, a request for inspection was also filed with the World Bank's Inspection Panel. The report of the World Bank Inspection Panel's investigation of this request was publicly released, and after considerable delay, the Inter-American Development Bank released the report of its investigation. This same project is now the subject of the fourth request received by the Mechanism.¹⁰⁴

It appears that the 2001 operating budget for the Mechanism was \$236,500. Total expenditures made in 2002 reached \$258,828, not including the salaries and overhead related to the Coordinator and other Bank staff working with the Mechanism or the time devoted by the Bank staff to the Mechanism.¹⁰⁵ The Bank, however, has made clear that it will provide any additional reserves that the Mechanism may need to adequately perform. However, this has not been necessary. In 2001, the Mechanism only spent \$44,959,¹⁰⁶ which was a reflection of the small workload of the Mechanism. In 2003, the workload had increased, the budget was \$247,263 and total expenditures were

100. *See id.* ¶ 8.1.

101. *See id.* ¶ 8.2.

102. *See id.* ¶ 8.3.

103. IADB website, <http://www.iadb.org/cont/poli/investig/notices.htm>.

104. The report for this fourth investigation was released in July 2004. *See* Press Release, International Rivers Network, Inter-American Development Bank Investigation Confirms Chronic Problems at Yacyreta Dam, July 12, 2004, *available at* <http://www.irn.org/programs/hidrovia/index.asp?id=040716.yacyreta.html> (last visited July 20, 2004).

105. INDEPENDENT INVESTIGATION MECHANISM, 2002 ANNUAL REPORT, *available at* <http://www.iadb.org/cont/poli/investig/iimar02eng.pdf>.

106. Information supplied by Mr. Rene Rios, Coordinator, IADB Inspection Mechanism.

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\$278,229.52.¹⁰⁷

3. Asian Development Bank's Accountability Mechanism

On May 29, 2003, the Board of the Asian Development Bank (ADB) voted to establish a new Accountability Mechanism (AM) to replace the Bank's prior Inspection Function, which became operational in December 1995.¹⁰⁸ The ADB's decision followed an extensive review of its existing inspection function that was precipitated by the ADB's unsatisfying experience with the prior mechanism.¹⁰⁹ The new Accountability Mechanism became effective on December 12, 2003.¹¹⁰

The new mechanism has two complimentary functions: a consultation phase and a compliance review phase.¹¹¹ Each of these has a separate structure.

a. Consultation Phase

The purpose of this phase of the Accountability Mechanism is to help project-affected people address the specific problems caused by ADB-supported projects with the consent and participation of all parties concerned. It is important to note that the purpose of this phase is to solve problems and not to identify and allocate blame.¹¹² The scope of this phase is broader than that of the compliance review phase.

A Special Project Facilitator (SPF) is fully responsible for managing the consultation phase of the Accountability Mechanism.¹¹³ The SPF is appointed by and reports to the President of the ADB. The SPF, who

107. INDEPENDENT INVESTIGATION MECHANISM, 2003 ANNUAL REPORT, available at <http://www.iadb.org/iim/iim2003.pdf>

108. Asian Development Bank (ADB), Review of the Inspection Function: Establishment of a New ADB Accountability Mechanism [hereinafter Review of the Inspection Function], available at http://www.adb.org/Documents/Policies/ADB_Accountability_Mechanism/default.asp (last visited Apr. 28, 2005). In June 2003, the ADB issued a new Bank Policy that describes how the Accountability Mechanism functions. ADB, Operations Manual Banking Policies, OM Section 49/BP, issued on 13 June 2003, available at <http://www.adb.org/Documents/Manuals/Operations/OM49.pdf> (last visited Apr. 28, 2004).

109. The existing mechanism proved unable to effectively handle a case involving a project in Thailand. For a description of this case, see ADB, FIRST DRAFT OF WORKING PAPER: REVIEW OF THE INSPECTION FUNCTION (2002), available at <http://www.adb.org/Inspection/draft.pdf> (last visited Apr. 28, 2005).

110. See ADB Accountability Mechanism, May 4, 2004, available at http://www.adb.org/Documents/Policies/ADB_Accountability_Mechanism/default.asp (last visited June 16, 2004).

111. See Review of the Inspection Function, *supra* note 108.

112. See *id.* ¶ 71.

113. See *id.* ¶ 62.

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has a rank equivalent to director general, is independent of the Bank's operational departments. The staff of the SPF consists of one professional and two administrative officers. The SPF was responsible for preparing the operational procedures for the consultation phase.

The activities of the SPF include:¹¹⁴

1. collecting information on problem-solving experiences in the ADB and elsewhere that can be fed back into the design and implementation of ADB operations;
2. providing "generic support and advice" to operational departments in their problem-solving activities;
3. reviewing and assessing complaints;
4. facilitating consultative dialogues, facilitating mediation and other forms of problem-solving techniques;
5. informing the Board of the ADB about the results of specific consultation activities; and
6. reporting annually to the President, with a copy to the Board, on its activities which will be integrated into an annual report with the report of the Compliance Review Panel.¹¹⁵

The SPF is authorized to receive any complaint from "any group of two or more people (such as an organization, association, society, or other grouping of individuals) in a borrowing country," a local representative of the affected group or, in exceptional cases, a non-local representative.¹¹⁶ The complaint must be in writing and must be specifically addressed to the SPF.¹¹⁷ The complaint must include the following:

1. an allegation that the complainant is or is likely to be directly affected "materially and adversely" by the ADB-supported project, "irrespective of any allegation of noncompliance by ABD of its operational policies and procedures";
2. a statement that the complainant claims that the "direct and material harm" is or will be the result of an act or omission of the ADB in the course of the design and implementation of the ADB-supported project;
3. a description of the "direct and material harm, i.e., the rights and interests that have been, or are likely to be, directly affected" by the project;

114. *See id.* ¶ 66.

115. For information on the Compliance Review Panel, see discussion of compliance review phase *infra* Section II.A.3.b.

116. Review of the Inspection Function, *supra* note 108, ¶ 68.

117. *See id.* ¶ 69.

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4. the identity of the complainant and any representatives;
5. a description of the project;
6. a statement of the desired outcome or remedies sought by the complainant; and
7. a description of the “good faith” efforts that the complainant has made to address the issue with the Bank’s operational department.¹¹⁸

The SPF will not accept any complaint that deals with, inter alia, procurement issues, allegations of fraud or corruption or the adequacy or suitability of the ADB’s existing policies and procedures.¹¹⁹

The consultation process managed by the SPF is expected to take about three months from the date on which the complaint is filed. At certain stages during the process, the complainant is free to refer the matter to the compliance review phase.¹²⁰ The consultation process involves the following nine steps:

1. Complainant files a written complaint with the SPF.
2. The SPF registers the complaint and sends an acknowledgement to the complainant. If the SPF “immediately” determines that the complaint cannot be accepted because it is not within the scope of ADB’s mandate or he/she cannot help the problem, he/she must notify the complainant with a copy to management.
3. The SPF determines if the complaint meets all the requirements for eligibility. If the SPF determines that the complaint is ineligible, he/she informs the complainant. In this case, the SPF must also inform the complainant that it can file a request for a compliance review with the Compliance Review Panel, who will make an independent determination of eligibility.
4. The SPF undertakes a review to determine how best to address the issues raised in the complaint. After the review is completed, the SPF makes an assessment of how he/she can most effectively help to solve the problems. The SPF reports this finding to the President of the Bank and the Vice-President concerned with the operation at issue and refers the findings to the complainant and the applicable operations department. The SPF must also inform the complainant that it can either

118. *See id.* ¶ 70.

119. *See id.* ¶ 72.

120. *See id.* ¶ 74.

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- continue with the consultation process or file a request for a compliance review with the Compliance Review Panel.
5. The complainant informs the SPF if it wishes to proceed with consultations or to file a request for compliance review.
 6. The SPF receives comments from the complainant and the applicable operations department about the findings and, after reviewing the comments, makes recommendations on how to proceed. This recommendation must be approved by the President before anything can be implemented. If the complainant is not happy with the recommendation, it can file a request for compliance review.
 7. The SPF implements the problem-solving course of action with the participation of all interested parties.
 8. Termination of the consultation process: this can occur at the instigation of any of the parties to the consultation.
 9. The SPF monitors the implementation of any agreement reached during the consultation process. He/She must report at least annually to the President, with a copy to the Board on the state of implementation of the agreement.¹²¹

b. *Compliance Review Phase*

The ADB has established a Compliance Review Panel (CRP) consisting of three members.¹²² The chair of the CRP works full-time and the two other members work part-time. The CRP is supported by a staff of two professionals and three administrative officers.¹²³ The members of the CRP are appointed by the Board on the recommendation of the President.¹²⁴ They report directly to the Board on all their activities.¹²⁵ The Board has appointed a Board Compliance Review Committee (BCRC) which exercises oversight over some aspects of the CRP's work.¹²⁶ The BCRC replaces the Board Inspection Committee, which oversaw the previous inspection function.

121. *See id.* ¶¶ 75-89.

122. *See id.* ¶ 95.

123. *Id.*

124. *See id.* ¶ 96.

125. *See id.* ¶ 98.

126. For details on the functions of the BCRC, see discussion of CRP process *infra* p. 430.

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The activities of the CRP include:

1. receiving and determining the eligibility of requests for compliance reviews;
2. conducting compliance reviews;
3. issuing reports that include its findings and recommendations on policy compliance;
4. monitoring the implementation of decisions made by the Board; and
5. issuing annual reports that contain descriptions of the requests it has received, a summary of its activities and advice on the lessons learned from its cases.¹²⁷

The CRP investigates alleged violations by the ADB of its operational policies and procedures that “directly, materially, and adversely affect [] local people in the course of the formulation, processing, or implementation of the [ADB]-assisted project.”¹²⁸ The purpose of the investigation is to determine only whether or not the ADB has complied with CRP operational policies and procedures. The purpose is not to investigate the borrowing country, the executing agency for the project or the private partner in the project. Their conduct will only be investigated to the extent “directly relevant” to an assessment of the ADB’s compliance with its operational policies and procedures.¹²⁹

Requests for compliance reviews can be filed by:

1. any group of two or more people (such as an organization, association, society or other grouping of individuals) in a borrowing country where an ADB-assisted project is located or in an adjacent ADB member country;
2. the local representative of the affected group;
3. a non-local representative of the affected group if the CRP agrees; and
4. one or more members of the Board of Directors.¹³⁰

The request must be in writing and must be addressed to the secretary of the CRP.¹³¹ Requests can be submitted in any of the official or national languages of the ADB’s developing member countries, but

127. *See id.* ¶ 100.

128. *Id.* ¶ 99.

129. *Id.*

130. *See id.* ¶ 103.

131. *See id.* ¶ 106.

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the working language of the CRP, like that of the SPF, is English.¹³² The request must include, inter alia, the following:¹³³

1. the assertion that the requester is or is likely to be “directly affected materially and adversely” by the ADB-assisted project;
2. the assertion that the “direct and material harm” from which the requester is suffering or is likely to suffer is or will be the result of the ADB’s alleged failure to follow its operational policies and procedures in the course of the design and implementation of the ADB-assisted project;
3. a description of the harm;
4. a description of the ADB-assisted project;
5. a statement of the outcome or remedy that the requesters believe the Bank should provide; and
6. an explanation of the requester’s efforts to address the matter with the SPF.

The CRP can only deal with requests relating to the ADB’s “operational policies and procedures.”¹³⁴ In addition to the limitations on the scope of activities of the SPF described above, the CRP cannot deal, inter alia, with requests that relate to matters that are not the responsibility of the Bank or that have not first been filed with the SPF.¹³⁵

The CRP process involves the following ten steps:

1. The request for compliance review is filed with the Office of the CRP (OCP).
2. The OCP registers the request and sends an acknowledgement to the requester.
3. The CRP determines the eligibility of the request. This must be done within fourteen days from registration, unless the SPF has already determined that the complaint is ineligible. In the latter case, the determination must be made within twenty-one days from registration. The CRP informs the Board of its decision.
4. The Board decides whether to authorize a compliance review.
5. The CRP conducts the compliance review.
6. The CRP prepares a draft report which it submits to Bank management and the requesters for comment.
7. The Bank management and the requesters submit their re-

132. *Id.*

133. *See id.* ¶ 107.

134. *See id.* ¶ 110.

135. *See id.* ¶ 113.

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- sponses to the draft report to the CRP within thirty days from receipt of the draft report.
8. The CRP issues its final report to the Board within fourteen days after receiving the comments of the management and the requester.
 9. Within twenty-one days, the Board considers the report and makes the final decision regarding any recommendations that the CRP has made on how to bring the project into compliance with the ADB's operational policies and procedures or to mitigate any harm caused by the project.
 10. The CRP monitors implementation of the remedial actions approved by the Board and reports at least annually to the Board on the implementation.

c. *Experience*

Prior to December 2004 the Mechanism received one request involving the Chashma Right Bank Irrigation Project in Pakistan. In April 2003, the ADB Board approved the Inspection Committee's recommendation to authorize an inspection.¹³⁶

The old ADB inspection function received seven requests for inspection. Most of these were found to be ineligible for investigation. The most important case involved the Samut Prakarn Wastewater Management Project in Thailand (Samut Prakarn).¹³⁷ This case proved to be controversial, and its handling exposed such serious problems with the mechanism that the case precipitated a review of the inspection function that ultimately resulted in the establishment of the current Mechanism.

Samut Prakarn involved a request for an inspection from a group of villagers who alleged that the Asian Development Bank's decision to change the proposed location for this project was made without an assessment of the environmental and social impacts of the proposed change on the local communities. The Board of Directors authorized an investigation and appointed a Panel to conduct this investigation. The Panel, however, did not receive clearance from the Government of

136. ADB, ANNUAL REPORT OF THE INSPECTION COMMITTEE OF THE BOARD, 2003-2004, *available at* <http://www.adb.org/Documents/Reports/Inspection/ar2003-2004.pdf> (last visited Dec. 10, 2004).

137. For details of the project, see ADB, SAMUT PRAKARN WASTEWATER MANAGEMENT PROJECT (2002), *available at* <http://www.adb.org/Inspection/Projects/samutprakarn.asp> (last visited Apr. 28, 2005).

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Thailand to visit the project site, ultimately causing the Panel to suspend its inspection of the project. Despite this fact, the Panel did issue a report, based on a review of the project documents and the documentation submitted by the requesters and by management. The Panel found that the Asian Development Bank had failed to comply with all applicable operational policies and that there was direct and material harm to the rights and interests of the requesters. Management objected to the Panel's findings. The Board of Directors' final decision in this case imposed some additional monitoring requirements on management.

The difficulties involved in the Samut Prakan case, which followed from the decision of the Government of Thailand, made it an extremely expensive case for the Asian Development Bank. It is estimated to have cost the Bank \$1.7 million in staff time and resources, in addition to the \$200,000 incurred by the Panel. The typical case appears to cost the Bank about \$160,000 in staff time and resources.¹³⁸ However, according to the 2003-2004 Annual Report, the budgetary allocation for the Chashma Project investigation is \$515,000 of which \$463,000 had been dispensed by June 30, 2004.¹³⁹

The budget for the first year of operations of the Accountability Mechanism is about \$1.25 million. About \$400,000 is for the SPF and about \$850,000 is for the CRP.¹⁴⁰

4. IFC/MIGA's Compliance Advisor/Ombudsman

In 1999, International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA) established the office of the Compliance Advisor/Ombudsman (CAO). Its mandate is to assist the two organizations in dealing with complaints from people affected by the projects they support in a way that is "fair, objective and constructive."¹⁴¹ Specifically, the office has three functions:

138. See Second Draft of the Report to Asian Development Bank, Review of Inspection Function (July 31, 2002) ¶ 120. Also see annex 1 of this report for a discussion of Samut Prakan.

139. ANNUAL REPORT OF THE INSPECTION COMMITTEE OF THE BOARD, *supra* note 136.

140. ADB, Proposal for a New ADB Accountability Mechanism: A Two-Step Approach of Consultation and Compliance Review: Resource Implications, available at http://www.adb.org/Documents/Policies/ADB_Accountability_Mechanism/acent307.asp (last visited Jan. 29, 2005).

141. COMPLIANCE ADVISOR/OMBUDSMAN (CAO), OPERATIONAL GUIDELINES FOR THE OFFICE OF THE IFC/MIGA 4 (2000), available at [http://www.cao-ombudsman.org/pdfs/FINAL_CAO_GUIDELINES_IN_ENGLISH_\(09-20-00\).doc](http://www.cao-ombudsman.org/pdfs/FINAL_CAO_GUIDELINES_IN_ENGLISH_(09-20-00).doc) (last visited Apr. 28, 2005).

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- (i) to respond to complaints by persons who are affected by IFC- and MIGA-supported projects through attempting to resolve the issues raised using a flexible problem-solving approach (the Ombudsman Role);
- (ii) to provide independent advice to the President and senior management of IFC and MIGA (the Advisory Role); and
- (iii) to oversee audits of IFC's and MIGA's social and environmental performance, both on systemic issues and issues related to specific projects (the Compliance Role).¹⁴²

The CAO is appointed by and reports directly to the President of the World Bank Group and is not part of the line management structure of either the IFC or MIGA. The CAO has the authority to appoint all the members of the staff of the CAO and any consultants that it uses.¹⁴³ According to the CAO's 2002-2003 Annual Report, the staff of the CAO consists of the CAO, three specialists and four support staff. The office has also made use of the services of consultants.

a. *Ombudsman Function*

The CAO Ombudsman's primary function is to help resolve issues related to the social and environmental impacts of IFC- and MIGA-supported projects. The Ombudsman's aim is to work with all relevant parties to "identify problems, recommend practical remedial action and address systemic issues that have contributed to the problems, rather than to find fault."¹⁴⁴ In keeping with best practices for Ombudsman, the CAO gives priority to confidentiality of process but not of product. In fact, it exercises a presumption in favor of disclosure of its reports.

The CAO's guidelines establish a six-step process for its Ombudsman's function. These steps, which are initiated by the filing of a complaint by affected persons, are:¹⁴⁵

- (i) *Acknowledgement of Receipt*: The CAO sends an acknowledgement that it has received the complaint within five days of receipt of the complaint.
- (ii) *Appraisal and Acceptance (or Otherwise)*: In deciding whether or not to accept the complaint the CAO considers whether:

142. *See id.*

143. *See id.* at 7.

144. *Id.* at 10.

145. *See id.* at 10-18.

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- the complainant has been affected or is likely to be affected by the actual or potential social and/or environmental impacts of the project on the ground;
- the complaint relates to the planning, implementation or impact of an IFC or MIGA project;
- there are “sufficient and specific grounds” for the complaint; and
- the complaint is genuine (i.e., not malicious, trivial or designed to gain competitive advantage).

If the complaint is accepted it will be registered and the complainant sent a notice of acceptance. If rejected, the CAO will close the file and so inform the complainant.

- (iii) *Assessment*: The CAO undertakes a preliminary investigation in order to assess the complaint and determine how it should be handled. This phase concludes with a decision on whether or not to proceed and an outline of the proposed course of action to be followed. This phase should be completed within thirty working days of the decision to accept the complaint. During this step, the CAO will seek information and comment from IFC or MIGA management, who must respond within twenty days of the inquiry. Similar requests will be sent to the project sponsor and other relevant parties. At the end of the assessment, the CAO has three options:
- First, the CAO might decide that it would not be useful to continue with the investigation, in which case it will so inform the complainant and other relevant parties.
 - Second, the CAO may decide that while there is no benefit to be derived from further action by the Ombudsman, there are issues which could usefully form the basis for a compliance audit. In such a case, the CAO will inform the complainant and other relevant parties and at its own discretion may decide to initiate a compliance review.
 - Third, the CAO can decide to continue with its problem-solving activities. This option leads to the fourth stage of the process.
- (iv) *Action in Response to a Complaint: Facilitation, Mediation and Investigation*: The course of action adopted by the CAO will depend on the nature, complexity and urgency of the matter. The action taken by the CAO is designed to solve problems and to this end can involve:

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- promoting dialogue between the complainant, IFC/MIGA and the project sponsor in order to stimulate a self-generated solution among the parties;
 - conciliation or mediation facilitated by the CAO or a third party at the request of the CAO;
 - investigation by the CAO; or
 - interim recommendations for action.
- (v) *Conclusion and Closure.* The CAO may conclude and close a case at any time when a satisfactory solution has been reached or when the CAO concludes that further action is not likely to be useful or productive. When the CAO closes a case, it will report to the President and will advise the complainant of the CAO's decision and the reasons therefore. If the case has not been successfully concluded the CAO's report to the President may contain recommendations on future actions that IFC/MIGA could take to address the issues raised in the complaint. The CAO's report is made public. Once the case is closed, the CAO has the discretion to undertake a compliance audit to look at issues of non-compliance that have arisen in the course of the Ombudsman's investigation.
- (vi) *Monitoring and Follow-Up.* The CAO will seek to ensure that agreements between parties make provisions for review and monitoring. The report to the President should also contain a program of implementation so that monitoring of compliance with the agreements can be incorporated into normal project management and monitoring. The CAO will also, "to the extent that this is practicable,"¹⁴⁶ monitor implementation of its recommendations.

b. *Compliance Audit Function*

Compliance audits can be triggered, as indicated above, by the Ombudsman's investigations, although the compliance audit will be delayed until after the conclusion of the Ombudsman process. Alternatively, compliance audits can be undertaken at the request of IFC or MIGA management or on the CAO's own initiative.¹⁴⁷

The purpose of a compliance audit is to determine whether IFC and MIGA staff, and in some cases project sponsors, have complied with

146. *Id.* at 18.

147. *See id.* at 20-21; *see also* CAO, CAO COMPLIANCE AUDIT ROLE: GUIDANCE ON COMPLIANCE AUDITING AND ENHANCING OUTCOMES (2002).

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IFC's and MIGA's social and environmental policies, guidelines and procedures. It is important to note that the CAO's operational guidelines stipulate that:

A compliance audit would not normally seek to set aside an otherwise reasonable interpretation or judgment. However, it will nevertheless be important to draw attention to situations where reasonable interpretations have led to undesirable outcomes and make recommendations about them.¹⁴⁸

The findings of the compliance audit are presented to the President of the World Bank Group in a report that can contain recommendations on corrective action as well as policy and procedural matters. The CAO will monitor implementation of its endorsed recommendations. The CAO will also inform the Board of the findings of its audits after these findings and recommendations have been discussed with the President.

c. Advisory Role

The CAO's advisory role can be performed at the request of the President or IFC and MIGA management or on the CAO's own initiative. It is usually performed in an informal way through regular information exchange between IFC and MIGA staff and the CAO. The CAO is able to provide advice at all stages of project preparation and implementation, but it does not act as a clearinghouse for new projects and its advice should not be interpreted as an endorsement of any project. The advice usually takes the form of summaries and periodic memoranda to the President. The CAO decides whether these documents should be publicly disclosed.¹⁴⁹

d. Annual Report

The CAO provides an annual report to the IFC and MIGA Boards. The purpose of this report is to provide the Boards with an overview of CAO activities and information on its monitoring of the implementation of the CAO recommendations that the Board has endorsed.¹⁵⁰ The Boards can request that the CAO supplement this annual report

148. *Id.*

149. *See id.* at 22.

150. *See id.* at 23.

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with a briefing. The Boards can also request briefings at other times, for example, after being informed of the results of compliance audits or the handling of a specific complaint.¹⁵¹

e. *Experience*

Most of the CAO's experience has been in its role as Ombudsman. According to its 2003-2004 Annual Report, the CAO, in its role as Ombudsman, has received twenty-eight formal complaints, of which ten were assessed, seven were investigated and recommendations made, five were rejected, two resulted in large scale mediations and four were closed.¹⁵² Common issues arising from these complaints are affected communities' "right to know and to be consulted about projects with a potential impact on the environment or the social fabric of the community."¹⁵³ The 2001-2002 Annual Report stated that, in addition to the formal complaints, the office had received sixty-five letters of inquiry.¹⁵⁴

The CAO has also provided informal advice to IFC and MIGA in approximately ten or eleven cases. For example, the CAO has advised IFC on incorporating ideas on sustainability into its investment decisions so that these decisions are designed to produce positive outcomes as opposed to merely avoiding harm. The CAO has provided advice to the World Bank Group in its extractive industries review and in regard to how the IFC and MIGA can use the World Commission on Dams report to further their own dam management and oversight responsibilities.¹⁵⁵ The CAO has also provided advice, based on a CAO investigation, to shareholders in an IFC project that resulted in a mercury spill that led to 300 cases of mercury poisoning.¹⁵⁶ Finally, in 2002 the CAO undertook a review of the IFC's safeguard policies, which is publicly available through the CAO's website.¹⁵⁷

Following a clarification of the situation, the CAO provides formal advice to IFC and MIGA in cases arising from complaints to the Ombudsman and from compliance audits. In these cases, the formal

151. *See id.*

152. CAO, COMPLIANCE ADVISOR/OMBUDSMAN 2003-04 ANNUAL REPORT 3 (2004).

153. CAO, COMPLIANCE ADVISOR/OMBUDSMAN 2000-01 ANNUAL REPORT 7 (2001), available at <http://www.cao-ombudsman.org/pdfs/AnnReportCAOarEng.pdf> (last visited Apr. 28, 2005).

154. CAO, COMPLIANCE ADVISOR/OMBUDSMAN 2001-02 ANNUAL REPORT 7 (2002), available at http://www.cao-ombudsman.org/pdfs/CAOar_02_Eng.pdf (last visited Apr. 28, 2005).

155. *See id.* at 10-11.

156. *See id.* at 11.

157. *See id.*

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advice addresses policy and process issues in a broader context than that of the individual project from which the complaint or audit arose.¹⁵⁸

The compliance function is the least developed of the CAO's roles. The CAO only developed its compliance audit operating guidelines in 2002. The CAO has undertaken a compliance audit of at least one project, a MIGA project.¹⁵⁹ In January 2002, the CAO received a complaint regarding the Bulyanhulu mine in Tanzania. Following an assessment of the complaint, the CAO found that the mine was performing in accordance with environmental and social standards and did not merit a compliance audit.¹⁶⁰

The 2004 operational budget of the CAO was \$1,900,864.¹⁶¹ In addition, the CAO has a contingency fund of \$1 million and the IFC Board has promised to provide additional funds if necessary.¹⁶² It has developed a procedure to try and encourage the parties involved in a complaint to its Ombudsman (presumably excluding the complainant) to contribute to the cost of the CAO's activities in regard to the complaint.¹⁶³ This is important because the cost of the CAO's involvement in a project can be substantial. In one case the total cost of a mediation organized by the CAO, excluding the costs of the CAO staff, was approximately \$1.7 million, of which about \$1 million was paid by the company.¹⁶⁴

5. European Bank for Reconstruction and Development's Independent Recourse Mechanism

On April 29, 2003, the EBRD's Board of Directors approved the establishment of an Independent Recourse Mechanism (IRM).¹⁶⁵ The decision was made after significant public and internal consultations.

158. CAO, COMPLIANCE ADVISOR/OMBUDSMAN 2002-03 ANNUAL REPORT 11 (2003).

159. *See id.* at 14-15; *see also* CAO, PRELIMINARY AUDIT REVIEW OF MIGA IN RELATION TO COMPANIA MINERA ANTAMINA S.A. (2001), *available at* <http://www.cao-ombudsman.org> (last visited Apr. 28, 2005).

160. MIGA, 2003 ANNUAL REPORT (2003), *available at* <http://www.miga.org> (last visited June 16, 2004).

161. CAO, COMPLIANCE ADVISOR/OMBUDSMAN 2003-04 ANNUAL REPORT 19 (2004).

162. *Id.* It does not appear that, to date, the CAO has had to draw on this contingency fund.

163. *See id.* at 17.

164. The project related to the mercury spill at the Yanococha mine in Peru. CAO, COMPLIANCE ADVISOR/OMBUDSMAN 2002-03 ANNUAL REPORT 19 (2003).

165. *See* EBRD, INDEPENDENT RECOURSE MECHANISM: AS APPROVED BY THE BOARD OF DIRECTORS ON 29 APRIL 2003, *available at* <http://www.ebrd.org/about/policies/irm/main.htm>.

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The consultations included a four-month period for public comments on a proposal approved by the Board's Financial and Operational Policies Committee.¹⁶⁶

The IRM consists of a “system of processes and procedures designed to provide a venue for an independent review of complaints or grievances from groups that are, or are likely to be directly and adversely affected by a Bank-financed project.”¹⁶⁷ It is designed as both a compliance review and problem-solving mechanism for both public and private sector projects but with a focus on compliance review. This means that when the IRM receives eligible complaints it can undertake a compliance review. However, it may also engage in problem-solving in order to “facilitate the early resolution of the issues that have arisen in connection with the design, appraisal or implementation of a project.”¹⁶⁸ The IRM's compliance reviews are limited to the following specified EBRD policies: the Environmental Policy and provisions of the Public Information Policy which relate to project-specific issues and, in the future, any new policies that the Board decides should be within the compliance review function.¹⁶⁹ It should be noted that the Environmental Policy addresses such social issues as “compliance with specified internationally recognised labour standards, protection of workers' health and safety and safeguards relating to cultural property, indigenous peoples and involuntary resettlement.”¹⁷⁰ The IRM can also consider relevant Bank procedures and any other Bank policies that may be related to possible violations of these two policies.¹⁷¹

The IRM is authorized to receive both complaints relating to the design, assessment and implementation of projects and complaints filed within twelve months following the date of physical completion of the project, or where physical completion is not an appropriate indicator, within twelve months after the date of the final disbursement of the loan.¹⁷²

The IRM consists of the following officers and bodies:¹⁷³

166. *See id.* § I. The IRM Report contains a summary of the public comments received by the EBRD and the staff responses to these comments.

167. *Id.* Annex 1 ¶ 2.

168. *Id.* § II.1.

169. *Id.* Annex 1 ¶ 3.

170. *Id.*

171. *Id.*

172. *Id.* Annex 1 ¶ 12.

173. *Id.* Annex 1 ¶ 6.

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- The Board of Directors, which has decision-making authority in the case of complaints relating to projects that have received Board approval;
- The President of the EBRD, who has decision-making authority in the case of complaints relating to projects that have not yet received Board approval and any problem-solving initiative;
- A Roster of three to ten experts who are appointed by the Board of Directors on the recommendation of the President. The members of this Roster should have similar qualifications and should function in a similar way to the IDB's Roster of Experts. Unlike the IDB's experts, the members of the EBRD Roster are paid a retainer for which they are required to spend five days each year at the EBRD learning about the policies and procedures of the Bank; and
- The Chief Compliance Officer (CCO), who has assumed additional duties as the coordinator of the IRM.¹⁷⁴ The CCO reports directly to the President and is independent of all the EBRD's operational departments. The CCO's current responsibilities include ensuring that the Bank's processes comply with the highest standards of integrity, conducting investigations of alleged misconduct by Bank personnel and handling allegations of fraud and corruption in the EBRD and EBRD-financed projects.¹⁷⁵

a. *Procedures*

On April 4, 2004, the Board of Directors approved the IRM Rules of Procedure.¹⁷⁶ These detailed rules govern how complaints may be filed with the IRM and how such complaints are to be assessed and, if found eligible, processed by the IRM through compliance reviews, problem-solving initiatives or a combination of the two. The rules also set out requirements relating to deadlines, reports, disclosure of and access to information and other issues.¹⁷⁷

Any two or more individuals with a common interest who claim that they are or are likely to be "directly and adversely" affected by a

174. The CCO is currently responsible for investigating cases of misconduct among the EBRD's staff. However, the CCO is not responsible for investigating cases of fraud and corruption in EBRD operations that do not involve misconduct by EBRD staff.

175. For more information on the CCO's role in regard to fraud and corruption, see the EBRD's website, <http://www.ebrd.org/about/index.htm>.

176. See EBRD, INDEPENDENT RECOURSE MECHANISM RULES OF PROCEDURE: AS APPROVED BY THE BOARD OF DIRECTORS ON 6 APRIL 2004 [hereinafter IRM RULES OF PROCEDURE], available at <http://www.ebrd.com/about/policies/irm/procedur.pdf> (last visited June 16, 2004).

177. See *id.*

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Bank-financed project or the agent for such individuals can file a complaint with the IRM.¹⁷⁸ The complainants can request that their identity be kept confidential, but the IRM will not accept anonymous complaints.¹⁷⁹

There is no special form that the complaint must follow other than it must be in writing.¹⁸⁰ The complaint can be in any language. However, the complaint must identify the project and the harm that it is causing or is expected to cause. In addition, the complaint must indicate the actions that the complainant has taken to resolve the matter with the EBRD and what actions the complainant would like the Bank to take. The complaint should be sent to the CCO.¹⁸¹

The CCO must determine whether or not the complaint is “manifestly ineligible” within five business days of the receipt.¹⁸² If the CCO finds the complaint to be “manifestly ineligible,” he/she shall send the complainant a written response within those same five days.

If the complaint is not “manifestly ineligible,” the CCO will register and acknowledge the complaint. Upon registration, the CCO will appoint an independent expert from the Roster, the Eligibility Assessment Expert, to assist in assessing its eligibility.¹⁸³ The Eligibility Assessors, comprised of the CCO and the Eligibility Assessment Expert, must make an Eligibility Assessment of the registered complaint within thirty business days of the receipt of the complaint. If the Eligibility Assessors recommend that the complaint is ineligible, notice shall be given within fifteen business days of the receipt of the complaint.¹⁸⁴ If the complaint is found ineligible, the Assessors must make a reasoned recommendation to dismiss the complaint. This recommendation will be sent to the complainant, the project sponsor and the relevant Bank department. The complainant will be entitled to comment on this recommendation.¹⁸⁵

A complaint is eligible if, *inter alia*:¹⁸⁶

- The complainant is from a group of two or more individuals with “a common interest;”

178. *Id.* Annex 1 ¶ 7.

179. *Id.*

180. *Id.* Annex 1 ¶ 8.

181. *Id.* Annex 1 ¶ 9.

182. *Id.* at 8.

183. *Id.* Annex 1 ¶ 11.

184. *Id.* Annex 1 ¶ 12.

185. *Id.* Annex 1 ¶ 14.

186. *Id.* Annex 1 ¶ 12.

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- The complainant is, or is likely to be, directly and adversely affected by a Bank-financed project and there is “prima facie evidence of such direct and adverse effects;”
- The complainant has made a good faith effort to resolve the issue with the Bank staff;
- The complaint relates to the design, assessment or implementation of the project or to a project where the EBRD maintains a financial interest, which means that the complaint was filed within twelve months of physical completion of the project or, where this is not applicable, within twelve months of the final disbursement;
- The complaint, inter alia, is not frivolous or malicious; does not involve matters of procurement, fraud or corruption; does not relate to the adequacy or suitability of EBRD policies;¹⁸⁷ or does not relate to the responsibilities of other parties besides the EBRD or to the laws, policies and regulations of the borrowing country;¹⁸⁸ and
- The CCO and the expert decide there is a possibility that the EBRD has acted “contrary to, or failed to act when required in accordance with, the mandatory provisions of an EBRD policy which is within the purview of the compliance review function of the IRM.”¹⁸⁹ As was discussed above, the policies that currently fall within the purview of the IRM’s compliance review function are the Environment Policy and the project-specific provisions of the Public Information Policy.¹⁹⁰

When the CCO and the expert are making the eligibility and compliance review assessment of the complaint, the CCO should also consider, as part of a separate process, whether there is any potential for utilizing problem-solving techniques (fact-finding, mediation, conciliation, dialogue facilitation, investigation and reporting) to deal with the issues raised in the complaint.¹⁹¹ The CCO, whose decision should be based on stipulated criteria,¹⁹² can recommend the use of these techniques regardless of the recommendation regarding eligibility and compliance review. The CCO’s recommendation on problem-solving is made to the President in a separate report, which should also identify a

187. *Id.* Annex I ¶ 13.

188. *Id.* Annex I ¶ 18.

189. *Id.* Annex I ¶ 16.

190. *Id.* Annex I ¶ 17.

191. *Id.* Annex I ¶ 27.

192. *Id.* Annex I ¶ 28. The stipulated criteria relate to the likelihood of the problem-solving efforts achieving a positive outcome.

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problem-solver and the terms of reference for this expert. The President decides whether or not to undertake a problem-solving activity.¹⁹³ The actual problem-solving efforts will then be undertaken by an expert selected by the President.

After they complete their review, the CCO and the independent expert submit a report and recommendation to either end the complaint process or to conduct a compliance review. The report is submitted either to the President (in the case of projects that have not yet received Board approval) or to the Board of Directors (if the project has received Board approval).¹⁹⁴ If the appropriate decision-maker is the President, the report will also be transmitted to the Board for informational purposes.¹⁹⁵

The appropriate decision-maker (i.e., the Board or the President) then decides whether or not to accept the recommendation. If the recommendation is to dismiss the complaint, the appropriate decision-maker may accept the recommendation or may remit it back to the CCO for further investigation or for reconsideration by a new expert.¹⁹⁶ If the recommendation is to conduct a compliance review, an expert will be appointed as soon as the appropriate decision-maker approves the recommendation.¹⁹⁷ It should be noted that if the CCO or the expert is of the opinion that “serious, irreparable harm” will be caused by the continued processing or implementation of the project, they can recommend that the President suspend work on the project or disbursement of the loan.¹⁹⁸

Once the expert has completed his/her investigation, he/she submits a report with his/her findings and recommendations to the President, who, if not the appropriate decision-maker, transmits the report to the Board.¹⁹⁹ The findings of the expert must be limited to determining whether or not there has been a material policy violation.²⁰⁰ The expert, however, may recommend systematic internal changes within the EBRD to ensure future compliance with EBRD’s policies as well as changes in the scope or implementation of the

193. *Id.* Annex 1 ¶ 27.

194. *Id.* Annex 1 ¶ 19.

195. *Id.*

196. *Id.* Annex 1 ¶ 20.

197. *Id.* Annex 1 ¶ 21.

198. *Id.* Annex 1 ¶ 22.

199. *Id.* Annex 1 ¶ 24.

200. *Id.*

project.²⁰¹

The appropriate decision-maker can decide whether or not to accept the recommendations and findings of the expert.²⁰² Once the appropriate decision-maker has considered the report, the complainant and other involved parties will be made aware of the report and any resulting decisions, and the report will be made public, subject to “maintaining confidentiality of any commercially sensitive information.”²⁰³ The CCO, unless the appropriate decision-maker decides that the expert should do so, is authorized to monitor the implementation of the decision of the President or Board.²⁰⁴

The CCO will submit an annual report to the President and Executive Committee for transmission to the Board of Directors.²⁰⁵ The report will also be published on the EBRD website.

6. African Development Bank’s Independent Review Mechanism²⁰⁶

In late June 2004, the Boards of Directors of the African Development Bank Group (AFDB)²⁰⁷ voted to establish an Independent Review Mechanism (the Mechanism) for the AFDB. This Mechanism consists of a Compliance Review and Mediation Unit (CRMU) and a Roster of Experts. The CRMU is the organizational unit that supports the Mechanism and is headed by a Director who will be appointed by the President of the Bank in consultation with the Boards of Directors of the AFDB. The Director of the CRMU (the Director) will work full-time for the AFDB and report administratively directly to the President of the Bank, but functionally will report to both the President and the Boards of Directors of the AFDB.

The Roster of Experts will consist of three individuals who are each appointed for one non-renewable five-year term by the Boards of Directors on the recommendations of the President of the Bank. The Chairperson of the Roster of Experts will be appointed by the Boards

201. *Id.*

202. *Id.* Annex 1 ¶ 25.

203. *Id.*

204. *Id.* Annex 1 ¶ 26.

205. *Id.* Annex 1 ¶ 39.

206. The author worked as a consultant to the African Development Bank on inspection functions, and the information in this Section is based on his communications with the relevant staff at the Bank and the formal resolutions establishing the Bank’s Independent Review Mechanism.

207. The African Development Bank Group consists of the African Development Bank, the African Development Fund and the Nigerian Trust Fund.

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from among the three members of the Roster. The members of the Roster of Experts are expected to be independent of the Bank management. Thus, they cannot have worked in any capacity for the Bank for at least two years prior to their appointment to the Roster and cannot work for the Bank for two years after the completion of their term as an expert. The members of the Roster of Experts will be paid a retainer by the Bank and shall only be expected to work full-time for the Bank when they are appointed to serve on a compliance review Panel. Finally, the experts can only be dismissed from their position by the Boards of the Bank for cause.

The Mechanism is empowered to receive requests for action from any two or more persons or their representatives. The requesters must allege that they have been adversely affected by a project financed by the AFDB in which the Bank failed to comply with its operational policies and procedures. For public sector projects, the allegations can relate to any of the Bank's operational policies and procedures. However, in the case of private sector projects, the allegations must relate to the Bank's environmental and social safeguard policies, which include its policies dealing with agriculture, education, health, gender, good governance and environment.

In order for requests, which must be in writing, to be eligible for treatment by the Mechanism, the management of the Bank must have had an opportunity to deal with the matter. In addition, the requests must fall within the scope of the Mechanism's mandate. This means, inter alia, that the request cannot involve matters that are the responsibility of parties other than the AFDB, is not a complaint against procurement decisions, is not a complaint dealing with fraud and corruption or with matters before other tribunals or review bodies and is not frivolous or malicious.

Once the Director receives the request he/she conducts a preliminary review of the request to determine its eligibility. At the conclusion of this review, the Director informs the Board of the Bank and the President if the request is eligible for either a compliance review or a problem-solving exercise. The management of the Bank is given an opportunity to respond to the request before the matter proceeds to either a problem-solving exercise or a compliance review.

If the Director decides that the request should be handled through a problem-solving exercise, he/she takes responsibility for organizing the exercise and invites all relevant parties to participate. The Director can use whatever problem-solving techniques he/she deems most appropriate in the exercise. At the end of the problem-solving exercise, the Director will make a report on the exercise. This report is submit-

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ted to the Boards of the AFDB, to the President and to the participants in the problem-solving exercise. If the exercise results in a positive outcome, the Director may help monitor the implementation of the agreed resolution of the problem-solving exercise. If the exercise does not result in an outcome that is satisfactory to all relevant parties within a reasonable period of time, the Director can make his/her own recommendations for remedial action to the Boards of the AFDB or to the President, if the project has not yet been approved by the Board. The Director's recommendations can include undertaking a compliance review. Such a recommendation is likely in any case in which the Director concludes that there is prima facie evidence that the affected parties have been harmed or threatened with harm as a result of the Bank's failure to follow the relevant AFDB policies and procedures.

If the requester has asked for a compliance review and the Director has not undertaken a problem-solving exercise, the Director will determine if the request is eligible for a compliance review. If the Director determines the request is eligible for a compliance review, the Director shall make a recommendation to the Boards of Directors or to the President, in the case of projects that have not yet been approved by the Boards. If the Director recommends in favor of conducting a compliance review, the recommendation shall include draft terms of reference for the compliance review and shall identify two experts, from the Roster of Experts, to work with the Director on the compliance review. Thus, the Compliance Review Panel (Panel) will consist of the two experts plus the Director. The Boards of Directors or the President may approve the recommendation on a "non-objection" basis or remit the request to the Director or to one of the members of the Roster of Experts to reassess the recommendation regarding the composition of the Panel or the terms of reference of the compliance review.

Once the recommendation in favor of the compliance review is approved and the Panel appointed, the Panel will conduct the compliance review consistently with the terms of reference. At the end of the review, the Panel will prepare a report containing its findings and recommendations to the Boards or the President, if the project has not yet been approved by the Boards. The Boards or the President, as the case may be, shall decide whether or not to accept the findings and recommendations of the Panel.

If the Director, after reviewing the request for a compliance review, determines that it is not eligible for such review, he/she shall refer the request to the Chairperson of the Roster of Experts. The Chairperson shall then make a determination of the eligibility of the request and so inform the Boards of Directors. If the Chairperson decides that the

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request is not eligible, he/she shall inform the Boards, or in the case of projects that have not been approved by the Boards, the President, of the ineligibility. If the Chairperson finds the request to be eligible, he/she shall recommend that the Boards or the President, as the case may be, authorize a compliance review and submit, together with the recommendation, draft terms of reference for the review and a recommendation on which two experts from the Roster of Experts to appoint to the Panel.

All the reports of the Director arising from problem-solving exercises or from requests for compliance review, the reports of the Panel arising from compliance reviews and the decisions of the Boards and President shall be made publicly available subject to the provisions of the Bank's information disclosure policy.

The Director, in consultation with the members of the Roster of Experts, is required to prepare an annual report for the Boards of the AFDB and its Board of Governors. This report, which will be published by the Bank, will contain information on the activities of the CRMU during the preceding year, including discussion of any identifiable trends that may have emerged from the mechanism's problem-solving and compliance review activities and the lessons that the CRMU has learned about the impacts and challenges of implementing the AFDB's operating policies and procedures.

The Mechanism will become operational once the Director of the CRMU is appointed and takes up the position; this is expected to be before December 31, 2005.

B. *The Situation in Other International Organizations*

1. International Monetary Fund

The International Monetary Fund (IMF) does not have an inspection mechanism. However, it recently created an Independent Evaluation Office that conducts selective evaluations of the IMF's operations. The mechanism, which is closer to an operations evaluation mechanism than an inspection mechanism, does offer outside parties some scope for submitting suggestions for evaluations to the Office. Over time, it is conceivable that this could develop into a vehicle for submitting complaints about IMF operations.²⁰⁸

208. For more information, see INTERNATIONAL MONETARY FUND, INDEPENDENT EVALUATION OFFICE (IEO) OF IMF, available at <http://www.imf.org/external/np/ieo/index.htm> (last visited June 16, 2004).

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2. United Nations

The United Nations has two mechanisms which play a role in inspection and compliance matters.

a. *Joint Inspection Unit*

The Joint Inspection Unit (JIU) was established by the United Nations General Assembly in 1966.²⁰⁹ The JIU has broad powers of investigation in relation to the specialized agencies and other international organizations within the United Nations system that have accepted its statute. The JIU consists of eleven Inspectors appointed by the General Assembly on the basis of their special experience in national or international administrative and financial matters, including management questions. Inspectors serve five-year terms that are renewable once.²¹⁰

The JIU has the mandate to investigate all matters “having a bearing on the efficiency of the services and the proper use of funds”²¹¹ in the organizations subject to the JIU’s jurisdiction. In exercising these powers, the JIU can make on the spot investigations and inquiries. It must satisfy itself that the activities undertaken by the organizations under its jurisdiction are carried out in the “most economical manner and that the optimum use is made of resources available for carrying out these activities.”²¹² The JIU’s investigations tend to cover both financial matters and general management and programmatic issues. The JIU reports on its investigations to the executive heads of the relevant institutions. It also provides an annual report to the General Assembly and the appropriate legislative bodies of the other organizations subject to its review. It has the authority to monitor the implementation of its recommendations.

It is important to note that the JIU does not deal with complaints or undertake investigations on request from non-state actors who allege that they have been harmed or are threatened with harm from the actions or decisions of the specialized agencies and other international organizations within the United Nations system over which it has jurisdiction.

209. See U.N. GAOR, 21st Sess., U.N. Doc. A/2150 (1966).

210. See U.N. GAOR, 56th Sess., Supp. No. 34, at 1, U.N. Doc. A/56/34 (2001).

211. U.N. JOINT INSPECTION UNIT, ABOUT JIU: JOINT INSPECTION UNIT OF THE UNITED NATIONS SYSTEM, available at <http://www.unsystem.org/jiu/new/about.htm> (last visited June 16, 2004).

212. *Id.*

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b. *Office of Internal Oversight Services*

The Office of Internal Oversight Services was established in 1994. It is headed by an Under-Secretary-General, who is appointed by the Secretary-General with the approval of the General Assembly for a fixed non-renewable term of five years. The Office has operational independence and submits reports on its activities and an annual report to the Secretary-General for submission to the General Assembly.²¹³ The Office can conduct audits, program evaluations and program inspections and investigations.²¹⁴ It is supposed to act as an “agent for change”²¹⁵ within the United Nations system, to promote accountability for the stewardship of resources, efficiency and productivity, cost effective controls to ensure compliance with authority, minimization of waste and deterrence of fraud and dishonesty.²¹⁶

It is important to note this office does not deal with complaints, conduct audits or undertake investigations on request from non-state actors.

C. *Other Models of Inspection Mechanisms*

1. European Ombudsman

The European Ombudsman has been included in this Section even though it differs from the other inspection mechanisms discussed in this Paper in that it does not operate in the context of a development institution. There are two reasons for including it in this Paper. First, it is a mechanism in a supra-national organization that is designed to address complaints from affected non-state actors who feel that they have been harmed or threatened with harm by the operations of the supra-national organization. Second, the Ombudsman offers an example of a model that combines problem-solving with some compliance review in a manner that is relatively flexible and informal. Consequently, it is a potential model for an inspection function in an international organization. In this regard it should be noted that many states have established ombudsmen and are more familiar with this mechanism than with the other inspection mechanisms discussed in

213. See U.N. OFFICE OF INTERNAL OVERSIGHT SERVICES, OFFICE OF INTERNAL OVERSIGHT SERVICES: GENESIS, MISSION, METHODS, IMPACT 3 (2000), available at http://www.un.org/Depts/oios/oios_03.pdf (last visited June 16, 2004).

214. See *id.* at 4.

215. *Id.* at 1.

216. See *id.* at 5.

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this Paper.

The European Parliament established the European Ombudsman (the Ombudsman) in 1994.²¹⁷ The mandate of the Ombudsman is to deal with complaints from citizens of the European Union or any natural or legal person residing in the Union alleging “maladministration in the activities of Community institutions or bodies.”²¹⁸ According to the European Ombudsman website, “maladministration” means “poor or failed administration” and occurs when the institution fails to do something that it should have done, does something that it should not have done or does something in a wrong way.²¹⁹ The website cites “administrative irregularities, unfairness, . . . abuse of power, [and] refusal of information” as examples of maladministration.²²⁰

The procedures established for the European Ombudsman are relatively simple.²²¹ The complainant writes to the Ombudsman within two years of learning of the facts on which the complaint is based. The complainant need not be individually affected by the maladministration. However, the complainant must have contacted the institution or body concerned before it contacts the Ombudsman.²²² The Ombudsman registers the complaint and sends the complainant an acknowledgment of receipt of the complaint.²²³ The receipt also contains the registration number for the complaint and the name of the officer who is dealing with the case.²²⁴ The Ombudsman then reviews the complaint to determine if it falls within the Ombudsman’s mandate and is admissible.²²⁵ In addition, the Ombudsman decides if there are sufficient grounds to justify making an inquiry into an admissible com-

217. Decision of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman’s Duties, 1994 O.J. (L113) 15 [hereinafter European Ombudsman Statute], available at <http://www.euro-ombudsman.eu.int/lbasis/en/statute.htm> (last visited Apr. 28, 2005); Decision of the European Ombudsman Adopting Implementing Provisions [hereinafter European Provisions], available at <http://www.euro-ombudsman.eu.int/lbasis/en/provis.htm> (last visited Apr. 28, 2005).

218. European Ombudsman Statute, *supra* note 217, art. 2.2.

219. EUROPEAN OMBUDSMAN, EUROPEAN OMBUDSMAN: HOW TO COMPLAIN, available at <http://www.euro-ombudsman.eu.int/media/en/default.htm> (last visited Apr. 28, 2005).

220. *Id.*

221. For a detailed description of the procedures, see European Provisions, *supra* note 217. The European Ombudsman recently released a leaflet for citizens titled “At a Glance” which briefly describes the Ombudsman’s role and gives answers to frequently asked questions, available at <http://www.euro-ombudsman.eu.int/glance/en/default.htm> (last visited June 16, 2004).

222. See EUROPEAN OMBUDSMAN, *supra* note 219.

223. See European Provisions, *supra* note 217, art. 2.1.

224. See *id.* art. 2.2.

225. See *id.* art. 3.1

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plaint.²²⁶

If an inquiry is warranted, the Ombudsman informs the complainant and the institution involved and invites the institution to submit an opinion within a stipulated period of time, which normally will not exceed three months.²²⁷ The Ombudsman normally sends this opinion to the complainant and invites the complainant to send observations on the institution's opinion.²²⁸

After reviewing both the institution's opinion and the complainant's observations, the Ombudsman may decide to either close the case or continue the inquiry. This decision is conveyed to the two parties.²²⁹

The Ombudsman can request the relevant European institutions and the member states to provide it with information and documents for the purpose of its inquiries.²³⁰ In addition, the Ombudsman can request European institutions to make arrangements for it to conduct on the spot investigations.²³¹ In addition to powers of investigation, the Ombudsman has the authority to explore friendly solutions with the complainant and the relevant European institutions.²³²

The Ombudsman's investigations and/or efforts at a friendly-solution result in a report which, if the Ombudsman thinks it appropriate, can include draft recommendations.²³³ This report is submitted to the complainant and the institution.²³⁴ The institution is required to respond to the report within three months of receiving it. The response may be to accept the Ombudsman's decision and it may contain a description of the measures the institution has taken to implement the recommendations.²³⁵ If the Ombudsman does not consider the institution's report to be satisfactory, it issues another report addressing the issues of maladministration and includes recommendations.²³⁶ This second report takes the form of a special report to the European Parliament. Copies of the report are also sent to the complainant and the relevant European institution.²³⁷ The second report, therefore,

226. *See id.* art. 4.1.

227. *See id.* art. 4.3.

228. *See id.* art. 4.4.

229. *See id.* art. 4.5.

230. *See id.* art. 5.1.

231. *See id.* art. 5.3.

232. *See id.* art. 6.

233. *See id.* art. 8.1.

234. *See id.* art. 8.2.

235. *See id.* art. 8.3.

236. *See id.* art. 8.4.

237. *See id.* art. 8.5.

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allows the Ombudsman to engage in some monitoring of the implementation of the conclusions of its investigations or friendly solution.

If the Ombudsman decides that it is no longer possible for the European institution to eliminate the case of maladministration and that the instance of maladministration has no general implications, it closes the case with a “critical remark” rather than a report.²³⁸ The complainant and the institution are informed of this decision.²³⁹

It should be noted that the Ombudsman has the power to undertake inquiries on its own initiative.²⁴⁰

The Ombudsman is required to submit an annual report to the European Parliament in addition to the special reports referred to above.²⁴¹ The annual report may “contain such recommendations as [the Ombudsman] thinks appropriate to fulfill his responsibilities under the Treaties and the Statute.”²⁴² This report, therefore, offers the Ombudsman an opportunity to make some comments on how effectively its recommendations and the conclusions of the investigations are being implemented by the relevant institution.

In general, the documents of the Ombudsman are available to the public. There are, however, occasions where the law or a decision of the Ombudsman may result in a document being kept confidential.²⁴³

Experience

In 2003, the Ombudsman received 2,436 complaints.²⁴⁴ This was a 10% increase over the previous year, due in part to a concerted effort to inform citizens of their rights.²⁴⁵ A total of 253 inquiries were opened and 180 cases were closed following inquiries.

2. Export Development Canada

In 2002, Export Development Canada (EDC), the Canadian export

238. *Id.* art. 7.1.

239. *See id.* art. 7.2.

240. *See id.* art. 9.

241. *See id.* arts. 11.1-11.2.

242. *Id.* art. 11.3.

243. *See id.* art. 13.

244. THE EUROPEAN OMBUDSMAN EXECUTIVE SUMMARY AND STATISTICS FROM THE ANNUAL REPORT 2003, available at http://www.euro-ombudsman.eu.int/report03/pdf/en/short03_en.pdf.

245. *Id.*

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credit agency, appointed a Compliance Officer.²⁴⁶ This official's mandate is to "enhance existing transparency and accountability practices in areas such as public disclosure of information, environmental reviews, human rights and business ethics."²⁴⁷ The Compliance Officer is authorized to encourage dialogue between EDC and the complainant so as to try and resolve disputes; to provide EDC with advice on ethical business practices; and to oversee and monitor compliance audits that are conducted by internal or external professionals but that are triggered by complaints filed with the Compliance Officer.²⁴⁸ Thus, this official performs a function similar to that performed by the CAO in IFC and MIGA.²⁴⁹

The first Compliance Officer was appointed in January 2002.²⁵⁰ In 2003, the Compliance Officer received five complaints/allegations of non-compliance.²⁵¹ Of the five received, one fell within the Program's mandate and was reviewed following the Program's procedural guidelines.²⁵²

III. COMPARATIVE ANALYSIS OF INSPECTION MECHANISMS AND GENERAL PRINCIPLES THAT SHOULD GUIDE INSPECTION MECHANISMS

A. Comparative Analysis

The purpose of this comparative analysis is to see what lessons can be learned about the structuring of inspection mechanisms in international organizations. Eight of the twelve mechanisms described above are designed to receive complaints from affected parties.²⁵³ They are: the World Bank's Inspection Panel (IP); IFC/MIGA's Compliance

246. See EXPORT DEVELOPMENT CANADA (EDC), THE COMPLIANCE OFFICER: LISTENING STAKEHOLDERS, available at http://www.edc.ca/corpinfo/csr/compliance_officer/index_e.htm (last visited Apr. 28, 2005).

247. *Id.*

248. See EDC, THE COMPLIANCE OFFICER'S ROLE, available at http://www.edc.ca/corpinfo/csr/compliance_officer/role_e.htm (last visited Apr. 28, 2005).

249. See EDC, *supra* note 246.

250. See EDC, WHO IS THE COMPLIANCE OFFICER, available at http://www.edc.ca/corpinfo/csr/compliance_officer/who_e.htm (last visited May 23, 2002).

251. EDC, ANNUAL COMPLIANCE PROGRAM REPORT 2003, available at http://www.edc.ca/corpinfo/csr/compliance_officer/2003_actreport_e.pdf.

252. *Id.*

253. In addition to these eight mechanisms, the IMF's Independent Evaluation Office also creates a possibility for outsiders to propose studies to the office and to comment on the terms of reference of these studies. However, since the primary focus of this office is on post hoc evaluations and not complaints by third parties, it has been excluded from this comparative analysis.

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Advisor Ombudsman (CAO); the Inter-American Development Bank's Independent Inspection Mechanism (IIM); the Asian Development Bank's Accountability Mechanism (AM); the African Development Bank's Compliance Review and Mediation Unit (CRMU); Export Development Canada's Compliance Officer (EDC); the European Bank for Reconstruction and Development's Independent Recourse Mechanism (IRM); and the European Ombudsman (EO). The following comparative analysis focuses on these eight mechanisms. A table comparing all the mechanisms discussed in Section II is attached as an Appendix to this Paper.

1. The Composition of the Mechanisms

The IP, CAO, AM and CRMU all have at least some of the persons who will actually do the problem-solving or compliance review activities of the mechanism working full-time for the institution. In the case of the IP, only the chair of the Panel works full-time for the Panel. In addition, the Panel has a staff of full-time professionals and a support staff. The remaining two members of the IP only work on an "as needed" basis. In the case of the CAO, the CAO and the specialist advisors all work full-time. The CAO also has a support staff. The AM's Special Project Facilitator and the chair of its Compliance Review Panel work full-time. The remaining two members of the Compliance Review Panel only work when needed. In addition, the AM, like the IP, has a full-time professional and support staff.

The Director of the CRMU at the AFDB is a full-time employee of the Bank. This person is responsible for undertaking the problem-solving activities of the mechanism and for making recommendations to the Boards of the AFDB and to its President regarding compliance reviews. The Director will also serve as a member of the Compliance Review Panel, together with two others who are selected from the three-member Roster of Experts. The members of this Roster are paid a retainer in order to ensure their availability to undertake compliance reviews. They are, however, free to pursue other activities, but they cannot work in any capacity for the AFDB for the duration of their term on the Roster.

The IIM and IRM have "virtual" Panels in the sense that there are no full-time Panelists. The IIM has a Roster of ten to fifteen potential Panelists from which a Panel can be constituted on an "as needed" basis, and the IRM has a Roster of three to ten independent experts. The members of these Rosters are free to pursue other activities but they cannot work in any capacity for the institution to whose Roster they have been appointed for the duration of their term on the Roster.

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However, the IRM's Roster of Experts will be paid a retainer to try and ensure their availability. In return for the retainer they will be required to spend five days a year at the EBRD learning about the Bank and its operational policies and procedures. The IIM's Roster is serviced by a secretariat that consists of one professional staff member and support staff. This secretariat will receive all complaints and steer them to the appropriate entity responsible for advising the Board on whether or not to authorize an investigation. In the case of the IRM, the EBRD's Chief Compliance Officer provides secretariat support to the Roster of Experts.

In the cases of the IP, IIM, AM, IRM and CRMU the Board of the institution appoints the members of the Panel or the Roster from nominations or recommendations from the Bank President. The appointments to the IP and the Rosters of Experts of the IIM, AM and CRMU are for a fixed term and are non-renewable. The members of the Panel or Roster are expected to be independent of Bank management. Thus, they report to the Board and cannot be removed except by the Board and for cause. In addition, they cannot have worked in any capacity for the institution for a specific period of time—usually two years—before their appointment and for a stipulated period after the expiration of their appointment.

In the case of the CAO, the appointment is made by the President of the World Bank Group, who is not the chief executive officer of IFC or MIGA. The CAO reports directly to the President and not to the CEOs of these institutions.

2. The Scope of the Mechanisms' "Jurisdiction"

The IP, IIM, AM and CRMU can accept and investigate complaints relating to any ongoing Bank operation. This means that they can accept complaints relating to operations that are in the design, appraisal or implementation phase of their life-cycle. These mechanisms each have a means for determining when the mechanism's "jurisdiction" ends. In some cases, this is when the loan is at least ninety-five percent disbursed, while in others it is twelve months after physical completion of the project or the date of the last disbursement. In addition, these mechanisms are precluded from dealing with any cases relating to procurement matters or with fraud and corruption cases. Finally, the mechanisms cannot accept any case which has already been the subject of an inspection unless there is new evidence or circumstances which were not known at the time of the original investigation.

The CAO is limited to cases involving the social and environmental impact of IFC and MIGA operations. This means that it can only deal

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with matters relating to the institutions' safeguard policies. EDC deals with any case involving issues of transparency or accountability relating to environmental reviews, human rights, business ethics and information disclosure. Finally, the EO can accept any case relating to "maladministration" in any institution of the European Union.

The IRM is limited to cases involving specified policies of the EBRD relating to environment and public disclosure of information. The IRM cannot accept cases involving procurement or fraud and corruption. The IRM can also not accept any complaint that is currently before another judicial or review body where the results of the review could have a bearing on any actions or decisions that the IRM may take.

The CRMU can accept cases involving both public and private sector projects. In the case of public sector projects, the scope of its jurisdiction extends to cases pertaining to any of the AFDB's operating policies and procedures. However, in private sector projects, the mechanism is limited to the Bank's policies dealing with agriculture, education, health, gender, good governance and environment.

The types of cases that the mechanisms receive are influenced by the nature of their institutions' work. For example, the IP's, IIM's and the AM's predecessor's experience is primarily with public sector projects. On the other hand, the CAO only deals with private sector projects. It should be noted that, because of the nature of the work of the AFDB, ADB and EBRD, the AM, CRMU and IRM can accept complaints dealing with both public and private sector projects.

3. Eligibility to File Complaint

In five of the seven mechanisms (IP, IIM, AM, IRM, CRMU), the complaint must be filed by groups that consist of at least two affected people who have a common interest in the substance of the complaint. All these mechanisms allow any affected person to qualify as one of the members of the complaining group. Thus, in principle, it is possible for both natural and legal persons to qualify as an affected person for this purpose.²⁵⁴ All five mechanisms also allow a representative of the affected people to file a complaint on their behalf, but this does not alter the requirement that the complaint involve at least two affected people.

The first mechanism with this requirement was the IP. The other

254. The IP has received complaints from legal persons. *See, e.g.*, Bangladesh Jute Sector Adjustment Credit (Cr. 2567-DB), Tanzania: Power VI Project (Cr. 2489-TA) and Papua New Guinea Governance Promotion Adjustment Loan Project (Cr. 7021-PNG).

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mechanisms followed the IP's example. The rationale for restricting eligibility to groups of two or more people appears to have been a sense of caution. When the IP was established, it was an unprecedented experiment and the World Bank had no idea how many affected people would actually file complaints with the IP. Given the large number of people affected by World Bank projects, there was a concern that the mechanism would be overwhelmed with complaints. In particular, some thought that if individuals were allowed to file complaints, the inspection mechanisms would be flooded with complaints that were trivial, frivolous or in some way unrepresentative of the group of people affected by a particular Bank-funded operation. In fact, the numbers of complaints filed with each of these mechanisms has been relatively small—thirty since 1994 in the case of the IP, four since 1994 in the case of the IIM, one complaint to the AM since it began operations and seven complaints to its predecessor.

It is important to note that the one exception to the IP rule prohibiting individuals from filing complaints is that individual Executive Directors can request the IP to undertake investigations.

In the remaining three mechanisms (CAO, EDC, EO), individuals are allowed to file complaints. This may result in a greater number of cases than in the three mechanisms discussed above. For example, the CAO in its first three years of operation received thirteen complaints. However, it has a greater capacity to handle a larger number of complaints than the IP or IIM because of the relative informality of its Ombudsman procedures.

The CAO and EO both allow representatives to file complaints on behalf of the affected people.

All eight mechanisms allow the complainants to request that their identities be kept confidential. This requirement is necessary to protect the complainants from any potential threats to their safety. Experience indicates that these threats to their safety can emanate from both governmental and non-governmental opponents of the complainants. For example, in one of the IP's cases the complainants requested anonymity because they feared reprisals from other NGOs who supported the project and opposed their complaint.²⁵⁵

4. Requirement of a Pre-Complaint Approach to Management

The IP, IIM, AM, IRM, CRMU and EO, with varying degrees of formality, all require that the complainant raise the matter with the

255. This information was provided in an interview with a member of the IP.

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institution's management before it files its complaint. The logic of this requirement appears to be that management should have an opportunity to explain its apparent non-compliance or to correct the alleged non-compliance before the inspection function is invoked.

The CAO and EDC do not formally require a pre-complaint approach to management. However, one of the first steps in their investigation of a complaint is likely to be an effort to find out if management has had an opportunity to deal with the complaint and, if so, how they handled the complaint.

5. Formal Requirements for an Acceptable Complaint

The IP, IIM, IRM, CRMU and the compliance review function of the AM all require that the complaint must specifically allege that the complainants have been harmed or threatened with harm as a result of the failure of the institution to comply with its operational rules and procedures in the design, appraisal and/or implementation of a Bank-financed operation. This requirement is consistent with the compliance focus of the mechanisms.

It should be noted that this requirement implies that successful complainants need to be reasonably knowledgeable about the institution and its operational rules and procedures. This increases the chances that complaints will be brought by, or at least supported by, relatively sophisticated groups or organizations.

The CAO, EDC, the problem-solving functions of the AM and IRM, and the EO do not impose many formal requirements on the complaints that they accept. All that is required is an allegation that the complainant has been harmed by an operation of the institution. These mechanisms place the burden for determining the complaint's suitability for investigation or resolution on the inspection mechanism itself. This appears to reduce the need for the complainants to have the support of sophisticated organizations and to increase the ability of affected people to utilize the mechanism. It is also consistent with the problem-solving focus of these mechanisms. The experience of the CAO suggests that a lack of formal requirements does not result in a significant number of trivial complaints being submitted to the inspection mechanism.

6. The Existence of Formal Procedures for Deciding to Conduct an Investigation and for the Conduct of the Investigation

The IP, IIM and the compliance review functions of the AM, IRM and CRMU all have relatively formal procedures for their operations.

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The relative formality of these procedures is a consequence of the mechanisms' focus on issues of non-compliance. Because mechanisms may make a finding that management's failure to comply with the applicable policies and procedures caused harm, management is concerned that unless they are given certain procedural protections, they could be found "at fault" without some form of due process. It is partly in response to these concerns that the procedures tend to spell out clearly that management has a right to respond to the complaint and to the report on the investigation.²⁵⁶

These five mechanisms all have procedures that govern the making of the decision to authorize an investigation. These procedures require management to provide a formal response to the complainant within a specified period of time. In addition, they require that an identified entity make a recommendation to the institution's Board of Directors on whether or not to authorize an investigation. In three cases, the final decision to authorize an inspection is made by the Board of Directors. In the cases of the IRM and CRMU, the decision will be made either by the Boards of Directors or the President of the institution, depending on whether or not the project at issue has previously been approved by the Board.

These mechanisms all have relatively flexible rules governing the actual conduct of an investigation. They all grant the panel conducting the investigation full access to the staff and records of the institution. In addition, the mechanisms all provide that the panel can design its own procedures for conducting the investigation and can use whatever methods of investigation it deems appropriate, including a visit to the site of the operation from which the complaint arises. In all cases, the member state in which the operation is located must consent to the visit.

In three of these cases, the procedures provide that the Board of Directors makes the final decision on how to respond to the report on the investigation. In the cases of the IRM and CRMU, the decision is made by either the Boards of Directors or the President of the applicable banks, depending on whether or not the Board has previously approved the project.

The remaining mechanisms—CAO, EO, the problem-solving functions of the AM and IRM and the EDC—have very simple procedures that, in fact, amount to a description of how they will handle the complaint. This simplicity is a direct consequence of the fact that they

²⁵⁶. Practical considerations are also a factor in this regard.

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all have a relatively strong focus on problem-solving, which requires a relatively flexible and informal approach. The CRMU has a somewhat more formal problem-solving procedure because it is more closely tied into the compliance review functions of the mechanism.

7. Decision to Authorize an Inspection

The IP, IIM, IRM, CRMU and AM all leave the final decision as to whether to authorize an investigation up to the Board of Directors. The only partial exceptions to this are the IRM and CRMU, which give the President of the Bank decision-making authority only in the case of projects that have not yet been approved by the Board. The panel or the experts who conduct the preliminary phase of the investigation are limited to making a recommendation on whether or not the Board should authorize an investigation.²⁵⁷ In the case of the CAO, EDC and EO, the mechanism itself makes the decision on how to proceed.

The IP and the AM's predecessor have not had a happy experience with giving the Board full discretion in regard to authorizing an inspection. In the first few years of the IP, there was intense conflict on the Board surrounding each decision related to authorizing an inspection. Since the Board's discretion at this stage was reduced by the second review of the Resolution, the process seems to be working more smoothly. In all post-second review cases, the World Bank Board has adopted the recommendation of the IP without acrimonious debate. The ADB has also experienced difficult Board discussions relating to the decision on authorizing an inspection. In fact, the difficulty of these discussions was a contributing factor in deciding to initiate the extensive review that resulted in the decision to establish the AM. As a result of these experiences, the current trend is for the mechanism to limit the discretion of the Board in making its decision. In fact, the Board usually decides on a "non-objection" basis.

8. Outcomes of Inspections

The IP and IIM can only include findings of fact in their reports on their investigations. The responsibility to develop solutions to any problems that the investigation may have uncovered lies with management, who will need to describe their proposed solution in their response to the report. The AM, IRM and CRMU do allow the inspec-

²⁵⁷. In the case of the Asian Development Bank, the Board's inspection sub-committee makes the recommendation to the full Board, which makes the final decision.

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tors to make recommendations.

The CAO in the reports of its Ombudsman cases may make both findings of fact and recommendations. The report is likely to include a solution to the problem presented by the complaint when the parties have agreed on a solution. If the Ombudsman fails to resolve a case, its reports may include observations on why a resolution was not possible. The CAO can also state in this report that a compliance review is warranted. Similarly, the EO can make recommendations in its reports to the relevant European institution. It is not clear if the EDC can make recommendations, but it is likely that its reports can include both findings of fact and recommendations.

9. Follow-Up to the Report

Only four of the inspection mechanisms have the authority to monitor the implementation of any remedial actions that grow out of their investigations. They are the AM, IRM, CRMU and the CAO, which in its capacity as Ombudsman can build a monitoring role for itself into the solution to the problem that it helps the parties fashion and adopt. In addition, the EO and EDC have some capacity to play a monitoring role. The absence of such authority in other mechanisms is problematic because it means that the Board has no easy way of knowing if the management and staff are actually implementing the remedial action that management proposed and the Board authorized.

10. Publication of the Report

Seven of the eight mechanisms—IP, IIM, AM, IRM, CAO, CRMU and EO—provide for publication of the full reports of the mechanisms. The EDC only requires publication of a summary of the report.

In the case of the IP, IIM, IRM, AM and CRMU, publication usually takes place after each Board decision. At that time, or more accurately, within a specified period of time thereafter, all the relevant documents (the complaint, the mechanism's report, the Board decision and the response of the management) will be made public. In the case of the CAO, the reports will be publicly released when the matter is deemed closed.

There are two exceptions to this effort to publish all information in the cases handled by the inspection mechanisms. First, on request, the identity of the complainants will be kept confidential. In fact, this information, after it has been verified by the mechanism, will also not be divulged to the Board or management. Second, where applicable, commercially sensitive information will be kept confidential.

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11. Lessons Learned

The IP and IIM are not authorized to make substantial contributions to the learning process in their respective institutions. Consequently, neither in the reports on their investigations nor in their annual reports to the Board are they expected to discuss the lessons they learned about the institutions' operations from their work. This means that the institutions are currently being deprived of their inspection mechanism's unique knowledge about the impact of their operations on affected communities and about the implementation of their operational policies and procedures. The AM and IRM are authorized to include "lessons learned" in their reports but are not required to include this information in their annual reports. The CAO has more opportunity to capture and convey some of this information in the recommendations it makes in its case reports and in its annual reports. The EO can also include information on the lessons that it has learned in its case reports and in its annual report.

The CRMU has the most extensive lessons learned requirements. It is required to include information both on the trends relating to the activities of the AFDB that emerge from its problem-solving exercises and compliance reviews and on the lessons that it has learned about the impacts of and the challenges arising from the implementation of the Bank's operating policies and procedures.

IV. THE NEED FOR AN INSPECTION FUNCTION AND OPTIONS FOR ANY INTERNATIONAL ORGANIZATION

A. *The Need for an Inspection Function*

The need for an inspection mechanism for international organizations that engage in operations in their member countries that can adversely affect non-state actors is based, in the first instance, on the general principle that those who exercise power should be accountable to those who are affected by their use of their power. In addition, as a practical matter, international organizations need inspection mechanisms as part of their drive for good governance for themselves and their member states. Without such mechanisms, the institutions may be allowing the flawed aspect of operations and actions to continue unchanged or may be failing to correct certain unplanned negative consequences of their operations.

Some organizations may seek to refute the practical argument for an inspection Panel by arguing that the fact that they do not receive many

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complaints from non-state actors indicates that they have little need for an inspection function. However, the number of complaints actually received by an organization is a misleading indicator of the need for an inspection function. There are two reasons for this.

First, the absence of an inspection mechanism means that affected people who would like to complain to the organization cannot do so. Thus, the small number of complaints may be more a reflection of lack of opportunity than of the fact that affected people do not have complaints about operations of the particular organization.

Second, the number of cases received by an inspection function is not necessarily an accurate reflection of the benefits it offers an institution. The existence of the inspection function creates an incentive for staff and management to pay closer attention to the international organization's policies and procedures and to ensure that their activities are in compliance with these policies and procedures. This has led to the phenomenon of "Panel proofing" projects in the World Bank. "Panel proofing" refers to enhanced efforts by Bank staff to ensure that their activities are in compliance with the World Bank's operational policies and procedures. The value of this preventive function to the work of a development bank is hard to measure but is not inconsiderable.

B. General Principles

Based on the above description and analysis of existing inspection mechanisms, it is possible to identify a number of principles that should be observed in designing an inspection mechanism for an international organization. Any mechanism that fails to incorporate these principles is likely to be viewed as deficient by at least one of the stakeholders in the mechanism. These stakeholders include affected people, members of the organization's governing bodies, management and staff, non-state actors (both legal and natural persons) and member states.

In order to ensure that all these stakeholders have confidence in the inspection mechanism and view its establishment as a positive development for the international organization, it is advisable for the organization to offer all these stakeholders an opportunity to comment on the inspection mechanism that it eventually proposes to adopt before it actually takes the formal decision to establish the mechanism. Such a step is also consistent with the evolving practice in the international financial institutions of allowing for a notice and comment period

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before adopting significant policies or procedures.²⁵⁸

The principles that should guide the design of an international organization's inspection mechanism are:

1. Clarity of Purpose

Inspection mechanisms in international organizations can be designed to serve one or more of three different functions. These functions are compliance review, problem-solving and lessons learned. Compliance review refers to investigations that are designed to determine if the bank's staff and management met the requirements of all the applicable operating rules and procedures in the particular operation that is the subject of the review. Thus, in performing a compliance review, an inspection mechanism's primary focus is on the acts and omissions of the bank's staff and management as opposed to the harm suffered by the affected people. The IP is a good example of an inspection mechanism whose primary focus is compliance review.

The problem-solving function deals with troubling issues that have arisen in the course of an operation of the institution and that have been identified by affected people as causing or threatening them with harm. In performing the problem-solving function, the inspection mechanism's primary concern is the harm suffered by the affected people, as opposed to the acts and omissions of the bank's staff and management. Its objective is to identify ways to correct the problems identified in the complaint. The Ombudsman function of the CAO is a good example of a problem-solving mechanism.

The lessons learned function refers to the ability of the inspection function to contribute to the lessons that the institution learns about the design and implementation of its operations. The inspection function, because its operations are triggered by the complaints of affected persons rather than by the staff or management of the institution, has a unique perspective on the organization's operations. It is in a position to identify trends within the implementation of the institution's policies and procedures that are unlikely to be obvious to other actors in the organization. An inspection mechanism that is concerned with lessons learned will seek to convey the information that it gathers in a manner and form that can be used by the institution to improve its future operations.

258. For example, this practice has been used by the MDBs in establishing their inspection mechanisms and by the World Bank and the International Monetary Fund in developing some of their more controversial operational policies.

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These three purposes are not mutually exclusive, and it is possible for one inspection mechanism to perform more than one of these functions. Thus, for example, while the IP is primarily a compliance mechanism it does perform some problem-solving activities. This follows from the fact that its mandate is not only to investigate World Bank compliance with its operating policies and procedures but also the harm caused to the requesters to the IP. Similarly, when the CAO is engaged in problem-solving it may identify issues that are suitable for compliance reviews.

The AM and IRM both perform both problem-solving and compliance review functions. They may also play a lessons learned role. The newly created CRMU at the African Development Bank has the potential to play the most active lessons learned function. It is the only mechanism that is explicitly required to include information on both the trends relating to the activities of the AFDB that it identifies in its problem-solving and compliance review exercises and the lessons it learns about the impacts of and the challenges arising from the implementation of the Bank's policies and procedures in its annual report.

2. User Friendliness

All inspection functions at development banks are intended as mechanisms through which affected people can complain about the effects of bank-funded operations. This suggests that the procedures that the inspection mechanism adopts for receiving and handling these complaints should be as easy as possible for the affected people to understand and utilize. This is particularly important given that many of the affected people are unlikely to have either the knowledge about the organization or the resources needed to access a complex mechanism.

A user-friendly mechanism is one that has simple and flexible procedures and limits the number of requirements that a complainant must satisfy before the mechanism begins to address the substance of the matters raised in the complaint. The Ombudsman part of the CAO is a good example of a user-friendly mechanism. It merely requires the complainant to identify the project that is the source of its complaint and to explain the problems that it is facing. The CAO will then conduct its own investigations to determine if further action is warranted.

An example of a mechanism that is not particularly user-friendly is the World Bank Inspection Panel. The management of the World Bank has been able to use the Panel procedures to challenge the eligibility of

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complainants and the suitability of complaints for investigation. The result has been to force affected people to rely on relatively sophisticated advisors in preparing their complaints. In addition, at least prior to the second review of the Resolution establishing the Panel, management was able to utilize weaknesses in the procedures to complicate the deliberations of the Board on the Inspection Panel's recommendations of whether or not to authorize an investigation.

3. Independence

The mechanism should be independent from the management of the organization and should report directly to its Board of Directors. In addition, the terms and conditions of employment of the Panel members should be designed to promote and protect their independence. There are a number of measures that should be adopted to achieve this outcome. First, the members should not have worked for the institution in any capacity for a stipulated period before their appointment. Second, they should be appointed for one non-renewable term of office. Third, the Board of Directors should only be able to terminate their appointment for cause. Fourth, the budget of the mechanism should be designed to promote its independence. Fifth, the members should be ineligible for any bank employment for a stipulated period after the termination of their appointment. Some of the mechanisms studied bar the Panel members from ever again working for the organization after their term of office ends. This seems to be excessive. The term of the prohibition against employment by the institution need only be long enough to avoid creating an incentive for the individuals to favor the organization while working for the inspection mechanism.

4. Powers of Investigation

The mechanism must have access to all the persons, documents, records and locations that it deems necessary to conduct a complete investigation. The mechanism must also have the authority to make both findings and recommendations in its report at the end of the investigation.

5. Impartiality, Competence and Fairness

The investigating mechanism must be, and must be seen to be, impartial, fair and technically competent. This means that its recommendations, findings and conclusions must be supported by facts and well-

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reasoned arguments and must be consistent with prior decisions and actions of the investigating mechanism. In addition, the mechanism's investigations should be sufficiently comprehensive to demonstrate that it has gathered all the relevant information and has used this information in its reports.

6. Efficiency and Cost Effectiveness

The inspection mechanism must operate efficiently and must be cost effective. This means it should be able to deal with complaints relatively quickly and at a cost that does not impose an undue burden on the organization.

7. Effective Management of Issues Presented

The inspection mechanism should deal and be seen to deal effectively with the issues that fall within its mandate. One important consequence of this principle is that the inspection mechanism should be given the power to monitor the implementation of the results of an inspection process. The AM, IRM, CRMU and CAO have this power, while the lack of this monitoring power is generally recognized to be the greatest weakness in the IP.²⁵⁹

Another aspect of the efficacy of the mechanism is the staff and management's level of knowledge about and understanding of the mechanism. The reason is that if the staff view the mechanism in a negative light, they may work to undermine it. On the other hand, if the staff see the mechanism as a useful means for solving problems in the institution's operations, they are more likely to support the mechanism and thereby enhance its effectiveness. In addition, educating staff about the mechanism may encourage them to take actions which prevent their projects becoming the subject of complaints to the mechanism. This, in itself, may have a beneficial effect on the quality of the organization's operations.

C. *Options for an Inspection Function at Any International Organization*

Based on the general principles discussed above, it is feasible to identify a number of possible structures for an inspection mechanism

259. This conclusion is based on discussions with members of the World Bank Inspection Panel, its staff and experts who either have been participants in cases before the Inspection Panel or are keen observers of the Inspection Panel. See DEMANDING ACCOUNTABILITY: CIVIL SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL (D. Clark, J. Fox & K. Treakle eds., 2003).

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in an international organization. These possible structures, all of which conform to the general principles discussed above, are described in this section.

Before discussing these options, however, it is necessary to briefly discuss two issues that any organization must consider in deciding which of the possible structures to adopt. The first issue is the weight the organization wants to give to compliance review in its inspection mechanism. This issue is important because if the organization plans to give primary importance to compliance it will need procedures that are relatively more formal so that the various stakeholders—complainants, staff and management, member states, etc.—know their rights and responsibilities in the process and how they will be affected by the findings and recommendations of the mechanism. If the most significant objective is problem-solving, then the mechanism can have relatively more flexible and informal procedures because each stakeholder in the problem-solving process will be able to determine for itself how to deal with any findings or recommendations of the inspection mechanism.

The second issue arises in those cases where the organization is contemplating giving its inspection mechanism some compliance review responsibilities. In these cases, the organization needs to determine if its operational policies and procedures are sufficiently well developed that they can meaningfully serve as the basis for compliance reviews. If the operational policies and procedures are not sufficiently detailed and do not clearly establish the obligations for the organization's staff and management or the standards with which they must comply, it is very difficult for the inspection mechanism to conduct a credible compliance review. In this sense, the establishment of inspection mechanisms can have a salutary effect on the development of operational policies and procedures at the organization, thereby helping to promote a more effective rule-based culture in what are ultimately organizations designed to serve the public interest.

1. Option 1: An Inspection Mechanism

In this option, the organization would establish an independent mechanism with the mandate to investigate complaints from affected persons who allege that they have been harmed or threatened with harm caused by the failure of the organization's staff to comply with all its operational policies and procedures in the relevant operation. The focus of this mechanism would be on compliance review. However, it is possible to incorporate into the mechanism both an ability to engage in some problem-solving activities and the responsibility to provide some

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lessons learned in its reports and publications.

There are three different versions of an inspection mechanism that an international organization could adopt. The advantages and disadvantages of each of these versions are discussed below.

a. *Version 1: Inspection Committee, Inspection Unit and Roster of Experts*

This version is similar to the inspection mechanisms previously used by the Asian and the Inter-American Development Banks. It envisages an inspection function that consists of an Inspection Committee that is a sub-committee of the Board of Directors, an Inspection Unit and a Roster of Experts. The Inspection Committee will make recommendations to the Board on whether or not to authorize an investigation and on how to respond to the findings of the investigating Panel and the management response thereto.

The Roster of Experts will consist of ten to fifteen members and will assist the Inspection Committee. The Board of Directors will appoint the members of this Roster to one non-renewable fixed term on the Roster. In order to be eligible for appointment to the Roster, a person may not have worked for the organization for a stipulated period prior to his/her appointment. In addition, the expert may not work for the organization in any other capacity during the time of his/her appointment and for a set period after the term of his/her appointment ends. Given the size of the Roster and the requirement that no member be selected to work on a case in his/her own country, no member of the Roster can be assured that he/she will be appointed to a Panel during the time of his/her appointment.

In this version, the Inspection Committee, upon receipt of a complaint, would appoint an expert from the Roster of Experts to conduct a preliminary review and make a recommendation on whether an inspection is warranted. Based on this report, the Inspection Committee will decide whether or not to recommend to the full Board of Directors to adopt, reject or modify the recommendation of the expert. If the Board of Directors, following the Committee's recommendation, decides to authorize an investigation, the Inspection Committee will appoint an inspection Panel to conduct the investigation. This Panel will consist of three experts selected from the Roster. This Panel will present its report, which may include both findings of fact and recommendations for corrective action, to the Inspection Committee. After the Inspection Committee reviews this report and the management response thereto, it will present this information and its own recommendations for corrective action to the Board of Directors. The Board will make the final decision on how to deal with the issues raised in the

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investigation. The Inspection Committee will be responsible for monitoring implementation of the Board's final decision.

An Inspection Unit, whose staff will be drawn from the staff of the organization, will support the Inspection Committee. This Unit, which may only consist of one professional and support staff, will act as the secretariat for the Committee. The Unit will be the "address" to which affected people will send their complaints, and it will determine if they meet the basic requirements for eligibility before submitting the complaint to the Inspection Committee. In addition, the Unit will act as the secretariat for the three-member Panel that will conduct the investigation.

Advantages and Disadvantages of Version 1

This version has two advantages. First it is relatively cheap. The cost of the staff for the Inspection Unit is the only fixed cost in this version. All other costs will be variable costs that depend directly on the number of complaints the inspection function receives and the number of investigations the Board chooses to authorize. One indication of how much the fixed costs of this option would be is that the 2001 operating budget for the IADB Mechanism, whose Inspection Unit has a staff of one professional and support staff, was \$236,500.

Second, the mechanism is clearly independent of the organization's management. The Board of Directors or its Inspection Committee makes all decisions and all appointments related to a particular investigation. In addition, the staff of the Inspection Unit is directly accountable to the Inspection Committee.

In considering the disadvantages of this version, it is useful to note that the Asian Development Bank and the Inter-American Development Bank have both experienced difficulties with their inspection mechanisms. The Asian Development Bank experienced so many problems with its inspection mechanism that it undertook an extensive and expensive review of its mechanism.²⁶⁰ This review, which included consultations with interested parties in ten different cities around the world, was a consequence of the political and public relations problems that it experienced in the Samut Prakarn case. In this case, the Asian Development Bank was forced to deal with an investigation that was blocked by a non-cooperating borrower government and the political tensions that this caused in the Bank Inspection Committee, its equiva-

260. See discussion of Asian Development Bank's inspection function *infra* Section II.A.3.

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lent of the Inspection Committee.

The Inter-American Development Bank model has also faced difficulties.²⁶¹ Potential users found its initial structure to be very user-unfriendly because the complaints had to be sent to the Office of the President. Despite changes that have corrected this problem, there is still substantial doubt about the independence and efficacy of the mechanism. This is based partly on the fact that the final report in the mechanism's first case was not publicly released and the outcome of the investigation was not clear. In addition, a second case has moved more slowly than the procedures would lead one to expect. The small number of cases received by the IADB inspection mechanism is at least in part attributable to this lack of public confidence in the mechanism.

The first problem with this version is that the key decision about whether to authorize an inspection is made by a Board committee and then ratified by the full Board while the factual record in the case is undeveloped. This means that the Board is making its decision based on the relatively unsubstantiated allegations in the complaint and the response of management, who have extensive knowledge of the project or operation and who, in all likelihood, are challenging the complainant's allegations. The result is that the Board is being asked to authorize an investigation when the information available to it indicates that a project or operation funded by the organization has caused harm and the organization's management denies that the harm was caused by their failure to comply with Bank operating policies or procedures. This creates the implication that the harm was caused by some other participant in the operation, such as the member state. Experience at both the World Bank and the Asian Development Bank suggests that Board decisions on inspection matters when the Board has such limited information become very contentious and politicized.

It was the bitterness caused by these debates that caused the World Bank Board of Directors to authorize the second review of the World Bank's Inspection Panel. These bitter disputes have been avoided following the second review and the resulting decision to strictly limit the Board's discretion in accepting or rejecting the Panel's recommendation on whether or not to authorize an investigation. The experience of the Asian Development Bank suggests that the problem is unlikely to be solved by delegating the decision to a Board sub-committee.

261. See discussion of Inter-American Development Bank inspection function *infra* Section II.A.2.

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The second potential problem with this model is that the organization is likely to experience difficulty in finding qualified people to serve on the Roster of Experts. The reason is that the experts who know the organization well may be reluctant to serve on the Panel when they realize that it will preclude them from working in any other capacity for the organization during their term of service on the Roster, without any compensating assurance of work as an expert for the inspection function.

A third problem arises from the fact that the members of the Panel of Experts do not necessarily know each other and do not necessarily know the inspection function very well. This means that each time a Panel is appointed for a specific case, the Panel will need to get to know each other and learn to function effectively as a group and will have to learn about the inspection mechanism's procedures for conducting investigations. The Panel's steep learning curve will need to be repeated in each case, which will slow down the process and increase the costs of an investigation if the Panel is expected to do highly professional work.

Fourth, there is likely to be some concern about the independence of the Inspection Unit. Since the personnel of this Unit will be drawn from the international organization's staff, they will not appear to outsiders to be truly independent unless they are precluded from returning to employment with the organization after working for the Inspection Unit. However, the possibility that the number of cases received by the organization's inspection function may be small (based on the experience of the IADB it could be about one to two cases per year) and the limited role that the Unit will play in the inspection function suggest that this position will not necessarily be an attractive one. The absence of a relatively senior person in this position may undermine public confidence in the inspection mechanism and faith in the organization's commitment to having an effective inspection function.

Fifth, this version cannot easily be adapted to incorporate greater problem-solving responsibilities. The Executive Directors on the Inspection Committee cannot be expected to engage in problem-solving, and it is unlikely that the affected people would be willing to accept the staff of the Inspection Unit as problem-solvers, if the staff is not seen as having sufficient stature in the Bank. To overcome this difficulty, the Inspection Committee would have to appoint an expert from the Roster of Experts for this purpose. Such ad hoc appointments, particularly if made without sufficient consultation with the affected persons

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and other interested parties, have a higher risk of failure than would be the case if the identity of the problem-solver were known to all interested parties before the complaint was filed.

The mechanism can also not easily be adapted to playing a greater lessons learned function. Neither the members of the Inspection Committee nor the staff of the Inspection Unit are in a position to perform this task without questions being raised about their suitability for the task. It is also unlikely that an expert would be able to effectively perform this function if he/she has not been involved in all the cases received by the mechanism. The nature of a roster system makes it unlikely that there would be one expert with such extensive involvement in the work of the mechanism.

b. Version 2: Full-Time Inspection Panel

This version is modeled on the World Bank's Inspection Panel. In this version, the organization Board of Directors would appoint a three-member Panel, each of whom would serve a fixed non-renewable term in office. Only the chair of the Panel, who would be appointed to a one-year term by the members of the Panel, would work full-time for the inspection function. The other two Panel members would commit to be available to work on the Panel as and when needed. The Panel would be supported by a small permanent staff that would be drawn from the staff of the organization.

The scope of jurisdiction and the operating procedures of this version would be similar to those of the World Bank's Inspection Panel. The one difference would be that the Panel would have the authority to decide for itself whether or not to conduct an investigation. The Board would retain the power to make the final decision on how to respond to the Panel's findings from its investigation and the management response thereto.

This change in the procedures from the World Bank Panel procedures should streamline the process without adversely affecting any party's position in the process. The Board would still retain the power to make the most important decision in the process and to hold the Panel accountable for its actions. Management would still be able to raise its concerns about the eligibility of the complainants and the suitability of the complaint for investigation. The only difference is that management would now do this informally to the Panel during the investigation or formally to the Board in their response to the Panel report. Finally, the simpler procedures would work to the benefit of potential complainants.

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Advantages and Disadvantages of Version 2

The primary advantage of this version is that there is a permanent Panel that operates and is seen to operate in all respects independent of management. It is very effective in promoting confidence in the independence of the inspection function.

A second advantage is the fact that the chair of the Panel works full-time at the organization. This creates the possibility that, at least in principle, he/she gets to know the organization and its staff and management. This should help the Panel to overcome the initial suspicion that an inspection function at the organization will face.

Third, the fact that the three Panelists know that they will be working together on all Panel-related matters should increase their incentive to develop their knowledge about the procedures and practices of the inspection mechanism. This should positively affect the efficiency and efficacy of the Panel and its investigations.

Finally, the benefit of having a full-time Panel member is that this person can handle all complaints and all requests for information that the Panel receives. This creates a buffer between the international institution and the inspection function that enhances outsider confidence in the inspection function and helps depoliticize the treatment of complaints in the institution.

The primary disadvantage of version 2 is that it is very expensive. Its direct costs are a full-time secretariat and a full-time Panel chair that is paid at a senior executive's level. One indication of the cost of this mechanism is that the annual budget of the World Bank Inspection Panel is now about \$2 million.²⁶² In fact, it is most likely that the cost of this mechanism makes this option unsuitable for most organizations.

Another disadvantage is that the mechanism, because of its focus on compliance review, tends to have formal procedures that are not particularly user-friendly. This has two adverse effects. First, the fact that the procedures are not user-friendly effectively limits access to the Panel to those groups who have sophisticated knowledge of the Bank and its operating policies and procedures or who are able to retain the services of people or organizations that have such knowledge. Second, the formal procedures tend to encourage both the complainant and the institution's staff and management to view the proceedings as roughly analogous to litigation, which tends to foster an adversarial relationship between the complainant and the organization's staff and

²⁶². See discussion of World Bank Inspection Panel *infra* Section II.A.1.

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management. An adversarial relationship, in turn, may increase the total costs of the investigation.

c. Version 3: The “Virtual” Inspection Panel

This version is a mix of versions 1 and 2. It seeks to overcome the problems of the roster system associated with version 1 and the high costs associated with version 2.

In this version, instead of a Panel that consists of a full-time chair and two part-time Panelists, this version would have a “virtual” Panel of three members who would only be convoked when a complaint is submitted. The three members of this Panel, who would only work on an as needed basis, would be paid a small retainer to assure their availability when cases arise. In addition to the retainer, the Panelists would also be paid for participating in each particular Panel investigation. One of these Panelists would be appointed as chair of the Panel. This person would agree to be available to conduct preliminary reviews of any complaints received by the Panel. The Panel would be supported by a small secretariat that consists of possibly one professional and one support staff.

It should be noted that the EBRD and the AFDB have adopted a version of this “virtual” Panel. Their mechanisms have a Roster of Experts, who are or will be paid a small retainer. In return for this retainer, EBRD’s experts are required to spend five days a year at the EBRD learning about the Bank and its operating policies and procedures. This will have the salutary effect of enhancing the efficacy of the experts in the event they are actually required to conduct an investigation. To date, it is unclear exactly what responsibilities the AFDB’s experts will have.

The Panel would be assisted by a small secretariat, whose function would merely be to provide administrative support to the Panel. This secretariat may need to be expanded to provide adequate support when the Panel is involved in an investigation.

The scope of jurisdiction and the operating procedures of this model could be identical to those of the World Bank Inspection Panel or they could be designed to be more flexible to allow for the Panel to undertake problem-solving activities. In the latter case, the chair of the Panel could be authorized, when a complaint is received, to engage in some preliminary problem-solving. This could involve the chair engaging in discussions with all interested parties and seeing if it is possible to fashion a solution that satisfies all interested parties. If this in fact did happen, then the chair would recommend against an investigation to the Board and in the report to the Board would explain the solution

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that was reached. If it is not possible to solve the problem, then the chair would consult with the other Panel members and they would decide whether or not to recommend an investigation. The Panel would base its decision on the same criteria that would have been applicable if the chair had not engaged in problem-solving activities.

This model could also be given a lessons learned responsibility. The virtual Panel could present an annual report to the Board, management and Board of Governors of the Bank that includes a section on the lessons it has learned from its activities. This report, if applicable, could include recommendations on what steps the Bank can take to enhance compliance with its operating policies and procedures and to improve these policies and procedures.

In this version of the option, the Panel would be given the authority to monitor the implementation of the decisions reached by the Board at the end of the investigation.

Advantages and Disadvantages of Version 3

This version has one advantage over each of the other versions of Option 1. First, unlike in version 1, the identity of the Panelists in any particular case will be known in advance. This should enhance confidence in the mechanism. It also creates incentives for Panel members to develop their expertise in inspection matters. This should reduce their learning curve in any particular case, thereby improving the efficiency and efficacy of the mechanism. It should also make it easier than is the case in version 1 for the virtual Panel to play both a problem-solving and lessons learned role, in addition to its primary compliance review function.

Second, the costs of this mechanism would be lower than the costs of version 2. The reason is that none of the Panel members work full-time for the inspection mechanism, and the permanent staff of the mechanism is no bigger than the staff of the Inspection Unit in version 1. Moreover the fixed costs of this mechanism will only exceed the fixed costs of version 1 by the amount of the retainers paid to the three Panel members.

The primary disadvantage of this mechanism follows from its “virtual” nature. The lack of a full-time presence of a Panelist at the organization means that the Panel will have less opportunity to get to know its personnel. This could adversely affect the Panel’s standing within the organization thereby impairing the efficacy of the inspection mechanism.

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2. Option 2: The Ombudsman²⁶³

In this option, the organization would appoint an Ombudsman. This office would consist of one full-time or part-time professional, who would be a highly respected expert recruited from outside the organization, and a support staff.

The Ombudsman differs from the previous option in that its primary focus is on problem-solving. Thus the Ombudsman would establish much less stringent requirements for accepting complaints and much less formal operating procedures than those utilized in the first option. In fact, the Ombudsman would accept any complaint that appeared to identify a bona fide problem arising from an operation of the organization that has caused or threatened to cause harm to affected people. It would be incumbent on the Ombudsman to investigate the complaint to see if it is suitable for problem-solving activities. If this is not the case, the Ombudsman would so inform the complainant and explain why the Ombudsman was unable to help the complainant. In all other cases, the Ombudsman would attempt to solve the problems raised in the complaint. In the event that it was successful in solving the problem, the Ombudsman would prepare a report to the Board, the complainant and to the organization's management describing the solution and the history of the complaint. If the Ombudsman is not successful, he/she would prepare a report explaining the history of the complaint, the efforts undertaken to resolve the problem and, if appropriate, observations on the cause of the problem and the steps that the organization could take to avoid such problems in the future. The Ombudsman would therefore play a potentially useful and creative lessons learned role in the organization. This role could be enhanced by having the Ombudsman discuss some of the lessons he/she has learned from the complaints he/she has received in his/her annual report to the Board.

The Ombudsman would also be responsible for monitoring the implementation of the solutions that he/she helps devise for the

263. Prior to the establishment of the World Bank Inspection Panel, the author had proposed that the World Bank establish an ombudsman to receive complaints from non-state actors. See Daniel D. Bradlow, *Why the World Bank Needs an Ombudsman*, FIN. TIMES, July 14, 1993, at 13; see also Daniel D. Bradlow, *Opening Statement to the Sub-Committee on International Financial Institutions of the Standing Committee on Finance*, House of Commons, Canada (Feb. 18, 1993). The author had the opportunity to discuss his proposal both at an informal seminar for the Bank's Board of Directors and with the Bank's General Counsel. The proposal was influential in the design of the Inspection Panel. See I.F.I. Shihata, *THE WORLD BANK INSPECTION PANEL IN PRACTICE* 18-19 (2d ed. 2000).

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problems raised in the complaints he/she receives.

The Ombudsman can only perform limited compliance review functions because if he/she is to be a credible problem-solver, all parties must have confidence in his/her impartiality. If the Ombudsman is responsible for compliance review as well as problem-solving, it will adversely affect the willingness of the organization's management and staff to engage in problem-solving with the Ombudsman. The reason is that they will be concerned that the Ombudsman may use the information he/she learns in the course of problem-solving in compliance reviews and that his/her findings in regard to compliance matters may influence his/her problem-solving efforts and vice versa. Consequently, the Ombudsman's contribution to compliance review should be limited to comments on compliance issues in the case and in the annual reports of the Ombudsman to the Board.

Advantages and Disadvantages of Option 2

The first advantage of this mechanism is that it has the potential to solve the problems faced by affected persons.

The second advantage is that it is user-friendly, having operating procedures that are informal and flexible. This means that the mechanism should be relatively easy for affected people to access without too much outside assistance. It should also be possible for the Ombudsman to be creative in designing solutions to the problems with which he/she is presented.

Third, the mechanism functions with great independence. In fact, it is not necessary for the Board of Directors to be involved in the Ombudsman's handling of any particular case. However, the Ombudsman is accountable to the Board. Consequently, he/she will report to the Board on his/her handling of the cases that he/she receives and on the overall conduct of his/her operations. If the Board would like to play a more active role in the process, it could limit the Ombudsman to making his/her reports in the form of recommendations, which do not become binding on the parties until adopted by the Board.

The major disadvantage of this mechanism is that it plays a minimal role in compliance. Its clear focus is on problem-solving and lessons learned. However, in assessing this cost, it is important to carefully evaluate whether the organization's operating policies and procedures have the detail and broad coverage that make them suitable for compliance reviews by an inspection mechanism. In order for compliance reviews to be meaningful for affected people, it is necessary that

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the organization have policies and procedures that establish clear standards and guidelines for its staff.

An important qualification on this mechanism is its novelty. The CAO, because its authority is limited to reviewing IFC and MIGA operations, only has experience with problem-solving with private sector operations. It is not clear that its success in this area can be easily transferred to operations that involve the public sector, particularly if the sovereign itself is a necessary party to the problem-solving process. It should be noted that the new mechanisms at the African Development Bank, the Asian Development Bank and the European Bank for Reconstruction and Development have clear problem-solving mandates involving both public and private sector projects. However, they are too new to be able to assess their efficacy and problem-solving success in public sector projects.

3. Option 3: Combined Compliance Review and Problem-Solving Mechanism

This option, which combines a compliance function and a problem-solving function into one mechanism, consists of a Director of the Compliance Review and Problem-Solving Mechanism (the Director) and a Roster of Experts. The newly created Independent Review Mechanism at the African Development Bank is the closest in form and function to this option.

The organization would appoint the Director, who would have the status of a senior member of the organization's staff, to a fixed term that was non-renewable. The Director would work exclusively on compliance review and problem-solving matters. In order to protect the independence of the Director, this official could not have worked for the organization in any capacity for at least two years before his/her appointment as Director and could only be removed from his/her position for cause, and he/she would not be allowed to work for the organization for a stipulated period after his/her term of office ends.

The Roster of Experts would consist only of three members who would be appointed by the Board of the organization on the recommendation of the head of the organization. The members of the Roster would be appointed for a fixed non-renewable term. In order to protect the independence of the experts, they could not have worked for the organization in any capacity for at least two years before their appointment to the Roster, could only be removed from the Roster for cause and would not be allowed to work for the organization for a stipulated period after their term of office ends. During their term of office they would work for the institution on an "as needed" basis and

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would be ineligible to work for it in any capacity that is not connected to the Compliance Review and Problem-Solving Mechanism. The members of the Roster would be paid a small retainer to ensure their availability when needed. In return they would be expected to spend a stipulated number of days at the organization learning about the Bank and its operating policies and procedures.²⁶⁴ They would also be compensated for the work that they actually do for the Compliance Review and Problem-Solving Mechanism.

If the organization does not want to pay the members of the Roster a retainer, it would need to appoint a larger Roster of Experts—probably ten experts—to ensure that at least some experts are available when the Mechanism needs them. To protect the independence of the experts, they would be precluded from performing any other functions for the organization during their service on the Roster but would only be paid for the services they perform for the compliance review mechanism. Based on the experience of the Inter-American and Asian Development Banks with this approach to a Roster, there are reasons for doubting that some organizations would be able to assemble a ten- to fifteen-member Roster of qualified people. The primary reason for this is that the experts are being asked to forego any possibility of working for the organization both during and for a stipulated period after their term on the Roster without being given any assurance that they will ever be used by the Compliance Review and Problem-Solving Mechanism. This is likely to decrease the attractiveness of the position for many qualified experts.

The Director would receive all complaints from affected people alleging that they have been harmed by an operation of the organization. Complainants could state whether they are seeking problem-solving or compliance review functions or both in regard to their complaint.

Upon receipt of the complaint, the Director would conduct a preliminary review to determine if the complaint contains a bona fide allegation of harm arising from a Bank-funded operation. Once this was established, the official would decide whether to accede to the request of the complainant or to make his/her own decision on whether the case was more appropriate for problem-solving efforts or a compliance review. The Director would inform the President, the Board and the complainant of his/her decision and the reasons for the decision.

264. The EBRD requires the members of its Roster of Experts to spend five days per year at the Bank learning about the Bank and its operating policies and procedures.

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If the Director decides that the case is suitable for problem-solving, the Director will invite all relevant parties to participate in a problem-solving exercise that he/she would conduct. If the problem-solving exercise succeeds in resolving the issue, the Director will prepare a report describing the case and the solution. This report will be provided to all participants in the problem-solving exercise and to the Board and the President of the organization. One element of the solution should be that the Director will be involved in monitoring implementation of the solution. In the case of projects that have not yet been submitted for Board approval, the Director would submit a report to the Board on the implementation of the solution when the project was presented for Board approval.

If the problem-solving efforts are not successful, either within a stipulated period of time or by common consent of the parties, the Director could declare the problem-solving exercise a failure and submit a report discussing the efforts and the reasons for their failure and making recommendations of steps the organization could take to deal with the unresolved issue. This report should be submitted to the participants in the problem-solving exercise, the Board and the President. The President, in cases that have not yet been submitted to the Board, and the Board, in cases of projects that it has already approved, would then decide to accept or reject the expert's recommendations for remedial action. If the President or Board decides to reject the recommendation, he/she/it should inform all participants of his/her/its reasons for doing so.

The Director can include a recommendation that the project undergo a compliance review in his/her report. Such a recommendation would be appropriate if the Director determines that the complainant has been harmed or threatened with harm by the organization's operation and that the harm or threat was caused by the failure of its staff and management to comply with any of the organization's policies and procedures. The Director's recommendation would be submitted to the Board for ratification.

This means that compliance reviews can be initiated in one of three ways: by request of the complainant, on the recommendation of the Director either upon receipt of the complaint or after the problem-solving exercise. In all cases, the Board would decide whether or not to adopt the recommendation. It should be noted, however, that if the complainant requests both a problem-solving exercise and a compliance review, the request for compliance review will not be addressed until the Director rejects the request, the problem-solving exercise is successfully completed or the Director has declared the exercise a

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failure.

The compliance review would be conducted by a compliance review Panel that consists of two experts from the Roster of Experts and the Director. Consequently, the recommendation to have a compliance review should include advice on which two members of the Roster of Experts to appoint to the Panel that will conduct the compliance review. The Board will make the final decision regarding the appointment of the experts to the Panel and of the chair of the Panel.

The two experts, with one acting as chair of the Panel, would be responsible for conducting the compliance review. The Director would participate in the review and in the discussions on the report about the investigation but would only have a vote in the case of a deadlock on the Panel.

After completing its investigation, the Panel would present its findings of fact and recommendations for corrective action to the Board of Directors. The Board, based on this report and management's response thereto, would decide whether to accept, modify or reject the recommendations of the Panel.

The Director, working with the Roster of Experts, should be required to prepare an annual report on the activities of the Compliance Review and Problem-Solving Mechanism. The report, which would be submitted to the Board and should be made publicly available, should discuss, in addition to the year's activities, some of the trends that have emerged from the year's problem-solving exercises and compliance reviews and any lessons it has learned about the Bank's operating policies and procedures during the course of the year. Thus, the annual report of the Director would serve a lessons learned function.

This option is most similar to the AFDB's Compliance Review and Mediation Unit. It is also similar to the EBRD's Independent Recourse Mechanism. However, there are two important differences from the latter. The first is that, unlike the CCO at the EBRD, the proposed Director would only work on matters relating to the Compliance Review and Problem-Solving Mechanism. This is important for four reasons. First, it should ensure that the Mechanism is receiving all the attention it needs. Second, the fact that a senior official works exclusively on these issues should raise the credibility and prestige of the Mechanism. Third, it would avoid the risks of any conflicts between the different roles that the CCO plays. Fourth, the fact that the Director, unlike the CCO, is appointed to this post from outside the organization and for a non-renewable term should enhance stakeholder confidence in his/her independence.

The second important difference is that the mandate of the Mecha-

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nism will allow it to accept complaints arising from any of the organization's operational policies and procedures. In the case of the EBRD, currently only the Environmental Policy and Public Information Policy are subject to the Independent Recourse Mechanism. The broader scope of the proposed Mechanism should enable it to avoid unnecessary fights about whether certain complaints fall within the scope of its mandate. In addition, it will avoid the risk of future operational policies and procedures being politicized as the Board debates whether or not a particular new policy or procedure should be submitted to the inspection mechanism's "jurisdiction." It should also be noted that the inspection mechanisms at the World Bank and the Inter-American and Asian Development Banks allow claims involving all their operational policies and procedures to be investigated. It is only the EBRD, the CAO at the IFC and MIGA and complaints regarding private sector projects to the CRMU at the AFDB that are limited to dealing with environmental and social issues.

Advantages and Disadvantages of Option 3

The first advantage of this option is that it establishes a mechanism that has both compliance and problem-solving components. In this sense it combines the best of all the above options. In addition, the annual report, with its discussion of the trends that have emerged from the cases handled by the mechanism, lessons it has learned about the organization's operating policies and procedures and recommendations on how to resolve the issues it has identified in the report, should serve a useful lessons learned function for the organization.

The second advantage is cost. The direct cost of this mechanism need not be any higher than the cost of the cheapest of the other options. Like the Inspection Unit (see Version 1 of Option 1) and the Ombudsman, the fixed cost of this mechanism would only consist of the cost of the Director and a support staff. In addition, if the three-member Panel option is chosen, there will be the cost of the small retainer paid to the members of this Panel. All other costs will be directly related to the cases that it receives.

The primary disadvantage of this mechanism is that, by leaving open the possibility that a failed problem-solving effort could result in a compliance review, it may reduce the incentives for the parties to engage as actively as possible in problem-solving activities. However, this tendency would be reduced if experience indicates that the parties do not necessarily gain more from a compliance review than from a well-organized problem-solving exercise.

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V. CONCLUSION AND RECOMMENDATION

A. *Concluding Observations*

Based on the above analysis it is possible to draw a number of conclusions. First, over time there have been changes in the structure of the inspection mechanisms used by the MDBs. In fact, it is possible to identify three “generations” of inspection mechanisms. The first generation consists of the World Bank’s and the Inter-American Development Bank’s inspection mechanisms and the original mechanism created at the Asian Development Bank. The second generation is the Compliance Advisor Ombudsman at IFC and MIGA. The third generation is only now beginning to emerge and consists of the new mechanisms at the African Development Bank, the Asian Development Bank and the European Bank for Reconstruction and Development.

The first generation mechanisms were designed to be compliance review mechanisms. They were not given any problem-solving authority, although they found, in fact, that the requesters expected them to play a problem-solving role. The second generation was given both a problem-solving and compliance review function. Its structure sought to combine both the problem-solving and the compliance review in one office. The independence of this office was protected by taking the office outside of the normal lines of authority at IFC and MIGA and having the head of the office report to the President of the World Bank Group rather than to the executives in charge of daily operations at IFC and MIGA. In addition, its mandate, because of the nature of IFC and MIGA’s work, is limited to private sector projects. The third generation mechanisms tend to divide authority relating to the compliance review and the problem-solving functions so that they have a staff member who is responsible for problem-solving and an independent compliance review mechanism that reports to the Board of the Bank. In these mechanisms the staff member in charge of problem-solving reports through the normal lines of authority in the organization while the compliance review personnel report directly to the Board of the institution. The third generation mechanisms apply the problem-solving function to both public sector and private sector projects.

This “generational” progression in the functioning of the inspection mechanisms is not surprising. In reality, non-state actors are more interested in having the problems caused by the organization’s operations solved than they are in ensuring that the staff and management comply with the applicable operational policies and procedures, which may not be well known by them. On the other hand, the senior management of the organization does have a significant interest in

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compliance review. Consequently, the inspection mechanism cannot satisfy both groups of stakeholders if it does not perform both of these functions. In fact, the World Bank's Inspection Panel has sought to overcome this gap by informally playing a problem-solving role whenever it sees an opportunity to do so.

The second lesson is that, in order for inspection mechanisms to be effective compliance review mechanisms, international organizations need detailed operational policies and procedures. Without such detailed policies and procedures it is difficult for the staff and management of these international organizations to know the standards they are expected to uphold in their work. In addition, it is hard for non-state actors to know what to expect from the staff and management of the international organizations which directly affect their lives. In the absence of such clear policies and procedures, the creation of an inspection mechanism can merely result in a messy politicized process in which non-state actors are trying to impose responsibility on staff and organizations, and the staff and management are trying to avoid responsibility post hoc.

In this regard, in order for detailed policies and procedures to be viewed as legitimate, they need to be developed through a rule-making procedure that has the confidence of all relevant stakeholders. This means that the establishment of inspection mechanisms generates an impetus towards establishing more transparent and participatory rule-making procedures. This development can already be seen in the member organizations of the World Bank Group, where a number of important operational policies and procedures have only been adopted after a public notice and comment period.²⁶⁵ In this sense, the creation of inspection mechanisms appears to be having a positive effect on the development of international administrative law.

The third lesson is that for an inspection mechanism to maximize its value to the organization it needs to have a clear lessons learned function. There are two reasons for this. First, the unique perspective of the inspection mechanism, based on the fact that all its activities are

²⁶⁵. It should be noted, however, that the impact of the inspection mechanisms on the operational policies and procedures of the World Bank is more complicated than this positive development would suggest. The World Bank, for example, in recent years has been changing the format of its operational policies, seeking to split the details contained in its old operational policies into three documents, only two of which establish mandatory rules for Bank staff. The impact of this change on the Inspection Panel is not yet clear, although a number of observers are pessimistic about its likely impact. See Kay Treacle, Jonathan Fox & Dana Clark, *Lessons Learned, in DEMANDING ACCOUNTABILITY*, *supra* note 14, at 247-75. A full exploration of the implications of this shift for the evolution of administrative procedures in the Bank is beyond the scope of this Paper.

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initiated by non-state actors who have been directly and adversely affected by the international organization's operations, means that it is likely to have information on the actual impact of the organization's operations and its policies and procedures that are not available to any other part of the organization. Consequently, the mechanism has the potential to help the organization by informing it about the lessons it is learning from this information. Second, the lessons learned function helps the inspection mechanism build credibility with all stakeholders in the international organization. It is a way to demonstrate to the organization's staff and management and to its member states that the purpose of the mechanism is not "finger pointing" but improvement in the operations of the organization. The lessons learned function also demonstrates to non-state actors that the organization is interested in improving its operations and in avoiding the identified problems in the future. Based on these observations, it is clear that any international organization interested in creating an inspection mechanism or rethinking the structure of its current mechanism will need to create a mechanism that is capable of performing problem-solving, compliance review and lessons learned functions.

B. Recommendation

Of the various options identified above, the one best qualified to satisfy all the elements required for effective inspection mechanisms is the Compliance Review and Problem-Solving Mechanism described in the third option. While the mechanism has multiple functions, it is still consistent with the clarity of purpose requirement because the mechanism always makes explicit what function it is performing at any given time. The mechanism, because it has simple procedures for initiating problem-solving exercises and compliance reviews, offers potential complainants a user-friendly mechanism for having their concerns about the organization's operations addressed in a way that is efficient, effective and inexpensive. The structure of the mechanism ensures that all of its different actors are able to make independent decisions and are relatively independent of the organization's management. They also will have all the necessary investigatory powers.

C. Possible Terms of Reference

The following is a set of possible terms of reference for a Compliance Review and Problem-Solving Mechanism (CRPSM) that should be applicable to any international organization interested in creating an inspection mechanism:

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Structure of the CRPSM

- 1) The CRPSM shall consist of a Director, who shall work full-time for the organization, and a three-member Roster of Experts, who shall work only when needed by the organization.
- 2) The Director shall be appointed for a five-year term that is renewable only once and shall not be eligible to work for the organization for a two-year period after his/her tenure as Director ends. The Director, who shall hold the rank of a senior official, shall not have worked for the organization in any capacity for at least two years prior to his/her appointment to the position.
- 3) The members of the Roster of Experts shall be selected by the representatives of the member states of the organization, working through the appropriate body in the structure of the international organization on the basis of a recommendation from the chief official of the organization. They shall not have worked for the organization in any capacity for two years before their appointment to the Roster. They shall be selected on the basis of their knowledge of the operating conditions of the international organization, expertise, experience, integrity and ability to act independently. In addition, in making these appointments, the relevant decision-makers shall pay due regard to maintaining a reasonable degree of diversity of expertise, experience, nationality and gender among the members of the Roster.
- 4) The members of the Roster of Experts will be paid a retainer for serving on the Roster in order to ensure their availability to work for the CRPSM. They will also be required to spend five days per year at the organization learning about the operations and operating policy and procedures of the organization and consulting with the Director about the CRPSM's annual report.
- 5) The members of the Roster of Experts can only serve one five-year term on the Roster of Experts and, during their term on the Roster, can only be removed by a decision of the relevant body representing the member states of the organization upon a showing of good cause. They will not be eligible to work for the international organization for a two-year period after the end of their term.

Problem-Solving Function

- 1) The Director of the CRPSM is authorized to receive requests to undertake a problem-solving exercise from any person or group of two or more persons who contend that they have been harmed or are threatened with harm by an operation, which is

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- not yet complete, and which is either funded by the international organization or in which the international organization plays a key role, depending on the nature of the organization.
- 2) The Director of the CRPSM is authorized to receive requests for a problem-solving exercise from any individual or organization who can demonstrate that he/she/it represents any person or group of people who have been harmed or are threatened with harm by an organization-funded operation.
 - 3) The request for a problem-solving exercise must be in writing but does not have to conform to any specified format. It must identify the operation which is alleged to be the cause of the harm, and it must explicitly state that the requester has been harmed or is threatened with harm by the identified operation. The request should also indicate what efforts, if any, the requester has made to communicate his/her/its concerns to the organization's staff and management.
 - 4) The Director of the CRPSM has the exclusive authority to decide whether or not to accede to the request for a problem-solving exercise. However, if the Director decides to reject the request, he/she shall provide the requester and the relevant decision-making body that represents the member states of the organization with a written explanation of his/her decision.
 - 5) The Director of the CRPSM, in undertaking a problem-solving exercise, has the authority to undertake all actions he/she deems useful in bringing the requested problem-solving exercise to a successful conclusion and has access to all organization staff and records that he/she considers relevant to the problem-solving exercise. In regard to information supplied by the organization's staff, the Director shall comply with all the requirements of the organization's information disclosure policy.
 - 6) The Director of the CRPSM has the authority unilaterally or in consultation with all the participants in the problem-solving exercise to terminate the exercise at any time whether or not it has been successful.
 - 7) Within a stipulated period after the conclusion of the problem-solving exercise, the Director of the CRPSM shall prepare a report describing the problem-solving exercise, the reasons for terminating the exercise and any recommendations that he/she deems appropriate for resolving the problems identified in the exercise. This report shall be submitted to the chief executive officer and the relevant body representing the member states of the organization, the complainant and all other par-

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ties who have participated in the problem-solving exercise. The report shall also be made public except for those portions that include information given by the parties to the Director of the CRPSM in confidence or whose disclosure would violate the information disclosure policies of the organization.

- 8) In the event that the problem-solving exercise has been successful, the Director of the CRPSM shall include in his/her report a program for monitoring the implementation of the results of the problem-solving exercise.
- 9) In his/her report at the end of the problem-solving exercise, the Director of the CRPSM can recommend that the matter be submitted to a compliance review, regardless of whether or not the requester had originally requested a compliance review.

Compliance Review Function

- a. The CRPSM is authorized to accept requests for a compliance review from any person or group of two or more persons who alleges that they have been harmed or are threatened with harm by an operation funded by the organization and that the harm has been caused by the failure of the organization and its staff and management to comply with its own operating policies and procedures.
- b. The CRPSM is authorized to receive requests for a compliance review from any organization which can demonstrate that it represents any group of two or more people who have been harmed or are threatened with harm by an operation funded by the organization and that the harm has been caused by the failure of the organization and its staff and management to comply with its own operating policies and procedures.
- c. The requests for a compliance review, which must be in writing, do not have to conform to any specified format but must identify the operation of the international organization which is alleged to be the cause of the harm, explicitly state that the complainant has been harmed or is threatened with harm by the identified operation and explicitly state that the cause of the actual or threatened harm is believed to be the failure of the organization's management and staff to comply with its operating policies and procedures. If possible, the complaint should also indicate with which operating policies and procedures it believes the organization and its staff and management have failed to comply. The complaint should also indicate what efforts, if any, the requester has made to commu-

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- nicate his/her/its concerns to the organization's staff and management. In the event that the complaint is from an organization representing a person or group of people, it must also include evidence of the organization's authorization to represent the person or group of people.
- d. The CRPSM is authorized to accept requests for compliance reviews which ask the CRPSM to keep the identity of the complainant confidential. However, it cannot accept anonymous complaints.
 - e. Compliance reviews can also be initiated pursuant to a recommendation of the Director of the CRPSM contained in the Director's report at the end of a problem-solving exercise or after reviewing a request from a complainant for both a problem-solving exercise and a compliance review and deciding to accede only to the request for a compliance review.
 - f. The Director of the CRPSM is authorized to make a recommendation to the relevant decision-making body representing the member states of the organization on whether or not to grant the request for a compliance review.
 - g. The relevant decision-making body representing the member states of the organization can accept or reject the recommendation of the CRPSM on a "non-objection" basis. If it decides to accept the recommendation, this decision-making body shall appoint two persons from the Roster of Experts to conduct the compliance review.
 - h. The recommendation of the CRPSM, the relevant decision-making body's decision and the terms of reference for the experts who will conduct the review will be conveyed to the requesters and made public.
 - i. The two experts, with the support of the Director of the CRPSM, shall conduct the compliance review. The Director shall participate in all meetings of the experts to discuss the compliance review but shall only have a vote in the event of a disagreement between the experts.
 - j. The experts shall have free access to all relevant information, documents and staff in conducting the compliance review. They are also authorized to utilize whatever investigatory techniques, including but not limited to site visits, interviews with stakeholders and document reviews, they deem necessary to conducting the compliance review. The experts are also authorized to consult with the requesters regarding any corrective actions that either the requesters or the experts may wish to recommend.

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- k. At the end of the compliance review, the experts shall prepare a report to the relevant decision-making body representing the member states of the organization detailing their findings of fact and recommendations for corrective action.
- l. The relevant decision-making body representing the member states of the organization, based on the experts' report and the management response thereto, shall decide whether to accept or reject the recommendations of the experts. They may also adopt a modified version of the recommendations.
- m. After the relevant decision-making body representing the member states of the organization has made its decision, the report of the experts, the management response and the decision of this decision-making body shall be provided to the requester and shall be made public.
- n. The Director of the CRPSM and an expert appointed each year from the Roster of Experts by the relevant decision-making body representing the member states of the organization on the recommendation of the Director shall be required to monitor the implementation of the corrective actions authorized by the Board. For as long as necessary, the Director and the expert shall submit a report at the end of each year to this decision-making body discussing the implementation of the authorized corrective actions. This report shall also be submitted to the original requesters and shall be made public.

Annual Report

- 1) Each year the Director of the CRPSM, in consultation with all members of the Roster of Experts, shall prepare an annual report to the chief executive officer and the relevant decision-making body representing the member states of the organization. The report shall be made public.
- 2) The report shall describe the work of the CRPSM during the previous year and shall include a discussion of any identifiable trends relating to the work of the organization that have emerged from the CRPSM's problem-solving exercises and compliance reviews and a discussion of the lessons that the CRPSM has learned about the impact of and challenges in implementing the organization's operating policies and procedures. The report may also contain recommendations on changes that should be made to the organization's operating policies and procedures.

APPENDIX: COMPARATIVE ANALYSIS OF INSPECTION MECHANISMS

	World Bank Inspection Panel	IFC/MIGA CAO	IADB Indep. Investigation Mechanism	ADB Accountability Mechanism	EBRD Indep. Recourse Mechanism	AFDB Indep. Review Mechanism	Export Dev Canada	UN's JIU	UN's Office of Internal Oversight	European Ombudsman	U.S. Inspector General
Structure	- 3-member Panel; chair full time; permanent staff - fixed term	- CAO; permanent staff - fixed term	- Permanent Coordinator and Roster 10-15 members - fixed term	Board Committee; Compliance Review Panel and Special Project Facilitator and secretariat from bank staff, fixed term	Chief Compliance Officer and Roster of Experts	Director of CRMU and 3-member Roster of Experts	1 permanent officer	11 full time inspectors fixed term	Under-Sec. Gen. heads office, operational independence	Full time Ombudsman - fixed term	Full time fixed term
Appointment	Panel appointed by Board on recommendation of Pres. and Committee	CAO by President of WBG	Roster - appointed by Board on nomination by Pres.	Panel appointed by Board; Project Facilitator appointed by President	Roster appointed by Board on recommendation of President; CCO is current position	- Director appointed by President in consultation with Board - Roster appointed by Board on recommendation of President		Inspection by UNGA		By European Parliament	By President and confirmed by U.S. Senate
Scope	Public sector operations only	- Social and env matters only - Private sector projects	Public and private sector	Public and private sector	Public and private sector and only Environmental Policy and Public Information Policy	- Public sector- all policies - Private sector- only env. and social safeguard policies	- Transparency - Accountability re: env. review, HR, business ethics and info disclosure	All matters relating to efficiency of services and proper use of funds		Maladministration	Audit investigation promote efficiency fraud and corruption maladministration
Exclusion	- procurement substantially disbursed loan (>95%) - fraud and corruption	Social and env. matters only	Similar to WB	Similar to WB	- procurement - fraud or corruption - complaints before other judicial or review bodies	- procurement - fraud and corruption - complaints before other bodies					

APPENDIX: CONTINUED

	World Bank Inspection Panel	IFC/MIGA CAO	IADB Indep. Investigation Mechanism	ADB Accountability Mechanism	EBRD Indep. Recourse Mechanism	AFDB Indep. Review Mechanism	Export Dev Canada	UN's JIU	UN's Office of Internal Oversight	European Ombudsman	U.S. Inspector General
Accepts Complaints from Affected People	Yes (2 or more people)	Yes - Ombudsman Compliance can arise from complaint	Yes (community)	Yes	Yes (2 or more people)	Yes (2 or more people)	Yes	No	No	Yes	No
Complaint Must Allege Violation of Operating Rules and Procedures	Yes	No Ombudsman CAO decides in compliance	Yes	Yes – only for Compliance Review Panel	No – only for compliance review	Yes	No	No	No	No	No
Representative Can File Request on Behalf of Affected People	1) Local Rep. 2) Foreign Rep. in exceptional circumstances ED or Board	Yes - Ombudsman	Local Rep. can file; Foreign Rep. exception	Local Rep.	Yes	Yes	Unclear	No	No	No	No
Requirement of Prior Approach to Management	Yes	No - Ombudsman checks with Management	No - Coordinator checks	Yes	Yes	Yes	No	No	No	No	No
Formal Procedures Established that Include Deadlines	Yes	Ombudsman - Minimal (Limited Rules on Closing Case)	Yes	Yes	Yes	Yes	No	No	Minimal	Minimal	No
Decision to Authorize Investigation	Panel recommends Board decides but limited discretion	CAO	Roster member recommends - Board decides	Panel recommends to Board Committee which recommends, Board decides	CCO recommends Board/President decides – depending on stage of project	Director of CRMU recommends to Board but if recommends against review then refers to chair of Roster to review and recommend to Board	N/A	JIU	OIOS	Ombudsman	Inspector General

APPENDIX: CONTINUED

	World Bank Inspection Panel	IFC/MIGA CAO	IADB Indep. Investigation Mechanism	ADB Accountability Mechanism	EBRD Indep. Recourse Mechanism	AFDB Indep. Review Mechanism	Export Dev Canada	UN's JIU	UN's Office of Internal Oversight	European Ombudsman	U.S. Inspector General
Powers to Investigate	Yes - documents and staff	Yes - documents and staff	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Operates as Instrument of Board Oversight or Management Tool	Board oversight	Reports to Pres ⇒ Partial management tool but independent	Board oversight	Board oversight	Board oversight except for projects not yet approved by Board	Board oversight except for projects not yet approved by Board	—	Management tool	Management tool	Oversight	Management tool
Investigation Result in Fact Finding and/or Recommendation	Fact Finding	Fact Finding and Recommendation	Fact Finding	Fact Finding and Recommendation	Fact Finding and Recommendation	Fact Finding and Recommendation	—	Fact Finding and Recommendation	Fact Finding and Recommendation	Fact Finding, Conclusion and Recommendation	Fact Finding and Recommendation
Follow-up to Report	None	Ombudsman - Yes	Yes	No	None	Yes	Yes	Report to UNGA	Yes	Yes	Yes
Lessons Learned	Limited Annual Report	Limited Annual Report but has Advisory Role	Annual Report	Annual Report	Annual Report	Annual Report-trends and lessons learned	—		Annual Report	Annual Report	Yes
Publication of Reports and Decision	Yes	Yes	Yes	Yes	Unclear from Proposal	Yes	Yes	Unclear	Yes	Yes	Yes
Primary Focus on Compliance/ Problem-Solving	- Primarily Compliance - Problem-Solving left to Management	Ombudsman - Problem-Solving but also has Compliance Role	Compliance and Problem-Solving	Compliance	Compliance and Problem-Solving	Compliance and Problem-Solving	Problem-Solving	Audit	Audit	Problem-Solving	Compliance