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Chapter 14

The World Bank Inspection Panel: About Public Participation and Dispute Settlement

Laurence Boisson de Chazournes

1. INTRODUCTION: EVOLUTION OF THE INSPECTION PANEL'S MANDATE

The World Bank Inspection Panel¹ was created by the Board of Executive Directors of the World Bank ('the Bank')² in September 1993 in the year of that Organization's 50th anniversary. It is in many regards an original institution. It is an unprecedented mechanism in the world of international organizations, insofar as it provides a direct means of controlling the Bank's operations, thus enabling certain actors to question the legitimacy of Bank activities. In addition, the Inspection Panel reveals the World Bank's complexity in regard to the institution's legal and structural characteristics, as much as in regard to the nature of its relations with its partners.

Moreover, the Inspection Panel reflects the evermore urgent need to build 'public spaces' – in the meaning attributed to that concept by the philosopher Jürgen Habermas³ – enabling unusual connections between partners of different stature, who need to exchange information, work together and even negotiate.

¹ The Inspection Panel was created in September 1993, by the adoption of two identical resolutions emanating from the Executive Board of the International Bank for Reconstruction and Development (IBRD No. 93-10) and the International Development Association (IDA No. 93-6). These resolutions provide the framework within which the Panel is to exercise its functions. The Panel has in addition itself adopted Operating Procedures to implement these resolutions. For the text of these instruments see I. Shihata, *The World Bank Inspection Panel: In Practice* (2nd edn., Oxford University Press, Oxford/New York, 2000), pp. 271–277 and 373 *et seq.* Moreover, in 1996 and 1999 the Board of Executive Directors issued further clarifications in respect of the Panel's functioning. These instruments are reproduced in Shihata, *ibid.*, pp. 320–328.

² The 'World Bank Group' is made up of five institutions: the International Bank for Reconstruction and Development (IBRD) established in 1944; the International Finance Corporation (IFC) and the International Development Association (IDA), respectively established in 1956 and in 1960; the International Center for the Settlement of Investment-related Disputes (ICSID) and the Multilateral Investment Guarantee Agency (MIGA), set up in 1965 (Washington Convention) and 1985 (Seoul Convention) respectively.

³ J. Habermas, *L'espace public: archéologie de la publicité comme dimension constitutive de la société bourgeoise* (trad. M.B. de Launay) (Payot (coll. 'Critique de la politique'), Paris, 1993), p. 324. For relatively recent developments – notably at the European level – see by the same author,

Within the World Bank, borrower states are obviously privileged partners, as the vast majority of loan operations are made with them or with related entities. Nevertheless, some grant programmes have been created, allowing the Bank to supply non-states entities, such as foundations or associations, with funds. Within the context of the preparation and implementation of operational activities, other actors may, even if they are not a party to the transactional operations, wish to intervene in order to put forward their point of view or because they advocate interests related to the development of Bank-financed operations. Such is often the case for non-governmental organizations (NGOs), be they local, national or international.

The Inspection Panel procedure is a formalization of the type of interrelation contemplated by Habermas' model: it has created for both individuals and collectivities within the borrower states' jurisdictions, a means of intervening before the World Bank and in particular, a means of coming into relation with the Board of Executive Directors, the Bank's privileged decision-making body. Thus, the Inspection Panel procedure connects individuals with the very core of the international decision-making process within this institution.

The creation of the Inspection Panel is the result of a comprehensive maturation process, the World Bank having been through important changes, especially since the end of the 1980s. At the dawn of the twenty-first century, the Bank is no longer what it was when first established in the aftermath of the Second World War. At that time, the reconstruction of the European economic systems was the primary concern. When in the 1950s, talk of 'development' first emerged to adjust activities to other regions around the world (the results in Europe of the Marshall Plan having gone beyond expected forecasts) it was mostly in macro-economic terms, with particular concern for domestic growth, via the financing of infrastructure projects. The mandate of financial institutions has since extended progressively to the extent of today embracing matters such as social development, the fight against poverty and against corruption.⁴

Development is now conceived first and foremost as a societal problem, one requiring that sustained attention be given to institutional aspects. These changes demonstrate that a new vision of development is emerging: development can no longer be based on the vertical 'trickle-down effect', but must be distributive and involve participation. If economic growth can still be considered the spearhead for development, one must nonetheless acknowledge additionally, the needs of various concerned populations and issues of redistribution.

These ideas have blossomed within the World Bank, notably thanks to the large international conferences hosted under the auspices of the United Nations

Après l'état-nation: une nouvelle constellation politique (trad. R. Rochlitz) (Fayard, Paris, 2000), p. 157.

⁴ See L. Boisson de Chazournes, 'Issues of Social Development: Integrating Human Rights into the Activities of the World Bank' in *World Trade and the Protection of Human Rights: Human Rights in the Face of Global Economic Exchanges* (Institut René Cassin, Bruylant, Brussels, 2001), pp. 47–70.

(UN). These conferences also showed that there were an increasing number and diversity of actors on the international stage. It is true that states remain the first and foremost subjects of the contemporary legal order; nevertheless, other entities have emerged internationally, be they international organizations (which, whilst established by states, have emancipated themselves to a greater or lesser extent from their control, depending on their activities), NGOs, private sector companies, or again, even private persons.

The hydroelectric construction projects at Narmada⁵ in India and in the Arun Valley in Nepal,⁶ for which World Bank financing had been solicited, and the protest that followed, have shown that the financial institution could not avoid a debate with actors with which it had not previously established any contact, such as NGOs and local populations. Thus the concepts of public participation, transparency and empowerment have progressively found their right to exist within the context of the preparation and implementation of the activities financed by the World Bank, enabling concerned groups to be heard during the elaboration phase of projects, and even to be a party to the project's execution.

New control and dispute settlement procedures accompany these changes, paving the way for consultations, negotiations and readjustments between 'traditional' partners of the international legal order, but also between the latter and a growing number of other actors who are becoming, to a lesser or greater extent, endowed with international legal capacities. The mechanism established by the World Bank Inspection Panel fits within this context.

Thus, the World Bank Inspection Panel is one of the answers given to the criticisms made by those who wanted the Bank to be more involved with non-state actors. This procedure provides individuals with a means of intervening in an international organization, enabling them to influence the latter's decision-making process (section 2 below). It also presents characteristics that demonstrate new trends in respect of compliance and dispute settlement (section 3 below).

2. PUBLIC PARTICIPATION AND THE INTERNATIONAL DECISION-MAKING PROCESS: THE PATH OPENED BY THE WORLD BANK INSPECTION PANEL

The Inspection Panel is a subsidiary body of the World Bank's Board of Executive Directors (the Board). It has been established to ensure, by the means of an investigation mechanism, better quality in the projects financed by the Organization. It has jurisdiction over the operational activities of two of its affiliates, the

⁵ On this question, see B. Morse and T.R. Berger, *Sardor Sarovar: The Report of the Independent Review* (1992); and T.R. Berger, 'The World Bank's Independent Review of India's Sardor Sarovar Projects' (1993) 9 *Am. U. J. Int'l L. & Pol'y* 33. See also Shihata, n. 1 above, at pp. 5-8.

⁶ From A. Umaña Quesada (ed.), *The World Bank Inspection Panel: The First Four Years (1994-1998)* (World Bank Publications, Washington DC, 1998); see also Shihata, n. 1 above, at pp. 102-105.

International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). Two other affiliates of the World Bank group, the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) maintain a privileged relationship with the private sector. Despite strong pressure, they have not yet created this type of mechanism. They have opted for an organ fulfilling advisory functions as well as an ombudsman's role,⁷ enabling them to avoid setting up a formalized supervisory mechanism.

Conceived as an independent body, it consists of three members,⁸ chosen mostly for their professional abilities, integrity and independence from Bank Management. They are appointed for five-year mandates by the Board, on the President's nomination. They can only be relieved of their functions by a reasoned decision of the Board. Lastly, in order to fulfil their functions, Panel members are independent of any hierarchy in their work despite being Bank civil servants.⁹

2.1 The Bank's operational policies and the promotion of the principle of public participation

The Inspection Panel procedure rests on the concept of public participation¹⁰ and, more specifically, aims at taking due account of local populations in borrower

⁷ The Office of the Compliance Advisor/Ombudsman (CAO), or 'mediating adviser' for the application of the IFC and MIGA policies. Its function, mandate and the applicable procedural requirements are to be found on the IFC website <www.ifc.org/cao/index.html>. Its task is described as follows: The CAO has three roles: 1. To advise and assist IFC/MIGA to address Complaints by people directly impacted by projects in a manner that is fair, objective and constructive (Ombudsman) 2. To oversee compliance audits of IFC/MIGA, overall environmental and social performance, and specific projects (Compliance auditor.) 3. To provide independent advice to the President and management on specific projects as well as broader environmental and social policies, guidelines, procedures and resources (Advisor) The Ombudsman role is the most innovative of the three. It is aimed at resolving issues by providing a context and process for parties to find mutually satisfactory solutions. It is focused on identifying problems, recommending actions, using conflict resolution and mediation approaches and addressing systemic issues, where necessary. An external review of the CAO was completed in July 2003: B. Dysart, T. Murphy and A. Chayes, *Beyond Compliance? An External Review Team Report on the Compliance Advisor/Ombudsman Office of IFC and MIGA* (24 July 2003).

⁸ Every year the Inspection Panel nominates a President from among its members. The President's function is to supervise the Panel's standard activities.

⁹ See paras. 2–10 of the Resolution establishing the Panel.

¹⁰ Principle 10 of the Rio Declaration on the Environment and Development (Rio de Janeiro, 13 June 1992) states: 'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided'. See Report of the United Nations Conference on Environment and Development, UN Doc. A/CONF.151/26 (vol. 1) Annex I (1992).

countries. This principle, that blossomed at the end of the 1980s, has become a key concept in efforts to ensure the effective application of projects and that they produce the expected results. The World Bank operational policies and procedures rank among the most important vehicles to promote the enforcement of this principle.

The latter are documents, elaborated and adopted by Bank Management, indicating to the Organization's staff the behaviour to be adopted in respect of the preparation and implementation of Bank-financed projects. They deal notably with subjects having social and environmental implications, such as requirements in respect of the conduct of environmental impact assessments, indigenous populations, or compensation to be paid to populations that have been resettled as a result of a project. Another requirement is that local populations be informed and consulted and be given an opportunity to put forward their point of view. Respecting the operational policies and procedures is one of the quality guarantees of Bank-financed operations.

The operational policies are internal documents and the vast majority of them are binding on Bank employees, who are required to follow their prescriptions when dealing with borrower countries.¹¹ Operational policies nonetheless have external effects, since they shape both the Bank's, and its partners' behaviour within the context of their mutual relationship during design, appraisal and implementation phases of a project. Besides, they are more and more frequently used as an assessment criterion for the Bank's projects by a civil society avid for international actors' accountability, thus becoming parameters for good conduct. This is all the more important if one keeps in mind that the World Bank acts increasingly as a facilitating body in projects uniting public and private financial actors: its operational policies can then influence the behaviour of other creditors who may be implicated in the process.

An underlying question is the legal nature of the Bank's operational policies and procedures. The scale of normativity, ranging from soft to hard, and the question of the extent to which one or other is to prevail in assessing the impact of legal norms and rules, are well known. In the context at hand, this question remains unsettled, to say the least. The same problem exists for other instruments, such as the UN Secretary General's circulars.¹² Whilst they present certain char-

¹¹ On the significance of the World Bank's operational policies, see L. Boisson de Chazournes, 'Policy Guidance and Compliance Issues: The World Bank Operational Standards' in D. Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, Oxford/New York, 2000); see also in the same volume, the chapter by D.A. Wirth, 'Commentary: Compliance with Non-Binding Norms of Trade and Finance' at pp. 330–344.

¹² See, e.g., the UN Secretary General's Bulletin of 6 August 1999, 'Observance by United Nations Forces of International Humanitarian Law' (ST/SGB/1999/13), reproduced in (1999) 81 *Revue Internationale de la Croix-Rouge* [*International Review of the Red Cross*] 812, in English. For a commentary, see L. Condorelli, 'Les progrès du droit international humanitaire et la Circulaire du Secrétaire Général des Nations Unies du 6 août 1999' in L. Boisson de Chazournes and V. Gowlland-Debbas (eds.), *The International Legal System in Quest of Equity and Universality*

acteristics of an administrative character within the organization in which they are to be implemented, operational policies also produce external effects, by 'shaping' the behaviour of the Bank's partners. In so doing, some of them contribute to the creation of norms of general international law or codify existing norms of general international law. They may also acquire the status of conventional law when their stipulations are re-used in loan and credit agreements binding both the borrower and the Bank.¹³

The creation of the Inspection Panel has made it possible to reinforce both the enforcement and impact of these policies, since they constitute the 'applicable law' in requests before the Inspection Panel. Policies and procedures determine the Panel's jurisdiction *rationae materiae*, insofar as they are one of the conditions for a request's eligibility. Thus, in the event that a local population representative in a borrower country deems the interest of that population to be affected, or even that their legitimate demands have been ignored in the process of a project's design and during implementation, and after having tried to gain satisfaction from the Bank – a step which draws on the condition of 'exhausting diplomatic remedies' in dispute settlement practice – they may seize the Inspection Panel with a complaint for the non-application of the relevant operational policies, invoking serious damage caused by this situation.

2.2 The concepts of public participation, transparency and accountability at the heart of the Inspection Panel procedure

The Inspection Panel procedure enables groups of persons affected by a Bank-financed project to seize the Panel in order to request that the Organization assess, and even correct, its own behaviour. The Panel decides on the complaint's eligibility, as well as on the merit of asking the Board for the authorization to undertake an investigation of Bank action with regard to the application of its operational policies. In the event of an investigation, the Bank may be led to enact an action plan in order to correct the litigious situation.

This process is innovative, if not a precursor, since it gives civil society a place at the core of the international decision-makers' considerations, and paves the way for ensuring accountability for the latter's decisions. This procedure also plays the role of institutional bridge between the World Bank's executive organ and the ultimate beneficiaries of the financed project. Thus, the Inspection Panel makes possible a contact between the Board and affected individuals. It is true that before the Inspection Panel was created, persons affected by Bank-financed projects could write to Bank Management, stipulating any damage which they

[L'ordre juridique international en quête d'équité et d'universalité] *Liber amicorum Georges Abi-Saab* (Kluwer Law International, The Hague, 2001), and, by the same author, 'Le azioni dell'O.N.U. e l'applicazione del diritto internazionale umanitario: il "bollettino" del Segretario generale del 6 agosto 1999' (1999) 82 *Riv. Dir. Int.* 1049.

¹³ On the legal nature of these agreements, see A. Broches, 'International Legal Aspects of the Operations of the World Bank' (1959-III) 98 *RdC* 297 *et seq.*

considered they might suffer or had suffered, but no institutionalized and independent mechanism enabled them to articulate their concerns and complaints; moreover, whilst such communications were addressed to Bank Management and staff, the Board was not informed.

The Inspection Panel's jurisdiction only extends to Bank activities. Thus, the borrower states' behaviour does not fall within its jurisdiction. The Board re-iterated this imperative in 1999, when Conclusions aimed at clarifying the Resolution establishing the Inspection Panel were adopted.¹⁴ This question had provoked ferocious discussions within the Board, since developing countries saw, under the cover of the Inspection Panel procedure, a means of circumventing respect for their sovereignty, enabling interference in their domestic affairs. They particularly opposed the use of the Panel as a tribunal by non-state actors apparently without any legitimacy to do so. This situation of mistrust among members of the Board and between some Executive Directors and the Inspection Panel, which became apparent as soon as the mechanism was established, resulted with a few exceptions in a clear departure in the Panel's functioning from what was originally conceived in the Resolution.¹⁵ The situation returned to normal with the adoption of the above-mentioned Conclusions in 1999.

It is true that the distinction to be made between the World Bank's behaviour and that of the borrower is likely to raise problems in practice, because of the permeable nature of the relationship that prevails between the World Bank and its borrowers. The notion of 'project cycle' highlights this aspect of the very close relationship, not to say dependency, between these actors in the conduct of operational activities. In its beginnings, the Bank required that borrower countries submit loan or credit requests, accompanied by a description of the projects ready to be undertaken. However, the institution soon realized that borrower countries often lacked the means and human resources necessary to elaborate such documents. It thus established a practice involving Bank staff in the design and preparation of the projects it was to finance. The project cycle then requires the

¹⁴ The Executive Directors re-iterated as follows: 'The profile of Panel activities, in-country, during the course of an investigation, should be kept as low as possible in keeping with its role as a fact-finding body on behalf of the Board. The Panel's methods of investigation should not create the impression that it is investigating the borrower's performance. However, the Board, acknowledging the important role of the Panel in contacting the requesters and in fact-finding on behalf of the Board, welcomes the Panel's efforts to gather information through consultations with affected people. Given the need to conduct such work in an independent and low-profile manner, the Panel – and Management – should decline media contacts while an investigation is pending or underway. Under those circumstances in which, in the judgment of the Panel or Management, it is necessary to respond to the media, comments should be limited to the process. They will make it clear that the Panel's role is to investigate the Bank and not the borrower'.

Cf., Conclusions of the Board's Second Review of the Inspection Panel, 20 April 1999, reproduced in Shihata, n. 1 above, at pp. 323–328.

¹⁵ Some investigations requested by the Inspection Panel have not been authorized by the Board and disagreements have arisen regarding the extent of the Inspection Panel's authority during the various phases in the procedure. On this question, see Shihata, n. 1 above, at pp. 99–154.

negotiation of a loan or credit agreement between the borrower and the Bank, containing a description of the project and the conditions in which it is to take place: loans or credits may be subject to conditions to be implemented either upon entry into force of the loan or credit agreement or upon disbursement of the funds allocated for the project. During the implementation phase of the project, the institution is under an obligation of oversight and of 'due diligence' to ensure that the funds intended for a loan are used by the borrower exclusively for the purposes for which they were disbursed.¹⁶ The Inspection Panel's recommendations at the conclusion of any investigation must be approved by the Board before they can have any effect. The Inspection Panel's conclusions may shed light on weaknesses in the Bank's functioning, compelling the financial institution to correct its behaviour by means of action plans. Undertaking such a procedure may also reveal deficiencies attributable to the borrower country. However, such behaviour does not formally belong to the procedure before the Panel, and it is therefore in parallel to the latter that borrower countries may have to decide on a future course of action in concert with the Bank. Any such action nonetheless remains external to the review process before the Panel and is not subject to supervision by the Inspection Panel.

A concession was made in 1999 in terms of extending the Panel's powers to the Bank and state actions after its recommendations had been approved. It was not, however, granted a general oversight role in elaboration and implementation of action plans. It was only granted jurisdiction to allow it to assess the nature of the consultations undertaken with affected populations during the elaboration of an action plan between the borrower and the Bank.¹⁷ It remains to be seen whether these subtle distinctions can be applied in practice: evaluating the extent to which the process of public participation has been carried out may indeed nec-

¹⁶ This oversight is performed when the borrower withdraws the sum needed for the project's execution. The loan resources can only be withdrawn piecemeal as the project progresses and with the financial institution's agreement. The latter prepares reports and sends assessment missions to the borrower country, notably as a means of initiating communication with the beneficiaries and of assessing the conditions of a project's implementation.

¹⁷ See Conclusions of the Board's Second Review of the Inspection Panel, 20 April 1999, reproduced in Shihata, n. 1 above, at pp. 323–328. 'A distinction has to be made between Management's report to the Board (Resolution para. 23), which addresses Bank failure and possible Bank remedial efforts and "action plans", agreed between the borrower and the Bank, in consultation with the requesters, that seek to improve project implementation. The latter "action plans" are outside the purview of the Resolution, its 1996 clarification, and these clarifications. In the event of agreement by the Bank and borrower on an action plan for the project, Management will communicate to the Panel the nature and outcomes of consultations with affected parties on the action plan. Such an action plan, if warranted, will normally be considered by the Board in conjunction with the Management's report, submitted under Resolution paragraph 23. The Panel may submit to the Executive Directors for their consideration a report on their view of the adequacy of consultations with affected parties in the preparation of the action plans. The Board should not ask the Panel for its view on other aspects of the action plans nor would it ask the Panel to monitor the implementation of the action plans. The Panel's view on consultation with affected parties will be based on the information available to it by all means, but additional country visits will take place only by government invitation'.

essarily imply that the entity conducting the evaluation addresses the very content of that which is the object of the process. Moreover, the acts of both the Bank and the borrower being so closely connected, it is difficult to conceive that one of them would not be tempted to offload its responsibility onto the other. The Bank's Board would then have to fulfil the function conferred upon it by the Resolution establishing the Inspection Panel; namely, to make a final decision, at the stage when the Panel recommendations are being discussed and approved, about the attribution of responsibilities.

Thus, although they are not party to the Bank's contractual relationship with its borrowers, individuals are given the possibility of defending their interests in the event that the requirements of the operational policies – which are internal Bank documents – have not been respected. They can thereby exercise a certain control on the financial institution's activities. This contributes to the emergence of concepts of accountability and transparency. One can note, however, that one is dealing with a new type of accountability, since it has been traditionally understood that an international organization need only be accountable to its member states. With the Inspection Panel, private persons have become agents of this transparency within the decision-making process. The characteristics of this vehicle for transparency will now be analyzed.

3. THE INSPECTION PANEL: A *SUI GENERIS* SETTLEMENT PROCEDURE

The aim of the Inspection Panel procedure is to conduct investigations. It is characterized by flexibility and the fact that it is non-judicial in nature. Moreover, the nature of the procedure is administrative, finding application mostly within the relevant international organization itself. Established by the Bank's Board of Executive Directors and entrusted with the task of examining the organization's activities in the light of the prescriptions elaborated by the former, the Inspection Panel is an autonomous body whose independence is guaranteed in various ways.¹⁸

What is more, this procedure is both preventive, as well as curative. The Inspection Panel may be seized in a 'preventive' manner during a project's preparation phase, in order to lodge a complaint in respect of potential damages (as was for instance the case in the Arun Valley project).¹⁹ It may also be seized during the implementation phase of a project, when the contemplated (and potentially damaging) activities have not yet begun. The Panel may be seized in a 'curative' sense as well, when the damage has already occurred, be it during the project's preparation or implementation phase. Such is the case, for instance, when groups of persons must be displaced before a, or part of a project begins.

¹⁸ On the guarantees securing the Panel's independence, see above.

¹⁹ See Umaña Quesada, n. 6 above.

Considering these various possibilities, one readily understands that the Inspection Panel performs its work along the breadth of a continuum, a period of time that goes from a project's conception to its implementation, which generally covers an eight to 10-year time span.²⁰

3.1 Seizing the World Bank Inspection Panel

The favoured method of seizing the Inspection Panel is based on the complaints formulated by private persons who consider that they have been adversely affected by a project. Thus, the Resolution establishing the Inspection Panel foresees, in its Article 12, that:

12. The Panel shall receive requests for inspection presented to it by 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), or by the local representative of such party or by another representative in the exceptional cases where the party submitting the request contends that appropriate representation is not locally available and the Executive Directors so agree at the time they consider the request for inspection. ... The affected party must 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.

As early as 1996, the Bank's Board thought it necessary to specify that an affected party is 'a community of persons such as an organization, association, society or other grouping of individuals including 'any two or more persons who share some common interests or concerns'.²¹

The crucial issue is to identify the individuals who may lodge a complaint. It cannot be a country's entire population; but must rather be groups of private persons living in the project zone (or representatives of persons living there) and who run the risk of suffering damage by activities related to Bank-financed projects.²² They must allege and prove on the one hand, that the Bank has not followed its own operational policies and procedures, and on the other hand, that

²⁰ Note that para. 14(c) of the Resolution establishing the Panel states: '14. In considering requests under paragraph 12 above, the following requests shall not be heard by the Panel: (c) Requests filed after the Closing Date of the loan financing the project with respect to which the request is filed or after the loan financing the project has been substantially disbursed. This will be deemed to be the case when at least ninety five percent of the loan proceeds have been disbursed'.

²¹ See *Review of the Resolution Establishing the Inspection Panel: Clarifications of Certain Aspects of the Resolution*, 17 October 1996, reproduced in Shihata, n. 1 above, at pp. 320–322.

²² Affected persons may ask for their anonymity to be preserved, under the condition, naturally, that they give (confidentially) their identity to the Panel itself.

this has provoked, or may provoke, material adverse effects. They must have previously expressed their concerns to Bank representatives and not be satisfied with the consequences. One of the problems that has only been partially dealt with to date is that of knowing whether the criterion relative to the place of implementation is essential, or whether other inhabitants of the concerned borrower country are also entitled to bring a request due to the fact that the project deals with state-wide interests and issues. In the case relative to the construction of the Yacyretá dam, the Panel even went as far as to point out the global nature of the interests involved, but did not draw any explicit consequence as to the lodging of a request in such circumstances.²³

According to paragraph 12 of the Resolution, NGOs can submit requests to the Panel, as the local representatives of an 'affected party', if they prove that the concerned populations have duly entitled them to do so. It can be pointed out that international NGOs may also play the role of 'another representative in the exceptional cases where the party submitting the request contends that appropriate representation is not locally available'. Nevertheless, the Board must approve this mode of representation during their evaluation of the request for inspection brought to their attention by the Panel. This would implicitly mean that the Board assesses a country's domestic situation, and the extent to which fundamental freedoms are respected, such as freedom of association and freedom of assembly.

A World Bank Executive Director (or the whole Board of Executive Directors) may also seize the Inspection Panel. The same paragraph 12 reads:

In view of the institutional responsibilities of Executive Directors in the observance by the Bank of its operational policies and procedures, an Executive Director may in special cases of serious alleged violations of such policies and procedures ask the Panel for an investigation, subject to the requirements of paragraphs 13 and 14 below. The Executive Directors, acting as a Board, may at any time instruct the Panel to conduct an investigation.

On one occasion, the Board of Executive Directors asked the Inspection Panel to conduct an investigation into a project in China. The request for investigation had in fact been initiated by international NGOs, thus raising the problem of the Board's authorization for doing so. In order to obviate this issue, and because the Chinese representative had agreed to this arrangement, the Board asked the Panel to undertake an investigation.

In this situation one is not within the context of a given group of persons' specific interests having been affected. What is at issue here is enabling representatives of the World Bank's main decision-making body to verify the quality of the projects financed by this organization. They are therefore acting in the name of a collective interest covering both the interests of private persons affected by a project and those of the institution.

²³ See *Request for Inspection: Argentina/Paraguay: Yacyretá Hydroelectric Project* (RQ 96/2, 30 September 1996), discussed in Shihata, n. 1 above, at pp. 117-124.

In the first case, namely seizure of the Panel by a group of individuals, persons external to the Bank may access the Inspection Panel. 'External persons' means persons who are neither agents of the Organization, nor parties to a contractual relationship with the Organization. In the second case, it is an organ of the Organization, or a member of the latter, which requests an investigation. Private persons put forward their own interests, having to prove that they would have been or might be the victims of damage to their own interests. On the other hand, the Board of Executive Directors or one of its members will request an investigation in the name of the protection of an institutional collective interest.

3.2 Course of the procedure

Once initiated, the procedure has several phases, and is accompanied by time limits. A political dimension is added to the technical and factual assessment of the circumstances evoked by the complaint. Indeed, the investigation cannot be undertaken on the Panel's own initiative: it must have been previously approved by the Board. Similarly, the Board will have to adopt the recommendations and conclusions of the Inspection Panel at the end of the investigation before they can result in any effects, notably insofar as Management and Bank staffs are concerned.

First, the Panel must decide whether it has *prima facie* jurisdiction over the claim. This is then recorded, which is a mere administrative formality. The claim is then transmitted to Bank Management, which has 21 working days to answer the claim's allegations. The Panel then has 21 working days to assess whether the claimants have standing and whether their request is eligible.

If the Panel does not recommend an inspection and if the Executive Directors accept this view, the case is classified. Should they deem it necessary, the Executive Directors, may, despite the Panel's opinion, nonetheless require that an inspection investigation be undertaken. Three days after the Board has made a decision on whether an investigation is required or not, the Panel report, including the inspection enquiry and the answer from the Management, is made public through the Bank Public Information Centre (PIC) in Washington DC as well as in its offices located in the relevant member states.

If the Panel recommends an inspection and if the Board approves this recommendation, the Panel proceeds to a detailed inspection, with no specific time limit. Once the Panel has finished its inspection, its findings and conclusions are recorded concerning the allegations in the request for an inspection, which are then transmitted to the Board and the Bank Management. Bank Management then has six weeks to submit to the Board their recommendations on the measures that should be taken by the Bank in response to the Panel's findings and conclusions.

The Board then adopts a final decision concerning the measures to be taken, given the Panel's findings and Bank Management recommendations. Three days after the Board's decision, the Panel report and the Management's recommendation are made public through the Bank Public Information Center and the Bank offices located in the relevant member countries.

The country concerned by a request for an investigation is informed that the request has been lodged, and the Panel takes its opinion into account in the course of its inspection. If the Panel wishes to visit the country concerned, it must obtain its prior approval. This has raised a number of problems, due to the tensions (referred to above) associated with the fears held by some countries regarding foreign control of the conduct of their domestic affairs. Several investigation claims presented by the Panel have therefore not been authorized. In 1999, under cover of the diplomatic formula 'gentlemen's agreement', the Board committed itself to clarifying its role, by accepting that field visits would be authorized if the Panel deemed them to be necessary:

The Board recognizes that enhancing the effectiveness of the Inspection Panel process through the above clarifications assumes adherence to them by all parties in good faith. It also assumes the borrowers' consent for field visits envisaged in the Resolution. If these assumptions prove to be incorrect, the Board will revisit the above conclusions.²⁴

Once a claim has been lodged, private persons are no longer formally involved in the procedure. Their fate concerning access to information is the same as that of any person external to the Bank. Nevertheless, the Panel may question them and take their views into account. The Panel, in addition, has the ability to do so with any person of its choice. Individuals, groups of persons, national and international NGOs, may also transmit documents and reports related to an investigation to the Panel.²⁵ This practice is quite similar to the submission of *amicus curiae* briefs, which may operate in other dispute settlement fora.

3.3 Specific features of the Inspection Panel procedure and subsequent practice

The novelty of the Inspection Panel procedure is more striking when one thinks, for instance, about the issue of external disputes in which international organizations are involved and the difficulty of finding fora enabling claims for accountability from these organizations.²⁶ Of course, one must remember that the Inspection Panel is not a contentious dispute settlement procedure, nor is it by any means a mechanism challenging or asserting the international organization's legal responsibility, no more than that of the borrower countries or their decision-making bodies.

²⁴ See *Conclusions of the Board's Second Review of the Inspection Panel*, 20 April 1999, reproduced in Shihata, n. 1 above, at pp. 323–328.

²⁵ R.E. Bissel, 'Recent Practice of the Inspection Panel of the World Bank' (1997) 91 *Am. J. Int'l L.* 743.

²⁶ On this issue see in general L. Boisson de Chazournes, C. Romano and R. Mackenzie (eds.), *International Organizations and International Dispute Settlement: Trends and Prospects* (Transnational Publishers, New York, 2002).

Nonetheless, in the event of a dysfunction within the system, the Inspection Panel procedure enables problems to be 'objectivized' by way of a control mechanism and may result in a correction of behaviour by the financial organization, for the benefit of the affected populations, through the implementation of corrective actions. This leads one to think that such a mechanism will have its followers, and may be a model for other such mechanisms within the world of international organizations – not only financial – at a time when the latter are blossoming, not to say proliferating, and when their focus on various operational activities within member states' territories is multiplying.

Indeed, the Inter-American Development Bank (IDB) and Asian Development Bank (AsDB) had set up similar procedures,²⁷ but reviewed them at the turn of the twenty-first century. It is interesting to note that an emphasis in the new system has been put on a first stage of consultation and problem solving prior to recourse to compliance review.

The IDB created an Independent Investigation Mechanism in 1994, which was reviewed in 2001.²⁸ The mechanism enables a Permanent Coordinator to receive complaints by individuals who consider, in a manner similar to the World Bank's Inspection Panel procedure, that their rights have been or will be materially adversely affected by an IDB-financed activity as a result of the latter not having followed one or several of its operational procedures. The matter may then be addressed to a panel whose membership is drawn from a permanent roster. The IDB mechanism differs from the Bank's Inspection Panel in that investigators, drawn from a roster, participate in the process only after the Coordinator, working in collaboration with the Bank's Legal Department, has decided that an allegation warrants further consideration. A single expert drawn from the roster and appointed by the IDB President will ascertain whether the claim is eligible and warrants an inspection. If so, three other experts will be appointed to conduct an investigation.²⁹

Pursuant to a decision taken in May 2003,³⁰ the AsDB replaced in December 2003 its Inspection Function (itself created in 1995) with a mechanism modelled on the Investigation Mechanism of the IDB. One reason for this change was because of difficulties faced by the Board in reaching decisions on whether or not to authorize inspections under the 1995 mechanism. The new mechanism provides for a 'non-objection' decision-making formula for the Board in its function of authorizing reviews. The mechanism is comprised of two phases: a consultation phase, which involves the appointment of a Special Project Facilitator (SPF) and

²⁷ A similar mechanism has been established with the Inter-American Bank for Development (in 1994), and the Asian Bank for Development (in 1999). For a comparison of the three institutions, see Shihata, n. 1 above, at pp. 491–500.

²⁸ See <www.iadb.org/aboutus/iii/independent_invest/independent_invest.cfm?Language=English> (site visited July 2004).

²⁹ *Accountability at the World Bank* (IBRD, Washington DC, 2003), pp. 15–16.

³⁰ See <www.adb.org/Documents/Policies/ADB_Accountability_Mechanism/default.asp> (site visited July 2004).

a compliance review phase, to which matters will be directed if they cannot be resolved by the SPF. Requests can be submitted to the SPF regardless of whether the complaint alleges that the AsDB has complied or not with its operational procedures but must nonetheless stipulate that the two or more persons submitting their request will be, or are likely to be, affected by the project, this requiring direct material harm or a likelihood of such harm in the future. The consultation phase takes several months and is aimed at arriving at a consensus based problem-solving course of action. An interesting feature is that monitoring is envisaged of any agreement reached in that regard. The creation of a Compliance Review Panel (CRP) may nonetheless be deemed necessary at various stages of the consultation phase (which may therefore be abandoned) but this requires an allegation of a breach of one of the AsDB's operational policies and procedures. The CRP may investigate not only the AsDB's activities but also those of the borrowing country, executing agency or private partner, but only to the extent that their acts are directly relevant to the project.

In 2003, the European Bank for Reconstruction and Development (EBRD) created in like fashion its own mechanism, with the expectation that it will be operational by April 2004. The Independent Recourse Mechanism (IRM) was created after considerable public and internal consultation, and consists of a 'system of processes and procedures designed to provide a venue for an independent review of complaints or grievances from groupings that are, or are likely to be, directly and adversely affected by a Bank-financed project'.³¹ On receipt of a complaint and a consideration of its eligibility, an independent EBRD-appointed Chief Compliance Officer (CCO) will ascertain whether it is useful to have recourse to problem-solving techniques (fact-finding, mediation, conciliation, etc.).³² The President has the final say on whether such a problem-solving initiative should be pursued. This procedure is quite independent of the Compliance Review Procedure. In the latter context, complainants (being two or more individuals with a common interest who are, or are likely to be, adversely affected by an EBRD-financed project) are assessed by the CCO, who may register it (this will not occur if the complaint is manifestly frivolous or malicious or no good faith attempts have been made to resolve the issue with the relevant EBRD department) and an independent expert, taken from a roster, will be appointed. The latter will assist the CCO in evaluating the eligibility of the complaint.³³ Complaints that challenge, *inter alia*, the adequacy or suitability of the EBRD policies themselves will be ineligible.³⁴ To be eligible for Compliance Review, the CCO and independent expert must consider that there is a possibility that a mandatory provision of an EBRD policy within the scope of the IRM has not been complied

³¹ See EBRD, Independent Recourse Mechanism as Approved by the Board of Directors on 29 April 2003, Annex 1, para. 2.

³² *Ibid.*, para. 27.

³³ *Ibid.*, para. 12.

³⁴ *Ibid.*, para. 13.

with.³⁵ It is significant that only environmental and public information disclosure policies can be reviewed. Should compliance review be considered necessary, an expert will be appointed and he or she has as long as they consider necessary to fulfil this function.

As noted, the IFC and MIGA have established a Compliance Officer/Ombudsman (CAO) mechanism. The significant difference when compared to other models is that this mechanism only deals with private sector projects. The CAO has three functions, the first being its ombudsman's role, using mediation and other dispute settlement techniques to address complaints by people who feel that they are or will be affected by MIGA or IFC supported projects; the second is as compliance auditor to verify selected projects; and finally the CAO provides independent advice to Senior Management either with regard to specific projects or more generally on the application and effectiveness of policies. Whilst functionally independent, the CAO nonetheless reports to the President of the Bank.³⁶

Finally, one can note that the African Development Bank is contemplating the creation of its own compliance review procedure.³⁷

4. CONCLUSIONS: OF THE ENDOGENOUS AND INNOVATING NATURE OF THE INSPECTION PANEL PROCEDURE

The innovative aspects of the World Bank Inspection Panel procedure must not make one forget that this mechanism's endogenous aspects are linked to the peculiarities of the organization within which it was established. The World Bank structure, together with the type of activities it conducts, has strongly influenced the shape of the mechanism. It is obvious that no perfect solution exists, and the Panel has not escaped criticism. Ever since it began, the procedure has caused tensions, as the different actors involved have not always been satisfied with the process or its results. For instance, Bank Management does not appreciate being questioned, nor do borrower countries appreciate being pinpointed, nor complaining private parties not achieving their pursued goals because of blockages or slowness in the course of the procedure.

The Inspection Panel procedure is a prism enabling one to apprehend the Organization's inner life and the difficulties attaching to the setting-up of control mechanisms. The ambiguous relationship between the privileged political decision-making body and an Inspection Panel body whose role is to investigate dysfunctions in the Organization's activities, are thus singled out within the financial

³⁵ Ibid., para. 16.

³⁶ *Accountability at the World Bank*, n. 29 above, at p. 16.

³⁷ A. Rigo Sureda, 'Process Integrity and Institutional Independence in International Organizations: The Inspection Panel and the Sanctions Committee of the World Bank' in Boisson de Chazournes, Romano and Mackenzie, n. 26 above, at pp. 180–187. See also D. Bradlow, 'Study on an Inspection Function for the African Development Bank' (24 November 2003, unpublished, on file with author).

institution. It is difficult for the political body – the Board – to accept that the very investigation body it has established – the Panel – should invoke its independence to ask its creator to make decisions that risk neglecting the sacrosanct harmony within its walls, established, notably, by the generalized recourse to consensus. Private persons, for their part, wish to participate more in the course of the procedure initiated, whereas Bank authorities are becoming painfully used to the presence of these new actors, who assert ever more firmly that the principles of public participation, transparency and accountability are to be acknowledged for their benefit.

The Panel's experience (23 claims have been declared eligible)³⁸ nonetheless shows that the implementation of this investigation procedure has contributed to improve the quality of Bank-financed operations. The institution has decided to withhold the implementation of certain projects, if not to renounce them. It has also enforced corrective measures, premised largely on the contribution of local populations and has established within the Organization a series of mechanisms and procedures to ensure a supervision of the quality of operations during the projects' preparation and implementation.³⁹

The Inspection Panel procedure also sheds light on new trends in the contemporary legal order, especially on the need to build public spaces enabling the relationships between partners destined to work side by side, and with each other. The World Bank has joined this emerging trend by establishing the Inspection Panel, and by taking part in the implementation of other innovative mechanisms in the field of international decision-making process.

³⁸ As at 17 February 2004, out of 30 requests received, the Panel registered 26. Out of the 26, the Panel found three to be not eligible, because either the harm did not exist, or it was not related to a Bank project. Out of the 23 requests found eligible, the Panel recommended an investigation in 14 cases.

³⁹ See Boisson de Chazournes, n. 11 above, at pp. 289–292; D. Freestone, 'The Environmental and Social Safeguard Policies of the World Bank and the Evolving Role of the Inspection Panel' in A. Kiss, D. Shelton and K. Ishibashi (eds.), *Economic Globalization and Compliance with International Environmental Agreements* (Kluwer Law International, The Hague, 2003), pp. 139–156.