

The World Bank's Experience With Its Inspection Panel*

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I. Introduction

About four and a half years ago, in September 1993, the Executive Directors of the World Bank¹ adopted the Resolution Establishing the Inspection Panel.² On the basis of this Resolution, the Inspection Panel was subsequently created with the appointment of the first three Panel members³ by the Bank's Board of Executive Directors in April 1994, their taking office in August 1994, and, finally, the opening of the Panel's office for business in September 1994.

The Bank established the Inspection Panel to provide for a formal mechanism for complaints by people directly and adversely affected by Bank-supported projects on grounds of the Bank's failure to abide by its own policies and procedures in the design, appraisal and implementation of the projects it finances.⁴ Once complaints were found by the Panel to be within its jurisdiction as described in the

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¹ The term World Bank or Bank is used here to mean the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA), unless the context indicates otherwise.

² Resolution No. 93-10 IBRD, Resolution No. 93-6 IDA, The World Bank Inspection Panel, dated September 22, 1993 (hereinafter the Resolution or the Resolution Establishing the Panel). The Resolution Establishing the Panel has been published in 34 ILM 520 (1995).

³ The first three Panel members were Mr. Ernst-Günther Bröder, a German national, Mr. Alvaro Umaña Quesada, a Costa Rican national, and Mr. Richard Etter Bissell, a US national. Their terms were staggered for five, four, and three years respectively. When Mr. Bissell's term expired in 1997, Mr. James MacNeill, a Canadian national, was appointed third member of the Panel. For the Panel's first business year, Mr. Bröder was appointed the first chairman of the Panel by the Executive Directors. Thereafter, the Panel members themselves had to select their chairman. Their selection resulted in a second year term for Mr. Bröder and Mr. Bissell's election from August 1996 to July 1997. Mr. Umaña Quesada is the Panel's current chairman.

⁴ For a detailed account on the developments which led to the establishment of the Inspection Panel, see I.F.I. Shihata, *The World Bank Inspection Panel (1994)* (hereinafter *The World Bank Inspection Panel*). See also I.F.I. Shihata, *The World Bank in a Changing World*, Vol. III (forthcoming 1998), Chapter on *The World Bank Inspection Panel – Its Historical, Legal and Operational Aspects* (hereinafter *The World Bank in a Changing World*, Vol. III).

Resolution and these findings were approved by the Bank's Board of Executive Directors, the Panel was to investigate the Bank's compliance with its own policies and procedures in the execution of its operational activities. Thus triggered by third party non-state actors' initiatives, the Panel was meant to provide the Bank's Board with the results of an independent review of controversial Bank projects and, thereby, to improve quality control in project design, appraisal and implementation and enhance the public's confidence in the Bank's commitment to greater transparency and accountability.

The World Bank was the first international organization to establish an independent body to investigate complaints of third party non-state actors for failure to comply with its own policies in its operational work.⁵ It may be noted that the establishment of the European Court of Justice (ECJ) by the European Communities with jurisdiction over acts of the institutions of the Communities affecting individuals should not be counted in this context.⁶ In fact, it would be inappropriate to see in the ECJ a precedent for the Bank's Panel because of the *sui generis* nature of the European Communities as opposed to the nature of other international organizations.

While the World Bank's move to create an inspection function was later followed by some other international financial institutions,⁷ the World Bank's Inspection Panel remains the only standing organ of that type. It has also been the most active since the inception of these inspection functions.⁸

⁵ For an analysis of this unprecedented mechanism under international law, see Shihata, *The World Bank Inspection Panel* (note 4), at 118-124. See also D.D. Bradlow/S.Schlemmer-Schulte, *The World Bank's New Inspection Panel: A Constructive Step in the Transformation of the International Legal Order*, 54 *ZaöRV* 392 (1994) (discussing the impact of the Panel's creation on the individual's standing and the international organizations' and the States' status under international law).

⁶ For example, the European Community (EC) Treaty, i.e. the former Treaty on the European Economic Community as it has been amended by and incorporated into the Treaty on the European Union, provides for multiple remedies for individuals against acts and omissions of the community institutions. Any natural or juridical person can challenge the legality of acts of the community institutions before the ECJ, if these acts are addressed to that person or are of "direct and individual concern" to him. (See Article 173, Para. 4 of the EC Treaty.) Likewise, individuals can bring an action before the ECJ for failure of EC institutions to act, provided this failure constitutes an infringement of the EC Treaty. (See Article 175, Para. 3 of the EC Treaty.) Individuals can also claim compensation before the ECJ for any damage they have suffered, if this damage was caused by EC institutions or by its servants in the performance of their duties. (See Article 178 in connection with Article 215, Para. 2 of the EC Treaty.) The existence of such broad remedies for individuals against the EC institutions, while unusual in the context of international organizations, seems, however, not unusual in the context of the EC which, as a supranational organization, is in some respects comparable to a confederation or a federal state.

⁷ The Inter-American Development Bank (IDB) established an inspection function in 1994 and the Asian Development Bank (ADB) did the same in 1995. Their respective mechanisms have been patterned after the World Bank's Inspection Panel in most respects. They differ, however, in one important aspect. The IDB and the ADB mechanisms do not consist of a standing Panel with its separate secretariat. Rather, each has a roster of names from which in an actual case members of the Panel will be chosen to investigate the matter once a complaint is lodged.

⁸ While the World Bank's Inspection Panel has to date received eleven requests, so far only one request was brought before the IDB's inspection function. Similarly, one request only was lodged with the ADB's inspection mechanism.

During its a little more than three and a half years in operation, the World Bank's Inspection Panel has built up an impressive record of work on cases that were brought before it. Moreover, the Resolution, i.e. the legal basis for the Panel's existence, has been subject to two reviews by the Bank's Board since it was adopted. The first review was completed in October 1996 with the issuance of Clarifications of Certain Aspects of the Resolution Establishing the Panel⁹ including guidelines for the application of the Resolution. The second review, which started in fall 1997, is still ongoing at the time of writing. In light of the Panel's case record and the two reviews of the Resolution, an assessment of the Bank's experience with this unique body investigating complaints of third parties when harm to them appears to have occurred because of Bank failures is appropriate and timely.

After a brief summary of the original process for requests before the Panel (Part II), this assessment of the Bank's experience with the Panel will report on the Panel's case record (Part III). It will then summarize the results of the first review of the Resolution Establishing the Panel and briefly outline the issues so far discussed on the occasion of the second review (Part IV). Finally, the contributions made to the development of international law through the Bank's experience will be discussed (Part V) before conclusions on the Panel's significance and its possible future will be drawn (Part VI).

II. The Original Process for Complaints before the Panel

Under the Resolution Establishing the Panel, the Panel was given a mandate to receive complaints by groups of individuals whose rights or interests have been or are likely to be directly and adversely affected by the Bank's failure to comply with its policies and procedures during the project cycle of a project financed or to be financed by the Bank.¹⁰ The Panel's mandate extends explicitly to projects financed by IBRD and IDA.¹¹ Activities of other World Bank Group¹² affiliates,

⁹ See Clarifications of Certain Aspects of the Resolution Establishing the Inspection Panel (R96-204), dated September 30, 1996 which were approved by the Bank's Board of Executive Directors on October 17, 1996 (hereinafter Clarifications or 1996 Clarifications). These Clarifications have been made publicly available.

¹⁰ It may be noted that, according to the Resolution, one or more Executive Directors may also ask the Panel for an investigation and the Executive Directors acting as a Board may, at any time, take the initiative in instructing the Panel to conduct an investigation. So far, however, the Panel mechanism has only been activated by requests from third parties. For a comprehensive description of the Panel process including the issues not mentioned here, see generally Shihata, *The World Bank Inspection Panel* (note 4).

¹¹ See Resolution Establishing the Panel (note 2), at para. 28. For details on IBRD and IDA and their position within the World Bank Group, see *infra* note 12.

¹² The World Bank Group consists of five legally separate institutions. These include the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA), both making and guaranteeing loans to developing countries but with IDA lending to the poorest of them; the International Finance Corporation (IFC), making loans and equity invest-

such as the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA), are, in the absence of any reference to them in the Resolution, not subject to investigation by the Panel.¹³ Bank actions as trustee of the Global Environment Facility and other trust funds are implicitly subject to the Panel's jurisdiction.¹⁴

After the Panel receives a request for inspection, it has to notify the Board and the President of the Bank of the request.¹⁵ Within a certain period of time from notification, the Bank's Management must provide the Panel with evidence that it has complied with the relevant Bank policies and procedures (e.g. on the occasion of the earlier submission of the subject-matter to Management and before submission of a formal request to the Panel), or that it intends to do so now in the face of the formal request.¹⁶

Upon receipt of Management's response to the request, the Panel's core function begins. Under the Resolution, the Panel exercises this function in two stages. In the first stage, it assesses whether the request for inspection meets the eligibility requirements of the Resolution and, based on this assessment, either recommends to the Bank's Executive Directors to authorize an investigation of the matter or does not recommend the authorization of an investigation.¹⁷ In the second stage, which will only take place if the Board of Executive Directors has authorized an investigation, the Panel carries out this investigation and issues, on the basis of its investigation, findings to the Board on whether the Bank has seriously violated its operational policies and procedures with respect to the design, appraisal and/or implementation of the project referred to in the request.¹⁸

The Panel's assessment of the eligibility of the complaint comprises the establishment of four elements of jurisdiction.¹⁹ Thus, the Panel has to ascertain: (i) its competence regarding the standing of the complainant (*ratione personae*); (ii) its competence regarding the subject-matter of the complaint (*ratione materiae*); (iii) its competence relating to the timing of the complaint in terms of the project

ments in private enterprises in developing countries; the Multilateral Investment Guarantee Agency (MIGA), providing guarantees to foreign investors in developing countries against losses caused by non-commercial risks; and the International Centre for Settlement of Investment Disputes (ICSID) providing facilities and procedures for arbitration and conciliation of investment disputes between private investors and host country governments. Within the World Bank Group, the International Bank for Reconstruction and Development (IBRD) is the oldest in the Group. It was established in 1945 after the Bretton Woods Conference.

¹³ IFC and MIGA are currently in the process of preparing a system for an inspection function for their respective operations. Such a system may eventually be extended to all private sector financing operations of the Bank Group, including those of IBRD and IDA. The latter are, in the absence of an explicit exemption to this effect, covered by the Bank's Inspection Panel.

¹⁴ See Shihata, *The World Bank Inspection Panel* (note 4), at 39-41.

¹⁵ See Resolution Establishing the Panel (note 2), at para. 17.

¹⁶ *Ibid.* at para. 18.

¹⁷ *Ibid.* at para. 19.

¹⁸ *Ibid.* at para. 22.

¹⁹ *Ibid.* at paras. 12-14.

cycle (*ratione temporis*); and (iv) the admissibility of the complaint in the absence of other grounds barring it under the Resolution.²⁰

According to the Resolution, a complainant has standing if it is (a) "in the territory of the borrower," (b) is "not a single individual," but "a community of persons such as an organization, association, society or other groupings of individuals," and (c) has "rights or interests [which] have been or are likely to be directly affected by an action or omission of the Bank."²¹ The Resolution allows for representation of an affected party by a local representative or, in exceptional cases where local representation is not available and the Executive Directors agree to this, by another representative.²²

In order to ascertain its subject-matter jurisdiction, the Panel must make sure that (a) the request for inspection is based on an alleged "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,"²³ (b) such "alleged violation of Bank policies and procedures is of a serious character," (c) the alleged violation relates to applicable policies and procedures, i.e. "the Bank's Operational Policies, Bank Procedures and Operational Directives, and similar documents before these series started," but not to "Guidelines and Best Practices and similar documents or statements," and (d) the alleged violation, if established, would have "a material adverse effect" on the affected party who submitted the request.²⁴

A request would be excluded under the Resolution for reasons of its timing, if it were filed "after the Closing Date of the loan financing the project" or "after the loan financing the project has been substantially, [i.e. at least to 95 percent] disbursed."²⁵

Finally, a request would be barred if (a) "the subject-matter of [it] has been dealt with by the Management of the Bank and the Management has failed to demonstrate that it has followed, or is taking adequate steps to follow the Bank's policies and procedures," (b) the request represents "complaints with respect to actions which are the responsibility of other parties" than the Bank, (c) the request represents complaints from suppliers, contractors or losing bidders against procurement decisions under Bank-financed projects, and (d) the request is "related to a

²⁰ For a detailed explanation of the first stage of the Panel's function, see I.F.I. Shihata, Legal Opinion of the Senior Vice President and General Counsel, Role of the Inspection Panel in the Preliminary Assessment of Whether to Recommend Inspection (SecM95-11), January 3, 1995 (hereinafter Role of the Inspection Panel in the Preliminary Assessment of Whether to Recommend Inspection). This opinion was made available to the public by decision of the Board of Executive Directors. It may be requested from the Bank's Public Information Center. It is also published in I.F.I. Shihata, *The World Bank in a Changing World*, Vol. II (1995), Annex III(D), and in 34 ILM 525 (1995).

²¹ See Resolution Establishing the Panel (note 2), at para. 12.

²² *Ibid.*

²³ It should be noted that non-compliance by the Bank with its own policies and procedures includes situations where it fails to follow-up on the borrower's obligations under loan agreements with respect to policies and procedures. See Resolution Establishing the Panel (note 2), at para. 12.

²⁴ *Ibid.* at paras. 12 and 13.

²⁵ *Ibid.* at para. 14(c).

particular matter or matters over which the Panel has already made its recommendation upon having received a prior request, unless justified by new evidence or circumstances not known at the time of the prior request."²⁶

Once the Panel finds the request eligible, it recommends to the Board to authorize an investigation. If the Board decides to authorize an investigation by the Panel, the Panel will carry it out by checking the pertinent Bank records, interviewing Bank staff and other persons and, if needed, undertaking an on-site visit to the project in the territory of the borrowing country. Investigative action in the borrowing country requires that country's prior consent.²⁷ Considering all relevant facts of the investigation, the Panel will submit its findings on whether the Bank has complied with its policies and procedures in a report to the Board.²⁸ At this point, Management is given the opportunity to comment on the Panel's findings, e.g. by proposing remedial actions.²⁹ The Board of Executive Directors, based on all information before it, decides on any actions to be taken in this respect.³⁰

It should be noted that all information regarding the request, including the text of the request, the Panel's recommendation on the eligibility of the request, the Board's decision to authorize or deny investigations, the Panel's findings, Management's comments and the final Board decision are made publicly available after Board consideration in each case.³¹

As will be seen below, the practice under the Resolution as well as the discussion on the occasion of the two reviews, to which the Resolution was subjected, confirmed the core elements of the Panel process but invariably also changed the contents and application of some of the procedures and substantive requirements of the Resolution. Altogether, the cases and the reviews reinforced the new Inspection Panel concept, shaped the meaning of its process, at times developing it progressively further, while, at others, hesitating to move further forward.

III. The Actual Cases Before the Panel

As of April 1998, the Panel has received eleven requests and registered nine of them.³² The two requests which were not registered fell clearly outside the Panel's mandate as described in the Resolution establishing it. The first request which was not registered concerned the Bank's lending to a country while the complainants

²⁶ *Ibid.* at paras. 13 and 14(a), (b), and (d).

²⁷ *Ibid.* at para. 21.

²⁸ *Ibid.* at para. 22.

²⁹ *Ibid.* at para. 23.

³⁰ *Ibid.*

³¹ See Resolution Establishing the Panel (note 2), at paras. 24 and 25. It may also be noted that the Panel has to issue an annual report which will also be made publicly available. See Resolution Establishing the Panel (note 2), at para. 26.

³² For a summary of the Panel's case work from the Panel's perspective, see the First and Second Annual Report of the Inspection Panel, the former covering the period from August 1, 1994 to July 31, 1996, and the latter from August 1, 1996 to July 31, 1997. See also R.E. Bissell, Recent Practice of the Inspection Panel of the World Bank, 91 *American Journal of International Law* 741 (1997).

had a claim concerning an expropriation action in that country. This request was not related to the Bank's operational activities (i.e. a Bank-financed project), which a Panel investigation is meant to cover. The other request which was not registered concerned an IFC investment in the construction of a hydroelectric project rather than an IBRD or IDA operation.

Out of the other nine requests, four related to IBRD and five to IDA projects. Eight of the requests concerned large infrastructure projects such as hydroelectric dams, power stations, natural resources management projects, bridges, and an irrigation area and water reservoir. One request related to a sector adjustment operation. In all the requests concerning infrastructure projects, non-compliance with primarily environmental policies and procedures and those on social rights of people was alleged by the complainants.

The summary below provides the factual background of the cases brought before the Panel in chronological order, i.e. in the order the requests were received. In the course of the requests as dealt with by Management, the Panel and the Board under the procedures of the Resolution, interpretations of the Resolution were made and practices developed under it for some issues raised in connection with the Panel proceedings. Other issues, while also raised in the process, remained unsolved. The interpretations and practices that were developed are reflected in the Board's decisions in the concrete cases as well as in the points that were included in the Clarifications of Certain Legal Aspects of the Resolution which the Board issued in 1996 as a result of the experience in the course of requests on the occasion of the Board's first review of the Resolution Establishing the Panel. Below, references are made to both the interpretations of, and practices developed under, the Resolution endorsed by the Board and the issues which remain unsolved.

1. Planned Arun III Hydroelectric Project/Nepal

In the first request (registered in October 1994), a group of Nepalese citizens claimed non-compliance by the Bank (IDA) with, among other things, its policies on disclosure of information, environmental assessment, involuntary resettlement and indigenous people in connection with a proposed hydroelectric project in Nepal (Arun III) which was under consideration but not yet financed by the Bank.³³

After the Panel had recommended to the Board that an investigation be authorized but before the Board decided on that recommendation, the General Counsel issued a legal opinion responding to questions from several Executive Directors.³⁴

³³ See Request for Inspection: Panel Recommendation – Nepal Arun III Proposed Hydroelectric Project (IDA/SecM94–378), December 16, 1994 (including in Attachment (1) the text of the request itself). For Management's initial response, see Attachment (2) of the Panel's Recommendation.

³⁴ See Shihata, Role of the Inspection Panel in the Preliminary Assessment of Whether to Recommend Inspection (note 20).

In this legal opinion, the General Counsel comprehensively discussed the scope of the role of the Panel in the preliminary stage of whether to recommend an inspection in general (without however commenting on the Panel's report and recommendations on the actual request). Among the points dealt within the General Counsel's legal opinion, there is one that is particularly worth mentioning here. That point concerns the interpretation of the meaning of the term "affected party" which had been subject to some debates. The Resolution defines an affected party as being not a single individual but a community of persons.³⁵ By contrast, the Panel's Operating Procedures state that an affected party, could be "any group of two or more people."³⁶ Some writings had also found that an affected party could be "any two or more persons."³⁷ In his legal opinion, the General Counsel pointed out that these interpretations would not be consistent with the Resolution which explicitly explains the notion of an affected party as "a community of persons such as an organization, association, society or other grouping of individuals." According to the General Counsel's opinion, this explicit language of the Resolution suggests that complaints submitted individually by a number of persons, each acting in his own single capacity, without any common bond between them, will not meet the requirement of a community of persons. While the group of individuals need not have the juridical personality of an association, corporation etc., it has to be a group which represents a commonality of interests. The Board endorsed the General Counsel's legal opinion, including the point on the affected party. The understanding of this term was further confirmed on the occasion of the first review of the Resolution Establishing the Inspection Panel. The 1996 Clarifications of Certain Aspects of the Resolution emphasize that an affected party means "any two or more persons who share some common interests or concerns."³⁸

Apart from the issue of a requester's standing before the Panel, the Board authorized an investigation in the case at hand with respect to the issues of environmental assessment, involuntary resettlement and indigenous people on the basis of

³⁵ See Resolution Establishing the Panel (note 2), at para. 12.

³⁶ See Operating Procedures, adopted by the Panel on August 19, 1994, at para. 4(a).

³⁷ See D.D. Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, 34 *Virginia Journal of International Law* 553, 583 (1994) (stating implicitly that any two or more persons may lodge a request with the Panel by noting that "any 'affected party' except a single individual" is allowed to bring a complaint under the Resolution and omitting a reference to any interests that complainants must share); K.V.S.K. Nathan, *The World Bank Inspection Panel - Court or Quango*, 12 *Journal of International Arbitration* 135, 141 (1995) (stating that "[t]he 'jurisdiction' of the Panel extends to an affected party which should consist of at least two persons in the territory of the borrower country," but also not referring to any common interest that the requesters must share); and D.D. Bradlow, *A Test Case for the World Bank*, 11 *American University Journal of International Law and Policy* 247, 261 (1996) (arguing against an interpretation of the term "affected party" as requiring a commonality of interests from complainants by making the case that such a requirement would unduly restrict access to the Panel and, for example, exclude individuals who are affected by the same Bank-financed project, but on different grounds).

³⁸ See Clarifications (note 9), on the term "affected party" in the section on eligibility and access.

the Panel's recommendation. Later, a report was sent to the Board by the Panel, including its findings which confirmed that remedial actions, proposed by Management after the Board had approved of an investigation by the Panel, would satisfactorily meet the Bank's requirements if diligently followed.³⁹ The Panel's report also expressed some concerns about inadequate economic analysis of the project. However, the matter became moot after the Bank's new President, James D. Wolfensohn, commissioned a comprehensive internal review, on the basis of which he decided later not to proceed with the project.⁴⁰

2. Compensation for Expropriated Assets/Ethiopia

In March 1995, the Panel received its second complaint on behalf of two Greek citizens.⁴¹ In their complaint, the requesters alleged that the Bank (IDA) violated a specific Bank policy by continuing to lend to Ethiopia, despite the latter's failure to compensate them for the expropriation some twenty years earlier of property belonging to the family of the requesters. According to the policy referred to by the complainants, the Bank has to take a borrowing country's position with respect to an alien's expropriated property into account in its lending if this position is substantially affecting the country's international credit standing.⁴² In May 1995, the Panel decided that it would not register the request because the requesters had failed to exhaust local remedies for their compensation claim and consequently had not shown that the failure of the government to compensate them was caused by the Bank's continued lending to Ethiopia.⁴³

Management also concluded that the request should not be registered but for different reasons than the Panel had put forward. In the view of Management, the request was outside the scope of the Panel's mandate because neither the requester's claim nor the allegedly violated policy related to the design, appraisal or implementation of a project.⁴⁴

Before the divergent views were taken up in the Board, a discussion between Management and the Panel took place on the issues of which policies and procedures and which projects would be covered by the Panel's mandate

³⁹ See Request for Inspection: Panel Investigation Report – Nepal Arun III Proposed Hydroelectric Project (INSP/SecM95–3), June 22, 1995.

⁴⁰ See Nepal Arun III Proposed Hydroelectric Project – Management Response to the Inspection Panel's Investigation Report (INSP/SecM95–5), August 2, 1995.

⁴¹ See First Annual Report of the Inspection Panel (note 32), at 56 (summarizing the details of the Request for Inspection: Compensation for Expropriation and Extension of IDA Credits to Ethiopia).

⁴² See OMS 1.28 on Disputes over Defaults on External Debt, Expropriation, and Breach of Contract requiring the Bank "not to lend for projects in a country if it considers that the position taken by it with respect to alien owners of expropriated property is substantially affecting its international credit standing."

⁴³ *Ibid.*

⁴⁴ See Memorandum from the President ad interim to the Executive Directors, Request for Inspection: Compensation for Expropriation and Extension of IDA credits to Ethiopia (IDA/R95–83), dated May 30, 1995.

under the Resolution. As a result of that discussion, Management and the Panel stated their common understanding that (i) the Panel's mandate is limited to reviewing compliance with Bank policies and procedures with respect to the design, appraisal and/or implementation of projects as provided for in the Resolution; and (ii) the term "project" as used in the Resolution and the above mentioned memoranda has the same meaning as used in Bank practice, i.e. including in principle programs and activities other than specific physical works.⁴⁵

In July 1995, the Board decided to approve the decision not to register the request expressly following Management's arguments in its decision. The 1996 Clarifications confirmed this approach.⁴⁶ They state that the Panel's mandate does not extend to reviewing the consistency of the Bank's practice with any of its policies and procedures without qualification, but, as stated in the Resolution, is limited to cases of alleged failure by the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of projects, including cases of alleged failure by the Bank to follow-up on the borrower's obligations under loan agreements with respect to such policies and procedures. The Clarifications also provide that the word "project" as used in the Resolution has the same meaning as it generally has in the Bank's practice, and includes both projects under consideration by Bank Management as well as projects already approved by the Executive Directors.

3. Emergency Power Project/Tanzania

Failure to follow provisions in IDA's Articles of Agreement on the consideration of alternative private sector financing before approving IDA financing and failure to follow environmental policies were mentioned in the third request.⁴⁷ This request was submitted in March 1995 by a group of US and Tanzanian citizens (as, respectively, owners and employees of a corporation) and concerned an IDA-financed power project in Tanzania. In this case, the Panel did not recommend an investigation, because of the complainants' failure to show non-consideration of alternative financing, a violation of environmental policies, or the project's adverse environmental effect.⁴⁸ The Board took notice of, and approved the Panel's recommendation not to investigate on a no-objection basis in September 1995.

⁴⁵ See Memorandum by the Vice President and Secretary to the Executive Directors and Alternates, Scope of the Mandate of the Inspection Panel: Compensation for Expropriation and Extension of IDA Credits to Ethiopia, dated June 16, 1995.

⁴⁶ See Clarifications (note 9), on the meaning of the terms "project" and "policies and procedures" in the section on eligibility and access.

⁴⁷ See Request for Inspection - Tanzania: Power VI Project, Panel Recommendation (INSP/SecM95-6), August 16, 1995 (including in Annex 1 the text of the request itself).

⁴⁸ *Ibid.* at para. 15. (Panel Recommendation.)

4. Rondonia Natural Resources Management Project/Brazil

In the fourth request registered in June 1995, a group of NGO's from the state of Rondonia in Brazil acting as agents of Rondonia residents regarding the Bank-financed Rondonia Natural Resources Management Project (PLANAFLORO) claimed non-compliance with a number of Bank (IBRD) policies, including the environmentally relevant policies on forestry, wildlands, indigenous people and NGO participation.⁴⁹ Alleged non-compliance with other policies concerned those on investment lending, accounting, financial reporting and auditing, project monitoring and evaluation, procurement, use of consultants, project supervision, borrower compliance with audit covenants, and suspension of disbursements.

On the basis of an initial field study, the Panel recommended to the Board that an investigation into a potential violation of policies related to the design, appraisal, and execution (i.e. supervision and monitoring of the execution of PLANAFLORO) was warranted.⁵⁰

The Panel did not recommend an investigation of the Bank's compliance with its procurement and use of consultants guidelines because of an earlier decision that such matters would not be within its mandate. In the course of a query from a Bangladeshi NGO, the Panel, after having received the Board's approval of its approach, had clarified in its response to the NGO in April 1995 that the provision of the Resolution excluding complaints against procurement decisions of borrowers from the scope of the Panel's mandate would extend to procurement decisions by the Bank.⁵¹ Quoting from the General Counsel's book on the Inspection Panel⁵² and noting that there was a separate procedure for addressing complaints related to procurement, the Panel stated that procurement decisions by the Bank, while not expressly mentioned in the Resolution, were meant to be excluded from the Panel's jurisdiction. The 1996 Clarifications later confirmed that no procurement action is subject to inspection by the Panel, whether taken by the Bank or by the borrower.⁵³

After receipt of the Panel's recommendation, the Board asked the Panel to conduct an additional review to further substantiate the materiality of damages and to establish whether such damages were caused by deviation from Bank policies and procedures. This step was not based on an explicit provision in the Resolution. The Resolution limits the first phase of the inspection process to ascertaining the eligibility of the request, normally completed within the 21 days stated

⁴⁹ See Request for Inspection – Brazil: Rondonia Natural Resources Management Project, Panel Recommendation (INSP/R95-2), August 18, 1995 (including in Annex 1 the text of the request itself). For Management's initial response to the request, see Annex 2 of the Panel's Recommendation.

⁵⁰ *Ibid.* at para. 14. (Panel Recommendation.)

⁵¹ See First Annual Report of the Inspection Panel (note 32), at 55–56.

⁵² See Shihata, *The World Bank Inspection Panel* (note 4), at 51–52.

⁵³ See Clarifications (note 9), on the issue of procurement decisions in the section on eligibility and access.

in the Resolution.⁵⁴ In this case, however, the Board concluded that it needed more factual information on which to base a decision on whether an investigation should be carried out than was provided to it in the Panel's report.

The Panel submitted an additional report to the Board after Management had informed it of the status of the project's implementation (in particular on a remedial action plan agreed with the government of Brazil). Based on the Panel's additional report⁵⁵ and the comprehensive Management report⁵⁶ on the status of the project's implementation (which included the remedial action plan agreed with the government of Brazil), the Board decided in January 1996 not to authorize an investigation but to review the execution of the action plan after six to nine months with the assistance of the Panel. That review was completed, as envisaged, to the Board's satisfaction.

The handling by the Panel, Management and the Board of this request is important in two aspects. In one, it contributed to the above-mentioned Clarifications on the Resolution of the Inspection Panel. In the other, it foreshadowed debates calling for a second review of the Resolution.

The Board's request for an additional review of the facts of the case by the Panel later prompted a discussion on an extension of the original 21-day period for the Panel's ascertainment of the eligibility of the request during the review process. The Panel argued in favor of such an extension that the Board had modified requirements of the Resolution by asking the Panel for additional information during the preliminary review stage, information which is sometimes equivalent to the contents of an investigation.⁵⁷ For the production of that information, the 21-day period provided for in the Resolution would not be adequate. Responding to the experience in the Rondonia case and following the Panel's arguments, the Board decided in the course of the first review of the Resolution that the first phase of the inspection process should normally be completed within the 21 days as stated in the Resolution.⁵⁸ However, in cases where the Inspection Panel believes that it would be appropriate to undertake a "preliminary assessment" of the damages alleged by the requester (in particular when such an assessment could lead to a resolution of the matter without the necessity of a full investigation), the Panel may undertake the preliminary assessment and indicate to the Board the date on which it would present its findings and recommendations as to the need, if any, for a full investigation. If the Panel needs more than eight weeks from the date of receipt of Management's comments for its assessment, it should seek Board approval for the extension, possibly

⁵⁴ See Resolution Establishing the Panel (note 2), at para. 19.

⁵⁵ See Request for Inspection – Brazil: Rondonia Natural Resources Management Project, Panel Report on Additional Review (INSP/R95-4), December 12, 1995.

⁵⁶ See Brazil: Rondonia Natural Resources Management Project, Management Report on the Status of Implementation (SecM95-1271), December 20, 1995.

⁵⁷ See Review of the Inspection Function – Practical Suggestions Based on Experience to Date, Working Paper for the World Bank Executive Directors prepared by the Inspection Panel in November 1995 (internal document).

⁵⁸ See Clarifications (note 9), on the extension of the period allowed for the understanding of a preliminary assessment under the section on the Panel's function.

on a "no-objection" basis. What is needed at this preliminary stage is not to establish that a serious violation of the Bank's policy has actually resulted in damages suffered by the affected party, but rather to establish whether the complaint is *prima facie* justified and warrants a full investigation.

The other aspect, which was not discussed during the first Board review of the Resolution, but the occurrence of which took place for the first time in the course of the Rondonia request, concerns the conclusion of a remedial action plan by Management after Management was given the opportunity by the Panel to respond to the request and after the Panel had submitted its recommendation on an investigation to the Board. The taking of remedial action by Management at this point in time was not envisaged by the Resolution. By contrast, the latter provides that such remedial action would be taken by Management before the request for inspection is heard by the Panel which has to satisfy itself that "the subject matter of the request has been dealt with by Management and Management has failed to demonstrate that it has followed, or is taking adequate steps to follow the Bank's policies and procedures."⁵⁹ Nevertheless, Rondonia was not the only case in which Management came up with a remedial action plan only shortly before the Board had to decide on the Panel's recommendation, thus creating a dilemma for the Board (because the latter could of course not ignore the new facts presented by Management), while, at the same time, preventing it from being able to do full justice to the Panel's thorough report and recommendation.⁶⁰

5. Pangué/Ralco Hydroelectric Complex/Chile

The fifth request, received in November 1995, came from a Chilean NGO, representing people living in the area in which the Pangué/Ralco complex of hydroelectric dams on a river in Chile was to be built.⁶¹ While the requesters alleged the violation of a number of IFC and Bank policies, the Panel informed the requesters and the Board about its decision not to register the complaint because it found that the request clearly lay outside its mandate since it concerned not an IBRD or IDA project but one financed by IFC.⁶² As indicated earlier in this paper, IFC is a legally separate affiliate of the Bank which supports private investment through loans, guarantees and participation in equity. IFC's activities are not subject to the Resolution Establishing the Panel. However, as also noted earlier, IFC is in the process of studying options for an inspection mechanism by which the Bank's private sector financing operations may eventually be covered.⁶³

⁵⁹ See Resolution Establishing the Panel (note 2), at para. 13.

⁶⁰ See Shihata, *The World Bank in a Changing World*, Vol. III (note 4).

⁶¹ See Request for Inspection – IFC Financing of Hydroelectric Dams in the Biobío River in Chile (INSP/SecM95–8), December 1, 1995.

⁶² See First Annual Report of the Inspection Panel (note 32), at 21.

⁶³ The system for an inspection function, which IFC and MIGA are currently considering for their respective operations, could, once approved, be extended to all private sector operations of the Bank Group including those of IBRD and IDA.

6. Jamuna Bridge Project/Bangladesh

In the sixth request registered in August 1996, failure of the Bank (IDA) to comply with the policies on environmental assessment, resettlement and participation of NGOs was alleged by a Bangladeshi NGO, representing people (the so-called char people) living on mid channel islands that emerge periodically from the Jamuna River bed as a result of accretion.⁶⁴ The complaint was brought in the context of the project financing the construction of a multipurpose bridge over the Jamuna River. In particular, non-compensation for the damages that the allegedly affected people incurred as a result of their resettlement was claimed.

The Panel noted that the initial resettlement plan of the project did not even acknowledge the existence of the char people.⁶⁵ But Management's response referred to them on the basis of an erosion and flood policy which included a system of compensation of the char dwellers affected by river erosion.⁶⁶ This erosion and flood policy was adopted by the Bangladeshi Government and the Bank after the request was registered and while Management was drafting its response. In light of the erosion and flood policy, the Panel found that an investigation was not warranted at that stage because the erosion and flood policy constituted an adequate framework for compliance by Management with the Bank's policies and procedures.⁶⁷ The Board approved the Panel's recommendation, but asked Management to provide a progress report on the project's implementation for its review, to which it would invite the Panel to participate.

7. Yacyretá Hydroelectric Project/Argentina/Paraguay

In the seventh request registered in October 1996, a Paraguayan NGO claimed, on its own behalf and on behalf of people living in the project area who wished to remain anonymous, that the Bank (IBRD) had, among other things, failed to follow its policies on resettlement, indigenous people, wildlands, project supervision, and environmental assessment in the design and implementation of the Yacyretá Hydroelectric Power Plant.⁶⁸ This project is co-financed by the Bank together with the Inter-American Development Bank (IDB) through a loan to Argentina on whose territory the power plant is primarily built. The project under this loan is carried out by a bi-national (i.e. Argentinean and Paraguayan) entity.

⁶⁴ See Request for Inspection – Bangladesh: Jamuna Bridge Project, Panel Recommendation (INSP/SecM96-14), December 2, 1996 (including in Annex 1 the text of the request itself). For Management's initial response, see Annex 2 of the Panel's Report and Recommendation.

⁶⁵ See Second Annual Report of the Inspection Panel (note 32), at 10.

⁶⁶ See Request for Inspection – Bangladesh (note 64) (reproducing Management's response in Annex 2).

⁶⁷ *Ibid.* at para. 56. (Panel Recommendation.)

⁶⁸ See Request for Inspection – Argentina/Paraguay: Yacyretá Hydroelectric Project, Panel Recommendation (INSP/R96-2), December 26, 1996 (including in Annex 1 the text of the request itself). For Management's initial response, see Annex 2 of the Panel's Recommendation.

In its response, Management challenged the eligibility of the request in a number of respects.⁶⁹ It argued, that since the Bank loans for the Yacyretá project were all made to Argentina, and the requesters were from Paraguay, they did not reside "in the territory" of the borrower, as required by the Resolution. Also, the Paraguayan NGO could not file a claim on its own behalf because it had not been damaged. It could only do so on behalf of the residents living close to the project site. Finally, the anonymity of the requesters would make it impossible for Management to respond to their concerns.

In its report,⁷⁰ the Panel concluded that the request was eligible because, in its view, the project had a bi-national character and the Government of Paraguay, although not the recipient of the Bank loan, had also accepted some obligations. In addition, another different loan had been made to Paraguay with an element to address the resettlement of people living in the area next to the project site. A local NGO would have the right to file a request not only on behalf of residents affected by the project but also with regard to damage to the biodiversity and other environmental conditions caused by a violation of a Bank policy even in the absence of damages to people. Anonymity would not be a reason for declaring a request ineligible, since legitimate concerns by requesters of being subject to reprisals had to be taken into consideration by the Panel. The identity of anonymous requesters would be usually checked by the Panel on the occasion of site visits.

Besides these technical issues related to the requesters' standing, the Panel found that Bank policies had been violated. It was particularly struck by the fact that the infrastructure works were almost completed while only a third of the housing in the resettlement component was finished. Other social mitigation measures also lagged behind. The Panel therefore recommended that the Board authorize an inspection.⁷¹

The Board, however, did not follow that recommendation, mainly because, for the second time, Management and the borrower had meanwhile agreed on an action plan designed to take care of the problems of project implementation. Instead, the Board invited the Panel to undertake a review of the existing problems of the Yacyretá project regarding environmental and resettlement issues in order to provide an assessment of the adequacy of the action plan agreed between the Bank and the countries concerned (Argentina and Paraguay) within the next four months. The Board also stated that it expected the Panel to review consistency of the Bank's actions with its procedures while reviewing the action plan.

In the course of its review of the plan, the Panel received a number of further requests asking for inspection of specific aspects of project execution which were allegedly detrimental to the people, communities and environment on the Argentine side of the reservoir. Because the substance of the issues raised in these re-

⁶⁹ *Ibid.* reproducing Management's response in Annex 2.

⁷⁰ *Ibid.* at paras. 13–39. (Panel Recommendation.) See also Second Annual Report of the Inspection Panel (note 32), at 11.

⁷¹ See Request for Inspection – Argentina/Paraguay (note 68), at para. 43.

quests were the same as in the original request, the Panel, in consultation with the Board, incorporated them into the ongoing review. By then, the Panel's review was carried out in parallel with the investigation by the inspection mechanism of the IDB. In September 1997, the Panel presented the report on its review to the Board which in substance amounted to a full investigation of the complaints submitted by the requesters.⁷² That report was discussed in December 1997. On the basis of the Panel's report, the Board noted that the implementation of the action plan had made significant progress towards resolving the environmental and resettlement problems of the project. The Board, nevertheless, requested Bank Management to continue its follow-up on the implementation of the action plan and to report to it on further progress in the matter within six months. While the Board decided not to involve the Panel in the follow-up this time, it announced that it would determine later whether it wished the Panel to play a further role in this respect. Another progress report has been sent to the Board in April 1998 and is currently awaiting its discussion in the Board.

It should be noted that in mid-September about 50 brickmakers, who had been resettled during the course of the construction of the Yacyretá Hydroelectric Project, extended their original suit in an Argentinean court for damages against the bi-national entity serving as an executing agency for the project to the Bank and IDB. The basis for the brickmakers' action against the Bank is its involvement in the preparation of the resettlement and environmental action plan. The Bank filed a motion to dismiss the claims on the basis of its immunities pursuant to its Articles of Agreement,⁷³ the Specialized Agency Convention,⁷⁴ the Establishment Agreement between the Bank and Argentina,⁷⁵ and the arguments that there is neither privity of contract between the Bank and the plaintiffs nor another legal basis under the applicable law of Argentina for a claim of the plaintiffs against the Bank. In this context, it must be emphasized that the Panel's assessment of a failure by the Bank to comply with its own standards does not imply any liability on the part of the Bank under the applicable law of a borrowing country. The Panel's assessment however may indirectly contribute to the determination of borrower actions which could constitute a fault under domestic law. While the borrower's actions clearly do not fall within the Panel's mandate under the Resolution, the Panel's determination of Bank actions could provide an analysis that constitutes a factual basis for those who wish to present a claim against the borrower under domestic law.

⁷² See Request for Inspection – Argentina/Paraguay: Yacyretá Hydroelectric Project, Panel Review and Assessment (INSP/R97-10), September 18, 1997.

⁷³ See Article VII of the IBRD Articles of Agreement (outlining the scope of the Bank's immunities).

⁷⁴ See Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly of the United Nations on November 21, 1947 and Annex VI on the application of the Convention to IBRD (United Nations Publication, ST/LEG/4/Rev. 1, Sales No. C/E/F/R/S.75.X.2, 1974).

⁷⁵ See Agreement between the IBRD and the Argentine Republic Concerning the Establishment of a Resident Mission in Buenos Aires, signed on December 20, 1991 (on file with the Bank).

8. Jute Sector Adjustment Credit/Bangladesh

The eighth request to be reported was filed in August 1996 by a group of owners of private jute mills in Bangladesh.⁷⁶ They claimed that they had suffered economic losses due to the Bank's (IDA's) failure to follow its policies and procedures on adjustment lending, supervision of programs and suspension of disbursements in the design and implementation of the Bangladesh Jute Sector Adjustment Program. The latter intended to restructure Bangladesh's jute manufacturing industry according to the needs of the world market through a number of measures such as the elimination of excess capacity by closure and downsizing of a certain number of public mills, privatization of another number of these mills, and retrenchment of employees of closed, downsized, or privatized mills. As a result of political turmoil, the conditions for the disbursement of the second tranche of the credit, originally scheduled for March 1995, were not met and the tranche consequently not released. In fact, the project suffered from a three-year delay in implementation.

In its formal response to the request, Management asserted that all policies and procedures had been observed, and that, in any case, acts and omissions in relation to the implementation of adjustment credits – in contrast to investment credits – were the sole responsibility of the borrower and the request, therefore, was outside the Panel's mandate.⁷⁷

The Panel concluded that the request was eligible since, in its view, the requesters had suffered the alleged harm caused by the Bank's failure to ensure sufficient political commitment and to maintain certain macroeconomic policies as required under the Bank's adjustment lending policy, and to supervise the general macroeconomic framework under the supervision of programs policy.⁷⁸ In the Panel's eyes, the Bank also failed to discuss remedies other than the non-release of the second tranche of the credit such as suspension and cancellation of the credit as prescribed in the policy on suspension of disbursement in order to sanction the non-implementation of the program by Bangladesh. The Panel generally rejected Management's argument that it had no mandate to review the implementation of adjustment credits. The Panel's view had been reinforced by a legal opinion from the Bank's Deputy General Counsel (Operations) who listed a range of remedies that would be available to the Bank in the case of non-compliance with implementation covenants of adjustment credits. However, because the new Government of Bangladesh and the Bank were negotiating a revised time-table for the implementation of the program and an extension for the credit's closing date, the Panel did not find an investigation useful at that stage and, therefore, did not recommend one to the Board.⁷⁹

⁷⁶ See Request for Inspection – Bangladesh: Jute Sector Adjustment Credit, Panel Report and Recommendation (INSP/R97-3), March 20, 1997 (including in Annex 1 the text of the request itself).

⁷⁷ *Ibid.*, reproducing Management's response in Annex 2.

⁷⁸ *Ibid.* at paras. 87–89. (Panel Recommendation.)

⁷⁹ *Ibid.* at para. 89. (Panel Recommendation.)

The Board agreed with the Panel's conclusion not to investigate, without determining whether it would follow the Panel's reasoning in all respects. In June 1997, Management allowed this loan to close.

In the absence of a Board decision on some substantive issues related to this request, some questions remain to be answered in future. Among them is the question of whether the Bank has a responsibility for the implementation of adjustment programs as the Deputy General Counsel (Operations) had suggested in his opinion on the basis of remedies available to the Bank in the case of non-compliance by the borrower with covenants in adjustment credit agreements. Another open question is whether the provisions in the Bank's policies on adjustment lending include provisions on rights or interests of individuals in the sense of the Resolution's eligibility requirements.⁸⁰ This question is legitimate because sectoral adjustment policies only address the sector as a whole and require the maintenance of a macroeconomic policy framework by the borrowing country's government without describing individualized rights. The Panel simply assumed that policies and procedures on adjustment programs would also include descriptions of rights or interests of individuals which could be adversely affected by the Bank's non-compliance with these policies and procedures. Were the Panel's reasoning correct, requesters could successfully challenge Bank actions in the context of an adjustment operation if they were part of the sector which the program addresses and if they suffered economic losses or failed to make expected profits as a result of the non-implementation of an adjustment program or the non-adherence to the general policy framework guidelines.⁸¹ It will be for the Board to determine whether ultimate beneficiaries of an adjustment program qualify as holders of rights or interests under Bank policies and procedures.

9. Itaparica Resettlement and Irrigation Project/Brazil

The ninth request, received in March 1997, concerned a resettlement and irrigation project in Itaparica, Brazil.⁸² A local union of rural workers representing people living in the project area alleged the Bank's violation of its policies for dam

⁸⁰ For a definition of rights or interests under the Resolution, see Shihara, *The World Bank Inspection Panel* (note 4), at 54. See also Bradlow/Schlemmer-Schulte (note 5), at 404 (analyzing the Bank's policies and procedures for their rights and interests contents in terms of formal and substantive due process requirements as well as emphasizing that the policies and procedures must include mandatory rules in order to create rights and interests of individuals in the sense of the Resolution's requirements).

⁸¹ The question of a violation of rights or interests of individuals in connection with adjustment programs has been raised earlier. See E.R. Carrasco/M.A. Kose, *Income Distribution and the Bretton Woods Institutions: Promoting an Enabling Environment for Social Development*, 6 *Transnational Law & Contemporary Problems* 1, 45 (1996) (discussing whether the Panel's jurisdiction covers adjustment lending).

⁸² See Request for Inspection – Brazil: Itaparica Resettlement and Irrigation Project, Panel Recommendation (INSP/R97-7), June 27, 1997 (reproducing the request in Annex 1). For Management's initial response to the request, see Annex 2 to the Panel's Recommendation.

and reservoir projects, on environmental assessment, involuntary resettlement, and indigenous people.

The Panel recommended investigation of the complaint but sought the Board's confirmation that it was not time-barred which, under the Resolution, is, among other criteria, the case when 95 percent of the loan financing the project is disbursed.⁸³ The project was initially financed by a Bank loan, which was fully disbursed. It was however later further financed by a supplemental loan – introduced through an amendment of the original loan agreement – which was almost, but not quite 95 percent disbursed. The General Counsel issued a legal opinion confirming that, under such circumstances a request would not be time-barred.⁸⁴

In September 1997, the Board, while avoiding the issue of time-limits on the eligibility of complaints, decided not to authorize an investigation, for the third time because of a remedial action plan, prepared after Management's initial response on the request to the Panel and to be fully financed by the Government of Brazil. The Board concluded that the Bank should help supervise the implementation of the Brazilian Government Action Plan which required the disbursement of an additional \$290 million for the purpose of the project to ensure completion of works providing productive infrastructure and technical assistance to resettlers. It should be noted that both the action plan and the request for Bank supervision of its implementation were initiated by the Brazilian Government. The Board decided further that it would review the progress of the project in a year and invite the Panel to assist in that review.

It should be noted that it was during the September 1997 meeting, discussing this and the next request, that the Board decided to hold a further review on the general role of the Panel and the Resolution establishing it.

10. NTPC Power Generation Project/India

In the tenth case, received in May 1997, residents in the Singrauli area of India, where the National Thermal Power Corporation (NTPC) operates and is expanding a number of coal-powered generating facilities, claimed non-compliance by the Bank with its policies on environmental assessment, involuntary resettlement and indigenous people.⁸⁵ Management recognized its partial failure to observe some of the policies involved in its response to the request and submitted a detailed remedial action plan.⁸⁶

⁸³ *Ibid.* at para. 46. (Panel Recommendation.)

⁸⁴ See Legal Opinion of the Senior Vice President and General Counsel, Time-Limits on the Eligibility of Complaints Submitted to the Inspection Panel (SecM97-693), July 28, 1997 (internal document).

⁸⁵ See Request for Inspection – India: NTPC Power Generation Project, Panel Report and Recommendation (INSP/R97-9), July 25, 1997 (including in Annex 1 the text of the request itself).

⁸⁶ *Ibid.*, Memorandum from Mr. Kaji to Mr. Bissell, India: NTPC Power Generation Project, Management Response to Request for Inspection, June 3, 1997, reprinted in Annex 3 of the Panel's Report and Recommendation regarding this request.

Despite that plan, the Board, in September 1997, approved the Panel's recommendation for an investigation by the Panel of the Bank's role in the power generation project. But bearing in mind that the Panel had already undertaken a preliminary review at the project site, the Board decided that the investigation should be conducted at the Bank's headquarters in Washington. The Panel was asked to report its findings to the Board within three months. At that point, the Board would decide whether any further action would be deemed appropriate. The Board took also notice of the action program of corrective measures prepared by Bank Management and requested periodic progress reports on the implementation of that program.

The Panel presented its report on the limited investigation it conducted in the NTPC case in December 1997.⁸⁷ In this report, the Panel noted that it found the violations of Bank policies and procedures regarding the involuntary resettlement and associated aspects of the project of which it had found *prima facie* evidence in its earlier recommendation confirmed by its desk study. Management agreed in substance with the Panel's main findings while disputing some of the facts on which these findings were based.⁸⁸ The Panel's report was discussed in the Board in March 1998.

11. Ecodevelopment Project/India

In March 1998, the Panel received the eleventh request for inspection from an Indian NGO representing tribal people living in the Nagarhole National Park in Karnataka, India. The requesters claimed that IDA had violated their rights and interests as a result of violations of the policies on indigenous peoples, involuntary resettlement and forestry in the design and implementation of the Ecodevelopment Project. The Panel registered this request in April 1998 and forwarded it to Management for a response.

IV. The Two Reviews of the Resolution Establishing the Panel

As has been noted earlier, the Bank's Board of Executive Directors has reviewed the Bank's experience with its inspection function twice since the Inspection Panel was created in 1993. The first review of the experience under the Resolution Establishing the Panel took place in 1996. This review was required by the Resolution itself which provides in Paragraph 27 that "[t]he Executive Directors shall review the experience of the inspection function established by this Resolution after two years from the date of the appointment of the first members of the Panel." The first review consisted of an in-depth discussion of all important issues related to the Panel process that had come up during the first two years after the appoint-

⁸⁷ See Request for Inspection – India: NTPC Power Generation Project, Panel Report on the Investigation (INSP/R97-15), December 24, 1997.

⁸⁸ See India: NTPC Power Generation Project, Management Report and Recommendation on Inspection Panel Report (INSP/SecM98-2), February 4, 1998.

ment of the first Panel members, including practical and legal issues raised in connection with complaints brought under the Resolution, general queries and criticism from outside the Bank, as well as issues raised by the Panel, Management or within the Board itself. In that sense, the first review represented a comprehensive assessment of the Bank's experience with the practice under and theory of the Resolution Establishing the Panel.

By contrast, the second review, which the Board decided to undertake *ad hoc* during the discussion of actual requests in September 1997, focused on two inter-related issues both connected with the political sensitivities the Panel process had raised among some of the Bank's largest borrowers. The two main issues discussed during the second review included the question of the place for remedial action plans in the Panel process (as it had emerged in connection with the Rondonia, Yacyretá, Itaparica and NTPC cases), and the question of the approach to the increasing perception of the Panel investigating the borrower's failure with respect to its obligations under a loan agreement rather than the Bank's failure to follow its policies and procedures.

The summary below covers in particular those aspects of the first review that were not discussed earlier in the context of a concrete case. These are mainly aspects which have been discussed more in the abstract or on the basis of an aggregate view of the practice of the Panel process. The summary of the second review briefly outlines the main issues of the still ongoing debate.

1. The First Review of the Resolution Establishing the Panel

The first review of the Resolution Establishing the Panel started in February 1996 with an informal meeting of the Executive Directors on the matter based on four papers prepared by Management. These papers included (i) a non-exhaustive list of issues for discussion; (ii) a table summarizing the history of the requests before the Inspection Panel; (iii) a list summarizing comments received from the Panel and outside sources; and (iv) a note and a table comparing the Bank's Inspection Panel with the inspection functions of the IDB and the ADB. In this informal meeting, the Executive Directors agreed that the Board's Committee on Development Effectiveness (CODE) would first review the matter in depth on the basis of Management's recommendations before final recommendations would be made by CODE to the Board. In March 1996, a number of papers with suggestions from several NGOs for the review were received and circulated to the Committee before Management sent its paper outlining the issues that had arisen in the implementation of the Resolution, summarizing the positions of the Inspection Panel and outside sources with respect to these issues as well as indicating Management's own position. Subsequently, the Panel submitted comments on Management's paper to CODE.

Discussion in CODE in June 1996 revealed a broad preference among committee members to keep the original Resolution Establishing the Panel intact as Management had suggested, while providing for measures of flexibility in its imple-

mentation. Rather than introducing amendments to the Resolution, it was felt that the Board should consider the issuance of guidelines for the application of the Resolution in practice. Such guidelines would, since they would be issued by the Board, have the same legal force as the Resolution and would in fact complement its text. A paper presenting Management's recommendations and formulations of such guidelines as revised in light of CODE's discussions and the majority view in the June 1996 CODE meeting was presented to the Board.⁸⁹ The latter approved these guidelines which were conveniently termed "Clarifications of Certain Aspects of the Resolution Establishing the Panel" in October 1996.⁹⁰

One issue that had initially been part of the review of the Resolution and the respective discussions in CODE was, however, excluded from the consensus reached in the Clarifications. This was the issue of a possible extension of the Bank's inspection function to IFC and MIGA operations. It was felt in CODE that this was a complex question that could not be answered with a quick "yes" or "no" but involved further analysis of the differences and similarities between IFC and MIGA on the one side and the major part of the Bank's operations, i.e. the public sector operations, on the other side. It was further felt that if, however, an extension of the inspection function to IFC and MIGA was to be considered, it should also be discussed whether private sector financing operations across the World Bank Group (including those of the Bank itself) should not be subjected to a different Panel or, at least, if the same Panel would be dealing with these operations whether this Panel should not be operating under different procedures that would take account of the special circumstances of the private sector. In the June 1996 meeting of CODE, the issue was therefore separated from the general review of the Resolution Establishing the Panel. Subsequently, a paper on a proposed inspection mechanism for private sector projects was prepared by the IFC Management for discussion in CODE. On the basis of that paper, it was agreed in July 1996 by CODE that IFC and MIGA would carry out consultations with their clients, i.e. the private sector and co-financiers, as well as Executive Directors representing borrowing countries on the question of an inspection function for their activities and report on these consultations to CODE. The report on these consultations was submitted to the Board a year later. According to the report, a majority of those consulted were not in favor of any inspection function and would, in particular, object to an inspection of IFC's and MIGA's private sector operations under the established procedures of the existing Inspection Panel of the Bank. With these objections of the private sector on the one side but an equally important desire by Management to continue considering a Panel mechanism for the two Bank affiliates on the other side, the

⁸⁹ See Review of the Resolution Establishing the Inspection Panel: Clarifications of Certain Aspects of the Resolution (R96-204), September 30, 1996. See also note 9.

⁹⁰ For a summary of the discussion on the occasion of the first review of the Resolution Establishing the Inspection Panel and the results thereof, see also Shihata, *The World Bank in a Changing World*, Vol. III (note 4), and Louis Forget, *Le "panel d'inspection" de la Banque Mondiale*, *Annuaire Français de Droit International* 645 (1996).

discussion in CODE was not conclusive. Management was, however, asked to present different options integrating the two divergent views to a subsequent meeting.

In contrast to the difficulties of reaching a consensus on the question of an inspection for IFC and MIGA operations, the results of the remainder of the general review of the Bank's experience with the inspection function were embodied in the Clarifications without difficulty.

In connection with the Panel's function and procedures, as has already been mentioned in the context of the discussion of the Rondonia case, the Board, while keeping the 21-day period of the Resolution as a general rule, agreed to the flexible extension of the Panel's time frame for ascertaining the eligibility of a request, as an exception to the general rule, in case the Panel believes that undertaking a preliminary assessment of the harm allegedly suffered by the complainants would be appropriate and potentially lead to a solution of the matter obviating the need for a full investigation.⁹¹ Interestingly, the Board did not agree with the suggestion made by some NGOs to eliminate the first phase of the Panel process altogether and have the Panel alone ascertain a request's eligibility without any Board decision in this respect and, if a request would be found eligible, to go ahead with the investigation. The Board also confirmed another original feature of the Panel's function in the Clarifications. It made it clear that the Panel's investigations should continue to result in "findings" (not in recommendations to the Board on remedial measures alleviating the project's flaws as a result of the Bank's failure to follow its policies and procedures, or on overall improvements of the Bank's policies and procedures, as suggested by some NGOs). The Board committed itself to continue to act on the Panel's investigations and Management's recommendations with respect to such remedial measures as may be needed.⁹²

On the issues of access to the Panel and the eligibility of requests for inspection, the Board confirmed the interpretation of an "affected party" as being "any two or more persons who share some common interests or concerns"⁹³ that it had decided on earlier on the basis of the General Counsel's legal opinion issued in connection with questions on the Panel's role in ascertaining a request's eligibility raised in the Nepal Arun III case. It may be noted, in this context, that Management had not objected in its recommendations to the Board to the suggestion of several NGOs to extending access to the Panel to all affected parties, including a single individual. The Board, however, declined to follow that suggestion. It also did not agree to another NGO-supported suggestion which favored the extension of the inspection function to requests submitted by foreign NGOs, local NGOs whose rights or interests were not affected by the project or even to complaints submitted in the general public interest. The Board finally did

⁹¹ See *supra* note 58 and accompanying text.

⁹² See Clarifications (note 9), under the section on the Panel's function.

⁹³ *Ibid.*, under the section on eligibility and access. (Emphasis added.)

not accept the Panel's suggestion to empower the Bank's President to ask for an inspection, emphasizing that it had established the Panel as an independent mechanism to the Board that was to assist the latter in its supervisory function of Management.

As mentioned above, the Board also clarified that the request for inspection must relate either to a project under consideration by Management to be financed by the Bank, or to a project already approved by the Board and financed by the Bank. It also confirmed its earlier understanding to the effect that the term "project" as used in the Resolution had the same meaning as generally used in the Bank's practice.⁹⁴

As also mentioned earlier, the Board reiterated that no procurement action is subject to inspection by the Panel whether taken by the Bank or by a borrower.⁹⁵

On the question of disclosure of information, the Board agreed to make Management's response to the request for inspection as well as the opinions of the General Counsel of the Bank on matters related to the Panel available to the public after the Board had discussed these documents.⁹⁶ In the case of the General Counsel's opinions, the Board, however, reserved its right to decide otherwise in a specific case. Regarding another dimension of outreach, the Board decided that Management would make significant efforts to make the Inspection Panel better known in borrowing countries.⁹⁷ It clarified, however, that the Bank would not provide technical assistance or funding to potential requesters.⁹⁸

No change in the composition of the Panel was proposed⁹⁹ but, as has been mentioned earlier, the Panel's composition was eventually to be discussed again in connection with the decision on an inspection mechanism for private sector operations unless the option chosen would be the creation of a separate panel.

The Board also emphasized that the authority to interpret the Resolution was vested in the Board.¹⁰⁰ While the Panel would apply the Resolution to specific cases as it understands it, that application would be subject to the Board's review.

The Board also reiterated the requirement of the Resolution that "[t]he Panel shall 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."¹⁰¹ The request of some NGOs that the Board should have a separate legal counsel to advise on Panel matters distinct from the Bank's General Counsel was rejected. It was recalled that the General Counsel provided in-

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*, under the section on the composition of the Panel.

¹⁰⁰ *Ibid.*, under the section on the role of the Board.

¹⁰¹ *Ibid.*, and Resolution Establishing the Panel (note 2), at para. 15. (Emphasis added.)

dependent legal advice to both the President and the Board on all matters. It was also noted that he was not involved in the preparation of Management's responses to the requests for inspection.¹⁰²

2. The Second Review of the Resolution Establishing the Inspection Panel

The second review was agreed upon by the Executive Directors in September 1997 when, during a Board meeting discussing the Inspection Panel's recommendation in the NTPC and Itaparica cases, differences in views on how to best deal with the Panel's recommendations to investigate particular requests for inspection emerged, leading the Executive Directors to agree on a second review of the Bank's experience under the Resolution Establishing the Panel.

Since September 1997, two informal Board meetings have been held on the basis of papers prepared by Management and the Panel. Discussions have focused on the timing in the preparation of a remedial action plan in the course of a request before the Panel, the possible content of such remedial action plan, and the clarification of related questions on the Bank's accountability and its liability. These discussions have turned out to be difficult in light of the embarrassments attached to investigations by the Panel in borrowing countries and the related perceptions that the Panel would be investigating the borrowers' failures rather than the Bank's failures despite the Panel's clear mandate under the Resolution to limit itself exclusively to Bank actions.

The debate in the Board on these important and politically highly sensitive issues is still ongoing, postponing a meaningful discussion of the issues of the second review of the Bank's experience with its Inspection Panel to the future.

V. Discussion of the Bank's Experience with the Panel

The cases before the Panel and the two reviews of the Resolution Establishing the Inspection Panel (one of which is, as mentioned before, still ongoing) make up the Bank's experience with its Inspection Panel. It is indeed a rich experience. The real extent of the exercise of the Panel's investigatory function in the cases prove this point as well as the vast number of issues discussed during the first review of the Resolution and the controversial debate in the process of its second review, the latter highlighting many practical difficulties of today's development assistance.

Along the cases brought before the Panel and the discussion during the reviews, although fairly unnoticed by the direct players in the process, contributions were made to the development of international law. This applies specifically to the law

¹⁰² It may be noted that there are examples where the views of Management as expressed in its response differ from the views of the General Counsel as found in his opinion. One such example is the question of time-limits on the eligibility of complaints submitted to the Inspection Panel that was raised in the Itaparica case. See *supra* note 84 and accompanying text.

of international organizations in terms of their external accountability (i.e. their accountability vis-à-vis third party non-state actors). The contributions that stand to date result from the decisions made by the Board in the context of the cases and the Clarifications issued by the Board in the course of the first review of the Resolution Establishing the Panel. Further contributions (potentially including revisions of earlier decisions, further developments of these decisions or new decisions) may be expected from the completion of the second review of the Panel's experience.

The extent of the exercise of the Panel's investigatory function as well as the contributions of the Panel experience to the development of international law deserve to be looked at more closely.

1. The Extent of the Exercise of the Panel's Investigatory Function

It is interesting to note that, of the eight registered cases which reached the stage of the Panel recommendation,¹⁰³ the Panel recommended an investigation in five cases, while the Board formally approved the Panel's recommendation in favor of an investigation in only two cases, (i.e. the first and the penultimate case of all cases brought before the Panel) and asked the Panel to make assessments which amounted *de facto* to an investigation in a third case (i.e. the seventh case brought before the Panel).¹⁰⁴ In three cases the Panel did not recommend an investigation. In the latter three cases, the Board took notice of the Panel's recommendation against an investigation and approved of it.

Aside from the presence of a formal authorization by the Board to the Panel to carry out an investigation as described in the Resolution, the Panel ultimately played an active role in the supervision of the implementation of projects in six cases. (These cases are Nepal Arun, Rondonia, Jamuna Bridge, Yacyretá, Itaparica, and NTPC.) In all these cases, a remedial action plan had been adopted by Management. In four of these six cases, the action plan had been adopted after Management had had the opportunity to respond to the requests (Nepal Arun, Rondonia, Yacyretá, and Itaparica). In two cases (Jamuna Bridge and NTPC), the action plan had been taken at the same time that Management was drafting its response and was referred to in the response. The Panel's role in these six cases consisted in assisting in the review of the implementation of the remedial action plan (Rondonia, Jamuna Bridge, Yacyretá, and Itaparica), or in carrying out the investigation itself (Nepal Arun and NTPC). Consequently, it may be said that, while the Board decided to formally authorize an investigation in only two cases, the Panel has had an impact in more than these two cases.

¹⁰³ It must be emphasized that one of the total of nine registered cases has only recently been registered and not yet reached the stage of the Panel's recommendation.

¹⁰⁴ See Shihata, *The World Bank in a Changing World*, Vol. III (note 4).

2. The Cases' Contributions to the Development of International Law

The concrete cases have contributed two features to the development of international law: One may be referred to as "case law" or "jurisprudence" under the Resolution Establishing the Panel; the other could be called a "commentary" on the Resolution.

The outcome of Panel assessments and investigations may be called "case law,"¹⁰⁵ although not in the narrow sense given to it in the common law context where precedents, i.e. court decisions on cases, traditionally constitute the main source of law. It is, however, legitimate to speak of a case law of the requests before the Panel in the broader sense, i.e. in the meaning of an aggregate of reported cases that interpret codes, statutes, and regulations similar to the courts' jurisprudence complementing the written law in civil law systems. The jurisprudence resulting from cases brought before the Panel consists of interpretations of, and practices developed under the Resolution. It is contained in decisions of the Board on matters of cases before the Panel. First among these Board decisions are the two main types of decisions that, under the Resolution, must be taken by the Board in the course of an inspection (i.e. the decision on the authorization of an investigation and the decision on remedial actions etc. after an investigation was carried out). This jurisprudence is also contained in other Board decisions which, although not expressly required under the Resolution, were taken in order to ensure the Board's authority of being the final interpreter of the Resolution and avoid misunderstandings resulting from Panel actions in connection with requests brought before it. While, consistent with the general principles of the Bank's institutional organization under its charter, it is the Board that makes these decisions, the substance of the body of case law includes also the bases for the Board's decisions in the concrete cases, i.e. the Panel recommendations, Management responses, legal opinions issued by the General Counsel, as well as debates in the Board itself, provided the Board's decisions allow for the latter to be truly identified as express or implicit bases for the Board's decisions.

In this context, it should be noted that, on a number of legal issues, the Board did not take a final position. This happened in the cases in which the Board denied the Panel recommendations in favor of an investigation its support without, however, siding with Management's view on the issue. It also happened in the cases in which the Board agreed with the Panel's general recommendation not to carry out an investigation without, however, expressly endorsing specific arguments made by the Panel in furtherance of the recommendation.

¹⁰⁵ The term "case law" is used here to mean the aggregate of reported cases that interpret the Resolution Establishing the Inspection Panel as the "statute" or "legislative basis" for the work of the Panel, Management and the Board in connection with cases brought before the Panel.

In an indirect way, i.e. outside the discussions on a concrete case, the cases have also contributed to the development of an authoritative "commentary"¹⁰⁶ on the Resolution. This commentary is contained in the Clarifications of Certain Aspects of the Resolution.¹⁰⁷ As mentioned before, the Clarifications include general interpretations of, and flexible practices developed under the Resolution which the Board agreed upon in the course of the first general review of the Resolution in 1996, a review that took place outside the context of a concrete case.

From a substantive point of view, the cases have helped to clarify a number of aspects under the Resolution. Among them figure the interpretations of terms in the Resolution such as "affected party, i.e. a group of persons with a common interest," "policies and procedures, i.e. those related to the design, appraisal and/or implementation of projects but not any," "projects, i.e. all types of Bank programs and development assistance activities," and "excluded procurement decisions, i.e. those by both the borrower and the Bank." The difficulties of interpreting other terms such as a requester "in the territory of the borrower," "rights or interests" of requesters, time-limits on subsequent loans, and the follow-up on borrower obligations in the context of the implementation of adjustment loans have been discussed, while final decisions on the interpretation of these terms have not yet been made.

Procedurally, it has been interesting to see that the Panel's role to look into the subject-matter in the first stage of a request has been strengthened after the experience in the Rondonia case. It may also be noted that remedial action plans, while they have not been envisaged by the Resolution to be taken at the time they were mostly taken, have not in all cases prevented an investigation. One formal investigation has been approved by the Board in the presence of a remedial action plan and the Board asked for assistance in the supervision of project implementation under the action plan by the Panel in the other cases. One of the tasks of the ongoing review will be to decide whether the discretionary power which the Board exercised in handling the cases where Management had initiated remedial action plans should be kept, the approach which the Board took most often, i.e. not to authorize an investigation but ask the Panel for assistance, be formalized, or the procedures be completely changed.

3. The First Review's Contributions to the Development of International Law

In addition to the formal creation of an annotated commentary on the Resolution Establishing the Panel, the first review of this Resolution resulted in substance in (a) a confirmation of the general roles and functions of the Panel, the

¹⁰⁶ The term "commentary" is used here to denote a remark or note on some statutory provision intended to illustrate or explain its meaning. Analogies in domestic legal systems include the US Code Annotated or the classical commentaries on the civil codes of France and Germany.

¹⁰⁷ See Clarifications (note 9).

Board, and the General Counsel in the Panel process, and (b) in a clearer determination of the eligibility requirements for requests.¹⁰⁸

In terms of the roles and functions of the Panel and the Board, the Panel's role as an independent investigatory body and the Board's role as the final decision-maker regarding any request, as originally envisaged under the Resolution, have been reiterated. Attempts to enlarge the Panel's competence (and consequently reduce the Board's role) by formally merging the eligibility assessment and investigation phases into one failed.¹⁰⁹ While the 1996 Clarifications facilitate the Panel's preliminary assessment of the damages alleged by the requester on the occasion of the eligibility test by giving the Panel the possibility to ask for an extension of the period in which the ascertainment of the eligibility of the request should have normally been completed, the two stages of the Panel process were kept, both of them leaving the final decision on the matter to the Board rather than the Panel.

Although the substance of the requirements ascertained during the two stages of the Panel process and the order in which the eligibility assessment and investigation are made take quasi-judicial forms with the admissibility of the request being established before its merits are tested, the Board's confirmed role as the decision-maker on the outcome of a Panel proceeding at both stages proves that the Inspection Panel can to date not be compared with a court of law. The Board's decision to confine the Panel's recommendations after an investigation to findings on whether the Bank has complied with all relevant Bank policies and procedures, as originally envisaged in the Resolution, and to reject suggestions that called for an extension of the Panel's function to include making recommendations on measures to be taken with respect to the project (including possible remedies for the harm that parties affected by Bank-financed projects may have eventually suffered from), or to discuss even the Bank's overall policies and procedures, are also evidence of the Panel not having the same functions as a court.¹¹⁰ As a practical matter, the suggestion of giving the Panel a substantive advisory function was seen to be difficult to implement. It was found that such a function would require placing at the Panel's disposal technical and financial resources far beyond its existing facilities. More importantly, the proper lines between the role of the Panel and that of Management would be blurred if the Panel, rather than Management, would

¹⁰⁸ As mentioned before, some of the definitory contributions of the first review are based on earlier decisions taken in this respect in the course of the cases. With respect to these, the Clarifications merely reiterate the earlier decisions.

¹⁰⁹ In its note of November 1995, Review of the Inspection Function (note 57), the Panel stated that the extent of information expected by the Board at the preliminary stage is sometimes equivalent to the content of an investigation and that an extension of the time period of the preliminary stage reduces the need for a formal investigation. The Panel's views indicate a thinking in the direction of an elimination of the two-step procedure. Even more clearly, had NGOs asked for the elimination of the preliminary assessment of eligibility of the request by the Board and the streamlining of the procedure by the Panel by entrusting this assessment to the Panel.

¹¹⁰ These calls for an extension of the Panel's function originate with the NGOs Oxfam International and International Rivers Network.

recommend to the Board operational remedial measures or changes in Bank policies and procedures.¹¹¹ Finally, the 1996 Clarifications made the limitations of the Panel's role undoubtedly clear by reiterating that it would be the Board which would continue to have the authority to interpret the Resolution and to authorize inspections.

As has been mentioned above, in connection with the confirmation of the Panel's role as an independent investigatory body without decision-making powers (in particular with respect to the concrete requests brought before it), the Board also confirmed the role of the Bank's General Counsel as adviser (i) to the Board on the requirements of the Resolution Establishing the Panel, and (ii) to the Panel on the Bank's rights and obligations of the Bank with respect to the request under consideration. It should be noted that the Board's confirmation of the role of the Bank's General Counsel took place after full discussion of the criticism voiced in this respect from outside the Bank.

The Board's approach to the role of the General Counsel in the Panel process reflects the general understanding of that function in the Bank's internal institutional structure.¹¹² Under Bank practice, the General Counsel has since the Bank's inception advised the Board regarding the application and interpretation of the Bank's Articles of Agreement. The Board of Executive Directors, which, according to the Bank's Articles, has the ultimate power to interpret the Articles of Agreement, has generally based its formal interpretations as well as any clarification of the Articles' requirements on the advice and the legal opinions of the General Counsel. It is the Executive Directors' endorsement of, or concurrence with the General Counsel's opinions which gives them authority and allows for their incorporation in the Bank's subsequent practice under the Articles of Agreement.¹¹³

It has been suggested that there exists a conflict of interest if the General Counsel is able to advise the Board and the Panel regarding legal issues raised in connection with Panel proceedings.¹¹⁴ Specifically, it was argued that the conflict

¹¹¹ It may be noted that, in practice, Management discussed remedial actions with Panel members in the case of the Arun III Project and the Board invited the Panel several times to assist it in its review of Management progress in the case of follow-ups regarding the progress of action plans taken in the course of several requests. Such flexibility has not been seen as inconsistent with the text of the Resolution.

¹¹² For a detailed description of the role of the Bank's General Counsel, see I.F.I. Shihata, *The Role of the World Bank's General Counsel, Remarks on the Occasion of the Roundtable of International Financial Institutions General Counsels, Proceedings of the 91st Annual Meeting of the American Society of International Law 214-222 (1997)*.

¹¹³ In this vein, the General Counsel's legal opinions have often resorted to purposive interpretation to enable the Bank to respond to the changing needs of the world in which it operates. See, e.g., I.F.I. Shihata, *The World Bank in a Changing World, Vol. 1, (1991), Chapter 2 (The World Bank and "Governance" Issues in Its Borrowing Members)* (analyzing aspects of governance beyond the Bank's mandate and those consistent with it on the basis of a purposive interpretation of the Bank's Articles of Agreement).

¹¹⁴ See D.D. Bradlow, *A Test Case for the World Bank*, 11 *American University Journal of International Law and Policy* 247, 291 (1996), and Dana Clark/David Hunter, *The World Bank Inspection Panel: Amplifying Citizen Voices for Sustainable Development* 7 (Center for International

of interest would lie in the fact that the General Counsel is part of the Bank's Management and is, as head of the Legal Department, through his lawyers involved in all Management decisions in the design, appraisal, and supervision of the implementation of a Bank-financed project, while it is these Management decisions which are then at issue in Panel proceedings.¹¹⁵ The implicit conclusion of such reasoning is that the General Counsel's advice on legal issues would be tainted by the interest to spare the Legal Department from any embarrassment.

The idea of a conflict of interests in the advisory role of the General Counsel both as an adviser to the Board as well as to the Panel in connection with issues regarding the Resolution or requests has, however, to be rejected on several grounds.

Regarding the General Counsel's advice on the Resolution Establishing the Panel to the Board, it should be noted that the General Counsel does not comment to the Board on the specifics of a case pending before the Panel. In case the Board requests an opinion from the General Counsel regarding the requirements of the Resolution Establishing the Panel, he gives his views as to the meaning of provisions of the Resolution in the abstract. And, as with any other legal opinion, the General Counsel's views represent legal advice to the organ of the Bank requesting such opinion. These opinions do not necessarily coincide with Management's views on the issue.¹¹⁶ Furthermore, the General Counsel's views on the meaning of the Resolution are only given to the Board upon the Executive Directors' request. It is the latter who ultimately have the power to interpret the Resolution.

A similar analysis applies to the General Counsel's advice to the Inspection Panel on the rights and obligations of the Bank with respect to the request under consideration, as formulated under the Resolution. The General Counsel will again refrain from applying the general legal rule he is explaining to the concrete facts of the request. Also, on the occasion of the discussion of a request in the Board, the latter has the chance to agree or differ with the General Counsel's opinion.

As a general matter, the view suggesting a conflict of interest in the legal advice by the General Counsel to the Board and the Panel in connection with a request before the Panel not only negates the independence and integrity of the abstract legal advice by the General Counsel but is also based on wrong assumptions on the current state of the institutional system of an international organization in general and the World Bank in particular.

Environmental Law Document [CIEL], Discussion Draft of March 27, 1998) (asserting that the General Counsel's advisory role to the Board and the Panel in connection with a request to investigate Management's behavior results in a conflict of interest because the General Counsel's office both represents Management in its response to a claim and provides legal advice to the Board, i.e. the decision-maker). A similar criticism had been voiced by NGOs in connection with the first review of the Inspection Panel Resolution.

¹¹⁵ See Bradlow (note 114), at 291.

¹¹⁶ As has been noted earlier, see *supra* note 102, the General Counsel's views has in fact differed from Management's view (supported by the Legal Department) as expressed in a response to a request.

At the current state of the institutional system of international organizations, there is neither a personal nor a non-personal conflict of interest when the General Counsel gives abstract legal advices to the Board or the Panel.

A personal conflict of interest would only exist if the General Counsel's personal or financial interests would conflict or appear to conflict with his official responsibility.¹¹⁷ In the case of the General Counsel's abstract legal advice to both the Board and the Panel, no personal gains are involved, however.

The role of the General Counsel may also not be characterized as involving a non-personal conflict of interest or a lack of separation of functions within the Bank's organizational structure. Critics of the role of the General Counsel argue the existence of such a conflict of interest because, in their eyes, the General Counsel's Office "represents" Management in its response to a claim and provides legal advice to the decision maker, i.e. the Board.¹¹⁸ This view confuses, however, the General Counsel's role of an abstract legal adviser in connection with the Panel process with the role of a legal counsel in an adversarial procedure before a court. Neither is the Panel process a judicial review in a court nor do the requesters and the Bank's Management assume the role of plaintiff and defendant respectively so that they would require their own separate counsels representing them. Currently, the abstract legal advice by the General Counsel merely reflects the non-adjudicatory nature of the Panel's review mechanism. It must be emphasized that as long as the Panel remains an investigatory body without decision-making powers, it will be inappropriate to see a conflict of interests in the General Counsel's role of a legal adviser.¹¹⁹ It should be noted again that the Bank's Board of Executive Directors signaled in its 1996 Clarifications that it is currently not willing to enlarge any of the Panel's powers and functions that would turn it into an independent adjudicatory body.¹²⁰

¹¹⁷ For a definition of a conflict of interest in connection with public officials and fiduciaries, see Black's Law Dictionary 299 (6th ed. 1990). See also International Encyclopedia of the Social Sciences, Vol. 3, 242 (David L. Sills ed., 1968).

¹¹⁸ See Clark/Hunter (note 114), at 7.

¹¹⁹ Regarding any calls for an expansion of the Panel's role and, by extrapolation, a reduction of the Board's powers in connection with non-state actors' complaints with a view to develop the Panel process into a judicial review, it must be noted that (i) such calls would be of a *de lege ferenda* nature, and (ii) they must precede any discussion of the role of the General Counsel and appropriate legal representation of the Bank and the affected people. It is the Panel's and the Board's roles which determine the nature of the Panel mechanism and any legal advice or counsel merely reflects that nature.

¹²⁰ While the following discussion is irrelevant for the discussion of the role of the General Counsel because he is not an organ of the Bank, a comparison with the development of the concept of separation of powers in states and developments in the EU and other international organizations may be interesting from the broader perspective on the functions and competencies of the organs of an international organization in general, and the Bank in particular. The concept of separation of powers (including the development of the legislative, the executive, and the judiciary) developed in the 18th and 19th century in the constitutional law of the Western states as institutional checks and balances and a means to protect the individual against the concentration of uncontrolled state power. The principle of separation of powers in this sense is, however, not incorporated in the charter of any international organization. As an exception in this respect, the ECJ has introduced the principle of "institutional

Besides issues related to the current roles and functions of the Panel, the Board and the General Counsel, the second important substantive result of the first review of the Resolution establishing the Panel is the clearer determination of the meaning of a number of eligibility requirements of a request including the meaning of "affected party," "projects," "policies and procedures," and "procurement decisions" that are excluded from being challenged before the Panel.¹²¹

The Bank's general approach in the determination of eligibility requirements, while open to all arguments made from various sides, was a careful one, inclined to confirm the original wording of the Resolution establishing the Panel rather than introducing new changes, thereby confirming the idea of an independent Panel, recognizing its work, and giving it further time to establish its reputation, while finding it too premature, two years after its establishment, to radically change the Panel's proceedings.

Thus, the "affected party" keeps being defined as a community of interest rather than sole individuals.¹²² This definitory approach reflects the realities of development assistance in the Bank's practice. Projects and programs cover broad and not individualized economic and social goals by the financing of infra-structure and agricultural projects, health, population, nutrition, and education projects, structural adjustment programs (including overall macroeconomic policy advice), sectoral adjustment programs (including sectoral structural policy advice), and gov-

balance" under the EC-Treaties to govern the relationship between the EU's institutions. See Case C-70/88, *Parliament v. Council*, 1990 ECR 2041, 2073. The ECJ's rationale to speak of "institutional balance" instead of a separation of powers results from the fact that the traditional division of governmental functions into the categories of legislative, executive, and judicial functions does not exist among the EU's institutions. The latter rather share these functions and none of them can be described as the sole legislator or executive. No other international organization has developed a similar principle of institutional balance. This is not surprising because no other international organization has powers as broad as, and equivalent to, the EU. In other international organizations, a separation of functions in the above sense has so far been limited to the creation of judicial review mechanisms of international organizations' decisions vis-à-vis staff. Consequently, any future development of the Inspection Panel mechanism into a judicial review process would be another pioneering step by the World Bank. For the time being, any discussion on such a development remains, however, of pure academic nature.

¹²¹ Other eligibility requirements were clarified in connection with cases, while further requirements, although their meaning was discussed in case proceedings, were not authoritatively determined. See discussion above under V. 2.

¹²² The Bank's decision to give standing to a grouping of individuals rather than single individuals contrasts with the development of legal actions in domestic legal systems where individuals were given access to grievance or judicial review bodies before collective action was allowed to be taken. For a general discussion of the rationale of individuals' access to courts, see A. Bleckmann, *The Aim of Judicial Protection: Protection of the Individual or Objective Control of the Executive Power? The Role of locus standi*, in *Judicial Protection against the Executive Power*, Vol. III, 19-45 (Hermann Mosler ed., 1985). For a description of the more recent development of collective action in Europe, see Cathérine Kessedjian, *L'action en justice des associations de consommateurs et d'autres organisations représentatives d'intérêts collectifs en Europe*, 33 *Rivista di diritto internazionale privato e processuale* 281-300 (1997).

ernance programs (including legal, judicial and civil service reform advice).¹²³ They are not geared to improve only single individuals' situations but target specific public and/or private sectors or the economy as a whole.

Similarly careful has been the approach to the definition of other eligibility requirements, such as the meaning of "projects," "policies and procedures," and excluded "procurement actions." In all cases, the determination of the meaning of the terms was made in reference to the original wording of the Resolution and the reasons for the respective formulation as reflected in the drafting history of the Resolution. Thus, the term project was found to have the same meaning as in the Bank's practice, the policies and procedures applicable in the Panel process include only those that relate to the design, appraisal and/or implementation of projects but not those that have no such project-link, and procurement actions were generally found not to be subject to inspection by the Panel since a separate complaint mechanism exists for grievances in connection with procurement actions.

VI. Conclusion

Altogether, the cases before the Panel and the first review of the Resolution establishing it have reinforced the concept of the Inspection Panel. Case law, the authoritative commentary, and the extent of the Panel's investigatory activity have confirmed the Panel's role and function as an independent investigatory body receiving complaints from individuals adversely affected by projects financed by the Bank. While the creation of the Panel was initially quite a new and risky undertaking by the Bank, the Bank's experience with the Panel has successfully entered a consolidation phase in the implementation of this new concept in international law. This is important for the long-term success of the Bank's step to add a new institutional feature to its organizational structure.

This new feature is probably one of the most important recent institutional innovations in the law of international organizations. A new visible body, i.e. the Inspection Panel, was added to the Bank's organizational structure. Also, compared with an individual's traditionally limited standing under international law, new rights of access to that body for individuals affected by Bank-financed projects were introduced.¹²⁴

¹²³ For details on the evolution of the Bank's development assistance from project to program lending, see World Development Report – Poverty, 1–6 (World Bank, 1990).

¹²⁴ Individuals have traditionally been accorded standing before international fora in two situations. Either they were staff of an international organization and allowed to bring complaints before the organization's administrative tribunals. See, e.g., C.F. Amerasinghe, *The Law of the International Civil Service* (1998). Or, individuals were given standing under regional treaty systems and special international conventions to bring complaints against states for violations of international human rights obligations. See A. Cassese, *Individuals in International Law: Achievements and Prospects* 113, 117 (M. Bedjaoui ed., 1991) (analyzing the problems with all aforementioned mechanisms of enforcement of human rights); F. Newman/D. Weissbrodt, *International Human Rights* 20 seq. (1990) (discussing the inadequacy of traditional methods of protecting human rights); T. Buergenthal, *International Human Rights Law and Institutions: Accomplishments and Prospects*,

The Bank's concept of an Inspection Panel stands for this international organization's commitment to the concept of accountability, more specifically the organization's external accountability towards non-state actors. In fact, the Panel has been created in line with growing concerns from the 1980s onwards about the accountability of the major international development agencies.¹²⁵ While the notion of accountability has been shown to have many facets,¹²⁶ the Inspection Panel reflects the facet of a complaint mechanism for people affected by development projects.

It must be emphasized that, while the Panel realizes the concept of accountability it does, however, not stand for the different concepts of legal liability under domestic law and international responsibility in international law. Actions on the basis of legal liability under domestic law in suits before local courts or international responsibility for violations of international treaty or customary law in cases brought before an international judicial forum should not be confused with requests brought before the Panel.¹²⁷ Unlike local or international courts, the Panel is not competent to render judgments. The Panel is also not applying domestic law or general international law like local or international courts, but applying the Bank's internal policies and procedures.¹²⁸ Through its investigatory powers, it enables the Bank to respond better to its own failures under its own internal rules by listening to the voice of the people in its borrowing members

63 *Washington Law Review* 1, 14 (1998) (noting that it has always been easier to promulgate human rights than to enforce them); C.F. Amerasinghe, *Local Remedies in International Law* (1990) (describing the problems associated with using local remedies to enforce international law).

¹²⁵ For general details about these concerns, see, e.g., J.C.N. Paul, *Law and Development into the 90s: Using International Law to Impose Accountability to People on International Development Actors*, *Third World Legal Studies* 1-16 (1992). Similar concerns were expressed within the Bank on the occasion of a number of reviews of the overall efficiency of Bank operations and the search for ways of improving the performance of Bank-financed projects. For details on the Bank's motives for the establishment of an inspection function, see Shihata, *The World Bank Inspection Panel* (note 4), at 5-13.

¹²⁶ Among the facets are effective, transparent and participatory systems for development assistance, complaint and redress mechanisms for people affected by development projects. See Peter Slinn, *Law Accountability, and Development*, *Third World Legal Studies* vii-xx, at xix (1993).

¹²⁷ On the difference between accountability and legal liability, see Shihata, *The World Bank Inspection Panel* (note 4), at 106-117, and *Id.*, *The World Bank in a Changing World*, Vol. III (note 4). For details on the difference between the concepts of accountability, liability, and international responsibility, see S.Schlemmer-Schulte, *Accountability, Liability, and International Responsibility of International Organizations - The Case of the World Bank*, Remarks on the Occasion of the Panel Discussion on "The Accountability of International Organizations to Non-State Actors" at the 92nd Annual Meeting of the American Society of International Law (ASIL), held on April 4, 1998, *Proceedings of the 92nd Annual Meeting of ASIL* (forthcoming 1998). *Contra* Nathan (note 37), at 143 (suggesting that the Bank would be liable if not taking steps to prevent harm to parties located in the borrowing country without, however, clearly distinguishing between the three different concepts of accountability, liability and international responsibility and overlooking that the standards applicable to the Panel process, i.e. the Bank's internal policies and procedures, do not include provisions making the Bank liable to affected parties for non-compliance with these standards).

¹²⁸ On the applicable standards in the Inspection Panel process, see Shihata, *The World Bank Inspection Panel* (note 4), at 41-47.

who are the ultimate intended beneficiaries of the Bank's development assistance. In this respect, the Inspection Panel breaks with the traditional concepts of legal maxims and institutions of international law and introduces the new concept of an investigatory mechanism by which affected parties can hold it accountable for its own failures. Of course, thinking along this concept can be useful for the development of the traditional concepts.¹²⁹

As flexible as it is, the new concept can also be developed further if it is sufficiently consolidated, presenting chances for international lawyers for creative law-making in the future and, more importantly from the international development institution's point of view, contributing greatly to the efficiency of the operational activities of the Bank's development assistance.

¹²⁹ As has been mentioned, the distinction between Bank and borrower failures which have to be made in order to assess the potential failure of the Bank to comply with its own standards can indirectly contribute to the determination of borrower actions which could constitute a fault under domestic law. See discussion of the Yacretá Hydroelectric Project under III. 7. Similarly, such distinction may help in the theoretical analysis of multiple tortfeasor situations from the point of view of international responsibilities. On the question of multiple tortfeasors in general, see J.E. Noyes/B.D. Smith, *State Responsibility and the Principle of Joint and Several Liability*, 13 *Yale Journal of International Law* 225 (1988) (suggesting the concept of a joint and several liability in the multiple tortfeasor case); and J. Quigley, *Complicity in International Law: A New Direction in the Law of State Responsibility*, *British Yearbook of International Law* 77 (1977) (distinguishing between different types of multiple tortfeasor situations and the different resulting liabilities).