

**The World Bank Inspection Panel-its Historical,
Legal and Operational Aspects
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I- Introduction :

The world bank inspection panel , a special mechanism created by the world bank`s executive directors in September 1993 , has completed its fifth year of operation on august 1 , 1999 . Its experience has been subjected to two successive reviews by the bank's executive directors in 1996 and 1998/99 . this may allow for an evaluation of this important experience and a critique of its evolution in practice.

This paper describes the most relevant aspects of this mechanism. It traces the developments which led to the establishment of the panel , analyzes the resolution by virtue of which it was created, describes how this resolution has been so far applied in practice , how some of its provisions have been virtually amended by clarification issued by the bank's executive directors in the course of the first review of the panel`s experience in 1996 , and how some of these “clarifications” were later repealed to bring the panel's work closer to the original resolution establishing it . the chapter also presents the author`s explanation of how the role of the panel has until the completion of the second board review in April 1999 turned from the inspection function to the function of triggering remedial action by the bank or the borrower , though mainly by the latter , before or without a full investigation by the panel of the complaints submitted to it and how this issue has been tackled and resolved in the second review of the panel`s experience

II. developments which led to the establishment of the inspection panel

The creation by the world bank of an independent mechanism of its own to assess the extent to which it actually lives up to the standards it

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(**)This is the last article to be published in this review. by the late great Egyptian Jurist : I.Shihata . Our deep condolences to his family and friends . The editor.

has set for itself in the design , appraisal and implementation of its operations was unprecedented in the work of international organizations⁽¹⁾

(the earlier precedent of the jurisdiction of the European court of Justice over decisions of the European Communities is not counted in this respect as the distinct supranational nature of the latter organization does not provide a comparable precedent)⁽²⁾ The circumstances which led to the establishment of the panel and the factors, which influenced its final shape are therefore important both for a general understanding of the inspection function and for the interpretation of the Resolution establishing the panel⁽³⁾

A- The 1992 Internal Review of Bank Operations :

The creation of an operations` inspection function in the Bank

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- (1) for a comprehensive legal analysis of the Resolution establishing this unique body see Ibrahim F.I Shihata, *The World Bank inspection panel in practice*, chapter 2 (2nd ed. 2000) on which this paper is based.
 - (2) 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 E.C institutions. Any natural or juridical person can challenge the legality of acts at the EC institutions before the European Court of Justice acts are addressed to that person or are of direct and individual concern" to him. (See ex Article 173 Para. 4 now Article 230 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 ex Article 175 Para. 3 now Article 232 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 ex Article 178 now Article 235 in connection with ex article 215, Para. 2 now Article 288 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 may not however be unusual in the context of the EC which as a supranational organization may in some respects be comparable to a confederation.
 - (3) for a detailed account of the circumstances which led to the establishment of the inspection panel see Shihata , *super I* at 1-34.

emanated from an internal review of its work following the appointment in September 1991 of the late Lewis p. Preston as president of the Bank . This review coincided with , and was influenced by , increasingly strong voices from inside and outside and the bank on what was perceived as the Bank's inadequate attention to the high standards reflected in its policies and procedures .

Preston's conviction that the management of the Bank's portfolio of loans required improvement was shared by many Executive Directors , government officials, Bank staff and external parties. It led to the establishment of a task force, headed by an experienced senior manager in the Bank , to examine the quality of the Bank's loan portfolio. One of the main findings of the task force's report (which was submitted in November 1992 and came later to be known as the "Wapenhans Report," after the name of its chairman) was that the Bank staff were often concerned about getting as many projects as possible approved under the Bank's lending program⁽⁴⁾. In such an "approval culture," less attention had been given to the commitment of borrowers and their implementing agencies to the proper implementation of the projects financed and to the need for continued supervision by the Bank of such implementation⁽⁵⁾. The task force recommended a change in the Bank's policies and practices in order to improve performance of its portfolio management. It referred in this context, to the need to enhance the role of the bank's operations evaluation department (OED). A subsequent action plan, prepared by Management in July 1993 , in response to the task force's recommendation's introduced

(4) See effective Implementation: Key to Development Impact (R92-125), November 3, 1992 [hereinafter Wapenhans Report]. The findings of the Wapenhans Report are summarized in getting results the World Bank's agenda for improving development effectiveness 1-7 (World Bank 1993).

(5) See Wapenhans report, supra note 4.

new business practices and processes.⁽⁶⁾ It recommended greater participation in the design and implementation of bank-financed projects by the people affected by these projects and greater involvement of relevant NGOs in project design and implementation . It emphasized project “ownership” (in the sense of the commitment of the borrower to the project objectives and timely implementation), and better ways of monitoring the performance of Bank operations. In this respect, the plan highlighted the need for the Bank’s access , when necessary, “to a reliable source of independent judgment about specific operations that may be facing severe implementation problems.”⁽⁷⁾ Accordingly , it concluded that “ the interests of the Bank would be best served by the establishment of an independent Inspection panel.”⁽⁸⁾

B- External Demands For Greater Accountability

External criticism of the Bank by NGOs and influential circles in certain member countries with large subscriptions in the Bank’s capital (and large subscriptions /contributions to the Bank’s affiliate, the International Development Association (IDA) no doubt influenced that conclusion. This external criticism was part of a broader concern expressed by non-governmental sources in several developed countries to the effect that international organizations were not adequately accountable for their activities and that they needed to be more open and responsive. The criticism escalated in 1993, in the course of the final negotiations by donor countries on the tenth replenishment of IDA. This was also the time when some UN member states threatened to withhold part of their assessed

(6) see portfolio management :next steps, A program of action (world bank, July 22,1993)

(7) Id. At Para . 60

(8) see id.

contributions to the United Nations until that organization set up an independent Inspector General's office⁽⁹⁾.

The Narmada Precedent

The debate on the Bank's accountability had been fueled by mistakes allegedly made by the Bank regarding two major projects in India: the Narmada River Development Sardar Sarovar Dam and power project (in short, the Narmada dam project) and the Narmada River Development Water Delivery and Drainage project (in short, the Narmada canal project). The first project was partially financed by IDA and the second by IDA alone by agreements concluded in the mid-1980s⁽¹⁰⁾. While the IDA credit for the canal project was fully disbursed and closed on July 1, 1992, the IBRD loan and the IDA credit for the dam project were still under disbursement when the project's implementation became an issue attracting world-wide attention. Under construction since 1987, the projects included a large concrete dam, a 1200-megawatt powerhouse, transmission lines, a canal system and drainage network to serve an irrigation area of about 2 million hectares in Gujarat, India. Besides major environmental impacts, the dam project finally required the resettlement of more than 120,000 people from a submersion area of approximately 370 square kilometers (while the original estimate confirmed in Bank reports had calculated the resettlement of 70,000 persons only). The canal

(9) See the US proposal for an office of inspector general, submitted to the 48th session of the UN General Assembly on November 24, 1993; UN Document A/C/4S/35 (1993). on the role of the inspectorate proposal in the U.S. congressional debate over UN appropriations for fiscal year 1994 (H.R. 2519, October 14, 1993), see D. Thornburgh, today's United Nations in a Changing World, 9 AM. U. J. INT'L. & POLICY 215, 220n. 17, 222 (1993).

(10) See Loan Agreement No. 2497-IN (1985) and Development Credit Agreement No. 1553-IN (1986)

project involved a resettlement of a similar magnitude although that was not foreseen at the time of project appraisal . The Bank funding represented only about 10 percent of overall costs .

From the beginning of project implementation ,the environmental assessment and the resettlement / rehabilitation component of the Narmada projects had been subject to heavy criticism by local and international NGOs . Responding to this criticism , the then president of the World Bank, Barber Conable, decided in March 1991 to commission an independent review , which was chaired by the late Bradford Morse , a retired administrator of the United Nations Development program who was previously a US congressman. The objective of that review was to conduct an assessment of the implementation of the projects regarding the resettlement and rehabilitation of the population displaced or affected , and the amelioration of the environmental impact of all aspects of the project , with reference to existing Bank operational directives and guidelines⁽¹¹⁾. The independent review team was “not meant to be a commission of inquiry,” however, and consultation with various interested groups was “not to imply a mediation of adjudication function” The report of Mr. Morse and his team , discussed by the Bank’s executive directors in June 1992 , noted a failure to incorporate Bank policies in the project credit and loan agreements and a subsequent failure to require adherence to enforceable provision of these agreements⁽¹²⁾. As a consequence of these

(11) Terms of Reference dated March 14, 1991 issued by the President of the World Bank following his appointment of Mr. Morse to address this issue on August 30, 1991. It may be noted that the establishment of the “Morse Commission” was not formally discussed by the Bank’s Board, even though some Executive Directors took an active role in this matter.

(12) The report was published by its authors, without prior Bank permission, as B. MORSE & T.R.BERGER. SARDAR SAROVAR: THE REPORT OF THE INDEPENDENT review (Ottawa: Resource Futures International 1992) [hereinafter MORSE REPORT]; see also T.R. Berger, The World

findings , the Morse report recommended a review of Bank procedures to ensure that the full reach of its policies was implemented in the projects it financed⁽¹³⁾. Although Management disputed some of the report's findings and maintained that the loan documents reflected the requirements of applicable policies , it carried out a further internal review of the project and submitted its results to the Board in May 1993⁽¹⁴⁾. The management review reiterated some of the main findings of the Morse report , which , understandably , led external critics to call for general new remedies to avoid similar deficiencies .

C. The Bank's Internal Review Mechanisms Prior to Inspection Panel

Up to that time (mid 1993), internal mechanisms for quality control in the preparation and implementation of Bank-financed projects operated at the three stages of the project cycle: preparation , appraisal and supervision, and monitored through project evaluation .

While formal responsibility for project preparation rested with the borrower, the Bank assisted the borrower in its preparatory activities in a number of ways⁽¹⁵⁾. Procedures for project design and appraisal also included numerous safeguards to ensure not only the economic soundness of the project but also the assessment of its environmental impacts

Bank's Independent Review of India 's Sardar Sarovar Projects, 9 AM. U. J . IN I 'L L. & POICY 33 (1993).

(13) See MORSE REPORT, supra note 12, at 353-54.

(14) See India: The Sardar Sarovar (Narmada) Projects - Management Response (SecM92-849), June 23, 1992. The Bank-wide resettlement review, initiated in 1993, was completed in April 1994; see The Bank wide Review of Involuntary Resettlement 1968-1993, Report prepared by the Task Force for the Bank wide Resettlement Review, Environment Department (April 1994). For the details of the further internal review, see H. Wyss, Bank wide lessons learned from the experience with the India Sardar Sarovar (Narmada) Project, annexed to SecM93-516, May 24, 1993.

(15) See W.C. BAUM, THE PROJECT CYCLE 8- 10 (World Bank Publication 1982).

(including prior public consultations by the borrower)⁽¹⁶⁾. Special expert consultations were also required regarding projects on international waterways , and dam and reservoir projects⁽¹⁷⁾. After a loan was approved by the Bank's Executive Directors, the Bank monitored progress in project implementation and compliance with loan conditions⁽¹⁸⁾. Supervision concentrated, however , on familiarizing the borrower and the implementing agencies , if any, with the Bank's procurement Guidelines and the preparation of the progress reports to the progress reports to be reviewed by Bank staff . It included staff visits to the project site. Following project completion , an ex post evaluation of projects was selectively carried out by the Bank's Operations Evaluation Department (OED) to draw lessons from experience, and more generally to enhance the internal and external transparency of Bank operations⁽¹⁹⁾. OED evaluated each project on the basis of a project implementation report . Each report covered the execution and initial operation of the project, the costs and benefits derived and to be derived from it , the performance by the borrower and the Bank of their respective obligations under the loan agreement and the extent of accomplishment of the project developmental purposes. Furthermore , OED carried out evaluation studies focusing on

(16) See, among others, the Bank's Operational Policies on the Economic Evaluation of Investment Operations, OP 10.04 (April 1994), and on Environmental Assessment, OP 4.01 (January 1999) (which was first introduced in 1989 under Operational Directive (OD) 4.00 Annex A and formulated in OD 4.01 in 1991 before being converted into an OP). It should be noted that consultations are required to be held with the people potentially affected by the project and local NGOs speaking for these people under the Operational Policies concerning involuntary resettlement and indigenous people. See OD 4.20 Indigenous People (September 1991), and OD 4.30, Involuntary Resettlement (June 1990) which has been converted to OP/BP 4.12 Involuntary Resettlement (June 1999).

(17) See OP 7.50 Projects on International waterways (October 1994) and OD 4.00 Annex on Environmental POUCH for Dam and Reservoir Projects (April 1989).

(18) For more details, see SHIHATA. *supra* note 1, at 16-18.

(19) *Id* at 19-20.

selected issues and sectors . OED's assessment of the performance of completed operations included an assessment of the technical, financial , economic , social and environmental aspects of the project and provided ratings of overall performance and sustainability.

The Bank had also regular audits by the Internal Auditing Department which periodically audits operational , financial , administrative, personnel and information resource management systems to test their efficiency and compliance with the Bank's internal control systems⁽²⁰⁾. On occasion , the Bank carried out ad hoc independent evaluations such as the one commissioned for the Narmada project⁽²¹⁾.

The wide attention inside and outside the Bank which both the Wapenhans Report and the Morse report received triggered a number of proposals in the course of 1993 which contributed to the process of the establishment of the Inspection panel. Some of these proposals originated within the Bank, others came from external sources.

D. Proposals for an Inspection Function

In February 1993, four Executive Directors (three representing non-borrowing countries and one representing a number of borrowing countries) came forward with a proposal for the establishment of an independent in-house inspection capacity for on-going projects⁽²²⁾. This proposal, to which a fifth Executive Director later associated himself, was made after submission of the Wapenhans Report but before Management had prepared its full-fledged response to it. The proposal envisaged a small permanent unit staffed three inspectors selected from among experienced Bank officers, to be part of the Bank structure, possibly under the OED, with sufficient independence of its own . This unit would receive requests

(20) id at 21.

(21) See supra notes 11-13 and accompanying text

(22) See SHIHATA, supra note 1, at 22-23.

for inspects for inspection from borrowers or Executive Directors (but not directly from affected parties), undertake the relevant inspection after deciding on the eligibility of the request, and, in addition, carry out random evaluation on a sample of projects in the Bank's loan portfolio before their completion . The Bank's Board would take note of the findings of the unit's recommendations but would "ask for an increased role in cases of special importance."

The initial reaction of the Bank's senior staff to this proposal suggested that there was no apparent need for a permanent inspection unit of that type and that an ad hoc inspection capacity would suffice. This position was not, however, adopted. Further developments, culminated meanwhile in several specific proposals made outside the Bank for the appointment by the Board of a Bank ombudsman⁽²³⁾ and another for an independent appeals commission with judicial powers , including the power to issue binding decisions on the Bank⁽²⁴⁾.

E. Board Consideration and Adoption of the Resolution Establishing the Panel

Political support for some of these external proposals (including in particular support for the latter proposal in the US House of Representatives in the course of the IDA 10th Replenishment) was widely

(23) See D. D. Bradlow, Why World Bank needs an Ombudsman, FIN. TIMES, July 14, 1993, at 13.

(24) See statements on behalf of Environmental Defense Fund, National Wildlife Federation and Natural resources Defense Council before the Sub-Committee on International Development, Finance, Trade and Monetary Policy of the Banking Finance and Urban Affairs Committee, Ups. House of Representatives (May s, 1993). See also D. Hunter & L. UDALL, Proposal FOR AN INDEPENDENT APPEALS COMMISSION (Environmental Defense Fund and Center for International Environmental Law, 1 993).

felt⁽²⁵⁾. Bank management moved towards the development of a plan for the establishment of a standing inspection function. A first staff paper contained two proposals, one along the lines of the Executive Directors' proposal for an inspection unit within the OED, and one for an independent, in-house inspection panel with three inspectors appointed by the Board upon the president's recommendation⁽²⁶⁾. The latter panel was to receive complaints from individual Executive Directors and affected parties, but the complainant party had first to seek an explanation from Management before approaching the panel. The panel would, after carrying out an investigation, submit recommendations to the president on projects under preparation and to the Board on projects under implementation.

No consensus on either of these options was reached, however in informal discussions with the Executive Directors. Concerns were expressed in particular over the potential risks such an inspection function could bring to bear on the respective roles of Bank Management and Board. Fears were also expressed regarding the possibility of a large

(25) The proposal that an independent appeals commission would be established in the World Bank was incorporated in a U. S. committee draft on conditions for IDA- I 0. See Sub-Committee on International Development, Finance, Trade and Monetary Policy of the Banking, Finance and Urban Affairs Committee, U. S. House of Representatives, Draft "International Development and Debt Relief Act of 1993" (May 26, 1993). Although the call for the establishment of an independent appeals commission in the World Bank eventually entered the U. S. appropriation legislation in October 1993 in a substantially modified form, the discussion, however, indicated an emerging trend in the U. S. Congress to strongly favor the establishment of a commission or panel of inspectors in the Bank.

(26) For the Executive Directors' proposal, see the accompanying text of supra note 22. For the second alternative proposal on an independent, in-house inspection panel, see Operations Inspection in the Bank: Issues and Options, Draft Report submitted to the Executive Directors (R93-122), June 10, 1993.

volume of complaints. In an attempt to facilitate agreement , Bank Management prepared a revised paper reconciling the two options , together with a draft resolution ⁽²⁷⁾.

The latter draft resolution envisaged an independent three-member inspection panel with powers to hear complaints presented either by a group of four or more Executive Directors or by one or more persons directly affected by a failure of the Bank to follow its operating policies, rules and procedures. The revised paper was considered by the Executive Directors at the end of august 1993. While there was still some support for an in-house inspection unit under the OED Director-General , a majority of Executive Directors favored the establishment of an independent panel as a subsidiary body reporting to the Board . However, the discussions on some of the specifics of such a panel revealed that a further revision of the draft resolution was needed . The text of the further revised draft resolution was submitted to the Board on September 21, 1993.⁽²⁸⁾ During that Board meeting which reconvened on september22,1993, the revised draft resolution was further amended before it was finally adopted⁽²⁹⁾. The resolution required a Board review of the Inspection function after two years from the date of the appointment of the first members of the

(27) See Functions and Operations of an Inspection Function, Draft Paper (R93-122/1), August 6, 1993 and Draft IBRD/IDA Resolution on The World Bank's Independent Inspection Panel, August 5, 1993.

(28)See Memorandum from the President, Operations Inspection Function: Objectives, Mandate and operating Procedures for an Independent Inspection Panel (R93-122/2), September 10, 1993.

(29)See 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), published in SHIHATA, supra note I, at 271-99.

panel⁽³⁰⁾. This review was completed in July 1996 and resulted in the issuance by the Board of certain “Clarifications” which in fact introduced some amendments (by addition) to the resolution⁽³¹⁾. Subsequent discussion in the Board on the panel’s recommendations to investigate two projects resulted in the board’s agreement in September 1997 to carry out a further review, which was completed in April 1999. The results of these two review will be explained following a description of the resolution establishing the panel.

III. The resolution establishing the world bank inspection panel.

A . Composition

The inspection panel was thus created by a resolution of the bank’s executive directors as an independent body within the bank’s structure. The resolution provides that the panel is composed of three members of different nationalities of bank member countries who are nominated by the bank’s president and appointed by its executive directories⁽³²⁾. According to the resolution, selection criteria for panel members include their ability, integrity, and independence from bank management, exposure to development issues and living condition in developing countries⁽³³⁾. As desirable, but not a necessary factor, knowledge and experience of the bank’s operations is also mentioned as a

(30) See para. 27 of the Resolution Establishing the Panel.

(31) See Clarifications of Certain Aspects of the Resolution Establishing the Inspection Panel (R96204), dated September 30, 1996 which were approved by the Board of Executive Directors on October 17, 1996 and appear in Annex 1-2 of the book referred to in note 1 [hereinafter Clarifications].

(32) see para 2 of the resolution establishing the panel.

(33) Id. at para. 4.

relevant criterion⁽³⁴⁾. However, in order to serve on the panel, a member's prior affiliation with the bank, if any, must date back two years at least⁽³⁵⁾. Also after having served on the panel, a panel member is prohibited from returning to or joining the bank⁽³⁶⁾. Panel members may only be removed from office by a decision of the executive directors, for cause⁽³⁷⁾. Currently, the chairman of the panel works full-time on panel matters, as required by the resolution⁽³⁸⁾. The other two members work on a part-time basis. But the resolution allows for their full-time engagement "when their work load justifies such an arrangement⁽³⁹⁾". The panel from the beginning has had its own separate secretariat: the resolution speaks of the assignment of a staff member to the panel as executive secretary⁽⁴⁰⁾.

A . Objectives

The objectives of the panel's function are not listed in the resolution. It is clear, however, from the history detailed above, that the underlying objective is to improve transparency in the bank's management and staff for observance of the bank's policies and procedures through the project cycle⁽⁴¹⁾. This of course, serves the ultimate objective of enhancing quality control in project design, appraisal, and implementation by subjecting staff work to a high level independent inspection when harm appears to have resulted from or

(34) see id

(35) id at para 5.

(36) Id at 10.

(37) id at para 8.

(38) id at para 9.

(39) see id.

(40) 40 id. at para. 11. The Executive secretary has worked on a full time basis a few months after his appointment and has since had an Assistant Executive secretary.

(41) While the Resolution is silent on the objectives of the inspection function management papers submitted to the Executive Directors and the discussion of these papers and of the draft resolution prepared by the Office of the Bank's senior vice President and General Counsel provide details on these matters. See SIIHATA. supra note 1, at 29-33.

threatened by violations of such policies or procedures. To that end, the resolution gives the inspection panel a mandate to investigate, by authorization of the bank's board in each case. 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 abide by its policies and procedures regarding the design, appraisal or implementation of a project financed (or to be financed) by the bank⁽⁴²⁾. One or more executive directors may also ask the panel for an investigation, which would take place with board authorization. The board of executive directors may, at any time, take the initiative in instructing the panel to conduct an investigation⁽⁴³⁾.

C. Institutional coverage

As the resolution establishing the panel was issued by the board of IBRD and IDA, the institutional coverage of the panel's extends explicitly to projects financed by these two institutions only. IFC and MIGA activities are not subject to investigation by the panel, although, as will be mentioned, this issue is presently under active consideration⁽⁴⁴⁾. Bank action as trustee of the global environment facility (GEF) and other trust funds are not explicitly covered. There is, however, room for including these actions under the panel's jurisdiction by way of interpretation, subject to the concurrence of the bank's executive directors (and possibly GEF's council, with respect to GEF- financed projects)⁽⁴⁵⁾.

(42) See para. 12 of the Resolution Establishing the Panel.

(43) See id

(44) IFC and MIGA have appointed in March 31, 1999, an ombudsman with broader powers who reports to the institution's President. They are currently considering a system for an inspection function for their respective operations. Such a system is likely to utilize the existing Panel, with possible variations related to its procedures, see SHIHATA I A, supra note I, at 159.

(45) See Shihata, Supra note 1, at 33-35.

D. Eligibility of complaints

Under the resolution, the panel's role is to be performed in two stages, except when the request is initiated by the board where only the latter stage applies. In the first stage the panel is to assess whether the request for inspection meets the eligibility requirements of the resolution. On the basis of this assessment, the panel recommends to the executives directors whether to authorize an investigation. In the second stage, which takes place only after the board authorizes investigation, the panel carries out its investigation and reaches its findings on whether the bank has been in serious violation of its operational policies and procedures, provided, as mentioned that such violation relates to the design, appraisal and/or implementation of the project involved.

In the exercise of the first stage of its function, the panel is required by the resolution to establish four elements of jurisdiction, the first of which does not apply if the request is made by a member or members of the bank's board. These eligibility requirements cover (I) the panel's competence relating to the person of the complainant (*jurisdiction ration personae*); (II) its competence regarding the subject-matter of the complaint (*jurisdiction ration materiae*); (III) its competence to the timing of the complaint (*jurisdiction ration temporis*); and (IV) the admissibility of the complaint in the absence of other grounds excluding it under the resolution⁽⁴⁶⁾.

The panel has competence in respect of the complainant if the

(46) See Memorandum 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. This memorandum was made publicly available by decision of the Board of Executive Directors. It is available at the Bank's Public Information Center and is also published in 34 ILM 525 (1995).

latter is an affected party.” An affected party, under the resolution, must be a “community of persons, such as an organization, association, society or other grouping of individuals, but ‘not a single individual’”⁽⁴⁷⁾ while the panel initially understood this to mean “any two or more persons” and so indicated in the operational procedures⁽⁴⁸⁾ issued by it, the board later made it clear (in its 1996 “clarifications”) that it means only “any two or more individuals who share some common interests or concerns”⁽⁴⁹⁾ The affected party must show that its “ rights or interests have been or are likely to be directly affected by an action or omission of the bank ,” a requirement that effectively excludes complaints on behalf of the public at large (*actio popularis*)⁽⁵⁰⁾. Finally ,the affected party must be “in the territory of the borrower”⁽⁵¹⁾. Such a party can act in its name or through a local representative⁽⁵²⁾. In exceptional cases, the resolution authorizes the affected party to employ a foreign representative such as an international NGO, when local representation is not available and foreign representation is approved by the bank’s board at the time it authorizes inspection⁽⁵³⁾.

To ascertain its subject-matter jurisdiction, the panel must, according to the resolution, make sure that (a) the request is based on an alleged “failure of the bank to follow its operational policies procedures with respect to the design, appraisal and / or implementation of a project financed by the bank (including situations where the bank is alleged to

(47) See Resolution Establishing the Panel, at para. 12

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

(49) See Clarifications, supra note 31, on the term “affected party” in the section on eligibility and access.

(50) See Resolution Establishing the Panel, at para. 12.

(51) See id

(52) See id

(53) See id

have failed in its follow-up on the borrower's obligation under loan agreements with respect to such policies and procedures);"⁽⁵⁴⁾ (b) such alleged violation of the Bank's policies and procedures is of a serious character; (c) the alleged violation relates to the Bank's own policies and procedures, within the limits of flexibility provided therein (the latter phrase, "policies and procedures," means, according to the Resolution, the Bank's Operational Policies, Procedures and Operational Directives and similar documents (previously called "Operational Manual Statements" and "Operational Notes"), but not "Guidelines" and "Best Practices and the like"),⁽⁵⁵⁾ and (d) the alleged violation, if established, would have "a material adverse effect" on the affected party, i.e., a harm which, in the judgment of the Panel, seems to be material enough as to warrant investigation of the complaint.⁽⁵⁶⁾

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 disbursed."⁽⁵⁷⁾ The Resolution left no doubt as to the meaning of "substantial" disbursement by defining it, in an accompanying note, to mean disbursement of at least 95 percent of the loan amount," regardless of the stage of project completion.⁽⁵⁸⁾ This mathematical specificity was meant to leave no doubt as to the intended meaning. It did, however, give rise to a different interpretation in an actual case, where, at the time of the request for inspection, a supplemental loan was 94.2 percent disbursed after an initial loan financing the same project was fully disbursed. (As

(54) id at para.13.

(55)id at para.12.

(56)see id

(57)id at para.14(c)

(58)see footnote accompanying para.14 (c) of the resolution establishing the panel.

then General Counsel of the Bank, this author took the view that that fact in itself did not disqualify from inspection the project's design or appraisal as well as measures taken under the supplemental loan.)⁽⁵⁹⁾.

Finally, a request may be barred for the following other reasons: First, if the subject matter of the complaint had not been first dealt with by the Bank Management, because the complainant had failed to submit its complaints to Management before resorting to the Panel⁽⁶⁰⁾. Second, if after the complaint was submitted to Management, the Panel is satisfied that Management has complied, or intends to comply with the Bank's relevant policies and procedures⁽⁶¹⁾. Third, the Panel is barred from investigation of a complaint that is based on actions, which are the responsibility of parties other than the Bank, such as the borrower.⁽⁶²⁾ Fourth, the Panel is further barred from accepting complaints from Suppliers, contractors or losing bidders against procurement decisions under Bank-financed projects⁽⁶³⁾. (This was later "clarified" to include Bank procurement decisions, and not only those of the borrower.)⁽⁶⁴⁾ Finally, requests related to a particular matter or matters on which the Panel has already made its recommendation are excluded from being entertained again.

E. The Inspection Function

Once the Panel finds the request eligible, it would, according to the Resolution, recommend to the Board that it authorizes an

(59)see legal opinion

(60)see resolution establishing the panel, at para.13

(61)see id

(62)id at para.14 (a).

(63)id at para.14(b).

(64)

investigation⁽⁶⁵⁾. After the Board decides that the matter is to be investigated, the Panel conducts the investigation by checking the pertinent Bank records, interviewing Bank staff and other persons, consulting as needed with the Director-General of the Bank's OED and the internal Auditor-General, as well as with the borrower itself and the Executive Director representing the borrowing (or guaranteeing) country⁽⁶⁶⁾. The Panel may also carry out the investigation in the territory of the borrowing country after obtaining the borrowing country's prior consent⁽⁶⁷⁾. The Panel considers all relevant facts before submitting its findings on whether the Bank has complied with its policies and procedures in a report to the Board⁽⁶⁸⁾. At this stage, Management is given the opportunity to comment on the Panel's findings, e.g. by making recommendations on remedial actions, and the Board, based on all information before it, decides on any actions to be taken in this respect⁽⁶⁹⁾.

F. Disclosure Requirements

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 investigation, the Panel's findings, Management's comments and the final Board decision are made publicly available after Board consideration of each document⁽⁷⁰⁾. Management's initial response to the request submitted to the Panel is not mentioned among the documents for which the Resolution requires public disclosure.

(65)see resolution establishing the panel, at para.19.

(66)id at para.21

(67)see id for the assumption that the borrower would not normally withhold such consent, see at 68 infra .

(68)id at para.22

(69)id at para.23.

(70)id at para.25.

It was, however, included by virtue of the 1996 Board "Clarifications"⁽⁷¹⁾.

IV. Application of the Resolution by the Panel, Management and the Board

A . Overview

As of June 2000, the Panel has received twenty-one requests and registered nineteen of them. Of the three requests, which were not registered, the first was submitted on behalf of foreign persons whose property in a borrowing member country was allegedly confiscated many years earlier. The request suggested that by continuing to lend to the country involved, IDA had violated a long standing policy which requires it (and the IBRD) "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."⁽⁷²⁾ It also suggested that IDA had violated the policy on disclosure of information and requested investigation of these matters. The Panel refused to register the request on the basis that "the requesters failed to complete the filing of a request for compensation in accordance with the laws of [the country] and therefore failed to establish that the lack of compensation was the direct consequence of any alleged acts or omissions of IDA as required by the Resolution."⁽⁷³⁾ In effect, that request was inadmissible for the obvious reason that it did not relate to alleged failure

(71) See Clarifications, supra note 31, under the section on outreach noting that Management will make its response to requests for inspection available to the public within three days after the board has decided on whether to authorize an inspection

(72) See OMS 1 28 on Disputes over Defaults on External Debt, Expropriation, and Breach of Contract.

(73) See FIRST ANNUAL REPORT OF THE INSPECTION PANEL covering the period of August 1, 1994 to July 31, 1996 reproducing the Panel's decision at 56.

by the IDA relating to the design, appraisal or implementation of any specific project financed by TDA. The second unregistered request related to an II; C investment in the construction of a hydroelectric project. It was not registered because of its obvious inadmissibility as it concerned an IFC rather than an IBRD or IDA operation⁽⁷⁴⁾. The third unregistered request

was submitted with respect to a project that the Panel had previously investigated⁽⁷⁵⁾. The new request was submitted on the basis of alleged new complaints. The Panel did not register it because the loan financing the project had been closed⁽⁷⁶⁾.

B. Registered Requests - The Panel's Case-Load

Out of the other nineteen requests, eleven related to IBRD- and six to IDA financed projects. One request, the first received by the Panel, related to a project appraised for financing by IDA but for which no financing decision had been taken by the Board. Another request was related to a project to be financed by both IBRD and IDA. Fifteen of the requests concerned specific investment projects, of which twelve constituted large infrastructure projects (such as hydroelectric dams, power stations, natural resources management, the construction of a bridge, an irrigation and water drainage area, mining and a sanitation system). Two requests were related to environmental and environmental management projects, and two to a land reform project. Two other requests resulted from adjustment operations. In all the requests concerning infrastructure projects, non-compliance with Bank policies and procedures covering primarily environmental issues and social interests of

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

(75)NTPC Power Generation Project - India. See, *infrà*, at pp.3 1-33 of this paper.

(76)NTPC Power Generation Project - India (2nd filing), November 29, 1999.

affected people was alleged by the complainants. The Panel recommended investigation for eight of the nineteen registered requests⁽⁷⁷⁾.

Arun III Dam Project - Nepal

In the first request (registered in October 1994), a group of Nepalese citizens claimed non-compliance by the Bank 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 then under consideration but not yet financed by the Bank⁽⁷⁸⁾. On the basis of the Panel's recommendation, the Board authorized an investigation with respect to the issues of environmental assessment, involuntary resettlement and indigenous people. A report was sent to the Board by the Panel, including its findings which confirmed that remedial actions proposed by Management (after the investigation had started but before its completion) would satisfactorily meet the Bank's requirements if diligently followed.⁽⁷⁹⁾ However, the matter became moot after the Bank's new President, James D. Wolfensohn, informed the Board that, based on a

(77) For a detailed summary of the Panel's case work, see SIIIIATA, *supra* note 1, at Chapter Three, and, from the Panel's perspective, ANNUAL REPORTS OF THE INSPECTION PANEL, covering the periods from August 1, 1994 to July 31, 2000. See also THE INSPECTION PANEL: THE FIRST FOUR YEARS (A. U. Quesada ed., 1998); R. Bissell, Recent Practice of the Inspection Panel of the World Bank, 91 AM. J. INT'L L. & POLICY 741 (1997); L. UDALL, THE WORLD BANK INSPECTION PANEL: A THREE YEARS REVIEW (1997); and S. Schlemmer-Schulte, The World Bank's Experience With Its Inspection Panel, 58 ZEITSCHRIFT FÜR AUSLÄNDISCHES OFFENTLICHES RECHT UND VOLKRECHT (ZÄoRV) HEIDELBERG 1. INT'L L. 353 - 338 (1998).

(78) See Request for Inspection: Panel Report - Nepal Arun III Proposed Hydroelectric Project (IDA/SecM94-373), December 16, 1994 (including in Attachment (1) the text of the request itself). For Management's response, see Attachment (2) of the Panel's Report.

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

comprehensive internal review, he had decided not to proceed with the project⁽⁸⁰⁾.

Power Project - Tanzania

Environmental policies were also mentioned in a request, registered in March 1995, of a group of US and Tanzanian citizens (as, respectively, owners and employees of a corporation) regarding an IDA-financed power project in Tanzania⁽⁸¹⁾. In this case, the Panel did not recommend an investigation, because of the complainants' failure to show a violation of IDA policies or the project's adverse environmental effect⁽⁸²⁾.

Natural Resources Management Project - Rondonia, Brazil

In a request registered in June 1995, a group of NGOs from the state of Rondonia in Brazil acting as agents of Rondonia residents regarding the Bank-financed Rondonia Nature Resources Management Project claimed non-compliance with a number of Bank policies, including the environmentally relevant policies on forestry, wildlands, indigenous people and NGO participation's⁽⁸³⁾. This request became an important precedent for the Bank in that its handling by the Panel, Management and the Board contributed to the above-mentioned clarifications on the Resolution of the Inspection Panel. After receiving the Panel's

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

(81)See Request for Inspection - Tanzania Power VI Project, Panel Recommendation (INSP/SecM956), August 16, 1995 (including in Annex I the text of the request itself).

(82)/d at para. 15. The Board agreed with that approach.

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

recommendation to authorize investigation for apparent reasons of non-compliance, in particular with environmental policies⁽⁸⁴⁾, 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. Based on the Panel's additional report⁽⁸⁵⁾, and on a comprehensive Management report on the status of the project's implementation (which included a remedial action plan that Management discussed with the borrower in the meantime)⁽⁸⁶⁾, the Board decided not to authorize an investigation but to review the execution of the action plan after 6 to 9 months with the assistance of the Panel. That review took place in the projected time to the satisfaction of the Board.

Bridge Project - Bangladesh

In a request registered in August 1996, failure of the Bank to comply with the policies on environmental assessment, resettlement and participation of NGOs was alleged by a Bangladeshi NGO, representing people living on mid-channel islands that emerge periodically from the Jamuna River bed as a result of accretion, in the context of the construction of a multipurpose bridge over the Jamuna River⁽⁸⁷⁾. It was claimed in particular that no compensation was paid for the damages

(84) See Request for Inspection - Brazil: Rondonia Natural Resources Management Project, Panel Recommendation (INSP/R95-2), August 18, 1995, at para. 14.

(85) See Request for Inspection - Brazil: Rondonia Natural Resources Management Project, Panel Report on Additional Review (INSP/R95-4) 7 December 12, 1995.

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

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

incurred by the allegedly affected people as a result of their resettlement. The Panel visited the project site and gathered information from Management on the general resettlement action plan and on the erosion and flood policy (which included a system of compensation for affected people) that was adopted by the Government shortly after the request was registered. Based on the information it gathered, the Panel found that an investigation was not warranted at that Stage⁽⁸⁸⁾. 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. Later in 1998, Management Submitted a progress report on the implementation of the erosion and flood action plan noting that the project's progress as a result of the plan was Satisfactory in terms of environmental and Socioeconomic programs for affected people⁽⁸⁹⁾. Upon the Board's request, the Panel also presented a report on the progress of the plan, concluding that, despite some remaining problems, the remedial measures in place for compensating the people living on the mid-channel islands appeared adequate, with some adjustments⁽⁹⁰⁾.

(88)id at para. 56.

(89)See Bangladesh: Jamuna Bridge Project, Management's Report on the Progress of the Implementation of the Erosion and Flood Action Plan (SecM98-422), May 21, 1998.

(90)See Bangladesh: Jamuna Bridge Project, Inspection Panel Report on the Progress of the Implementation of the Erosion and flood Action Plan (INSP/SecM98-13), August 17, 1998.

Hydro Electric Project - Argentina/Paraguay

In a request registered in October 1996, a Paraguayan NGO claimed on its own behalf and on behalf of people living in the project area that the Bank had, among other things, failed to follow its policies on resettlement, indigenous people, wildlands, and environmental assessment in the design and implementation of the Yacyreta hydroelectric Power Plant, financed by a Bank loan to Argentina and co-financed by the Inter-American Development Bank (IDB)⁽⁹¹⁾. Although the Panel recommended that the Board authorize an inspection⁽⁹²⁾, the Board, which received objections related to the eligibility of the complaint from Bank Management and the Government of Argentina, invited the Panel to undertake what is called, in a formula negotiated among its members, a "review of the existing problems of the Yacyreta project regarding environmental and resettlement" issues in order to provide an assessment of the adequacy of measures agreed between the Bank and the countries concerned (Argentina and Paraguay) within the next four months. It also stated that the Panel could "review consistency of the Bank's actions with its procedures."⁽⁹³⁾ A controversy later arose as to whether the latter review amounted to a full investigation, i.e. whether it should have been confined to the Bank's "procedures" (as stated in the decision), or should have also included its policies (as is normally the case in the inspection envisaged under the Resolution). The Panel's report, submitted in September, 1997, in fact covered issues of compliance with applicable

(91) See Request for Inspection - Argentina Paraguay: Yacyreta Hydroelectric Project, Panel Report and Recommendation (INSP/R96-2), December 26, 1996 (including in Annex I the text of the request itself For the Management response, see Annex 2 of the Panel's Report and Recommendation.

(92) *id* at para. 43.

(93) *Id* at para. 3.

Bank policies and procedures in detail⁽⁹⁴⁾. The report was discussed in the Board in December 1997. The Board noted that the implementation of the action plan had made significant progress towards resolving the environmental and resettlement problems of the project. It requested Management to continue its follow-up on the implementation of the action plan and to report to it on the further progress in the matter within six months. The Board also noted that it would determine later whether to give the Panel a further role in this follow-up. Management submitted another progress report in June 1998 in which it conceded that serious social and economic problems persisted on the Paraguayan side of the project, although significant progress had been made on the Argentinean side (where the Bank borrower is)⁽⁹⁵⁾. It was agreed that Management, together with the IDB, would develop another action plan in consultation with affected people to address the problems identified in Paraguay. In May 1999, the Board discussed another progress report which noted that implementation on the Paraguayan side continued to be characterized by set backs⁽⁹⁶⁾. While completion of the implementation of the last action plan including the resettlement of families would be delayed beyond 1999, overall progress had nevertheless been made based on measures agreed upon jointly between the governments of Argentina, Paraguay, the Bank, and IDB.

It should be noted that parallel to the request brought before the Inspection Panel, 51 Argentinean brickmakers, who had been resettled during the course of the construction of the project, brought suit in an Argentinean court in February 1997 against the binational (i.e.

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

(95) See Informal Notes - Status of Action Program, Argentina Paraguay: Yacyreta Hydroelectric Project, Meeting of the Board of Executive Directors, on June 23, 1993.

(96) See Argentina Yacyreta Hydroelectric Project- Progress Report (SecM99-333), May 14, 1999.

Argentinean and Paraguayan) agency executing the project for damages suffered as a result of their resettlement. Later, both the Bank and IDB were added as codefendants. The plaintiffs argued that the Bank's involvement as co-financier of the project would make it liable for damages suffered by the plaintiffs as a result of the project. The Bank filed motions with the Argentinean court to dismiss the suit on the basis of Bank immunity. The Bank also argued that there was no private of contract between the Bank and the plaintiffs nor did the Bank undertake or breach any duty to the plaintiffs or cause harm to them. The case is still pending.

Sector Adjustment Loan - Bangladesh

Owners of private jute mills in Bangladesh requested the Panel in November 1996 to investigate the economic losses they alleged to have suffered as a result of IDA's failure in the design and implementation of a jute sector adjustment program, which was subject to delay and failure by the borrower to meet agreed conditions⁽⁹⁷⁾. This was the first request which related to an adjustment (rather than a specific investment) loan. While the Panel considered the request eligible under the Resolution for a number of reasons, it did not find an investigation useful in that particular case, given that a new government was negotiating with the Bank a revised time-table for the implementation of the program. According to the Panel, close supervision during the extension for the credit's closing date could meet some of the requesters' concerns. It added, however, that, without revisiting basic design concepts with the government and requesters, presumably none of the requesters' expectations would be met. The Panel concluded that, under these circumstances, investigations "would serve no

(97) See Request for Inspection - Bangladesh: Jute Sector Adjustment Credit, Panel Report and Recommendation (INSP/R97-3), March 20, 1997 (including in Annex I the text of the request itself). For Management's initial response to the request, see Annex 2 of the Panel's Report and Recommendation.

useful purpose" and did not, therefore, recommend one to the Board⁽⁹⁸⁾. The Board readily agreed with the Panel's recommendation on a no-objection basis. There was, therefore, no occasion to discuss in the Board whether and under what circumstances complaints related to adjustment operations would be eligible for the Panel's inspection. In June 1997, this credit was closed without disbursement of its remaining tranches.

Resettlement and Irrigation Project - Itaparica, Brazil

Non-compliance with environmental policies was alleged in a request concerning a resettlement and irrigation project in Itaparica, Brazil⁽⁹⁹⁾. A local union of rural workers representing people living in the project area alleged the Bank's violation of its policies for dam and reservoir projects, environmental assessment, involuntary resettlement, and indigenous people. The Bank had not financed the dam and reservoir project but only provided a loan to help mitigate their environmental and resettlement effects. The Panel recommended investigation of the complaint but sought the Board's confirmation that it was not time-barred.⁽¹⁰⁰⁾ (This was the case of the project initially financed by a Bank loan, which was fully disbursed, then financed by a supplemental loan - introduced through an amendment of the original loan agreement - which was almost, but not quite, 95 percent disbursed.)⁽¹⁰¹⁾ In September 1997,

(98) id at para, 89.

(99) This request was received in March 1997. It is attached to Request for Inspection - Brazil: Itaparica Resettlement and Irrigation Project, Panel Report and Recommendation (INSP/R97-7), June 27, 1997 in Annex 1. For Management's initial response to the request, see Annex 2 to the Panel's Report and Recommendation ..

(100) id at para.46

(101) For an analysis of the situation where the same project is financed by more than one loan in different disbursement statuses, 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, reprinted as Annex 1-5 of the book referred to in note 1.

the Board decided not to authorize an investigation but concluded that the Bank should help supervise the implementation of the Brazilian Government Action Plan which required the spending by Brazil of an additional US \$290 million for the purpose of the project to ensure completion of works providing productive infrastructure and technical assistance to resettles. 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. The review was completed without particular problems.

In May 1999, the Board discussed a first progress reports⁽¹⁰²⁾ (submitted earlier by Management including a comprehensive assessment of the Itaparica resettlement) and a Supplementary technical note⁽¹⁰³⁾. Both reported that significant progress had been made in the construction of the works as well as the social infrastructure and processes connected with it. A final progress report regarding the implementation by the government of Brazil's action plan is expected in December 1999.

NTPC Power Generation Project - India

The next case submitted to the Panel concerned the NTPC Power Project in India, which was meant to strengthen the borrower's capacity to implement new investment policies and upgrade environmental performance and management as well as to increase its power generation

(102) See Brazil: Itaparica Resettlement and Irrigation Project Implementation Progress Report (SecM98-1005), December 24, 1998.

(103) See Brazil: Itaparica Resettlement and Irrigation Project Technical Note, Supplement to Implementation Progress Report (SecM98-1005/1), May 14, 1999.

capacity⁽¹⁰⁴⁾. The residents in the project area who filed the request claimed non-compliance by the Bank with its policies on environmental assessment, involuntary resettlement and indigenous peoples. In its response, management recognized its partial failure to observe some of the policies involved and submitted a detailed remedial action plan⁽¹⁰⁵⁾. The Board, which had just declined to authorize investigation of the Bank's role in the Itaparica project in Brazil after a divisive discussion, approved the Panel's recommendation for an investigation of the Bank's role in the NTPC project in India. 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 after the request was submitted to the Panel and requested Management to submit periodic progress reports on the implementation of that program. The Panel presented its report on the investigation it conducted in the NTPC case in December 1997⁽¹⁰⁶⁾. The Panel's study confirmed violations of Bank policies and procedures regarding the involuntary resettlement and associated aspects of the project which had been referred to in the Panel's earlier recommendation. The Panel's report was challenged by Management, which disputed some of the facts on which the Panel's

(104) See Request for Inspection - India: NTPC Power Generation Project, Panel Report and Recommendation (INSP/R97-9), July 2N, 1997 (including in Annex I the text of the request itself).

(105) See 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, see supra note 94

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

conclusions were based.

The Panel's report and Management's response were discussed in the Board in February 1998. The Board agreed to wait before taking any decisions until the progress reports prepared by Management on the implementation of the action plan together with reports by an independent monitoring panel and an independent institute for social impact assessment were completed. By February 1999, six consecutive progress reports⁽¹⁰⁷⁾ have been submitted to the Board. As mentioned earlier, a new request related to the same project was submitted on November 29, 1999 after the loan was closed but was not registered by the Panel for that reason.

Ecodevelopment Project - India

In April 1998, the Panel registered a request related to the Ecodevelopment Project in India financed by an IDA credit and a grant from the GEF to improve park management and village Ecodevelopment in a larger area including the Nagarhole National Park in Karnataka⁽¹⁰⁸⁾. A special feature of this project was that it was by design a "process project" rather than a "blue print project" whereby the planning involving people living in and around the protected areas of significant global biodiversity continued beyond the design phase of the project. This request was brought by an Indian NGO representing tribal people in the Nagarhole

(107) See India: NTPC Power Generation Project, Status of Action Program, First Progress Report (INSP/SecM98-1), January 12, 1998; India: NTPC Power Generation Project, Status of Action Program, Second Progress Report (INSP/SecM98-501), June 16, 1998; India: NTPC Power Generation Project, Status of Action Program, Fourth Progress Report (SecM98-908), November 13, 1998; India: NTPC Power Generation Project, Status of Action Program, Fifth Progress Report (SecM98-967), December 7, 1998; and India: NTPC Power Generation Project, Status of Action Program, Sixth and Final Progress Report (SecM99-85), February 9, 1999.

(108) See Request for Inspection, India: Ecodevelopment Project (INSP/SecM98-5), April 3, 1998.

National Park. It alleged noncompliance by IDA with its policies on indigenous peoples, involuntary resettlement, and forestry as well as GEF policies, primarily by a failure to set up a specific indigenous peoples development plan for the tribal population eventually subject to a forceful eviction from the project area.

In its response, Management noted compliance with all policies and procedures under the circumstances of the project. It particularly Stressed that compliance with the policy on indigenous peoples would rest on the consultations with affected people to be undertaken along the ongoing village-planning process⁽¹⁰⁹⁾.

The Panel, in October 1998, found in its preliminary review that the policies on involuntary resettlement and indigenous peoples seemed to have been violated and that the same applied to the GEF guidelines on participation. The tribal people in the park had not been included in an indigenous peoples' development plan and, therefore, a significant potential for serious harm existed⁽¹¹⁰⁾. The Panel thus recommended to the Board to authorize an investigation.

The Board, in December 1998, decided that no investigation was required at that time in light of Management's detailed explanation of how it would in the implementation of the project address the concerns raised in the Panel's report together with the State Government of Karnataka and in consultation with the affected people. The Board decided further that Management should prepare a report on its efforts and keep the Board informed while the Panel would, at the end of the process, comment on

(109) See Request the Inspection - India: development Project, Panel Report and Recommendation (INSP/R98-4), October 27, 1998 (in Annex 2 reproducing Management's Response).

(110) See, id (Panel Recommendation)

Management's report.

Highlands Water Project - Lesotho/South Africa

In May 1998, the Panel received a request regarding a planned second water project in Lesotho submitted by residents of the township Alexandra in South Africa to which water will be transferred under the project. Policies specifically alleged to have been violated by IBRD included the policies on dam and reservoir projects, economic evaluation of investment operations, water resources, and poverty reduction⁽¹¹¹⁾. The Board approved the loan financing the project on the basis of a full briefing on the pending request before Management submitted its response to the Panel. The response subsequently raised several eligibility issues and firmly stated that all policies had been complied with⁽¹¹²⁾. The Panel's report, while emphasizing that the request was in principle eligible, did not recommend an investigation. Although Management, according to the Panel, seemed not to have consulted with potentially affected people according to the Bank's policy for dam and reservoir projects until April 1998, there seemed to be no violation of the policies on water resources management and poverty reductions⁽¹¹³⁾. Any eventual hardship the requesters might have suffered seemed to the Panel to lack a connection with any failures on the Bank's part. The Board accepted the Panel's recommendation not to investigate in September 1998.

Drainage and Sanitation Project- Lagos/Nigeria

The next request, registered in June 1998, related to an IDA financed drainage and sanitation project in Lagos, Nigeria. It was submitted by a local NGO acting on its own behalf and on behalf of

(111) See Request for Inspection Lesotho/South Africa: Phase 1B of Lesotho Highlands Water Project, Panel Report and Recommendation (INSP/R98—2), August 19, 1998 (including in Annex I the text of the request itself).

(112) See id. (in Annex 2 including Management's response to the request).

(113) See id. (Panel Report and Recommendation.)

individuals, families, and community associations⁽¹¹⁴⁾. The requesters claimed that their rights or interests had or would be adversely affected as a result of IDA's failure to comply with its policies, especially those on involuntary resettlement, poverty, gender dimensions of development, and project monitoring and evaluation. Instead of improving the health standards and living conditions in the respective area of Lagos by clearing and aligning existing storm water drains, the request alleged that people living in the project area suffered destruction of their homes and businesses without compensation or resettlement opportunity and that the drainage channels had become receptacles for waste water regularly overflowing into living spaces.

Management responded that no violation of Bank policies and procedures had occurred and all people affected by the project had been properly consulted, resettled and compensated⁽¹¹⁵⁾. In November 1998, the Panel delivered its report to the Board⁽¹¹⁶⁾, it did not recommend an investigation as it had found no serious failure on the Bank's part with respect to compliance with its policies, although it had observed a potential neglect by Management related to compliance with the policy on involuntary resettlement. The latter, however, related to people who appeared not to have been living in the area at the time of loan processing and Management had meanwhile given assurances that the borrower would compensate them during the project's execution under an agreement between the Bank and the borrower. The Board accepted the Panel's recommendation not to investigate.

(114)See Request for Inspection, Nigeria /Lagos Drainage and Sanitation Project (INSP/SecM98-10), June26, 1998.

(115)See Nigeria: Lagos Drainage and Sanitation Project, Panel Report and Recommendation (INSP/R98-5), November 10, 1998 (in Annex 3 reproducing Management's Response).

(116)See id (Panel Report and Recommendation).

Land Reform and Poverty Alleviation Project - Brazil

In January 1999, the Panel registered a request signed by more than 800 Brazilian rural workers and residents and a number of NGOs, labor unions of rural workers, religious welfare groups, church associations, and an academic institute regarding the Land Reform and Poverty Alleviation Pilot Project in Brazil financed by IBRD⁽¹¹⁷⁾. The project is testing a market-based land reform plan in several Northeastern Brazilian states involving financial support for about 15,000 families of poor rural laborers and farmers without, or with insufficient land to purchase suitable agricultural properties from willing sellers. The requesters asserted that the project in its design and implementation would violate the Bank's policies on poverty reduction, disclosure of information, involvement of NGOs in Bank operations and environmental assessment. They specifically contended that the project was not achieving its objectives as it did not facilitate the implementation of expropriation of uncultivated land mandated under the Brazilian constitution. Instead, the project required the rural workers' associations to negotiate directly with land owners the sale of their unused land under the so-called market-based approach adopted by the Bank. The request contended that the latter approach would in the medium- and long-term let the poor end up poorer than before as they would not be able to repay their financial debts incurred for the purchase of land.

In March 1999, Management responded to the request disagreeing specifically with the requester's allegation that the project's market-based approach would not achieve its goals, i.e. to redistribute land assets in

(117) See Request for Inspection Brazil: Land Reform and Poverty Alleviation Pilot Project (INSP/SecM99-1), January 12, 1999

order to alleviate the country's rural poverty⁽¹¹⁸⁾ Pre-project analyses had shown very good prospects for financial sustainability and current information regarding the project's ongoing implementation would not contradict the earlier studies' assessment. Furthermore, the Bank-financed pilot project would not exclude expropriation per se but leave the choice of land reform instruments to the Brazilian government that had, for the Northeastern part of the country, agreed to test the market-based approach. Management also denied allegations of violations of other Bank policies.

In June 1999, the Panel issued its report and recommendations to the Board⁽¹¹⁹⁾. The Panel expressly noted that it would not be for it to discuss the role of expropriation and the legality of alternative methods of agrarian reform programs as these were issues that would not directly relate to Bank policies and procedures. It further noted that it had not found any evidence of specific policy violations from which eventual harm suffered by the requesters could have resulted or would be resulting in the future. In light of Management's efforts to continuously improve the terms and conditions of credits for land purchases for beneficiaries, the Panel also saw no likelihood of a grave deterioration of the beneficiaries' personal situation. The Panel, therefore, did not recommend to the Board an investigation and the Board agreed.

A new request related to the same project was submitted by the same requesters containing the same allegations on September 14, 1999. The Panel registered the request as it alleged that it was based on new evidence. Management disagreed again with the allegation and stated that

(118) See Brazil: Land Reform and Poverty Alleviation Pilot Project, Panel Report and Recommendation (INSP/R99-4), June 2, 1999 (containing in Annex 2 Management's Response).

(119) See id (Panel Recommendation).

the project was rated by the Bank's Quality Assurance Group as one of the two best projects in the Latin America and Caribbean Region. The Panel found the request ineligible for investigation as the requesters had not brought their request first to Management. The Board approved the Panel's recommendation not to investigate on a no-objection basis on January 7, 2000.

Swissbourgh diamond Mines (Pty) Ltd & Others Regarding Highlands Water Project - Lesotho/South Africa

In May 1999, the Panel registered a request brought before it by six companies registered in Lesotho and by South African nationals as individuals who were also shareholders in the Lesotho Companies⁽¹²⁰⁾. The companies led by Swissbourgh Diamond Mines (Pty) Ltd. claimed to have been deprived of their mining rights in an area of the Malibamat'so River Valley. Their right to fair, full and prompt compensation was allegedly violated by IBRD's non-compliance with its policies and procedures in the financing of the Lesotho Highlands Water Project. The conclusion of the loans financing the latter project was allegedly the reason why the requesters' leases were cancelled in 1991 as the Lesotho agency in charge of the project, in order to be eligible for Bank financing, had to hold a valid lease over the project area without any private investor's claims to mine. While the requesters have been challenging the lease cancellations in court and proceedings are still pending in this respect, they alleged that the Bank failed to observe its policy and procedure on disputes over defaults on external debt, expropriation, and breach of contract, and its policy on disclosure of information by not suspending disbursement of funds in relation to the Lesotho project, not considering to decline financing new

(120)120 See Request for Inspection from Swissbourgh Diamond Mines (Pty) Ltd. & Others - Lesotho: Lesotho/Highlands Water Project (INSPISecM99-5), May 14, 1999.

projects in the country and by appraising the project while the requesters' dispute over the expropriation was pending⁽¹²¹⁾. The Bank also allegedly failed to provide the requesters with copies of all project information documents.

In its June 1999 response, Management contended to have been in full compliance with the requirements of the Bank's policies invoked by the requesters. The Bank had informed itself about the borrower's efforts to settle the dispute over the alleged expropriation of the requesters licenses as well as assessed the potential harm resulting from the dispute to the country's international credit standing. According to information provided to the Bank by the borrower, the dispute over the matter of the illegally granted leases had been submitted to the courts and the borrower had indicated to be prepared to abide by the courts' final decision over it. The latest judgment in the case, pronounced in late April 1999, declared the mining leases void ab initio. In light of this information, the Bank had concluded that the borrower had been making reasonable efforts to settle the dispute. Consequently, there was no substantial harm resulting from the alleged expropriation to Lesotho's international credit standing and,

(121) it may be noted that the relevant parts of the Operational Manual Statement on Disputes over Defaults on External Debt, Expropriation and Breach of Contract (OMS 1.28), applicable at the time of appraisal of Phase IA of the project, read: "The Bank will not lend for projects in a country if it considers that the position taken by that country with respect to alien owners of expropriated property is substantially effecting its international credit standing. Nor will it appraise projects in such a country unless it has good grounds for believing that the obstacles to lending will soon be removed." The relevant parts of the Bank's Operational Policy on Disputes over Defaults on External Debt, Expropriation, and Breach of Contract (OP 7.40), applicable at the time of appraisal of Phase IB of the project, read: "When there are disputes over expropriations that, in the opinion of the Bank, the country is not making reasonable efforts to settle and that are substantially harming the country's international credit standing, the Bank considers whether to continue lending for new projects in the country. Further, the Bank may not appraise proposed projects in such a country unless it has good grounds for believing that the obstacles to lending will soon be removed."

thus, reconsideration of Bank lending to Lesotho was not necessary. As to the alleged violation of the Bank's policy on disclosure of information, Management noted that, as required by the policy, it had kept all project related information available at the Bank's Infoshop (earlier the Public Information Center) and advised the requesters to contact the latter to obtain the information they asked for. Management added that the request, in its view, was at any rate ineligible, as it was submitted after two of the several subsequent loans financing the project had been closed during the life of which the alleged violations took place.

The Panel's July 1999 recommendation in Swissbourg Diamond Mines/Lesotho found the request eligible, especially as a third loan, financing the project and dated December 1998, had not yet been closed when the request was submitted. The Panel further found that Management did not comply with procedural requirements in the Bank's policy on disputes over defaults on external debt, expropriation and breach of contract. According to the Panel, Management had specifically violated a procedural provision requiring that "[i]f, at the time a loan is presented to the Executive Directors for approval, there are any substantial amounts in dispute between the borrowing country and suppliers or lenders to, or investors in that country, the matter is mentioned in the Memorandum and Recommendation of the President/President's Report." According to the Panel's report, the lawsuit over the significant amount in damages claimed by the requesters from Lesotho was not referred to in the President's Report when the third loan financing the project was submitted to the Board for approval. Further procedural provisions were found to have been violated by Bank Management in the process of assessing whether the dispute over the expropriation was substantially harming the country's international credit standing and in the release of project information. Nevertheless, the Panel found no link between any actions and/or omissions of the Bank and the harm claimed by the requesters.

Consequently, it did not recommend an investigation into the matters alleged in the request. The Board approved this recommendation on a no-objection basis.

Western Poverty Reduction Project - China

In mid-June 1999, the Panel registered a request concerning a poverty reduction project in certain regions in China with several, mainly infrastructure, components to be financed by IBRD and IDA. Among the project's components supporting land and household development was a component supporting voluntary resettlement of rural laborers and rural poor. The request was submitted by the International Campaign for Tibet (ICT), a U.S. based NGO allegedly acting on behalf of people living in the project

area. ICT claimed that its representational authority would be based on its longstanding involvement in the project area and its mandate to advocate on behalf of the interests of the Tibetan people. ICT claimed further that it had received letters from inside the project area seeking international assistance in raising concerns about the allegedly devastating impacts of this project on local peoples. In terms of the harm potentially resulting from the project, ICT asserted that the project, if approved and implemented, would adversely affect the lives and livelihood of Tibetan and Mongolian ethnic peoples. Specifically, the complaint mentioned that resettlement of the new immigrants would directly adversely impact 4,000 local people and have further indirect impacts on the entire county including a serious risk of escalation of ethnic tension and resource conflicts. According to the request, the potential harm would result from the Bank's noncompliance with its policies on indigenous peoples, environmental assessment, involuntary resettlement, pest management, and

disclosure of operational information.

Management's response to the request concerning the China Western Poverty Reduction Project, submitted in July 1999, concluded that the Bank had complied with its policies. It noted, however, that some of the qualitative aspects of the project's design could be improved, especially with regard to the social and cultural aspects of the project. Management announced that measures were being taken to ensure that these aspects are Strengthened. Specifically, Management noted that there was no violation of the Bank's policy on indigenous peoples. Measures to address the requester's concerns of dilution of Tibetan and Mongol cultures such as culturally sensitive education and health care systems and protection of the way of life of herders in the move-in area of the voluntarily placed laborers would mitigate the cultural risks feared by the requesters. Through these measures the objectives of the Bank's policy on indigenous peoples would be fulfilled. Management further contended that a resettlement action plan addressed all needs of the few people that were involuntarily resettled under the project, as required by the Bank's policy on involuntary resettlement. Management also noted that the project was correctly screened and assessed for its environmental impact, as required under the respective Bank policy. Similarly, the Bank's policy on pest management had been observed by ensuring that the borrower would introduce certain strategies to minimize and monitor the use of chemical pesticides. Finally, Management maintained that all disclosure requirements of the respective Bank policy were fulfilled by making specific project information pertaining to the environment and the resettlement available to the affected people prior to project appraisal.

The Panel was authorized to investigate. Its report showed that while the Bank has observed its policies in certain respects it has violated

them in other respects. It highlighted in particular that indigenous peoples surveys were incomplete and specific Surveys and social cultural assessments should have been made for each ethnic group in the project area. Management recommended to the Board further measures that would cost some \$3 million to complete the surveys and other actions suggested by the Panel. Management also suggested the establishment of a council of experts to monitor application of certain measures and submitted a number of "structural proposals" to improve on the Bank's future handling of projects likely to raise similar concerns. The Board declined on July 7, 2000 to approve the project component in question with the corrective measures recommended by Management. China then withdrew its request for the Bank's financing of that component although there were indications that the Board was about to approve it provided the Board had the occasion to review the completion of the measures recommended by Management prior to loan disbursement on that component.

Special Structural Adjustment Loan - Argentina

The seventeenth request, registered in August 1999, was submitted by a group of attorneys from a center for legal and social studies in Argentina, an NGO representing about 418 beneficiaries of the Pro-Huerta program providing food and nutrition assistance to the absolute poor. The requesters alleged that IBRD violated the terms and conditions under which the Board of Executive Directors approved the Special Structural adjustment Loan to Argentina because the loan's last tranche was intended to be released despite the fact that the disbursement conditions set forth in the loan agreement were not met. Specifically, adequate levels of funding for a number of specific social programs (including the Pro-Huerta program) were allegedly not maintained, eventually resulting in the termination of the Pro-Huerta program (PH-program). The requesters also alleged violation of the Bank's policies on

"poverty alleviation," "project supervision," "project monitoring and evaluation," "suspension of disbursement," and "disclosure of information."

In its September 1999 response, Management contended that it had fully complied with all relevant Bank policies and procedures. Specifically, Management pointed out that Argentina, the recipient of the special structural adjustment loan, was not obligated under the loan agreement to carry out the so-called social budget condition (attached to the second and third branch release) by which a series of identified social programs, among them the PH-Yrogram, would be maintained at a certain aggregate level without assigning an exact figure to each program individually. This was only a condition of disbursement of the second tranche of the loan. If Argentina would not meet the condition, it would only forfeit its right to receive the respective tranche proceeds. Argentina did, however, maintain the specified aggregate budget amount whereupon the bank released the second tranche. Moreover, while the condition does not spell out a concrete amount to be allocated to the PH-Program, Argentina had allocated both in FY98 and FY99 recognizable sums to the PH-Program allowing for its scoured continuation until the end of 1999. Argentina also indicated to the Bank its intention to ensure the viability of the PH-Program at least through FY2000. In light of these facts, the Bank was likely to also release the last tranche.

Management noted further that, contrary to the request's allegation, no violation of the Bank's policy on poverty reduction existed. The latter required that efforts be made in the context of adjustment lending to safeguard budgetary allocations for basic health, nutrition and education for the benefit of the poor. The social budget condition of the special structural adjustment loan to Argentina fully serves the Bank policy purposes. Given the numerous supervision missions by the Bank

and the frequent written and verbal exchanges between the Bank's and the borrower's authorities, the Bank's policy on supervision had not been violated either. No violation of the policy on project monitoring and evaluation occurred as the latter policy would be inapplicable in the context of adjustment lending. Similarly, the Bank's policy on suspension of disbursements was not violated as it did not apply to the release of the tranche of an adjustment loan. Disbursement of loan proceeds under the respective Bank policy may be suspended where the borrower breaches a legal obligation. Mere non-fulfillment of a condition precedent to a tranche release, does not constitute the breach of a legal obligation. It only leads to non disbursement of the tranche amount (equivalent in effect to suspension of disbursement). Finally, the policy on disclosure of information, had been fully complied with, as all documents referred to in the policy as disposable had been made available to the public. The Panel's recommendation on this request is pending.

Lake Victoria Environmental Management Project/Kenya

The request for the inspection of this project, co-financed by IDA and the GEF trust fund was received on October 12, 1999 and registered on November 22, 1999. The requesters were Kenyan NGO acting for and on behalf of persons in the area known as the Nyanza Gulf of Lake Victoria and two other NGOs representing other local communities.

The requesters claimed that the proposed use of a mechanical method for removal of water hyacinth from the lake, by shredding and sinking the weed to the bottom of the lake, was selected without a prior environmental impact assessment or appropriate community consultation, and would result in ecological decay and environmental degradation that in turn would adversely affect communities living on the shore of the lake.

Failure to follow- Bank policies on environmental assessment, poverty alleviation, economic evaluation of investment projects and project supervision was alleged.

In its response submitted on December 20, 1999, Management contended that it had properly followed all Bank policies and procedures. It specifically asserted that the project intended to alleviate the problems resulting from water hyacinth infestation of Lake Victoria and that the pilot nature of the chosen chopping/shredding will allow for changes in the project implementation if justified, based on environmental or other concerns.

The Panel recommended on March 6, 2000 investigation of the request, basing its conclusion primarily on impressions from a field visit and the fact that the request and management response contradicted each other while the requesters' assertions contained a prima facie case of violation of Bank policies with material impact on requesters. The investigation is pending.

Mining development and Environmental Control Technical Assistance Project / Ecuador.

An Ecuadorian NGO acting for and on behalf of persons in the project area submitted a request to the Panel on December 13, 1999, that was registered on December 17, 1999. The request claimed that the development of mining activities will prevent local communities from continuing to work and live on their traditional agricultural and cattle breeding activities. The project would also have a destructive impact on critical natural habitats, threatening protected, natural reserves and endangered species. Alleged violation of policies on environmental assessment, wild lands, indigenous people, and project supervision.

In its response, submitted on January 187 2000, Management denied any violation of policies. It also contended that requesters had failed to demonstrate actual or potential direct harm because the area where requesters reside had not been and is not being "mapped" under the project so that harm can logically not result from the project to the specific persons on whose behalf the request was made.

The Panel, on April 28, 2000, recommended investigation mainly based on evidence found during a field visit supporting that there was a possibility of violation of Bank policies by which requesters were harmed or are likely to be harmed. The Panel found in particular that there was a possibility that the geo-information component might lead to a mapping of the area in which the alleged affected people reside.

The Board approved investigation on a no-objection basis on May 15, 2000. The Panel has not yet submitted its findings.

C. Analysis of the Practice

It is interesting to note from the cases submitted to the Panel that investigation was authorized by the Board explicitly in only two cases in spite of the Panel's recommendation to investigate six claims. The two projects where inspection was explicitly authorized by the Board are the first and the tenth, the Arun III project in Nepal, which had not been financed by the Bank at the time of inspection (and where Bank financing was eventually withdrawn), and the NTPC Power project in India, where inspection took place only at the Bank's headquarters. The Board virtually authorized inspection in a third case, the Yacyreta dam project, but stood short of stating so.

The reason for the evolution of a practice that seems different from that Suggested by the wording of the Resolution may be twofold. The

straightforward approach provided for in the Resolution requires the Panel to limit its role at the initial stage to ascertaining on a prima facie basis whether eligibility criteria are met. However, this was complemented from the beginning by a procedure, which the Panel introduced on its own initiative. On August 19, 1994, the Panel introduced its "Operating Procedures" for the purpose of facilitating its work and providing practical guidance to those who may submit requests for inspection to it. In these Procedures, the Panel provided for its power to carry out, after receiving the Management response and any clarifications provided, "a preliminary review" in order to "determine whether conditions required by provisions of the Resolution exist"⁽¹²²⁾. The review at this initial stage, i.e. before Board authorization of a full investigation, was introduced by the Panel to be undertaken if it is "satisfied [on the basis of the information available at this stage] that Management has failed to demonstrate that it has followed, or is taking adequate steps to follow the Bank's policies and procedures"⁽¹²³⁾. (Under the Resolution, this language appears in paragraph 13 which speaks of the preliminary condition that the Panel, before hearing a complaint, should be satisfied that its subject-matter had been submitted first to Management and that Management had failed to adequately address it.) In this "preliminary review," according to the Operating Procedures, the Panel "may not investigate Management actions in depth"⁽¹²⁴⁾. However, the purpose of this review, according to the text adopted by the Panel, is "to determine whether Management's failure to comply with the Bank's policies and procedures meets the following three conditions: (a) whether such failure has had, or threatens to have, a material adverse effect; (b) whether the alleged violation of the Bank's

(122) See Operating Procedures of the Inspection Panel, at para. 34.

(123) See *id*

(124) *id* at para 35.

policies and procedures are, in the judgment of the Panel, of a serious character; and (c) whether remedial actions proposed by Management do not appear adequate to meet the concerns of the Requester as to the application of the Bank's policies and procedures⁽¹²⁵⁾. (Under the Resolution, determining such conditions in any definitive manner would constitute the subject matter of the investigation, which has yet to be authorized.) the Panel's objective in introducing this procedure seems to have been its concern to base its recommendation (on whether to carry out a full investigation) on firm grounds and, if possible, to see if Management could propose remedial action to obviate the need for full investigation.

In a 'working paper' prepared by the Panel on the occasion of the first review oil its experience. the Lance explained that the Board, by asking the Panel to take further time to produce additional reports during the preliminary review stage, had practically modified the Resolution's requirements⁽¹²⁶⁾ The Panel described that "modification" as a pragmatic approach. developed by the Board in response to very real problems⁽¹²⁷⁾. it also noted on that occasion that "the extent Of information expected by the Board at the preliminary stage is sometimes equivalent to the content of an investigation⁽¹²⁸⁾". For that reason, the Panel argued for an extension of the period of the preliminary assessment it had introduced in its Procedures, indicating that such careful assessment "reduces the need for a formal investigation inspection, which can still be authorized by the Board as a last resort⁽¹²⁹⁾". After the Rondonia case, the Bank's Board in effect agreed

(125)id at para.35(a)-(c).

(126) see review On the Inspection E unction - Practical Suggestions Erased on Experience to Date working paper for the World E3allLi Executive directors prepared by the Inspection Panel in November 1995.

(127)see id

(128)see id.

(129)see id.

with that approach. It therefore accordingly allowed the Panel in the 1996 "Clarifications" to extend the period of this preliminary assessment, as may be needed, within certain limits⁽¹³⁰⁾. Board majority seemed to have found in this approach a convenient method to redress the situation, without having to authorize the full "investigation" which the Resolution envisaged in each case where it is warranted. Although the purpose of the Panel's investigation is to ascertain Bank compliance with its own policies and procedures, the borrowing countries involved have typically seen it as an embarrassment to the government. Opposition groups within these countries also used it to press the government to make new concessions. An attitude against full investigation whenever it could be avoided thus evolved among borrowing member countries and created a divisive climate every time the Board had to discuss a Panel recommendation to investigate. The preparation of a remedial action plan mitigated these negative effects but also focused attention on measures to be taken by the borrower, rather than on the subject-matter of inspection envisaged in the Resolution that is the Bank's own failures.

The above procedure, first adopted by the Panel and later endorsed by the Board, was probably based on a certain understanding of paragraph 13 of the Resolution which may differ from its literal and intended meanings. This paragraph reads as follows:

"The Panel shall satisfy itself before a request for inspection is heard that the subject matter of the request has been dealt with by the Management of the Bank and Management has failed to demonstrate that it has followed, or is taking adequate steps to

(130) See Clarifications, supra note 31, on the extension of the period allowed for the understanding of a preliminary assessment under the section on the Panel's function.

follow the Bank's policies and procedures. [....].

As the above language speaks of a condition that has to be fulfilled before a request for inspection is "heard," it clearly makes the prior submission of the subject matter of the request to Management and the lack or inadequacy of response by Management conditions for the admissibility of the request by the Panel. It also envisages that Management's adoption at this early stage of what the Panel would see as adequate steps (i.e. adequate remedial action) to follow the Bank's policies and procedures would obviate the need for investigation and cause the Panel not to recommend it. However, in many cases where a remedial action plan was prepared by Management this was done after the request for inspection was submitted to the Panel (and, in all but one case - Arun TII, before the Board was to discuss the Panel's recommendation to investigate). The submission of such a plan could not therefore bar the request from being "heard" by the Panel. Typically, the action plan included, as mentioned, measures to be taken by the borrower. Yet, it created a dilemma for the Board, which saw in the plan a satisfactory solution that addressed the underlying complaints and spared all parties the travails of an investigation. The result, however, was seen by many commentators to short-cut the process envisaged in the Resolution to let the Panel proceed with investigation when the eligibility conditions are met.

Under a literal reading of the Resolution, remedial action may be adopted by Management before the matter reaches the Panel. It may also be adopted after the Panel undertakes its investigation and reaches its findings. In the latter case, Management is required to submit to the Board its recommendations in response to such findings (pursuant to paragraph 22 of the Resolution). the Resolution does not require the adoption by

Management of an action plan in the intermediate stage between the registration of a request for inspection and the submission of the Panel's findings. Although it does not exclude this possibility, the Resolution simply envisages that Management would provide the Panel with a response within 21 days to enable the Panel to decide whether the request was eligible for investigation and that the Panel would make a recommendation to the Board only on this question within a similar period.

An action plan on remedial measures to be taken by the borrower alone is likely to divert attention from the main issue of whether the Bank has followed its policies or procedures. Yet, it could, as a practical matter, make a full investigation superfluous from the viewpoint of many Board members. This has in fact contributed to the abovementioned practice of the Board declining to authorize the investigation and requesting instead progress reports on the implementation of the plan. The occurrence of this possibility was not unforeseen, however, at the time of the adoption of the Resolution and its possible preemption of the Panel's role was in fact among the criticisms leveled against the Resolution at the time. However, this criticism would not be justified if the action plan addressed also the measures to be taken by the Bank to remedy any failures that may be attributed to it. As explained in the 1994 first edition of this author's book on the Inspection Panel, the "obviation of the need for inspection in such cases should be seen as a positive development to the extent that it allows for correcting Bank failures in a speedy manner.⁽¹³¹⁾" it may thus be surmised that the preparation of the remedial action plans, which obviated the need for inspection has practically served the purpose of the affected parties but not always that of the inspection function itself. It has also

(131) See IBRAHIM F.I. SHIHATA, THE WORLD BANK INSPECTION PANEL 100 (1st Ed., 1994). (Emphasis added)

caused much frustration and misunderstanding, especially for those watching the process from the outside. This matter was discussed at length in the second review of the Panel's experience. Its candid discussion by the Executive Directors in 1998/99 helped in developing a solution, which in the view of this author serves both the purposes of affected parties and the inspection function.

There are other views on this matter, however. They prefer the earlier practice where they saw the Panel performing a quasi judicial function and possibly an embryonic regulatory function, i.e. two functions other than those endowed on it by its constituent Resolution. They hoped that the continued performance by the Panel of such presumed functions would lead to the emergence of a "regulatory system of settlements in an adjudicative framework" as exemplified in the use in US courts of "consent orders" (where the court embodies negotiated agreements between the parties to litigation, especially those concerning large scale problems in state institutions)⁽¹³²⁾. These views, however, like the broader view that sees the Panel's function as basically redressing any harm associated with a Bank-financed project regardless of its cause, are in fact speaking of a different mechanism from that created by the Bank in 1993 to review serious violations of its own policies and give the Bank the opportunity to correct its violations and if needed its applicable policies. An adjudicative, let alone a regulatory mechanism, certainly needs different capabilities and procedures. If it were required, it would also need a structure Separate from the Bank.

(132)132 See B. Kingsbury, Operational Policies of International Institutions as Part of the Law-Making process. The World Bank and Indigenous Peoples, in THE REALITY OF INTERNATIONAL LAW ESSAYS [N HONOUR OF IAN BRONLIE 323, 333-4 (G. S. Goodwin-Gill & S. Talman eds., 1999).

V. First Review of the Inspection Panel Experience

The Resolution establishing the Panel provides for a review by the Executive Directors of the experience "after two years from the date of the appointment of the first members of the Panel."⁽¹³³⁾ This review started in February 1996, when the Executive Directors held a preliminary discussion of the matter in light of four papers prepared by Management which covered: (i) a non-exhaustive list of issues for discussion; (ii) a table summarizing the manner in which requests before the Panel were handled; (iii) a list summarizing comments received from the Panel and the NGOs which had communicated their views to Bank Management; and (iv) a note and a table comparing the Bank's Inspection Panel with the inspection panels established by IDB in 1994 and ALB in 1995⁽¹³⁴⁾.

The Board's Committee on Development Effectiveness (CODE) first reviewed the matter in depth in light of Management's recommendations before final recommendations were made to the Board. A number of papers received from several NGOs⁽¹³⁵⁾ on the subject were circulated to the Committee before it received in May 1996 a paper from Management⁽¹³⁶⁾ outlining different issues which arose in the implementation of the Resolution and summarizing the positions of the Panel and outside sources with respect to such issues. The Panel also

(133)id at para.27.

(134)See Review of the Inspection Panel Function - Background Documents; February 23, 1996, discussed in an informal board meeting on February 27, 1996.

(135)See Letters from Oxfam International and International Rivers Network March 26, 1996

(136)See Review of the Resolution Establishing the World Bank Inspection Panel, May 7, 1996.

submitted a report to CODE commenting on Management's paper⁽¹³⁷⁾. One of the major issues highlighted in the Management paper was whether the inspection function was to be extended to the activities of the IFC and the MIGA, and, if so, whether inspection of private sector operations across the World Bank Group (i.e. including those of the Bank itself) should have a different Panel or the same Panel operating under different procedures which take account of the special circumstances of the private sector.

Discussion in CODE revealed a broad preference among its members to keep the original Resolution establishing the Panel intact while providing for measures of flexibility in its implementation. Rather than introducing amendments to the Resolution, it was felt that the Board should consider the issuance of directives to guide its application in practice. Such directives, being issued by the Board, would have the same force as the Resolution and would in fact complement its text.

On the possible application of the inspection function to IFC and MTGA operations, a separate paper prepared by the IFC Management was subsequently discussed in CODE. It was agreed that IFC and MIGA would consult with the business community, co-financiers and Executive Directors representing borrowing countries and report back to CODE. Once CODE had completed its consideration of the inspection mechanism for IFC and MIGA projects, it was Management's intention to propose a common approach to inspection for all Bank Group private sector projects. In October 1997, CODE discussed an IFC report on "Consultations with Private Sector Clients and Co-financiers on the Possible Establishment of an Inspection Mechanism for IFC and MIGA." The report showed that a

(137) See Memorandum from the Chairman of the Inspection Panel, Review of the Resolution Establishing the World Bank Inspection Panel, May 14, 1996.

majority of those consulted were not in favor of an inspection function and would not, at any rate, welcome inspection under the established procedures of the existing Panel. Discussion in CODE was not conclusive and Management was asked to present different options to a subsequent meeting. The matter was later taken up by the IDA Deputies in the irrelevant course of the Twelfth Replenishment of IDA resources. IFC and MTGA are now studying it further with a view to subjecting their operations to the Inspection Panel (after having appointed an ombudsman for similar functions)⁽¹³⁸⁾.

In its first review in 1996, after considering the proposals submitted by Management and the Panel on all other matters, and aware of the views submitted by NGOs on the issues involved, CODE, then the full Bank Board reached certain conclusions which were conveniently termed "clarifications" of the Resolution⁽¹³⁹⁾. These may be summarized as follows:

On the Panel's function and procedures, suggestions were made by some NGOs to do away with the first phase of the process (where the Panel recommends and the Board approves whether to investigate). Other suggestions were made by the Panel and accepted by Management to extend the 21-day period given by the Resolution for the Panel to make its recommendation on this matter (after receiving Management's response to the complaint, which response has to be submitted within 21 days from notification of the request to Management). The Board decided that the Panel's recommendation should normally be completed within 21 days as

(138) For details see SHIHATA, *supra* note 1, at 157-162.

(139) See Review of the Resolution Establishing the Inspection Panel - Clarification of Certain Aspects of the Resolution, September 30, 1996, discussed and approved in the Board on October 17, 1996, for a reference to the text of the Clarifications, see Sara note 31.

originally envisaged⁽¹⁴⁰⁾. However, it gave the Panel the requested discretion when it found it appropriate to carry out a "preliminary assessment" of the alleged damage (in particular when this could lead to a resolution of the matter without the need for a full investigation). The Board asked that the Panel, in undertaking such a preliminary assessment, indicate to the Board the date on which it would present its findings and recommendation as to whether a full investigation was still required. If such a date was expected by the Panel to exceed eight weeks from the date of receipt of Management's response, the Panel would seek Board approval for the extension, possibly on a "no-objection" basis. The Board also made it clear in that respect that what was needed at this preliminary stage was not to establish that a serious violation of the Bank's policy had actually resulted in damages suffered by the affected party. Rather, it was to establish whether the complaint was *prima facie* justified and warranted a full investigation because it was eligible under the Resolution. The Board also agreed that the Panel's investigations should continue to result in "findings" (not in recommendations to the Board on the substance of the project subject to the complaint or on the Bank's overall policies and procedures, as suggested by some NGOs). The Board would continue to act on the basis of recommendations of Management with respect to such remedial action as may be needed, in light of the Panel's findings. On the issues of access to the Panel and eligibility of requests for inspection, Management had no objection to extending such access to all affected parties, including a single individual, as suggested by NGOs (and as was originally mentioned in the first draft Resolution) The Board, however, favored maintaining the present language of the Resolution with the understanding that the affected party, which the Resolution describes as "a

(140)See Clarifications, *supra* note 31, under the section on the Panel's function.

community of persons such as an organization, association, society or other grouping of individuals," includes "any two or more persons who share some common interests or concerns"⁽¹⁴¹⁾. This confirmed an interpretation given on an earlier occasion by the Bank's General Counsel⁽¹⁴²⁾. The Board did not support extending the inspection function as requested by some NGOs to requests submitted by foreign NGOs, local NGOs whose rights or interests were not affected by the project or, more generally, to claims submitted in the public interest. The Board also declined the Panel's request to authorize inspection upon the request of the Bank's President, noting that the Panel was established by the Board to perform an independent function for the Board and that such independence might be affected by a direct reporting to the President.

The Board also clarified that the request for inspection may relate either to a project under consideration by Bank Management, i.e. a project in the design, preparation, reappraisal or appraisal stage, or to a project already approved by the Board and financed by the Bank⁽¹⁴³⁾. It also reconfirmed an earlier Board understanding (in July 1995) to the effect that the term "project" as used in the Resolution had the same meaning as generally used in the Bank's practice⁽¹⁴⁴⁾. As also agreed in July 1995, it was clarified that the Panel's mandate did not extend to reviewing the consistency of the Bank practice with all of its policies and procedures

(141) See *id.* under the section on eligibility and access.

(142) See memorandum of the senior vice President and General Counsel Roze on the Inspection Panel in the Preliminary Assessment of Whetlael-to-Recommend Inspection, Sahara note 46.

(143) See Clarifications, *supra* note 31, under the section on eligibility and access.

(144) For details on the discussion regarding the meaning of the term project under the Resolution establishing the Panel and for a differentiation between "project loans" and "adjustment loans" in the Bank's practice, see Shihata, *supra* note 129. See also first ANNUAL REPORT of the inspection panel, *supra* note 72, at 57-s8.

but, as stated in the Resolution, was limited to cases of alleged failure by the Bank to follow its operational policies and procedures With respect tee the design, appraisal and /or implementation of projects, including Cases of alleged failure by the Bank to follow-up on the borrowers' obligations under loan agreements, with respect to such policies and procedures⁽¹⁴⁵⁾.

On the questic n 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 promptly after the Board had discussed these documents⁽¹⁴⁶⁾. It also shortened the period of disclosure of all documents to three days from the date of Board decision.

No change in the composition of the Panel was proposed but it was agreed that once a decision was made on inspection of private sector operations the question of the composition of the Panel might be revisited unless a separate panel were to be established for that purpose (perhaps to be served by the same Secretariat)⁽¹⁴⁷⁾.

The Board also clarified that the authority to interpret the Resolution was Vested in the Board⁽¹⁴⁸⁾. The Panel would apply the Resolution in specific cases as it understood it subject to the Board's review when the matter was submitted for its consideration. The Board also reconfirmed the Resolution's requirement that the advice of the Bank's Legal Department be sought by the Panel "on matters related to the Bank's rights and obligations with respect to the request under consideration⁽¹⁴⁹⁾.

(145) see Clarifications, .supra note 31. under the Section on eligibility and access.

(146)See id under the section on outreach.

(147)See id under the section on the composition of the Panel.

(148)See id under the section on the role of the Board.

(149)See id

The request of some NGOs that the Board should have a legal counsel to advise on Panel matters, separate from the Bank's General Counsel, was not granted. It was recalled that the General Counsel provided independent legal advice to both the President and the Board on all matters and was not, in any event, involved in the preparation of Management's response to the requests for inspection. (The recent case of the Itaparica project in Brazil proved the point; the General Counsel's legal opinion to the Board differed in its conclusions from Management's response on the eligibility question.)

Also the Board agreed that significant efforts be made to make the Inspection Panel better known in borrowing countries, but stated that the Bank should not provide technical assistance or funding to potential requesters⁽¹⁵⁰⁾.

Finally, the Board clarified that the exclusion of procurement decisions from the Panel's jurisdiction was not limited to decisions taken by the borrower (as the letter of the Resolution suggests) but extends to all procurement decisions, including those taken by Bank Management⁽¹⁵¹⁾. It was noted in this respect that a separate mechanism existed for addressing procurement-related complaints.

(150)id. under the section on outreach.

(151)See id under the section on the eligibility and access.

VI. Second Review of the Inspection Panel Experience

The clarifications of 1996 did not reduce the divisiveness in the Bank's Board when it addressed Panel recommendations with respect to subsequent complaints in the following year. On the contrary, preliminary assessments conducted by the Panel tended to establish the harm and to suggest a causal relationship between it and violation of Bank policies or loan agreements, then, in many cases recommended a full investigation. The decisions on the courses of action to be followed regarding the complaints concerning the Yacyreta and NTPC projects led the Executive Directors to agree on the need for a second review of the whole experience.

The first informal Board meeting on that review took place on November 13, 1997 on the basis of a management paper⁽¹⁵²⁾ which, after referring to the above analysis suggested that the Board had two options. The first option would be to literally follow the original text of the Resolution, limiting remedial plans submitted by Management to the very initial stage (before the complaint is submitted to the Panel) and the latest stage (after the investigation is completed). The second option, which is closer to the Board's practice codified in the 1996 Clarifications, would allow remedial plans in the intermediate stage (between the date of registration of the complaint and the Board's consideration of the Panel's recommendations) but with certain refinements. The plan would in this case be Submitted first by Management to the Panel, which would comment on its adequacy in its report to the Board. The Panel might then agree that the plan obviated the need for inspection or might still recommend a full investigation. The informal Board discussion showed a

(152)See Second Review of the Inspection Panel Experience (SecM97-873), November 6, 1997.

broad preference for the second option. It also revealed a great measure of dissatisfaction on the part of Executive Directors representing borrowing countries who saw that the remedial plans were always concerned with measures to be taken by the borrowers at the borrowers' own expense and thus departed from the purpose of the inspection function which was meant to address the failures of the Bank and no other party.

This led to a new approach proposed by this author on behalf of the Bank's Management⁽¹⁵³⁾. The purpose of this new approach was to ensure full respect for the scope established in the Resolution for the inspection function while benefiting from the practical attitude preferred by the Board under the 1996 Clarifications. The approach consisted mainly in unbundling the possible responses which a request submitted to the Panel may trigger on the part of Management and tailoring the procedure to be followed to the nature of each response while paying full regard to the Resolution's requirement (Paragraph 14(a)) that complaints with respect to actions which are the responsibility of parties other than the Bank are excluded from the Panel's mandate. The following scenarios had thus to be dealt with separately:

I. A first possible scenario envisages that Management's response would be that there is no serious violation of any Bank policy or procedure applicable to the operation involved. Such a response should normally be made within the 21-day period provided for in the Resolution. The Panel will in such a case formulate its recommendation to the Board on whether an investigation is needed. The Panel will follow in this process the requirements of the Resolution, limiting itself to alleged actions or omissions attributed to the Bank and to no other party.

(153) See Second Review of the Inspection Panel Experience - A Commentary (SecM98-8), January 7, 1998.

2. A second possible scenario envisages response by Management to the Panel to the effect that the request does not meet the Resolution's requirements for reasons other than the absence of any serious violations, such as that the complainant was not an affected party or that the loan was more than 95 percent disbursed. Again in this case, the 21-day period provided by the Resolution should normally be adequate for providing such a response. The Panel would assess the eligibility of the complaint and formulate its recommendation on whether an investigation is needed. The Panel's assessment may agree or disagree with Management's response but would exclusively address actions or omissions attributed to the Bank. Under the Resolution as clarified in 1996, the Panel would normally make its recommendation within a 21-day period but has the possibility of extending this period up to eight weeks and may even seek a longer extension from the Board.
3. A third possible Management response is that failures do exist but they are exclusively attributable to the borrower or to other factors external to the bank. If the Panel agrees that there was no prima facie evidence that any failure was attributed to the Bank, it would not recommend an investigation. However, Management may under this scenario present to the Board a remedial action plan on the measures the borrower agreed to take to remedy the situation. The 21-day period provided for in the Resolution may not suffice for the preparation of Management's response. Management would need to discuss the remedial plan with the borrower and the affected parties and reach agreement on it with the borrower before presenting it to the Board. In such a case, Management may be allowed an extension, say up to eight weeks, from the day it received the complaint, for the preparation of the response including the

action plan, if any. The Panel would not have a role under the Resolution with respect to an action plan that exclusively addresses measures to be taken by the borrower, not the Bank. (Nothing of course would prevent the Board from asking the Panel to assist in the review of such a plan, if the Board so wished. However, this would be an ad hoc assignment outside the scope of the Panel's Resolution.)

4. A fourth possible response by Management is that failures do exist which are exclusively attributable to the Bank. In this case, the Bank's response should indicate the measures the Bank intends to take to rectify such failures. Management may need the above-mentioned extension of the 21 day period to prepare this response and consult with the borrower and the affected party on the corrective actions. The Panel, on its part, will assess the situation in light of Management's response and any consultation it may wish to make. It will have the extended period approved in the 1996 "Clarifications" (eight weeks subject to possible further extension) for this purpose. Clearly, the Panel would in this case consider whether the Bank's response satisfactorily disposed of the matter and therefore obviated the need for inspection. Should this not be the case, the Panel would recommend a full investigation of the Bank's alleged failures.

5. A fifth possible answer is that Management agrees that certain failures have occurred some of which are attributable to the borrower, and some to the Bank. Typical of such situations are those where the borrower has not honored its obligations under the loan agreement but poor supervision on the part of the Bank has resulted in the continuation of such a failure on the part of the borrower with resulting harm to affected parties. As the Panel's mandate under the Resolution is related to the failures attributable to the Bank and not to "actions which

are the responsibility of other parties such as a borrower," a distinction has to be made between the action required in each case and the role of the Panel would be defined accordingly. Management would, in such situations, prepare, within the extended period, two sets of corrective measures: those related to the Bank itself and meant to correct any failure on its part, and those agreed with the borrower and addressing what the borrower should do to correct its failures (and, failing this, what remedies are or will be taken by the Bank under the loan agreement as a result of continued violations). While the first set of proposed corrective measures relating to the Bank's own failures will be addressed in the first instance to the Panel, the second set of measures are to be addressed directly to the Board and would be dealt with by the Board as in the case under paragraph 3 above. Upon receipt of the remedial plan proposed by the Bank to correct its own failures, the Panel will determine, in the extended period already granted to it, whether an investigation is needed and, therefore, should be recommended to the Board. It may do so if it believes that the measures proposed by the Bank are not adequate to rectify all the Bank's failures or that the Bank's failures in fact exceed those characterized in Management response as Bank failures. In deciding whether to authorize the investigation, the Board will review the assessment made by the Panel, taking into account the views expressed by Management. Clearly, if such investigation is approved by the Board on the recommendation of the Panel, it will be limited to the Bank's actions and omissions alleged in the request for inspection and to the adequacy of the Bank's plan to address them. The above scenarios attempted to capture all possibilities and tailor a practical procedure for each one, within the framework of the Resolution and its 1996 "Clarifications."

The only addition to pre-existing procedures was the possibility of extending the 21-day period provided for in the Resolution for Management response. If additional scenarios arose in practice they could be dealt with under the same understanding: the Panel will independently determine whether investigation is needed in each case, but such investigation, if authorized by the Board, will be limited to the Bank's behavior and the adequacy of the Bank's response with respect to that behavior. Meanwhile, any borrower's failure discovered in the process would be remedied under an agreed plan between the Bank and the borrower, following appropriate consultation with the affected parties, and would be directly submitted to the Board for approval. Discussion of the above described approach in the Bank's Board of Executive Directors in March 1998 led to the establishment of an ad hoc Working Group of six Executive Directors (representing borrowing and non-borrowing countries) to work out a compromise regarding the controversial questions of the second review of the Panel's experience. In December 1998, the Working Group presented its final report to the Board following consultation with the Panel, the General Counsel and NGO representatives. After hearing the views of the Panel and unprecedented consultation with NGOs, the Executive Directors approved the revised Working Group report's "Conclusions of the Second Review of the Inspection Panel" in April 1999⁽¹⁵⁴⁾.

The 1999 Conclusions confirm the soundness of the Resolution establishing the Inspection Panel and provide clarifications for its

(154) See Minutes of Meeting of the Executive Directors on April 20, 1999 (M99-22, IDA/M99-22), dated May 13, 1999, noting in para. 3 that the Executive Directors approved the recommendations and clarifications in the 1999 Conclusions of the Board's Second Review of the Inspection Panel which were circulated on April 22, 1999, and are reproduced in Annex 1-3 of the author's book referred to in note I

application. These clarifications supplement the clarifications issued by the Board on October 17, 1996 but prevail over them in case of conflict. The Conclusions approved by the Board are as follows:

1. In reaffirming the Resolution and the importance of the Panel's function, its independence and integrity, the Board called on Management to follow the Resolution as issued. Management will not, therefore, communicate with the board on matters associated with the request for inspection, except as provided for in the Resolution. It will thus direct its response to the request, including any steps it intends to take to address its failures, if any, to the Panel. Management will report to the Board any recommendations it may have, after the Panel completes its inspection and submits its findings (paragraph 23 of the Resolution).
2. In its initial response to the request for inspection, Management will provide evidence on either of the following courses:
 - (a) that it has complied with the relevant Bank operational policies and procedures;
 - (b) that there are serious failures attributable exclusively to its own actions or omissions in complying, but that it intends to comply with the relevant policies and procedures .
 - (c) that the serious failures that may exist are exclusively attributable to the borrower or to other factors external to the bank.
 - (d) or that the serious failures that may exist are attributable both to the Bank's non-compliance with the relevant operational policies and procedures and to the borrower or other external factors.
3. Management admission of serious failures attributable exclusively or partly to the Bank, should be accompanied by evidence that it has since

complied or intends to comply with the relevant operating policies and procedures. This response will contain only those actions that the Bank has implemented or can implement itself

4. The Inspection Panel will satisfy itself as to whether the Bank's compliance or evidence of intention to comply is adequate, and reflect this assessment in its reporting to the Board. It will determine the eligibility of a request for inspection independently of any views that may be expressed by Management. With respect to matters relating to the bank's rights and obligations regarding the request under consideration, the Panel will seek the advice of the Bank's Legal Department as required by the Resolution (para. 15).
5. To recommend whether an investigation should be carried out the Panel will satisfy itself that the eligibility criteria provided for in the Resolution have been met. It will base its recommendation on the information presented in the request, in the Management response, and on other documentary evidence. The Panel may decide to visit the project country if it believes that this is necessary to establish the eligibility of the request. At this stage, the Panel will not report on the Bank's failure to comply with its policies and procedures or its resulting material adverse effect; any definitive assessment of a serious failure of the Bank that has caused material adverse effect will be done after the Panel has completed its investigation.
6. The original time limit, set forth in the Resolution for both Management's response to the request and the Panel's recommendation, will be strictly observed except for reasons of force major, i.e. reasons that are clearly beyond Management's or the Panel's control, respectively, as may be approved by the Board on a no-objection basis.

7.If the Panel so recommends, the Board will authorize an investigation without making a judgement on the merits of the claimants' request, and without discussion except with respect to whether the following technical eligibility criteria have been met:

(a) The affected party consists of any two or more persons with common interests or concerns and who are in the borrower's territory (Resolution para.12).

(b)The request does assert in substance that a serious violation by the bank of its operational policies and procedures has or is likely to have a material adverse effect on the requester (Resolution paras.12 and 14a).

(c) The request does assert that its subject matter has been brought to Management's attention and that, in the requester's view, Management has failed to respond adequately demonstrating that it has followed or is taking steps to follow the Bank's policies and procedures (Resolution para.13).

(d)The matter is not related to procurement (Resolution para.14b).

(e)The related loan has not been closed or substantially disbursed (Resolution para.14c).

(f) The Panel has not previously made a recommendation on the subject matter or, if it has, that the request does assert that there is new evidence or circumstances not known at the time of the prior request (Resolution para.14d).

8.The "preliminary assessment" concept, as described in the October 1996 Clarification, no longer applies. The paragraph entitled "The Panel's Function" in the October 1996 "Clarifications" is thus deleted.

9. The profile of Panel activities in the borrowing country during the course of an investigation, should be kept as low as possible in keeping with its role as a fact finding body on behalf of the Board. The Panel's methods of investigation should not create the impression that it is investigating the borrower's performance. However, the Board, acknowledging the important role of the Panel in contacting the requesters and in fact-finding on behalf of the Board, welcomes the Panel's efforts to gather information through consultations with affected people. Given the need to conduct such work in an independent and low-profile manner, the Panel - and Management - should decline media contacts while an investigation is pending or underway. Under those circumstances in which, in the judgment of the Panel or Management, it is necessary to respond to the media, comments should be limited to the process. They will make it clear that the Panel's role is to investigate the Bank and not the borrower.
10. As required by the Resolution, the Panel's report to the Board will focus on whether there is a serious Bank failure to observe its operational policies and procedures with respect to project design, appraisal and/or implementation. The report will include all relevant facts needed to understand fully the context and basis for the panel's findings and conclusions. The Panel will discuss in its written report only those material adverse effects, alleged in the request, that have totally or partially resulted from serious Bank failure of compliance with its policies and procedures. If the request alleges a material adverse effect and the Panel finds that it is not totally or partially caused by Bank failure, the Panel's report will so state without entering into analysis of the material adverse effect itself or its causes.
11. For assessing material adverse effect, the Panel would compare the

situation with that in which the project would not have taken place. The "without-project situation" should thus be used as the base case for comparison, taking into account what baseline information may be available. Non-accomplishments and unfulfilled expectations that do not generate a material deterioration compared to the without project situation will not be considered as a material adverse effect for this purpose.

12.A distinction has to be made between Management's report to the Board (Resolution para.23), which addresses Bank failure and possible Bank remedial efforts and "action plans," agreed between the borrower and the Bank, in consultation with the requesters, that seek to improve project implementation. The latter "action plans" are outside the purview of the Resolution, its 1996 clarification, and these clarifications. In the event of agreement by the Bank and borrower on an action plan for the project, Management will communicate to the Panel the nature and outcomes of consultations with affected parties on the action plan. Such an action plan, if warranted, will normally be considered by the Board in conjunction with the Management's report, submitted under Resolution para.23.

13.The Panel may submit to the Board for its consideration a report on its view of the adequacy of consultations with affected parties in the preparation of the action plans. The Board should not ask the Panel for its view on other aspects of the action plans nor would it ask the Panel to monitor the implementation of the action plans. The Panel's view on consultation with affected parties will be based on the information available to it by all means, but additional country visits will take place only by government invitation.

14. The Board underlines the need for Management to make significant efforts to make the Inspection Panel better known in borrowing countries, as specified in the 1996 "Clarifications." The board emphasizes the importance of prompt disclosure of information to claimants and the public, as stipulated in the Resolution (paras. 23 and 25) and in its 1996 Clarifications. The Board requires that such information be provided by Management to claimants in their language, to the extent possible.
15. Issues of interpretation of the Resolution will be cleared with the Board.
16. The Board recognized that enhancing the effectiveness of the Inspection Panel process through the above clarifications assumes adherence to them by all parties in good faith. It also assumes the borrowers' consent for field visits envisaged in the Resolution. If these assumptions prove to be incorrect, the Board indicated that it would revisit the above conclusions.

" Continuing the role of the Panel in remedial action plans agreed with the borrower to ascertaining the adequacy of consultation with affected parties, though a welcomed addition to the constituent Resolution, has been criticized in some literature as an overreaction." This role is somehow seen by critics as drawing adjudicative and regulatory processes together, but is also considered by them to be unduly limited. A future reform in their view should allow the Panel to have an opportunity to express its opinion on each proposed remedial plan, "ideally after hearing the view of the complainants," and "to be involved in supervision of the plan through a process of continued jurisdiction and review"⁽¹⁵⁵⁾ This

(155) See KINGSBURY, *supra* note 13(), at 335.

matter was in fact discussed at length at the Working Group that proposed the Conclusions with the agreement at the end that it would have added to the functions of the Panel a power that is not only outside the Resolution but requires a vast extension of its competence and may adversely affect the role of Management in conducting its relationships with Bank borrowers.

VII. Issues of Bank Liability and Accountability

The main function of the Panel under the Resolution is to ascertain, upon receipt of an eligible request and authorization from the Board to investigate it, whether the Bank has failed to observe its policies and procedures regarding the design, appraisal and/or implementation of the project to which the request is related, including Situations where the Bank is alleged to have failed in its follow-up on the borrower's obligations under the loan agreement with respect to such policies and procedures. As noted earlier, for a variety of reasons, much confusion had arisen as to what is expected from the Panel at the early stage of ascertaining eligibility what is the scope of its investigation after the Board authorization and What is expected from Management so that it may be found in compliance with the Bank's policies and procedures. If the steps explained above have clarified the Panel's role, which it exercises with full independence from the Bank's Management, the meaning and extent of the Bank's obligations for the actions and omissions to be investigated may need nevertheless further elaboration.

A. Scope of the Bank's Failure

The Bank has over the years adopted many policies and procedures, which are meant to be observed by Bank staff in Bank operations within the limits of flexibility provided in them. Some of these

policies and procedures originated in Board-approved policy papers and some are scattered in different instructions issued by Management to staff under varied titles over the years. In addition, many "guidelines" and "best practices" have been issued by Management to staff which are not meant to be strictly followed in each case but represent what Management considers as good standards which guide the work of the staff but may be adapted to the circumstances of each borrower and each project. The Resolution establishing the Panel makes a clear distinction between the Bank's policies and procedures which are meant to be strictly followed by staff subject only to the exceptions they allow and the non-binding guidelines and practices. According to the Resolution (Paragraph 12), the Panel's mandate is limited to the inspection of alleged Bank failure to follow "the Bank's 'Operational Policies,' 'Bank Procedures,' 'Operational Directives' and similar documents" and does not extend to "'Guidelines,' 'Best Practices' and similar documents or Statements."

Some of the Bank's policies and especially its procedures are addressed only to the Bank staff. Most Bank operational policies, however, describe the manner in which Bank-financed projects are to be prepared and implemented and thus pertain mainly to actions the Bank should seek from its borrowers. Some such actions may be required before negotiation of the legal documents or before their presentation to the Board. Policies related to project implementation are normally reflected in covenants, which appear in the loan agreement, or in a project agreement attached to it. In some cases, detailed action plans are attached to these agreements where the borrowers obligations are provided in detail. Since the borrower, and not the Bank, implements the project, the Bank's failure would occur in such cases when it fails to reflect its operational policies in the actions required from the borrower in the loan documents or when, after having

reflected them as required, it fails to properly supervise project implementation to ensure that the borrower does abide by its contractual obligations. The harm to affected parties resulting from project implementation would in the first instance be attributed to those who implement the project, even though there could be instances where the Bank would have contributed to the harm by not strictly following its policies in the design or appraisal of the project, in the actions it requires from the borrower in the loan documents or in the supervision of their implementation.

In all the above respects, if the Bank's binding policies or procedures relate exclusively to measures to be taken by the Bank staff, a failure would take place if the staff fail to take such measures as envisaged, unless of course there were exceptions allowed under the policies and procedures which were properly followed. If, on the other hand, the policies related to potential measures to be taken by the borrower, as is often the case under Bank operational policies, e.g. the preparation and implementation of environmental assessment reports or resettlement plans, the staff responsibility would clearly be limited to seeing to it that the borrower's obligations were provided for, the plans expected from the borrower were drawn up in the appropriate time and such obligations and plans were then carried out by the borrower as agreed. Clearly, the obligation of the staff with respect to actions to be taken by the borrower is not to guarantee that the intended outcome will materialize in each case, but to make their best effort, with the due diligence required under the Staff Rules, to ensure that the borrower will indeed carry out its obligations. To quote a French legal expression, this is an "*obligation de moyens*" and not an "*obligation de re'sultat*."

In order, therefore, to attribute to the Bank an existing or

potential harm associated with a project, it is not enough to prove that the project is being or will be financed by the Bank. The harm must result, in whole or in part, from the Bank's own failure either in accepting the project design, in appraising the project or in the supervision of its implementation. Without this clear distinction and the causality related to it, the confusion between the Bank's failure and the borrower's failure would continue to prevail.

Liability and Accountability

Many questions have also been raised concerning the Bank's possible legal liability for its failures and the scope of its accountability for such failures. A distinction is called for between the two concepts.

Liability

The question of the Bank's liability in cases where a harm is clearly attributed in whole or in part to the Bank's failure to observe its policies and procedures was raised by some Executive Directors representing borrowing countries who suggested that the Bank should in such cases bear the cost of remedial actions. One has to distinguish, however, between the Bank's liability to its borrowers and its liability to third parties, such as the parties affected by the projects it finances. By virtue of provisions in the General Conditions applicable to Bank loan agreements, the rights and obligations of the Bank, the borrower and the guarantor are enforceable in accordance with their terms notwithstanding any conflicting law in the borrowing country, and disputes between the Bank and the borrower may be resolved by negotiations and, failing this,

through international arbitration⁽¹⁵⁶⁾. (In practice, such disputes have always been resolved amicably by negotiations.) The inspection function does not interfere with this process; it relates exclusively to the inspection of the Bank's failure to observe its policies and procedures that results in harm to affected parties in the territories of the borrower and not to failures by the borrower.

As for the Bank's possible legal liability to affected parties in the territory of the borrower, it has to be noted first that the Inspection Panel is not a court of law that bases its findings on strict judicial procedures and rules of evidence and second that, as a public international organization, the Bank and its staff (in the performance of their duties) have immunity in their operations from legal action before national courts, except when this immunity has been waived⁽¹⁵⁷⁾. Assuming for the sake of discussion that such immunity is not recognized or has been waived, the question of legal liability must then be discussed in light of applicable law in each case. In principle, such liability will be based on fault (intended harmful action or omission, or negligence) under applicable law, unless that law imposes strict or absolute liability (regardless of fault) in certain situations. The mere failure by the Bank to observe its policies would rarely amount to a Fault under applicable law; these policies typically require high standards beyond what foreign financiers otherwise need to observe under national or international law. In any event, the obligations

(156)See Article X, Sec. 10.01 and 10.04 of the General Conditions Applicable to Loan and Guarantee Agreements, dated January 1, 1985.

(157)For details of the immunity in this context (which does not apply to suits initiated by Bank creditors against the Bank). see SHIHATA, Sara note 1, at 243-258.

the Bank would have to meet under such laws, if they were applicable to it, would be different from the obligations of the party which actually implemented the project. They would be limited to the exceptional cases of lender liability where this was recognized and established by legislation, agreement or through a judicial or arbitrate process. This point was clear in the intervention of those Executive Directors who, in the context of the inspection function, spoke of a moral or ethical obligation, rather than a legal one, to assist the borrower in alleviating the harm.

The remedial action plans to be agreed upon with borrowers and any complementary financing such plans may entail would normally represent the action expected from the Bank in such circumstances, in addition, of course, to any internal measures the Bank may take with respect to the staff responsible. To the extent that the Bank's own legal liability is established in a specific case, as a result of its violation of a legal obligation applicable to it, the Bank would of course be expected in such rare circumstances to take appropriate measures as a responsible international organization. This should not, however, be confused with the failure of the Bank to observe any of its policies or procedures, which do not amount to a legal obligation *vis-a-vis* the affected party with whom the Bank has no contractual relationship. The Bank's attempt to protect the interests of such an affected party, even if it proved unsuccessful, should not be taken as a valid basis for holding the Bank legally liable for the harm caused by other parties. The Bank's liability for harm to affected parties must be based on a legal cause of action which such parties can take up against the Bank either on the basis of a contractual relationship with them or a tort under applicable law. It cannot, therefore, arise in the absence of either of these bases even if the Bank did not enjoy the

immunities provided for in its Articles of Agreement.

Accountability

Accountability seems to be a broader concept than legal liability. The Bank as an international organization is accountable to its members. Under the Bank's Articles of Agreement, any dispute between the Bank and a member on the interpretation of the Bank's Articles is to be resolved by the Board of Executive Directors, subject to possible appeal by a member before the Board of Governors (Article IV). Bank staff have immunity from legal process before national courts with respect to acts performed by them in their official capacity, unless of course the Bank waives such immunity (Article VII, Section 8(a)). These staff are nevertheless subject to disciplinary action for any misconduct as well as for negligence in the performance of their duties under the Bank Staff Rules. The Bank's internal system of accountability requires that staff be accountable to the President, the President to the Executive Directors and the Executive Directors to the Board of Governors. Members of the Board of Governors are cabinet ministers in their respective governments, accountable to their head of government and to their Parliament. The latter are or should be accountable to the people of the country.

The creation of the Inspection Panel has complemented the internal system of Bank accountability by giving a direct access to affected parties before the Panel (which is a facility of the Bank) and by requiring Management to present to the Board recommendations for corrective action in case the Panel finds a serious violation of Bank policies and procedures resulting in harm to such affected parties in the situations described above. The Board's decision on the actions to be taken by the Bank demonstrates the Bank's accountability for its actions or omissions,

regardless of the question of liability.

VIII. Conclusion

The World Bank Inspection Panel is an innovative mechanism, which is meant to enhance the Bank's accountability for its role in the projects it finances and, more generally, to strengthen the quality of the Bank's work through an independent inspection function readily accessible to affected parties. The Panel was originally intended to carry out its investigative function as a routine matter whenever the eligibility of the request for inspection was established. In practice, the Panel, Management and the Board of the World Bank have contributed to a somewhat different approach which seemed from a practical viewpoint to attempt to address the harm through new measures to be taken by the borrower, while reducing the possible embarrassment of an actual investigation. In this practice, Management, after receiving the request from the Panel for inspection, tended to agree with the borrower on remedial action plans whenever these were needed. The Panel also seemed to be inclined towards carrying out preliminary assessments which it initially envisaged in its operating Procedure as "preliminary review." This practice also tended to invite remedial action and obviate the need for inspection. A Board majority has often found in such action plans a useful answer which would render the inspection unnecessary but give the Panel the opportunity to participate in the review of the plan's implementation. This orientation of the Panel's practice took place for practical reasons but seems to have been widely misunderstood. When it was recently questioned, the Bank's President made it clear that he supports the role of the Panel and welcomes its inspection of any eligible request. He also pointed out that remedial

action taken by Management "should not stop the inspection." In its second review of the Panel's experience, the Bank's Board discussed whether an approach based on a literal reading of the Resolution establishing the Panel should be strictly Followed or whether the approach which has been followed in many Cases in practice and endorsed by the Board in 1998 should be formally adopted. The result was an agreement on procedures tailored to each Management response, which clearly confined the inspection function to the Bank's alleged failures, as envisaged from the outset.

The creation of the Panel has provided private parties with a direct legal access to an international forum where they can submit their complaints and see them addressed in a process previously known to them, with prompt disclosure of information upon the Board's consideration of each action. This is a progressive step in the development of both the law of international organizations and the international law of human rights. Prior to the establishment of the Panel, review mechanisms of international organizations were limited to the internal activities of these institutions. The Panel is the first mechanism introducing a non judicial process to assist in ensuring compliance with the policies and procedures of a global international organization's operational activities, i.e. its activities with direct effects on other parties. This mechanism has primarily been used by groups of individuals whose rights or interests have been allegedly affected or are likely to be affected by the Bank's operations. Similar mechanisms have since been followed in other international financial institutions, perhaps marking a new trend in international organizations' law. The World Bank, which was a pioneer in introducing participation of affected

parties in the design and implementation of projects, has thus pioneered also in giving them direct access to an independent grievance mechanism. It is in the common interest that this process be seen in this light and not be mistaken as a process to pressure borrowing governments into taking measures not required under loan agreements or to create a judicial or regulatory function for a body not equipped to do either.

