

The World Bank’s Inspection Panel: Promoting True Accountability through Arbitration

Enrique R. Carrasco & Alison K. Guernsey***

Abstract

In September 1993, the World Bank created the Inspection Panel. At the time, it was hailed as an unprecedented effort to increase the Bank’s accountability. Prior to the establishment of the Panel, the Bank had engaged in a number of projects that devastated local populations and caused significant environmental damage. After unrelenting pressure from environmental and human rights non-governmental organizations (“NGOs”), the World Bank established the Inspection Panel with hopes of bringing transparency to the Bank’s project lending. Generally, the Panel is charged with investigating complaints filed by parties in borrower countries who believe that the Bank is violating its policies or procedures in the design, preparation, or implementation of a Bank-funded project. Despite its novelty when it was established in 1993, there are many critiques of the Panel. In general, critics question whether the Panel truly increases the accountability of the World Bank on the whole. Critics often point out that it has a limited substantive mandate and no ability to grant relief. Furthermore, the mechanism fails to give affected people a true voice in the outcome of an investigation. After the Panel receives the claim, the Bank rarely considers the affected communities’ desires for resolution. In essence, the Panel is compliance-oriented, and problem-solving is not a principal focus. This paper proposes an alternative to the current Inspection Panel process that would offer real and meaningful accountability. Our proposal envisions a two-stage process that first would require claimant communities to file a Request for Claim Resolution with a newly created Office of Claims Resolution (“OCR”) at the World Bank. The Director of the OCR would appoint an independent Intermediator who would attempt to solve the problem created by the Bank’s alleged noncompliance with its own policies and procedures. We expect that most claims would be resolved at the administrative level. If, however, the Intermediator failed to resolve the claim or if the Bank agreed to corrective measures but failed to abide by them, claimant communities would have the option to institute arbitration proceedings against the Bank. The proceedings would be conducted based on a modified version of the Optional Rules for Arbitration between International Organizations and Private Parties produced by the

* Professor of Law, The University of Iowa College of Law; J.D., Georgetown University Law Center.

** J.D. Candidate, The University of Iowa College of Law, 2008; B.A., The University of Michigan, 2001.

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Permanent Court of Arbitration. The tribunal’s decision would be public, final, and binding upon the parties. Its award could set forth corrective measures that the Bank would be required to take to bring it into compliance with its policies and procedures. The tribunal could also award damages to the claimant community.

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I. INTRODUCTION

In September 1993, the World Bank created the Inspection Panel. At the time, it was hailed as an unprecedented effort to increase the Bank's accountability. Prior to the establishment of the Panel, the Bank had engaged in a number of projects that devastated local populations and caused significant environmental damage. One highly visible project involved the Sardar Sarovar Dam on the Narmada River in India. In the late 1980s, the Bank advanced India a loan to build a dam that would supply water to thirty million people and irrigate crops to feed another twenty million.¹ The project was deeply flawed, however, requiring an unanticipated relocation of thousands of people and threatening to cause widespread soil erosion.²

Lewis Preston, then President of the World Bank, commissioned an independent review of the project, which became known as the Morse Commission. The Commission's report revealed that the Bank had pervasively failed to follow its own social and environmental policies in project lending.³ Another internal review of the Bank, known as the Wapenhans Report, described a "culture of approval" at the Bank, an attitude that emphasized increasing the Bank's loan portfolio without adequately taking into account the social and environmental consequences

¹ World: South Asia Narmada: A Fiftieth Anniversary of the World Bank and the IMF Prompts Criticisms History of Controversy, http://news.bbc.co.uk/2/hi/south_asia/407326.stm (last visited Oct. 2, 2005).

² Angana Chatterji, Under Siege In The Narmada Valley, <http://www.countercurrents.org/en-angana300503.htm> (last visited Oct. 11, 2005).

³ The Commission recommended the Bank withdraw from the project. Nevertheless, the Bank Management decided to press forward, and Preston personally advocated action to remedy the project's shortcomings. Given the significant public sentiment against the dam project and the frequent human rights violations against protesters and NGO leaders, the Indian Government ultimately withdrew from the loan agreement in 1993. Susan Katz Miller & Sanjay Kumar, *Narmada Dam Fails World Bank's Final Test*, NEW SCIENTIST, Apr. 10, 2003, available at <http://www.newscientist.com/article/mg13818680.400-narmada-dam-fails-world-banks-final-test-.html>.

of the project lending.⁴ After unrelenting pressure from environmental and human rights non-governmental organizations (“NGOs”), the World Bank established the Inspection Panel with hopes of bringing transparency to the Bank’s project lending.

The Inspection Panel is comprised of three members who are appointed by the World Bank, but the Panel is ostensibly independent from the larger institution. Generally, the Panel is charged with investigating complaints filed by parties in borrower countries who believe that the Bank is violating its policies or procedures in the design, preparation, or implementation of a Bank-funded project.⁵ The Panel deals exclusively with claims relating to the International Bank of Reconstruction and Development (“IBRD”), which focuses on providing loans to “middle income and creditworthy poor countries” and the International Development Association (“IDA”), which “focuses on the poorest countries in the world.”⁶ The Panel’s jurisdiction does not extend to the risk-mitigation or private-sector investment arms of the World Bank.⁷

⁴ See *infra* note 14 and accompanying text.

⁵ World Bank, Inspection Panel, About Us, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,menuPK:64129249~pagePK:64132081~piPK:64132052~theSitePK:380794,00.html> (last visited Nov. 26, 2007).

⁶ World Bank, International Bank for Reconstruction and Development, About Us, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20046292~menuPK:51123588~pagePK:50004410~piPK:36602~theSitePK:29708,00.html> (last visited Jan. 20, 2008).

⁷ The Bank’s private-sector investment arm is the International Finance Corporation (“IFC”); the risk mitigation department is the Multilateral Investment Guarantee Agency (“MIGA”). Instead of being subject to the mandate of the Inspection Panel, these institutions are reviewed by the Office of the Compliance Advisor Ombudsman (“CAO”). See Compliance Advisor Ombudsman, <http://www.cao-ombudsman.org/> (last visited Jan. 20, 2008); see also generally COMPLIANCE ADVISOR OMBUDSMAN, OPERATIONAL GUIDELINES (2007) [hereinafter CAO GUIDELINES], available at <http://www.cao-ombudsman.org/htmlenglish/documents/WEBEnglishCAO06.08.07Web.pdf>. The CAO uses mediation and other dispute resolution methods, followed by compliance audits of questioned projects, and ultimately provides advice to the institutions’ senior management about the application and effectiveness of the IFC and MIGA’s policies. *Id.* While it is beyond the scope of this paper, members of civil society have called for the creation of an additional accountability mechanism for MIGA and IFC based, in part, on the existing Inspection Panel. See Ctr. for Int’l Environmental Law and Friends of the Earth–U.S., Draft

In order to bring a claim to the Panel, the Requesters must believe that actual or likely harm will result from the Bank's failure to adhere to its policies and procedures. Requesters must also bring their concerns to the attention of the Bank before filing a claim.⁸ The Panel's functions and procedures are outlined in its Operating Procedures and its founding Resolution.⁹ To date, there have been fifty-two requests for inspections.¹⁰

Despite its novelty when it was established in 1993, there are many critiques of the Panel. In general, critics question whether the Panel truly increases the accountability of the World Bank on the whole. Critics often point out that it has a limited substantive mandate and no ability to grant relief. Furthermore, the mechanism fails to give affected people a true voice in the outcome of an investigation. After the Panel receives the claim, the Bank rarely considers the affected communities' desires for resolution. In essence, the Panel is compliance-oriented, and problem-solving is not a principal focus.

This paper proposes an alternative to the current Inspection Panel process that would offer real and meaningful accountability. Our proposal envisions a two-stage process that first would require claimant communities to file a Request for Claim Resolution with a newly created Office of Claims Resolution ("OCR") at the World Bank. The Director of the OCR would

Proposal for an Independent Review Panel for the International Finance Corporation Multilateral Investment Guarantee Agency (Aug. 15, 1997), <http://www.ciel.org/Ifi/ifcres.html>.

⁸ World Bank, Inspection Panel, Panel Process, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20173251~menuPK:64129467~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html> (last visited Nov. 26, 2007).

⁹ See World Bank, Inspection Panel, Policies and Procedures, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20173262~menuPK:64129254~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html> (last visited Nov. 26, 2007).

¹⁰ See World Bank, Inspection Panel, Requests, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20221606~menuPK:64129250~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html> (last visited Nov. 26, 2007) (providing a list of all of the requests for inspection and the supporting documentation relating to each request).

appoint an independent Intermediator who would attempt to solve the problem created by the Bank's alleged noncompliance with its own policies and procedures. We expect that most claims would be resolved at the administrative level. If, however, the Intermediator failed to resolve the claim or if the Bank agreed to corrective measures but failed to abide by them, claimant communities would have the option to institute arbitration proceedings against the Bank. The proceedings would be conducted based on a modified version of the Optional Rules for Arbitration between International Organizations and Private Parties produced by the Permanent Court of Arbitration. The arbitral tribunal would consist of three arbitrators and could sit in any location that would best facilitate the proceedings. The tribunal's decision would be public, final, and binding upon the parties. Its award could set forth corrective measures that the Bank would be required to take to bring it into compliance with its policies and procedures. The tribunal could also award damages to the claimant community.

Our paper is structured as follows. Part II discusses the background behind the establishment of the Bank's Inspection Panel. Part III explains the Inspection Panel procedure. Part IV sets forth the major criticisms of the Inspection Panel. Part V reviews the various proposals observers have made to reform the Inspection Panel in light of the criticisms. Part VI sets forth our proposal. Part VII concludes the article by providing commentary as to why we believe our proposal improves upon other reform proposals by using an independent arbitration mechanism to bring about effective accountability on the part of the World Bank.

II. DEVELOPMENT OF THE INSPECTION PANEL

Two of the major impetuses for the establishment of an accountability mechanism at the

World Bank were the findings of the Morse Commission and the Wapenhans Report.¹¹ Charged with evaluating the Bank's role in the Sardar Sarovar Dam and Canal project on the Narmada River in India,¹² the Morse Commission was the entity responsible for the first "independent review of a Bank-supported project under implementation."¹³ After its investigation, in June 1992, the Commission published a report illustrating the Bank's major failures—particularly the environmental and human-rights problems resulting from the Bank's refusal to follow its own policies and procedures during the project's execution.¹⁴

The Wapenhans Report, which was the product of a committee of Bank personnel commissioned to review the Bank's operating procedures generally, was issued a few months later in November 1992. The report highlighted the Bank's need to change its "approval culture," whereby the Bank often disregarded the "commitment of borrowers and their implementing agencies" as well as "the degree of 'ownership' assumed by borrowers" over such projects.¹⁵

¹¹ See generally IBRAHIM F. I. SHIHATA, THE WORLD BANK INSPECTION PANEL (1994); Daniel D. Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, 34 VA. J. INT'L L. 553, 557–65 (1994).

¹² SHIHATA, *supra* note 11, at 9–13 (highlighting the Bank's project on the Narmada River as "[t]he single most important case to draw public attention to the accountability issue"). See generally Operations Evaluation Department, *Learning from Narmada*, O.E.D. PRÉCIS, May 1995 [hereinafter *Learning from Narmada*] (discussing the problems that the projects posed for western India),

¹³ See generally *Learning from Narmada*, *supra* note 12, at 1–2 (discussing the problems that the projects posed for western India)

¹⁴ WORLD BANK INSPECTION PANEL, ACCOUNTABILITY AT THE WORLD BANK: THE INSPECTION PANEL 10 YEARS ON 2 (2003) [hereinafter INSPECTION PANEL 10 YEARS ON]. Ultimately, the Commission recommended that the Bank reconsider the project. *Id.* Instead, the Bank continued with the projects under a set of standards that it developed in consultation with Indian authorities. *Learning from Narmada*, *supra* note 12, at 2. In March 2003, the Indian government decided to continue with the project with other sources of funding, and it requested that the Bank cancel the remaining portion of its loan for the project. *Id.*

¹⁵ SHIHATA, *supra* note 11, at 7. The Wapenhans Report stated, in short, that in order to improve the performance of its portfolio, the Bank needed to change its own policies and practices. WORLD BANK, GETTING RESULTS: THE WORLD BANK'S AGENDA FOR IMPROVING DEVELOPMENT EFFECTIVENESS (1993) [hereinafter GETTING RESULTS] (summarizing the findings of the

Given the critical findings of these two studies, the debate within the Bank at that time was not whether the Bank should institute a review mechanism during the implementation stage of Bank projects, but rather what type of entity the Bank should create.

A. VARIOUS PROPOSALS FOR AN ACCOUNTABILITY MECHANISM

Generally, the proposals for a review mechanism fell into two categories: proposals calling for an independent unit within the Bank¹⁶ and proposals calling for a mechanism wholly independent from the Bank.¹⁷ Favoring the in-house review mechanism, in February 1993, four Executive Directors of the Bank submitted a memorandum to Bank President Lewis Preston. As Ibrahim F. I. Shihata, the Bank's Senior Vice President and General Counsel,¹⁸ described the content of the memorandum, the Directors' proposal "envisaged a small permanent unit, [to] which one to three inspectors selected from among experienced *Bank officers* 'of the highest caliber with the necessary independence'" would be appointed.¹⁹

Various NGOs, on the other hand, advocated for an independent, out-of-house investigatory body during a U.S. House of Representatives Hearing in May 1993.²⁰ Furthermore, having decided that a permanent independent body was the only acceptable review mechanism, the U.S. Congress attempted to influence the Bank's decision by tying government funding to

Wapenhans Report, submitted to the Executive Directors as WORLD BANK'S PORTFOLIO MANAGEMENT TASK FORCE, EFFECTIVE IMPLEMENTATION: KEY TO DEVELOPMENT IMPACT R92-125 (1992)).

¹⁶ Bradlow, *supra* note 11, at 567–68.

¹⁷ Bradlow, *supra* note 11, at 565–67.

¹⁸ World Bank, Archives, Ibrahim F. I. Shihata Appointed Vice President and General Counsel, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTARCHIVES/0,,contentMDK:64055845~menuPK:64319213~pagePK:36726~piPK:36092~theSitePK:29506,00.html> (last visited Jan. 11, 2007).

¹⁹ SHIHATA, *supra* note 11, at 22 (emphasis in original).

²⁰ *Id.* at 26–27 (citing numerous environmental groups who gave testimony advocating for an "independent appeals commission" and outlining various proposals).

institutional reforms.²¹ Although the proposal never progressed beyond a committee draft, the fact that the U.S. wanted an inspection panel that was wholly independent was not lost on the Bank.²²

Other outside institutions also presented proposals for accountability mechanisms. For example, in testimony before the Canadian Parliament and the U.S. House of Representatives, Law Professor Daniel Bradlow advocated for the appointment of an ombudsperson to handle complaints about the Bank.²³ He emphasized that in order to be effective, the ombudsperson, “would be independent of the bank staff [and] should not be drawn from the bank staff.”²⁴ Under this proposal, the ombudsperson would be responsible for receiving and investigating complaints

²¹ To emphasize its concern with the Bank’s operations, the U.S. government threatened to withhold the tenth replenishment of the Bank’s International Development Association (“IDA”) funds if the Bank did not establish an inspection panel by the end of 1993. Ian A. Bowles & Cyril F. Kormos, *The American Campaign for Environmental Reforms at the World Bank*, 23 FLETCHER FORUM OF WORLD AFFAIRS 211, 220 (1999). The Chair of the Authorizing Subcommittee in the House of Representatives at the time, Congressman Barney Frank, apparently told the Bank’s Managing Director, Ernest Stern, that Congress did not have time to authorize IDA funding as long as the Bank failed to find time to create an inspection panel. *Id.* More strikingly, U.S. Senator Patrick Leahy, who was the Senate Appropriations Subcommittee Chairman at the time, wrote to Bank President Preston in June 1993 in order to outline Congress’s concerns over the findings of the Wapenhans Report. *Id.* at 219. In that letter, Leahy stated that given the Wapenhans Report and the findings of the Morse Commission, “serious consideration should be given to establishing a permanent, independent commission for investigating public concerns about Bank-financed projects.” *Id.* (citing Letter from Patrick Leahy, Senator, U.S. Congress, to Lewis Preston, President, World Bank (June 7, 1993)).

²² SHIHATA, *supra* note 11, at 27. A substantially modified conditional IDA proposal was incorporated into appropriation legislation after the establishment of the Panel in October 1993. *Id.*

²³ *Id.* at 23–24 (citing *The Case for a World Bank Ombudsman Before the Subcomm. on Int’l Dev., Finance, Trade & Monetary Policy of the H. Comm. on Banking, Finance and Urban Affairs*, 103d Cong. (1993) (statement of Daniel Bradlow) & *The Need for a World Bank Ombudsman Before the Subcomm. on Int’l Financial Inst. of the Canadian H. of Commons Standing Comm. on Finance* (1993) (same)); see also Bradlow, *supra* note 11, at 568–69 (outlining his ombudsman proposal).

²⁴ Daniel Bradlow, *Personal View: Why the World Bank Needs an Ombudsman*, FIN. TIMES, July 14, 1993, at 17. In his article, Bradlow provides more information about the specific duties and functions that should be associated with the ombudsperson position. See *id.*

from the public about the Bank's failure to comply with its own policies and procedures, and in a purely advisory role would make recommendations to the Bank's Executive Directors on which complaints to investigate and how to respond to the findings of an investigation that had already taken place.²⁵ Bradlow engaged in various discussions about his proposal with Bank Management, but it was ultimately abandoned for a panel, rather than a single-person, approach.²⁶

III. INSPECTION PANEL PROCEDURE AND EVOLUTION

Since its inception, the Inspection Panel's role has been to address the concerns of those who are "affected by Bank projects and to ensure that the Bank adheres to its operational policies and procedures in the design, preparation, and implementation of such projects."²⁷ In theory, the Panel does this by providing an independent forum where those harmed by a World Bank-

²⁵ Bradlow, *supra* note 11, at 568–69.

²⁶ SHIHATA, *supra* note 11, at 25.

²⁷ INSPECTION PANEL 10 YEARS ON, *supra* note 14, at 3. *See generally* IBRAHIM F. I. SHIHATA, THE WORLD BANK INSPECTION PANEL: IN PRACTICE 88–93 (2d ed. 2000) (discussing the history of decisions relating to the Panel's composition). The World Bank annually lends between U.S. \$15 to \$20 billion "for projects in the more than 100 countries it works with" World Bank, Projects and Operations, The Project Cycle, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:20120731~menuPK:41390~pagePK:41367~piPK:51533~theSitePK:40941,00.html> (last visited Jan. 20, 2008). The Bank has identified eight phases of the project cycle. First, the Bank "prepares lending and advisory services . . . targeted to country poverty reduction efforts." *Id.* Second, the Bank identifies projects that are geared toward supporting "financially, economically, socially, and environmentally sound" development strategies. *Id.* Third, countries receive "policy and project advice" from the Bank "along with financial assistance." *Id.* Fourth, "[t]he Bank assesses the economic, technical, institutional, financial, environmental, and social aspects of the project." It is at this point that the Bank prepares the "project appraisal document" and drafts the legal documents. *Id.* Fifth, the Bank and the borrower country "agree on loan or credit agreement[s]." The Board must then approval the project. *Id.* Sixth, the borrower country starts implementing the project. It is the Bank's responsibility to ensure that "the loan proceeds are used for the loan purposes." *Id.* Seventh, the Bank's and borrower's performance are evaluated via the "Implementation Completion Report." *Id.* Finally, the "Bank's Independent Operations Evaluation Department prepares an audit report and evaluates the project." *Id.*

financed project can complain.²⁸ Panel member Werner Kiene has stated that the Inspection Panel differs from many accountability and recourse mechanisms. In his view, the Panel represents a shift in development paradigms—it is a mechanism of “development-by-below,” whereby beneficiaries of Bank policies are able to demand responses to problems themselves.²⁹ However, while the Inspection Panel has increased the World Bank’s accountability, critics have pointed to various flaws that limit the Panel’s effectiveness.³⁰

A. THE 1993 RESOLUTION ESTABLISHING THE INSPECTION PANEL

Pursuant to the 1993 Resolution that established the Inspection Panel, the Panel is composed of a group of “three members of different nationalities from Bank member countries.”³¹ The President of the World Bank nominates these members, and they are ultimately appointed by the Bank’s Executive Directors.³² In an effort to help maintain the Panel’s independence from the larger Bank, anyone who has worked as Bank staff in the prior two years is prohibited from serving on the Panel.³³ Moreover, once having served on a Panel, Panel

²⁸ WORLD BANK INSPECTION PANEL, ANNUAL REPORT: JULY 1, 2005 TO JUNE 30, 2006, at 13 (2006) [hereinafter ANNUAL REPORT 2005–06].

²⁹ Werner Kiene, Member, World Bank Inspection Panel, Lecture at the Univ. of Ill. Ctr. for Global Studies: Accountability & Compliance: New Institutions for Helping the Poor Get What They Are Supposed to Get (Mar. 4, 2005), <http://www.cgs.uiuc.edu/resources/webvideo/>; see also Ellen Hey, *The World Bank Inspection Panel: Towards the Recognition of a New Legally Relevant Relationship in International Law*, 2 HOFSTRA L. & POL’Y SYMP. 61, 62 (arguing that the development of the Panel evidences a new notion that the relationship between an individual or a group and an international organization is “directly relevant in law”).

³⁰ See *infra* Part IV.

³¹ Int’l Bank for Reconstruction and Dev. & Int’l Dev. Ass’n., Resolution, *The World Bank Inspection Panel* No. IBRD 93-10 and IDA 93-6, at ¶ 2 (Sept. 22, 1993) [hereinafter Inspection Panel Resolution], available at <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/ResolutionMarch2005.pdf> (establishing the Inspection Panel).

³² *Id.*

³³ *Id.* at ¶ 5. When considering who will serve on the Inspection Panel, the President and the Executive Board consider many characteristics, including the members’ “ability to deal thoroughly and fairly” with the request that individuals bring to them, “their integrity and their independence from the Bank’s Management,” their experience with international development

members are prohibited from working for the Bank.³⁴

The 1993 Resolution also set forth the basic criteria by which the Board expects the Panel to operate.³⁵ Although the method of operation has not changed substantially since the Panel's foundation in 1993, there have been important changes to the manner in which the Board approves Panel requests to investigate. The Bank's Board made these changes through the 1996 and 1999 Clarifications,³⁶ thereby turning the Panel into a more regular, if not yet fully accepted, part of the Bank's structure.

B. STANDING TO BRING REQUEST REVIEW BEFORE THE PANEL

The Panel's operating procedures explicitly limit access to the Panel via standing requirements³⁷ First, the procedures authorize complaints only from a "group" of people, not an individual. The 1996 Clarification defines a group as "any two or more persons who share some

issues, and their understanding of the Bank's general operations. INSPECTION PANEL 10 YEARS ON, *supra* note 14, at 3. While the Panel's chair typically works on a full-time basis and the other two members work part time, the Board can employ all of the members on a full-time basis should the need arise. Inspection Panel Resolution, *supra* note 31, at ¶ 9.

³⁴ WORLD BANK INSPECTION PANEL, ANNUAL REPORT: JULY 1, 2001 TO JUNE 30, 2002, at 5 (2002) [hereinafter ANNUAL REPORT 2001–02].

³⁵ See generally Inspection Panel Resolution, *supra* note 31.

³⁶ WORLD BANK, INSPECTION PANEL, REVIEW OF THE RESOLUTION ESTABLISHING THE INSPECTION PANEL: 1996 CLARIFICATION OF CERTAIN ASPECTS OF THE RESOLUTION (1996) [hereinafter 1996 CLARIFICATION], available at <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/1996ReviewResolution.pdf>; WORLD BANK, INSPECTION PANEL, 1999 CLARIFICATIONS OF THE BOARD'S SECOND REVIEW OF THE INSPECTION PANEL (1999) [hereinafter 1999 CLARIFICATIONS], available at <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/1999ClarificationoftheBoard.pdf>; see also World Bank, Inspection Panel, Operating Procedures, <http://www.inspectionpanel.org> (follow "Policies and Procedures" hyper link, then click on "Panel Operating Procedures") (containing the operating procedures adopted by the Panel on Aug. 19, 1994); INSPECTION PANEL 10 YEARS ON, *supra* note 14, at 12–13, 140–45 (providing context for the 1996 and 1999 Clarifications to the Panel's original mandate and reproducing the text of those clarifications).

³⁷ Inspection Panel Resolution, *supra* note 31, at ¶ 12; World Bank, Inspection Panel, Operating Procedures, *supra* note 36, at II.3.A.4(a)–(d). See generally IBRAHIM F. I. SHIHATA, *supra* note 27, at 55–70.

common interests or concerns.”³⁸ Second, the group must claim that “an action or omission of the Bank to follow its own operational policies and procedures during the design, appraisal and/or implementation of a Bank-financed project”—which includes both project lending and development policy lending³⁹—will have an “actual or threatened material adverse effect on [their] rights or interests.”⁴⁰ In other words, there must be a clear connection between the harm that the affected people are suffering, or about to suffer, and the Bank’s policy.

One example where the Inspection Panel refused to recommend remedial measures for a particular request because of a lack of causation was the Lesotho Highlands Water Project in South Africa. In that case, the claimants complaint to the Inspection Panel stated that black townships were going to suffer a “dramatic increase in water prices for what was Africa’s largest-ever dam project,” and that the “bank’s technical advice to the South African government[] resulted in a distortion of water management policies and placed a disproportionate cost on poor townships.”⁴¹ The Inspection Panel did not recommend an investigation, however,

³⁸ 1996 CLARIFICATION, *supra* note 36.

³⁹ The Inspection Panel has addressed three claims related to development policy lending: (1) Bangladesh Jute Sector Adjustment Credit in 1996, (2) Argentina Special Structural Adjustment Loan in 1999, and (3) Papua-New Guinea Governance Promotion Adjustment Loan in 2001. Inspection Panel, Requests, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20221606~menuPK:64129250~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html> (last visited Jan. 20, 2008).

At the time, development policy lending was referred to as adjustment lending. *See* Press Release, World Bank, Development Policy Lending Replaces Adjustment Lending: The World Bank Overhauls Its Guidelines For Policy-Based Lending to Reflect 20 Years of Experience (Aug. 10, 2004), *available at* <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20237378~menuPK:34457~pagePK:64003015~piPK:64003012~theSitePK:4607,0.html>.

⁴⁰ World Bank, Inspection Panel, Operating Procedures, *supra* note 36, at I.1, II.3.A.4(a).

⁴¹ Kay Treacle, et al. *Lessons Learned, in DEMANDING ACCOUNTABILITY: CIVIL SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL* 267–68 (D. Clark, J. Fox & K. Treacle eds., 2003); Anonymous Letter Requesting Inspection of the Lesotho Highlands Water Project to Inspection Panel, World Bank (Apr. 23, 1998), *available at* <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/lesothorequestforinspection.pdf>.

because “there [did] not appear to be a connection between these conditions and any observance or not by the Bank of its own policies and procedures. Rather, they appear to be a part of the enormous legacy and odious burden of apartheid.”⁴²

Third, even if the requestor is able to satisfy this requirement, before filing such a claim the requestors are required to take steps “to bring the matter to the attention of [Bank] Management with a result unsatisfactory to the Requestor.”⁴³ The Panel has indicated that “[i]t is useful, if possible, for Requesters to attach copies of any correspondence between affected people and the Bank to demonstrate that steps had been previously taken to try to get complaints resolved.”⁴⁴

Parties other than the affected parties are authorized to file claims with the Inspection Panel as well. For example, any one of the Bank’s Executive Directors may request an investigation.⁴⁵ The procedures also authorize local or foreign representatives, such as non-governmental organizations, acting on the explicit instructions of affected people to bring requests to the Panel.⁴⁶ In the case of foreign representation, however, the “Panel will require clear evidence that there is no adequate or appropriate representation in the country where the project is located.”⁴⁷ According to the Panel procedures, the circumstances warranting non-local

⁴² Inspection Panel, Panel Report and Recommendation, Lesotho/South Africa: Lesotho Highlands Water Project (Request 1) (Aug. 18, 1998), *available at* <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/Lesotho1Eligibility.pdf> (cited in Kay Treacle, et al., *supra* note 41).

⁴³ World Bank, Inspection Panel, Operating Procedures, *supra* note 36, at I.1; Dana Clark, *The World Bank and Human Rights: The Need for Greater Accountability*, 15 HARV. HUM. RTS. J. 205, 218 (2002) (“The Panel is intended to be a forum of last resort, and local people must first exhaust other remedies by raising their concerns with the bank prior to filing a claim.”).

⁴⁴ INSPECTION PANEL 10 YEARS ON, *supra* note 14, at 7.

⁴⁵ World Bank, Inspection Panel, Operating Procedures, *supra* note 36, at II.3.A.4(d).

⁴⁶ *Id.* at II.3.A.4(b)–(c)

⁴⁷ *Id.* at II.3.C.11.

representation must be “exceptional”⁴⁸—a requirement that emerged as a compromise between NGOs in developed countries that wanted to be able to represent affected peoples in foreign nations and borrowing-country governments that “feared intervention of foreign parties” in their relationships with their citizens and “the increased politicization and internationalization of their domestic issues.”⁴⁹

Notably, it is the Board that is ultimately charged with determining whether exceptional circumstances exist.⁵⁰ As one scholar has pointed out, vesting ultimate authority with the Board to make this determination undermines the independent nature of the Panel. The Executive Directors can be “politically motivated” in their role as policy makers for the institution and should not be authorized to make an eligibility determination under a system that is purportedly independent from the Bank.⁵¹

In the history of the Inspection Panel, there has only been one instance where the Board has permitted wholly non-local representation: the China Western Poverty Reduction.⁵² When this project was first implemented, people in the affected area feared they would be harmed if

⁴⁸ Inspection Panel Resolution, *supra* note 31, at ¶ 12; *see also* DANA L. CLARK, CENTER FOR INT’L ENVTL. LAW, A CITIZEN’S GUIDE TO THE WORLD BANK INSPECTION PANEL 10 (2d ed. 1999) (stating that exceptional circumstances “could include countries where local NGOs are not allowed to operate or where there is a risk of retaliation”).

⁴⁹ SHIHATA, *supra* note 11, at 58–59.

⁵⁰ World Bank, Inspection Panel, Operating Procedures, *supra* note 36, at VI.39 (“The Board decides whether or not to accept or reject the Panel’s recommendation; and, if the Requester is a non-local representative, whether exceptional circumstances exist and suitable local representation is not available.”).

⁵¹ Stefanie Ricardo Roos, *The World Bank Inspection Panel in its Seventh Year: An Analysis of its Process, Mandate, and Desirability with Special Reference to the China (Tibet) Case*, in 5 MAX PLANCK YEARBOOK OF UNITED NATIONS LAWS 486–87 (J.A. Frowein & R. Wolfrum, eds. 2001), available at http://www.mpil.de/shared/data/pdf/pdfmpunyb/roos_5.pdf.

⁵² For a copy of the request for inspection that the International Campaign for Tibet filed on behalf of the affected persons, see e-Law Environmental Law Alliance Worldwide, China—Request for Inspection (World Bank) by the International Campaign for Tibet (China Western Poverty Reduction Project) (June 18, 1999) [hereinafter ICT Request], available at <http://www.elaw.org/resources/text.asp?id=2439>.

they spoke against it⁵³ and instead sent letters to a Washington, D.C. based non-governmental organization, the International Campaign for Tibet (“ICT”), “seeking international assistance in raising concerns about the devastating impacts of th[e] project on local peoples.”⁵⁴ The Tibetan Government in Exile also sought ICT’s help in filing a claim with the Panel.⁵⁵

In its request for inspection on behalf of the affected persons, the ICT included an annex detailing the basis for its representational authority.⁵⁶ ICT claimed that the “exceptional” threshold had been met because “local people affected by the . . . [p]roject [were] unlikely to access information about the existence of the Inspection Panel, or to have access to NGOs in their country who would be able to provide documentation about the existence of the Panel or the Bank’s policies and procedures.”⁵⁷ Even assuming the presences of NGOs, however, the ICT argued that no one in the country could “safely bring a claim” given Chinese treatment of dissidents.⁵⁸ Ultimately, the Board never commented upon ICT’s eligibility and the Panel’s request for a determination of the issue, but it did authorize an inspection.⁵⁹

⁵³ CLARK, *supra* note 48, at 18.

⁵⁴ Letter from Jim MacNeill Chairman of the Inspection Panel, Notice of Registration, IPN Request RQ99/3 to John Ackerly, President Bhuchung Tsering, Director International Campaign for Tibet (June 18, 1999), *available at* <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/ChinaNOR.pdf> (outlining the International Campaign for Tibet’s claim that “[g]iven the location of this project and the situation faced by local people, this claim [should] meet[] the exceptional circumstances requirement for non-local representation”).

⁵⁵ *Id.*

⁵⁶ ICT Request, *supra* note 52, at Annex B1 (detailing the extensive involvement and presence that ICT had in the affected area and excerpting, as part of its plea for representational authority, letters that the ICT had received from people living in the area)

⁵⁷ *Id.* (citing a U.S. Department of State report’s conclusion that there are “no independent domestic NGO’s that publicly monitor or comment on human rights conditions”).

⁵⁸ *Id.* (“The most dangerous consequence to local peoples is of imprisonment and harsh treatment in imprisonment. Less obvious, but more common risks include interference in a complainant’s or suspected complainant’s ability to maintain housing, livelihood, education and medical services.”).

⁵⁹ *See* Roos, *supra* note 51, at 490 (quoting the Board’s determination that resolution of the eligibility issue would “likely delay investigation” and proposing that the Panel proceed to

The precise requirements for what a Requestor must include in the request to the Panel are outlined in the operating procedures. Generally, the Requester must include a description of the project at issue, “an explanation of how Bank policies, procedures or contractual documents were seriously violated,” the harm that the party suffered, and what steps the Requester has already taken to resolve the issue with the Bank.⁶⁰ If the party is not sure what policies apply, “[o]n the basis of the factual situation and elements of harm presented, the Panel will identify what policies, if any” are implicated.⁶¹ The Panel provides a model form for those who wish to request inspection, although a simple letter with all of the relevant information is also sufficient.⁶²

C. SUBJECT MATTER JURISDICTION

There are limitations on the subject-matter jurisdiction of the Inspection Panel, as its procedures only empower the Panel to review Bank compliance with its (1) operational policies, which “establish the parameters for the conduct of operations [and] also describe the circumstances under which exceptions to policies are permissible and. . . who authorizes exceptions”; (2) bank procedures, which “explain how Bank staff carry out the policies set out in the [operating procedures] by spelling out the procedures and documentation required to ensure Bank wide consistency and quality; and (3) operational directives, which “contain a mixture of

investigation without a resolution of whether ICT met the standard); *see also* INSPECTION PANEL, INVESTIGATION REPORT, QINGHAI PROJECT: A COMPONENT OF THE CHINA: WESTERN POVERTY REDUCTION PROJECT 8–9 (Apr. 28, 2000), *available at* <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/CHINA-InvestigationReport.pdf>

⁶⁰ World Bank, Inspection Panel, Operating Procedures, *supra* note 36, at II.3.B.5(a)–(g).

⁶¹ INSPECTION PANEL 10 YEARS ON, *supra* note 14, at 7.

⁶² World Bank, Inspection Panel, Operating Procedures, *supra* note 36, at II.C; *see also* INSPECTION PANEL 10 YEARS ON, *supra* note 14, at 161–62 (reproducing the Panel’s model form). The Office of the Inspection Panel is also available to consult with people interested in making a request if that person needs advice on preparing or submitting a request. World Bank, Inspection Panel, Operating Procedures, *supra* note 36, at II.E.

policies, procedures, and guidance.”⁶³

The Panel is not authorized to investigate Bank compliance regarding actions of “other parties (such as the borrowing government, the implementing agency, a corporation, the IFC, or the MIGA).”⁶⁴ Also precluded from Panel review are “[c]laims by actual or potential suppliers of products or services” and “[c]omplaints filed after the closing date of the loan” or when less than five percent of the loan outstanding.⁶⁵ If the Panel has already inquired into a matter on a previous request, the claim is also precluded unless the Requester is able to show that there is new evidence or new circumstances surrounding the issue.⁶⁶ One example of when the Panel has rejected a request for investigation based on eligibility was the Request for Inspection regarding the Public Works and Employment Creation Project in Burundi. The Requestors complained about the “lack of due process for procurement of services in a Project-related concession agreement,” but the claim was not eligible for inspection because it related to procurement.⁶⁷

⁶³ Namita Wahi, *Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability*, 12 U.C. DAVIS J. INT’L L. & POL’Y 331, 352 (2006) (citing World Bank, Operational Manual, Definitions, available at <http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/05TOCpages/Definitions>); World Bank, Inspection Panel, Operating Procedures, *supra* note 36, at I.2(a)–(d).

⁶⁴ INSPECTION PANEL 10 YEARS ON, *supra* note 14, at 9, box 1.2; *see also supra* note 7 (describing the IFC and MIGA).

⁶⁵ INSPECTION PANEL 10 YEARS ON, *supra* note 14, at 9. In addition to potentially reducing the number of the projects that would be subject to the Inspection Panel’s jurisdiction, the Bank’s directors advocated for a disbursement limitation as a way to ensure that the Panel would not have the power to review matters “falling within the purview of the Banks Operations Evaluation Department,” which is now known as the Independent Evaluation Group (“IEG”). SHIHATA, *supra* note 11, at 52 n.52. The IEG’s purpose is to assess “what works, and what does not; how a borrower plans to run and maintain a project; and the lasting contribution of the Bank to a country’s overall development.” Independent Evaluation Group, About IEG, <http://www.worldbank.org/oed/about.html> (last visited Jan. 20, 2008).

⁶⁶ INSPECTION PANEL 10 YEARS ON, *supra* note 14, at 9.

⁶⁷ WORLD BANK INSPECTION PANEL, ANNUAL REPORT: JULY 1, 2004 TO JUNE 30, 2005, at 24 (2005) [hereinafter ANNUAL REPORT 2004–05].

D. THE PANEL'S ACTION ON A REQUEST

Once the Panel has received the request, the “process can be divided into three stages: registration, eligibility, and investigation.”⁶⁸ The registration component is where the Panel makes the Bank and the public aware that a requestor has filed a complaint and completes a quick review to ensure that the group has standing and that the Panel has jurisdiction over the claim.⁶⁹ The Panel’s operating procedures do not provide a specific timeline within which this registration review must take place, but they do require that the Panel “promptly register the Request or ask for additional information, or find the Request outside the Panel’s mandate.”⁷⁰ For the most recent requests that the Panel has received, the complaints have been registered within a week.⁷¹ The Panel views this first step as an “administrative” one, and its primary purpose is to prevent “complaints that are obviously outside its mandate, that are anonymous, or that are manifestly frivolous.”⁷²

Generally, whether or not the Panel can register the request is fairly clear. For example, in 1995, the Inspection Panel refused to register a request filed by a number of Chilean citizens and a Chilean NGO. The requestors claimed that the International Finance Corporation (“IFC”),

⁶⁸ INSPECTION PANEL 10 YEARS ON, *supra* note 14, at 8.

⁶⁹ *Id.* at 9; World Bank, Inspection Panel, Operating Procedures, *supra* note 36, at III; *see also supra* note 40 and accompanying text.

⁷⁰ World Bank, Inspection Panel, Operating Procedures, *supra* note 36, at III.A.16.

⁷¹ Inspection Panel Register Requests No. RQ07/06 Country: Ghana, Second Urban Environment Sanitation Project (USP II) (IDA Credit No. 3889-GH), *available at* <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/RegisterGhanaUESPII.pdf> (last visited Sept. 10, 2007) (indicating that the request was filed on August 16, 2007 and registered on August 22, 2007); Inspection Panel Register Request No. RQ07/03 Country: Albania, Power Sector Generation and Restructuring Project (IDA Credit No. 3872 ALB), *available at* <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/RegisterAlbaniaPower.pdf> (last visited Sept. 10, 2007) (showing that the request was filed on April 30, 2007 and the request was registered on May 2, 2007).

⁷² INSPECTION PANEL 10 YEARS ON, *supra* note 14, at 8.

a part of the bank that provides loans to private companies,⁷³ “had violated [the Bank’s] relevant policies regarding indigenous peoples and environmental assessment and failed to supervise properly the implementation of the project.”⁷⁴ The Inspection Panel concluded, however, that its mandate clearly limited its investigatory powers to projects under the IBRD and the IDA. Because it did not have power over IFC projects, it refused to investigate.⁷⁵

Once a claim is registered, the eligibility phase begins, and the Panel forwards the complaint to the Bank’s President. As a representative of the Bank’s Management, the President must respond to the Panel’s inquiry within twenty-one business days,⁷⁶ providing evidence that the Bank “has complied, or intends to comply with the Bank’s relevant policies and procedures.”⁷⁷ When the Panel receives Management’s response, it has another twenty-one business days to evaluate whether Management has truly remedied, or intends to remedy, the problem.⁷⁸

One factor that the Panel may consider when deciding whether to recommend an investigation is whether Management “dealt appropriately with the subject matter of the request

⁷³ IFC: International Finance Corporation, What We Do, <http://www.ifc.org/ifcext/about.nsf/Content/WhatWeDo> (last visited Sept. 15, 2007).

⁷⁴ Center for International Environmental Law, Proposed IFC/MIGA Inspection Panel, <http://www.ciel.org/Ifi/ifc.html> (last visited Sept. 15, 2007).

⁷⁵ *Id.* Out of the forty-nine request for inspection thus far, the Inspection Panel has refused to register five of them. Inspection Panel, Requests, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20221606~menuPK:64129250~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html> (listing all of the requests, including the non-registered ones from Burundi, Cameroon, India, Chile, and Ethiopia) (last visited Feb. 18, 2008).

⁷⁶ World Bank, Inspection Panel, Operating Procedures, *supra* note 36, at IV.27.

⁷⁷ *Id.*

⁷⁸ *Id.*; *see also* World Bank, Inspection Panel, Operating Procedures, *supra* note 36, at IV.29. (noting that the Panel may request further information from Management “to make an informed recommendation” regarding whether to investigate”). In general, the Panel must “decide whether [the request] is based on an alleged failure by the Bank related to its own policies and procedures, and whether any alleged consequent harm complained of appears material enough to warrant investigation.” INSPECTION PANEL 10 YEARS ON, *supra* note 14, at 9.

. . . and demonstrated clearly that it has followed the required policies and procedures.”⁷⁹ If so, then this may weigh in favor of recommending no further action. In instances where the views between the Management and the Requester with regard to the Bank’s compliance with its policies and/or the source of the alleged harm cannot be easily reconciled, however, the Panel may choose to recommend an investigation.⁸⁰ Additionally, it is expected that if Management admits that it failed to follow the Bank’s policies, in its response to the claim it should propose “remedial actions and a timetable for implementing them.”⁸¹

The decision whether to recommend an investigation is not just based on the request and Management’s response, however. The Panel also has the power to conduct a preliminary study, which may entail a visit to the project site.⁸² The idea behind such a visit is to ensure that the Panel makes “an informed recommendation about an investigation to the Board”⁸³; although this preliminary evaluation is not required.⁸⁴ Even if the Panel chooses to conduct an in-country preliminary study, the eligibility evaluation process must occur completely within the twenty-one days following the receipt of the President’s response to the complaint’s initial registration. Only

⁷⁹ World Bank, Inspection Panel, Operating Procedures, *supra* note 36, at V.33(a)–(b).

⁸⁰ *See, e.g.*, INSPECTION PANEL, REPORT AND RECOMMENDATION ON REQUEST FOR INSPECTION, PAKISTAN, NATIONAL DRAINAGE PROGRAM PROJECT 24, *available at* <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/EligibilityReport.pdf> (last visited Nov. 30, 2007) (“[T]he differing views on the issues raised by the Request cannot be easily reconciled and . . . they involve conflicting assertions and interpretations about the issues, the facts, and compliance with Bank policies and procedures. The Panel believes that these important questions . . . as well as the proximate cause of the alleged harm . . . can only be addressed in the context of a Panel investigation.”).

⁸¹ INSPECTION PANEL 10 YEARS ON, *supra* note 14, at 10; *see also* World Bank, Inspection Panel, Operating Procedures, *supra* note 36, at V.33(c).

⁸² *Id.* at III.B.36.

⁸³ INSPECTION PANEL 10 YEARS ON, *supra* note 14, at 10, Box 1.3.

⁸⁴ 1999 CLARIFICATIONS, *supra* note 36, at ¶ 11.

in “circumstances outside the control of the Panel or Management” is the timeline waived.⁸⁵ In addition to a substantive inquiry into the merits of the compliant, during this phase of the process the Panel conducts a more thorough review of the eligibility of the Requestors themselves.⁸⁶

Thus, it is after reviewing the claimant’s request, Management’s response, information from third parties, and any preliminary findings,⁸⁷ as discussed above, the Panel will make a recommendation to the Board indicating “whether the matter should be investigated” more thoroughly.⁸⁸ This is referred to as the Eligibility Report.

Under the Resolution establishing the Panel, only the Board had the power to officially authorize the Panel to proceed with an investigation.⁸⁹ After the 1999 Clarifications, which were developed in response to the criticisms of the Working Group on the Second Review of the Inspection Panel, the Board agreed to authorize investigations on a “no-objection” basis except for in limited circumstances.⁹⁰

⁸⁵ INSPECTION PANEL 10 YEARS ON, *supra* note 14, at 10 (“The time limit has not been applied twice for country internal political reasons.”)

⁸⁶ *Id.* at 9 (“[T]he Panel needs to establish whether the Requesters are who they say they are, live in the project area in the borrower’s territory, and are a community of people sharing some common interests or concerns.”)

⁸⁷ World Bank, Inspection Panel, Operating Procedures, *supra* note 36, at V.A.31(a)–(d).

⁸⁸ *Id.* at V.C.37.

⁸⁹ *Id.* at VI.39.

⁹⁰ 1999 CLARIFICATIONS, *supra* note 36, at ¶ 9 (“If the Panel so recommends, the Board will authorize an investigation without making a judgment on the merits of the claimants’ request, and without discussion except with respect to . . . technical eligibility criteria.”); Treakle, et al., *supra* note 41, at 257 (“In every case since the second review, the board members have approved panel recommendations for investigations.”).

There were significant problems with the manner in which the Board authorized and, frequently, failed to authorize investigations prior to the establishment of the no-objection approval. First, “the Panel’s preliminary assessment reports [upon which the Board based its decision about whether to authorize an investigation] . . . gave rise to lengthy Board discussions on the substance of the complaints, which was inappropriate before the results of an investigation.” INSPECTION PANEL 10 YEARS ON, *supra* note 14, at 13. Furthermore, because of the Board’s tendency to engage in in-depth discussions about whether to authorize an investigation, Management often submitted action plans for Board consideration in its

Following the Board’s approval of the Panel’s investigation request, the Panel ostensibly begins investigating soon thereafter. No specific timeline is included in the operating procedures, however.⁹¹ Panel investigations typically consist of visits to the project site, interviews with the affected people or their representatives, and conversations with government officials and the authorities in charge of the project.⁹² The Panel also interviews Bank staff and Management.⁹³ All of these conversations are supposed to remain confidential, and the 1999 Clarifications “stress the need for the Panel to keep the profile of its in-country activities low and to make it clear that the Panel is investigating the Bank (not the borrower).”⁹⁴ The Panel may also hire outside consultants who are recognized specialists in the subject areas related to the Requestors’ claim.⁹⁵

investigation decision. However, “a fundamental problem with having an Action Plan at this stage was that the plan could not be based on the findings of a full, independent investigation.” *Id.* at 12. Because Management’s proposals were often appealing in the absent of countervailing information that could only be obtained through an investigation, the Board approved these plans and required no further investigatory action by the Panel. *Id.* As a result, the Board failed to recommend investigations in cases where it was likely needed. *Id.* at 12–13 (discussing the context of the 1996 and 1999 Clarifications). The ability to ensure that the Panel has more control over what it investigates helps to secure the independence of that body.

⁹¹ World Bank, Inspection Panel, Operating Procedures, *supra* note 36, at VII.42(a)–(b) (indicating that upon approval the Panel’s Chair shall move “promptly” to start the investigatory procedures).

⁹² World Bank, Inspection Panel, Operating Procedures, *supra* note 36, at VII; *see also* INSPECTION PANEL 10 YEARS ON, *supra* note 14, at 14.

⁹³ INSPECTION PANEL 10 YEARS ON, *supra* note 14, at 14.

⁹⁴ *Id.*; 1999 CLARIFICATIONS, *supra* note 36, at ¶ 12.

⁹⁵ World Bank, Inspection Panel, Operating Procedures, *supra* note 36, at VII.B.45(d). In the case of Inspection Panel Request Number 31: Cartagena Water Supply, Sewerage, and Environmental Management Project, the Inspection Panel hired six “internationally recognized specialist in environmental assessment, hydrology, marine outfalls, indigenous peoples, and economic analysis and financial issues.” ANNUAL REPORT 2005–06, *supra* note 28, at 26. In the case of the Panel’s investigation into the Qinghai Project, which was part of the China Western Poverty Reduction Project, Robert Hunter Wade, Professor of Political Economy, London School of Economics served as a consultant. Robert Hunter Wade, *Tighter IMF Accountability? Some Dangers* n.49, in ACCOUNTABILITY OF THE INTERNATIONAL MONETARY FUND (Barry Carin & Angela Wood eds., 2005).

After ruling on whether the Bank is in compliance with its policies and procedures, the Inspection Panel submits its findings to the Bank’s Management and the Board.⁹⁶ The Panel does not propose remedial measures⁹⁷ and it “does not have the power to issue an injunction, stop a project, or award financial compensation for harm suffered.”⁹⁸ The Bank’s Management reviews the Panel’s findings and must submit a response to the Board within six weeks.⁹⁹ If it chooses to do so, Management is able to make remedial recommendations in this report.¹⁰⁰ The Bank officially refers to these reports as “compliance plans”—although they have also been referred to as “action plans.”¹⁰¹ The plans describe “the measures [the Management] intends to adopt to address the problems of non-compliance of the project expressed in the Panel’s report.”¹⁰²

The Board reviews the Panel’s findings in conjunction with Management’s recommendations. While the Board is empowered “to ask the Panel to check whether Management has made appropriate consultations about [any proposed] remedial measures with

⁹⁶ See World Bank, Inspection Panel, Operating Procedures, *supra* note 36, at VIII (outlining the requirements for the Panel’s report).

⁹⁷ Inspection Panel Resolution, *supra* note 31, at ¶ 22 (“The report of the Panel shall consider all relevant facts, and shall conclude with the Panel’s findings on whether the Bank has complied with all relevant Bank policies and procedures.”); INSPECTION PANEL 10 YEARS ON, *supra* note 27, at 14.

⁹⁸ Treacle et al., *supra* note 41, at 258.

⁹⁹ Inspection Panel Resolution, *supra* note 31, at ¶ 23; World Bank, Inspection Panel, Operating Procedures, *supra* note 36, at IX; SHIHATA, *supra* note 27, at 85–86.

¹⁰⁰ INSPECTION PANEL 10 YEARS ON, *supra* note 14, at 14–15 (“Consistent with normal operating procedures, Bank Management, when it responds to the Panel’s Investigation Report, recommends, when relevant, remedial actions to the Board”).

¹⁰¹ SHIHATA, *supra* note 27, at 189 (drawing a distinction between “remedial ‘Action Plans,’” which are agreements between the Bank and the Borrower, and “Compliance Plans,” which are solely related to the Bank.”). While the term “remedial action plan” thus technically refers to an agreement by both the Bank and the borrower, the academic literature often also refers to compliance plans as “action plans.” Mariarita Circi, *The World Bank Inspection Panel: Is it Really Effective?* 6 GLOBAL ADMINISTRATIVE LAW AND GLOBAL GOVERNANCE 9 (2006), <http://www.bepress.com/cgi/viewcontent.cgi?article=1182&context=gj>.

¹⁰² Circi, *supra* note 101, at 9.

affected people, . . . the Board has not done so to date.”¹⁰³ The Board is then required to contact the initial Requester within two weeks of considering the Panel’s report and Management’s response, informing him or her of the investigation’s results and “the action decided by the Executive Directors, if any.”¹⁰⁴

The length of a Panel investigation varies greatly—from a number of months to over a year—and there is no timeline set forth in the Panel Resolution or its operating procedures. In the case of the Panel’s investigation into a number of dam projects in Uganda, for example, the Panel registered the request on August 7, 2001,¹⁰⁵ requested permission to investigate on October 26, 2001,¹⁰⁶ and finally sent its report to the Board on May 23, 2002.¹⁰⁷ Management responded to the Panel’s investigation on June 7, 2002, and the Board met to consider both reports on June 17, 2002, approving Management’s findings with regard to the Panel’s investigation.¹⁰⁸

IV. CRITICISMS OF THE INSPECTION PANEL

Each year the demand for the Panel’s attention increases, and July 1, 2006 to June 30, 2007 was the Panel’s busiest year to date.¹⁰⁹ During that time, “the Panel registered six new Requests for Inspection.”¹¹⁰ It also “completed two investigations” and worked on “three other

¹⁰³ INSPECTION PANEL 10 YEARS ON, *supra* note 14, at 15.

¹⁰⁴ World Bank, Inspection Panel, Operating Procedures, *supra* note 36, at X.55

¹⁰⁵ Inspection Panel Register, Part I: Requests Registered Request No. RQ 01/3, Country: Uganda Project: Third Power Project (Credit No. 2268-UG) and proposed Bujagali Hydropower project, <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/UgandaRegister.pdf> (last visited Sept. 14, 2007) [hereinafter Uganda Project Request].

¹⁰⁶ ANNUAL REPORT 2001–02, *supra* note 34, at 13.

¹⁰⁷ Uganda Project Request, *supra* note 105.

¹⁰⁸ ANNUAL REPORT 2001–02, *supra* note 34, at 16–17. Ultimately, this project was delayed due to corruption scandals. Treacle, et al., *supra* note 41, tbl. 11.5.

¹⁰⁹ WORLD BANK INSPECTION PANEL, ANNUAL REPORT: JULY 1, 2006 TO JUNE 30, 2007, at 13 (2007) [hereinafter ANNUAL REPORT 2006–07].

¹¹⁰ *Id.*

investigations, once of which is nearly complete.”¹¹¹ The previous fiscal year was also a busy one, as the Panel approved three out of four investigative requests from affected persons,¹¹² investigated five complaints concurrently, and submitted a number of reports to the Bank’s Executive Board determining Bank compliance with its policies and procedures in pending complaints.¹¹³

Despite the increasing use of the Panel’s procedures, there are numerous criticisms of the Panel’s work, and critics often question whether the Panel truly increases the World Bank’s accountability.¹¹⁴ According to these critics, the Panel is not an adequate accountability mechanism because it has a limited mandate,¹¹⁵ a limited ability to grant relief,¹¹⁶ and generally lacks the independence from the Bank necessary to make it a wholly effective institution.

A. PANEL’S INABILITY TO GRANT RELIEF

The inability of the Panel to grant relief is one of the most-cited problems with the Inspection Panel.¹¹⁷ First, the Panel has very limited authority to recommend any type of remedial measure to the Bank—the Panel is not a problem-solving entity, and under its operating-procedures it is expected to opine solely on whether the Bank complied with its own

¹¹¹ *Id.*

¹¹² ANNUAL REPORT 2005–06, *supra* note 28, at 13. The final investigative request was not approved because the Requesters asked the Panel to defer the decision for six months because some of the issues were being addressed. *Id.*

¹¹³ *Id.* at 13–14

¹¹⁴ *See generally* Treacle, et al., *supra* note 41.

¹¹⁵ *Supra* note 63.

¹¹⁶ Wahi, *supra* note 63, at 357–61; Dana Clark, *Understanding the World Bank Inspection Panel*, in DEMANDING ACCOUNTABILITY: CIVIL SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL (Dana Clark, J. Fox & K. Treacle eds., 2003). *See generally* Daniel D. Bradlow, *Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*, 36 GEO. J. INT’L L. 403 (2005) (conducting a comparison of existing independent inspection entities and then proposing an ideal mechanism based on the strengths of those surveyed). *But see* SHIHATA, *supra* note 27, at 204–19 (2000) (attempting to rebut many of these criticisms).

¹¹⁷ *Supra* notes 97–103 and accompanying text.

policies. It also follows, then, that the Panel has no authority to provide compensation to affected communities.¹¹⁸ Furthermore, just as the Panel is generally precluded from proposing and providing remedies,¹¹⁹ so are the affected parties who initiated the investigatory process in the first place.¹²⁰

Since the Panel is unable to provide relief, both the Panel and affected communities often look to Management for aid. It is not the Bank's practice, however, to provide compensation for harms that the Inspection Panel identifies.¹²¹ Consequently, an increased ability for the Panel and

¹¹⁸ *Supra* notes 97–98

¹¹⁹ *Supra* notes 97–103 and accompanying text.

¹²⁰ Treakle, *supra* note 41, at 267 (citing Letter from Madhu Kohli, Grameen Bank, to Ernst Günther Bröder, Inspection Panel, The World Bank (Sept. 24, 1997)).

¹²¹ The Bank does have a limited ability to provide injunctive relief, but its power to halt a project depends on the stage of the project. Board authorization for an inspection of a project that has not yet begun does not automatically mean that the Bank also intends the preparatory work on the project to cease. SHIHATA, *supra* note 27, at 81 (“A decision by the Board authorizing inspection ‘normally would not involve cessation of preparatory work on an operation . . .’” (quoting Memorandum from World Bank Management Report to the Board of Directors (Sept. 10, 1993))). If the Bank does so intend, however, Management has the power “to suspend the Bank’s preparatory work, or the Board may request it to do so pending the outcome of inspection in cases where the prevailing circumstances require such a measure.” *Id.* Furthermore, “[t]he Panel . . . may also indicate whether . . . suspension of preparatory work . . . would be needed for the purpose of its inspection (if, for example, the continuation of such work would have the potential of making the alleged harm irreversible).” *Id.* This tactic appears to be little used, although Dana Clark has indicated that it could have been invoked in the National Thermal Power Corporation (“NTPC”) Power Generation Project in Singrauli, India in order to halt the “forced eviction” of villagers from the project area before the inspection could take place. Dana Clark, *Singrauli: An Unfulfilled Struggle for Justice*, in DEMANDING ACCOUNTABILITY: CIVIL SOCIETY CLAIMS AND THE WORLD BANK 176 & n.46 (D. Clark, J. Fox & K. Treakle eds., 2003).

The Bank also has the power to grant injunctive-type relief by halting or cancelling loan disbursement. *See* Int’l Bank for Reconstruction and Development, General Conditions for Loans, Section 7.02 (July 1, 2005, as amended through Sept. 1, 2007); Int’l Development Association, General Conditions for Credits and Grants, Section 6.02 (July 1, 2005, as amended through Oct. 1, 2006); *see also* Operational Directive Section 13.40(2), Suspension Unrelated to Payment. As a general matter, because the financial demands of complete a project without the Bank’s support are prohibitively high, an order to stop disbursement functions as the equivalent of an order to halt the entire project. *See* NGAIRE WOODS, THE GLOBALIZERS: THE IMF, THE WORLD BANK, AND THEIR BORROWERS 70 (2006) (“The IMF and World Bank enjoy

the Bank to grant relief, both injunctive and compensatory, to parties who are affected by the Bank's failure to follow its own policies and procedures would dramatically increase the effectiveness of the Panel and its responsiveness to claimant communities.

B. BANK'S FAILURE TO FOLLOW THROUGH WITH REMEDIAL PLANS

Not only is the Panel unable to propose relief based on its investigatory findings, but the Board has "explicitly prohibited the panel from having an oversight role in [the] management-generated action plans" that the Bank designs as remedial responses to the problems that the Inspection Panel uncovers.¹²² Unfortunately, at the same time the Bank prevents Panel oversight

considerable bargaining power in their relations with borrowing governments. Countries mostly approach the institutions when they have little access to alternative sources of finance.").

Only one Inspection Panel case appears to support the notion that countries are free to engage in development projects absent Bank funding. *See* Press Release, World Bank, China Announces Withdrawal of Loan Application for Qinghai Component of China Western Poverty Reduction Project (2000), *available at* <http://go.worldbank.org/NKY8VBZQ80>; *see also* Tibet Environmental Watch, China Withdraws from World Bank Project (July 7, 2000), <http://www.tew.org/development/china.wb.reject.html> ("The Chinese authorities have announced that they will now carry out the proposed resettlement and development of the project area in Qinghai without funding from the World Bank" after Bank Management ordered disbursement stopped until the borrowing country complied with a series of conditions). Professor Philip Alston has also pointed out that India, which "by the standards of most developing countries . . . is less in hock to the international community than most," has "rejected unacceptable World Bank loan conditions, and told the Bank in no uncertain terms to keep its money." Philip Alston, *Remarks on Professor B.S. Chimni's A Just World Under the Law: A View From the South*, 22 AM. U. INT'L L. REV. 221, 227 (2007). But as recently as 2006, the Bank suspended disbursements on the road and resettlement components of the Mumbai Urban Transport Project in India, and instead of proceeding on its own, the "State of Maharashtra agreed to a ten condition strategy [imposed by the Bank] for lifting the suspension of disbursements." ANNUAL REPORT 2005–06, *supra* note 28, at 57.

¹²² *Supra* notes 101–102 (defining action and compliance plans); Treakle, *supra* note 41, at 266; 1999 CLARIFICATIONS, *supra* note 36, at ¶ 15–16 (noting that action plans are "outside the purview" of the founding Resolution, and the Board is unable to "ask the Panel to monitor the implementation of the action plans"). *But see* WORLD BANK INSPECTION PANEL, ANNUAL REPORT: JULY 1, 2003 TO JUNE 30, 2004, at 42–48 (2004) [hereinafter ANNUAL REPORT 2003–04]. When parties filed a request for inspection relating to two projects that partially finance the Yacretá Hydroelectric Project, the Board

of these remedial plans, the Board has, itself, failed to entirely fulfill its responsibility to follow-up on the proposed plans.¹²³

For example, in the case of the Yacyretá Hydroelectric Project in Argentina/Paraguay, claimants filed a request for inspection asserting that the Bank had violated its policies relating to the “environment, resettlement, wildlands, information disclosure, indigenous peoples, and project supervision, among others.”¹²⁴ After an extremely contentious investigation, the Inspection Panel found that the Bank had violated numerous policies and procedures.¹²⁵ In developing its action plan in response to the Panel’s criticisms, however, Management did not consult with local communities and failed to publish its action plan in Spanish so that the affected communities could understand the outcome of the investigation.¹²⁶ Six years after the Panel report was first considered by the Board, “bank management had done little to follow up to

requested the Panel to review and assess Management’s action plan and the additional implementation measures on its behalf. After the Board meeting, the Panel returned to the Project area to explain and discuss the Panel’s findings with the Requesters and the people they represent. The Panel noted its continuing role in assessing Management’s actions. Thus, for the first time in its ten-year history, the Panel’s role in the context of a Request for Inspection has continued after the submission of the investigation report to the Board, to help ensure that Management follows through on its action plan and to carry forward a dialogue with the people affected by a Bank-financed project.

Id.

¹²³ Clark, *supra* note 43, at 219–20. Ms. Clark refers to these cases as the “lost cases” and attributes the lack of oversight to the fact that the “Board is overwhelmed with information . . . [and] does not have a standing committee to track the implementation of action plans or to evaluate the effectiveness of remedial measures. *Id.* at 220.

¹²⁴ Kay Treakle & Elías Díaz Pena, *Accountability at the World Bank: What Does it Take? Lessons from the Yacyretá Hydroelectric Project, Argentina/Paraguay*, in DEMANDING ACCOUNTABILITY: CIVIL SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL 74 (D. Clark, J. Fox & K. Treakle eds., 2003).

¹²⁵ *Id.* at 77 (citing Inspection Panel, Review of Problems and Assessment of Action Plans, Argentina/Paraguay: Yacretá Hydroelectric Project 4 (Sept. 16, 1997)). This investigation was conducted prior to the “no-objection” approval requirement, and the Board was divided about whether to allow the investigation in the first place. *Id.* at 69–77.

¹²⁶ *Id.* at 78, 79.

ensure that the action plans were being implemented,” and the Board did not intervene.¹²⁷

Another such example of the Bank’s neglectful attitude toward its action plans is the Cartagena Water Supply, Sewerage, and Environmental Management Project in Colombia.¹²⁸ In that case, the Bank was funding an expansion of Cartagena’s water and sewage system. The project included the construction of a pipeline that “would carry the untreated wastewater from the city and discharge it into the Caribbean Sea,” which was located some two and one half kilometers from coastal fishing villages.¹²⁹ The Panel’s investigation found numerous problems with the design and the implementation of the project,¹³⁰ so Management prepared an action plan to address the Panel’s report on July 29, 2005.¹³¹ The Board addressed both the action plan and the Panel’s findings in November 2005, approving the action plan “with [a] caveat . . . that Management would submit a progress report to the Board on the execution of the Project and Action Plan within six months.”¹³² Management did not submit the progress report until September 4, 2006, almost a full year following the meeting of the Board.¹³³

¹²⁷ *Id.* at 84.

¹²⁸ ANNUAL REPORT 2005–06, *supra* note 28, at 44–49.

¹²⁹ *Id.* at 44.

¹³⁰ *See generally* INSPECTION PANEL, INVESTIGATION REPORT NO. 32034-CO, COLOMBIA: CARTAGENA WATER SUPPLY, SEWERAGE AND ENVIRONMENTAL MANAGEMENT PROJECT (LOAN NO. 4507-CO) (June 24, 2005), *available at* <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/PanelInvestigationReportFinal.pdf>.

¹³¹ MANAGEMENT REPORT AND RECOMMENDATION IN RESPONSE TO THE INSPECTION PANEL INVESTIGATION REPORT” COLOMBIA CARTAGENA WATER SUPPLY, SEWERAGE AND ENVIRONMENTAL MANAGEMENT PROJECT (Loan No. 4507-CO) (July 29, 2005), *available at* <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/ManagementReportandRecommendations.pdf>.

¹³² ANNUAL REPORT 2005–06, *supra* note 28, at 48–49

¹³³ PROGRESS REPORT TO THE BOARD OF EXECUTIVE DIRECTORS ON THE IMPLEMENTATION OF THE MANAGEMENT’S ACTION PLAN IN RESPONSE TO THE INSPECTION PANEL INVESTIGATION REPORT ON THE CARTAGENA WATER SUPPLY, SEWERAGE, AND ENVIRONMENTAL MANAGEMENT PROJECT 2 (2006), *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/12/13/000020953_20061213134653/Rendered/PDF/38182.pdf.

Yet another recent example of Management’s failure to follow up with its remedial action plans is the Mumbai Urban Transport Project in India.¹³⁴ In total, the Panel received four separate requests for inspection stemming from this project in 2004.¹³⁵ The Requestors claimed that forced resettlement in order to construct two road segments, “would destroy their livelihoods, cause them to dismantle their productive sources and disperse their supporting networks and kin groups.”¹³⁶ The Requestors also complained about the quality of the replacement structures in the relocations sites, among other things.¹³⁷ Following its investigation, the Panel found numerous errors in the Banks practices, including flaws in the environment assessment and the determinations relating to the quality of the resettlement site.¹³⁸ The Bank conceded to the majority of the Panel’s findings that it had violated Bank policy and presented an action plan to remedy the project’s faults, which the Board approved.¹³⁹ On March 28, “[i]t was agreed that Management would submit a progress report to the Board in no more than six months”¹⁴⁰ That progress report came almost a year later on March 1, 2007.¹⁴¹ In addition to being late, “a number of issues [in the action plan] still needed to be resolved” and “many of the target dates listed in Management’s Action Plan had not been met.”¹⁴²

¹³⁴ Inspection Panel, India: Mumbai Urban Transport Project (2004), <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20223785~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html> (last visited Jan. 21, 2008).

¹³⁵ ANNUAL REPORT 2005–06, *supra* note 28, at 50–51.

¹³⁶ *Id.* at 51.

¹³⁷ *Id.* at 51–52.

¹³⁸ *See generally* INSPECTION PANEL, INVESTIGATION REPORT NO. 34725, INDIA: MUMBAI URBAN TRANSPORT PROJECT (IBRD LOAN NO. 4665-IN; IDA CREDIT NO. 3662-IN) (Dec. 21, 2005), *available at* <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/IPNMUTPFINAL.pdf>.

¹³⁹ ANNUAL REPORT 2005–06, *supra* note 28, at 56–57.

¹⁴⁰ *Id.* at 57.

¹⁴¹ ANNUAL REPORT 2006–07, *supra* note 109, at 77.

¹⁴² *Id.* (describing the many ways in which the Bank has failed to comply with the terms of the remedial plan).

C. LIMITED PANEL INDEPENDENCE

An additional criticism of the existing system is that the panel is not entirely independent from the Bank as a whole. First, in relation to the Panel's autonomy, critics have claimed that "as an interior body of the Bank itself, its ideas cannot be completely independent of the ideology of that institution."¹⁴³ Because it is an arm of the Bank, it is by definition an institution with a de facto World Bank bias and consequently acts with the interests of the institution in mind and not necessarily those of the affected communities.

In addition to potential problems stemming from the close institutional tie between the Bank and the Panel, some critics have argued that the Bank's ability to interfere with the Panel's work (either at the investigation or the remedy stage), and the lack of the Panel's ability to prevent such interference, also compromises its status as an independent body.¹⁴⁴ Rather than an autonomy-based argument, this type of lack of independence focuses on the Panel's lack of power.¹⁴⁵ Because the Panel has no power to remedy the problems that it uncovers, any

¹⁴³ Jason Morgan-Foster, Note, *The Relationship of IMF Structural Adjustment Programs to Economic, Social, and Cultural Rights: The Argentine Case Revisited*, 24 MICH. J. INT'L L. 577, 641 (2003); see *id.* at 641 n.320 (outlining the Bank's denial that the two institutions are too close to be independent and highlighting some of the safeguards in place to ensure institutional independence, such as the Panel's independent budget and the terms and selection of its members); *id.* at 641 n.319 (framing the Panel's lack of independence as a lack "independence of the ideas of the Panel from the ideology of the Bank").

¹⁴⁴ Eisuke Suzuki & Suresh Nanwani, *Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks*, 27 MICH. J. INT'L L. 177, 207 (2005) (citing to claims by Richard E. Bissell that independence is only partial). Of note, many concerns with the lack of Bank independence were addressed in the two "Clarifications" to the Panel's resolution. For example, with the institution of the no-objection approval for Panel investigations there was less fear that the Bank would fail to authorize an investigation because it feared a finding of non-compliance. See *supra* note 90 and accompanying text. Following the second clarification, the Bank was also no longer authorized to institute action plans with the intention of preempting a Panel investigation. Treacle et al., *supra* note 41, at 254.

¹⁴⁵ Morgan-Foster, *supra* note 143, at 641 n.319 (discussing Sigrun Skogly's belief that the independence of the Panel should be measured with reference to its lack of power to bind the Board of Directors of the Bank (citing SIGRUN SKOGLY, HUMAN RIGHTS OBLIGATIONS OF THE

resolution that the Panel ultimately helps a community achieve must have also been within the desires of the Bank. Consequently, when the Bank responds in an overly defensive or adversarial manner to the Panel's findings,¹⁴⁶ or manipulates information to mislead the Board regarding compliance,¹⁴⁷ it is very clear to the Board that the Bank is not in line with the Panel's work and that any action that the Board orders will not be happily received. It seems unlikely that a vehement disapproval of the Panel's findings by the Bank is not lost on the Board, which is ultimately charged with approving or disapproving a resolution. If the Panel were responsible for remedying the problems that it uncovered, such an adversarial exchange would not be problematic as the Panel would be able to proceed with a remedial plan even without the Bank's approval.

D. OBSTACLES TO ACCESS PANEL'S PROCEDURES

Panel critics also regularly raise concerns over the equity of the access to Panel procedures and the resulting pro-Management bias. Specifically, once the affected parties (or their agents) have requested an inspection, the parties are not given the opportunity to address the Panel's findings, Management's response, or review any of the information about their claim prior to the Board decision on how to proceed.¹⁴⁸ Thus, while Management is able to have its recommendations considered by the Board, the original requestors are pushed aside as the Board

WORLD BANK AND THE INTERNATIONAL MONETARY FUND 184–85 (2001) [hereinafter HUMAN RIGHTS]).

¹⁴⁶ Treakle, et al., *supra* note 41, at 254 (noting that in the past the Bank has had a tendency “to respond defensively—denying that [it] violated any policies, challenging the claimants’ eligibility, and in some cases challenging the panel’s findings”).

¹⁴⁷ Clark, *supra* note 116, at 18 (discussing the Lake Victoria Environmental Management Project in Kenya as one egregious example of when Management disputed the Panel's findings. In that case, the Panel concluded that the Bank had violated its public-consultation requirements, but rather than proposing remedies to address the Panel's findings, Management disputed them and issued “a rebuttal document that gave the impression that consultations had taken place.” In a follow up report, the Panel demonstrated that “management had manipulated information in such a way as to deliberately mislead the board”).

¹⁴⁸ Treakle, et al., *supra* note 41, at 267.

“ignore[es] the experience, knowledge, and preferences of the people who triggered the process in the first place.”¹⁴⁹

Coupled with the Management bias inherent in the Bank’s relief process, there are a number of structural obstacles to filing complaints, and parties may find that the Panel has excluded their claim on procedural grounds. For example, the Panel does not have the power to investigate projects in cases where “the loan financing the project has been substantially disbursed.”¹⁵⁰ As critics point out, however, “many problems with projects [that the Bank finances] do not show up until years after the funds are disbursed”; thus, for these people, “there simply is no official recourse.”¹⁵¹ For example, in the second request associated with India’s NTPC Power Generation Project, the Inspection Panel refused to register the complaint because the “Request was filed after the loan financing the project closed.”¹⁵² Any and all harms emerging thereafter are simply not redressable.

Similarly, the Panel refused to register a 2007 request for inspection associated with Cameroon’s Urban Development Project and Douala Infrastructure Development Project

¹⁴⁹ *Id.*

¹⁵⁰ Inspection Panel Resolution, *supra* note 31, at ¶ 14(c) (defining “substantially disbursed” as when “ninety-five percent of the loan proceeds have been disbursed”). The ninety-five percent disbursement requirement was instituted “largely because the bank loses its leverage to influence government implementation once it no longer controls the finances.” Treacle, et al., *supra* note 41, at 267. Of note, the Asian Development Bank’s Accountability Mechanism no longer includes a ninety-five percent disbursement limit as a cut off. Suzuki & Nanwani, *supra* note 144, at 216–17. The inspection mechanisms under the European Bank for Reconstruction and Development and the Japan Bank for International Cooperation also do not have a disbursement limitation. *Id.* at 217.

¹⁵¹ Treacle, et al., *supra* note 41, at 267 (“While the bank’s policies apply to a project until the loan is repaid, the panel is not an option for those people who learn about the panel and choose to file a claim too late in the project cycle to meet the requirements for eligibility.”).

¹⁵² India NTPC Power Generation Project, Second Request (1999), Summary of Decision Not to Register, <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/India-NTPC.pdf> (last visited Feb. 5, 2008)

because the projects had closed in June 1988.¹⁵³ In that case, the Requestors complained that the Bank had not provided “any information about the Projects [at the time they were approved] and that they did not learn about Work Bank support for the Projects until 2003.”¹⁵⁴ The Requesters claimed that “many of the affected people have suffered from depression and have felt traumatized by the Projects,”¹⁵⁵ and urged the Panel to hear the “concerns of ‘the 500 families in distress and in the streets for the past 20 years because of the mismanagement’” of the project.¹⁵⁶ The Panel invoked the ninety-five percent disbursement policy when it refused to register the complaint, but also “note[d], however, the many significant concerns stated by the Requesters,” which seemingly implies that the Bank should attempt to deal with the problems.¹⁵⁷ Thus, any harms associated with the Banks projects in Cameroon will never be addressed within the Inspection Panel mechanism, and the affected parties must rely on the goodwill of the Bank and the government to provide redress, which is very unlikely.¹⁵⁸ This structural impediment is a major barrier to solving many of the problems that can be directly tied to Bank-funded projects.

¹⁵³ NOTICE OF RECEIPT OF A REQUEST FOR INSPECTION AND DECISION NOT TO REGISTER, CAMEROON—URBAN DEVELOPMENT PROJECT (LOAN NO. 2244-CM) AND SECOND URBAN PROJECT (LOAN NO. 2999-CM) (2007), *available at* <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/SummaryofRequest.pdf>.

¹⁵⁴ *Id.* at 1.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 2 (quoting the request for inspection, which is available in French at <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/RequestWithoutMemos.pdf>).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* (“[T]he Bank consistently requested the competent authorities to address the Nylon zone resettlement issue until the Second Urban project closed. Regrettably no satisfactory solution was implemented by the Government . . . While at this date, the Bank cannot hold any fiduciary responsibility for the Nylon project . . . and cannot, therefore offer any assistance . . . we will continue to raise the resettlement issue with the authorities.” (quoting Letter from Director of Operations for Cameroon, World Bank, to Requesters (Oct. 23, 2006))).

V. POSSIBLE ALTERNATIVES TO THE INSPECTION PANEL

Despite several reoccurring problems with the Inspection Panel,¹⁵⁹ academics and practitioners have proposed few alternatives. Those who have addressed the subject have explored the option of working within the present framework of the Panel to fix its shortcomings. One approach has focused on expanding the Panel’s compliance-oriented mandate by allowing the body to review compliance with policies other than the Bank’s own.¹⁶⁰ Other proposals have focused on the need for better problem-solving by ensuring that the Panel has the ability to monitor any remedial action that is needed based on problems that the Panel uncovered during its investigation.¹⁶¹

Specifically focusing on the Inspection Panel (as opposed to accountability mechanisms generally) there has been no proposal advocating for its replacement. With regard to international financial institutions generally, however, at least one scholar has detailed the need for mechanisms with a more effective combination of problem-solving and compliance review.¹⁶² And scholars have also indicated that arbitration may be the “most appropriate mode of settlement” to ensure an adequate remedy for parties harmed by multilateral development banks.¹⁶³ These various proposals are outlined below.¹⁶⁴

¹⁵⁹ See *supra* Part IV.

¹⁶⁰ Currently, the Inspection Panel’s mandate is limited to evaluating whether the Bank has complied with its own policies and procedures. World Bank, Inspection Panel, Operating Procedures, at I.1, II.3.A.4(a). See generally Roos, *supra* note 51, at 498–502. As Professor James Gathii has noted, “[The Panel] has no mandate . . . to even consider ‘external’ criteria such as Bank program compliance with the International Bill of Human Rights or International Environmental Treaties.” James Gathi, Professor, Rutgers University School of Management, Remarks at Harvard Law School Roundtable, The Cutting Edge (Apr. 24, 1999), <http://www.law.harvard.edu/academics/graduate/cwe/chayes/cutting.html>.

¹⁶¹ See *infra* Part V.A.1.

¹⁶² See *infra* Part V.B.

¹⁶³ Suzuki & Nanwani, *supra* note 144, at 224.

A. PANEL MODIFICATIONS

1. Better Remedial Structure for Problem-Solving

a. *Development Effectiveness Remedy Team (“DERT”)*

One set of proposed modifications to the present Panel focuses on ensuring that the Bank follows through with remedial measures, essentially transforming the Panel from an entity solely concerned with compliance review to one that also focuses on problem solving. Dana Clark has proposed the development of a problem-solving unit within the existing Inspection Panel framework to address the failure of the Panel to ensure that the Bank takes proper remedial measures following an investigation.¹⁶⁵ Clark calls the unit the Development Effectiveness Remedy Team (“DERT”),¹⁶⁶ and the unit would be charged with “remedying the social and environmental policy violations identified by the Inspection Panel and helping to ensure that displaced and aggrieved communities are adequately compensated and assisted to improve their standards of living.”¹⁶⁷

Unlike the Inspection Panel, DERT would be completely independent from the Bank’s Management and would report directly to the Board of Executive Directors.¹⁶⁸ The unit would provide the Board with “oversight and technical assistance to efforts to bring into compliance projects that have been subject to Inspection Panel investigations.”¹⁶⁹ It would also work to

¹⁶⁴ In addition to the modifications outlined below. In a recent article, one practitioner recently proposed opening up the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court on Human and Peoples’ Rights to human rights claims against non-state actors such as the Bank. Wahi, *supra* note 63, at 406–07.

¹⁶⁵ See generally Clark, *supra* note 43, at 223–26. Dana Clark is president of the International Accountability Project and the former director of the International Financial Institutions Program at the Center for International Environmental Law.

¹⁶⁶ *Id.* at 224

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

ensure the execution of Management action plans and oversee the implementation of the plans with the help of the affected community.¹⁷⁰

DERT's findings about the progress of a project under review would be open to the public, community members in an affected area would have the opportunity to participate in the unit's work, and those not involved directly in the unit's decision-making process would have the ability to "present and document their grievances and suggest remedial measures."¹⁷¹ Clark believes that this problem-solving unit would force the Bank to "assume greater responsibility for ensuring compliance with its policy framework, as well as for meeting the needs and respecting the rights of local affected communities."¹⁷²

b. Arbitration to Encourage Problem-Solving

Similar to Ms. Clark, Eisuke Suzuki and Suresh Nanwani, have also discussed the need for accountability mechanisms "to monitor the progress of [the] implementation of the recommendations" that multilateral development bank ("MDB") boards adopt following an inspection process.¹⁷³ In essence, Suzuki and Nanwani see the benefit in expanding the role of accountability mechanisms from compliance-oriented to problem-solving entities as well.

To highlight some of the Inspection Panel's deficiencies in this regard, Suzuki and Nanwani have conducted a comparison between the Panel and the ADB's Accountability Mechanism ("AM"), which was established in 2003.¹⁷⁴ Generally, the AM is comprised of two

¹⁷⁰ Clark, *supra* note 43, at 224.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Suzuki & Nanwani, *supra* note 144, at 222–23. Suzuki and Nanwani are both former employees of the Asian Development Bank.

¹⁷⁴ See generally Asian Development Bank, ADB Accountability Mechanism, http://www.adb.org/Documents/Policies/ADB_Accountability_Mechanism/default.asp?p=policies (last visited Nov. 20, 2007); A HANDBOOK ON THE ASIAN DEVELOPMENT BANK: THE ADB AND ITS OPERATIONS IN ASIA AND THE PACIFIC REGION (Dorothy Guerrero, ed. 2003)

phases: consultation and compliance review.¹⁷⁵ The consultation phase occurs prior to the compliance-review phase in order to address “urgent claims of direct, material harm.”¹⁷⁶ The consultation phase seeks to reach “consensus and agreement on the complaint from all parties concerned, acceptable methods for resolution, and a timeframe for resolving issues in the complaint.”¹⁷⁷ Following consultation, a three-person Compliance Review Panel (“CRP”) performs the compliance review.¹⁷⁸

Significantly different from the Inspection Panel, the CRP not only has the ability to conduct a review of the project at issue, but the body also has the authority to recommend remedial actions to the Board and monitor the “implementation of remedial actions.”¹⁷⁹ Furthermore, affected persons also have a greater participatory role under the Accountability Mechanism, as claimants have a right to be informed of the progress of both the consultation and the compliance review, and they are additionally empowered to comment on drafts of the CRP reports.¹⁸⁰ The ADB also helps to ensure that affected communities are afforded a proper remedy for a Bank violation of its policies by eliminating the ninety-five disbursement requirement¹⁸¹ to

¹⁷⁵ Asian Development Bank, Accountability Mechanism, Listening to Communities Affected by ADB-Assisted Projects and Enhancing Developmental Effectiveness, <http://www.adb.org/Accountability-Mechanism/default.asp> (last visited Nov. 20, 2007).

¹⁷⁶ Suzuki & Nanwani, *supra* note 144, at 221; *see also* Asian Development Bank, Office of the Special Project Facilitator, The Consultation Phase of the ADB’s Accountability Mechanism, <http://www.adb.org/SPF/default.asp> (last visited Nov. 20, 2007).

¹⁷⁷ Asian Development Bank, Office of the Special Project Facilitator, What Is the Consultation Phase? http://www.adb.org/SPF/what_consultation.asp (last visited Nov. 20, 2007).

¹⁷⁸ *See generally* Asian Development Bank, Compliance Review Panel, <http://compliance.adb.org/> (last visited Nov. 20, 2007); *see also* Suzuki & Nanwani, *supra* note 144, at 221–23 (discussing the two phases).

¹⁷⁹ ASIAN DEVELOPMENT BANK ACCOUNTABILITY MECHANISM, OPERATIONAL PROCEDURES FOR COMPLIANCE REVIEW PANEL IV (2004), *available at* <http://compliance.adb.org/> (following link “About the Panel,” then follow link to “Operating Procedures”).

¹⁸⁰ *Id.* at III.A.41–42.

¹⁸¹ *Supra* note 150 and accompanying text.

which the Panel still adheres.¹⁸²

While Suzuki and Nanwani believe the ADB's Accountability Mechanism to be superior to that of the Inspection Panel, they have also highlighted that as with other inspection mechanisms its "competence does not extend to the making of monetary indemnity or compensation for any material harm."¹⁸³ In order to address this lacuna, Suzuki and Nanwani have posited that arbitration is the "most appropriate mode of settlement for MDBs," providing a "creative alternative to allow private parties' claims to be settled."¹⁸⁴

As part of their proposal, Suzuki and Nanwani have pointed out that each MDB has an administrative tribunal.¹⁸⁵ Consequently, they propose moving parties' claims from the "compliance review phase to [a MDB] administrative tribunal[,] . . . [which] could be metamorphosed as a special tribunal established at the request and consent of the parties."¹⁸⁶ They provide no further details, however, on how such a move would work¹⁸⁷ and caution that the use of arbitration must not "jeopardize[e] the organizational effectiveness of MDBs" given the "reconfiguration of authority and control over decisions of international organizations [that]

¹⁸² Suzuki & Nanwani, *supra* note 144, at 216 ("[The] Accountability Mechanism replaces the 95 percents disbursement limit as a cut-off with the date of the issuance of a project completion report (PCR) for the ADB-assisted project. The ADB issues the PCR within 1–2 years after the project is physically completed and in operation.").

¹⁸³ *Id.* at 224. This is not to imply that the AM is without other potential faults, however. Hemantha Withanage the Executive Director of the group NGO Forum on ADB has recently criticized the ADB for failing to respond appropriately to the recommendations of the CRP, as revealed in the annual CRP Monitoring Report. *See* Accountability Mechanism: A Jailbird of Bureaucracy, <http://hwithanage-accountabilitymechanism.blogspot.com/> (last visited Feb. 1, 2008). He has also claimed that the low number of requests filed indicate that the AM complaint system is too "cumbersome" for lay people. *Id.*

¹⁸⁴ *Id.* at 224 ("A corollary of the principle of responsibility is the principle of remedy.").

¹⁸⁵ *See, e.g.,* Asian Development Bank, Administrative Tribunal <http://www.adb.org/ADBT/default.asp> (last visited Nov. 20, 2007) ("ADB Board of Directors established the Administrative Tribunal in 1991 as an external mechanism to review personnel decisions by Management.").

¹⁸⁶ *Id.* at 224.

¹⁸⁷ *Id.* at 222–25.

inevitably occurs” in such situations.¹⁸⁸

c. Tort Remedies and Arbitration

Highlighting the possibility of another resolution to the problems with the Inspection Panel, Koen de Feyter has advocated for the use of tort remedies and international arbitration as a means of ensuring Bank accountability to affected parties.¹⁸⁹ Because only the Bank and the Borrower are parties to a particular project’s loan agreement, de Feyter points out that affected parties do not have the right to sue for failure to implement the agreement—there is no privity.¹⁹⁰ He argues, however, that tort law may provide an alternative place for affected parties to cabin their claims because the affected parties can

argue that they suffered injury as a consequence of a wrongful act or omission committed by the Borrower and the Bank. With respect to the bank, the affected persons may argue negligence. The submission then is that the Bank breached its duty to take care by not contemplating the injurious effect on the affected persons, when deciding not to insist on the implementation of the agreement, or on compliance with operation polices . . .¹⁹¹

To prevent the Bank from blaming the Borrower, de Feyter discusses the potential of joint responsibility, “using a concept of complicity between multiple tortfeasors.”¹⁹²

In conjunction with these tort remedies, de Feyter briefly points out international arbitration “may offer the best opportunities” for the adjudication of disputes between the World Bank and private parties and that the Optional Rules for Arbitration between International Organizations and Private Parties developed by the Permanent Court of Arbitration “offer a suitable framework for settling [such] disputes.”¹⁹³ He provides no further elaboration, however.

¹⁸⁸ *Id.* at 224.

¹⁸⁹ Koen de Feyter, *Self-Regulation, in HUMAN RIGHTS*, *supra* note 145, at 129.

¹⁹⁰ *Id.* at 129.

¹⁹¹ *Id.* at 129–30.

¹⁹² *Id.* at 130 (“Direct complicity requires intentional participation, but not necessarily any intention to do harm, only knowledge of the likely harmful effects of the assistance given.”).

¹⁹³ *Id.* at 135.

B. REFORMING INSPECTION MECHANISMS GENERALLY

Unlike the singular approach of expanding either compliance or problem-solving responsibilities, Professor Daniel Bradlow has developed a proposal for an accountability mechanism that would emphasize both. In the development of his proposal, Professor Bradlow conducted a comprehensive survey of existing accountability mechanisms and discussed the three most feasible structures within the context of international financial institutions.¹⁹⁴

In developing an accountability mechanism, Bradlow notes that inspection mechanisms can be designed to perform three different but not mutually exclusive functions: compliance review, problem-solving, and lessons learned, the third function providing the institution with the ability to improve its performance.¹⁹⁵ Accordingly, he proposes a Compliance Review and Problem-Solving Mechanism (“CRPSM”), an entity that incorporates separate divisions focusing on policy-and-procedure compliance and problem-solving, and that includes the “lessons-learned” function.¹⁹⁶ Bradlow draws from the African Development Bank’s accountability entity, which also has independent compliance and problem-solving divisions, for much of his proposal.¹⁹⁷

¹⁹⁴ Bradlow, *supra* note 116, at 467–83 (presenting the options as (1) an inspection mechanism, which could include either a committee, full-time panel, or ad hoc panel; (2) an ombudsperson; or (3) a combined compliance review and problem-solving mechanism).

¹⁹⁵ *Id.* at 464–65. Bradlow has cautioned that the institution must consider the weight the organization would like to accord to compliance review versus problem-solving and, if incorporating a level of compliance review, whether the institutions’ “operational policies and procedures are sufficiently well developed” to serve as the basis for such review. *Id.* at 468.

¹⁹⁶ *Id.* at 479–83; *see also* 486–91 (providing the Terms of Reference for the proposed CSPRM).

¹⁹⁷ *Id.* at 479; *id.* at 482–83 (discussing the benefits of the CRPSM compared to AFDB’s mechanism); *see also* African Development Bank Group, Independent Review Mechanism (“IRM”), http://www.afdb.org/portal/page?_pageid=473,5848220&_dad=portal&_schema=PORTAL (last visited Nov. 14, 2007) (providing an outline of the mechanism’s the Compliance Review and Mediation Unit (“CRMU”) and the Roster of Experts). *See generally* AFRICAN DEVELOPMENT BANK GROUP, COMPLIANCE REVIEW AND MEDIATION UNIT OF THE INDEPENDENT REVIEW MECHANISM, OPERATING RULES AND PROCEDURES (2006), *available at*

1. Compliance Review and Problem-Solving Mechanism

Under Bradlow’s proposal, the CRPSM would consist of a Director as well as a Roster of Experts.¹⁹⁸ The organization would appoint the Director and he or she would work solely on compliance and problem-solving matters.¹⁹⁹ This would have the effect of ensuring that the mechanism received “all the attention it need[ed]” and that the institution and those outside of the organization recognized its “credibility and prestige.”²⁰⁰ In order to ensure independence from the larger institution, the Director would be limited in his or her ability to work for the institution both prior and subsequent to his or her appointment and could only be dismissed for cause.²⁰¹

As an initial matter, the Director would be responsible for receiving complaints from persons affected by one of the institution’s projects.²⁰² The claimants would have the option of specifying whether they were seeking problem-solving help or compliance review,²⁰³ but the Director would also have the power to make an initial determination regarding the type of review most appropriate for the complainants and so inform the institution of his or her decision and the reason for that decision.²⁰⁴

Assuming that problem-solving were appropriate, the Director would lead the affected parties in a “problem-solving exercise,” ultimately issuing a report to the institution regardless of

http://www.afdb.org/pls/portal/docs/PAGE/ADB_ADMIN_PG/DOCUMENTS/CRMU_DOCS/OPERATING%20RULES%20AND%20PROCEDURES%20EN.PDF.

¹⁹⁸ Bradlow, *supra* note 116, at 479.

¹⁹⁹ *Id.* at 479.

²⁰⁰ *Id.* at 482 (noting that this feature is not included in any review mechanism currently used by international development institutions).

²⁰¹ *Id.* at 479.

²⁰² *Id.* at 480.

²⁰³ Bradlow, *supra* note 116, at 480.

²⁰⁴ *Id.* at 480–81.

whether the problem-solving was success or failure.²⁰⁵ In cases of successful problem-solving, the Director would be responsible for overseeing the implementation of the solution.²⁰⁶ If the exercise failed, however, the Director would be empowered to suggest remedial action.²⁰⁷ The financial institution would ultimately be responsible for determining whether to accept or reject the Director's proposal.²⁰⁸ If the institution decided not to proceed with the suggested remedies, it would be required to provide its reasons to the parties involved, including the claimants.²⁰⁹

When claimants requested compliance review rather than problem-solving, or when the Director made a determination that compliance review would be more appropriate either as an initial matter or following a problem-solving exercise, the Roster of Experts would become involved.²¹⁰ The Roster of Experts would consist of three members appointed by the organization's board.²¹¹ As with the Director, there would be limits on the ability of the experts to work with the institution both prior to and following their term on the roster,²¹² the experts could only be removed from the roster with cause,²¹³ and would not be able to work for the organization in a capacity outside of the CRPSM during their tenure on the roster.²¹⁴ The experts would be expected to spend time familiarizing themselves with the operations of the institution,²¹⁵ which is similar to the requirement imposed by the European Bank for

²⁰⁵ *Id.* at 481; *see also* African Development Bank Group, Mediation (Problem-Solving) Exercise, http://www.afdb.org/portal/page?_pageid=473,5848232&_dad=portal&_schema=PORTAL (last visited Nov. 15, 2007).

²⁰⁶ Bradlow, *supra* note 116, at 481.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Bradlow, *supra* note 116, at 479.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 479–80.

²¹⁵ *Id.* at 480.

Reconstruction and Development.²¹⁶

Once the need for compliance-review emerged, the board of the institution would be charged with appointing a compliance-review panel. It would include two experts from the Roster as well as the Director.²¹⁷ The Director's role on the panel would be limited, however. He or she would engage in discussions regarding the compliance investigation but would only vote on whether the institution was in compliance with its policies or procedures if the panel were deadlocked.²¹⁸ Following an investigation, the compliance-review panel would be required to present a report to the board detailing its "findings of fact and recommendations for corrective action," and the board would vote to accept, reject, or modify the findings.²¹⁹

In addition to the problem-solving exercise and the compliance-review panel, Bradlow's proposal would require an annual report.²²⁰ The Director would be charged with issuing this document, and it would include information about the activities of the CRPSM, including some of the "trends that have emerged in the year's problem-solving exercises" and lessons learned from the various issues with which the entity dealt.²²¹ The report would be made publicly available.²²² Bradlow does recognize the shortcomings of his proposal, however, including the cost.²²³ He also mentions the possibility that claimants may be unmotivated to participate in the problem-solving exercise because they may feel that compliance review would be more

²¹⁶ Bradlow, *supra* note 116, at 480 n.264. *But see id.* at 482–83 (discussing the differences between the EBRD and this proposed mechanism). *See also generally* European Bank for Reconstruction and Development, Independent Recourse Mechanism, <http://www.ebrd.com/about/integrity/irm/about/index.htm> (last visited Nov. 14, 2007).

²¹⁷ Bradlow, *supra* note 116, at 482 (indicating that the board also has the power to appoint the panel's chair from the compliance-review panel members).

²¹⁸ *Id.* at 482.

²¹⁹ *Id.* at 491.

²²⁰ *Id.* at 482.

²²¹ *Id.* at 482.

²²² Bradlow, *supra* note 116, at 482.

²²³ *Id.* at 483.

fruitful.²²⁴

Generally, Bradlow envisions the CRPSM as part of the third-generation of accountability mechanisms—those that provide both problem-solving and compliance-review capabilities independently.²²⁵ Three other such examples include the Asian Development Bank’s Accountability Mechanism,²²⁶ African Development Bank’s Independent Review Mechanism²²⁷ and the European Bank for Reconstruction and Development’s Independent Recourse Mechanism.²²⁸

VI. ARBITRATION AS AN ALTERNATIVE

Not surprisingly, the Bank’s current Inspection Panel— while cutting edge when it was instituted in 1993²²⁹—has become antiquated when compared to those mechanisms that have emerged more recently. It is because the present Inspection Panel fails to meet the needs and the expectations of claimant communities²³⁰ that we propose a new arbitration-based accountability mechanism that builds upon the third-generation mechanisms and incorporates some of the reforms proposed by various observers, as discussed above.

²²⁴ *Id.* at 483.

²²⁵ *Id.* at 484.

²²⁶ *See supra* notes 173–184 and accompanying text.

²²⁷ *See supra* note 197 (discussing some aspects of the AFDB’s mechanism).

²²⁸ *See supra* note 216; *see generally* EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, INDEPENDENT RECOURSE MECHANISM (2003), *available at* <http://www.ebrd.com/about/integrity/irm/about/irm.pdf> (providing background on the establishment of the EBRD’s review mechanism); EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, INDEPENDENT RECOURSE MECHANISM RULES OF PROCEDURE, at iv (2004), *available at* <http://www.ebrd.com/about/integrity/irm/about/procedur.pdf> (outlining the compliance and problem-solving foci of the IRM).

²²⁹ Suzuki & Nanwani, *supra* note 144, at 187–88 (“The establishment of the World Bank Inspection Panel in late 1993 was an extraordinary development. Never before had any entity independent of the governing organs of an international organization existed to hear and investigate complaints filed by private individuals.” (internal citations omitted)).

²³⁰ Bradlow, *supra* note 116, at 484–85 (referring to the Bank’s Inspection Panel as part of the first generation of review mechanisms, which focused exclusively on compliance even when the Requesters saw the entity as a venue for problem solving as well).

A. FUNDAMENTAL PRINCIPLES

Our proposal is based upon several fundamental propositions. First, in today's era it is axiomatic that international organizations that wield considerable power in the domestic affairs of their member states must be held accountable for the way in which that power is exercised.²³¹ In addition to political, administrative, and financial mechanisms, legal accountability is key. Accordingly, an effective remedial mechanism is "essential to any accountability regime for international organizations."²³²

Second, international organizations such as the World Bank are no longer immune to the dictates of human rights law. International organizations are bound by customary international law.²³³ Therefore, the Universal Declaration of Human Rights, which is declaratory of customary international law, is binding upon the Bank.²³⁴ Pursuant to the Universal Declaration:

[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.²³⁵

Moreover, "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."²³⁶ Complementing the rights set

²³¹ Bradlow, *supra* note 116, at 405; see 2004 FINAL REPORT OF THE COMMITTEE ON THE ACCOUNTABILITY OF INTERNATIONAL ORGANIZATIONS TO THE BERLIN CONFERENCE 5 (2004).

²³² KAREL WELLENS, REMEDIES AGAINST INTERNATIONAL ORGANIZATIONS 184 (2002); Dinah Shelton, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 9 (2d ed. 2005) ("Access to justice implies that the procedures are effective, i.e. capable of redressing the harm that was inflicted.")

²³³ C.F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 240–47 (2005); HENRY G. SCHERMERS & NEILS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY 822–25 (3d ed. 1995).

²³⁴ See W. Michael Reisman, *Comment, Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 867 (1990).

²³⁵ Universal Declaration of Human Rights, G.A. Res. 217A, at 71, art. 25, U.N. Doc. A/810 (Dec. 12, 1948.)

²³⁶ *Id.* art. 28.

forth in the Universal Declaration is the “right to development,” which the United Nations General Assembly declared to be “an inalienable human right.”²³⁷ Accordingly, “states have the duty to take steps individually *and collectively* to formulate international development policies with a view to facilitating the full realization of the right to development.”²³⁸ Viewed in a progressive light, the realization of economic and social human rights should be incumbent not only upon states but upon non-state actors, including international organizations such as the Bank.²³⁹ Indeed, Clark has noted that the “Bank considers itself to be in the forefront of efforts to promote economic and social human rights, asserting that ‘[t]hrough its support of primary education, health care and nutrition, sanitation, housing, and the environment, the Bank has helped hundreds of millions of people attain crucial economic and social rights.’”²⁴⁰

The third fundamental proposition relates to compensation. Although member states are “owners” of the Bank projects and are therefore responsible for any harm they cause their local communities in the carrying out of the project, to the extent that the Bank itself causes the harm to local communities because of its failure to follow its own policies and procedures, it should be

²³⁷ Declaration on the Right of Development, G. A. Res. 41/128, annex, 41 GAOR, 97th plen. mtg., Supp. No. 53 at 186, U.N. Doc. A/41/53 (Dec. 4, 1986).

²³⁸ Declaration on the Right of Development, G. A. Res. 41/128, annex, 41 GAOR, 97th plen. mtg., Supp. No. 53 at 186, U.N. Doc. A/41/53 (Dec. 4, 1986) (emphasis added).

²³⁹ See Christine Chinkin, *The United Nations Decade for the Elimination of Poverty: What Role for International Law?*, 54 CURRENT LEGAL PROBS. 553, 559 (2001); see also generally HUMAN RIGHTS, *supra* note 145; Sigrun I. Skogly, *The Human Rights Obligations of the World Bank and the IMF*, in HUMAN RIGHTS, *supra* note 145, at 45.

²⁴⁰ Clark, *supra* note 43, at 211. (quoting World Bank, *Development and Human Rights: The Role of the World Bank* 3 (1998)). Clark further states: “As noted by the former General Counsel of the World Bank, ‘balanced development can only be achieved if the basic human rights are secured for persons adversely affected by development.’” *Id.* at 225 (quoting Ibrahim F.I. Shihata, *Legal Aspects of Involuntary Population Displacement*, in ANTHROPOLOGICAL APPROACHES TO INVOLUNTARY RESETTLEMENT: POLICY, PRACTICE, AND THEORY 27 (Michael M. Cernea & Scott E. Guggenheim eds. 1993)). See also generally HUMAN RIGHTS, *supra* note 145 (arguing that the World Bank and the IMF are bound by international human rights law); see generally Wahi, *supra* note 63 (proposing the adoption of a horizontal application of human rights law to the World Bank and the IMF).

responsible for fully compensating the harmed communities. As stated by the Permanent Court of International Justice in the *Factory at Chorzow* case, “reparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, a payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, [could be for] damages for loss sustained which would not be covered by restitution in kind or payment in place of it.”²⁴¹

That harmed communities would be able to recover damages is not inconsistent with the doctrine of functional necessity, which “holds that international organizations are entitled to such immunities as will enable them to exercise their functions in the fulfillment of their purposes.”²⁴² There is no question that after the advent of the Marshall Plan, the primary purpose of the World Bank has been to promote development. Accordingly, holding the Bank accountable for damages resulting from its failure to follow its own policies and procedures in development projects would promote, rather than detract from, the Bank’s purposes.²⁴³

Fourth, when devising a remedial mechanism with respect to claims by individuals or

²⁴¹ Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory, Advisory Opinion, 2004, I.C.J. PP 152 (July 9). Pursuant to the Articles on Responsibility of States, “The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.” Art. 31, ¶ 1. “Injury includes damages, whether material or moral, caused by the internationally wrongful act of a State.” Art. 31 ¶ 2. See Shelton, *supra* note 218, at 52 (“Notably, the ICJ has indicated that the basic principle of reparation articulated in the *Chorzow Factory* case applies to reparation for injury to individuals....”).

²⁴² Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 VA. J. INT’L L. 53, 56 (1995). See also August Reinisch, INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS 233–38 (2000).

²⁴³ See *id.* 58 (arguing that “human rights norms imposes a limitation on the jurisdictional immunity of international organizations.”); see also de Feyter, *supra* note 189, in HUMAN RIGHTS, *supra* note 145, at 133–34 (“[I]f claimants would be successful in obtaining appropriate compensation, the court would be assisting the Bank in fulfilling its mission as defined by its Articles of Agreement...”).

groups of individuals against an international organization, it is important to keep in mind that there is a marked inequality in positions between the former and the latter. As Wellens has argued, international organizations therefore have “the duty to establish appropriate remedial mechanisms to do justice as between [them] and third parties other than officials.”²⁴⁴ In doing so, the parties should be treated as equals.²⁴⁵ Arbitration would accomplish this goal. Unlike the current IP procedure, arbitration would ensure “that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting its case.”²⁴⁶ Moreover, severing the arbitral body completely from the World Bank ensures that claimant communities will receive an independent, impartial hearing.²⁴⁷

B. ARBITRATION UNDER THE BANK’S GENERAL CONDITIONS FOR LOANS

Arbitration, of course, is not foreign to the World Bank. In addition to arbitration of disputes internal to the Bank,²⁴⁸ the Bank’s General Conditions for Loans²⁴⁹ stipulate that

²⁴⁴ WELLENS, *supra* note 232, at 25–26.

²⁴⁵ *Id.* at 24; *see* PHILLIP CAPPER, INTERNATIONAL ARBITRATION: A HANDBOOK 41 (3d ed. 2004) (commenting upon the French case of *Siemens AG v Dutco* in which the Cour de Cassation “ruled that the method of appointment of the tribunal breached the principle that the parties should be treated equally in the arbitration”).

²⁴⁶ Permanent Court of Arbitration, Optional Rules for Arbitration between International Organizations and Private Parties, Article 15, ¶ 1 [hereinafter Optional Rules].

²⁴⁷ Article 10 of the Universal Declaration of Human Rights states: “Everyone is entitled in full equality to a fair and public hearing by an *independent and impartial tribunal*, in the determination of his rights and obligations.” (emphasis added). Article 14.1 of the International Covenant on Civil and Political Rights states: “All persons shall be equal before the courts and tribunals. In the determination of . . . his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, *independent and impartial tribunal* established by law.” (emphasis added).

²⁴⁸ Under the World Bank Group’s Conflict Resolution System (“CRS”), staff members can resort to arbitration, via the Appeals Committee, to challenge administrative decisions with respect to employment issues or disciplinary action based on misconduct. A panel of three Appeals Committee Panel members is designated to review each appeal. The Panel prepares a Report of its findings and recommendations, which is submitted to the Vice President, Human Resources (“HRSVP”). The HRSVP, or designated Senior Official (in the event the HRSVP is disqualified), reviews the recommendation of the Appeals Committee and makes a decision on

disputes between the Bank and the borrowing member country are to be settled by arbitration.²⁵⁰

The existing Arbitral Tribunal consists of three arbitrators. One arbitrator is appointed by the Bank, the second arbitrator is appointed by the Loan Parties (or, if they do not agree, by the Guarantor).²⁵¹ The third arbitrator, the Umpire, is appointed by agreement of the parties or, if they do not agree,²⁵² by the President of the International Court of Justice or, if the President does not appoint, by the Secretary-General of the United Nations.²⁵³ If a side fails to appoint an arbitrator, the arbitrator will be appointed by the Umpire.²⁵⁴

An arbitration proceeding is instituted upon notice by the party instituting such proceeding to the other party. The notice must contain a statement setting forth (i) the nature of

the Appeal. The Administrative Tribunal, composed of seven judges, is the final stage of the process that is available to staff who are not satisfied with the resolution of their issues through the appeal process. *See* <http://web.worldbank.org/WEBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTCRS/0,,menuPK:64165918~piPK:64166031~theSitePK:465567,00.Html> (last visited Nov. 30, 2007).

²⁴⁹ The General Conditions “set forth certain terms and conditions generally applicable to the Loan Agreement and to any other Legal Agreement. They apply to the extent the Legal Agreement so provides.” International Bank for Reconstruction and Development, General Conditions for Loans, Section 1.01, July 1, 2005 (as amended through September 1, 2007 (for operations whose PCNs are issued from September 1, 2007)) [hereinafter *General Conditions*], available at http://sitesources.worldbank.org/INTTOPGENCON/Resources/IBRD_GC_05_Rev7.pdf. The General Conditions further state: “If any provision of any Legal Agreement is inconsistent with a provision . . . , the provision of the Legal Agreement shall govern.” *Id.* Section 1.02.

²⁵⁰ *Id.* Section 8.04 (a). The controversy may be between parties to the Loan Agreement or the parties to the Guarantee Agreement. *Id.* Arbitration is the exclusive forum of dispute resolution: “The provisions for arbitration set forth in this Section shall be in lieu of any other procedure for the settlement of controversies between the parties to the Loan Agreement and Guarantee Agreement or of any claim by any such party against any other such party arising under such Legal Agreements.” *Id.* Section 8.04 (j).

²⁵¹ *Id.* Section 8.04 (c).

²⁵² The parties have sixty days after the notice instituting the arbitration proceeding to agree upon an Umpire. *Id.* Section 8.04 (e).

²⁵³ If the parties failed to agree in this time period, either party would have the power to request the appointment of the Umpire. *Id.* at Section 8.04 (c), (e).

²⁵⁴ *Id.* Section 8.04 (c). If an appointed arbitrator resigns, dies or becomes unable to act, a successor arbitrator is appointed in the same manner as prescribed for the appointment of the original arbitrator and will have all the powers and duties of the original arbitrator. *Id.*

the controversy over claim, (ii) the nature of the relief sought, and (iii) the name of the arbitrator appointed by the instituting party.²⁵⁵ Within thirty days of such notice, the other party must notify the instituting party the name of the arbitrator it has appointed.²⁵⁶

The Arbitral Tribunal convenes at such time and place as determined by the Umpire.²⁵⁷ Thereafter, the Tribunal determines where and when it shall sit.²⁵⁸ The Tribunal decides “all questions relating to its competence.”²⁵⁹ It also determines its procedure, “except as the parties shall otherwise agree.”²⁶⁰ All decisions of the Arbitral Tribunal are made by majority vote.²⁶¹ Although the provisions do not state expressly state what law the Tribunal is to apply, Broches has argued that, in light of Section 10.01 of the General Conditions (now Section 8.01),²⁶² the Bank’s agreement with a member state is governed by public international law and therefore the Tribunal is bound to apply such law.²⁶³

The Arbitral Tribunal must give all parties a fair hearing and must render its award in writing, signed by a majority of the Tribunal.²⁶⁴ The award may be rendered by default.²⁶⁵ It is

²⁵⁵ *General Conditions, supra* note 249, Section 8.04(d).

²⁵⁶ *Id.*

²⁵⁷ *Id.* Section 8.04(f).

²⁵⁸ *Id.*

²⁵⁹ *Id.* Section 8.04(g).

²⁶⁰ *General Conditions, supra* note *supra* note 249, Section 8.04(g)

²⁶¹ *Id.*

²⁶² Section 8.01 of the General Conditions states: “The rights and obligations of the Bank and the Loan Parties under the Legal Agreements shall be valid and enforceable in accordance with their terms notwithstanding the law of any state or political subdivision thereof to the contrary.” *Id.* Section 8.01.

²⁶³ *Letter from Aron Broches to Editors-in-Chief, Correspondence*, 91 AM. J. INT’L L. 489 (1997). However, Broches argues that an agreement between the Bank and a nonstate “is certainly not an international agreement governed by international law.” Aron Broches, *International Legal Aspects of the Operations of the World Bank*, 98 RECUEIL DES COURS 297, 351 (1959 III).

²⁶⁴ *General Conditions, supra* note 249, Section 8.04 (h).

²⁶⁵ *Id.*

final and binding upon the parties to the Loan Agreement (and the Guarantee Agreement).²⁶⁶ If the parties have not complied with the award within thirty days after counterparts of the award have been delivered to the parties, a party may “(i) enter judgment upon, or institute a proceeding to enforce, the award in any court of competent jurisdiction against any other party; (ii) enforce such judgment by execution; or (iii) pursue any other appropriate remedy against such other party for the enforcement of the award and the provisions of the Loan Agreement or Guarantee Agreement.”²⁶⁷

The parties are responsible for fixing the amount of remuneration of the arbitrators and others required for the conduct of the arbitration proceedings.²⁶⁸ If the parties do not agree upon remuneration before the Arbitral Tribunal convenes, the Tribunal will fix an amount that is reasonable under the circumstances.²⁶⁹ The parties will defray their own expenses in the arbitration proceedings.²⁷⁰ The costs of the Arbitral Tribunal “shall be divided between and borne equally by the Bank on the one side and the Loan Parties on the other.”²⁷¹

While the Bank has provided for an arbitration framework to resolve disputes between and its member states, the provisions have never been invoked.²⁷² As Shihata has written, because there are on-going relations between the Bank and its member states, there is an

²⁶⁶ *Id.*

²⁶⁷ *Id.* Section 8.04 (k). The paragraph states further: “Notwithstanding the foregoing, this, section shall not authorize any entry of judgment or enforcement of the award against the Member Country except as such procedure may be available otherwise than by reason of the provisions of this Section.” *Id.*

²⁶⁸ *Id.* Section 8.04 (i).

²⁶⁹ *General Conditions, supra* note 249, Section 8.04 (i).

²⁷⁰ *Id.*

²⁷¹ *Id.* “Any question concerning the division of the costs of the Arbitral Tribunal or the procedure for payment of such costs shall be determined by the Arbitral Tribunal.” *Id.*

²⁷² Ibrahim F. I. Shihata, *Avoidance and Settlement of Disputes—The World Bank’s Approach an Experience*, 1 INT’L L. FORUM DU DROIT INTERNATIONAL 90, 93 (1999).

incentive to resolve disputes through negotiation.²⁷³ Moreover, negotiated resolutions are facilitated because “the Bank’s agreements with its borrowers provides [sic] the law governing their relationship which prevails over any conflicting text in the borrower’s domestic law or the Bank’s Articles.”²⁷⁴

C. ADMINISTRATIVE REMEDY AT THE WORLD BANK

1. Office of Claims Resolution

In keeping with well-known principles relating exhaustion of administrative remedies and as reflected in the current IP procedures,²⁷⁵ under our proposal claimant communities would not be able to resort to the type of arbitration set forth in the General Conditions for Loans without first attempting to resolve the dispute directly with the Bank. The Bank would establish an Office of Claims Resolution (“OCR”), comprised of a Board-appointed Director and support staff. Through the use of a Roster of Claims Resolution Intermediators, the OCR would combine a problem-solving approach with compliance review. In other words, we see no need to have a bifurcated mechanism similar to the ADB’s Accountability Mechanism or Professor Bradlow’s proposed CRPSM.²⁷⁶

The administrative procedure would begin with the filing of a Request for Claim Resolution either within twelve months after the completion of the project or the final

²⁷³ *Id.* at 92.

²⁷⁴ *Id.* Shihata notes:

All disputes, including the most difficult ones, such as the partition of the outstanding debt of former Yugoslavia among its successor states, and the insistence of Romania, before its transition, on the prepayment of its outstanding Bank loans without paying a required penalty, were resolved through negotiation over a short period of time.

Id. at 93.

²⁷⁵ See *supra* notes 43–44 and accompanying text (requestor of Panel must show steps it has taken to resolve the issue with the Bank).

²⁷⁶ See *supra* Part V and accompanying text (outlining these two mechanisms).

disbursement of the loan.²⁷⁷ However, filing outside of this period would be allowed in exceptional purposes where the claimants could show manifestly compelling reasons for failing to file on a timely basis. The Request would set forth: (i) the claimant community's identity as a group of two or more persons who share a common interest or concern; (ii) an explanation of how the Bank is not in compliance with its own policies and procedures; (iii) the material harm that the claimant community has suffered or is likely to suffer as a result of the alleged non-compliance; and (iv) a proposed remedy.

The Bank's Board would appoint a Director of the OCR, whose main function would be to receive Requests, ensure they set forth the required information, coordinate the appointment of an Intermediator, and produce the OCR's annual report. The Director, who would work independently of the Bank's Management, could serve for an indefinite term. The OCR would maintain a diverse twelve-person Roster of Intermediators. The Board would appoint the Intermediators after consultation with the NGO community. To ensure their independence, the Intermediators would be barred from working for the Bank for two years prior to their appointment. The Intermediators would be chosen on the basis of their knowledge of the Bank's operations and their expertise in development issues. Moreover, the Roster would be globally diverse—i.e., it would not be dominated by persons from West or North.

In addition to an initial training session on the policies and procedures of the Bank—including past case studies of issues where the Inspection Panel encountered the largest number of problems—the Intermediators would periodically be required to spend some time at the Bank to ensure they are apprised of any developments relating to the Bank's operations and operating

²⁷⁷ Our proposal is based on the filing period set forth under the European Bank for Reconstruction and Development's Independent Recourse Mechanism. *See* EBRD, Independent Recourse Mechanism: As Approved By Board Of Directors On 29 April 2003, Annex 1 ¶ 12, available at <http://www.ebrd.org/about/policies/irm/main.htm>.

policy and procedures. After serving a three-year term, or resigning from the Roster, or being removed therefrom for cause by the Bank's Board, the Intermediators would not be eligible to work for the Bank for two years.

Upon the submission of the Request for Claim Resolution, the Director would have five business days to determine whether the claim on its face is clearly ineligible.²⁷⁸ If it is not, the Director would have thirty business days to assist the claimant community and the Bank in selecting an Intermediator from the Roster. If the claimant community and the Bank were not able to agree on an Intermediator, the Director would make the choice. The Bank or the claimant community could challenge the Director's choice on the grounds that the chosen Intermediator would be inappropriate, in which case the Director would make another, final appointment. In urgent cases, the Director could shorten the appointment period to ten days.

Once appointed, the Intermediator would have up to thirty business days to ensure that the claimant community had standing and that the jurisdictional requirement was met. If the Intermediator rejected the Request on either ground, the claimant community would have the right to have another Intermediator—mutually agreed upon or appointed by the Director—review the Request (within a thirty-day period) with respect to these threshold issues. If the second Intermediator rejected the Request, the claimant community's Request would be dismissed with prejudice—i.e., they would be unable to resort to arbitration. The claimant community, however, could resubmit a Request if they could show there was new evidence or new circumstances surrounding the problem or issue in question.

²⁷⁸ Under the European Bank for Reconstruction and Development's Independent Recourse Mechanism, the Chief Compliance Officer must determine whether the complaint is "manifestly ineligible" within five business days of the receipt of the complaint. EBRD, INDEPENDENT RECOURSE MECHANISM RULE OF PROCEDURE: AS APPROVED BY THE BOARD OF DIRECTORS ON 6 APRIL 2004, ¶ 16.

If the Intermediator concluded that both the standing and jurisdictional requirements were met, he/she would first conduct an investigation to determine whether the Bank was in compliance with its own policies and procedures. If the Intermediator determined that the Bank was in compliance with its own policies and procedures, he/she would so inform the claimant community and provide a detailed description of the reasons for his/her decision to both the community and the Bank, which would remain on file in the OCR and be readily accessible by the public. If the claimant community disagreed with the Intermediator's conclusion, and still believed that the Bank was not in compliance with its policies and procedures, it would then have to decide whether to pursue arbitration.

If, however, the Intermediator determined that the Bank was not in compliance with its own policies and procedures, he/she would have the authority to take all appropriate actions to help the parties problem-solve the matter. The exercise would require the Bank Management, in consultation with the Bank's Board, to (i) respond directly to the allegations set forth in the claimant community's initial complaint, which were confirmed by the Intermediator; (ii) directly address the remedy that the claimant community proposed in the initial complaint and, if not adopted, present reasons for the failure to adopt the claimant-community's proposed remedy; (iii) propose a plan of action, which might include financial compensation, to bring it back into compliance with its policies and procedures; and (iv) in the event the project was completed, consider the amount of compensation that would put the claimant community in the position it would have been in before commencement of the project.²⁷⁹

²⁷⁹ As note, under the current IP procedure, the claimant community must claim that "an action or omission of the Bank to follow its own operational policies and procedures during the design, appraisal and/or implementation of a Bank-financed project" will have an "actual or threatened material adverse effect on [their] rights or interests." *See supra* notes and accompanying text. In the 1999 clarifications, the Board stated: "For assessing material adverse effect, the without-

The claimant community would have an opportunity to comment upon the adequacy of the plan of action or proposed compensation. If, through the efforts of the Intermediator, the parties agreed on a plan of action or compensation, the Intermediator would produce a public report for the Director setting forth the plan of action, which would include firm timetables, or the agreed compensation. Because the Board would have already consulted with the Bank's Management regarding the plan of action or compensation, no further Board approval would be required. If the Bank failed to abide by the plan of action, including the specific timetables therein, the claimant community could institute arbitration proceedings to compel the Bank to abide by its plan of action and otherwise to collect damages resulting from the Bank's failure to do so.

If the parties could not come to a mutually agreeable resolution of the problem either by way of a plan of action or compensation, the Claim Resolution exercise would come to an end. The Intermediator would prepare a public report for the Director setting forth the reasons for the unsuccessful resolution of the claim. At that point, the claimant community could pursue arbitration.

D. ARBITRATION

Although we could graft the arbitration provisions of the Bank's General Conditions for Loans described above onto our proposal, we prefer instead to rely upon the Optional Rules for Arbitration between International Organizations and Private Parties (Optional Rules for Private

project situation should 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.” 1999 CLARIFICATIONS, *supra* note 36, at ¶ 14.

Parties) produced by the Permanent Court of Arbitration (“PCA”), as modified below.²⁸⁰ The rules, which closely follow the UNCITRAL rules of arbitration,²⁸¹ are a product of a Steering Committee appointed by the PCA’s Secretary-General in 1994, which noted the need to include international organizations as parties in the PCA’s dispute-settlement proceedings.²⁸² In addition to producing optional rules for arbitration between international organizations and states, the Steering Committee also drew up rules that would govern disputes between private parties and international organizations.

The Optional Rules for Private Parties, which entered into effect on July 1, 1996,²⁸³ set forth a comprehensive set of arbitration rules ranging from provisions on notice of arbitration,²⁸⁴ to the composition of the arbitral tribunal,²⁸⁵ to the arbitral proceedings themselves,²⁸⁶ and to the

²⁸⁰ The Permanent Court of Arbitration was established by the Convention for the Pacific Settlement of International Disputes at the first Hague Peace Conference of 1899. The 1899 Convention was revised at the second Hague Peace Conference in 1907. In the mid-1930s, the PCA agreed to administer a “mixed” arbitration in which one of the parties was a foreign corporation rather than a State. Tjaco T. Van Den Hout, *The Permanent Court of Arbitration: Responding to a Century of Globalization*, 2 INT’L LAW FORUM DU DROIT INTERNATIONAL 235 (2000). In 1962, the PCA created the “Rules of Arbitration and Conciliation for settlement of international disputes between two parties of which only one is a state.” *Id.* at 236. In 1976, the PCA became directly tied into the field of international commercial arbitration when the UNCITRAL arbitration rules designated the Secretary-General of the PCA as the “appointing authority.” *Id.* This led the PCA in the 1990s to adopt a number of optional arbitration rules based on the UNCITRAL Rules. *Id.*

²⁸¹ UNCITRAL Arbitration Rules, adopted April 28, 1976. *Report of the United Nations Commission on International Trade Law on the Work of its Ninth Session*, 31 U.N. GAOR Supp. (No.17) at paras. 56-57, U.N. Doc. A/31/17 (1976), reprinted in 15 I.L.M. 701 (1976).

²⁸² WELLENS, *supra* note 232, at 221.

²⁸³ *Id.* Although no arbitrations have been conducted under the Optional Rules for Private Parties, the rules were used as a starting point for drafting rules of procedure for an arbitration proceeding instituted to settle a dispute between the Bank for International Settlements and three of its private shareholders. See Scott Armstrong Spence, *Organizing an Arbitration Involving and International Organization and Multiple Private Parties*, 21 J. INT’L ARBITRATION 309 (2004).

²⁸⁴ Optional Rules, *supra* note 246, Article 3.

²⁸⁵ *Id.* Articles 5-14.

²⁸⁶ *Id.* Articles 15-30.

award.²⁸⁷ A number of provisions are worth noting. First, the rules are “subject to such modification as the parties may agree in writing.”²⁸⁸ Second, agreement to the rules “constitutes a waiver of any rights of immunity from jurisdiction, in respect of the dispute in question, to which such party might otherwise be entitled.”²⁸⁹ Moreover, “waiver of immunity relating to the execution of an arbitral award must be explicitly addressed.”²⁹⁰ Thus, under our proposal, as already stipulated in the General Conditions for Loans, the Bank would agree to a waiver of immunity²⁹¹ —i.e., a party may “(i) enter judgment upon, or institute a proceeding to enforce, the award in any court of competent jurisdiction against any other party; (ii) enforce such judgment by execution; or (iii) pursue any other appropriate remedy against such other

²⁸⁷ *Id.* Articles 31-41.

²⁸⁸ *Id.* Article 1 ¶ 1.

²⁸⁹ Optional Rules, *supra* note 246, Article 1 ¶ 2.

²⁹⁰ *Id.*

²⁹¹ An explicit waiver would be required despite the wording of Article VII, Section 3 of the Bank’s charter. It states:

Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of a final judgment against the Bank.

IBRD, Articles of Agreement, Dec. 27, 1945, art. VII, sec. 3, 2 U.N.T.S. 134. This “facially broad waiver” has been construed narrowly: “[I]t is evident that the World Bank’s members could only have intended to waive the Bank’s immunity from suits by its debtors, creditors, bondholders, and those other potential plaintiffs to whom the Bank would have had to subject itself to suit in order to achieve its chartered objectives.” *Mendaro v. World Bank*, 717 F.2d 610, 615 (C.A.D.C. 1983) (holding Bank immune from employee’s Title VII suit); *accord Morgan v. Int’l Bank for Reconstruction and Dev.*, 752 F. Supp. 492 (D.D.C. 1990); *see also SHIHATA*, *supra* note 27, at 251–52 (stating that narrow interpretation of Bank’s waiver “is generally consistent with the practice in other [non-U.S.] member countries”).

party for the enforcement of the award.”²⁹²

Third, the International Bureau of the PCA at The Hague is in charge of the archives of the arbitration proceeding.²⁹³ Moreover, “the International Bureau shall, upon written request of all the parties or of the arbitral tribunal, act as a channel of communications between the parties and the arbitral tribunal, and provide secretarial services including, *inter alia*, arranging for hearing rooms, interpretation, and stenographic or electronic records of hearings.”²⁹⁴ Fourth, “Unless the parties have agreed otherwise, the place where the arbitration is to be held shall be The Hague, The Netherlands.”²⁹⁵ Under our proposal, we suspect that the arbitration proceedings would take place in a location other than The Hague, such as in New York City or in the member country in which the project is located. Accordingly, under the rules, “the international Bureau shall inform the parties and the arbitral tribunal whether it is willing to provide the Secretariat and registrar services”²⁹⁶

Fifth, “The arbitral tribunal may determine the locale of the arbitration within the country agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.”²⁹⁷ Finally, “After inviting the views of the parties, the arbitral tribunal may meet at any place it deems appropriate for the inspection of property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.”²⁹⁸

²⁹² *General Conditions*, *supra* note 249, Section 8.04 (h).

²⁹³ *Optional Rules*, *supra* note 246, Article 1 ¶ 4.

²⁹⁴ *Id.*

²⁹⁵ *Id.* Article 16 ¶ 1.

²⁹⁶ *Id.*

²⁹⁷ *Id.* Article 16 ¶ 2.

²⁹⁸ *Id.* Article 16 ¶ 3.

1. Appointment of the Arbitral Tribunal

Under our proposal, the arbitral tribunal—like the arbitration provisions set forth in the Bank’s General Conditions for Loans—would consist of three arbitrators.²⁹⁹ One arbitrator would be appointed by the Bank, and the second arbitrator would be appointed by the claimant community.³⁰⁰ The two arbitrators thus appointed would choose the third arbitrator, who would act as the presiding arbitrator of the tribunal.³⁰¹ As noted below, the claimant community would be required to name its arbitrator in the notice of arbitration. The Bank would have thirty days after receipt of the notice to appoint its arbitrator.³⁰² If the Bank failed to appoint an arbitrator within the allotted time, the claimant community would request the President of the International Court of Justice to appoint the second arbitrator. If the President failed to appoint the second arbitrator within thirty days after the claimant’s request,³⁰³ the claimant would request the Secretary-General of the PCA to make the appointment within thirty days of the request.³⁰⁴ If within thirty days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator would be appointed in the same way the second arbitrator would be chosen if the Bank were to fail to make a timely appointment.

Members of the arbitral tribunal would be chosen from a Roster of Arbitrators comprised

²⁹⁹ See Optional Rules, *supra* note 246, Article 5 (providing that three arbitrators will be appointed if the parties have not previously agreed on the number of arbitrators, one or three).

³⁰⁰ See *id.* Article 7, ¶ 1.

³⁰¹ *Id.*

³⁰² *Id.* Article 7 ¶ 2.

³⁰³ Article 7 ¶ 2 (b) stipulates sixty days.

³⁰⁴ Optional Rules, *supra* note 246, Article 7, 2(b).

of persons nominated by Bank members and the NGO community.³⁰⁵ The Arbitrators would have to be persons who have been widely recognized for their knowledge and competence relating to the operations of the World Bank and to development, and who are capable of exercising independent judgment. They would serve five-year renewable terms. The parties would be free to select persons who are not on the Roster, provided they met the requirements of expertise in the field and independence.³⁰⁶

2. The Arbitral Proceedings

The affected community³⁰⁷ would commence arbitration proceedings by providing the Bank with a notice of arbitration.³⁰⁸ In addition to appointing an arbitrator, the notice would be required to include a statement of the claim,³⁰⁹ which in particular would include the following:

- A statement indicating that the arbitration is being demanded by “any two or more persons who share some common interests or concerns.”³¹⁰
- A statement identifying the project and the “action or omission of the Bank to follow its own operational policies and procedures during the design, appraisal and/or

³⁰⁵ According to Article 8 of the Optional Rules, “In appointing arbitrators pursuant to these Rules, the parties and the appointing authority are free to designate persons who are not Members of the Permanent Court of Arbitration at The Hague.” *Id.* Article 8 ¶ 3.

³⁰⁶ A party may challenge the selection of an arbitrator on the grounds either that the arbitrator will not be impartial or independent, or that the arbitrator is not qualified. *See id.* Articles 9-12.

³⁰⁷ The proceeding would be in the nature of a class action. Accordingly, the arbitral tribunal would certify the class by determining common injury. As noted in the text, in the notice of arbitration the claimants would be required to show shared interest or concerns. Experience thus far under the IP procedure suggests that certifying a class would not be problematic.

³⁰⁸ *Id.* Article 3, ¶¶ 1-2.

³⁰⁹ In order to expedite the resolution of the dispute, our proposal differs from the Optional Rules. Under the Optional Rules, the notice of arbitration is not required to contain a statement of the claim. If the notice does not contain such a statement, the arbitral tribunal fixes the period of time within which the claimant must communicate the statement. *Id.* Article 18, ¶ 1.

³¹⁰ 1996 CLARIFICATION, *supra* note 36.

implementation of [the] Bank-financed project,” whatever the case may be.³¹¹

- A statement identifying how the Bank’s action or omission will have an “actual or threatened material adverse effect on [the claimants’] rights or interests.”³¹²
- If applicable, a statement, along with the submission of the Intermediator’s public report, indicating how the Bank was not in compliance with the agreed upon plan of action.
- If applicable, a statement, along with the submission of the Intermediator’s public report, indicating the inadequacies of the Bank’s proposed resolution of the complaint at issue.
- If applicable, a statement indicating any Bank-caused damages that had arisen within one year after the completion of the project or the final disbursement of the loan.
- A statement indicating the relief or remedy sought.

Within a time period to be determined by the tribunal, the Bank would submit its statement of defense to the arbitral tribunal and the claimant community.³¹³ The statement would include, if applicable:

- A statement identifying any disputes of fact.
- A statement asserting that the Bank
 - was in compliance with its own policies and procedures, as reflected in the Intermediator’s public report (submitted along with the statement of defense), or
 - had complied with the agreed upon plan of action or had excusable grounds for not complying with the plan of action, or
 - had proposed a plan of action that would have brought it into full compliance with its own policies and procedures and that was unreasonably or in bad faith

³¹¹ World Bank, Inspection Panel, Operating Procedures, *supra* note 36, at I.1, II.3.A.4(a).

³¹² *Id.*

³¹³ See Optional Rules, *supra* note 246, Article 19.

rejected by the claimant community.

- A statement, if applicable, denying liability for damages.

As to the proceeding itself, the arbitral tribunal could hold hearings at the request of either party. If no such request is made, the tribunal would decide whether to hold such hearings or whether to conduct the proceedings based on the submission of documents alone.³¹⁴ With respect to burden, “Each party shall have the burden of proving the facts relied on to support its claim or defence.”³¹⁵ If the arbitral proceeding followed (i) a conclusion by the Intermediator that the Bank had complied with its policies and procedures, or (ii) an unsuccessful resolution of a Request for Claim Resolution, the claimant community would carry a “heavy burden” of showing that (a) the Bank was not in compliance with its policies and procedures, or (b) the claimant community acted reasonably and in good faith when it rejected the Bank’s proposed plan of action.

In keeping with current IP procedure and as contemplated by the Optional Rules, testimony by affected community members or their representatives or by government officials and authorities in charge of the project, as well as nonpublic documents, would remain confidential.³¹⁶ Just as the Inspection Panel has hired consultants in its investigations, so too would the arbitral tribunal be able to appoint experts to report to it on specific issues.³¹⁷ As to interim measures, either party may request the arbitral tribunal to issue interim measures necessary to preserve their respective rights of either party.³¹⁸ With respect to the applicable law, “the arbitral tribunal shall have regard both to the rules of the organization concerned and to

³¹⁴ *Id.* Article 15 ¶ 2.

³¹⁵ *Id.* Article 24 ¶ 1.

³¹⁶ *Id.* Article 25 ¶ 4.

³¹⁷ *Id.* Article 27.

³¹⁸ Optional Rules, *supra* note 246, Article 26 ¶ 1.

the law applicable to the agreement or relationship out of or in relation to which the dispute arises and, where appropriate, to the general principles governing the law of international organizations and to the rules of general international law.”³¹⁹

3. The Award

Upon closure of the hearings, the arbitral tribunal would issue its final award. The award could be declaratory, indicating whether or not the Bank was in compliance with its own policies and procedures, or whether it was abiding by its plan of action or had an excuse for not doing so, or whether the Bank’s proposed plan of action was reasonable and made in good faith and should have been accepted by the claimant community. With respect to the third issue, if the arbitral tribunal decided that the Bank’s plan of action was unreasonable or made in bad faith, it would issue an award for specific performance which would include a plan of action that it deemed would be in compliance with the Bank’s policies and procedures. The tribunal would also award any damages that the claimant community could prove with a reasonable degree of certainty, including damages that were realized within one year after the completion of the project or final disbursement of the loan. All decisions or awards of the arbitral tribunal would be made by a majority of the arbitrators.³²⁰ All awards would be made public and would be final and binding on the parties.³²¹

³¹⁹ *Id.* Article 33 ¶ 1.

³²⁰ *Id.* Article 31 ¶ 1.

³²¹ *Id.* Article 32 ¶ 2. The Optional Rules state that the “award may be made public only with the consent of both parties.” *Id.* Article 32 ¶ 5. Under our proposal, arbitral awards would be required to be made public. We do not make reference to “decisions,” as there is a distinction between decisions and awards. “‘Awards’ are decisions of the tribunal which finally dispose of an issue, or issues, between the parties and which will be given recognition and effect by state courts . . . Decisions and directions which relate only to procedural matters . . . are not properly described as ‘awards’.” CAPPER, *supra* note 245, at 111.

4. Costs

The Optional Rules for Private Parties state that the arbitral tribunal will fix the costs of arbitration in its award. Costs include, among other things, the fees of the arbitral tribunal, travel and other expenses incurred by the arbitrators and any witnesses, the costs of expert advice, and the “costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable.”³²² In principle, the costs of arbitration are borne by the unsuccessful party.³²³ “However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is a reasonable, taking into account the circumstances of the case.”³²⁴ Moreover, with respect to the costs of legal representation, “the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.”³²⁵

We believe the costs of the arbitration should be borne by the unsuccessful party only in the unlikely event the claimant community brought a manifestly frivolous arbitration claim or when the Bank clearly acted in bad faith. Otherwise, each party should bear its own legal expenses, and, like the arbitration provisions under the General Conditions for Loans, the costs should be divided equally between the parties.

This raises the obvious question of how claimant communities would bear the costs of arbitration. First, with respect to the costs of legal representation—relating to both filing a Request for Claim Resolution and arbitration—we are confident that the major national and

³²² Optional Rules, *supra* note 246, Article 38.

³²³ *Id.* Article 40 ¶ 1.

³²⁴ *Id.*

³²⁵ *Id.* Article 40 ¶ 2.

international law firms would be eager to represent claimants communities on a pro bono basis. A clearinghouse for such work could be provided by the Advocates for International Development (“A4ID”), an organization which coordinates legal pro bono work throughout the world with respect to issues relating to international trade and development.³²⁶ A4ID also works closely with major international NGOs, such as The Centre for African Policy and Peace Strategy, ActionAid, and Oxfam. Second, with respect to the other costs of arbitration, organizations such as A4ID could work with the NGO community and other donors to raise funds to cover such costs. Moreover, the PCA maintains a Financial Assistance Fund, which is intended to help developing countries meet part of the costs involved in international arbitration.³²⁷ The Fund consists of voluntary financial contributions by States, intergovernmental organizations, national institutions, as well as natural and legal persons.³²⁸ Although the Fund currently provides assistance only to a “Qualifying State,”³²⁹ there is no reason why the rules of the Fund could not be amended to provide financial assistance to claimant communities.

5. Enforcement

In order to demonstrate to the world that it believes in true accountability—and to

³²⁶ Advocates for International Development, <http://a4ID.org/default.aspx> (last visited Dec. 3, 2007). The authors have spoken with Chris Marshall, who chairs A4ID’s Board of Trustees, about the possibility of having A4ID act as a clearinghouse for pro bono legal representation under our proposal. Although Mr. Marshall stated that the Board would have to approve such activity, he was very supportive of the idea in general and believed there would be many lawyers would be eager to represent claimant communities.

³²⁷ Permanent Court of Arbitration, Financial Assistance Fund, http://www.pca-cpa.org/showpage.asp?pag_id=1179 (last visited Nov. 26, 2007).

³²⁸ Permanent Court of Arbitration Financial Assistance Fund for Settlement of International Disputes, Terms of Reference and Guidelines, ¶ 4 (as approved by the Administrative Council on December 11, 1995), *available at* <http://www.pca-cpa.org/upload/files/FUNDENG.pdf>.

³²⁹ *Id.* ¶ 5.

maintain its legitimacy—the World Bank should willingly comply with the arbitral award. If enforcement were necessary, the claimant community would seek enforcement of the award under domestic law or via international conventions. Here we will limit our commentary to the widely adopted 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”).³³⁰ Article III of the New York Convention sets forth the basic obligation of each Contracting State to “recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.”³³¹ The United States has implemented the Convention via the Federal Arbitration Act (“FAA”).³³² Under the FAA, U.S. federal district courts have original jurisdiction over actions arising under the in New York Convention.³³³

For present purposes, we raised three issues with respect to application of the New York Convention. First, the Convention requires that an arbitration agreement be “in respect of a defined legal relationship, whether contractual or not.”³³⁴ Certainly the Bank has no contractual relationship with claimant communities with respect to its obligation to follow its own policies and procedures.³³⁵ The language of the Convention, however, appears to cover non-contractual claims, such as tort claims,³³⁶ as would be the case with respect to affected communities’ claims against the Bank.³³⁷ Second, the Convention provides that member states may declare that the

³³⁰ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6977, 330 U.N.T.S. 38 [hereinafter *New York Convention*].

³³¹ *Id.* at Article III.

³³² Federal Arbitration Act, 9 U.S.C. §§ 202–08 (1980).

³³³ *Id.* § 203.

³³⁴ *New York Convention*, *supra* note 330, Article II (3).

³³⁵ Shihata, *supra* note 25, at 258.

³³⁶ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 153 (2d ed. 2001).

³³⁷ Since adversely affected community members are not parties to a loan agreement between the Bank and the borrowing country, they would need to bring a claim in tort. de Feyter suggests that claimants would argue negligence. Claimants would argue that “the Bank breached its duty

provisions apply only to relationships that are considered “as commercial under the national law of the State making [the] declaration.”³³⁸ The United States, as well as other nations, has made this declaration.³³⁹ Although U.S. courts have construed the term “commercial” broadly,³⁴⁰ it may be problematic to construe the Bank’s compliance with its own policies and procedures as commercial activities.³⁴¹ Consequently, enforcement of an arbitral award under our proposal may well have to be pursued in a country that has not made the declaration.³⁴² Finally, under the New York Convention a court can refuse to enforce an award that is not “capable of settlement

to take care by not contemplating the injurious effect on the affected persons, when deciding not to insist on the implementation of the [loan] agreement, or on compliance with its operational policies...” de Feyter, *supra* note 189, in HUMAN RIGHTS, *supra* note 145, at 129–30. He also argues that the Bank could be held liable if the borrower fails to comply with its international human rights obligations. *Id.* at 130. We disagree with this proposition to the extent it makes the Bank liable for a member’s breach of its human rights obligations in the absence of a link to the Bank’s policies and procedures. Shihata opposes liability based on fault. He argues that the Bank’s failure to follow its own policies and procedures does not “amount to a legal obligation vis-à-vis that affected party with whom the Bank has no contractual relationship.” Ibrahim F.I. Shihata, *The World Bank Inspection Panel—Its Historical, Legal and Operational Aspects*, in THE INSPECTION PANEL OF THE WORLD BANK: A DIFFERENT COMPLAINTS PROCEDURE 7, 43 (Gudmundur Alfredsson & Rolf Ring, eds. 2001). Even if fault liability were possible, the “mere failure by the Bank to observe its policies would rarely amount to fault under applicable law; these policies typically require high standards beyond what borrowers or their foreign financiers otherwise need to observe under national or international law.” *Id.* at 42; *see* Shihata, *supra* note 25, at 254–58 (discussing the limits of lender liability). We believe that the creation of the Inspection Panel and the “case law” it has created since its inception clearly indicate that the Bank and the various stakeholders in the Bank’s projects believe the Bank has a duty to abide by its operational policies and that there should be a remedy for harm caused by its failure to abide by its policies. If the arbitral tribunal holds that the Bank is liable for damages and if the Bank believes the borrowing country should be ultimately liable for the damages caused by the harm, it can bring an arbitration proceeding against the borrowing country pursuant to the Bank’s General Conditions for Loans. *See General Conditions*, *supra* note 249.

³³⁸ *New York Convention*, *supra* note 330, Article 1(3).

³³⁹ BORN, *supra* note 336, at 149.

³⁴⁰ *Id.* at 150.

³⁴¹ *See* Shihata, *supra* note 25, at 252 (“Neither the Bank’s lending operations, nor, clearly, the issuance and observance of its policies and procedures are commercial activities pursued for private purposes.”).

³⁴² Many of the major European countries have not made the declaration. *See* CAPPER, *supra* note 245, at 149–52.

by arbitration.”³⁴³ Moreover, Article V(2)(a) states that an arbitration award need not be recognized if “[t]he subject matter of the difference is not capable of settlement by arbitration under the law” of the country where recognition is sought. While this non-arbitrability doctrine has been narrowed over the years,³⁴⁴ it is conceivable that a court may invoke this doctrine with respect to ordering the Bank, pursuant to the arbitral award, to comply with its own policies and procedures.

VII. CONCLUSION

Our proposal would bring about real and effective accountability on the part of the World Bank because fundamentally it eliminates the Bank’s paternalistic, biased, and politically motivated approach to resolving claims brought by claimant communities who have suffered, or are likely to suffer, harm as a result of the Bank’s failure to follow its own operational policies and procedures during the design, appraisal and/or implementation of a Bank-financed project. Specifically, a politically motivated Board would no longer determine whether exceptional circumstances exist for foreign representation of claimant communities. Given today’s globalized world, the non-local representation limitation is anachronistic.³⁴⁵ Accordingly, as provided for in the Optional Rules for Arbitration, there is no reason why an affected community should not be able to “be represented or assisted by persons of their choice.”³⁴⁶ In other words, there is no compelling reason why a party in an arbitration proceeding—or at the pre-arbitration

³⁴³ *New York Convention*, *supra* note 330, Article II (1).

³⁴⁴ *See BORN*, *supra* note 336, at 243–95.

³⁴⁵ A study of claims brought before the Inspection Panel revealed that a majority of cases were led by Southern NGOs, with most of the remaining claims being brought by a coalition of Southern and Northern NGOs. The study’s authors therefore argue that “[t]his evidence puts the charge that the ‘Panel process is a tool of Northern NGOs’ to rest.” Jonathan Fox & Kay Treakle, *Concluding Propositions*, in *DEMANDING ACCOUNTABILITY: CIVIL SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL* 280-81 (D. Clark, J. Fox & K. Treakle eds., 2003).

³⁴⁶ *Optional Rules*, *supra* note 246, Article 4.

phase—should be denied the autonomy to choose its representation from among the global legal and NGO communities. Moreover, under our proposal there would be no issue as to whether the Board would authorize an investigation, even under a “no-objection” basis.

Importantly, our proposal would give claimant communities a true voice and remedy. Our proposed administrative remedy under the OCR would actively involve members of the claimant community in an independent claim resolution mechanism that combines the compliance and problem-solving functions that currently are separate resolution components at multilateral development banks such as the ADB.³⁴⁷ If a plan of action was agreed upon at the administrative level, the requirement of Board approval for the plan’s implementation would be eliminated. Compliance with the plan of action would be monitored by the claimant community’s legal or NGO representation in conjunction with the OCR Director. If the Bank failed to abide by the plan of action, the claimant community would have the option of instituting truly independent arbitration proceedings and seeking damages for any harm that might have resulted from the Bank’s breach of the agreement. In the event the administrative process was unsuccessful and that the arbitral tribunal decided that the Bank’s plan of action was unreasonable or made in bad faith, the arbitral tribunal could order its own plan of action, which would be implemented without Board approval. Finally, under our proposal payment communities could bring an arbitration claim for damages realized within one year after the completion of the project or final disbursement of the loan.

While our proposal seeks to bring about real and effective accountability on the part of

³⁴⁷ The third function identified by Professor Bradlow, lessons-learned, would be fulfilled by the OCR Director’s submission of an annual report to the Board.

the Bank, it is also consistent with the doctrine of functional necessity.³⁴⁸ First, our proposal does not expand the current mandate of the Inspection Panel. Claimant communities would still be limited to bringing claims alleging noncompliance with the Bank's own policies and procedures. Second, although under our proposal the Board would no longer have the last word on implementation of a plan of action, the Bank Management would still consult with the Board with respect to the resolution of a claim.

Third, although excessive arbitration against the World Bank arguably could impede its ability to function, we foresee that most claims, especially given the possibility of arbitration, would be resolved at the administrative level, and that the Bank would willingly comply with the agreed plan of action. Fourth, in the arbitration proceeding the Bank would be entitled to present an excuse for failing to abide by the agreed plan of action, and the claimant community would a "heavy burden" of showing that (i) the Bank was not in compliance with its policies and procedures, or (ii) the claimant community acted reasonably and in good faith when it rejected the Bank's proposed plan of action at the administrative level. Finally, claimant communities would bear the costs of arbitration if they brought a manifestly frivolous claim.

We recognize that ultimately our proposal rest on a political decision: the World Bank's willingness to waive its immunity. In this regard, we concur with de Feyter's observation that the "Bank [should waive its immunity] in recognition of its role as an autonomous international actor, and of the important impact its actions and omissions have on the human rights conditions

³⁴⁸ See *supra* note 242 and accompanying text. As Singer has indicated, strictly speaking the doctrine of functional necessity is not applicable when an international organization expressly waives immunity. In such cases, the tribunal "should determine whether the organization has in fact waived its jurisdictional immunity, regardless of whether this would benefit the organization." Singer, *supra* note 242, at 11.

of people affected by their projects.”³⁴⁹ We also recognize that limiting our proposal to the World Bank might to some extent cause countries to seek funding at other multilateral financial institutions that do not allow adversely affected communities to bring arbitral claims. Ideally, therefore, an arbitration option should be adopted uniformly.

³⁴⁹ de Feyter, *supra* note 189, *in* HUMAN RIGHTS, *supra* note 145, at 134–35.