

Hardening the legal softness of the World Bank through an Inspection Panel?

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1. Introduction

Beyond the Articles of Agreement of the International Bank for Reconstruction and Development (1944), which is the treaty establishing the World Bank and associated procedural rules, the activities of the Bank are governed by numerous soft law instruments. Primary among these are the operational policies and procedures (OPPs). These consist mainly of Operational Policies (OPs), which are norms for how the Bank's Management is to carry out operations, and Bank Procedures (BPs), which are more procedurally oriented instructions setting out how World Bank policies are to be implemented.¹

The World Bank Inspection Panel (IP), which was established by a resolution of the World Bank in 1993,² has generated significant interest among legal scholars due to its characteristics.³ It functions as an organ reviewing acts and omissions of the Management of

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¹ See <http://go.worldbank.org/RF8N5YBBF0>.

² Resolution No. IBRD 93-10 and Resolution No. IDA 93-6 (hereinafter the Resolution). This mandate has been specified in the 1996 Clarification of Certain Aspects of the Resolution (hereinafter the 1996 Clarification) and the 1999 Clarification, as well as in Bank Procedures (BP) 17.55 – Inspection Panel.

³ See, in particular, Alexander Orakhelashvili, *The World Bank Inspection Panel in Context. Institutional Aspects of the Accountability of International Organizations*, in 2 *International Organizations Law Review*, 2005, pp. 57–102. See also Maartje Van Putten, *Policing the Banks: Accountability Mechanisms for the Financial Sector*, Montreal: McGill-Queen's University Press, 2008; Dana L. Clark, Jonathan Fox and Kay Treakle (eds) *Demanding Accountability: Civil Society Claims and the World Bank Inspection Panel*, Lanham, MD: Rowman & Littlefield, 2003; G.A. Gualtieri, 'The Environmental Accountability of the World Bank to Non-State Actors: Insights from the Inspection Panel', in 72 *The British Year Book of International Law* 2001, pp. 213–253; Gudmundur Alfredsson and Rolf Ring (eds), *The Inspection Panel of the World Bank: A Different Complaints Procedure*, The Hague: Kluwer Law International, 2001; Ibrahim Shihata, *The World Bank Inspection Panel: In Practice*, Oxford: Oxford University Press, 2nd ed., 2000, in particular pp. 16–21; Ellen Hey, *The World Bank*

the World Bank as a response to requests from private parties (hereinafter ‘requesters’) affected by World Bank projects. Such requests are based on the OPPs adopted by the Board of Executive Directors of the World Bank. As of April 2012, the panel had received requests in 70 different cases. Of the 61 cases in which it so far has made a final recommendation concerning investigation, it has recommended investigation in 32, of which investigation was subsequently rejected by the Board of Executive Directors in four cases. Of the remaining 28, it has finalized investigation reports in 26 cases. All these reports concluded that there had been non-compliance with the OPPs.

The main purposes of this article are to study the normative characteristics of the OPPs upon which the IP bases its decisions, and to examine whether and how the IP has contributed to ‘hardening’ the legal characteristics of the OPPs. The latter task involves a critical examination of the view that the IP is to be regarded as a bottom–up accountability instrument essentially internal to the World Bank.⁴ My main underlying hypothesis is that the OPPs in combination with the IP have contributed to ‘harden’ the ‘soft’ characteristics of the World Bank. Such a process of hardening ‘soft law’ can be termed a process of ‘legalization’. Keohane et. al have studied the contribution of dispute settlement mechanisms to the legalization of international law. They describe how such mechanisms relate to legalization as follows:

Legalization is a form of institutionalization distinguished by obligation, precision, and delegation. Our analysis applies primarily when obligation is high. Precision on the other hand, is not a defining characteristic of the situations we examine. We examine the decisions of bodies that interpret and apply rules, regardless of their precision ... Our focus is a third dimension of legalization: delegation of authority to

Inspection Panel: Towards the Recognition of a New Legally Relevant Relationship, in 2 Hofstra Law and Policy Symposium, 1997, 61–74; Lori Udall, *The World Bank Inspection Panel: A Three Year Review*, The Bank Information Center, 1997; Daniel D. Bradlow, *International Organizations and Private Complaints: The Case of the World Bank*, in 34 *Virginia Journal of International Law*, 1994, 553–613 (in particular pp. 565–570); Bradford Morse and Thomas Berger, *Sardar Sarovar, The Report of the Independent Review*, 1992 (in particular pp. 349–358); and The World Bank, *Effective Implementation: Key to Development Impact*, Report of the Portfolio Management Task Force, 1992.

⁴ See, in particular, The World Bank Inspection Panel, *Accountability at the World Bank. The Inspection Panel at 15 Years* (2009), pp. 6–7.

courts and tribunals designed to resolve international disputes through the application of general legal principles.

Three dimensions of delegation are crucial to our argument: independence, access and embeddedness.⁵

There are two main differences between the IP and the eight dispute settlement bodies⁶ analysed by Keohane et al. First, the IP differs from the dispute settlement bodies in the sense that the level of obligation is lower: OPPs, as compared to treaty obligations. Secondly, while the dispute settlement bodies deal with formal disputes between states or between states and individuals, the IP deals with less formal complaints raised by individuals against the practices of an inter-governmental organization. Hence, states are not formally parties to cases before the IP, and its cases do not concern the responsibility of states under international law.⁷

This article begins by analysing the normative status (level of obligation) of the OPPs (section 2). Thereafter we examine the extent to which the IP has contributed to hardening the softness of the OPPs (section 3).

2. Normative status of the OPPs

2.1 General starting points

The OPPs are adopted by the World Bank Board of Executive Directors in accordance with Article V section 2(f) of the Articles of Agreement of the International Bank for Reconstruction and Development: ‘The Board of Governors, and the Executive Directors to the extent authorized, may adopt such rules and regulations as may be necessary or appropriate to conduct the business of the Bank.’ The OPPs are generally formulated without the use of compulsory language (e.g. ‘shall’ or ‘must’) or recommendatory language (e.g. ‘should’ or ‘encourage’). They are formulated in the present tense, expressing how the

⁵ Robert O. Keohane, et al., *Legalized Dispute Resolution: Interstate and Transnational*, in 54 *International Organization* no. 3, 2000, p. 458.

⁶ The eight bodies are the UN Security Council, the Permanent Court of Arbitration, the International Court of Justice, panels established under the GATT (i.e. prior to the establishment of the dispute settlement system of the World Trade Organization), the dispute settlement system of the WTO, the European Court of Justice, the European Court of Human Rights, and the Inter-American Court of Human Rights.

⁷ See para. 12 of the Resolution and para. 12 of the 1999 Clarification.

Management is expected to conduct its operations.⁸ Thus, the OPPs are formulated neither as obligations nor as non-binding guidelines. The World Bank has adopted several other normative instruments to which the OPPs refer, guidelines in particular. These do not have the same normative status as the OPPs and are meant to be more dynamic ('living instruments'). These instruments will not be considered in any detail in this article.

In order to determine the normative status of the OPPs we will examine two main issues. The first is whether the OPPs are to be regarded as legally binding norms or policy guidelines. This issue concerns the normative status of the OPPs within the World Bank ('internal normative status'), and in relation to third parties ('external normative status'). The second is which status the OPPs have in public international law. The focus will be on the external normative status of the OPPs when we explore this issue.

One IP case that brought up the normative status of the OPPs was *China: Western Poverty Reduction Project case*.⁹ This case has been essential for the subsequent practice of the IP and for the attitude of other organs of the World Bank.¹⁰ One essential question was whether the OPPs were binding on the Management: what their internal normative status was. The IP concluded that 'read in their entirety, the Panel feels that the directives cannot possibly be taken to authorize a level of 'interpretation' and 'flexibility' that would permit those who must follow these directives to simply override the portions of the directives that are clearly binding.'¹¹ Subsequent to this case, it has become clear that the internal normative status of the OPPs is that they are legally binding unless they state otherwise. In addition, of relevance to the OPPs' external normative status, the IP stated that it 'has failed to find any grounds for the view that precedents in a country, or a country's 'political and social systems', can in any way determine what is required by the policies.'¹² As we shall see below, subsequent practice

⁸ See <http://go.worldbank.org/DZDZ9038D0>. An example is OP 4.01, para. 1: 'The Bank requires environmental assessment (EA) of projects proposed for Bank financing to help ensure that they are environmentally sound and sustainable, and thus to improve decision making.'

⁹ *China: Western Poverty Reduction Project* (request no. 16, 1999). See also *Argentina/Paraguay: Yacyretá Hydroelectric Project* (request no. 7) paras. 245 ff.

¹⁰ The World Bank Inspection Panel, *Accountability at the World Bank: The Inspection Panel 10 Years On* (2003) pp. 69–79.

¹¹ *China: Western Poverty Reduction Project* (request no. 16) para. 37.

¹² *Ibid.* para. 43. See also para. 42: 'Management's past experience in a country is obviously important. It can provide the basis for a certain level of comfort that the work that is required by the policies will be undertaken

of the Board of Executive Directors and the Management indicates that they have accepted the position of the IP. This case thus marks a major shift in the attitude of the organs of the World Bank as to the internal normative status of the OPPs.

2.2 The broader public international law perspective

Arguably, the status of the OPPs from a broader public international law perspective (external normative status) depends on whether the character of the OPPs is such that World Bank can incur international responsibility for failure to comply with them. In order to incur responsibility under international law, a violation of an obligation under international law must have occurred. The question is thus whether cases of the IP based on the OPPs may concern the responsibility of the World Bank under international law. We will examine this question in light of the work of the International Law Commission (ILC) on the responsibility of international organizations.

According to Article 10.2 of the ILC Draft Articles on the Responsibility of International Organisations (2011),¹³ an international organization may incur responsibility for ‘breach of any international obligation that may arise for an international organization towards its members under the rules of the organization’. According to Article 2(b) of the Draft Articles, by the rules of the organization is meant ‘in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization’. This definition is essentially parallel to the definition used in Art. 2.1(j) of the Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations (1986).¹⁴ Supporting itself on a reference to the decision of the International Court of Justice

successfully. It is an entirely different matter, however, to suggest that experience and precedent can determine what is required by the policies.’

¹³ See International Law Commission, Report of the Sixty-first Session, 2009, UN doc. A/64/10, 13–178. The Draft Articles were adopted by the ILC on the second reading in 2011; see *Yearbook of the International Law Commission*, 2011, vol. II, Part Two. See also the relevant work of the International Law Association: *Accountability of International Organisations*, Final Report, 2004, in particular pp. 45–46.

¹⁴ According to Art. 2.1(j) of the Vienna Convention, “‘rules of the organization’ means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization’.

in the advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*,¹⁵ the Commentaries of the ILC observed that:

One important feature of the definition of ‘rules of the organization’ in subparagraph (b) is that it gives considerable weight to practice. The definition appears to provide a balance between the rules enshrined in the constituent instruments and formally accepted by the members of the organization, on the one hand, and the need for the organization to develop as an institution, on the other hand.¹⁶

The Commentaries to Article 10 of the Draft Articles state that:

An international obligation may be owed by an international organization to the international community as a whole, one or several States, whether members or non-members, another international organization or other international organizations and any other subject of international law.¹⁷

The ILC Draft Articles might be regarded as a proposal to codify customary international law in these respects. But, as indicated by the ILC, there remains some degree of disagreement concerning the legal status of some of the rules of international organizations.¹⁸

There are thus no general rules of public international law that would prevent the OPPs of the World Bank from being binding under international law. To the contrary, the rules referred to above indicate that the OPPs may constitute a legal basis for responsibility of the World Bank under international law.

2.3 Legal subjects

One issue that remains is the relationship between the OPPs and external actors affected by World Bank acts and omissions. As emphasized by the ILC, a main issue of controversy concerning Article 10 taken together with Article 2 of the Draft Articles is the extent to which

¹⁵ I.C.J. Reports 1949 p. 180.

¹⁶ ILC, Draft articles on the responsibility of international organizations, with commentaries (2011), p. 11, para. 18.

¹⁷ *Ibid.* p. 31, para. 3.

¹⁸ *Ibid.* pp. 32–33.

the rules of the organization are to be regarded as internal rules, labelled as ‘internal law of the organization’ or ‘administrative regulations’, or as part of international law. On the one hand, it is clear that essential elements of the OPPs have been adopted to protect the interests of third parties that are affected by World Bank projects. On the other hand, it is equally clear that the OPPs are not formulated in terms of rights of external actors, but in terms of duties of the organs of the World Bank, its Management in particular.

The mandate of the IP is defined as follows in para. 12 of the Resolution establishing the IP:

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

Paragraph 13 of the 1999 Clarification adopted by the Executive Directors specifies the mandate of the IP as follows: ‘The Panel will discuss in its written report only those material adverse effects, alleged in the request, that have totally or partially resulted from serious Bank failure of compliance with its policies and procedures.’ Accordingly, the IP has been instructed to focus on those acts or omissions that are comparable to ‘material breaches’ of international obligations.¹⁹

The mandate of the IP serves to strengthen the link between the OPPs and external actors, both in terms of their application to acts and omissions of the World Bank that substantively affect the interests of external actors, and by providing a procedure whereby external actors can defend and promote their interests. Hence, the opportunity for private actors to bring

¹⁹ See Article 60(3)(b) of the Vienna Convention on the Law of Treaties. The term ‘material breach’ was also famously used in UN Security Council Resolution 1441 (2002) on the situation between Iraq and Kuwait, paras. 1 and 4. In para. 14 of the 1999 Clarification, the Executive Directors specify: ‘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.’

cases to the IP in support of their interests, and the view that the underlying obligations are legally binding for the organs of the World Bank, as well as the directive that the IP is to deal only with serious breaches of the norms, all indicate that the OPPs are to be regarded as international obligations of the World Bank. We can thus conclude that essential elements of the OPPs define obligations of the World Bank in relation to private parties.

2.4 Relationship between the OPPs and other rules of international law

One way to approach the relationship between OPPs and other rules of international law is to regard elements of the former as building on standards that have been developed in international law through treaties, soft-law instruments, and the practice of states and international organizations.²⁰ Relevant international law can be found, *inter alia*, within international environmental law, international human rights, international labour law, and international trade and investment law.²¹ A differing approach would be to regard the World Bank normative system as a self-contained regime that, although reflecting standards developed nationally and internationally, does not rely or depend on such norms.

The OPPs contain some references to other norms of international law and international institutions. We may distinguish between two categories of such references – those that apply generally to World Bank funding activities, and those that are specific to certain funding activities, i.e. funding of projects and programmes under the Montreal Protocol and the Global Environment Facility.²² Since the latter mainly concern funding that is linked to implementation of specific treaties, these references will not be further explored in the following. The general references contained in the OPPs are set out in Table 1.

²⁰ See *Honduras: Land Administration Project* (request no. 38) para. 256: ‘The Panel observes that OD 4.20 broadly reflects the spirit and provisions of ILO Convention No. 169.’

²¹ Examples include the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention, 1998), the International Covenant on Economic, Social and Cultural Rights (CESCR, 1966), and ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries (1989).

²² For the Global Environment Facility, see OP 10.20 para. 2 and BP 10.20. For the Montreal Protocol, see OP 10.21 paras. 1, 2 and 5, and BP 10.21 Annex A para. 2, Annex B paras. 3 and 11, and Annex C paras. 5, 7 and 17.

Table 1: References to international norms in World Bank operational policies and procedures

Norm referred to	Location of reference	Nature of reference
Treaties within specified area	OP 4.01 para. 3; OP 4.11 para. 3; OP 4.36 para. 6; BP 4.01 paras. 10 and 19; BP 9.00 para. 29(g)	Avoid violation of treaties, limited to environmental treaties (MEAs); administrative procedures; training of workers
Specific treaties	OP 4.11 note 4	World Heritage Convention to be regarded as environmental treaty
Customary international law and general principles	OP 7.30 note 6; OP 7.60 para. 3(b)(ii); OP 9.00 note 3	Factors to be taken into account; definition of scope
Binding decisions of intergovernmental organizations (IGOs)	OP 12.00 note 24; BP 4.04 note 1	Eligibility criteria for funding; definition
Non-binding decisions of IGOs	OP 1.00 note 1; OP 4.02 note 2; OP 4.09 paras. 6 and 7, and note 7; OP 8.60 para. 19(a); OP 10.21 para. 5 and Annex B; BP 4.01 Annex B notes 6 and 8; BP 9.00 para. 29(g)	Objective; presumption of compliance; classification of products; products that cannot be funded; standards acceptable to the WB; guidance for WB action; eligibility criteria; exempted from requirements; training of workers
Non-binding decisions of NGOs	OP 4.36 Annex A(c)(i) and notes 1 and 3; OP 4.37 note 5; OP 8.30 para. 9(a); OP 11.02 notes 4 and 5; BP 8.30 para. 2; BP 9.00 para. 29(g)	Definitions; principles acceptable to the WB; ensure application of standards; training of workers

In general, then, the OPPs do not refer to specific treaties. The overview in Table 1 shows that general references to international norms are few and far between among the numerous OPPs of the World Bank, and that such references are frequently set out in footnotes and annexes.

Consequently, such references seem to have low priority in the OPPs, and this provides the OPPs with the character of being a self-contained normative framework.

Given the advanced legal and institutional frameworks of human rights and labour in public international law²³ and their relevance to projects of the World Bank, we might expect references to these areas of international law in the OPPs. A previous OPP, OMS 2.20, did contain a reference that was broader than those contained in OPs and BPs.²⁴ However, neither OMS 2.20 nor current OPPs contain references to treaties in the fields of human rights and labour. The same is the case as regards minorities and indigenous peoples. General references within the OPPs are limited to environmental treaties, which indicates that environmental issues have been more thoroughly integrated into the World Bank normative framework than other fields of international law.²⁵

As shown in Table 1, there are few references to customary international law and general principles of law, and those references relate to how the Bank shall approach ‘*de facto* governments’ and good governance principles. If we also take into account the practice of states, IGOs and NGOs, we find several additional references. While the OPPs do not mention state practice as such, there are several references to decisions of IGOs and NGOs. Such mentions include, in addition to environmental topics, references to accounting and auditing principles, as well as standards adopted by the World Health Organization and the Food and Agriculture Organization.

In sum, we can observe, first, that the World Bank’s policy regarding references to external normative instruments is pragmatic rather than principled. While there seems to be some reluctance against such references, they have nevertheless been included where deemed necessary and politically acceptable. Nevertheless, the general tendency for the World Bank is to leave the relationship between projects and international law to be sorted out by the state hosting the project. Secondly, the World Bank’s approach seems to be *ad hoc* rather than systematic. When we consider normative materials not referred to in light of normative

²³ For a comparison between human rights and the environment, see Ole K. Fauchald, *International Environmental Governance: Lessons Learned from Human Rights Institutional Reform*. FNI Report 14/2011, Lysaker: Fridtjof Nansen Institute.

²⁴ See *Honduras: Land Administration Project* (request no. 38) para. 255.

²⁵ For more details, see Gualtieri, *supra* note 3, pp. 216–224.

materials that have been referred to, we observe that references are missing in many OPPs where they could have been included.²⁶

2.5 Conclusions

The internal normative status of the OPPs of the World Bank is clear: the OPPs are in general legally binding within the World Bank. Far less clear, however, is the external normative status, which is the focus of this article. While there is nothing in international law that would prevent the OPPs from being binding under international law, it remains unclear whether the OPPs actually are to be regarded as binding in this respect. On the one hand, the mandate and procedures of the IP point in the direction of regarding the OPPs as binding. On the other hand, the way in which the OPPs approach other rules of international law – in a pragmatic and *ad hoc* manner – constitutes an argument against seeing the OPPs as binding.

In order to further clarify the external normative status of the OPPs, we need to take a closer look at the design and practice of the institution created to promote the interests of third parties in World Bank projects: the Inspection Panel.

3. The World Bank Inspection Panel – contributing to ‘legalization’ of the OPPs?

3.1 Introduction

The extent to which the IP clarifies and strengthens the external normative status of the OPPs depends on its mandate and practice. An essential factor in this respect is the extent to which the IP fulfils the characteristics of ‘judicial bodies’ under international law.²⁷ The IP itself has emphasized its role as a ‘fact-finding body’²⁸ that is ‘independent from Management and

²⁶ There are several OPPs where references could easily have been included: *inter alia*, OP 4.76 Tobacco (the WHO Tobacco Convention); OP 7.40 Disputes over Defaults on External Debt, Expropriation, and Breach of Contract (conditions for expropriation in customary international law); OP 9.00 Program-for-Results Financing (see paras. 8 and 15); OP 14.25 Guarantees (see para. 12); BP 7.50 Projects on International Waterways; BP 9.00 Program for Results Financing (fraud and corruption, see para. 26).

²⁷ For a discussion and application of five core and two additional criteria included in a ‘test of judiciality’, see Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, in 31 *New York University Journal of International Law and Politics*, 1999, pp. 709–751, especially pp. 713–723.

²⁸ See para. 12 of the 1999 Clarification. There is no generally accepted definition of ‘fact-finding body’, and the concept can have different meanings depending on the context in which it is used. Shihata, *supra* note 3, pp.

reports directly to the Board of Executive Directors'.²⁹ In a publication from 2009, the Panel Chair characterized the IP's procedures as 'a clear and independently administered accountability and recourse process'.³⁰ The general impression is that the IP conceives itself as a bottom-up accountability instrument that is essentially internal to the World Bank.³¹ The International Law Association has classified the IP as among 'non-judicial remedial action against international organisations'. It also observes that: 'The investigatory powers of an Inspection Panel comprise political, administrative and legal forms of accountability. Its findings cannot be reconsidered or changed through a political process.'³²

Against this background, this section begins by exploring the characteristics of the IP as an institution, focusing on its formal and real institutional independence (section 3.2). Thereafter follows an examination of the mandate of the practice of the IP. After considering the IP's interpretation of the OPPs (section 3.3), we briefly examine mechanisms established to secure compliance with the findings of the IP as endorsed by the Board of Executive Directors (section 3.4).

3.2 Independence

The point of departure when considering the independence of the IP is the declaration in para. 1 of the Resolution establishing the IP: 'There is established an independent Inspection Panel.' The Panel Chair has stated that the hallmark of the IP is independence, integrity and impartiality.³³ One basic feature of judicial institutions is that, in order to ensure legitimacy and fairness of their decisions, such institutions must be regarded by external actors as independent of the interests of the parties to the dispute.

The main issue in relation to the IP is its independence from the interests of bodies of the World Bank, in particular the Management, which is the main executive organ of the World

212–214, seems to be using the concept to describe a body whose findings and conclusions are not legally binding.

²⁹ The Inspection Panel, *Annual Report 2006–2007*, p. 13.

³⁰ The World Bank Inspection Panel, *Accountability at the World Bank. The Inspection Panel at 15 Years* (2009) p. ix.

³¹ *Ibid.* pp. 6–7.

³² See International Law Association, *supra* note 13, p. 46.

³³ The World Bank Inspection Panel, *Accountability at the World Bank. The Inspection Panel at 15 Years* (2009) p. x, see also pp. 18–22.

Bank,³⁴ and arguably also the Board of Executive Directors.³⁵ In addition, the IP must be regarded as independent from the interests of those bringing cases before it. The latter issue has in general not been considered controversial in relation to the IP, and will not be dealt with separately in the following.³⁶

When it comes to determining the degree of independence of a dispute settlement body, Keohane et al. emphasize the following:

The extent to which members of an international tribunal are independent reflects the extent to which they can free themselves from at least three categories of institutional constraint: Selection and tenure, legal discretion, and control over material and human resources.³⁷

Here, we will assess these three elements: selection and tenure of panel members, the IP's control over material and human resources, and the IP's power to interpret its mandate. The IP's function with regard to interpretation of the OPPs will be discussed separately below.

1) Selection and tenure of panel members: Keohane et al. regard the selection and tenure of panel members as the 'most important criterion' for determining the degree of independence of international tribunals.³⁸ The IP members are nominated by the President of the World Bank subsequent to a process where the position has been openly announced and a selection committee has recommended two or three candidates. Panel members are appointed by the

³⁴ See Article V, section 5 of the Articles of Agreement of the International Bank for Reconstruction and Development (IBRD). Keohane et al. (*supra* note 5) focus on the independence of the dispute settlement organ from state interests; see pp. 458–459.

³⁵ See Article V sections 2 and 4 of the Articles of Agreement of the IBRD.

³⁶ The process pursued by the IP has several similarities to an 'inquisitorial' system in the sense that the IP takes on the primary responsibility of ensuring that the case is sufficiently prepared with regard to facts and legal arguments. We may thus question the independence of the IP in relation to the requesters, partly as a consequence of the fact that requesters may need help to formulate their requests, partly as a result of the ways in which the IP conducts its investigations through direct on-site communications with the affected people, and partly as a consequence of subsequent direct contact with affected people in the follow-up processes.

³⁷ Keohane et al., *supra* note 5, p. 460.

³⁸ *Ibid.*

Board of Executive Directors.³⁹ It can be argued that when the President, who is the head of the Management of the World Bank,⁴⁰ plays a role in this selection, the independence of the IP is significantly reduced. This concern is to some extent accommodated by establishing a selection committee and by requiring the President to consult with the Executive Directors before nominating members to the panel. Moreover, former employees of the World Bank cannot serve on the IP until two years after their service has ended.⁴¹ In addition, the IP chooses its Chairperson, who is to work on a full-time basis.⁴² The relatively long terms for which the panel members are elected, five years, the rule that members may not be re-elected or subsequently be employed by the World Bank, the requirement that panel members shall be selected ‘on the basis of their ability to deal thoroughly and fairly with the requests brought to them, their integrity and their independence from the Bank's Management’, and the rule that panel members can be removed only by decision of the Board of Executive Directors for cause⁴³ also contribute to the independence of the IP. On the other hand, panel members are required to be loyal to the World Bank in the same way as ordinary employees, and their salaries are determined by the Board upon recommendation by the President.⁴⁴

There is no strict requirement concerning the nationality or professional background of panel members, although most members have come from the countries.⁴⁵ So far, only one out of twelve members, Edith Brown Weiss, has had a background in international law. The IP's Executive Secretaries have both had a background in international law. The IP's Executive Secretaries are selected by the President of the World Bank.⁴⁶

Against this background, we can conclude that the IP has a certain degree of formal and real independence from the World Bank's Management. The IP is somewhat more dependent on the Executive Directors, but the Executive Directors are unlikely to take advantage of the

³⁹ Para. 2 of the Resolution.

⁴⁰ See Article 5, section 5 of the Articles of Agreement of the IBRD.

⁴¹ Para. 5 of the Resolution.

⁴² *Ibid.* paras. 7 and 9.

⁴³ *Ibid.* paras. 3, 10 i.f., 4 and 8 respectively. International tribunals normally allow judges to be re-elected, and there are generally no restrictions on the employment of retired judges.

⁴⁴ *Ibid.* para. 10.

⁴⁵ The distribution has been as follows (including current panel members): four from Western Europe, three from North America, two from Asia, two from Latin America, and one from Africa.

⁴⁶ Resolution para. 11. Both Executive Secretaries have been from the USA.

dependence in practice, since they are unlikely to reach consensus to restrict the independence of panel members. The dependence of the IP on its Executive Secretary for advice on legal matters is, however, a cause for concern in light of the link between this person and the President and Management of the World Bank.

2) *Control over material and human resources*: As emphasized by Keohane et al., control over material and human resources influences the ability of tribunals to ‘process their caseloads promptly and effectively’.⁴⁷ Given the strict deadlines established for the IP’s process,⁴⁸ access to sufficient resources is essential to its ability to produce high-quality reports. It is also important for the extent to which the IP will be able to attract cases and make itself available to potential requesters.

There are two main aspects to the issue of control over material and human resources: the availability of such resources, and the freedom to decide on the use of the resources. As to the availability of resources, para. 11 of the Resolution establishing the IP states: ‘The Panel shall be given such budgetary resources as shall be sufficient to carry out its activities.’ The budget for the first three years was set at USD 1.5 mill. per year, and the IP’s expenditures were ‘each year about one-third under budget’.⁴⁹ The budget has since more than doubled in size to USD 3.5 mill. for 2010–2011. Starting with the 2005–2006 budget, expenditures have regularly exceeded budgets.⁵⁰ In recent years, the annual reports of the IP have contained no separate budgetary comments. Despite the emphasis in the early years on the need for a flexible budget, the actual expenditures of the IP seem stable and predictable. These developments might indicate that, despite a significant increase, resources available to the IP have become scarcer in recent years. However, according to the IP: ‘In recent years, because of a particularly high workload, the Panel has requested and received supplementary contingency funding as needed’.⁵¹

⁴⁷ Keohane et al., *supra* note 5, p. 462.

⁴⁸ See BP 17.55.

⁴⁹ The Inspection Panel, *Annual Report 1996–97*, p. 21.

⁵⁰ See annual reports, starting with the *Annual Report 2005–2006*.

⁵¹ The World Bank Inspection Panel, *Accountability at the World Bank. The Inspection Panel at 15 Years* (2009) p. 19.

The materials studied, which has been limited to the annual reports of the IP, indicate that there are no significant concerns regarding the freedom of the IP to decide on its use of available resources. On the contrary, the IP itself has stated: ‘the Panel ... maintains complete and independent control over its budget and resource decisions in the discharge of its functions, including the conduct of investigations, hiring of staff and expert consultants, and other matters.’⁵² The staff serving the IP has been organized as a secretariat separate from the staff of the Management and the Executive Directors.

In sum, the IP has significant control over material and human resources, and that contributes to its independence. On the other hand, this independence depends on the decisions by the Management and the Board.

3) *Power to interpret the IP’s mandate:* The original mandate of the IP was flexible, leaving many issues for future clarification. During the early years, the IP saw itself as the primary interpreter of the Resolution. This was in practice accepted by the Management and the Board of Executive Directors. They abstained from instructing the IP in specific cases. On two occasions, however, differences in opinion that emerged between the IP and the Management led the Board to specify the mandate of the IP. The role of the Board was strengthened through the 1996 and 1999 Clarifications, as well as through the adoption of Bank Procedure (BP) 17.55 in 1999.⁵³ One example is paras. 13 and 14 of the 1999 Clarifications which specify the content of the IP’s reports to the Board, and how the IP is to assess the adverse effects of non-compliance.⁵⁴ Moreover, according to para. 10 of the 1999 Clarification: ‘Issues of interpretation of the Resolution will be cleared with the Board.’⁵⁵

⁵² *Ibid.*

⁵³ See <http://go.worldbank.org/UX9BT3WJ70>.

⁵⁴ The IP has commented these Clarifications as follows: ‘The question of whether there is harm and how such harm can be corrected appear to have become less important.’ See The World Bank Inspection Panel, *Accountability at the World Bank: The Inspection Panel 10 Years On* (2003), p. 13.

⁵⁵ See also the 1996 Clarifications which made clear that: ‘In applying the Resolution to specific cases, the Panel will apply it as it understands it, subject to the Board’s review.’

The subsequent practice of the IP and the Board of Executive Directors indicates that the latter will intervene only if it explicitly disagrees with the approach of the IP.⁵⁶ Hence, despite the seemingly clear obligation for the IP to consult with the Executive Directors in interpreting the Resolution, the IP has not openly undertaken such consultations in individual cases. The independence of the IP in this respect was underlined in the joint statement of the Chairperson of the IP and the Senior Vice President and General Counsel of the World Bank concerning the competence of the IP to investigate projects undertaken in the context of the ‘country systems strategy’ of the World Bank.⁵⁷

4) *Concluding remarks:* The IP enjoys a relatively high degree of independence from the World Bank Management. Of particular interest are the numerous rules and mechanisms established to ensure its independence. However, some concerns remain, in particular as regards the relationship between the IP and the President of the World Bank. Formally, the IP is less independent of the Board of Executive Directors, and countries have maintained significant control over the IP through their representatives. In practice, however, the Board has not intervened beyond its dealings with cases from the IP after the adoption of the 1999 Clarification.

3.3 The IP’s interpretation of OPPs

To what extent can the IP independently determine whether there is compliance with the OPPs of the World Bank? And how does it approach questions of interpretation that may arise in this context? These questions, which are essential to consider when determining the extent to which the IP contributes to a ‘legalization’ of the OPPs, will be taken up in light of the IP’s

⁵⁶ There are several cases illustrating this development, where the Management and the IP held strongly conflicting views regarding the acceptability of the requests, see, *inter alia*, *China: Western Poverty Reduction Project* (request no. 16, 1999) and *Uganda: Third Power Project, Fourth Power Project, and proposed Bujagali Hydropower Project* (request no. 24, 2001). In the latter case, the World Bank provided only a guarantee to the project, and did not issue a loan. The Management argued that the IP could not deal with a case concerning private projects in which the World Bank was not a principal actor. The IP argued that its competence was broad, and that it could address any case that the Bank was involved in according to the 1996 Clarification. This understanding of the Clarification was accepted by the Executive Directors, see paras. 40–42 of the investigation report, and The Inspection Panel, *Annual Report 2001–2002*, pp. 8–17. One recent case is the *Papua New Guinea: Smallholder Agriculture Development Project* (request no. 62), see Management report paras. 22–25. The issue raised here by the Management was not commented upon in the press release from the Board.

⁵⁷ See The Inspection Panel, *Annual Report 2003–2004*, p. 68.

procedures for dealing with a case, as well as the practice of the IP, the Management and the Board of Executive Directors. The latter is of particular interest when we seek to determine the extent to which the decisions of the IP are final or may be set aside or disregarded by the Management and the Board.

In the following, we explore three main aspects of the practice of these institutions: 1) the extent to which the IP can determine whether there is compliance with the OPPs based on an independent interpretation of these rules, 2) the extent to which the IP enjoys discretion when determining the content of the OPPs, and 3) the extent to which the IP may and does take into account a broad range of interpretative arguments when clarifying the OPPs in question.

1) Independent interpretation and application of the OPPs: The IP interprets the OPPs in two contexts: when determining whether to recommend investigation, and in its final report. The eligibility phase of an IP case is concluded by the Board's decision on whether to proceed with an investigation. According to para. 19 of the Resolution, this decision is to be based on the IP's examination of whether the case meets the conditions for investigation and on the basis of the IP's recommendation.⁵⁸ The Board rejected investigation in four cases between 1995 and 1998, despite recommendations by the IP that they be investigated.⁵⁹ Common to these cases was that the Management had negotiated action plans directly with the borrowing country, and presented the plans to the Board when it considered the IP's recommendations. The decisions of the Board in these cases were controversial.⁶⁰ Consequently, in the 1999 Clarification the Board addressed the general issue of how to proceed with such cases, underscoring the independence of the IP when determining whether the conditions for making complaints are met. This Clarification indicates that the Board will review the IP's

⁵⁸ See also paras. 30–39 of the IP's Operating Procedure.

⁵⁹ See *Brazil: Rondônia Natural Resources Management Project* (request no. 4, 1995); *Argentina/Paraguay: Yacyretá Hydroelectric Project* (request no. 7, 1996); *Brazil: Itaparica Resettlement and Irrigation Project* (request no. 9, 1997); and *India: Ecodevelopment Project* (request no. 11, 1998). It can be noted that the IP nevertheless conducted a review in the first two cases, and concluded that there had been non-compliance with the operational policies and procedures.

⁶⁰ See The World Bank, *Accountability at the World Bank. The Inspection Panel 10 Years On* (2003) pp. 62–63, concerning *Argentina/Paraguay: Yacyretá Hydroelectric Project* (request no. 7, 1996). See also Shihata, *supra* note 3, pp. 174–175. There was also disagreement between the Management and the IP with regard to the competence to determine whether the complainants fulfilled the requirements for submitting complaints, see Shihata p. 183.

assessments only to a limited extent.⁶¹ The role of determining whether the investigation may proceed is thus shared between the IP and the Board, with increased emphasis on the independence of the IP. Subsequently, the Board has followed the recommendations of the IP with regard to investigation in all cases. As stated in the Annual Reports of the IP, the Board in general accepts such recommendations of the IP on a ‘non-objection basis’.⁶²

In recent cases there have been signs that the Management is increasingly taking initiatives that lead to postponement of decisions on whether to proceed with investigations.⁶³ In one case in 2009, a press release stated that ‘Board members welcomed this constructive approach by the Inspection Panel and Bank Management’.⁶⁴ This development indicates that the IP may be inclined to accept a more informal process in which there will be increased emphasis on resolving the specific concerns raised through dialogue with the Management, the host country and the requesters, thus avoiding full investigations. While such an approach may benefit the interest of resolving issues in an efficient and informal manner, there is also the danger that it might harm the interests of the requesters, the general interest in transparency and accountability, and the long-term legal status and integrity of the OPPs. From one perspective, this development could indicate decreased independence of the IP due to pressure from the Management. From another perspective, it might indicate that the IP has strengthened its position vis-à-vis the Management, and is currently of the opinion that it can more effectively ensure compliance with the OPPs through informal processes. As yet it is too early to draw any firm conclusions in this respect.

⁶¹ See paras. 6, 7 and 9 of the 1999 Clarification.

⁶² See, *inter alia*, The Inspection Panel, *Annual Report 2003–2004* p. 38, request no. 23: ‘The Board approved the Panel’s recommendation on a non-objection basis’. See also request no. 26 p. 45, request no. 27 p. 52, and The Inspection Panel, *Annual Report 2004–2005*, requests nos. 32 and 33 p. 36, request no. 31 p. 40 and request no. 26 p. 42.

⁶³ See requests nos. 74, 69, 67, 66 and 64, where matters were resolved during the eligibility phase.

⁶⁴ Press release 17 September 2009, *World Bank Board Discusses Inspection Panel Eligibility Report for Institutional Reform Program for the Yemen Arab Republic*, http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/PR_English_Eligibility.pdf. One case in which the decision on eligibility was postponed for eight months, where the result was that an investigation was carried out, is *Nigeria: West African Gas Pipeline Project* (request no. 44, 2004); see The Inspection Panel, *Annual Report 2008–2009*, p. 133.

The tasks of the IP when interpreting the OPPs during an investigation follow from para. 12 of the Resolution. Here it is stated that the IP is to determine whether there is ‘a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank ... provided in all cases that such failure has had, or threatens to have, a material adverse effect.’⁶⁵ The IP has been faced with a broad range of questions concerning the legal nature and the normative content of the OPPs. The *China: Western Poverty Reduction Project case* was decided after the 1999 Clarification, and has had great significance for the subsequent practice of the IP.⁶⁶ Even if the Management did not fully agree with the opinion of the IP in that specific case,⁶⁷ the subsequent decisions in the case⁶⁸ and subsequent practice of the Board and the Management indicate that they have accepted the position of independence taken by the IP.

The findings of the IP can be classified into one of the following three categories:

- a) compliance with the OPPs
- b) non-compliance with the OPPs, and
- c) expression of concern with the approach of the project and advice on how to proceed.⁶⁹

One basic feature of a judicial organ is that it concludes on whether there is compliance or non-compliance with the relevant rules. It can be argued that the more an organ produces findings of category c), and the less it makes clear conclusions in terms of categories a) and b), the less ‘judicial’ and the more ‘advisory’ it is. The extent to which the IP gives clear

⁶⁵ See also Chapter 1 of the Inspection Panel Operational Procedure.

⁶⁶ The World Bank Inspection Panel, *Accountability at the World Bank: The Inspection Panel 10 Years On* (2003) pp. 69–79.

⁶⁷ See *Management Report and Recommendation in Response to the Inspection Panel Investigation Report. China: Western Poverty Reduction Project Qinghai Component*, paras. 20–21, and *Country Focus and Safeguard Policies: Institutional Issues of June 12, 2000*, attached to the report, in particular paras. 5, 11, 23, 25, 43 and 47–49.

⁶⁸ See The Inspection Panel, *Annual Report 1999–2000* p. 29: ‘In an unprecedented move, the Board agreed that no work would be done and no funds disbursed for the \$40 million Qinghai component of the Project until it had decided on the results of “any review by the independent Inspection Panel.”’

⁶⁹ An illustrative case is *Colombia: Cartagena Water Supply, Sewerage and Environmental Management Project* (request no. 31, 2004). For a conclusion that there was compliance, see the Investigation Report paras. 143–147, for a conclusion on non-compliance, see the Investigation Report paras. 140–142, and for statements expressing concern and advice, see the Investigation Report paras. 133–139.

conclusions concerning compliance is thus an important factor when assessing its judicial nature. The practice of the IP shows that it frequently comes to clear conclusions concerning compliance with the OPPs. Thus far, in all cases in which the IP has issued investigation reports, it has concluded that at least some of the acts or omissions of the Management have been in non-compliance with the OPPs.⁷⁰ We cannot discern any specific tendency in the practice of the IP to substitute expressions of concern for conclusions concerning compliance.

In principle, and given the characteristics of the OPPs as discussed in section 2, the IP cannot fulfil its mandate without interpreting the relevant provisions of the OPPs. Paragraph 3 of the 1999 Clarification states that the IP ‘may independently agree or disagree, totally or partially, with Management’s position and will proceed accordingly’. An analysis of the findings of the IP shows that the IP interprets the OPPs independently from the views held by the Management,⁷¹ thus contributing independently to the interpretation of the OPPs. In cases of disagreement, it is up to the Board to resolve disagreements between the IP and Management.⁷² The IP thus depends on the Board to get final acceptance of its interpretation should Management disagree with its conclusions. An analysis of the official responses of Management to the IP’s investigation reports shows that Management relatively frequently indicates that it disagrees with the IP. While most such disagreement concerns the facts of the cases, there have been instances where the disagreement more or less explicitly concerned interpretation of the OPPs.⁷³ The practice of the IP confirms that it regards it as its right and

⁷⁰ This statement concerns the 26 investigation reports that had been issued by the IP by April 2012, as well as the two cases (requests nos. 4 and 7) in which the IP has issued ‘reviews’.

⁷¹ For an example, see *Management Report and Recommendation in Response to the Inspection Panel Investigation Report. China: Western Poverty Reduction Project Qinghai Component*, part IV, and *Background Paper* of 12 June 2000, attached to the Report, paras. 5 ff., in particular paras. 45 and 64–65 (request no. 16, 1999). The Board supported the IP: ‘The Board of Executive Directors met on 6–7 July 2000 to consider the Panel’s Investigation Report and Management’s Report and Recommendation. The Board, despite support for the actions proposed by Bank Management, could not agree to support these recommendations without further Board review and approval after the proposed studies were completed. Therefore, the Board voted against approving Management’s recommendations.’ The Inspection Panel, *Annual Report 1999–2000* p. 30.

⁷² One example is *Albania: Integrated Coastal Zone Management and Clean-Up Project* (request nos. 47/48) paras. 271–276.

⁷³ In addition to the above-mentioned *China: Western Poverty Reduction Project Qinghai Component* (request no. 16), examples include *Chad: Petroleum Development and Pipeline Project, Management of the Petroleum Economy Project, and Petroleum Sector Management Capacity Building Project* (request no. 22) Management report pp. 22, 25 and 25–26; *Uganda: Third Power Project, Fourth Power Project, and proposed Bujagali*

duty to interpret the OPPs independently from the views of the Management.⁷⁴ Moreover, the Board has on some occasions expressed support for the IP's approaches, and thus strengthened its independence from Management.⁷⁵

A third issue concern legal advice. The Resolution establishes a procedure whereby the IP 'shall seek the advice of the Bank's Legal Department on matters related to the Bank's rights and obligations with respect to the request under consideration.'⁷⁶ According to para. 62 of the IP's Operating Procedure: 'Any such advice will be included as an attachment to the Panel's recommendation and/or Report to the Executive Directors.'⁷⁷ It can be asked whether the 'rights and obligations' refer only to 'external' rights and obligations of relevance to the project in question, such as agreements with the borrowing country or other third parties, or also extend to the OPPs. In light of the consistent reference to OPPs elsewhere in the Resolution, and in light of the IP's practice of not explicitly consulting the Legal Department on interpretation of the OPPs, as well as the General Counsel's response to a request for a legal opinion in the *Honduras: Land Administration Project* case,⁷⁸ the reference to the 'Bank's rights and obligations' must be read as pertaining only to the 'external' rights and obligations of the World Bank. Indeed, the IP has stated that to seek or receive advice from

Hydropower Project (request no. 24) Management report pp. 16–17, 24–25 and 27; and *Papua New Guinea: Smallholder Agriculture Development Project* (request no. 62) Management report paras. 26–30.

⁷⁴ Examples include *India: Coal Sector Environmental and Social Mitigation Project and Coal Sector Rehabilitation Project* (request no. 23) paras. 213–235; *India: Mumbai Urban Transport Project* (requests nos. 32 and 33) paras. 638–640; and *Cambodia: Forest Concession Management and Control Pilot Project* (request no. 36) paras. 268–272.

⁷⁵ For recent examples, see *Uganda: Private Power Generation Project* (request no. 44) and *Albania: Integrated Coastal Zone Management and Clean-Up Project* (requests nos. 47 and 48) in The Inspection Panel, *Annual Report 2008–2009* pp. 143 and 153 respectively, as well as News Release No. 2008/049/AFR. See also *Democratic Republic of Congo: Transitional Support for Economic Recovery Credit Operation (TSERO) and Emergency Economic and Social Reunification Support Project (EESRSP)* (request no. 37), News Release No. 2008/188/AFR.

⁷⁶ Para. 15 of the Resolution. While para. 10 of the 1999 Clarification states that: 'Issues of interpretation of the Resolution will be cleared with the Board', there is no similar obligation concerning issues of interpretation of the OPPs.

⁷⁷ Examples of such legal opinions can be found in *Uganda: Third Power Project, Fourth Power Project, and proposed Bujagali Hydropower Project* (request no. 24) para. 152 and Annex 1; and *Honduras: Land Administration Project* (request no. 38) paras. 226–230 and Annexes B and C.

⁷⁸ Request no. 38, paras. 226–242 and Annex C.

the Bank's Legal Department 'would undermine the independence of the Panel's work, not least because the General Counsel of the World Bank Group is a member of the committee responsible for certifying, on behalf of Management, that a project is in compliance with relevant operational policies and procedures.'⁷⁹

As the Legal Department is frequently involved during preparation and management of projects and that it shall 'clear the management response' to the requests for inspection,⁸⁰ it is of interest to assess how the IP relates to the advice given by the Legal Department.⁸¹ There are few examples of explicit discussion of opinions by the Legal Department in the investigation reports of the IP. In reports where the IP has discussed opinions of the Legal Department, the IP has on rare occasions expressed views that have been critical to and independent of the opinions of the Legal Department.⁸² During the review of the Resolution in 1996, several NGOs argued that the IP should be invested with its own legal office independent from the Legal Department of the World Bank, in order to ensure more independence from the World Bank.⁸³ The proposal failed to gain sufficient support. In any case, neither the President of the World Bank nor the Management can instruct the Legal Department. Finally, as noted above, the IP has so far had access to legal advice through its Executive Secretaries.

Against this background, we may conclude that in principle the IP enjoys significant independence from the institutions of the World Bank when interpreting the OPPs. However, given the lack of legal expertise among members of the panel and the IP's perception of itself

⁷⁹ The World Bank Inspection Panel, *Accountability at the World Bank. The Inspection Panel at 15 Years* (2009) p. 19.

⁸⁰ BP 17.55 para. 7.

⁸¹ The role of the Advisory Counsel, under which the Legal Department is established, is set out in Article V, Section 6(a) of the Articles of Agreement of the IBRD: 'The Counsel shall advise the Bank on matters of general policy.' See also Ibrahim Shihata, The Role of the World Bank's General Counsel, in *Proceedings of the 91st Annual Meeting of the American Society of International Law*, 1997, pp. 214–222.

⁸² See *India: NTPC Power Generation Project* (request no. 10) paras. 87 and 89; *China: Western Poverty Reduction Project* (request no. 16) paras. 300–301, 326–327, 332 and 335–340; *Uganda: Third Power Project, Fourth Power Project, and proposed Bujagali Hydropower Project* (request no. 24) para. 156; and *Honduras: Land Administration Project* (request no. 38) paras. 210, 221, 240 and 254–258.

⁸³ Shihata *supra* note 3, pp. 171–172.

as a fact-finding body, it may be asked whether the IP is in fact adequately equipped to fulfil such interpretative tasks.

2) *Degree of interpretative discretion*: Keohane et al. argue that: ‘Other things being equal, the wider the range of considerations the body can legitimately consider and the greater the uncertainty concerning the proper interpretation or norm in a given case, the more potential legal independence it possesses.’⁸⁴ As regards the IP, it is of interest to ask to what extent the OPPs leave interpretative discretion to the IP. The OPPs of primary interest here are those that protect the interests of potential requesters. Such OPPs are found mostly among the Operational Policies (OPs), as opposed to Bank Procedures (BPs), and include generally those related to sustainable development (environmental, social and economic aspects), as well as those related to conflict situations (e.g. OPs 2.30 and 7.30).

The OPs are not formulated in terms of rights of affected parties. They set out the Board’s expectations as to how the Management will act to fulfil the rules and objectives of the World Bank. Some of the OPs set out detailed and technical requirements, while others are formulated in general terms. The degree of interpretative discretion thus varies widely within and between OPs. In principle, the degree of interpretative discretion does not differ fundamentally from that which can be found in treaties. In practice, as will be further explored below, the IP reports indicate that the Panel is only rarely confronted with difficult interpretative issues. This is not necessarily because few interpretative issues arise, but might be due to a lack of ability or willingness to explicitly raise and deal with such issues. The lack of legal expertise among IP members is important in this respect. The legal qualifications of the IP Executive Secretary may to some extent compensate, but the Secretary’s contribution in this respect is difficult to trace in the approach to interpretative issues in IP reports.

3) *Resort to interpretative arguments*: The IP has adopted the following general approach in its reports: it quotes the relevant OPPs, it presents the views of the requesters and the Management, it sets out the relevant facts as established by the IP, and it concludes on compliance. In addition, the IP has in recent reports⁸⁵ included a final chapter in which it

⁸⁴ Keohane et al., *supra* note 5, p. 461.

⁸⁵ See *Panama: Land Administration Project* (requests nos. 53 and 56).

discusses ‘systemic issues’ related to the Bank’s compliance with OPPs in light of its conclusions in the case at hand.

During the last years, the IP’s reports have very rarely explicitly identified interpretative issues. In general, the IP has restricted itself to quoting applicable parts of the OPPs. From an analytical perspective, the conclusions of the IP regarding compliance are often weakly linked to the OPPs. Interpretative issues can be raised by the requesters, the Management, or the IP. The lack of focus on interpretative issues indicates that these actors do not have the necessary interest or ability to raise such issues. The requesters normally have limited, if any, access to legal advice. The responses of the Management can draw on advice provided by the Legal Department and are thus more likely to give rise to issues of interpretation. However, the IP often refrains from analysing and discussing such issues even in cases of responses from the Management.

In some cases, the IP discusses interpretative issues in the chapters on systemic issues. These discussions do not represent part of the analyses leading to conclusions regarding compliance with OPPs. They can be classified as *obiter dicta*, representing recommendations of the IP to Management indicating how the IP would prefer the OPPs to be applied in the future.⁸⁶

As the IP rarely raises interpretative issues, there are few examples of its use of interpretative materials. The IP has not referred to general rules on treaty interpretation or the practice of the International Court of Justice. While its approach to interpretative methodology is not based on the methodology developed in international law, there are some noteworthy similarities.

The reports contain some references to the object and purpose of the OPPs,⁸⁷ as well as to their context.⁸⁸ In these respects, the interpretative methodology of the IP has similarities with the methodology outlined in Article 31 of the Vienna Convention on the Law of Treaties (1969). The context includes other OPPs than the one the compliance discussion is based on, as well as references to the Articles of Agreement of the International Bank for Reconstruction and Development, the mandate of the IP, guidelines and handbooks. The

⁸⁶ See *Papua New Guinea: Smallholder Agriculture Development Project* (request no. 62) paras. 532–547.

⁸⁷ *Ibid.*, para. 525; *India: Mumbai Urban Transport Project* (requests nos. 32 and 33) para. 640

⁸⁸ *Papua New Guinea: Smallholder Agriculture Development Project* (request no. 62) para. 233, 352; *Cambodia: Land Management and Administration Project* (request no. 60) para. 145

context can also be extended to treaties, customary international law and general principles of law. As noted above, there are few references to such external norms in the OPPs, and most of the discussion of such norms in IP reports is related to such references.⁸⁹

Some cases discuss external norms that are unrelated to references to such norms in the OPPs.⁹⁰ One contentious issue has been how the World Bank is to relate to international human rights. On the one hand, it can be argued that the World Bank shall refrain from intervening in the policy of the borrowing states, according to Article IV section 10 of the Articles of Agreement of the International Bank for Reconstruction and Development. Hence, making compliance with certain human rights standards a condition for loans could arguably be in violation of this provision. On the other hand, many commentators and NGOs have argued that the World Bank not only has a right but also a duty to take into account international human rights standards.⁹¹

In the *Chad: Petroleum Development and Pipeline Project case*, the IP had the opportunity to address the relationship between human rights and OPPs.⁹² The Management argued that:

The Bank is concerned about violations of human rights in Chad as elsewhere while respecting the Bank's Articles of Agreement which require the Bank to focus on economic considerations and not on political or other non-economic influences as the basis for its decisions. In evaluating the economic aspects of any project, human rights issues may be relevant to the Bank's work if they may have a significant direct economic effect on the project.⁹³

⁸⁹ *Papua New Guinea: Smallholder Agriculture Development Project* (request no. 62) para. 155; *Pakistan: National Drainage Program Project* (request no. 34) paras. 347–357; *Colombia: Cartagena Water Supply, Sewerage and Environmental Management Project* (request no. 31) paras. 175–180.

⁹⁰ *Papua New Guinea: Smallholder Agriculture Development Project* (request no. 62), para. 334; *Chad: Petroleum Development and Pipeline Project, Management of the Petroleum Economy Project, and Petroleum Sector Management Capacity Building Project* (request no. 22) paras. 210–217

⁹¹ See, *inter alia*, Shihata *supra* note 3, p. 210 and Udall *supra* note 3, p. 65.

⁹² See *Chad: Petroleum Development and Pipeline Project, Management of the Petroleum Economy Project, and Petroleum Sector Management Capacity Building Project* (request no. 22) paras. 210–217.

⁹³ *Ibid.* para. 212.

The IP stated that it ‘appreciates the fact that the frequently imprecise concepts of ‘governance’ and ‘human rights’ acquire special significance in the context of the Bank’s mandate and operations.’ It concluded that it ‘felt obliged to examine whether the issues of proper governance or human rights violations in Chad were such as to impede the implementation of the Project in a manner compatible with the Bank’s policies.’⁹⁴ Thus, the IP limited its examination of human rights issues to the direct relevance for compliance with the OPPs. It did not comment on whether the OPPs should be interpreted in light of human rights standards or be applied in order to ensure achievement of such standards.⁹⁵ In a subsequent case, the *Honduras: Land Administration Project case*, the IP brought the issue one step further in concluding that:

The Panel notes that it is a matter for Honduras to implement the obligations of an international agreement to which it is party and does not comment on this matter. However, the Panel is concerned that the Bank, consistently with OMS 2.20, did not adequately consider whether the proposed Project plan and its implementation would be consistent with ILO Convention No. 169.⁹⁶

This statement indicates the willingness of the IP to interpret OPPs in light of treaties in cases where it can be argued that such treaties have implicitly been identified as relevant context for the OPPs.⁹⁷

On occasion, the IP has also referred to other interpretative arguments, including previous cases of the IP,⁹⁸ soft law instruments issued by IGOs or NGOs⁹⁹, and literature¹⁰⁰. Such

⁹⁴ *Ibid.* paras. 214 and 215.

⁹⁵ See also The World Bank Inspection Panel, *Accountability at the World Bank. The Inspection Panel at 15 Years* (2009) p. xi and *Remarks of the Chairman of the Inspection Panel to the Board of Executive Directors on the Chad–Cameroon Pipeline Projects*, 12 September 2002, para. 8.

⁹⁶ *Honduras: Land Administration Project* (request no. 38) para. 258. See also the statement in para. 256.

⁹⁷ See also Steven Herz and Anne Perrault, *Bringing Human Rights Claims to the World Bank Inspection Panel*, October 2009, available at <http://www.bicusa.org/en/Page.Publications.aspx>.

⁹⁸ *Papua New Guinea: Smallholder Agriculture Development Project* (request no. 62) para. 527, 530; *Peru: Lima Urban Transport Project* (request no. 61) para. 216

⁹⁹ *Papua New Guinea: Smallholder Agriculture Development Project* (request no. 62), para. 357

¹⁰⁰ *Ibid.*, para. 233.

arguments are scarce, however, and do not seem to have been applied in any systematic manner. In this sense, the IP differs from international tribunals and compliance mechanisms.

4) *Concluding remarks:* The IP enjoys extensive independence from the institutions of the World Bank when interpreting the OPPs. Moreover, while some of the OPPs are technical and detailed, the extent of interpretative discretion is significant under other OPPs. Despite a setting in which the IP thus enjoys important opportunities for interpreting and specifying OPPs, we find that the IP has made little use of such opportunities. This means that the reports of the IP remain unimportant sources of argument when determining the content of OPPs.

3.4 Compliance with IP findings

As illustrated by the *China: Western Poverty Reduction Project* case, the independence and judicial standing of the IP also depends on the willingness of other organs to accept and subsequently comply with its findings. In comparing the IP to international tribunals, we should recall that such tribunals to a significant degree depend on the subsequent willingness of states to comply with their findings. In general, few enforcement measures are available to international institutions for securing compliance with the findings of international tribunals.¹⁰¹ In this sense, then, international tribunals and compliance mechanisms have a high degree of ‘softness’ from a legal perspective.

The reports of the IP are followed up in several ways. The first step is the Management’s report on how it intends to follow up the investigation report.¹⁰² In addition, the Management frequently negotiates a revised action plan for the project with the borrowing country.¹⁰³ It may do so directly in response to the request, or as a follow-up to the IP’s report. The second

¹⁰¹ Examples of enforcement mechanisms that are available to tribunals include UN Security Council resolutions available to secure compliance with judgements of the International Court of Justice (see Art. 94.2 of the Charter of the United Nations) and the possibility of authorizing suspension of obligations to secure compliance with rulings under the World Trade Organization’s dispute settlement system (see Art. 22 of the Understanding on Rules and Procedures Governing the Settlement of Disputes).

¹⁰² See para. 23 of the Resolution: ‘Within six weeks from receiving the Panel’s findings, Management will submit to the Executive Directors for their consideration a report indicating its recommendations in response to such findings. The findings of the Panel and the actions completed during project preparation also will be discussed in the Staff Appraisal Report when the project is submitted to the Executive Directors for financing.’ See also paras. 15 and 16 of the 1999 Clarifications.

¹⁰³ See para. 15 of the 1999 Clarifications.

step is the Board of Executive Directors' discussion of the Management's report in light of the IP report.¹⁰⁴ A third step in some cases is the establishment of a process in which the Board asks the Management to provide additional reports on progress.¹⁰⁵ In addition, the Board may ask the IP to comment on the Management's progress in following up its recommendations.¹⁰⁶ Additionally, the IP has

... developed a practice of returning to the project site, after the Board decision, to meet with Requesters and explain the outcome of the investigation, Management's response and action plan, and the Board decision. Beginning with the Inspection of the Yacyretá Hydroelectric Project in 1996, the Panel has returned to the project sites of all claims to brief Requesters and meet with other interested stakeholders. During these meetings, the stakeholders gain a better understanding of the Panel's findings and Management's proposed action plans.¹⁰⁷

Finally, the Board of Executive Directors may suspend disbursement of funds to the project until the IP report has been followed up satisfactorily. This was done for the first time in the *China: Western Poverty Reduction Project case*. The Board decided that 'no work would be done and no funds disbursed for the \$40 million Qinghai component of the Project until it had decided on the results of 'any review by the independent Inspection Panel''.¹⁰⁸

While the Management generally accepts the findings of the IP, there have been several instances where it has objected to the IP conclusions.¹⁰⁹ In these cases the Board has tended to

¹⁰⁴ Information concerning the discussion of the Executive Directors can be found in the annual reports of the IP, and occasionally in separate press releases.

¹⁰⁵ As an example, see *India: Mumbai Urban Transport Project* (requests nos. 32 and 33) in which the Management has submitted five progress reports.

¹⁰⁶ As an example, see *Paraguay/Argentina: Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)* (request no. 26). Such follow-up can also include a request by the Executive Directors that the Panel return to project sites to monitor or provide follow-up fact-finding.

¹⁰⁷ The World Bank Inspection Panel, *Accountability at the World Bank. The Inspection Panel at 15 Years* (2009) p. xi.

¹⁰⁸ The Inspection Panel, *Annual Report 1999–2000* p. 29.

¹⁰⁹ See The Inspection Panel, *Annual Report 2005–2006* pp. 56–57 concerning *India: Mumbai Urban Transport Project* (requests nos. 32 and 33), and pp. 63–65 concerning *Cambodia: Forest Concession Management and*

accept the action plans presented by the Management despite the disagreement between the IP and the Management. However, where such disagreement is sufficiently serious, the Board is likely to establish follow-up procedures which provide the IP with the opportunity to assess Management's efforts to deal with the issues identified in the IP report.

In sum, the World Bank has put in place an elaborate and advanced system to ensure that the findings of the IP are followed up in practice. In particular, the subsequent contact between the IP and the requesters seems to be an effective, if resource-demanding, manner in which to follow up the cases. When compared to other dispute settlement and compliance mechanisms of international law, the procedures established for the IP rank among the most effective.

4. Concluding remarks

Section 2 above concluded that the external normative status of the World Bank's OPPs has remained unsettled. On the basis of an analysis of the OPPs and their related regulatory framework it can be argued both that they are binding and that they are non-binding in relation to third parties. The practice of the IP thus far has not contributed significantly to strengthening or clarifying the external normative status of the OPPs. The major reason seems to be the IP's lack of methodology regarding approaches to interpretative issues. First, there is the challenge that interpretative issues frequently remain unidentified in the reports of the IP. The IP focuses on clarifying the facts of the case, and its decisions on compliance often seem disconnected from the normative content of the OPPs. In this sense, the IP remains committed to its function as a 'fact-finding' body.¹¹⁰ Secondly, the categories of interpretative arguments used by the IP, and the extent to which such arguments are used, seem to be decided on an *ad hoc* basis. Such an approach prevents the IP from building a coherent body of case law that can serve to clarify the OPPs and strengthen their external normative status.

One main consequence of this situation is that the Board of Executive Directors maintains a high degree of control over the interpretation of the OPPs. We can, however, question whether such control is needed, given the Board's freedom to amend the OPPs should it disagree with interpretations developed by the IP.

Control Pilot Project (request no. 36); and *The Inspection Panel, Annual Report 2007–2007* pp. 48–50 concerning *Pakistan: National Drainage Program Project* (request no. 34).

¹¹⁰ See para. 12 of the 1999 Clarifications.

While there have been important efforts in recent years at strengthening the internal accountability of the World Bank, strengthening its external accountability presents additional challenges. As many actors, including the Management, countries, NGOs and private parties, are involved in World Bank projects, complex issues regarding the allocation of responsibility among these actors may arise. In addition, the OPPs have been drafted to be applied in the internal affairs of the World Bank, not as norms that define rights and duties in relation to third parties. Hence, it can be argued that the OPPs will need to be redrafted if they are to be accorded higher external normative status. Moreover, strengthened external accountability could increase the costs of World Bank projects, also in terms of administration and time. As alternative funding of projects may be available for any given project, World Bank funding may risk being replaced by other funding if overly burdensome conditions are attached to its funding. The World Bank must therefore strike a balance between external accountability and efficiency.