The World Bank Inspection Panel and the Development of International Law

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1 Introduction

When established in 1993, the World Bank Inspection Panel (WBIP or Panel) was a *novum*.[1] It was established by identical resolutions of the Boards of Executive Directors (Board) of the International Bank for Reconstruction and Development (IBRD) and of the International Development Association (IDA) (collectively referred to as the World Bank).[2] During the following years, other international

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[1] For some early writings on the WBIP see Bissell 1997; Bradlow 1994; Bradlow and Schlemmer-Schulte 1994; Hey 1997; Schlemmer-Shulte 1998; Shihata 1994. For a list including publications up to 2002 see http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/Bibliograpgy.pdf. Accessed 14 October 2011.

[2] The Boards of the IBRD and IDA adopted Resolution No. IBRD 93-10 and Resolution No. IDA 93-6 "The World Bank Inspection Panel" (22 September 1993), hereinafter the Resolution, available at http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,menuPK:64132057~pagePK:64130364~piPK:64132056~theSitePK:380794,00.html. Accessed 13 October 2011. All documents related to and cases considered by the WBIP are available from the above mentioned website.

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development banks (IDBs) followed suit and established similar accountability mechanisms.[3] The WBIP and other IDB-accountability mechanisms serve to hold IDBs to account and seek to enhance their legitimacy. The most innovative aspect of these mechanisms is that individuals and groups in society are in a position to trigger the procedure.

The focus of this chapter is on the changes that the WBIP has introduced to international law, to the law of international organizations in particular. This chapter highlights the most innovative legal aspect of the WBIP and IDB-accountability mechanisms in general: the legal- or rule-based relationship that they establish between an international organization on the one hand and individuals and groups in society on the other hand. This chapter concludes that it may be useful for purposes of analysis to conceptualize IDB-accountability mechanisms as procedures for administrative or quasi-judicial review.

This chapter also suggests that in assessing the contribution of courts to the development of international law, the question put to us by the editors of this volume, IDB-accountability mechanisms as well as other court-like bodies that are available at the international level merit inclusion, a suggestion that was welcomed by the editors. This, moreover, is a point pursued by Tullio Treves when he, together with others, developed first the research project on civil society, international courts and compliance bodies and subsequently the research project on non-compliance procedures in international environmental law.[4] Non-compliance procedures and IDB-accountability mechanisms differ from each other and from international court procedures and challenge classical international legal notions about dispute settlement.[5] However, such procedures also enrich the ways in which an increasing variety of international actors may seek to enhance compliance with international law.

This chapter proceeds as follows. Section 2 describes the procedure available at the WBIP. Section 3 presents a brief overview of the accountability mechanisms established by IDBs. Section 4 analyzes the WBIP and IDB-accountability mechanisms more in general in terms of international law. Section 5 concludes this chapter by assessing what the WBIP has contributed to the development of international law.

[3] Bradlow 2005 and Sect. 3 below.

[4] Treves et al. 2005, 2009. On the WBIP in Treves et al. 2005 see Boisson de Cahzournes 2005.

[5] See Treves 2005, 2009.

2 The Procedure of the World Bank Inspection Panel

The WBIP started its work in 1994 and its operations were reviewed by the Board in 1996 and 1999.[6] The Panel consists of three members who are appointed for 5-year non-renewable terms.[7] Panel members are appointed by the Board,[8] are officials of the Bank, owe loyalty to the Bank[9] and operate independently from Bank Management.[10]

The WBIP considers requests for inspection from two or more persons (affected party), or their local representative and exceptionally another representative.[11] An affected party "must demonstrate that its rights or interests have been or are likely to be directly affected by an act or omission of the Bank as a result of a failure of the Bank to follow its own operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank".[12] If an investigation is pursued, the Panel procedure proceeds in two stages: the eligibility phase and the investigation phase.

During the eligibility phase, the Panel first ascertains whether the request is not prima facie inadmissible, based on formal criteria.[13] It, thereafter, considers whether the request meets the other, more substantive, eligibility criteria listed in the Resolution. At this stage, the Panel ascertains if the alleged violations are serious, if the subject matter of the request has been raised with Bank Management and if the latter has failed to take steps to address the situation in accordance with Bank policies and procedures.[14] Within 21 days after receipt of notification of the request from the Panel, Bank Management must inform the Panel of its response to the request.[15] Thereafter, the Panel, within another 21 days, determines whether the request is eligible and makes a recommendation to the Board whether a full investigation should ensue.[16] If the Board approves a recommendation to engage in an investigation, the investigation phase starts.

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[6] Review of the resolution establishing the Inspection Panel 1996 Clarification of Certain Aspects of the Resolution (17 October 1996), hereinafter 1996 Review of the Resolution and 1999 Clarification of the Board's Second Review of the Inspection Panel (20 April 1999), hereinafter 1999 Clarification of the Second Review, both available at website mentioned *supra*, note 2.

[7] The Resolution, paras 2 and 3.

[8] The Resolution, para 2.

[9] The Resolution, para 10.

[10] The Resolution, para 4.

[11] The Resolution, para 12 and 1996 Review of the Resolutions, para 3. For an overview of the Panel procedure and its work see IBRD 2009.

[12] The Resolution, para 12.

[13] The Resolution, para 14.

[14] The Resolution, paras 12–13.

[15] The Resolution, para 18.

[16] The Resolution, para 19.

During the early years of the Panel's operation, Bank Management regularly interfered at this stage of the procedure with the aim of preventing an investigation from being conducted and the Board regularly rejected or limited recommendations for investigation because Executive Directors representing borrower States prevented the Board from reaching consensus, which is how the Board adopts decisions in practice.[17] This situation was considered in the 1999 Board Review. As a result, it was made explicit that Bank Management should no longer interfere with the work of the Panel and the Board decided that it would hence forward, if so recommended by the Panel, authorize investigations without considering the merits of the request.[18] Since then, all recommendations for investigation issued by the Panel have been approved by the Board.[19]

During the investigation phase, the Panel proceeds to a full investigation of the request. Thereafter, the Panel submits its findings and recommendations to the Board.[20] The Board considers the Panel's findings together with a response by Bank Management and decides on any action to be taken.[21]

The Panel may undertake site visits in the State concerned, subject to the consent of the borrowing State.[22] Such visits are in practice and as necessary carried out by Panel members during both the eligibility and investigation phase.

An affected party is informed within 2 weeks after the Board decides on a Panel recommendation on whether to proceed to a full investigation or on action to be taken pursuant to a full investigation.[23] Within the same period of time, the information is also made available to the public by placing relevant decisions and reports on the website of the Panel.[24]

The WBIP in determining whether the rights or interests of an affected party have been or are likely to be directly affected by an act or omission of the Bank bases its assessment on the so-called Operational Policies and Procedures (OP&P), that is Operational Policies, Bank Procedures, and Operational Directives of the Bank.[25] The OP&P include so-called safeguard policies, which address social and

[17] See Naudé Fourie 2009, pp. 187–190 and 297–301 on the Request of Inspection n. 4, Brazil: Rondônia Natural Resources Management Project (16 June 1995), where the Board did not approve the recommendation to proceed to a full investigation, and the Request of Inspection n. 10, India: NTPC Power Generation Project (1 May 1997), where the Board limited the nature of the investigation in terms of the time allowed for the investigation and by preventing a site visit.

[18] 1999 Clarification of the Second Review, paras 2 and 9.

[19] See IBRD 2009, pp. 26–28.

[20] The Resolution, para 22.

[21] The Resolution, para 23.

[22] The Resolution, para 21.

[23] The Resolution, paras 19 and 25.

[24] The Resolution, para 25.

[25] The Resolution, para 12. More generally on the relevance of OP&P and the impact of IDB-accountability mechanisms applying and interpreting them see Bradlow and Naudé Fourie 2011a.

environmental risks that may arise as a result of a project financed by the Bank.[26] Operational Directives have been largely replaced by Operational Policies and Bank Procedures, so-called OP&BP, which are internally binding on the Bank's staff.[27] The OP&P concern topics such as: involuntary resettlement, environmental assessment, natural habitats, indigenous peoples, development cooperation and conflict, water resources management, and pest management,[28] with the first four topics belonging to the category safeguard policies. OP&P are issued by senior Bank Management in accordance with policies approved by the Board and may be the subject of discussion in the Board.[29] More recently, new or significantly amended OP&Ps may also be subject to public consultation prior to their adoption.[30] While OP&P may reflect or be inspired by international law, they do not constitute a restatement of, for example, human rights law or international environmental law. This entails that the WBIP does not base its findings on international law in general, but on the norms and rules as contained in the OP&P. This situation, however, has not prevented the Panel from including in its considerations the deplorable state of human rights observance in the context in which a bank financed project was to be carried out.[31]

3 IDB-Accountability Mechanisms

As illustrated by the comprehensive study conducted by Bradlow in 2005,[32] the founding of the WBIP was followed by the establishment of similar mechanisms by other IDBs. IDBs that have established accountability mechanisms include the following.

- The Inter-American Development Bank (IDB), in 1994, established the Independent Investigation Mechanism and in February 2010 its successor, the Independent Consultation and Investigation Mechanism (ICIM).[33]

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[26] For the safeguard policies see http://go.worldbank.org/WTA1ODE7T0. Accessed 13 October 2011.

[27] Shihata 2000, p. 44.

[28] For the texts of OP&P see http://go.worldbank.org/DZDZ9038D0. Accessed 13 October 2011.

[29] Shihata 2000, pp. 41–43.

[30] See http://go.worldbank.org/3LO8WV1V80. Accessed 11 October 2011.

[31] Naudé Fourie 2009, pp. 261–263. See Request of Inspection n. 22, Chad: Petroleum Development & Pipeline Project (22 March 2001). Also see WB General Council's, Ana Palacio, 2006 statement acknowledging that human rights are an intrinsic part of the Bank's mission 'The Way Forward: Human rights and the World Bank' at http://go.worldbank.org/RR8FOU4RG0. Accessed 25 October 2011.

[32] Bradlow 2005, also see Bradlow and Naudé Fourie 2011b.

[33] www.iadb.org/en/mici/independent-consultation-and-investigation-mechanism-mici,1752.html. Accessed 24 October 2011.

- The International Finance Corporation and the Multilateral Investment Guarantee Agency, in 1999, established the office of the Compliance Advisor/Ombudsman (CAO).[34]
- The Asian Development Bank (ADB), in 2003, established the ADB Accountability Mechanism.[35]
- The European Bank for Reconstruction and Development, in 2004, established the Independent Recourse Mechanism and in May 2009 its successor, the Project Compliant Mechanism.[36]
- The African Development Bank (ADB), in 2006, established the Independent Review Mechanism (IRM).[37]

The mandates of the IDB-accountability mechanisms are not identical. Salient differences are, for example, whether the mechanism engages only in compliance review or also in problem solving and whether a single individual can submit a complaint. All IDB-accountability mechanisms, except for the WBIP, are explicitly mandated to engage in problem solving during the first stage of the procedure. The WBIP, however, in recent years, based on the experience of other IDB-accountability mechanism, informally has introduced problem solving during the eligibility phase.[38] A single individual may submit complaints to, for example the ADB's ICIM and the EBRD's PCM.[39] The WBIP, as the ADB's IRM, however, will not consider complaints involving a single individual.[40]

Despite these and other differences, I suggest that the IDB-accountability mechanisms share certain salient traits. These traits are as follows: (1) the competence to consider complaints submitted by individuals or groups in society against an IDB; (2) the standards for assessing the conduct complained of are provided by internal rules of the IDB; and (3) the accountability mechanism operates independently from IDB management organs and reports to IDB executive organs. In addition, it is worth noting that neither the standards of review employed or the outcome of the review processes are legally binding in terms of classical international law.

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[34] www.cao-ombudsman.org/about/. Accessed 24 October 2011.

[35] www.adb.org/Documents/Policies/ADB_Accountability_Mechanism/default.asp?p=policies. Accessed 24 October 2011.

[36] www.ebrd.com/pages/project/pcm/about.shtml. Accessed 24 October 2011.

[37] www.afdb.org/en/about-us/structure/independent-review-mechanism/. Accessed 24 October 2011.

[38] See IBRD 2009, pp. 51–55.

[39] Policy establishing the Independent Consultation and Investigation Mechanism (17 February 2010), para 28; Project Complaint Mechanism: Rules of Procedure (May 2009), para 2. See websites referred to supra n. 33 and n. 36, respectively.

[40] The Resolution, para 12 and the Independent Review Mechanism Operating Rules and Procedures (16 June 2010), para 4(a); see website referred to supra n. 37.

4 A New Legal Relationship and a New Normative System

With the establishment of the WBIP, a normative system beyond classical international law has emerged within the World Bank and, I suggest, in other IDBs. Within these systems, individuals and groups in society are entitled to hold an international organization to account for non-observance of its own internal rules. Within these normative systems, procedural rules apply—for the WBIP these are contained in the Resolution and in its Operating Procedure[41]—and substantive rules are applied and interpreted—for the WBIP the rules in the OP&P. Moreover, the OP&P are deemed to bind the individuals who are to secure their application—World Bank staff.

Why is the procedure provided by the WBIP, and other IDB-accountability mechanisms, difficult to define in terms of classical international law? I suggest, this is due to the absence of two elements that are determinative of classical international law: the State and State consent.

That the State, beyond the obligation to consult the borrower and the Executive Director representing the State concerned,[42] does not have a role carved out for it in the WBIP procedure is remarkable. In terms of classical international law, one would expect affected individuals and groups in society to be represented by their State at the international level or expect the State to act on the basis of its own right at that level, as when it exercises diplomatic protection. As the WBIP procedure illustrates, an entirely different procedure has been established: one in which affected parties—individuals or groups in society—hold the World Bank, to account. This procedure thereby establishes the independent responsibility of the World Bank vis-à-vis individuals and groups in society and creates a legal- or rule-based relationship between these two actors, which is independent from the State concerned. The normative content of this relationship is provided by the OP&P, which can be invoked by affected parties.

State consent is remote, if not absent, from the decision-making procedure applied for the adoption of the OP&P and the Resolution instituting the WBIP. States did not explicitly consent to the OP&P or to the Resolution establishing the WBIP. States instead consented to the Articles of Agreement of the IBRD and of IDA, adopted in 1945 and 1960, respectively, neither of which foresees the establishment of an accountability mechanism, such as the Panel. Instead, the Articles of Agreement provide that the Board of Governors, the supreme organ of the Bank, save for a few exceptions, may delegate its powers to the Executive Directors who are responsible for the general operations of the Bank and oversee

[41] For the WBIP Operating Procedure see http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20175161~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html. Accessed 24 October 2011.

[42] The Resolution, para 21.

Bank Management in conducting the ordinary business of the Bank.[43] It is within the general operations and ordinary business of the Bank that the Board and Bank Management take decisions that govern the operations of the Bank: decisions such as the OP&P and the Resolution establishing the WBIP.

As I have suggested elsewhere, this manner of proceeding might be conceptualized as States consenting to a process of normative development, instead of to a rule of international law or a set of rules of international law in the form of a treaty.[44] The latter is characteristic of classical international law and in this context State consent serves both to establish and legitimize the rule or treaty in question as a rule of international law.[45] When States consent to a process of normative development they instead agree to a decision-making procedure, in which they may or may not themselves be involved and which years after giving their consent may result in (unforeseen) decisions that apply to them.[46] In this situation, State consent does not create and provides a very weak basis for legitimizing the rules that emerge from the decision-making procedure. As a result, the legitimacy of the decision-making procedure that engendered the rules is questioned. In the case of the World Bank, this issue has arisen with developing States questioning the legitimacy of decision-making procedures of the Bank, especially because developed States hold the majority of votes.[47]

Some might argue that an individual State by subscribing to the content of the loan agreement governing the project, concluded between itself and the World Bank, consent to the rules in question. While formally, this may be a correct reflection of the legal situation. In practice at this stage, two legal-policy elements play a role, which undermine the legitimacy of the argument. First, States at this stage cannot amend or reject the OP&P or the WBIP-procedure and thus have no influence on the content of the rules that apply to them. Second, States at this stage may find themselves in a take-it-or-leave-it situation in which they feel they cannot reject the agreement for fear of losing the project.

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[43] IBRD Articles of Agreement (16 February, 1989), Articles 2, 4 and 5; IDA Articles of Agreement (24 September 1960), Sects. 2, 4 and 5. For the texts of the Articles of Agreement of the IBRD and IDA see http://go.worldbank.org/0FICOZQLQ0. Accessed 24 October 2011.

[44] Hey 2003, pp. 14–15.

[45] See also Bodansky 1999, pp. 607–610.

[46] This situation is similar to the position of the United Nations Security Council, which although explicitly authorized to take legally binding decisions (Article 25 United Nations Charter), is now taking decisions that were not foreseen in 1945, when Charter was drafted. Examples of such decisions are those adopted to counter terrorisms. See Nolte 2008; Wet 2008; Wood 2008.

[47] See "BRICS Countries Urge IMF, World Bank to Speed Up Reforms", English.xinhuanet.com, 3 September 2011, http://news.xinhuanet.com/english2010/world/2011-09/23/c_131154706.htm. Accessed 24 October 2011. This situation is similar to the ongoing discussion regarding the legitimacy of the UN Security Council, given its composition and voting arrangements (see "New powers seek UN Security Council Reform" Sydney Morning Herald, 14 April 2011, http://news.smh.com.au/breaking-news-world/new-powers-seek-un-security-council-reform-20110414-1dfyl.html. Accessed 24 October 2011).

In the absence of States and of State consent, it is clear that the WBIP and IDB-accountability mechanisms more in general do not easily fit the classical international law framework. However, as international society develops so do its subjects and the relationships among those subjects, a point that was made by the International Court of Justice in its 1949 Advisory Opinion in *Reparation for Injuries*. Where the Court held that

> Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.[48]

Might it be that as a result of IDBs taking on tasks that directly affect individuals and groups in society, the requirements of international life have become such that the factual or social relationship that exists between these two types of actors is being translated into law. If so, we might be witnessing the emergence of a new body of law or a new normative system, beyond classical international law. The fact that the decisions adopted by IDB-accountability mechanisms are not legally binding in terms of classical international law does not seem to be determinative of their normative significance. Moreover, we have witnessed similar developments in national legal systems where the emergence of administrative law in continental legal systems gave rise to considerations similar to those that emerge when assessing the significance of IDB-accountability mechanisms.[49] Think of the *Conseil d'Etat* in France and the *Raad van State* in the Netherlands. Both bodies are now administrative courts; however, their *sections du contentieux* initially started as advisors to the king or government.[50] Moreover, Naudé Fourie's research shows that the WBIP acts like courts engaged in judicial review.[51] Why do I raise these points? Not to argue for or against the international legal status of IDB-accountability mechanisms, but rather to point to a legal context that offers a basis for understanding and assessing IDB-accountability mechanisms: national public, and in particular administrative, law. The argument, moreover, should not be taken to imply that national administrative law can or should be transplanted to the international legal field on a one-by-one basis; it cannot and should not. However, the argument made is that areas of national law may offer useful insights for conceptualizing contemporary issues in international law.[52]

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[48] ICJ: Reparation for Injuries Suffered in the Service of the United Nations, Advisory Op. (11 April 1949), p. 178.

[49] For the Netherlands see Samkalden 1952; Wiarda 1952.

[50] On the history of the *Conseil d'Etat* see Koopmans 2003, pp. 130–135; on the history of the *Raad van State* see www.raadvanstate.nl/over_de_raad_van_state/geschiedenis/#wetgeving. Accessed 14 October 2011.

[51] Naudé Fourie 2009.

[52] See e.g. van Aaken 2009 (suggesting that the proportionality principle, used by national courts to balance and thereby reconcile countervailing values may offer a useful perspective for addressing fragmentation in public international law. On fragmentation see Treves 2007.

5 Conclusions: How Has the WBIP Changed International Law?

The WBIP, I suggest, has in three major ways changed international law, only two of which have been considered in this chapter. First, the fact that the WBIP has been replicated, even if not in the exact same way, has changed the law, or the "normative landscape" if you think the term "law" is not appropriate, in which IDBs operate. Moreover, it is not only the WBIP which has influenced other IDB-accountability mechanisms, but the WBIP itself has been influenced by the practice of other IDB-accountability mechanisms. An illustration is provided by the initiative of the WBIP to introduce problem solving into its procedures.[53] As a result of the activities of IDB-accountability mechanisms, I suggest, it is now generally accepted that affected people should be able to hold an IDB to account based on the internal rules and regulations of the IDB in question. This process, besides substantive standards, I suggest, involves three further distinct but related elements: transparency and access to information, participation in decision making and access to justice. In the case of the World Bank, the OP&P and bank policies more in general[54] provide the substantive standards as well as the standards for transparency and access to information and participation in decision making; the WBIP-procedure, as other IDB-accountability mechanisms, provides the last element—access to justice. How might this development be conceptualized? Possibly as the 'constitutionalizing' of secondary rules of international law, just as Cardesa-Salzmann has suggested we should conceptualize the development of non-compliance procedures in global environmental regimes.[55]

Second, the IDB-accountability mechanisms illustrate that at the international level the development of law, or norms if you prefer, of a public nature need not be limited to those instances which involve States. Normative systems, akin to national administrative law, seem to have evolved within IDBs—including the right to complain, norms to assess the conduct complained of and an independent body that engages in the assessment. Is this another example of the "Reweaving of the Fabric of International Law?" as Brunnée suggests is taking place in the context of decision making in Multilateral Environmental Agreements (MEAs).[56] I suggest that IDB-accountability mechanisms indeed are reweaving the fabric of international law. However, given that State consent is very far removed from the operation of the accountability mechanisms, legitimate decision making, both in the adoption of the applicable rules and in the functioning of the mechanisms,

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[53] See supra n. 38 and accompanying text.

[54] See e.g. the World Bank's new Policy on Access to Information (1 July 2010), at http://go.worldbank.org/TRCDVYJ440. Accessed 14 October 2011.

[55] Salzmann 2011. Also see Bodansky 2009, suggesting that individual treaty regimes harbor traits of constitutionalism, but that international environmental law *in toto* does not constitute a constitutional order.

[56] Brunnée 2008.

becomes even more of an issue than is the case with regard to MEAs, even if the issues at stake are similar.

Third, and this is the topic not considered in this chapter, the IDB-accountability mechanisms have contributed to the interpretation of rules such as those on involuntary resettlement, environmental impact assessment, and indigenous peoples,[57] which are relevant also in contexts other than those of IDBs. The exclusion of this analysis from the present chapter is an omission which is due to considerations of space and time and due the fact the work of IDB-accountability mechanisms is not easily accessible in a format that facilitates comparative analysis. What is required is analysis of IDB-accountability mechanisms' practice.[58] The importance of studying international law on the basis of practice is what Tullio Treves emphasizes in his work,[59] and it is by engaging in this type of analysis that he has made a major contribution to our understanding of international law.

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[57] Bardlow and Naudé Fourie 2011.

[58] The work by Bradlow and Naudé Fourie 2011, referred to in this chapter, is exemplary in this respect.

[59] Treves 2005, p. 3.

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