

The World Bank's New Inspection Panel: A Constructive Step in the Transformation of the International Legal Order

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I. Introduction

The World Bank's Executive Directors voted to establish an independent Inspection Panel ("the Panel") in September, 1993³. This three member Panel is mandated to review complaints from any group of private persons alleging that they are suffering or expect to suffer material adverse effects from the failure of the International Bank for Reconstruction and Development or the International Development Association

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³ International Bank for Reconstruction and Development, Resolution No. 93-10, September 22, 1993. This Resolution is also titled International Development Association (IDA), Resolution No. IDA 93-6, because the Inspection Panel will also be competent to hear cases related to the IDA's development credits (hereinafter referred to as "the Resolution").

The Resolution establishing the Inspection Panel is substantially influenced by several proposals made for the creation of a World Bank Ombudsman or an independent appeals function in the Bank. See D. Bradlow, *The Case for a World Bank Ombudsman*, Statement submitted to the Subcommittee on International Development, Finance, Trade, and Monetary Policy of the Banking Finance and Urban Affairs Committee, U.S. House of Representatives, May, 1993; *id.*, *Why World Bank Needs an Ombudsman*, *Financial Times*, July 14, 1993, at 13; E. Christensen, *Green Appeal: A Proposal for an Environmental Commission of Inquiry at the World Bank* (Natural Resources Defense Counsel, 1990); L. Udall/D. Hunter, *Draft Provisions for an Independent Appeals Commission to Oversee the World Bank* (1993); J. Cahn, *The World Bank and the Democratization of Development*, 6 *Harvard Human Rights Journal* 159 (1993). A group of the Bank's Executive Directors also proposed that the Bank establish an Inspection Panel that would conduct investigations on request of the Executive Directors. This proposal would not have granted private individuals the right to bring complaints to the Panel.

(collectively "the Bank")⁴ to follow its operational policies and procedures in its ongoing operations. These include Bank procedures for undertaking environmental impact assessments of proposed operations⁵, for the treatment of people involuntarily resettled during the course of Bank operations⁶, for relations with indigenous peoples and with non-governmental organizations⁷, and for public participation in Bank-funded operations⁸.

The Panel will have investigatory and advisory powers. It will review all complaints and will make recommendations to the Executive Directors about which complaints to investigate. It will also investigate those complaints which the Executive Directors approve for investigation. The Panel will report its findings and, if applicable, its recommendations for corrective actions to the Executive Directors. In all cases, the final decision will rest with the Board of Directors.

The Bank will inform the complainant of the outcome of its investigation. It will disclose the complaint, the findings and recommendations of the Panel, and the final decisions of the Executive Directors to the public. The Bank will also publish the Panel's annual report.

⁴ The World Bank Group includes three funding "windows", each of which technically is a separate international organization: the International Bank for Reconstruction and Development (IBRD), see Articles of Agreement of the IBRD, Dec. 27, 1945, 60 Stat. 1440, T.I.A.S. No. 1502, 2 U.N.T.S. 134, amended Dec. 16, 1965, 16 U.S.T. 1942, T.I.A.S. No. 5929 (hereinafter IBRD Articles of Agreement); the International Development Association (IDA), see Articles of Agreement of the IDA, Jan. 26, 1960, 11 U.S.T. 2284, T.I.A.S. No. 4607, 439 U.N.T.S. 249 (hereinafter IDA Articles of Agreement); and the International Finance Corporation (IFC), see Articles of Agreement of the IFC, May 25, 1955, 7 U.S.T. 2197, T.I.A.S. No. 3620, 264 U.N.T.S. 117. This paper will not consider the IFC or the other two members of the World Bank Group, the International Center for the Settlement of Investment Disputes (ICSID) and the Multilateral Investment Guarantee Agency (MIGA) since the Resolution on the Inspection Panel does not apply to their activities. See Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 4 I.L.M. 524 (1965); and the Multilateral Investment Guarantee Agency (MIGA), see Convention Establishing the Multilateral Investment Guarantee Agency, Oct. 11, 1985, reproduced in: I.F.I. Shihata, MIGA and Foreign Investment (1988) (containing a complete set of MIGA's basic documents).

⁵ See Operational Directives 4.00 and 4.01 (The World Bank, 1989).

⁶ See Operational Directive 4.30 (The World Bank, 1991).

⁷ See Operational Directive 4.20 (The World Bank, 1991).

⁸ See Operational Directive 14.70 (The World Bank, 1991). Also see I.F.I. Shihata, The World Bank and Non-Governmental Organizations, 25 Cornell International Law Journal 623 (1992).

The creation of this Panel is one of three important reform measures⁹ that the Bank has recently undertaken. The second, the Bank's new policy on information disclosure, is intended to provide the public with more detailed and timely information on Bank operations. This should improve the public's ability to meaningfully participate in Bank operations. The third set of reforms are changes in the Bank's management practices that are designed to encourage Bank staff to place greater emphasis on the effective implementation of Bank-funded projects than on the quantity of funds committed to new operations.

These reforms are part of the Bank's response to the findings of the independent review of the Bank-funded Sardar Sarovar projects¹⁰ and to the Bank's internal review of its portfolio management¹¹. The internal portfolio management review, while recognizing that many problems in Bank operations are caused by the harsh economic, political and social environment facing the Bank's borrowers and by the increasing complexity of Bank operations, found that an important cause of the increase in the proportion of problem projects in the Bank's loan portfolio was the "loan approval culture" in the Bank. This culture was reflected in the way in which Bank staff implemented the Bank's operational rules and pro-

⁹ Resolution on the Inspection Panel, *supra* note 3; Resolution on Disclosure of Operational Information, in IBRD Operational Manual – BANK Procedures, BP 1750 (The World Bank, 1993); the plans for management improvement are published in the Bank's paper Getting Results: The World Bank's Agenda for Improving Development Effectiveness (World Bank, 1993). See for a comprehensive summary of the Bank's problems and responses I. Guest, Make Use of the World Bank's "Identity Crisis", The Christian Science Monitor, Dec. 16, 1993, available in LEXIS, library NEXIS, file ALLNWS.

¹⁰ The Sardar Sarovar projects in India involved the forced removal of up to 200,000 people and the appropriation of up to 117,000 hectares of land. The Bank appointed an independent commission to review the project. After a 10-year international campaign waged by the people adversely affected by the dam and their supporters around the world the commission found that the Bank had ignored its own guidelines, in particular those pertaining to the environmental and social aspects of the project, in approving the design and implementation of the project. See B. Morse/T. Berger, Sardar Sarovar: The Report of the Independent Review (1992) (hereinafter Report of the Independent Review). Unfortunately, Sardar Sarovar is not an isolated case. For a discussion of other Bank funded decisions, see T. Hutchins, Using the International Court of Justice to Check Human Rights Abuses in World Bank Projects, 23 Columbia Human Rights Law Review 487, 488–496 (1991/92). See also R. Mikesell/L. Williams, International Banks and the Environment (1992).

¹¹ See World Bank, Portfolio Management Task Force, Effective Implementation: Key to Development Impact (1992) (hereinafter Wapenhans Report) (discussing causes for the increase in the number of "problem" loans in the Bank's asset portfolio).

cedures¹². These findings have corroborated the criticism of outside observers of the Bank who have argued that deficiencies in the Bank's operating procedures are a major cause of the adverse environmental and social consequences of Bank operations¹³.

The Executive Directors' decision is an important development for international law. It implicitly acknowledges that international organizations have a legally significant, non-contractual relationship with private parties that is independent of either the organization's or the private party's relationship with the state. It also establishes the first forum in which private actors can hold an international organization directly accountable for the consequences of its actions¹⁴.

After briefly describing the jurisdiction and working procedures of the Panel in more detail, this paper will discuss the impact of the Panel on the status of major actors in international law.

¹² The report cited the staff's view of the loan approval process as a "marketing" exercise designed to win Board approval rather than as an objective review of a proposed project feasibility, and a lack of transparency in Bank-funded operations, as causes of their increase in the number of problem projects.

¹³ See, e.g. B. Rich, *The Emperor's New Clothes: The World Bank and Environmental Reform*, 7 *World Policy Journal* 305 (1990); D. Wirth, *The World Bank and the Environment*, *Environment*, Dec. 1986, at 33; J. Horberry, *The Accountability of Development Assistance Agencies: The Case of Environmental Policy*, 12 *Ecology Law Quarterly* 817 (1985). See Bradlow (note 3); Cahn (note 3).

¹⁴ So far, the European Communities (EC) are the only organizations that allow private actors to bring non-contractual claims against the organization before an independent forum, the European Court of Justice (ECJ). See Treaty Establishing the European Coal and Steel Community (ECSC TREATY), art. 40; Treaty Establishing the European Economic Community (EEC Treaty), art. 215 (2); Treaty Establishing the European Atomic Community (EURATOM Treaty), art. 188 (2). However, the EC needs to be distinguished from other international organizations whose primary purpose is to promote international cooperation. The European Communities' purpose is to establish an integrated community. It also has much greater power over its member states and their citizens than other international organizations. See Case 6/64, *Costa v. E.N.E.L.*, 1964 E.C.R. 585 (qualifying EC-law as a legal order *sui generis* distinct from international law).

There are reports that the African, Asian, and Inter-American Development Banks all intend to create their own independent inspection panels to review complaints relating to the procedures they follow in their operations. See John Chalmers, *Asian Development Bank Comes under Fire at Annual Meeting*, Reuters World Service, May 2, 1994, Monday, BC Cycle. Pratap Chatterjee, *Africa-Finance: Development Bank Must Reform*, Say U.S. Lawmakers, Inter-Press Service May 19, 1994. The Inter-American Development Bank Press Office has informed the authors that it will be establishing an inspection panel.

II. *The Inspection Panel's Powers and Procedures*¹⁵

1. Panel Membership

The members of the Panel, who must each have a different nationality¹⁶, shall be selected by the Executive Directors from nominations submitted by the President of the Bank¹⁷.

The Executive Directors have established the following minimum qualifications relating to the expertise of the Panelists:

(a) They must be able to deal "thoroughly and fairly" with requests for inspection¹⁸;

(b) They must have integrity and be independent of Bank management¹⁹;

(c) They must have "exposure to developmental issues and living conditions in developing countries"²⁰;

(d) It would be "desirable" for them to have knowledge and experience of Bank operations²¹.

The Board has developed the following requirements to assure the independence of the Panelists:

(a) They cannot have worked as an Executive Director, Alternate Executive Director, an advisor to an Executive Director, or on the Bank Staff within the past 2 years²².

(b) Panelists shall serve a single non-renewable 5 year term of office²³.

¹⁵ For a more detailed analysis of the Panel's powers and procedures see D. Bradlow "International Organizations and Private Complaints: The Case of the World Bank Inspection Panel", 34: 3 Virginia Journal of International Law (forthcoming).

In April, 1994, the World Bank selected the first members of the Panel. They are Ernst Gunther-Bröder (Chairperson), who will serve a five-year term; Alvaro Umaña Quesada, who will serve a four-year term; and Richard Etter Bissell, who will serve a three-year term. See Independent World Bank Inspection Panel Appointed, Bank News Release No. 94553 (World Bank, April 22, 1994).

¹⁶ Resolution, *supra* note 3, paragraph 2.

¹⁷ *Id.*

¹⁸ Resolution, *supra* note 3, paragraph 4.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Resolution, *supra* note 3, paragraph 5. The first members of the Panel shall be selected as follows: one for three years, one for four years, and one for five years. *Id.* The Panelist selected for five years shall serve a one year term as the Chair of the Panel. Thereafter the members of the Panel shall select a Chairperson who shall serve a one year term. Resolution, *supra* note 3, paragraph 7.

²³ Resolution, *supra* note 3, paragraph 10.

Members of the Panel will be ineligible for employment with the Bank after their term of office expires²⁴.

(c) Panelists may only be removed from office for cause by a decision of the Executive Directors²⁵.

2. Powers of the Panel

The Panel has the following powers:

(a) **Investigatory:** The Panel can investigate complaints involving the Bank's failure through act or omission to follow its "operational policies and procedures"²⁶. The Panel will submit its findings in a report to the Executive Directors and the Bank's President²⁷.

The scope of Paragraph 12 of the Resolution limits "operational policies and procedures" to the Bank's Operational Policies, Bank Procedures, and Operational Directives. These mandatory rules and procedures cover the treatment of involuntarily resettled communities²⁸, the Bank's relations with indigenous people²⁹, information disclosure³⁰, environmental impact assessments³¹, as well as rules applicable to loan disbursements and contract management³².

(b) **Advisory:** The Panel will review all complaints and make recommendations to the Executive Directors about which complaints to investigate³³.

(c) **Rule-making:** The panel has the power to formulate the procedural rules that will govern the complaints process and to resolve the issues not clarified in the Resolution³⁴.

The Panel's advisory and investigatory powers are strengthened by the requirement that the Bank make the complaints it receives, the recom-

²⁴ Resolution, *supra* note 3, paragraph 8.

²⁵ *Id.*

²⁶ Resolution, *supra* note 3, paragraphs 20–22. The phrase "operational policies and procedures" is quoted from paragraph 12 of the Resolution.

²⁷ Resolution, *supra* note 3, paragraph 19.

²⁸ See Operational Directive 4.20 (The World Bank, 1991).

²⁹ See Operational Directive 14.70 (The World Bank, 1991).

³⁰ See Operational Directives 4.00 and 4.01 (The World Bank, 1989).

³¹ There are two volumes of Operational Directives. These are made available to all Bank employees but are not readily available to the public. This situation may be changing under the Bank's new information disclosure policy. See, *supra* note 9.

³² Resolution, *supra* note 3, paragraph 25.

³³ Resolution, *supra* note 3, paragraph 24.

³⁴ See Operational Directive 4.30 (The World Bank, 1991).

mendations and findings of the Panel, and the ultimate decisions of the Executive Directors "publicly available"³⁵.

3. The Complaint's Process

1. The Complaint

The Resolution establishes the following requirements for a successful request for inspection:

(a) the Requests can be brought by any "... affected party in the territory of the borrower which is not a single individual (i.e. a community of persons such as an organization, association, society or other grouping of individuals), or by the local representative of such party ..." ³⁶. The Representative needs to present the Panel with written evidence demonstrating that he is acting on behalf of an affected party ³⁷.

(b) In "exceptional cases" a non local representative can bring a complaint on behalf of the affected party ³⁸. In these cases, the complainant must show that no appropriate local representative is available and the Executive Directors must agree.

(c) Complaints must:

(i) be in writing and must state all relevant facts. These include the harm suffered or threatened as a result of the Bank's failure to follow its operational rules and procedures ³⁹;

(ii) demonstrate that the rights of the affected party have been or are likely to be "directly affected" by acts or omissions of the Bank that are inconsistent with its "operational policies and procedures" ⁴⁰;

(iii) demonstrate that the Bank's failure to follow its operational policies and procedures relates to the design, appraisal and/or implementation of an ongoing Bank-funded project ⁴¹. The challenged Bank action

³⁵ Resolution, *supra* note 3, paragraph 12. The Executive Directors "acting as a Board" can also instruct the Panel to conduct investigations. *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ The jurisdiction of the Panel ends once the Bank operations are "substantially" completed. A footnote to paragraph 14 of the Resolution defines this to mean that 95% of the loan proceeds have been disbursed.

can include a failure to “follow-up” on the borrower’s obligations under the loan agreement⁴²;

(iv) demonstrate that the Bank’s failure to follow its operational policies and procedures has had or threatens to have a “material adverse effect” on the affected party⁴³;

(v) specify the steps that the requesting party has taken to communicate with the Management of the Bank about the complaint and the response that it received from the Bank’s management⁴⁴;

(vi) be limited to the acts of the Bank. It cannot relate to the actions of the borrower, guarantor, or any other non-Bank party.

2. Complaint Review Procedures

The purpose of the Panel’s review of a complaint is to make a recommendation to the Executive Directors on whether or not to authorize an investigation. In making this determination, the Panel both must assess the adequacy of the complaint⁴⁵ and determine if the Bank has taken or is intending to take adequate measures to address the concerns of the complainant.

The Resolution stipulates the following complaint review procedures:

(a) The Chair of the Panel must inform the President and the Executive Directors “promptly” of any requests for investigation received by the Panel⁴⁶;

(b) The Bank Management has 21 days after this notification to provide the Panel with evidence that it has complied with or “intends to comply” with the relevant policies and procedures⁴⁷;

(c) The Panel must decide whether to recommend an investigation to the Executive Directors within 21 days of receiving the Management’s response⁴⁸;

⁴² Id.

⁴³ Resolution, *supra* note 3, paragraph 16.

⁴⁴ Resolution, *supra* note 3, paragraph 14. The complainant cannot relate to procurement issues.

⁴⁵ Resolution, *supra* note 3, paragraph 17.

⁴⁶ Id.

⁴⁷ Resolution, *supra* note 3, paragraph 19.

⁴⁸ Id.

(d) The Panel is required to consult with the Bank's legal department⁴⁹ and with the borrower and the Executive Director representing the borrower before making its recommendation⁵⁰.

(e) The Panel's recommendation shall be circulated to all Executive Directors "within the normal distribution period"⁵¹ and the Executive Directors will then decide whether to investigate.

(f) The affected party, if it initiated the request, shall be informed of the Executive Director's decision within 2 weeks of the decision⁵².

(g) The decision of the Executive Director, the recommendation of the Panel, and the request for investigation shall be made publicly available⁵³.

3. Standards for Review of Complaint

The Panel may recommend that the Executive Directors authorize an investigation if it can make an affirmative finding on all four of the following issues⁵⁴:

(a) the request for investigation states sufficient grounds to justify an investigation. It may be deduced from Paragraph 12 of the Resolution, that sufficient grounds exist if the complainant is alleging 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 the failure of the Bank to follow its operational policies and procedures" and that this failure has had a "material adverse effect" on it;

(b) the Bank staff has failed to adequately respond to the complaint⁵⁵;

(c) the violation of the Bank's policies and procedures is of a "serious character"⁵⁶;

(d) the request has not been the subject of a previous Panel review (unless new facts or evidence justify a second review)⁵⁷.

⁴⁹ Resolution, *supra* note 3, paragraph 15.

⁵⁰ Resolution, *supra* note 3, paragraph 21.

⁵¹ Resolution, *supra* note 3, paragraph 19.

⁵² *Id.*

⁵³ Resolution, *supra* note 3, paragraph 25.

⁵⁴ Resolution, *supra* note 3, paragraphs 12, 13, 14, 16.

⁵⁵ Resolution, *supra* note 3, paragraph 16.

⁵⁶ Resolution, *supra* note 3, paragraph 13. This expression is not defined.

⁵⁷ Resolution, *supra* note 3, paragraph 14.

4. *The Investigation*

The purpose of the investigation is for the Panel to make a finding, based on "all relevant facts", on whether "the Bank has complied with all applicable Bank policies and procedures"⁵⁸.

The Resolution establishes the following procedure for investigations:

(a) The Chairperson shall designate one or more of the Panelists to conduct the investigation⁵⁹ and to report their findings to the whole Panel within a period of time to be determined by the Panel⁶⁰;

(b) The investigator shall have access to all Bank staff who may have information and to all pertinent Bank records⁶¹;

(c) The investigator must consult "as needed" with the Director General of the Operations Evaluation Department, and the Internal Auditor⁶². In addition, he/she must consult with the borrower and the Executive Director representing the borrower/guarantor⁶³;

(d) The Panel can conduct an on-site investigation with the prior consent of the borrower country⁶⁴;

(e) The Panel's report to the Executive Directors must include all relevant facts and the Panel's finding on whether the Bank had complied with the relevant policies and procedures⁶⁵. If applicable, the Panel must include both majority and minority recommendations and findings⁶⁶.

(f) The Bank's management must submit its recommendations in response to the Panel's findings to the Executive Directors within 6 weeks of receiving the Panel's findings⁶⁷.

(g) The affected party must be informed of the results of the investigation and any resulting actions, if any, within 2 weeks of the Executive Directors⁶⁸;

(h) The report of the Panel and the Bank's response thereto shall be publicly available within 2-weeks of the Executive Director's decision⁶⁹.

⁵⁸ Resolution, *supra* note 3, paragraph 22.

⁵⁹ Resolution, *supra* note 3, paragraph 20.

⁶⁰ *Id.*

⁶¹ Resolution, *supra* note 3, paragraph 21.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Resolution, *supra* note 3, paragraph 22.

⁶⁶ Resolution, *supra* note 3, paragraph 24.

⁶⁷ Resolution, *supra* note 3, paragraph 23.

⁶⁸ *Id.*

⁶⁹ Resolution, *supra* note 3, paragraph 25.

4. Annual Report

Paragraph 26 states that the Panel is required to submit an annual report on its activities to the President and Executive Directors. The report shall be published by the Bank.

III. The Inspection Panel's Significance for International Law

The creation of the Inspection Panel will affect the international legal status of individuals, international organizations, and states. It will also affect the relationships of these actors *inter se*.

1. Impact on the Individual's Role

The Panel is the first international forum in which individuals⁷⁰, who do not have a contractual relationship with an international organization, can hold that international organization directly accountable for the consequences of its actions.

This action enhances the international legal status of the individual in two ways. First, it recognizes that individuals can have claims against international organizations that do not require the participation of the state of which the individual is a citizen. These claims arise out of the way in which the Bank decides which projects to fund and the conditions it attaches to these decisions. The consequences of these decisions are felt directly by the private individuals, who are the intended beneficiaries of these operations.

By establishing the Panel, the Bank has also acknowledged that international organizations whose actions directly affect individuals, need to establish a forum in which individuals may bring claims on their own behalf. Prior to the establishment of this Panel, most international fora⁷¹

⁷⁰ The Resolution limits the Panel's jurisdiction to receiving complaints from groups of individuals. It is not authorized to review complaints from single individuals. See Resolution, *supra* note 3, paragraph 12.

⁷¹ The most pertinent fora exist within the three regional treaty systems. See the European System of the Council of Europe and its basic instrument, the European Convention of the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (1950); the Inter-American System of the Organization of American States and its basic instrument, the American Convention on Human Rights, O.A.S. Off. Rec. OEA/Ser.L./V.II.23, doc. 21, rev. 6 (1979); the African System of the Organization of African Unity and the African Charter on Human and Peoples' Rights, OAU doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982); see on the UN level the Optional Protocol, GA res. 2200A (XXI),

which did grant individuals standing, only allowed them to bring complaints against member states⁷².

Second, the decision to establish the Panel defines the scope of the individual's new ability to hold international organizations, like the Bank, responsible. This right is limited to the ability to hold the Bank accountable for the harm caused by its failure to act in compliance with its own operational rules and procedures⁷³.

The actual impact of the Panel on the individual's international legal status will depend on the nature of the complaints brought to the Panel and on the decisions of the Panel. However, at this stage, it is clear that the Panel has the potential to profoundly influence the evolution of the law of international organizations and of the status and rights of private actors under international law.

21 UN Doc. E/4393, at 17 (1967) establishing a complaint procedure before the Human Rights Committee of the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 U.N.T.S. 717.

See generally I. Brownlie, *The Individual before Tribunals Exercising International Jurisdiction*, 11 *International Comparative Law Quarterly* 701 (1962); C. Chinkin, *Third Parties in International Law* 14 and 122 (1993) (describing the international fora to which individuals have direct or indirect access).

It should be noted that some international organizations, including the Bank, have established administrative tribunals that receive complaints from private individuals. However, the jurisdiction of each of these tribunals is limited to adjudicating complaints brought by the staff of the particular international organization which created the tribunal. The tribunal will not entertain a complaint from an outside party. See C.F. Amerasinghe, *The Law of the International Civil Service* (1988); *id.*, *Case Law of the World Bank Administrative Tribunal* (1989).

⁷² It has to be noted that the regional treaty systems and special international conventions stressed the supervision of the states' performance in the area of human rights. While human rights law has generally evolved over the past few decades, individuals still experience difficulties to enforce their rights outside regional treaty systems or specific international conventions. The individual had to find a state to champion his case before the ICJ or go through diplomatic channels. He could also use local remedies, or the U.N. machinery. When enforcing his rights against an international organization the individual encounters even greater problems since most of the aforementioned techniques are generally only available against states. See A. Cassese, *Individuals*, in: M. Bedjaoui (ed.), *International Law: Achievements and Prospects* 113, 117 (1991) (analyzing the problems with all aforementioned mechanisms of enforcement of human rights); F. Newmann/D. Weissbrodt, *International Human Rights* 20 seq. (1990) (discussing the inadequacy of traditional methods of protecting human rights); T. Buergenthal, *International Human Rights Law and Institutions: Accomplishments and Prospects*, 63 *Washington Law Review* 1, 14 (1988) (noting that it has always been easier to promulgate human rights than to enforce them); C.F. Amerasinghe, *Local Remedies in International Law* (1990) (describing the problems associated with using local remedies to enforce international law).

⁷³ See Resolution, *supra* note 3, paragraph 12.

This potential arises from the fact that while the Panel's jurisdiction is limited to the technical and procedural issues related to the Bank's implementation of its operating rules and procedures⁷⁴, the scope of the Bank's rules and procedures incorporates such complex international legal issues as the rights of involuntarily resettled populations and of indigenous peoples. This means that while the Panel was created to resolve narrow issues of formal due process, the complainants may raise substantive legal questions in their complaints. Since these complaints will eventually become public, the Panel and the Bank will find it difficult to avoid addressing these substantive questions in their responses to the complaints. They may also find it difficult to maintain a clear distinction between those issues that can be defined as formal due process (and therefore within the Panel's jurisdiction) and those that can be considered substantive due process (and therefore outside the Panel's jurisdiction).

The Panel may seek to limit its impact on the international legal status and rights of the individual through restrictive interpretations of its jurisdiction and of the mandatory rules and procedures of the Bank. In fact, it is likely that in the initial stages of its work, the Panel will focus on relatively narrow questions of procedure and technical interpretations of Bank rules.

Even its decisions at this initial stage will set precedents that help clarify the individual's standing in the international law applicable to international organizations. The Panel's decisions will also begin to influence the Bank's ability to establish discretionary rules and the nature of an individual's rights and expectations created by the Bank's mandatory rules. Although the Panel's determination of an individual's formal rights will be made in the unique context of the World Bank's lending activities, it will serve as a model for similar fora that might be created in other organizations⁷⁵.

However, as complainants become more expert in their use of the Panel, they will begin basing their complaints on more sophisticated interpretations of the individual rights and expectations created by the Bank's rules and procedures. These more sophisticated complaints, because they will ultimately become public, will compel the Panel to adopt

⁷⁴ Paragraph 12 of the Resolution, *supra* note 3, limits the Panel's jurisdiction to the Bank's Operational Policies, Bank Procedures and Operations. See, *supra* notes 28-31 and accompanying text.

⁷⁵ In this sense, the Panel represents the first tentative steps towards the development at the international level of the general administrative law that exists at the municipal level.

less restrictive methods of interpretation⁷⁶. In this event, the Panel, like the complainant, may use *jus cogens* and customary international law, and general principles of international law⁷⁷ to interpret the rights and responsibilities of international law. The types of questions that could arise in this manner should relate to such issues as the international human rights law applicable to indigenous people and involuntarily resettled population and to international environmental law.

Thus, it is possible that, over time, the findings and decisions of the Panel will set legal precedents in the areas of international human rights and environmental law as well as in the law of international legal organizations. As a result, the Panel could contribute to a more effective enforcement of an individual's rights by shaping international definitions of those rights⁷⁸. Although this would be achieved in the specific context of

⁷⁶ The European Court of Justice (ECJ), for example, used a broad teleological method to interpret the treaties and secondary EC-law. In applying this method the ECJ relied on international treaties in which member states but not the communities had participated and on general principles of international law as found in the member states' constitutions to supply a context, guide interpretation, and fill gaps in EC-law with respect to an individual's human and fundamental rights. See e.g. Case 4/73, *Nold v. Commission*, 1974 E.C.R. 491, 507 (referring to the European Convention for the Protection of Human Rights and the constitutional law traditions of the member states to define fundamental rights under the EC-treaties); see also G. Ress, Die Bedeutung der Rechtsvergleichung für das Recht Internationaler Organisationen, 36 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 227 (1976); id., Die Dynamik des EG-Rechts als Rechtsproblem, in: R. Bieber/G. Ress (eds.), The Dynamics of EC-Law 49, 55 (1987).

⁷⁷ The reason for using a method of interpretation that relies on norms of general international law to supply a context, guide interpretation and fill gaps in the Bank's internal rules is that general rules of international law which are generally recognized as applicable between states and which are not by their nature unsuitable for international organizations are also binding on the latter. The most obvious rationale for this conclusion is that states bound by general international law should not be able to evade that law collectively. See F. Morgenstern, Legal Problems of International Organizations 32 (1986); A. Bleckmann, Zur Verbindlichkeit des allgemeinen Völkerrechts für Internationale Organisationen, 37 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 107 (1977) (discussing the theoretical basis of the applicability of general international law to international organizations); H. Schermers, International Institutional Law 657, 781 (1990) (assuming that international organizations are automatically bound by general international law).

⁷⁸ See T. Meron, Human Rights and Humanitarian Norms as Customary Law (1989); I.F.I. Shihata, The World Bank and Human Rights, in: F. Tschofen/A.R. Parra (eds.), The World Bank in a Changing World 97 (1991) (discussing why and under which limitations imposed on it by the Charter the Bank is subject to international human rights law). See L. Henkin, The Age of Rights (1990) (discussing the development of an individual's rights under international law in depth); A. D'Amato, The Concept of Human Rights in International Law, 82 Columbia Law Review 1110, 1127 seq. (1982) (describing the actual

Bank actions the implications for an individual's rights under international law generally would be clear.

Finally, it should be noted that, since the Panel only has advisory powers, it will not resolve all enforcement problems. Only the Bank's Executive Director could decide to grant complainants whatever damages or equitable relief are deemed necessary in a particular case. In addition, the Panel can not protect individual complainants from human rights violations perpetrated by individual borrower countries⁷⁹.

2. Impact on the International Organization's Legal Status

The creation of the Panel is a response to the tendency of the Bank, like most international organizations, to constantly expand its scope of operations. This raises two issues that affect the status of international organizations in international law. The first is whether an international organization has the implied powers to create an international forum in which private individuals, on their own initiative, can present international claims. The other is concerned with the nature of an international organization's responsibility under international law.

The powers of international organizations are limited to those that the member states have expressly conferred upon them in the treaty establishing the organization⁸⁰. Under the doctrine of implied powers, these express powers are supplemented by additional powers that the international organization necessarily must have if it is to effectively perform its limited purposes⁸¹. The treaty establishing the organization usually allocates these powers between the political and functional organs of the

process by which various human rights become law); B. Stark, Economic Rights in the U.S. and International Human Rights: Towards an "Entirely New Strategy", 44 *Hastings Law Journal* 79 (1992). The Bank's policies and procedures appear to be influenced by international environmental and human rights law. See, e.g. the Bank's rule on involuntary resettlement, Operational Directive 4.30 (The World Bank, 1990).

⁷⁹ Resolution, *supra* note 3, par. 14. Nevertheless, the Panel will have to decide when an action should be attributed to the Bank or to the borrower state.

⁸⁰ See I. Brownlie, *Principles of Public International Law* 68 (1990); N. Mugerwa, *Subjects of International Law*, in: M. Sørensen (ed.), *Manual of Public International Law* 257 (1968); H. Schermers, *International Organizations*, in: Bedjaoui (note 72), at 78.

⁸¹ *Id.* The treaties establishing international organizations are subject to increasingly broad interpretation. Thus, the ICJ adopted a broad interpretation of the U.N. charter by qualifying expenditures relating to UN peace-keeping operations in the Congo as expenses within the meaning of art. 17, par. 2 of the charter. See *Certain Expenses of the U.N.*, 1962 I.C.J. 151.

organization⁸². In the case of the World Bank, powers are allocated between the Board of Governors, the Executive Directors, and the staff⁸³.

The Articles of Agreement of the Bank give the Executive Directors wide powers to determine the Policies of the Bank⁸⁴. They also give to the Executive Directors the power to interpret the Articles of Agreement⁸⁵. While the Executive Directors can use their powers of interpretation to interpret the Article expansively, they cannot use these powers to stretch the meaning of the Articles of Agreement to the point of *de facto* amending them⁸⁶.

Throughout the history of the Bank, the Executive Directors, in interpreting the Articles, have respected the formal limits that the Articles place on the Bank's powers. Nonetheless, each generation of Bank leaders has interpreted its mandate in light of the changing needs of the time⁸⁷. Thus, the Executive Directors have progressively expanded the range of permissible Bank operations as our understanding of the process of economic development and of the range of inputs necessary to achieve economic development has evolved⁸⁸. Today, the Bank's operations in-

⁸² See Brownlie (note 80), at 689.

⁸³ See E. Mason/R. Asher, *The World Bank since Bretton Woods* 62 (1973) (describing the allocation of the institutional powers in the Bank). See also IBRD Articles of Agreement, art. I (describing the Bank's "purposes", i.e. its overall powers) and art. V (describing the inner institutional organization).

⁸⁴ IBRD Articles of Agreement, art. V in Section 4 (a) in connection with the IBRD By-Laws, Sections 14 and 15; IDA Articles of Agreement, Art. VI Section 4 (a) in connection with the IDA By-Laws, Sections 5 and 6.

⁸⁵ IBRD Articles of Agreement, art. IX; IDA Articles of Agreement, Art. X. See also I.F.I. Shihata, *The World Bank and "Governance" Issues in Its Borrowing Members*, in: Tschofen/Parra (note 78), at 62 seq.

⁸⁶ The IBRD Articles of Agreement in art. VIII provide for a specific process to modify the Agreement, so do the IDA Articles of Agreement under art. IX. See also M. Reisman, *Through or despite Governments: Differentiated Responsibilities in Human Rights Programm*, 72 *Iowa Law Review* 391, 395 (1987) (discussing the "elasticity" of an international organizations date); I.F.I. Shihata, *Human Rights Developments and International Financial Institutions*, *American University Journal of International Law and Policy* 27, 35 (1992).

⁸⁷ See A. Broches, *International Legal Aspects of the Operations of the World Bank*, 98 *Recueil des Cours* 301 (1959) (discussing the project analysis in the 1950's which was based on a narrow economic test); P.A. Moseley, *Aid and Power: the World Bank and Policy Based Lending* 21-25 (1991) (giving a brief history of the World Bank's changing position on policy based lending).

⁸⁸ See Moseley, *ibid.*, at 21 seq.; I.F.I. Shihata, *The World Bank Facing the 21st Century - Developments in the 1980's and Prospects for the 1990's*, in: Tschofen/Parra (note 78), at 7 seq. (describing how the World Bank expanded its policy objectives).

clude environmental⁸⁹, social, and to a limited extent “good governance”⁹⁰ projects and programs, as well as the more traditional infrastructure projects.

Viewed in this light, the Panel is merely a functional mechanism that serves the developmental mandate of the Bank. It is a response to the Bank’s experience which has demonstrated that the Bank requires and does not receive comprehensive, timely, and objective information on its operations if it limits public access to the Bank. The Bank has also learned that the Directors need stricter internal supervision over Bank staff⁹¹. Thus, under the current interpretation of the mandate of the Bank, the Executive Directors have the inherent and implied powers to create the Panel.

The Bank’s implied power to create the Panel can also be deduced from its increasingly complex and direct interactions with individuals. These interactions raise important questions about the Bank’s obligations under international law. The Panel is therefore a reasonable response to the Bank’s need to answer these questions in a manner that is consistent with both its developmental mandate and with developments in international human rights and environmental law. It provides a mechanism through which the Bank can begin to analyze the nature of its responsibilities for the real impact its operations have on individuals and the environment.

Finally, the Panel’s limited jurisdiction is consistent with the Bank’s own obligation to respect its member states’ legal sovereignty. The reason for this is that the states have accepted both the Board’s interpretation of the Bank’s Article and the expansion in the scope of the Bank’s activities⁹². Moreover, the Panel’s mandate is limited to reviewing the

⁸⁹ See P. Le Prestre, *The World Bank and the Environmental Challenge* 1–34 (1989) (describing the emergence of the Bank’s environmental policy); I.F.I. Shihata, *The World Bank and the Environment – A Legal Perspective*, in: Tschofen/Parra (note 78), at 135–180.

⁹⁰ The Bank demands from a borrower good governance, i.e. good public sector management; financial accountability; predictability of rules and regulations; access to accurate information about the borrower’s economy and market conditions. In particular, the requirement of predictable rules includes human rights standards of clear and evenhandedly applied laws to individuals affected by projects. See generally *Governance and Development* (World Bank, 1992); Shihata (note 85), at 54.

⁹¹ See Wapenhans Report, *supra* note 11, and Report of the Independent Review, *supra* note 10; B. Hurni, *The Lending Practices of the World Bank in the 1970’s, Analyses and Evolutions* (1983); C. Payer, *The World Bank: A Critical Analysis* (1983); Bradlow (note 3).

⁹² The Panel does not interfere with the states’ traditional reserved domain even though individuals have access to it without the states’ actual consent because states have already

Bank's conduct *vis-à-vis* individuals. It does not include examination of the borrower country's behavior either in its dealings with the Bank or with its own citizens.

The second aspect which the Panel may influence is the issue of an international organization's responsibility. Responsibility in this context will probably have two separate but potentially related meanings. The first is the nature of the Bank's responsibility based on its own internal law. The second is the scope of the Bank's responsibility under general principles of international law.

It is important to note that the decision to establish the Panel is itself considered a recognition by the Bank of its international responsibility. While the basic acknowledgement of an international organization's international responsibility is uncontested⁹³, its details are still disputed⁹⁴.

In the absence of a model codification of an international organiza-

impliedly accepted interactions between the Bank and individuals that followed the broadened scope of Bank's policies. See G. McGinley, Practice as a Guide to Treaty Interpretation, 9 The Fletcher Forum 211 (1985) (describing that subsequent practice by the parties to an agreement serves as an interpretive guide); Brownlie (note 80), at 625 (discussing the case of an organization which acts beyond what can be justified by present interpretation of the treaty where, in the absence of a formal amendment of the treaty, subsequent practice provides sufficient cogent evidence of member state's consent to treaty change).

⁹³ In an *obiter dictum* the ICJ stated in the *Reparations for Injuries* Case that an international organization does not only have rights but is also subject to obligations arising out of principles of international responsibility. *Reparations for Injuries suffered in the Service of the UN*, 1949 I.C.J. 174. See also C. Eagleton, International Organizations and the Law of Responsibility, 76 *Recueil des Cours* 385 (1955); G. Amador, La responsabilité de l'Etat, la responsabilité des organisations internationales, 34 *Revue de Droit International Public* 146 (1956); P. de Visser, Observations sur le fondement et la mise en œuvre du principe de la responsabilité de l'ONU, 40 *Revue de Droit International et de Droit Comparé* 165 (1963); I. Seidl-Hohenveldern, Die völkerrechtliche Haftung für Handlungen Internationaler Organisationen im Verhältnis zu Nichtmitgliedstaaten, 11 *Österreichische Zeitschrift für öffentliches Recht* 497 (1961); F. Seyerstedt, Is the International Personality of International Organizations valid vis-à-vis Non-Members?, 4 *The Indian Journal of International Law* 233 (1964); K. Günther, Die völkerrechtliche Verantwortlichkeit internationaler Organisationen gegenüber Drittstaaten (1969).

⁹⁴ See more recent discussions of the international responsibility of international organizations: W. Meng, Internationale Organisationen im völkerrechtlichen Deliktsrecht, 45 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 324 (1985); M.P. Gonzalez, Les organisations internationales et le droit de la responsabilité, 92 *Revue Générale de Droit International Public* 63 (1988); D.W. Bowett, *The Law of International Institutions* 365 (4th ed. 1982).

tion's international responsibility⁹⁵, the relevant legal principles must be drawn from the few precedents of the UN peace-keeping forces⁹⁶, provisions in treaties⁹⁷, and the exceptional example of the European Communities (EC)⁹⁸. The Panel offers the possibility of expanding this body of precedents.

Initially, the work of the Panel will focus on the internal Bank rules. However, the Panel can be expected to progressively expand its area of oversight to include general international law issues. The dynamic force driving the development in the Panel's work will be the combination of the increasing sophistication of individual complaints and the need for internal Bank rules to be consistent with at least the minimum standards of organizational responsibility established by international law⁹⁹.

⁹⁵ The International Law Commission's (ILC) attempts to codify principles of state responsibility do not address the issue of an international organization's responsibility. See Sh. Rosenne (ed.), *The ILC's Draft Articles on State Responsibility* (1991).

⁹⁶ See D.W. Bowett, *UN Forces* (1964) (discussing the UN responsibility for damages related to peace-keeping activities in the 1950's and 1960's); B. Amrallah, *The International Responsibility of the UN for Activities Carried out by UN Peace-Keeping Forces*, 32 *Revue Egyptienne de Droit International* 57 (1976); F. Seyerstedt, *U.N. Forces in the Law of Peace and War* (1966). See also provisions on the liability of the UN for injuries to individuals by operations of the UN peace-keeping forces in the *Status of Forces Agreements* and the internal UN regulations. All documents reprinted in R.C.R. Siekmann, *Basic Documents on U.N. and Related Peace-Keeping Forces* (1985).

⁹⁷ See *Outer Space Treaty*, 610 U.N.T.S. 215 (1967) (in art. 6 stating that international organizations as well as states are responsible for activities in the outer space); *Convention on Liability for Damage Caused by Space Objects*, reprinted in 66 *American Journal of International Law* 702 (1972) (art. 22 makes international organizations subject to the same liability under the treaty as states); *Moon Treaty*, 18 I.L.M. 1434 (1979) (art. 16 provides for a limited liability of international organizations under the treaty); *Convention on the Law of the Sea*, UN Doc. A/CONF.82/16124/1982 (according to arts. 139 and 263 international organizations are also liable for damages resulting from treaty activities causing injuries).

⁹⁸ The EC treaties stipulate the EC's responsibility for non-contractual liability *vis-à-vis* private actors. See *EEC Treaty*, art. 215 (2); *EURATOM Treaty*, art. 188 (2); *ECSC Treaty*, art. 40. The concept of non-contractual liability in EC-law is more comparable to a sovereign's liability under domestic law than to the international responsibility to which the EC, although the latter is not mentioned in the treaties, is also subject. However, international responsibility plays no role in the practice of the EC, because the focus of the EC's activities is on the internal community level.

⁹⁹ A possible result of the likely progression in the Panel's work is that the Bank's concept of responsibility will evolve. We can gain some insights into this process from the law of the EC's responsibilities. The Bank's concept of responsibility can be compared to the law of the EC's responsibilities. Like the Bank, the EC is subject to both the internal responsibilities imposed by internal rules adopted under the founding treaty and to principles of international responsibility that apply to all international organizations. However,

In addition, the Panel will have to resolve how to treat those complaints that involve actions that can be attributed to both the Bank and other non-Bank actors¹⁰⁰. The Panel's definition of the Bank's responsibility, therefore, will help clarify the respective responsibilities of the Bank, the borrower, the relevant member state, and all other participants in Bank-funded operations. In these cases the Panel will also have to decide the difficult and so far unresolved question of what are the legal consequences of a multiple tortfeasor¹⁰¹ situation. The Panel's decisions in this regard may set useful precedents for clarifying responsibility in other situations in which multiple international actors collaborate in economic, social and developmental projects that were intended to directly affect the lives of individuals.

unlike the Bank, the EC has kept the two concepts of liability separated and provides no common forum for bringing claims of both for breach of international duties and duties arising under the non-contractual liability.

See G. Nicolaysen, *Europarecht* I 220 (1991) (noting that the treaty provisions on the EC's non-contractual liability do not address the issue of the EC's international responsibility which, consequently, may not be brought before the ECJ's jurisdiction under the non-contractual liability clauses); G. White, *State Responsibility in the Context of European Community Law*, in: *Essays in Honour of Georg Schwarzenberg* 301, 306 (1988) (arguing that breach of EC-law has to be considered to be a breach of obligations distinct from international obligations because of the supranational characteristics of community law).

¹⁰⁰ Besides general questions of what are the constitutive elements of an international organization's responsibility, another aspect of this responsibility that may arise from the work of the Panel is the issue of the remedies that may be available to complainants, e.g. restitution in kind or damages. It should be noted that because the Panel has advisory powers, this issue would need to be decided by Executive Directors and not the Panel although the Panel may make recommendations. See Brownlie (note 80), at 457 seq. (on damages and reparation in the context of state responsibility); R. Rosenstock, *The 44th Session of the ILC*, 87 *American Journal of International Law* 138, 141 (1993) (discussing the ILC's work on a draft of legal remedies for state responsibility); C. Gray, *Is there an International Law of Remedies?*, 56 *British Yearbook of International Law* 25 (1985) (discussing the various remedies under current international law in the context of state responsibility).

¹⁰¹ The international law applicable to multiple tortfeasors is unsettled. It is, in particular, not clear whether the law imposes full or partial liabilities on each tortfeasor. See Brownlie, *ibid.*, at 455 seq. (discussing the question of agency and joint tortfeasors in the context of state responsibility); J.E. Noyes/B.D. Smith, *State Responsibility and the Principle of Joint and Several Liability*, 13 *Yale Journal of International Law* 225 (1988) (suggesting the concept of a joint and several liability in the multiple tortfeasor case); see also J. Quigley, *Complicity in International Law: A New Direction in the Law of State Responsibility*, *British Yearbook of International Law* 77 (1977) (distinguishing between different types of multiple tortfeasor situations and the different resulting liabilities).

3. Impact on the States' Legal Status

On its face, the Resolution establishing the Panel appears to have no relevance to the international legal status of the state. The Resolution clearly limits the Panel's jurisdiction to matters that are within the exclusive domain of the Bank. Nevertheless, the work of the Panel is likely to have an impact on the borrower states. In fact the Panel, by allowing individuals to bring their own complaints to the Panel and by delineating the boundary of the Bank's responsibility, can be viewed as part of the general trends undermining the sovereignty of the state¹⁰² and of its dominant position in the structure of international law¹⁰³. It should be noted, that, since the Panel's scope of operations is limited to complaints of individuals in borrower countries, it is likely to have a more profound effect on the international legal status of borrower states than that of richer states.

There are two reasons for the Panel having this impact on the international legal status of the state. The first, which was discussed in more detail above, is that the Panel is a new manifestation of the growing power of international organizations. This growing power is a consequence of growing interdependence in the international order and of the international community's increasing reliance on international organizations to solve common problems¹⁰⁴.

These developments have contributed to an expansion of the powers of the international organization at the expense of its member states, or at least those member states who are most dependent on the services of the international organization. In the case of the World Bank, this means that the powers of the Bank have expanded at the expense of the sovereign powers of its borrower states.

The second reason is that the creation of the Panel has resulted in an international private right of action. This right allows the individual to

¹⁰² Sovereignty has never been absolute. All states are subject to *jus cogens* and customary rules of international law. Also, many international organizations favor majority or weighted voting in their rule-making processes. In light of these many rules limiting the sovereign's powers sovereignty is better described as "relative" than "exclusive". See I. Seidl-Hohenveldern, *International Economic Law* 22 (1992) (using the term "relative" for describing the nature of a sovereign's powers); Mugerwa (note 80), at 247, 255.

¹⁰³ See C. Grossman/D. Bradlow, *Are We Being Propelled to a People-Centered Transnational Legal Order?*, 9 *American University Journal of International Law and Policy* 1 (1993) (discussing the general trend of the shrinking role of the state in international law and the growing importance of non-state actors in the international order).

¹⁰⁴ *Id.*

bring a complaint to an international forum without the consent or participation of a sovereign state. This development is a direct challenge to the sovereign states' powers to represent the claims of its citizens in international fora. Under classical conceptions of sovereignty, the states had the exclusive power to represent their nationals on the international plane¹⁰⁵.

It should be noted that the Panel is not the first forum in which non-sovereigns can bring international claims on behalf of individuals. The International Court of Justice has allowed the United Nations to represent individuals in an advisory opinion proceeding before the court¹⁰⁶. Human rights tribunals have recognized the rights of individuals to bring claims against the sovereign and of non-governmental actors to bring claims on their behalf¹⁰⁷. In both these cases, the non-state actor was viewed as better placed than the state to bring the complaint to the international forum. However, the Panel is the first permanent forum in which a group of individuals¹⁰⁸ can bring their own claims against international organizations.

The creation of the Panel therefore further reduces the exclusivity of the states' control over private claims. Moreover, it does this by opening

¹⁰⁵ See Brownlie (note 80), at 521; M. Sahovic/W. Bishop, *The Authority of the State: Its Range with Respect to Persons and Places*, in: Sørensen (note 80), at 311, 362; Cassese (note 72), at 118.

¹⁰⁶ See *Reparations for Injuries suffered in the Service of the UN*, 1949 I.C.J. 174. This representation of individuals by the United Nations was based on the principle of limited functional protection, as opposed to unrestricted diplomatic protection which can be exercised by the state only. However, in the case of both functional protection and diplomatic protection the individual's claim is taken on by the protecting subject as its own. See D.W. Bowett, *The Law of International Institutions* 340 (1982) (commenting the ICJ's opinion in the *Reparation Case*).

¹⁰⁷ It should be noted that in these fora the non-state actor acts (only) as the representative of the individual. This differs from diplomatic protection. In the latter, the state takes on the claim of the individual as its own. *Id.* See also D. Weisbrodt, *The Contribution of International Non-Governmental Organizations to the Protection of Human Rights*, in: T. Meron (ed.), *Human Rights in International Law: Legal And Policy Issues* 403 (1984); L.S. Wiseberg/H.M. Scoble, *Monitoring Human Rights Violations: The Role of NGO's*, in: D. Kommers/G. Loescher (eds.), *Human Rights and American Foreign Policy* 179 (1979); Kamminga/ Rodley, *Direct Intervention at the UN: NGO Participation in the Commission on Human Rights and its Subcommission*, in: H. Hannum (ed.), *Guide to International Human Rights Practice* 186 (1984).

¹⁰⁸ The Resolution also allows non-governmental organizations to represent the group of individuals which is adversely affected. Even an international global non-governmental organization (NGO) may in exceptional cases act as a representative. See Resolution, *supra* note 3, par. 12.

an entirely new set of issues for which individuals can bring their own complaints. The Panel, for the first time, allows individuals to bring their own complaints against international organizations, even though there has been no recognized deficiency in the ability of the state to bring these complaints.

It should be recognized, however, that it is not yet clear whether the most significant result of this development will be a reduction in the states' sovereign domain or the creation of new and additional individual rights. The resolution of this issue will depend on the future work of the Panel.

IV. Conclusion

The Bank's decision to establish the Panel is an interesting attempt by an international organization to cope with the deficiencies of the international legal order. It is based on the Bank's acknowledgement that individuals most directly experience the impact of the Bank's operations. Consistent with this recognition, the decision enhances the individual's status in international law by according him procedural capacity before an international forum.

The decision of the Panel, moreover, partially ends the legal fiction that the Bank deals only with the borrower and that there is no legally significant, non-contractual relationship between the individual and the Bank. The Bank-individual relationship arises from the way in which the Bank makes its decisions about which of its member country's development projects or programs to fund and on what conditions. The Bank's decision therefore, is a significant step towards creating consistency between the legal framework within which the Bank operates, and the *de facto* impact of its activities.

This *de jure* recognition of the *de facto* relationship between the Bank and the individuals affected by Bank-funded projects will clarify the rights and responsibilities of the international organization towards the individual. By doing this, the Panel may also influence the relationship between the individual and the Bank member-state. The reason for this is that, by implication, the determination of the Bank's responsibility will help determine the responsibility of the State towards the individual complainant.

These developments will alter conceptions of the international legal protection of an individual. Both the state of which the individual is a national, and the international organization now have responsibility for

protecting the rights and interests of the individual. However, in the case of the international organization, the Panel mechanism does not convert the private claim into the international organization's claim. Instead, the Panel creates a quasi-judicial forum in which the individual can bring its own claim. This development allows the individual to actively participate in the prosecution of its claim¹⁰⁹. In addition, since the Panel will make the complaint, its findings and the Executive Director's decisions publicly available, it allows the individual to participate in the formulation of its substantive rights with the international organization. It therefore offers the individual a means through which it can attempt to participate in the formulation of the substantive principles of international law.

The creation of the Panel is a constructive and welcome development in creating an international law that reflects the challenges of our increasingly interdependent global community. The Executive Directors' decision is a useful advance towards an international law that both respects the rights and needs of individuals and is responsive to their demands for a more important role in the international legal order. It is to be hoped that both complainants and the Bank will effectively exploit the legal opportunities created by the establishment of this Panel. In addition, other international organizations should follow the example of the Bank and create their own fora for examining the complaints of those individuals most directly affected by their operations.

¹⁰⁹ In this regard the Panel rather represents an international organization's "local remedies". See Brownlie (note 80), at 494, 504; C. Trinidad, *Exhaustion of Local Remedies and the Law of International Organizations*, 57 *Revue de Droit International de Sciences Diplomatiques, Politiques et Sociales* 81, 83 (1979) (suggesting the establishment of an international organizations' local remedies for claims against itself).