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J.H.H. Weiler
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THE NEW PUBLIC LAW IN A GLOBAL (DIS)ORDER
A PERSPECTIVE FROM ITALY

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The Proliferation of Independent Accountability Mechanisms in the Field of Development Finance

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The New Public Law in a Global (Dis)Order – A Perspective from Italy

This working Paper was borne of the collaboration between The Jean Monnet Center at NYU School of Law and the IRPA (*Istituto di ricerche sulla pubblica amministrazione* - Institute for research on public administration). IRPA is a nonprofit organization, founded in 2004 by Sabino Cassese and other professors of administrative law, which promotes advanced studies and research in the fields of public law and public administration. The seminar's purpose was to focus attention, in the international context, on the original and innovative contributions made by Italian legal scholars to the study of the transformations of the State, and to the fields of public law and public administration generally.

The project challenged some of the traditional conventions of academic organization in Italy. There was a "Call for Papers" and a selection committee which put together the program based on the intrinsic interest of each proposed paper as well as the desire to achieve intellectual synergies across papers and a rich diversity of the overall set of contributions. Likewise, formal hierarchies were overlooked: You will find papers from scholars at very different stages of their academic career. Likewise, the contributions were not limited to scholars in the field of "Administrative Law," "Constitutional Law," or "International Law," but of the integrated approach of the New Italian Public Law scholarship, as explained in the prologue to this paper.
The Jean Monnet Center at NYU is hoping to co-sponsor similar Symposia and would welcome suggestions from institutions or centers in other Member States.

J.H.H. Weiler, *Director, Jean Monnet Center for International and Regional Economic Law & Justice*
Sabino Cassese, *Judge of the Italian Constitutional Court*

Prologue:
The New Italian Public Law Scholarship

Since the second half of the 20th Century, a new distinctive Italian Public Law Scholarship has been developing.

Originally, traditional Italian Public Law scholarship was highly influenced by the German positivist and dogmatic approach. As a consequence, Italian Scholarship devoted greater attention to the law found in books rather than to law in action; the majority of legal scholars were also practicing lawyers; and Scholarship was focused on interpreting the law, not in analyzing the conditions of legal change and reform.

Beyond the mainstream of this scholarship, and within the line which links the founder of the Italian Public Law School, the Sicilian professor and politician Vittorio Emanuele Orlando to his main pupil, Santi Romano (who had also been the President of the Council of State) and to the most renowned student of Santi Romano, Massimo Severo Giannini, in the last quarter of the 20th century a new generation of scholars grew, whose programme was to find new ways to study Public Law. Since then, therefore, a new Italian Public Law has been developing.

The work of this New School has several distinctive features. It developed in the field of administrative law, but it has greatly contributed to the main subjects of constitutional law, such as the State and its crisis, and the Constitution. It has turned from German to British and especially American legal culture. It combines attention to tradition with that for innovation. It studies institutions and how they operate within their historical development and it contributes to researches on the history of Public Law ideas. It is not confined within the usual borders of the Public Law discipline, but it has a great interest in studying topics that are at the intersection of law, politics, economics, and sociology. It is an example of lateral thinking and it adopts methodological pluralism. It has greatly contributed to the ongoing body of research on the Europeanization and globalization of law, in collaboration with foreign scholars. It combines study of statutes with study of judicial decisions. It is engaged not only in study of the law, but also in legal reforms, participating in several manners to the legal process. It has gained prominence in the general public opinion, because its members play the role of public intellectuals. It is mainly based in Rome, but it has ramifications elsewhere (Universities of Viterbo, Urbino, Siena, Naples, Catania). It has established strong and permanent links with many European (French, German, British, Spanish), and some non-European legal cultures, namely American. It has produced important collective works (treatises, dictionaries) and edits two important law journals ("Rivista trimestrale di diritto pubblico" and "Giornale di diritto amministrativo"). It has established a research institute (*Istituto di ricerca sulla pubblica amministrazione* - IRPA), that is very active in the field.

For all these reasons, the Jean Monnet Center at NYU School of Law and the IRPA decided to host a seminar in order to focus attention, in the international context, on the original and innovative contributions made by Italian legal scholars to the study of the transformations of the State, and to the fields of public law and public administration generally.

The seminar – entitled "The New Public Law in a Global (Dis)Order – A Perspective from Italy" – took place on the 19th and 20th of September, 2010, at the New York University (NYU) School of Law[♦].

Here, a selection of the papers presented at the Seminar has been published. Our will and hope is that these articles shall contribute to the growth of the Italian Public Law Scholarship and to strengthen its efforts in dealing with the numerous legal issues raised by globalization.

Sabino Cassese, *Judge of the Italian Constitutional Court*
Giulio Napolitano, *Professor of Public Law at University "Roma Tre"*
Lorenzo Casini, *Professor of Administrative Law at University of Rome "Sapienza"*

♦ Authors were selected through a call for papers and they were the following: Stefano Battini; Lorenzo Casini; Roberto Cavallo Perin, Gabriella Racca e Gianlugi Albano; Edoardo Chiti; Elisa D'Alterio; Maurizia De Bellis; Federico Fabbrini; Francesco Goisis; Daniele Gallo: Elena Mitzman; Giulio Napolitano; Cesare Pinelli. Discussants at the seminar were Eyal Benvenisti, Sabino Cassese, Angelina Fisher, Matthias Goldmann, Benedict Kingsbury, Mattias Kumm, Giulio Napolitano, Pasquale Pasquino, Richard B. Stewart, Luisa Torchia, Ingo Venzke, and Joseph H.H. Weiler. More information available at http://www.irpa.eu/index.asp?idA=302.

THE PROLIFERATION OF INDEPENDENT ACCOUNTABILITY MECHANISMS IN THE FIELD OF DEVELOPMENT FINANCE

By Elena Mitzman*

Abstract

In the field of development finance, over the past two decades, several financing institutions have started acknowledging and addressing the local impact of the projects they support, by adopting a series of social and environmental policies and procedures. In some cases, following the example of the World Bank Inspection Panel, these institutions have also established independent internal bodies, which have the power of investigating policy compliance in relation to affected people's complaints on specific projects, and thus create a direct accountability path between financing institutions and the ultimate beneficiaries of their activities. Over the years, these mechanisms (Independent Accountability Mechanisms) have evolved and proliferated, not only among international organizations, but also at the EU and national level, gradually coming to constitute a new and original model of review. In this paper we analyze the characteristics of these mechanisms, highlighting some of their strengths and weaknesses. We will also try to understand to what extent they resemble familiar forms of review of administrative action, and question whether they may constitute the affirmation of schemes and principles of an administrative law type at the global level.

* PhD Candidate, Doctoral School in Comparative and European Legal Studies, Trento University. E-mail contact: elena.mitzman@unitn.it. This article is an extensively revised version of a paper written for the Institute for Research on Public Administration (IRPA) and New York University Jean Monnet Center Seminar "The New Public Law in a Global (Dis-)Order. A Perspective from Italy" (New York, September 19/20 2010). The author owes many thanks to Professors Joseph Weiler, Sabino Cassese, Eyal Benvenisti, and to Ingo Venzke, for their observations on an earlier draft of the paper, to Professors Giulio Napolitano and Lorenzo Casini for their kind guidance, and to Professors Giandomenico Falcon and Barbara Marchetti for their precious suggestions and continuous support. Useful comments on a previous draft were also received from Professor Daniel Bradlow. All of the web-sites cited in the paper were last visited on January 22nd, 2011.

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Introduction

In 1993, the World Bank (the international organization chartered at the Bretton Woods conference, to assist in the reconstruction and development of member States by promoting the investment of capital for productive purposes) established the World Bank Inspection Panel, an independent body within the organization, with the power of conducting investigations on the operations of the Bank in relation to specific projects. The mandate of the Panel was to verify whether Management had complied with the operational policies and directives set forth by the Bank's Board of Directors, and to report such findings to the Board itself.

What was so innovative about the mechanism was the fact that its findings would be made public, and that, most importantly, its investigations could be triggered by third party requests, coming from project-affected people who claimed they had been damaged by a Bank financed project, as a consequence of Management's failure to follow the relevant policies. Its establishment created a new accountability path, between the World Bank and the residents of its member countries, that constituted a novelty in the field of international organizations, which had always been held accountable to and through their member States.

Sixteen years later, the Inspection Panel is no longer unique in its kind, as several organizations have followed the example of the World Bank in the creation of analogous mechanisms. These include not only Multilateral Development Banks similar to the World Bank, but also Banks and agencies at the EU and national level.

These organizations are quite varied, but all of them are in the business of providing different types of financial support for the realization of projects, generally in less developed areas of the world, and often presenting complex environmental and social implications for the targeted territories. For this reason, these organizations have encountered criticism over the years for their involvement in problematic projects, and have been accused of being secretive and un-accountable towards the ultimate beneficiaries of their operations.

In reaction to such criticism, and for better managing the impact of financed projects, these organizations have started taking into consideration a new set of aspects – like the environmental effect of projects, the conditions of resettled people, the existence of adequate compensation

plans, etc. – and paying attention to rules and procedures for their adequate evaluation. The establishment of social and environmental policies and procedures, for guiding operational departments in the preparation of projects, and the subsequent creation of IAMs, to ensure their correct application, have therefore become rising best practices in the field of development finance, thus producing a gradual proceduralization and, to a certain extent, juridification of financing activities, with respect to the local impact of financed projects.

In this paper we will analyze ten of these IAMs, for the purpose of better understanding their nature and the extent of their activities. In particular, we will do so by focusing first and foremost on a series of structural and procedural aspects, tentatively accepting the premise that "much global governance can be understood and analyzed as administrative action" and that "such administration is often organized and shaped by principles of an administrative law character".[1]

In this perspective, after describing the origins of these mechanisms and some of the motives that determined their establishment and proliferation (chapter 1), we will analyze their main functions, structure, and procedures; in this respect, although the Inspection Panel's model has been adapted in various ways by the involved organizations, we will try to provide a comprehensive picture of the various mechanisms, highlighting significant similarities and differences (chapter 2).

In the subsequent chapters we will then elaborate on some of the problems posed by these mechanisms, analyzing the safeguards put in place by the various organizations, questioning whether certain structural and procedural characteristics of IAMs could impair their capacity to operate independently (chapter 3), and trying to clarify the extent and limitations of IAM activity in practice (chapter 4).

In our closing remarks we will assess some of the strengths and weaknesses of these mechanisms and formulate proposals which could possibly improve them. In addition to that, some considerations will be made on the administrative law perspective in this specific context.

[1] B. Kingsbury, N. Krisch, R.B. Stewart, J.B. Wiener, "Global governance as administration—national and transnational approaches to global administrative law", 68:3-4 *Law and contemporary problems*, (2005), p. 2.

1. **The Origins of Independent Accountability Mechanisms**

1.1. *The Establishment of the World Bank Inspection Panel*

The Inspection Panel represents one of the reforms launched by the World Bank during the eighties and nineties, aimed at addressing the perceived need that the Bank be more responsive to the social and environmental concerns related to the projects it financed.[2] Such reforms consisted, first and foremost, in the adoption of a series of policies by the Bank's Board of Directors[3] that spelled out procedures and standards for the preparation and implementation of projects, including, for example, the preliminary assessment of their environmental impact, or the preparation of resettlement plans for affected residents. These internal regulations were directed at the organization's administrative apparatus (Management), but also had an impact also on the borrowers of the Bank, as the satisfaction of policy prerequisites was conditional for obtaining financial support and could be included in the terms of the financing agreements. Moreover, most of the procedures were to be carried out by the borrowers directly, while Management was supposed to provide assistance and supervision.

The establishment of the Inspection Panel came a few years later, and is commonly traced back to two triggering episodes in particular: on the one hand the World Bank's involvement in the construction of the controversial *Sardar Sarovar* dam in India, which had dramatic consequences for the local population and environment,[4] and on the other hand the troublesome

[2] The World Bank is a multilateral development bank (MDB), i.e., an international organization created by States for the purpose of providing loans or other financial services to its members. It is composed of the International Bank for Reconstruction and Development (IBRD) and the International Development Agency (IDA), and constitutes the public sector lending branch of the World Bank Group. The World Bank Group, for its part, includes also the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA) – which support private businesses investing in developing countries – and the International Center for Settlement of Investment Disputes (ICSID), which arbitrates disputes between governments and foreign investors. On the World Bank and on MDBs in general, *see* I. Shihata, *The World Bank in a changing world* (M. Nijhoff Publishers, The Hague, 1991-2001), and J.W. Head, *Losing the global development war* (M. Nijhoff Publishers, The Hague, 2008).

[3] Which is composed of 24 directors, representing the 186 member States, and acts as a delegate body for the 186 member *Board of Governors*.

[4] The project was investigated by an independent commission, appointed by the World Bank. Excerpts of the report of the commission, *Sardar Sarovar: The Report of the Independent Review*, June 1992, are available at:

findings of an internal report, which shed light on numerous problems in the organization's portfolio management.[5] Both cases raised awareness of the fact that various levels of Management observed a "culture of approval", paying insufficient attention to project quality, borrower commitment, Bank supervision, and policy application. As a response, Management prepared an action plan underlining the need for a better monitoring of Bank operations, and recommending, among other steps, the opportunity of establishing a mechanism which could provide, when needed, independent judgments on the implementation of specific projects.[6]

Such a mechanism came to life in 1993, when a Resolution of the Bank's Board of Directors established the World Bank Inspection Panel,[7] a permanent body which was meant to answer, on the one hand, the growing demands for greater accountability of the World Bank *vis-a-vis* civil society and project affected people, and on the other hand the Bank's managerial concerns of efficiency.[8]

The Panel was composed of three Board-nominated experts and was designed as an independent body within the organization, reporting directly to the Board of Directors, assisted by a permanent Secretariat, and separate from Management and its President. The Panel was therefore given the mandate to carry out investigations on specific projects, to verify whether Management had complied with the operational policies and directives set forth by the Bank's

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<narmada.aidindia.org/content/view/52/>. *See also* WORLD BANK, *OED Précis, Learning from Narmada*, May 2005.

[5] The report, *Effective Implementation: Key to Development Impact* (R92-125), also known as "Wapenhans report", was completed in November 1992, and is summarized in WORLD BANK, *Getting results: The World Bank's Agenda for Improving Development Effectiveness*, July 1993. An account of the circumstances which lead to the creation of the Panel is provided in I.F.I. Shihata, *The World Bank Inspection Panel* (Oxford University Press, New York, 1994), and in I.F.I. Shihata, "The World Bank Inspection Panel – Its Historical, Legal and Operational Aspects", in G. Alfredsson, R. Ring (eds.), *The Inspection Panel of the World Bank: a different complaints procedure* (Kluwer Law International, The Hague, 2001), p. 7.

[6] WORLD BANK, *Progress Report on The Implementation of Portfolio Management: Next Steps A Program of Actions*, The World Bank, Washington, D.C., 1994.

[7] IBRD – IDA, Resolution No. IBRD 93-10/Resolution No IDA 93-6, *The World Bank Inspection Panel*, 22 September 1993.

[8] *See* R.E. Bissell, S. Nanwani, "Multilateral Development Bank Accountability Mechanisms: Developments and Challenges", 3:2 *Central European Journal of International & Security Studies* (2009), p. 160, J. Fox, "Framing the Inspection Panel", and D. Clark, "Understanding the World Bank Inspection Panel", in D.L. Clark, J. Fox, K. Treakle, (eds.), *Demanding Accountability: Civil Society Claims and the World Bank Inspection Panel* (Rowman & Littlefield Publishers, Lanham-Oxford, 2003).

Board of Directors, and to report such findings to the Board itself. Its findings were meant to be public, and its investigations could be triggered by external requests coming from project-affected people, claiming they had suffered adverse material effects from a Bank financed project, as a consequence of Management's failure to follow the relevant policies.

Besides setting the basis for greater transparency of World Bank operations, the new mechanism gave non-State actors a system of redress towards an international organization protected from third party claims by international immunity, and constituted to that extent an unprecedented novelty in the field of international organizations.[9]

1.2. *The Subsequent Diffusion of IAMs*

The example of the World Bank was followed by several organizations, the first ones of which were the private sector branches of the World Bank Group (IFC and MIGA) and four Regional Development Banks (RDBs),[10] that in practice had encountered problems and criticism analogous to those faced by the World Bank.[11]

Today, sixteen years after its establishment, the Inspection Panel is no longer unique in its kind, as IAMs have become a quickly rising good practice of the international finance field,[12]

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[9] *See*, *ex multis*, E. Hey, "The World Bank Inspection Panel: Towards the Recognition of a New Legally Relevant Relationship in International Law", 2 *Hofstra Law and Policy Symposium* (1997), I. Shihata, *supra* note 5, D.D. Bradlow, S. Schlemmer-Schulte, "The World Bank's New Inspection Panel, a constructive Step in the Transformation of the International Legal Order", 54 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, (1994), p.392, G. Alfredsson, R. Ring (eds.), *supra* note 5, L. Boisson De Chazournes, "The World Bank Inspection Panel: About Public Participation and Dispute Settlement", in T. Treves, M. Frigessi Di Rattalma, A. Tanzi, A. Fodella, C. Pitea, C. Ragni, (eds.), *Civil Society, International Courts and Compliance Bodies*, (T.M.C Asser Press, The Hague, 2004), p. 187.

[10] Regional Development Banks (RDBs) are international organizations quite similar to MDBs, but focusing on the development of specific regions of the World (e.g. Asia, Africa, South-America, and so forth). *See* E.R. Carrasco, W. Carrington, H.J. Lee, "Governance and Accountability: The Regional Development Banks", 08-47 *University of Iowa Legal Studies Research Paper* (2008), J.H. Head, *supra* note 2, and J.H. Head, "Asian Development Bank", Supplement 23 in R. Blanpain, M. Colucci, J. Wouter, "Intergovernmental Organizations", *International Encyclopaedia Of Laws*, (Kluwer Law International, Alphen aan den Rijn, 2008).

[11] *See* J.H. Head, *supra* note 2.

[12] *See* D.D. Bradlow, "Private complaints and international organizations: a comparative study of the independent inspection mechanisms in international financial institutions", 36 *Georgetown Journal of International Law* (2005), pp. 403-494, R.E. Bissell, S. Nanwani, *supra* note 8, M. Van Putten, *Policing the Banks: accountability mechanisms for the financial sector*, (McGill-Queen's University Press, Montreal, 2008), and E. Suzuki, S. Nanwani,

especially promoted by the governments of developed countries, that own most of the shares of the interested institutions.[13]

In particular, in 1999 the Compliance Advisory Ombudsman (CAO) was established to supervise the operations of the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA).[14]

In 1994 the Board of Executive Directors of the Inter-American Development Bank (IDB), the RDB focusing on Latin American and Caribbean countries, established the Independent Investigation Mechanism, which was substituted in 2010 by the Independent Consultation and Investigation Mechanism (ICIM), consisting of a Project Ombudsperson, a five-member Panel and an Executive Secretary.[15]

The accountability mechanisms of the Asian Development Bank (ADB), the RDB focusing on the development needs of Asian countries, was first established in 1995, as an inspection policy based on the activity of a roster of experts. It was reformed in 2003 with the creation of an Accountability Mechanism (AM), consisting of two new entities: a Special Project Facilitator (SPF) and a three member Compliance Review Panel (CRP).[16]

The Project Complaint Mechanism (PCM) of the European Bank for Reconstruction and Development (EBRD) was established in March 2010, in substitution of the 2003 Independent Recourse Mechanism (IRM), and is composed of a PCM Office, with PCM Experts and a PCM Officer.[17]

"Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks", 27:177 *Michigan Journal of International Law*, (2006), pp. 177-225.

[13] *See* M. Van Putten, *supra* note 12, p. 142. *See* E. Benvenisti, "The Interplay between Actors as a Determinant of the Evolution of Administrative Law in International Institutions", 68:3-4 *Law and Contemporary Problems* (2005), p. 319.

[14] CAO Terms of Reference, available at: <www.cao-ombudsman.org/about/whoweare/documents/TOR_CAO.pdf>.

[15] *See* <www.iadb.org/MICI/>.

[16] Which have separate secretariats but are considered "linked for the purpose of responding to the complaints of project-affected people" and therefore form a unitary mechanism. *See* ADB, *Establishment of an Inspection Function* (Doc. R225-95), 10 November 1995, Manila, ADB, *Review of the Inspection Function: Establishment of a New ADB Accountability Mechanism* (Doc. R79-03), 8 May 2003, Manila. The ADB is currently undertaking another review of its Accountability Mechanism Policy (<www.adb.org/Accountability-Mechanism/>).

[17] *See* <www.ebrd.com/pages/project/pcm.shtml>.

The Independent Review Mechanism (IRM) of the African Development Bank (AfDB), the RDB focusing on the African region, was established in 2004 and underwent a review in June of 2010.[18] It now consists of a Compliance Review and Mediation Unit (CRMU), which is headed by the Director CRMU and includes a roster of experts.

Over the years, these six mechanisms have gradually come to form a peer group of "Independent Accountability Mechanisms of International Financial Institutions", which exchange lessons learned and occasionally cooperate in the conduct of investigations relating to co-financed projects. The proliferation of IAMs, however, has also gone beyond the field of MDBs, with the establishment of new mechanisms by other supranational and even national institutions.[19]

In particular, in 2004 the Overseas Private Investment Corporation (OPIC) - an independent U.S. government agency providing financial services to facilitate the participation of U.S. capitals and skills in developing countries[20] - established an Accountability and Advisory Mechanism, consisting in an Advisory Office and an Office of Accountability, pursuant to Congressional indications for the creation of an accountability mechanism modeled on the ones adopted by the MDBs.[21]

Shortly before then, two new accountability mechanisms had also been set up by two national export credit agencies (ECAs), i.e., agencies providing financial support for national exports abroad, whose "primary role […] is to promote trade in a competitive environment", ("whereas multilateral development banks and development agencies focus primarily on

[18] *See* <www.afdb.org/en/about-us/structure/independent-review-mechanism/>.

[19] For the purposes of this paper, we have selected a group of mechanisms based on the list of participants at the latest Meeting of the "Independent Accountability Mechanisms of International Financial Institutions", <www.compliance.adb.org/dir0035p.nsf/alldocs/RDIA-86Y4JT?OpenDocument>. The chosen criterion, therefore, simply selects the mechanisms that presently recognize themselves and cooperate in this emerging group and is not meant to be legally relevant, nor meant to encompass the whole range of possible analogous mechanisms. For that matter, it actually excludes the mechanism established by Export Development Canada, which participated only in past meetings of the peer group.

[20] The President and Board of Directors of OPIC are nominated by the President of the United States, by and with the advice of Senate. It operates "under the policy guidance of the Secretary of State" (Art. 231, of Title IV of the Foreign Assistance Act of 1961, P.L. 87-195), reports annually to Congress, and is of course subject to national legislations, like for example the FOIA. *See* <www.opic.gov/>.

[21] *See* the Preamble to the General Policy and Guidelines, approved by the Board on 29 July 2004, BDR(04)33.

development assistance").[22] The Japan Bank for International Cooperation, a bank owned by the Japanese government, established an Examiner Office for the purpose of ensuring compliance with its Guidelines for Confirmation of Environmental and Social Considerations.[23] While Nippon Export and Investment Insurance (NEXI) - a Japanese incorporated administrative agency, which provides trade and investment insurance to Japanese companies and represents the second official Japanese ECA[24] - approved the Procedures for Submitting Objections on Guidelines of Environmental and Social Considerations in Trade Insurance (GESC), which establish an Examiner figure,[25] in relation to the organization's guidelines for "prevent[ing] or mitigat[ing] potential impacts on the environment".[26]

Finally, the European Investment Bank (EIB), the financing institution of the EU,[27] adopted in 2008 and reformed in 2010, a Complaints Mechanism based on the operations of a newly established Complaints Office (CO) in cooperation with the existing European Ombudsman (EO), that can receive, among other things, complaints in relation to the extra-EU operations of the Bank.[28]

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[22] OECD, Revised Council Recommendations on the Common approaches. In this respect, OPIC should qualify as a development agency, as its mandate is to "complement … the development assistance objectives of the United States", and the OECD qualifies Export-Import Bank of the United States (Ex-Im Bank) as the official U.S. ECA.

[23] JBIC, Summary of procedures to submit objections concerning JBIC Guidelines for Confirmation of Environmental and Social Considerations. *See*: <www.jbic.go.jp/en/about/role-function/pdf/jbic-brochure-english.pdf>.

[24] *See* OECD, <www.oecd.org/countrylist/0,3349,en_2649_34169_1783635_1_1_1_1,00.html#I>.

[25] *See* organizational chart at <www.nexi.go.jp/e/pamphlet/2009/pdf/07e.pdf>.

[26] "(i.e., not only on the natural environment, but also on social issues such as involuntary resettlement and respect for the human rights of indigenous peoples …)", NEXI, Guidelines on environmental and social considerations in trade insurance (GESC).

[27] The EIB's capital is subscribed by the EU member States, and invested in projects both within and outside the EU, for the realization EU policy objectives. In this regard the EIB differs from the MDBs, which have an open membership, and from the EBRD, which is an MDB created after the fall of the Soviet regime, to foster the transition of Eastern European countries towards market based economies.

[28] The EIB Complaints mechanism principles, terms of reference and rules of procedure and the EIB Memorandum of Understanding with the EO, are available at: <www.eib.org/about/cr/governance/complaints/index.htm>.

2. **The Main Characteristics of IAMs**

2.1. *Functions and Activities: the Multipurpose Nature of IAMs*

The Resolution establishing the World Bank Inspection Panel contained no specific statement concerning the objectives of this new mechanism or the reasons which had lead to its creation. It was nonetheless possible to infer, from the operative sections of the Resolutions and from the debate which preceded its approval, that the Panel was meant to focus on the Bank's "non-compliance" with its operating policies and procedures and that "fact-finding" was to represent one of its main functions.[29]

Over the years the IAM reality has evolved greatly: the number of functions has risen, the functions are generally clarified in IAM founding documents, and the Inspection Panel itself has been able to spontaneously develop new functions, by informally adopting innovative practices. As a result, the array of IAM activities is now more varied, articulated and precise.[30]

Fact finding is the first function of IAMs, and to a certain extent it appears instrumental to all the others: IAMs are given access to the organization's documents, they may conduct interviews with the operational departments and other actors (requesters, local authorities, other interested parties), and, in most cases, they may also hire external experts and make on-site visits. It must be noted, however, that the extent of fact-finding powers does vary from case to case.[31]

The second function is problem-solving (or consultation), and it is concerned with promoting dialogue among the interested parties, addressing harm and finding an agreed solution to the issues raised by the complainants' requests. All IAMs have an explicit problem-solving mandate, and even the Inspection Panel (which wasn't originally given one) has exercised

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[29] I.F.I. Shihata, *supra* note 5, p. 28. Note that the second review of the Resolution qualifies the Panel as a "fact-finding body on behalf of the Board", IBRD – IDA, *Clarification of the Board's Second Review of the Inspection Panel*, 20 April, 1999.

[30] *See* D.D. Bradlow, *supra* note 12. *See also* INSPECTION PANEL, *Accountability at the World Bank, The Inspection Panel at 15 years*, Washington D.C., 2009.

[31] For example, several possibilities aren't contemplated for the Examiners at JBIC, who have more limited investigative powers, and are obliged to arrange all the interviews through the Operational Department (art. 4 of the Examiner Procedures).

problem-solving efforts in practice.[32] This function may be exercised in a variety of ways, from "leaving space for negotiations",[33] to conducting joint fact finding missions, mediation efforts and making recommendations.[34]

The third function exercised by IAMs is compliance review, which has the purpose of verifying whether Management has complied with the organization's policies or not and may therefore resemble, to the extent that it leads to findings of conformity or non-conformity with general norms, a form of *jus dicere*.

Another important function is the monitoring of Management's implementation of remedial action, also called follow-up, which has been developed by most mechanisms, and exercised on occasion by the Inspection Panel as well.[35] It consists of keeping track of Management's progress for reporting it to the heads of the organizations and making it public, even though the extent of the IAMs powers may vary from case to case,[36] and range from merely receiving information from Management,[37] to actively investigating its operations also through direct site visits. In certain cases, then, follow-up activity may also include consulting with Management and the requesters, issuing draft reports on which the parties can make observations and issuing further recommendations.[38]

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[32] INSPECTION PANEL, *Accountability at the World Bank, The Inspection Panel at 15 years*, Washington D.C., 2009.

[33] Which is the approach adopted by the Inspection Panel in the request relating to the *Romania: Mine Closure and Social Mitigation Project.*

[34] At the CAO, for example, the problem-solving efforts include: "mediated agreements, joint fact-finding, multiparty monitoring programs, stakeholder dialogues or roundtables, or other collaborative approaches" (CAO, Annual Report 2008/2009), and at the EBRD problem-solving includes "mediation, conciliation, dialogue facilitation, or independent fact-finding" (PCM, Rules of Procedure).

[35] INSPECTION PANEL, *Accountability at the World Bank, The Inspection Panel at 15 years*, Washington D.C., 2009.

[36] Some mechanisms exercise this function autonomously, like the CAO, the PCM, and the mechanisms at OPIC and EIB, while others do so only at the organization's discretion, by express request, like the Inspection Panel and the ICIM. Moreover, while in certain cases monitoring activity continues at the discretion of the mechanism itself (ICIM Policy, art. 52), or until full implementation is reached, like for the CAO and PCM, for others a specific time limit is set, like at the ADB, where the time frame is five years though the CRP may recommend further monitoring if necessary (CRP Procedures, art. 47).

[37] Like at JBIC. Which however can hardly be considered effective monitoring.

[38] ADB, CRP Procedures, art. 48 and art. 49 (iv).

As regards the implementation of recommended action, the EIB Complaints Office (CO) is in a unique position with respect to the other IAMs: in addition to a "follow-up and report" function, this mechanism has expressly introduced a form of appeal consisting in the possibility of presenting "confirmatory complaints" to the CCO,[39] or even complaints to the European Ombudsman.[40]

As a complement to their other functions, the majority of IAM mechanisms have the power to make non-binding recommendations on actions to take in response to a claim – a power which may be exercised during problem-solving, in the compliance review reports and in some cases during monitoring activity. In this sense, IAMs have evolved from the Inspection Panel's fact-finder model to a dispute resolution oriented approach.[41]

A key function of IAMs is, then, the possibility of contributing to the learning process of their host organizations, which is known as "lessons learned function" or advisory function,[42] and is performed by providing observations and recommendations on measures to be taken to avoid future non-compliance, and in general on more systemic aspects of the organization's operations.[43] This function may be performed in various ways: on a spontaneous basis in the project-specific compliance reports,[44] or in the annual reports to the Boards and Presidents of the organization,[45] or through specific advisory channels, in response to requests from the heads of

[39] Which requesters may raise with the CO when they are dissatisfied with the outcome of its review, or with the implementation of its remedial action, (EIB, CO Rules of Procedure, art. 11).
[40] The EO may therefore review the CO's process, as an alternative to the confirmatory complaints system, or as a second level of appeal, (EIB, CO Rules of Procedure, art. 12).
[41] R. Bissell, S. Nanwani, *supra* note 8. Interestingly, the Inspection Panel itself, despite its limited statutory mandate, has at times made suggestions, for example in the *India: Coal Sector and Social Mitigation Project* (*See Investigation Report*, p.122) in the *Ghana: Second urban environmental sanitation project* (Investigation report, p.xxviii), or in the *India: Coal Sector Environmental and Social Mitigation Project* (Annual Report 2003-2004, p. 40).
[42] *See* D.D. Bradlow, *supra* note 12, suggesting that all mechanisms should expressly have one.
[43] IAMs may, for example, highlight recurring problems in the application of key policies or implementation of certain kinds of projects, or underline country-specific issues, or detect institutional constraints (like lack of resources, or time pressure in the preparation of projects) which affect the organization's capacity to perform properly, and they may suggest ways for preventing them to occur in the future.
[44] ICIM Policy, art. 64; IRM Operating rules and procedures, art. 52.
[45] NEXI Objection procedures, art. 15; IRM Operating rules and procedures, art. 78.

the organization.[46] Also in this case, the Inspection Panel has, on occasion, exercised this function spontaneously.[47]

2.2. *IAM Structure*

IAM structure varies according to the number of members and the nature of their employment, which can be permanent or on an as-needed basis. In particular, IAMs can consist of a single post,[48] a standing panel,[49] a roster of experts which are employed on an as-needed basis,[50] or various combinations of these.[51]

Moreover, while certain mechanisms concentrate all their functions within the same operating unit,[52] others assign them to different sub-units. In particular, problem-solving initiatives are sometimes separate from compliance review functions.[53] While in other cases the preliminarily function of determining the eligibility of a request is separate from the actual performance of IAM problem-solving or compliance review.[54]

In each of the host organizations, the choice of which structure to adopt is generally the result of balancing competing considerations. Because of the expenses that an IAM carries for its host organization, the need to contain such costs naturally plays a role in the decisions concerning the design of these mechanisms;[55] in IAM experience this need has been met, for example, by adopting rosters of experts, or by limiting the number of fixed positions in the mechanism, and by allowing a flexible employment of additional members, according to the

[46] Like for the CAO, or the OPIC Advisory Group.
[47] *See* INSPECTION PANEL, *Accountability at the World Bank, The Inspection Panel at 15 years*, Washington D.C., 2009.
[48] Like the CAO or the NEXI Examiner.
[49] Like the World Bank Inspection Panel.
[50] Like the PCM.
[51] Like the ICIM, or the OPIC mechanism, or the ADB AM.
[52] As is the case for the CAO, the World Bank Inspection Panel, and the mechanisms at EIB, JBIC and NEXI.
[53] This is the case of the ICIM, and particularly of the ADB mechanism, in which the two sub-units of the mechanism have separate secretariats and administrative staffs
[54] In the EBRD mechanism, for example, the Officer nominates an expert for the eligibility phase, and a different one for the compliance review phase.
[55] I.F.I. Shihata, *supra* note 5, p. 94. This concern emerges also in the results of the consultations held by JBIC for the reform of its mechanisms: *see* <www.jbic.go.jp/en/about/environment/guideline/disagree/pdf/A04-02-05-01_b_From%20General%20Public%20in%20Japan.pdf>.

flow of requests.[56] It is worth noticing, however, that the choice of a roster mechanism (or "virtual panel")[57] has been seen, in IAM practice, as a potential risk for the mechanism's independence and credibility, and has therefore been reconsidered,[58] or mitigated,[59] in order to afford greater continuity and stability of the mechanisms.

The various mechanisms also differ in regard to their institutional status and setup.

In particular, the Inspection Panel's three members are outside of Management's line of reporting and report directly to the organization's Board of Directors. All Panel members, however, are subject to a basically internal nomination procedure: they are appointed by the Bank's Board of Directors upon nomination by the President,[60] who within the governance structure of the World Bank represents the head of Management. On the other hand, the Resolution establishes that panelists may be removed only by the Board of Directors, only "for cause", and that their five year term is non-renewable. Furthermore, the Resolution establishes that certain categories of Bank officials (Executive Directors, Alternates, Advisors and staff members of the Bank Group) may not serve on the Panel until two years after the end of their service. Along the same lines, members of the Panel may not be employed by the Bank Group following the end of their service on the Panel, to prevent their activities from being influenced by expectations on possible future employments. Finally, the Panel manages an autonomous budget and is aided by a permanent Secretariat.

The position of the Compliance Advisory Ombudsman (CAO) within the World Bank Group is instead somewhat different. In the first place, the CAO doesn't report to the organization's stakeholders (i.e., the member States, represented within the Boards of Directors), but rather to the President of the World Bank Group. The President of the World Bank Group,

[56] It is worth noticing that even a standing panel such as the Inspection Panel has some elements of flexibility, as only the chairman is employed on a permanent basis, while the other two members of the Panel are employed on an as-needed basis.
[57] D.D. Bradlow, *supra* note 12.
[58] Like at the ADB. *See* <www.adb.org/Documents/Policies/ADB_Accountability_Mechanism/default.asp>.
[59] For example, the PCM roster can count up to ten members, but the EBRD has actually limited the number of nominations "thus giving the roster the character of a permanent panel", R. Bissell, S. Nanwani, *supra* note 8, p. 175.
[60] Who makes his nomination after consulting with the Executive Directors, (Inspection Panel Resolution, para. 2).

for his part, isn't the chief executive officer of either IFC or MIGA – which are the organizations subject to the CAO's review – but has the important power of recommending the nominees for those two posts to the Boards of Directors of the two organizations.[61] The CAO appears therefore to be intended as a more internal figure, in a fiduciary relation with the President: in particular, he is nominated by the President for a term of three to five years, which is renewable by mutual consent, and serves at the President's discretion.[62] Like the Inspection Panel, however, the CAO manages an autonomous budget and has a permanent Secretariat. Moreover, the professional staff members of the CAO's Office are restricted from obtaining employment with IFC or MIGA for a period of two years after the end of their engagement.

The ADB mechanism, instead, combines these two models, by adopting for its problem solving unit, which reports to the President of the Bank,[63] features which are similar to those of the CAO, and for its compliance review unit features which are similar to those of the Inspection Panel.[64]

The problem solving and compliance review functions are regulated in separate ways also by the IDB. Here – even though the ICIM Project Ombudsperson and the ICIM Panel are both nominated by the Board of Directors, to which they directly respond – the first body has a more fiduciary relation to the organization,[65] while the second one is subject to safeguards which are analogous to the ones set up for the World Bank Inspection Panel.[66]

The AfDB and the EBRD, instead, which both have mechanisms consisting in a roster of experts, coordinated by a central and permanent figure (respectively, the Director of CRMU and the PCM Officer), have adopted separate procedures for the nomination of the coordinating

[61] IFC Articles of Agreement, art. IV, Sec. 5, and MIGA Convention, art. 32.
[62] CAO Terms of Reference.
[63] The SPF is appointed by the President after consultation with the Board, (AM Policy, art. 62).
[64] The Panel is nominated by the Board, upon recommendation by the President, and reports directly to it (AM Policy, art. 63).
[65] The Ombudsperson is a Bank employee, appointed by the Board for a period of three to five years, renewable by mutual consent (ICIM Policy, art. 74).
[66] The Panel members aren't employees, they are nominated for a non-renewable term, may be removed only for cause, and is subject to incompatibilities and limitations on subsequent employments (ICIM Policy, articles 77 to 84).

figures and for the nomination of the members of the two rosters. In particular - even though all members are subject to various forms of incompatibility and restrictions with respect to successive employment for the Banks - the coordinating figures are appointed by the President and may be removed only with his approval,[67] while the roster members are appointed, and may be removed for cause, by the Bank's Board of Directors itself.[68] Moreover, only the roster members of the CRMU are appointed for non-renewable terms, whereas the coordinating figures of the two mechanisms, and the roster members of the PCM, are appointed for renewable terms.

It is important to notice, at this point, that the EBRD mechanisms is inserted in the Bank's Office of the Chief Compliance Officer (CCO), differently from all the other MDB IAMs, which are constructed as self standing units. The CCO reports directly to the President, may be dismissed only with guidance from the Board and is responsible for a number of different matters, including the investigation of allegations of fraud, corruption and misconduct which in the other MDBs are kept separate from the IAM functions and are managed by different offices.

Outside the MDB world, in spite of some similarities with the mechanisms mentioned above, IAMs still appear to be generally underdeveloped and their structures are less well defined.

The OPIC mechanism founding resolution states that the OA Director is nominated by the President of OPIC and reports directly to him, but no further details are provided with respect to nomination procedures or to the inner structure of the Director's office.[69]

Also the recently revised EIB Complaints Office is vaguely defined and in any case more internal, in comparison to the other mechanisms. According to its Terms of Reference, the mechanism falls under the responsibility of the organization's Head of Corporate Responsibility and reports to the heads of Management. The procedures specify that it "is independent from operational activities" and will be provided budgetary support "so that [it] can be effective and

[67] CRMU Terms of Reference, art. 61, PCM Rules of Procedure, art. 55.
[68] CRMU Terms of Reference, art. 73, PCM Rules of Procedure, art. 48.
[69] Other than the fact that such nomination will be made under the "personnel framework" provided by "relevant rules and regulations governing hiring in the U.S. government", which OPIC is subject to.

independent",[70] but there is no description of its internal structure or nomination procedures, nor of the existence of other safeguards.

Lastly, JBIC and NEXI have established that the Examiners of the two organizations are nominated by the President and CEO and report directly to him. This said, in the case of JBIC very little detail is provided, while at NEXI a few additional safeguards are set forth.[71]

2.3. *IAM Procedures*

In line with the dual nature of IAMs, as mechanisms of both external accountability and internal control, IAM activity may be triggered in two main ways: by external requests on the one hand, and by internal requests, presented by the heads of the organization, on the other.[72] In IAM practice, however, the possibility of receiving external requests has predominated, while internal requests have been less frequent.

That said, IAM procedures appear relatively succinct and impose few formalities, in line with the common understanding that they should be accessible and, given their relatively new and experimental nature, flexible.

Despite their variety, these procedures all tend to display two main phases: a preliminary phase for the eligibility screening of requests, and a principal phase for the actual performance of IAM functions (i.e., problem-solving and compliance review).

The eligibility requirements vary from case to case, but generally fall under five main categories.

The first one of these is the requirement of standing, in which regard the establishing resolution of the World Bank Inspection Panel required the presence of a plurality of subjects,

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[70] Terms of reference, Par. II, art. 7.

[71] JBIC, Summary of Procedures to Submit Objections concerning JBIC Guidelines for Confirmation of Environmental and Social Considerations, para. II. NEXI, Procedures for Submitting Objections on Guidelines of Environmental and Social Considerations in Trade Insurance, articles 20 to 23.

[72] For example: at the AfDB mechanism, requests for investigation may be presented by the Board of Directors (IRM Operating Rules and Procedures, art. 4), the CAO may receive requests for compliance auditing from senior Management or the President (CAO Guidelines, para. 3.3), and the Inspection Panel may receive requests both from the Board and from individual Directors (Inspection Panel Resolution, para. 12). While this possibility isn't contemplated at the EBRD mechanism.

displaying *prima facie* evidence of three circumstances: direct material harm (or risk of harm) to their rights or interests, Management's failure to comply with the policies and a *nexus* of causality between the two events. In practice, however, the World Bank Inspection Panel has generally interpreted the standing requirement broadly,[73] while a few other mechanisms have introduced a few interesting innovations: some IAMs now accept individual requests,[74] while others have loosened the requirement of direct material harm by explicitly introducing the possibility of requests coming from NGOs.[75] Moreover, the development of new functions has also determined the creation of separate standing schemes. In particular, while compliance review reflects the technical and quasi-judicial schemes originally adopted by the Inspection Panel, the criteria for problem-solving activity are more discretional (as, for example, they present a looser requirement of *prima facie* non-compliance).[76]

The second type of requirement defines the material scope of IAMs (in a way, the *ratione materiae* jurisdiction), on the basis of the types of projects and financial contracts they can review, as well as the policies which are covered by their action.[77]

The third type of requirement is the duty, on the part of the requesters, of exhausting prior administrative remedies within the organization. In other words, IAMs must verify that requesters have already raised their issue with Management, and that Management has failed to meet their requests.[78] IAM review is therefore conceived as a mechanism of last resort, with

[73] In the *Yacyretà* case, for example, it accepted a request from an NGO, in defense of biodiversity (INSPECTION PANEL, *Eligibility Report*, p.2). Also in the *Brazil: Paranà Biodiversity Project* case, the Panel didn't object to the fact that the request was presented in defense of an interest like biodiversity, without alleging direct material harm to individuals (*see* INSPECTION PANEL, *Eligibility Report*).

[74] As opposed to requests presented necessarily by two or more persons. This is the case of the CAO, the ICIM, and the mechanisms at EBRD and EIB.

[75] As opposed as requests necessarily from affected people. This is the case of the EBRD and EIB.

[76] The CAO, for example, doesn't require allegations of non-compliance for problem solving requests, while it does for compliance audits. Compare also the AfDBs requirements for problem solving (IRM Operating Rules and Procedures, art. 34) with the ones for compliance review (IRM Operating Rules and Procedures, art. 44).

[77] For example: the Inspection Panel covers all the Operational Policies and Procedures of the Bank, relating to AfDB has a more limited jurisdiction for the review of private sector and non-sovereign operations, in comparison to sovereign ones (IRM Operating Rules and Procedures, art. 2), while OPIC includes labor standards and human rights, which other organizations do not.

[78] *See* for example the Inspection Panel Resolution, the IRM Operating Rules and procedures, art. 1 (which, however, define the requirement loosely), or the JBIC Examiner Procedures, art. 4 lett. (I).

respect to the preferred possibility of a purely internal and administrative solution of the issues raised.

A fourth requirement sets forth the *ratione temporis* jurisdiction of IAMs, which could be defined as a window, the opening and closing of which is related to the organization's level of involvement in the project, e.g. the fact that an agreement has been signed, the level of project execution, or the level of loan disbursement.[79]

Lastly, IAM procedures provide for a variety of exclusionary rules, for example: *ne bis in idem* requirements, a restriction on claims which appear non serious, or otherwise frivolous or malicious, and a bar on claims which refer to the responsibility of other parties (such as the borrower) and do not include actions or omissions of the organization.

During the eligibility phase, an answer from Management on the issues raised by the request is sometimes required.[80] After that, the phase ends with the IAM's determination of whether IAM action is warranted or not.[81]

In case of a positive determination, certain mechanisms have the power to proceed directly,[82] while others require clearance from the organization (i.e., from the President or Board

[79] With respect to the opening date, most mechanisms accept requests relating to projects which are being considered by the organization but haven't yet been approved: regulations generally require the presence of a policy relevant determination (CAO and OPIC), or of other preparatory commitments (like the signing of a mandate letter, or the assignment of a project number, IDB). However, NEXI and JBIC do not admit such requests, while the EBRD mechanism admits them only for problem-solving efforts and not for compliance review. With respect to the closing date, instead, there has been a gradual extension of the time frame with respect to the Inspection Panel's original model (95 per cent of loan disbursement), as most mechanisms now accept requests within one (AfDB) or two (IDB) years after the physical completion of the project or after the last disbursement from the organization. It is worth noticing that all requirements are in any case based on objective criteria, with the sole exception of the EIB mechanism, that adopts a subjective criteria by admitting complaints only within one year from when the alleged facts could have been reasonably known by the claimants (para. IV, art. 5).

[80] *See* PCM Rules of Procedure, art. 15, or the Inspection Panel Resolution, art. 18. While the CAO adopts a more informal approach, of "holding discussions with the project team" (CAO Guidelines, art. 3.3.4).

[81] In case of a negative determination the request is rejected, but some mechanisms give the requesters the possibility of clarifying their position, or of presenting a confirmatory complaint (EIB). Interestingly, the EBRD President (or Board) may send negative eligibility reports back to the PCM, for further consideration (PCM Rules of Procedure, art. 27).

[82] This is the case for mechanisms at EIB, JBIC, OPIC, NEXI, and for the CAO (although for compliance audits it must consult with the Executive Vice President).

of Directors).[83] Among these, in some cases clearance is required for the exercise of only one of the functions (compliance review or problem solving) and not for the other.[84]

Problem-solving and compliance review may be coordinated in various ways. In general, compliance review is perceived as a remedy of last resort; however, while for some mechanisms this fact implies that compliance review is necessarily precluded when problem-solving efforts have succeeded,[85] others expressly provide for the possibility of accessing compliance review even when problem-solving has been successful, if there is evidence of serious compliance issues.[86]

Successful problem-solving typically leads to the adoption of an agreement, the implementation of which may be subject to monitoring by the IAM.

In case of failure, instead, IAMs normally turn to compliance review, which, according to the Inspection Panel's original model, consists in an investigation lead by the mechanism itself and ending with the adoption of a final report, which spells out evidence of compliance or non-compliance with the organization's policies. The report is communicated to the Board of Directors and also to Management, which, upon receiving it, is required to prepare an action plan in response to the Panel's findings of non compliance. The action plan is then communicated to the Board of Directors, which will have the final power to decide what action to take.

With respect to the Inspection Panel's original model, however, many of the other mechanisms present a more articulate remedial phase in which, for example, affected parties are

[83] The Inspection Panel's investigations must be approved by the Board (Inspection Panel Resolution, art. 25). At the ADB the President must approve of the course of action for SPF efforts (AM Policy, art. 83) and the Board must authorize compliance reviews (AM Policy, art. 121).

[84] At the EBRD, the President must approve of Problem Solving initiatives (PCM Rules of Procedure, art. 31), while compliance review's don't require clearance. At the AfDB, instead, the accordance of the President (for financial operations which are not yet approved) or Board (for approved ones) is necessary for compliance reviews, but not for problem solving (IRM Rules and Procedures, artt. 35 and 46). The OPIC mechanisms, for its part, determines eligibility for compliance review in consultation with the President, and eligibility for problem-solving autonomously.

[85] Like at the CAO, where compliance review may be accessed only if problem-solving has failed, or at the discretion of the CAO's Vice President.

[86] In the ADB mechanisms the requesters themselves may apply for review even during consultation, when they have "serious concerns on compliance" (AM Policy, art. 42). In the AfDB mechanism, instead, the Director CRMU may decide to carry out a compliance review, even after successful problem-solving, subject to Board or President accordance (IRM Operating Rules and Procedures, art. 43).

invited to comment upon Management's action plan, and practically all of them, by now, provide an *ad hoc* monitoring phase.

3. **Considerations on IAM Independence**

The *raison d'être* for the establishment of Independent Accountability Mechanisms was that of creating a source of reliable assessments on the organization's activity; a fundamental prerequisite for IAM activity has therefore been their independence, in particular with respect to the operational departments of the organization involved in the reviewed activity. In the present chapter we will investigate some of the structural and procedural elements which have the strongest impact on this prerequisite.

3.1. *Nomination Procedures and Other Structural Features*

Within MDBs the objective of IAM independence has been pursued, above all, by setting IAMs outside of Management's line of reporting, and establishing that they report directly to the heads of the organization. However, as we have seen, while certain mechanisms report directly to the member States represented in the Boards of Directors (who constitute, in a way, the stakeholders of the organization), for others the lines of reporting are more complex, and a relationship with the President is somehow present.

Within MDB governance, the President normally constitutes the chief executive of the organization, and must therefore account for all its operations to the Executive Directors. For this reason, his position appears less impartial, in comparison to the one of the Board, when it comes to judging Management's operations.

Therefore, the position of IAMs like the World Bank Inspection Panel and the CRP of the ADB Accountability Mechanism, which report directly to the Board of Directors, appear more independent from Management's interests in comparison to IAMs which maintain reporting lines with the President, and are therefore in a more delicate position.

The establishment of special nomination procedures constitutes another instrument through which IAM independence may be secured. From this point of view, however, financial organizations have at times been criticized for their lack of adequate provisions.[87]

First of all, as we have seen, even though many IAMs are appointed by the Board of Directors of the organizations, an important role in the nomination procedures is often played by the President. In addition to that, while all MDB mechanism regulations clarify who nominates and who appoints IAM members, very few of them actually regulate the nomination procedures.

In particular, in 2007 the World Bank released an excerpt from its "Selection Procedures for Members of the Inspection Panel" (R2003-0043/2)[88] that provides for the establishment of a Selection Committee,[89] whose role is to prepare a short list of candidates, from which the President shall choose what persons to recommend to the Board for the Panel position. In addition, the recently established PCM procedures establish a partially similar selection process for PCM Experts.[90]

These evolutions signal an effort in achieving greater transparency in the nomination procedures and even contain some appreciable elements (like the possibility, for the Selection Committee, of meeting the Inspection Panel to take into account its opinion on the necessary competences of the candidates). On the other hand, however, several aspects of the procedures still remain vague[91] and an important role in the selection is in any case played by senior officers of the Bank, and ultimately by the President.[92]

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[87] R.E. Bissell And S. Nanwani, *supra* note 8, p. 191.

[88] Available at: <siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/Selection_Procedures_Members_Inspection_Panel.pdf>.

[89] Appointed by the President, in consultation with Executive Directors, and including "the chairman of the Committee on Development Effectiveness (CODE), and the Dean or co-Dean of the Board, one Managing Director or Regional Vice President and the General Counsel".

[90] PCM Rules of Procedure, art. 47.

[91] For example, the total number of members of the Committee and who the other members may be.

[92] For these reasons, the Inspection Panel itself has underlined that "worry continues that the involvement of Bank Management in the selection of Panel Members may create an impression of conflict of interest and could weaken the Panel's independence (Bridgeman 2008)", INSPECTION PANEL, *Accountability at the World Bank, The Inspection Panel at 15 years*, Washington D.C., 2009, p. 19.

That said, nomination procedures clearly aren't the only index by which the independence of an administrative body may be assessed. In particular, the existence of internal nomination procedures may be counterbalanced by, on the one hand, differentiating the types of nominations, and on the other hand, providing for additional safeguards, like the non-renewability of IAM mandates, various forms of incompatibility, limitations on subsequent employment for the host organization, and restrictions on the possibility of removing IAM members from their posts.

From this point of view it is possible to notice that IAMs have adopted both of these strategies: a fairly reasonable set of safeguards (like as the ones we just mentioned) are present in all the examined IAMs, and there appears to be a tendency to differentiate the nomination processes of the various IAM members. In particular, the safeguards seem to be stronger for compliance review units in comparison to problem solving units, and for IAM experts in comparison to IAM coordinating figures.

The possibility of administering an independent budget and of referring to an independent secretariat also constitute important safeguards, which contribute not only to the mechanism's independence, but also to its visibility and credibility. In this respect, the position of the EBRD mechanism within the office of the Chief Compliance Officer is problematic in comparison to the other mechanisms: though the PCM Officer manages an autonomous budget, the CCO is responsible for ensuring that the PCM Officer carries out the PCM functions and administrative responsibilities. Therefore, even though the CCO doesn't interfere in the merits of IAM activity, the mechanism's position is less visible and defined.

For the same reasons, an analogous critique may also be made for the EIB mechanism, which, besides being ill-defined, is in any case inserted in the organization's Corporate Responsibility office.

Outside the MDB world, in general, the protection of IAMs independence appears limited by the characteristics of the institutions in which they operate. In particular, even though several

IAMs enjoy safeguards analogous to the ones established by the MDBs,[93] in practice they always report to the CEOs of their host organizations. The obvious reason for this is the fact that the governance structure of national development agencies and ECAs is quite different from that of MDBs as, in particular, there is no separation between a political and normative body (such as the Boards of Directors of MDBs) and an administrative structure (represented by Management). These IAMs, therefore, don't have the possibility of reporting to a body that is functionally separate from Management and has an interest in monitoring its activities and ensuring good administration (in other words, the stakeholders of the organization), and for this reason they appear to constitute more internal and less autonomous entities.

3.2. *Procedural Hurdles*

From a different perspective, IAMs' independence may also be impaired by procedural hurdles obstructing their capacity to act autonomously on the requests they receive. In this paragraph we shall focus on two steps, in particular.

The first of these is the requirement of obtaining prior clearance from the organization for the conduct of investigations on eligible requests.

In the case of the World Bank Inspection Panel, for example, this has constituted an obstacle to the mechanism's operations in its early years, as Management had taken on the practice of presenting to the Boards of Directors – upon being notified of the receipt of an investigation request – preliminary action plans which the Board was approving, rather than authorizing the Panel's investigations.[94] This practice caused widespread dissatisfaction with the Inspection Panel among developing countries, that carried the burden of Management's action plans, and felt that the mechanism ended up focusing on the borrower's performance rather than

[93] Like limits to the renewability of their mandates (NEXI Procedures, art. 22; JBIC Procedures), or limitations on subsequent employment for the host organization (NEXI Procedures, art. 22; JBIC Procedures), or the assignment of a separate office with an *ad hoc* staff (JBIC Procedures).
[94] I.F.I. Shihata, *supra* note 5, p. 219.

on Management's.[95] The situation changed only after 1999, when the Board's Second Review of the Panel's Resolution clarified, among other things, that the Board had to authorize the Panel's investigations "without discussion":[96] since then, the Board of Directors has approved of all the Inspection Panel's investigation recommendations, on a non-objection basis.

A second procedural requirement which may interfere with IAM operations is the need to obtain prior State approval to conduct investigative missions,[97] since potential opposition from developing countries is always a problem for IAMs, as the early experience of the World Bank Inspection Panel and of the ADB mechanism has shown.[98] Very recently, moreover, in the *Fuzhou Environmental Improvement Project*,[99] the compliance review unit of the ADB mechanism (CRP) was denied permission from the Chinese authorities for conducting a site visit. The CRP expressed its concern and took a very strong stance on the problem, by stigmatizing the episode in its reports and ultimately refusing to complete its investigations.[100] The Board of Directors, for its part, "supported the Panel's recommendation to review and improve the policy on the issue of site visits" and "agreed that this should be taken up as part of the ongoing review of the Accountability Mechanism policy".[101]

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[95] It is worth noticing that also in the ECA context developing countries have shown suspicion towards IAMs. *See* for example the *Comments from Developing Countries on The Draft Summary of Procedures (the Procedures) to Submit Objections Concerning JBIC Guidelines for Confirmation of Environmental and Social Considerations and The Draft of the Establishment of the Office of the Examiner for Environmental Guidelines*, published on the JBIC website, which show concern with the possibility that requests will interfere with project execution and may have the objective of uncovering the country's responsibilities. (<www.jbic.go.jp/en/about/environment/guideline/disagree/pdf/A04-02-05-01_c_From%20Governments%20of%20Developing%20Countries.pdf>)

[96] *See* I.F.I. Shihata, *supra* note 5, D. Clark, *supra* note 8, p. 15.

[97] "Inspection in the territory of such country shall be carried out with its prior consent", (Inspection Panel Resolution, art. 21).

[98] *See* E. Suzuki, S. Nanwani, *supra* note 12, p. 214.

[99] The endeavor of a Chinese Municipal authority, financed by the ADB, to improve water quality in its territory by creating new sewer networks and flood prevention infrastructure.

[100] "The CRP continues to hold the view that a site visit is essential in order to complete the compliance review and discharge its mandate in this case." CRP, Annual report 2009, p. 8.

[101] ADB's news release on the "ADB Board of Directors' Decision 19 October 2010", *see* <compliance.adb.org/dir0035p.nsf/alldocs/BDAO-7XVC5P?OpenDocument>.

This kind of episode isn't frequent in IAM practice, also because IAM regulations tend to make such procedural steps less discretionary.[102] However, these cases give a good idea of some of the existing obstacles to IAMs' autonomy and of the kind of remedies IAMs can seek in such cases. In particular, as IAMs don't have coercive powers over any of the parties involved, their only possibility is to stir other forms of accountability (for example pressure from civil society, which has access to all IAM reports) and trigger the intervention of other authorities (i.e., in the cases we have seen, the Boards of Directors of the two organizations), by denouncing the fact to the heads of the organization and to the public.

In sum, IAM structures and procedures present both safeguards and risks for their independence, so that in practice the position of these mechanisms appears ultimately determined by two factors: on the one hand their capacity to denounce possible interferences, and on the other hand the existence of recipients who are willing and able to sustain them.

Inevitably, therefore, the level of IAM independence will also vary, *de facto*, in relation to each mechanism's experience and capacity to assert itself.[103] In general, however, such conclusions may actually confirm the observation that IAMs reporting directly to political and normative bodies like the Boards of Directors of MDBs are in a better position, in comparison to the more internal mechanisms.

Given these premises, an interesting opportunity for IAMs to strengthen their position within their respective organizations could also derive from the possibility of liaising with external institutions, an example of which may be IAM cooperation in the context of investigations on jointly financed projects. In the past this practice has been in fact adopted, as IAMs have conducted joint investigations and signed written agreements spelling out their

[102] *See* for example: the clarifications introduced by the Second Review of the Inspection Panel Resolution, the IRM Procedures, art. 46 (which establishes that CRMU recommendations for compliance review are approved on a non-objection basis), the ICIM Policy, art. 49 (spelling out a requirement of "country non-objection", rather than "consent", for site visits).

[103] Recently, it has been said that the Inspection Panel has asserted its "de facto independence" by, among other things, "strengthening its credibility and prestige" and "raising awareness of undue Management interference", A. Naudé Fourie, *The world bank inspection panel and quasi-judicial oversight. In search of the 'judicial spirit' in public international law*, (Eleven International Publishing, Utrecht, 2009), p. 186.

reciprocal obligations, to our knowledge on a spontaneous basis and with no express indication or authorization from their host organizations.[104]

Very recently, instead, this practice has to a certain extent started to be codified, as the IDB, the EIB and the EBRD have introduced specific provisions on cooperation.[105] In this respect we may note that, whereas proceduralization could help consolidate cooperation and set the basis for future developments, the risk of curbing IAM initiative and autonomy by creating new potential hurdles should be carefully avoided.[106]

4. **Considerations on IAMs in Practice**

In this chapter, we will make a series of considerations on IAM action - in relation to their capacity to trigger remedies for the requesters and to investigate Management's activity - on the basis of the information made available by these mechanisms to the public (reports, annual reports and so forth).

4.1. *Some General Data*

First of all, there are significant differences among the various IAMs, with respect to their case-load and to case distribution. The World Bank Inspection Panel is among the most active IAMs, as it received 58 requests in 15 years, 12 of which were resolved at the eligibility phase, while 24 were subject to full investigation.[107]

[104] *See* the *Uganda: Private Power Generation Project* case, and the *Memorandum of Understanding* that was signed on that occasion between the Inspection Panel and the AfDB mechanism (INSPECTION PANEL, *Annual Report 2007-2008*).
[105] *See* ICIM Policy, art. 98, EIB Complaints Mechanism, para. III, art.7.1, PCM Rules of Procedure, art. 16.
[106] The EBRD, for example, has established that written cooperation agreements on matters like confidentiality and sharing of information could be established by the co-financing institutions: a requirement which, from our point of view, must not become an opportunity for the heads of the organizations to introduce additional hurdles in IAM operations.
[107] *Source*: INSPECTION PANEL, *Accountability at the World Bank, The Inspection Panel at 15 years*, Washington D.C., 2009, p. 201.

The CAO, for its part, has received even more requests, 110, and has found 43 of them ineligible. Among the closed cases, the vast majority appears to be settled at the ombudsman level, while only six full compliance audits have ever been carried out.[108]

The ADB mechanisms also appears to have focused predominantly on problem solving: after 2004 (the year in which the mechanism was established as a permanent body) the OSPF received a total of 25 complaints,[109] while the CRP received only three requests.[110] It is interesting to notice that, among the 15 problem solving requests which were found ineligible by the OSPF, ten were motivated by the fact that "complainants have yet to address the problem with the concerned operations department". It would therefore appear that the requirement of exhausting administrative remedies is applied quite strictly, in line with the idea that IAMs are meant as mechanism of last resort.

Among the other RDBs, the distribution of requests between problem solving and compliance review seems more balanced, but the total number of requests is also lower. In particular, up to 2009 the AfDB mechanism had registered four requests, two for compliance review and two for problem solving,[111] while the IDB mechanism had registered five.[112] In 2010, however, the IRM received two new requests and the ICIM six, which might be an indication that the debates which preceded the mechanisms' reviews have also been useful in making it more visible.[113]

The EBRD mechanism, instead, received fourteen requests since 2004, eight of which were found ineligible,[114] while only one led to a full compliance review.[115]

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[108] CAO, Annual Report 2008-9, p.4.
[109] OSPF, Annual Report 2009, p. 22.
[110] <compliance.adb.org/dir0035p.nsf/alldocs/BDAO-7XGAWN?OpenDocument>.
[111] IRM, Annual Report 2009.
[112] *See* <www.iadb.org/en/mici/registry-of-cases,1805.html>.
[113] Which may perhaps be an indication that the debates which preceded the mechanism's review have also been useful in making it more visible.
[114] Thirteen requests were brought before the old mechanism, the IRM (*see* the IRM Register <www.ebrd.com/pages/about/principles/integrity/irm/register.shtml>, and the IRM Annual Reports), and one was brought before the new one (*see* the PCM Register, <www.ebrd.com/pages/project/pcm/register.shtml>).
[115] The *Vlore Thermal Power Generation Project* case.

The IAMs of other Banks or agencies, then, have in general received less attention from the public, compared to the group of MDBs.

In the case of the EIB the reason might well be the recent creation of the mechanism,[116] but in case of NEXI and JBIC that together received only one request since their establishment in 2003 the fact appears more problematic.[117] In particular, this fact might indicate that IAMs at ECAs are intrinsically less visible - perhaps for the reason that such organizations are usually less involved in the design and execution of financed projects[118] - and certainly calls into question the effectiveness of such mechanisms.

Quite interestingly, however, the OPIC mechanism has received a certain number of requests (6, between problem solving and compliance review)[119] which might be an indication that development agencies are better targets for IAM requests, in comparison to ECAs .

4.2. *The Typical Outcome of IAM Review (and Who Determines It)*

The remedial outcome of IAM activity depends on a number of variables: in particular, while problem solving depends greatly (though not exclusively) on the parties' willingness to reach an agreement,[120] the results of compliance review depend on a number of other factors, which we will try to highlight by analyzing both procedural and practical elements.

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[116] Prior to the establishment of the new Complaints Mechanism, the CO had coordinated the competent services of the Bank in handling the complaints lodged against the EIB at the EO (EIB, Complaints Office Activity Report 2008), a function which, in our opinion, confirms the internal, ambiguous nature of the mechanism and could compromise the its impartiality. With respect to the EO requests we will note that, according to Schmalenbach, the vast majority of such complaints "were related to the termination of contracts, unsuccessful tenders, outstanding payments and the rejection of proposed projects", reason for which the author observes that "the European Ombudsman's potential is far from being exhausted" as indeed it "may bear comparison with the World Bank Inspection Panel", K. Schmalenbach, "Accountability: Who is judging the European Development Cooperation?", in S. Bartelt, P. Dann, (eds.) "The Law Of Eu Development Cooperation", *Europarecht-Beiheft* (2008), p. 185, (available at: < ssrn.com/abstract=1471871>).

[117] The request was received by JBIC and, in any case, was found ineligible. *See* Examiner Annual Report 2007.

[118] *See* G. Caspary, "Policy coherence for sustainable infrastructure in developing countries: the case of OECD-country public financing for large dams", 15:4 *Global Governance* (2009).

[119] *See* OPIC OOA Public Registry: <www.opic.gov/doing-business/accountability/registry>.

[120] For example, the BTC Pipeline Project was the subject of a series of complaints in front of the PCM; however, problem solving efforts were satisfactory only in some of those cases, because of the company's un-willingness to engage in the other. *See* PCM Annual Report 2004-2005, Annual Report 2006, and Annual Report 2007.

In the 1994 World Bank Inspection Panel model, remedial action is proposed by Management following the Panel's review, in the form of an Action Plan, and then the Board decided what action to take, "if any".[121]

Since then, a series of procedural innovations have been introduced, which reveal three different trends.

First of all, IAMs have assumed a more central role, with respect to Management, in the definition of remedies: most of them have the power to make express recommendations, which in some cases, they can modify after seeing Management's action plan,[122] while in other cases the IAM may discuss its recommendations directly with the Board.[123] Second, affected parties are given the possibility to comment on the proposed remedies in various ways: by providing opinions on Management's action plan, by commenting on a draft compliance report from the IAM that gets also sent for comment to Management,[124] or by having the opportunity to comment on both.[125] Finally, the discretion of the heads of the organization in deciding remedial action has been curbed in various ways: for example by setting precise time limits,[126] or by reducing the extension of their powers from the possibility to decide "appropriate" or "necessary" remedies,[127] "if any",[128] to the mere alternative between "accepting" or "not accepting" IAM recommendations.[129]

Therefore, despite the fact that the actual approval of remedies still depends on the organization, there is an effort to put in place more participatory and transparent procedures for determining corrective measures.

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[121] Inspection Panel Resolution, art. 23.
[122] ICIM Policy, art. 68; ADB, CRP Procedures, art. 42; PCM Rules of Procedure, art. 42.
[123] For example: the AfDB mechanism and Management can agree on a joint presentation of their recommendations to the Board (IRM Operating Rules and Procedure, art. 57), at IDB the heads of the organization may meet with the ICIM Panel regarding the report (ICIM Policy, art. 69), and the CAO discusses its audit findings with the President at his invitation (CAO Guidelines, art. 43.4.2).
[124] ICIM Policy, art. 68; ADB, CRP Procedures, art. 42.
[125] PCM Rules of Procedure, art. 42, NEXI Objection Procedures, art. 13 and art. 14.
[126] ADB, CRP Procedures, art. 45 (the Board is given 21 days).
[127] *See* ICIM Policy, art. 71; NEXI Objection Procedures, art. 14; ADB, CRP Procedures, art. 45.
[128] Inspection Panel Resolution, art. 23.
[129] *See* PCM Rules of Procedure, art. 43; IRM Operating Rules and Procedures, art. 58.

With respect to the types of project-level remedies, instead, given the financial nature of the institutions in question, they normally depend on the organization's level of involvement in the project and on its powers *vis-à-vis* the borrower.

First of all it is worth noting that IAM procedures usually do not to specify the kind of remedies which are available,[130] except for two cases. On one hand, some procedures expressly refer to the power of recommending forms of compensation, by specifying that such a power may not go beyond what expressly provided for in the policies.[131] On the other hand, in cases in which serious and irreparable harm could otherwise occur, some mechanisms have the power to recommend *interim* measures, like the suspension of project processing, project implementation, or loan disbursement. The final decision is however taken by the organization, within the limits of its rights,[132] (i.e., as we understand it, the limits of its powers *vis-à-vis* the borrower, as defined by the financial agreement).

This said, in practice outcomes which occur rarely are project cancellation and disengagement from project activities, as they are undesirable for the organization,[133] imposing for the borrower,[134] and to a certain extent are believed to be contrary to the affected people's interests as well.[135]

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[130] Referring generally to "measures to cure non-compliance" (NEXI Objection procedures, art. 12), or "recommendations in regard to its findings" (ICIM Policy, art. 64), including "remedial changes in the scope and implementation of the project" (ADB Review, art. 126).

[131] *See* ICIM Policy, art. 66; PCM Rules of Procedure, art. 36; IRM Operating Rules and Procedures, art. 53. It is therefore understood that, while IAMs may not recommend compensation in the form of administrative liability, they may still refer to those policy provisions which require, for example, that project applicants assure compensation to affected people for resettlement and for loss of assets, and recommend an adequate implementation of such requirements.

[132] *See* ICIM Policy, art. 66; PCM Rules of Procedure, art. 30; IRM Operating Rules and Procedures, art. 18.

[133] I.F.I Shihata, *supra* note 5, p.89; J.H. Head, "*Asian Development Bank*", *supra* note 10, p. 39.

[134] *See*, for example, JBIC's response to the public comments on its complaints procedure: "it is not appropriate to place the borrower to disadvantage by suspending or canceling disbursement because of JBIC's non-compliance with the Guidelines", (<www.jbic.go.jp/en/about/environment/guideline/disagree/pdf/A04-02-05-01_b_From%20General%20Public%20in%20Japan.pdf>).

[135] As the organization's involvement may help ensure social and environmental standards, which might otherwise be disregarded by project executors or other available lenders. *See* S.R. Roos, "The World Bank Inspection Panel in its Seventh Year: An Analysis of its Process, Mandate, and Desirability with special reference to the China (Tibet) case", 5 *Max Planck United Nations Year Book* (2001), p. 517.

More often, instead, IAM procedures result in the adoption of modifications and adjustments in the project design and implementation, like for example: a more thorough assessment of the project's environmental impact and the implementation of more adequate safeguards, the preparation of better relocation plans, the creation of project-specific monitoring bodies, and so forth.[136]

If accepted, these remedies are adopted in the form of reciprocal obligations between the financial organization and its client. For example, the financial organization may modify the terms of the loan agreement and exercise a tightened scrutiny on the client's activity, while the client will commit to a series of corrective measures.

Therefore, from a practical point of view, the extent of such remedial action depends on the timeliness of IAM involvement and on the organization's willingness, and capacity, to impose more stringent standards on its client and grant their effective implementation.

From a legal point of view, instead, it is clear that IAM action doesn't result in any direct obligation between the financial organization and project-affected people, and rather involves a negotiation between the organization and its client.

In this respect, a recent case from the World Bank Inspection Panel appears however quite interesting. In the *Albania: Integrated Coastal Zone Management and Clean-up Project* case project-affected people presented a series of claims before the Albanian Judiciary, in relation to the demolitions of their homes which had taken place in the context of the Bank-financed project. The Bank's Board of Directors, in consideration of Management's "appalling record" in the case,[137] committed the Bank to cover the claimants' legal expenses. Even if the Bank underlined that it was "not legally obliged to" "provide assistance to the Requesters", the remedy

[136] INSPECTION PANEL, *Accountability at the World Bank, The Inspection Panel at 15 years*, Washington D.C., 2009, p. xiii. On the proactive approach adopted by compliance mechanisms at the global level see G. Sgueo, "Proactive Strategies in the Global Legality Review", 1 *Rivista trimestrale di diritto pubblico* (2010), pp. 21-55.
[137] World Bank Press Release, 17 February, 2009 (<www.inspectionpanel.org>).

resembles to a certain extent a form of reparation for liability, and is in any case unprecedented, to our knowledge, in the Inspection Panel's experience.[138]

4.3. *Characters and Extent of Compliance Review*

Compliance review is probably the most intriguing aspect of IAM activity from a lawyer's point of view, in that it presents itself as an internal legality review of the organization's operations. We shall therefore briefly expound on the matter, by focusing particularly on the activity of the World Bank Inspection Panel, which seems to be the IAM most oriented to compliance review.

At the outset, the Panel's compliance review function appears spelled out in simple and restrictive terms. First of all, its establishing documents do not provide a working definition of the concept of compliance, nor do they provide any ground of review for identifying and categorizing instances of non-compliance.[139] Second, the mandate of the Panel doesn't include the power to interpret Bank policies (a power which is retained by the Board of Directors) nor the actual determination of the Bank's legal obligations (an issue on which the Panel must consult with the organization's Legal Counsel).[140] Additionally, the Panel's review is not limited to specific acts or decisions, but is meant to cover the project experience as a whole. And moreover, the requesters are not bound to indicate what policies and provisions they deem violated, so the Panel is free to individuate them autonomously.

In practice, the Inspection Panel has been seen to conduct very detailed analysis of Management's operations, spelling out each episode, document and decision which has concurred to determine the issues raised by the complainants. The Panel highlights both episodes of compliance and non-compliance, and tries to identify the reasons behind them.[141]

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[138] Also because Management recommended it "regardless of the decision to cancel or restructure the Project" (Management Report and Recommendation, p.3).

[139] Like the grounds for review set out by art. 230 TEC for the ECJ (lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of rules relating to its application, and misuse of powers), or their analogues at the national level.

[140] Inspection Panel Resolution, art. 15.

[141] *See* A. Naudé Fourie, *supra* note 103, p. 216. on the practice of "root cause analysis", and INSPECTION PANEL, *Accountability at the World Bank, The Inspection Panel at 15 years*, Washington D.C., 2009. p. xii, explaining "systemic issues that help to explain causes of noncompliance".

With regard to the definition of what constitutes compliance, commentators have found that the Inspection Panel has adopted a "teleological" and "substantial" approach, requiring the actual realization of policy objectives, rather than accepting a mere formal conformity to procedural requirements.[142] On some occasions, then, the Panel has even suggested the application of higher standards than the ones expressly required by the policies.[143]

With regard to policy interpretation, the Panel has at times avoided taking a position on the exact meaning of certain terms, adopting a "purposive" approach instead.[144] In one way or another, however, by delving into the facts of the case it has been willing to discuss and question Management's discretion in matters such as its "overly restrictive definition of the Project Area",[145] its individuation of the "area of influence" of a project,[146] or of which groups may qualify as "indigenous people",[147] or of what criteria should be adopted in defining the "watershed area" in the context of an environmental impact assessment,[148] or in defining flood risks.[149] From this point of view, an interesting aspect of the Panel's approach is its practice of employing expert consultants, which allows it to discuss even the most technical aspects of such decisions.

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[142] *See* A. Naudé Fourie, *supra* note 103, p. 244, S.R. Roos, *supra* note 135, pp. 473-521. A similar approach may also be present at other IAMs; in one of its cases, for example, the CAO declared that: "in addition to relying on warranties and representations, MIGA needs to proactively assure itself that insured clients have in place the capacity to comply with all applicable social and environmental requirements" (CAO Audit of MIGA's Due Diligence in the *Dikulushi DRC* case, p. 21).

[143] In the *Yacyretà* case, for example, the Panel observed that in the presence of a diffuse perception of corruption regarding the management of a project "the Bank needs to expect a higher than usual level of supervision in order to ensure that corruption does not occur" (*Investigation Report*, p.xxvii).

[144] B. Kingsbury, "Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples*"*, in G.S Goodwin-Gill & S. Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* (Clarendon Press, Oxford, 1999), pp. 323-342, 1999.

[145] Like in the *Cambodia Forest Consession Management* case, reported by A. Naudé Fourie, *supra* note 103, p. 238.

[146] Like in the *Lake Victoria Environmental Management Project* case (Investigation Report, p. 56).

[147] Like in the *Colombia: Cartagena Water Supply, Sewerage and Environmental Management Project* case (Investigation Report, p. 59).

[148] Like in the *Argentina: Santa Fe Road Infrastructure Project and Provincial Road Infrastructure Project* case (Investigation Report, p. xiii).

[149] *See* the *Santa Fe Road Infrastructure Project*, (Investigation Report, p. xii).

The Panel's approach to environmental impact assessments is also very interesting,[150] as it analyzes the various solutions available, identifies cases in which less burdensome alternatives weren't sufficiently considered and takes the occasion to underline the importance of properly analyzing all possibilities.[151] From our point view, these episodes may resemble an application of the principle of proportionality: the principle is already sketched by the Bank's policies in the first place (and is therefore not developed by the Panel autonomously) but it is the Panel's investigations that contribute to its effective implementation.

In a recent occasion, then, pertaining to the uncertain application of a policy provision, the Inspection Panel rejected the interpretation proposed by Management, noting that the available documents gave no proof of the possibility that, during project preparation, Management had in fact considered the issue of how to interpret the requirement in question. For that reason, Management's justification constituted a mere "*post facto* rationalization",[152] and was therefore unacceptable. From our point of view, this episode may constitute an occasion in which the Inspection Panel has used the principle of duty to give reason to uncover the fact that no proper evaluation had been made (regarding the applicability of a certain policy), and therefore to individuate an egregious case of maladministration.

Finally, though the object of IAM review covers only the operations of their host organization, since the financing organization doesn't materially execute the projects they finance, having mostly an ancillary function of supervision and technical assistance, IAM analysis will inevitably consider the project executor's activity, for the purpose of determining whether management has assured the correct implementation of policy standards.[153] The same is

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[150] The Environmental Risk Assessment (EIA) is imposed by the Bank' Operational Policy *Environmental Assessment* (OP 4.01).

[151] *See* for example the Colombia: Cartagena Water Supply, Sewerage and Environmental Management Project case (Investigation Report, p. xvi), and the Uganda: Private Power Generation Project case (Investigation Report, p. 117). *See* also Sri Lanka: Southern Transport Development Project (Compliance Review Panel, Final Report).

[152] INSPECTION PANEL, *Albania: Integrated Coastal Zone Management and Clean-Up*, Investigation Report, p. xvii.

[153] S. Battini, *Amministrazioni senza Stato: profili di diritto amministrativo internazionale* (Giuffrè, Milano, 2003), p. 266. *See*, for example, the way the Inspection Panel pointed out of local authorities' lack of capacity to deal with all the different resettlement needs, and the lack of independence and adequacy in the grievance systems, in the

true with respect to proposed remedial action, which will inevitably include IAM proposed obligations for the borrower.[154]

In this respect, while avoiding to directly investigate the borrower (also for avoiding opposition from developing countries), IAMs have in certain occasions made meaningful considerations borrower's activity, by denouncing episodes of human rights violations,[155] or by indirectly advocating the application of policy standards also in areas which weren't covered by the Bank's intervention.[156]

A new development to this issue, however, may derive from the "use of country systems" strategy, a practice by which financial institutions may agree to apply, when equivalent, locally developed standards in substitution of their own policies. In this respect, as some commentators have observed, IAMs may have to evaluate Management's determinations on the matter, and therefore contribute to the activity of certifying locally developed standards.[157]

Mumbai Urban Transport Project (INSPECTION PANEL, *India: Mumbai Urban Transport Project*, Investigation Report, p. xxiii and xxiv). To a certain extent the analysis of the borrower's activity is in fact perceived as a necessary prerequisite for the effective exercise of IAM review: "Management cannot disclaim responsibility for adverse effects … simply because it is not the executor of the activities included", A. Naudé Fourie, *supra* note 103, p. 44.

[154] *See* for example the IRM's recommendations in the *Uganda: Bujagali Hydropower Project and Bujagali Interconnection Project* case: "The Bank should urge the Government of Uganda to form a committee consisting of representatives of the claimants and relevant government ministries and agencies to hear and determine agreeable compensation on case-by-case basis to all pending compensation issues as soon as possible and at the latest, before the Bujagali projects are completed and commissioned." (IRM, Second Monitoring Report, p. 18).

[155] The Inspection Panel, for example, denounced episodes of human rights violations in the *Chad Cameroon* case (*see* INSPECTION PANEL, *Accountability at the World Bank, The Inspection Panel at 15 years*, Washington D.C., 2009, p. xi).

[156] "People interviewed by the Panel hoped that the safeguards built into Bank-financed projects would be extended to other activities not financed by the Bank", from an excerpt of the India Mumbai Urban Transport Project Investigation Report, reported by A. Naudé Fourie, *supra* note 103, p. 267.

[157] M. Van Putten, *supra* note 12, p. 282. Also the CRP makes some observations on this matter in its 2009 Annual Report, p. 4.

5. **Closing Comments**

5.1. *IAM Efficacy and Proposals for Reform*

In the field of international development finance IAMs have been greeted by many as a positive innovation, as also their proliferation may perhaps attest, for their capacity of enhancing the accountability of international organizations and, to a certain extent, promote outcomes which are more considerate of affected people's needs. At the same time, however, their independence and their actual effectiveness have at times been questioned.[158]

Various suggestions for reform have therefore been made, including a proposal to create an international tribunal for all MDBs,[159] and a proposal to substitute the World Bank Inspection Panel with a system of arbitration,[160] both of which implying that the World Bank (or MDBs in general) accept a waiver on their immunity.

In this respect, however, we can't avoid thinking that the creation of more court-like bodies, with the power to issue binding sentences, would probably require a series of changes with respect to the IAM model, like for example: the adoption of more detailed legal proceedings for the purpose of fully granting due process, the introduction of stricter rules on evidence and the limitation of IAM independent fact-finding powers, for the purpose of better protecting their impartiality, and perhaps a stronger presence of lawyers, rather than technical experts, in the composition of the mechanisms. With respect to IAMs, such mechanisms could end up being less flexible in their operations, costlier for affected parties and more prone to judicial restraint with respect to the more technical and discretional aspects of the organization's activity.

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[158] *See* for example M. Circi, "The World Bank Inspection Panel: is it really effective?", 6:3:10 *Global Jurist Advances*, *University of Berkeley Electronic Press* (2006), <www.bepress.com/gj/advances/vol6/iss3/art10/>, and E. Nurmukhametova, "Problems in Connection with the Efficiency of the World Bank Inspection Panel", 10 *Max Planck United Nations Year Book* (2006), pp. 397-421, D. Hunter, L. Udall, "The World Bank's New Inspection Panel: Will it Increase the Bank's Accountability?", *Center for International Environmental Law* (1994).

[159] *See* Head's proposal for an International Tribunal for Multilateral Development Banks, in J.W. Head, *supra* note 2, p. 283. On a different topic (aid), but in an analogous spirit, see also Bussani's proposal for a Global Court for International Aid, in M. Bussani, *Il diritto dell'occidente. Geopolitica delle regole globali* (Einaudi, Torino, 2010) p. 203.

[160] E.R. Carrasco, A.K. Guernsey, "The World Bank's Inspection Panel: Promoting True Accountability Through Arbitration", 08-10 *University of Iowa Legal Studies Research Paper* (2008). While Suzuki and Nanwani suggest substituting the compliance review function of IAMs with an Administrative Tribunal. *See* E. Suzuki, S. Nanwani, *supra* note 12.

For these reasons, the creation of tribunals appears to us preferable only if conceived as a form of appeal with respect to IAMs, rather than as a substitute for them. In any case, however, such reforms might be hard to realize in the near future given the difficulty of assessing, at least in our opinion, MDBs' willingness to accept a waiver on their immunities with respect to such a broad category as project-affected people.[161]

The most viable solution, for the moment, might therefore be that of working within the IAM model in order to strengthen it, as after all IAMs have shown, up to now, an appreciable capacity to evolve in response to external criticism and changing needs, both through the spontaneous introduction of innovative practices,[162] and thanks to the organizations' practice of scheduling periodic assessments and revisions of their mechanisms.[163]

In this respect, various types of improvements may be imagined, for example: more transparent and inclusive nomination procedures,[164] procedural improvements for combining and developing both problem-solving and compliance review functions,[165] enhancing the independent investigative powers of certain mechanisms, establishing IAMs as autonomous offices, the development of an effective monitoring function[166] (which should be participatory, and exercised by the mechanism autonomously, until full compliance and implementation have

[161] MDBs already accept waivers on their immunities, as for example they have set up Administrative Tribunals for the labor disputes with their employees. However, the category of interested subjects in such cases (i.e., MDB employees) is much smaller.
[162] Like the Inspection Panel's *de facto* development of functions which aren't assigned to it by the Resolution.
[163] Which, for that matter, often include public consultations and open procedures of notice-and-comment.
[164] Bissell and Nanwani suggest that organizations should ensure "the buy-in of civil society in the selection process of key personnel in the accountability mechanism", *supra* note 8, p. 191.
[165] In this respect, for example, the World Bank Inspection Panel still exercises its problem-solving activities in an informal way: it may thus be argued that the introduction of a specific provision could enhance its powers in this respect, or at least clarify its position. On the other hand, other mechanisms (like, for example, the CAO) may need to adequately enhance the compliance review function, with respect to problem-solving. While problem-solving may prove more effective in providing timely solutions for the affected parties, the need of verifying whether the organization's policies have been violated or not appears equally as important. In this respect, broadening the access to compliance review functions, independently from the outcome of problem-solving efforts (like the provisions introduced by the ADB, and by the AfDB mechanism) and allowing complaints from NGOs, may be useful improvements which all IAMs should consider.
[166] *See* D.D. Bradlow, *supra* note 12; M. Circi, *supra* note 159.

been reached), the possibility for IAMs to intervene in a more timely manner,[167] and the power of recommending reparatory compensation for cases in which Management's violations have been particularly egregious (like in the recent Inspection Panel case, *Albania: Integrated Coastal Zone Management and Clean-up Project*).[168]

It must be noted, however, that even the most sophisticated mechanism risks being of little use, if it doesn't receive a sufficient number of requests. To this extent, the cases of JBIC and NEXI make us wander whether we are witnessing an unproductive proliferation of IAMs and make us reflect on the risks that such a phenomenon could pose. In particular, these examples might be an indication that organizations that do not have a direct development mandate, and are therefore less involved in project preparation and implementation, are perhaps in need of more tailored solutions. For example, the visibility and significance of national mechanisms would be enhanced if they could report directly to a political institution (a Minister, or Parliament),[169] while, from another point of view, the establishment of centralized mechanisms could also be explored, such as, for example, a single IAM for the operations of ECAs, perhaps established under the auspices of the OECD Working Group on ECAs.[170]

5.2. *The Legal Nature of IAMs*

As we have said before, fifteen years ago, the establishment of the World Bank Inspection Panel constituted a novelty in the field of international organizations, as it created a new legally

[167] In this respect, mechanisms which do not allow requests for projects not yet approved – like NEXI (Objection Procedures, art. 5.1), and JBIC (Objection Procedures, art. 3) - should reconsider such limitation.
[168] World Bank Press Release, 17 February, 2009 (www.inspectionpanel.org).
[169] This would perhaps liken them to the position of the European Ombudsman, and to a certain extent would reproduce the situation present at MDBs, where IAMs are an instrument for the political and normative bodies of the organization (the Boards) to control its administrative and bureaucratic structure.
[170] Under the OECD a series of common practices have already flourished, like the adoption of the *Arrangement on Officially Supported Export Credits* - *see* J. Koven Levit, "The Dynamics of International Trade Finance Regulation: The Arrangement on Officially Supported Export Credit", 45 *Harvard International Law Journal* (2004), p. 65, and by the same author "A Bottom-Up Approach to International Lawmaking: the Tale of Three Trade Finance Instruments", 30 *Yale Journal of International Law* (2005), p. 125 - and the adoption of the *Common Approaches on Environment and Officially Supported Export Credits*. Interestingly, a centralized mechanism was proposed with respect to multinational enterprises in N. L. Bridgeman, D. B. Hunter, "Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism", *Georgetown Environmental Law Review* (Winter 2008).

relevant relationship between international organizations and third parties by providing non-State actors with a direct avenue of redress towards an international organization which is protected by a system of immunities against third party liability claims.

The establishment of these mechanisms, to the extent that it provides an institutional *forum* for affected people to voice their interests, may be seen as one of the many examples of a known phenomenon in the field of international law, which is the growing role of individuals and civil society in the international arena.[171]

Specifically, with regard to the field of international development finance, it may constitute one of the many effects of changing conceptions of the idea of "development", "the modern view" of which implies, among other things, broadening the responsibilities of development agents, focusing on legal rules and procedures to assure that such responsibilities are met, and including project-affected people within the array of parties to whom these organizations are accountable.[172]

Development financing of this kind has started implying, more and more, a balancing of competing interests at the project level, in the pursuit of solutions which appear best suited for local communities and territories. In other words, development financing has become a form of governance which resembles the determinations of public authorities pursuing the well-being of their constituents,[173] and to that extent may perhaps be "understood and analyzed as administrative action".[174]

In this particular perspective, IAMs represents a way of broadening the array of parties who may question such balancing activity, and may thus be compared to analogous grievance mechanisms developed at the national and supranational level. For example, the Inspection Panel

[171] T. Treves, M. Frigessi Di Rattalma, A. Tanzi, A. Fodella, C. Pitea, C. Ragni, (eds.), *supra* note 9, p. 187.
[172] D.D. Bradlow, "Development decision making and the content of international development law", 27 *Boston College International and Comparative Law Review*, p. 207.
[173] We therefore witness some of the "hallmarks of international governance", such as "international regulation of subject matter which hitherto was not only within the domain of States but within the domain of administration within the State" and "International Proceduralization and international insistence on domestic proceduralization", J.H.H. Weiler, "The Geology of International Law – Governance, Democracy and Legitimacy", 64 ZaöRV (2004), p. 559.
[174] B. Kingsbury, N. Krisch, R.B. Stewart, J.B. Wiener, *supra* note 1, p. 2.

of the World Bank has been seen as a form of independent review of administrative action,[175] comparable to existing forms of administrative review or judicial review at the national and supranational level.[176] In fact, the Panel has been proposed as an instance of "global administrative justice",[177] whose exact nature may be understood in various ways, according to the point of view: as a hybrid body with some quasi-judicial elements,[178] as a consultative body (exercising forms of *justice retenue* within the World Bank, as opposed to *justice délégué*),[179] as a mechanism exercising legality review through the adoption of proactive strategies,[180] or as an "information court", ensuring accountability through the realization of the principle of transparency.[181]

From our point of view, it is interesting to notice how certain aspects of IAM procedure do, in fact, reflect a number of schemes and "principles of an administrative law character".[182]

First and foremost, the IAM procedure seems to realize the principle of participation in administrative decisions, both towards local authorities and towards host organizations.[183] In particular, not only do IAMs guard the consultation requirements embedded in the policies, but they also create additional occasions for participation. On the one hand IAM procedures, besides

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[175] "In the case of the World Bank we have a "public authority" (the World Bank) decision … challenged by private actors affected … before an independent body (the World Bank Inspection Panel) in order to obtain the review of the decision with respect to its legality, meant as conformity with the requirements of law and policy that the World Bank has to follow", G. Falcon, "Internationalization of Administrative Law: Actors, Fields and Techniques of Internationalization – Impact of International Law on National Administrative Law", 18:1 *European Review of Public Law* (2006), p. 230.

[176] The supranational experience I refer to is the emergence of EU administrative law.

[177] S. Cassese, *Oltre lo Stato* (Laterza, Bari, 2006), p. 114. The judicial or quasi-judicial nature of the mechanism has been underlined by various commentators. For example K. Nathan, "The World Bank Inspection Panel: Court of Quango?", 58 *Journal of International Arbitration* (1995), p. 148.

[178] S. Battini, *supra* note 154.

[179] S. Cassese, *supra* note 178, p. 116.

[180] G. Sgueo, *supra* note 136, pp. 21-55.

[181] T.N. Hale, A.M. Slaughter, "Transparency: Possibilities and Limitations", 30 *Fletcher Forum on World Affairs* (2006).

[182] B. Kingsbury, N. Krisch, R.B. Stewart, J.B. Wiener, *supra* note 1, p. 2. The emergence of global public law principles is pointed out, in particular, in G. Della Cananea, *Al di là dei confini statuali. Principi generali del diritto pubblico globale* (Il Mulino, Bologna, 2009).

[183] *See* L. Boisson De Chazournes, "Public Participation in Decision-Making: The World Bank Inspection Panel", in E. Brown Weiss, A. Rigo Sureda, L. Boisson De Chazournes, *The World Bank, International Financial Institutions, and the Development of International Law*, 31 *ASIL, Studies in International Legal Policy* (1999), p. 84, and by the same author *The World Bank Inspection Panel*, *supra* note 9, p. 187.

being generally quite inclusive of all interested parties, allow affected people to question Management's determinations and then require that Management provide an answer on the merits. On the other hand, the eligibility requirement of exhausting administrative remedies seems to imply that host organizations have the duty to answer affected-people's claims, independently from what may be spelled out in the operational policies (or at least that they are bound to do so if they want to avoid IAM involvement, and thereby prevent the issue from reaching the heads of the organization and the public).

From another point of view, the procedure implements, in a way, a sort of duty to give reason (and perhaps furthers the kind of reasoned decision-making that the principle stands for), as Management is required to answer requesters' claims on the merits, provide justifications for its decisions and prove that such justifications aren't mere "*post facto* rationalizations".

In addition – though in varying degrees, according to the mechanism – IAMs also enhance the transparency of their host organization's activity, by making their reports available to the public.

It is then worth noticing that, through the gradual proceduralization of IAM operations, such principles and schemes have also been extended to new phases of the IAM process, such as the follow-up phase, which were previously left to organization's discretion.

This considered, when compared to other forms of review developed at the national and supranational level, IAMs seem to represent an original mix of known schemes, adapted to the specific context of financing institutions.

In particular, their problem-solving functions would seem to constitute a form of alternative dispute resolution, focusing more on dispute settlement than on review. The compliance review phase, instead, presents several quasi-judicial elements, such as: its standing requirements, certain elements of due process in the procedures, the power to individuate norm violations and to determine the existence of a causal *nexus* between such violation and the alleged material damage, the possibility of recommending remedial action and sometimes even *interim* measures, and so forth. While other elements of IAM activity – like the possibility of

giving policy advice, or the willingness to question Management's determinations on the merits[184] – have perhaps a more administrative nature.

Despite their quasi-judicial elements,[185] however, it is worth clarifying that IAMs don't properly qualify as forms of judicial review of administrative action and that this consideration seems true, not only, for the mechanisms developed by national and supranational legal orders like the EU (the non judicial nature of which is in fact beyond question), but also for the ones developed at the international level.

In this respect, for example, if it is true that the similarity with judicial review lies mainly in the compliance review function of IAMs, it is also true that such function constitutes only a part of IAM activity, which in certain cases is not even quantitatively significant with respect to the preferred alternative of problem-solving. Additionally, also the more internal nature of certain mechanisms may put into question the judicial review analogy; in particular, while the analogy may perhaps stand with respect to bodies like the World Bank Inspection Panel or the Compliance Review Panel of the ADB mechanism, it appears more difficult to maintain with respect to bodies like the Compliance Advisory Ombudsman of the IFC and MIGA or the mechanism of the EBRD.

Another significant element is the advisory nature of IAM activity and their lack of any coercive authority: despite a gradual trend to restrict the discretion of the heads of the organizations, in their decisions on IAM recommendations,[186] still the final outcome of IAM activity ultimately depends on a decision of the parent organization.

In line with these observations, it has also been emphasized that IAM procedures don't constitute "remedies mechanisms",[187] as they merely create an opportunity for affected people to

[184] Like in the case of the Inspection Panel, as we have seen.
[185] And despite the possibility of individuating instances of "judicialization" in IAM practice. *See* A. Naudé Fourie, *supra* note 103.
[186] *See* chapter 3.2 and 4.2.
[187] Which would "provide to a claimant's right to a remedial measures and a corresponding enforceable judgment. By contrast, the Panel gives a procedural right to requesters to voice concerns about Bank-financed projects", S. Schlemmer-Schulte, "Introductory note to the Conclusion of the Second Review of the World Bank Inspection Panel", 39 *International Legal Materials* (2000), p. 245.

question and influence the organization's operations, but the final outcome of the procedure remains dependant on the organization's discretion and on its capacity to enact change.[188]

From another point of view, it is also true that in a public law perspective any kind of judicial review analogy risks drawing a parallel to a series of, perhaps more constitutional, transformations – related to the idea of limiting power through legally binding means, and recognizing individual rights *vis-à-vis* public authority – that haven't yet taken place in the interested organizations.[189] In particular, it is worth noting that IAMs operate in the normative space created by internal policies and procedures that – despite their growing level of effectiveness and despite the external significance that they acquire thanks to IAMs themselves – appear in any case formally voluntary, since the heads of the organization are not legally bound to enforce them.[190] We may therefore wander whether this auto-regulative nature of the IAM phenomenon doesn't constitute a further obstacle to the possibility of conceptualizing it as a form of *justice*.

For the moment, what IAMs seem to have done is create a legally relevant relationship - between a specific type of activity (i.e., development financing) and the rights and interests of those affected by it - that appears framed as an original form of administrative relationship, conditioned and shaped by the financial nature of the activity in question.[191]

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[188] If remedial action is taken, it is "based on Management's or the Board's discretionary powers to perform their duties of business", *Ibid*.

[189] Hey finds that "the Inspection Panel procedure [is] weak when judged by the standards of government subject to the rule of law" because, among other reasons, "the Panel bases its conclusions on internal regulations of the World Bank, as distinct from international law and the Inspection Panel procedure thus does not resolve the important debate about the extent to which the World Bank is bound by civil and political rights and other human rights law", in E. Hey, *supra* note 9, p. 70. On the possibilities and limitations of the administrative law perspective in this sense, see N. Krisch, "Global Administrative Law and the Constitutional Ambition", 10 *LSE law, society and economy working papers, London School of Economics and Political Science* (2009).

[190] Some considerations on the nature of these policies are provided in L. Boisson De Chazournes, *supra* note 9, p. 191, N. Krisch, *supra* note 190, B. Kingsbury, L. Casini, "Global Administrative Law Dimensions of International Organizations Law", 6 *International Organizations Law Review*, (2009), pp. 319–358. In this respect the position of IAMs appears less defined in comparison to other forms of dispute settlement at the global level, like for example the DSS of the WTO. *See* B. Marchetti, "The WTO dispute settlement system: administration, court or tertium genus?", 3 *Suffolk Transnational Law Review* (2009), p. 567-598.

[191] From this point of view it is interesting to see how, even scholars who have tried to provide the Inspection Panel with a stronger human rights basis, represented by the "right to sustainable development", have also admitted that the only legally relevant content of such right is the principle of participation. *See* F. Seatzu, *Il panel di ispezione*

In this respect it is interesting to observe how IAMs have multiplied, and, in particular, how national and EU administrations have followed the lead of global administrations in creating avenues of participation and review for project-affected people, who are clearly non-citizens, non-residents, and are in no contractual relationship with the financing organization. Though the effectiveness of these latter instruments appears still problematic, there is a sense that IAMs may constitute a model for starting to frame those social and environmental responsibilities of financing organizations that are otherwise difficult to pin down by national and supranational legal orders.[192] Within "the global disorder", therefore, the field of development finance may present a series of regularities, which could make it an "interesting reference point for the discussion on international or global administrative law".[193]

In this context, the use of administrative law tools and principles may help to strengthen the position of IAMs and the accountability framework of financing institutions.[194] For example, in the context of compliance reviews the use of more defined legal principles could help build better arguments against Management. Some interesting developments, in this respect, may derive from the recently established EIB mechanism, since the scope of this IAM is determined by the concept of "maladministration" as defined by the European Ombudsman, and therefore

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della Banca Mondiale. Contributo allo studio della funzione di controllo nelle banche internazionali di sviluppo, (Giappichelli, Torino, 2008), p. 67.

[192] At the international level judicial review of development financing has been always barred by international organizations' systems of immunities. However, obstacles to judicial review have also emerged at other levels, despite the absence of such immunities. In particular, at The EU level, since the action for annulment under art. 230 TEC (now art. 263 TFEU) against acts of the EIB is barred to private parties, EIB financing activities may be tried only for non-contractual liability under article 288 TEC (now art. 340 TFEU), the application of which is however subject to a series of conditions that might be hard to prove in the case of financing activities (i.e., the illegality of the allegedly wrongful act committed by the institution concerned, the suffering of actual harm and, above all, the existence of a causal link between the act and the alleged damage). Analogous difficulties may be present also at the national level, because of the peculiar nature of financing activity, particularly when its effected are produced in other countries (as the scarcity of case-law on the social and environmental consequences of development financing would seem to confirm). For this reason, Schmalenbach's opinion that "in the area of the EDC … the second best solution [i.e., non-judicial accountability *fora*, like the EO] may be the best one in view of the legal hurdles erected by the judicial review system" (K. Schmalenbach, *supra* note 116, p. 185) seems to us very fitting, and may perhaps apply not only to the EIB, but to national agencies as well.

[193] P. Dann, "Accountability in Development Aid Law: The World Bank, UNDP and Emerging Structures of Transnational Oversight", 44 *Archiv für Völkerrecht* (2006), p. 382.

[194] *See* G. Falcon, *supra* note 176, p. 245.

includes administrative law categories – such as "abuse of power", "failure to reply" and "discrimination"[195] – that could interact with IAM jurisprudence, in better defining the concept of "compliance". It could also be possible to suggest the establishment, at the end of compliance review activities, of a formal duty to give reason for Boards and Presidents, with regard to their determinations on remedial action, particularly when such determinations diverge from IAM recommendations.[196]

From a different point of view, a comparison with administrative activity could help frame the nature of financing activities, by better defining the extent to which such activity may be compared to administrative action. In particular, while the public law analogy appears more fitting for development finance, as it is accompanied by normative and administrative interventions which have a significant impact in determining the borrower's actions, other types of financing (like the one provided by ECAs, which apparently interfere much less in the definition of the social and environmental characteristics of financed projects) may require different types of accountability paradigms, in order to acknowledge the significant economic impact of such activity, while still recognizing that it has a different nature and mandate in comparison to development finance.

[195] EIB Complaints Mechanism, art. 1.2.

[196] From this point of view, it would be possible to build on certain developments which are already in place, in some of the mechanisms, like the President's duty to give reason for his decision on whether to authorize problem solving initiatives at the IDB and EBRD (ICIM Policy, art. 31, PCM Rules of Procedure, art. 31), or the European Ombudsman's capacity to apply the category of "maladministration" to the internal accountability procedures of the EIB, which contributes to create a duty to give reason for the EIB with respect to the Complaints Office's findings ("The EO considers that his role is to review whether the EIB has provided a consistent and reasonable explanation of its position in relation to such matters" art. 2 of MOU).

Prologue:
The New Italian Public Law Scholarship

Since the second half of the 20th Century, a new distinctive Italian Public Law Scholarship has been developing.

Originally, traditional Italian Public Law scholarship was highly influenced by the German positivist and dogmatic approach. As a consequence, Italian Scholarship devoted greater attention to the law found in books rather than to law in action; the majority of legal scholars were also practicing lawyers; and Scholarship was focused on interpreting the law, not in analyzing the conditions of legal change and reform.

Beyond the mainstream of this scholarship, and within the line which links the founder of the Italian Public Law School, the Sicilian professor and politician Vittorio Emanuele Orlando to his main pupil, Santi Romano (who had also been the President of the Council of State) and to the most renowned student of Santi Romano, Massimo Severo Giannini, in the last quarter of the 20th century a new generation of scholars grew, whose programme was to find new ways to study Public Law. Since then, therefore, a new Italian Public Law has been developing.

The work of this New School has several distinctive features. It developed in the field of administrative law, but it has greatly contributed to the main subjects of constitutional law, such as the State and its crisis, and the Constitution. It has turned from German to British and especially American legal culture. It combines attention to tradition with that for innovation. It studies institutions and how they operate within their historical development and it contributes to researches on the history of Public Law ideas. It is not confined within the usual borders of the Public Law discipline, but it has a great interest in studying topics that are at the intersection of law, politics, economics, and sociology. It is an example of lateral thinking and it adopts methodological pluralism. It has greatly contributed to the ongoing body of research on the Europeanization and globalization of law, in collaboration with foreign scholars. It combines study of statutes with study of judicial decisions. It is engaged not only in study of the law, but also in legal reforms, participating in several manners to the legal process. It has gained prominence in the general public opinion, because its members play the role of public intellectuals. It is mainly based in Rome, but it has ramifications elsewhere (Universities of Viterbo, Urbino, Siena, Naples, Catania). It has established strong and permanent links with many European (French, German, British, Spanish), and some non-European legal cultures, namely American. It has produced important collective works (treatises, dictionaries) and edits two important law journals (“Rivista trimestrale di diritto pubblico” and “Giornale di diritto amministrativo”). It has established a research institute (“Istituto di ricerca sulla pubblica amministrazione - IRPA”), that is very active in the field.

For all these reasons, the Jean Monnet Center at NYU School of Law and the IRPA decided to host a seminar in order to focus attention, in the international context, on the original and innovative contributions made by Italian legal scholars to the study of the transformations of the State, and to the fields of public law and public administration generally.

The seminar – entitled "The New Public Law in a Global (Dis)Order – A Perspective from Italy" – took place on the 19th and 20th of September, 2010, at the New York University (NYU) School of Law[197].

Here, a selection of the papers presented at the Seminar has been published. Our will and hope is that these articles shall contribute to the growth of the Italian Public Law Scholarship and to strengthen its efforts in dealing with the numerous legal issues raised by globalization.

Sabino Cassese, *Judge of the Italian Constitutional Court*
Giulio Napolitano, *Professor of Public Law at University "Roma Tre"*
Lorenzo Casini, *Professor of Administrative Law at University of Rome "Sapienza"*

[197] Authors were selected through a call for papers and they were the following: Stefano Battini; Lorenzo Casini; Roberto Cavallo Perin, Gabriella Racca e Gianlugi Albano; Edoardo Chiti; Elisa D'Alterio; Maurizia De Bellis; Federico Fabbrini; Francesco Goisis; Daniele Gallo: Elena Mitzman; Giulio Napolitano; Cesare Pinelli. Discussants at the seminar were Eyal Benvenisti, Sabino Cassese, Angelina Fisher, Matthias Goldmann, Benedict Kingsbury, Mattias Kumm, Giulio Napolitano, Pasquale Pasquino, Richard B. Stewart, Luisa Torchia, Ingo Venzke, and Joseph H.H. Weiler. More information available at http://www.irpa.eu/index.asp?idA=302.