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Policy Guidance and Compliance: The World Bank Operational Standards

LAURENCE BOISSON DE CHAZOURNES

In discussions of compliance with and the role of non-binding norms in the international legal system, it initially might appear curious to consider the Operational Standards developed by the World Bank. They appear to be quasi-administrative in nature, for internal use by the Bank to guide its staff in their activities. However, they also are applied in the framework of financing development projects through loan and credit agreements negotiated between the Bank and borrowing countries. As such, they gain an external dimension, potentially affecting the behavior of the borrower.

The author would like to thank Andres Rigo, Acting Vice President and General Counsel, the World Bank, for his comments and observations.

1 The terms 'World Bank' and 'Bank' refer to the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA) established in 1960, the latter providing concessional funding for less economically developed countries. A more encompassing term, 'World Bank Group', refers to the IBRD and IDA, plus the International Finance Corporation (IFC) established in 1956 to engage in private sector financing, the Multilateral Investment Guarantee Agency (MIGA), established in 1988 to provide guarantees against various types of non-commercial risks faced by foreign private investors in developing countries, and the International Centre for Settlement of Investment Disputes (ICSID), established in 1966 to provide conciliation and arbitration facilities for the settlement of disputes related to transnational investments.
The Operational Standards are atypical of international policy and legal instruments. Their purpose is to assist individuals working for an international organization to fulfill their tasks pursuant to the mandate of the organization. As policy instruments they do not have legal status per se in the international legal system. They may enter the legal order, however, and be regulated by the law of treaties by being incorporated into a loan or credit agreement. The Operational Standards also may play a crucial role in fostering the emergence of new international practices that seek to promote sustainable development and in facilitating respect for international legal instruments negotiated and adopted in other arenas. Finally they play an important role in assessing the quality of the World Bank’s activities.

The World Bank Operational Standards reveal the multifaceted, complex nature of the compliance issue. The Bank has developed an array of procedures and mechanisms to ensure compliance with the Standards during an operational activity, taking into account their policy nature, as well as their contractual character when incorporated into a loan or credit agreement. In addition, the Standards promote compliance with international conventions and non-legally binding instruments. Last but not least, by favoring the participation of non-state actors the Standards make such actors the ‘guardians’ of respect for the Bank’s norms and procedures. The establishment of the World Bank Inspection Panel has significantly reinforced this last element.

The present study begins by discussing the notion of Operational Standards, describing various environmental and social standards. This is followed by an assessment of the role of procedures and mechanisms in promoting compliance with Operational Standards and the role of Operational Standards in fostering compliance with other international law. Links are drawn between public participation in the Bank’s activities and compliance. The conclusion comments on the linkages between Operational Standards, compliance issues, and the international legal system.

A. OPERATIONAL STANDARDS IN THE WORLD BANK’S ACTIVITIES

Operational Standards, also termed ‘operational policies and procedures’, consist of numerous instructions from the Bank management to its staff.

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2 The expression ‘loan or credit agreements’ encompasses guarantee agreements, grant agreements, such as Global Environment Facility grants, as well as other legal documentation entered into by the World Bank and others for the purposes of financing specific operations.


5 The Res. establishing the Inspection Panel calls for reviewing complaints regarding ‘operational policies and procedures’. This term is given a specific meaning in the context of the Res. and
They encompass a wide array of topics intended to assist the Bank staff in its work concerning financed activities falling within the mandate of the Bank, such as specific investment activities or activities aimed at facilitating investments for productive purposes. The operational policies and procedures have been elaborated around general themes, some of them designed to avoid or mitigate detrimental impacts of financial activities on certain groups of people and on the environment.

Operational Standards encompass documents entitled 'Operational Policies', 'Bank Procedures', and 'Operational Directives', as well as various other documents including operational statements and ad hoc circulars embodying the Bank policies and procedures. The various titles reflect the evolution of the policy documents towards codification of prescriptive conduct. Originally, Operational Standards were conceived as aspirational targets drawn from practice and enshrined in policy documents. Over time, the Standards increasingly have been considered to express mandatory processes and prescriptions and have been more strictly and literally interpreted. Various events taking place in the early 1990s contributed to the change of perception, especially the release of two reports commissioned by the Bank: the 'Morse Report', an independent review of highly-criticized projects known as the 'Narmada projects', and the 'Wapenhans Report', an internal review of Bank operations commissioned by its President in the wake of the Morse Report. The latter assessed the implications of Bank financed projects to draw some lessons and recommendations on how to improve their effectiveness. The Morse and Wapenhans Reports both highlighted a need to strengthen quality control in the Bank's operations and to enhance transparency and accountability in the implementation of projects. Compliance with Operational Standards was identified as an important tool for achieving such objectives. Subsequent shifts in the role of the Operational Standards occurred in 1992, when the Bank's management clarified the extent to which consists of the Bank's Operational Policies, Bank Procedures and Operational Directives and similar documents issued before these series were started. It does not include Guidelines and Best Practices and similar documents of statements. Ibid., para. 12.

6 Art. I(i) of the Articles of Agreement establishes that the primary purpose of the Bank is to 'assist in the reconstruction and development of territories of its members by facilitating the investment of capital for productive purposes'. Articles of Agreement, 2 U.N.T.S. 134, as amended 606 U.N.T.S., 294. See 'Project and Non-Project Financing under the IBRD Articles', Legal Opinion of the Senior Vice-President and General Counsel, December 21, 1984.

7 For most of the Bank's history, operational policies and procedures have been codified in a reference document called The Operational Manual. A system of Operational Manual Statements (OMS) and Operational Policy Notes (OPN) was used in the 1970s and 1980s. After 1987, they were consolidated into Operational Directives (OD); see World Bank Operational Policies: Lessons of Experience and Future Directions, CODE97-73 (November 20, 1997).


9 Effective Implementation: Key to Development Impact (R92-125), November 3, 1992.
the Operational Standards are binding, and in 1993 when the World Bank Inspection Panel was established.

Operational Standards are now looked upon as normative and procedural benchmarks for assessing the Bank's activities. This evolution was supplemented by a change in the Bank's disclosure policy. Originally, operational policies and procedures were not accessible to the public at large, as their purpose was solely to guide Bank staff in the conduct of its operational activities. The process of making them publicly accessible began at the end of the 1980s and was strengthened, as discussed below, by the 1993 adoption of a general disclosure policy concerning Bank documents.

1. Adoption and Binding Nature of Operational Standards

The adoption process for Operational Standards is not a systematic internal legislative process that covers every topic of relevance for the operational work of the organization. Instead, the process is ad hoc: a topic emerges and eventually becomes sufficiently important and relevant to justify the adoption of an operational policy or procedure. When the Bank feels that an issue should be dealt with this way, its staff and management prepare draft documents. Consultations are held at different stages with external partners, including non-governmental organizations (NGOs). These partners may make comments and observations before the drafting process starts and thereafter on draft documents. There are no formal requirements for the consultation process, which may take place by electronic means or other written modes, or orally when NGOs and other partners are invited to round tables. When finalized, operational policies and procedures are issued by the management.

The Board, the Bank's executive body composed of representatives of member states, is involved in the elaboration of Operational Standards. The Board's Executive Directors may approve policy papers, to which are attached draft operational policies submitted for their consideration. The Board is thereby given an opportunity to discuss the proposed policy. When not attached to a policy paper, draft operational policies are circulated to the Board for comment. In addition, all policies and procedures must be consistent with the Bank's constituent agreement, i.e., the Articles of Agreement. The Articles are interpreted by the Board, which is responsible for determin-

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11 For example, in 1982 the Bank issued an Operational Manual Statement on 'Tribal People in Bank-financed Projects' (OMS 2.4) whose objective was to protect the interests of relatively isolated and non-acculturated tribal groups. The adoption of this policy had been prompted by criticisms against projects financed by the Bank and dealing with the Amazonian forest.

ing matters of policy for the Bank. Operational Standards constitute one of the channels by which the mandate of the organization is translated into practice.

Some Operational Standards are mandatory for Bank staff, while others are merely of persuasive value. The mandatory character of a policy determines the jurisdiction of the World Bank Inspection Panel to receive complaints. The management of the Bank issued a decision in 1992 that specified the extent of the binding nature of Operational Standards. The objective of the decision was to ensure greater clarity of, and compliance with, Operational Standards. Within the Bank, there had been discussions about the need to clarify the limits of flexibility in applying a series of Operational Standards known as ‘Operational Directives’ to simplify the Bank’s business practices and to better monitor the performance of Bank operations. The Bank decided to replace the ‘Operational Directives’ (ODs) with statements termed ‘Operational Policies’ (OPs), ‘Bank Procedures’ (BPs), and ‘Good Practices’ (GPs). OPs are ‘short statements (usually one or two pages) of policy’. BPs ‘spell out the required documentation and common set of procedures needed to ensure operational consistency and quality’. GPs are intended to disseminate knowledge and indicate successful examples.

OPs and BPs are binding on the staff of the Bank within the limits of flexibility provided, while GPs are not binding. The issue is complicated, however, by the fact that not all ODs and other earlier documents have been converted to OPs, BPs, and GPs. The situation may be a source of legal controversy because ODs include procedures and practices that are not all binding on the staff of the Bank. An assessment of the binding nature of the provisions of ODs depends on the wording of each standard.

2. Environmental and Social Operational Standards

The Bank’s operational policies and procedures cover a number of social and environmental considerations, ranging from the protection of specific vulnerable groups of people to water resources management issues. Some of the instruments are of general application, others are more specific. All contain provisions that are process-oriented, requiring respect for certain procedural steps and actions, while others add normative clauses, prescribing certain patterns of behavior. These policies and procedures not only provide guidelines for the Bank staff, they also indicate what requirements the borrower must fulfill before the Bank will finance an operation. The ‘pillar’ policies for

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13 Ibid., at 44–5.
15 Shihata, supra note 12 at 45.
16 The operational policies and procedures are available on the Bank’s Internet website <http://www.worldbank.org>. As of June 1, 1999, the Environment Assessment policy has been issued as OP 4.01 (January 1999). The Indigenous Peoples policy and the Involuntary
integrating social and environmental considerations into the financial activities of the Bank\textsuperscript{17} are found in the Environment Assessment policy, the Indigenous Peoples policy, and the Involuntary Resettlement policy, as well as the policies dealing with the Involvement of Non-governmental Organizations (NGOs) in Bank-supported Activities, and Disclosure of Operational Information.

The Policy on Economic Evaluation of Investment Operations also plays an important role, integrating environmental concerns in the cost-benefit analysis conducted for Bank-financed projects. The Bank analyzes every proposed project in order to determine whether the project creates more net benefits to the economy than other mutually exclusive options for the use of the resources in question,\textsuperscript{18} including the option of not undertaking the project at all. Assessment of project sustainability requires taking into account economic, financial, and institutional risks, as well as environmental risks on the territory of the borrower, on neighboring countries, and on the global environment.\textsuperscript{19} This policy is complemented by other requirements, notably the Environment Assessment (EA) requirement.

The Bank's EA operational policy is the cornerstone for evaluating project activities with potential environmental impacts.\textsuperscript{20} It lays down standards and procedures for conducting environmental assessment and aims at improving decision-making by ensuring that the project options are environmentally sound and sustainable. The Bank screens all projects for classification into one of three categories that determine the appropriate level of environmental assessment.\textsuperscript{21} The most rigorous assessment is required for Category A project.


\textsuperscript{18} Impact on the global environment are considered when (a) payments related to a project are made under an international agreement, or (b) projects or project components are financed by the Global Environment Facility. \textit{Ibid.}

\textsuperscript{19} In fiscal year 1997, 18 projects totalling $2.9 billion of Bank lending underwent full EA and a further 82 projects totalling about $6.1 billion in Bank lending underwent some measure of EA appropriate to their potential environmental impact. The World Bank, \textit{Annual Report 1997} (1997), 25.

\textsuperscript{20} \textit{Ibid.} 4.01 on Environmental Assessment includes a fourth category, 'Category F1'. According to the Bank, '[a] proposed project is classified as Category F1 if it involves investment of Bank funds, through a financial intermediary, in sub-projects that may result in environmental
jects, those which are likely to have a significant adverse environmental impact, such as impacts that are sensitive, diverse, or unprecedented or that affect an area beyond the sites or facilities subject to physical works.\textsuperscript{22} Category B projects are those whose environmental impacts are less serious and thus require a less exhaustive form of environment assessment.\textsuperscript{23} No environmental impact assessment is required where the project has no, or only minimal, adverse environmental impacts (Category C projects).\textsuperscript{24}

The borrower must conduct the assessment to ensure that development options under consideration are environmentally sound and sustainable, and that possible environmental impacts are recognized early in the project cycle and taken into account in the project design. Environmental assessments identify ways to improve projects to minimize, mitigate, or compensate the adverse impacts. The environment assessment also should ensure that the project is consistent with domestic law and that it does not contravene any international treaties to which the borrowing country is a party.

Meaningful consultations with project-affected groups and local NGOs must be held during the environment assessment process and should be initiated as early as possible. For Category A projects, public participation must begin shortly after classification of the project and before the terms of reference for the EA are finalized. Public participation is required again once a draft EA is prepared, and throughout project implementation.

Dam and reservoir projects receive special EA treatment in order to avoid, minimize, or compensate for adverse environmental impacts wherever possible, using design features and other measures implemented as part of the project. Environmental specialists help identify potential project impacts at an early stage. Even before the project is categorized, the Bank must ensure that the borrower selects independent, recognized experts to carry out environmental reconnaissance to identify the project impacts, ascertain the scope of the EA, assess the borrower's capacity to manage an EA process, and advise on the need for an independent advisory panel, which would normally be set up for large dam projects.

\textit{Indigenous Peoples}

The Bank has a specific policy to address the concerns of indigenous peoples, defined as social groups whose social and cultural identity is distinct from that of significant adverse environmental impacts'. Sub-projects under a financial intermediary project would have to be categorized individually as category A, B, or C projects. OP 4.01 also specifies that in the context of evaluating a proposed project, the analysis of alternatives should include a 'without project' option.

\textsuperscript{22} OP 4.01 in relevant part provides, '[a] proposed project is classified as category A if it is likely to have significant adverse environmental impacts that are sensitive, diverse or unprecedented'. A potential impact is considered sensitive if it may be irreversible or raise issues covered by operational policies and procedures on Indigenous Peoples, Natural Habitats, Management of Cultural Property or Involuntary Resettlement. \textit{Ibid.}

\textsuperscript{23} \textit{Ibid.}

\textsuperscript{24} \textit{Ibid.}
of the dominant society and who are vulnerable to being disadvantaged in the development process. The notion includes, but is not limited to, ‘indigenous ethnic groups’, ‘tribal groups’, and ‘scheduled tribes’. The definitional criteria focus on the issues of vulnerability and distinctiveness, but other criteria have a role to play: close attachment to ancestral territories, indigenous language, self-identification, presence of customary, social, and political institutions, and the existence of subsistence-oriented production. The purpose of the policy is to ensure that these groups benefit from development projects and that potentially adverse effects are avoided or mitigated. The policy requires the ‘informed participation’ of indigenous peoples in projects and programs that affect them. The borrowing country must prepare an indigenous peoples’ development plan to provide the framework for their participation in project activities and to ensure that they receive socially and culturally appropriate benefits. The policy requires that development plans assess: (i) the legal status of groups covered by the policy, as reflected in the country’s constitution and legislation; and (ii) the ability of such groups to obtain access to and effective use of the legal system to defend their rights.

Involuntary Resettlement

The Bank’s policy states as a basic objective that involuntary resettlement should be avoided or minimized where feasible and that all viable alternative project designs should be reviewed. The Bank studies any operation that involves involuntary land acquisition for potential resettlement requirements early in the project cycle. The objective of the policy is to assist displaced people who have lost their land, houses, or both, or their means of livelihood, in their efforts to restore or improve former living standards and earning capacity.

Where displacement is unavoidable, the borrowing country must prepare resettlement plans or development programs that indicate compensatory measures and an implementation scheme, including a grievance mechanism permitting affected peoples to bring complaints, as well as a timetable and a budget. Bank policy standards state that compensation for displaced people should (i) evaluate their losses through methods such as a land-for-land approach, a market value approach, or a mixture of land-based and non-land-based strategies, (ii) assist with their move and support them during their transition to the resettlement site, and (iii) assist them to improve their former living standards and the income earning capacity that they would have had without the proposed Bank project.

Like the policy on indigenous peoples, the policy on resettlement requires informed participation and consultation with the affected people during the preparation of the resettlement plan. Community participation in planning and implementing resettlement should be encouraged as well. The policy stresses the need to pay particular attention to the needs of the poorest and to
give appropriate attention to indigenous peoples, ethnic minorities and ‘pastoralists’ who may have customary rights to the land or other resources taken for the project.

**NGOs and Disclosure of Information**

The policies and procedures on environmental impact assessment, indigenous peoples, and involuntary resettlement also contain specific provisions requiring the involvement of NGOs. In addition, a ‘Good Practices’ policy sets out a framework for involving NGOs in Bank-supported activities and provides staff with guidance for working with them.

The policy on disclosure of operational information sets out procedures to be followed for making environmental assessments and environmental action plans accessible to affected groups and local NGOs in borrowing countries. This policy, and the one on the involvement of NGOs, complements the other policies. Legally, these policy requirements are important vehicles for ‘operationalizing’ or implementing broader international standards on access to information, public awareness, and participation in decision making. As such they acknowledge the role of the beneficiaries of development assistance activities in ensuring the sustainability of such activities.

3. Incorporating Operational Standards in Loan and Credit Agreements

Although Bank practice can make Operational Standards binding on the Bank’s staff, it is also important to consider their status under international law. In terms of compliance, Operational Standards create normative and procedural expectations for the staff and partners of the Bank and contribute in many ways to forging and developing accepted practices under international law. In addition, their incorporation in loan and credit agreements negotiated between the Bank and the borrowers enables them to become binding under international treaty law. By entering into an agreement with the World Bank, a borrowing state is placed under an obligation to take the measures necessary to comply with its contractual obligations. These obligations may in some cases include references to policy requirements, causing the latter to become part of the contractual terms. This practice progressively has gained acceptance with respect to environmental and social policy requirements.

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25 The Bank has established a Public Information Center, called the ‘Infoshop’, through which much of the material covered by the policy is available. It is located at the Bank Headquarters and serves the public in member countries through the Internet and through Bank field offices.

A number of legal techniques have been devised to ensure that the Operational Standards reflected in loan and credit agreements are accompanied by safeguards against non-compliance. The policy requirements thus become enforceable under international law like any other provision of a loan or credit agreement. The various contractual techniques used for integrating such measures and commitments into loan and credit agreements include, \textit{inter alia}, drafting a stipulated prior condition, meaning that the loan or credit agreement only comes into force when the condition has been met, or including a stipulated condition with respect to the disbursement of the loan or credit. Another technique is to include a covenant committing the borrower to execute specific measures by a certain date. These obligations may be complemented by detailed requirements in project agreements concluded with the project executing agencies. Loan and credit agreements thus may include detailed provisions on resettlement and rehabilitation should these issues be relevant to the project, making compliance a condition of effectiveness for a loan or a credit. The government then is required to take all necessary action to adopt and implement a resettlement action plan designed in accordance with the Bank policy on Involuntary Resettlement, before the agreement would be declared effective. Alternatively, an implementation program or plan of action may be attached as a schedule to the loan or credit agreement. Such a program or plan of action specifies the borrower's obligations with respect to policy requirements.

The relevant policy on environmental assessment expressly requires the staff of the Bank to ensure that mitigation measures identified in an Environmental Management Plan are fully integrated in the implementation and operation of a project. References to such measures in project legal documents, for example in the project description, are part of the measures taken for pursuing such an objective.

\textbf{B. COMPLIANCE WITH OPERATIONAL POLICIES AND PROCEDURES}

Various mechanisms play a role in promoting compliance with Operational Standards, and more particularly with environmental and social operational

\footnotesize{27} For a discussion of principles and rules of international law as applicable law to loan and credit agreements between the Bank and borrowing countries, see Broches, A., 'International Legal Aspects of the Operations of the World Bank' (1959 III) \textit{R.C.A.D.I.} 297.

\footnotesize{28} The effectiveness deadline is normally 90 calendar days from signing the loan or credit agreement.


\footnotesize{30} An Environmental Management Plan (EMP) is an instrument that details (a) the measures to be taken during the implementation and operation of a project to eliminate and offset adverse environmental impacts, or to reduce them to acceptable levels; and (b) the actions needed to implement these measures. See OP 4.01---Annex A on Environment Assessment.
policies and procedures. Some mechanisms are rule-oriented, while others are more institutionally oriented.

1. Rule-oriented and Quality Insurance Mechanisms

Rule-oriented mechanisms promote respect for policy requirements in a number of ways. The legal techniques mentioned in the prior section, for example, have been developed to ensure that policy requirements are reflected in loan and credit agreements. The borrower should resort to all necessary means and measures to comply with these contractual commitments. For its part, the Bank should exercise compliance supervision with due diligence. If the Bank is not satisfied with the borrower’s performance, it may suspend disbursement of a loan or credit, cancel it, or accelerate its maturity. This kind of action is rather exceptional because dialogue with the borrowing country is usually persuasive, allowing compliance to be readjusted before the extreme stage is reached. The interruption of a contractual relationship is disfavored because it impedes the continuation of a dialogue that may find ways to correct the non-complying situation and does nothing to foster the environmental and social policies.

In addition to legal techniques that aim to ensure implementation of and compliance with project legal documents, there are operational mechanisms and procedures that have been established within the organization to guarantee the quality of the Bank’s activities. One of the parameters of evaluation is compliance with operational policies and procedures. Internal review processes during the preparation of a project and random audits during the course of its preparation and implementation are among the quality insurance mechanisms put in place to ensure compliance. Eventually, disciplinary measures may be imposed.

The Operations Evaluation Department (OED), an independent evaluation unit within the Bank, plays an important role in the process, conducting a post-project evaluation that looks, inter alia, at the environmental and social aspects of completed operations, draws lessons from past practices, and suggests further roles to be played by operational policies and procedures. It rates the development impact and performance of the Bank’s operations, reporting its results and recommendations to the Board. By doing so, it promotes the good practices contained in operational policies and procedures.

31 See General Conditions Applicable to Loan and Guarantee Agreements, Art. 6.02, January 1, 1985. See also Shihata, supra note 29 at 199–208.
and highlights the problems encountered in implementing such standards. This assessment activity is supported by the publication of reports that provide recommendations and ‘best practices’ guidelines drawn from the Bank’s development experience. To summarize, this post-project evaluation creates incentives for stricter and more effective compliance with Operational Standards.

2. The World Bank Inspection Panel

The World Bank Inspection Panel was created in 1993 to improve quality control in the Bank’s operations during project preparation and implementation. The Panel also was expected to increase accountability of the Bank’s management and staff vis-à-vis the Bank’s Board and to ensure transparency in the Bank’s operations, and thus was established as an independent and permanent organ within the Bank’s organizational structure. It was granted the competence to receive and, subject to the approval of the Bank’s Board, investigate complaints from groups of individuals whose rights or interests have been or are likely to be directly and adversely affected by the Bank’s failure to comply with operational policies and procedures. An Executive Director in the Bank or the Bank’s Board also may instruct the Panel to conduct an investigation, even though affected people have not introduced a request.

Individuals or any affected group of people who share common concerns or interests in the country where the project is located may submit a request on condition that it is possible to demonstrate that their ‘rights or interests have been or are likely to be directly affected by an action or an omission of the Bank’. The affected party may present its request directly or through local representatives acting as an agent. NGOs based in the country can take on this representation role and international NGOs may assume representation in exceptional cases where the party submitting the request asserts that appropriate local representation is not available. In those circumstances, the Executive Directors have to agree to such representation when they consider the request for inspection.

34 On the motives for the establishment of the Inspection Panel, see Shihata, supra note 12 at 5-13.
35 The mandate of the Inspection Panel covers projects financed by the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA).
36 The Resolution provides in a non-restrictive manner that the ‘Panel shall receive requests for inspection presented to it by an affected party in the territory of the borrower which is not a single individual (i.e., a community of persons such as an organization, association, society or other grouping of individuals)’. The Clarifications endorsed by the Executive Directors on October 17, 1996 (hereinafter Clarifications-1) specify that a group of individuals alleging to be affected should be understood as meaning ‘any two or more individuals with common interests or concerns’.
Outside scrutiny of the Bank’s compliance with Operational Standards, through requests to the Inspection Panel, is a new means of promoting compliance with Bank Standards. Compliance concerns are institutionalized, in fact, by establishment of this specific entity to conduct investigations, offering the possibility of remedial action by the Bank if a violation is found. Moreover, establishment of the Inspection Panel has encouraged a Bank-wide process that can help clarify for the staff and management the content of operational policies and procedures and increase their awareness of the need for compliance with them.

Complaints must satisfy admissibility criteria. A complainant must allege a violation of operational policies and procedures and demonstrate that the violation is due to an omission or action of the Bank with respect to the design, appraisal, and implementation phases of a Bank-financed project, i.e., from the time of the project design until its substantial completion. Complainants must allege that such failure has had, or threatens to have, a material adverse effect on them. The notion of ‘project’ is wide and encompasses all developmental activities eligible to be financed by the Bank. The terms design, appraisal, and implementation are understood in light of the Bank’s concept of ‘project cycle’, in each phase of which the Bank has a role and different responsibilities.

38 Para. 12 of the Res. establishing the Inspection Panel refers to the ‘failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank (including situations where the Bank is alleged to have failed in its follow-up on the borrower’s obligations under loan agreements with respect to such policies and procedures), provided in all cases that such failure has had, or threatens to have, a material effect’. The Panel’s ratione materiae competence should be ascertained in the light of four requirements: (1) an alleged failure of the Bank to follow its operational policies and procedures in the design, appraisal, and/or implementation of a project financed by the Bank; (2) the alleged failure must be of a certain gravity; (3) the alleged failure must relate to the Bank’s own policies and procedures; and (4) the alleged failure must be such as to have or be likely to have an adverse material effect on the complainant. See ‘Role of the Inspection Panel in the Preliminary Assessment of Whether to Recommend Inspection—A Memorandum of the Senior Vice President and General Counsel, January 3, 1995’ (1995) 34 I.L.M. 503, 525–34.
39 Clarifications—1 made clear that the word ‘project’ as used in the Res. ‘has the same meaning as in the Bank’s practice, and includes projects under consideration by Bank management as well as projects already approved by the Executive Directors’. The notion of project is not limited to specific investments. It includes programs or activities other than specific physical works. See Decision No. 2 of the Executive Directors, Scope of the Panel’s Mandate—Compensation for Expropriation and Extension of IDA Credits to Ethiopia under OMS 1.28, The Inspection Panel, Report, August 1, 1994 to July 31, 1996, 57. See generally ‘Project and Non-project Financing under the IBRD Articles’, Legal Opinion of the Senior Vice-President and General Counsel, December 21, 1984.
The request for inspection by the Panel may relate either to a project in the design, preparation, pre-appraisal, or appraisal stage, or to a project already approved by the Board and financed by the Bank. With respect to the implementation phase, the Panel has the mandate to investigate whether the Bank has properly ensured that the borrower carried out its obligations under a loan or credit agreement.41

The Inspection Panel is not vested with general law-making powers and thus lacks the competence to enact new standards or amend existing operational policies and procedures. It may only adopt rules for 'procedural matters relating to the work of the Panel'.42 The Panel adopted such rules on August 19, 1994 (hereinafter the 'Operational Procedures') based on the Resolution establishing the Inspection Panel.43

The Panel possesses limited investigatory powers with respect to complaints alleging a failure by the Bank to follow its policies and procedures in specific operational activities. By implication, the Panel is not entitled to review the consistency of the Bank's practice with all of its policies and procedures,44 nor is the Panel entitled to decide on a general basis the adequacy of a particular policy or procedure.45 Within the limits of its mandate, however, the Panel plays an important role in promoting compliance with Operational Standards.

The Panel exercises its investigatory and quasi-investigatory powers46 on a case-by-case basis. In so doing, the Panel decides on the applicability of

41 The Res. specifies that a complaint can be lodged for 'situations where the Bank is alleged to have failed in its follow-up on the borrower's obligations under loan agreements' with respect to operational policies and procedures. The Res. also states as a principle that no requests will be declared eligible regarding a project after the project's loan 'closing date' or after 95% or more of the loan proceeds have been disbursed. For an interpretation of this requirement, see Time-Limits on the Eligibility of Complaints Submitted to the Inspection Panel, Legal Opinion of the Senior Vice President and General Counsel, July 28, 1997.
42 See Para. 24 of the Res.
46 The practice developed so far is described by Shihata, I.F.I., The World Bank Inspection Panel—A Background Paper on its Historical, Legal and Operational Aspects, The World Bank Inspection Panel (forthcoming). The first set of Clarifications issued by the Bank's Executive Directors stated, in fact, the practice that has been followed by the Panel by providing that 'where the Inspection Panel believes that it would be appropriate to undertake a 'preliminary assessment' of the damages alleged by the requestor (in particular when such preliminary assessment could lead to a resolution of the matter without the need for a full investigation), the Panel may undertake the preliminary assessment and indicate to the Board the date on which it would present its findings and recommendations as to the need, if any, for a full investigation'. The second set of Clarifications, entitled 'Conclusions of the Board's Second Review of the Inspection Panel' (hereinafter Clarifications II), approved April 20, 1999 and with immediate effect, states, however, that '[t]he preliminary assessment' concept, as described in the October 1996 Clarification, is no longer needed. The paragraph entitled "The Panel's Function" in the October 1996 "Clarifications" is thus deleted (para. 11).
relevant policies and procedures, interprets their content in deciding whether or not the Bank failed to comply with them, and clarifies their content through interpretation.\textsuperscript{47} The Inspection Panel also has the opportunity to highlight best practices in applying Bank policy instruments. Most importantly, the Inspection Panel can publicize the inadequate practices that gave rise to the complaint before it, and reveal possible failures and inconsistencies in compliance with Operational Standards.

The dynamics attached to such an interpretative function should be considered in the broader institutional context as well. The Panel engages in a dialogue with the Bank’s management when discussing an alleged failure of the Bank to follow its operational policies and procedures. The Executive Directors play a pivotal role when exercising their powers to decide whether or not to authorize an investigation and what action to take following an investigation. The end result of the process may contribute to a clarification of the content of policies and procedures, as well as to remedying the problems through the adoption of action plans. The Executive Directors also may adopt decisions on general matters relating to the Inspection Panel and have done so to define the scope of the Panel’s mandate. Exchanges of views on issues related to the institutional aspects of the Panel may contribute incidentally to clarifying some operational policies and procedural requirements.\textsuperscript{48}

The Inspection Panel contributes generally to improving the quality of Bank operations by signaling possible failures in following operational policies and procedures and increasing awareness among the Bank’s staff of the importance of implementing them. Most of the requests brought to the attention of the Panel so far have dealt with environmental and social standards. The ensuing recommendations and findings of the Inspection Panel have stressed the need for devoting greater attention to compliance. They have in fact contributed to the establishment of abovementioned mechanisms, such as internal review processes and random audits, for quality insurance purposes.

\textsuperscript{47} This interpretative function of operational policies and procedures is exercised under the overall review of the Bank’s Board, and to the extent that it does not involve the Bank’s legal rights and obligations. For matters related to the ‘Bank’s rights and obligations with respect to a request under consideration’, the advice of the Bank’s Legal Department should be sought (para. 15 of the Res.). As of the end of 1998, the General Counsel had given two legal opinions. The first one was issued on January 3, 1995 and dealt with the ‘Role of the Inspection Panel in the Preliminary Assessment of Whether to Recommend Inspection’. The second one dealt with the question of ‘Time-Limits on the Eligibility of Complaints Submitted to the Inspection Panel’ and was issued on July 24, 1997.

\textsuperscript{48} The Decision of the Executive Directors on the Scope of the Inspection Panel’s Mandate—Compensation for Expropriation and Extension of IDA Credits to Ethiopia under OMS 1.28 may provide an example of a nurturing process or ‘constructive dialogue’. Although the main issue was the scope of the Inspection Panel’s mandate, the exchange of views that took place provided some guidance as to the interpretation of OMS 1.28 (now OP 7.40 on Disputes over Defaults on External Debt, Expropriation, and Breach of Contract). See The Inspection Panel, Report, August 1, 1994 to July 31, 1996, 56–8.
The contribution of the Panel to promoting compliance with operational policies and procedures is enhanced through making public all documents related to the Inspection Panel’s activities, as provided in the Resolution establishing the Inspection Panel, Clarifications-I, and the Operating Rules. The public can access the request itself, the management’s response to it, the Panel’s recommendation on the eligibility of the request, the Board’s decision to authorize or deny an investigation, the Panel’s findings, the management’s comments, and the final Board decision. This contributes to the role of the Panel in raising awareness of and respect for operational policies and procedures, but the impact could be enhanced by a decision to systematically publish the sets of documents issued at the different stages of each complaint, e.g., by setting up an official Bank collection or series. In addition, more extensive use could be made of electronic technology, simplifying access to and dissemination of information, and helping ‘make the Inspection Panel better known in borrowing countries’. At present, the information is publicly available but not easily accessible.

Making all the documents publicly available helps ‘objectivize’ the issues at stake, providing a record of the decisions taken by different organs (Inspection Panel, management, the Executive Directors) involved at the various steps of the procedure. Such transparency contributes to fairness and accountability at all procedural stages. These aspects could be strengthened if the process could be further formalized, keeping in mind that the procedure is non-judicial in nature. Formalization means greater resort to comparative jurisprudence and to legal interpretative methods, both of which have a role to play in the process of decision-making on the admissibility of a complaint, interpretation of the policies and procedures, and drafting of recommendations to the Executive Directors. Such changes would not only facilitate improvement of the decision-making process, but also favor consistency and predictability in the decisions and recommendations of the various organs.

49 See paras. 25 and 26 of the Res. and paras. 41, 56, and 65 of the Operating Rules. See also the first set of Clarifications (Outreach) which state that ‘management will make its response to requests for inspection available to the public within three days after the Board has decided on whether to authorize the inspection. Management will also make available to the public opinions of the General Counsel related to the Inspection Panel matters promptly after the Executive Directors have dealt with the issues involved, unless the Board decides otherwise in a specific case.’ The Inspection Panel, Annual Report, August 1, 1996 to July 31, 1997, 30. The Clarifications-II emphasize the importance of prompt disclosure of information to claimants and to the public (para. 18). They also require that ‘such information be provided by Management to the claimant in their language, to the extent possible’.


51 See Clarifications-I (Outreach). The second set of Clarifications restate this concern (para. 17).

52 The issues of consistency and predictability are also important should requests concerning a co-financed project be brought before the inspection mechanisms of several financial institutions. As
The Inspection Panel, the management of the Bank, and the Executive Directors could take this into consideration when exercising their respective powers, notably in selecting the members of the Panel. The composition of the Panel deserves close attention as it has direct relevance to the way activities are conducted.

C. DEVELOPMENT OF AND COMPLIANCE WITH INTERNATIONAL LAW

The World Bank does not operate in isolation. Its environmental and social operational policies and procedures reflect concerns related to the promotion of sustainable development as expressed in many other fora. Operational Standards are in fact vehicles for achieving this objective, although they are not necessarily exhaustive in covering the issues. The relationship between these policies and international law standards highlights their mutually reinforcing contribution to the promotion of sustainable development and the rule of law. In particular, the policies' references to international law promote respect for best practices. Although some policy statements make precise reference to various international treaties, they do not exclude the possibility of taking into account treaties not explicitly mentioned. Operational policies and procedures also refer to soft law instruments, and in so doing promote respect for them. Both types of instruments are taken into account because they are intrinsically linked to the Bank's activities.

As noted earlier, the policies on environmental assessment, indigenous populations, and involuntary resettlement require that Bank-financed projects take into account the domestic legal order of the borrowing country. The Bank should exercise due diligence and good faith in assessing the legal situation prevailing in a borrowing country, including the international commitments the country has undertaken. Clearly, various means exist for integrating international commitments into domestic legal orders, including enabling legislation, direct incorporation, or executive order. Such requirements then may be taken into consideration when implementing the relevant Operational Standards. While the Bank's Standards normally will correspond to the domestic legal order, in some cases the Bank's mandatory policy standards may call for the application of higher standards than those contained in national law.

an example, the Yacreta hydroelectric project gave rise to two complaints, one brought before the Inspection Panel of the Bank, the other before the Independent Investigation Mechanism of the Inter-American Development Bank. See Umaña, supra note 50 at 327.

53 It has been suggested that at least one of the members of the Inspection Panel should have legal expertise. See Bradlow, D., 'International Organizations and Private Complaints: The Case of the World Bank Inspection Panel' (1994) 34 Va. J. Int'l L. 553, 573.
As a general requirement, first stated in a policy adopted in 1984, the Bank has committed itself not to finance projects that contravene international environmental agreements to which the concerned member country is a party. This commitment was reiterated in the OP on forestry and in the OP on environment assessment. It not only shapes the conduct of the Bank with respect to international environmental agreements, but also increases the awareness of borrowing countries of the need to implement and comply with international environmental law.

Operational policies and procedures also may expressly refer to international principles and rules as a means of identifying the good and best practices to be followed, helping identify the minimum standards applicable to a Bank project. The binding nature of these international instruments may vary, but the main reason for referring to them is their wide acceptance and usefulness for development activities. The OP on 'management of cultural property in Bank-financed projects', for example, makes explicit reference to country obligations under international treaties concerning cultural property, such as the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage. The OP on pest management refers to international instruments as an indication of minimum standards to be followed in the area covered by the policy, with the FAO Guidelines for Packaging and Storage of Pesticides and the Guidelines on Good Labeling Practice for Pesticides playing a technical role in providing detailed standards and norms. Other international instruments, even though not referred to explicitly, may play a similar role, at least for interpretation purposes. The UN

54 See OMS 2.36 on Environmental Aspects of Bank Work (1984). The provision reads: "[t]he Bank will not finance projects that contravene any international environmental agreement to which the member country concerned is a party'.
55 Operational Policy (OP) 4.36 on Forestry. The provision reads: 'governments must also commit to adhere to their obligations as set forth in relevant international instruments to which they are a party'.
56 Operational Policy (OP) 4.01 on Environmental Assessment. The relevant part of the policy reads: '[E] takes into account the obligations of the country, pertaining to project activities, under relevant international environmental treaties and agreements. The Bank does not finance project activities that would contravene such country obligations, as identified during the EA.'
57 The 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage is given as a reference for defining the notion of cultural property. See OP 4.11, para. 2(a) (forthcoming).
58 For the purpose of the policy (OP 4.09), minimum standards are defined with reference to the FAO's Guidelines for Packaging and Storage of Pesticides (1985), Guidelines on Good Labeling Practice for Pesticides (1985), and Guidelines for the Disposal of Waste Pesticide and Pesticide Containers on the Farm (1985). See also the forthcoming policy on application of EA to projects involving pest management (BP 4.01--Annex C) which refers to the WHO Classification of Pesticides by Hazard and Guidelines to Classification (1994-5) and to the UN Consolidated List of Products Whose Consumption and/or Sale have been Banned, Withdrawn, Severely Restricted or not Approved by Governments (1994).
59 See ibid.
60 See ibid.
Convention on Biological Diversity, for example, may be considered in the context of the policy on indigenous peoples. Programmatic instruments may similarly provide guidance, including Agenda 21 and the 1995 Global Program of Action for the Protection of the Marine Environment from Land-based Activities. The interactions between these international instruments and Operational Standards underline the pragmatic nature of the Operational Standards, which aim to identify and implement the best practices to promote sustainable development. They also highlight the flexibility of international law in general, allowing for practices to be codified in both hard law and soft law instruments. The general recognition of such practices in appropriate international fora serves as a useful tool for promoting sustainable development.

Operational policies and procedures constitute a means by which new patterns of behavior are encouraged in borrowing countries. As such, they favor the emergence or consolidation of international practices which may acquire the status of customary norms. This has been the case notably with the Environmental Assessment policy. Since it was first introduced in 1989, it has served as a model for the legislation of many countries and for multilateral development banks, including the Inter-American Development Bank, the Asian Development Bank, and the European Bank for Reconstruction and Development, for bilateral donors and for the private sector in providing assistance and investment activities. In addition, it helped pave the way for inclusion in the Rio Declaration on Environment and Development of an ‘Environment Impact Assessment’ requirement as a national instrument.

Such cross-fertilization also can be seen in respect of the requirement that riparian countries of an international watercourse be notified in cases of planned measures or projects financed by the Bank. The application of the Bank policy on international waterways has contributed significantly to the

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65 Principle 17 of the Rio Declaration on Environment and Development reads as follows: ‘[e]nvironmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority’. Sands et al., supra note 612 at 53.
66 OP 7.50 International Waterways (October 1994).
recognition of this procedural requirement in general international law and to its codification in the UN Convention on the Law of the Non-Navigational Uses of International Watercourses. Such a practice highlights the composite nature of the norm-creating process whereby non-legally binding instruments and policy instruments, such as the Bank Operational Standards, play a role in the formation and development of an international customary norm, enabling *lex ferenda* to become *lex lata*.

While operational policies and procedures promote respect for progressive and process-oriented standards, their application on the ground may face resistance or there may be uncertainty about how to soundly implement them. The requirement of public participation and/or meaningful consultations provides a good example of the challenges and difficulties. It is one thing to establish the sequencing of actions to be conducted and the timing of public participation, but quite another to put in place a real and meaningful participation process. Cultural traditions, the need for public space for debate, the existence or lack thereof of an institutional framework, the rate of literacy, etc. all play a significant role in implementing the principle and have to be taken into account within the flexibility provided by the relevant operational policies and procedures. The borrowing country is required to expend its best efforts to take the appropriate measures for implementing the policy requirements, while the Bank should exercise due diligence during the preparation and the implementation of the project to make sure that the borrower complies with the policy requirements. The emergence of patterns of behavior for promoting public participation takes place in a rather experimental context whereby the Bank and the borrowers engage in a dialogue on how best to implement public participation requirements and both share responsibility in shaping such practices.

The fact that the international instruments to which a borrowing country has committed itself should be taken into consideration or should be considered as reflecting agreed international good and best practices, shows the close relationship of the Operational Standards with international law principles and standards in areas covered by them. It also demonstrates the virtues of operational policies and procedures in promoting the implementation of international law instruments, be they of a binding or non-binding, normative or technical nature. Another important compliance feature is the

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68 Parallels can be drawn with international law notions for interpreting the concept of best efforts, e.g., with the obligation to undertake to take steps with a view to achieving progressively the full realization of economic, social, and cultural rights, as spelled out in Art. 2, para. 1 of the International Covenant on Economic, Social and Cultural Rights. See the General Comment of the UN Committee on Economic, Social and Cultural Rights, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev. 3, para. 1–14.
role played by Operational Standards in contributing to the development of new international practices. They create normative expectations and pave the way for the consolidation of patterns of behavior. In addition, they lead to the emergence of principles and rules and may contribute to their recognition as *lex lata* under international law.

D. PUBLIC PARTICIPATION AND COMPLIANCE WITH OPERATIONAL STANDARDS

Prior to and during the 1992 Rio Conference on Environment and Development, the practice of permitting representatives of civil society to participate in decision-making processes and granting them the right of access to remedies for ensuring sustainable management of resources gained legitimacy. This evolution reveals the possible integrative nature of development efforts and environmental protection and highlights the close interrelationships between the fields of development, environment, and human rights in promoting sustainable development.

With the possibility that non-state actors may participate in the elaboration and implementation of projects, the Bank is acknowledging that public participation is central to ensuring the sustainability of developmental activities. The Bank's calls for public participation are numerous, including public consultation of affected people and local NGOs about a project's environmental aspects, community participation and consultations with people affected by a resettlement, informed participation of indigenous populations, and involvement of local groups in the planning, designing, implementing, and monitoring of projects related to the protection of natural habitats, or in forestry and conservation management activities. There is no doubt that these policy prescriptions, which are operationalized in the Bank's activities, contribute to a large extent to the development of international rules and standards. Furthermore, the measures that have been taken to strengthen information disclosure have promoted transparency and access to information. In doing so, the policy prescriptions have contributed to the empowerment of non-state actors, and more especially local populations, by giving them the possibility to be more effectively involved in the decision-making process.


70 See OP 4.01 on Environment Assessment, para. 15.

71 See OP 4.30 on Involuntary Resettlement, paras. 7-10.


73 See OP 4.04 on Natural Habitats, para. 10.

74 See OP 4.36 on Forestry, para. 1(c).
In establishing the Inspection Panel, the Bank created a new path for public participation: it allowed individuals to bring complaints before a newly established organ if they believed that their interests protected under the Bank's Operational Standards had been impaired. Also noteworthy is the fact that during an investigation representatives of the public-at-large may provide the Panel with supplemental information if they believe that it is relevant to a request. The Inspection Panel in fact provides a new venue for dialogue on compliance issues between a lending institution and the direct beneficiaries of its developmental activities, and in doing so significantly complements initiatives and actions aimed at ensuring compliance with Operational Standards.

CONCLUSIONS

A few paradoxical comments help underline the hybrid but nonetheless rich nature of the World Bank Operational Standards. Originally designed to provide guidance to the staff of the Bank in its operational work, the role played by Operational Standards has evolved over time, as they have been increasingly perceived as quality assessment tools in Bank operations as well as means for ensuring transparency and accountability. This has contributed to focusing attention on the need to strengthen the means for ensuring compliance. A wide array of mechanisms and procedures has been established, strengthened, or revitalized so as to meet this objective. Checks and balances of an operational nature have been created to ensure that Operational Standards are complied with during the entire cycle of a project from inception to completion. Increased attention is put on the role of the Operations Evaluation Department (OED) to identify non-compliance problems in its post-project evaluations and for drawing lessons. Legal tools have been attracting increasing attention, with a view to ensuring that when policy terms are transformed into legal terms through their incorporation in loan or credit agreements, they acquire a more established status under international law, i.e., treaty law status, and they therefore benefit from the legal remedies that can be taken in the event of a breach. Lastly, the need was felt to institutionalize compliance concerns in establishing an independent and permanent organ within the Bank's structure which investigates complaints brought by groups of individuals whose rights or interests would have been adversely affected by the Bank's failure to comply with Operational Standards in the context of a project. The establishment of the Inspection Panel also con-

tributed to increase the Bank management’s accountability towards the Board with respect to the implementation of Operational Standards.

The Operational Standards are the product of the particular institutional setting of the World Bank and are designed for internal purposes. They nevertheless entertain multiple relationships with the international legal system, whether through their elaboration or their implementation. External actors, such as NGOs, play a role in their elaboration. Local NGOs are involved in the design and implementation of projects, as they are granted a voice through participation and consultation processes. Furthermore, environmental and social Operational Standards take into account international good practices as reflected in other international instruments. A process of cross-fertilization is noticeable, which can lead to the emergence of principles and norms of general international law. All these elements reveal the composite nature of the law-making process in the international legal system. Policy instruments and the attention given to their compliance contribute in many ways to this process. They reveal that porosity and interactions are core aspects of the contemporary legal system, where a plurality of actors is engaged in activities at the local, national, and international levels. Although states retain a pre-eminent role in the making and implementation of international law, international organizations, NGOs, and individuals play an increasingly important role in shaping new practices and ensuring their respect.