the world bank inspection panel and quasi-judicial oversight

in search of the 'judicial spirit' in public international law

Andria Naudé Fourie

THE WORLD BANK INSPECTION PANEL AND QUASI-JUDICIAL OVERSIGHT

IN SEARCH OF THE 'JUDICIAL SPIRIT' IN PUBLIC INTERNATIONAL LAW

by
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The commercial edition of this book is published by Eleven International Publishing
isbn 978-90-77596-82-1, © 2009 Eleven International Publishing
P.O. Box 358
3500 AJ Utrecht, The Netherlands
Tel.: +31 30 231 0545
Fax: +31 30 225 8045
info@elevenpub.com
www.elevenpub.com

The commercial edition is sold and distributed in USA and Canada by
International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786, USA
Tel.: +1 800 944 6190 (toll-free)
Fax: +1 503 280 8832
orders@isbs.com
www.isbs.com

Printed on acid-free paper.

ISBN: 978-90-77596-83-8

Printed in The Netherlands

The World Bank Inspection Panel and Quasi-Judicial Oversight:
In Search of the 'Judicial Spirit' in Public International Law

Het Wereldbank Inspectie Panel en quasi-rechterlijk toezicht:
Op zoek naar de 'rechterlijke invalshoek' in het internationaal publiekrecht

Proefschrift
ter verkrijging van de graad van doctor aan de
Erasmus Universiteit Rotterdam
op gezag van de
rector magnificus

Prof.dr. H.G. Schmidt

en volgens besluit van het College voor Promoties.
De openbare verdediging zal plaatsvinden op

vrijdag 16 oktober 2009 om 13:30 uur
door
Andria Naudé Fourie
geboren te Delmas, Zuidafrika

PROMOTIECOMMISSIE

Promotoren:	Prof.dr. E. Hey Prof.mr. R. de Lange
Overige leden:	Prof.mr. N.J.H. Huls Prof.dr. J. Brunnée Prof.dr. J. Bell

ACKNOWLEDGEMENTS

A book such as this is the manifestation of a long journey – not only towards gaining knowledge, but also towards self-actualization. Ellen Hey and Roel de Lange, my two PhD advisors, were much more than mere occasional contributors along the way: they were *medereizigers*, travelling-companions that consistently – each in their unique way that complemented the other – supported, coached, and, above all, helped me to unlock what I already knew without realizing it. For this, I am deeply in their debt. My gratitude is also extended to the members of the Doctoral Committee (John Bell, Jutta Brunnée, and Nick Huls) for their comprehensive review of the manuscript; and to Daniel Bradlow, Edith Brown Weiss, David Freestone, and David Hunter for sharing some of their insights about the World Bank Inspection Panel with me – although, all opinions expressed about the Panel in this book are mine, and so are any mistakes. I have to thank Jac Fourie for introducing me to the world of systems thinking more than a decade ago; but it is his ever-so-patient (often long-distance) IT support for which I owe him the greatest thanks. My colleagues at the Erasmus School of Law (and in particular the departments of Public International Law and European Law) have been wonderful in their support. I especially owe a huge 'thank you' to Aleksandar Momirov, since he has been a tremendous source of inspiration, ideas, friendship, and (what is a prerequisite when completing a PhD) humour. I would also like to express my gratitude to the Secretariat of the World Bank Inspection Panel for granting me permission to reproduce certain Inspection Panel material; as well as to Selma Hoedt and Eleven International Publishing for their consummate professionalism. Finally, I am grateful to Paulo Da Rosa for assisting me in my analysis of the Inspection Panel Requests; and to Raveen Moenesar for his excellent – and meticulous – research and editing assistance, notwithstanding his very busy schedule.

Oegstgeest, June 2009

For my parents – for teaching me the “most valuable result of all education”, namely: the “ability to make yourself do the thing you have to do, when it ought to be done, whether you like it or not.”[*]

[*] T. H. Huxley, English biologist (1825 – 1895).

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List of Acronyms and Abbreviations

ADB	Asian Development Bank
AfDB	African Development Bank
ANC	African National Congress
AoA	Articles of Agreement [of the World Bank]
BP	Best Practice
CAO	Compliance Advisory Ombudsman
EA	Environmental Assessment
EBRD	European Bank for Reconstruction and Development
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
EEC	European Economic Community
EP	European Parliament
ER	Eligibility Report, Inspection Panel
EU	European Union
GA	General Assembly (of the United Nations)
GAL	Global Administrative Law
GEF	Global Environment Facility
GP	Good Practice
HIV	Human Immunodeficiency Virus
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
ICT	International Campaign for Tibet
IDA	International Development Agency
IDB	Inter-American Development Bank
IDI	Institut De Droit International
IEG	Independent Evaluation Group
IEO	Independent Evaluation Office

IFC	International Finance Corporation
ILA	International Law Association
ILC	International Law Commission
IMF	International Monetary Fund
IO	International Organization
IP	Inspection Panel
IPDP	Indigenous People Development Plan
IPE	Independent Panel of Experts
IR	Investigation Report, Inspection Panel
IR (ES)	Investigation Report, Inspection Panel (Executive Summary)
IRBD	International Reconstruction and Development Bank
JSC	Judicial Services Committee
MASL	Metres Above Sea Level
MDB	Multilateral Development Bank
MIGA	Multilateral Investment Guarantee Agency
MR	Management Response, to Request for Inspection
MR to IR	Management Response, to Inspection Panel Investigation Report
MPNF	Multiparty Negotiating Forum
MUTP	Mumbai Urban Transport Project
NAACP	National Association for the Advancement of Colored People
NDP	National Drainage Program (Pakistan)
NGO	Non-governmental Organisation
NoR	Notice of Request, Inspection Panel
OD	Operational Directive
OED	Operations Evaluation Department
OMS	Operational Manual Statement
OP	Operational Policy
OPM	Operational Policy Manual
OPN	Operational Policy Notes
OP&P	Operational Policy and Procedure
PAD	Project Appraisal Document
PAP	Project Affected People
QAG	Quality Assurance Group
R&R	Resettlement & Rehabilitation
SA	South Africa
SC	Security Council (of the United Nations)

TAC	Treatment Action Campaign
TDR	Triadic Dispute Resolution
TEC	(Consolidated Version of the) Treaty Establishing The European Community
TEU	(Consolidated Version of the) Treaty on European Union
UK	United Kingdom
UN	United Nations
US(A)	United States (of America)
WB	World Bank

SAMENVATTING

HET WERELDBANK INSPECTIE PANEL EN QUASI-RECHTERLIJK TOEZICHT: *OP ZOEK NAAR DE 'RECHTERLIJKE INVALSHOEK' IN HET INTERNATIONAAL PUBLIEKRECHT*

Internationale organisaties worden voortdurend bekritiseerd voor hun gebrek aan aansprakelijkheid en legitimiteit, vooral sinds wordt aangenomen dat zij publieke bevoegdheden uitoefenen welke onder omstandigheden individuen en hun leefomgeving ongunstig kan beïnvloeden. In antwoord op deze kritiek heeft de Wereldbank in september 1993 een onafhankelijke Inspectie Panel opgericht. Het Inspectie Panel is gemandateerd om te onderzoeken of handelingen en beslissingen van het management en de staf van de Wereldbank in overeenstemming zijn met de *Operational Policies* en *Bank Procedures* van de Wereldbank. Wat een dergelijk onderzoek in die tijd uniek maakte was het feit dat een verzoek tot een onderzoek ingediend kon worden door ongunstig geraakte groepen van individuen. Hierdoor werden individuen in een directe relatie geplaatst met een internationale organisatie – in dit geval de Wereldbank – wat van juridische betekenis is in het internationaal publiekrecht.

Dit boek heeft het uitgangspunt dat rechtsstatelijkheid, zoals ingegeven in het kader van rechterlijk toezicht, de aansprakelijkheid en legitimiteit van politieke instellingen bevordert. De meeste inspanningen hiertoe zijn in het gunstigste geval, bij gebrek aan een wettelijk regime (met gerechtelijke instellingen), een uitdrukking van onze zoektocht naar de juridische invalshoek in het internationaal publiekrecht. Dit boek vormt een weerspiegeling van deze zoektocht.

Het boek stelt dat er een functionele, procedurele en institutionele vergelijkbaarheid bestaat tussen enerzijds het Inspectie Panel van de Wereldbank en anderzijds gerechtsinstellingen die rechterlijk toezicht in niet-internationale constitutionele systemen uitoefenen. Voorts kan het

onderzoeksproces van het Inspectie Panel worden geconceptualiseerd als 'quasi-rechterlijk toezicht'. De term 'rechterlijk toezicht' wordt gedefinieerd als het proces waarin gerechtsinstellingen de handelingen en beslissingen van wetgevende, uitvoerende en bestuurlijke organen van de overheid (de 'politieke instellingen') beoordeelt aan de hand van specifieke normen, welke zijn vastgelegd in de grondwet van een staat of in andere normatieve instrumenten die hogere wetgeving bevatten (zoals internationale mensenrechten). De term 'quasi-rechterlijk toezicht' verwijst naar een vergelijkbaar beoordelingsproces, alhoewel dit wordt uitgeoefend door tribunalen, niet zijnde gerechtsinstellingen, wiens uitspraken niet noodzakelijk juridisch bindend zijn.

DEEL EEN behandelt de functionele, procedurele en institutionele aspecten van gerechtsinstellingen die rechterlijk toezicht uitoefenen, zoals *aard*, *effect* en *dynamiek* van rechterlijk toezicht. Hoofdstuk 2 schetst een initieel conceptueel model van de aard, effect en dynamiek van rechterlijk toezicht (ook wel genoemd het 'Rechterlijk Toezichtsmodel' of het 'Model'). Het Model legt de nadruk op twee essentiële kenmerken die de aard van rechterlijk toezicht vormen, namelijk de uitbreiding van juridische macht (oftewel juridisering) en de waarborg tot gerechtelijke onafhankelijkheid. Het Model zet tevens drie effecten van rechterlijk toezicht uiteen, namelijk constitutionele geschillenbeslechting, bescherming van mensenrechten (met inbegrip van verschaffing van remedies aan geraakte individuen) en legitimatie van politieke instellingen.

Voorts beschrijft het Model de relationele aspecten binnen de dynamiek van rechterlijk toezicht. Enerzijds wordt gekeken naar de relatie (en onderlinge afhankelijkheid) tussen gerechtsinstellingen en politieke instellingen, en anderzijds tussen de elementen die de aard en effect van rechterlijk toezicht vormen. Het Model stelt voor dat gerechtsinstellingen, die het mandaat hebben om rechterlijk toezicht uit te oefenen, de neiging hebben om in de loop der tijd de mate van *de facto* gerechtelijke onafhankelijkheid en juridisering uit te breiden.

Het aanvankelijke Model wordt getoetst in de hoofdstukken 3 en 4 door middel van een horizontale constitutionele rechtsvergelijkende studie naar drie niet-internationale constitutionele systemen. Dat zijn de Verenigde Staten, de Europese Unie (*acquis communautaire*) en post-Apartheid Zuid-Afrika. In hoofdstuk 3 tonen verschillende voorbeelden uit de grondwetten van deze drie constitutionele systemen aan hoe gerechtsinstellingen hun *de facto* onafhankelijkheid van politieke instellingen bewerkstelligen (grotendeels door standaardarresten te benadrukken, institutionele geloofwaardigheid en prestige te vestigen en het publiek bewust te maken van ongepaste politieke inmenging) en hun juridische invloed uitbreiden (bv. het uitbreiden van rechtsmacht zonder sterke constitutionele basis middels extensieve interpretatietechnieken en ontwikkeling en gebruik van rechtsbeginselen of doctrines).

Hoofdstuk 4 illustreert hoe het Amerikaanse Hooggerechtshof, het Europese Hof van Justitie en het Zuid-Afrikaanse Constitutionele Hof grondwettelijke geschillen tussen politieke instellingen op horizontaal (d.w.z. tussen overheden onderling) en verticaal (d.w.z. tussen overheid en burger) niveau beslecht. Bovendien wordt aangetoond hoe deze gerechtsinstellingen in toenemende mate de mensenrechtenbescherming hebben weten te realiseren. In het geval van de Verenigde Staten en Zuid-Afrika heeft dit plaatsgevonden na een periode waarin discriminerende praktijken werden getolereerd en legitiem werden geacht door de rechtsstaat. Verder wordt toegelicht hoe deze gerechtsinstellingen de nationale politieke instellingen hielpen met hun constitutionele legitimatie door te wijzen op de toewijding van de overheid aan de democratie, de rechtsstaat en mensenrechtenbescherming. Voorts illustreren voorbeelden hoe de gerechtsinstellingen remedies ontwikkelen voor ongunstig geraakte individuen, hoewel de ontwikkelingstijd aanzienlijk en niet altijd effectief kan zijn. In feite toont de constitutionele praktijk aan dat gerechtsinstellingen dikwijls een objectieve samenwerking vereisen opdat de remedies effectief zijn in het bewerkstelligen van een maatschappelijke verandering.

Op basis van de constitutionele rechtsvergelijkende studie van de hoofdstukken 3 en 4 wordt het onderdeel dynamiek van het Rechterlijk Toezichtsmodel verder verfijnd in hoofdstuk 5. Het verfijnde model postuleert dat de relationele aspecten van rechterlijk toezicht niet alleen de drijvende kracht is achter groei (of de uitbreiding van juridisering en gerechtelijke onafhankelijkheid), maar ook kan resulteren in afname (of de vernauwing van juridisering en gerechtelijke onafhankelijkheid). Deze afname kan in principe worden verklaard door de werking van limiterende factoren (zoals politieke druk, beperkingen in grondwettelijke documenten, juridische "geestesmodellen", financiële beperkingen en een overvloed aan rechtszaken).

Het Model stelt bovendien voor dat gerechtsinstellingen fluctueren tussen activisme (hogere gerechtelijke onafhankelijkheid en juridisering) en terughoudendheid (lagere gerechtelijke onafhankelijkheid en juridisering). Toch laat het Model zien dat de beweeglijkheid van gerechtsinstellingen die rechterlijk toezicht uitoefenen een bepaalde lijn van algehele vooruitgang vertoont. Daarmee wordt bedoeld dat er een trapsgewijze toename van juridisering en gerechtelijke onafhankelijkheid plaatsvindt in een lijncurve, dat ruwweg overeenkomt met de evenwichtspunten tussen juridische en politieke discretie binnen een bepaald constitutioneel systeem.

DEEL TWEE behandelt de functionele, procedurele en institutionele gelijkwaardigheid tussen het Inspectie Panel van de Wereldbank en gerechtsinstellingen in niet-internationale constitutionele systemen die rechterlijk toezicht uitoefenen, door het Rechterlijk Toezichtsmodel toe te passen op de institutionele historie en praktijk van het Inspectie Panel. Bij wege van introductie plaatst hoofdstuk 6 het mandaat, de procesvoering en

praktijk van het Inspectie Panel in haar institutionele context, dat wil zeggen als instelling van de Wereldbank gericht op het aan de orde stellen van kwesties rondom aansprakelijkheid en legitimiteit.

Hoofdstuk 7 analyseert de mate waarin het Inspectie Panel zijn *de facto* onafhankelijkheid behoudt ten opzichte van het management en de staf van de Wereldbank (en in mindere mate ten opzichte van de Raad van Bestuur van de Wereldbank). Het hoofdstuk besluit met de constatering dat het Inspectie Panel zijn onafhankelijkheid op soortgelijke wijze behoudt als gerechtsinstellingen die rechterlijke toezicht uitoefenen, hoewel dit niet altijd resulteert in een significante toename van de mate van *de facto* onafhankelijkheid.

Hoofdstuk 8 onderzoekt de manier waarop het Inspectie Panel haar juridische invloed uitoefent en concludeert dat het Inspectie Panel veel van de technieken aanwendt die door gerechtsinstellingen worden gebruikt om juridisering te faciliteren. Voorbeelden hiervan zijn de extensieve interpretaties van het Inspectie Panel Resolutie en de *Operational Procedures* en *Bank Procedures* van de Wereldbank, welke worden gebruikt om (wat kan worden beschouwd als) een eerste opzet van doctrine te ontwikkelen. Deze doctrine definieert in hoeverre er sprake is van naleving van beleidsregels van de Wereldbank, en hoe dit moet worden vastgesteld.

Hoofdstuk 9 bekijkt of de institutionele historie en praktijk van het Inspectie Panel de drie effecten van rechterlijk toezicht weerspiegelen, en constateert dat dit in beperkte mate het geval is. Het Inspectie Panel beslecht "constitutionele" geschillen tussen het management van de Wereldbank en de Raad van Bestuur door de Raad te voorzien van onafhankelijk geverifieerde feiten, maar ook tussen het management en appellanten die een verzoek tot onderzoek hebben ingediend door middel van conflictbeschrijving en haar rol om feiten te onderzoeken. Het Inspectie Panel heeft slechts in een enkele zaak mensenrechtenkwesties aan de orde gesteld, namelijk de zaak *Tsjaad-Kameroen Oliepijplijn*. Het hoofdstuk illustreert echter hoe het Inspectie Panel indirect aandacht besteedt aan (en daarmee bijdraagt aan de bescherming van) mensenrechten, zoals de nadruk van het Inspectie Panel op geleden schade en de aandacht voor grondrechten. Voorts wordt aangetoond dat noch de ontwikkeling, noch de handhaving van effectieve remedies binnen de formele kaders van het mandaat van het Inspectie Panel vallen, hoewel het Inspectie Panel hier toch arbitrair gezien indirect aan bijdraagt. Tot slot wijst hoofdstuk 9 erop dat het Inspectie Panel bijdraagt aan de legitimatie van de Wereldbank door haar te houden aan haar beginselen van deugdelijk bestuur (zoals transparantie en participatie van projectgerelateerde geraakte individuen in het beslissingsproces), door bij te dragen aan de conceptualisering van internationale rechtsstatelijkheid in de context van de Wereldbank en door de Wereldbank (indirect) te houden aan mensenrechten.

Hoofdstuk 10 analyseert de dynamiek van het Inspectie Panel en concludeert dat het Panel, net zoals de gerechtsinstellingen die rechterlijk toezicht

uitoefenen, de mate van juridisering en gerechtelijke onafhankelijkheid heeft laten toenemen in de loop der tijd, hoewel dit schommelt tussen hogere en lagere punten van juridisering en gerechtelijke onafhankelijkheid. De meeste beperkende factoren verbonden aan rechterlijk toezicht zijn ook actief in de context van het Inspectie Panel, echter schijnt dat enkele daarvan (zoals juridische geestesmodellen) voornamelijk de groei van juridisering en gerechtelijke onafhankelijkheid bevorderen, en niet de afname ervan. Het hoofdstuk concludeert dat de praktijk van het Inspectie Panel kan worden ingedeeld in vier fasen van ontwikkeling (te noemen de worsteling om relevantie en geloofwaardigheid, het bereiken van het omslagpunt, volwassenwording, en het bereiken van een evenwicht en verder), en dat deze stadia bovendien ruwweg corresponderen met de lijn van algehele vooruitgang.

Hoofdstuk 11 besluit dit boek door het Rechterlijk Toezichtsmodel alsmede de bevindingen uit de toepassing van het Model op het Inspectie Panel samen te vatten. Het hoofdstuk onderzoekt de implicaties van deze bevindingen om het Inspectie Panel te versterken, alsmede de aansprakelijkheidsmechanismen erachter. Er wordt besloten met de constatering dat, ondanks dat het gebrek aan formele onafhankelijkheid en het summiere mandaat van het Inspectie Panel hem niet verhinderen om zijn juridisering en gerechtelijke onafhankelijkheid uit te breiden, het terughoudende effect van factoren zoals politieke druk en de beperkingen inherent aan de Inspectie Panel Resolutie (bv. geen bevoegdheid voor het Panel om een beslissing te nemen) zal bepalen hoe ver het Panel kan gaan zonder formele interventie (bv. aanvulling in een *Board review of the Panel* of een amendement bij de Inspectie Panel Resolutie). Het hoofdstuk doet aanbevelingen om verder onderzoek te verrichten, voornamelijk om het Rechterlijk Toezichtsmodel te verfijnen en multidisciplinair onderzoek te verrichten naar de effectiviteit van internationale aansprakelijkheidsmechanismen zoals het Inspectie Panel. Tenslotte stelt het hoofdstuk voor dat het Inspectie Panel van de Wereldbank, een mechanisme van quasi-rechterlijk toezicht, de juridische invalshoek meer weerspiegelt dan men zou verwachten.

"What society needs is the operation of a judicial spirit far more than an insistence on the mere outward features of a formal court."[**]

[**] W.A Robson, Justice and Administrative Law (1928), at 37.

Chapter 1

Introduction

1.1. The Voices of World Bank 'Project Affected People'

The undersigned, Madhu Kohli, files this claim on her own behalf and on behalf of persons whose names and addresses are attached. For fear of reprisal against the claimants, the names of those persons […] have been made available to the Inspection Panel, but are otherwise to remain confidential.[1]

We appeal to the inspection panel to stand beside us in support of our right to survive, sustain our long-standing knowledge, and protect the social coherence achieved through our perennial struggle for lives and livelihood. Damage to ecological balance to such a degree because of this kind of human actions amounts to a deliberate denial of our right to live or exist. Our existence is rooted in the process of erosion and accretion, appearance and disappearance of chars. We derive our subsistence from the land and water, the char and the river. Our agriculture, fishery, transportation, rituals, social harmony have an inseparable link with the river.[2]

The Bank has failed to supervise the project effectively and violated its own directives on supervision. The PAPs [project affected people] often had no information about World Bank [WB] mission visits. Mostly it was through hearsay that they learnt that a WB team was in the project area. Unless hijacked, the WB representatives preferred not to meet PAPs in situations where NTPC [implementing agency] representatives did not have a dominating presence. The Bank missions often relied on NTPC officials to translate statements of PAPs and vice versa. [….] To a team of foreign NGOs in February 1995 a Bank official is understood to have stated that the Bank should not even try to meet PAPs without the NTPC officials. This official further suggested to the NGOs that if PAPs felt intimidated by the presence of NTPC officials, they should resort to legal action. With such arrogant and uncaring attitude the Bank missions can hardly be trusted to make unbiased and accurate reports.

[1] 1997 *India NTPC Power Generation Project*, Request, at §1.

[2] 1996 *Bangladesh Jamuna Multipurpose Bridge Project*, Request, at 14.

> *….] The People of Singrauli have the experience of humiliation of cascades of World Bank jeeps cruising through their villages without stopping.*[3]
>
> *[…] our hope is that an Inspection would lead to both rectifications in the World Bank's approach to the forest sector in Cambodia and potentially to similar World Bank projects elsewhere in the world. We hope that the World Bank will welcome the opportunity to reflect on lessons learned from this experience and will continue to value their relationship with NGOs in Cambodia, who consider the World Bank to be an important and respected player in Cambodia's development.*[4]

1.2. The World Bank Inspection Panel as a Quasi-Judicial Oversight Mechanism

In September 1993, the World Bank[5] ('the Bank') established the 'World Bank Inspection Panel' ('the Panel') to meet criticisms concerning the accountability and legitimacy of the Bank.[6] This book conceptualizes the World Bank as an international institution that exercises public power[7] – primarily through its Board of Executive Directors ('the Board') and Bank management and staff – which affects individuals and their environment, at times adversely, at the local level.[8] The Inspection Panel is conceptualized as a 'quasi-judicial oversight' mechanism[9] that offers adversely affected individuals a process

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3 1997 *India NTPC Power Generation Project*, Request, at §59.

4 2005 *Cambodia Forest Concession Management and Control Pilot Project*, Request, at 4.

5 International Bank for Reconstruction and Development and the International Development Association. Hereafter, the 'World Bank' or 'Bank'.

6 For an account of the World Bank's additional motivations for establishing the Inspection Panel (especially considerations internal to the Bank), *see* I.F.I. Shihata, The World Bank Inspection Panel: In Practice, at 1-8 (2000). For definitions of accountability and legitimacy, *see* section 1.3 below.

7 'Public power' is conceptualized as the exercise of power that 'constructs the public plane or space'. *See e.g.*, P. Allot, Eunomia: New Order for a New World, at 336-337 (1990).

8 *See e.g.*, B. Kingsbury, N. Krisch, R. B. Stewart, & J.B. Wiener, *Foreword: Global Governance as Administration – National and Transnational Approaches to Global Administrative Law*, 68 Law & Contemporary Problems 1, at 2 (2005): "The World Bank supervises developing countries in their adoption and implementation of very detailed externally-devised standards for matters ranging from the structure of insurance markets to the conduct of environmental assessments." *And see* P. Birnie & A. Boyle, *International Governance and the Formation of Environmental Law and Policy*, *in* P. Birnie & A. Boyle (Eds.), International Law & the Environment, at 34-37 (2002), on the role international organizations play in 'international governance': "Used in this sense, the term 'governance' when applied to the UN and its agencies implies rather less than global government, a task for which no international organization is equipped, but more than the power to determine policy or initiate the process of international law-making."

9 For a definition of (quasi-) judicial oversight, *see* section 1.3.2 below. Most studies of the Panel have not conceptualized the Panel in (quasi-) legal terms. *But see* in general K. Nathan,

through which they can directly address complaints against the Word Bank for not living up to its own internal operational standards.[10]

The World Bank Inspection Panel is the object of this book, with specific focus placed on how the Panel has fulfilled its role as a quasi-judicial oversight mechanism.

1.2.1. Accountability and Legitimacy of International Institutions at the 'Common Point of Impact'

As the prominence of international institutions has grown over the past few decades, a situation has emerged where international institutions often exercise public powers alongside states – thus, jointly affecting individuals and their environment at the local (national) level. The issues of accountability and legitimacy of international institutions are therefore decidedly linked to the exercise of public power.[11] This situation – described here as the 'common zone of impact' – is further complicated if the lines of responsibility between international institutions and states are blurred.[12] This is often the case,

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The World Bank Inspection Panel: Court or Quango? 12 Journal of International Arbitration 135 (1995); *and see* A. Gowlland Gualtieri, *The Environmental Accountability of the World Bank to Non-State Actors: Insights from the Inspection Panel*, The British Year Book of International Law 213, at 252-253 (2001): "[…] NGOs and external commentators, as well as some sections of Bank staff, have leaned towards the 'judicialization' of the Panel. The Resolution indeed grants the Panel quasi-judicial functions during the eligibility and investigation phases […]. While the Inspection Panel should remain a flexible and pragmatic dispute resolution mechanism, strengthening its quasi-judicial functions has the potential to give the mechanism greater teeth."

[10] The establishment of the Inspection Panel was a highly significant development in public international law, because it was the first accountability mechanism of its kind that placed individuals in a "legally relevant relationship" vis-à-vis international institutions. *See* in general E. Hey, *The World Bank Inspection Panel: Towards the Recognition of a New Legally Relevant Relationship in International Law,* 2 The Hofstra Law & Policy Symposium, 61 (1997).

[11] *See e.g.*, T.D. Zweifel, International Organizations & Democracy: Accountability, Politics, and Power, at 1 (2006): "During the past generation, a 'third wave' of democracy washed over many countries. But international institutions have not necessarily followed suit; as states transfer more and more rulemaking powers to them, they suffer from a growing crisis of legitimacy." *And see* A. Reinisch, *Securing the Accountability of International Organizations*, 7 Global Governance 131 (2001): "With the increase of tasks that are fulfilled by international organizations […] it becomes more likely that not only interests but also rights and even fundamental rights of individuals may be impaired." The association of 'power' with 'accountability' is also reflected in ILA's definition of 'accountability' – *see* section 1.3.3 below. On the legitimacy of "legal rules laid down by international bodies", *see e.g.*, P.B. Stephan, *Accountability and International Lawmaking: Rules, Rents, and Legitimacy*, 17 Northwestern Journal of International Law & Business 681 (1996-1997).

[12] The World Bank divides responsibility for the development project between itself and the borrower across the 'project life cycle', *see* P. McClure (Ed.), A Guide to the World Bank, at 55-

especially if considered from the perspective of 'project affected people' (PAP) – as (adversely) affected individuals are called in the World Bank context. Consequently, local people often have trouble discerning whether the adverse effects they are suffering result from the exercise of public power by states, by international institutions – or by both.[13] This distinction becomes crucial if project affected people want to demand accountability (including seeking redress for harm suffered by them), since international institutions typically enjoy immunity before domestic courts.[14] As the Inspection Panel cases discussed in this book will illustrate, many World Bank development projects exhibit the various facets of this problematic phenomenon.

Since the early 1980s, calls for the improved accountability and legitimacy of international institutions have grown, resulting in a steady chorus. The twin-issues of 'accountability and legitimacy of international institutions' have by now become a standard part of international law discourse and have generated a wealth of literature,[15] including influential studies conducted

58 (2003). Formally, the Bank is responsible for project design, appraisal, and evaluation while the borrower (i.e., borrowing state, and its implementing agency) is responsible for the actual implementation of the project – although the Bank has some supervisory responsibilities during implementation. *See e.g.*, Shihata (2000), at 13-14: "The increasingly intensified role of the Bank in the supervision of implementation does not mean that the Bank replaces the borrower, as the owner of the project, who is solely responsible for any harmful effect it may inflict on private groups or individuals as a result of such implementation. In fact, while the Bank's policies aim at the avoidance of such harmful effects, the Bank does not take any action with direct effect on parties other than the borrower, and any effect of its actions vis-à-vis the borrower cannot have any effect on third parties unless the borrower reflects them in its implementation of the project." *Also see* B. Knoll, *Legitimacy and UN Administration of Territory*, 4 Journal of International Law & Policy 2:1 (2007), at 2:2: expounding "the basic components on which legitimacy rests in a system where the exercise of power is shared between international and local institutions." Knoll concludes that "legitimacy rests upon a process that seeks to gradually devolve public authority from the former to the latter."

[13] *See e.g.*, 2007 *Albania Integrated Coastal Zone Management and Cleanup*, IR (ES), at ix, xiv & xv. Management denied "categorically" that there was a "direct or indirect linkage between the Project and the demolitions that are the basis of the Request." In its investigation, the Panel confirmed that the demolitions were, indeed, "directly" and "substantially" linked to the Bank project – *see* discussion of this case at section 7.3.5 below.

[14] *See e.g.*, Shihata (2000), at 122-123, for a discussion of 51 Argentinean brickmakers that tried (unsuccessfully) to bring suit against the Bank in an Argentinean court concerning damages suffered as a result of the Bank-sponsored *Yacyretá* project (for a discussion of the *Yacyretá* Inspection Panel case, *see* section 7.3.3 below).

[15] *See e.g.*, D. Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?* 93 American Journal of International Law 596 (1999), arguing that the legitimacy issue centres on the perception that the [international environmental law] process is undemocratic. Bodansky quotes Paul Graig (*see* fn. 11): "The very fact that [legitimacy is a central concern] at all is significant. We do not use this language when we think of other Treaty arrangements between states […]. That we do so in this context [EC rule-making] bears testimony to the acceptance by the major players that the [European] Community requires a form of legitimation which can no longer be found purely in the

by prominent bodies such as the *Institut de Droit International* (IDI),[16] the International Law Association (ILA)[17] and the International Law Commission (ILC).[18] It is generally assumed, as the ILA noted in its 2004 report, that judicial mechanisms – and, particularly, judicial remedies – are likely to be more effective to ensure accountability, especially of non-state actors, due to "nature of the judicial function".[19] Yet, while these efforts have laid important foundations for potential solutions – e.g., generating consensus that there *is* a problem, and conceptualizing the problem[20] – a legal regime regulating the accountability of international institutions – especially one that can provide effective (legal) remedies to affected individuals – remains elusive.[21] Hence, for time being at least, it would appear that our efforts have to be focused on

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traditional language of state agreement and state control." For an example of global projects that research and monitor accountability of international institutions, *see* the Global Public Policy Initiative's Project on 'Accountability in Global Governance', described by S. Burall & C. Neligan, *The Accountability of International Organizations*, at <http://www.gppi.net/fileadmin/gppi/IO_Acct_Burall_05012005.pdf>. *Also see* in general J. Coicaud & V. Heiskanen (Eds.), The Legitimacy of International Organizations (2001); R.W. Grant & R.O. Keohane, *Accountability and Abuses of Power in World Politics*, IILJ Working Paper 2004/7, (Global Administrative Law Series) at <www.iilj.org>; S. Andresen & E. Hey, *The Effectiveness and Legitimacy of International Environmental Institutions*, 5 International Environmental Agreements: Politics, Law and Economics 211 (2005); A. Reinisch, *Securing the Accountability of International Organizations*, 7 Global Governance 131 (2001); J. Steffek, *The Legitimization of International Governance: A Discourse Approach*, 9:2 European Journal of International Relations (2003); and V.P. Nanda, *Accountability of International Organizations: Some Observations*, 33 Denver Journal of International Law & Policy 379 (2004-2005).

16 *See* IDI Report (1995), *The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties*.

17 *See* ILA Report (2004), *Accountability of International Organisations*. Hereafter, 'ILA Report (2004)'.

18 The ILC is also working on the issue – phrased as the 'responsibility of international organizations' and has published five reports between 2002 and 2007 (with Giorgio Gaja as Special Rapporteur), which might lead to an adoption of 'draft Articles on the Responsibility of international organizations' by UN's General Assembly – similar to the process that was followed with the State Responsibility issue. *But see* criticism of these efforts by J.E. Alvarez, *Luncheon Address, Canadian Council of International Law*, (27 October 2006), at <http://www.asil.org/events-il-calendar.cfm?mode=archive&page=58>, at 30-34. Alvarez commented that efforts such as the ILC's are not advancing consensus; and that there is a need to focus on accountability regimes for particular international institutions instead of formulating generalized rules that are too general to be of practical use.

19 ILA Report (2004), at 47.

20 *E.g.*, the ILA Report (2004), at 5-6, argues that accountability can take various forms (*e.g.* legal, political, administrative, financial) and can be ensured through judicial / quasi-judicial and non-judicial means – on three basic levels, i.e.: internal and external scrutiny and monitoring; tortuous liability for injurious consequences arising out of acts or omissions not involving a breach of any rule of international and/or institutional law; responsibility arising out of acts or omissions which do constitute a breach of a rule of international and/or institutional law.

21 *See* above, note 18 (Ch. 1).

searching for the "judicial spirit" in public international law, as per Robson's suggestion.[22] In many respects, this book is a reflection of this 'search'.

The search for the "judicial spirit" in public international law has brought this book to look towards non-international constitutional systems[23] for the analytical or conceptual tools – if not answers – to address accountability and legitimacy problems. International law has often 'borrowed' ideas from national law, although not without controversy.[24] Vertical 'transplantation' of legal concepts from the national to the international level[25] – or, more specifically, *vertical transplantation of the core notions behind these concepts in order to serve as analytical tools and frameworks for analysis at the international level* – might be particularly justifiable in this instance, since international institutions have a local impact, often, as argued, alongside states.

1.2.2. Mechanisms Ensuring Accountability and Legitimacy in Non-International Constitutional Systems

In non-international systems, the exercise of public power by, primarily, the state and its organs[26] also leads to issues of accountability and legitimacy. In many (traditionally, 'western') constitutional systems, the accountability and legitimacy of those exercising public power are ensured through mechanisms of democracy and the 'rule of law'. Which leads to the question whether these mechanisms hold any potential for regulating public power exercised by international institutions.

Clearly, the checks and balances associated with democracy – as reflected in the simple notion of 'one man, one vote' – cannot curb the exercise of public power at the international level because public international law is decidedly undemocratic, and is likely to remain as such.[27] Besides, as the world has discovered as recently as the 20th century, democracy is far from

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[22] *See* above, note ** (Ch. 1).

[23] That is, national and supranational constitutional systems (such as the EU).

[24] *See e.g.*, J.B. Wiener, *Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law*, 27 Ecology Law Quarterly 1295 (2001), at 1295-1296 and 1301: "Whatever couplings or comminglings between national and international law have in fact occurred might have been so discreet, or perhaps so scandalous, that no one seems to talk about them in polite company (at least not for very long). Even if borrowing from national into international law occurs in practice, it seems to have been neglected or hushed, both in officialdom and in theory."

[25] Or, "trans-echelon" comparison – *see* Wiener (2001), at 1297. For a discussion of 'vertical' comparative law methodology, *see* section 1.5.3 below.

[26] Although this situation is also changing – public power, exercised at the local level, is increasingly exercised by various types of private entities (e.g., private security firms managing prisons).

[27] *But see* Zweifel (2005), at 2-3, for efforts to 'read in' democracy in international institutions,

perfect in this regard: "[m]ajorities can abuse their authority just like Hart's highwayman whose power, like theirs, stems from the barrel of a gun".[28] Hence, non-international constitutional systems have come to rely increasingly on the counteracting force of the 'rule of law' to curb the exercise of public power. As the examples of post-Apartheid South Africa and post-communist Eastern Europe illustrate, individuals have often been willing to subject their newfound democratic freedom to the rule of law "at the moment of their liberation from despotic and arbitrary regimes".[29] The rule of law is a decidedly nuanced concept, but all understandings of the notion are bound to involve some form of (quasi-) judicial oversight of the exercise of public power.[30] Although the rule of law at the international level (or, the 'international rule of law') is still weakly conceptualized,[31] this book suggests that the international rule of law holds potential for addressing the issue of international institutions' accountability and legitimacy, specifically as manifested through the exercise of (quasi-) judicial oversight.

1.2.3. This Book

Therefore, the point of departure of this book is the supposition that *judicial oversight (of the exercise of public power) enhances the accountability and legitimacy of those exercising public power* – typically, political institutions. Moreover, that much of what we understand under the terms 'judicial oversight' or 'judicial review' is a *function of the relationship and the interaction between courts and political institutions*.[32]

This book hypothesizes that there is *functional, procedural and institutional equivalence between the World Bank Inspection Panel and judicial oversight mechanisms in 'non-international' constitutional systems.*[33] This equivalence

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i.e., analysing "the extent to which" international institutions and "their policymaking are governed by democratic rules, formal or informal."

[28] *See* D. Beatty, The Ultimate Rule of Law, at 1 (2004). Beatty refers to the notion developed by H.L.A. Hart, The Concept of Law, at 6 (1961).

[29] Beatty (2004), at 2.

[30] For definitions of the 'rule of law' and 'quasi-judicial oversight', see section 1.3 below.

[31] *See* in general D. Dyzenhaus, *The Rule of (Administrative) Law in International Law*, Institute for International Law and Justice, Working Paper 2005/1, at <www.iilj.org>. *See also* UN General Assembly Report of the Sixth Committee, *The rule of law at the national and international levels*, UN Doc. A/61/456, 17 November 2006, as well as the related report of the Secretary-General, *Uniting our strengths: Enhancing United Nations support for the rule of law*, UN Doc. A/61/636 – S/2006/980, 14 December 2006.

[32] In this book, 'political institutions' or 'political bodies' refer to the executive, legislative and administrative powers in a constitutional system. *See* T. Koopmans, Courts and Political Institutions: A Comparative View, at 11, (2003). Koopmans relies on the traditional *trias politica* doctrine for "heuristic purposes" – *i.e.*, as a "tool for purposes of comparative research."

[33] *See* above, note 23 (Ch. 1).

justifies the comparison between courts in non-international constitutional systems and the World Bank Inspection Panel. More specifically, the book postulates that *the World Bank Inspection Panel functions as a quasi-judicial body that exercises quasi-judicial oversight.* The concepts 'quasi-judicial body' and 'quasi-judicial oversight' will be discussed at greater length later on.

The approach followed by this book thus departs from others that have analysed the World Bank Inspection Panel with approaches grounded in public international law[34] or international relations.[35] In many respects, this book fits within the emerging school of 'Global Administrative Law' (GAL)[36] (which denotes the "administrative law of global governance"),[37] since GAL calls on similar equivalences between national and international (or 'global') law.[38]

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[34] *See* in general D. Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, 34 Virginia Journal of International Law 553 (1993-1994); L. Boisson de Chazournes, *Public Participation in Decision-Making: The World Bank Inspection Panel*, 31 ASIL Studies in Transnational Legal Policy 84 (1999); 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, 323 at 323-342 (1999); and Shihata (2000).

[35] *See* in general J. Fox, *The World Bank Inspection Panel: Lessons from the First Five Years*, 6 Global Governance 279 (2000); *and see* D. Clark, J. Fox & K. Treakle (Eds.), Demanding Accountability: Civil-Society Claims and the World Bank Inspection Panel (2003), written primarily from a civil society perspective.

[36] The Global Administrative Law 'movement' started with the 'Research Project on Global Administrative Law', established by the NYU School of Law's 'Institute for International Law and Justice' in conjunction with the 'Center on Environmental and Land Use Law'. For an introduction to GAL, *see* B. Kingsbury, N. Krisch, & R.B. Stewart, *The Emergence of Global Administrative Law*, 68 Law and Contemporary Problems 15, at 15 (fn 1) (2005).

[37] Kingsbury *et al.* (2005), at 15-17. GAL is defined as "comprising the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make."

[38] For instance, GAL argues that "much of global governance can be understood and analyzed as administrative action: rulemaking, administrative adjudication between competing interests, and other forms of regulatory and administrative decision and management" (Kingsbury *et al.* (2005), at 17); and that the "attempted extension of domestic administrative law" is one of the responses to the "accountability deficit in the growing exercise of transnational regulatory power" (Kingsbury *et al.* (2005), at 16). In GAL terms, the World Bank Inspection Panel is described as an example of "the development of new mechanisms of administrative law at the global level to address decisions and rules made within the intergovernmental regimes" (Kingsbury *et al.* (2005), at 16 & 34). The Inspection Panel is also mentioned as an example of the "entitlement to have a decision of a domestic administrative body affecting one's rights reviewed by a court or other independent tribunal", which is "among the most widely accepted features of domestic administrative law" (Kingsbury *et al.* (2005), at 39).

Two sets of research questions have been formulated in order to test the abovementioned hypothesis: first, what are the core characteristics of judicial oversight and what outcomes does it bring about? How do courts perform judicial oversight? What are the boundaries of judicial oversight, and what types of constraints do courts exercising judicial oversight face? Moreover, what is the role of the interaction (and interdependency) between courts and political institutions in this regard? In other words, *what are the 'nature', 'effect' and 'dynamics' of judicial oversight?* Second, to what degree (if any) does the practice and institutional history of the World Bank Inspection Panel reflect judicial oversight – as conceptualized by the first research question? Put differently, *what is the extent of the functional, procedural and institutional equivalence between courts exercising 'judicial oversight' and the Inspection Panel?*

The first research question will be addressed by developing a conceptual model ('the Judicial Oversight Model', or 'Model') that is informed by theories of judicial review, systems thinking and systems dynamics. The Model will be tested and refined through a 'horizontal' comparative constitutional law analysis (involving the United States, the European Union, and South Africa). The second research question will be answered by means of a 'vertical' comparative law analysis[39] that will compare the institutional history and practice of the Inspection Panel against the Judicial Oversight Model. These and other methodological aspects will be discussed later on in this chapter.

Scope clarifications

The study contained in this book is situated in the broader context of efforts to conceptualize the international rule of law, which encompasses the discourse on the accountability and legitimacy of international institutions.[40] Hence, although this book focuses primarily on the World Bank Inspection Panel, the final chapter of this book will draw conclusions of a more general nature that might be relevant for international institutions beside the World Bank, both in a practical sense but also in terms of further research.[41]

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[39] For a definition of 'vertical' and 'horizontal' legal comparison, *see* section 1.5 below.

[40] *See* section 1.2.1 above.

[41] *See* section 11.4 below. In that sense, the book also fits within the discourse on (treaty-based) compliance mechanisms and compliance assessment, as well as international dispute settlement mechanisms. *See e.g.*, in general E. Brown Weiss, *Introduction*, 29 Studies in Transnational Legal Policy Series 1 (1997) (on 'compliance to soft law'); *and see* L. Boisson de Chazournes, C. Romano & R. Mackenzie, International Organizations and International Dispute Settlement: Trends and Prospects (2002); *Also see* D. Ehlermann, *Experiences from the WTO Appellate Body*, 38 Texas International Law Journal 469 (2003) (on the "tensions between the dispute settlement system and rule-making system of the WTO).

However, this book specifically excludes analyses into the effectiveness of the World Bank Inspection Panel. In other words, the book does not answer the question whether or not the Inspection Panel *has*, in fact, enhanced the accountability and legitimacy of the World Bank; nor, whether the Panel process has actually improved the plight of Bank project affected people. These are valid questions that, arguably, deserve urgent attention. However, they require a very different type of research than is reflected in this book. Answering questions of effectiveness would, for instance, require empirical research that goes far beyond analyzing the Inspection Panel case documents (such as conducting field visits to previous Requesters and conducting intensive interviews with Bank management and staff) and invariably asks for a multidisciplinary approach – for which this study is not equipped. However, the final chapter of this book makes suggestions for further research in this respect.[42]

1.3. Definitional Considerations

This section will define a few recurring terms used throughout this book, namely: 'rule of law' (1.3.1), '(quasi-) judicial oversight' (1.3.2), 'accountability' (1.3.3), and 'legitimacy' (1.3.4). These terms deserve specific consideration because they have come to mean a great number of different things to different people – which becomes clear particularly if one attempts to use these concepts at the international level. Since all four terms have been originally developed at the national level, efforts to 'transpose' them to the international level run the risk of running into the sand at some stage. However, as mentioned above, the aim is not to 'vertically' transplant legal concepts from the national to the international level; but rather, to employ the core notions behind these concepts to serve as tools for analysing an existing or emerging legal concept at the international level. Hence, the definitions contained in this section reflect only those 'core notions' that are relevant for the analyses contained in this book.

The order in which these four terms are discussed in this section also suggests a certain circular relationship between them. Thus, the 'rule of law' regulates the exercise of public power, and is accordingly presented as a potential mechanism for enhancing the accountability and legitimacy of international institutions. '(Quasi-) judicial oversight' is a particular manifestation of the rule of law that directly addresses the 'accountability' of political bodies exercising public power (because it holds those political institutions to a higher set of legal standards, which were typically adopted through an earlier political process). Hence, the outcome of judicial oversight indirectly improves the 'legitimacy' of political institutions exercising public

[42] *See* section 11.4 below.

power, because they are seen to be accountable and committed to the rule of law.

1.3.1. Rule of Law

In the state context, the 'rule of law' "connotes a climate of legality and of legal order".[43] Dicey's theory incorporates three aspects of the rule of law: "(1) the existence of principled normative rules, (2) adequately created and equally applicable to all legal subjects, (3) by accessible courts of general jurisdiction".[44] Judicial oversight, as defined next, is therefore a particular manifestation of the rule of law, since it ensures the equal enforcement of "principled normative rules" on private and public legal subjects alike.

What the rule of law might mean at the international level, is still being debated.[45] Former UN Secretary General Kofi Annan's 2004 definition of the rule of law reflects Dicey's abovementioned three elements, albeit referring to the rule of law at the national level. Annan described the rule of law as

> a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.[46]

This book reflects the position that an 'international rule of law' (i.e., the rule of law conceptualized in terms of the international legal system) should also reflect these elements – and should include (quasi-) judicial oversight in particular. It is unlikely, however, that all of the components in Annan's definition of the rule of law will be developed to the same degree at the international level.[47]

1.3.2. (Quasi-) Judicial Oversight

'Judicial oversight' involves the process whereby courts review the actions or decisions of the legislative, executive or administrative branches of government

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[43] E.C.S. Wade (Ed.), Introduction to the Study of the Law of the Constitution (1961), at XIX to CXCVIII.

[44] S. Beaulac, *An Inquiry into the International Rule of Law*, EUI Working Papers, MWP 2007/14 (2007), at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1074562>, at 8.

[45] *See e.g.*, Beaulac (2007); Dyzenhaus (2005); *and see* E. Cannizzaro, *Machiavelli, the UN Security Council and the Rule of Law*, Global Law Working Paper 01/06 (2006), at <http://www.law.nyu.edu/global/workingpapers/2006/index.htm>.

[46] *Also see* above, note 31 (Ch. 1).

[47] Note, however, that the discussion within the UN is more often focused on spreading the rule of law to states, and not only about the conceptualization of the notion at the international level – *see* above, note 31 (Ch. 1).

(the 'political institutions') against specific normative standards set out in the nation's constitution or in other normative instruments containing 'higher law' (such as international human rights instruments).[48]

The primary outcome of judicial oversight is therefore a determination of constitutionality (i.e., whether or not the particular exercise of public power is in compliance with the relevant constitutional document(s)).[49] Additionally, courts exercising a mandate of judicial oversight might grant specific legal remedies to individuals that have been adversely affected by the unconstitutional (or, illegitimate) exercise of public power.[50]

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[48] *See* in general M. Cappelletti, *Judicial Review in Comparative Perspective*, 58 California Law Review 1017 (1970). *Also see* A Mavčič, *A Tabular Presentation of Constitutional/Judicial Review Around the World*, at <http://www.concourts.net>. On whether it is possible to develop a common definition of 'judicial review', see E. De Wet, *Judicial Review as an Emerging General Principle of Law and Its Implications for the International Court of Justice*, 47 Netherlands International Law Review 181, at 205-208 (2000). De Wet defines judicial review as "the reviewing of the legality of decisions of political organs by an independent judicial organ" (at 182); and discusses the growing significance of judicial review for the international level (at 199-202). *Also see* H.J Abraham, The Judicial Process, at 283 (1968); defining judicial review as "[…] the power of any court to hold unconstitutional and hence unenforceable any law, any official action based upon a law, and any other action by a public official that it deems – upon careful, normally painstaking, reflection and in line with the canons of the taught tradition of the law as well as judicial self-restraint – to be in conflict with the Basic Law, in the United States its Constitution." For an historical overview of the development of judicial review, *see* B. Schwartz, A History of the Supreme Court, at 3-11 (1993). For an assessment of the globalisation of judicial review and constitutionalism, *see* in general C. Neal Tate and T. Vallinder (Eds.), The Global Expansion of Judicial Power (1995); *and see* R. Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (2004).

[49] This definition of 'judicial oversight' therefore encompasses both the review of executive decisions and actions ('administrative law'), and of legislation adopted by the legislature ('constitutional law'). The definition also incorporates so-called 'hybrid' constitutional models found in the UK, The Netherlands, and Canada – *see* J. Goldsworthy, *Homogenizing Constitutions*, 23 Oxford Journal of Legal Studies 483, at 483-484 (2000). Dutch courts review legislation against international human rights instruments that are deemed to have 'direct effect' (*see* Articles 93 and 94 of the Dutch Constitution). In the UK, the Human Rights Act of 1998 gives judges authority to interpret legislation so that it conforms to the European Convention on Human Rights as far as possible; however, UK judges cannot strike down legislation and can only issue a 'declaration of incompatibility'. In Canada, the Charter of Rights (1983) is largely subject to section 33, which gives legislatures the express power to override most of the human rights that are protected in the Charter. *Also note* that, on the level of abstraction used in this book, the term 'judicial oversight' encompasses the notion of 'constitutional review'. Constitutional review is more often used in the (continental) European context, and has slightly different constitutional foundations than 'judicial review'. *See e.g.,* G. Vanberg, The Politics of Constitutional Review in Germany: Political Economy of Institutions and Decisions, at 1 (2004), defining 'constitutional review' as the "power of judicial bodies to set aside ordinary legislative or administrative acts if judges conclude that they conflict with the constitution […]."

[50] Therefore, courts exercising judicial oversight – as defined in this book – actually fulfil a function of both 'review' and 'appeal'.

'Quasi-judicial oversight' largely reflects the definition of judicial oversight, except that it is not exercised by judicial institutions or 'courts'. Following from this difference, decisions made by a quasi-judicial body may or may not be legally binding. Note that, while this book mostly refers to 'quasi-judicial oversight' in the context of public international law, it is not restricted to the international level only. For instance, many (now, powerful) national courts started off having no or very limited formal powers of oversight.[51] Highly respected institutions such as the Dutch *Raad van State*, the French *Conseil d'État*, and *Conseil Constitutionnel* were not considered to be a 'courts' for a significant time of their history and, hence, were exercising 'quasi-judicial oversight' at that time.[52]

1.3.3. Accountability

This book uses the International Law Association's definition of 'accountability', as set out in its recent research on the accountability of international organizations (IO). According to the ILA, "accountability is linked to the authority and power of an IO".[53] In other words, since international organizations exercise public power (as this book argues), a range of different stakeholders might demand accountability from the IO. Accountability, then, is defined as "the duty to account" for the exercise of public power.[54]

The ILA has furthermore conceptualized three 'levels' of accountability.[55] This book argues that the kind of accountability ensured by the World Bank Inspection Panel is essentially what the ILA calls "first level accountability", that is:

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[51] *E.g.*, concerning the U.S. Supreme Court, the U.S. Constitution does not specifically bestow the powers of judicial review on the Court. For a discussion of how the Court assumed the powers of review, *see* section 3.1.1.1 below.

[52] For a discussion of the institutional evolution of the *Conseil d'Etat*, *see* Koopmans (2003), at 10, 34-36. The Dutch *Raad van State* only obtained judicial powers in 1976 – *see* <http://www.raadvanstate.nl/over_de_raad_van_state/geschiedenis/#wetgeving>: "De grondwetsherziening van 1887 maakte het mogelijk de Raad van State of een afdeling van de Raad (bijvoorbeeld de Afdeling geschillen) aan te wijzen als administratieve rechter. Dan zouden beroepen tegen bestuurshandelingen door de Raad of de Afdeling zelfstandig worden beslist in plaats van dat de Afdeling geschillen moest volstaan met de Kroon te adviseren in administratief-beroepszaken. Pas in 1976 was het echter zover." For a discussion of the *Conseil Constitutionnel*, *see* A. Stone Sweet, *Judicialization and the Construction of Governance*, at <http://repositories.cdlib.org/iir/ccop/wps-1999-04>, at 24-30.

[53] ILA (2004), at 5.

[54] Id.

[55] That is, "internal and external scrutiny"; "tortuous liability for injurious consequences arising out of acts or omissions not involving a breach of any rule of international and/or institutions law"; and "responsibility arising out of acts or omissions which do constitute a breach of a rule of international and/or institutional law." *See* ILA (2004), at 5.

> […] the extent to which [I]nternational Organisations, in the fulfilment of their functions as established in their constituent instruments, are and should be subject to, or should exercise, forms of internal and external scrutiny and monitoring, irrespective of potential and subsequent liability and/or responsibility.[56]

1.3.4. Legitimacy

Legal and political discourse on the 'legitimacy' of states and international institutions is complex, and is often approached from different ideological angles.[57] At its core, however, it concerns the grounds for justifying the exercise of public power.[58] As Bodansky remarked, "[t]he liberal view of humans as free and rational individuals makes the very notion of authority problematic. As Rousseau asked, "If men are born free, what can justify their chains?"[59] In modern democratic systems, where political institutions are given substantial discretion to govern over an ever-widening array of subjects, the mere possibility of judicial oversight might be an important mechanism for legitimizing the exercise of such political discretion.[60]

The concept of 'legitimacy' is also multifaceted. For instance, Fallon identifies three "concepts of legitimacy", namely: 'legal', 'moral', and 'sociological'.[61] 'Legal legitimacy' is measured "by legal norms", and, hence, comes close to the notion of 'legality'.[62] In other words, "[t]hat which is lawful

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[56] Id. For the specific nature of the "internal and external scrutiny and monitoring" in the broader context of the World Bank, *see* section 6.1.2.1 below.

[57] *E.g.*, Coicaud & Heiskanen argue that "[t]he Continental Enlightenment philosophy has traditionally been concerned with the legitimate organization of the relationship between popular sovereignty and public (state) power, seeking to establish, as a matter of policy, the primacy of the former over the latter. More specifically, it has sought to define the conditions under which it could be legitimately argued that the exercise of state power reflects the will of the people and, accordingly, that the doctrine of the sovereignty of the people prevails over that of the sovereignty of the state." In contrast, "[…] Liberalism has traditionally been more concerned with the government's authority to take decisions, precisely on the basis of such pre-existing majoritarian laws, without having to ask the individual citizen's consent each time such authority is exercised." Coicaud & Heiskanen concludes that "[t]his difference in approach has resulted in competing, and in practice often conflicting, views on the legitimate organization of the relationship between the state or government and the people or citizens, and has consequently yielded differing interpretations of the concept of legitimacy." *See* Coicaud & Heiskanen (2001), at 2-3.

[58] *Also see* above, note 11 (Ch. 1).

[59] Bodansky (1999), at 596. Bodansky summarizes a renowned statement by Jean-Jacques Rousseau, *in* The Social Contract (1762), Book 1, Chapter 1.

[60] *See* De Wet (2000), at 202-203.

[61] R.H. Fallon (Jr.), *Legitimacy and the Constitution*, 118 Harvard Law Review 1787, at 1790 (2004-2005). Fallon applies this model to analyse the legitimacy of the United States Constitution.

[62] Id.

is also legitimate […]".[63] 'Moral legitimacy' "inheres in the moral justification, if any, for claims of authority asserted in the name of law".[64] Thus, moral legitimacy is concerned with the question whether the actions of political institutions is a "function of moral justifiability or respect-worthiness".[65] 'Sociological legitimacy' holds that "authority is legitimate insofar as it is accepted, as a matter of fact, as deserving of respect or obedience – or, in a weaker usage […], insofar as it is otherwise acquiesced in".[66] Sociological legitimacy thus emphasises the "capacity of the [constitutional] system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society".[67] In other words, sociological legitimacy is concerned with how political institutions are perceived from within the constitutional system (thus, including the broader population and civil society) and, in an increasingly interconnected world, even how political institutions are perceived from outside the constitutional system (thus, including a global audience).[68]

This book is particularly concerned with the legitimacy of those entities exercising public power – the political institutions – and emphasizes the moral and sociological aspects of legitimacy.[69] Specifically, this book is interested in *how* (quasi-) judicial oversight mechanisms – at least through the intention of their decisions, if not through their effect – might indirectly contribute to the sociological and moral legitimacy of political institutions.[70] Note, however, that this book does not focus on the legal, moral, or sociological legitimacy of 'judicial oversight', or of 'courts exercising judicial oversight'.[71]

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63 Fallon (2004-2005), at 1794.
64 Fallon (2004-2005), at 1791.
65 Fallon (2004-2005), at 1796.
66 Fallon (2004-2005), at 1790-1791.
67 S.M. Lipset, Political Man: The Social Bases of Politics (1960), quoted in Fallon (2004-2005), at 1795.
68 Fallon (2004-2005), at 1795.
69 The notion of 'legal legitimacy' has arguably less to contribute to the analysis, especially in the context of the Inspection Panel, where it is less clear what the applicable law is in particular instances (and, hence, what would constitute legal legitimacy) – *see e.g.,* the debate on the human rights obligations of international institutions such as the World Bank, discussed in section 9.2 below.
70 Clearly, it is difficult to adduce empirical evidence that could support such an argument. Therefore, what follows in section 4.3 below (where the legitimizing effect of courts is discussed in the context of three constitutional systems), is largely based on self-evidence. What this kind of 'legitimacy' specifically means in the context of the World Bank, will be discussed in sections 6.1.2.2 and 9.3 below.
71 However, the credibility (or legitimacy) of courts will be considered as a 'limiting factor' that influences the dynamics of judicial oversight – *see* section 5.1.2.4 below.

1.4. Theoretical Influences

This section outlines two theoretical areas that have influenced the study contained in this book – i.e., theories concerning judicial review and systems theory. Theories about judicial review (1.4.1) are largely grounded in law and legal theory, while systems theory (1.4.2) has been developed in a decidedly non-legal context.

1.4.1. Theories on Judicial Review

The Judicial Oversight Model developed in Part I of this book is primarily descriptive in nature, although it has definite analytical undercurrents.[72] This section will position the Judicial Oversight Model in terms of existing theories on judicial and constitutional review, without specifically propagating a particular theory.[73] However, the literature on judicial review is simply enormous, making the prospect of theoretical positioning daunting.[74] In an effort to simplify matters, theories on judicial review have been grouped into three categories. This section will briefly set out each category, and clarify the theoretical position of the Judicial Oversight Model in relation to that category.

A first category of judicial review theories is either concerned with justifying or legitimizing the use of judicial review, or with opposing the basic legitimacy of judicial review – stressing its 'undemocratic character'.[75] These theories are, in essence, making an argument for or against the 'counter-majoritarian difficulty' (as Alexander Bickel originally coined the phrase).[76] The Judicial Oversight Model accepts the basic legitimacy of judicial review as a point

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[72] *See* below, note 120 (Ch. 1).

[73] This section will refer to 'judicial *review*' since this term is most frequently used in the literature.

[74] *E.g.*, a title search on 'judicial review' on an electronic database such as *Hein Online* returns 915 results (journals only); while a journal search on *JSTOR* returns 4 423 results. An *Amazon.com* search of English book that contain the words 'judicial review' in the title, returns 15 909 results (as of 9 March 2009).

[75] *See e.g.*, L. B. Tremblay, *General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law*, 23 Oxford Journal of Legal Studies 525, at 525-562 (2003) – setting out a general theory legitimizing judicial review.

[76] The counter-majoritarian difficulty refers to the criticism that "judicial review constitute[s] control by an unrepresentative minority of an elected majority" – *see* A. M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics, at 16 (1962). Bickel's account deals with the manner in which the counter-majoritarian difficulty critique can be addressed. *But see* Ely, Democracy and Distrust: A Theory of Judicial Review, at 71-72 (1980), criticizing Bickel's central argument (*see* Bickel, at 55 (1962), contesting that Bickel poses the wrong question, which flows from the wrong presupposition – namely, that it is within the competency of courts to develop and impose certain fundamental values. On the 'counter-majoritarian difficulty', *also see* Koopmans (2003), at 104-108.

of departure, arguing that "judicial review is linked to the Constitution, not to public consent, and that judges should therefore occasionally be 'daring enough to defy popular will'".[77] However, the Judicial Oversight Model also addresses the limitations and, to some extent, the potential 'side-effects' of judicial oversight. The Model argues, as will be illustrated in Chapter 5, that the limits inherent to judicial oversight act as counterbalance to the excessive expansion of judicial oversight – a major concern of the opponents of judicial review.[78]

A second category of judicial review theories might accept the legitimacy of judicial review as a point of departure, but differ on the proper scope of judicial review, and also *how* this scope should be determined (thus, this category encompasses theories concerning constitutional interpretation).[79] The Judicial Oversight Model is based on the assumption that judicial oversight *does* have a definable scope; however, and this point is crucial, the Model does not take a prescriptive view as to what the proper scope of judicial oversight should be, nor does it propagate a particular theory about how the scope of judicial oversight should be determined. Indeed, the Judicial Oversight Model postulates that courts and political institutions both play a distinct, and varying, role in fixing the boundaries of judicial oversight on particular issues. In addition, the Model suggests that the scope or boundaries of judicial oversight, as well as the methods to determine that scope, are specific to the context of a particular constitutional system.[80]

The third category of judicial review theories emphasizes judicial behaviour – of individual judges or of particular courts practicing judicial review. Many of these theories have traditionally developed in the U.S. constitutional context, with its strong realist jurisprudential tradition, and have subsequently been influenced by other disciplines such as political science, law and economics, and statistics.[81] The Judicial Oversight Model is informed by these theories

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[77] *See* Koopmans (2003), at 105, quoting L. Tribe, American Constitutional Law, at 61-66 (1988).

[78] *See e.g.*, Justice Frankfurter's observation in his dissenting opinion in *Trop v. Dulles*, 356 U.S. 86 (1958), that the Constitution "has not authorized the judges to sit in judgment on the wisdom of what Congress and the Executive Branch do". *Also see* the discussion on judicial activism and restraint in section 5.4 below.

[79] *See e.g.*, Ely, at 181 (1980). Ely's central thesis is that judicial review should only concern itself with correcting the 'failures' or 'deficits' of democracy – i.e., a "representation-reinforcing theory of judicial review". *Also see* in general C. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (1999), describing and propagating "a distinctive form of judicial decision-making", i.e. "minimalism" (at ix); *and see* K. Roosevelt (III), The Myth of Judicial Activism: Making Sense of Supreme Court Decisions, at 3 (2006), arguing that the exercise of judicial oversight should be "legitimate" – i.e., the "Supreme Court has taken a reasonable position in terms of deferring or not deferring to the government body whose action it is reviewing […]."

[80] *See e.g.*, Koopmans (2003), at 96-97.

[81] *See* in general J. A. Segal & H.J. Spaeth, The Supreme Court and the Attitudinal Model

inasmuch as it describes what courts *do* when they perform judicial oversight and *how* they perform these duties. However, the Model is also concerned with the interaction between courts and political institutions within a constitutional system.[82] The Judicial Oversight Model employs conceptual frameworks developed in the fields of political science[83] and systems thinking theory (see section 1.4.2 below) to facilitate this analysis.

1.4.2. Systems Theory

Systems theory – specifically, the related disciplines of 'systems thinking' theory and 'systems dynamics' theory – plays an influential role in the development of the Judicial Oversight Model, and in particular conceptualizing the 'dynamics' of judicial oversight.[84]

'Systems thinking' is a non-linear approach to analysis that aims to uncover the relationships and dynamics between the various elements or variables within a particular system, and between different systems.[85] The underlying premise of systems thinking theory is that "everything is dynamic, complex, and interdependent".[86] Systems thinking is therefore often juxtaposed against Descartes's reductionist view (which argues for the reduction of complex things to its fundamental parts), even though systems thinking theory does not reject the reductionist approach altogether. Rather, the theory postulates, when struggling with complex problems with uncertain outcomes, it is human nature to want "to simplify things, create order, and work with one problem at a time".[87] Thus, "[s]ystems thinking doesn't advocate abandoning [the reductionist] approach altogether; instead, it reminds us that simplification,

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Revisited (2002); *and* R.A. Posner, How Judges Think (2008). *See also* I. Ayres, *Man vs Machine – How computers routed the experts*, 1 September 2007, at <www.ft.com>, in which two U.S. political scientists successfully predicted how individual U.S. Supreme Court judges would vote during the 2002 term in 75% of the cases "by using just a few variables concerning the politics of the case".

82 *See e.g.* in general Koopmans (2003); and M. Shapiro & A. Stone Sweet, On Law, Politics and Judicialization (2002).

83 *See e.g.*, Shapiro & Stone Sweet (2002); J.A. Ferejohn, *Judicializing Politics, Politicizing Law*, 65 Law and Contemporary Problems 41 (2002); and K. Alter, Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe (2001).

84 *See* Chapter 5 below.

85 G.M. Weinberg, An Introduction to General Systems Thinking, at 28 (1975): "The general systems movement attempts to aid thinking about medium number systems by finding general laws." *And* at 52: "What is a system? As any poet knows, *a system is a way of looking at the world*." (emphasis in the original).

86 *See* V. Anderson & L. Johnson, Systems Thinking Basics: From Concepts to Casual Loops, at 19 (1997). *Also see* J.D. Sterman, Business Dynamics: Systems Thinking and Modeling for a Complex World, at 4 (2000).

87 Anderson & Johnson (1997), at 19.

structure, and linear thinking have their limits, and can generate as many problems as they solve".[88] Systems thinking theory also explains why complex problems are usually so difficult to solve, suggesting that making changes to a system without comprehending the intricate linkages between system components might result in 'unintended consequences'.[89] As Sir Thomas More noted:

> [a]nd it will fall out as in a complication of diseases, that by applying a remedy to one sore, you will provoke another; and that which removes the one ill symptom produces others […].[90]

Forrester refers to this phenomenon as the "counterintuitive behavior of social systems".[91]

'Systems dynamics', a disciplinary component of systems theory, is a "method for understanding the dynamic behaviour of complex systems".[92] A key principle of systems dynamics methodology is the emphasis on understanding the 'structure' of a system. The structure of a system consists of the "feedback loops, stocks and flows, and nonlinearities created by the interaction of the physical and institutional structure of the system with the decision-making processes of the agents acting within it".[93] Systems dynamics uses various "circular or mutually causative techniques" to uncover events, patterns and the underlying structure of a system in order to describe and understand complex systems, and to solve problems pertaining to a particular system.[94] Although systems dynamics is "grounded in the theory of nonlinear dynamics and feedback control developed in mathematics, physics, and engineering", it is "fundamentally interdisciplinary".[95] The tools and frameworks of systems dynamics "dra[w] on cognitive and social psychology, economics and other social sciences" and have been applied to "the behavior of human as well as physical and technical systems".[96]

Systems thinking and systems dynamics generate insight into the major characteristics of systems,[97] and facilitate an understanding of (or, at least, an appreciation for) the different ways in which systems (might) behave.[98]

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88 Id.

89 Anderson & Johnson (1997), at 20.

90 Sterman (2000), at 5, quoting Sir Thomas More, Utopia, at 30 (2007).

91 Sterman (2000), at 5, quoting J.W. Forrester, *Counterintuitive Behavior of Social Systems*, 73 Technology Review 53, at 52-68 (1971).

92 Sterman, (2000), at 4.

93 *See* Sterman, (2000), at 107.

94 Anderson & Johnson (1997), at 18.

95 Sterman, (2000), at 4-5.

96 Sterman, (2000), at 5.

97 For example, the components of a system are interrelated in different ways. Systems can be 'complex' – consisting of other discrete systems such as the nervous system and digestive system – *see e.g.* note 35 (Ch. 5) below on complex systems.

98 For example, systems expand or decline and possibly yield unintended consequences – *see*

Social theorists, such as Niklas Luhmann, have employed the conceptual frameworks and tools of systems theory to conceptualize 'law' as a 'social system'.[99] However, lawyers appear to be less familiar with the benefits of employing systems theory in legal analysis,[100] even though they regularly refer to legal *systems* or constitutional *systems*.[101] This book aims to show that systems thinking and systems dynamics have a well-developed range of theoretical and conceptual frameworks and tools that lawyers can use – with relative ease – to facilitate legal analysis.[102]

This book therefore suggests that it might be helpful to conceptualize a particular 'legal order' as a complex social system;[103] with 'constitutional law' a sub-system within the legal order that regulates the exercise of public power. Finally, the process of 'judicial oversight' (as defined in this book), can be conceived as a further sub-system within the constitutional system.[104] Thus conceptualized, the book will use basic analytical tools from systems dynamics theory (such as feedback loops and causal loop diagrams) to gain

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e.g., Sterman (2000), at 22, explaining that the "dynamic complexity" of systems arises because systems are *e.g.*, "[d]ynamic", "[s]elf-organizing", and "[c]haracterized by trade-offs".

[99] *See* in general N. Luhmann, Social Systems (1995). *And see e.g.,* Forrester (1971), at 52: "It is my basic theme that the human mind is not adapted to interpreting how social systems behave. Our social systems belong to the class called multi-loop nonlinear feedback systems. In the long history of evolution it has not been necessary for man to understand these systems until very recent historical times. Evolutionary processes have not given us the mental skill needed to properly interpret the dynamic behavior of the systems of which we have now become a part."

[100] The application of Systems Thinking to law seems to have been limited to specific specialized areas only, such as bankruptcy law – *see e.g.*, L.M. LoPucki, *The Systems Approach to Law*, 82 Cornell Law Review 479 (1997). On a more critical note, LoPucki has argued that a systems approach to law has the potential to bring "legal scholarship in touch with reality" (at 482).

[101] *See* Anderson & Johnson (1997), at 1-2; explaining that "a system is a 'group of interacting, interrelated, or interdependent components that form a unified whole." *Also see* D.J. Gerber, *Toward a Language of Comparative Law?*, 46 American Journal of Comparative Law 719, at 729 (1998), noting that a legal system can be defined as the decisions of a variety of actors (such as courts, political institutions and individuals) "acting in [their] legal capacities together with the factors that regularly influence such decisions"; and "[i]n the context of law, the concept of 'system' is typically used in a vague way to refer to the totality of factors involving law in a particular jurisdiction".

[102] Such as 'feedback loops' (Sterman (2000), at 12-13), and 'causal loop diagrams' (Sterman (2000), at 137-140).

[103] *See e.g.*, O. Brand, *Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies*, 32 Brooklyn Journal of International Law 405, at 435 (2007), defining law as "a normative system that consists of principles, rules, institutions, and other institutionally defined instruments".

[104] Note that some systems do not consist so much of concrete elements, but consist of processes – s*ee* Anderson & Johnson (1997), at 2. *Also see* P. Allot, *The Concept of International Law*, 10 European Journal of International Law 36 (1999): "Law is a system of legal relations. A legal system is an infinite number of interlocking legal relations forming a network of infinite density."

an understanding about the structure and behaviour of these systems, and, specifically to draw out the various interdependencies and relationships between these systems and their components. Of specific interest is the relationship and interdependencies between two (groups of) protagonists within these systems, namely, courts and political institutions.

1.5. Comparative Law Method

This book holds the view that comparative law methods should be fit for purpose. As Palmer argued:

> […] there is a sliding scale of methods and the best approach will always be adapted in terms of the specific purposes of the research, the subjective abilities of the researcher, and the affordability of the costs.[105]

Therefore, a comparative law method has been developed that specifically sets out to answer the two research questions posed by this book.[106] This section will briefly position this comparative law method in terms of some prominent criticisms of comparative law methodology (1.5.1), before formulating the comparative objective (1.5.2), and setting out the method itself (1.5.3).

1.5.1. Positioning the Comparative Law Method

While the popularity of comparative law as a field of enquiry has increased over the past few decades, various criticisms remain concerning existing comparative law methodology.[107] One practical concern, for instance, is the lack of shared conceptual frameworks and a common 'language';[108] which also, in part, explains this book's reliance on the conceptual frameworks provided by systems theory.

A further point of attention concerns the functionalist method.[109] Various scholars have criticized the dominant position of functionalism, while post-

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[105] V.V. Palmer, *From Lerotholi to Lando: Some Examples of Comparative Law Methodology*, 53 American Journal of Comparative Law 261, at 290 (2005). This view is contrasted by others that seek to develop broader or more general (if not 'unifying') comparative law methods. *See e.g.*, Brand (2006) at 408; and H.E. Chodosh, *Comparing Comparisons: In Search of Methodology*, 84 Iowa Law Review 1025, at 1030-1031 (1999).

[106] *See* section 1.2.3 above.

[107] *See e.g.*, R. Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 American Journal of Comparative Law 125 (2005), arguing that comparative constitutional law "remains under-theorized and lacks a coherent methodology".

[108] *See* Gerber (1998), at 727.

[109] Functionalism emphasizes "a concrete social problem" instead of the formal aspects of laws or institutions, *see* A. Peters & H. Schwenke, *Comparative Law beyond Post-Modernism*, 49 International and Comparative Law Quarterly 800, at 800-808 (2000).

modernist critique contends that functionalism specifically (and comparative methodology in general) does not reflect an understanding of the underlying (political, historical, social or economic, cultural) context.[110] This study notes the validity of these criticisms, especially insofar as they guard against the narrow – and sole – employment of comparative methods that consider only one aspect, such as the social function of laws. Thus, functionalism is considered an important element of the comparative law method employed in this book, but as Myres McDougal once remarked: "The demand for inquiring into function is, however, but the beginning of insight".[111]

A further contention flowing from the criticism of functionalism is that comparative law methodology is often not aligned with 'new' comparative objectives. Conventional comparative objectives tend to be exclusively 'norm-centered' (as functionalism is), while 'new' comparative objectives might also include procedural and institutional comparative goals, such as the 'dynamics' of the relevant legal systems.[112] Given the nature of the two research questions this study is answering, the comparative objective – and thus, the corresponding method – cannot be solely norm-centred and has to include procedural and institutional elements.

1.5.2. Comparative Objective

The comparative objective of this study is therefore twofold. First, it aims to conceptualize a particular legal concept (judicial oversight) at the non-international level. Second, it aims to use this conceptualized 'model' of judicial oversight in a vertical comparative law analysis to study the functional, procedural and institutional similarity between the World Bank Inspection Panel and courts exercising judicial oversight.[113] In other words, the comparative objective is not, strictly speaking, to seek a 'fit' between judicial oversight in its non-international context and quasi-judicial oversight in the international context, or to 'transplant' judicial oversight to the international level.[114] More accurately, the comparative objective is to 'transplant' the analytical framework associated with judicial oversight – as conceptualized in terms of its nature, effect and dynamics – to the international level.

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[110] Zweigert and Kötz introduced the importance of 'context' into mainstream comparative law methodology – *see* K. Zweigert & H. Kötz, Introduction to Comparative Law, at 28-46 (1992). *Also see* Brand (2007), at 417-420, criticizing functionalism for being purely contemporary in nature and lacking incentives to engage in historical research.

[111] Peters & Schwenke (2000), at 828, quoting Myres S. McDougal.

[112] *See* Gerber on changing comparative goals *in* Gerber (1998), at 722-726. Gerber's main criticism of functionalism is that it is not aimed at analyzing the dynamics of legal systems, because it is normatively focused on the "social function of norms".

[113] For other examples of comparative objectives, *see* Koopmans (2003), at 4-6.

[114] *See* Gerber (1998), at 721.

1.5.3. A Comparative Method in Four Stages

Any comparative analysis has to gain a thorough (contextual) understanding of the legal concept that forms the *tertium comparationis* to avoid the pitfalls of "mindless borrowing".[115] Hence, the comparative law method employed in this book follows an "empirical and inductive approach" that is concerned with the evolution of a particular legal concept[116] in its institutional and politico-legal context. Such an approach, as Koopmans explained, has the benefit of allowing us

> to develop ideas about the judicial interpretation of legal and constitutional provisions, about the use of broad and narrow notions and concepts, about the social and cultural factors influencing legal developments, about the relationship between law and politics […]. These problems can be analysed in the abstract – for example, on the basis of historical and sociological studies. They can also be concreticized, by means of a study of constitutional practice, of case law on issues of constitutional and administrative law, and of the debates over those issues in various legal systems.[117]

The comparative law method employed in this book combines two different 'modes' of comparison, that is, 'horizontal' comparison (between non-international legal systems) and vertical comparison (between non-international and international legal systems).[118] The method consists of four stages (see Figure 1 below), and reflects Gerber's description of comparative law methodology as a process that "consists of using abstraction to structure information," thus having "theory formation, theory testing and theory refinement at its core".[119] Stages one to three are 'descriptive-analytical'[120] in nature, while Stage four contains normative elements.

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[115] *See* Wiener (2001), at 1298-1302.

[116] *See* Koopmans (2003), at 5-6: "[Legal comparison] shows us something about law and legal evolution generally. […] This is, in the main, an empirical and inductive approach to important problems of public law and the relationship between law, politics and administration."

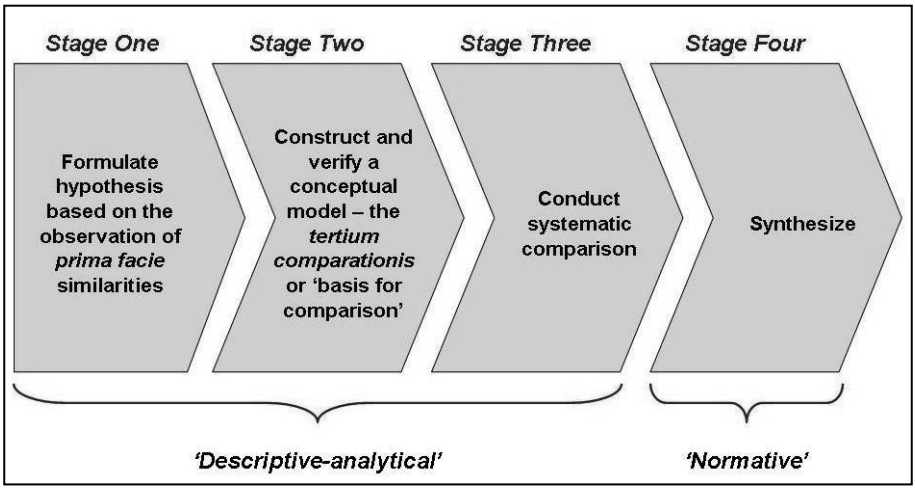
[117] Koopmans (2003), at 5-6.

[118] Also described as "cross-echelon" comparison, *see* Wiener (2001), at 1297.

[119] Gerber (1998), at 727.

[120] *I.e.*, descriptive in nature, but also grounded in 'analytical jurisprudence'. *See* Brand (2007), at 436-437, quoting P. Birks, *Equity in the Modern Law: An Exercise in Taxonomy*, 26 University of Western Australia Law Review 1, at 3-5 (1996), arguing that "taxonomy 'promotes understanding' and is 'essential' to ensure stability and consistency in the law".

Figure 1: A Four-Staged Comparative Law Method



1.5.3.1. Stage one

The first stage involves the formulation of a hypothesis, based on the observation of *prima facie* similarities between a specific (quasi-) legal concept at the national and international legal levels – as has been formulated earlier in this chapter.[121]

1.5.3.2. Stage two

During stage two, the legal concept that is the object of comparison (here, judicial oversight) is analysed at a higher level of abstraction, since

> the operations of what we call legal systems can only be understood by using a conceptual framework designed specifically to capture those characteristics […] [and] by analyzing the decision of legal actors and the patterns of influence of those decisions we can gain knowledge of the operation of such systems. [122]

An initial conceptual model (here, the Judicial Oversight Model) is constructed for this purpose.[123] Next, the initial conceptual model is verified

[121] *See* section 1.2.3 above.
[122] Gerber (1998), at 729-730. Brand refers to this stage as "conceptual orientation", *in* Brand (2007), at 439.
[123] *See* Chapter 2 below.

through a horizontal comparative constitutional law analysis.[124] The following paragraphs will briefly outline the manner in which the horizontal comparative constitutional law study has been set up in this book.

Assembling the horizontal comparative law study

A comparative analysis of this nature should be broad enough so that meaningful conclusions can be drawn. On the other hand, a selection of some kind is inevitable to keep the analysis manageable. The horizontal comparative constitutional law study in this book has been limited to the jurisprudence of three courts, namely: the Supreme Court of the United States, the Court of Justice of the European Communities, also known as the European Court of Justice (ECJ),[125] and the South African Constitutional Court.[126]

The inclusion of the United States Supreme Court is almost self-evident, having served as a constitutional 'blueprint' for many states.[127] The bicentennial of *Marbury v. Madison*[128] in 2003 served as a prominent reminder of the rich history of American constitutional law, in which the U.S. Supreme Court has acted as a major protagonist over the years.[129] However, the age of the U.S. Constitution, venerable as it is, has resulted in great interpretational difficulties – not to mention two bitterly opposing schools of thought[130] –

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[124] *See* Chapters 3, 4 and 5 below.

[125] The ECJ has extensive jurisdiction on EC law ('Pillar I'), limited jurisdiction concerning Common Foreign and Security Policy ('Pillar II'), and no jurisdiction on Police and Judicial Co-operation in Criminal Matters ('Pillar III') – for an explanation of the 'pillar' structure and the ECJ's corresponding jurisdiction, *see* P. Craig & G. De Búrca, EU Law: Text, Cases and Materials, at 30-42 (2003).

[126] The South African Constitutional Court was first established through the 1993 'Interim' Constitution (Act 200 of 1993), (*see* sections 98, 99 & 100); and the Court's position was formalized by the 1996 'Final' Constitution (*see* section 167).

[127] Also for the post-Apartheid South African Constitutions – *note e.g.,* how much section 35 (concerning "Arrested, detained and accused persons") of the 1996 South African Constitution resembles the so-called '*Miranda* Rights' doctrine developed by the U.S. Supreme Court (discussed in section 3.2.1.2 below). *Also see* Koopmans (2003), at 40-44 on the "impact of the American model" of judicial review.

[128] *Marbury v. Madison*, 5 U.S. 137 (1803) – the illustrious case that put judicial oversight on the constitutional agenda in the United States, discussed in section 3.1.1.1 below.

[129] There are concerns among certain U.S. academics and legal practitioners that the U.S. Supreme Court's global lustre and influence is waning; *see* A. Liptak, U.S. Court Is Now Guiding Fewer Nations, 17 September 2008, at <http://www.nytimes.com/2008/09/18/us/18legal.html?scp=3&sq=supreme%20court%20influence&st=cse>.

[130] Especially the vastly opposing schools of constitutional interpretation in the U.S. constitutional system. *See e.g.*, discussion about the 'false-dichotomy" (at vii) between Interpretivism and Non-Interpretivism, *in* Ely (1980), at 7: "Indeed, much of the history of the struggle between the two schools has been marked precisely by charges that the other side's philosophy is undemocratic."

which has forced the Supreme Court to be innovative, and has consequently resulted in interesting (if occasionally controversial) judgments well worth analysing.

The reasons for including the ECJ are perhaps less obvious, especially due to the *sui generis* nature of the EU's constitutional system. On the one hand, a convincing argument can be made that the EU exhibits certain federal characteristics, which especially come to the fore when the ECJ reviews actions taken by EC organs or member states.[131] In such circumstances, the ECJ's jurisprudence might have more in common with the U.S. Supreme Court than it might seem on first blush.[132] On the other hand, the ECJ's jurisprudence provides this study with various interesting – and unique – examples. For instance, the ECJ's jurisprudence often reflects the fact that the EU 'constitutional' system is, in many respects, a convergence of the constitutional structures and practices of EU member states.[133]

Finally, judicial oversight might still be in its infancy in post-Apartheid South Africa,[134] but the South African Constitutional Court has already made an impressive contribution to comparative constitutional jurisprudence in its relatively short lifespan[135] – especially concerning the justiciability of socio-economic rights.[136] Moreover, South Africa's history provides the study with interesting comparisons of the role of the judiciary under Apartheid, compared

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[131] *See* J. Coles, The Law of the European Union, at 19-23 (2003).

[132] As has been discovered by constitutional lawyers and political scientists alike – *see e.g.*, in general M. Shapiro, *Judicial Review and Bureaucratic Impact: The Future of European Union Administrative Law*, *in* M. Hertogh & S. Halliday (Eds.), Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives (2003); Shapiro & Stone Sweet (2002); R. Dehousse, The European Court of Justice: The Politics of Judicial Integration (1998); *and see* K.J. Alter, Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe (2001).

[133] *See in* general K. Lenaerts, *Interlocking Legal Orders In The European Union And Comparative Law*, 52 International and Comparative Law Quarterly 4, at 873 (2003). *E.g.*, it is widely acknowledged that the French *Conseil d'Etat* can be regarded as predecessor of the ECJ, certainly as far as (quasi-) judicial review of administrative law is concerned. The strong 'filial relationship' between the ECJ and the *Conseil d'Etat* becomes "very obvious to those who know the parent". *See e.g.*, L. Scarman, English Law: The New Dimension, at 23 (1974).

[134] Judicial review has only been part of the South African constitutional landscape since the adoption of the post-Apartheid Constitutions of 1993 and 1996. Before, this time, South Africa followed the 'Westminster Model', albeit its own version of 'sovereignty of parliament', since 'parliament' lacked democratic legitimacy. For a history of sovereignty of parliament within South Africa, and the lack of judicial oversight capabilities (and its consequences), *see* in general I. Loveland, By Due Process of Law? Racial Discrimination and the Right to Vote in South Africa 1955-1960 (1999), *and see* section 4.2.3.1 below.

[135] The South African Constitutional Court, encouraged by the Constitution's support (and, in some case obligated by it – *see* section 39) for comparative jurisprudence, has been impressive in its use of comparative law. *See e.g.*, *S. v. Makwanyane*, CCT/3/94, at §§55-57, and §§288 & 289.

[136] *See e.g.*, Hirschl (2004), at 130-134; *and see* International Commission of Jurists 2008

to its role in the post-Apartheid constitutional system that is committed to democracy and the rule of law – including strongly articulated powers of judicial oversight. South Africa's two post-Apartheid Constitutions[137] are partially the outcome of a comparative law study as well, having been significantly influenced by U.S., Canadian, Indian, and German constitutionalism and, hence, provides the study with a broad perspective.[138]

The case law included in the comparative constitutional law study have mostly been selected based on, what Hirschl calls, the "prototypical cases" principle.[139] This principle is used when "a researcher wishes to draw upon a limited number of observations or case studies to test as many key characteristics as possible that are akin to those found in as many cases as possible".[140] Hence, the horizontal comparative constitutional law analysis refers mostly to 'landmark' cases, or at least cases that are familiar entries in most constitutional law textbooks.[141]

1.5.3.3. Stage three

The third stage of the comparative law method constitutes the core of the vertical comparison between non-international legal systems on the one hand, and the international legal system on the other.[142] During this stage, the (verified) conceptual model is compared against the (quasi-) legal concept (including its institutional context), at the international level. The existence of similarities (identified during stage one) is confirmed and, once

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Report, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights*, at 38-40, and 52-54 (Hereafter, 'ICJ (2008) Report'). *Also see* section 3.2.3.1 below.

[137] *I.e.*, South Africa's Interim Constitution of 1993, and the Final Constitution of 1996.

[138] *See* H. Ebrahim, *The Making of the South African Constitution: Some Influences*, *in* P. Andrews & S. Ellmann (Eds.), The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law, at 88 (2001).

[139] R. Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 American Journal of Comparative Law 125, at 133, 142 (2005), noting four principles on which cases for comparison can be selected, *i.e.*, "most similar cases", "most difficult cases", "prototypical cases", and "outlier cases".

[140] Case selection for the purposes of this book has been influenced to a lesser degree by the "outlier cases" principle, i.e., cases "where the outcome is poorly explained by existing theories but may be explained by a newly identified explanation" – *see* Hirschl (2005), at 146.

[141] Another benefit of primarily sticking to the 'basic canon' of comparative constitutional law is that most constitutional lawyers and, indeed, many international lawyers are familiar with at least the cursory facts and significance of most of these cases – thus, making the analysis as concise as possible, without it being too cursory.

[142] The EU does not qualify as a 'national' legal system; however, it has been argued that in its supranational form (i.e. concerning EC law matters – 'Pillar I'), the EU has federal characteristics. For a discussion of the debate surrounding the proper 'classification' of the EU's constitutional system, *see* Coles (2003), at 19-23.

confirmed, their significance is determined – they might, for instance, be merely coincidental.[143] And even those similarities that turn out to be 'real' are unlikely to be of equal significance.[144]

Next, differences are identified and analysed. This is a crucial point for the credibility of the analysis, because it is the differences between the legal systems that determine the boundaries of the analogy, and can ultimately disprove the hypothesis. As with the similarities, however, the identified differences should also not be taken at face value. For instance, are they 'real' differences, or might they turn out to be more artificial once the context is taken into account? Moreover, differences can also be graded, or further differentiated according to predefined criteria.[145]

1.5.3.4. Stage four

During this stage of the comparative law method, the hypothesis formulated in stage one can be proved or disproved. Based on this conclusion, final insights can be developed that might contain normative elements.[146]

1.6. Outline of the Book

This book consists of two parts. Part I (Chapters 2 to 5) aims to construct a conceptual model (the Judicial Oversight Model) that depicts the 'nature', 'effect' and 'dynamics' of judicial oversight – thus, answering the first research question set out above. Chapter 2 sets out the initial Model, which focuses on the 'nature' and 'effect' of judicial oversight, and certain relational aspects of the 'dynamics' of judicial oversight. Chapters 3 and 4 form the core of the horizontal comparative constitutional law study, tracing the 'nature' (Chapter 3) and 'effect' (Chapter 4) of judicial oversight in the jurisprudence of the United States Supreme Court, the European Court of Justice, and the South African Constitutional Court. Chapter 5 refines the Judicial Oversight Model – and concludes Part I – by expounding the 'dynamics' of judicial oversight in more detail.

Part II of the book (Chapters 6 to 10) applies the Judicial Oversight Model to the World Bank Inspection Panel – thus, addressing the second research question set out earlier. Chapter 6 serves as an introduction to the World Bank Inspection Panel and places it in its proper institutional context. Readers

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[143] *See* Wiener (2001), at 1356, fn. 226. Wiener quotes Watson: "It is a myth to think that […] every parallel is a provenance."

[144] In other words, similarities should be qualified on the basis of pre-selected criteria – *see e.g.*, Brand on the notion of 'gradation', *in* Brand (2007), at 445.

[145] Id.

[146] *See* Chapter 11 below.

already familiar with the World Bank and the Inspection Panel might prefer to proceed directly to Chapters 7 to 10, which apply the Judicial Oversight Model to the institutional history and practice of the Inspection Panel. Chapters 7 and 8 consider whether the 'nature' of judicial oversight is reflected in the Inspection Panel's history and practice, while Chapter 9 assesses the existence of the 'effect' of judicial oversight in the Panel context. Chapter 10 concludes Part II by gauging whether the history and practice of the Inspection Panel exhibit the 'dynamics' of judicial oversight.

Chapter 11 concludes this book by summarizing the salient findings from Parts I and II, and reflects on the implications of these findings for the Inspection Panel and, potentially, also for other international accountability mechanisms. In addition, Chapter 11 sets out three areas for further research, and reflects on the contribution of the World Bank Inspection Panel to the 'search' for the "judicial spirit" in public international law.

PART I

CONSTRUCTING A CONCEPTUAL MODEL OF JUDICIAL OVERSIGHT

Kant defined 'theory' as a "collection of rules, even of practical rules"; adding that

> the rules concerned are envisaged as principles of a fairly general nature, and […] they are abstracted from numerous conditions which, nonetheless, necessarily influence their practical application. Conversely, not all activities are called practice, but only those realisations of a particular purpose which are considered to comply with certain generally conceived principles of procedure.[1]

Kant's definition reflects this intricate exchange between theory and practice – and also points to the aim of Part I, which is to construct a conceptual model of judicial oversight, verified by comparative constitutional practice.

Chapter 2 sets out the initial model – the "intellectual blueprint" of this book[2] – that is illustrated and verified through examples from the jurisprudence of the United States Supreme Court, the European Court of Justice, and the South African Constitutional Court (Chapters 3 and 4). Concluding Part I, the Judicial Oversight Model is further refined in Chapter 5.

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1 I. Kant, (1793, (1970)), at 61, quoted by I. Scobie, *Some Common Heresies About International Law: Sundry Theoretical Perspectives, in* M. Evans (Ed.), International Law 59 at 61 (2003).

2 Scobie, *in* Evans (2003), at 61.

CHAPTER 2

THE JUDICIAL OVERSIGHT MODEL

> *When you look at the world systemically, it becomes clear that everything is dynamic, complex, and interdependent. Put another way: Things change all the time, life is messy, and everything is connected. We may know all this. However, when we're struggling with an over-whelming problem or an uncertain future, we tend to want to simplify things, create order, and work with one problem at a time.*[1]

'Judicial oversight' has been defined as a review process, conducted by the judiciary, into the exercise of public power by the political institutions (legislative, executive, and administrative bodies) of a particular constitutional system.[2] This definition is deliberately broad in order to incorporate various meanings (often based on slightly different constitutional foundations) associated with 'judicial review' and 'constitutional review' in different constitutional systems,[3] and thus seeks to overcome the problem of a lack of common comparative legal language.[4] Regardless of how broad this definition is, however, it is not entirely suited to serve as the basis for comparative law analysis because it falls short of describing the many dimensions of judicial oversight. For instance, what does the oversight process entail and how is it accomplished? What outcomes are closely associated with the exercise of judicial oversight? Since the exercise of judicial oversight juxtaposes courts against the political institutions of a constitutional system, what is the effect of these interactions on the development or evolution of the judiciary?

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1 Anderson & Johnson (1997), at 19.

2 *See* definition of '(quasi-) judicial oversight' in section 1.3.2 above.

3 For a comparative overview of constitutional systems that have a form of judicial oversight, *see* in general A. Mavčič, The Constitutional Review (2001).

4 *See* Gerber (1998), at 722-723.

What is required to answer these types of questions – and, specifically, the research questions posed by this book[5] – is the formulation of a "neutral reference system in the form of concepts", or "abstract models derived in an inductive process from specific instances of real-existing law".[6] "[C]onceptualization", Brand noted, is "firmly established in the social sciences" and is "accepted by analytical jurisprudence as crucial to our perception and understanding of law".[7] And on a more pragmatic note: conceptualization is the "basic tool for lawyers to communicate with each other and to transfer knowledge from one area of law to another".[8]

This chapter will start the process of constructing such an abstract, conceptual model – the 'Judicial Oversight Model' (or, 'the Model'). Note, however, that the aim of the Model is not to set out a 'general theory' of judicial oversight.[9] The Judicial Oversight Model is a suggested analytical tool, developed specifically to serve as the *tertium comparationis* of the comparative law analyses contained in Parts I and II of this book. Constructing a conceptual model such as this involves making an important trade-off – that is, choosing between developing a complex but highly accurate model versus constructing a model that is simplified, yet incomplete within acceptable margins of error.[10]

The Judicial Oversight Model reflects the latter choice in the sense that it is simplified – and admittedly incomplete. The Model focuses on three aspects or dimensions of judicial oversight, namely, its 'nature', 'effect', and 'dynamics'. The 'nature' of judicial oversight refers to its core characteristics (2.1). The Model emphasizes two fundamental characteristics of judicial oversight, namely: judicial independence (2.1.1) and the expansion of judicial influence and power, or, judicialization (2.1.2). The 'effect' of judicial oversight refers to the outcomes associated with the exercise of judicial oversight (2.2). The Model outlines three effects often associated with judicial oversight, namely, constitutional dispute resolution (2.2.1), human rights protection (2.2.2), and the indirect legitimization of political institutions (2.2.3). Finally, the 'dynamics' of judicial oversight relates to the relationships and interdependencies between system components, and the consequences of

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5 *See* section 1.2.3 above.

6 Brand (2007), at 436.

7 Brand (2007), at 437.

8 Id.

9 As clarified in section 1.4.1 above, this book does not subscribed to a particular 'general theory' of judicial oversight, as this study is, at its core, 'descriptive-analytical', and not normative.

10 This sentiment is also reflected in Einstein's well-known statement about theory: "It can scarcely be denied that the supreme goal of all theory is to make the irreducible basic elements as simple and as few as possible without having to surrender the adequate representation of a single datum of experience". *See* A. Einstein, *On the Method of Theoretical Physics*, 1:2 Philosophy of Science 163, at 165 (1934).

these relationships for change (such as growth and decline), for equilibrium and fluctuation, and for the general evolution of courts (2.3).[11]

The initial Model, set out in Chapter 2, will concentrate largely on the relational aspects of the dynamics of judicial oversight, hence, the relationship between courts and political institutions (2.3.1), and the relationship between the nature and effect of judicial oversight (2.3.2). This chapter will focus on only one consequence of these relationships, namely, 'growth'. Chapter 5 will refine the Judicial Oversight Model by conceptualizing the other consequences of the interaction between systems components, namely, 'decline' up to the point of 'equilibrium', 'fluctuation', and the general 'evolution' of courts that exercise a mandate of judicial oversight.

2.1. The 'Nature' of Judicial Oversight: Two Defining Characteristics

The Judicial Oversight Model posits that courts exercising the powers of judicial oversight exhibit two important characteristics: they assert their *de facto* independence from political institutions (2.1.1), and they expand their judicial power and influence (2.1.2). This section will look into each of these components of the 'nature' of judicial oversight in more detail.

2.1.1. Asserting Judicial Independence

Judicial independence, according to the UN's 'Basic Principles on the Independence of the Judiciary', can be defined as the absence of "any inappropriate or unwarranted interference with the judicial process".[12] Or, as Ramseyer put it: "courts where politicians do not manipulate the careers of sitting judges" can be considered as 'independent'.[13] There appears to be

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[11] *See* <http://dictionary.reference.com/browse/dynamics>.

[12] Principle 4 of the U.N.'s 1985 Basic Principles on the Independence of the Judiciary, at <http://www.unhchr.ch/html/menu3/b/h_comp50.htm>; *also see* J. Bridge, *Constitutional Guarantees of the Independence of the Judiciary*, at <http://www.ejcl.org/113/article113-24.pdf>.

[13] J.M Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 The Journal of Legal Studies 721, at 721-722 (1994). Others have defined judicial independence as "the freedom of courts to make decisions without control by the executive or legislative branches or by the people" (*see* S.B. Burbank, *The Architecture of Judicial Independence*, 72 Southern California Law Review 315, at 335 (1998-1999)); or as a principle, which holds that "judges shall decide lawsuits free from any outside pressure: personal, economic, or political, including any fear of reprisal" (*see* A. Cox, *The Independence of the Judiciary*, 21 University of Dayton Law Review 566 (1995-1996)). On "the influence of 'the people' on judicial independence", *see* J.A. Ferejohn & L.D Kramer, *Independent Judges, Dependent Judiciary*, 77

broad acceptance[14] that judicial independence is a crucial precondition for the realization of justice and respect for human rights,[15] and importantly, that judicial independence facilitates judicial oversight.[16]

While 'judicial independence' is a broad concept, of which the importance is widely embraced, the Judicial Oversight Model is specifically concerned with a few aspects of judicial independence. First, since the judicial oversight process involves the review of the actions and decisions of political institutions, it is of particular importance that courts are insulated against "inappropriate or unwarranted" political interference.[17] In other words, the Model focuses on judicial independence from political institutions, and not on other forms of interference.

Second, constitutional systems based on respect for democracy and the rule of law usually guarantee judicial independence through various formal (often constitutional) measures, such as providing judges with life tenure,[18] insulating judicial salaries from political interference,[19] and ensuring that judges can only be removed from office upon a finding of 'cause'.[20] Though such measures are clearly necessary, the Model argues that they are not

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New York University Law Review 962, at 968-970 (2002), recalling James Madison's insight that "the greatest threat to justice in a republican system comes from the most democratic parts of government", i.e., "acts in which the Government is the mere instrument of the major number of the constituents."

[14] For instance, the 'Basic Principles on the Independence of the Judiciary' (above, note 12, Ch. 2), has been endorsed by the UN General Assembly on two occasions. *Also see* T. Bingham, The Business of Judging, at 55 (2000): "It is a truth universally acknowledged that the constitution of a modern democracy governed by the rule of law must effectively guarantee judicial independence". The guarantee of judicial independence is also the first article of the 1999 'Universal Charter of the Judge', at <http://www.hjpc.ba/dc/pdf/THE%20UNIVERSAL%20CHARTER%20OF%20THE%20JUDGE.pdf>. *But see* Ramseyer (1994), at 721-722, arguing that the importance of judicial independence should not be exaggerated because it is not common to "freedom-loving nations everywhere" and that there is a strong interdependency between courts and political institutions (for a discussion of this interdependency, *see* section 2.3.1 below).

[15] *See* the 1994 statement by the UN Commission on Human Rights: "Convinced that an independent and impartial judiciary and an independent legal profession are essential pre-requisites for the protection of human rights and for ensuring that there is no discrimination in the administration of justice." Quoted by Bingham (2000), at 55.

[16] *See* Burbank (1998), at 336; *and see* Cox (1995), at 567. At least two of the three "historic" reasons for judicial independence as defined by Cox ("protection against executive oppression", "protection against violations of fundamental human rights" and "assurances of upright and impartial judges") fall squarely within the cadre of judicial oversight, as defined in this book.

[17] *See* above, note 12 (Ch. 2).

[18] *E.g,* article 97(2) of the German Grundgesetz of 1949.

[19] *E.g,* article III, section 1 of the U.S. Constitution: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office."

[20] *E.g,* article 97(2) of the German Constitution; *and see* section 177 of the South African

conclusive; and they certainly do not insulate courts completely from political influence or interference.[21] As Justice Mahomed, former Chief Justice of the South African Constitutional Court[22] remarked:

> […] courts could easily be reduced to paper tigers with a ferocious capacity to snarl and to roar but no teeth with which to bite and no sinews to execute their judgments, which may then be mockingly reduced to pieces of sterile scholarship, toothless wisdom or pious poetry.[23]

Therefore, the Model specifically relates to the degree of *de facto* judicial independence. If courts are not independent from political institutions in practice, they cannot perform judicial oversight effectively, regardless of the existence of conditions that guarantee their independence on paper.[24]

Third, the Judicial Oversight Model concentrates on the actions taken by *courts* – some overt, most unobtrusive – to assert their independence from political institutions. Specifically, the Model postulates that the protection of judicial independence is perhaps more in judicial hands than is generally believed.[25] Hence, the remainder of this section will outline a few mechanisms through which courts might assert their *de facto* independence from political institutions, i.e.,: building institutional credibility and prestige (2.1.1.1); leveraging landmark cases (2.1.1.2); and raising public awareness about (what courts consider to be) inappropriate political challenges to judicial independence (2.1.1.3).

2.1.1.1. Building institutional credibility and prestige

The Model proposes that the existence of strong institutional credibility and prestige is a critical component of *de facto* judicial independence since it helps to insulate courts from inappropriate political interference. As Justice Mahomed explained:

Constitution. For more examples, *see* I. Mahomed, *The Independence of the Judiciary*, 115 South African Law Journal 658, at 661 & 662 (1998).

[21] For a discussion on the influence of political pressure on judicial oversight, s*ee* section 5.1.2.1 below.

[22] Judge Mahomed was Chief Justice of South Africa between 1998 and 2000, *see* <http://www.concourt.gov.za/text/judges/former/justiceismailmahomed/1.html>.

[23] Mahomed (1998), at 660-661.

[24] In other words, 'judicial independence' that exists on paper only, is not considered as 'real' judicial independence in terms of the Judicial Oversight Model. Conversely, the Model postulates that it is possible for a court to have *de facto* judicial independence in the absence of formal measures to safeguard judicial independence, although under such a scenario, the court would be more vulnerable to political interference – s*ee* section 5.1.2.1 below.

[25] *See* Ferejohn & Kramer (2002), at 964, arguing that courts protect their independence through the exercise of judicial self-restraint, so as not to encroach too much on political ground. For a discussion of judicial self-restraint in the context of 'judicial mental models', *see* section 5.1.2.2 below.

> […] the real and ultimate power of the judiciary must lie in its independence and integrity and in the esteem which this generates within the minds and the hearts of the people affected by its judgments. No politician can afford to be seen to defy the orders of a judiciary perceived by the people to be scrupulously independent and honest in the defence of the constitutional values bonding a nation.[26]

A crucial element of judicial credibility and prestige resides with, what Mahomed termed, the "judicial temper" of individual judges – i.e., the "intellectual and emotional equipment they bear upon the process of adjudication".[27] Other measures that "project and nurture the reputation of the judiciary" might include guarding the integrity of the judicial procedure, making access to courts "friendly and comfortable", and "demystifying" those elements "in the language of the law which makes it unintelligible".[28] The prestige of a court can even be significantly influenced by external, formal paraphernalia – such as the robes, (in some countries) the wigs, the building[29] – and their importance should not be underestimated.

2.1.1.2. Leveraging landmark cases

'Landmark' or 'milestone' cases, as Justice Oliver Wendell Holmes once explained, are crucial for normative development because they "exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend".[30] Landmark cases define the "constitutional moments" within a nation's history and in the evolution of judicial institutions.[31] In some instances, it is clear in advance that a judgment will be a 'landmark' ruling because the particular case addresses issues of high significance within that constitutional system.[32] The Judicial Oversight Model proposes that courts might use this moment in the spotlight to strengthen its prestige and, hence, its *de facto* independence. In other instances, a case might seem unimportant, even bordering on the trivial,

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[26] Mahomed (1998), at 661.
[27] Mahomed (1998), at 662.
[28] Id.
[29] *See* Schwartz (1993), at 37, on the U.S. Supreme Court's lack of prestige during the early days of its existence, reflected e.g., in the fact that the Court did not have a building of its own, but operated out of a "lowly committee room in Capitol Hill". *Also see* section 3.1.1.1 below.
[30] Justice O.W. Holmes, dissenting in *Northern Securities Co. v. United States*, 193 U.S. 197 (1904).
[31] *See* J.H.H. Weiler (Ed.), The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration, at 3 (1999).
[32] *E.g.*, *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954) – discussed in sections 3.2.1.1 and 4.2.1.1 below; and *Government of the Republic of South Africa v. Grootboom*, 2001 (1) SA 46 (CC) – discussed in section 3.2.3.1 below.

but the court's *ruling* turns it into a 'landmark' case.[33] Thus, the court creates an opportunity for nurturing its institutional credibility and prestige. There are also examples where the significance of certain rulings only becomes clear (much) later, at which point they are referred to as 'landmark' or 'milestone' cases.[34] Clearly, courts do not directly leverage these types of landmark cases to assert their independence; however, these landmark cases might nonetheless contribute to the credibility and prestige of a court in a general sense.

While courts use landmark cases to strengthen their *de facto* independence throughout their institutional history, the Model suggests that courts especially benefit from the leveraging effect of landmark cases at the early stages of their institutional evolution, and at critical intervals where the entire constitutional system might be experiencing some kind of disturbance or upheaval.[35] Indeed, it is an interesting phenomenon that (new) courts often seem to 'come to their own' in moments of great political turmoil or *impasse*.[36] Hence, courts appear to use prominent cases to strengthen their *de facto* independence from political institutions in the name of overarching (political, social or economic) goals, such as the strengthening of the federal state, the realization of market-integration objectives, or the protection of a fledgling democracy and its rule of law.

2.1.1.3. Raising public awareness about political interference

The Judicial Oversight Model proposes that courts will 'raise the alarm' in exceptional circumstances – for instance, by alerting the news media – in order to create public awareness of undue political challenges to judicial independence. While such strategies are typically successful, courts are likely to employ them sparingly because they place significant strain on the judiciary's relationship with the political institutions – a relationship that remains important, given the judiciary's reliance on the "sword" and the "purse" of the political branches of government.[37]

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[33] *See e.g.*, *Marbury v. Madison*; and *Case 6/64, Flaminio Costa v. ENEL*, [1964] ECR 585.

[34] *E.g.*, *Case 283/81, CILFIT v. Ministry of Health* [1982] ECR 3415; *see also Case 103/88, Fratelli Costanzo SpA v. Commune di Milano*, [1989] ECR 1839, ECJ.

[35] *For example*, during moments of economic distress, civil unrest or political revolution.

[36] *See* Ackerman (1989), at 45, noting the "distinctive features of the concrete historical process that allowed Americans to transform moments of passionate sacrifice and excited mobilization into lasting legal achievements […]." An example where the judiciary failed to capture such a moment might be the U.S. Supreme Court's *Dred Scott* decision – *see* section 4.2.1.1 below.

[37] *See* in general Ferejohn & Kramer (2002). It was Alexander Hamilton that first referred to this vulnerability of the judiciary: "The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even

2.1.2. Expanding Judicial Influence ('Judicialization')

Alexis de Tocqueville famously observed in 1835 that most political questions in American society are eventually phrased in legal terms.[38] The 'judicialization' or 'juridification' of society is no longer limited to the United States, however; it has become a global phenomenon over the course of the previous century.[39] Definitions of 'judicialization' differ somewhat, and are typically influenced by the disciplinary context in which the concept is used.[40] Broadly speaking, however, most definitions of judicialization refer to a situation where courts increase their influence over time. The Judicial Oversight Model suggests that courts expand judicial influence or power – i.e., expand the degree of judicialization – by dealing with issues that were previously dealt with solely, or largely, by the political institutions of a constitutional system.[41] Put differently, the process of judicialization occurs mostly at the nebulous interface between law and politics,[42] and expands

for the efficacy of its judgments." (Emphasis (in capitals) in the original). *See* <http://www.constitution.org/fed/federa78.htm>.

[38] A. de Tocqueville, De la démocratie en Amérique, Vol. I, Part I, Ch. 6 (1835); abridged translation published by Oxford University Press, 1946 (*see* 1959 reprint, at 77).

[39] *See e.g.*, Koopmans (2003), at 268-276; *and see* in general Hirschl (2004) on the emergence of, what he calls, a "juristocracy".

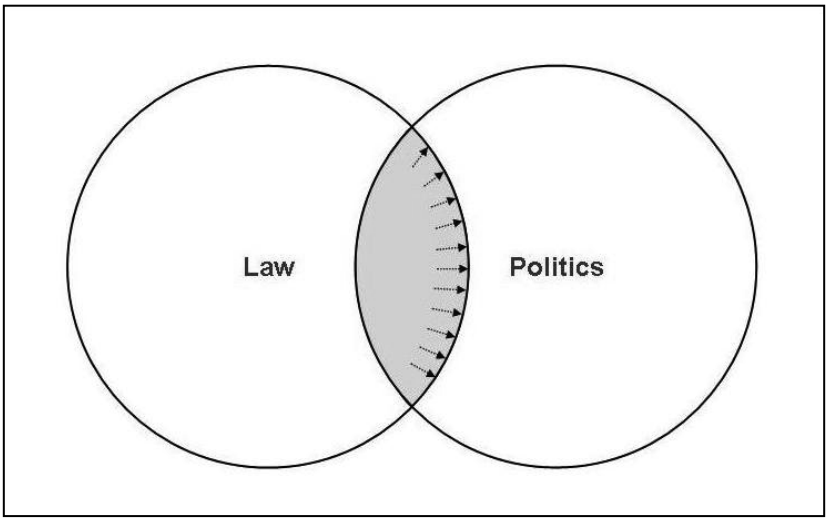
[40] *For example*, the political science field focuses more on the power relationships between courts and political institutions in this regard – *see e.g.*, Stone Sweet, at 17 (1999), who uses the term 'judicialization' as "shorthand" for the "construction of judicial power", and who describes judicialization as a "political process". Note that the notion of judicialization, as defined in this book, is not to be confused with the idea of 'constitutionalization' – a burgeoning area of research in public international law in particular – which is defined *e.g.*, as "constitution-making" or "norm-generation" by "judicial interpretation" – *see* D. Cass, *International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 European Journal of International Law 39, at 41-42 (2001). Also see T. Schilling, *On the Constitutionalization of General International Law*, Jean Monnet Working Paper 06/05, at 4 (2005), describing the "constitutionalization of general international law" as the objective of "transposing the achievements of the constitutional State system, in particular in the protection of human rights, to the international level." However, as can be inferred from these two definitions, the Judicial Oversight Model expounded in this chapter clearly encompasses some of the ideas associated with 'constitutionalization', as the remainder of this chapter will illustrate.

[41] Thus, largely based on Koopmans's definition – *see* Koopmans (2003), at 268.

[42] *See e.g.*, Koopmans (2003), at 246: "Developments over the last fifty years have not left the basic tenets of the concept of constitutionalism untouched. It is still possible to operate a constitutional system on the basis of separation of powers: it happens in the USA. It is also feasible to make a conceptual distinction between legislative functions on the one hand, government and the administration of the country on the other. Nevertheless, constitutional practice in most countries shows that these neat distinctions and classifications are gradually being overshadowed by one all-embracing contrast: that between the world of politics and the world of law."

judicial discretion and narrows political discretion – thus, enlarging the area of 'law' at the cost of the area of 'politics' (see Figure 2 below).[43]

Figure 2: Judicialization – Expanding Judicial Discretion, Narrowing Political Discretion



But why has judicialization become such a prominent feature of the judicial oversight process? Many explanations have been proffered from various disciplines; all probably containing elements of truth. For example, one argument might be that judicialization is a logical consequence of the special nature of the judicial oversight process. As Cappelletti noted:

> [t]he exercise of judicial review […] is rather different from the usual judicial function of applying the law. Modern constitutions do not limit themselves to a fixed definition of what the law is, but contain broad programs for future action. Therefore the task of fulfilling a constitution often demands a higher sense of discretion than the task of interpreting ordinary statutes; that is certainly one reason why Kelsen, Calamandrei and others have considered it to be a legislative rather than a purely judicial activity.[44]

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[43] Ferejohn identifies three different forms of judicialization that encompass both the contraction of political discretion and the expansion of judicial discretion, *i.e.*: judicial limitation of legislative powers; judicial assumption of policy-making roles that limits the discretion of the executive; and monitoring of the "conduct of political activity itself […] by constructing and enforcing standards of acceptable behaviour for interest groups, political parties, and both elected and appointed officials" – *see* J.A. Ferejohn, *Judicializing Politics, Politicizing Law*, 65 Law and Contemporary Problems 41, (2002).

[44] Cappelletti (1970), at 1047.

In other words, wielding such broad judicial discretion – as is required by the exercise of judicial oversight – might invariably lead to an expansion of judicial power.

Another argument, closely related to the previous explanation, is that courts increase their influence because the nature of (constitutional) law compels them to do so. Scholars have often reflected on one of the great paradoxes in law, namely, that law has to be stable and certain, yet it cannot be stagnant since it has to respond to the real social needs of a given moment.[45] As Cox remarked, the "great constitutional questions of each age cannot always be wisely decided by a Court imprisoned in logical deduction from the formulas of the past".[46] Courts must answer the crucial constitutional issues of each era by interpreting the constitutive document "in accordance with law", but their decision must still "meet the needs and aspirations of the times".[47] James Landis remarked in 1924:

> [t]o ignore the ["formulation of social ideals of time and place"], as represented in a vast popular movement, would be to attribute to the Supreme Court not judicial independence but judicial ignorance of the philosophy and end of law.[48]

A different explanation suggests a more active role for the judiciary in the judicialization process. Courts, so the argument goes, expand their power over time because they deliberately choose to do so. Already without a "sword" and "purse" of their own, courts fear that they will lose judicial power (and thus, become irrelevant) if they do not expand that power. As Ely remarked, those holding public offices, judges included, know that "one of the surest ways to acquire power is to assert it".[49]

The Judicial Oversight Model is particularly concerned with the manner in which courts actually realize judicialization, and not so much the motivations

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[45] *See* Schwartz (1993), at 275: "Warren strongly believed that the law must draw its vitality from life rather than precedent. What Justice Holmes termed 'intuitions' of what best served the public interest played the major part in Warren's jurisprudence. He did not sacrifice good sense for the syllogism. Nor was he one of 'those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result.' When symmetry and logic were balanced against considerations of equity and fairness, he normally found the latter to be weightier. In the Warren hierarchy of social values, the moral outweighed the material." Schwartz is quoting from a comment Justice Frankfurter made to Justice Fred Vinson, *see* Frankfurter to Fred Vinson, n.d., Frankfurter Papers, Library of Congress, at 35-36.

[46] A. Cox, The Court and the Constitution, at 70 (1987).

[47] Id.

[48] J.M. Landis, 'Labor's New Day in Court', Survey, 15 November 1924, at 177, quoted in Burbank (1998-1999), at 327.

[49] Ely (1980), at 48. Koopmans offers a more pragmatic explanation for the waves of judicialization that occurred during the second half of the 20th century, namely: the success of litigation campaigns driven by single-issue groups (i.e., "pacifist, or pro-environment, or anti-abortion, or pro animal rights" movements. When single-issue groups drive the judicialization process, courts usually do not have much of an option – beyond a strict application of the formal rules of standing – but to allow it; *see* Koopmans (2003), at 94, 248 & 253.

behind it. The Model suggests that courts typically expand their influence through the following substantive mechanisms:[50] the expansion of judicial influence without strong legal justification (2.1.2.1); the employment of expansive interpretation techniques (2.1.2.2); and the development of legal principles and doctrines (2.1.2.3). The remainder of this section will look into each of these methods in more detail.

2.1.2.1. Expanding oversight mandate without strong legal justification

Sometimes, courts appear to expand their influence by merely assuming additional functions without any justification, or by overturning a previous legal precedent without a strong legal (constitutional) basis to rely on – at least not one that is readily accepted. Courts might typically follow such a course of action when they believe the situation calls for it – for example, when some important societal change is required for which there is a lack of political will. In other words, the Model proposes that, on occasion, courts (to paraphrase the slogan of a prominent sporting-goods brand) simply "do it".

This form of judicialization is often justified by arguments that the court's decision serves a bigger societal goal or socio-political objective. Judicialization in this sense therefore reflects Oliver Wendell Holmes's idea that law is "both a mirror and a motor" – thus, "reflecting the development of the society which it serves and helping to move that society in the direction of the dominant jurisprudence of the day".[51]

2.1.2.2. Employing expansive interpretation techniques

Judicial oversight, as the definition outlined in Chapter 1 implies,[52] involves the interpretation of constitutional documents. Due to the open-ended language contained in constitutional documents, judicial interpretation becomes a major driving force behind judicialization. As Judge Albie Sachs remarked about the South African Constitution (considered by many as one of the most progressive constitutions in the world due to the extensive human rights protection it provides):

> [w]e work with an admirable state-of-the-art text that *presents* itself in clear, eloquent language, yet does not *explain* itself with equal clarity.[53]

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[50] Other non-substantive factors that may lead to an expansion of judicialization include institutional factors, such as financial and time considerations. However, these factors are discussed more in the context of *receding* judicial influence – *see* section 5.1.2 below.

[51] Schwartz (1993), at vii, 174, *and see* above, notes 45-46 (Ch. 2).

[52] *See* section 1.3.2 above.

[53] A. Sachs, *One Case at a Time: Judicial Minimalism on the Supreme Court; By Due Process*

The Model submits that judicialization often occurs through the employment of expansive interpretation techniques of constitutional provisions. Expansive interpretation techniques, such as purposive or teleological interpretation and 'reading in', typically lead to a broadening of the scope of judicial oversight, or to the expansion of the substantive meaning of constitutional provisions.

2.1.2.3. Developing legal principles and doctrines

Courts engaged in judicial oversight frequently develop legal principles and doctrines to assist them with (consistent and coherent) normative development because "[s]omething is needed to mediate between the words of the Constitution and specific judicial decisions".[54] The Judicial Oversight Model suggests that the development and employment of legal doctrines or principles such as the 'principle of proportionality',[55] theories of '*Ermessen* (discretion)',[56] and the 'reasonableness' test[57] often lead to judicialization. Not all legal doctrines or principles will necessarily lead to judicialization, however. The 'political question' doctrine[58] and the 'margin of appreciation doctrine',[59] for instance, typically limit judicial discretion or allow for broader political discretion. However, the development and employment of such doctrines might, by itself, be a manifestation of judicial authority. Courts decide *when* to apply doctrines limiting judicial discretion; moreover, since courts develop the boundaries of these doctrines, they also decide *how far* to limit their discretion. In other words, by applying doctrines that have the effect of limiting judicial discretion, courts exercise *self*-restraint – as apposed to restraints imposed by political institutions, which might arguably narrow judicial discretion even further.[60]

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of Law: Racial Discrimination and the Right to Vote in South Africa, 51 The University of Toronto Law Journal 87, at 88-89 (2001). Emphasis in the original.

54 Roosevelt (2006), at 19.

55 On the 'principle of proportionality', *see* in general Beatty (2004); *and see* W. van Gerven, *The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe*, *in* E. Ellis (Ed.), The Principle of Proportionality in the Laws of Europe, at 37-63 (1999).

56 *See* Koopmans (2003), at 110.

57 *See* Koopmans (2003), at 27 & 114.

58 *See* Koopmans (2003), at 98-104.

59 *E.g.*, developed by the European Court of Human Rights in cases such as *Handyside v. United Kingdom*, ECHR (1976), 1 EHRR 737. For a discussion of the 'doctrine of the margin of appreciation', *see* in general Y. Shani, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16:5 European Journal of International Law 907 (2005); and Y. Arai-Takahashi, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR (2002).

60 *See* section 5.4 below for a discussion of judicial 'activism' and 'restraint'.

Judicial 'law-making' might be considered as another mechanism of judicialization, as courts are often criticized for engaging in such practices.[61] The Model does not comment on the validity of these criticisms, primarily because they concern the limits of judicial oversight, which, the Model submits, are highly context specific.[62] Of greater importance is that courts frequently *do* engage in judicial law or policy-making – often under the guise of judicial interpretation or formulation of judicial doctrine[63] – and that these practices lead to an expansion of judicial power.[64]

2.2. The 'Effect' of Judicial Oversight: Key Outcomes

The Judicial Oversight Model proposes that the exercise of judicial oversight realizes certain outcomes or 'effects'.[65] As mentioned earlier, the first – and most obvious – outcome of judicial oversight that comes to mind is the determination of constitutionality.[66] Where an executive decision or legislative act is found to be unconstitutional, the court might 'strike it down' or invalidate it.[67] The Model, however, emphasises three other effects associated with the exercise of judicial oversight, namely: constitutional dispute resolution (2.2.1); human rights protection (2.2.2), including the provision of remedies (2.2.2.1); and the indirect legitimization of political institutions (2.2.3).

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61 *See* Cox (1995-1996), at 566-567; Stone Sweet (1999), at 17; *and see* Koopmans (2003), at 110, arguing that courts are often not the right institution to take on such tasks.

62 *See* section 1.4.1

63 *See* B.N. Cardozo, The Nature of the Judicial Process (1921), stating judicial law-making as fact (albeit in the Anglo-Saxon legal tradition working with *stare decisis*), e.g., at 14-15 &142.

64 The Model therefore does not consider judicial law or policy-making as a separate mechanism of judicialization; i.e. it is considered to be incorporated with the other three mechanisms of judicialization discussed in this section.

65 Thus, reflecting a functionalist approach to comparative methodology. Functionalism emphasizes "a concrete social problem" instead of the formal aspects of laws or institutions. Hence, the social function of laws is the *tertium comparationis* in functionalist legal comparisons. *See* Peters & Schwenke (2000), at 800-829, quoting Ernst Rabel, founder of the functional approach.

66 *See* section 1.3.2 above.

67 Some courts can only make a declaration of unconstitutionality – they cannot 'strike down' a law or executive decision. *E.g.*: "Strictly speaking, the French Constitutional Council (*Conseil constitutionnel*) does not exercise powers of judicial 'review' as it can only look into questions of constitutionality between the passing of the bill and the promulgation of the statute: it 'previews' rather than reviews." *See* Koopmans (2003), at 43.

2.2.1. Constitutional Dispute Resolution

The Judicial Oversight Model suggests that constitutional disputes typically arise on, and are resolved at, firstly, a 'vertical' level – thus, between private and public parties (here, political institutions). Vertical constitutional disputes usually concern a claim brought by a private party (an individual or legal person) asserting that a particular political body has violated one or more of its constitutional rights. Since such vertical constitutional disputes often concern the protection or realization of a specific fundamental or human right, this aspect of constitutional dispute resolution will largely be discussed as part of section 2.2.2 (human rights protection) below.

Secondly, 'horizontal' constitutional disputes arise at the public level, between political institutions (e.g., legislature vs. executive), or between different levels of government (e.g., national/federal vs. provincial/state). These disputes usually concern the constitutional demarcation of public power. The judiciary has traditionally played a role in resolving horizontal constitutional disputes through the exercise of judicial oversight – in fact, some judicial bodies, such as the French *Conseil constitutionnel*, have originally been brought into life with the sole purpose of resolving horizontal constitutional disputes.[68]

The Judicial Oversight Model is also concerned with the mechanisms through which these constitutional disputes are resolved. For instance, the Model notes the positional power of the party framing the conflict (here, courts) – which might be as simple as formulating the facts of the case, and the issues at stake. This mechanism might be significant, for example, in cases where conflicting rights are at stake since the framing of the dispute might influence how these rights are eventually prioritized.[69]

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[68] *See* Shapiro & Stone Sweet, at 151 (2002). *Also note* that the *Conseil constitutionnel* was not designated a 'judicial' body when it was originally established – *see* Stone Sweet (1999), at 24-30.

[69] *See* O. De Schutter & F. Tulkens, *Rights in Conflict: the European Court of Human Rights as a Pragmatic Institution*, RefGov Working Papers REFGOV-FR-14, at <http://refgov.cpdr.ucl.ac.be/?go=publications>, at 20-21, on the importance of 'framing' in human rights claims where there are conflicting rights at stake: "[…] the framing of the conflict between rights through the 'necessity' test leads to prioritize one right above the other, which results in obfuscating the reality of the conflict itself." *Also see* Schwartz (1993), at 266-269, mentioning the importance of framing the conflict as an example of judicial leadership – here, referring to judges (like Chief Justice Warren) who could frame "the issues in a deceptively simple way, reaching the heart of the matter while stripping it of legal technicalities". Noting that "Warren helped steer cases from the moment they were first discussed simply by the way he framed the issues." (Quoted from the Washington Post, 15 June 1983, at A16). *See* Schwartz (1993), at 269, for a discussion of Chief Justice Warren's judicial leadership in framing the issues at handing during the *Brown* case conferences where the Supreme Court "justices discuss and vote on cases". Warren began his first *Brown* conference by framing the issue as being primarily about getting agreement on the *remedy*, and not on substantive issue (at 288). Warren drafted

2.2.2. Human Rights Protection

The use of judicial oversight as a mechanism to realize the protection of human rights has largely coincided with the rise of an international concern for human rights.[70] The protection of rights as an outcome of judicial oversight is not necessarily limited to *human rights* protection,[71] but it is the focus of the Judicial Oversight Model because judicial oversight has become such a major vehicle for ensuring that governments respect, protect, and even fulfil human rights over the course of the 20th century.[72] Yeats once remarked that "all states depend for their health upon a right balance between the One, the Few and the Many".[73] While this is, admittedly, no easy balance to attain – especially in the light of ever-increasing demands placed on governments that are often faced with limited or dwindling resources – individuals have been increasingly looking to courts to ensure this balance.[74] Courts with the powers of judicial oversight might not necessarily be the best institutions to guard over the interests of the 'Many', but courts are certainly in a favourable position to guard the interests of the 'One' and the 'Few' because they are not under pressure to be (re-)elected by the 'Many'.[75]

The Judicial Oversight Model suggests that courts accomplish human rights protection by safeguarding procedural fairness ('due process'), and by developing the substantive content of constitutional provisions that contain human rights guarantees. The Model notes that these actions will plausibly result in recourse for affected individuals, but will not necessarily guarantee them redress since the development and enforcement of effective legal remedies are required to realise the full effect of human rights protection, as will be discussed next.

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the first opinion, which (at 299) "definitely set the tone of the final opinion. It was written in the typical Warren style: short, nontechnical, well within the grasp of the average reader." Note that the mechanism of 'framing the conflict' might also enhance the degree of judicialization.

[70] *See* H.J. Steiner & P. Alston, International Human Rights In Context: Law, Politics, Morals, at Ch. 16 (2000).

[71] Individual rights could also include, for example, contractual rights; thus, individual rights not specifically embodied in a 'Bill of Rights'.

[72] *See* M.J. Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?*, 38 Wake Forest Law Review 635, at 636 (2003); B. Simma & P. Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 Australian Yearbook of International Law 83 (1988); *and see* Koopmans (2003), at 268.

[73] W.B. Yeats, Explorations, at 351 (1989). Yeats originally referred to the "One" as the "executive", the "Few" as the "hereditary class" and the "Many" as "the people".

[74] Beatty (2004), at 1-4.

[75] Judges of constitutional courts are typically not democratically elected, although there is some political influence, as the U.S. Supreme Court nomination process illustrates – *see* below, note 34 (Ch. 3).

2.2.2.1. Remedies

The Judicial Oversight Model describes three interdependent elements of legal remedies associated with the exercise of judicial oversight, namely development, enforcement, and effectiveness. The Model postulates that the development, enforcement and effectiveness of legal remedies – as well as the manner in which these elements interact – are in large part influenced by the constitutional context[76] and the degree of judicialization and judicial independence in the constitutional system.[77]

From these conjectures, the Model makes three observations that also illustrate the interdependencies between courts and political institutions: first, legal remedies often take a long time to develop, and might take an even longer time to be effective.[78] Second, the development and enforcement of remedies are closely linked; hence, remedies are more effective if they are developed with enforcement already in mind.[79] Third, legal remedies are not always effective in bringing about real, structural and systemic social change.[80] Thus, for legal remedies to be most effective, it requires an (objective) partnership between courts and political institutions.[81]

2.2.3. Indirect Legitimization of Political Institutions

Recall that 'legitimacy', as defined earlier, focuses on the sociological and moral aspects of legitimacy; and, specifically, how courts indirectly contribute (through the intention of their decisions, if not through their effect) to the sociological and moral legitimacy of political institutions.[82]

The Judicial Oversight Model submits that courts exercising judicial oversight indirectly strengthen the sociological and moral legitimacy of political institutions (thus, a form of 'weak' or 'input' legitimacy) by holding

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[76] *See e.g.*, the remedy of *recours en annulation* (which provides for a specific administrative decision to be annulled) developed by the French *Conseil d'Etat*; or the *Anfechtungsklage* remedy in German administrative law (employed especially by 'single-issue' movements to alter a particular policy decision) – *in* Koopmans (2003), at 135-136, and 150-151.

[77] For a discussion of the impact of the degree of judicialization and judicial independence on the 'outcomes' of judicial oversight, *see* section 2.3.2.2 below.

[78] *See e.g.* Koopmans's discussion of the institutional development of the French *Conseil d'Etat* (including development of remedies), *in* Koopmans (2003) at 130-142.

[79] *E.g.,* during Warren's first *Brown* conference – *see* above, note 69 (Ch. 2); for a discussion of the ineffectiveness of legal remedies in bringing about social change, *see* section 4.2.4 below.

[80] *See* in general R. Rosenburg, The Hollow Hope: Can Courts Bring About Social Change? (1991) *and see* D. Bell, Silent Covenants: Brown *v.* Board of Education and the Unfulfilled Hopes for Racial Reform (2004).

[81] L.A. Powe (Jr.), *The Politics of American Judicial Review: Reflections on the Marshall, Warren, and Rehnquist Courts*, 38 Wake Forest Law Review 697, at 716 (2003).

[82] *See* section 1.3.4 above.

them accountable for decisions or actions that pertain to democracy, the rule of law, and human rights. Put differently, courts might contribute to the legitimization of political institutions by placing them in a favourable light insofar as their commitment to human rights, democracy and the rule of law is concerned. This effect of judicial oversight – albeit often an 'unintended' and indirect outcome – is a further example of the interdependency between courts and political institutions, which will be discussed next.

2.3. The 'Dynamics' of Judicial Oversight: Relational Aspects

The 'relational aspects' of the dynamics of judicial oversight refer to the relationship and interaction between courts and political institutions (2.3.1), and between the nature and effect of judicial oversight (2.3.2). This section will explore each of these interdependencies in more detail.

2.3.1. Relationship between Courts and Political Institutions

As mentioned earlier, the interdependencies between courts and political institutions – two major protagonists within a constitutional system – form a central theme in this book, as the comparative law analysis in the next two chapters will illustrate.[83] At its core, the relationship between these protagonists concerns the boundaries between law and politics,[84] and the constant tension between democracy and the rule of law – as is reflected by Schwartz's comment regarding American constitutionalism:

> [i]n 1627, the Lord Chief Justice of England held in the celebrated 'Five Knights' case' that the King could order the detention of individuals without charging them and without offering them the opportunity to post bail. The Attorney General, stating the case of the Crown, asked: 'Shall any say, The King cannot do this? No, we may only say, He will not do this.' It was precisely to ensure that in the American system one would be able to say 'The State *cannot* do this' that the people enacted a written Constitution containing basic limitations upon the powers of government. To what avail would such limitations be, however, if there were no legal machinery to enforce them? Even a Constitution is naught

[83] *See e.g.* Sterman (2000), at 22, explaining that the "dynamic complexity" of systems arises because systems are (amongst other things) "[t]ightly coupled". That is, the "actors in the system interact strongly with one another and with the natural world. Everything is connected to everything else. As the famous bumper sticker from the 1960s proclaimed, 'You can't do just one thing.'"

[84] *Also see* Figure 2 above.

> but empty words if it cannot be enforced by the courts. It is judicial review that makes constitutional provisions more than mere maxims of political morality.[85]

The Judicial Oversight Model suggests that this 'boundary' between law and politics is often established by courts when they exercise their mandate of judicial oversight, and that the exact position of that boundary is highly context specific.[86] By establishing this boundary, however, courts also establish the current equilibrium between politics and law in a particular constitutional system.[87]

The interaction between courts and political institutions, although described as primarily part of the dynamics of judicial oversight, actually permeates all three aspects of the Judicial Oversight Model. For instance, 'judicial independence' is in many respects a misnomer because courts always have a degree of dependency on the "sword" and "purse" of political institutions. In addition, the judicialization process is influenced to a significant degree by the "boundaries between judicial and political activities".[88] Certain effects of judicial oversight, such as constitutional dispute resolution and human rights protection, might place courts on a confrontational path with political institutions, whereas the legitimization of political institutions might lead to an improvement of the relationship between courts and political institutions. Finally, as Chapter 5 will demonstrate, the relationship between courts and political institutions might affect both the expansion and contraction of judicialization and judicial independence.

2.3.2. Relationship between the Nature and Effect of Judicial Oversight

The various components of the Judicial Oversight Model introduced so far have been discussed as discrete elements for the sake of setting out the Model. In reality, however, the Model's components are interrelated. For example, landmark cases can also be leveraged to expand judicial influence; while 'judge-made' law is not only an example of judicialization, but might also be considered as part of the 'outcomes' of judicial oversight. Moreover, some outcomes of judicial oversight might lead to additional judicialization. Stone Sweet describes, for instance, how "triadic dispute resolution" (i.e., where courts act as arbiters in, what this book has termed, horizontal constitutional disputes)[89] enhances the "capacity of a triadic dispute resolver to authoritatively

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85 Schwartz (1993), at 43.
86 Koopmans (2003), at 1-4.
87 *See* section 5.3.5 below.
88 Koopmans (2003), at 1.
89 *See* section 2.2.1 above.

determine the content of a community's normative structure" – thus, an example of judicialization.[90]

The Judicial Oversight Model proposes that the relationship between the nature and effect of judicial oversight can be expressed in terms of visual diagrams or analytical tools (such as the figures set out in the remainder of this Chapter) to analyse specific aspects thereof. The initial Model set out in this chapter considers three manifestations of the relationship between the nature and effect of judicial oversight. First, the Model proposes that the relative positions of courts regarding the degree of *de facto* judicial independence and judicialization can form the basis for comparative analyses (2.3.2.1). Second, the Model submits that the degree of judicialization and judicial independence might have an effect on the realization of specific outcomes associated with judicial oversight (2.3.2.2). Third, the Model holds that the relationship between judicialization and judicial independence is likely to affect 'growth', i.e., expansion of the degree of judicialization and judicial independence (2.3.2.3).

2.3.2.1. Relative Position of Courts in terms of Judicialization and Judicial Independence

The relationship between judicialization and judicial independence can be visualized on a 'coordinate plane' with two axes – Judicialization and Judicial Independence – that is referred to as the 'Judicial Independence / Judicialization Plane' (see Figure 3 below). The Plane has been divided into four quadrants, with each quadrant representing a specific relationship between the degree of judicialization and the degree of judicial independence, that is: quadrant A (low judicial independence, low judicialization); quadrant B (high judicial independence, low judicialization); quadrant C (low judicial independence, high judicialization); quadrant D (high judicial independence, high judicialization)

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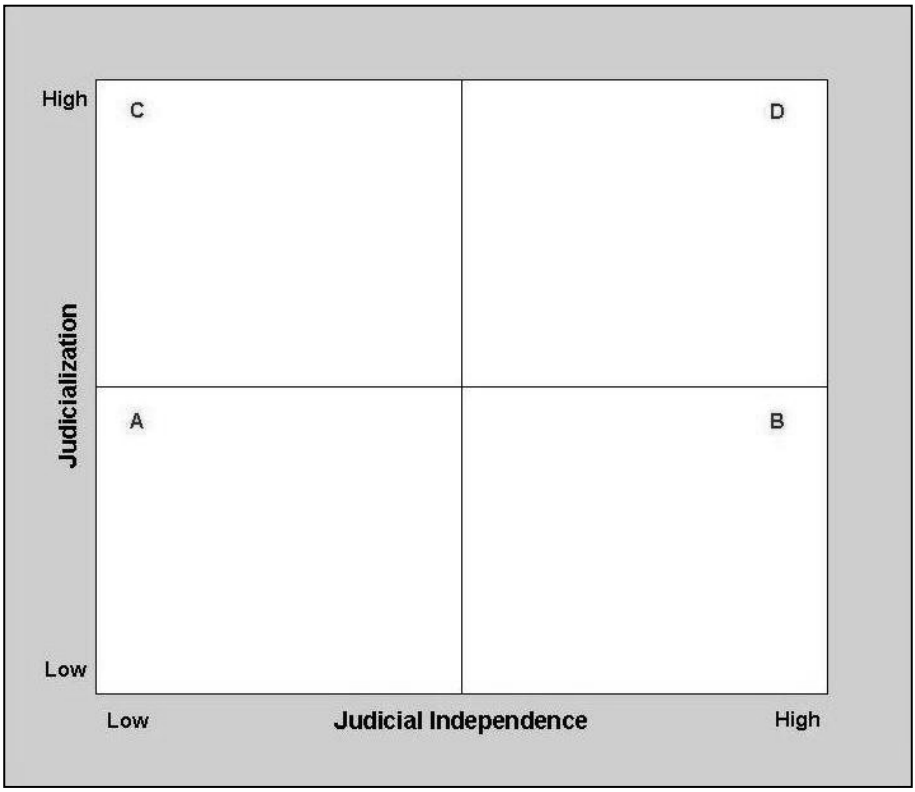
[90] *See* Stone Sweet (1999), at 17: "Judicialization is a political process sustained by the interdependence of dyads and triads, and of rules and strategic behavior. It is observable, and therefore measurable, as modifications in the conduct of dispute resolution and social exchange. The 'judicialization of dispute resolution' is the process through which a TDR mechanism appears, stabilizes, and develops authority over the normative structure governing exchange in a given community. The 'judicialization of politics' is the process by which triadic lawmaking progressively shapes the strategic behavior of political actors engaged in interactions with one another."

Figure 3: The 'Judicial Independence / Judicialization Plane'



The Judicial Independence / Judicialization Plane could serve as the basis for analyses that describe and compare the relative position of different courts. For instance, new courts or tribunals not specifically designated as 'courts' might be positioned in quadrant A, whereas courts located in quadrant B might have the necessary formal safeguards to protect judicial independence, but judicialization might be hampered by a narrowly defined constitutional mandate. Conversely, courts in quadrant C might be pushing an ambitious judicialization agenda without the necessary *de facto* independence to back it up. Many – if not most – modern (constitutional) courts, situated in constitutional systems based on democracy and the rule of law, are probably positioned in quadrant D.

2.3.2.2. Impact on the 'Effect' of Judicial Oversight

The realization of specific judicial oversight outcomes (as outlined in section 2.2 above) might be influenced by several factors, such as the extent to which

judicial functions are explicitly provided for in constitutional documents or other forms of legislation,[91] or by the socio-political context of a particular constitutional system.[92] However, the Judicial Oversight Model holds that the relationship between judicialization and judicial independence in a particular constitutional system (expressed in Figure 3 above), also affects the realization of particular outcomes of judicial oversight. Put differently, the realization of a particular effect of judicial oversight is partly influenced by the degree of judicialization and *de facto* judicial independence in the constitutional system.

The Model also suggests that realizing the different outcomes of judicial oversight is likely to require varying degrees of judicial independence and judicialization. For instance, human rights protection (and, especially, the development and enforcement of remedies) might require higher levels of judicialization and judicial independence[93] (e.g., court positioned in quadrant D), than (horizontal) dispute resolution (e.g., court positioned quadrant A).[94] Whereas courts might have a significant legitimizing effect on political institutions as long as they are sufficiently independent (e.g., court positioned in quadrant B).[95]

2.3.2.3. Growth, or the Expansion of Judicialization and Judicial Independence

Benjamin Cardozo used the metaphor of a glacier – sculpting the landscape as it grinds by – to describe the nature of the judicial process.[96] This metaphor is also apt to describe the process of judicial oversight, because it, too, implies 'movement' or growth that leaves a lasting imprint on the constitutional landscape. The Judicial Oversight Model postulates that courts with a mandate of judicial oversight tend to expand their degree of judicialization and judicial

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[91] *E.g.*, if the constitution explicitly states that the judiciary cannot arbitrate between political institutions in case of horizontal disputes, it would highly irregular (and therefore highly unlikely) for courts to assume such a role.

[92] *E.g.*, a country with a history of systemic human rights abuses facilitated by political institutions (such as South Africa) might more readily look to courts for the protection of human rights – *see* Beatty (2004), at 4.

[93] Because of the uneven power relationship that exists in vertical disputes (of which human rights cases is an example), courts might have to extend their judicial influence (*i.e.*, extend the degree of judicialization) in order to protect the private party from its powerful political counterpart.

[94] Generally speaking, since it is likely in the interest of both political parties to the horizontal dispute to break the political *impasse*, they might refrain from exerting political power on the judiciary (here acting as arbiter) – thus, keeping each other 'honest'.

[95] *I.e.*, not requiring a particularly high degree of judicialization, especially inasmuch courts act as arbiters between political institutions.

[96] Cardozo (1921), at 21 & 24.

independence over time, although both variables do not necessarily expand to the same extent, or at the same rate.[97]

Systems dynamics theory describes this type of growth as 'positive reinforcing', and uses 'causal loop diagrams', such as Figure 4 (below) to visualize these 'cause-and-effect relationships' among the major variables of a system.[98]

Figure 4: The Positive Reinforcing Relationship between Judicialization and Judicial Independence

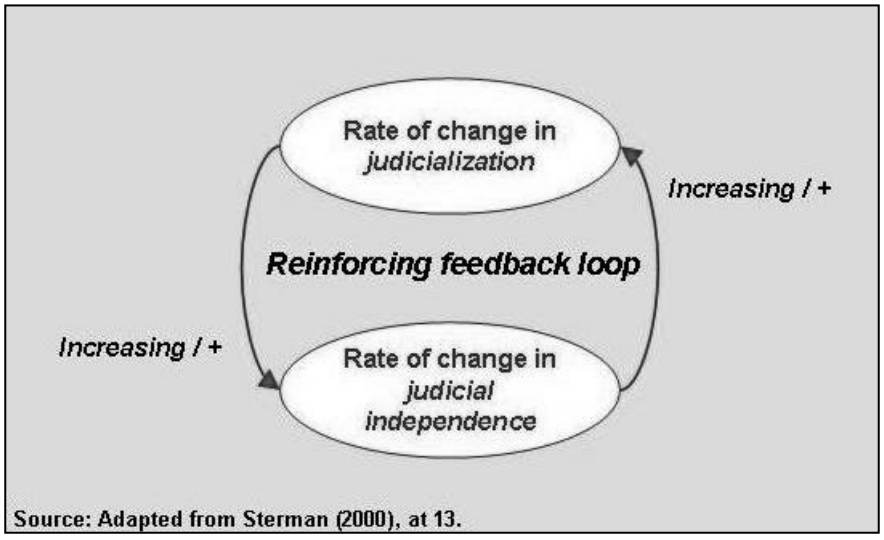

Figure 4 illustrates how judicialization and judicial independence operates in a positive reinforcing feedback loop.[99] Thus, as *de facto* judicial independence strengthens (i.e., as the rate of change[100] in judicial independence increases), courts are more likely to expand their influence (i.e., increase the rate of change in judicialization). A higher degree of judicialization enables further expansion of judicial independence – and so on.[101] The self-reinforcing

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97 For a more detailed discussion of about movement between the 'four quadrants', *see* section 5.3 below

98 *See* Anderson & Johnson (1997), at 20.

99 Reinforcing feedback loops describe the scenario where, if one variable changes, the other variable changes in the same direction. This means that if the rate of change in judicialization increases, the rate of change in judicial independence will increase as well. However, if the rate of change in judicialization is reduced, the rate of change in judicial independence will be reduced as well. *See* Sterman (2000), at 12-15.

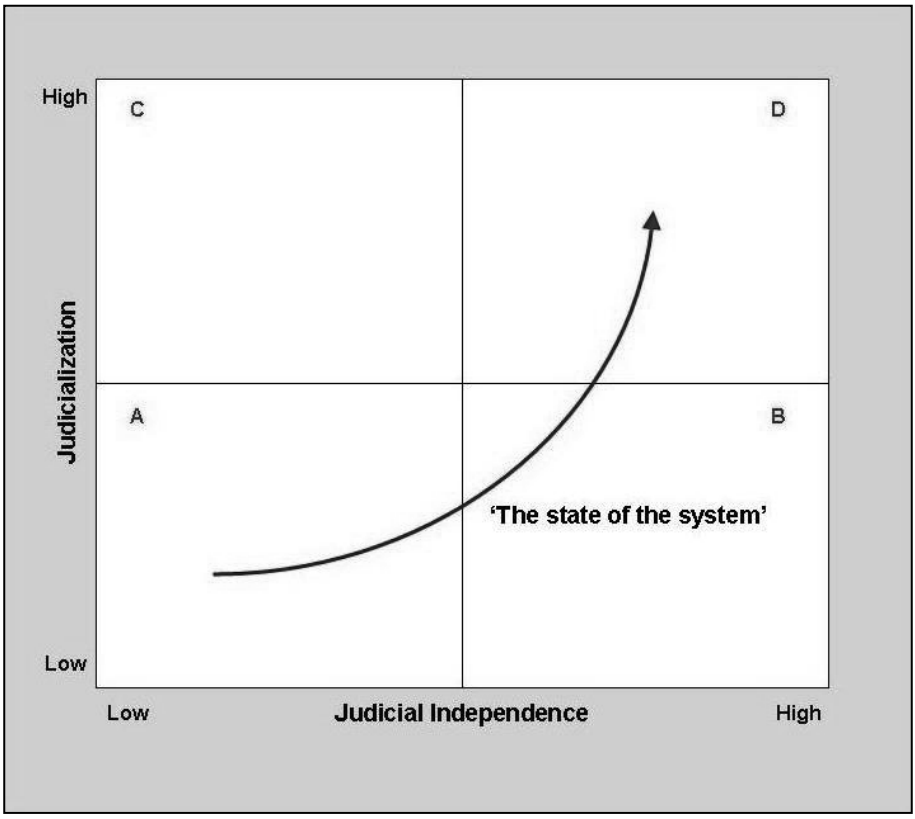
100 'Rate of change' refers to the "absolute rate of change in a quantity" – here, the degree of judicialization or judicial independence; *see* Sterman (2000), at 109.

101 For a discussion about the limits to growth, *see* section 5.1 below.

relationship between judicialization and judicial independence also explains why a change affecting one variable is likely to affect the other – an aspect that Chapter 5 will explore in more detail.

The positive reinforcing relationship between judicial independence and judicialization thus fuels exponential growth – i.e., a court's movement to the direction of quadrant D in a curved line (see Figure 5 below).[102]

Figure 5: Positive Reinforcing Feedback Loop Fuelling Exponential Growth

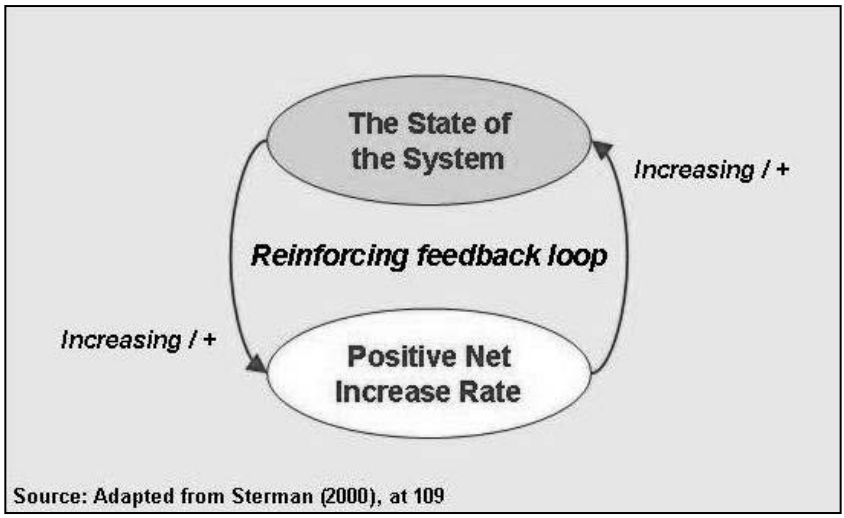


Note, however, that the positive reinforcing relationship between judicialization and judicial independence does not result in "linear growth" (i.e., growth in a straight line from quadrant A to D). Linear growth does not "require any feedback from the state of the system", which is fairly uncommon, especially in complex social systems – such as the constitutional systems studied in

[102] *See* Sterman (2000) at 108-109. Note that "[p]ositive feedback need not always generate growth". It can also create self-reinforcing decline, as when a drop in stock prices erodes investor confidence which leads to more selling lower prices, and still lower confidence."

this book.[103] In Figure 5 (above), the 'state of the system' is therefore one of exponential growth, fuelled by the feedback structure described in Figure 4 (above). The relationship between these two figures is explained in Figure 6 (below).

Figure 6: Exponential Growth – Illustrating the Relationship between Figures 4 and 5



In other words, as a reinforcing feedback loop with a positive polarity continues to operate (i.e., where the rate is 'net positive'), it influences the 'state of the system' in the same direction. Thus, the state of the system reflects exponential growth – or the exponential expansion of judicialization and judicial independence.

2.4. Summary

This chapter set out the basic conceptual framework of the book – the Judicial Oversight Model. The Judicial Oversight Model describes three aspects or dimensions of judicial oversight, namely: the *nature* or fundamental characteristics of judicial oversight; the *effect* or outcomes of judicial oversight; and the *dynamics* of judicial oversight. The Model emphasizes two particular characteristics of judicial oversight, namely: the existence of *de facto* judicial independence from political institutions and the occurrence of judicialization (i.e., the expansion of judicial influence and power). The Model focuses

[103] Id.

specifically on the *mechanisms* through which courts exert their independence from political institutions and expand the degree of judicialization.

The Model outlines four effects or outcomes associated with judicial oversight, namely: constitutional dispute resolution, human rights protection, and the indirect legitimization of political institutions. Concerning the dynamics of judicial oversight, the initial Model set out in this chapter describes the relationship between courts and political institutions; and between the nature and effect of judicial oversight. Hence, the Model illustrates how these relationships and interdependencies can be used to analyse and compare different courts. Finally, the Judicial Oversight Model postulates that the degree of judicialization and the degree of *de facto* judicial independence will expand exponentially over time, primarily as a result of the positive reinforcing relationship between the main variables in the constitutional system.

Theory is both interesting and necessary, but as Justice Oliver Wendell Homes put it so eloquently:

> [t]he life of the law has not been logic: it has been experience. The felt necessities of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[104]

Thus, it is to the experience of judicial oversight – in three constitutional systems – that we turn to next.

[104] O.W. Holmes (Jr.), The Common Law, at 1 (1881). Benjamin Cardozo responded to this quote by Holmes, adding that: "[…] Holmes did not tell us that logic is to be ignored when experience is silent." *See* Cardozo (1921), at 29.

Chapter 3

Judicial Independence and Judicialization in the United States, European Community and South Africa

Thinking without comparison is unthinkable. And, in the absence of comparison, so is all scientific thought and scientific research.[1]

This chapter will trace the nature of judicial oversight – conceptualized here as the assertion of judicial independence and the expansion of judicial influence (judicialization)[2] – in the constitutional systems of the United States, European Union (European Community Law), and post-Apartheid South Africa. The aim of the comparative constitutional law analyses included in this chapter – and the next – is to 'validate' the Judicial Oversight Model, as set out in Chapter 2, and not to 'apply' it as such. Once the Model has been validated and further refined, it will be applied to the World Bank Inspection Panel in Part II of this book.

The first section of this chapter will analyse how the U.S. Supreme Court, the European Court of Justice (ECJ), and the South African Constitutional Court have asserted their *de facto* independence from their respective political institutions (3.1). The next section will explore how these three courts have expanded the degree of judicialization over time (3.2). The chapter will conclude with a summary of the salient findings (3.3).[3]

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1 G.E. Swanson, *Frameworks for Comparative Research: Structural Anthropology and the Theory of Action*, *in* I. Vallier (Ed.), Comparative Methods in Sociology, at 141-202 (1971), quoted in Palmer (2005), at 261.

2 *See* section 2.1.1 on 'judicial independence' and section 2.1.2 on 'judicialization' above.

3 Note that jurisprudence from these three courts will be discussed – both in Chapters 3 and 4 – in chronological order (i.e., the order in which the courts have been established).

3.1. Courts Asserting Institutional Independence

As explained earlier, the Judicial Oversight Model posits that courts assert their *de facto* independence by, one, building their institutional credibility and prestige; two, by leveraging landmark cases; and, three, by raising public awareness about undue political interference in special circumstances.[4] This section will provide examples of these three 'mechanisms' from the constitutional practice of the United States Supreme Court (3.1.1), the European Court of Justice (3.1.2), and the South African Constitutional Court (3.1.3).

3.1.1. United States Supreme Court

Despite a relatively strict adherence to the 'separation of powers' doctrine,[5] the independence of the judiciary, in particular that of the Supreme Court, has been challenged by the political institutions throughout the constitutional history of the United States.[6] A further interesting feature of American constitutionalism, however, is the fact that none of these challenges has seriously jeopardized the *de facto* independence of the Supreme Court – at least not in the long run.[7] Different explanations have been offered to explain the resilience of the Court's independence, such as continuously strong popular support;[8] but the Court's own role in this regard should not be underestimated. The Supreme Court has laid important foundations for *de facto* judicial independence during its early years when it established the institutional credibility and prestige of

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4 *See* section 2.1.1 above for a more detailed discussion of each mechanism.

5 *See* Koopmans (2003), at 162-168.

6 For a discussion of U.S. historic attacks on judicial independence *see* Cox (1995-1996), at 574. *Also see* B. Friedman, *"Things Forgotten" in the Debate Over Judicial Independence*, 14 Georgia State University Law Review 737, 739-753 (1997-1998); *see* in general Burbank (1998-1999); *and see* Roosevelt (2006), at 11-21.

7 *E.g.,* there has been only one (unsuccessful) impeachment ever against a Supreme Court Judge (*i.e.* the Chase impeachment during the Marshall Court era) – *see* Schwartz (1993), at 58. Another prominent example of political interference with judicial independence include President Roosevelt's proposed Court "Packing Plan" – *see* Schwartz (1993), at 232-244. *Also see* A. Cox (1995-1996), at 574-579; *and see* in general W.G. Ross, *The Resilience of Marbury v. Madison: Why Judicial Review has Survived so Many Attacks*, 38 Wake Forest Law Review 733 (2003).

8 *See e.g.*, Friedman (1997-1998), at 738. *Also see* a 2006 CNN Poll, *Poll: Americans don't want politicians constraining judges*, 28 October 2006, at <http://edition.cnn.com/2006/POLITICS/10/27/activist.judges/index.html>: "Despite complaints about 'activist judges' from both the right and the left following controversial rulings, two-thirds of Americans do not believe elected officials should have more control over federal judges […]. Sixty-seven percent of 1,013 people surveyed by Opinion Research Corp. on behalf of CNN said federal judges – and the decisions they make – should not be subject to more control."

the Court during the 'Marshall era',[9] especially by leveraging *the* landmark case in American constitutional history – *Marbury v. Madison*.[10]

3.1.1.1. Laying the foundations for an independent court

First-time visitors to the Supreme Court building seldom fail to be impressed by its forbidding grandeur. As such, the building has very much become the embodiment of the institution's own credibility and prestige. Nevertheless, the Court started out on a much humbler footing. In fact, nothing from its modest beginnings indicated that the Supreme Court would become the "great ganglion of nerves of the US society" that it is today.[11] For example, the architects of the grandiose Capital Hill building in Washington, D.C. neglected to include specific chambers for the Supreme Court, forcing the Court to operate from various locations in the Capitol until 1935.[12] The Court received its first case only three years after it had started to operate in 1793, and its justices had to 'ride circuit', covering a vast area at a time when travel was painstakingly slow.[13] With the 1801 appointment of John Marshall as the second Chief Justice of the Supreme Court,[14] however, the process of asserting the *de facto* independence of the Court started in all earnest.

Throughout his long term as Chief Justice, Marshall forged the credibility and prestige of the Court. For example, Marshall realized unanimous decisions in all 42 cases during his first three years in office – a staggering feat, not only by today's standards, considering that the bench at the time included impressive ideological opponents to Marshall such as Justice Joseph Story.[15] Moreover, Marshall enhanced the unity of the court by insisting on penning all the decisions *and* by reading them in open court.[16] But it was the Supreme Court's leveraging of *Marbury v. Madison* – a case that had all the potential of *undermining* judicial independence because, as will be explained below, it

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[9] *I.e.*, the period when John Marshall was Chief Justice of the Supreme Court from 1801 – 1835.

[10] *Marbury v. Madison*, 5 U.S. 137 (1803).

[11] Schwartz (1993), at 75.

[12] Schwartz (1993), at 37.

[13] Id.

[14] The first U.S. Supreme Court was the 'Taft Court', dating from 1790 – 1801. U.S. Supreme Court 'cycles' are named after the term of the reigning Chief Justice.

[15] Ironically, Justice Story was appointed by President Jefferson to serve as ideological counterweight to Marshall. Story sided with Marshall in all his cases and the two men quickly became life-long friends. *See* Schwartz (1993), at 59-62; *and see* in general M.J. Glennon, *The Case That Made the Court*, 27:3 The Wilson Quarterly 20 (2003).

[16] *See* Glennon (2003), at 21.

effectively pitted the Court against Congress and the President[17] – that placed the Court's *de facto* independence on such a strong trajectory.

In *Marbury v. Madison*, Marshall's first case on the bench, the Supreme Court ruled that it had the power to review the constitutionality of federal legislation although it was not (and is still not) explicitly provided for in the U.S. Constitution. As such, the case is also a prime example of judicialization, which will be discussed in the second part of this chapter.[18] In the context of this discussion, however, *Marbury* – "[t]he case that made the court"[19] – has become a symbol of judicial independence and judicial diplomacy.[20] In order to appreciate this statement, it is necessary to have a brief look at the facts of the case, as well as the political context in which it was decided.

The build-up to the case occurred against the backdrop of the Presidential elections of 1800, in which 'Federalist' John Adams lost the election to 'Democratic-Republican' Thomas Jefferson. During the long 'lame duck period' that followed the election in those days, the Federalist-dominated Congress passed a new Judiciary Act that created, amongst other things, several new federal courts and appointed judges with Federalist sympathies to these new courts shortly before Jefferson's inauguration. William Marbury was among these 'last-minute' judicial appointments. The outgoing Secretary of State (none other than Marshall himself, whom outgoing President Adams had already been appointed as Chief Justice by this time)[21] failed to deliver all the judicial commissions in time, including Marbury's commission. President Jefferson, on taking office, ordered the new Secretary of State, Madison, not to deliver the remaining commissions. Marbury requested a *mandamus* directly from the Supreme Court in terms of the new Judiciary Act, which would force the Jefferson administration to deliver the commissions.[22]

The case created a serious dilemma for the Federalist-inclined Court: denying Marbury his commission would mean a ringing victory for the Jefferson executive, and might have serious implications for the *de facto*

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[17] Marshall was a Federalist party appointee, whilst the incoming President (Jefferson) and the majority in Congress was from the rival Democratic-Republican party.

[18] *See* section 3.2.1 below.

[19] Glennon (2003), at 21.

[20] *But see* arguments that the importance of *Marbury* is overrated, *e.g.,* Levison's criticisms against teaching Marbury in American law schools *in* S. Levinson, *Why I Do Not Teach Marbury (Except to Eastern Europeans) And Why You Shouldn't Either*, 38 Wake Forest Law Review 553 (2003). *Also see* in general M.S. Paulsen, *The Irrepressible Myth of Marbury*, 101 Michigan Law Review 2706 (2002-2003). *Marbury* may have acquired a 'life of its own', but the myth and the lore surrounding the case only seem to have added to the *de facto* independence of the Supreme Court.

[21] The fact that Marshall held two official positions in this period, and that he did not recuse himself from the subsequent case, is unthinkable today. *See* Cox (1987), at 49.

[22] The new Judiciary Act ordained the Supreme Court with original jurisdiction in a number of specific instances, including a request for a *mandamus*.

independence of the Court.[23] On the other hand, a finding in favour of Marbury would probably be defied by the Jefferson administration, which would also have a negative impact on the credibility and prestige of the Supreme Court.[24] The Court found an impressive way out of this *impasse*. Instead of addressing the claim brought under the new Judiciary Act, the Court declared unanimously that the Judiciary Act was unconstitutional (and, hence, unenforceable) since it provided the Supreme Court with original jurisdiction in additional circumstances; while the Constitution only granted original jurisdiction in enumerated, and therefore limited, instances. In Marshall's words, now immortalized on a plaque in the Supreme Court building, it is "emphatically the province and duty of the judicial department to say what the law is".[25]

Marbury v. Madison left many unanswered questions, many of which have been revisited in the recent bicentennial of the case.[26] Perhaps our considerations of *Marbury*'s importance have become largely based on perception; but perceptions are not to be ignored when judicial credibility and prestige are at stake. In conclusion, the Marshall era, as heralded by *Marbury v. Madison*, established a "model of judicial independence" and judicial credibility,[27] which meant that, going forward, many, if not most of the crucial constitutional questions of each era would be settled by the Court – and not by political institutions, economic pressures, or through the "force of arms".[28] At the end of Marshall's long reign in 1836, the Court's *de facto* independence – as embodied by its credibility and prestige – has been established well enough for the Court to have survived the devastating effects of the *Dred Scott*[29] decision and the consequent Civil War.[30]

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[23] Especially considering that the majority on the bench at that time had Federalist sympathies – *see* Friedman (1997-1998), at 740.

[24] At the time of the *Marbury* ruling, one district judge with Federalist sympathies (Pickering) had already been impeached (although unsuccessfully). Thus, Marshall had more than good reason to proceed with caution – *see* Friedman (1997-1998), at 740.

[25] *See* Cox (1987), at 58. No federal legislation was struck down during the remainder of the Marshall Court, although the Court nullified various state acts. *See e.g.*, *Fletcher v. Peck*, 10 U.S. 87 (1810); *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816); and *Cohens v. Virginia*, 19 U.S. 264 (1821). *But see* G.A. Bermann, *Marbury v. Madison and European Union "Constitutional Review"*, 36:3 The George Washington International Law Review 557, at 558 (2004), arguing that the U.S. 'Supremacy Clause' (art. VI cl. 2) helped to ensure the acceptance of federal judicial review of state legislation. For a discussion of the potential reasons for the Court's exercise of 'self-restraint' in the aftermath of *Marbury* (i.e., by not invalidating further federal legislation), *see* section 5.3.1 below.

[26] *See e.g.*, J.B. Grossman, *The 200th Anniversary of Marbury v. Madison: The Reasons We Should Still Care About the Decision, and The Lingering Questions It Left Behind*, at <http://writ.news.findlaw.com/commentary/20030224_grossman.html>.

[27] Id.

[28] Schwartz (1993), at 43-62.

[29] *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

[30] *See* Schwartz (1993), at 105, 124 and, at 116 – Schwartz quotes Justice Frankfurter: "*Dred*

3.1.1.2. Judges speaking out

It has become fairly common over the years for political representatives in the United States – from across the political spectrum – to accuse the judiciary (and the Supreme Court in particular) of 'activism', and to propagate some form of judicial censure or regulation.[31] The most recent wave was triggered by highly controversial and much publicised issues such as the *Schiavo* case,[32] the sanctioning of gay marriage by certain state courts,[33] and the appointments of Chief Justice Roberts and Associate Justice Alito to the Supreme Court.[34] In a rare interview, (then) recently retired Justice Sandra Day O'Connor and Justice Stephen Breyer raised their concerns about judicial independence in the light of the recent political threats of 'retribution' made against the judiciary in the context of the abovementioned issues. Justice O'Connor noted:

> [w]e espouse the notion in this country, and around the world, that our best hope for peace is having all nations abide by the rule of law […]. And our federal courts have been a rather good example for other nations around the world […] to see our courts now, under such serious attack, is a concern to me.[35]

Scott […] probably helped to promote the Civil War, as it certainly required the Civil War to bury its dicta." *Also see* section 4.2.1.1 below.

[31] *Also see* section 5.4 below.

[32] Terri Schiavo was in a "persistent vegetative state" for several years. Her husband successfully petitioned to have her disconnected from life-support, which her parents opposed. Republican lawmakers in the Florida state government as well as Congress tried to pass legislation that would reverse the decision. The Supreme Court of Florida struck down the state legislation and the (federal) Supreme Court refused to hear the case. Schiavo eventually died from the effects of dehydration, amidst a great national polemic. In the political battle that continued after her death, prominent lawmakers such as Tom DeLay and the House majority leader blamed "an unaccountable judiciary" and threatened "retribution" against the courts that refused to hear the case. *See e.g.*, C. Hulse & D.D. Kirkpatrick, *The Schiavo Case: Political Strategy; Even Death Does Not Quiet Harsh Political Fight*, 1 April 2005, at <http://query.nytimes.com/gst/fullpage.html?res=990CE7D7103FF932A35757C0A9639C8B63>.

[33] *See e.g.,* L. Kiritsy, *Bush: Nation must defend sanctity of marriage: State of the Union speech addresses gay marriage*, 22 January 2004, at <http://www.aegis.com/news/bayw/2004/BY040103.html>. President Bush said that the "sacred institution" of marriage between a man and a woman had to be defended since "[a]ctivist judges […] have begun redefining marriage by court order, without regard for the will of the people and their elected representatives".

[34] *See e.g.*, A. Liptak, *Few Glimmers of How Conservative Judge Alito is*, 13 January 2006, at <http://www.nytimes.com/2006/01/13/politics/politicsspecial1/13legal.html>.

[35] *See* B. Mears, *O'Connor: Don't call us 'activist judges'*, 28 November 2006, at <http://edition.cnn.com/2006/POLITICS/10/27/mears.judicialindependence/index.html>. Justice O'Connor made similar remarks at a meeting of the Georgetown Law Center when she reportedly cautioned that such political attacks on judicial independence "take the nation a step closer to 'dictatorship'". These remarks sparked a national controversy, and highlight the point that this particular mechanism to protect judicial independence (i.e. judges 'speaking out', here in selected audiences) can backfire. *See* D. Lithwick, *Can We Talk? Decoding the blabbering Supremes*, 8 April 2006, at <http://www.slate.com/id/2139514/>. Lithwick argues that Supreme Court Justices should not "speak from the shadows", *i.e.* 'off the record' in informal speeches

3.1.2. European Court of Justice

When the European Court of Justice was established, there was no indication that it would evolve into the powerful judicial organ it has become – thus, in many ways similar to the history of the U.S. Supreme Court. For instance, in the early treaties of the European Communities, the Court was given a very limited set of powers primarily aimed at settling disputes on the application of EC law, and providing clarification and guidance concerning the correct interpretation of the Treaties.[36] As Alter noted:

> [t]he system designed at the founding of the European Community in 1957 was inherently limited and weak. It was a system where few cases would make it to the Court, and in which the largest infractions could easily and without repercussion persist until a political will to rectify the situation emerged. Indeed, in the 1960s and early 1970s the European Court heard few cases of political significance, and its most important doctrines were not widely accepted in national legal and political communities.[37]

Thus, given the Court's weak institutional position, it would have to build its credibility and prestige – not only vis-à-vis the Community's political organs, but also with member states and citizens. The ECJ laid the foundations for its *de facto* independence (which would also enable the Court to increase the degree of judicialization to a significant degree as time went by)[38] when it developed two fundamental principles of European Community law in the 1960s, namely: direct effect (3.1.2.1) and supremacy (3.1.2.2) – neither of which was originally provided for in the Community Treaties.[39] In establishing the principles of direct effect and the supremacy of EC law – in both instances, by leveraging landmark cases (or, more accurately put, leveraging cases that became landmark cases as a result of the ECJ's rulings)[40] – the ECJ elevated

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made *e.g.* at universities, and adds that if judges "want to be a part of the conversation", they should "step up to the mike and talk". *Also see* N. Totenberg, *Retired Supreme Court Justice Hits Attacks on Courts and Warns of Dictatorship*, at <http://rawstory.com/news/2006/Retired_Supreme_Court_Justice_hits_attacks_0310.html>.

36 For a discussion of EC/EU treaty development, *see* Craig & De Búrca (2003), at 10-51. Although later EU/EC treaties gave the ECJ authority to conduct judicial oversight in specific circumstances, the focus of these powers has been mainly to keep the EC's political organs in check, and not to ensure that member state legislation was compatible with EC law. *See e.g.*, Dehousse (1998), at 2: "The grand [social science] theories of the 1960s and 1970s paid only scant attention to the Court, whose role was perceived essentially as that of a 'technical servant' […]. International relations analyses of the integration process often exclude the possibility of supranational institutions like the ECJ forcing states to adopt a behaviour that would not be consonant with their national interests."

37 Alter (2001), at 1.

38 *See* section 3.2.2 below.

39 *See* J. Coles, Law of the European Union, at 148 (2003).

40 For a definition of 'landmark cases', *see* section 2.1.1.2 above.

the position of EC law. In doing so, the Court also raised its own institutional status, thereby strengthening its *de facto* independence.

3.1.2.1. Establishing the principle of the direct effect of EC law

The 'direct effect' of a provision of EC law is an "ambiguous concept",[41] which means that the provision in question "can be interpreted by the courts as being capable of creating rights that any natural or legal person may enforce in their national courts".[42] Hence, the provision could be "incorporated directly into the corpus of national law".[43] This principle might be problematic for member states because it affects state sovereignty, in particular for those member states with a dualist tradition, which implies that international treaties or conventions cannot create "rights for individuals unless and until implemented by the legislature".[44] By developing the principle or doctrine of direct effect, as Craig and De Búrca noted,

> [t]he Court developed a bold theory of the nature of EC law, attributed to it the characteristics and force which the Court considered necessary to promote a set of dynamic and far-reaching common goals within a group of distinct and sovereign States.[45]

In *Van Gend en Loos v. Netherlands*[46] – the 1963 case in which the Court addressed the issue for the first time – the ECJ concluded that

> the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights […] and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.[47]

Van Gend en Loos concerned the direct effect of a specific provision of the EC Treaty,[48] and the Court formulated a very strict test that such a provision had

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41 Craig & De Búrca (2003), at 178.
42 Coles (2003), at 155.
43 Id.
44 Coles (2003), at 156. An example of this is the UK, which adopted the 1998 Human Rights Act to give effect to the European Convention on Human Rights. The UK attempted something similar with its adoption of the 1972 European Communities Act, but the consequences of this Act is debatable – *see* Craig & De Búrca (2003), at 302-303.
45 Craig & De Búrca (2003), at 179.
46 Judgment of 5 February 1963 in *Case 26/62, Van Gend en Loos v. Netherlands*, [1963] ECR 1.
47 Coles (2003), at 156.
48 Former article 12 of the EEC Treaty, currently article 25 TEC.

to meet in order for it to have direct effect.[49] Over time, the ECJ has relaxed these requirements[50] and has expanded the doctrine to cover other EC legal instruments, such as Regulations,[51] Decisions,[52] and international agreements concluded by the EC.[53] Directives, by its very definition ("[…] binding, as to the result to be achieved, upon each Member State to which it is addressed, *but shall leave to the national authorities the choice of form and methods*"),[54] seem incapable of having direct effect. However, the ECJ expanded the doctrine of direct effect in the context of Directives – a prime example of judicialization, which will be discussed later in this chapter.[55]

3.1.2.2. Constructing the supremacy of EC law

The newly established European Communities soon faced the pervasive problem of member states refusing to accept the supremacy of EC law over national law. And there seemed to be little political will among the member states – and the EC's political organs – to improve the situation.[56] The issue also had significant implications for the ECJ, because without the assertion of the supremacy of EC law, any form of judicial review conducted by the Court would have been superficial, if not impossible. When *Costa v. ENEL*[57] reached the ECJ via the preliminary reference procedure, the Court's opportunity to address the problem had arrived.[58] Although, few would have guessed how important this case would become for the ECJ, based on the seemingly mundane facts of the *Costa* case.

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[49] *I.e.*, the measure had to be "clear and precise", "unconditional" and "non-dependent". *See* Coles (2003), at 157-158.

[50] *See* Coles (2003), at 158.

[51] Judgment of 14 December 1971 in *Case 43/71, Politi v. Italian Ministry of Finance of the Italian Republic*, [1971] ECR 1039.

[52] Judgment of 6 October 1970 in *Case 9/70, Franz Grad v. Finanzamt Traunstein,* [1970] ECR 825.

[53] Judgment of 5 February 1976 in *Case 87/75, Bresciani v. Amministrazione delle Finance*, [1976] ECR 129. Also see judgment of 26 October 1982 in *Case 104/81, Haupzollamt Mainz v. Kupferberg*, [1982] ECR 3641.

[54] Article 249(3) TEC (emphasis added).

[55] *See* section 3.2.2.2 below.

[56] *E.g.*, between 1960 and 1969, the Court received no infringement cases brought by member states. Moreover, only 27 of the infringement cases were brought by the Commission. Compare this to the 1604 infringement cases brought by the Commission by 1999. By 1999, still only four infringement cases were brought by member states – *see* statistics quoted in Alter (2001), at 15.

[57] Judgment of 15 July 1964 in *Case 6/64, Flaminio Costa v. ENEL*, [1964] ECR 585.

[58] The ECJ laid the groundwork for the supremacy doctrine in *Case 26/62, Van Gend en Loos v. Netherlands*, when the Court concluded that "[…] the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights." *See* section 3.1.2.1 above.

Costa, a shareholder of a company affected by the nationalization of the Italian electricity industry, refused to pay his electricity bill (of a nominal amount) to the now state-owned ENEL, arguing that the ENEL nationalisation was contravening various EC treaty articles.[59] Originally filed in an Italian small claims court, the case found its way to the ECJ through the (then) relatively unknown preliminary reference procedure,[60] and *simultaneously* came before the Italian Constitutional Court.[61] Shortly before the ECJ delivered its ruling, the Italian Constitutional Court ruled that the Italian nationalization of the electricity industry did not contravene EC law and ordered Costa to pay his electricity bill. Importantly, however, the Italian Constitutional Court also asserted that EC law could not be supreme over national law, relying on the principle of *lex posterior derogate legi apriori*.[62]

It is important to note that, in terms of the preliminary reference procedure, the ECJ can only make a declaratory ruling about the specific interpretation of EC law that should stand in each case. In other words, in *Costa*, the ECJ could not explicitly rule whether or not the Italian nationalisation legislation was in violation of EC law. However, the Court's declaratory rulings in preliminary reference procedures, which instruct local courts how specific EC treaty provisions have to be interpreted, often have the same effect.[63] The ECJ's declaratory ruling in the *Costa* case (which had a prejudicial status in the domestic court) ultimately resulted in a ruling that the Italian electricity nationalization had *not* contravened EC law. Therefore, on the mere facts of the case, the Italian government scored a victory.

The Court, on the other hand, laid the foundation for a much bigger prize – namely, the supremacy of EC law – when it added, in no uncertain terms, that

> the law stemming from the Treaty, an independent source of law, [cannot], because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.[64]

The ECJ built on this foundation in *Internationale Handelsgesellschaft* when it ruled that EC law is supreme even if the national law in question

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[59] *I.e.*, articles 102, 93, 53 & 37 TEC.

[60] Article 234 TEC.

[61] The Italian Constitution provides for a preliminary reference procedure similar to that of the EC, which created the possibility of this 'parallel' position – *see* Alter (2001), at 19, fn. 25.

[62] *I.e.*, the law adopted last surpasses any previous laws. This was also the case in other legal systems of EC member states, such as France and Germany – *see* Alter (2001), at 19 & 23.

[63] *See* Alter (2001), at 21, arguing that these early cases left national courts with no alternative but to rule about their respective national law's compatibility with EC law.

[64] *Costa v. ENEL*, at 585, 593. *And see* Craig & De Búrca (2003), at 345.

is constitutional in nature.[65] In many respects, the ECJ's formulation of the supremacy doctrine culminated with the *Simmenthal* case when the Court made it explicit that

> [e]very national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights of individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.[66]

With *Costa v. ENEL* and the cases that followed, the ECJ not only established the supremacy of EC law over national law, it also established its own supremacy to be the arbiter of member state legislation compatibility with EC law – something which was never envisaged in the original treaties.[67] By establishing the supremacy doctrine in EC law, the Court raised its own institutional profile in the process,[68] allowing it to assert its *de facto* independence from the EC's political institutions – and also from the EC's member states (including their domestic courts) – over time.

3.1.3. South African Constitutional Court

South Africa's judiciary has faced stiff political challenges to its *de facto* independence during in the Apartheid years – challenges which the courts failed to deflect in most instances, often without even making an attempt.[69] Given South Africa's problematic history in this regard, it is perhaps to be expected that the South African Constitutional Court, established in 1993, did not share the problems of a lack of institutional credibility and prestige that plagued the Supreme Court and ECJ during their early years. This does not mean, however, that the new Constitutional Court did nothing to build its institutional credibility and prestige, as will be discussed below (3.1.3.1).

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[65] Judgment of 17 December 1970 in *Case 11/70, Internationale Handelsgesellschaft,* [1970] ECR 1125.

[66] Judgment of 9 March 1977 in *Case 106/77, Simmenthal,* [1978] ECR 629 and [1978] 3 CMLR 263, at 283.

[67] *See e.g.*, M.G. Puder, *Supremacy of the Law and Judicial Review in the European Union: Celebrating Marbury v. Madison with Costa v. ENEL*, 36:3 The George Washington International Law Review 567 (2004), at 585.

[68] *See e.g.*, a recent polling of 1000 UK Chief Executives *in* J. Willman, *Business chiefs say EU rules outweigh benefits*, 16 October 2006, at <http://www.ft.com/cms/s/0/6655cb1e-5c8a-11db-9e7e-0000779e2340.html>. The majority of those polled was of the opinion that the negative aspects of increasing EU legislation was outweighing the benefits of a single market. They also indicated that they distrusted the EU Commission and would like to renegotiate EU membership. Significantly, however, the ECJ was the only EU institution that obtained a positive score in the survey.

[69] *See* section 4.2.3.1 below.

Moreover, the Court recently took unprecedented measures to protect its institutional integrity (3.1.3.2).

3.1.3.1. The birth of a *Rechtsstaat;* and a Court coming of age

As the country's first ever constitutional court, mandated to guard the integrity of the Constitution and the Bill of Rights in particular, there was great anticipation among all walks of life that the Court would live up to these high expectations.[70] One of the Constitutional Court's first cases, *S. v. Makwanyane*[71] (by which the Court abolished capital punishment) gave a strong indication that the Court would deliver the highest standards of jurisprudence, and the case thus made a significant contribution to establish the institutional credibility of the Court. However, it was through a particular landmark case, the *First Constitutional Certification* decision,[72] that the Court asserted its *de facto* judicial independence in an impressive manner.

One of the important compromises that were reached early on during the multiparty negotiations (which preceded the first democratic elections of 1994) was *which body* would bear the responsibility for adopting the new South African Constitution.[73] The question was important because the legitimacy of the body adopting the final Constitution would inevitably affect the legitimacy of the document itself.[74] The ruling National Party wanted the multiparty negotiating forum (MPNF) to adopt the text, while the ANC and its allies asserted that only a democratically elected political body would have a legitimate mandate to adopt the final Constitution.[75] The parties finally agreed that the MPNF would adopt an *interim* Constitution, which would be rubber-stamped by the existing (Apartheid regime's) parliament to ensure constitutional continuity. Besides ordaining the judiciary with the powers of judicial review and containing the country's first ever Bill of Rights, the Interim Constitution outlined the procedure by which the new democratically elected parliament would adopt a *final* constitution. The Interim Constitution also included a set

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[70] Note that some critics questioned the motives behind limiting democracy by means of judicial review, just at the moment that millions of South Africans had the right to vote for the first time. *See* Hirschl (2004), at 89-99.

[71] *S. v. Makwanyane*, 1995 (3) SA 391 (CC).

[72] *Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC).

[73] For an historic overview of the circumstances surrounding the *Certification* cases, *see* in general at <http://www.constitutionalcourt.org.za/site/theconstitution/thecertificationprocess.htm>. *Also see* C. Rickard, *The Certification of the Constitution of South Africa*, *in* P. Andrews & S. Ellmann (Eds.), The Post-Apartheid Constitutions, Perspectives on South Africa's Basic Law, at 224-289 (2001).

[74] A. Sachs, *The Creation of South Africa's Constitution*, 41 New York Law School Law Review 669, at 671 (1996-1997).

[75] For a discussion of the multi-party negotiation process, *see* Andrews & Ellmann (2001), at 22-73.

of (unchangeable) constitutional principles to which the final constitutional text would have to adhere. In quite an extraordinary display of trust in the rule of law, the MPNF agreed that, after the Constitutional Assembly had adopted the Final Constitution,[76] the Constitutional Court would have to certify that the document complied with all the abovementioned constitutional principles before it could be signed into law.[77]

After months of hard work and negotiations, the text of the Constitution was finalized in early May 1996 and promptly sent to the Court for certification.[78] With the eyes of the country, if not the world, fixed on the outcome of the *First Certification* Case,[79] 1996 was set to become known as "the year of the '*Rechtstaat*'" in South Africa.[80] In a unanimous judgement delivered on 6 September 1996, the Constitutional Court ruled that the final Constitution did not comply with several of the constitutional principles agreed upon during the multiparty negotiations.[81] Hence, the Constitution had to be referred back to the Constitutional Assembly for reconsideration.[82] On 4 December 1996, in another unanimous judgement that attracted far less attention than its predecessor, the Court ruled that the Constitutional Assembly had remedied the "eight defective provisions" "conscientiously".[83] Thus, the Final Constitution was signed into law – in accordance with the rule of law – by President Nelson Mandela in Sharpeville on 10 December 1996.[84]

Commentators have noted that the real significance of the *Certification* cases was that the Court established its *de facto* independence from the government and from "the ANC in particular".[85] The *Certification* cases were an important

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[76] *I.e.,* parliament in another guise.

[77] *See* the 1993 Interim Constitution, section 71.

[78] The Constitutional Assembly was given two years to complete this task. *See* 1993 Interim Constitution, section 73(1).

[79] *Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC).

[80] *See*, *In the year of the Constitution, SA begins moulding a Rechtstaat*, 24 December 1996, at <http://www.mg.co.za>.

[81] During the first *Certification* case the Constitutional Court heard more than 90 objections to the Constitutional text – *see* Sachs (1996-1997), at 677. Examples of areas where the Court found the Constitutional text to be inadequate include *e.g.*, the Constitution's failure to entrench agreed fundamental rights; failure to protect the independence of watchdogs (including a Public Protector and an auditor-general); and the reduction of provincial autonomy – *see* Sachs (1996-1997), at 678-682.

[82] However, the Court stated that the constitutional text was in principle in compliance with the "philosophy and the spirit" of the Constitutional Principles. It was therefore not necessary for the Constitutional Assembly to "go back to the drawing board" – they merely had to rectify the nine areas identified by the Court – *see* Sachs (1996-1997), at 682.

[83] *Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1997 (2) SA 97 (CC).

[84] Appropriately, on International Human Rights Day.

[85] *See* A.S. Butler, *The Constitutional Court Certification Judgments: The 1996 Constitutional Bills, Their Amending Provisions, and the Constitutional Principles*, 114 South African Law Journal 703, at 722, n. 64 (1997).

opportunity for the Constitutional Court – as a new court – to demonstrate its independence and its willingness to hold the political institutions accountable to their own decisions. As Chaskalson and Davis argued, the *Certification* cases were

> a testament to the institutional confidence gained by the Constitutional Court in the first two years of its operation. The widespread acceptance of the judgment by the political parties reflects the degree to which constitutionalism and the rule of law have become uncontroversial facts of South African political life in the three years since April 1994.[86]

3.1.3.2. The Constitutional Court's independence under pressure

In May 2008, the South African Constitutional Court startled the country by revealing in a press statement, signed by all 11 judges, that the Court had filed a complaint at the Judicial Services Committee (JSC) against 'one of their own' – Cape High Court Judge President, John Hlophe – for approaching two Constitutional Court judges "in an improper attempt to influence this court's pending judgement in one or more cases".[87] The cases in question were connected to the highly controversial – and politically inflammable – fraud case against ANC President Jacob Zuma (who since became the President of the Republic of South Africa) and the French arms manufacturer, Thint.[88]

While the JSC investigation on the matter was still pending, Hlophe subsequently filed an unprecedented R10-million defamation suit against the Constitutional Court in the Johannesburg High Court.[89] In September 2008, the High Court ruled in Hlophe's favour, forcing the Constitutional Court to appeal the matter to the Supreme Court of Appeal (the highest court on all non-constitutional matters). In its letter of appeal, the Constitutional Court reasserted its "claim that Hlophe had attempted to influence certain judges

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[86] M. Chaskalson & D. Davis, *Cases and Comment: Constitutionalism, the Rule of Law, and the First Certification Judgment*, 13 South African Journal of Human Rights 430, at 432 (1997). *Also see* H. Klug, *Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review*, 13 South African Journal on Human Rights 185 (1997).

[87] *See* G. Stolley, *Hlophe accused of Zuma interference*, 30 May 2008, at <http://www.mg.co.za/article/2008-05-30-hlophe-accused-of-zuma-interference>. This was not the first JSC complaint lodged against Justice Hlophe: "Hlophe has spent the past three years fending off various complaints to the JSC, including one of moonlighting for a company without the necessary permission, and another of granting that firm permission to sue a judge in his court for defamation. A divided JSC ruled [in 2007] that there was not sufficient evidence to warrant an impeachment inquiry against him."

[88] The case before the Constitutional Court concerned the constitutionality (and hence admissibility) of evidence gathered through police search-and-seizure raids carried out on the properties of Jacob Zuma and Thint (Pty) Ltd.

[89] *See*, *Hlophe demands R10-million from highest court*, 11 October 2008, at <http://www.mg.co.za/article/2008-10-11-hlophe-demands-r10m-from-highest-court>.

improperly and said it was necessary to make this public to safeguard the independence of the judiciary".[90] The Constitutional Court further argued that if the details of the JSC complaint made against Hlophe had only transpired later, "there would have been a serious risk that the litigants (Zuma and French arms company Thint), and the South African public, would have questioned the way [the Constitutional Court's] decision had been reached".[91] Especially given the fact that the Constitutional Court ultimately ruled in favour of Zuma and Thint,[92] the Court felt that "the litigants and the public needed to know that the court had not succumbed" to any external pressure exerted on it.[93] A full bench of the Supreme Court of Appeal unanimously overturned the High Court decision on 31 March 2009, resulting in victory for the Constitutional Court and, arguably, for the independence of the judiciary.[94]

This highly unusual step taken by the Constitutional Court to protect its independence – ironically, in this case, from within the judiciary itself – might indeed have been unavoidable and essential to safeguard the credibility and prestige of the institution, as the Court had argued; but it also illustrates that taking such a measure to assert *de facto* judicial independence involves various risks.

3.2. Courts Increasing Judicial Influence ('Judicialization')

The Judicial Oversight Model describes three mechanisms through which courts might increase their influence, that is: judicialization occurring without strong legal justification; expansive interpretation techniques; and the development and employment of legal doctrines or principles.[95] The second part of this chapter will illustrate these mechanisms of judicialization with

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[90] Id.

[91] *See, Constitutional Court appeals against Hlophe judgement*, 10 October 2008, at <http://www.mg.co.za/article/2008-10-10-constitutional-court-appeals-hlophe-judgement>.

[92] *See Thint (Pty) Ltd v National Director of Public Prosecutions*, 2008 (2) SACR 421 (CC); *and Zuma v National Director of Public Prosecutions*, 2009 (1) SA 1 (CC).

[93] *See, Constitutional Court appeals against Hlophe judgement*, 10 October 2008, at <http://www.mg.co.za/article/2008-10-10-constitutional-court-appeals-hlophe-judgement>. *Also see*, *Judge Hlophe apologises to Surty*, 12 February 2009, at <http://www.mg.co.za/article/2009-02-12-judge-hlophe-apologises-to-surty>.

[94] P. de Bruin, *Sege oor Hlope*, Beeld, 31 March 2009, at <http://jv.news24.com/Beeld/Suid-Afrika/0,,3-975_2494433,00.html>. *And see*, *Hlope application could see SCA ruling stand*, 1 April 2009, at <http://www.mg.co.za/article/2009-04-01-hlophe-application-could-see-sca-ruling-stand>. The South African media obtained an interdict against JSC, forcing them to hold the Hlope hearing in public – *see* C. van Wyk, *Slegte dag x 2 vir Hlope*, 31 March 2009, at <http://jv.news24.com/Beeld/Suid-Afrika/0,,3-975_2494751,00.html>. Note, however, that at time of writing, Judge Hlophe's JSC ruling was still pending.

[95] *See* section 2.1.2 above.

examples from the jurisprudence of the United States Supreme Court (3.2.1), the European Court of Justice (3.2.2), and the South African Constitutional Court (3.2.3).

3.2.1. United States Supreme Court

The judicialization of American society, largely heralded by *Marbury v. Madison*,[96] is perhaps nowhere as visible as in the United States. However, the judicialization process in the U.S. has probably occurred more on an incremental basis than is generally believed.[97] While there are numerous examples from Supreme Court jurisprudence that illustrate how the Court has increased its degree of judicialization, this section will focus on a few well-known examples. Two cases, *Marbury v. Madison* and *Brown v. Board of Education*,[98] will illustrate how the Court has expanded its influence despite lacking a strong legal (constitutional) basis to justify its ruling (3.2.1.1). Next, the section will discuss a few examples that illustrate how doctrines developed to determine the scope of judicial oversight could lead to increased judicialization (3.2.1.2).

3.2.1.1. Judicialization without strong legal justification

As discussed earlier in this chapter, the Supreme Court assumed the powers of judicial oversight in *Marbury v. Madison* as a means of asserting their *de facto* independence.[99] While *Marbury* remains a celebrated case in American constitutional law, the legal rationale employed by the Court has been the source of much criticism over the years since the exercise of judicial oversight is without explicit constitutional foundation.[100] On the other hand, *Marbury*, flawed legal reasoning notwithstanding, has survived and gained its own legal legitimacy over time. This does not distract from the fact, however, that the Supreme Court has significantly increased the degree of judicialization without a strong legal basis. In fact, the rationale behind *Marbury v. Madison* may have been political, rather than legal. Schwartz commented, for instance, that for Marshall, a veteran of the American War of Independence who experienced first hand the crippling effect of a lack of unity among the States, "judicial review, like law itself, was "a means not an end".[101] The 'end', which

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96 As reflected in De Tocqueville's observation, *see* above, note 38 (Ch. 2).
97 *See* Ferejohn & Kramer (2002), at 1037.
98 *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954).
99 *See* section 3.1.1.1 above.
100 *See e.g.*, above, note 20 (Ch. 3).
101 *See* Schwartz (1993), at 38-45.

Marshall sought to realize by employing judicial oversight, was the realization of the objectives "intended by the framers of the Constitution", namely: "an effective national government endowed with vital substantive powers".[102]

In *Brown v. Board of Education*, the issue was not the legal basis for creating a legal precedent, but the justification for overturning an existing one – something that is not done easily in Anglo-Saxon legal systems without providing good legal justification. *Brown v. Board of Education* was the first prominent case in which the Supreme Court confronted the issues of racism and civil rights, and, as such, heralded the realization of human rights through judicial means;[103] but is also an excellent example of judicialization.

Brown was decided by overturning the long-standing legal precedent established in *Plessy v. Ferguson*,[104] which stated that 'separate but equal' educational facilities did not violate the Equal Protection Clause of the Fourteenth Amendment. While most commentators at the time concluded that the Court's decision in *Brown* was undoubtedly 'right' (fervent opposition to the ruling from certain circles excluded), many questioned the legal basis on which the Court overturned *Plessy*.[105] For example, one of the criticisms levelled against the ruling at the time was that the Court's conclusion (that "[s]eparate educational facilities are inherently unequal") relied too much on psychological and sociological aspects, and not enough on law.[106] The "typical academic view" at the time can be paraphrased by the words of (then) Columbia law professor Herbert Wechsler, who noted that "while he 'should like to think' that there existed a convincing legal rationale for the decision, 'I have not yet written the opinion.'"[107]

Defending the legal basis of the *Brown* decision opens a deep jurisprudential discourse that goes beyond the purpose of this discussion. While many have (in my opinion, successfully) defended the legal basis of *Brown*,[108] the fact remains that the Court had overturned *Plessy* – and increased the degree of judicialization to a significant extent – in large part based on the argument that that it was the 'right' thing to do. For instance, when Chief Justice Warren took office after the death of his predecessor, the Supreme Court had already

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[102] Id.

[103] *See* section 4.2.1 below.

[104] *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).

[105] *See* Roosevelt (2006), at 66-67.

[106] There was a huge controversy afterwards about the inclusion of so-called 'footnote 11', in which the Court referenced the works of several social scientists as support for its arguments – *see* Schwartz (1993), at 303; *and see* Roosevelt (2006), at 67: "Among those who did not favour the result as a matter of politics, the reaction was less polite skepticism than fury."

[107] Roosevelt (2006), at 67.

[108] In general, Ronald Dworkin's work may arguably be understood as a sophisticated defence of *Brown v. Board of Education*. *Also note* that many U.S. originalists now take pains to argue that "*Brown* is actually correct on originalist grounds", and that *Plessy* was the 'activist' decision – *see* Roosevelt (2006), at 68. For criticism of the *Brown* decision's impact on actual social reform, *see* in general Bell (2004).

heard *Brown*, and had practically reached a stalemate.[109] Warren not only reinvigorated the case, but also forged a unanimous ruling from a bench that included four justices from southern states.[110] When Warren was congratulated with the ruling afterwards, he responded: "Don't thank me […] thank the guys from the southern states; they did it anyway because it was 'right' – regardless of what they faced from their constituent states".[111] Or, as Schwartz noted:

> [p]erhaps the *Brown* opinion did not articulate the juristic bases of its decision in as erudite a manner as it could have. But the decision in *Brown* emerged from a typical Warren judgment, with which few today will disagree. The Warren opinion was so *right* in that judgment that one wonders whether additional learned labor in spelling out the obvious was necessary.[112]

Doing the 'right thing' might often be more important for a court than having a scrupulous legal basis as justification; but it is not accomplished without a significant increase in the degree of judicialization.

3.2.1.2. Employing doctrine to expand the scope of judicial oversight

As mentioned in Chapter 1, the limits or legitimate scope of judicial oversight is a recurring issue in constitutional law – and in the United States in particular.[113] The Supreme Court has developed several legal doctrines or rules to serve as guidelines how to draw the line between law and politics. For instance, in *United States v. Carolene Products*[114] ("a fairly innocuous case concerning a federal statute prohibiting interstate shipment of milk"),[115] the Court proposed in a footnote that legislation aimed at "discrete and insular minorities" should be subject to a "more searching judicial inquiry".[116] The Court affirmed this approach in the 1944 *Korematsu* case when the Supreme Court ruled that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect […] [hence] courts must subject them to the most rigid scrutiny".[117] Note, however, that in *Korematsu* the Court failed to provide the applicant (placed under 'curfew' by Executive Orders

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[109] Schwartz (1993), at 286-289. Justice Frankfurter was of the opinion that, had the case been put to a vote at the time, the case would have been decided with a 5-vote majority, with 4 dissents (Vinson, Reed, Jackson & Clark), probably with more than one concurring opinion, which would have been "catastrophic". *See* F. Frankfurter, Frankfurter Papers, 20 May 1954, Harvard Law School.

[110] Warren stated afterwards that nobody wanted to believe the ruling at first – his clerks were contacted for weeks afterwards to request the dissenting opinions. *See* Schwartz (1993), at 307.

[111] Schwartz (1993), at 307.

[112] Schwartz (1993), at 284.

[113] *See* section 1.4.1 above, *and see* Koopmans (2003), at 98-128.

[114] *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), n. 4.

[115] Koopmans (2003), at 53-54.

[116] *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), n. 4.

[117] *Korematsu v. United States*, 323 U.S. 214 (1944).

after the Japanese attack on Pearl Harbor) with actual redress, because the Court considered the Executive Orders in question as justified due to "the circumstance of war with Japan".[118]

The Supreme Court's 'footnote four' in *Carolene Products* formed the basis of the Court's later reasoning in civil rights matters[119] that the Warren Court (primarily) developed into the 'preferred position doctrine', which will be addressed in more detail below.[120]

In *Miranda v. Arizona*,[121] the Supreme Court "ruled that in order to use a suspect's confession in a subsequent prosecution, police had to administer the famous *Miranda* warning".[122] The *Miranda* warning, which, as every regular viewer of American television series knows, starts with the now famous words: "You have the right to remain silent. Anything you say can be used against you in a court of law." The *Miranda* warning has come to be widely accepted throughout U.S. society,[123] but it is important to note for the purposes of this discussion that the *Miranda* warning does not flow from a strict interpretation of the U.S. Constitution. The *Miranda* test is based on the Constitution's Fifth Amendment, which states that no one "shall be compelled in any criminal case to be a witness against himself". The "principle that a compelled confession cannot be used in court follows quite easily from the words of the Self-Incrimination Clause;"[124] but the

> application of the *Miranda* test prevents prosecutors from using many confessions that are entirely voluntary, if police fail to give the warning. *Miranda*, then, gets lots of cases "wrong" as a matter of constitutional meaning: the doctrine prohibits some things that the Constitution itself does not.[125]

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[118] A similar argument was made in *Hirabayashi v. United States*, 320 U.S. 81 (1943), at 102 – *see* Roosevelt (2006), at 219-220. *Also see* section 4.2.1.2 below.

[119] *See* Koopmans (2003), at 54, arguing that 'footnote four' likely explains the *Brown* decision, but that the Court has gone far beyond the parameters of this doctrine in the "post-Brown" years.

[120] Schwartz (1993), at 281, noting the Warren Court's key contributions as "1) acceptance of the preferred-position doctrine, (2) extension of the trend towards holding Bill of Rights guarantees binding on the states, and (3) broadening of the substantive content of the rights themselves."

[121] *Miranda v. Arizona*, 384 U.S. 346 (1966).

[122] *See* Roosevelt (2006), at 72.

[123] *See* Roosevelt (2006), at 72-96. *Miranda* was repeatedly criticized as an example of judicial 'activism'. In 1968, the U.S. Congress adopted legislation that "represented a different approach" (essentially, reverting to the position before *Miranda*), which required a court to "consider the totality of the circumstances to determine whether a confession was voluntary". The federal government, however, did not actively enforce this law. Eventually in 1999, on application of the U.S. Solicitor General, the law was declared unconstitutional in *Dickerson v. United States* 530 U.S. 428 (2000).

[124] Roosevelt (2006), at 72.

[125] Roosevelt (2006), at 73.

Put in terms of the Judicial Oversight Model, the *Miranda* test limits political discretion, and thereby expands the scope of judicial oversight.[126]

Another example of judicial doctrine that led to the expansion of judicialization – and even more controversial than *Miranda v. Arizona* – is the Court's development of a 'right' to privacy over the course of a few cases; thus, a 'right' that is not explicitly guaranteed by the Constitution. In *Griswold v. Connecticut*,[127] the Supreme Court declared a State law prohibiting the use of contraceptives to be unconstitutional, arguing that provisions in the Bill of Rights provided citizens with a "zone of privacy" that is "protected from state intrusion".[128] In *Griswold*, which concerned a married couple, the notion of 'privacy' still "bore some resemblance to the ordinary understanding of the word: it related to intimate activities conducted out of public view".[129] In *Eisendstadt v. Baird* (which concerned the prohibition of contraceptives sold to a non-married couple),[130] however, the Court expanded the notion of privacy to "signify a right of autonomy in making important decisions".[131] The Court noted:

> [i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[132]

In *Roe v. Wade*,[133] which concerned the right to an abortion, the Supreme Court asserted (without, as many critics have argued, attempting to explain its reasoning)[134] that the 'right to privacy' is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy".[135] Despite stringent (and continuous) criticism of the Court's reasoning in *Roe*, the right to abortion survived (with some modifications) in *Planned Parenthood v. Casey*.[136] The lead opinion of the case[137] based its justification for upholding

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126 *See e.g.*, Figure 2 above.
127 *Griswold v. Connecticut*, 381 U.S. 479 (1965).
128 Roosevelt (2006), at 113.
129 Id.
130 *Eisenstadt v. Baird*, 405 U.S. 438 (1972).
131 Roosevelt (2006), at 113.
132 *Eisenstadt v. Baird*, 405 U.S. 438 (1972), at 453.
133 *Roe v. Wade*, 410 U.S. 113 (1973).
134 Roosevelt (2006), at 114. For criticism of *Roe v. Wade*, *see e.g.,* J.H. Ely, *The Wages of Crying Wolf: A Commentary on Roe v. Wade*, 82 Yale Law Journal 920, at 921 (1973). Ely argues that *Roe* "is not constitutional law and gives almost no sense of an obligation to try to be."
135 *Roe v. Wade*, 410 U.S. 113 (1973), at 153.
136 *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
137 Reflecting the opinions of Justices O'Connor, Kennedy and Souter; with two concurring opinions from Justices Blackmun (the original author of *Roe*) and Stevens. Chief Justice Rehnquist and Justice Scalia dissented.

Roe on a further doctrine, which "suggested that *stare decisis* somehow [be] combined with the analysis of liberty", and from which four questions could be derived, namely:

> [h]as the rule of the earlier case proved unworkable? Has society come to rely on that rule, so that overruling it would impose special hardships? Has the law developed so as to undercut the basis of the earlier case? And have facts changed sufficiently to rob the earlier case of its justification?[138]

The Court ruled that the answer to all four questions would imply that *Roe* had to be upheld.[139]

3.2.2. European Court of Justice

In many respects, the jurisdiction of the European Court of Justice has been broadened by the expanding agenda of the EU itself, which, of course, is driven by a political and not judicial process. However, throughout the history of the EU, its political organs have often appeared to be relying on the ECJ in times of political stalemate, whether consciously or subconsciously, for achieving progress in the process of European integration. In this context, the ECJ has significantly increased its influence by using expansive interpretation techniques such as teleological interpretation (3.2.2.1); and by using existing doctrines and principles that have been developed in member states, as well as developing its own legal doctrines facilitated by the preliminary reference procedure (3.2.2.2).

3.2.2.1. The ECJ and teleological interpretation

There are numerous examples of ECJ rulings that resulted in the expansion of judicial influence, as the examples from this chapter and the following indicate. Of particular interest, however, is the manner in which the Court reached many of those decisions. As Craig and De Búrca noted:

> [t]he Court has achieved the hobby-horse status which it occupies amongst European lawyers as much on account of its reasoning and methodology as on account of the impact of its decisions. Its approach to interpretation is generally described as purposive or teleological, although not in the sense of seeking the purpose or aim of the authors of a text.[140]

The ECJ has employed teleological or purposive interpretation throughout its history that resulted in much of the court's judicialization. Note, however,

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[138] *See* Roosevelt (2006), at 117, arguing that applying these questions to the facts of *Brown* probably would have led to an overturning of *Plessy* as well.

[139] Id.

[140] Craig & De Búrca (2003), at 97-98.

that purposive or teleological interpretation used in the context of the ECJ does not refer to the "narrower historical-purposive approach" conventionally associated with the interpretation technique. Instead, it refers to the tendency of the Court

> to examine the whole context in which a particular provision is situated, and gives the interpretation most likely to further what the Court considers that provision in its context sought to achieve. Often this is far from a literal interpretation of the Treaty or of legislation in question, even to the extent of flying in the face of the express language.[141]

The Court has justified its use of teleological interpretation as a necessity for realizing the effectiveness of EC law – thus, for realizing the EC's political goals.[142] For instance, in *Van Gend en Loos*, which denoted "the beginning of a long line of judgments in which the European Court has used this purposive or teleological interpretive method," the ECJ argued that the "purpose and spirit behind the creation of the Treaties implied the need for a different approach". [143] In setting out the need for EC law to have direct effect in some circumstances,[144] the Court

> referred to the 'objective' of the Treaty; its reference to 'peoples' as well as governments; the creation of 'institutions endowed with sovereign rights'; and the need for nationals to 'co-operate in the functioning of this Community'. Such factors, the Court believed, 'implies [sic] that this Treaty is more than an agreement which merely creates mutual obligations between the contracting States.'[145]

In *Costa v. ENEL*,[146] e.g., the ECJ increased its influence in the absence of a strong legal ('constitutional') justification[147] and based its ruling almost entirely on a teleological interpretation of various EC Treaty provisions. In fact, the only textual evidence used by the Court is generally deemed to have been weak.[148] The Court "drew on the spirit and the aims of the Treaty to conclude that it was 'impossible' for the Member States to accord primacy to domestic laws".[149]

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[141] Craig & De Búrca (2003), at 98. *Also see* T. Koopmans, *The Theory of Interpretation and the Court of Justice*, *in* D. O'Keeffe & A. Bavasso (Eds.), Judicial Review in European Union Law, at 45 (2000).
[142] Coles (2003), at 156.
[143] Id.
[144] *See* section 3.1.2.1 above.
[145] Coles (2003), at 156.
[146] *See* section 3.1.2.1 above.
[147] *See* section 3.1.1.1 above.
[148] *See* Craig & De Búrca (2003), at 279, arguing that the "language of direct applicability in art. 189 (now art. 249) would be meaningless if States could negate the effect of Community law by passing subsequent inconsistent legislation."
[149] Craig & De Búrca (2003), at 278-279.

The Court's extensive use of purposive interpretation has been criticized by some as judicial 'activism';[150] but the significance of its effect cannot be denied. As Craig and Burca noted,

> [i]n the years of so-called institutional malaise or stagnation, the Court arguably played a 'political' role through law, attempting to render the Treaty effective when its provisions had not been implemented as required by the Community, and to render secondary legislation effective when it had not been properly implemented by Member States.[151]

3.2.2.2. Employing legal doctrines or principles – through procedure

Much of the ECJ's judicialization process have been facilitated by legal doctrines developed under the auspices of the preliminary reference procedure. Indeed, as mentioned earlier, the doctrines of EC law supremacy and direct effect have largely been developed by leveraging (landmark) cases that came to the ECJ via preliminary reference from national courts. Significantly, the purpose of the preliminary reference procedure was to ensure the consistent interpretation of EC law,[152] and not to enforce EC law in member states.[153] However, as Alter points out, the preliminary reference procedure has, in many ways, become a mechanism for ensuring the compatibility of member state legislation with EC law, thereby limiting the discretion of political institutions in EU member states – i.e., an example of judicialization.[154] The preliminary reference procedure has also been "of seminal importance for the development of Community law,"[155] because it allowed the Court to expand its doctrine of direct effect (and, hence also its judicial influence), as the next discussion will illustrate.

The Court's expansion of 'direct' and 'indirect effect' in the context of EC Directives

Earlier in this chapter, the ECJ's efforts to establish the possible direct effect of EC measures (of EC treaty provisions and other EC legal instruments) have

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[150] Craig & De Búrca (2003), at 98. *Also see* H. Rasmussen, On Law and Policy in the European Court of Justice, at 62 (1986), arguing that the ECJ looked for "inspiration in guidelines which are essentially political of nature and hence, not judicially applicable. This is the root of judicial activism which may be an usurpation of power".

[151] Craig & De Búrca (2003), at 97.

[152] Article 234 TEC.

[153] K.J. Alter, *Who are the "Masters of the Treaty?": European Governments and the European Court of Justice*, 52:1 International Organization 121, at 126 (1998).

[154] Id.

[155] Craig & De Búrca (2003), at 433.

been discussed.[156] It was noted that EC Directives were initially considered not to have direct effect since they are not self-executing, but are framework decisions that require member states to take various implementation actions before private parties can rely on the rights embodied in them.[157] A major problem for the EU, which frequently came before the ECJ in the form of individual complaints received via the preliminary reference procedure, was that many Directives remained unimplemented or not properly implemented in several member states, regardless of the fact that the deadline for implementation (set by the EU Commission) had long passed. Consequently, adversely affected private parties could not rely on the rights that the Directives, properly implemented, would have conferred on them.

The legal position on this matter seems to be unambiguous, and it therefore came as quite a shock to member states when the ECJ opened up the possibility for Directives to have direct effect under certain circumstances. The ECJ expanded the doctrine of direct effect – over the course of a few landmark cases[158] – to include Directives that remained unimplemented or that have not been properly implemented in a member state *after* the EC deadline for implementation had passed. However, the Court persistently refused to extend the doctrine of direct effect to include the situation where the unimplemented Directive in question concerned a claim between two private parties (i.e., the Court refused giving Directives 'horizontal' direct effect).[159] This resulted in the aberrant situation where one individual's claim would be successful if the respondent was a state organ, while another individual's claim *regarding the same unimplemented Directive* would fail if the respondent was another private party.[160] However, the Court found another way to address the problem – a further example of judicialization.

In the early 1980s, the ECJ received two cases that both dealt with member state failure to implement the Equal Treatment Directive,[161] both concerning German citizens. The relationship between the parties was 'horizontal' in the one case,[162] and 'vertical' in the other.[163] The Court granted relief to the

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[156] *See* section 3.1.2.1 above.

[157] *E.g.,* EC Directives – *see* article 249(3) TEC.

[158] Starting with *Case 26/62, Van Gend en Loos v. Netherlands*. Other major cases include judgment of 4 December 1974 in *Case 41/74, Van Duyn v. Home Office*, [1974] ECR 1337; and judgment of 5 April 1979 in *Case 148/78, Pubblico Ministero v. Ratti*, [1979] ECR 1629.

[159] *See* judgment of 26 February 1986 in *Case 152/84, M.H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)*, [1986] ECR 723 and judgment of 14 July 1994 in *Case 91/92, Paola Faccini Dori v. Recreb Srl*, [1994] ECR I-3325.

[160] *See e.g.*, decision of 22 December 1978, *France Minister of the Interior v. Cohn-Bendit*, [1980] 1 CMLR 543 (French Council of State). *Also see* Coles (2003), at 166.

[161] *See* Directive 76/207.

[162] Judgment of 10 April 1984 in *Case 79/83, Hartz v. Deutsche Tradax GmbH*, [1984] ECR 1921.

[163] Judgment of 10 April 1984 in *Case 14/83, Von Colson and Kamann v. Land Nordhein-Westfalen*, [1984] ECR 1891.

private party applicants in both cases, but refrained from using the direct effect doctrine. Instead, the Court based its decision on article 10 TEC, which requires Member States to take "all appropriate measures […] to ensure fulfilment of the obligations arising out of this Treaty". The Court formalized its position on the matter in the *Marleasing* case[164] when it provided relief to a private party applicant a horizontal position by ruling that "national law must be interpreted in conformity with the [unimplemented] Directive".[165] Through this example of judicialization (here, by utilizing the interpretative technique of '*conforme'* or 'sympathetic' interpretation[166]), the ECJ managed to address the problem in an indirect manner while simultaneously avoiding the controversial issue of granting EC Directives horizontal effect.[167]

Employing legal doctrines and principles inherited from member states

The ECJ makes fruitful use of the many legal doctrines and principles it has inherited from the domestic legal systems of EU member states to expand its own influence. For example, in the *Algera* case[168] the Court asserted the need for effective judicial oversight of EU staff cases based on the prohibition of denial of justice, which, the Court argued, is an intrinsic principle of law in the legal systems of EU member states.[169] In many of the ECJ's most celebrated cases concerning the realization of the rights of free movement of goods, services, and people, the Court made extensive use of the principle of proportionality, which limits (political) discretion of member states[170] and is regarded as "one of the most important principles for the protection of individual rights in Community law".[171] In a number of cases, the Court

[164] Judgment of 13 November 1990 in *Case 106/89, Marleasing SA v. La Comercial Internacional de Alimentacion SA*, [1990] ECR I-4135.
[165] Coles (2003), at 168.
[166] Koopmans (2003), at 118-119.
[167] Coles (2003), at 169. Several theories have been formulated to explain the lack of member state reaction to the Court's activism during the forming years of the EC – *see e.g.*, Dehousse (1998), at 14; and Bermann (2004), at 560.
[168] Judgment of 12 July 1957 in *Joined Cases 7/56 and 3/57 to 7/57, Algera and Others v. Common Assembly of the ECSC*, [1957] ECR 39.
[169] J. Schwartze, *Judicial Review In EC Law – Some Reflections On The Origins And The Actual Legal Situation*, 51 International and Comparative Law Quarterly 17 (2002), at 17-18.
[170] *E.g.*, judgment of 20 February 1979 in *Case 120/78, Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, [1979] ECR 649. *Also see* judgment of 24 March 1994 in *Case 275/92, Her Majesty's Customs and Excise Commissioners v. Schindler & Schindler*, [1994] ECR I-1039.
[171] J. Schwartze, *Enlargement, the European Constitution, and Administrative Law*, 53(4) International and Comparative Law Quarterly 969, at 973 (2004). On the prominence of the 'principle of proportionality', *see* in general Beatty, (2004).

listed 'proportionality' as one of the requirements that measures, taken by EC member states restricting the free movement of goods, must meet.[172]

For example, in the *Cassis de Dijon* case,[173] which concerned a German rule stipulating the minimum alcohol level for certain alcoholic drinks (such as the blackcurrant liqueur in question), the Court ruled it constituted a 'quantitative restriction and equivalent measure'[174] that was contrary to article 28 of the TEC. The Court formulated the '*Cassis de Dijon* rule of reason' that is based on the principle of proportionality, stating that

> [o]bstacles to the free movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements.[175]

3.2.3. South African Constitutional Court

As a new court in a young democracy, the South African Constitutional Court naturally has not had the same opportunity to expand its degree of judicialization to the same extent as the ECJ and U.S. Supreme Court have done. Moreover, given the judiciary's broad mandate of judicial oversight, and the wide range of human rights guaranteed in the post-Apartheid constitutions,[176] it is perhaps to be expected that the Constitutional Court would require a lesser degree of judicialization than its counterparts in the EC and U.S. Yet, as Justice Albie Sachs remarked:

> [w]ithout a doubt we must build our jurisprudence carefully, on a step-by-step basis. Yet, however eager some legal critics might be for us to stick closely to the letter of the constitutional text and show appropriate deference to the democratically elected legislature, we cannot insulate ourselves from inquiries of a broad and foundational character. We work with an admirable state-of-the-art text that *presents* itself in clear, eloquent language, yet does not *explain* itself with equal clarity.[177]

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[172] *See e.g.*, judgment of 14 July 1983 in *Case 174/82, Officier van Justitie v. Sandoz BV*, [1983] ECR 2445; and judgment of 12 March 1987 in *Case 178/84, Commission v. Germany (Re German Beer Purity Law)*, [1987] ECR 1227.

[173] *Case 120/78, Cassis de Dijon*.

[174] *See* Coles (2003), at 275-279, arguing that the prohibition of such measures are attempts to "remove non-fiscal barriers to trade".

[175] *See* Coles (2003), at 289. *Also see* Craig & De Búrca (2003), at 378-379. The Court also identified examples of measures that may reasonably constitute such 'mandatory requirements', such as public health considerations.

[176] The *1996 Constitution of the Republic of South Africa* is considered to be one of the most 'liberal' in the world – *see e.g.*, H. Suzman, *Visions of a Liberal Future*, The Liberal, at 20 (2007), at <http://www.exacteditions.com/exact/browse/395/432/3053/3/22>.

[177] Sachs (2001), at 88-89 (emphasis in the original).

In one particular area – concerning the justiciability of socio-economic rights – the Constitutional Court has expanded its influence (or, limited political discretion)[178] by developing clearer criteria against which the government's efforts to fulfil socio-economic rights can be measured. The Court has thereby entered an area that many commentators (especially those from western democracies where these so-called 'red rights' are usually not constitutionally guaranteed) have warned against,[179] that is: a place where a court can get dangerously close to treading on political toes. This section will consider how the Constitutional Court has increased the degree of judicialization in this respect (3.2.3.1); thereby breathing life into a category of human rights that has for so long been not much more than a fierce paper tiger.[180]

3.2.3.1. Realizing the justiciability of socio-economic rights

The South African Constitution[181] is one of the few in the world that guarantees a wide range of socio-economical human rights that have the potential, at least, of being justiciable[182] since it places specific obligations on the state to "take reasonable legislative and other measures, within its available resources" to "achieve the progressive realisation" of these rights.[183] Clearly, phrases such as these require further (judicial) interpretation to evaluate the actions or decisions taken by political institutions in this regard. The Constitutional Court has taken up this challenge, but it has done so fairly cautiously, in an incremental manner.

Soobramoney v. Minister of Health, KwaZulu Natal,[184] the first Constitutional Court case to deal (indirectly) with socio-economic rights – illustrated just how complex the balance to be achieved in these cases can be. Soobramoney, a patient suffering from chronic renal failure, claimed that the state had failed to take active measures that would fulfil his constitutional right to life when it refused to provide him with continued dialysis.[185] The Court ruled that chronic illnesses could not be treated with the same priority

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178 *See* section 2.1.2 above.

179 *See e.g.*, A. Neier, *Social and Economic Rights: A Critique*, 13:2 Human Rights Brief 1 (2006), at 1-3.

180 *Also see* section 4.2.3 below.

181 1996 Constitution of the Republic of South Africa.

182 *See* D. Schneider, *The Constitutional Right to Housing in South Africa: The Government of the Republic of South Africa v. Irene Grootboom*, 2 The International Journal of Civil Society Law 46, at 49 (2004). *Also* note that, despite the fact that the ICESCR had 144 parties at the time of the *Grootboom* case (discussed below), very few of these parties had taken any meaningful steps to realize these rights – *see* Steiner & Alston (2000), at 237-238 (2000).

183 *See* sections 26, 27, 29 & 30 of the 1996 Constitution of the Republic of South Africa.

184 *Soobramoney v. Minister of Health (KwaZulu Natal)*, 1998 (1) SA 765 (CC). *See* ICJ (2008) Report, at 52.

185 The state hospital in question did provide Mr Soobramoney with emergency dialysis.

as emergency medical cases, thereby demonstrating that the Court was "very much aware of the limits to remedies it can give when certain rights are denied or violated".[186] Justice Albie Sachs subsequently defended the Court's rationale by explaining that

> being placed in a queue for access to scarce resources is not to find yourself being subject to a limitation of your right, but to be put in a position to enjoy your right together with others. You do not ration free speech or the vote, but you have to ration access to resources. So, provided the queue is fairly established, and the criteria are rational and non-discriminatory, it was not up to us as judges to say that we thought Mr. Soobramoney should go to the head of the queue.[187]

The sad facts of the case, culminating in Soobramoney's death shortly after the Court delivered its ruling, caused many to think that the justiciability of socio-economic rights would remain a pipedream.[188] With *Government of the RSA v. Grootboom*,[189] however, the Court's "chickens [had come] to roost"[190] – it was time to meet at least some of the high expectations concerning the justiciability of socio-economic rights.

The *Grootboom* case concerned an all too familiar situation in South African post-Apartheid society, namely: destitute and homeless people, living in pitiable – and worsening – circumstances, facing eviction for resettling (often illegally) on an open plot of privately owned land.[191] As is often the case, this piece of land happened to be privately owned and the owner requested

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However, on his return, the hospital refused further treatment of a chronic illness due to a lack of resources.

[186] *See* S.B.O. Gutto, *Beyond Justiciability: Challenges of Implementing/Enforcing Socio-Economic Rights in South Africa*, 4 Buffalo Human Rights Law Review 79, at 99 (1998). Gutto quotes Justice Chaskalson (then President of the Constitutional Court) who said: "[…] one cannot but have sympathy for the appellant and his family, who have the cruel dilemma of having to impoverish themselves in order secure treatment […]. The hard and unpalatable fact is that if the appellant were a wealthy man he would be able to procure such treatment from private sources; he is not and has to look to the State to provide him with the treatment. But the State's resources are limited […]."

[187] A. Sachs, *Social and Economic Rights: Can They be Made Justiciable?*, 53 Southern Methodist University Law Review 1381, at 1386 (2000).

[188] Schneider (2004), at 50.

[189] *Government of the Republic of South Africa v. Grootboom*, 2001 (1) SA 46 (CC). *Also see* ICJ (2008) Report, at 38.

[190] *See* Sachs (2000), at 1381. This was particularly true for Justice Sachs – he had been a prominent member of a "generation of lawyers" that had been advocating the inclusion of justiciable socio-economic rights in the Constitution for years.

[191] Irene Grootboom was part of a group of 510 children and 390 adults living in Wallacedene 'informal settlement' – also known in less sympathetic terms as a 'squatter camp'. For background on the housing conditions in post-Apartheid South Africa, *see* Schneider (2004), at 45-47 *and see* E. Wickeri, *Grootboom's Legacy: Securing the Right to Access to Adequate Housing in South Africa?*, Center for Human Rights and Global Justice Working Paper, 5 Economic, Social and Cultural Rights Series 7 (2004), at <http://www.chrgj.org/publications/docs/wp/Wickeri%20Grootboom's%20Legacy.pdf> .

local authorities to (lawfully) evict the 'squatters'. The Constitutional Court had to consider the content of the government's constitutional obligation to the *Grootboom* applicants, in terms of sections 26[192] and 28(1)(c)[193] of the Constitution. In a unanimous decision, the Constitutional Court first affirmed the justiciability of socio-economic rights in general,[194] and the constitutional rights of Irene Grootboom and her fellow 'squatters' in particular. The Court also developed the substantive content of the 'right to housing' by laying down specific guidelines for the government. For example, the Court ruled that the state's obligation to "provide adequate housing"[195] was not to provide housing as such, but to establish a "coherent and coordinated [housing] programme". The Court also found that the obligation to provide adequate housing would typically vary between e.g., rural and urban areas. Moreover, the Court ruled that the state's constitutional obligation had to be focussed on "people in crisis" – stating that those whose needs were "most desperate" were entitled to some form of emergency shelter and relief.[196]

On the other hand, the Court rejected the argument that the primary evaluation criterion of government efforts had to be the so-called 'minimum core' test, as set out in the International Covenant on Economic, Social and Cultural Rights (ICESCR),[197] opting, instead, for applying a 'reasonableness' test (which is well entrenched in Anglo-Saxon administrative law);[198] and to do so on an incremental basis. Ultimately, the Court ruled that government housing programmes in force at the time of the *Grootboom* application failed to meet the reasonableness test, at least as far as providing shelter for those "in most desperate need" was concerned.

To be sure, the Court's decision waved no magic wand to ameliorate the housing conditions of *Grootboom* residents.[199] However, commentators

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[192] Granting everyone the right to access to adequate housing.

[193] Affording children the right to shelter.

[194] Incidentally, the Court's general affirmation in this regard included a rejection of the argument that enforcing socio-economic rights would infringe the separation of judicial, legislative and executive powers. During the *First Certification* case, the Court took a more tentative approach, ruling that socio-economic rights were justiciable, "at least to some extent." *See Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC), §78. *Also see* Schneider (2004), at 49.

[195] Section 26(1) of the 1996 Constitution of the Republic of South Africa.

[196] *See Government of the Republic of South Africa v. Grootboom*, 2001 (1) SA 46 (CC), §§31, 38, 44, 64 & 66.

[197] *See* GA Res. 2200A (XXI), 16 December 1966. South Africa became a signatory to this treaty as well as to the *International Covenant on Civil and Political Rights* in 1994.

[198] Koopmans (2003), at 27 & 114. *Also see* A. Belani, *The South African Constitutional Court's Decision in TAC: A Reasonable Choice?,* Center for Human Rights and Global Justice Working Paper, 7 Economic, Social and Cultural Rights Series 36 (2004), at <http://www.chrgj.org/publications/docs/wp/Belani%20The%20South%20African%20Constitutional%20Court's%20Decisions%20in%20TAC.pdf>.

[199] *See* Wickeri (2004), at 21-25, for a discussion of the impact of the *Grootboom* case.

praised the Court for "carving out a middle ground" between the two extremes of "making social and economic rights fully enforceable individual entitlements" versus "denying them any recognition in law".[200] The Court adopted a pragmatic and flexible approach that would allow "the legislature more room to establish" its various socio-economic policies and to "prioritize some over others".[201] It is also a very realistic approach because courts may be able to order remedies that have budgetary repercussions (and they regularly do; also regarding the enforcement of civil and political rights), but "arguments [made by a court] that suggest the transfer of government funding from one program or budget to another will not be seriously considered" by political institutions.[202]

In *Minister of Health v. Treatment Action Campaign*, the Constitutional Court built on the principles it has set out in *Grootboom*.[203] The case pitted the Health Department and its highly unpopular policy of refusing to freely provide the drug 'Nevirapine' to HIV positive pregnant women,[204] against the Treatment Action Campaign (TAC) – a local NGO that advocated for the drug's nationwide administration.[205] In another unanimous decision, the Constitutional Court ruled that the Health Department's policy "had not met its constitutional obligations to provide people with access to health care service in a manner that is reasonable and that takes account of pressing social needs".[206] The Court ordered the Health Department to implement Nevirapine administration to pregnant women "without delay" at all public hospitals and clinics, although it did not set out a specific time framework for government compliance with the ruling.[207]

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[200] Beatty (2004), at 128.
[201] Wickeri (2004), at 19.
[202] Wickeri (2004), at 19 & n. 118.
[203] *Minister of Health v. Treatment Action Campaign*, 2002 (5) SA 721 (CC). *See* ICJ (2008) Report, at 39.
[204] Nevirapine is a World Health Organization approved drug that prevents so-called 'mother-to-child' HIV transmission. The South African Health Department had decided, citing amongst other reasons its concern regarding the 'safety' of the drug, to only implement the administration of Nevirapine at a few state clinics and research facilities in each province for a period of only two years. This was after the manufacturers of Nevirapine had offered to make the drug available to the South African government free of charge for a five-year period. *See* A. Hendriks, *Case of Minister of Health v. Treatment Action Campaign et al., 5 July 2002*, 9 European Journal of Health Law 283, (2002).
[205] For background to the *TAC* case and the HIV AIDS situation in South Africa, *see* in general M. Heywood, *Preventing Mother-to-Child HIV Transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign Case Against the Minister of Health*, 19 South African Journal on Human Rights 278 (2003).
[206] Heywood (2003), at 311. *Also see Minister of Health v. Treatment Action Campaign*, 2002 (5) SA 721 (CC), at §§25 & 30.
[207] Id.

As with *Grootboom*, critics of the Court's *TAC* ruling questioned the use of the 'reasonableness' test, arguing that it unnecessarily narrowed the content of socio-economic rights.[208] However, others have argued that the 'reasonableness' approach has actually allowed the Court to "reserve discretion to decide future economic rights cases under the very fact-dependent 'reasonableness' rubric".[209] Justice Kate O'Regan echoed this sentiment in the earlier *Makwanyane* case when she explained the Court's flexible approach to interpreting the Bill of Rights as follows:

> [t]he purposive or teleological approach to the interpretation of rights may at times require a generous meaning […] and at other times a narrower or specific meaning. It is the responsibility of the courts […] to develop fully the rights entrenched in the Constitution. But that will take time. Consequently any minimum content which is attributed to a right may in subsequent cases be expanded and developed.[210]

Thus, in two carefully measured judgements, the Court has illustrated to critics of justiciable social and economic rights that it was possible to provide "meaningful relief to the least fortunate members of society" in a manner that did not place the judiciary in an "unacceptable managerial role".[211] Through its pragmatic (although, to some extent also expansive) interpretation of the Constitution, the Court has outlined the constitutional responsibilities of the political institutions and has provided government with definite guidelines on how to fulfil those obligations. In *Grootboom*, *TAC*, and even in *Soobramoney*, the Court has set out a judicial approach that balances the required degree of judicialization with the need for preserving the independence and institutional integrity of the Court.[212]

3.3. Summary

This chapter illustrated the nature of judicial oversight – i.e., courts asserting *de facto* independence from political institutions and expanding their influence or power (judicialization) – through examples from the United States Supreme Court, the European Court of Justice, and the South African Constitutional Court.

The United States Supreme Court laid the foundations for an independent and powerful court during the Marshall Court era, heralded by *Marbury v. Madison* – which is probably comparative constitutional law's primary example of judicialization without a strong legal basis. While Supreme Court

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208 Belani (2004), at 36.
209 Id.
210 *See S. v Makwanyane*, 1995 (3) SA 391 (CC), §325, quoted in Belani (2004), at 37.
211 C. Sunstein, Designing Democracy: What Constitutions Do, at 221 (2001).
212 A. Belani (2004), at 5.

Justices rarely issue public comments on political pressure experienced by the judiciary, they will do so on occasion – as they have done recently in the aftermath of the political fallout from e.g., the *Schiavo* case. The chapter has also illustrated how the Supreme Court has expanded the degree of judicialization, in particular during the Warren Court era, as exemplified by cases such as *Brown v. Board of Education* and *Miranda v. Arizona.* The onset of the Burger Court did not result in a significant reduction of judicialization – as was expected in certain political circles – as *Roe v. Wade* illustrates; however, judicialization arguably slowed down under the Rehnquist Court.

The European Court of Justice constructed the supremacy and direct effect of EC law through cases such as *Costa v. ENEL* and *Van Gend en Loos*, thereby also establishing its own primacy as the arbiter of compatibility with EC law. Over the years, the ECJ has instituted itself as a powerful Community organ – with a high degree of *de facto* independence from the Community's political institutions – in particular through its extensive use of teleological interpretation of the EC treaties, and its employment of the preliminary reference procedure. The ECJ's application of direct effect to EC Directives, in particular, is a prominent example of the Court's judicialization efforts.

The South African Constitutional Court was instrumental in the actualization of a post-Apartheid 'Rechtsstaat' with the two *Certification* cases – through which the Court also cemented its own institutional credibility and prestige. The Court is also willing to defend its *de facto* independence publicly, as the recent *Hlope* saga demonstrated. The South African Constitutional Court has been in a unique position to expand its influence by making socio-economic rights justiciable. Cases such as *Grootboom* and *TAC* illustrated the Court's willingness to engage in this complex task, albeit on a more incremental basis, and by showing ample deference to the political institutions. Since the judiciability of socio-economic rights is an area fraught with political difficulty, the Court's incremental approach is probably wise from an institutional point of view.

CHAPTER 4

THE EFFECT OF JUDICIAL OVERSIGHT IN THE UNITED STATES, EUROPEAN COMMUNITY AND SOUTH AFRICA

> *[…] comparison shows us something about law and legal evolution generally. It allows us to develop ideas about the judicial interpretation of legal and constitutional provisions, about the use of broad and narrow notions and concepts, about the social and cultural factors influencing legal developments, about the relationship between law and politics, and half a dozen other fundamental problems.*[1]

The exercise of judicial oversight is often a "means to an *end*".[2] As Schwartz commented about Chief Justice Marshall:

> Marshall's accomplishments as Chief Justice were directly related to his overriding conception of law. To Marshall, the law was essentially a social instrument – with the Constitution itself to be shaped to special and particular ends. The Constitution was not to be applied formalistically; it must be applied in the light of what it is for. Marshall never doubted that the overriding purpose behind the organic instrument was to establish a nation that was endowed with all the necessary governmental powers.[3]

And, as the examples in the previous chapter have already indicated, the 'outcomes' or 'effects' of judicial oversight are often political in nature.[4]

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1 Koopmans (2003), at 6.
2 Schwartz (1993), at 45.
3 Schwartz (1993), at 38.
4 *E.g.,* for Marshall, judicial review was as means to realize strong federal government (*see* above, note 3 (Ch. 4)); while the ECJ employed teleological interpretation to realize the objectives of the EC treaties (*see* section 3.2.2.1). A case such as *Azanian Peoples Organisation (AZAPO) v. President of the RSA*, (1996) 4 SA 671 (CC) (in which AZAPO, a political

The Judicial Oversight Model describes three prominent outcomes associated with the exercise of judicial oversight that might affect the well-being of the entire polity. This chapter will illustrate these outcomes – constitutional dispute resolution (4.1), human rights protection – including the provision of legal remedies (4.2), and the indirect legitimization of political institutions (4.3) – with examples from the jurisprudence of the United States Supreme Court, the European Court of Justice, and the South African Constitutional Court. The chapter will conclude with a summary of the key findings (4.4).

4.1. Constitutional Dispute Resolution

The Judicial Oversight Model postulates that constitutional disputes can arise between private and public parties ('vertical' disputes) and between public parties, e.g., legislature versus executive ('horizontal' disputes).[5] This section primarily contains examples of horizontal constitutional dispute resolution from the United States Supreme Court (4.1.1), the European Court of Justice (4.1.2), and the South African Constitutional Court (4.1.3).[6]

4.1.1. United States Supreme Court

The United States has one of the few constitutional systems that have been designed in terms of the traditional separation of powers doctrine.[7] Hence, the demarcation of public power is a recurring issue in U.S. constitutional law.[8] In the United States, however, this issue is usually not resolved by political debate, as is often the case in Western Europe, but often by the judiciary.[9] Many prominent examples of such horizontal constitutional dispute resolution in the

party, challenged the constitutionality of amnesty granted to participants in the 'Truth and Reconciliation' process), also illustrates the South African Constitutional Court's willingness to assist the government by upholding the constitutionality of these amnesty arrangements – through its powers of judicial review – in order to realize the objectives of "national unity and reconciliation". In *AZAPO*, the Constitutional Court ruled that the epilogue to the 1993 Interim Constitution (on 'National Unity and Reconciliation') justified the limitation on the right of access to court.

5 *See* section 2.2.1 above.

6 Since vertical disputes frequently involve human rights protection, vertical constitutional dispute resolution will be largely dealt with in section 4.2 (with the exception of vertical dispute resolution in the EC, of which a particular aspect will be discussed in section 4.1.2 below).

7 Koopmans (2003), at 162-163.

8 Since the U.S. is also a federal constitutional system, conflicts of this nature frequently include the demarcation of power between states and federal levels. *See e.g.*, Koopmans (2003), at 168-171.

9 Koopmans (2003), at 163-164.

Unites States concern the constitutional scope of 'executive power' (4.1.1.1).[10] In another prominent (and more controversial) instance, the Supreme Court even settled a dispute that arose directly from a democratic process – i.e., the 2000 Presidential elections (4.1.1.2).

4.1.1.1. Delineating the scope of executive power

The Court's delineation of the scope of executive power serves as a check on, as Koopmans put it, the emergence of the "imperial presidency".[11] In the 1952 *'Steel Seizure'* case,[12] the Supreme Court resolved a conflict that concerned the scope of "executive authority". On 8 April 1952, President Truman ordered the seizure of a number of steel mills in order to avoid potential negative effects that an imminent national strike by steel workers would have on the ongoing Korean War. Truman justified this action by stating that he was acting in his capacity as Commander-in-Chief, and thus, within the scope of his executive authority. The owners of the steel mills in question took the issue to court, challenging "the absence of both constitutional and legislative authority" of Truman's actions.[13] The Executive countered that the seizure of the steel mills was part of the President's "inherent authority" as Commander-in-Chief.[14] The Supreme Court refused to accept Truman's argument and ruled that

> by usurping legislative power President Truman had violated the Constitution, and that the seizure of the steel mills was hence ultra vires – particularly so since Congress had expressly refused to enact a suggested amendment to the Taft-Hartley Act authorizing such governmental seizures in an emergency.[15]

In *United States v. Nixon*,[16] the Supreme Court was drawn "into the center of the Watergate vortex" in order to help resolve the political crisis that was triggered by the Watergate scandal and, specifically, by President Nixon's involvement in it.[17] Nixon refused to provide investigators with access to tape recordings that could have clarified certain unanswered questions regarding the "politically inspired" burglary of the Watergate building where the Democratic Party headquarters were located.[18] Nixon defended his refusal

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10 *See e.g.*, *Springer v. Philippine Islands*, 277 U.S. 189 (1928).

11 Koopmans (2003), at 175-180, arguing that presidential power has "grown into the kind of office the founding fathers could never have imagined". *Also see* the UK situation, where ruling party's Prime Minister and his cabinet effectively have a stronghold over executive power – Koopmans (2003), at 180-191.

12 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

13 *See* Abraham (1968), at 22 (1968). *Also see* Koopmans (2003), at 164.

14 Id.

15 Koopmans (2003), at 22.

16 *United States v. Nixon*, 418 U.S. 683 (1974).

17 Schwartz (1993), at 333.

18 Koopmans (2003), at 99.

based on "notions such as 'executive autonomy' and 'executive privilege'", similar to the arguments made by Truman in the *Steel Seizure* case.[19] The Supreme Court rejected these arguments, and its ruling precipitated the first ever resignation of an American President. While the Court's ruling did not escape criticism,[20] it had contributed to resolving the political dispute and, as Schwartz commented, "[t]he impact of judicial review was definitely broadened by *Nixon* and the Burger Court's other separation-of-powers decisions".[21]

In *Massachusetts v. EPA*,[22] the Supreme Court recently "entered the debate on global warming" by rejecting the legality of an earlier decision made by the Environmental Protection Agency (EPA) to exclude global warming from its annual pollution report. The Court ruled that greenhouse gases should "fall within the meaning of 'air pollutant' under section 202(a)(1) of the Clean Air Act" and that the EPA was legally obliged to include it in its reports. The original EPA decision was criticised because, as was argued at the time, it was made as a result of pressure from the Bush Administration.[23] Thus, the broader significance of the *EPA* case was seen in some circles as a "strike against the Presidential control model" because it marked "an emerging shift away from the expansive deference of the *Chevron* era and toward greater judicial oversight of administrative action".[24] Commentators further remarked that,

> [s]ince the early 1980s, the presidential control model has dominated debates on discretion, accountability, and judicial review. However, recent decisions — some involving highly charged political issues — have looked suspiciously upon expansive presidential control arguments and ultimately rejected them. On the spectrum between broad presidential power and multiple avenues of administrative accountability, *Massachusetts v. EPA* marks another step away from the political conception of administration founded in the values of the incumbent administration, and toward a more neutral, judicially enforced administrative state.[25]

Another area in which the U.S. judiciary has recently stepped in, albeit cautiously, to determine the scope of executive privilege, concerns anti-terrorism measures taken by the executive. This issue will be discussed in more detail below.[26]

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19 Koopmans (2003), at 99.

20 *See e.g.*, G. Günter, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 UCLA Law Review 30 (1974).

21 Schwartz (1993), at 333. Thus, also leading to further judicialization.

22 *Massachusetts v. E.P.A.*, 127 U.S. 1438 (2007).

23 *See* A.C. Revkin, *With White House Approval, E.P.A. Pollution Report Omits Global Warming Section*, 15 September 2002, at <http://www.nytimes.com/2002/09/15/us/with-white-house-approval-epa-pollution-report-omits-global-warming-section.html>.

24 *See e.g.*, *The Supreme Court – Leading Cases*, 121(185) Harvard Law Review 415 (2007).

25 Id.

26 *See* section 4.2.1 below.

4.1.1.2. 'Casting the decisive vote' in a presidential election

The Supreme Court's decision to intervene in the political fray that erupted in the aftermath of the hotly contested presidential elections of 2000 has been criticised extensively.[27] What made the Court's ruling in *Bush v. Gore*[28] especially troubling, was that the Court voted strictly along 'party lines' – resulting in a five-four split (with five justices appointed by Republican Presidents *versus* four justices appointed by Democratic Presidents);[29] suggesting that politics played a decisive role in this case.

The 2000 Presidential election, which took place on 8 November of that year, pivoted on the outcome of the election in Florida – whichever candidate won Florida's electoral votes, would win the election.[30] The Florida results required a recount because of the slim victory it afforded George W. Bush. The recount gave Bush an even slimmer victory of 327 votes.[31] Gore's legal team demanded a hand recount in specific counties that used "punch-card voting machines", because an examination of some of those votes showed "a surprising number of undervotes – ballots on which no vote had been cast", leading to the suspicion that the punch-card machine had not registered the mark made by the voter (a 'chad') properly.[32] Some counties undertook such a recount; but others did not. Gore tried to legally enforce this additional recount in the Florida courts, while Bush "sought review by the federal Supreme Court, something the Court had discretion to grand or deny" through the certiorari system.[33] By 9 December, the Supreme Court accepted the case, and ordered a stoppage of the recount until it had made its ruling.[34] The Court's five-four ruling, as mentioned, not only ended the dispute, but also effectively decided the election – something which sat uncomfortable with an American society proud of its long history of democracy.

Whether or not the Court should have intervened in this case is a valid question; and so is the question whether the Court's decision was 'legitimate'. Perhaps the Court should have deferred the decision to Congress, as some has

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[27] *See* C. Fried, *'A Badly Flawed Election': An Exchange*, 48:3 The New York Review of Books 53 (2001). *Also see* Roosevelt (2006), at 188 (2006); *and see* Koopmans (2003), at 280.

[28] *Bush v. Gore*, 531 U.S. 98 (2000).

[29] Note that *Bush v. Gore* was actually one of the few instances in modern times where the Court voted strictly along party lines. *See* Koopmans (2003), at 279-280.

[30] Gore had actually won the popular vote. However, the U.S. Presidential election is decided based on electoral college vote, which the U.S. Constitution has apportioned to each of the 50 States, *see* article II, section 1.

[31] Roosevelt (2006), at 189.

[32] Roosevelt (2006), at 190, also noting other problems noted, such as "butterfly ballot", experienced at the time.

[33] Roosevelt (2006), at 190. On the *certiorari* system, *see* Koopmans (2003), at 35-36.

[34] Part of the problem was that Florida state law required final submission of results by 12 December – *see* Roosevelt (2006), at 191-192.

suggested.[35] Be that as it may, the Court did intervene; and the outcome of the dispute fairly quickly contributed to political stability. As Justice Robert Jackson once quipped:

> [t]here is no doubt […] that if there were a super Supreme Court, a substantial proportion of our reversals […] would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.[36]

4.1.2. European Court of Justice

The Treaty Establishing the European Community (TEC), as amended over the years,[37] has come to provide for extensive judicial dispute resolution concerning matters of European Community law between the EC/EU's political organs and member states ('horizontal' dispute resolution) (4.1.2.1), and also between private parties and EC/EU organs ('vertical' dispute resolution) (4.1.2.2).

In the context of EC law, it is also useful to make a further distinction concerning the nature of horizontal disputes between EC/EU organs and/or member states before the Court. The ECJ has a mandate to resolve disputes concerning compliance with EC law – 'enforcement actions' – as well as the authority to resolve disputes about the validity ('constitutionality') of specific EC legislation – 'judicial review'. As this section will illustrate, the EU member states have come to value the Court's dispute settlement role, and have consistently strengthened the ECJ's mandate in this regard.[38]

4.1.2.1. Resolving horizontal disputes between Community organs and / or member states

Enforcement cases

Article 226 TEC provides for judicial dispute resolution between Community organs and member states in cases where a member state is alleged to have "failed to fulfil an obligation under this Treaty" – thus, including both "positive actions, and failure to act". This enforcement procedure is initiated by a Community organ, although a compulsory preliminary procedure has to be followed in which the member state and the Commission must attempt to resolve the dispute first.[39]

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35 Roosevelt (2006), at 198.
36 Justice Robert H. Jackson, concurring in *Brown v. Allen*, 344 U.S. 443 (1953), at 540.
37 For a discussion of EC/EU treaty development, *see* above, note 36 (Ch. 3).
38 Craig & De Búrca (2003), at 100.
39 Coles (2003), at 84-86.

The ECJ has been generally reluctant to accept several of the defences (for non-compliance) offered by member states. For instance, in *Commission v. Greece*,[40] the Court refused to accept Greece's argument that the "measure allegedly breached was illegal".[41] And in *Commission v. United Kingdom*,[42] the Court stated: "[…] a Member State cannot justify its failure to fulfil obligations under the Treaty by pointing to the fact that other states have also failed, and continued to fail, their own obligations."

Originally, the ECJ could not "pass sentence" in cases where it found member states to be in non-compliance with EC law – the Court could only make a "declaratory statement', resulting in rulings that had no "executory force".[43] Hence, these disputes essentially remained unresolved since the Court's ruling did not lead to member state compliance with EC law. However, member states eventually strengthened the ECJ's position through treaty amendment,[44] which authorised the Court to order member states found to be in breach of an EC obligation to pay a fine or penalty.[45] The importance of the Court's dispute settlement role in this context increased as the number of enforcement cases brought by the Commission exploded from a mere 27 cases between 1960 and 1969, to 861 between 1990 and 1999.[46]

Conversely, the number of enforcement cases brought to the Court by member states under Article 227 TEC (claiming that "another member state has failed to meet its obligations under EC law")[47] has remained negligible – only 4 such cases had been filed between 1960 and 1999.[48] Member states probably have made little use of this dispute resolution mechanism in fear of reciprocity, and also to preserve diplomatic relations.[49] Arguably, the mere existence of this mechanism might have had the effect of resolving disputes in the sense that disputes have been prevented. Member states, for instance,

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[40] Judgment of 30 June 1988 in *Case 226/87, Commission v. Hellenic Republic*, [1988] ECR 3611.

[41] Coles (2003), at 89.

[42] Judgment of 9 July 1991 in *Case 146/89, Commission v. United Kingdom*, [1991] ECR 3533.

[43] Coles (2003), at 92.

[44] Article 228 TEU.

[45] Although some problems remain regarding the actual securing of such payments – *see* Coles (2003), at 93-95.

[46] *See* Alter (2001), at 15. *Also see* section 5.1.2.5 below about the potential limiting effect of a court's caseload.

[47] Coles (2003), at 82-83.

[48] Alter (2001), at 15.

[49] *See* Coles (2003), at 83. Note that there is only one completed member state enforcement action – *see* the judgment of 4 October 1979 in *Case 141/78, France v. United Kingdom (Re Fishing Net Mesh Sizes)*, [1979] ECR 2923. Note however that in many of the conflicts between private parties and member states or between private parties and EC organs, the *real* conflict in the background is often between member states. For examples, *see* in general J.H. Jans, R. De Lange, S. Prechal *et al.*, Europeanisation of Public Law (2007).

make ample use of the tactic of threatening fellow member states with court action, usually with the desired effect.[50]

Article 230 'judicial review'

Article 230 TEC gives the ECJ a broad mandate to settles disputes that arise between different Community organs or between Community organs and member states concerning the "legality" of Community institutions' acts, such as conflicts concerning the proper ('constitutional') demarcation of public power,[51] or regarding the constitutionality of EC legislation.[52] Originally, article 230 TEC allowed only member states, the Council, and the Commission to challenge the legality of EC legislation before the ECJ – thus, excluding the European Parliament. As will be discussed later in this chapter,[53] the ECJ strengthened the position of the European Parliament in this regard, citing the need for restoring "the institutional balance within the Community".[54]

The ECJ's mandate generally excludes reviewing the legality of "recommendations and opinions" (two specific legal instruments that can be adopted by EC organs), but, as the Court ruled in *Commission v. Council (Re ERTA)*,[55] it will look at the "substance of the act, its subject matter, context and legal effect, rather than its form and designation"[56] to determine whether or not a legal instrument is capable of judicial review.

4.1.2.2. Resolving vertical disputes between Community organs and private parties

Article 230 TEC also provides private parties with the opportunity to request judicial review of EC legislation adopted by a Community organ. Article 230 stipulates that, in order for a private party to challenge the legality of an EC measure, the party must prove, simultaneously, that the measure in question was a "decision", "of individual concern to the applicant", and also of "direct

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50 Coles (2003), at 83.

51 *E.g.,* judgment of 30 June 1993 in *Joined Cases 181/91 & 248/91, European Parliament v. Council and Commission*, [1993] ECR I-3685, regarding the Council's decision to provide special aid to Bangladesh.

52 *See* article 230 TEC – the grounds for review are the same as in the case of member states (discussed above). *See e.g.*, judgment of 31 March 1992 in *Case 284/90, Council v. European Parliament*, [1992] ECR I-2277. The disputes in these cases often revolved around the argument whether the correct decision-making process had been followed.

53 *See* section 4.3.2.1 below.

54 Coles (2003), at 99.

55 Judgment of 31 March 1971 in *Case 22/70, Commission v. Council (Re ERTA)*, [1971] ECR 263.

56 Coles (2003), at 98.

concern to the applicant".[57] However, the ECJ has traditionally adopted an approach in these cases that is significantly more restrained (relative to other areas within its jurisdiction). In *Plaumann and Co v. Commission*,[58] for instance, the Court considered the meaning of "direct and individual concern" for the first time, and decided "for no readily apparent reason" to consider the "individual concern" requirement (arguably a narrower consideration) before considering the "direct concern" requirement (arguably a broader consideration).[59] The Court ruled (in what was to become the '*Plaumann* test', employed in several other cases) that

> [p]ersons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.[60]

It is particularly the 'application' of the *Plaumann* test that leads to problems. In *Plaumann*, for instance, the ECJ noted that the applicant was an "importer of clementines", which the Court regarded as

> commercial activity which may at any time be practised by any person and is not therefore such as to distinguish the applicant in relation to the contested Decision as in case of the addressee [of the Decision].[61]

In practice, few private party applicants pass the application of this stringent test since the *Plaumann* test "renders it literally impossible for an applicant ever to succeed, except in a very limited category of retrospective cases".[62] The *Plaumann* test has also been criticised for being "economically unrealistic".[63] The Court's narrow approach on this matter is especially troubling considering that the Court will not answer a preliminary reference from a national court in cases where the Court argues that the private party could have brought the case directly under article 230, but refrained from doing so.[64]

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[57] *See* Coles (2003), at 99-101, noting that the Court has been "hesitant to 'open the floodgates'" to claims brought by "the many bodies that may be adversely affected by Community legislation."

[58] Judgment of 15 July 1963 in *Case 25/62, Plaumann & Co v Commission*, [1963] ECR 95.

[59] *Case 25/62, Plaumann & Co v. Commission*. *Also see* J. Coles (2003), at 100.

[60] *See* Craig & De Búrca (2003), at 488-489.

[61] Id.

[62] L.W. Gormley, *Judicial Review in EC and EU Law*, 4 The Cambridge Yearbook of European Legal Studies 167, at 175-187 (2002).

[63] *See* Craig & De Búrca (2003), at 488-489.

[64] Judgment of 9 March 1994 in *Case 188/92, TWD Textilwerke Deggendorf GmbH v. Germany*, [1994] ECR I-833. There were tentative hopes that the Court might be willing to broadening its interpretative approach in individual petition cases (*see e.g.* Advocate General Jacobs's opinion of 21 March 2002 in *Case 50/OOP, Unión de Pequeños Agricultores v. Council*, [2002] ECR I-6677 and also in Court of First Instance *Case T-177/01, Jégo-Quéré &*

4.1.3. South African Constitutional Court

The *Constitutional Certification* cases,[65] discussed in the previous chapter,[66] are also excellent examples of judicial (horizontal) constitutional dispute resolution. This section will discuss the dispute settlement aspects of the *Constitutional Certification* cases (4.1.3.1), and illustrate how the Constitutional Court settled a critical dispute between the national and provincial levels of government (4.1.3.2).

4.1.3.1. Settling disputes between opposition parties

The political parties that had participated in the Multiparty Negotiation process had not only committed themselves to specific constitutional outcomes (embodied by the so-called Constitutional principles), but had also subjected themselves to conflict resolution by the Constitutional Court should they fail to agree on the text of the final constitution.[67] And, indeed, all the opposition parties in parliament filed depositions against the adoption of the final Constitution because they argued that, for varying reasons, the text failed to comply with various Constitutional principles. The two *Certification* cases therefore settled the specific political dispute as to whether or not the final Constitution could be certified and signed into law. However, considering the wide range of constitutional topics covered by the *First Certification* judgment,[68] and especially that a significant part of the ruling concerned the demarcation of provincial power (an area that is usually a rich source of constitutional conflict);[69] it may be argued that the Constitutional Court also prevented various future political disputes.

Cie SA v Commission, [2002] ECR II-2365), but the ECJ rejected the Court of First Instance rulings (that broadened the interpretation) in these cases.

[65] *Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC); and *Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1997 (2) SA 97 (CC).

[66] *See* section 3.1.3.1.

[67] Id.

[68] The judgment consists out of eight chapters (269 pages), covering a wide area of constitutional topics such as interpretation of the Bill of Rights, the separation of powers between central government's legislature and executive, independent institutions such as the Human Rights Commission and the Auditor General, self-determination and languages.

[69] Chapters V and VII of the ruling deal with this topic and these chapters make up approximately 50% of the judgment. *See* <http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/20071126193439/SIRSI/0/520/S-CCT23-96>: "[…] specifically whether the constitutional text provides for 'legitimate provincial autonomy' and whether 'the powers and functions of the provinces' under the proposed constitution are 'substantially less than or substantially inferior' to those provinces enjoy under the Interim Constitution."

On the other hand, judicial dispute settlement does not always yield desirable results to all involved. The Court's ruling in the first *Certification* case, for instance, may not have sent the negotiating parties "back to the drawing board", but it certainly sent the parties back to additional gruelling negotiation sessions.[70]

4.1.3.2. Settling disputes between different levels of government

Another example of judicial dispute resolution that resulted in a less desirable outcome is the *Western Cape Legislature v. President* case.[71] This dispute had the potential to negatively affect or even completely disrupt the first democratic elections at the local (municipal) level, which were scheduled for the end of 1995.[72] The Western Cape's provincial legislature (dominated by the National Party, making it the only provincial government in which the ANC did not win an outright majority in the 1994 elections) challenged the authority of the national Parliament to delegate certain powers (here, the appointment of provincial electoral committee members) to the President.[73] The Western Cape provincial legislature moreover challenged the constitutionality of certain provisions of the (then) new Local Government Transition Act,[74] which was adopted by parliament to oversee the transition from a centralised to a more decentralised form of local government. This challenge, in particular, had the potential to derail all local elections – not just local elections in the Western Cape.

The Constitutional Court dismissed many of the Applicant's challenges – including challenges regarding the validity of the Local Government Transition Act. However, the Court ruled that, while Parliament could indeed delegate its legislative authority to the Executive, the Executive could not amend this delegated authority unilaterally, as was done in this case. Chief Justice Chaskalson added that

> [c]onstitutional cases cannot be decided on the basis that Parliament or the President acted in good faith or on the basis that there was no objection to action taken at the time that it was carried out. It is of crucial importance at this early stage of the development of our new constitutional order, to establish respect for the principle that the Constitution is supreme. The Constitution itself

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70 *See* above, note 82 (Ch. 3).

71 *Executive Council of the Western Cape Legislature v. President of the RSA*, 1995 (4) SA 877 (CC).

72 The first democratic national and provincial elections took place in April 1994, but local elections would only follow the year thereafter. Note that all these elections took place under the auspices of the 1993 Interim Constitution.

73 *Executive Council of the Western Cape Legislature v. President of the RSA*, 1995 (4) SA 877 (CC), at §99.

74 *Executive Council of the Western Cape Legislature v. President of the RSA*, 1995 (4) SA 877 (CC), at §14.

> allows this Court to control the consequences of a declaration of invalidity if it should be necessary to do so. Our duty is to declare legislative and executive action which is inconsistent with the Constitution to be invalid, and then to deal with the consequences of the invalidity in accordance with the provisions of the Constitution.[75]

In other words, the Court would not refrain from resolving the dispute in accordance with the Constitution just because of negative political 'consequences'; and in this case, the result of the Court's ruling was that local elections in Western Cape Province had to be postponed.

4.2. Human Rights Protection

The bulk of this section concerns the judicial protection of human rights – typically as embodied in a 'Bill or Rights'.[76] Broadly speaking, however, the U.S. Supreme Court (4.2.1) and the European Court of Justice (4.2.2) have also displayed a readiness to protect individual rights and interests not directly associated with fundamental human rights. For example, the Supreme Court has long been a defender of the right to contractual freedom and individual property rights[77] and the ECJ has championed the realization of specific individual rights that emanated from the European Community Treaties, such as the freedom of establishment and services.[78]

Unfortunately, the *lack* of judicial protection of human rights often serves as a better illustration why the realization of this particular effect of judicial oversight is so important. Various examples from the United States and South Africa (4.2.3) illustrate this point, where the judiciary not only turned a proverbial 'blind eye' to (various degrees of) human rights violations, but actively participated in enforcing legislation that lead to serious human rights infringements.

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[75] *Executive Council of the Western Cape Legislature v. President of the RSA*, 1995 (4) SA 877 (CC), at §100.

[76] *As e.g.*, in the U.S. Constitution (Amendments I to X), and the South African Constitution of 1996 (sections 7 - 39).

[77] Especially during the Fuller Court era, *see* Schwartz (1993), at 174-175.

[78] *See e.g.*, article 43 TEC (which provides the right to the "actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period") and article 49 TEC (concerning the right to "conduct professional forays into another Member State" for a temporary period). *See* Coles (2003), at 204.

4.2.1. United States Supreme Court

The judicial protection of human rights in the United States has long served as a 'prototype' for many constitutional jurists.[79] While this designation is undoubtedly deserved, it does not paint the entire picture. This section will briefly consider the history of judicial human rights protection in the United States (4.2.1.1) and will look specifically at the role of the Supreme Court concerning the protection of human rights in times of war (4.2.1.2).

4.2.1.1. From *Dred Scott*, to *Brown*, and beyond

For the largest part of its history, the U.S. Supreme Court was mainly concerned with settling constitutional questions regarding federalism and the separation of powers – not with human rights protection.[80] Moreover, cases that did involve individual rights focused more on rights of contract and property.[81] On the one hand, this position reflects the historical context – where the concern with human rights only arose during and after World War II.[82] On the other hand, the history of judicial human rights protection in the United States might also be indicative of the argument that human rights protection requires a higher degree of judicialization, as argued in Chapter 2.[83]

Dred Scott v. Sandford[84] concerned the effects of slavery, and provided the first major opportunity for the Supreme Court to enforce the protection provided by the fundamental rights entrenched in the U.S. Constitution. In fact, evidence suggests that the political institutions relied heavily on the Court to solve the slavery issue[85] – an increasing political problem, at the time, between 'slave-holding' and 'non-slave holding' states that would eventually lead to the American Civil War.[86] Unfortunately, the Supreme Court's ruling essentially had the effect of placing the Court's sign of approval on slavery and, as many have argued, contributed to the outbreak of the Civil War.[87] Indeed, *Dred Scott* is a prime example that "ambitious attempts to settle national debates by judicial fiat often backfire".[88] As Koopmans remarked about political over-reliance on the judiciary in recent years,

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[79] *See e.g.,* Judicial Service Committee interview with Albie Sachs of 4 October 1994, at <http://ww.constitutionalcourt.org.za/site/judges/transcripts/albertlouissachs.html>.

[80] *See* Schwartz (1993), at 227.

[81] Id.

[82] *See* above, note 70 (Ch. 2).

[83] *See* section 2.3.2.2 above.

[84] *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

[85] *See* Schwartz (1993), at 109-111.

[86] *See* Schwartz (1993), at 124-125.

[87] *See* above, note 30 (Ch. 3).

[88] Roosevelt (2006), at 209-210. *Also see* Koopmans (2003), at 273-276; *and see* Schwartz (1993), at 127, quoting Judge Learned Hand: "[…] we may wonder whether we do not rest our

> [t]rue solutions can be brought about only on the basis of a certain form of consensus in society; and only the political parties and the political institutions are in a position to provoke debates, to indicate roads to the future and to draw the consequences from popular convictions and feelings. The judiciary is in no such position.[89]

Ultimately, *Dred Scott* had a markedly negative effect on the credibility and prestige of the Supreme Court,[90] considering how the Court was marginalized during the Civil War and in its aftermath.[91] In fact, the 'separate but equal' doctrine was born during the post-Civil War Reconstruction era,[92] which perpetuated discrimination against former slaves – a position that, as seen in the previous chapter, would only be overturned some 55 years later in *Brown v. Board of Education*.[93]

The Warren court, starting with *Brown*,

> completed the shift from the safeguarding of property rights to the protection of personal rights. In enforcing the liberties guaranteed by the Bill of Rights, the Supreme Court forged a new and vital place for itself in the constitutional structure. More and more the court came to display its solicitude for individual rights. Freedom of speech, press, and religion, subjected to legislative and administrative inquisitions – all came under the Warren Court's fostering guardianship.[94]

The expansion of judicial human rights protection quickly became the hallmark of the Warren Court; and two cases from that era illustrate the Court's aim of realising equality before the law – regardless of race, social standing or financial ability. In the 1956 *Griffin v. Illinois*,[95] for instance, the Court granted the applicant a motion to get a free court transcript, arguing that

> [t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.[96]

And in *Gideon v. Wainwright*,[97] which considered the right to legal representation, the Court stated

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hopes too much upon constitutions, upon laws and upon courts. These are false hopes, believe me, these are false hopes".

89 Koopmans (2003), at 274.

90 *See* section 3.1.1.1 above.

91 *See* Schwartz (1993), at 126-146. For instance, one of the first actions taken by Congress after the war was to overturn the *Dred Scott* decision.

92 *Plessy v. Ferguson*, 163 U.S. 537 (1896).

93 *See* section 3.2.1.1 above.

94 Schwartz (1993), at 227.

95 *Griffin v. Illinois,* 351 U.S. 12 (1956).

96 Id.

97 *Gideon v. Wainwright,* 372 U.S. 335 (1963), at 344.

> reason and reflection requires us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.[98]

The Warren Court also expanded human rights protection to other areas, such as criminal procedure – as the discussion of *Miranda v. Arizona* in the previous chapter illustrated.[99]

Justice Fortas described the Warren Court era as "the most profound and pervasive revolution ever achieved by substantially peaceful means";[100] while Schwartz noted that the Warren era was the "rarest of all political animals", namely:

> […] a judicially inspired and led revolution. Without the Warren court decisions giving ever-wider effect to the right to equality before the law, most of the movements for equality that have permeated American society would have encountered even greater difficulties.[101]

Such praise for the Court is undoubtedly deserved; but, to be sure, the broad human rights protection sparked by the Warren Court also required extensive political developments, culminating in the adoption of the (federal) Civil Rights Act of 1964.[102]

The human rights 'revolution' was, in many respects, continued by the Burger Court, despite expectations from within some political circles that the Burger Court would see to the "dismantling of the jurisprudential edifice erected by the Warren Court, particularly in the field of criminal justice".[103] For instance, both *Eisendstadt v. Baird*, and *Roe v. Wade* were decided in the Burger era.[104] As far as Equal Protection cases were concerned, the Burger Court was unanimous that "racial classifications are suspect and must be subject to strict scrutiny under which the classification will be held to deny equal protection unless justified by a 'compelling' government interest".[105] Moreover, in *Craig v. Boren*,[106] the Court ruled that "gender classifications were subject to stricter scrutiny than the rational-basis test governing economic classifications," thereby creating a 'quasi-suspect' classification, that would be "subject to an intermediate review standard".[107] In applying this standard,

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98 Schwartz (1993), at 280.
99 *See* section 3.2.1.2 above.
100 Schwartz (1993), at 279, quoting Justice Fortas in Fourteenth Amendment Centennial Volume 34 (Ed. Schwartz, 1970).
101 Schwartz (1993), at 279.
102 *See* Koopmans (2003), at 48-49. *And see* discussion in section 4.2.4.1.
103 Schwartz (1993), 314.
104 *See* section 3.2.1.2 above.
105 Schwartz (1993), at 326.
106 *Craig v. Boren,* 429 U.S. 190 (1976), at 197.
107 Schwartz (1993), at 326.

> the Court struck down discriminatory classifications in education, dependent benefits, clubs, alimony, estate administration, and jury selection. Indeed, it can be said that the removal of sexual disabilities in our constitutional law was almost entirely the handiwork of the Burger Court.[108]

Small wonder, then, that the Burger Court had been described as "the counter-revolution that wasn't".[109]

With the advent of the Rehnquist Court in the mid-1980s, a marked slow-down of judicial expansion in the area of judicial human rights protection can be observed.[110] By that time, however, human rights protection had become a deeply entrenched outcome of judicial oversight in the American constitutional system – see e.g., the discussion of *Planned Parenthood v. Casey* in the previous chapter.[111] The Court had "gradually relinquished the rule that the Bill of Rights was not binding on the states," thus "bringing the states up to the federal standards as developed" by the Supreme Court (i.e., 'incorporation').[112] Moreover, where the Court had initially adopted a "selected approach" – hence, only granting rights it considered to be 'fundamental' judicial protection under the Due Process clause – over time "almost every right protected by the Bill or Rights was held to be fundamental […]".[113]

4.2.1.2. The role of the Court in times of war

An issue the Supreme Court – and the United States judiciary in general – has long been struggling with, is how to balance human rights protection against greater concerns of national security. For example, the Supreme Court grappled with this issue during World War II when the government interred U.S. citizens of Japanese origin in the aftermath of Pearl Harbor. For the greatest part of the War period, the Court refused to provide its own citizens

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[108] Schwartz (1993), at 326-327. But the Burger Court drew the line at treating other factors as 'suspect', *e.g.*, wealth and mental retardation.

[109] *See* V. Blasi (Ed.), The Burger Court: The Counter-Revolution that Wasn't (1983).

[110] Schwartz (1993), at 367, stating that Rehnquist has succeeded in calling "'a halt to […] the sweeping rules made in the days of the Warren Court'" (quoting from New York Times Magazine, 3 March 1985, at 33) – adding that it was "not only a halt, but a rollback of much of the Warren jurisprudence. The Rehnquist conservative program has included enlargement of government authority over individuals, a check to the expansion of criminal defendants' rights, limitations on access to federal courts, and increased emphasis on protection of property rights. As Chief Justice, he has finally been in a position to advance his conservative agenda." The jury is still out on the Roberts Court (since 2003), though early indications are that, with the current sitting Justices, it will continue along the vein of the Rehnquist Court.

[111] *See* section 3.2.1.2 above.

[112] Koopmans (2003), at 50-51.

[113] Koopmans (2003), at 51.

with redress.[114] For instance, in *Korematsu,*[115] and similarly in *Hirabayashi*,[116] the applicants challenged the constitutionality of the detention of Japanese Americans because of its discriminatory basis. The Supreme Court rejected this argument, ruling that Korematsu was not detained "because of hostility to him or his race" but "because we are at war with the Japanese Empire".[117] Moreover, the Court attempted to legitimize the government's decision to detain all Japanese Americans because it "was impossible to bring about an immediate segregation of the disloyal from the Loyal".[118]

Mark Twain once said that history does not necessarily "repeat itself"; but it "rhymes". The Supreme Court faced a similar dilemma during the Cold War, in the height of the McCarthy era.[119] Again, the Court appeared to be slow off the mark in protecting individual rights, as *Dennis v. United States* illustrates.[120] In this case, the Supreme Court confirmed the conviction of Mr Dennis (who was a leader in the U.S. Communist party at the time) for conspiring to overthrow the government, over the claimant's objection that his actions were protected by the First Amendment. The Court justified its ruling, stating that courts must determine "whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as necessary to avoid the danger".[121]

Since the terrorist attacks on U.S. soil on 11 September, 2001, the United States government, and the executive branch in particular, has asserted vast powers to combat the 'war against terror', including powers to detain citizens and non-citizens alike without trial. While the judiciary first seemed to pay (some have argued, excessive) deference to the political branches, there are promising signs that the federal courts, including the Supreme Court, have remembered some lessons from the past. In *Hamdi v. Rumsfeld*,[122] for instance, the Supreme Court ruled that Hamdi (a U.S. citizen who had been captured in Afghanistan, and detained in various facilities, including the controversial U.S. military facility in Guantánamo Bay in Cuba – without trial) had the right

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114 Roosevelt (2006), at 218.
115 *Korematsu v. United States*, 323 U.S. 214 (1944).
116 *Hirabayashi v. United States,* 320 U.S. 81 (1943).
117 *Korematsu v. United States*, 323 U.S. 214 (1944), at 223.
118 *Korematsu v. United States*, 323 U.S. 214 (1944), at 219.
119 Senator McCarthy launched, what was considered (in retrospect) to be a witch-hunt against various (prominent) U.S. citizens accused of supporting communism. *See e.g.,* Schwartz (1993), at 256-258, on the Supreme Court and the Cold War era.
120 *Dennis v. United States*, 341 U.S. 494 (1951). For a critical discussion on *Dennis* and the Court's role in the McCarthy era *see* in general E.V. Rostow, *The Democratic Character of Judicial Review*, 66:2 Harvard Law Review 193 (1952).
121 Id.
122 *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

> to a hearing before some impartial decision-maker, at which time he could challenge the facts that Executive officials claimed as a basis for his imprisonment.[123]

Rasul v. Bush[124] concerned a similar situation, but with the important exception that Rasul was not a U.S. citizen. The question before the Court, then, was whether the United States Constitution afforded non-citizens held in Guantánamo Bay similar protection. The situation has not been resolved completely at the time of writing, but in *Rasul*, the Court seemingly rejected the U.S. government's argument that "neither U.S. law nor the Constitution placed any constraints on how the Executive dealt with foreigners abroad". The Court's ruling appeared to suggest that "foreigners held in Guantánamo are entitled to a day in court, though what rights they might assert remains unclear".[125]

It is perhaps easy, with the benefit of hindsight, to criticize decisions such as *Dennis* and *Korematsu*. The fact remains that, during times of war or other 'imminent' (or perceived) threats to national security, courts have to strike a balance between showing deference to the government (as 'national security' belongs to the decision-making realm of the political institutions) and to protecting individual rights – and that balance is by no means easy to attain. The danger, however, as Rostow had pointed out more than 30 years ago when he commented about the Court's decision in the *Dennis* case, is that

> [r]uin can come to a society not only from the furious resentments of a crisis. It can be brought about in imperceptible stages by gradually accepting, one after another, immoral solutions for particular problems.[126]

And it is particularly the role of the courts, through the exercise of judicial oversight, to prevent gradual slippage to a state where human rights abuses are justified in the name of national security.

4.2.2. European Court of Justice

The original treaties that established the European Communities did not include the protection of fundamental human rights as an objective. In fact, as with all regimes aimed at advancing free trade and economic integration, the protection of human rights might stand in direct opposition to some of the economic

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123 Id. *Also see* Roosevelt (2006), at 76-77.

124 *Rasul v. Bush*, 542 U.S. 466 (2004). *Also see* S. Altaner, *Guantanamo Captives and Iguanas Need Equal Rights, Lawyer Urges*, 30 May 2007, at <http://www.bloomberg.com/apps/news?pid=20601088&refer=muse&sid=afyUSUmXMCAo>, arguing that the iguanas at the military base receive better protection under U.S. law than the detainees (if a soldier accidentally kills an iguana on the Guantánamo Bay base, it is an offence carrying a $10.000 fine).

125 Roosevelt (2006), at 76-77.

126 Rostow (1952), at 207.

and trade provisions associated with the freedom of movement of goods, people and services.[127] Moreover, there is already another treaty in Europe that deals with the protection of human rights – the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) adopted within the framework of the Council of Europe. Nevertheless, as this section will illustrate, the jurisprudence of the ECJ (often echoed in the various EC Treaties adopted over the years) has increasingly reflected a concern for human rights protection, albeit "complementary to the 'key reference'", the ECHR.[128] Some of the Court's cases, while not focusing primarily on human rights, have had some effect on human rights protection (4.2.2.1), while in others, the Court considered human rights aspects more directly (4.2.2.2).

4.2.2.1. Cases resulting in individual rights protection

Since its inception, the ECJ has displayed a predisposition to interpret "rather general or unclear written rules" in the EC Treaties in such a manner that would ensure "the best possible protection of the individual rights of the citizen" within the European Union.[129] This statement can perhaps be questioned in the light of the apparent reluctance of the Court to give broader interpretation to article 230 TEC concerning individual petition right into the legality of EC legislation.[130] In various other instances, however, the ECJ has made a significant contribution to the improvement of EU citizens' individual rights.

For instance, the previous chapter has illustrated how the ECJ has utilised the preliminary reference procedure to develop important Community legal principles such as the supremacy and direct effect of EC law.[131] It is important to note that the effect of the ECJ's rulings in these cases ensured that private parties could secure the realization of individual rights – rights that were formally bestowed on them by the EC Treaties but which they were denied at that point – against their own governments.[132]

In *Internationale Handelsgesellschaft GmbH v. EVGF*,[133] the ECJ noted that

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[127] *E.g.*, protection of intellectual property rights versus the right to health and the freedom of establishment; and services to perform abortions in other states versus the right to freedom of religion.

[128] K. Lenaerts, *Fundamental rights in the European Union*, 25 European Law Review 575, at 578 (2000).

[129] Schwartze (2002), at 22.

[130] *See* section 4.1.2.1 above.

[131] *See* sections 3.1.2.1 and 3.1.2.2 above.

[132] *See* discussion on remedies in section 4.2.4 below.

[133] Judgment of 17 December 1970 in *Case 11/70, Internationale Handelsgesellschaft,* [1970] ECR 1125.

> respect for fundamental human rights forms an integral part of general principles of law protected by the Court of Justice. The protection of such rights, while inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the [European] Community.[134]

In *Nold v. Commission*,[135] the ECJ stated that

> international treaties for the protection of human rights on which Member States have collaborated or of which they are signatories [such as the ECHR], can supply guidelines which should be followed within the framework of Community law.

However, in *Re the Accession of the Community to the ECHR*, the Court noted the fact that the "Community lacked the necessary competence to accede" to the ECHR in its own capacity.[136] The Court's reluctance to engage more directly in human rights protection, however, probably also has to be understood in the context of the "judicial politics" between itself and the European Court of Human Rights, which is the formal guardian of the ECHR.[137]

4.2.2.2. Cases concerning human rights protection

An example where the Court's jurisprudence contributed to the realization of a specific fundamental right is the Court's role in realizing the "equal treatment of men and women" as a "fundamental legal principle of Community law".[138] In *Defrenne v. Sabena*,[139] for instance, the ECJ effectively expanded the right of equal treatment of men and women by ruling that article 141 TEC (which provides for "equal pay for work of equal value") had both vertical and horizontal direct effect.[140] In *Deutsche Post AG v. Sievers and Schrage*[141] the Court solidified this position by ruling that the "economic aim of article

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[134] Coles (2003), at 72.

[135] Judgment of 14 May 1974 in *Case 4/73, Nold v Commission*, [1974] ECR 491.

[136] Opinion of 28 March 1996 in *Case 2/94, Accession by the Community to the ECHR*, [1996] ECR I-1759. *Also see* Coles (2003), at 72.

[137] *See e.g.*, Dehousse (1998), at 169-170.

[138] Articles 136-148 TEC. *Also see* Coles (2003), at 233.

[139] Judgment of 8 April 1976 in *Case 43/75, Gabrielle Defrenne v Société anonyme belge de navigation aérienne SABENA (Defrenne II)*, [1976] ECR 455.

[140] *I.e.*, between private parties and between a private party and public authorities. For a discussion of the direct effect of EC Directives, s*ee* section 3.2.2.2 above. Other cases of note in this regard include judgment of 30 April 1996 in *Case 13/94, P v S and Cornwall County Council*, [1996] ECR I-2143; judgment of 27 March 1980 in *Case 129/79, Macarthys Ltd v Smith*, [1980] ECR 1275; and judgment of 31 March 1981 in *Case 96/80, Jenkins v Kingsgate (Clothing Productions) Ltd*, [1981] ECR 911. *Also see* Coles (2003), at 234.

[141] Judgment of 10 February 2000 in *Joined Cases C-270 & 271/97, Deutsche Post AG v Sievers & Schrage*, [2000] ECR I-929.

141" has now become "secondary to its social aim"; thus reflecting that "equal treatment is a fundamental human right within Community law".[142]

In the recent landmark case of *Kadi v. Council and Commission*,[143] the ECJ considered the "EC's implementation of a UN Security Council Resolution which had identified [the applicants] as being involved with terrorism and had mandated that [the applicants'] assets be frozen".[144] The UN Security Council measures in question have been criticized for some time for not meeting due process standards.[145] The Court ruled – and controversially so – that the jurisdiction of the European Community's judiciary extended to reviewing "measures adopted by the Community giving effect to resolutions of the Security Council of the United Nations".[146] Thus, in reviewing the EC measures in question,[147] the Court ruled that they had infringed the Applicants' "fundamental rights under Community law" due to various due process concerns.[148] Also controversially, the Court adopted a distinct dualist view of international law, arguing that the

> UN Charter and UN SC Resolution, just like any other international law, exist on a separate plane and cannot call into question or affect the nature, meaning or primacy of fundamental principles of EC law.[149]

Moreover, the Court affirmed that even if the obligations flowing from the UN Charter were considered to be part of the "hierarchy of norms within the Community legal order", they would

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[142] Coles (2003), at 234.

[143] Judgment of 3 September 2008 in *Joined Cases C-402/05 P & C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission*, [2008] ECR I-0000.

[144] *See* G. de Búrca, *The European Court of Justice and the International Legal Order after Kadi*, 1 Jean Monnet Papers, at 2 (2009), at <http://www.jeanmonnetprogram.org/papers/09/090101.pdf>.

[145] *See e.g.*, in general, A. Reinisch, International Organizations Before National Courts (2008); *and see* A. Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, 95 American Journal of International Law 851 (2001). *Also see* M. Bothe, *Security Council's Targeted Sanctions against Presumed Terrorists: The Need to Comply with Human Rights Standards*, 6:3 Journal of International Criminal Justice 541 (2008).

[146] *Joined Cases C-402/05 P & C-415/05 P, Kadi & Al Barakaat v. Council and Commission*.

[147] Council Regulation 881/2002, OJ 2002 L 139: "Imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation 467/2001 […]."

[148] The Court ruled that "the principle of effective judicial protection has been infringed", and that the regulation imposed an "unjustified restriction of (the) right to property." *See* J.C. Brisard, *The European Court of Justice Challenging the UN Terrorism Sanctions Regime: A Legal Perspective*, 8 September 2008, at <http://www.analyst-network.com/article.php?art_id=2416>.

[149] De Búrca (2009), at 35; *and see* discussion of the supremacy of EC law over national law in section 3.1.2.2 above.

> rank higher than legislation but lower than the EC Treaties and lower than the 'general principles of EC law' which have been held to include 'fundamental rights'.[150]

While the *Kadi* case has been criticized for its potentially adverse impact on the relationship between EC law and international law, and while it has left many questions unanswered,[151] the significance of the case for the strengthening of human rights protection within the context of EC law cannot be denied.[152]

4.2.3. South African Constitutional Court

The South African Constitutional Court's invaluable contribution to enhancing the justiciability of socio-economic rights has already been discussed in the previous chapter.[153] While it is an example of judicialization, the effect of making socio-economic rights more justiciable has also been the realization of specific individual rights. This section will focus on two different aspects concerning judicial human rights enforcement in the South African context. The systematic human rights abuses that occurred under Apartheid are well known and documented.[154] However, a related topic that is perhaps not so widely discussed outside South African legal circles is the failure of the Apartheid-era judiciary to safeguard human rights. This section will briefly consider the judicial legacy under Apartheid (4.2.3.1), before looking into a particular aspect that the post-Apartheid judiciary has to deal with when enforcing human rights, namely, how to deal with existing 'common' and 'customary' law (4.2.3.2).

4.2.3.1. A troubling judicial legacy

Unlike the position in the United States, where the judiciary played a major role placing civil and political rights on the national agenda,[155] the South African judiciary, at best, had no influence in the political revolution that started in the late 1980s in South Africa and culminated in the first democratic elections of 1994. At its worst, the Apartheid-era judiciary strengthened the Apartheid regime, because it played a central role in upholding the (illegitimate) 'rule of law'.[156]

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[150] *Joined Cases C-402/05 P & C-415/05 P, Kadi & Al Barakaat v. Council and Commission*, at §§305-308.
[151] De Búrca (2009), at 1-2.
[152] De Búrca (2009), at 44-45.
[153] *See* section 3.2.3.1 above.
[154] *See e.g.* in general A. Krog, Country of My Skull (1998).
[155] *See* section 4.2.1.1 above.
[156] It is hardly surprising, then, that two major research projects in the early 1980s found that

It has been widely debated in South African legal circles what the Apartheid-era judiciary could or should have done to protect human rights in the context of South Africa's sovereignty of Parliament model (which did not allow for any form of judicial oversight, as defined in this book).[157] This topic, though highly interesting, falls outside the parameters of this discussion. More relevant for present purposes, however, is how the case law from the Apartheid era illustrates the adverse effects on individuals when a judiciary is completely disengaged from any form of oversight, thus allowing political institutions complete discretion.

For most judges of the Apartheid era, 'sovereignty of parliament' meant that courts could only enforce the law as parliament had created it – *ius dicere non facere*, in other words.[158] Justice Friedman explained this position in *S v. Ramgobin* as follows:

> […] whether I like the provisions and whether good reason exists for Parliament to have decreed them is irrelevant. According to our Constitution […] Parliament is supreme. It can, by simple majority, pass whatever law it desires and the Courts cannot gainsay its power to do so. It might be suggested that it is undesirable that this should be so, that there is not, for example, in

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the South African legal system was experiencing a large-scale legitimacy crisis because the majority of the population did not trust the law or the judiciary's application thereof. Those were, the 1981 RGN and 1983 Hoexter Commission reports. *See* D. Kleyn & F. Viljoen, Beginnersgids vir Regstudente, at 46 (1996). *Also see* in general D. Dyzenhaus, Judging the Judges, Judging Ourselves (1998).

[157] For a summary of the various arguments *see* (now Constitutional Court Judge) Edwin Cameron's submission to the Truth and Reconciliation Commission on the role of the judiciary during Apartheid *in* E. Cameron, *Submission on the Role of the Judiciary Under Apartheid*, 115 South African Law Journal 436 (1998). *Also see* J.W. Pitts, *Judges in an Unjust Society: The Case of South Africa*, 15 Denver Journal of International Law & Policy 49 (1986-1987). *See also* J. Dugard, *The Judicial Process, Positivism and Civil Liberty*, 88 South African Law Journal 181 (1971); *and* J. Dugard, *Some Realism About the Judicial Process and Positivism – A Reply*, 98 South African Law Journal 372 (1981). Grant Gilmore offered three choices that judges operating in unjust systems could follow, namely, a judge could resign; offer him or herself as a "candidate for impeachment" by refusing to implement the unjust law; "evade the issue" by dismissing the case on some technicality; or "enforce the law with death in his heart – because it is the law […]." *See* G. Gilmore, The Ages of American Law, at 37-38 (1977). Other commentators argued that judges sympathetic to human rights should rather stay on the bench and 'do what they could' in order to soften, if not combat, the devastating effects of the Apartheid government's legislation and executive actions. Judge Sachs of the South African Constitutional Court explained, for instance, that when he was a practising advocate, he was "very happy to see certain members on the Bench" because "[i]t saved people's lives, it enabled us, it gave us the space to expose torture, it humanized society just that little bit." *See* Judicial Service Commission Interview with A. Sachs, 4 October 1994, at <http://www.constitutionalcourt.org.za/site/judges/transcripts/albertlouissachs.html>.

[158] The South African 'version' of the sovereignty of parliament model differed, of course, from the Westminster model in one important way: South Africa's parliaments, under Apartheid, were not democratically elected. *See* Loveland (1999), Chs. I-V for a constitutional history of South Africa during its colonial and post-colonial years.

> our Constitution something in the nature of an entrenched bill or rights against which the constitutionality of Acts of Parliament can be measured; but this too is by the way for present purposes.[159]

To be sure, there were some "judicial 'responses' to Apartheid"[160] that were not supportive of the Apartheid regime, even though it may be questioned whether those responses actually protected the "interests of all those who appeared before it, regardless of racial origin".[161] For example, in the 1949 *Radebe v. Hough* case, concerning the payment of damages for pain and suffering to a black South African (a 'native', as black South Africans were called in more polite conversation), the judge in the lower court justified the "low sum awarded, notwithstanding the gravity of the injury",[162] as follows:

> […] one must take into consideration the standing of the person injured. For instance, in the case of a native […] I should most certainly not award the same amount for pain and suffering as I would for the same pain and suffering of a person who had more culture and, for instance, I would award a larger sum for damages in the case of an injury to a European woman than I would for a native male […].[163]

The Appellate Division unanimously rejected the argument, ruling that a "plaintiff's experience of physical injury" could "[m]ost decidedly" not "be determined by reference to his race".[164]

4.2.3.2. Human rights enforcement in terms of 'common' and 'customary' law

The political revolution of 1994 also resulted in a judicial one: under the post-Apartheid Constitutions, the judiciary was finally given the "devil's power" of *toetsingsbevoegdheid* so abhorred by President Paul Kruger.[165] Courts

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[159] *S v. Ramgobin and Others*, 1985 (3) SA 587 N. *Also see S v. Adams*, (91/86) [1986] ZASCA 82; [1986] 2 ALL SA 602 A; and *S v. Werner*, 1981 (1) SA 187 A.

[160] Loveland (1999), at 248 – 256.

[161] Loveland (1999), at 257, quoting H. Corder, Judges at Work: The Role and Attitudes of the South African Appellate Judiciary, 1910-50, at 168 (1984). Loveland argues that Corder's criticism "seems rather overstated".

[162] Loveland (1999), at 249.

[163] *Radebe v Hough*, 1949 (1) SA 380 A.

[164] *Radebe v Hough*, 1949 (1) SA 380 A, at 385. Other cases where the judiciary arguably showed (a degree of) resistance to Apartheid policies include *Sachs v Donges*, 1950 (2) SA 265 A; and *R v Abdurahman*, 1950 (3) SA 136 A – *see* Loveland (1999), at 250-256.

[165] President Paul Kruger, then President of the *Boer* South African Republic, in response to *Brown v. Leyds* (in which the High Court of the South African Republic exercised a rudimentary form of judicial review) was quoted as saying that the judicial 'testing authority' (judicial review) was a principle of "the devil itself". *See* I. Loveland (1999), at 45-47 for a discussion on *Brown v. Leyds*, 1897 (4) OR 17. *Also see* J. Dugard, Human Rights and the South African Legal Order, at 20-23 (1978).

could finally review the constitutionality of decisions made by the legislative and executive bodies. However, the new constitutional regime had not eradicated existing South African 'common law'[166] and 'customary law'.[167] An interesting feature of South African human rights jurisprudence, therefore, is that the judiciary has to "develop" or reinterpret South African common and customary law to "promote the spirit, purport and objects of the Bill of Rights".[168]

Two such cases, *Carmichele v. Minister of Safety and Security*[169] and *Bhe and others v. President of RSA*[170] illustrate this approach. In *Carmichele*, the applicant was brutally assaulted by a known offender who was awaiting trial for attempted rape, but who was nevertheless released without bail, on recommendation of the prosecutor and the police. Ms. Carmichele sued the Ministries of Safety and Security, and Justice for damages under the existing common law area of *delict* – through which an applicant can claim damages for injury from both public and private parties. The case was dismissed by the lower courts, holding that the applicant failed to prove that the respective ministers had not met a "specific duty of legal care" towards her personally, as was required by the common law position. In appeal, the Constitutional Court reversed the lower court decision, stating that is was

> common ground that the State's obligations in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions.[171]

Therefore, the

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[166] In the South African context, this term refers to what is essentially a mixture of 'Roman Dutch' and English law – a reflection of South Africa's colonial past.

[167] South African common law and customary law have co-existed in various forms throughout South Africa's colonial and post-colonial history. The adoption of the post-Apartheid Constitutions had not erased these existing legal systems. Instead, the political parties involved in the formulation of the Post-Apartheid Constitutions have opted for the inclusion of an incremental approach that would redevelop existing common and customary law in the light of new human rights standards since erasing these existing systems would have created immense legal uncertainty. *See* I. Currie & J. de Waal, The Bill of Rights Handbook, at 67-69 (2005).

[168] *See* section 39(2) of the Constitution. In some sense, this obligation is comparable to the obligation created by the UK's 1998 Human Rights Act, which requires the judiciary to interpret existing domestic law in such a way that it is compatible with the European Convention on Human Rights as far as possible. *See* D. Oliver, Constitutional Reform in the UK, at 112-119 (2003). *Also see* the ECJ's doctrine of 'indirect effect', which entails that 'national law must be interpreted in conformity with' unimplemented EC Directives, so as to provide relief to a private party applicant a horizontal position. *See* section 3.2.2.1 above.

[169] *Carmichele v. Minister of Safety and Security,* 2001 (4) SA 938 (CC).

[170] *Bhe and Others v. The Magistrate, Khayelitsha and Others*, 2005 (1) SA 580 (CC).

[171] *Carmichele v. Minister of Safety and Security*, 2001 (4) SA 938 (CC), §45. The Court refers here to *Osman v. United Kingdom*, ECHR (1998) Reports 1998-VIII, §115.

> Constitution required the common law of delict to be developed to recognize that the state had a duty of care to protect individuals from unlawful life-threatening attacks by another private person.[172]

The Constitutional Court ruling enabled Charmichele to have her case reopened in the lower courts so that it could be determined whether, on the facts, the respective ministers should be liable for damages.[173]

The *Bhe* case concerned gender equality and the implications of this constitutional right for South African women of African ethnic origin, to which the African customary law of intestate succession was applicable under certain circumstances. Ms Beh's father died intestate – thus, in customary law terms, without any direct male descendants. In terms of the existing customary law at the time, African women could not inherit in such circumstances.[174] The Constitutional Court thus had to determine how to bring this particular aspect of customary law in line with the Bill of Rights, without losing everything that makes customary law unique – and part of the national heritage. The Court opted for a significant reinterpretation of the customary law rule when it ruled that the provision in question was an "anachronistic piece of legislation which ossified 'official' customary law and caused egregious violations of the rights of black African persons". Seen in the light of the constitutional guarantee of gender equality, African women therefore had the right to inherit in intestate succession cases.

4.2.4. Remedies

An additional outcome of judicial oversight that often flows from the protection of human rights is the development and (to a lesser extent) the enforcement of specific judicial remedies, aimed at providing redress to adversely affected private parties.[175] This section will consider examples from the United States Supreme Court (4.2.4.1), European Court of Justice (4.2.4.2), and the South African Constitutional Court (4.2.4.3) concerning the role of the judiciary in developing and enforcing effective legal remedies.

4.2.4.1. United States Supreme Court

Brown v. Board of Education illustrates that the controversy of a human rights case often lies with the remedy and to a lesser degree with the substance of the case. As mentioned earlier, an important compromise Chief Justice Warren

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172 Currie & De Waal (2005), at 285.
173 Id.
174 Section 23 of the 1927 *Black Administration Act*.
175 *See* section 2.2.2.1 above.

brokered early on during the Court's conferences discussing *Brown*[176] was to separate the substantive ruling from the remedy. Hence, what is known in the mainstream as *Brown v. Board of Education* ('*Brown I'*),[177] dealt only with the substantive issue whether or not the 'separate but equal' doctrine was constitutional in the context of education. '*Brown II*' – a separate case – would deal with the remedy.[178]

Warren was criticised by some for splitting the case in two, but this step proved to be crucial in obtaining a unanimous ruling in *Brown I* – something that was a crucial first step for civil rights litigation in general.[179] Having dealt with the substantive matter conclusively in *Brown I*, the Court could therefore proceed with addressing the question *how* desegregation in education was to be accomplished – an issue which was, for many, a much bigger problem. Indeed, many Americans were in principle supportive of the Court's overruling of *Plessy*, but they feared the "political quagmire" – predicted by many – that would follow if the Court should order the *direct* desegregation of *all* schools.[180]

In *Brown II*, the Supreme Court followed a more cautious approach when it ordered the desegregation of schools to occur "with all deliberate speed" by way of structural interdict, which required the addressees of the interdict to report to the Supreme Court, at structured intervals, on progress regarding executing the Court's order.[181] Structural interdicts, as Fletcher remarked, are "the judicial analogue to administrative or executive action – the implementation of a general command in a particular setting".[182] However, as the aftermath of the *Brown* cases illustrates, courts are often stymied in their enforcement efforts, regardless of their use of remedies such as structural interdicts that allow for greater judicial influence over the enforcement process. Essentially, state legislatures developed their own interpretation of "with all deliberate speed", and in many instances, the phrase came to mean "no speed". Ultimately, the executive had to step in to address the "enforcement gap" that developed in the aftermath of *Brown II*: President Eisenhower had to send state troopers to Arkansas to protect the nine black children who wanted to attend an all-white

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176 That is, the second Brown conference held by the Court after first hearing the case. When Warren became Chief Justice, the Court had already held a conference to discuss the case.

177 *I.e.*, *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

178 *I.e.*, *Brown v. Board of Education,* 349 U.S. 294 (1955).

179 Schwartz (1993), at 288. Schwartz notes that despite splitting the case in two, Warren did not completely postpone the discussion of the remedy during the *Brown* Conferences. Instead, Warren managed to set aside debates about the substance outcome of the case and to frame the focus of the debate inside the Court on how to accomplish desegregation in schools. In other words, instead of debating whether or not the Supreme Court should overrule Plessy, it just became a matter of *how* and *how fast*? *See* above, note 69 (Ch. 2).

180 Schwartz (1993), at 288.

181 *Brown v. Board of Education,* 349 U.S. 294 (1955).

182 W.A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 Yale Law Journal 635, at 644-645 (1982).

school.[183] The Supreme Court finally closed the enforcement gap some 15 years later with the Burger Court's decision in *Alexander v. Holmes County Board of Education* (1969)[184] that ordered schools to desegregate "at once […] and immediately to operate as unitary school systems".[185]

Powe makes the point that, given the enforcement issues illustrated by *Brown*, human rights protection cannot be realized without a partnership between the judiciary and the political institutions.[186] While the Warren Court is often credited for the civil rights revolution in the United States, it required an (objective) partnership between the Warren Court and the Kennedy administration – as reflected in the adoption of the 1963 Civil Rights Act), to make judicial human rights protection – including remedies – a social reality.[187]

4.2.4.2. European Court of Justice

The previous chapter has illustrated how the ECJ had developed the legal principles of direct effect and the supremacy of EC law.[188] As mentioned earlier, those developments also had some (indirect) remedial effect since they opened the possibility for private parties to secure their individual rights – rights that the EC Treaties had legally bestowed on them, but which they were effectively denied at that point – from their own governments.[189] In practice, however, the Court's rulings often failed to result in any meaningful compensation for private parties.[190] The ECJ addressed the issue in an incremental fashion, and over a number of years, that ultimately culminated in the establishment of the 'state liability' remedy for individuals which have been adversely affected by member state infringement of EC law.[191]

There are no provisions in the EC Treaties that provide private parties with any general or specific remedy in cases of (proven) member state infringement of EC law. The original approach of the ECJ was to leave the matter of providing remedies for breaches of EC law up to the domestic courts. Indeed, the Court made it clear in early cases addressing this issue that national courts were not required to create a specific (new) remedy for breaches of EC law.[192] The Court's only proviso was that remedies granted to

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183 *See* Koopmans (2003), at 47.
184 *Alexander v. Holmes County Bd. of Ed.*, 396 U.S. 19 (1969).
185 *Alexander v. Holmes County Bd. of Ed.*, 396 U.S. 19 (1969), at 20.
186 Powe (2003), at 716.
187 *Also see* criticism that courts cannot effect real social change *in* G.N. Rosenburg, The Hollow Hope: Can Courts Bring About Social Change? (1991).
188 *See* sections 3.1.2.1 and 3.2.2.1 above.
189 *See* section 4.2.2.1 above.
190 Coles (2003), at 137.
191 For a discussion of the infringement procedure, *see* section 4.1.2.1 above.
192 Coles (2003), at 135.

private parties as result of a breach of EC law should be "available under the same conditions as it was for a breach of national law".[193] As this approach resulted in a lack of uniformity throughout the European Community, the ECJ started to formulate more specific guidelines to national courts. For instance, in *Sagulo, Brenca and Bakhouche*[194] the ECJ ruled that national remedies should "not be disproportionate to the nature of the offence committed", and in *Von Colson and Kamann v. Land Nordhein-Westfalen*[195] the Court added that such remedies had to be "effective" and "adequate".

In the *Factortame* case,[196] the ECJ built on its previous case law, ruling that national courts were under an obligation to provide effective and adequate remedies to individuals in cases of proven (member state) infringement of EC law. In *Factortame*, a case originating from the United Kingdom, the ECJ's ruling meant that UK courts had to set aside any rule of domestic law that might make it impossible for the domestic courts to provide such a remedy for the breach of EC law. Clearly, this was not an easy ruling for UK courts to accept or implement since the UK has a 'sovereignty of parliament' constitutional system.[197] Many uncertainties remained in the aftermath of *Fatortame*, especially regarding the requirement that domestic remedies had to be "effective".[198]

Eventually, the ECJ embarked on a new approach in the *Francovich* case[199] when it created a new, European Community-specific remedy (the 'state liability' remedy) for private parties that have suffered injuries as a result of member state infringement of EC law. The Court based this legal development on article 10 TEC, which requires member states to "take all appropriate measures […] to ensure fulfilment of the obligations arising out of this [EC] Treaty". The Court argued that the effectiveness of the rights of individuals in terms of EC law "would be significantly undermined if individuals were denied compensation when their rights had been infringed" by the unlawful

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[193] Id. Also see judgment of 16 December 1976 in *Case 33/76, Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, [1976] ECR 1989.

[194] Judgment of 14 July 1977 in *Case C-8/77, Concetta Sagulo, Gennaro Brenca and Addelmadjid Bakhouche*, [1977] ECR 1495.

[195] Judgment of 10 April 1984 in *Case 14/83, Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, [1984] ECR 1891.

[196] Judgment of 19 June 1990 in *Case C-213/89, The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, [1990] ECR I-2422.

[197] *Factortame* was a UK case that was referred to the ECJ via the preliminary reference procedure by the House of Lords. At issue was whether the domestic court was obliged – under EC law – to provide the applicants with interim relief. In terms of domestic law, UK courts could not provide such an injunction against the crown. *See* Coles (2003), at 136.

[198] Coles (2003), at 137.

[199] Judgment of 19 November 1991 in *Joined Cases 6/90 & 9/90, Andrea Francovich and Danila Bonifaci and others v Italian Republic*, [1991] ECR I-5357.

actions of member states.[200] Although *Francovich*, again, left several questions unanswered,[201] most of these issues were clarified by subsequent cases.[202]

4.2.4.3. South African Constitutional Court

While the Constitutional Court has been largely successful in make socio-economic rights justiciable, the Court has been experiencing some difficulty in formulating effective, enforceable remedies.[203] The Court's decision in *Grootboom*, for instance, did little to ameliorate the housing conditions of the *Grootboom* applicants.[204] A large part of the problem is that many of the traditional remedies available to constitutional courts (such as "declaratory relief, prohibitory interdicts, and mandatory orders") are inappropriate in cases involving socio-economic rights.[205] The Constitutional Court has specifically been hesitant to use structural interdicts in the context of socio-economic rights.[206] Many commentators have criticized the Court for its reluctance in this regard,[207] but as Brand noted, the Court's hesitancy can be justified because

> [s]tructural interdicts have to be carefully crafted indeed to be effective. More importantly, structural interdicts have the potential to erode the legitimacy of the Court, both because they directly and on an ongoing basis place the Court in confrontation with the executive, and can involve the Court in the day to day management of public institutions, something at which it is almost bound to fail.[208]

Interestingly, many of the remedies developed by South African Constitutional Court – concerning a broad spectrum of constitutional rights – reflect a

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[200] Coles (2003), at 138.

[201] *E.g.*, whether all organs of state could be liable or whether the remedy was only to be granted in cases of a breach of an EC Directive (as was the case in *Francovich*). *See* Coles (2003), at 139.

[202] Primarily in the judgment of 5 March 1996 in *Joined Cases 46/93 & 48/93, Brasserie du Pêcheur SA v Bundesrepublik Deutschland*; and *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, [1996] ECR I-1029.

[203] M. Ebadolahi, *Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa*, 83:5 New York University Law Review 1565, at 1579 (2008).

[204] *See* Wickeri (2004), at 21-25 for a discussion of the impact of the *Grootboom* case. *Also see* B. Schoonakker, *Treated With Contempt*, 21 March 2004, at <http://www.queensu.ca/msp/pages/In_The_News/2004/March/23.htm>: "Today, all that the site of Grootboom has to show for [the court] victory is the smelly ablution block, built over a donga that had served as a latrine for the squatters who went to court."

[205] Ebadolahi (2008), at 1590.

[206] Ebadolahi (2008), at 1594-1595.

[207] Ebadolahi (2008), at 1590.

[208] *See* D. Brand & C. Heyns, Socio-Economic Rights in South Africa, at 56 (2005).

spirit of cooperation with government institutions. Put differently, instead of simply (partially) invalidating legislation or executive action found to be unconstitutional; the Court often tries to develop remedies that allow for some political discretion.

Take the issue of same-sex marriages, which came before the court in the *Fourie* case.[209] The applicants challenged the validity of the Marriage Act, which included a formal question that marriage officials had to put to each party, namely: "Do you AB […] call all here present to witness that you take CD as your lawful wife (or husband)?" The applicants contended that the inclusion of the words "wife (or husband)" was unconstitutional since it discriminated against same-sex couples. The main issue, of course, is that same-sex marriages are controversial in South Africa, as elsewhere. Given the sensitivities surrounding the topic, the Court felt that parliament should be involved in the remedial process – especially in order for the substantive issue to gain popular support in the process. In *Fourie*, therefore, the Constitutional Court found the relevant area in the Marriage Act to be unconstitutional, but allowed the legislature one year to amend the Act accordingly. However, the Court also ruled that, should parliament be unable to come to an agreement after conclusion of this period, "Section 30(1) of the Marriage Act 25 of 1961 will forthwith be read as including the words 'or spouse' after the words 'or husband' as they appear in the marriage formula".

4.3. Judicial Legitimization of Political Institutions

Recall that 'legitimacy', as used in the context of the Judicial Oversight Model, focuses on how courts indirectly enhance the sociological and moral legitimacy of political institutions.[210] This section will describe how in the United States Supreme Court (4.3.1), the European Court of Justice (4.3.2), and the South African Constitutional Court (4.3.3) have indirectly strengthened the legitimacy of their respective political institutions by helping them to demonstrate their commitment to human rights, democracy and the rule of law.

4.3.1. United States Supreme Court

Since the conclusion of World War II, and with the onset of the Cold War, the United States has been viewed by many as the 'leader of free world', in large

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[209] *Minister of Home Affairs and Another v. Fourie and Another*, 2006 (1) SA 524 (CC). *Also see*, *Lesbian and Gay Equality Project and Eighteen Others v. Minister of Home Affairs and Others*, 2006 (1) SA 524 (CC).

[210] *See* sections 1.3.4 and 2.2.3 above.

part due to its commitment to democracy, the rule of law, and human rights protection. However, the civil rights movement of the 1950s and 1960s is testimony to the fact that a substantial portion of its citizens questioned the moral and sociological legitimacy of its political institutions because (state and federal) government failed to address blatant racial discrimination.[211] This section will discuss the role of the judiciary in restoring the legitimacy of the legislative and executive powers, specifically concerning the position of the United States as a global leader in the advancement and protection of human rights.

4.3.1.1. Restoring the legitimacy of the U.S. as (global) human rights leader

Brown v. Board initiated a new era of judicial human rights protection, which indirectly also enhanced the legitimacy of the political institutions.[212] However, as has been shown earlier in this chapter, the Supreme Court experienced difficulties with enforcing its desegregation order given in *Brown II*, eventually requiring the help of the Eisenhower administration.[213] The image of nine black children in Little Rock, Arkansas, being escorted to school by armed state troopers did not reflect well on the United State's position as "leader of the free world".[214] In an era where the absolutist nature of state sovereignty (as reflected in the principle that each state was to decide its own internal affairs without interference from other states)[215] was increasingly being questioned, the U.S. was facing growing international pressure to "get its own house in order", particularly in the context of the Cold War.[216] The U.S. Ambassador to the UN told President Eisenhower, for instance, that "[h]ere at the United Nations I can see clearly the harm that the riots in Little Rock are doing to our foreign relations […]. I suspect that we lost several votes on the Chinese communist item because of Little Rock".[217] Moreover, the United State's Cold War archrival, the Soviet Union, used every opportunity to contrast its own socialist, egalitarian society with the "racial terror" that existed in the U.S.[218]

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[211] For a description of the U.S. civil rights struggle, and a history civil disobedience, *see* in general M.L. King Jr. & C. Carson (Ed.), The Autobiography of Martin Luther King, Jr. (1999).
[212] *See* section 4.2.1.1 above.
[213] Id.
[214] *See* M.L. Dudziak, Cold Ward Civil Rights: Race and the Image of American Democracy, at 131 (2000). *Also see* Powe (2003), at 712-713.
[215] *See* UN Charter Article 2(7): "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."
[216] *See e.g.*, Dudziak (2000), at 199.
[217] Dudziak (2000), at 131. *Also see* Powe (2003), at 712-713.
[218] Powe (2003), at 713.

When the Soviets launched Sputnik in October 1957, for example, Radio Moscow daily announced a list of major American cities over which Sputnik had flown. "Those 'major' cities always included Little Rock, Arkansas".[219]

In other words, it can be argued that the continued efforts of the Supreme Court to enforce *Brown II* (culminating, as we have seen, in *Alexander v. Holmes County Board of Education*,[220] ordering schools to desegregate "at once"), and to expand judicial protection to other areas of racial discrimination, not only addressed the issue of racial discrimination *per se*, but also helped to restore the legitimacy of the United States in the eyes of the world. Seen from this viewpoint, the objective partnership between courts and political institutions, which is required to effectively remedy human rights violations, is also born from the need of political institutions to strengthen their own legitimacy.[221]

Following the same argument, the U.S. government also needs the assistance of the judiciary to restore the legitimacy of its anti-terror campaign – given the problems surrounding the protection of civil liberties on U.S. soil and the rights of those detained by the U.S. in Guantánamo Bay.[222] Thus, recent Supreme Court decisions such as *Hamdi v. Rumsfeld*[223] and *Rasul v. Bush*[224] make an important contribution towards restoring the legitimacy of the U.S. government – in particular in many parts of the world where the United States is viewed with distrust or animosity.[225]

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[219] Powe Jr. (2003), at 713, n.132, quoting P. Dickson, *in* Sputnik: The Shock of the Century (2001).

[220] *Alexander v. Holmes County Bd. of Ed.*, 396 U.S. 19 (1969).

[221] *See* section 4.2.4.1 above.

[222] *See* section 4.2.1.2 above. *Also see* Amnesty International's criticism of U.S. human rights abused in its 2008 Annual Report: "Human rights and freedom of the press in China, the detention of terrorist suspects by the United States and Russia's treatment of political dissent are the focus of scrutiny in Amnesty International's annual report", *in China, Russia, U.S. focus of human rights report*, 28 May 2008, at <http://edition.cnn.com/2008/WORLD/europe/05/27/human.rights.report/index.html>.

[223] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). The Supreme Court ruled that process demands that a citizen held on American soil as an enemy combatant should be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker. *See* J. Radack, *Opportunistic use of 'enemy combatant' label*, 15 October 2004, at <http://edition.cnn.com/2004/LAW/10/15/radack.enemy.combatant/index.html>.

[224] *Rasul v. Bush*, 542 U.S. 466 (2004).

[225] *See Supreme Court reverses decision on Guantánamo Bay appeal hearings*, 30 June 2007, at <http://www.ft.com>. The Supreme Court reversed its earlier decision by "deciding to consider whether prisoners held at Guantánamo Bay could challenge their detention in US courts."

4.3.2. European Court of Justice

The European Union – and specifically the "decision-making structure within the EC" – has long been criticised for lacking legitimacy because it suffers from a "democratic deficit".[226] This section will illustrate how the ECJ has helped to address this problem by strengthening the position of the European Parliament – the only organ of the European Union that is directly elected.[227]

4.3.2.1. Reducing the 'democracy deficit'

As Westlake noted, the European Parliament (EP) "was born hungry and frustrated and has developed into an habitual struggler".[228] The ECJ has aided the EP in its struggle for political power when the Court strengthened the EP's position in several of its cases. For instance, in *Roquette Frères v. Council*[229] and *Maizena v. Council*[230] the ECJ affirmed that the EP "had the same right as the other institutions to intervene in any case", and that instances where the Treaty required "consultation of the Parliament", the EP's "opinion had actually to be obtained".[231]

Initially, the EP was not one of the privileged applicants that had "presumed legal standing" to institute a process of judicial review into the legality of EC legal instruments in terms of article 230.[232] At first, the ECJ confirmed this position e.g., in *European Parliament v. Council (Re Comitology)*.[233] A few years after the *Comitology* case, however, the Court reversed its position. In *European Parliament v. Council (Re Chernobyl)*,[234] the ECJ ruled that article 230 should be interpreted so as to include the EP in the category of privileged

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[226] Craig & De Búrca (2003), at 167-175. *See* in general S. García (Ed.), European Identity and the Search for Legitimacy (1993). *Also see* C. Hoskyns & M. Newman (Eds.), Democratizing the European Union (2000).

[227] Since 1979, as per Council Decision 76/787/ECSC, EEC, Euratom, Decision of the representatives of the Member States meeting in the council relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage. *See* Craig & De Búrca (2003), at 172.

[228] M. Westlake, A Modern Guide to the European Parliament, at 28 (1994).

[229] Judgment of 29 October 1980 in *Case 138/79*, *SA Roquette Frères v Council*, [1980] ECR 3333.

[230] Judgment of 29 October 1980 in *Case 139/79, Maizena GmbH v Council*, [1980] ECR 3393.

[231] Craig & De Búrca (2003), at 84-85.

[232] *See* section 4.1.2.1 above.

[233] Judgment of 27 September 1988 in *Case 302/87, Parliament v. Council (Re Comitology)*, [1988] ECR 5615.

[234] Judgment of 4 October 1991 in *Case 70/88, Parliament v. Council (Re Chernobyl)*, [1990] ECR I-2041. Confirmed in judgment of 20 October 1992 in *Case 295/90, Parliament v. Council (Re Student Rights)*, [1992] ECR I-4193.

applicants, under certain conditions;[235] thereby recognising the right of the EP to instigate judicial proceedings under article 230 TEC. Significantly, the Court's *Chernobyl* ruling have subsequently been solidified by the EU's member states through amendments of articles 230 and 232 in the Treaty on European Union.[236]

4.3.3. South African Constitutional Court

As years of Apartheid-rule (under which both the judiciary and the political institutions suffered from a lack of legitimacy) ended with the country's first democratic election in April 1994, there seemed to be no reason for the courts to enhance the legitimacy of the newly established political institutions. Indeed, some commentators have noted the irony of subjecting South Africa's new democratically elected political institutions to judicial oversight, just as the majority in the country gained their liberty.[237] While there might be various other reasons why the continued legitimacy of the post-Apartheid governments may need to be indirectly strengthened by the judiciary,[238] one important motivation seems to be a desire to demonstrate the South African government's commitment to democracy, the rule of law and human rights. This section will illustrate how the Court has assisted the government in 'showcasing' (and also strengthening) its commitment to the rule of law (4.3.3.1), and to participatory democracy (4.3.3.2).

4.3.3.1. Strengthening commitment to the rule of law

The *Certification* cases, discussed in the previous chapter, are primary examples of the legitimizing effect of judicial oversight.[239] The unambiguous acceptance of political bodies (consisting of the ruling party and opposition alike) of the Court's authority to decide something for which there was no historical precedent, and to do so "on grounds which emphasise[d] so clearly

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[235] These conditions were: Parliament had to show a "specific interest in the proceedings"; the objective of the action had to be to safeguard powers of Parliament; and the case had to be solely about infringements of those powers. *See* Coles (2003), at 99.

[236] *See* the consolidated versions of the Treaty on European Union and of the Treaty establishing the European Community, 2002/C 325/01. Also see Coles (2003), at 99, and Craig & De Búrca (2003), at 86.

[237] *See e.g.*, Beatty (2004), at 4.

[238] For instance, to allay fears of (white) minorities – who still yield significant economic power and possess professional skills – the country can hardly do without. Unfortunately, there are many examples on the African continent of failed democracies, and the South African government might need to illustrate its continued commitment to democracy, the rule of law and human rights to attract *e.g.* foreign direct investment.

[239] *See* section 3.1.3.1 above.

that the sovereignty of legislative bodies [was] to be subordinated", sent important signals to sceptics about the new road of democracy and rule of law on which South Africa had embarked.[240] The response of the Inkatha Freedom Party (which vigorously opposed the certification of the constitution in both *Certification* cases) to the outcome of the *Second Certification* case illustrates this point poignantly: "The IFP will live by the new constitution because we are not a revolutionary party. If the court says pigs fly, then they fly".[241]

The issue of land reform and the illegal settlement of homeless people on private property (as illustrated by the *Grootboom* case)[242] is a politically loaded issue in South(ern) Africa. Vast numbers of people are in dire need of land, whether for settlement or agricultural purposes; and the most valuable land remains in the hands of a white minority.[243] While there is widespread agreement that these issues have to be addressed urgently, the manner in which land 'reform' occurred in neighbouring Zimbabwe and the devastating impact it has had on Zimbabwe's economic welfare and political stability, have caused great concern among many South Africans.[244] Moreover, the South African government's failure (at the time) to criticize illegal land grabs and human rights abuses in Zimbabwe,[245] have sparked fears that the land reform situation might also spiral out of control in South Africa and that democracy itself might be in danger as a consequence.[246]

The Constitutional Court did much to allay these fears in *The President of the Republic of South Africa and Another v. Modderklip Boerdery (PTY) Ltd*.[247] In the *Modderklip* case, the owner of the Modderklip farm was unable

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[240] Chaskalson & Davis (1997), at 445.

[241] Quoted in the Mail and Guardian of 6 December 1996, at <http://www.mg.co.za/>.

[242] *See* section 3.2.3.1 above.

[243] Most (more than 90%) of agricultural land remains in the hands of white minority. *See* A. Russel, *Fenced in: Why Land Reform in South Africa is Losing Its Pace*, 5 December 2007, at <http://www.ft.com/cms/s/0/5494b1d2-8bd3-11dc-af4d-0000779fd2ac.html>. *Also see*, *South Africa hints it may broaden land seizures*, 17 October 2006, at <http://edition.cnn.com/2006/WORLD/africa/10/17/safrica.land.reut/index.html>.

[244] Since the start of Zimbabwe's land policy, its economy has become the "world's fasted shrinking economy" and it has the world's highest inflation rate. *See e.g.,* T. Hawkins, *Zimbabwe's economy spirals downward*, 7 April 2006, at <http://www.ft.com/cms/s/0/a322dde2-c5d2-11da-b675-0000779e2340.html>. *Also see* M. Wines, *Zimbabwe: Inflation Rate Nears 1,600%*, 13 February 2007, at <http://www.nytimes.com/2007/02/13/world/africa/13briefs-zimbabweinflation.html>. *And see* M. Wines, *Zimbabwe Extends Crackdown On Dissent as Election Nears*, 24 December 2004, at <http://query.nytimes.com/gst/fullpage.html?res=9A05EFDD1E30F937A15751C1A9629C8B63>.

[245] *See, Cosatu reveals Zim protest plans*, 1 March 2005, at <http://www.mg.co.za>.

[246] *See, We need our own Mugabe*, 15 September 2003, at <http://www.mg.co.za>.

[247] *President of the RSA v Modderklip Boerdery (Pty) Ltd*, 2005 (5) SA 3 (CC). Note, that while there are clear similarities between the *Modderklip* and *Grootboom* cases, there are also two important differences. In *Grootboom*, the land in question was already earmarked for redevelopment to affordable housing. One of the reasons why the local authorities opposed the settlement of the *Grootboom* community on the land in question was the fear that the *Grootboom*

to obtain any assistance from local authorities to remove the illegal occupiers, even after obtaining an eviction order from the relevant High Court. By this time, however, the number of occupiers had grown from about a 100 to well over 40 000. Local authorities also refused to buy the property from the private owner. A unanimous Constitutional Court upheld the original eviction order and ruled in unambiguous terms that the state has acted unreasonably, since

> the obligation on the state goes further than the mere provision of mechanisms and institutions with which to enforce rights. [The state] is also obliged to take reasonable steps, where possible, to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law […]. Land invasions of this scale threaten far more than the private rights of a single owner and have the capacity to be socially inflammatory and the potential to have serious implications for stability and public peace. They should always be discouraged. Failure by the state to act appropriately in such circumstances means that Modderklip, and others similarly placed, could not look upon the state and its organs to protect them from such invasions. This would be a recipe for anarchy.[248]

By explicating the responsibility of government, the Constitutional Court made an important contribution towards ensuring political stability and, by extension, enhancing the government's legitimacy.

4.3.3.2. Strengthening commitment to participatory democracy

In *Doctors for Life International v. The Speaker of the National Assembly*,[249] the Applicants challenged the constitutional validity of certain health related Bills (which had subsequently become Acts) because the National Assembly had failed to meet its constitutional obligation to "facilitate public involvement in the law-making process".[250] The Constitutional Court ruled that Parliament's failure to hold public hearings was, indeed, a constitutional breach, and therefore invalidated the legislation in question.[251] Justice Ngcobo, writing for the majority, explained the importance of 'participatory democracy' in the South African context as follows:

> […] our Constitution was inspired by a particular vision of a non-racial and democratic society in which government is based on the will of the people […]. Commitment to principles of accountability, responsiveness and openness

community would gain an unfair advantage over other homeless people. In *Modderklip*, the land was not earmarked for affordable housing, and remained in private hands. In other words, in *Modderklip*, not only the rights of the homeless were at stake, but also rights of the private landowner.

[248] *President of the RSA v. Modderklip Boerdery (Pty) Ltd*, 2005 (5) SA 3 (CC), §45.

[249] *Doctors for Life International v. The Speaker of the National Assembly*, 2006 (6) SA 416 (CC).

[250] *See* section 72(1)(a) of the 1996 South African Constitution.

[251] Note that the bills in question had, by now, been adopted as legislation.

> shows that our constitutional democracy is not only representative but also contains participatory elements. This is a defining feature of the democracy that is contemplated […]. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy […]. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people.[252]

4.4. Summary

Chapter 4 demonstrated the effect of judicial oversight – constitutional dispute resolution, human rights protection (including the provisioning of remedies), and the indirect legitimization of political institutions – with examples from the United States Supreme Court, the European Court of Justice, and the South African Constitutional Court.

4.4.1. Constitutional Dispute Resolution

The United States Supreme Court occasionally acts as arbiter in (horizontal) constitutional disputes, often by (indirectly) delineating the scope of executive (presidential) power – as the *Steel Seizure*, *Nixon* and *Massachusetts v. EPA* cases illustrate. More controversially, the Court was also instrumental in resolving the political dispute that centred on the results of the 2000 Presidential election.

The European Court of Justice has a broad mandate to settle (horizontal) constitutional disputes between Community organs and member states through the 'enforcement' and 'judicial review' mechanisms provided for in the EC Treaty. The Court also resolves (vertical) disputes between Community organs and private parties concerning the legality of Community measures. However, the ECJ has taken a decidedly stricter interpretative approach in such disputes – as *Plaumann* and the Court's subsequent jurisprudence illustrate.

The South African Constitutional Court settled a highly significant political (horizontal) dispute among political parties represented in parliament with the two *Certification* cases – namely, whether or not the new Constitution met the pre-negotiated constitutional principles in all regards. In the *Western Cape Legislature* case, the South African Constitutional Court also resolved a horizontal constitutional dispute between the executive and a provincial parliament, which had the effect of postponing the country's first democratic municipal elections in the Western Cape Province.

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[252] *Doctors for Life International v. The Speaker of the National Assembly*, 2006 (6) SA 416 (CC), at §§111-114.

4.4.2. Human Rights Protection

The United States Supreme Court's record on human rights protection has been far from stellar, but it has come a long way since *Dred Scott* and *Brown v. Board of Education*. Indeed, since the Warren Court era, largely continued by the Burger Court, the Supreme Court has become a leader in the field of human rights protection. On the other hand, the Court has historically struggled to find a balance between human rights protection and national security interests during times of war (see e.g., the Court's initial hesitance to protect human rights of citizens of Japanese origin during World War II, as well recent issues regarding the Guantánamo Bay prisoners).

Human rights protection is not a primary objective of the European Court of Justice (especially not as it has interpreted its initial role); however, many of the Court's rulings have indirectly resulted in human rights protection. The ECJ has increasingly been directly considering fundamental rights protection in its jurisprudence, starting with *Internationale Handelsgesellschaft*, and culminating in the recent *Kadi* case.

The South African judiciary's troubling legacy under Apartheid serves as a primary example of the negative consequences when the courts completely disengage from human rights protection. Since 1993, however, the Constitutional Court has built an admirable reputation as a 'human rights court'. In particular, the Court's contributions toward making socio-economic rights judiciable are unique, and so are its reinterpretations of existing South African 'common' and 'customary' law to conform to the South African Bill of Rights.

Concerning the development and enforcement of effective remedies, the jurisprudence of all three courts analysed in this chapter indicate that remedies are more effective if they are formulated with enforcement already in mind (e.g., *Fourie*); that they take a long time to formulate (e.g., the ECJ's state liability remedy); and that they require an objective partnership between courts and political institutions (e.g., *Brown I and II*).

4.4.3. Legitimizing Political Institutions

All three courts studied in this chapter contributed indirectly to the legitimacy of the political institutions in their constitutional systems by providing them with opportunities to strengthen their commitment towards democracy, the rule of law, and human rights protection.

With cases such as *Brown*, *Hamdi* and *Rasul*, the U.S. Supreme Court has aided its government in restoring the moral and sociological legitimacy of the United States as a global leader in the field of human rights protection. The ECJ helped the EU to address concerns about the "democracy deficit" in the EC, by strengthening the procedural position of the European Parliament

concerning the article 230 TEC judicial review procedure. Arguably, the *Kadi* case also strengthened the global legitimacy of the EU, as it showed the EU's commitment to human rights and the rule of law. In the *Certification* and *Modderklip* cases, the South African Constitutional Court aided its government to show its commitment toward the rule of law, while the *Doctors for Life* case afforded government the opportunity to show its commitment to participative democracy

CHAPTER 5

REFINING THE MODEL: THE DYNAMICS OF JUDICIAL OVERSIGHT – FURTHER CONSEQUENCES OF RELATIONAL ASPECTS

All systems, no matter how complex, consist of networks of positive and negative feedback loops, and all dynamics arise from the interaction of these loops with one another.[1]

The Judicial Oversight Model – set out and illustrated in the preceding chapters – postulates that courts have a tendency to expand the degree of *de facto* judicial independence and judicialization, and, hence, realize more of the outcomes associated with judicial oversight. The Model proposes that this exponential growth is fuelled, in large part, by the relationship between judicialization and judicial independence, which operates in a positive reinforcing feedback loop.[2] But is this expansion of judicial independence and judicialization unbridled? Many of the examples already mentioned in Chapters 3 and 4 would seem to suggest that such expansion is curbed on occasion, often due to the exercise of judicial self-restraint.

To name but a few examples: more than 50 years after *Marbury v. Madison*, the United States Supreme Court had not struck down any additional federal legislation.[3] In fact, large parts of the Supreme Court's long history are testimony to the Court's struggles to determine the *limits* of the "awesome

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[1] Sterman (2000), at 13. Note that some authors, such as Sterman, refer to reinforcing feedback loops as 'positive' feedback loops, and to balancing feedback loops as 'negative' feedback loops. This book uses the terms as defined by Anderson & Johnson (1997), at 53-56 – to avoid confusion, since reinforcing feedback loops can have a polarity that could be either positive or negative.

[2] *See* section 2.3.2.3 above.

[3] For a discussion of the potential reasons behind this, *see* section 5.3.1 below.

power" of judicial oversight[4] – as is reflected in court-developed doctrines such as the political question doctrine,[5] and in the longstanding debate between 'originalists' and 'non-interpretivists' on the bench.[6] Despite the European Court of Justice's expansive approach towards many areas of European Community law, its interpretation of article 230 TEC concerning individual petition rights has been persistently narrow, compared to the Court's assertive judicialization in other areas of EC law.[7] And the South African Constitutional Court has been criticized by some for not going 'far enough' in making socio-economic human rights justiciable because of the Court's hesitancy to use structural interdicts in the context of socio-economic rights, and the Court's use of the 'reasonableness' test instead of the (arguably, broader) 'minimum core obligations' test of executive actions.[8]

On the other hand, comparative constitutional law also seems to suggest that a decline in the degree of judicialization and judicial independence is not indefinite either – at least not if courts want to sustain their own relevance within the constitutional system.[9] For example, after periods of showing a high degree of deference to the executive in times of war, the U.S. Supreme Court has, at some point, started to curb executive decisions in the light of human rights considerations.[10]

We might intuitively recognize that there are limits to the growth of judicialization and judicial independence, and, conversely, to their decline. Yet, understanding why these patterns of growth and decline occur, under what circumstances, and what these patterns might mean for the evolution of judicial institutions, are more complicated questions altogether. The dynamics of judicial oversight deals with these types of questions since it is concerned with the relationships between system components, and their consequences for change (i.e., growth and decline), equilibrium, fluctuation and the general

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4 *See e.g.,* Justice Frankfurter on the importance of 'restraint' in his dissenting opinion in *Trop v Dulles*, 356 U.S. 86 (1958), discussed in Schwartz (1993), at 257: "To Justice Frankfurter and his followers, restraint was the proper posture for a nonrepresentative judiciary, regardless of the nature of the asserted interest in particular cases." For a discussion of judicial activism and restraint, *see* section 5.4 below.

5 *But see* the discussion in section 2.1.2.3 above, noting that the exercise of judicial self-restraint might still amount to a degree of judicialization since it involves the exercise of judicial discretion.

6 This (what Ely calls) "false dichotomy" between interpretivism (or originalism) and noninterpretivism forms the opposite ends of the same spectrum – *see* Ely (1980), at vii, and at 2 – 40. Ely positions his "representation-reinforcing theory of judicial review" somewhere in-between these two ends (at 181).

7 *See* section 4.1.2.2 above for a discussion of the ECJ's narrow interpretation of individual petition right.

8 Ebadolahi (2008), at1585; *and see* discussion in section 3.2.3.1 above.

9 *See* section 4.2.3.1 above – for the negative impact on the legitimacy of the South African judiciary during Apartheid.

10 *See* section 4.2.1.2 above.

evolution of courts.[11] So far, the Model has only dealt with the relational aspects of the dynamics of judicial oversight, as well as one consequence thereof – growth.[12] The aim of this chapter is to refine the Model to include the other consequences of these relational aspects, as defined here, namely: decline, equilibrium, fluctuation, and the general development or evolution of courts.

Aided by the analytical tools developed in the field of systems dynamics theory and the examples from comparative constitutional law, this chapter will begin by looking at 'decline' (i.e., the contraction of judicialization and judicial independence up to the point of equilibrium), and consider the reasons behind it (5.1). The subsequent section goes a step further by describing the fluctuation between the growth and decline (5.2); closely followed by a consideration of the implications for the possible evolutionary paths of courts (5.3). The chapter will conclude with an appraisal of the terms judicial 'activism' and 'restraint' in the context of the Judicial Oversight Model (5.4), and a formulation of the refined version of the Judicial Oversight Model (5.5).

5.1. Decline, or the Contraction of Judicialization and Judicial Independence

Courts do not exist in a vacuum; they exercise the powers of judicial oversight within a particular constitutional system in order to serve a particular society, within a specific era. Hence, there is constant interaction – often subtle – between a court and the political institutions within the constitutional system, on the one hand; and between a court and the broader society it serves, on the other. These interactions hint at an important reason behind decline, or the contraction of judicialization and judicial independence, namely, 'feedback'.[13] This section will consider the main explanation proffered by systems dynamics theory for decline, known as the 'limits to success' (5.1.1). Flowing from this discussion, the section will also consider possible factors that might lead to a contraction in the degree of judicialization and judicial independence (5.1.2).

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[11] *See* above, note 11 (Ch. 2).

[12] *See* section 2.3.2.3 above.

[13] Anderson & Johnson (1997), at 4: "Feedback is the transmission and return of information […]. The most important feature of feedback is that it provides the catalyst for a change in behavior." *Also see* Sterman (2000), at 14-15: "Just as dynamics arise from feedback, so too all learning depends on feedback. We make decisions that alter the real world; we gather information feedback about the real world, and using the new information we revise our understanding of the world and the decisions we make to bring our perception of the state of the system closer to our goals."

5.1.1. The 'Limits to Success' Systems Archetype

Systems archetypes are simplified models of real world systems, which highlight the dynamics common to multiple systems. They offer a simplified and convenient way to describe the dynamics of many complex systems, without having to resort to extensive modelling.[14] As Forrester noted:

> Like all systems, the complex system is an interlocking structure of feedback loops […]. This loop structure surrounds all decisions of public or private, conscious or unconscious. The processes of man and nature, of psychology and physics, of medicine and engineering all fall within this structure.[15]

A constitutional system is an example of such a complex (social) system;[16] and the 'limits of success' archetype is an "interlocking structure of feedback loops", expressed as 'causal loop diagrams' such as Figure 4 in Chapter 2.[17] The 'limits to success' archetype hypothesizes that "a reinforcing process of accelerating growth (or expansion) will encounter a balancing process as the limit of that system is approached"; moreover, as expansion continues, it will result in "diminishing returns" as the system's limit is reached and/or exceeded.[18] Figure 9 (below) is an illustration of the limits to success archetype, expressed in terms of the Judicial Oversight Model.

Before launching into a discussion of this systems archetype, however, some groundwork is required. As discussed in Chapter 2, the Judicial Oversight Model hypothesizes that judicialization and judicial independence exist in a self-reinforcing relationship; that is, when one variable changes it is assumed that the other will change in the same direction, although not necessarily to the same extent. In a reinforcing feedback loop where the polarity is *positive* (i.e., as one variable in a feedback loop increases, the other increases as well), if the rate of change in judicialization increases, the rate of change in judicial independence increases too. The polarity of a reinforcing feedback loop can also be *negative*, however, as illustrated by Figure 7 (below). In a negative reinforcing feedback loop, should the rate of change in judicialization become negative, the rate of change in judicial independence will become negative as well – resulting in "self-reinforcing decline".[19] Thus, reinforcing feedback loops (both positive and negative) "reinforce change" – whether that 'change' implies growth or decline.

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[14] *See* Sterman (2000), at 138: "A causal loop diagram consists of variables connected by arrows denoting the causal influences among the variables. Important feedback loops are also identified in the diagram."

[15] J.W. Forrester, Urban Dynamics (1969), at 107.

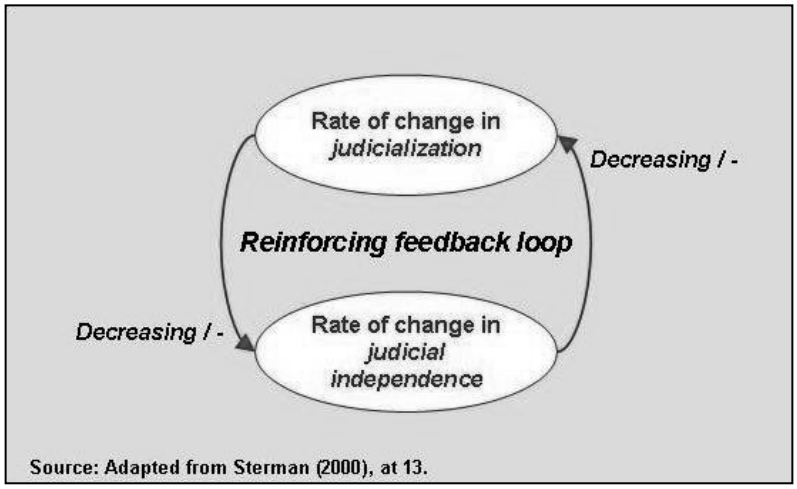
[16] *See* section 1.4.2 above.

[17] *See* section 2.3.2.3 above.

[18] Anderson & Johnson (1997), at 59.

[19] Sterman (2000), at 109.

Figure 7: The Negative Reinforcing Relationship between Judicialization and Judicial Independence

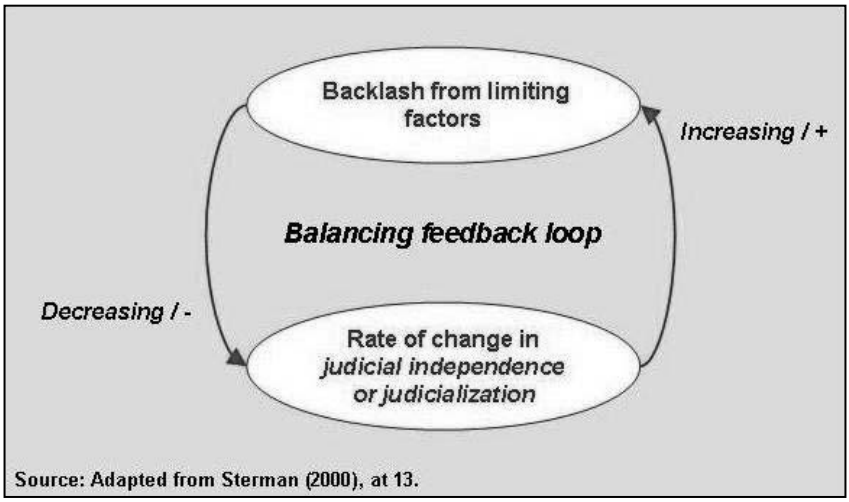


But what would cause the polarity of a reinforcing feedback loop to change from positive (growth) to negative (decline) in the first place? Put differently, what would 'limit' the system's 'success' in terms of growth? Systems dynamics theory attributes the change in polarity to 'limiting factors' operating in a 'balancing feedback loop'.[20] Balancing feedback loops are "self-correcting"; they "counteract change". As Figure 8 (below) illustrates, as one variable changes in one direction (e.g., positive), the other variable changes in the opposite direction (e.g., negative). In other words, as the rate of change in (e.g.) judicialization increases (growth), it triggers backlash or "corrective action" from limiting factors that reduces the rate of change in judicialization and can cause the rate to become negative (decline).[21]

[20] Sterman (2000, at 13. Limiting factors functioning in the context of judicial oversight will be discussed in section 5.1.2 below.

[21] Sterman (2000), at 112

Figure 8: The Effect of a Balancing Feedback Loop



Balancing feedback loops "seek balance, equilibrium, and stasis"; and "act to bring the state of the system in line with a goal or desired state".[22] In other words, corrective action will continue until such a desired state or state of equilibrium is reached.[23] As Anderson explained:

> There is always an inherent goal in a balancing process, whether the goal is visible or not. In fact, what 'drives' a balancing loop is a gap between the goal (the desired level) and the actual level. As the discrepancy between the two levels increases, the dynamic makes corrective actions to adjust the actual level until the gap decreases. In this sense, balancing processes always try to bring conditions into equilibrium.[24]

Phrased in terms of the Judicial Oversight Model, this 'goal' or 'desired state of equilibrium' refers to the 'equilibrium point of judicial oversight'. In practice, it is impossible to pinpoint the location of any such equilibrium point in a particular constitutional system, although we are fairly certain that such equilibria exist because we observe the effect when such equilibria are exceeded (resulting in a backlash from limiting factors, as will be discussed below).[25]

Moreover, the location of the equilibrium point of judicial oversight is likely to be different in each constitutional system (and also on different issues) and typically depends on various context-specific factors, such as the

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[22] Sterman (2000, at 111. It should be noted that 'goal' or 'desired state' in the context of systems theory does not necessarily refer to a *normative* 'goal' or 'desired state'.

[23] Sterman (2000), at 112.

[24] Anderson & Johnson (1997), at 27.

[25] *See* section 5.1.2 below.

nature of the issue being addressed by the court. For instance, emotive issues such as capital punishment and abortion might trigger backlash from limiting factors faster than less controversial issues.[26] The politico-legal history is also likely to affect the location of a constitutional system's equilibrium point. Compare, for instance, the different responses triggered by rulings of the U.S. Supreme Court and the South African Constitutional Court regarding capital punishment. The Supreme Court's ruling in *Furman v. Georgia*[27] that the death penalty was unconstitutional (based on the Court's interpretation of the Eight Amendment that prohibits the use of "cruel and unusual punishment"),[28] can be considered as an example of judicialization because it reduced the discretion of individual states. The *Furman* decision triggered a political and popular backlash against the Court, which was instrumental in the Court's reversal of *Furman* in *Locket v. Ohio* six years later.[29]

By contrast, there was no political backlash against the South African Constitutional Court when the Court declared the use of capital punishment to be unconstitutional in the *Makwanyane* case,[30] despite the fact that the death penalty consistently has strong popular support.[31] In the South African context, however, capital punishment had become inextricably linked to the policies of Apartheid since a significantly higher number of black South Africans were executed than white South Africans. The new democratically elected ANC government supported the abolishment of the death penalty because capital punishment was seen as a significant embodiment of Apartheid, despite strong popular support for it among its own party members.[32]

Finally, the equilibrium point of judicial oversight does probably not stay constant either. Given the propensity of constitutional systems to increase the degree of judicialization and judicial independence over time – as the Judicial Oversight Model suggest – it is perhaps to be expected that the equilibrium point also moves along an exponential growth trajectory over time (see Figure 10 below).[33]

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[26] *See* Koopmans (2003), at 98-128, on the 'limits of judicial review'.

[27] *Furman v. Georgia*, 408 U.S. 238 (1972).

[28] United States Constitution, Amendment VIII (1791).

[29] *Locket v. Ohio* 438 U.S. 586 (1978); *also see* Koopmans (2003), at 54-55.

[30] *S v Makwanyane* 1995 (3) SA391 (CC). The South African Constitution of 1993 and 1996 prohibit the use of "cruel, inhuman or degrading" punishment – *see e.g.*, section 12(1)(e) of the 1996 Constitution.

[31] *See e.g.*, *South Africans Support Death Penalty*, at <http://www.angus-reid.com/polls/view/11872>, 14 May 2006. Of the respondents to this poll, 72 % were in favour of the death penalty being reinstated. *Also see*, *Death penalty: '85% of SA want it back'*, 23 July 2007, at <http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20070723073951125C692759>.

[32] Of course, there were other reasons to abolish capital punishment (such as its questionable deterrent value) – *e.g.*, discussed by the Constitutional Court in *Makwanyane* at §§116-127.

[33] *See* section 5.3.5 below.

5.1.1.1. Limits to success – illustrative

The dynamics of complex, real world social systems can be exceptionally difficult to describe, which is why interlinking causal loop diagrams are used. These diagrams are, by their very nature, a simplification of reality so that the main ideas behind the logic can come to the fore. Once the principles are understood, the diagrams can be augmented to reflect a significant degree of complexity.[34] However, a relatively simple diagram (such as Figure 9 below) – thus, a diagram not reflecting all possible permutations – is considered to be adequate for the purpose of this book.[35]
For a diagram that has just been described as 'relatively simple', Figure 9 might look quite complex. This section aims to clear up this perception by discussing the diagram systematically – building on the groundwork laid so far in this chapter.

To start with the reinforcing feedback loop in the middle of the diagram. Assume that the rate of change in judicial independence and judicialization is positive – hence, the state of the system reflects (exponential) growth. Assume further that judicialization and judicial independence continue to expand. As the degree of judicialization and judicial independence near or exceed the system's goal (i.e., the equilibrium point of judicial oversight), backlash from limiting factors is being triggered – resulting in the activation of balancing feedback loops. The two balancing feedback loops (I and II) change the polarity of the reinforcing feedback loop (i.e., making it negative), causing a contraction of judicialization and judicial independence. This contraction is reflected in the state of the system as self-reinforcing decline; at least until the equilibrium point has been restored.[36]

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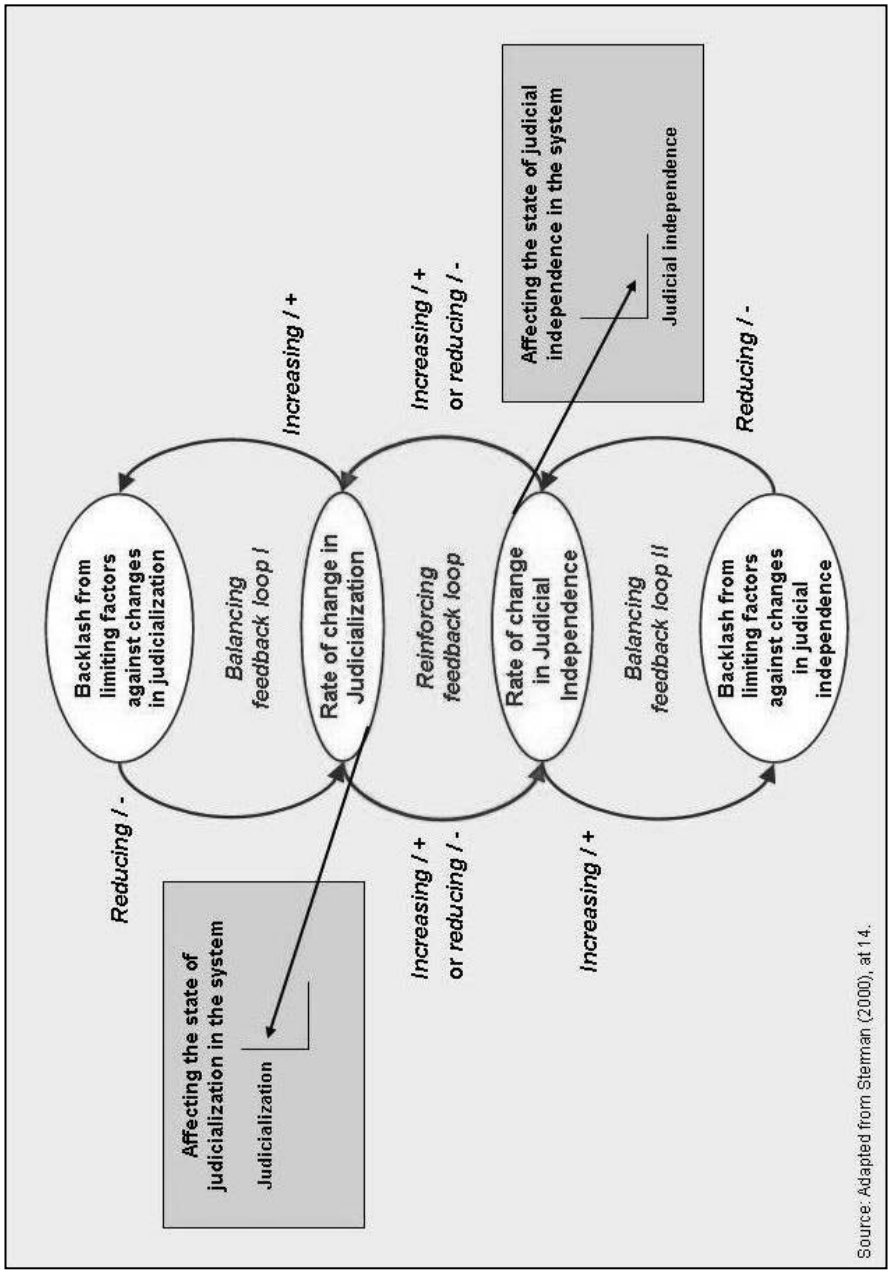
[34] For examples of how complex causal loop diagrams can become, *see e.g.*, Sterman (2000), at 182-183; and at 186-187.
[35] *See e.g.*, Sterman (2000), at 21-22 on "dynamic complexity", that is where "[t]he decisions of any one agent form but one of many feedback loops that operate in any given system."
[36] *But see* the discussion on 'oscillation' in section 5.2.1 below.

Figure 9: The 'Limits to Success' Archetype – Illustrating the Dynamics of Judicial Oversight



5.1.2. Limiting Factors in the Judicial Oversight Context

What limiting factors might potentially be relevant in the context of a constitutional system that provides for judicial oversight? The death penalty example mentioned above refers to one limiting factor: political pressure. The next discussion will look into political pressure in more detail (5.1.2.1), as well as suggest four other limiting factors, namely: judicial 'mental models' (5.1.2.2); structural and functional limitations inherent to constitutional documents (5.1.2.3); judicial credibility or legitimacy (5.1.2.4); and financial constraints pertaining to judicial caseload (5.1.2.5).

5.1.2.1. Political pressure and dependency on political institutions

Political pressure, manifested in a wide range of limiting actions taken by political institutions, is probably the most common limiting factor – and the best understood. For instance, political institutions might exert pressure on the judiciary through public criticism, adoption of legislation that reverses a particular ruling or that explicitly limits the mandate of the judiciary, or simply a refusal to give effect to a specific judgment.[37] Indeed, there can be no doubt that, when the real powers of courts and political institutions are compared, the capabilities of the "purse" and the "sword" are far more potent.[38]

On the other hand, the limiting effect of political pressure should not be overstated. Ely was probably right in questioning the argument that the judiciary (here, the U.S. Supreme Court) would exercise self-restraint in fear of political 'destruction'. As Ely argued, the so-called "wide-spread political reaction" that would "destroy the [Supreme] court in its wake" has never been realized, primarily because formal constitutional processes that can sanction the judiciary do not have any real teeth.[39] But Ely's argument is probably more applicable to highly assertive, and even aggressive, limiting actions that political institutions can take (such as impeachment). Limiting actions that are a lot subtler than impeachment proceedings against individual judges, can have the required effect. For instance, Roosevelt's infamous Supreme Court 'packing plan' did probably not have a real political chance of being adopted, but the mere threat of such a measure was, arguably, enough for the Court to

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[37] *See e.g.*, G. Parker, *EU court 'must heed national feelings*', 19 April 2006, at <www.ft.com>: "Judges at the European Union's top court must pay more attention to national sensitivities or risk fuelling growing public antipathy towards the EU, Wolfgang Schüssel, chancellor of Austria [and then holder of the rotating EU Presidency], has warned."

[38] *See* above, note 37 (Ch. 2).

[39] Ely (1980), at 45-48. Ely refers to a comment by Monaghan – *see* H.P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale Law Journal 1363, at 1366 (1973). There has been only one impeachment process instituted against a Supreme Court judge – the 'Chase impeachment', who was acquitted – *see* Schwartz (1993), at 58.

curb the expansion of judicialization and judicial independence.[40] Moreover, political pressure might even originate from other courts, as the Hlophe saga, discussed in Chapter 3, illustrates.[41]

Clearly, exerting political pressure on the judiciary holds some risk for political institutions – there might, for example, be a public backlash against the political institutions.[42] Nevertheless, the limiting potential of political pressure remains significant because, while the judiciary is formally independent, judicial institutions remain institutionally dependent on the political institutions carrying the "purse" and wielding the "sword".[43] It is the existence of this institutional dependency on political institutions, Ferejohn and Kramer argued, which has made the judiciary "into a self-regulator, the creator of self-imposed institutional and doctrinal constraints that […] keep judges from needlessly stepping on sensitive political toes".[44]

5.1.2.2. Judicial 'mental models'

'Mental models' is a term used in systems thinking theory that refers to our "assumptions about how the world works" or how it ought to work.[45] A 'judicial mental model' is defined as the normative framework of an individual judge, and is the product of a lifetime's worth of experiences, ideas, beliefs,

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[40] Although Roosevelt's plan was not implemented, its mere proposal seems to have had the 'desired effect' (from the Roosevelt administration's perspective), i.e.: the Supreme Court stopped striking down 'New Deal' legislation. *See* Schwartz (1993), at 233-236. *But see* Ely's skepticism of this argument above, note 39 (Ch. 5).

[41] *See* section 3.1.3.2 above. Also see the '*solange*' response from the German Constitutional Court, triggered by ECJ's ruling in *Internationale Handelsgesellschaft – in* Craig & De Búrca (2003), at 290-298; *and see* above, note 137 (Ch. 4)

[42] *See e.g.*, J. Joubert, *Krisis dreig oor Grondwet-plan*, 6 April 2006, at <http://www.news24.com/Beeld/Suid-Afrika/0,,3-975_1912649,00.html>. The ANC (then, the ruling party in parliament) proposed changes to the South African Constitution that would affect the judiciary, drawing fierce criticism from, amongst others, advocate George Bizos, legendary anti-Apartheid activist and part of Nelson Mandela's legal team in the Rivonia trial of 1963-1964.

[43] E.g., on the enforcement of judgements, and the judicial need for financial and logistical support – *see* Mahomed (1998), at 661-662; *and see* Burbank (1998) at, 317.

[44] *See* Ferejohn & Kramer 200), at 964, 1037; *also see* Cox (1995), at 583; *and see* the discussion on judicial self-restraint in section 5.4 below.

[45] Anderson & Johnson (1997), at 20; *also see* Sterman (2000), at 16, noting that mental models are "collections of routines or standard operating procedures, scripts for selecting possible actions, cognitive maps of a domain, typologies for categorizing experience, logical structures for the interpretation of language, or attributions about individuals we encounter in daily life." Moreover, it "includes our beliefs about the networks of causes and effects that describe how a system operates, along with the boundary of the model (which variables are included and which are excluded) and the time horizon we consider relevant – our framing or articulation of a problem."

education and preferences.[46] For instance, judicial mental models typically include a judge's concern with the proper scope of judicial oversight, and how this scope should be determined.

Judicial mental models can have a limiting effect on the expansion of judicialization and judicial independence when it calls for the exercise of judicial self-restraint. As Justice Benjamin Cardozo explained:

> By conscious or subconscious influence, the presence of this restraining power aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith […].The restraining power of the judiciary does not manifest its chief worth in the few cases in which the legislature has gone beyond the lines that mark the limits of discretion. Rather shall we find its chief worth in making vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and expression, in guiding and directing choice within the limits where choice ranges. This function should preserve to the courts the power that now belongs to them; if only the power is exercised with insight into social values, and with suppleness of adaption to changing social needs.[47]

Judicial mental models thus embody a certain self-awareness of the enormous responsibility shouldered by judges – towards the individuals that come before them, and towards society in general. Judge Learned Hand hinted at this role played by judicial mental models when he remarked to Archibald Cox (his clerk at the time):

> 'Sonny,' he said, 'to whom am I responsible? No one can fire me. No one can dock my pay. Even those nine bozos in Washington, who sometimes reverse me, can't make me decide as they wish. Everyone should be responsible to someone. To whom am I responsible?' Then he turned and pointed to the shelves of his library, and said, 'To those books about us. That's to whom I am responsible.'[48]

The acute awareness of judges that their rulings will be scrutinized and analysed – also by future generations who will have the benefit of hindsight – often (and probably more than is popularly believed) lead to the exercise of judicial self-restraint.[49]

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[46] Scobbie, *in* Evans (2003), at 63-66: "[…] all theoretical positions are, to some degree, subjective inasmuch as they reflect the author's own predispositions and concerns."

[47] Cardozo (1921), at 93-94.

[48] Cox (1995), at 583-584.

[49] *See e.g.*, Koopmans (2003), at 275, noting that judges are inclined to be more conservative, since they are "usually elderly gentlemen, occasionally ladies, who will not, as a rule, be very receptive to entirely new ideas". This argument is also reflected in Abraham's definition of 'judicial review' – *see* Abraham (1968) , at 283: "[…] judicial review is the power of any court to hold unconstitutional and hence unenforceable any law, any official action based upon a law, and any other action by a public official that it deems – upon careful, normally painstaking, reflection and in line with the canons of the taught tradition of the law *as well as judicial self-*

The exercise of judicial self-restraint might also be a response to political pressure, however. As Bryce noted: "To yield a little may be prudent, for the tree that cannot bend to the blast may be broken".[50] Seen from this perspective, judicial mental models might suggest a 'trade-off' between judicialization and judicial independence. In other words, the expansion of (short to medium-term) judicialization might be abandoned in order to preserve (longer-term) judicial independence.[51] Such a 'strategic response' can e.g., be discerned from comments made by federal appeals court Judge William Pryor in the aftermath of the political backlash against the judiciary triggered by the *Schiavo* case.[52] In an op-ed piece in the *Wall Street Journal*, Pryor stated that "[j]udges must do more than respond to criticisms; we must exercise restraint". He added: "[j]udges have a unique responsibility to safeguard our independence. It is not too much for us to look in the mirror and ask whether some criticisms are fair."[53]

Perhaps the extreme example of the prominence given to judicial mental models can be found in the U.S. constitutional system, where, in effect, the judicial mental models of nominated Supreme Court justices are being scrutinized during the senate hearing process,[54] and where it is frequently reflected in separate (dissenting or concurring) judicial opinions. The limiting role of judicial mental models might seem far more obscure in constitutional systems that do not allow separate judicial opinions, but its impact should not be underestimated.[55]

5.1.2.3. Limitations inherent to constitutional documents

Courts employ interpretation techniques that have the effect of broadening the meaning of constitutional and other legislative provisions – thereby increasing the degree of judicialization, as illustrated in Chapter 3.[56]

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restraint – to be in conflict with the Basic Law, in the United States its Constitution." (Emphasis added.)

[50] I. J. Bryce, The American Commonwealth, (1908), at 273.

[51] Thus, the exercise of judicial restraint – if seemingly paradoxically – becomes another way of asserting *de facto* judicial independence – *see* section 2.1.1 above. *Also see* suggestions for further research in section 11.4 below.

[52] *See* section 3.1.1.2 above.

[53] Quoted in B. Mears, *O'Connor: Don't call us 'activist judges'*, 28 November 2006, at <http://edition.cnn.com/2006/POLITICS/10/27/mears.judicialindependence/index.html>.

[54] *See e.g.*, A. Liptak, *Few Glimmers of How Conservative Judge Alito Is*, 13 January 2006, at <http://www.nytimes.com/>; *and see* C. Babington & J. Becker, *Alito Says He'd Keep 'Open Mind' on Abortion, Nominee Avoids Detailing Views on Controversial Issues*, 11 January 2006, at <http://www.washingtonpost.com>.

[55] *E.g.*, ECJ Judges are nominated by each member state. *See* Craig & De Burca (2003), at 88-89.

[56] *See* section 3.2 above.

Conversely, the existence of structural and functional limitations in the relevant constitutive documents will ultimately circumscribe how far courts can advance judicialization through expansive interpretation. If, for example, the constitution clearly prohibits the judiciary from fulfilling a particular function or allocates such function to another institution, it would be highly irregular (and therefore, unusual) for a court to assume this function by means of judicialization.[57]

Limitations inherent to constitutive documents can also be a result of such a document's age. The U.S. Constitution, for example, is a source of pride for its citizens as it is the oldest document of its kind in force. However, the fact that it was adopted over two centuries ago often requires the judiciary to be creative (and hence, expansive) in its interpretations in order to address modern-day issues. Compare, for instance, the South African Constitution with the U.S. Constitution on the issue of abortion. The U.S. Constitution does not have a specific provision that guarantees women the right to make their own decisions about reproductive issues. In the perennially controversial *Roe v. Wade*, the Supreme Court based its decision (that allows states to decide whether or not to legalize abortion under certain circumstances) on the Due Process Clause of the Fourteenth Amendment – from which the Court developed the notion of a 'right to privacy'.[58] *Roe* remains controversial – and vulnerable – in large part due to the lack of unambiguous constitutional text to support the Court's interpretation.[59] In fact, even pro-choice commentators have questioned the constitutional base of the Court's argument.[60] With *Roe*, the Supreme Court seems to have overcome the limitations inherent in the U.S. Constitution, but at a significant cost since the ruling triggered a significant (and continuous) popular and political backlash – which may lead to other limiting factors.[61]

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[57] *E.g.*, the ECJ has managed to achieve a significant degree of judicialization through its use of teleological interpretation of the EU's constitutive treaties (*see* section 3.2.2.1 above). However, the ECJ cannot rule about issues that explicitly fall outside its jurisdiction (e.g., falling under 'Pillar III') – *see* above, note 125 (Ch. 1). In other words, it is arguably easier for courts to assume additional functions by means of judicialization if the constitutional text is silent or vague on a particular matter – such as the case of the U.S. Supreme Court assuming the powers of judicial review (*see* section 3.1.1.1 above).

[58] *See* discussion of *Roe* in section 3.2.1.2 above.

[59] The Supreme Court has remained closely divided on the issue of abortion during the Rehnquist Court. With every new Supreme Court Justice appointment, speculation is usually rife whether or not it may have an impact on *Roe* (i.e., the appointment of a 'social conservative' Justice might tip the scale in favour of overturning *Roe*, as the partisan balance on the Court now stands – *see e.g.*, above, note 55 (Ch. 5); *and see* in general J. M. Balkin (Ed.), What Roe v. Wade Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decision (2005).

[60] *See e.g.*, Roosevelt (2006), at 114. *And see* 'dissenting' opinions by Jeffrey Rosen (at 170), Teresa Stanton Collett (at 187), and Michael Stokes Paulsen (at 196), *in* Balkin (2005).

[61] *See* section 3.2.1.2 above.

Conversely, the South African Constitution, adopted centuries later at a time when abortion has become much more socially acceptable, specifically guarantees the right to "bodily and psychological integrity, which includes the right to make decisions concerning reproduction".[62] When, the South African legislature legalized abortion in the *1996 Choice on Termination of Pregnancy Act*, the moral justification of the legislature's decision could be debated, but not the constitutional justification.[63]

5.1.2.4. Judicial credibility or legitimacy

> […] it is in the courts and not in the legislature that our citizens primarily feel the keen, cutting edge of the law. If they have respect for the work of the courts, their respect for law will survive the shortcomings of every other branch of government; but if they lose their respect for the work of the courts, their respect for law and order will vanish with it to the great detriment of society.[64]

Chapter 4 has indicated how courts can indirectly enhance the legitimacy of political institutions – an example of the effect of judicial oversight. But courts also have their own social and moral legitimacy (or credibility) to consider because it might have a limiting effect on the expansion of judicialization and judicial independence.[65] For example, a court may need to halt or significantly reduce judicialization on a particular topic in the face of strong public opposition, as the U.S. death penalty example illustrates.[66] Moreover, if courts are seen to be consistently failing to 'do the right thing' – such as the South African judiciary during Apartheid[67] – their sociological and moral legitimacy suffer. In such a scenario, the judiciary runs the risk of becoming irrelevant in the eyes of the society it serves. And popular support, as argued above, can be an important shield to protect courts against political interference.[68]

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62 Section 12(2)(a) of the 1996 South African Constitution.

63 *See* J. Cope, A Matter of Choice: Abortion Law Reform in Apartheid South Africa (1993). *Also see* S. Guttmacher, F. Kapadia, J. Te Water Naude *et al.*, *Abortion Reform in South Africa: A Case Study of the 1996 Choice on Termination of Pregnancy Act*, at <http://www.guttmacher.org/pubs/journals/2419198.html>.

64 Justice A.T. Vanderbilt, quoted in Abraham (1968), at 2.

65 *See* in general M. Loth, *Courts in quest for legitimacy: a comparative approach, in*, M. Malsch & N. van Manen (Eds.), De begrijpelijkheid van rechtspraak, at 15-39 (2007).

66 *See* section 5.1.1 above. *Also note* that the mechanism of judicial oversight was eschewed for so many years in France due to strong public opposition to the idea. *See e.g.*, Cappelletti (1970), at 1025-1026.

67 *See* section 4.2.3.1 above.

68 *See* section 5.1.2.1 above.

5.1.2.5. Financial constraints and judicial caseload

Clearly, political institutions can reduce the judiciary's funding and thereby curb the expansion of judicial independence and judicialization, which would be an example of political pressure.[69] However, financial constraints can also become a limiting factor in a different sense, that is, insofar as it relates to the management of judicial caseload.

Over the past few decades, courts with the power of judicial oversight, especially courts that provide a wide range of human rights protections, have become the 'victims of their own success' – their exploding caseloads being a testimony to this phenomenon.[70] The issue, of course, is that judicial caseloads increase at a rate that is disproportionate to courts' institutional capacity and funding. Moreover, the kind of reforms required to address the problem typically have a price tag of their own. A judicial caseload that is disproportionately heavy can indirectly restrain the expansion of judicial independence and judicialization, for example, by negatively affecting the credibility of the court. In the words of the popular adage: "justice delayed is justice denied".[71]

5.2. Fluctuation between Expansion and Retraction

So far, the Judicial Oversight Model has proposed that courts with the powers of judicial oversight expand the degree of *de facto* independence and judicialization (growth, or expansion); but that there are limits to this 'success' (decline, or contraction). The expansion of independence and judicialization is curbed by the operation of balancing feedback loops, which are triggered by the effect of limiting factors as the system nears or exceeds the equilibrium point of judicial oversight.[72]

However, as this section will illustrate, the retraction of judicialization and judicial independence is not permanent either. The Judicial Oversight Model suggests that courts fluctuate between positions of higher and lower judicial independence and judicialization. Benjamin Cardozo described this process of oscillation between growth and decline as follows:

> For every tendency, one seems to see a counter-tendency; for every rule its antinomy. Nothing is stable. Nothing absolute. All is fluid and changeable. There is an endless 'becoming.' We are back with Heraclitus. That, I mean, is

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[69] Id.

[70] *See e.g.,* in general S. Greer, *What's Wrong with the European Convention on Human Rights?*, 30 Human Rights Quarterly 680 (2008), arguing that the European Court of Human Rights "faces a potentially fatal case overload crisis".

[71] Quote attributed to W. E. Gladstone, British Statesman and Prime Minister (1868-1894).

[72] Such as the ones discussed in section 5.1.1 above.

> the average or aggregate impression which the picture leaves upon the mind. Doubtless in the last three centuries, some lines, once wavering, have become rigid. We leave more to legislatures today, and less perhaps to judges. Yet even now there is change from decade to decade. The glacier still moves.[73]

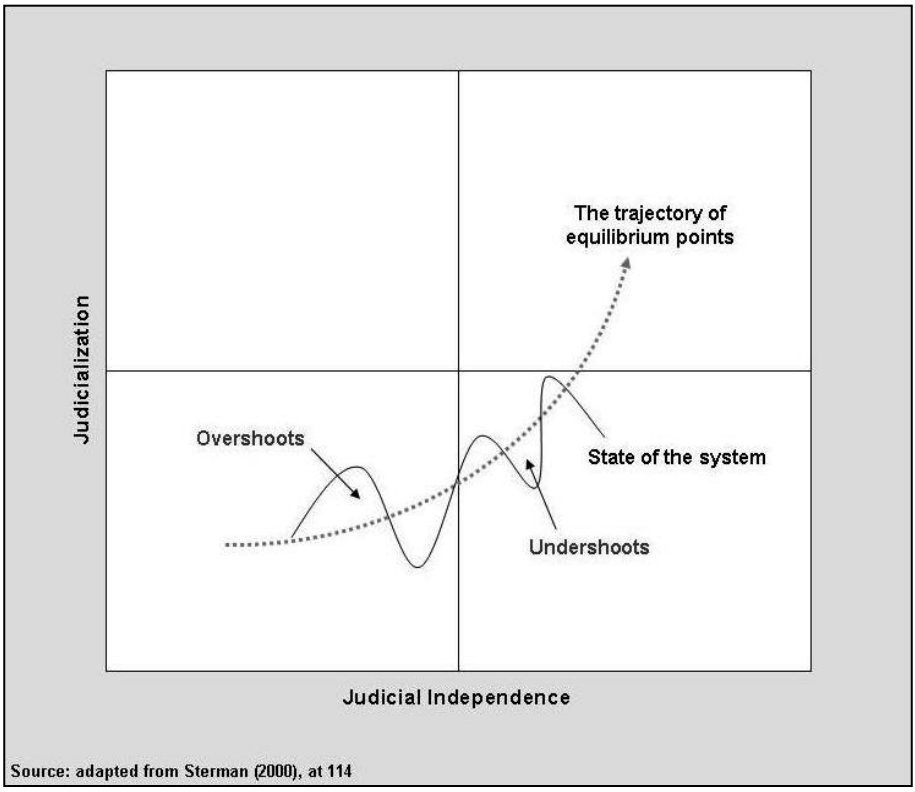
What explains this constant flux? This section will look to systems dynamics' discussion of 'oscillation', which is a "fundamental mode of behavior observed in dynamic systems", and the role fulfilled by 'delay' (5.2.1).[74] The section will conclude with a few examples from comparative constitutional law (5.2.2).

5.2.1. Oscillation and the Role of Time Delay

As mentioned earlier, in goal or equilibrium seeking systems behaviour (which is caused by the working of balancing feedback loops), "[t]he state of the system is compared to its goal, and corrective actions are taken to eliminate any discrepancies".[75] However, the Judicial Oversight Model proposes that the dynamics of judicial oversight often displays oscillatory behaviour, instead of mere goal or equilibrium seeking activities. In an "oscillatory system", Sterman explains, "the state of the system constantly overshoots its goal or equilibrium state, reverses, then undershoots, and so on".[76] Figure 10 (below) illustrates this phenomenon in context of the Judicial Oversight Model.

[73] Cardozo (1921), at 24.
[74] Sterman (2000), at 114.
[75] Id.
[76] Id.

Figure 10: Illustrating Oscillation in terms of the Judicial Oversight Model



The "overshooting arises from the presence of significant time delays" in the balancing feedback loop (recall Figure 9 above).[77] In other words, systems with balancing feedback loops that act in a time-delayed fashion display oscillatory behaviour. In the context of the Judicial Oversight Model this means that, as the expansion of judicialization and judicial independence nears or exceeds the equilibrium of judicial oversight, there is often a delay before the (full) effect of backlash or corrective actions from limiting factors becomes clear or is realized. This delay will cause the expansion of judicialization and judicial oversight to exceed the equilibrium (overshooting). The delay will also "cause corrective actions to continue even after the state of the system has reached equilibrium, forcing the system to adjust too much" (undershooting).[78]

Note that the effects of time delays (overshooting and undershooting) might also make it difficult to identify which limiting factors have caused the court

[77] Id.
[78] Id.

to change its behaviour.[79] For instance, there is difference in opinion as to what caused the Supreme Court to change direction during the New Deal era (thus, halting its practice of declaring New Deal legislation unconstitutional). Was the Court's change in direction driven by judicial mental models, separate from any political pressure, or was it caused by Roosevelt's (threatened) Court 'packing plan' (political pressure)?[80]

The effect of undershooting can also trigger "a new correction in the opposite direction" (i.e., renewed expansion).[81] Put differently, contraction of judicialization and judicial independence that goes too far beyond the equilibrium point might trigger backlash from different limiting factors (here, acting to limit decline). The effect of such limiting factors operating in a different balancing feedback loop will, in turn, change the polarity of the reinforcing feedback loop to be positive again – thus, fuelling renewed exponential growth of judicialization and judicial independence.

To use the response of courts in times of war as a hypothetical example: under the limiting influence of e.g., political pressure and judicial mental models (which hold, for instance, that courts should pay the executive a high degree of deference in times of war, in the interest of national security) courts might refrain from acting to protect human rights to the same degree as they have afforded individuals in peace time (undershooting). After a while, however, judicial mental models (which hold, for instance, that the executive has gone 'too far', or that it has had enough time to address national security issues) might start to slow down the negative rate of change in judicialization and judicial independence. The credibility of the court might also be suffering, given its reluctance to protect human rights – prompting the court to rekindle the expansion of judicialization and judicial independence by reasserting its *de facto* independence from political institutions, and by narrowing executive discretion.

5.2.2. Examples from Comparative Constitutional Law

The U.S. Supreme Court's fluctuation between lower and higher degrees of judicialization and judicial independence regarding the death penalty provides a good example that calls for further analysis. As mentioned earlier, the Supreme Court ruled in the 1970s that the use of capital punishment was unconstitutional (expansion);[82] but reversed its position within a few years, handing discretion back to state legislatures (contraction).[83] This position remained unchanged (thus, forming a 'punctuated equilibrium') until fairly

[79] Anderson & Johnson (1997) at 29. *Also see* above, note 40 (Ch. 5).
[80] *See* Ely (1980), at 47-48.
[81] Sterman (2000), at 114.
[82] *Furman v. Georgia*, 408 U.S. 238 (1972).
[83] *Locket v. Ohio*, 438 U.S 586 (1978).

recently, when the Supreme Court began a (cautious) re-examination of certain aspects of the death penalty. For example, the Court has declared the use of capital punishment against minors and mentally handicapped people to be unconstitutional (expansion),[84] while ruling recently that 'lethal injection' did not constitute 'cruel and unusual punishment' (decline).[85]

The European Court of Justice fluctuated between lower and higher positions of judicialization and judicial independence concerning the standing of the European Parliament in terms of the Article 230 judicial review procedure. At first, the Court refused to expand the Parliament's position (so as to include the EP in the category of 'privileged' applicants), but later reversed its position in the *Chernobyl* case by allowing the Parliament privileged standing to bring an Article 230 application.[86]

A case such as *Grootboom* also illustrates how a particular ruling can contain both elements of 'expansion' and 'contraction.[87] Government lawyers preparing for the *Grootboom* appeal (to the Constitutional Court) apparently held the expectation that they simply had to set out the case for "justification" of the government's existing housing policy, and "that was it".[88] As it turned out, the Court expected more from the government than merely proving and justifying the existence of a housing programme. On the other hand, the Court refused to use the "minimum core obligations" test, opting instead for the (arguably, narrower) "reasonableness test";[89] and also "indicated unambiguously that it would not prescribe to the state any particular policy option for giving effect to socio-economic rights".[90] Thus, while the Court was willing to "push the envelope", it did so cautiously.[91]

5.3. 'Net' Movement – across the 'Judicial Independence / Judicialization Plane'

To summarize, the Judicial Oversight Model has suggested why courts have a tendency to expand the degree of judicialization and judicial independence;

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[84] *Atkins v. Virginia,* 536 U.S. 304 (2002) – on using capital punishment for the mentally disabled; *and see Roper v. Simmons*, 543 U.S. 551 (2005) – on using capital punishment for minors.

[85] *Ralph Baze and Thomas C. Bowling v. John D. Rees*, 553 U.S. 2008; *see* L. Greenhouse, *Justices Uphold Lethal Injection in Kentucky Case*, at <http://www.nytimes.com/2008/04/17/washington/17scotus.html>, 17 April 2008.

[86] *See* section 4.3.2.1 above.

[87] *See* Schneider (2004), at 55.

[88] Nazrene Bawa, legal councillor for the South African government in the *Grootboom* case, as quoted *in* Schneider (2004), at 55.

[89] Discussed in section 3.2.3.1 above.

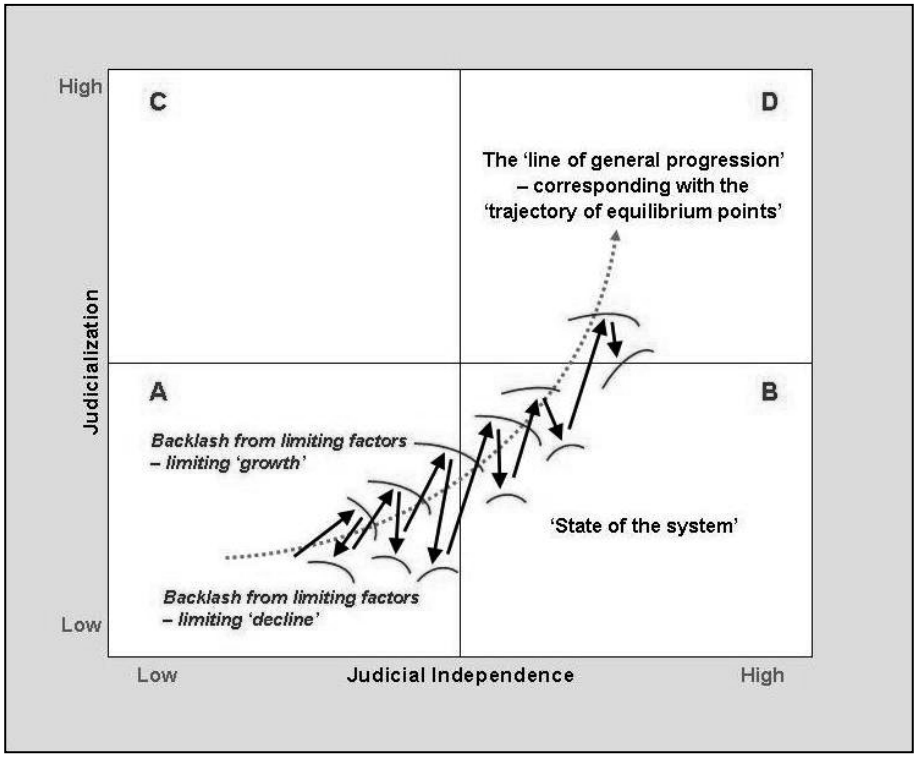
[90] *See* Liebenberg (2001), at 25.

[91] Wickeri (2004), at 31. *Also see* discussion in section 3.2.3.1 above.

why such expansion continues only up to a certain point, after which the degree of judicialization and judicial independence starts to contract; as well as how – and why – courts fluctuate between positions of higher and lower judicialization and judicial independence. Can the Model draw on these insights to form an aggregated view of likely evolutionary paths of courts? In other words, what does the dynamics of judicial oversight, as expounded in this chapter, tell us about the 'net' movement of a court across the four quadrants of the Judicial Independence/Judicialization Plane (recall Figure 3)?

This section will discuss five potential developmental paths of courts that exercise a mandate of judicial oversight, namely, 'rapid judicialization' (5.3.1), 'leveraging high judicialization' (5.3.2), 'catapulting to optimal position' (5.3.3), 'expanding independence exclusively' (5.3.4), and 'the line of general progression' (5.3.5). Figure 11 (below) describes these developmental paths in terms of movement across the 'four quadrants' of the Judicial Independence/ Judicialization Plane.[92]

Figure 11: Possible Evolutionary Paths of Courts Exercising Judicial Oversight



[92] *See* section 2.3.2.1 above.

5.3.1. Rapid judicialization from a low judicial independence base

Rapid judicialization from a position of (relatively) low *de facto* judicial independence can occur, for instance, on the basis of one or two specific issues (i.e., movement from quadrant A to C).[93] However, courts in this position are particularly vulnerable to the limiting impact of political pressure due to their low *de facto* independence. In other words, there is a high probability that a court's rapid movement from quadrant A to C will be unsustainable over the longer term; thus, forcing the court to reduce its level of judicialization (i.e., movement from quadrant C to A).

A possible example might be the United State Supreme Court during the Marshall Court era, in the aftermath of *Marbury v. Madison* – since the 'Judiciary Act' was the only federal legislation the Marshall Court 'struck down'. However, a closer examination of this part of U.S. constitutional history might actually place the Supreme Court's development in the next category (i.e., leveraging high judicialization to increase judicial independence), which will be discussed next. A better example is probably the Supreme Court's position in the aftermath of the *Dred Scott* decision. It is generally accepted that the Court overplayed its hand with *Dred Scott* (i.e., rapid movement from quadrant A to C) – although, as discussed above, the political institutions probably expected too much from the Court in the first place. Consequently, the Court was effectively sidelined during the Civil War and the post-war Reconstruction Era (i.e., decline from quadrant C to A).[94]

5.3.2. Leveraging high judicialization to increase judicial independence

If courts positioned in quadrant C can manage to withstand the political pressures to which they are particularly vulnerable, however, they might consequently leverage their strong degree of judicialization to strengthen their *de facto* independence as well (i.e., movement from quadrant C to D). If, for example, a court had moved to quadrant C on the basis of strong public support for a specific issue, political institutions may be less inclined to interfere with the court's position for fear of popular reprisal. In a different scenario, political institutions might not have taken the rapid judicialization of a court seriously (i.e., movement from quadrant A to C) because it underestimated the court's potential for playing a significant (future) role in the constitutional system. Such a scenario would create an opportunity for the court to strengthen its *de facto* independence as well (i.e., movement from quadrant C to D).

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93 *E.g.*, highly emotive issues such as particular human rights.

94 *See* section 4.2.1.1 above.

As mentioned in section 5.3.1, the U.S. Supreme Court's (initial) development path might fit this description. On the one hand, the Marshall Court did not strike down any additional federal acts during the remainder of Marshall's long term as Chief Justice. On the other hand, the Marshall Court nullified various state acts during that time.[95] By focussing on the constitutionality of state legislation instead, the Court largely avoided direct conflict with the federal (Jeffersonian) administration, thus preserving its independence. In other words, the Court built on its self-declared powers of judicial oversight through its review of state legislation, without evoking massive political backlash.[96] Through this approach, the Court arguably institutionalized the practice of judicial oversight of *all* legislation. By the time the next federal act was challenged in the Supreme Court (54 years after *Marbury*, in *Dred Scott*), the Supreme Court's authority to review the constitutionality of both state and federal legislation had become entrenched in American Constitutional law – at least firmly enough that the Court's reduced prestige in the aftermath of *Dred Scott* did not lead to a complete reversal of its degree of judicialization (thus, preventing too far a decline from quadrant C to A).

The ECJ might also be an example of a court that developed along this path. Many commentators have noted the lack of member of state reaction to the Court's aggressive expansion of its *de facto* judicial independence and judicialization during the forming years of the EC.[97] In other words, significant judicialization came *before* a high degree of judicial independence (as reflected in the court's credibility and prestige) was established.

5.3.3. Catapulting from minimal to optimal position

Rapid movement from low to high levels of judicial independence and judicialization (i.e., movement from quadrant A to D) would require extraordinary circumstances; and is therefore probably more the exception than the rule. Such movement is rare because it is an example of linear growth,

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[95] *See e.g., Fletcher v. Peck*, 10 U.S. 87 (1810); *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816); and *Cohens v. Virginia*, 19 U.S. 264 (1821). *Also see* Schwartz (1993) at 43-47. *But see* Bermann (2004), at 557-578, arguing that the U.S. 'Supremacy Clause' (Article VI, paragraph 2 of the U.S. Constitution) was instrumental in the long term to ensure the acceptance of federal judicial review of state legislation.

[96] This argument is also echoed in one of Alter's explanations for the acceptance of ECJ activism during the forming years of the EC – *i.e.*, member states failed to see the longer term effects of the Court's decisions on their sovereignty because they perceived cases brought against other member states as affecting those states only. *See* Alter (2001), at 26-27.

[97] *See* above, note 96 (Ch. 5); *and see* Bermann (2004), at 560. But note the Court's days of unquestioned judicialization is probably over – *see e.g.*, Dehousse (1998), at 127; *and* above, note 37 (Ch. 5)

which requires "no feedback from the state of the system".[98] A political revolution against an oppressive regime that results in the (re-)instatement of democracy and the rule of law might be one example that could trigger such a fundamental change in the position of the judiciary. As the political-revolution example implies, however, a court's rapid movement from quadrant A to D would not occur without the existence of strong political and popular support in the first place.

For instance, South Africa's judiciary during the Apartheid era was arguably situated in quadrant A or B. Since the political revolution of 1994, the position of the judiciary has been strengthened substantially – both post-Apartheid Constitutions have endowed the judiciary with powers of judicial oversight – probably catapulting it to quadrant D.[99]

5.3.4. Expanding independence to the exclusion of judicialization

Courts might expand their *de facto* independence from political institutions to a significant degree before embarking on a more assertive course of judicialization (i.e., movement from quadrant A to B). New courts, for instance, might follow this path. It is questionable, however, whether courts – especially as they mature – could continue expanding their independence to the exclusion of (some) expansion of judicialization as well. Or, at least not without triggering certain limiting factors (such as threats to the credibility of the court) that might threaten such a court's strong position of independence.

A lack of meaningful judicialization might mean, for example, that courts in this position can only assume a limited number of the roles associated with judicial oversight.[100] It is unlikely, for instance, that courts could engage in meaningful human rights protection without increasing the degree of judicialization as well. Thus, it the judiciary consistently refrain to address such issues, it might trigger a judicial legitimacy crisis that will ultimately lead to a lowering of its *de facto* independence (i.e., movement from quadrant B in the direction of quadrant A). In other words, just as high levels of judicialization without a corresponding growth in judicial independence are unsustainable in the long run (as argued in section 5.3.1), so is maintaining high levels of judicial independence without any meaningful expansion of judicialization.

The South African judiciary during Apartheid might be an example. As critics of the judiciary during the Apartheid era often charged: the judiciary had relatively strong independence (paradoxal as it may sound) but refused to

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[98] Sterman (2000), at 109; and, as this chapter has illustrated, courts exercising judicial review get lots of 'feedback' that influences its behaviour.

[99] *See* above, note 134 (Ch. 1).

[100] For a discussion of the impact of the degree of judicialization and judicial independence on the effect of judicial oversight, *see* section 2.3.2.2 above.

step in to alleviate the human rights abuses that occurred during Apartheid as a result of its '*ius dicere non facere*' mentality.[101]

5.3.5. The 'line of general progression'

The 'line of general progression' (Figure 11 above) is defined as the gradual expansion of judicial independence and judicialization (movement from quadrant A, to quadrant B, to quadrant D), tracing a trajectory of theoretical equilibrium points.[102] The Model proposes that courts which develop along the line of general progression will initially increase their judicial independence to a greater extent than their degree of judicialization. As these courts reach a certain level of maturity, however, the rate of growth of judicialization will be higher than the rate of growth of judicial independence. However, as Sterman noted, exponential growth "is never perfectly smooth […]".[103] In other words, as Figure 11 illustrates, if it were possible to chart the actual level of judicialization and judicial independence of a court, over time, it would show an oscillation around the line of general progression, intercepting the line from time to time.[104]

Various context specific circumstances might make it inevitable for a court to evolve along one of the other developmental paths described in this section. However, the Judicial Oversight Model postulates that it is more likely for courts that exercise the powers of judicial oversight to evolve along the line of general progression because this developmental path has a higher probability of being sustainable, since it is less likely to evoke severe backlash from limiting factors. For example, establishing a stronger base of *de facto* independence before embarking on significant judicialization makes a court less susceptible to backlash in the form of political pressure – especially the kind of severe pressure that leads to the 'destruction' to which Ely was referring.[105]

The Model allows for gradual or incremental changes to the degree of judicialization and judicial independence (i.e., movements closer to the line of general progression), which give society the opportunity to 'keep up with the court', so to speak.[106] On the other hand, once *de facto* judicial independence has been established to a sufficient degree, the Model specifically allows for the possibility of significant 'bursts' of judicialization when required – typically in circumstances where specific pressing social needs are not

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[101] *See* section 4.2.3.1; *and see* Loveland (1999), at 256-259.

[102] For a discussion on the 'equilibrium' in the context of judicial oversight, *see* section 5.1.1 above.

[103] Sterman (2000), at 109-110.

[104] For a discussion on oscillation, *see* section 5.2.1 above.

[105] For a discussion on the role of political pressure, *see* section 5.1.2.1 above.

[106] In other words, a scenario where there is *not* a disconnect between the broader society and the court.

satisfactorily addressed by the political institutions.[107] As Judge Albie Sachs noted, in commenting on Sunstein's general theory of "judicial minimalism" which propagates a particular form of judicial self-restrain:

> [i]t would seem, then, that no general theory requiring either judicial maximalism or judicial minimalism can usefully be advanced. There is a time to be cautious and a time to be bold, a time for discretion to be the better part of valour and a time for valour to be the better part of discretion. And it would appear that there is no logic intrinsic to the judicial function itself that can tell us when the clock strikes for valour and when for caution. The question then becomes not one of whether but one of when […].[108]

Therefore, the Judicial Oversight Model allows for both rapid and incremental advances in judicialization and judicial independence; but recognises that – and explains the mechanism by which – rapid changes have a higher propensity to trigger limiting factors.

5.4. Judicial 'Activism' and 'Restraint' in Perspective of the Judicial Oversight Model

This book has consciously (and perhaps, conspicuously) largely avoided using the terms judicial 'activism' and 'restraint'[109] up to this point. Not only because it is challenging to come up with coherent and consistent definitions, but also because the terms have been used in a confusing normative sense over the years, acquiring loose political labels such as 'liberal' and 'conservative'.[110] So much so, that judicial activism and restraint may have lost their ability to serve any useful purpose. As Kermit Roosevelt noted: the term judicial activism "turns out to be little more than a rhetorically charged shorthand for decisions the speaker disagrees with".[111] It remains cumbersome, nevertheless, to ignore

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[107] Such as the protection of minorities, and to correct other "malfunctions of the democratic system" – *see e.g.*, Ely (1980) at 76, 103.

[108] Sachs (2001), at 90. Cass Sunstein's general theory on judicial minimalism is set out in his book, One Case at a Time: Judicial Minimalism on the Supreme Court (1999). Note that Sunstein has subsequently modified his theory on judicial minimalism, which is now closer to fitting Sachs's comment. *See e.g.*, C. Sunstein, *Problems with Minimalism*, 58 Stanford Law Review 1899 (2005).

[109] The 'judicial activism/restraint' issue has traditionally been more of a U.S. debate (*see e.g.,* Ely (1980), at 2-3); *and* Abraham (1969) at 354)); but as the influence of the American constitutional model increased, so have its terminology and its polemics – *see* Koopmans (2003), at 50.

[110] And not only in the U.S. context – *e.g., see* in general P. Mahoney, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 Human Rights Law Journal 57 (1990); *and* L. Steyn, *Deference – A Tangled Story*, Public Law 346 (2005).

[111] Roosevelt (2003), at 3.

these terms in a book such as this. For better or for worse, judicial activism and restraint remain part of the comparative constitutional law vocabulary; thus, it seems appropriate to clarify how these terms fit within the Judicial Oversight Model.

In doing so, three problems have to be addressed, however. First, the terms have to be depoliticized. As Ely remarked, judicial activism is not synonymous with 'political liberalism'; and judicial constraint does not exclusively amount to 'political conservatism'.[112] And neither can the terms be associated with a particular theory of constitutional interpretation. In fact, judicial activism and restraint, as Ely puts it, "are categories that cut across [the interpretative theories of] interpretivism and noninterpretivism, virtually at right angles".[113] Second, the terms have to be recast in descriptive – as opposed to normative – terms. Comparative constitutional law teaches us that there are times when judicial activism might be 'good' and times when it might be less desirable; and the same is true for judicial restraint.[114] Third, judicial activism and restraint should not be viewed strictly in absolute terms. It is probably more useful (and accurate) to describe activism and constraint in terms of a continuum, where judicial restraint is at the one extreme and judicial activism at the other.[115]

With these three caveats in mind, judicial 'activism' and 'restraint' in the context of the Judicial Oversight Model can be defined as follows: judicial activism corresponds with *higher* (or expanding) levels of judicial independence and/or judicialization; while judicial restraint corresponds with *lower* (or reducing) levels of judicialization and/or judicial independence – see Figure 12 below. Phrased in terms of the interaction between courts and political institutions (the other focus of the Model), judicial activism involves the decision made by a court *not* to show deference "to the government body whose action it is reviewing" (thus, a decision not to defer); while judicial restraint concerns a court's decision to defer to the political institution in question.[116] Note, however, that in terms of this definition, judicial restraint

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[112] Ely (1980), at 1 & 3.

[113] Ely (1980), at 3.

[114] *E.g.*, *Brown* was, at least at the time, considered by many as an example of judicial activism since it overturned an existing precedent without a strong constitutional basis, yet the consensus seems to be that the Court's ruling was 'good', or 'legitimate'(*see* discussion in sections 3.2.1.1 and 4.2.1.1). However, the Hughes Court's 'activism' (between 1931 and 1937) that led the Court to consistently strike down all New Deal legislation put forward by the Roosevelt administration is generally considered to have lacked legitimacy since it was 'bad' for society to force the Court's own economic view (*see* Schwartz (1993), at 229-245).

[115] *See e.g.*, the kind of qualification proposed by Cohn & Kremnitzer *in* M. Cohn & M. Kremnitzer, *Judicial Activism: A Multidimensional Model*, 18 Canadian Journal of Law and Jurisprudence 333 (2005), at <ssrn.com/abstract=942476>. *Also see* below, note 55 (Ch. 11).

[116] *See* Roosevelt (2003), at 3. Roosevelt argues that the U.S. Supreme Court should not be criticized for its decision 'to defer or not to defer' *per se*, but whether that decision is considered to be "legitimate" or "reasonable".

is *self*-restraint. As the phrase implies, it still is within courts' discretion to decide when and how to exercise that restraint.[117]

Figure 12: Judicial 'Activism' and 'Restraint' in terms of the Judicial Oversight Model

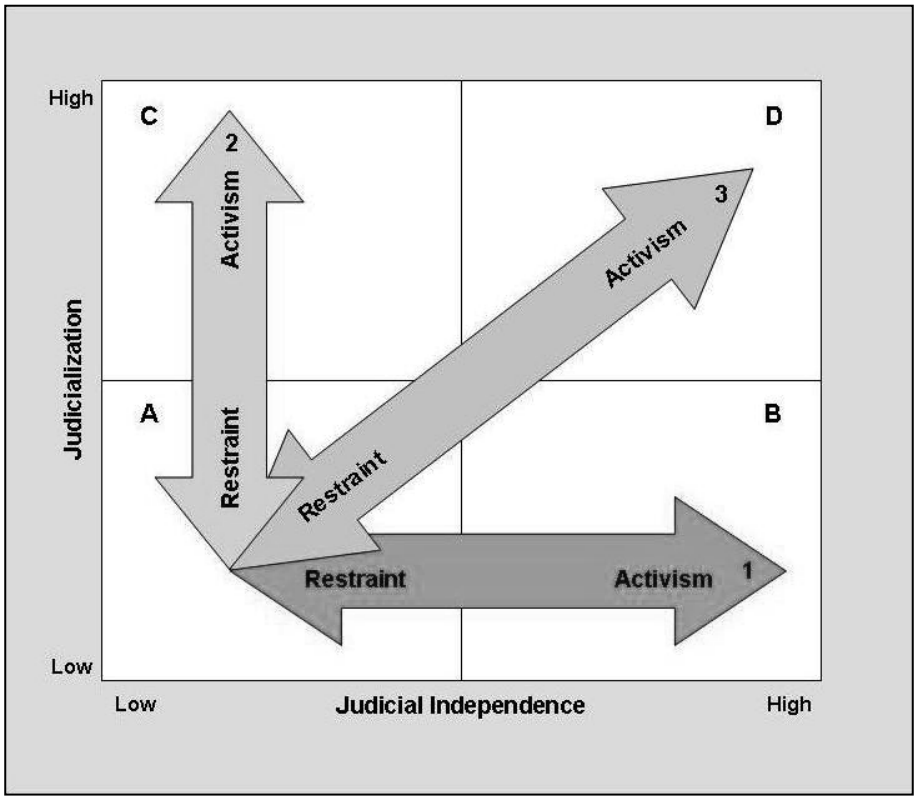


Figure 12 also illustrates another possibility (albeit of a more secondary nature), namely, that there are probably different 'levels' of judicial activism and restraint. Put differently, that judicial activism and restraint can be described as 'thick' or 'thin'. For example, the level of judicial activism in continuum 3 may be described as 'thicker' than the level of judicial activism in continuum 1; whereas the level of judicial activism of courts moving along the line of general progression is likely more moderate than continuum 3.

[117] *See* section 2.1.2.3 above.

5.5. Summary

This chapter refined the Judicial Oversight Model by expanding on the notion of the 'dynamics' of judicial oversight, which is concerned with the interrelationships between system variables and participants, and the consequences of those interdependencies, such as change, equilibrium, fluctuation and evolution. The chapter illustrated the 'limits of judicial oversight', as manifested by the impediment to indefinite expansion of judicial independence and judicialization. In addition, the chapter described how courts fluctuate between positions of lower and higher judicial independence and/or judicialization, and how courts evolve along different developmental paths. One developmental path – the line of general progression – has been emphasized as providing courts with the highest probability of sustainable expansion of judicialization and judicial independence. Finally, the chapter framed judicial activism and restraint in terms of the Judicial Oversight Model, i.e.: 'activism' corresponds to the expansion of judicial independence and/or judicialization, while 'restraint' corresponds to the reduction of judicial independence and/or judicialization.

5.5.1. The Refined Judicial Oversight Model

The refined Judicial Oversight Model can now be summarised as follows: the Judicial Oversight Model considers three dimensions of courts exercising the powers of judicial oversight, namely: 'nature', 'effect' and 'dynamics' – see Figure 13 below.

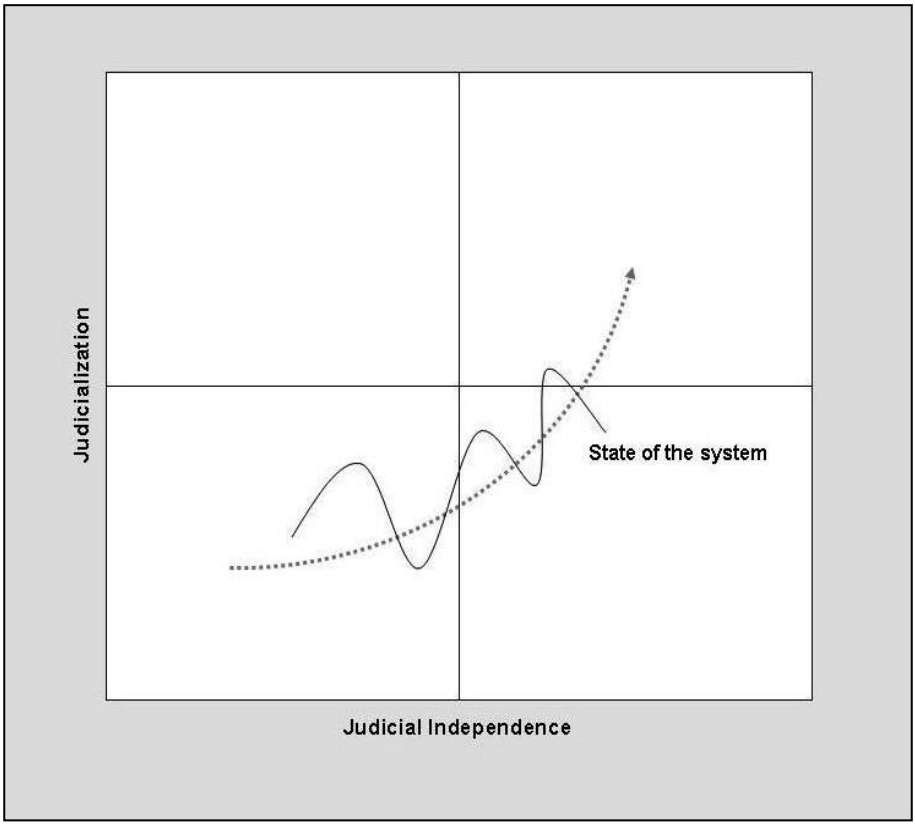
The *nature* of judicial oversight is described by two key variables: *de facto* judicial independence and judicialization. The Judicial Oversight Model posits that courts take action to strengthen their *de facto* independence from political institutions and to expand their power and influence (judicialization). Specifically, courts might assert their independence from political institutions by building institutional credibility and prestige; by levering landmark cases; and by raising public awareness of political interference. Moreover, courts might increase their influence and power by expanding their judicial oversight mandate without strong legal justification; by making use of expansive interpretation techniques; and by developing and employing legal principles or doctrines.

The *effect* of judicial oversight is illustrated by three potential outcomes: constitutional dispute resolution; human rights protection (including the development and enforcement of effective legal remedies); and the indirect legitimization of political institutions. The Judicial Oversight Model hypothesizes that the realization of specific outcomes is influenced by the particular socio-political context (including the constitutional documents

relevant to that constitutional system); but that it is also influenced by the degree of judicialization and judicial independence in the constitutional system.

The *dynamics* of judicial oversight describes the relationships between system components (such as courts and political institutions, and judicialization and judicial independence), and their consequences for change (i.e., growth and decline), equilibrium and the general evolution of courts. The Judicial Oversight Model postulates that, *while courts fluctuate between lower and higher levels of judicialization and judicial independence* (or, between positions of (varying degrees of) activism and restraint), *over time, courts are likely to expand their degree of judicialization and judicial independence along a line of general progression* since it ensures a more sustainable growth path.

Figure 13: The Judicial Oversight Model - Illustrating the Nature, Effect and Dynamics of Judicial Oversight



PART II:

APPLICATION OF THE JUDICIAL OVERSIGHT MODEL TO THE WORLD BANK INSPECTION PANEL

Part II of this books aims to analyse the World Bank Inspection Panel through the lens of the Judicial Oversight Model (developed in Part I) – with the ultimate objective of identifying institutional and functional parallels and contrasts between the Panel and judicial oversight. However, this is not a 'passive' process. As Palmer noted, vertical or "cross-echelon" legal

> transplants almost always undergo some modification and reform not only at an unconscious epistemological level (wherein borrowed rules receive a distinct local interpretation or "translation" by the local culture); there is often a conscious revision of the transplant to conform to an analogous or cognate legal idea already present in the system. The process is neither new nor abnormal in many mixed systems. It is actually a kind of creative convergence – the construction of autonomous law out of borrowed elements.[1]

Part II illustrates this "creative convergence".

Chapter 6 commences Part II, introducing the Inspection Panel in its institutional – World Bank – context. Readers familiar with the Bank and the Panel might therefore want to proceed directly to the application of the Judicial Oversight Model to the Panel's institutional history and practice, contained in Chapters 7 to 10.

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[1] Palmer (2005), at 276.

Chapter 6

Introducing the Inspection Panel in the Context of Accountability and Legitimacy at the World Bank

> *[…] in order to maintain credibility in promotion of accountability and the rule of law, the Bank must pay greater attention to its own internal accountability crisis. It is important to critically examine how principles of governance and the rule of law are applied at the Bank itself. There is a certain hypocrisy inherent in the Bank's willingness to promote these values as integral to development while failing to take steps to ensure that the Bank itself adheres to the rule of law and, at the very least, is held accountable for violations of its own policies.*[1]

This chapter aims to introduce the Inspection Panel in its institutional context. That is, the Inspection Panel is in the first instance a *World Bank* institution.[2] For example, while the Board of Executive Directors (the 'Board') has taken measures to ensure that the Inspection Panel can operate with a high degree of institutional independence from Bank management,[3] the fact remains

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1 D. Clark, *The World Bank and Human Rights: The Need for Greater Accountability*, 15 Harvard Human Rights Journal, at 221 (2002).

2 *See* <http://www.worldbank.org> for an introduction to the World Bank. *Also see* in general P. S. McClure, A Guide to the World Bank (2003); D.D. Bradlow & C. Grossman, *Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF*, 17 Human Rights Quarterly 411 (1995); M. Yunus, *Redefining Development*, *in* K. Danaher (Ed.), 50 Years is Enough: The Case Against the World Bank and the International Monetary Fund, at ix-1 (1999); *and* S. Mallaby, The World's Banker: A Story of Failed States, Financial Crises, and the Wealth and Poverty of Nations (2004).

3 For instance, the Inspection Panel Resolution (*see* below, note 4 (Ch. 6)) states that "an independent Inspection Panel" is established (§1); "Independence from the Bank's Management" is one of the selection criteria for Inspection Panel members (§4); Panel members cannot be employed by the World Bank group (in any capacity) after the end of their three-year term

that the Inspection Panel was established by a resolution of the Board (the 'Resolution').[4] The Panel answers directly to the Board,[5] Panel members are appointed by the Board (on nomination of the World Bank President),[6] and are considered to be Bank officials.[7]

Over the past few decades, the World Bank has been criticized by a wide variety of role players, concerning a wide array of topics.[8] This chapter will focus on two of those issues – accountability and legitimacy[9] – in order to create the backdrop against which the Inspection Panel's institutional history and practice must be understood. Note that this chapter will briefly introduce what these challenges mean for the World Bank (6.1) and how the Bank has addressed these issues (6.2), without specifically evaluating the effectiveness of the Bank's efforts. The chapter will then discuss the prominent features of the Inspection Panel's mandate, process and its practice (6.3), before concluding with a summary (6.4).

6.1. Accountability and Legitimacy Challenges

This section will expound some of the reasons behind the calls for enhanced accountability and legitimacy at the World Bank, coming from a variety of

(§10); Panel members' remuneration is determined by the Board, on recommendation from the World Bank President (§10); the Panel "shall be given such budgetary resources as shall be sufficient to carry out its activities" (§11); and the Panel is guaranteed full access to all relevant documentation and Bank staff in the course of an investigation (§21).

4 Resolution establishing the Inspection Panel, IBRD Resolution No. 93-10, IDA Resolution No. 93-6, 22 September 1993, hereafter 'Inspection Panel Resolution', or 'Resolution'.

5 Inspection Panel Resolution (1993), at §22.

6 Inspection Panel Resolution (1993), at §2. *Also see* the amended Inspection Panel selection procedure that aims to make the appointment process more inclusive; but ultimately culminates in the President making a nomination to the Board, which finally approves it – *see* Selection Procedures for Members of the Inspection Panel, R2003-0043/2 and IDA/R2003-0049/2, of 23 April 2003, at <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/IPN_Selection_Procedures_2009.pdf?&resourceurlname=IPN_Selection_Procedures_2009.pdf>.

7 Inspection Panel Resolution (1993), at §10.

8 *See* in general A. Versi, *Is the World Bank Deaf?*, 192 African Business 8 (1994); H.F. French, *The World Bank: Now Fifty, but How Fit?*, 7 World Watch 4, at 10 (1994); *and see* D. Bradlow, *The Governance of the International Financial Institutions: The Need for Reform*, 43 Indian Journal of International Law (2003); *but see* comment from M. Miller-Adams, *in* The World Bank: New Agendas in a Changing World, at xi (1999): "[…] the complexity of the institution makes it possible for social scientists to find evidence for every hypothesis and its opposite in their investigations of the World Bank."

9 For a summary of the main criticisms aimed at the World Bank (and other multilateral development banks), *see* J.W. Head, *For Richer or For Poorer: Assessing the Criticisms Directed at the Multilateral Development Banks*, 52 University of Kansas Law Review 241 (2003-2004).

internal and external stakeholders (6.1.1); and, given the potentially broad meanings of accountability and legitimacy, set out what these twin-challenges might specifically mean in the context of the Bank (6.1.2).

6.1.1. Why the Calls for Accountability and Legitimacy?

The World Bank has a highly complex mission. It aims to realize a "world free of poverty"[10] by providing affordable development assistance in the form of low interest or interest-free loans, credits and grants to developing and least developed countries.[11] As the world's largest development institution, the Bank's financial impact is highly significant;[12] however, as Mallaby explained, there is more to the World Bank than just its financial muscle power:

> [the World Bank] lends money to poor countries – some $20 billion a year – but its real importance lies in its influence over the developing world's policies. In the words of one critical account, the Bank has "more to say about state policy than many states," and while that goes a little far, the general point is valid.[13]

Furthermore, World Bank involvement often acts as a 'seal of approval' that opens up further funding from other lending agents, including regional multilateral development banks[14] and the private sector.[15] In other words, the World Bank's influence is akin to the exercise of public power, which may have an adverse effect on the environment and on private parties at the local level. Hence, calls for the enhancement of the Bank's accountability and legitimacy have been increasing over the past decades.[16]

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[10] *See* the World Bank's Mission Statement at <http://www.worldbank.org/html/extdr/smith-assoc/mor-pres.pdf>.

[11] IBRD countries are "middle-income and creditworthy poorer countries" (as identified by the Bank) that qualify for low interest-rate loans. Funding for IBRD loans is obtained at the world's financial markets. IDA countries are the "poorest, non-creditworthy countries" (as identified by the Bank) that qualify for credits (no-interest loans, repayment occurs over 35-40 years, with a 10 year grace period) and grants (no interest and no repayment of the principle amount). Funding for IDA credits and grants is obtained from aid money received from donor countries and from repayment of earlier credits – *see* <http://www.worldbank.org>; *and* McClure (2003), at 10-14.

[12] For example, between 1949 and 1992 alone, World Bank lending to governments has increased from $1.3 billion to $22 billion annually – *see* French (1994), at 10.

[13] Mallaby (2004), at 3.

[14] *Such as* the IDB, ADB, AfDB and the EBRD.

[15] *See e.g.*, 2001 *Chad-Cameroon Petroleum Development & Pipeline Project*, Request, at 2: "Participation by the World Bank has enabled the oil producing consortium [private sector oil companies] and the Government of Chad to agree to a 'Revenue Management Plan' and, as a result, the Bank expects that the oil revenue should be spent on poverty reduction programs […]."

[16] *See* section 1.2 above.

The failures of two prominent Bank development projects – Brazil *Polonoroeste* and India *Narmada* – brought the issues of World Bank accountability and legitimacy especially to the fore. The *Polonoroeste* project, designed and implemented over the course of the early 1980s, was the first Bank project that raised major alarm bells among civil society and other commentators as to the adverse environmental impact of World Bank development projects.[17] In the aftermath of *Polonoroeste*, the World Bank had adopted the predecessors of today's environmental safeguard policies to address some of these concerns.[18] The Bank's legitimacy had nevertheless suffered, as many continued to criticize the Bank's failure to be 'held accountable for' project-related environmental and social (human rights) failures.[19] However, it was the much-publicised India *Narmada* (or '*Sardar Sarovar*') project that became the notorious 'poster child' for World Bank accountability and legitimacy failures during the late 1980s to early 1990s.[20]

The *Narmada* project was typical of many large Bank development projects: it involved the layout of massive infrastructure that would (often involuntarily) displace a large number of people and have a profound impact on the environment. Mounting external criticism of the *Narmada* project triggered the first ever internal investigation into a World Bank project (the 1991 'Morse-Berger' investigation),[21] which also led to a broader internal investigation into the effectiveness of World Bank operations in general (the 1992 'Wapenhans' investigation).[22] A crucial finding in both reports was that

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[17] *See e.g.*, P.A. Rodgers, *Looking a Gift Horse in the Mouth: The World Bank and Environmental Accountability*, 3 The Georgetown International Environmental Law Review 457 (1990). *Also see* Shihata (2000), at 5-8.

[18] *See* section 6.2.1 below.

[19] *E.g., see* in general M. Darrow, Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law, at 19-25 (2006); T. Buergenthal, *The World Bank and Human Rights*, 31 ASIL Studies in Transnational Legal Policy 95 (1999); and K. Tomaševski, *The Influence of the World Bank and the IMF on Economic and Social Rights*, 64 Nordic Journal of International Law 385 (1995); and G. Brodnig, The World Bank and Human Rights: Mission Impossible?, *Carr Center for Human Rights Policy Working Paper T-01-05*, at <http://www.ksg.harvard.edu/cchrp/news_wpapers.shtml>. For a discussion of the Inspection Panel's role in human rights protection, *see* section 9.2 below.

[20] *See* T.R. Berger, *The World Bank's Independent Review of India's Sardar Sarovar Projects*, 9 American University Journal of International Law & Policy 33 (1993-1994). *Also see* Shihata (2000), at 5-6.

[21] Shihata (2000), at 6-8.

[22] The 'Morse-Berger' report was published by the authors without Bank permission, *see* Shihata (2000), at 7, fn. 14. *Also see* Kingsbury (1999), at 330. The 'Wapenhans' report was eventually published by the World Bank in response to donor country insistence – *see* D. Clark, *Understanding the World Bank Inspection Panel*, *in* D. Clark, J. Fox & K. Treakle (Eds.), Demanding Accountability: Civil-Society Claims and the World Bank Inspection Panel, at 2-5 (2003).

social and environmental failures could be directly attributed to the World Bank's failure to comply with its own operational (safeguard) policies and procedures.

6.1.2. The Meaning of Accountability and Legitimacy for the World Bank

Recall that 'accountability' has been broadly defined in this book as the obligation to account for the exercise of public power, and 'legitimacy' as being related to how political institutions are perceived, and whether their actions are a "function of moral justifiability or respect-worthiness".[23] This section will problematize these two terms in the context of the World Bank, and simultaneously hint at why accountability and legitimacy might be difficult to realize – and to evaluate.

6.1.2.1. Accountability: who, to whom, and for what?[24]

Who should be accountable at the World Bank? For World Bank project affected people, the answer to this question is simple: the 'Bank' should be held accountable; how they realise this, is for the Bank to sort out internally. A purely positivistic legal standpoint would seem to support this view. In practice, however, the responsibility for development projects is shared by World Bank management and staff (on the one hand), and the borrowing state and its implementing agency(s) (on the other). While the Bank and borrowers have divided the responsibilities of a development project between them, those lines are often blurred in practice. And it often leads to a situation, as many Inspection Panel cases illustrate, where both the Bank (management and staff) and the borrower sidestep accountability by blaming project failures on each other.[25]

To whom should the World Bank be accountable? Shihata asserted, for instance, that it was incorrect to claim that the World Bank has not been accountable to 'anyone' since the World Bank has a well defined *internal* accountability structure set out in its Articles of Agreement.[26] This is probably a fair assessment; however, the *external* accountability of the World Bank

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[23] *See* section 1.3.4 above.

[24] *See* C. Scott, *Accountability in the Regulatory State*, 27 Journal of Legal Studies 38 (2000), raising the notion the accountability issue has to be analyse from various perspectives.

[25] *See* above, note 12 (Ch. 1). *And see e.g.*, the 2007 *Albania Integrated Coastal Zone Management and Clean-Up Project* Inspection Panel case, where the World Bank denied any link between the demolition of houses (conducted by the Albanian government) and the Bank-funded *Coastal Zone Management* project – *see* discussion in section 7.3.5 below.

[26] Shihata (2000), at 8-16.

is of a much more complex nature. The Inspection Panel procedure seems to indicate that the Bank's external accountability extends to individuals that have been adversely affected by World Bank projects.[27] But what about international civil society, or citizens of donor countries that are dissatisfied with the manner in which the Bank spends donor money?[28] In other words, how far would the World Bank's *external* accountability extend?

For what actions, specifically, should the World Bank be held accountable? And 'against what' should the World Bank's actions be measured? The Inspection Panel procedure requires the Bank to comply with its own operational policies and procedures, which include the so-called 'safeguard' policies that have been specifically designed to mitigate the potential adverse social and environmental effects of its development projects.[29] However, should the Bank's actions also be measured against other public international law standards, such as those contained in multi-lateral environmental agreements and international human rights conventions – even though international institutions are (usually) not parties to such treaties? While there seems to be an emerging consensus that the World Bank has international human rights obligations,[30] for instance, it remains unclear what the content of such obligations might be.[31]

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[27] A few Inspection Panel Requests were submitted by local NGOs "on behalf of" the Requesters, as well as "on its own behalf", *see e.g.,* 1996 *Paraguay/Argentina Yacyretá Hydroelectric Project*; 1999 *Ecuador Mining Development and Environmental Control Technical Assistance*; 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*; 2004 *Colombia Cartagena Water Supply, Sewerage and Environmental Management Project*; and 2004 *Pakistan National Drainage Program Project*. Shihata was concerned that acceptance of such Requests would "amoun[t] to accepting claims based on public interest" or actio populares, which has not been envisaged by the Resolution. The Panel accepted these Requests without any queries and the matter has never been discussed by the Board – *see* Shihata (2000), at 118 & 228.

[28] Donor countries, at least, are more likely to have direct representation on the Board. Also, the IDA replenishment rounds have become an effective mechanism for donor countries to exert pressure on the Bank, *see e.g.,* Shihata (2001), at 21. Another example of donor country influence is through its NGOs – *see e.g.*, the tremendous lobbying effect of the U.S. based NGO, the 'Tibet Action Campaign', in realizing a full-scale Inspection Panel investigation into the 1999 *China Western Poverty Reduction* project, described in Clark *et al.* (2003), at 211-238.

[29] For a discussion of the safeguard polices, *see* section 6.2.1 below.

[30] *See* in general I.F.I. Shihata, *The World Bank and Human Rights: An Analysis of the Legal Issues and the Record of Achievements*, 17 Denver Journal of International Law & Policy 39 (1988-1989); I.F.I. Shihata, *Human Rights, Development, and International Financial Institutions*, 8 American University Journal of International Law & Policy 27 (1992-1993); *and see* the World Bank's Management Response to the 2001 *Chad-Cameroon Petroleum Development & Pipeline Project*, MR, at §16 – *also see* section 9.2.1 below.

[31] For arguments that the Bank's OP&P already reflects (at least some) international legal standards, s*ee* 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, at 323-342 (1999). *Also see* above, note 19 (Ch. 6).

6.1.2.2. Legitimacy: how the World Bank is perceived

Coicaud and Heiskanen concluded, for instance, that, despite ideological differences, the legitimacy of states is determined by "the relationship between the state/government and civil society (people/citizens)".[32] In the national context, this relationship is usually considered to be 'legitimate' or credible if it is regulated by democracy and the rule of law.[33] By analogy, they argue, the legitimacy of international organizations is reflected in its relationship with international civil society (i.e., affected people at the local level and international NGOs).[34] In the absence of democracy at the international level,[35] the legitimacy of international organizations is specifically determined by the extent to which they are accountable to affected people, and the extent to which their relationship with "international civil society" is regulated by the 'international rule of law'.[36]

In short, therefore, the World Bank's perceived lack of accountability has had a negative influence on the way the Bank is perceived by a wide range of stakeholders – such as project affected people, donor and borrower countries, and civil society. As this chapter's opening quote suggests,[37] given the Bank's own growing emphasis on borrower 'good governance', as reflected in many of the Bank's loan conditionalities, as well as and 'governance' and 'capacity building' projects,[38] its own lack of accountability for environmental and social project failures has dealt the Bank's legitimacy a great blow. This situation has prompted Bank critics to insist that the World Bank must first pay attention to one of good governance's own fundamental principles – that is: *patere legem*

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[32] Coicaud & Heiskanen (2001), at 4. For a discussion about the link between the legitimacy and effectiveness of 'International Environmental Institutions' such as the World Bank, *see* Andresen & Hey (2005), at 211-226.

[33] *See* section 1.3.4 above.

[34] This relationship is conventionally considered to be problematic because of the argument that no direct relationship exist between IO's and individuals, *see* Coicaud & Heiskanen (2001), at 5-10; *but see* above, note 10 (Ch. 1).

[35] *See* discussion in section 1.2 above.

[36] For a definition of the international rule of law *see* section 1.3.1 above. The definition of the 'legitimacy of international organizations' articulated here reflects an "idealist or institutionalist" theoretical approach to international organizations, ***i.e.*** arguing that: "[…] international organizations play a role in international affairs that is somewhat independent of states and governments, their creators. Like states, international organizations are formal subjects of international law, having an independent legal identity and the capacity to sue and be sued in international and national fora, within the limits of their functional immunity." *See* Coicaud & Heiskanen (2001), at 5.

[37] *See* above, note 1 (Ch. 6).

[38] *See* J.W. Head (2003-2004), at 241; *and* Bradlow & Grossman (1995), at 426-433; *also see* Darrow (2003), at 74-83.

quem ipse fecisti; or, ensure that you comply with the laws that you have made for others – before demanding good governance from others.[39]

6.2. World Bank Responses to these Challenges

The World Bank has responded to the challenges of accountability and legitimacy in two prominent ways.[40] First, it has developed operational policies and procedures to ensure that the social and environmental impact of its development projects is minimized – or, at least, is managed in a manner that is conducive for sustainable development (6.2.1). Second, the Bank has established quality assurance and compliance mechanisms to ensure that its policies and procedures are implemented in a manner that leads to improved development effectiveness and project quality (6.2.2).

6.2.1. The Operational Policies and Procedures

The World Bank's Operational Policies and Procedures (OP&P) have evolved over the last number of decades from a fairly amorphous body of "operational statements" and "*ad hoc* circulars" into a structured and formalized set of "Operational Policies, Bank Procedures and Good Practice Guidelines".[41] An important aspect of this evolution involved the process of clarifying the binding nature of these documents on Bank management and staff. For instance, the Operational Directives (OD) in circulation since the late 1980s contained a mixture of provisions that were both binding and non-binding in nature.[42] This situation resulted in uncertainty among Bank management and staff – and even among Board members, as the Inspection Panel uncovered in the 1999 *China Qinghai* case.[43]

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[39] *See e.g.,* J. Wouters & C. Ryngaert, *Good Governance: Lessons From International Organizations*, Working Paper No 54 – May 2004, at 4, at <http://www.internationallaw.be>; *and see* D. Bradlow, *Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*, 36 Georgetown Journal of International Law 403, at 408 (2005).

[40] For other World Bank responses to common criticisms (such as increased, and formalized, dialogue with civil society, decentralizing Bank staff – including decision-makers, and the implementation of 'private-sector' management philosophies such as decentralization and 'matrix'-based organization structures) *see e.g.*, Mallaby (2004), at 145-173.

[41] Shihata (2000), at 41-43, and Kingsbury (1999), at 324-325. *And see* Hunter (2004), at 204, noting that the Bank's OP&P "delineated the rights and interests of project-affected people".

[42] Id. *And see* Kingsbury (1999), at 329: "[…] Operational Directives have thus been understood to be 'binding' on Bank staff within the Bank management structure, but applied and enforced flexibly rather than 'legalistically'.

[43] Shihata (2000), at 42. *Also see* 1999 *China Western Poverty Reduction Project*, IR (ES), at §15.

The Bank aimed to address this issue with the so-called 'conversion process' that was started in 1992.[44] The outcome of the conversion process was – per policy area – an Operational Policy (OP) that covered the subject on a high level, and a set of Business Procedures (BP) that included a greater amount of detail on the topic. The remaining policy documents were converted into 'Good Practices' (GP). Both OP and BP would be binding on Bank management and Staff, while GP would be non-binding.[45] While the clarification resulting from the conversion process was welcomed, many commentators contended that the World Bank was using the conversion process as a smokescreen for 'watering down' the policies by converting vital components of certain ODs – which *were* formulated in an obligatory manner in the original OD – to GPs, which would be non-binding.[46]

A further point of contention is the World Bank's process for adopting new operational policies or making amendments to existing ones. While the Bank did involve external stakeholders (mostly, civil society) in the conversion process of some ODs (such as the conversion of OD 4.10 on Indigenous People into OP 4.10 and BP 4.10 respectively), it is not a formal

[44] The conversion process has resulted in an intermediary situation that might lead to situations where it is not clear whether the underlying document is merely providing staff with technical advice, or whether it places definite obligations on them. Due to the length of most Bank projects, it can also be problematic to determine whether a particular document had an obligatory nature during the time of implementation. A number of Inspection Panel cases illustrated this issue – *see e.g.*, 1994 *Nepal Arun III Proposed Hydroelectric Project and Restructuring of IDA Credit (Arun III)*, 1996 *Paraguay/Argentina Yacyretá Hydroelectric Project*, and 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)* Requests. *E.g.*, in *Arun III*, Bank management argued that the particular policy ('Economic Analysis of Investment Operations') was not in force at the time the Request was registered. The Inspection Panel rejected this argument, stating that the "fundamental requirements" of the old and new policy were basically the same, and that in Bank management's response to the Request it appeared as though Management applied the new policy in any event – *see* 1994 *Nepal Arun III Proposed Hydroelectric Project and Restructuring of IDA Credit (Arun III)*, ER at §21.

[45] The Inspection Panel Resolution (1993) (at §12) specifies that the Inspection Panel's mandate "does not include Guidelines and Best Practises and similar documents or statements." Thus, the conversion process also meant that some provisions from the old ODs would not be binding on Bank Staff – and would arguably be excluded from the Inspection Panel's mandate. Note, however, that the Inspection Panel seems to regard GPs and BPs as falling within its mandate – *see* 1999 *China Western Poverty Reduction Project,* IR (ES), at §15: "[T]here is indeed room for some flexibility and interpretation but, as provided in the Resolution that established the Panel, the Operational Directives (and updated OPs, *BPs, GPs*, etc.) are the primary source of Bank policy for purposes of assessing compliance". (Emphasis added.)

[46] *See e.g.*, P. Bosshard, J. Bruil, K. Horta *et al.*, *Gambling with People's Lives: What the World Bank's New "High Risk/High-Reward" Strategy Means for the Poor and the Environment*, at 39 (2003); *and see* Clark (2002): "The Bank's systematic process of weakening its policy framework represents another internal rebellion against the rule of law. The 'reformatting' of Bank policies is generally viewed by outside experts as an attempt to shield the Bank from accountability through the Inspection Panel process."

requirement.[47] Most operational policies and procedures are issued "under the authority of the [Bank's] President", by the relevant senior Bank management member.[48] Some policies, such as the 'Safeguard policies' (discussed below), are discussed by the Board in draft format before they are adopted by Bank management.[49]

The current set of World Bank OP&Ps has been combined in the Bank's 'Operational Manual' (OPM), and is organized into two volumes.[50] Volume I is concerned with policies that are typically relevant during the development of 'Country Assistance Strategies' and the identification of potential development projects[51] – two components of the project lifecycle that are not covered by the Panel mandate, and is therefore unlikely to become the subject of a Panel investigation.[52] The policies contained in Volume II of the OPM, however, concern "the requirements applicable to Bank-financed lending operations", and thus coincides with the Inspection Panel's mandate.[53]

Volume II is organized into seven subsections, of which three is of particular relevance for the Inspection Panel, namely: 'Safeguard Policies', 'Management', and 'Disclosure'.[54] The policy areas covered by the 'Safeguard Policies' include 'Environmental Assessment',[55] 'Natural Habitats',[56] 'Pest

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47 *See* Kingsbury (1999), at 324-325.

48 Shihata (2000), at 41.

49 Shihata (2000), at 42. Some commentators have also criticized the lack of Inspection Panel input into the development of World Bank OP&P. *E.g.*, the IFC and MIGA's Compliance Advice Ombudsman (CAO) and the inspection functions at some of the other Multilateral Development Banks are mandated to provide input on policy – *see* D. Bradlow (2005), at 436. Note that the Bank has engaged the Panel for the first time in 2004 on a policy matter, *i.e.*, the impact of the proposed use of 'Borrower Systems to Address Environmental and Social Safeguard Issues in Bank-Supported Projects' on the Panel's mandate. This request has lead to an unprecedented joint statement by the Inspection Panel Chairperson and the Bank's Senior Vice President and General Council on the matter – *see* '*Joint Statement on the Use of Country Systems – Mexico Decentralized Infrastructure Reform and Development Project'*, R2004-0077, 0077/3, at <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/News%20And%20Events/20235994/610Joint%20StatementInspPanGC.pdf>.

50 *See* World Bank Operational Manual, at <http://go.worldbank.org/DZDZ9038D0>.

51 *E.g.*, policies on 'Country Focus' and 'Sector/Thematic Strategies' and 'Business Products and Instruments'.

52 For a discussion of the Inspection Panel's mandate, *see* section 6.3.2 below.

53 *See* above, note 50 (Ch. 6).

54 Other subsections of Volume II include 'Contractual', 'Analysis', 'Fiduciary', and 'Financial'. Statistics from the Inspection Panel's 2006/2007 Annual Report illustrate that the OP&P "most often raised" in Inspection Panel Requests are a few specific 'Safeguard' policies, the 'Project Supervision' policy, and the 'Disclosure of Information' policy – *see* Inspection Panel Annual Report (2006/2007), at 126.

55 OP & BP 4.01.

56 OP & BP 4.04.

Management',[57] 'Indigenous Peoples',[58] 'Physical Cultural Resources',[59] 'Involuntary Resettlement',[60] 'Forests',[61] 'Safety of Dams',[62] 'Projects on International Waterways',[63] and 'Projects in Disputed Areas'.[64] The 'Management' subsection contains policies on the Bank's project management and supervisory responsibilities, as well as the Inspection Panel Resolution and subsequent Board Clarifications.[65] Finally, the 'Disclosure' subsection consists of the Bank's policy on the disclosure of project related information and required consultation with project affected people.[66]

6.2.2. Compliance and Quality Assurance Mechanisms

Establishing OP&Ps was only one part of the answer, however. Those policies still had to be institutionalized and enforced. The World Bank Group[67] has consequently established various compliance and quality assurance mechanisms to address these aspects.

For instance, the Independent Evaluation Group (IEG), formerly known as the Operations Evaluation Department (OED), was already established in 1973. As the name suggests, the IEG is an independent group within the World Bank that reports (like the Inspection Panel) directly to the Board of Executive Directors. Its current mission statement is to enhance "Development Effectiveness through Excellence and Independence in Evaluation".[68] The IEG conducts *post facto* quality and compliance reviews of Bank projects and its aims include ensuring that the institution learns "from experience", and to provide "accountability in the achievement of [World Bank] objectives".[69] The

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57 OP & BP 4.09.
58 OP & BP 4.10.
59 OP & BP 4.11.
60 OP & BP 4.12.
61 OP & BP 4.36.
62 OP & BP 4.37.
63 OP & BP 7.50.
64 *See* OP & BP 7.60. The Safeguard Policies currently also include OP 4.00 – 'Piloting the Use of Borrower Systems to Address Environmental and Social Safeguard Issues in Bank-Supported Projects'.
65 These are, OP & BP 13.05 (Project Supervision); OP & BP 13.55 (Implementation Completion Reporting); OP 13.60 (Monitoring and Evaluation); BP 17.30 (Communications with Individual Executive Directors); and BP 17.55 (Inspection Panel).
66 *See* 'The World Bank Policy on Disclosure of Information' (2003), at<http://go.worldbank.org/O124FD4A00>.
67 Thus, including the IFC, MIGA and ICSID – *see* <http://www.worldbankgroup.org/>.
68 *See* <htpp://www.worldbank.org/ieg/about.html>.
69 Id.

Inspection Panel and the IEG are therefore complementary functions to some degree, since the Inspection Panel's mandate ends where the IEG's mandate begins.[70]

The Bank's Quality Assurance Group (QAG)[71] was established in 1996 as a direct response to the Wapenhans report, which found that a "third of Bank projects were unlikely to achieve their objectives".[72] The QAG is responsible, amongst other things, for identifying and developing 'good practice' elements in Bank projects, and to conduct quality assessments on Bank projects (using both internal and external experts).[73]

In response to similar criticisms of the adverse social and environmental impact of the International Finance Corporation (IFC),[74] the World Bank Group established the Compliance Advisory Ombudsman (CAO) in 1999,[75] which serves as independent compliance body for IFC and Multilateral Investment Guarantee Agency (MIGA)[76] projects.

However, the most prominent step taken by the World Bank to address accountability and legitimacy criticisms was the establishment of the Inspection Panel in September 1993 with the adoption of Resolutions No.93-10 IBRD and No.93-6 IDA (jointly known as 'the Resolution') by the World

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[70] The Inspection Panel cannot investigate a Request after the loan financing of the project has been closed, or when more than 95% of the loan amount has been disbursed – *see* Inspection Panel Resolution (1993), at §14(c). The Inspection Panel also strengthens the complementary relationship between itself and the IEG and uses this relationship as a means of strengthening its own findings. For example, the Panel included references to the IEG's previous work – *see* 1995 *Brazil Rodônia Natural Resources Management Project*, Additional Review, at §37 & §55-56: "OED recommended early use of this remedy [suspension of disbursements] to ensure compliance in any future project of this type in Rodônia. The records examined by the Panel show that suspension of disbursements was never considered for PLANAFLORO until after the Request for Inspection was filed with the Panel." *Also see* 1996 *Paraguay/Argentina Yacyretá Hydroelectric Project*, ER, at §§30-31: Bank management held that "the suspension of disbursements was a discretionary remedy available to management, and thus not 'compulsory". The Panel challenged this argument, citing recent OED reports on (previous) *Yacyretá* loans, which also mentions the problems associated with Management's "discretionary use of legal remedies."

[71] *See* <http://go.worldbank.org/J4OO0PFYM0>.

[72] *See* <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/QAG/0,,contentMDK:20067550~menuPK:117784~pagePK:109617~piPK:109636~theSitePK:109609,00.html>.

[73] *See* <http://go.worldbank.org/4LX049UBZ0>.

[74] The Inspection Panel Request that brought the issue to the fore was the 1995 *Chile Financing of Hydroelectric Dams in the Bio-Bio River Project*, which was financed by the IFC. The Panel had to rule that the Request was inadmissible in terms of the Resolution (*prima facie* outside the Panel's institutional scope), and the Request was therefore not registered.

[75] *See* <http://www.cao-ombudsman.org>. The mandate of the CAO is comparable to that of the Inspection Panel, but since it is an ombudsman function, its methods are more problem-solving oriented. The CAO also has a policy advice function and conducts *post facto* compliance reviews of closed projects.

[76] *See* <http://www.miga.org>.

Bank's Board of Executive Directors. The remainder of this chapter will be conveyed to introduce the Inspection Panel – and specifically to set out the salient aspects of the Panel's composition (6.3.1), its mandate and institutional scope (6.3.2), process (6.3.3), and practice (6.3.4).

6.3. The Inspection Panel

The establishment of the World Bank Inspection Panel was a truly unique occurrence in public international law.[77] Not only did the World Bank give project affected people access to an independent recourse mechanism (the first of its kind, which over time resulted in the adoption of similar mechanisms at all the other major regional multilateral development banks (MDB));[78] but the Bank also opened itself up to external scrutiny for the first time.

6.3.1. Composition

The Inspection Panel consists of three members "of different nationalities from Bank member countries".[79] The World Bank President nominates potential Panel members, in consultation with various internal parties, after which members are ultimately appointed by the Board.[80] The Resolution sets out various selection criteria for the appointment of Inspection Panel members, which include the "ability to deal thoroughly and fairly" with Requests, personal "integrity" and "independence" from Bank management, prior experience with "developmental issues and living conditions in developing countries", and, "desirably," knowledge of and experience with Bank operations.[81] Although the Resolution does not specifically require the Panel to be representative in terms of geographic region or gender, the Panel's composition over the years has reflected a reasonable geographic spread.[82] Significantly, only one

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77 *See* Hey (1997), at 61-74.

78 That is, the IDB's 'Independent Investigation Mechanism', at <http://www.iadb.org/aboutus/iii/independent_invest/independent_invest.cfm?language=english>; the ADB's 'Accountability Mechanism', at <http://www.adb.org/accountability-mechanism>; the EBRD's 'Independent Recourse Mechanism', at <http://www.ebrd.com/about/integrity/irm/about/index.htm>; *and* the AfDB's 'Independent Review Mechanism', at <http://www.afdb.org/portal/page?_pageid=473,5848220&_dad=portal&_schema=PORTAL>. For a comparison of these accountability mechanisms at MDBs and other IFIs, *see* D. Bradlow (2005), at 403.

79 Inspection Panel Resolution (1993), at §2. The first Inspection Panel members, Ernst-Günter Bröder (Chairman), Alvaro Umaña Quesada, and Richard Bissell were appointed in April 1994, and the Panel received its first Request (1994 *Nepal Arun III Proposed Hydroelectric Project and Restructuring of IDA Credit*), shortly thereafter.

80 Inspection Panel Resolution (1993), at §2. *Also see* above, note 6 (Ch. 6).

81 Inspection Panel Resolution (1993), at §4. *Also see* below, note 83 (Ch. 6).

82 As of March 2007, Inspection Panel members were appointed from the following countries:

Inspection Panel member to date has been a lawyer,[83] although the Panel has to consult with the Bank's Legal Department on certain matters.[84] On the face of it, this fact would seem to detract from the argument that the Inspection Panel engages in quasi-judicial oversight. However, the evidence offered from the Panel's institutional history and practice – as illustrated in the remaining chapters of Part II – suggests that the lack of legal expertise on the Panel has not prevented the evolution of quasi-judicial oversight.[85]

6.3.2. Mandate and Institutional Scope

The Inspection Panel's mandate and institutional scope are set out in the Resolution, which has subsequently been clarified by two Board Reviews of the Inspection Panel function.[86] Any "group of two or more affected individuals" that are located "in the territory of the borrower", or their local representatives, can file a 'Request for Inspection' at the Inspection Panel.[87] In practice, most Requests are brought jointly by project affected people and a local NGO. Subject to Board approval, the Inspection Panel is mandated to review World Bank (IDA and IBRD)[88] compliance with the Bank's OP&Ps[89] during the design, appraisal and implementation stages[90] of a "project financed by the Bank".[91] However, there must be a proven causal link between

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U.S. (2), Netherlands (1), Costa Rica (1), Austria (1), Germany (1), Canada (1), Thailand (1), Ghana (1) and Argentina (1) – *see* <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20205101~menuPK:434360~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html>. As for gender however, there have been only two female members so far (Edith Brown Weiss and Maartje van Putten).

[83] *I.e.*, Edith Brown Weiss. Note that a recent posting, advertising an open Inspection Panel position describes the relevant expertise required as "economic, *legal*, social, environmental and other development-related fields" – *see* < http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/JobDescription_Final_2009.pdf?&resourceurlname=JobDescription_Final_2009.pdf> (emphasis added).

[84] *See* below, note 98 (Ch. 6).

[85] It does explain, to some extent, however, the Inspection Panel's insistence on procedural pragmatism and its apparent aversion to legal 'formalism' – *see e.g.,* below, note 11 (Ch. 10).

[86] *I.e.*, in 1996 and 1999. For a discussion of the Board Reviews of the Inspection Panel function, *see* section 7.1.1 below. *Also see* Shihata (2000), at 155-203.

[87] Inspection Panel Resolution (1993), at §12.

[88] As mentioned in section 6.2.2, the IFC, MIGA and ICSID have their own 'inspection function' – *i.e.*, the CAO.

[89] Inspection Panel Resolution (1993), at §12. For a discussion of the Bank's OP&P, *see* section 6.2.1 above.

[90] For an overview of the life cycle of World Bank development projects, *see* McClure (2003), at 55-57.

[91] Inspection Panel Resolution (1993), at §12. Specifically, "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".

the Bank's non-compliance with a particular OP&P and actual or potential "material adverse effect" suffered by the Requesters.[92]

The Panel does not have the competence to formally adopt its own findings – it can only make recommendations to the Board, which will make a final decision. The Inspection Panel is also precluded from investigating any actions of the borrower,[93] procurement matters,[94] and projects that have been closed,[95] as well as Requests concerning a matter that the Panel has already addressed in a previous Request.[96] The Inspection Panel is also not mandated to make recommendations concerning the necessary actions required to remedy the (potential) adverse affects suffered by the Requesters – remedial action is solely within the purview of Management (although, also subject to Board approval).[97]

The Resolution instructs the Panel to "seek the advice of the Bank's Legal Department on matters related to the Bank's rights and obligations with respect to the request under consideration".[98] However, the Resolution does not give the Legal Department any definitive authority to interpret either the Resolution, or the Bank's OP&Ps – the ultimate interpretative authority concerning both the Resolution and the OP&Ps (in the context of an Inspection Panel Request) resides with the Board.[99]

6.3.3. The Inspection Panel Process

As the first accountability mechanism of its kind, the innovative nature of the Panel process was recognized from the outset. As the Inspection Panel noted in its 1996/1997 Annual Report: "The Panel's operations have of necessity to be innovative and are still evolving with experience".[100] The Inspection Panel process is set out in the Resolution, while the Panel has also adopted Operating Procedures that complement the Resolution.[101] The 1996 and 1999

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92 Inspection Panel Resolution (1993), at §12.

93 Inspection Panel Resolution (1993), at §14(a).

94 Inspection Panel Resolution (1993), at §14(b).

95 Inspection Panel Resolution (1993), at §14(c): "Requests filed after the Closing Date of the loan financing the project with respect to which the request is filed or after the loan financing the project has been substantially disbursed." 'Substantially' means at least 95 percent.

96 Inspection Panel Resolution (1993), at §14(d).

97 Inspection Panel Resolution (1993), at §23. *Also see* section 9.2.3 below.

98 Inspection Panel Resolution (1993), at §15.

99 *And see* section 8.3 below.

100 *See* Inspection Panel Annual Report (1996/1997), at 5. *Also see* section 8.1.5 below on procedural innovations of the Panel.

101 *E.g.*, the Inspection Panel's Operating Procedures open with the following sentence: "In view of the unprecedented nature of the new inspection function the current procedures are provisional […]."

Board Reviews of the Inspection Panel function (which will be discussed in the next chapter) have also clarified certain aspects concerning the Inspection Process.[102]

The Inspection Panel process has two distinct stages, namely: the 'Eligibility Phase' and the 'Investigation Phase'.[103] During the Eligibility Phase (see Figure 14 below), the Panel has to make three major decisions on a *prima facie* basis – i.e., based on a cursory review of the facts and the evidence presented by the Requesters and Bank management. First, the Panel has to decide whether a Request can be registered. A Request can only be registered if it is not *prima facie* inadmissible; the criteria for determining inadmissibility are set out in paragraph 14 of the Resolution.[104] Second, (if the case was found to be admissible) the Panel has to determine whether a Request meets all the eligibility criteria specified by the Resolution.[105] In order to establish the eligibility of the Request, the Inspection Panel routinely visits the Requesters and the project area (assuming it has obtained borrower permission to do so).[106] Third, (if the Request was found to be eligible), the Panel has to decide whether a full investigation is required. The Inspection Panel would usually recommend a full investigation in cases where the Management Response and the Request contain "conflicting assertions" with regards to the facts and the claims of the case.[107]

The Investigation Phase will only commence once the Board approves the Inspection Panel's Eligibility Report, and agrees with the Panel's recommendation to investigate. Ever since the conclusion of the second Board Review in 1999, the Board has approved all the Inspection Panel's recommendations on a "no-objection" basis.[108]

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[102] *See* Shihata (2000), at 162, 165, 186-190. *And see* section 7.1.1 below.

[103] *See e.g.*, Inspection Panel Annual Report (2005/2006), at 20. Note that the process set out in this section reflects the position as established *after* the conclusion of the 1999 Board Review.

[104] *I.e.*,: the claim must not concern borrower obligations or procurement; and cannot be registered if the projects is 'closed' (or if more than 95% of the loan amount has already been disbursed); moreover, the Request cannot relate to a matter over which the Panel has already decided in a previous case (unless new facts had arisen). As of March 2009, only six Requests (out of 51) have not been registered because the Panel found them to be inadmissible on the basis of one or more the aforementioned criteria.

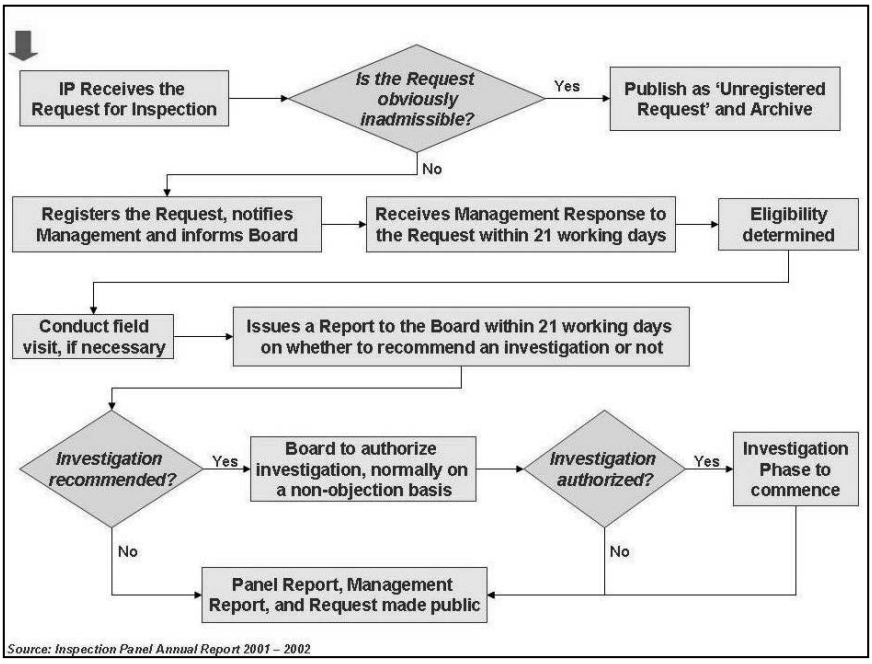
[105] Inspection Panel Resolution (1993), at §§12-13. During the eligibility visit the Panel would, as a matter of routine, also confirm that the Requests are not inadmissible after all.

[106] Inspection Panel Resolution (1993), at §21.

[107] *See. e.g.*, 2007 *Albania Power Sector Generation and Restructuring Project*, ER, at §41.

[108] A Board procedure that allows for fast decision-making. Essentially, something is adopted 'without objection' in cases where no Board member objects. Consequently, recommendations adopted 'without objection' are only based on documentation presented to the Board, and are not discussed in a Board meeting. *See* Shihata (2000), at 76-77.

Figure 14: Inspection Panel Process – Eligibility Phase



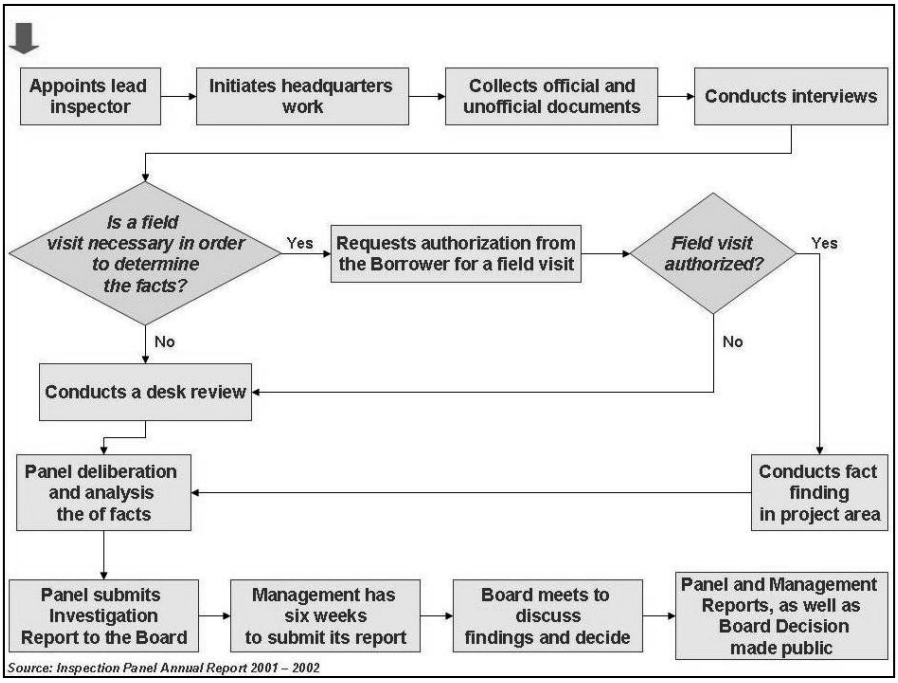
The Investigation Phase (see Figure 15 below) is more flexible and involves fewer critical decision points than the Eligibility Phase. This stage of the Inspection Panel process essentially involves the gathering of facts, the confirmation and/or refuting of claims, and the formulation of an Investigation Report that is submitted to the Board for final approval. The Resolution makes it clear that the Panel is to be given full access to "all [Bank] staff who may contribute information and all pertinent Bank records" in order to fulfil its investigative duties.[109] The only requirements concerning the investigation itself are that the Panel should consult – "as needed" – with the Director General of the Bank's IEG Internal Auditor; that the Panel must consult with "the borrower and the Executive Director representing the borrowing (or guaranteeing) country" (both before the Panel makes a recommendation on a full investigation and during an investigation); and that the Panel must obtain prior borrower approval for all project site visits.[110]

The Resolution does not prescribe any investigation or compliance assessment methods, and the Inspection Panel's own Operating Procedures instruct Panel members to apply "methods of investigation" that seem to be

[109] Inspection Panel Resolution (1993), at §21.
[110] Id.

the most "appropriate" in the light of the particular nature of the Request.[111] The Inspection Panel process formally ends with the Board's consideration of the final Investigation Report, after which the Investigation Report and the formal Management response is made public.[112]

Figure 15: Inspection Panel Process – Investigation Phase



Finally, the Resolution sets out strict time frames throughout the entire Inspection Panel process – with the exception of the actual investigation, where the Resolution only instructs the Panel to conduct the investigation "within a period to be determined by the Panel" and by "taking into account the nature of each request".[113] Strict time frames ensure that Inspection Panel cases are not dragged out unnecessarily by any party (especially not by Bank management) – a precaution that is most appropriate, since Inspection Panel

[111] Inspection Panel Operating Procedures, at §42(b)(i).

[112] However, in practice, the Board may ask the Panel to remain involved in the assessment and implementation of Managerial Remedial Action plans – *see* section 9.2.3 below. *Also note* that the Board has, as of date, never formally 'rejected' an Investigation Panel Investigation Report.

[113] Inspection Panel Resolution (1993), at §20. In practice, the average Inspection Panel investigation (*i.e.*, the period between obtaining Board approval of a full investigation, and the Inspection Panel's presentation of Investigation Report to the Board) lasts approximately a year (source: own analysis, based on Inspection Panel Requests' documentation).

Requests involve claims of existing or potential harm that could be aggravated or realised by unnecessary delay.

6.3.4. Inspection Panel Practice

For the purpose of the analysis in Chapters 7 to 10, Inspection Panel 'practice' refers to all Inspection Panel Requests registered between April 1994 and March 2009.[114] Inspection Panel Requests include all documents that have been drafted and submitted by Requesters, World Bank management and the Inspection Panel as part of the Inspection Panel process.[115] All these documents can be accessed through the Inspection Panel's website,[116] and specifically include: the Request;[117] the Panel's Notice of Registration when a Request has

[114] Excluding the unregistered cases (which did not meet admissibility criteria, *see* above, note 104 (Ch. 6)). As of March 2009, there have been six unregistered cases: 1995 *Ethiopia Compensation for Expropriation*; 1995 *Chile Financing of Hydroelectric Dams in the Bio-Bio River Project*; 2000 *India NTPC Power Generation II*; 2003 *Cameroon Petroleum Development & Pipeline II*; 2004 *Burundi Public Works & Employment Creation*; and 2007 *Cameroon Urban Development Project*.

[115] *See* Inspection Panel process flow diagrams in section 6.3.3 above.

[116] *See* <http://www.inspectionpanel.org>. There has been a noticeable trend to publish more documentation related to Inspection Panel Requests than is formally required by the Resolution – the Inspection Panel Resolution only requires the Panel's final investigation report to be made public (at §25). Examples of other Request-related documents that have been made public by the Bank include: excerpts from Board meeting minutes where particular Panel cases were discussed (*see e.g.*, IP Chairperson address to the Board in the discussion of the 2001 *Chad-Cameroon Petroleum Development & Pipeline Project*, in which the Panel's Chair was highly critical of Bank management's Response to the Panel Investigation Report, discussed in section 9.2.1 below); and Management Progress Reports to the Board on projects that were previously the subjects of Inspection Panel investigations. *See e.g.*, 1996 *Bangladesh Jute Sector Adjustment Credit Project*; 1997 *India NTPC Power Generation Project*; 2004 *India Mumbai Urban Transport Project*; 2001 *India Coal Sector Environmental and Social Mitigation Project and Coal Sector*; and 2005 *Cambodia Forest Concession Management and Control Pilot Project*.

[117] Submitted by a group of two or more Bank project affected individuals and/or their properly mandated (local) representatives (Inspection Panel Resolution (1993), at §12). Requests must be in writing and must include (1) evidence that the Request meets the eligibility criteria set out in the Resolution (at §§12-14), and (2) details about the claims of (potential) harm as a result of Bank non-compliance with particular operational policies. The Panel can ask Requesters to clarify certain points in the submitted Request before they make a final decision to register the Request. *Also note* that more than one Request is sometimes submitted regarding the same project, containing more or less the same claims. In these instances, the Panel will assess the eligibility of each Request separately. However, once the Requests are found to be eligible and in need of a full investigation, the Inspection Panel will treat the Requests as one for the purposes of the investigation. *See e.g.*, 2005 *India Mumbai Urban Transport* and 2007 *Albania Integrated Coastal Zone Mgt & Cleanup*.

been found to be *prima facie* admissible (NoR);[118] World Bank management's Response to the Request (MR);[119] and the Inspection Panel's Eligibility Report (ER).[120] Should the Request proceed to the Investigation Phase, the Panel's Investigation Report (IR)[121] and Bank management's response and recommendations in the light of the Investigation Report (MR to IR)[122] also constitute Inspection Panel practice for the purposes of this analysis. The Board occasionally requests the Panel to remain involved with the Request by assessing and monitoring Bank management's progress against its remedial action plans *after* the conclusion of the Investigation Phase.[123] In these instances, Panel practice will also include periodic Progress Report(s) made to the Board by the Inspection Panel and Bank management respectively.[124]

[118] The NoR sets out a summary of the Request's major claims and will usually specify which of the World Bank's OP&P are affected by the Requester(s) claims of non-compliance.

[119] Bank management is required to respond only to the allegations of non-compliance and resulting harm made in the Request, and cannot submit a remedial action plan at this point as part of the MR. For a discussion on Management's procedural deviation in this regard, *see* section 7.1.1 below. In accordance with the 1999 Board Review, Management can express its views on the eligibility of the Request in the MR, but the Inspection Panel is not bound to follow these opinions (at §6).

[120] In the ER, the Panel systematically assesses whether the Request is eligible for inspection (Inspection Panel Resolution (1993), at §§12-14). The ER might also include initial comments about the claims (as was the case in the Panel's early Requests – *see* discussion in section 7.1.1 below). The ER will conclude by finding the Request eligible or not eligible; and if eligible, will recommend whether a full investigation is required. In later Panel cases, the Inspection Panel has also 'reserved the right' to make a final recommendation on whether a full investigation was required due to outstanding or pending issues that might influence its decision. In such cases, the Panel will issue a second or 'final' ER (usually after a fixed deadline the Panel sets for itself in the original ER) with a final investigation recommendation. *See e.g.*, 2006 *Ghana/Nigeria West African Gas Pipeline Project* and 2006 *Romania Mine Closure and Social Mitigation Project*. For a more detailed discussion, *see* section 8.1.5 below.

[121] The IR consists of an Executive Summary (ES of IR) of all the major Panel findings. The main body of the IR will discuss the original Request, provide background to the project that is the object of investigation, set out the major issues in the MR and ER and will then proceed with a detailed discussion of all its findings and recommendations. Findings and recommendations in the IR are usually grouped/structured around every Bank operational policy and procedure that has allegedly been contravened by the Bank.

[122] The MR to the IR usually includes a managerial remedial action plan (RAP) to address the issues identified by the Panel. The Board might also ask Management to provide the Board with regular progress reports, as measured against the RAP – *see e.g.*, 2004 *India Mumbai Urban Transport Project*. The MR to IR will normally have an appendix that includes a detailed response to every Inspection Panel finding in the IR.

[123] *See e.g.*, 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)* and 2004 *India Mumbai Urban Transport Project*.

[124] *See* above, note 116 (Ch. 6). In recent years, even if the Inspection Panel was not officially involved *post* the Investigation Phase, Management Progress Reports have been published on the Panel's website. *See e.g.*, 2004 *Pakistan National Drainage Program Project* and 2005 *Cambodia Forest Concession Management and Control Pilot Project.*

6.4. Summary

Chapter 6 introduced the Inspection Panel in its proper institutional context as a World Bank institution – established primarily to address external and internal criticisms of the Bank's lack of accountability and legitimacy. The chapter has set out a brief history of these two criticisms aimed at the Bank, and explained (and problematized) what 'accountability' and 'legitimacy' specifically meant in the World Bank context. The chapter mentioned two World Bank responses to address its critics – mainly, the adoption of OP&Ps intended to safeguard certain social and environmental aspects of its development projects; and the establishment of compliance and quality assurance mechanisms to guarantee the enforcement of these OP&Ps, of which the Inspection Panel is probably the most prominent example.

The chapter moreover introduced salient aspects of the Inspection Panel's composition, mandate and institutional scope; as well as giving an overview of the two phases of the Inspection Panel process (i.e., eligibility and investigation). Finally, the chapter clarified what is understood as Inspection Panel 'practice' – namely, the various documents submitted by Requesters, Bank management, and the Panel associated with each registered Inspection Panel 'Request' or 'case'.

The Panel's practice will be the focus of the next three chapters.

CHAPTER 7

THE INSPECTION PANEL AND THE JUDICIAL OVERSIGHT MODEL: ASSERTING INSTITUTIONAL INDEPENDENCE

Board members noted that this investigative process demonstrates the value of an independent Inspection Panel in strengthening the Bank's accountability and effectiveness.[1]

The Inspection Panel's independence has been a point of contention from the outset since the Bank's Board has to approve all Panel recommendations.[2] However, a different consideration that is of equal, if not greater importance, is whether the Inspection Panel is independent from Bank management – since the Panel's mandate directly concerns reviewing Management actions. Several provisions of the Inspection Panel Resolution aim to ensure the Panel's independence from Bank management.[3] This chapter, however, is specifically concerned with the question whether the Inspection Panel asserts its *de facto* independence from Bank management – and possibly also from the Bank's Board of Executive Directors – through the mechanisms described by the Judicial Oversight Model, as set out in Part I of this book.

Recall that the Judicial Oversight Model postulates that courts strengthen their *de facto* independence from political institutions by building their institutional credibility and prestige, by leveraging landmark cases, and by

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1 2007 *Albania Integrated Coastal Zone Management and Clean-Up Project*, World Bank Press Release, 17 February 2009, at 2.

2 *See e.g.*, D. Clark, *A Citizen's Guide to the World Bank Inspection Panel*, at 5 (1999), at <http://www.ciel.org/Publications/citizensguide.pdf>, referring to the Panel as "quasi-independent"; *and see* Mallaby (2004), at 176, describing the Inspection Panel as "a sort of internal tribunal set up in 1993".

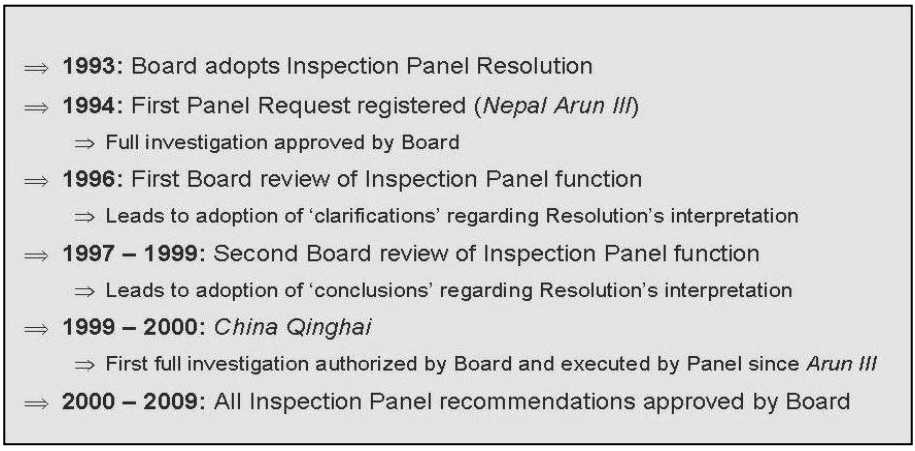
3 *See* above, note 3 (Ch. 6).

raising public awareness about inappropriate political interference.[4] This chapter sets off, firstly, by illustrating that the Inspection Panel's *de facto* independence has been placed under significant pressure in the past, and continues to be challenged on occasion (7.1). The chapter then proceeds by analysing how the Panel strengthens its credibility and prestige (7.2); leverages landmark cases (7.3); and raises awareness of undue Management interference with the Panel process (7.4). The chapter concludes with a summary of the main findings (7.5).

7.1. The Inspection Panel's *de facto* Independence under Pressure

Even a cursory examination of the Panel's history and practice reveals that the Inspection Panel's institutional independence has been under pressure since its inception; especially during the first six years of its existence (see Figure 16 below for an outline of key moments in the Inspection Panel's history). Bank management has been the Panel's greatest antagonist in this regard – which is perhaps to be expected since, as explained in the previous chapter, the Panel is specifically mandated to review whether Bank management and staff have complied with the Bank's OP&Ps.[5] However, as the next section will show, the Bank's Board of Executive Directors has also placed the Inspection Panel's *de facto* independence under pressure – especially insofar as the Board's decisions and practices have had a negative impact on the Inspection Panel's credibility.

Figure 16: Key Moments in the History of the Inspection Panel



4 *See* section 2.1.1.3 above.

5 For a discussion of the Inspection Panel's mandate, *see* section 6.3.2 above.

7.1.1. Between the Panel's Inception and the 1999 Board Review

Conflict between Board members representing donor countries and those representing borrowing countries arose shortly after the establishment of the Inspection Panel. In essence, borrowing countries felt that the Panel was being manipulated (by Board members representing borrower countries) to investigate the borrower and not to determine whether the Bank had complied with its OP&Ps.[6] The conflict soon resulted in decision-making paralysis on the Board, which held serious repercussions for the Panel since the Board has to approve all Inspection Panel recommendations. The Board practice of making decisions on the (informal) basis of consensus made the situation particularly difficult.[7] Board members representing borrowing countries – India and Brazil in particular, from which four controversial Inspection Panel Requests were filed between 1994 and 1999[8] – blocked the approval of three Panel investigations during this early period to register their dissatisfaction.[9] Consequently, the Inspection Panel's credibility as a new accountability mechanism suffered serious setbacks during this period because it was not able to fulfil its function properly. Under such circumstances, it would indeed be difficult for the Inspection Panel to convince potential Requesters of its *de facto* independence from the Bank.

Moreover, Bank management adopted certain practices during this time that would further erode the Panel's credibility. For example, in almost all Inspection Panel Requests received between 1994 and early 1999, Management continuously questioned the eligibility of several Inspection Panel Requests.[10] This practice by itself does not necessarily affect the credibility of the Inspection Panel; the problem, however, was more the manner in which Management did so – i.e., creating the impression that the Inspection Panel had no authority over Bank management, and that the Panel's interpretation of its own mandate was questionable. For example, in its response to the *Brazil Rodônia PLANAFLORO* Request, Management stated that

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6 Shihata (2000), at 155-201. *Also see* Inspection Panel Resolution (1993), at §§19-20.

7 Shihata (2000), at 155-201.

8 *I.e.*, 1995 *Brazil Rodônia Natural Resources Management Project*; 1995 *Brazil Rodônia Natural Resources Management Project*; 1997 *India NTPC Power Generation Project*; and 1998 *India Ecodevelopment Project*.

9 Between 1994 and 1999, the Inspection Panel registered 13 Requests and made recommendations for full investigations in six instances only. The Board approved only three of these six recommendations. For a discussion of this period, *see* section 10.4.1.1 below. *Also see* Hunter (2003), at 207, noting that "[i]n the beginning, we [NGOs] felt as if we were in a constant struggle with Bank Management to ensure the independence of the Panel."

10 *See* 1995 *Tanzania Power IV Project*; 1995 *Brazil Rodônia Natural Resources Management Project*; 1996 *Paraguay/Argentina Yacyretá Hydroelectric Project*; 1996 *Bangladesh Jute Sector Adjustment Credit Project*; 1997 *Brazil Itaparica Resettlement & Irrigation Project*; 1998 *Lesotho/South Africa Highlands Water Project*; and 1998 *Brazil Land Reform & Poverty Alleviation Project*.

> [t]he Panel *may wish* to assess the eligibility of the Request for review by the Panel. It is the Management's judgement that, as explained in Annex A, the Request does not meet the eligibility requirements […].[11]

And in *Brazil Land Reform*, Management argued that

> the Panel could not have discerned the breakdown of the Requestors or the extent to which they do or do not represent the Project beneficiaries for the purposes of the Request. [Management] considers, however, that if this information had been available to the Panel, the Request would not have qualified for registration and is not eligible for inspection.[12]

Some Management Responses to Requests did not even contain responses to the claims set out by the Requesters, as is required by the Inspection Panel Resolution.[13] Instead, Management only addressed the Requesters' claims in an Appendix to the Management Response,[14] creating the impression that this was done merely out of 'good will', and not because they were bound to do so. For example, in *Tanzania Power*, Management responded to the Request as follows:

> [w]hile the Panel requests IDA Management's statement on the merits of the Request, it is the view of IDA's Management that: (a) the Request does not meet all the eligibility requirements […] and (b) one of the allegations in the Request is not admissible under the Resolution. This response therefore deals with those issues. For your *information*, attached hereto is an Annex commenting on the specific alleged violations by the Management of IDA's policies and procedures.[15]

Similarly, in *Brazil Itaparica Resettlement and Irrigation* Management stated:

> [u]nder the Board Resolution establishing the Inspection Panel […] this Request is ineligible for consideration because more than 95% of the Loan Proceeds had

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[11] 1995 *Brazil Rodônia Natural Resources Management Project*, Memorandum to MR, at §2 (emphasis added).

[12] 1998 *Brazil Land Reform & Poverty Alleviation Project*, MR, at §3.7. The Inspection Panel rejected this argument. Note that the Resolution requires Management to make all information available to the Panel (at §21). *And see* 1998 *Brazil Land Reform & Poverty Alleviation Project*, ER, at §10: "In point of fact, there are no requirements for Registration in the Resolution that established the Panel. The Registration is purely an administrative step introduced by the Panel as a means of informing the Board, Management, the Requesters and the public in a concise manner about the existence of a Request for Inspection and its main content. It does not and cannot be construed as implying any judgment on the eligibility of the Request." *Also see* 1995 *Tanzania Power IV Project*, MR, at §2; 1996 *Bangladesh Jute Sector Adjustment Credit Project*, MR, at §13; and 1998 *Lesotho/South Africa Highlands Water Project*, MR, at §2.

[13] Inspection Panel Resolution (1993), at §18.

[14] *E.g.*, in 1995 *Tanzania Power IV Project* and 1995 *Brazil Rodônia Natural Resources Management Project*.

[15] 1995 *Tanzania Power IV Project*, MR, at §2 (emphasis in the original).

> been disbursed as of the date the Request was received. However, in the interest of transparency, the following detailed response has been prepared.[16]

A Management practice of this period that particularly jeopardized the credibility of the Inspection Panel function was the submission of a remedial action plan in conjunction with the Management Response to the original Request – contrary to what the Resolution requires.[17] Significantly, Management submitted such action plans at the outset of the Panel process even in cases where they have denied the validity of Requester claims or the eligibility of the Request.[18]

The submission of remedial action plans at the onset of the Panel process was problematic in three respects. First, Management's action plans consisted largely of remedial steps the *borrower* had to undertake, thus further fuelling borrower concerns that the Panel process was a means of interfering with their domestic affairs and not, as was the mandate of the Panel, to hold the Bank accountable. Second, since the Management action plans consisted largely out of borrower actions, it transferred the Request largely outside the Panel's mandate because the Panel is not mandated to investigate the borrower. Third, the submission of remedial action plans at the onset of the Panel process effectively circumvented the need for full Inspection Panel investigations in any event.[19] Since the Board was grappling with decision-making paralysis (as mentioned above), the early submission of a Management remedial action plan seemed to be an easy way out of the impasse. If the Board could approve an action plan that was "deemed sufficient to address the harm" alleged by the Requesters, so the argument went, the need for a full Panel investigation

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[16] *See* 1997 *Brazil Itaparica Resettlement & Irrigation Project*, MR, at 1. Note that it was not clear in this case whether or not 95% of the loan was, in fact, already disbursed – *see* 1997 *Brazil Itaparica Resettlement & Irrigation Project*, ER, at §§12-19. *And see* 1996 *Bangladesh Jute Sector Adjustment Credit Project*, MR, at §6: "Although, as stated in paragraph 4 above, the complaints in respect of delays in implementation of JSAC are outside the jurisdiction of the Inspection Panel, nevertheless we wish to address all of the issues raised by the Requesters more fully."

[17] *See* Shihata (2000), at 112-114. Management first adopted this procedure in the 1995 *Brazil Rodônia Natural Resources Management Project*, and thereafter it became regular practice. According to the Resolution, Management can only suggest remedial action steps *after* the Panel has submitted its Eligibility Report to the Board or *after* the Inspection Panel has submitted its Investigation Report to the Board. *See also* Inspection Panel Resolution (1993), at §18, which states that after a Request has been registered, Management can only give the Panel "evidence that it has complied, or intends to comply with the Bank's relevant policies and procedures"; *and see* §23, which states that only after the Inspection Panel has submitted its findings to the Board will Management submit "a report" to the Board "indicating its recommendations in response" to the Inspection Panel findings – *i.e.* a Remedial Action Plan.

[18] *See* 1995 *Brazil Rodônia Natural Resources Management Project*; *1996 Paraguay/ Argentina Yacyretá Hydroelectric Project* and 1997 *Brazil Itaparica Resettlement & Irrigation Project*.

[19] Shihata (2000), at 114.

(which would likely have resulted in uncomfortable political consequences for both the Bank and the borrower) could be eliminated. Ironically, however, this practice inadvertently prolonged the conflict between Board members and essentially rendered the Inspection Panel "superfluous".[20]

7.1.1.1. The 1999 Board Review

The 1999 Board Review of the Inspection Panel function[21] sought to address the issues (such as the ones mentioned above) that hampered the effectiveness of the Inspection Panel function. A broad (and unprecedented) range of external stakeholders participated in 1999 the review process,[22] although not all were satisfied with the outcomes.[23] In retrospect, the outcomes of the 1999 Board Review seem to have enhanced the Panel's institutional independence because (as will be shown in the remainder of this chapter) it enabled the Panel to assert its *de facto* independence.

For example, the Board instructed Management to end the practice of submitting action plans as part of their initial response to the Request.[24] The Board also confirmed that the Inspection Panel could "independently agree or disagree […] with Management's position" on the eligibility of the Request and on the claims of Bank non-compliance; and that it was the Inspection Panel's prerogative – not Management's – to make a recommendation about the eligibility of the Request.[25] Crucially for the credibility of the Panel, the Board decided to authorize future Panel investigations "without making a judgement on the merits" of the Request; and to do so "without discussion"

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[20] Id.

[21] The 1999 Board Review was preceded by the 1996 Board Review of the Panel function. The 1996 Board Review dealt mostly with interpretation of specific clauses of the Resolution, and less with the effectiveness of the Panel process. Many of the issues dealt with during the 1996 Board Review will be discussed in Chapter 8 below.

[22] Externally, some commentators and NGOs viewed their participation in the second Board review as a crucial factor in having 'saved' the Inspection Panel function. *See e.g.*, D. Bradlow, *Precedent-Setting NGO Campaign Saves the World Bank's Inspection Panel*, 6(3) Human Rights Brief 7 (1999).

[23] *See e.g.*, M.M. Philips, *Effort Would Curb Watchdog of World Bank – Big Borrower Nations Seek Limit on Probing Harm to People and Ecology*, The Wall Street Journal, 12 January 1999. *Also see* Shihata (2000), at 190. The Conclusions of the Board's Second Review of the Inspection Panel (1999) (Hereafter, the 1999 Board Review Conclusions) instructed the Panel to keep a "low profile" during its investigations to avoid media contact as far possible; and if the Panel did have to address the media, to make sure the Panel emphasized that is was the Bank – and not the borrower – that was being investigated (at §12). This instruction can be interpreted as an attempt towards curbing the Panel's independence; but it might also have been positive for the objectivity (and as a result, the credibility) of the Panel.

[24] *See* 1999 Board Review Conclusions, at §16.

[25] *See* 1999 Board Review Conclusions, at §§3 & 6.

except insofar as to rule on the eligibility of the Request.[26] Since the conclusion of the 1999 review, the Board approved all recommendations made by the Inspection Panel, mostly on a no-objection basis.

7.1.2. Beyond the 1999 Board Review

While the 1999 Board Review appears to have solved the most troublesome issues that placed the Inspection Panel's *de facto* independence under pressure during its early years, Management continues to challenge the Panel's independence, although the challenges have largely taken on a more subtle form in recent years. For example, in their response to the Panel Investigation Report in the *China Western Poverty Reduction (Qinghai)* case, Bank management suggested to the Board:

> [s]ince this was the first full investigation of the Panel, it is understandable that the process was not perfect, and it would perhaps be useful for the Executive Directors to review some of the procedural issues involved. We would recommend, for example, that in the future, *opportunity be provided to Management to check on facts before [Inspection Panel] reports are issued*.[27]

In *Argentina Santa Fe Road Infrastructure (I)*, the Panel noted that it was

> very concerned about statements in [the] Management Response that suggest that the Requesters' exercise of their right to raise their concerns before the Inspection Panel at the design stage of the Project would be detrimental to the preparation of the Project or the ability of Management to respond to their concerns […]. As to Management's *suggestion* that the Panel should not process the Requests during the design stage of Project preparation, the Panel notes that the Resolution clearly provides that a Request for Inspection may be submitted 'with respect to the design, appraisal or implementation of a project financed by the Bank'.[28]

In the recent *India Uttaranchal Decentralized Water Development*, Management challenged the eligibility of the Request. The Inspection Panel responded that it was

> concerned about statements in the Management Response *asking the Request to be considered* ineligible for investigation on the grounds that the Request does not refer to violation of operational policies and procedures by the Bank.

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[26] *See* 1999 Board Review Conclusions, at §9. In other words, the Eligibility stage of the Panel procedure would be viewed much more as a 'technical' or preliminary exercise, with only a *prima facie* consideration of the substantive elements of the Request.

[27] 1999 *China Western Poverty Reduction Project*, MR to IR (Annex: 'Background Paper'), at §7, n. 2 (emphasis added). Note that there has been no official response from the Board to this proposal from Bank Management; and it would appear as if this recommendation has not been followed.

[28] 2006 *Argentina Santa Fe Road Infrastructure Project and Provincial Road Infrastructure*, ER, at §§59-61 (emphasis added).

> The Panel notes that the Request does assert violation of Bank policies and procedures with respect to monitoring, management and implementation of the Project activities, including lack of the participation of the poorest and most vulnerable groups in the decision making for development of the watershed plans.[29]

And in *Argentina Santa Fe Road Infrastructure (I)*, Bank management noted their dissatisfaction with Inspection Panel 'interference' during project design and appraisal as follows:

> [t]he registration of the [Inspection Panel] Request has prevented Management from demonstrating that the project's preparatory design and appraisal phases are indeed proceeding in a Requester-responsive, policy compliant manner. It is during such preliminary design phases that Management is best positioned to react to such concerns, as it would have done if the Requesters had afforded it an opportunity to do so.[30]

The Panel rejected this argument, and reminded Management that the registering of Requests from projects that were still in the design and appraisal stage was fully within the Panel's mandate. The Panel added that

> [t]he Board of Executive Directors clearly acknowledged the usefulness of a Panel intervention in the early stages of a project and mandated that the documents submitted to the Board for loan approval describe and take into account the Panel's findings. In this context, the Panel would also like to point out that the submission of a Request for Inspection does not prevent Management from engaging in a constructive dialogue with the Requesters to try to address their concerns. This was the case, for example, in respect to recent Requests for Inspection submitted on Nigeria: West Africa Gas Pipeline Project and Romania: Mine Closure and Social Mitigation Project.[31]

The examples mentioned so far in this section would therefore appear to support a conclusion that the Inspection Panel's *de facto* independence has been under pressure since its inception, and that it continues to be challenged – although, perhaps, to a lesser degree, and in more subtle forms. However, does the Panel assert its *de facto* independence in ways that are comparable to courts exercising a mandate of judicial oversight? The remainder of this chapter will address this question.

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[29] 2007 *India Uttaranchal Decentralized Water Development Project*, ER, at §42 (emphasis added). *But note* the difference in phrasing, compared to early cases mentioned above.

[30] 2006 *Argentina Santa Fe Road Infrastructure Project and Provincial Road Infrastructure Project*, MR, at §48. The Inspection Panel also confirmed in this case that it "did not find evidence that Bank staff or their consultants had any contact with the Requesters and those people contacting the Panel, prior to receiving the formal letters from the Requesters." *See* ER, at §55.

[31] 2006 *Argentina Santa Fe Road Infrastructure Project and Provincial Road Infrastructure Project*, ER, at §§61 & 62.

7.2. Establishing Institutional Credibility and Prestige

This section will analyse examples from the Panel's history and practice that appear to have established its institutional credibility and prestige, and thereby strengthened its *de facto* independence. The section illustrates how the Panel protects the integrity of the Panel procedure (7.2.1), and how the Panel builds its institutional credibility and prestige through the quality of its investigation reports (7.2.2).

7.2.1. Protecting the Integrity of the Panel Procedure

The Inspection Panel's efforts to protect the integrity of its procedure is an important mechanism through which the Panel established its institutional credibility. One example of these efforts relates to the Panel's own decision-making process. The Resolution instructs the Inspection Panel to reach their decisions by consensus; but allows the Panel to reach decisions by way of majority voting (including the publishing of minority opinions) in the absence of consensus.[32] To date, however, the Panel has reached all its decisions by means of consensus only – possibly, because the Panel realizes that majority voting and minority opinions might dilute its institutional credibility.

The Inspection Panel has also asserted its authority over Management in terms of the Panel process – if not always successfully. For example, as mentioned above, during the Panel's early years, Management frequently avoided dealing directly with the claims made in the Request and conveyed their MR to challenging the eligibility of the Request instead.[33] The Panel consistently rejected this Management practice and insisted, as it did e.g., in *Brazil Rodônia*:

> […] the Panel must satisfy itself that Management has dealt with the subject matter of the Request […]. The subject matter of a Management response is restricted by the Resolution to 'evidence that it has complied or intends to comply with the Bank's relevant policies and procedures' […]. The Panel found that Management's 'response' did not deal with the subject matter of the Request. As with a previous Request, Management addressed the eligibility criteria of the Request, and set forth its own 'judgment' concluding that the Request was not eligible. However, comments on the subject matter were provided for the Panel's 'information' in Annex B. Avoiding a formalistic approach, the Panel has treated Annex B of Management's reply as the required 'Response' and is therefore satisfied that Management has dealt with the subject matter of the Request.[34]

Also in *Lesotho Highlands Water (I)*, the Panel pointed out that

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[32] Inspection Panel Resolution (1993), at §24.

[33] *See* section 7.1.1 above.

[34] 1995 *Brazil Rodônia Natural Resources Management Project*, ER, at §§4-5. The Panel

> Management refused to provide the Panel with a response to the Request, as expressly required by the Resolution. The Panel, of course, rejected Management's refusal to respond in the proper way, and so informed the President of the Bank. He was also informed that, in the interests of avoiding delay in the preliminary assessment, the Panel had decided nevertheless to go ahead and treat the information provided in the Annex as the substantive Management Response. In summary, the substance of the Management Response (found in the Annex) reiterates what Management had already told the Executive Directors, namely, that in its view all policies and procedures have been observed.[35]

However, the Panel has made some progress in this regard, as is illustrated by the *Lesotho Highlands Water (II)* case.[36] Although Bank management again challenged the eligibility of this Request, it did so in a manner that showed more deference to the Panel, especially compared to earlier Requests.[37] For instance, Management stated that the MR included "information to be *taken into account by the Panel* in determining the eligibility of the Request".[38] Nevertheless, the Panel insisted that the MR did not fully meet the requirements of the Resolution. The Panel stated that since it

> was not satisfied that the [Management] Response provided evidence of compliance or intent to comply with Bank policies and procedures as required by paragraph 18 of the Resolution and 33 of the Panel's Operating Procedures, the Panel, on June 30, 1999, requested Management '[t]o provide evidence of the Bank's compliance with BP 17.50, OP 7.40 and especially with BP 7.40 which is referred to in detail in the Request of Inspection'.[39]

The *Chad Pipeline* case provides another example of the Panel's efforts to protect the integrity of the Panel process. The Resolution guarantees the Inspection Panel access to all relevant information it requires to conduct a compliance review.[40] In *Chad Pipeline*, the Inspection Panel concluded that Management was non-compliant with the relevant OP&Ps that requires the proper consideration of project alternatives, because the Panel could not find any documentary evidence that such alternatives were considered.[41] In its response to the Panel Investigation Report, Management countered that such documentary evidence did indeed exist, but that the Panel was not given

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added that it was "not clear why Management suggest[ed] that the 'Panel *may wish* to assess the eligibility of the Request'" (emphasis in the original).

35 1998 *Lesotho/South Africa Highlands Water Project*, ER, at 8.

36 1999 *Lesotho Highlands Water Project*.

37 *See e.g.*, above, note 15 (Ch. 7).

38 1999 *Lesotho Highlands Water Project*, MR, at §4 (emphasis added). *But see* above, note 29.

39 1999 *Lesotho Highlands Water Project*, ER, at §9.

40 Inspection Panel Resolution (1993), at §21.

41 2001 *Chad Petroleum Development & Pipeline Project*, IR (ES), at §38.

access to this information because it was considered "proprietary".[42] During his presentation of the *Chad Pipeline* Investigation Report to the Board, Panel Chairperson Edward Ayensu objected as follows:

> [w]hile we appreciate the value of proprietary and confidential information, we must note that within the framework of an investigation process, the Panel's Resolution requires Management to disclose to it all relevant information […]. Management should not overlook the fact that, according to the Resolution, the Panel members in the performance of their functions are officials of the Bank and are subject to 'the requirements of the Bank's Articles of Agreements concerning their exclusive loyalty to the Bank.' Panel members are also required to abide by the same obligations as other Staff under the Principles of Staff Employment. Furthermore, the Panel members are selected by the President and appointed by this Board of Executive Directors, among other things, for their integrity 'and their ability to deal thoroughly and fairly with a Request brought to them.' On the basis of the foregoing, there are no grounds for Management to withhold relevant information from the Panel in the course of any future investigation.[43]

Finally, the Inspection Panel also protects the integrity of the Panel procedure by actively defending its mandate from Management attempts to erode it. For instance, in *Bangladesh Jute Sector Adjustment Credit*, Management admitted the existence of harm, but blamed it largely on the borrower. Consequently, almost the entire *Jute Sector* Request would have been excluded from the purview of the Inspection Panel since the Panel cannot investigate the borrower. The Panel objected as follows:

> [t]he Panel notes with concern Management's allegation that 'complaints in respect of delays in implementation are outside the jurisdiction of the Inspection Panel' […]. Since all projects financed by the Bank/IDA are carried out by the borrower or executing agency and never by the Bank/IDA itself, if Management's allegation is to be accepted, then the Panel would lack jurisdiction in all cases where delays in execution of a project has caused material and adverse effects to third parties. The Intent of the Resolution, and all precedents relating to its application by the Board of Executive Directors to date, seem to indicate that Management cannot disclaim responsibility for adverse effects of Bank/IDA-financed projects simply because it is not the executor of the activities included therein.[44]

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[42] 2001 *Chad Petroleum Development & Pipeline Project*, MR to IR (Summary), at Finding no. 29.

[43] *See* Inspection Panel Chairman's Board address in the 2001 *Chad Petroleum Development & Pipeline Project*, at §6 (hereafter, '*Chad Pipeline*, IP Chairperson address'). *And see* a similar incident in the *Albania Coastal Zone Management* case – *see* below, note 125 (Ch. 7).

[44] 1996 *Bangladesh Jute Sector Adjustment Credit Project*, ER, Box 1, at 7 (emphasis in the original). The Panel further noted that there are various Bank operational policies Management had to follow during the design, appraisal and implementation of a Bank-financed project (including policies related to project management and supervision); and failure to do so that resulted in harm enabled project affected people to request a Panel investigation. *Also note* that

7.2.2. Gaining Credibility through Quality Investigation Reports

The Inspection Panel also asserts its institutional credibility and prestige through the (progressively) high quality of its investigation reports – as has been increasingly acknowledged by both Bank Management and Board. For instance, in response to the Panel's investigation report in *India MUTP* (then) President Wolfowitz affirmed: "[…] the flaws identified by the Inspection Panel need to be addressed with urgency now. The Report proves the worth of the Inspection Panel".[45] In the same case, the Board also "commended the Panel for its Report and the high quality of its work".[46]

In *Paraguay/Argentina Yacyretá II*, Bank management stated that it "appreciates the Panel's thorough presentation of its findings,"[47] and that it

> acknowledges the Panel's recommendations, finds them constructive, and believes that the proposed Action Plan responds to the issues raised in the Panel's Report. Management is committed to applying its policies and procedures in full and will make every effort to pursue its mission statement in the context of the Project.[48]

The World Bank Vice President for Latin American and the Caribbean added that he was

> extremely grateful for the work of the Inspection Panel, and the positive relationship we have enjoyed during this process. Its findings are constructive, and we believe the Action Plan we have put together responds to the issues raised in the Panel's report […].[49]

In *Columbia Cartagena Water and Environmental Management*, the Board "recognized the importance of having the Panel as a mechanism for accountability, transparency and inclusion in Bank operations". In addition, (then) Bank President, Paul Wolfowitz emphasized "the importance of the Inspection Panel's independence" and asserted that the current Panel investigation "has been a fruitful process that has let to improved design in the Project and increased credibility with the communities".[50]

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some of the examples mentioned in section 8.3.1.1 below (interpreting the Resolution) can also be considered as examples of the Panel defending its mandate.

[45] *See* 2004 *India Mumbai Urban Transport Project*, Board Press Release, 29 March 2006, at 1.

[46] 2004 *India Mumbai Urban Transport Project*, Board Press Release, 29 March 2006, at 3.

[47] 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, MR to IR, at §3.

[48] 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, MR to IR, at §78.

[49] 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, Board Press Release, No. 2004/266/S.

[50] 2004 *Colombia Cartagena Water Supply, Sewerage and Environmental Management Project*, World Bank Press Release, 8 November 2005.

The Panel also gains internal credibility by illustrating that it understands, and appreciates, the context in which the development project is situated when it acknowledges the intricacies and risks the Bank have to manage on such projects.[51] For example, in *Chad Pipeline*, the Panel noted that the project was

> fundamental to the development of Chad. The Panel also recognizes that [the] Bank's participation in the Project is critical for its success especially in reducing poverty in Chad. This was clearly acknowledged in the Panel's Report. Furthermore, we believe that it is a credit to Management to embrace such a project, which is enmeshed in exceptionally complex environmental, developmental, political and social challenges.[52]

And in *Cambodia Forest Concession Management*, the Panel stated that it

> in principle, commends Management for engaging in forestry-related work in Cambodia. The Panel recognizes that this required the courage to be a risk taker, knowing that the work was important for poverty reduction and development, but also likely to lead to controversy and criticism. The Panel also emphasizes that in such a context compliance with safeguard policies is essential, even though transaction costs may be higher. Because of the strong economic incentives for unsustainable timber exploitation, the Bank has an important role to play and a comparative advantage in its effort to support sustainable forestry.[53]

While the significance of the examples mentioned in this section may not seem to amount to much, it should be remembered that all documents related to a Request are published on the Inspection Panel website and is therefore open to public scrutiny. Considering the serious challenges that had been made to the Inspection Panel's independence, during the first six years of its existence in particular, the Panel has come far in establishing its credibility and prestige within the World Bank.[54]

7.3. Leveraging Landmark Cases

Landmark cases provide the Panel with excellent opportunities for advancing its *de facto* independence because they point to deficiencies in the World Bank, thus drawing the attention of academic commentators, NGOs and the

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[51] The Panel has increasingly followed this approach in the aftermath of its China Qinghai report, for which it was criticized on this point – *see* section 7.3.1 below.

[52] *Chad Pipeline*, IP Chairperson address, at §2.

[53] 2005 *Cambodia Forest Concession Management and Control Pilot Project*, IR (ES), at §16.

[54] *See e.g.*, Hunter (2003), at 207-208: The initial Inspection Panel members and staff "grasped quickly the need to elevate the Panel in the Bank hierarchy and to establish and defend its independence from Bank Management who tried to assert control over the process. Mr. Bröder led the panel deftly through delicate times, in the end leaving the Panel strong, independent, and credible to the communities affected by Bank projects."

international media.[55] In the context of the World Bank, 'landmark' cases might e.g., involve politically sensitive issues such as the Bank's international human rights obligations; or might uncover findings of gross World Bank non-compliance that led to serious harm to people and the environment.

While there have been several important Inspection Panel Requests over the years that could be considered as 'landmark' in various respects,[56] this section considers five Requests that are deemed to be landmark cases, namely: *China Qinghai* (7.3.1), *Chad Pipeline* (7.3.2), *Paraguay/Argentina Yacyretá (II)* (7.3.3), *India MUTP* (7.3.4), and *Albania Integrated Coastal Zone Management* (7.3.5). The section will focus on the elements in these five Requests that made them into landmark cases, and will illustrate how the Inspection Panel has utilised them to strengthen its *de facto* independence.[57]

7.3.1. The *China Western Poverty Reduction (Qinghai)* Request

If the Inspection Panel has one "case that made the court",[58] it would have to be the 1999 *China (Qinghai)* Request.[59] As is so often the case with such 'watershed' moments in the life of a (quasi-) judicial institution, it was very much a matter of receiving the 'right' case, at the 'right' moment. The Inspection Panel could not have asked for more fortuitous timing. The lengthy second Board review process had just concluded in April 1999 when the *Qinghai* Request was registered in June 1999 – only a few days before the project proposal would go to the Board for final approval of the loan. The Panel was therefore well situated to implement the procedural improvements that were agreed on as part of the 1999 Board Conclusions.[60]

The *Qinghai* Request also had the hallmarks of a 'hard case'. Under the *Western Poverty Reduction Project*,[61] approximately 60 000 people would be resettled into an area that was occupied by 4 000 inhabitants – which included

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[55] *See e.g.*, *World Bank accused of razing DRC forests*, 4 October 2007, at <http://www.mg.co.za/article/2007-10-04-world-bank-accused-of-razing-drc-forests>; and D. White, *Why a World Bank oil project has run into the sand*, 22 January 2006, at <http://www.ft.com/cms/s/1/83d76a34-8b76-11da-91a1-0000779e2340.html>.

[56] *E.g.*, 1996 *Paraguay/Argentina Yacyretá Hydroelectric Project;* 1995 *Brazil Rodônia Natural Resources Management Project*; 1997 *India NTPC Power Generation Project*; 2001 *India Coal Sector Environmental and Social Mitigation Project and Coal Sector Rehabilitation Project*; 2001 *Uganda Third Power Project, Fourth Power Project, and proposed Bujagali Hydropower Project*, and 2007 *Uganda Private Power Generation Project*.

[57] Being landmark cases, these five Requests also feature strongly in the discussions in Chapters 8 to 10.

[58] Glennon (2003), referring to *Marbury v. Madison*.

[59] 1999 *China Western Poverty Reduction Project*.

[60] *See* section 7.1.1.1 above.

[61] The Inspection Panel Request concerned only the *Qinghai* portion of the *1999 China Western Poverty Reduction Project*, hence, the case is often referred to as the '*Qinghai*' Request.

ethnical minorities such as Tibetans and Mongolians.[62] The claimants argued that, due to several serious OP&P violations, the "integrity of the entire project" was undermined, claiming that "if the project moves forward we believe that it will constitute a serious threat to the ethnic minorities in the area and the fragile ecosystem in which they live".[63] Moreover, *Qinghai* was the first (and, to date, the only) Inspection Panel Request that was brought by an NGO based outside the territory of the borrower – a procedure for which Board approval is required.[64] Politically, the case also posed various difficulties. For instance, the project affected people in question were 'indigenous peoples' – Tibetans, to be specific, which is traditionally a sensitive issue both for the Bank and for influential donor countries such as the United States.[65] China was the Bank's biggest lending client at the time; but the Bank was under pressure to secure the continuation of China's lending business because of the country's increasing capability of funding its own development projects.[66] On the other hand, China's human rights track record continues to be a point of international contention – especially for donor countries such as Europe and the United States, that wield significant influence within the World Bank.

Consequently, the *Qinghai* Request generated a significant degree of media attention almost as soon as it was filed with the Inspection Panel.[67] All of these factors played a role in moving (then) incoming World Bank President Wolfensohn to apply pressure on the Board to suspend the loan approval until the completion of a full Inspection Panel investigation. The Board, including a reluctant China, succumbed – resulting in an opportunity for the Inspection Panel to conduct a full investigation (arguably, only its second investigation since its inception) of a case that could make – or break – the Panel.[68]

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62 1999 *China Western Poverty Reduction Project*, Request, at 1-2.

63 Id.

64 Inspection Panel Resolution (1993), at §12. The Board would have to consider whether appropriate local representation was not available. The Board avoided addressing the issue by asking the Inspection Panel out of their own accord to investigate – *see* 1999 *China Western Poverty Reduction Project*, IR, at 40. *Also see* Clark *et al.* (2003), at 227.

65 The NGO that filed the Request (the 'International Campaign for Tibet') was U.S. based.

66 *See e.g.*, G. Parker & A. Beattie, *EIB accuses China of unscrupulous loans*, 28 November 2006, at <www.ft.com>: "The world's development banks may have to water down the social and environmental conditions they attach to loans in Africa and elsewhere because they are being undercut by less scrupulous Chinese lenders, the European Investment Bank said on Tuesday. Philippe Maystadt, the EIB's president, said banks like his were operating in competition with Chinese lenders anxious to extend Beijing's influence across the world."

67 *See e.g.*, discussion by D. Clark & K. Treakle, *The China Western Poverty Reduction Project*, *in* Clark *et al.* (2003), at 224-225 (2003). The campaign involved the staging of protests in front of World Bank Headquarters in Washington, D.C. and dropping a massive banner down one side of the Headquarter buildings with the words: "World Bank Approves China's Genocide in Tibet."

68 Clark *et al.* (2003), at 224-228.

The Inspection Panel investigation uncovered several instances of significant World Bank non-compliance.[69] To name but a few prominent examples: the Panel found that maps of the so-called "move in area" were grossly inadequate, with the consequence that there was a "[…] high level of ambiguity, uncertainty and inconsistency" in terms of determining the "project area" and the exact number of "project affected people".[70] Such a potentially small oversight would mean, for example, that impact assessments could not be done properly; resulting either in harm, or that the full benefits of the project could not be realised as potential beneficiaries were left out. Moreover, the Panel found that surveys completed by affected people did not guarantee their anonymity – in fact, there was ample evidence that many surveys were not completed by project affected people themselves, but by officials.[71] The Panel pointed out that

> [t]he Bank must be aware that if there is even a perception of potential adverse effects that could result from a truthful statement of opposition to this Bank-financed project, then Bank staff has a responsibility to guarantee confidentiality of the respondent. This responsibility derives from the requirements for 'full and informed' consultation in ODs 4.20 (esp. par. 8), 4.30, and 4.01, since full and informed consultation is impossible if those consulted even perceive that they could be adversely affected for expressing their opposition to, or honest opinions about, a Bank-financed project.[72]

In the aftermath of the second Board Review, concluded in early 1999, there was a high degree of uncertainty among external commentators whether the Inspection Panel would be able to function independently from the Bank, and whether the Board would finally allow the Panel to conduct full, and meaningful, investigations.[73] After the conclusion *Qinghai*, these fears were largely assuaged – in large part because the Inspection Panel leveraged this

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[69] For criticism of the Inspection Panel investigation in the *Qinghai* case, *see e.g.*, Mallaby (2004), at 270-285; *and see* in general P. Bottelier, *Was World Bank Support for the Qinghai Anti-Poverty Project in China Ill-Considered?*, V(1) Harvard Asia Quarterly 11 (2001).

[70] 1999 *China Western Poverty Reduction Project*, IR (ES), at §17. *See also* IR, at §53: "The confusion the Panel encountered over what is and what is not included in the definition of the 'project area' is no doubt compounded by the fact that the documentation is very poorly supported by maps. Those maps that were in the documentation were of a very small scale. Most lacked scale lines and all omitted latitude and longitude or other co-ordinates. Even detailed 1:50000 maps of the irrigated areas that were provided to the Inspection Team on the day it visited the main irrigation area of Xiangride-Balong did not provide grid references or latitude and longitude, so that exact positions on the map could be determined. It is thus very difficult, if not impossible, for anyone reading the Environmental Assessment to gain a clear and unambiguous view of the locational aspects of the Project from the information provided. This applies to both the Move-out and Move-in areas."

[71] 1999 *China Western Poverty Reduction Project*, IR (ES), at §§28-29.

[72] 1999 *China Western Poverty Reduction Project*, IR, at §116. *Also see* section 8.3.1.2 below, on what constitutes 'meaningful and informed' consultation.

[73] *See* section 7.1.1.1 above.

landmark case, including the global publicity that surrounded it, to firmly establish itself as a credible compliance review mechanism both to the Bank and to external stakeholders.

7.3.2. The *Chad Petroleum Development and Pipeline* Request

The *Chad Pipeline* Request also occurred in the context of political controversy. The World Bank was criticized – by international NGOs in particular – for funding a (small) portion of the loan.[74] Critics of the *Pipeline* project cited the Chadian government's record of human rights violations, and were concerned that the earnings from the project would be misspent.[75] Importantly, the Bank's involvement served as the linchpin for attracting private sector investors (who made the largest investment). The consortium of private companies in question made World Bank involvement a prerequisite for their own investment, primarily because they wanted the World Bank safeguard policies to be applicable to the project.[76]

Wary of these external criticisms, the Bank set out to make the project a textbook example of sustainable development – for which the Panel also commended the Bank during its investigation.[77] Significantly, the project would ensure that revenues from the pipeline would be managed in separate accounts that would be used for earmarked purposes only – such as public works. Controversy soon arose, however, when it became known that the Chadian government

> had spent half of the $25 million dollar 'welcome bonus' paid by the consortium without any regard to the Revenue Management Law procedures. Approximately $4.5 million, for example, was spent on the acquisition of arms.[78]

This development, as well as reports that the country's opposition leader (who was part of a group of Requesters that filed the Panel claim) was being tortured, prompted (then) Bank President Wolfensohn to take the unusual step of intervening in order to secure the opposition leader's release.[79]

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[74] *See* G. Hernández Uriz, *To Lend or Not To Lend: Oil, Human Rights, and the World Bank's Internal Contradictions*, 14 Harvard Human Rights Journal 197 (2001).

[75] Id.

[76] Id. For a critical account of the Inspection Panel's *Chad Pipeline* investigation, *see* S. Mallaby (2004), at 341-356. For criticism of Mallaby's account, *see* D. Djiraibe & K. Horta, *Sebastian Mallaby's Portrayal of the Chad-Cameroon Oil & Pipeline Project in his book The World's Banker: An Example of Poor Research and Misrepresentation*, 6 December 2004, at <http://www.environmentaldefense.org/documents/4187_mallaby_rebuttal.pdf>.

[77] *See e.g.*, 2001 *Chad-Cameroon Petroleum Development & Pipeline Project*, IR (ES), at §§6-14, on the Bank's compliance with the EA procedure.

[78] Hernández Uriz (2001), at 225.

[79] 2001 *Chad-Cameroon Petroleum Development & Pipeline Project,* IR (ES), at §37.

Against this backdrop, the *Chad Petroleum Development and Pipeline* Request claimed, among other things, that "Directives on respect for human rights have been ignored […]".[80] The case therefore provided the Inspection Panel with a unique opportunity to address the controversial issue of the nature of World Bank human rights obligations, thereby also asserting its *de facto* independence from the Bank. The Panel openly criticized the Bank's longstanding human rights approach, which denies that the Bank has any civil and political human rights obligations:[81]

> […] the Panel takes issue with Management's narrow interpretation of the Bank's position on human rights […]. The Panel […] believes that the situation in Chad exemplifies the need for the Bank to be more forthcoming about articulating its role in promoting rights within the countries in which it operates. The Bank policies on consultation, among others, presume a basic respect for human rights.[82]

This aspect of the *Chad Pipeline* case will be discussed in more detail below.[83]

However, despite its stringent criticism of Management's stated position on human rights, the Panel emphasized its support for the World Bank's participation in the *Chad Pipeline* project, as mentioned above.[84] The Panel's position in this regard should be understood in the context of the aftermath of *China Qinghai*. Commentators and (former) Bank staff criticized the Panel's findings in the *Qinghai* case for not being attuned to operational realities – that is, invariably involving risk, especially with large infrastructure projects such as the *Chad Pipeline* case.[85] The Inspection Panel's recognition of the project's risks, and its stated support for the project's objectives might, on the one hand, be considered as a negative indication of the Panel's *de facto* independence. On other hand, showing a degree of deference to Bank management and staff (i.e., by acknowledging their efforts, and by showing an understanding of the operational context in which they have to operate) arguably contributes to the Panel's longer-term institutional credibility and, hence, *de facto* independence.[86]

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[80] 2001 *Chad-Cameroon Petroleum Development & Pipeline Project*, Request, at §4.

[81] For a discussion of the Bank's traditional position on human rights, *see* in general Darrow (2003); *also see* I.F.I. Shihata, *The World Bank and Human Rights: An Analysis of the Legal Issues and the Record of Achievements*, 17 Denver Journal of International Law & Policy 39 (1988/1989), for detail on the Bank's position on human rights and the justification thereof .

[82] 2001 *Chad Petroleum Development & Pipeline Project*, *Chad Pipeline*, IP Chairperson address, at §8.

[83] *See* section 9.2.1 below.

[84] *See* above, note 52 (Ch. 7).

[85] *See* above, note 69 (Ch. 7).

[86] Seen from this perspective, the Inspection Panel's comments are also a response to external criticism (originating primarily from the international civil society) of the Bank's involvement in the 2001 *Chad Petroleum Development & Pipeline Project*. *See e.g.*, in general S. Nguiffo

7.3.3. The *Paraguay / Argentina Yacyretá (II)* Request

The *Yacyretá* project had been a cause of concern for the World Bank for many years and was the subject of two separate Inspection Panel Requests.[87] As the Panel noted at the time of the second Request in 2002:

> [Yacyretá] was one of the most controversial and complex projects reviewed by the Panel to date. The Project is more than 20 years under implementation, thousands of people claim to be adversely affected, it is marred by allegations of corruption, and there is no satisfactory completion in sight.[88]

Both Requests centred on the plight of project affected people that suffered harm because of the (periodical) raising of the hydroelectric facility's reservoir. In the first Request, the Inspection Panel only obtained Board approval for a limited 'review' due to the abovementioned decision-making paralysis that existed on the Board at the time.[89] With the second *Yacyretá* Request received in 2002 (which covered largely the same facts and claims as in *Yacyretá I*),[90] the Panel got the opportunity to tend to 'unfinished business' and thereby bolstering its reputation as an independent and effective accountability mechanism.

In many respects, the Panel's *Yacyretá II* Investigation Report is a strong testimony to the fact that the Inspection Panel can be fair and balanced towards the Bank, while simultaneously not hesitating to point out the Bank's compliance failures. For example, the Panel acknowledged:

> [m]any Bank staff and other people concerned have put an inordinate amount of effort over the years 'to get the Project right' but with limited success. The Panel's investigation was as thorough as possible. The Panel had to be fair to the Requesters, to the Bank, and to all other project stakeholders and present to the Board of Executive Directors a succinct but comprehensive account of its findings.[91]

& S. Breitkopf, *Broken Promises: The Chad Cameroon Oil and Pipeline Project; Profit at Any Cost?*, June 2001, at <http://www.foei.org/en/publications/pdfs/promises.pdf>.

87 1996 *Paraguay/Argentina Yacyretá Hydroelectric Project* and 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*.

88 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, cover letter to the IR.

89 *See* section 7.1.1 above. The Panel was forced to do a limited 'review' and not a full 'investigation'. *See* Shihata (2000), at 120-124. The Panel's 1996 report to the Board concluded that "[…] a long history of delays and noncompliance tolerated by the Bank does not allow the Panel to provide a realistic assessment of future Project performance with any degree of confidence." As quoted in 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá I)*, IR, at §85.

90 This aspect of the two Yacyretá Requests will be discussed in more detail in section 10.1.3 below.

91 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, cover letter to the IR.

However, in reviewing the Project's environmental compliance, the Panel found:

> […] OD 4.01 requires that environmental assessments be prepared for the resettlement activities financed by the Bank. During most of its investigation, it appeared to the Panel that Management had not provided for the preparation of these environmental assessments. However, in November 2003 Management provided to the Panel environmental assessments that were prepared by EBY [borrower] consultants as evidence that the proper environmental assessments had been undertaken […]. The Panel has reviewed the Assessments and finds that they are very inadequate. They do not comply with the requirements of OD 4.01. The range of environmental matters addressed is limited; alternative resettlement sites are not considered; few mitigation measures are suggested, and affected parties were not consulted. The safeguard envisioned to be in place through OD 4.01 has therefore failed.[92]

The Panel also pointed to an instance where Management knowingly accepted project deficiencies. Through an independent verification of facts, the Panel confirmed that, contrary to Management's previous denial that the *Yacyretá* reservoir was not operated above the agreed level,[93]

> Management has accepted an error in the calculation of water level at Encarnación. From its analysis the Panel finds that the contention of affected persons that the Yacyretá reservoir is frequently operated under conditions that produce a water level in excess of 76 masl [metres above sea level] at Encarnación is *correct*.[94]

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[92] 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, IR (ES), at §XII. The Panel goes into a great amount of detail as to why these steps were inadequate to constitute compliance with OD 4.01 in the detailed IR.

[93] *See* 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, IR, at 15: "In 1994, the reservoir was filled to 76 masl, but filling of the reservoir to a higher level was subject to Bank approval, which was subject to the countries meeting their resettlement and environmental obligations […]. In 1996 the Panel received its first Request for Inspection concerning the Yacyretá Hydroelectric Project, which alleged that many activities that should have been completed prior to filling the reservoir were still pending. In February 1997, at the Board meeting held to discuss the Panel's recommendation to investigate the 1996 Request, Management presented two Action Plans (Plan A and Plan B) to address the Project's outstanding problems. Plan A provided for the completion of the resettlement and environmental actions that should have been, but were not, implemented before raising the reservoir's water level to 76 masl. Plan B aimed at dealing with several problems arising from the reservoir level being held at 76 masl. Consequently, the Board did not approve the Panel's recommendation to carry out an investigation. Instead it requested that the Panel assess the proposed Action Plans and undertake a review of the existing Project's resettlement and environmental progress."

[94] 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, IR (ES), at 19 (emphasis in the original). The operation of the reservoir below 76 masl was a major World Bank prerequisite (set after the first Panel Request in 1996) for the continuation of its financial support of the project.

The Panel furthermore pointed out that Bank management had not been painting the Board a realistic picture of the project's progress:

> […] the Panel finds that Management has in some respects been too optimistic in informing the Board on the future of project implementation. The Panel understands that it is difficult to accurately predict when certain aspects of the project will be completed. It believes some of the reporting has understated serious difficulties in project implementation. The Panel especially notes that only after it had conducted its own field research from January through December 2003 and conducted follow-up staff interviews did Management produce an Aide Memoire (October 23-30, 2003) that identified many of the problems the Panel had found and the remedial actions which need to be taken.[95]

Moreover, *Yacyretá II* provided the Inspection Panel with an opportunity to respond to Management criticisms in the aftermath of *China Qinghai* that the Inspection Panel's compliance standards were impossibly high.[96] Management contended that full compliance with the Panel's recommendations would have resulted in an exorbitant escalation of project implementation costs.[97] In *Yacyretá II*, the Panel pointed out that the *Yacyretá* project was an example of the staggering costs (for project affected people and the Bank alike) of non-compliance with the Bank's policies.[98]

It is also worth noting that the Board requested the Inspection Panel to remain involved with the case after the adoption of the IR, by reviewing Management's remedial action plan and by monitoring its implementation. Significantly, the Board had explicitly decided during the 1999 Board Review to end the practice of involving the Inspection Panel after the completion of the investigation. Hence, the Board's reversal of its own decision (without any explanation given or references made to the 1999 Board Review) is probably indicative of how much progress the Panel has made in establishing institutional credibility and prestige within the World Bank.[99]

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[95] 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, IR (ES), at 33.

[96] *Also see* section 8.4.2 below.

[97] Management calculated that it would cost $3,070,000 to implement the Inspection Panel's recommendations in the *Qinghai* case – *see* 1999 *China Western Poverty Reduction Project*, MR, at §§18-20. *Also see* Bottelier (2001), at 11: "It is strange that the IP does not have to consider trade-offs between the costs and benefits of additional assessments and studies it recommends. This may explain a tendency towards unrealistic perfectionism in parts of the IP report. Bank staff and borrowers have to make trade-offs continuously in the real world and they have to work within a budget. It would have cost the Bank (i.e. its Part II shareholders) more than ten times the original cost of project preparation and appraisal if all panel recommendations had been implemented."

[98] 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, IR (ES), at 19, arguing that the *Yacyretá* project "demonstrates that taking short-cuts with the Bank's safeguard policies is counterproductive for all concerned."

[99] *See* 1999 Board Review Conclusions, at §16: "The Board should not ask the Panel for its

7.3.4. The *India Mumbai Urban Transport* Request

As with the *Yacyretá II* and *Chad Pipeline* cases, the Inspection Panel's investigation report in *India Mumbai Urban Transport* (MUTP) reflects an understanding and appreciation of the project's objectives:

> [t]he Panel recognizes the urgent need for improvement in the transport infrastructure in Mumbai. Likewise the Panel recognizes the difficult challenge in resettling an estimated 120,000 or more people in Mumbai. This is the largest urban resettlement Project that the Bank has undertaken in India or elsewhere (except in China). There is no doubt that the Project is intended significantly to advance needed economic development in Mumbai and that large numbers of people will benefit from it.[100]

The Panel also acknowledged Bank staff efforts to address the concerns of the Requesters:

> [t]he Panel is aware that after the first Request was filed with the Inspection Panel, the Bank has devoted high level attention to the Project and has taken significant steps to try to bring the Project into compliance with its policies and procedures. The Panel commends staff for these efforts. The Panel also acknowledges the cooperation of staff with the Panel during its investigation.[101]

However, the Panel also uncovered several instances of serious World Bank non-compliance with OP&Ps. For example, a startling finding in *India MUTP* was the miscalculation of the number of people that had to be resettled due to the widening of a road:

> [d]uring implementation, and shortly before the Requesters submitted their complaints to the Panel, the Bank supervision mission in April 2004 reported that the number of people displaced and to be resettled under MUTP was in fact larger, by about 40,000 persons. This brought the total number of PAPs to about 120,000, an increase of about 50%. The increase alone is larger than entire resettlement components in many other Bank projects in India […]. Despite the increases in affected people, which meant a significant change in the scope of the Project resettlement component, the Bank did not re-assess the Project to confirm that the Project, as modified, was still justified, that the requirements of the Bank's policies were met, and that the implementing arrangements were still satisfactory, as required by BP 13.05.[102]

The Panel noted that

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view on other aspects of the [Bank management] action plans nor would it ask the Panel to monitor the implementation of the action plans."

[100] 2004 *India Mumbai Urban Transport Project*, IR (ES), at §18.

[101] *See e.g.*, 2004 *India Mumbai Urban Transport Project*, IR (ES), at 19.

[102] 2004 *India Mumbai Urban Transport Project*, IR (ES), at 22. Also noted in the IR, at §173: "It is difficult for the Panel to understand how such a distortion was possible, because the overall population data had been available in a succession of prior Bank documents, which the Panel was able to retrieve."

> less than two years after Board approval one supervision mission reported that the real number of displaced people was not the 80,000 mentioned in the PAD but some 120,000 people. This startling 50% increase was received by the Country Department without significant management reaction on the record, without proper Board notification, and without any decision to reconsider the entire component's appraisal, cost, or organizational support arrangements. The Panel found this surprising since it is far from Bank expected and normal procedures, and believes that the increase during project implementation is much more significant than in any other Project.[103]

The project furthermore failed to determine the needs of project affected people – a group of affected shopkeepers in particular, which had to relocate their shops because of the road widening. In collecting baseline data on the actual sizes of existing shops (which would be used to determine the shopkeepers' compensation for having to relocate their stores), the NGO responsible for the data gathering "generally ignored any internal upper stories".[104] The NGO also reported that "only a very small number of the structures [were] made of brick walls", while the "Panel estimate[d] that about 90 % or even more structures are made out of brick".[105]

The Inspection Panel also highlighted a few prominent instances where Bank management had provided the Board with "incorrect information on several key issues".[106] The Panel affirmed that the flaws in the project design were "compounded by incorrect understatements made by some Bank staff in positions of influence".[107] For example, on the failure of Bank management to disclose settlement risks, the Panel noted that

> this is not an instance when staff work might have simply failed to identify risks. The Panel's concern in the MUTP case is that advanced project documents testify that major specific risks had been identified, had been known and recorded in writing, but were left out from the most decisive project document – the PAD that was submitted to the Bank's Board of Directors for project approval.[108]

For the first time in the history of the Inspection Panel,[109] and indicative of how serious the Board had taken the Panel's findings, the Board decided to suspend further loan disbursements to the *MUTP* pending a satisfactory implementation of remedial action steps.[110] The Board also asked the Inspection Panel, as

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[103] 2004 *India Mumbai Urban Transport Project*, IR, at §298.
[104] 2004 *India Mumbai Urban Transport Project*, IR (ES), at 24.
[105] 2004 *India Mumbai Urban Transport Project*, IR, at §288.
[106] 2004 *India Mumbai Urban Transport Project*, IR, at §192.
[107] 2004 *India Mumbai Urban Transport Project*, IR, at §297.
[108] 2004 *India Mumbai Urban Transport Project*, IR, at §202.
[109] *Note* that in the 1999 *China Western Poverty Reduction Project*, China withdrew its loan application after the Board approval of the Inspection Panel Investigation Report out of own accord – *see* Clark *et al.* (2003), at 233.
[110] *See* 2004 *India Mumbai Urban Transport Project,* World Bank Press Release, 29 March 2006, at 2-3. The Bank suspended financing of project components; and laid down conditions

in the case of *Yacyretá II*, to review and oversee the implementation of the Management remedial action plan.[111]

7.3.5. The *Albania Integrated Coastal Zone Management and Cleanup* Request

In *Albania Coastal Zone Management*, the Inspection Panel found several serious instances of World Bank non-compliance with OP&Ps. The Requesters claimed the following:

> […] the Project implementation resulted in displacement of a small number of families, "*human rights violations*", "*inhumane actions*" including violence by the police and a "*complete lack of information and transparency regarding any projects or future plans for the area*." The Requesters argue[d] that the village of Jale was destroyed as a result of the Bank's failures and oversights "*to take into consideration legal rights as well as the well being*" of the community. They claim[ed] that the Bank also violated the policies requiring supervision of project activities and those mandating that risks of impoverishment for the community be mitigated.[112]

Over the course of its investigation, the Inspection Panel verified these claims, even though Management initially claimed that there was no

> direct or indirect linkage between the Project and the demolitions that are the basis of the Request. Management state[d] that the demolitions were part of an ongoing Government program started in 2001, and that the demolitions could not possibly be linked to the [Southern Coast Development Plan] because the SCDP [was] not yet in effect.[113]

The Panel also uncovered a serious incident of Management misrepresentation to the Board. During the Board's discussion of the project appraisal document (PAD), several Board members voiced their concerns about the Albanian government's ongoing demolitions of residential homes (which turned out to the subject of the Inspection Panel Request). The Board was placated by Management assurances at the time that there was an agreement between the Bank and the borrower to suspend these demolitions until "the criteria and procedures for identifying and assisting such vulnerable affected people are in

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for lifting the suspension. The Bank had also notified the Borrower that it had downgraded the Project ratings for Development Objectives and Implementation Progress to 'unsatisfactory'. Furthermore, the Board set additional loan conditions. *Also see* 2004 *India Mumbai Urban Transport Project*, MR to IR, at §§88-90.

111 2004 *India Mumbai Urban Transport Project*, World Bank Press Release, 29 March 2006, at 3.

112 2007 *Albania Integrated Coastal Zone Management and Clean-Up Project*, IR (ES), at VIII (emphasis in the original).

113 2007 *Albania Integrated Coastal Zone Management and Clean-Up Project*, IR (ES), at IX.

place".[114] When the Panel tried to confirm the existence of this 'agreement', it discovered that it did not exist. The Bank's project team stated that the reference to the 'agreement' in the PAD was a "mistake", which Management corrected at the time of the Board meeting. From the Panel's review of the transcript to the Board meeting in question, however, it was clear that this 'mistake' was never corrected. In other words, the Board had approved the project on the basis of incorrect (if not false) information.[115]

The *Coastal Zone Management* Request was significant for the assertion of Inspection Panel *de facto* independence (signified by the establishment of institutional credibility and prestige), as the outcomes of this case illustrate:

> [f]rom basic project management to interactions with the Board and the Inspection Panel, the Bank's record with this project is appalling,' said World Bank Group President Robert B. Zoellick, who has requested the Bank's Acting General Counsel [to] investigate matters, and who separately has referred matters to the Bank's Department of Institutional Integrity (INT). 'We take very seriously the concerns raised by the Inspection Panel and we are moving promptly to strengthen oversight, improve procedures, and help the families who had their buildings demolished. The Bank cannot let this happen again'.[116]

Moreover, the Bank also undertook to conduct "a case-by-case legal review" of the demolitions, and to appoint an "Independent Observer to monitor" this review. In addition, the Bank agreed to pay for "legal aid" for each of the Requesters, as well as the "retroactive application" of "assistance packages for the poor and/or vulnerable affected by the demolitions".[117]

7.4. Raising Awareness about Undue Political Interference with the Panel Process

Occasionally, the Inspection Panel highlights serious Management deviances from the Panel procedure, especially instances that violate the procedural rights of Requesters. Because these occurrences strike at the heart of the Inspection Panel process, they also threaten the institutional credibility and prestige of the Panel. For instance, in the *Lesotho Highlands Water (I)* Request,[118] World

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[114] 2007 *Albania Integrated Coastal Zone Management and Clean-Up Project*, IR (ES), at XXIII.

[115] 2007 *Albania Integrated Coastal Zone Management and Clean-Up Project*, IR (ES), at XXIV.

[116] 2007 *Albania Integrated Coastal Zone Management and Clean-Up Project* , World Bank Press Release, 17 February 2009, at 2. *Also see* in general R. Behar, *World Bank Spent More Than a Year Covering Up Destruction of Albanian Village*, 9 February 2009, at <http://www.foxnews.com/story/0,2933,490028,00.html>.

[117] 2007 *Albania Integrated Coastal Zone Management and Clean-Up Project* , World Bank Press Release, 17 February 2009, at 1.

[118] 1998 *Lesotho/South Africa Highlands Water Project*.

Bank staff at the Bank's Pretoria headquarters received the sealed Request, opened it, and faxed it to World Bank headquarters in Washington, D.C. Here, the Request was read and copied by Bank staff members before it was sent to the Inspection Panel for registration.[119] Moreover, Bank management used their knowledge of the existence of the Request in project appraisal discussions with the Board. The Inspection Panel strongly objected to this procedural deviance, stating that it "represented an unprecedented disregard by Bank management of the Resolution and the Panel's procedures" since it "placed the Panel in the awkward position of receiving an opened Request from Management".[120] The Panel emphasised that such "serious disregard of the Panel process threaten[ed] its integrity".[121] Importantly, the Panel added that this procedural violation also appeared to

> amount to a serious abuse of reasonable due process in any context. It must be recalled that there are two parties involved in the Panel process – the Requesters and the Bank management. The Requesters do not have any direct access to those who were to vote on the loan they questioned. The Board did not have the benefit of the Panel's independent assessment of the eligibility of the Request.[122]

The Inspection Panel's *de facto* independence would be negatively affected if World Bank officials and borrowers could simply pressurize or intimidate potential Requesters not to submit Inspection Panel Requests. Consequently, the Inspection Panel takes allegations of undue World Bank pressure exerted on (potential) Requesters very seriously. For example, in *Uganda Private Power Generation* (I), the Panel informed the Board that it

> heard testimony that some resettled people who submitted the letter of complaint have been subjected to pressure to refrain from complaining about the proposed Project. Individuals indicated to the Panel that they were, on other occasions, threatened for wanting to speak out about their concerns. Some indicated that while they have not refused the dam, they joined the letter stating their concerns regarding their resettlement and are fearful of the consequences.[123]

And in the *Brazil Parana Biodiversity* case, the Panel advised the Board that

> Requesters felt unduly pressured by Bank staff and others not to file a Request for Inspection and then to withdraw the Request. The Requesters have cited various arguments as having been used to exert pressure. The Panel finds that this practice threatens the integrity of the Panel process, and may have a chilling effect on local people who genuinely feel harmed or potentially harmed by

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[119] This contravenes the Inspection Panel's Operating Procedures (at §14), which calls for requests to be sent "by registered or certified mail or delivered by hand in a sealed envelope".

[120] 1998 *Lesotho/South Africa Highlands Water Project*, ER, at 7.

[121] Id.

[122] Id. *Also see* discussion of the Panel's concern for due process in section 9.2.2.2 below.

[123] 2001 *Uganda Third Power Project, Fourth Power Project, and proposed Bujagali Hydropower Project*, ER, at 82.

> Bank projects. The Panel wants to call the attention of the Board of Executive Directors and Bank Senior Management to this matter, and trusts that these kinds of practices will not occur in the future.[124]

Finally, in the *Albania Coastal Zone Management* case, the Inspection Panel notified the Board that the

> Management Response was particularly unhelpful and non-informative and at times in total conflict with factual information which had been long known to Management. The omission of known key information in the Management Response distorts the overall picture and further compounds many less than straight forward answers received by the Panel to its questions from some of the staff involved in Project management, and implementation.[125]

In this instance, the Panel considered Management's "less than helpful" behaviour serious enough to take the "unusual" and unprecedented step of "alerting Senior Management to key facts that it has uncovered" already in the course of the Panel investigation process.[126]

7.5. Summary

This chapter analyzed whether the Inspection Panel asserts its *de facto* independence from Bank management and staff, and, to a lesser degree, from the Board of Executive Directors. The chapter specifically assessed whether the Panel does so in similar ways as courts exercising judicial oversight – hence, by establishing its credibility and prestige, by leveraging landmark cases, and by raising public awareness in cases of undue political interference.

First, the chapter illustrated that the Inspection Panel's *de facto* independence has consistently been under intense pressure – from both Bank management and the Board – during the early stages of the Panel's existence in particular. The chapter also provided evidence that such challenges (mostly originating from Bank management) still occur – although they have become less frequent, and generally take on more subtle forms. Second, the chapter showed that the Inspection Panel has established its institutional credibility and prestige within the World Bank e.g., by making decisions on the basis of consensus only – hence, speaking with 'one voice'; and also by consistently protecting the integrity of the Inspection Panel process. Moreover, the Board has increasingly come to recognise the worth of the Inspection Panel as a result of the high quality of the Panel's investigation reports.

Third, the chapter highlighted five landmark cases (*China Qinghai*, *Chad Pipeline*, *Paraguay / Argentina Yacyretá (II), India MUTP*, and *Albania*

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[124] 2006 *Brazil Parana Biodiversity Project*, ER, at §43.
[125] 2007 *Albania Integrated Coastal Zone Management and Clean-Up Project*, IR (ES), at XXVII.
[126] Id.

Integrated Coastal Zone Management and Cleanup) and illustrated how these cases have enabled the Panel to assert its *de facto* independence. *China Qinghai* provided the Panel with an opportunity to allay (external stakeholder) concerns that it would be "crippled" after the conclusion of the 1999 Board Review. With the *Chad Pipeline* case, the Panel could assert its criticism of the World Bank's longstanding position on human rights; and with *Yacyretá II*, the Panel firmly established its credibility with the Board, as is evidenced by the Board's decision (contrary to the 1999 Board Review Conclusions) to involve the Panel after the conclusion of its investigation. The Panel strengthened its credibility further in *India MUTP*, especially by highlighting instances where Management provided the Board with inaccurate or (at best) overoptimistic information. The Panel's investigation also resulted in the Board's decision to suspend the loan until certain remedial action steps were taken. Finally, the Panel uncovered serious instances of non-compliance in *Albania Coastal Zone Management* – including a crucial misrepresentation to the Board in the PAD, and a failure to apply the Bank's policy on Involuntary Resettlement, which led some Board members to note "the value of an independent Inspection Panel in strengthening the Bank's accountability and effectiveness".[127] Fourth, the chapter demonstrated that the Inspection Panel formally notifies the Board and – because all documents related to the Panel process are made public – also the broader public, of instances where Bank management exerted undue influence over the Inspection Panel process.

The analysis contained in this chapter therefore suggests that the Inspection Panel asserts its *de facto* independence from Bank management and, to a certain degree, also from the Board. Given that the Inspection Panel is dependent on the Board for authorizing full investigations, the Panel's institutional credibility and prestige are perhaps even more important for the Panel than for courts exercising judicial oversight. Based on the evidence presented in this chapter, it can therefore be concluded that the Inspection Panel has been very successful in this regard, especially considering how it was marginalized during its early years.

[127] Above, note 1 (Ch. 7).

Chapter 8

The Inspection Panel and the Judicial Oversight Model: 'Judicialization'

The general tendency toward 'judicialization', that often appears where a triangle is formed between complainant, respondent, and institutional adjudicator, sets up a natural dynamic for the panel to enhance its jurisprudence and its own role, supported by legally oriented NGOs and potentially by some sections of Bank staff whose work such an approach vindicates.[1]

'Judicialization', as defined earlier, reflects the degree of judicial power and influence in a constitutional system.[2] The Judicial Oversight Model developed in Part I of this book revealed that courts exercising judicial oversight expand their influence over time, or, increase the degree of judicialization in a number of ways. First, courts expand their (original) mandate simply by taking on additional functions or performing oversight in additional areas – often without having a strong legal (constitutional) foundation for asserting such judicial power. Second, courts use interpretative techniques, such as teleological interpretation, to broaden the substantive and procedural meaning of legal (constitutional) provisions. Third, courts expand their influence through normative development, which is driven by the development of legal principles or doctrines. Thus, the broadening of judicial discretion (either formally attributed or informally assumed) and the limitation of political discretion lie at the root of these judicialization methods.

Can the Inspection Panel, which has no formal decision-making authority, actually *expand* its power and influence? And if so, does the Panel employ similar judicialization techniques as those described by the Judicial Oversight

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1 Kingsbury (1999), at 332. *Also see* above, note 90 (Ch. 2) on the norm-generating potential of triadic dispute resolution.

2 *See* section 2.1.2 above.

Model? The analysis of the Inspection Panel's institutional history and practice seems to indicate that the answers to both these questions, as well as Kingsbury's abovementioned prediction,[3] are affirmative. This chapter will illustrate how the Inspection Panel has expanded its mandate, often without offering any justification (8.1); limited Management's discretion (8.2); increased its influence through interpretation of the Resolution and specific OP&Ps (8.3); and how the Panel has increased its degree of judicialization by establishing – what might be called – the first foundations of 'legal doctrine' (8.4). The chapter will conclude by summarizing the major findings (8.5).

8.1. The Panel Expanding its Mandate

The Resolution grants the Panel some discretion, for example, by stating that the Panel must "*satisfy itself* that the alleged violation […] is of a serious character" when determining the eligibility of a Request.[4] The Resolution does moreover not assign a time limit to the actual Panel investigation; it simply states that the assigned inspector must report to the Panel within a period determined by the Inspection Panel by "taking into account the nature of each request".[5] Furthermore, the Inspection Panel's Operating Procedures (that have been accepted by the Board) specify that the Panel can use a variety of investigatory methods, such as "consulting local NGOs", "hiring independent consultants", and "any other reasonable methods the Inspector(s) consider appropriate to the specific investigation".[6]

On the other hand, the Board has also narrowed the Inspection Panel's discretion on occasion. For example, the 1999 Board Review Conclusions specifically instructed the Panel *how* to assess "material adverse effect" or "harm", namely, the Panel had to use the "without-project situation" as a baseline for making comparisons.[7] The Board stressed that "[n]on-accomplishments and unfulfilled expectations that do not generate a material deterioration compared to the without-project situation will not be considered as a material adverse effect for this purpose".[8] However, the Board added: "[a]s the assessment of material adverse effect can be difficult, the Panel will

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3 *See* above, note 1 (Ch. 8).

4 Inspection Panel Resolution (1993), at §13 (emphasis added).

5 Inspection Panel Resolution (1993), at §20. Note that there is a time limit of 21 days to the Eligibility phase – *see* section 6.3.3 above.

6 Inspection Panel Resolution (1993), at §45. It is under the auspices of this provision that the Inspection Panel uses external 'subject matter experts' to independently verify facts or highly specialized studies. For a discussion of the Panel's 'fact-finding' role, *see* section 9.1 below.

7 1999 Board Review Conclusions, at §14.

8 Id.

have to *exercise carefully its judgement* on these matters, and be guided by Bank policies and procedures where relevant".[9]

The Inspection Panel frequently goes beyond its compliance review mandate; and this section will highlight six mechanisms through which the Panel accomplishes this, namely: indirect criticism of the borrower (8.1.1); root cause analysis (8.1.2); criticism of World Bank development project strategies (8.1.3); concern for future compliance (8.1.4); procedural innovations (8.1.5); and the limitation of Management's discretion (8.2). Significantly, the Inspection Panel includes these 'findings', 'comments', and sometimes even formulated as 'recommendations', in its official Investigation Report – usually without pointing out that they are, in reality, simply '*obiter dicta*'. As the examples in this chapter (and the next two) will illustrate, the Panel is also very effective in linking these additional comments or findings to its formal compliance review mandate, thereby limiting the potential backlash from the Bank's political institutions.

8.1.1. Indirect Criticism of the Borrower

The Inspection Panel is barred from investigating the borrower.[10] Thus, the Panel always takes great pains to point out that it is not investigating the borrower,[11] especially in the light of the conflict that existed among Board members during the Panel's early years.[12] On occasion, however, the Panel will make comments that indirectly reflect on the Borrower's actions. For instance, the Requesters in the *Chad Pipeline* case claimed the Bank ignored human rights abuses perpetrated by the borrower. The Panel acknowledged that the human rights obligations of the borrower did not fall within its mandate,[13] but that it nevertheless

> felt obliged to examine whether the issues of proper governance or human rights violations in Chad were such as to impede the implementation of the Project in a manner compatible with the Bank's policies.[14]

The Panel then noted that

> on more than one occasion when political repression in Chad seemed severe, the Bank's President personally intervened to help free local opposition leaders,

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9 Id (emphasis added).

10 Inspection Panel Resolution (1993), at §14(a); *and see* section 6.3.2 above.

11 *See e.g.*, 1997 *India NTPC Power Generation Project*, ER, at §11; and 1995 *Brazil Rodônia Natural Resources Management Project*, ER at §12.

12 *See* section 7.1.1 above; and section 10.4.1.1 below.

13 2001 *Chad Petroleum Development & Pipeline Project*, IR (ES), at §34.

14 Id.

> including the representative of the Requesters, Mr. Yorongar, who was reported to have been subjected to torture.[15]

During the Panel investigation of the *Albania Coastal Zone Management* Request, various Albanian people interviewed by the Panel made "allegations of corruption", claiming that "certain people [were] using the Project and its resources to clear the area around Jale for a tourist resort".[16] The Panel stated that it did not "evaluate" these allegations since an investigation of borrower actions fell outside the Inspection Panel's mandate. The Inspection Panel nevertheless added that "the selective nature of the demolitions carried out by the Construction Police seems to support the desire to clear a certain area".[17]

8.1.2. Root Cause Analysis

The Inspection Panel is not explicitly required to analyse the underlying reasons behind the compliance issues uncovered by its investigations; however, the Panel regularly engages in 'root cause' analysis. Given that many of the claims made by Requesters are recurring,[18] the Inspection Panel's comments in this regard are invaluable because they provide the Bank with objective insights, based on on-the-ground observations.

For example, the Panel noted in a few cases that insufficient involvement of project affected people in project design and implementation, as required by the relevant OP&P, was a major root cause of several problems set out in the Requests. In the *Yacyretá (I)* case, the Panel stated:

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15 2001 *Chad Petroleum Development & Pipeline Project*, IR (ES), at §37.

16 2007 *Albania Integrated Coastal Zone Management and Clean-Up Project*, IR (ES), at xxiii.

17 Id. *Also see* 1999 *China Western Poverty Reduction Project*, IR, at §115, responding to Requesters' claims that "speaking freely" in project consultation sessions could constitute a crime under China's Criminal Code of 1997. The Panel stated that "[w]hile [it] does not endorse or express any opinion about these allegations, it notes that they were not disputed, or even directly addressed, in the Management Response."

18 *See e.g.*, IP Annual Report (2007/2008), at 142, for a summary of World Bank OP&P most cited in Inspection Panel Requests. As of June 2008, 38 out of 40 Requests raised issues of non-compliance with the Bank's Environmental policy, and 36 out of 40 raised issues of non-compliance regarding the Involuntary Resettlement Policy. Miscategorization of the project for environmental risk assessment purposes (discussed in section 8.2.2 below), for instance, has been claimed by Requesters in four cases (i.e., 1999 *China Western Poverty Reduction Project*; 2004 *Pakistan National Drainage Program Project*; 2005 *Cambodia Forest Concession Management and Control Pilot Project*; and 2005 *Democratic Republic of Congo Transitional Support for Economic Recovery Credit and Emergency Economic and Social Reunification Support Project*.

> [t]he lack of participation of affected people and local authorities in project related activities and a tendency by Bank supervision missions to ignore or take lightly the concerns of area people may be at the root of these problems.[19]

In *Yacyretá II*, the Panel argued that "closer contact with, and participation of affected people and local authorities would have provided the Bank a better understanding of the problems caused by the project".[20] And in *India NTPC Power*, the Panel found that a "[l]ack of local consultations and participation in both preparation and implementation of […] the Project appears, *prima facie*, to be the root cause of past and current problems and complaints […]".[21]

The use of broader environmental impact assessment tools (that can analyse the potentially cumulative impact of developmental projects) is not explicitly required by the Bank's policies.[22] According to the Inspection Panel, however, this is an oversight because "good professional practice in environmental impact assessment has in recent years stressed the need for cumulative effects analysis […]".[23] According to the Panel, the lack of 'regional' or 'sectoral' environmental impact assessments is a root cause of many issues highlighted by Requesters. In *India Coal Environmental & Social Mitigation*, for example, the Panel argued:

> […] given the fact that in the future additional mines are expected in the area of Parej East, the preparation of an area-wide [impact assessment] plan would have been a prudent course to take and might well have revealed many of the problems that have confronted Management.[24]

And in the *Uganda III & IV (Owen Falls) & Bujagali Power* case, the Panel stated that the Bank's "failure to perform a [Sectoral Environmental Assessment] for the Power III Project was a violation of the terms and

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[19] 1996 *Paraguay/Argentina Yacyretá Hydroelectric Project*, Inspection Panel Review and Assessment, at §238.

[20] 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, IR (ES), at 52-53.

[21] 1997 *India NTPC Power Generation Project*, ER, at §24 (i). *Also see* the discussion on the meaning of 'meaningful and informed consultation' in section 8.3.1.2 below.

[22] *See e.g.*, Management's response in *Chad Pipeline*, 2001 *Chad Petroleum Development & Pipeline Project*, MR to IR, at §19: "OD 4.01 does not 'require' the use of the tool of Regional EA. OD 4.01 states, *inter alia*, that 'Regional EAs *may* be used where a number of similar but significant development activities with potentially cumulative impacts are planned for a reasonably localized area.' However […] the absence of a formal Regional EA is largely a semantic issue, because, in the manner in which the Project is proceeding, the appropriate elements of a Regional EA will be part of the RDP [regional development plan]." (Emphasis in the original.)

[23] 2001 *Uganda Third Power Project, Fourth Power Project, and proposed Bujagali Hydropower Project*, IR (ES), at §22.

[24] 2001 *India Coal Sector Environmental and Social Mitigation Project and Coal Sector Rehabilitation Project*, IR (ES), at §12.

conditions under which the Board approved the Credit", and has "led directly to many of the concerns related to the Bujagali Project".[25]

In some instances, the Inspection Panel pointed to the weaknesses of the (project) implementing agency as the root cause behind some of the Requesters' claims.[26] In *Yacyretá II*, the Panel noted that the implementing agency's

> institutional weakness, the excessively broad range of its activities, and the mistrust of the area's affected people are considered by many to be key factors that have adversely affected Project execution and have created a situation that seems very difficult to solve.[27]

In *Cameroon Pipeline*, the Inspection Panel commended the implementing agency on its "extensive commitment to an ongoing collection of baseline data," but noted that "this has occurred only since the start of project implementation". The Panel concluded that "[m]any of the resource conflicts that have arisen during project construction could have been avoided had there been a full year's baseline information prior to project approval".[28] And in *India MUTP*, the Panel found that the lack of institutional capacity of the local NGOs tasked to handle the project's resettlement component was the "reason for many of the failures in R&R implementation".[29]

8.1.3. Criticism of World Bank Project Strategies

The Panel occasionally ventures outside its mandate by criticizing certain World Bank strategic project choices. For instance, in the 2005 *Democratic Republic of Congo* Request,[30] the Panel questioned the appropriateness of using a 'development policy loan' in the project context, because this loan type was not subject to any safeguard policies.[31] The Panel argued that the Bank should have ensured "the process for assessing whether there are significant environmental and social effects" was "rigorous and thorough"; and that there

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[25] 2001 *Uganda Third Power Project, Fourth Power Project, and proposed Bujagali Hydropower Project*, IR (ES), §§20-23, 37 & §43. *Also see* 1994 *Nepal Arun III Proposed Hydroelectric Project and Restructuring of IDA Credit*, ER, at §51.

[26] Formally, the obligations of the borrower and its implementing agency are out of scope for the Inspection Panel, *see* section 6.3.2 above.

[27] 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, IR (ES), at §40.

[28] 2002 *Cameroon Petroleum Development and Pipeline Project, and Petroleum Environment Capacity Enhancement Project*, IR (ES), at §14.

[29] 2004 *India Mumbai Urban Transport Project*, IR (ES), at §21. Also see above, notes 104 & 105 (Ch. 7).

[30] 2005 *Democratic Republic of Congo: Transitional Support for Economic Recovery Credit and Emergency Economic and Social Reunification Support Project*.

[31] 2005 *Democratic Republic of Congo: Transitional Support for Economic Recovery Credit and Emergency Economic and Social Reunification Support Project*, IR (ES), at 17-18.

was sufficient "willingness […] to undertake the prudent assessments in order to avoid subsequent unforeseen impacts and unwelcome developments".[32]

The Bank occasionally employs a so-called 'process approach' to project design; i.e., various project components are designed in stages. The implication of this approach is that consultation with potential project affected people is also postponed to, what the Bank considers to be, the 'appropriate' stage. In *Bangladesh Jamuna Multipurpose Bridge*, the Requesters claimed that the 'char people'[33] were 'forgotten', i.e., left out of project design and implementation planning.[34] Management rejected this claim and explained that

> [a] resettlement/compensation program for the char dwellers will be discussed with them *as soon as they are identified*. Representatives from the chars are expected to participate in the EFP plan committee […]. Consultation programs have been carried out only in areas identified to be affected, and where there are identifiable legitimate stakeholders. To do otherwise would cause confusion, unrealistic expectations and exaggerated or false claims for compensation […].[35]

The Panel criticized the Bank's decision to postpone consultation with the char people, arguing that "the substance and spirit of OD 4.00 and Annexes, and OD 4.30 seem to require the active participation of people likely to be affected".[36] Hence, the Panel concluded:

> [t]he fact that about 3,000 people signed the Request cannot go unnoticed. These people have been left uninformed and out of the design and appraisal stages of the project, including the environmental and resettlement plans aimed at mitigating adverse effects on people and nature.[37]

In *India Ecodevelopment*, the Requesters similarly complained that they were not consulted during the project design phase, as required by the Bank's policies. Management responded that "broad consultation" had already taken place, but that the main part of the consultation would take place during the project implementation phase when 'microplans' would be developed on village level.[38] The Inspection Panel again questioned the wisdom of the

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[32] 2005 *Democratic Republic of Congo: Transitional Support for Economic Recovery Credit and Emergency Economic and Social Reunification Support Project*, IR (Second ER), at viii.

[33] *I.e.*, people living on "temporary islands, created by seasonal flooding and unstable river paths"; *see* 1996 *Bangladesh Jamuna Multipurpose Bridge Project*, MR, at §ii.

[34] 1996 *Bangladesh Jamuna Multipurpose Bridge Project*, Request, at 5-6.

[35] 1996 *Bangladesh Jamuna Multipurpose Bridge Project*, MR, at §v (emphasis added).

[36] 1996 *Bangladesh Jamuna Multipurpose Bridge Project*, ER, at §47. *Also see* section 8.3.1.2 below, on the use of 'purposive' interpretation.

[37] 1996 *Bangladesh Jamuna Multipurpose Bridge Project*, ER, at §54.

[38] 1998 *India Ecodevelopment Project*, MR, at §§13-14.

'process approach', especially since the Bank was aware that there was a "history of mistrust between the tribal people and the government".[39] The Panel concluded:

> […] past experience may well indicate that a step-by-step 'process design project' is the best way to proceed. But it does appear that, in this case, [the Bank] preempted participation in decisions on a number of basic questions, decisions which establish at least a part of the framework within which the second phase microplanning will take place […]. Instead, Management chose to keep the project design phase at a level of generality that did not allow the real problems to appear, in particular the inherent conflicts at Nagarahole.[40]

Finally, in *Cambodia Forrest Consession Management*, the Panel found:

> […] by failing to identify the affected population within the planning phase and to develop an IPDP for the affected indigenous peoples, the size of the affected population was in effect not estimated at all. Rather, the Project followed what Management refers to as a 'process-oriented' approach, which left the development of this information to a later date […]. In this case, the Panel finds that a safeguard postponed is a safeguard denied, because by failing to identify beforehand the affected population, the Bank policies requiring consultation and participation of that population could not be properly followed.[41]

A longstanding external criticism aimed at the World Bank is the emphasis placed on infrastructure and 'technical' components, to the detriment of project components that are primarily geared towards ensuring sustainable development – such as environmental impact assessment and 'relocation and rehabilitation' (R&R).[42] For example, in *Yacyretá I*, the Panel noted the

> [i]mbalance in execution between civillelectro-mechanical works on the one hand and resettlement and environmental measures on the other has been one of the fundamental problems of the Yacyretá Project. This imbalance has been exacerbated by the usual Bank practice of financing the former while leaving the latter for counterpart funding. Given that this phenomenon has been observed in other cases the Panel believes that this practice should be reconsidered.[43]

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[39] 1998 *India Ecodevelopment Project,* ER, at §43.

[40] 1998 *India Ecodevelopment Project*, ER, at §§43-45.

[41] 2005 Cambodia Forest Concession Management and Control Pilot Project,

[42] *See* Head (2003/2004), at 256; *and* Berger (1993-1994), at 11-12 – referring to the finding in the Morse-Berger report that Bank management in the *Sardar Sarovar* project decided that the EIA would be done "in parallel with construction" – *see* section 6.1.1 above.

[43] 1996 *Paraguay/Argentina Yacyretá Hydroelectric Project*, Inspection Panel Review & Assessment, at §255. *Also see* 2001 *India Coal Sector Environmental and Social Mitigation Project and Coal Sector Rehabilitation Project*, IR, at §347: "The IPDPs have focused largely on projects for physical development of villages such as the construction of village roads, repair of wells, making of ponds for irrigation and the repair of a community hall. CCL [implementing agency] informed the Panel that its plan was gradually to reduce expenditure on infrastructure and to raise it on skill development and capacity building." *And see* 2005 *Cambodia Forest Concession Management and Control Pilot Project*, IR (ES), at 16-17: "The Panel finds that in the Project's focus on concessions, other aspects that were important to the Bank program

This systemic problem within the World Bank forms the backdrop of the Inspection Panel's criticism of the Bank's decision to merge the infrastructure and 'R&R' components in the *India MUTP* case.[44] The Inspection Panel argued that the decision to merge these components was a major root cause of many of the compliance issues uncovered by the Panel:[45]

> [t]he decision to merge the two projects led to a Project in which the R&R component was critical for the success of the Project, but which, on closer examination, was not ready for implementation when the Project was launched. Also, the estimate of the number of people to be resettled was reduced dramatically, as was the cost estimate for resettlement. Moreover, the reference to the problem of shopkeepers, initially present in the separate Project, seems to have been dropped from consideration after the merger. This last item is one that apparently prompted the shopkeepers to approach the Panel with a Request for Inspection. The Project now faces significant difficulties in meeting Bank policies with respect to the shopkeepers.[46]

The Panel linked these criticisms closer to its compliance review mandate by noting that OD 4.30 recommended that the R&R component should be "a free-standing resettlement project with appropriate cross-conditionalities" in certain circumstances.[47] The Panel concluded that the complexities involved and the sheer number of people that had to be relocated[48] indicated that the *MUTP* was "precisely the type of resettlement that, under OD 4.30, was intended to be addressed as a free-standing Project".[49]

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in Cambodia and the Government were largely ignored or at least marginalized throughout the planning phase of the Project. In particular, the Project did not seem to take on the key objective of using the potential of forests to reduce poverty."

[44] *India MUTP* was originally two twin projects – the infrastructure / transport project, and the R&R project. India's World Bank division decided to merge the projects in 1999, with the R&R becoming a "sub-component" of the main infrastructure project – *see* 2004 *India Mumbai Urban Transport Project*, IR (ES), at 19-20.

[45] 2004 *India Mumbai Urban Transport Project*, IR (ES), at 19-20.

[46] 2004 *India Mumbai Urban Transport Project*, IR (ES), at 20. The shopkeepers in *India MUTP* suffered considerable harm as a result of major oversights concerning them during the design phase. The Panel noted that, despite renewed efforts to address the harm the shopkeepers have suffered, in reality it was too late to fully compensate them.

[47] 2004 *India Mumbai Urban Transport Project*, IR (ES), at 19-20. The Panel added, referring to the Morse-Berger review: "This Policy directive was fully validated soon thereafter in 1991-1992 through the lessons from the Independent Review requested by the Bank's Board of the Narmada Sardar-Sarovar Project in India." (IR, at §106)

[48] Affecting at least 80 000 people – "unprecedented in both the Bank's and India's urban project histories" – *see* 2004 *India Mumbai Urban Transport Project*, IR (ES), at 20.

[49] 2004 *India Mumbai Urban Transport Project*, IR (ES), at 20. Management rejected this Inspection Panel finding – *see* 2004 *India Mumbai Urban Transport Project* MR to IR, at 67: "It should be noted that the Bank has successfully used a combined approach to project implementation for both construction and R&R activities in numerous major projects (in South Asia as well as other regions) and that Management continues to view the use of a "free-standing resettlement project" as an option to be considered on a case-by case basis."

8.1.4. Concern for Future Compliance

Occasionally, the Inspection Panel finds the Bank has complied with its OP&P based on current project circumstances, but expresses its concern over continued or future compliance – thus, sensitises the Board to be on the lookout for these issues when they assess the project's progress going forward. For example, in *Yacyretá II*, the Panel found the project to be compliant with its "consideration of the Biophysical Environment", but added:

> […] future environmental management of the Yacyretá Project is critically threatened, however, by the Project's financial position and […] both the natural environment and project-affected people will suffer additional harm if the project's environmental management practices deteriorate.[50]

In *India MUTP*, the Panel noted that the Bank was taking steps to protect the existing mangrove habitat protection (and was thus in compliance with the particular Bank policy);[51] the Panel nevertheless commented that

> the required compensatory tree planting [was] far behind schedule. The Panel was informed that Bank staff are following up on this issue. The October 2005 Aide Memoire of the Bank, however, does not clarify what actions are being taken. Based on this report and other data, the Panel is concerned that the responsive actions relating to the loss of Mangrove and other trees are not adequate.[52]

The Panel noted in *Cameroon Pipeline and Capacity Building* that it was "generally pleased with the efforts shown by the Bank management to reach compliance with its own policies and procedures"; but the Panel highlighted "the difficulties and delays associated with the implementation of the CAPECE [capacity building] Project," warning that if this was "not corrected, [it] may adversely affect the sustainability of the Pipeline Project".[53]

8.1.5. Procedural Innovations

This section will discuss two procedural innovations, developed and employed by the Inspection Panel at different stages of its institutional history, which

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[50] 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, IR (ES), at §xiii. *Also see* 2001 *Chad Petroleum Development & Pipeline Project*, IR (ES), at §§16-26, 28-31 & 49; *and see* 2004 *Mexico Indigenous and Community Biodiversity Project (COINBIO)*, ER, at §47.

[51] OP 4.04 (Natural Habitats).

[52] 2004 *India Mumbai Urban Transport Project*, IR (ES), at 35.

[53] 2002 *Cameroon Petroleum Development and Pipeline Project, and Petroleum Environment Capacity Enhancement Project,* IR (ES), at §8. *Also see* 2001 *Chad Petroleum Development & Pipeline Project*, IR (ES), at §§16-26, 28-31 & 49; *and see* 2004 *Mexico Indigenous and Community Biodiversity Project (COINBIO)*, ER, at §47.

led to judicialization, i.e.: 'preliminary review' (8.1.5.1), and 'deferring the recommendation concerning the need for a full investigation' (8.1.5.2).

8.1.5.1. Preliminary review

During the Inspection Panel's early years, when it struggled to obtain Board authorization to conduct full investigations,[54] the Panel developed the notion of 'preliminary review' as part of the Eligibility Phase.[55] Essentially, preliminary review allowed the Panel to conduct a 'mini investigation' before any formal Board approval had to be sought in terms of the Inspection Panel process. Thus, besides making formal recommendations about the eligibility of the Request and the need for a full investigation, the Panel would already comment on the claims made in the Request.[56] During the first Board Review of the Inspection Panel function in 1996, the Board endorsed the preliminary review concept and allowed the Inspection Panel to take more time for completing the Eligibility Phase than is formally set out by the Resolution.[57] Although the Board explicitly stopped the practice in 1999 during the second Board Review,[58] by that time, the Board had also cleared the way for full investigations.

The Inspection Panel's employment of the preliminary review notion was highly significant because, without it, the Panel function would not have amounted to much during the initial years of its existence. As it is, the contents of the Panel's early Eligibility Reports have proven to be valuable because they already included *prima facie* comments about the validity of the claims.[59] During a period in its history when the Inspection Panel was hardly ever allowed to function as it was originally intended, the Panel found a way to exercise its mandate – to a much greater extent than what could reasonability have been expected from it under the circumstances.

8.1.5.2. Deferring recommendation whether to investigate

A second procedural innovation that led to judicialization grew from the rule that, once the Inspection Panel has made a recommendation concerning the eligibility of the Request and about the need for a full investigation, it is barred from registering a further request on the same facts. An additional

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54 *See* section 7.1.1 above.

55 For a discussion of the Inspection Panel process, *see* section 6.3.3 above.

56 *See e.g.*, 1996 *Paraguay/Argentina Yacyretá Hydroelectric Project*, ER, at §§16-36; and 1996 *Bangladesh Jute Sector Adjustment Credit Project*, ER at §§36-88.

57 1996 Board Review Clarifications, at 1.

58 1999 Board Review Conclusions, at §§8 & 11.

59 *See* above, note 56 (Ch. 8).

Request can only be "justified by citing new evidence or circumstances not known at the time of the prior request".[60] Often, however, Requesters do not have new evidence to present or cannot argue a change of circumstance.[61] In fact, Requesters' concerns are often that their circumstances have remained unchanged – and unsatisfactory – because their concerns have not been addressed since they have filed an Inspection Panel Request.[62]

To circumvent the problem of being barred to register a further Request on the same facts, the Panel has developed a specific procedural approach over the course of a few Requests. In cases where the Inspection Panel has found the Request to be eligible, but would otherwise be unable or unwilling to recommend a full investigation (e.g., because of Management assurances that they are in the process of addressing Requesters' claims), the Panel would defer its recommendation regarding the need for a full investigation. In other words, the Panel created the possibility for Requesters to resubmit the Request, on the same set of facts, should they be dissatisfied with the outcome of its future interaction with Bank management.

The Panel first deployed this approach in *Mexico COINBO*.[63] The Panel found the Request to be eligible, stating that "[t]he Request and Management Response contain conflicting assertions and interpretations about the issues, the facts, and compliance with Bank policies and procedures" – i.e., the usual phrase that normally precedes a Panel recommendation that a full investigation should be conducted.[64] The Panel added, however, that "several considerations" applied in this case – including assurances from Management that "discussions that may lead to modifying the Project have involved the community representatives and 'will continue to involve systematic consultation with Project stakeholders'".[65] The Panel noted that it "continues to be very concerned that a restructuring of the Project" (the focus of the Requesters' claim) should "not be detrimental to the interests of the indigenous communities". The Panel concluded:

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60 Inspection Panel Resolution (1993), at §14 (d). *Also see* a discussion of this aspect of the Resolution in section 10.1.3 below.

61 Hence, the Panel recommended no investigation in the 1999 *Brazil Land Reform and Poverty Alleviation Pilot Project*, 2nd Request; and decided not to register the 1999 *India NTPC Power Generation Project*, 2nd Request, or the 2003 *Cameroon Petroleum Development and Pipeline Project*, 2nd Request.

62 *See e.g.*, S. Ananthanarayanan, *A Crippled Inspection Panel*, July 2004, at <http://www.indiatogether.org/2004/jul/hrt-wbinspect.htm>: "[…] there have been little positive results on the ground both in terms of the Bank's accountability and due relief to the projected affected people. In fact the Panel has fallen woefully short."

63 2004 *Mexico Indigenous and Community Biodiversity Project* (COINBIO).

64 *See e.g.*, 1999 *Kenya Lake Victoria Environmental Management Project*, ER, at §24; 2006 *Honduras Land Administration Project*, ER, at §68; and 2007 *Albania Power Sector Generation and Restructuring Project*, ER, at §66.

65 2004 *Mexico Indigenous and Community Biodiversity Project (COINBIO)*, ER, at §25.

> *[s]ince the Panel is not making a recommendation on this issue, the Requesters may still have recourse to the Panel* if they consider there are serious violations of Bank policies and procedures causing material adverse effect which are based on specific acts or omissions of the Bank relating to restructuring and implementation of the Project.[66]

The Inspection Panel repeated this 'deferral' approach in *Romania Mine Closure and Social Mitigation*, which had comparable circumstances;[67] and further developed the procedure in *Ghana/Nigeria Gas Pipeline*.[68] Here, the Panel placed a specific time restriction on the decision to refer the recommendation on investigation:

> [c]onsistent with prior similar recommendations approved by the Board, the Panel recommends to defer the decision on whether to recommend an investigation or not, until the review of compensation and other actions included in Management's Action Plan have been initiated and to see whether the concerns of the Requesters have been met […]. The Panel expects to be able to make a determination *by the end of 2006* as to whether an investigation is merited.[69]

By the end of this period, the Inspection Panel conducted an additional field visit and reviewed the situation. The Panel stated that they had a "constructive meeting" with officials from the implementing agency [WAPCo], during which WAPCo informed the Panel that they had "not been adequately informed by Bank management regarding the content of the Management's Response and the extent to which it required actions on their part".[70] The Panel noted that the Requesters "repeatedly stated that their situation had remained the same in the past six months".[71] Moreover, the Panel were unable "to confirm progress on the actions proposed by Management to address the Requesters' concerns" and "noted that Management does not seem to be following the timetable described in the Management's Response".[72] Hence, the Inspection Panel recommended a full investigation, which was approved by the Board.

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66 2004 *Mexico Indigenous and Community Biodiversity Project (COINBIO),* ER, at §§51-53 (emphasis added).

67 2006 *Romania Mine Closure and Social Mitigation Project*, ER, at §§48, 51 & 55-56.

68 2006 *Ghana/Nigeria West African Gas Pipeline Project*.

69 2006 *Ghana/Nigeria West African Gas Pipeline Project*, ER, at §§82-86 (emphasis added). In this case, the Panel eventually decided to recommend a full investigation, which the Board approved.

70 2006 *Ghana/Nigeria West African Gas Pipeline Project,* Additional ER, at §44.

71 2006 *Ghana/Nigeria West African Gas Pipeline Project*, Additional ER, at §46.

72 2006 *Ghana/Nigeria West African Gas Pipeline Project*, Additional ER, at §47.

8.2. Limiting Managerial Discretion

Another manner in which the Inspection Panel increases the degree of judicialization is to limit World Bank management's discretion or "professional judgment". Management often argues that a particular Bank policy allows them various options from which they are, by and large, 'free' to choose. For instance, in *Nepal Arun III*, Management stated:

> [t]he Request for Inspection argues that the Bank violated its operational policies and procedures by not ensuring that the Plan B project proposals were investigated to the prefeasibility stage. This is an area where there are no hard-and-fast rules; professional judgment – about the likely costs and benefits of further study, and of the associated delay – is the determining factor.[73]

The specific formulation of the OP&P, specifically its mandatory nature, is at the heart of this issue and has been problematic since the World Bank had started to formalize its operational policies in the 1980s.[74] The core of the Bank's policies (currently, OPs and BPs) is mandatory for Bank management and staff. On the other hand, they are not "marching orders for a specific operation" and therefore allow for some managerial discretion.[75] This 'latitude' inherent in the text is what gives the Inspection Panel the opportunity to employ expansive interpretation techniques;[76] but it also allows Management to claim the right to exercise discretion.

While the Inspection Panel is careful to allow for some managerial discretion[77] – a 'margin of appreciation',[78] as it were – it is simultaneously firm in its determination to establish the boundaries or 'margins' of Bank management's 'professional judgment'. As the Panel noted in the *China Qinghai* case:

> [r]ead in their entirety, the Panel feels that the directives cannot possibly be taken to authorize a level of 'interpretation' and 'flexibility' that would permit those who must follow these directives to simply override the portions of the directives that are clearly binding.[79]

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[73] 1994 *Nepal Arun III Proposed Hydroelectric Project and Restructuring of IDA Credit*, MR, at §4; *also see* MR, at §22, where Management argued that 'land-for-land' compensation was preferable, not compulsory in terms of the OP&P.

[74] For a discussion of this issue, *see* section 6.2.1 above.

[75] Shihata (2000), at 41-49.

[76] *See* section 8.3 below.

[77] *See e.g.*, 1999 *China Western Poverty Reduction Project*, IR (ES), at §15: "There is indeed room for some flexibility and interpretation but, as provided in the Resolution that established the Panel, the Operational Directives (and updated OPs, BPs, GPs, etc.) are the primary source of Bank policy for purposes of assessing compliance." *Also see* section 10.1.2 below.

[78] *See* above, note 59 (Ch. 2).

[79] 1999 *China Western Poverty Reduction Project*, IR (ES), at §11. Management criticized the Inspection Panel, stating that "[m]any of the Panel's findings appear […] to be based on an application of elements of each policy as legally binding rules, allowing for little or no

The remainder of this section will discuss two particular examples where the Panel consistently aimed at narrowing Management's discretion, namely: criticism for not exercising legal rights against the borrower (8.2.1), and criticism of the Bank's environmental screening of projects (8.2.2).

8.2.1. Exercising Legal Rights against the Borrower

In a number of cases, Requesters argued that the Bank should have exercised the legal remedies available to it in the case of non-performance by the borrower; and that the Bank's failure to do so amounted to non-compliance.[80] Management consistently rejected this argument, asserting that "the exercise of available legal remedies is not a requirement but a discretionary tool, to be applied only after other reasonable means of persuasion have failed".[81] And that it was "a matter for the judgment of Management, taking into account all the circumstances of each case"; therefore, that a decision not to suspend loan disbursements, for example, was "neither a sign of negligence nor of lack of concern". [82]

The Panel rejected these arguments, and stated e.g., in *Yacyretá I* that the Resolution

> defines as an instance of failure in the compliance of Bank policies and procedures situations where the Bank has 'failed in its follow-up on the borrower's obligations under loan agreements with respect to such policies or procedures'.[83]

The Panel criticised Management for being "unwilling" or "unable" in this case to exercise legal remedies against the borrower.[84] The Panel cited a (then) recent project supervision report as proof, which stated:

> [n]o Legal Covenant Report is attached to this form, because we are negotiating and finalizing with the Borrower and [sic] amendment, which will change most

flexibility or room for judgement" – *see* 1999 *China Western Poverty Reduction Project*, MR, at §§2.2.2 & 2.4; and MR to IR, at §20.

80 *See e.g.*, 1995 *Brazil Rodônia Natural Resources Management Project*, MR, at §3; 1996 *Paraguay/Argentina Yacyretá Hydroelectric Project*, MR, at §1.8; and 1997 *India NTPC Power Generation Project*, MR, at §3. *But see* 2004 *India MUTP*, where the Bank exercised one of its legal rights (suspension of funds) in the light of the Inspection Panel's findings (*India MUTP*, MR to IR, at §89).

81 1996 *Paraguay/Argentina Yacyretá Hydroelectric Project*, MR, at §1.8.

82 1997 *India NTPC Power Generation Project*, MR, at 3. *Also see* 1995 *Brazil Rodônia Natural Resources Management Project*, MR, at §4.

83 1996 *Paraguay/Argentina Yacyretá Hydroelectric Project*, ER, at §§30-31.

84 1996 *Paraguay/Argentina Yacyretá Hydroelectric Project*, Review & Assessment, at §250.

> of the covenants and conditionalities under the existing legal documents. It would make no sense to report now non-compliance, when we are reaching an agreement on new covenants and conditionalities under the loan.[85]

The Inspection Panel has also differed from the Bank's Legal Department over the scope of Management discretion. The Resolution requires the Panel to consult the Legal Department if a Request relates to the Bank's rights and obligations.[86] In *Uganda Power Projects (I)*,[87] the Panel consulted the Legal Department about the legal nature of a so-called environmental 'offset agreement' made between the Bank and the Borrower. The Bank's policy on Natural Habitats requires 'offset' agreements to be made when a natural habitat (such as a waterfall) is destroyed as a result of a development project (e.g., the building of a dam). In other words, the environmental loss must be 'set off' by guaranteeing the preservation, e.g., of another waterfall.[88] The Requesters claimed that the existing 'offset' agreement in *Uganda Power Projects* was not legally enforceable by the Bank. Due to the apparent ambiguous wording contained in the offset agreement, the Inspection Panel wanted to confirm whether the Bank, indeed, could legally enforce the agreement against the borrower.[89]

The Legal Department confirmed that the offset agreement was legally enforceable; but it went beyond answering the legal question put to it. The Legal Department also interpreted OP 4.04 (Natural Habitats), stating that OP 4.04 did not require environmental offset agreements to guarantee preservation of a specific natural habitat "in perpetuity", and that the "need and scope" of

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[85] Id. *Also see* 1995 *Brazil Rodônia Natural Resources Management Project*, Additional Review, at §§55-56: "History repeats itself in Rondonia's treatment of the indigenous people. In the POLONOROESTE program, major problems were addressed only after major external protests and the completion of the mid-term review in early 1985. Some progress was made on the Amerindian component of POLONOROESTE after the Bank finally suspended disbursements in March 1985 – the first time ever on environmental and social grounds. Funding was resumed in August 1985 after federal authorities moved to protect several vulnerable Amerindian areas and agreement was reached on an agenda for redirecting the program. OED recommended early use of this remedy to ensure compliance in any future project of this type in Rondonia. The records examined by the Panel show that suspension of disbursements was never considered for PLANAFLORO until after the Request for Inspection was filed with the Panel."

[86] Inspection Panel Resolution (1993), at §15.

[87] 2001 *Uganda Third Power Project, Fourth Power Project, and proposed Bujagali Hydropower Project*.

[88] OP 4.04 (Natural Habitats).

[89] 2001 *Uganda Third Power Project, Fourth Power Project, and proposed Bujagali Hydropower Project,* IR (ES), at 48; and IR, §§143-147. The issue was whether the agreement guaranteed the preservation of the Kalagala Falls "in perpetuity". The agreement stated that "The Government of Uganda undertakes that any future proposals which contemplate a hydropower development at Kalagala Falls will be **conditional** upon a satisfactory Environmental Impact Assessment being carried out which will meet the World Bank Safeguard Policies as complied with in the Bujagali Project. Government and the World Bank will jointly review and jointly clear such an Environmental Impact Assessment." (Emphasis, in bold, in the original.)

the OP therefore allowed for broad managerial discretion.[90] The Inspection Panel disagreed with the Legal Department's legal analysis and also rejected its "suggestion", as the Panel put it, that the OP allowed "broad flexibility for the Bank in determining the nature and scope of mitigation measures required in cases where a project significantly converts or degrades natural habitats".[91] The Panel concluded that the environmental offset agreement was not compliant with OP 4.04 because it was not legally enforceable.[92]

8.2.2. The Environmental Screening of Projects

Determining the project's risk category for environmental assessment (EA) purposes is "[o]ne of the most important decisions (perhaps the most crucial)" that Management must make.[93] As a senior World Bank environmental advisor told the Inspection Panel during the *China Qinghai* investigation: "If you get the scoping [of the EA] wrong, then everything goes wrong".[94] A project must be designated as category 'A' if it is "likely to have significant adverse environmental impacts that are sensitive, diverse, or unprecedented".[95] A project categorized as 'B', therefore, would require a far less detailed environmental assessment in terms of the OP&P.[96]

The issue of environmental screening first arose in the *China Qinghai* case when Requesters claimed that the project, categorized as a 'B', should have been categorized as an 'A'. Management contested this claim, stating that

> [s]creening a project into either Category A or B requires judgement about the overall risks (type of project, location, environmental sensitivity) of the project as well as the nature and magnitude of / potential impacts. How the risks and impacts are judged depends on the specific project involved.[97]

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[90] 2001 *Uganda Third Power Project, Fourth Power Project, and proposed Bujagali Hydropower Project*, IR, at §152.

[91] The Panel added that OP 4.04 states explicitly that "the Bank does not support projects involving the significant conversion of natural habitats unless there are no feasible alternatives for the project and its siting, and comprehensive analysis demonstrates that overall benefits from the project substantially outweigh the environmental costs." *See* 2001 *Uganda Third Power Project, Fourth Power Project, and proposed Bujagali Hydropower Project*, IR at §152.

[92] Thereby confirming one of the claims made by the Requesters in *Bujagali*.

[93] 1999 *China Western Poverty Reduction Project,* IR (ES), at §38.

[94] 1999 *China Western Poverty Reduction Project,* IR, at §139.

[95] OP/BP 8.60 (Environmental Assessment), at §8(a).

[96] "A proposed project is classified as Category B if its potential adverse environmental impacts on human populations or environmentally important areas – including wetlands, forests, grasslands, and other natural habitats – are less adverse than those of Category A projects." *See* OP/BP 8.60 (Environmental Assessment), at §8(b).

[97] 1999 *China Western Poverty Reduction Project*, Request, at 4; and MR, at 64.

The Inspection Panel rejected Management's assessment of the situation, however, arguing that the policy included a list of examples of projects that would typically fall into each EA category, and that the *Qinghai* project included several examples from the category 'A' list.[98] The Panel concluded:

> [o]n the face of it, therefore, it would seem that a straightforward reading of Annex E would lead an environmental professional to classify the project an 'A' if it included more than two of the components listed in Annex E, and if one or two of the descriptors in the preamble were found to apply.[99]

While some senior World Bank staff interviewed by the Inspection Panel during the *Qinghai* investigation agreed that the project should have been categorized as an 'A',[100] Bank management (in its official response to the *China Qinghai* investigation report) refused to accept the Panel's finding.[101]

Interestingly, the Inspection Panel assessed the 'appropriateness' of environmental screening out of its own accord in a number of subsequent cases – even though the environmental screening was not challenged in any of these Requests.[102] In *Pakistan National Drainage Programme*, Management conceded for the first time that categorizing the project as a 'B'

> appears to have reflected a premature (pre-EIA) balancing of possible adverse effects with positive effects, and a focus on individual infrastructure activities, without regard to their potential cumulative effects." Management adds that it acknowledges 'that it would have been more appropriate to categorize this as an EA category 'A' project.'[103]

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[98] *I.e.*, dams and reservoirs, irrigation, land clearance and levelling, resettlement and all projects with potentially major impacts on people – *see* 1999 *China Western Poverty Reduction Project* IR, at §140.

[99] 1999 *China Western Poverty Reduction Project*, IR, at §152.

[100] 1999 *China Western Poverty Reduction Project*, IR (ES), at §§43-45.

[101] 1999 *China Western Poverty Reduction Project*, MR to IR, at §§7-9. Management conceded that "a more thorough environmental analysis would have improved Project preparation" and agreed to treat the Qinghai component of the project (the topic of the Request) "as if it had been categorized" as category 'A'.

[102] I.e., 1999 *Kenya Lake Victoria Environmental Management Project* (the Panel concurred with Management's categorization of 'B'); 1999 *Ecuador Mining Development and Environmental Control Technical Assistance Project* (the Panel concurred with Management's categorization of 'A'); 2001 *Chad Petroleum Development & Pipeline Project* (the Panel concurred with Management's categorization of 'A'); 2001 *Uganda Third Power Project*, *Fourth Power Project*, *and proposed Bujagali Hydropower Project* (the Panel concurred with Management's categorization of 'B'); 2004 *Colombia Cartagena Water Supply, Sewerage and Environmental Management Project* (the Panel concurred with Management's categorization of 'A'); 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project* (*Yacyretá*) (the Panel concurred with Management's categorization of 'A').

[103] 2004 *Pakistan National Drainage Program Project*, MR, at §43.

However, in *Cambodia Forest Concession Management*, Management rejected the claim that the project should have been categorized as an 'A'.[104] The Inspection Panel disagreed:

> [g]iven the very serious potential impacts, and the close association of the Project with these impacts, the Panel finds that the Project should have been placed in Category A and a full Environmental Assessment carried out. By failing to do this, the Bank did not comply with OP 4.01. The Panel finds that careful study and debate by multiple parties, as required for a Category "A" project under OP 4.01, could have helped avoid serious errors in the design and implementation of the Project.[105]

8.3. Employing Expansive Interpretation Techniques

When interpreting the Inspection Panel Resolution (8.3.1.1) and the Bank's OP&Ps (8.3.1.2), the Panel generally construes the text to support a broader interpretation, as the examples in this section will illustrate.[106] Conversely, the Inspection Panel has accused Bank management on several occasions of being overly "legalistic", "formalistic", or "narrow" in its interpretations.[107] For example, in *Argentina SSAL (Pro-Huerta)*, the Panel noted that a "strict interpretation" of BP 17.50 would justify Management's actions on information disclosure; but added that "a more open dialogue […] within the boundaries of the Bank's stated policies, which favor disclosure", could possibly have "avoided the need for a Request for Inspection".[108] In *Ecuador Mining Management*, Management argued that OPN 11.01 (Wildlands) did not apply to the project, because thematic mapping (a major focus of the project) did not affect biodiversity. The Panel disagreed:

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[104] 2005 *Cambodia Forest Concession Management and Control Pilot Project*, MR, at §39; and ER, at §29.

[105] 2005 *Cambodia Forest Concession Management and Control Pilot Project*, IR (ES), at 21-22. *Also see* 2005 *Democratic Republic of Congo Transitional Support for Economic Recovery Credit and Emergency Economic and Social Reunification Support Project*, where the Panel agreed with Requesters (over Management objections) that the project should have been classified an 'A' (IR (ES), at 14).

[106] Kingsbury noted the potential for judicialization already in 1999 – *see* Kingsbury (1999), at 332: "The system of quasi-independent panel supervision of Bank compliance with its own policies has the potential to increase the normative significance of both the policies and the jurisprudence surrounding their interpretation."

[107] *See* 1995 *Tanzania Power IV Project*, ER, at §8; 1996 *Paraguay/Argentina Yacyretá Hydroelectric Project*, Review & Assessment, at 48-49; and 2005 *Cambodia Forest Concession Management and Control Pilot Project*, IR (ES) at 22-23. *But see* 1999 *China Western Poverty Reduction Project*, MR to IR, at §20: Here Management accused the Inspection Panel of being "legalistic".

[108] 1999 *Argentina Special Structural Adjustment Loan*, ER, at §27.

> [o]n its face, this could be regarded as a very narrow interpretation of the Bank's policy […] [because it] fails to take into account the overall aim of the Project which is to increase the amount of mining in the country, and which, if successful, will lead to an increase in the area of land […] that is converted, modified, damaged or contaminated.[109]

And in *Chad Pipeline*, Management rejected the Inspection Panel's finding that a regional environmental assessment should have been carried out, arguing that the policy states it 'may' use such an EA tool – and not that it 'must'.[110] The Panel maintained:

> Management's narrow interpretation of the word 'may' as stated in the relevant Environmental Assessment directive, does not necessarily confer immunity from the need for a Regional Assessment in all situations. Sometimes the use of a Regional EA may only be partially indicated, but sometimes the situation on the ground makes its use essential. In the case of the Pipeline Project, the potential for cumulative and wide-ranging socio-economic and environmental impacts indicates that the use of a Regional EA is essential to proper evaluation of the Project.[111]

8.3.2.1. Interpreting the Resolution

During the first five or six years of the Inspection Panel's existence, the Panel and Bank management were often at opposite ends concerning their interpretations of the Inspection Panel Resolution. The Panel consistently sought to propagate interpretations that would effectively expand its mandate, while Management supported interpretations that would keep the Panel's mandate as narrow as possible. In some instances, the Board (who ultimately determines which interpretation stands)[112] chose the narrower meaning; but in other cases, the Inspection Panel's broader interpretation prevailed. This section will discuss a few of these examples.

'Affected party'

The Resolution states that the Inspection 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

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[109] 1999 *Ecuador Mining Development and Environmental Control Technical Assistance Project*, IR, at §64.

[110] *See* 2001 *Chad Petroleum Development & Pipeline Project*, MR to IR, at §19.

[111] 2001 *Chad Petroleum Development & Pipeline Project*, IP Chairperson address, at §4; *and see* §§8-9: "[…] the Panel takes issue with Management's narrow interpretation of the Bank's position on human rights."

[112] *See* section 7.1.1.1 above.

> of persons such as an organization, association, society or other grouping of individuals) […].[113]

The Inspection Panel has interpreted "affected party" to mean "*any group* of two or more people".[114] In the first Inspection Panel case, *Nepal Arun III*, Bank management questioned whether "affected party" could mean simply "any" group of people and convinced the Board to request a legal opinion from the Bank's General Council (then, Ibrahim Shihata) about the correct meaning of the phrase.[115] Shihata suggested a narrower interpretation, arguing that "affected party" did not simply mean "any group" of people, but that there had to be a proven "commonality of interests" that "prompt[ed] them to act together in submitting the request".[116] Shihata's narrower interpretation prevailed when the Board formally adopted this interpretation in the 1996 and 1999 Board Reviews on the Panel function.[117] This interpretation, and its potential for narrowing of the Inspection Panel's mandate, drew criticism from external commentators. As Bradlow warned at the time:

> [t]he General Council's interpretation of the eligibility requirement [i.e., the meaning of "affected people"] threatens to turn this mechanism [the Panel] into one that is characterized as much by technical arguments over procedure and jurisdiction as by an investigation of the merits of the claim.[118]

Interestingly, the Inspection Panel's Operating Procedures continue to state that a Request can be brought by "any group of two or more people". Moreover, Eligibility Reports contain no apparent evidence that the Inspection Panel actively analyses whether or not any "commonality of interest" exists among Requesters.

'Territory of the borrower'

The Resolution requires an affected party to be present in the "territory of the borrower" before it can file a Request.[119] The Inspection Panel has interpreted this phrase to mean "the country where the Bank financed *project* is located".[120] This interpretation enabled the Panel to register Requests with a cross-border

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113 Inspection Panel Resolution (1993), at §12 (emphasis added).
114 Inspection Panel Operating Procedures, at §4(a) (emphasis added).
115 1994 *Nepal Arun III Proposed Hydroelectric Project and Restructuring of IDA Credit*, ER, at §§6-7; *and see* D. Bradlow, *A Test Case for the World Bank*, 11 American University Journal of International Law and Policy 247, at 261-262 (1996).
116 Shihata (2000), at 61.
117 *See* 1996 Board Review Clarifications, at 1: "It is understood that the 'affected party' […] includes any two or more persons who share some common interests or concerns."
118 Bradlow (1996), at 264.
119 Inspection Panel Resolution (1993), at §12.
120 Inspection Panel Operating Procedures, at §4(a) (emphasis added).

element, such as *Lesotho Highlands Water (I)*[121] and *Yacyretá I*,[122] over the objections of Bank management.[123] By the time the *Yacyretá II* Request was filed in 2002, Management did not raise any objections that the affected party was not present in the "territory of the borrower",[124] which seems to suggest that the Panel's broader interpretation of the phrase has come to be accepted.

When is a Request 'time barred'?

The Resolution states that the Inspection Panel "shall not" accept Requests that are "filed after the Closing Date of the loan financing the project with respect to which the request is filed or after the loan financing the project has been substantially disbursed" (i.e., at least 95% of loan proceeds have been disbursed).[125] This provision may sound straightforward, but the *Brazil Itaparica Resettlement and Irrigation* case illustrated how this phrase is also open to a broader or narrower interpretation. The Request was brought in connection with the second of two loans (both financing the *Itaparica* project), which were each less than 95% disbursed. Management contended that the Request was time-barred because, technically, there was only one loan; and in total, this loan was more than 95% disbursed.[126]

The Inspection Panel objected to Management's "focus on narrow, technical"[127] eligibility criteria; and asserted that "the records indicate that the Executive Directors *intended* the 95% disbursement figure to be an indicator of *completion of the project* financed by the loan", and not of the extent to which the funds have been disbursed.[128] The Board again requested a legal opinion from Shihata on the matter. Shihata disagreed with the Inspection Panel's interpretation, arguing that the original intention was to place a time restriction on the "loan financing the project" and not on the "completion

[121] The borrower "of record is the Lesotho Highlands Development Authority […] but the loan will be serviced directly by the Trans Caledon Tunnel Authority (TCTA) on behalf of South Africa." *See* 1998 Lesotho/South Africa Highlands Water Project, ER, at 3.

[122] The Requesters were from Paraguay. Technically, the borrower was Argentina, but both countries would benefit from the project. *See* Shihata (2000) at 118.

[123] 1999 *Lesotho Highlands Water Project*, MR, at §2; and 1996 *Paraguay/Argentina Yacyretá Hydroelectric Project*, MR, at §1.2.(b).

[124] *See* above, note 122 (Ch. 8).

[125] Inspection Panel Resolution (1993), at §14(c).

[126] 1997 *Brazil Itaparica Resettlement & Irrigation Project*, ER, at §16: "The Requesters' claim that their Request 'refers exclusively to Loan 2883-1-BR' is based on a misunderstanding of the nature of the additional financing made available to the Borrower: The original loan amount of $132.0 million was increased, under an amending agreement in 1991, by the amount of $100.0 million, to cover part of a cost overrun. From the legal and operational standpoints, the original and supplemental loans constitute one single loan."

[127] 1997 *Brazil Itaparica Resettlement & Irrigation Project*, ER, at §12.

[128] 1997 *Brazil Itaparica Resettlement & Irrigation Project*, ER, at §9 (emphasis added).

of the project". Shihata did agree, however, that a pragmatic approach was warranted in the *Itaparica* case because the 'loan' in question could certainly appear to be two separate loans in practice.[129] Since the 'second loan' was less than 95% disbursed, Shihata recommended that this particular Request should not be regarded as being time-barred, although not on the grounds the Panel has suggested. The Board ultimately accepted Shihata's narrower interpretation of the phrase.[130]

Meaning of the term 'project'

Another cause of disagreement between the Inspection Panel and Bank management has been the meaning of the word 'project'.[131] The Resolution states that a Request can be filed "with respect to the design, appraisal and/or implementation of a *project financed by the Bank* […]".[132] Specifically, the issue has been whether 'project' included the Bank's controversial 'structural adjustment' projects. The Inspection Panel argued that 'project' should have the "same meaning as used in the Bank practice", and that the Panel's mandate therefore included adjustment projects. Bank management (Shihata in particular, although the Board had not requested a legal opinion on the matter) argued that structural adjustment projects should not be included in the Panel's scope before the implications have been considered.[133]

The Panel propagated its interpretation for the first time when it registered the *Bangladesh Jute Sector Credit* Request (a structural adjustment loan, financing a project aimed at reforming the jute sector in Bangladesh according to free market principles). The Panel found the Request to be eligible, however, decided not to recommend a full investigation, which the Board accepted on a no-objection basis. Hence, although the *Jute Sector Credit* case – as well as the inclusion of structural adjustments projects in the Panel's mandate – was never discussed at Board level, it appears to have created an informal precedent. In all subsequent Requests that involved projects other than conventional 'investment lending', neither Management nor the Board questioned whether the Inspection Panel's mandate covered these projects.[134]

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[129] Shihata (2000), at 340-341.

[130] 1999 Board Review Conclusions, at §9(e), listing the "technical eligibility criteria", including: "The related *loan* [not project] has not been closed or substantially closed." (Emphasis added.)

[131] Shihata (2000), at 37-41.

[132] Inspection Panel Resolution (1993), at §12 (emphasis added).

[133] *See* Shihata, 2000, at 38-40. Shihata's issue with including structural adjustments in the Inspection Panel mandate was primarily that it is very complicated to determine the World Bank's external accountability in cases where structural adjustment loans cause harm.

[134] *See e.g.*, 1999 *Argentina Special Structural Adjustment Loan*; 2001 *Papua New Guinea Governance Promotion Adjustment Loan*; 2005 *Cambodia Forest Concession Management*

At the time of the *Uganda Power Projects* Request, the Inspection Panel formalized its position on this issue as follows:

> [t]he Panel wishes to note that in July 1995 [*Jute sector*] the Board *approved* Management's and the Panel's *common understanding* that the Panel has jurisdiction over all projects (broadly defined in the Bank practice), financed by the Bank and IDA regardless of the nature of the specific financial instrument used by such purposes, and that understanding was ratified in the 1996 Clarification of the Resolution […]. Consistent with such understanding, the Panel has examined other operations aside from the traditional 'investment lending' modality of the Bank, such as structural adjustment and grant operations, without any objection from the Board.[135]

It can therefore be concluded that the Inspection Panel's broader interpretation of 'project' prevailed.

8.3.2.2. Interpreting OP&P

The Inspection Panel's interpretations of the World Bank's OP&Ps tend to broaden the meaning of particular provisions – often with the effect of narrowing managerial discretion, as mentioned above.[136] The Panel occasionally makes use of expansive interpretation techniques, such as purposive or teleological interpretation, to accomplish this.[137]

Interpreting with underlying policy aims in mind: 'purposive' interpretation

The Inspection Panel's concern with promoting the underlying principles and objectives of the OP&P is reflected in several of its cases. For instance, in the *Bangladesh Jamuna Multipurpose Bridge* case, the Panel argued that "the *substance and spirit* of OD 4.00 and Annexes, and OD 4.30 seem to require the active participation of people likely to be affected".[138] In *Cameroon Pipeline and Capacity Building (I)*, the Panel raised its concerns about "delays associated with the implementation" of the project's institutional capacity building component. The Panel concluded that

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and Control Pilot Project; and 2005 *Democratic Republic of Congo Transitional Support for Economic Recovery Credit and Emergency Economic and Social Reunification Support Project*.

[135] 2001 *Uganda Third Power Project, Fourth Power Project, and proposed Bujagali Hydropower Project*, IR, at §40 (emphasis added).

[136] *See* section 8.2 above.

[137] *See e.g.,* Kingsbury (1999), at 337, noting that in the Panel's first investigation report (*Nepal, Arun III*), the Panel "took a purposive approach to the scope of application of OD 4.20 on indigenous peoples, eschewing debate about the exact meaning of the term in favour of the view that identifiable ethnic groups chronically vulnerable to damage from the development process were encompassed."

[138] 1996 *Bangladesh Jamuna Multipurpose Bridge Project*, ER, at §47 (emphases added).

> the *purpose* of OD 4.01, paragraph 12 regarding the strengthening of environmental capabilities to adequately assess construction impacts during the Implementation and Monitoring Phase of the project has not been achieved.[139]

And in *Columbia Cartagena Water & Environmental Management*, the Inspection Panel expressed concern whether alternatives for a planned "submarine outfall" were seriously considered. The Panel noted:

> [a] *basic principle* of environmental assessment is that there can be no choice if there is no alternative. This was recognized as early as the late 1960s […]. The *purpose* of environmental assessment is to improve decisions by making appropriate choices, so it follows that careful comparison of realistic alternatives is an important feature of environmental assessments.[140]

Interpretations that affect the scope of investigation

Several of the Panel's interpretations of OP&Ps have concerned the exact scope of the project – e.g., how the project area was delineated, who were considered to be 'PAP', and whether a particular OP&P was applicable to the project. The Inspection Panel's interpretations have often resulted in as broad a project scope (and thus, as broad a Panel mandate) as possible.

DETERMINATION OF THE 'PROJECT AREA'

The definition of the 'project area' is a crucial activity because it determines the parameters of the OP&Ps. For instance, it determines whether, or to what extent a particular OP/BP applies to the project. For example, if a project area is defined so as to exclude any physical cultural resources (such as a temple or sacred burial ground) the Bank does not have to comply with the OP/BP on Physical Cultural Resources, and the Inspection Panel cannot review the Bank's compliance with this policy. The defined project area will also determine the scope of the environmental assessment, and might even affect what risk category is assigned to the project as part of the environmental screening process.[141]

In *China Qinghai*, for example, the Panel stated that

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[139] 2002 *Cameroon Petroleum Development and Pipeline Project, and Petroleum Environment Capacity Enhancement Project*, IR (ES), at §22 (emphasis added).

[140] 2004 *Colombia Cartagena Water Supply, Sewerage and Environmental Management Project*, IR, at §60 (emphases added). *Also see 1999 China Western Poverty Reduction Project*, IR, at §280, 350 & 373; and 1999 *Kenya Lake Victoria Environmental Management Project*, IR (ES), at §39; *and see* 2001 *Chad Petroleum Development & Pipeline Project*, IR (ES), at 41: "The Panel believes that the removal of all temporary bridges (including the Lom River Bridge) is necessary to ensure compliance with the EMP (and the spirit of OD 4.01 and OP 4.04)."

[141] *See* section 8.2.2 above.

> it is simply not within Management's prerogative to define the Project in a very limited way […] for purposes of fulfilling this OD, since that does not ensure against adverse impacts on indigenous populations who live and work beyond the 'immediate project area'.[142]

The Panel added that there was a "high level of ambiguity, uncertainty and inconsistency in the use of the term 'project area'" in this case, which was exacerbated by very poor, to non-existent, maps.[143] In *Chad Pipeline*, the Panel was not satisfied that the environmental assessment properly considered the "spatio-temporal context of the project" because it was unclear to the Panel how the boundaries of the EA were determined.[144] In *Ecuador Mining Development*, the Inspection Panel considered the EA to be too limited in its geographical scope and therefore found the project not in compliance with OD 4.00/4.01.[145] And in *Cambodia Forest Consession Management*, the Panel criticized the Bank's singular focus on the "areas covered by the concessions", arguing that it resulted in "an overly restrictive definition of the Project Area".[146] The Inspection Panel spelt out the consequences of such a narrow definition in this case:

> [e]ach concession was considered separately without looking at multiplier effects and interactions between the concessions. As a result, the Project's social impacts were significantly understated and the Bank social and environmental safeguards not applied to the proper area and population. The Panel finds that this is not consistent with the applicable Bank policies, OP 4.01 and OD 4.20.[147]

DEFINITION AND QUANTIFICATION OF PROJECT AFFECTED PEOPLE

An issue closely related to defining the project area, is the definition and quantification of project affected people. Clearly, a project area that is defined too narrowly will also fail to identify and quantify all the people that might potentially be affected (positively or negatively) by the project.

In *China Qinghai*, for instance, the Panel found that people already living in the so-called 'move-in' area were not considered to be PAP – only the people of the 'move-out' area were considered as such.[148] The Panel found:

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142 1999 *China Western Poverty Reduction Project*, IR, at §79.

143 1999 *China Western Poverty Reduction Project*, IR (ES), at §§17 & 23.

144 2001 *Chad Petroleum Development & Pipeline Project*, IR (ES), at §7.

145 1999 *Ecuador Mining Development and Environmental Control Technical Assistance Project*, IR, at §32.

146 2005 *Cambodia Forest Concession Management and Control Pilot Project*, IR (ES), at 22-23.

147 Id. *Also see* 2004 *Pakistan National Drainage Program Project*, IR (ES), at xx & xxxiii-xxxiv.

148 1999 *China Western Poverty Reduction Project*, IR (ES), at §§21-22. Similarly, in the second *Yacyretá* case, the Panel found that "[…] host populations near resettlement sites are, in some cases, adversely affected by the design and construction of the resettlement sites, or by

> […] given the letter and intent of ODs 4.01, 4.20 and 4.30, the actual scale of the area to be impacted by the Qinghai Project, the ethnic composition of the Project's impacted populations, the boundaries of the "project area" were far too narrowly defined by Management. As a result, the assessments fail to address many of the most significant social and environmental impacts of the Project on the potentially affected populations, including those who are members of minority nationalities.[149]

The Panel added that if Management corrected the project's boundaries,

> it would increase the overall percentage of those who have the status of 'indigenous people' as well as the number of those who could be considered adversely impacted by the Project.[150]

In *Cameroon Pipeline and Capacity Building*, the Panel concluded that Management correctly identified the *Bakola/Bagyeli* tribe as indigenous people. However,

> the Panel questions why the IPP [indigenous people plan] considers only those Bakola/Bagyeli communities within 2 km of the pipeline. By limiting the IPP to this narrow band of settlements along the road, the Panel agrees with the Requesters that the EMP (and IPP) lack a wider regional assessment of the potential risks posed by the pipeline project in the larger area utilized by the Bakola/Bagyeli.[151]

In a few other instances, the Bank had defined the project area broadly enough, but simply failed to identify (and quantify) all the PAP within the project area. For instance, in the *Sardar Sarovar (Armada)* investigation, which directly preceded the establishment of the Inspection Panel,[152] the Morse-Berger commission found that the Bank designated only those affected by the dam/reservoir as 'PAP'. The commission concluded that the so-called 'canal-affected people' should be considered PAP as well, since they had lost twice as much land than those people affected by the dam/reservoir.[153] Similarly in *Nepal Arun III*, the Panel found that Management only considered those people living along the chosen "valley route" to be 'PAP'; and left out the people that were already affected by the abandoned "hill route".[154]

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added burdens on local infrastructure due to the influx of resettled population. OD 4.30 and OD 4.01 require that such impacts be assessed and mitigated….there was inadequate effort on the part of the Bank to ensure that the host population was informed and consulted with in planning and carrying out construction of the resettlement sites, as required by OD 4.30, paragraph 9." *See* IR (ES), at 23.

149 1999 *China Western Poverty Reduction Project*, IR, at §79.

150 1999 *China Western Poverty Reduction Project*, IR, at §278.

151 2002 *Cameroon Petroleum Development and Pipeline Project, and Petroleum Environment Capacity Enhancement Project*, IR, at §202.

152 *See* section 6.1.1 above.

153 Berger (1993-1994), at 3.

154 1994 *Nepal Arun III Proposed Hydroelectric Project and Restructuring of IDA Credit*, MR, at §22; and ER, at §83.

The Inspection Panel also exposes inadequate or outdated methodologies used for the quantification of project affected people. Proper methodology to quantify the number of PAP is crucial, especially when there is a large number of people involved, or when the project spans a long period – during which those numbers could change. In the *Yacyretá II* case, which concerned a Bank project that spanned a few decades, the Panel found

> persuasive evidence that a number of people who were present at the time of the 1990 census were erroneously omitted and that they fear they will be ineligible for the Project compensation and resettlement benefits.[155]

The Panel instructed Management to "confirm that the existing census and survey data will be updated and verified" before the water level in the reservoir was raised further; and added that the survey needed to "pay special attention to the accuracy of the geographical and topographical boundaries of the affected areas to allow proper identification of the affected people".[156] The *India MUTP* case provides a striking example of this issue and of its far-reaching consequences. *India MUTP* was the Bank's largest resettlement project to date (excluding projects in China); and yet, official figures of PAP varied widely over the lifetime of the project.[157] The Inspection Panel found that discrepancies in the reported numbers of PAP were primarily due to erroneous quantification methodologies, such as the inconsistent use of terminology. For example, the number of PAP was sometimes expressed as the "number of households", while at other times the figure was stated as the "number of affected people".[158]

APPLICATION OF A SPECIFIC OP&P TO THE PROJECT

Even if both the project area and the PAP have been defined properly, the scope of the project (and, hence, the Panel's investigation) can be significantly affected by Bank management's decision whether or not a specific OP&P is applicable to the specific circumstances of the Project. In *Albania Coastal Zone Management*, for instance, The Inspection Panel criticized Bank management's decision not to apply the Bank's Policy on Involuntary Resettlement (OP/BP 4.12) to "ongoing [borrower enforced] demolitions in the Project area" (a known risk that was listed in the Project Appraisal Document), or to "regional zoning requirements related to the implementation

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[155] 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, IR (ES), at 21-22.

[156] 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, IR (ES), at 22.

[157] *See* section 7.3.4 above.

[158] *See* 2004 *India Mumbai Urban Transport Project*, IR (ES), at 22. Also see 2006 *Ghana/Nigeria West African Gas Pipeline Project*, IR (ES), at xv: "the size of the displaced population seems to be underestimated as a result of the methodology used for their identification."

of the SCDP (land zoning)".[159] The Panel found this decision to be non-compliant with the provisions and the aims of OP/BP 412,[160] and identified it as a major reason behind the harm suffered by the Requesters. Moreover, the Panel highlighted the inaccuracies in Management's interpretation of OP/BP 4.12 that led to the decision:

> […] the Panel is surprised to read Management's statement in the PAD that "[w]hile some of the affected people would lose their structures and access to land as a result of encroachment removal, this neither 'result directly from the Bank-supported project' *nor is such removal tantamount to 'taking the land'."* [….] The Panel notes that by its clear terms, the Bank Policy states that "'*land' includes anything growing on or permanently affixed to land, such as buildings and crops*."[161]

Finally, in *Papua New Guinea Governance Promotion*, Management argued that OP/BP 4.36 (Forestry) was only applicable "to investment operations in forestry" and was therefore not relevant to the project, "which is a structural adjustment loan".[162] The Inspection Panel rejected this interpretation, stating that it "could not find any provision in the policy supporting such assertion".[163]

Developing substantive meaning of particular provisions: 'Meaningful and informed' consultation

A prominent example of judicialization through interpretation is the Inspection Panel' elaboration on the substantive meaning of 'meaningful and informed' consultation with project affected people, which is a requirement in several OP&Ps. In other words, what, specifically, did Bank management have to do (and what did it have to refrain from doing) to be compliant with provisions calling for the involvement of PAP? The Panel's elaboration of this phrase is especially important considering that the Panel frequently points to the lack of 'meaningful and informed' consultation as the underlying reason for the Request and many of the problems experienced by the project.[164]

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[159] 2007 *Albania Integrated Coastal Zone Management and Clean-Up Project*, IR (ES) at xii-xiii; and xv.

[160] 2007 *Albania Integrated Coastal Zone Management and Clean-Up Project*, IR (ES) at xv.

[161] Id. (emphasis in the original). For a discussion on the applicability (or not) of the Bank's policy on Indigenous Peoples, *see* section 10.3.2 below. *Also see* 2004 *Pakistan National Drainage Program Project*, IR (ES), at xxx: the Panel argued that OPN 11.03 (Cultural Property) should have been applied to the project.

[162] 2001 *Papua New Guinea Governance Promotion Adjustment Loan*, MR, at §9, fn. 1.

[163] 2001 *Papua New Guinea Governance Promotion Adjustment Loan*, ER, at §29.

[164] *See* section 8.1.2 above; *and see e.g.*, 1999 *Ecuador Mining Development and Environmental Control Technical Assistance Project*, IR §§52, 57 & 103; 2001 *India Coal Sector Environmental and Social Mitigation Project and Coal Sector Rehabilitation Project*, IR, at §§421 & 437; and 2004 *Colombia Cartagena Water Supply, Sewerage and Environmental Management Project*, IR (ES), at 21 and IR, at §240.

Management's approach toward consultation with PAP seems to be reflected in some of the Management Responses to Panel Requests. For instance, in *India MUTP*, Management warned that

> the act of consultation itself may raise expectations, while at the same time it cannot ensure that all concerns expressed will be addressed according to the specific wishes of each affected party.[165]

Such a sentiment seems to explain why Management often tends to keep consultation with PAP to the minimum. But what is an accepted 'minimum level' to constitute compliance with an OP&P? For instance, is it good enough to confirm that consultation 'has taken place'? The Inspection Panel has addressed these questions over the course of several Requests, and thereby started to shape the substantive content of the provision. For instance, in *China Qinghai* the Panel explained:

> [t]he Bank must be aware that if there is even a perception of potential adverse effects that could result from a truthful statement of opposition to this Bank-financed project, then Bank staff has a responsibility to guarantee confidentiality of the respondent. This responsibility derives from the requirements for 'full and informed' consultation in ODs 4.20 (esp. par. 8), 4.30, and 4.01, since full and informed consultation is impossible if those consulted even perceive that they could be adversely affected for expressing their opposition to, or honest opinions about, a Bank-financed project.[166]

In other projects, the Panel ruled that information disclosure had to be "in a language understandable to the affected people";[167] that consultations could not take place in the presence of government officials and armed guards;[168] that surveys used in the consultation process had to guarantee the anonymity of participants;[169] and that consultations had to be "timely, meaningful and relevant to Project design and execution".[170]

In *Yacyretá II*, the Panel noted an often-recurring finding, namely, that there was

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[165] 2004 *India Mumbai Urban Transport Project*, ER, at §§47 & 58. Similar sentiments were expressed by Management in the earlier *Bangladesh Jamuna Multipurpose Bridge* case: "Consultation programs have been carried out only in areas identified to be affected, and where there are identifiable legitimate stakeholders. To do otherwise would cause confusion, unrealistic expectations and exaggerated or false claims for compensation […]." *See* MR, at §v.

[166] 1999 *China Western Poverty Reduction Project*, IR, at §116.

[167] 1998 *India Ecodevelopment Project*, Request, at §4b)ii) & iv); *and see* ER, at §§iv, and 40-42. The Panel noted that a lack of meaningful consultation was what led to the Request in the first place.

[168] *See* 1999 *China Western Poverty Reduction Project*, Request, at 9; MR, at 74-75; and IR, at §116. *See also* 2001 *Chad Petroleum Development & Pipeline Project*, IR (ES), at §§26 & 37.

[169] *See* 1999 *China Western Poverty Reduction Project*, IR, at §116.

[170] *See* 2004 *Colombia Cartagena Water Supply, Sewerage and Environmental Management Project*, IR (ES), at 21; and IR, at §240.

> a wide discrepancy between the recollections of affected people in the Project area, who insist there have been no meaningful consultation or thorough on site visits and the Bank's statements about its supervision missions.[171]

These discrepancies can probably be explained by the fact that interaction with PAP is often more 'information sessions' than involving real consultation. As the Panel noted in *India MUTP*:

> […] when meetings with PAPs took place, 'consultation' with them seemed to be more in the nature of *telling them* what was to occur than engaging them in meaningful discussion on alternative options that might better meet their needs. The Panel finds that in addition to the lack of consultation on alternative resettlement sites, there was a lack of meaningful consultation on other elements of the Project, such as alternative alignments of the road. [172]

Similarly, in *India Coal Sector Environmental & Social Mitigations*, Management asserted that the borrower "has made an effort to consult with all project-affected people, their representatives and local NGOs". Moreover,

> [a]t each of the mines included under the project, mine managers held meetings with project affected people in which they explained the program of mitigating actions that would be undertaken in the course of implementation […].[173]

The Panel concluded, however, that these 'meetings' were information sessions only, and "[w]hile information meetings may be a preliminary to 'informed' consultations, they are not consultations".[174]

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[171] 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, IR (ES) at 31. *Also see* MR to IR, at 51, Annex 1, Finding no. 42. The Panel also specified prerequisites for project supervisory missions concerning consultation with PAP – see (IR (ES), at 31: "Management must ensure that it consults with and interacts meaningfully with affected people and that consultations must be in settings where affected people feel able to convey effectively their concerns to Bank staff. Bank supervision missions should clearly state the places they visited during field inspections and the conditions under which they visited (e.g. with Project staff or accompanied by representatives of NGOs, etc.), in order to better document not only that supervision missions were present in the area, but that the supervision team members actually had contact with affected persons and investigated matters directly dealing with issues of social safeguard policies."

[172] 2004 *India Mumbai Urban Transport Project*, IR, at §372 (emphasis added).

[173] 2001 *India Coal Sector Environmental and Social Mitigation Project and Coal Sector Rehabilitation Project*, IR, at §421.

[174] 2001 *India Coal Sector Environmental and Social Mitigation Project and Coal Sector Rehabilitation Project*, IR, at §437. *Also see* 1999 *Ecuador Mining Development and Environmental Control Technical Assistance Project*, IR, at §§52, 57 & 103: "It is worth noting that Management does not categorize these meetings 'to consult' but rather as meetings 'to inform'"; and "[i]n the Panel's view, Management's approach to consultation was unfortunate. If there was proper CONSULTATION", "[c]onducted in the spirit of the OD", Management could have addressed these concerns long ago or prevented many of the issues raised by the Requesters (emphasis, in bold, in the original). *See also* 2004 *Colombia Cartagena Water Supply, Sewerage and Environmental Management Project*, IR (ES) at 21: "This [consultation] is particularly important in the case of the affected Afro-Colombian communities living in the

Conversely, the Panel accepted a narrower interpretation concerning the consultation requirement in *Lesotho Highlands Water (I)*. Management argued that the OD

> does not require […] that all consumers of a commodity to be produced as a result of a Bank-financed project [here, water], and particularly those residing in a third country, be included in the consultation process […].[175]

The Panel concurred:

> [c]learly, this is true. The OD cannot intend that all consumers of any commodity produced as a result of a Bank-financed project be included in the consultation process, in whatever country they are located, first, second, or third. After all, *tests of reasonableness and common sense* must be applied. And they are not usually hard to find.[176]

8.4. Developing the Beginnings of 'Doctrine': What Constitutes 'Compliance'?

The previous section has illustrated how the Inspection Panel increases its influence by employing expansive interpretation techniques. The development of legal doctrines or principles often builds on such interpretations. This section will analyse how the Inspection Panel has developed a consistent approach – or, what can perhaps be considered the beginnings of 'legal doctrine' – to answering the question that forms the core of its mandate, namely: what constitutes 'compliance'?[177]

8.4.1. Defining the Problem

It may sound like a straightforward task – not amounting to much more than a simple verification of facts – to determine whether actual or potential harm suffered by project affected people is the direct "result of a failure of the Bank to follow its operational policies and procedures with respect to the design,

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area of the proposed outfall, who informed the Panel that they were not consulted about the location of the outfall but rather only informed about its construction and operation."

[175] 1998 *Lesotho/South Africa Highlands Water Project*, ER, at §13 (emphasis added).

[176] Id. (emphasis added).

[177] Note that the Inspection Panel Resolution does not provide the Panel with any guidance concerning *how* to determine compliance, nor does it clarify what constitutes 'compliance' and what not. The Resolution merely states (at §22) that the investigation "report of the Panel shall consider all relevant facts, and shall conclude with the Panel's findings on whether the Bank has complied with all relevant Bank policies and procedures." In other words, there are no formal 'grounds for review' (such as error in 'law' or procedural irregularity), as can be found in national constitutional and administrative law.

appraisal and/or implementation of a project financed by the Bank".[178] Indeed, that might be the case for some OP&P provisions. For instance, OP 4.01 specifies the elements an Environmental Assessment (EA) has to consider, i.e., "the natural environment (air, water, and land); human health and safety; social aspects (involuntary resettlement, indigenous peoples, and physical cultural resources); and transboundary and global environmental aspects".[179] OP 4.36 is similarly clear in stating that the Bank "does not finance projects that contravene applicable international environmental agreements".[180]

However, as noted earlier, several provisions in the OP&P allow the Bank considerable discretion.[181] Consider the following examples: "[t]he Bank favors preventive measures over mitigatory or compensatory measures, *whenever feasible*";[182] and "[t]he Bank does not finance projects that, *in its opinion*, would involve *significant conversion or degradation* of critical forest areas or related critical natural habitats".[183] Also, "the Bank *satisfies itself* that the borrower has *explored* all viable alternative project designs to avoid physical displacement of these [indigenous] groups. When it is *not feasible* to avoid such displacement, *preference is given* to land-based resettlement strategies […]";[184] and "[i]n *exceptional circumstances*, when it is not feasible to avoid relocation, the borrower will not carry out such relocation without obtaining *broad support* for it from the affected Indigenous Peoples' communities as part of the *free, prior, and informed consultation* process".[185]

These examples, as well as numerous others from the Inspection Panel cases, hint at why it can be very difficult to determine Bank compliance; and why Management, in its official responses to the Request and to the Inspection Panel's findings can so often claim to be "fully in compliance", with such confidence.[186]

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178 Inspection Panel Resolution (1993), at §12.
179 OP 4.01 (Environmental Assessment), at §3.
180 OP 4.36 (Forestry), at §6.
181 *See* section 8.2 above.
182 OP 4.01 (Environmental Assessment), at §2 (emphasis added).
183 OP 4.36 (Forestry), at §5 (emphasis added).
184 OP 4.12 (Involuntary Resettlement), at §9 (emphasis added).
185 OP 4.10 (Indigenous Peoples), at §20 (emphasis added).
186 *See e.g.*, 1999 *China Western Poverty Reduction Project*, MR (in Annex to ER), at 63: "Management is pleased to provide evidence demonstrating Management compliance with the relevant policies and procedures in the appraisal of the Project […]"; and 2002 *Paraguay/ Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, MR, at §9: "Management believes it has carried out its obligations in accordance with its relevant policies and procedures […]." Indeed, it is highly unusual for Management to admit to a finding of serious non-compliance. For an example where Management unambiguously accepted a Panel finding of serious non-compliance, *see* 2004 *Pakistan National Drainage Program Project*, MR, at §43 (on the project's environmental screening).

But if 'assessing compliance' is mostly subrogated by the exercise of 'professional judgment' (even if the Panel occasionally succeeds in limiting this discretion),[187] what role is there for the Inspection Panel? One option could be for the Inspection Panel to review compliance strictly on a 'case-by-case' basis. While such an incremental approach has certain merits, it cannot provide potential Requesters with any degree of 'legal certainty' on which they can base their claims; and neither can Bank management use its experiences with Inspection Panel cases to improve compliance on future projects. Moreover, the absence of a consistent compliance review approach weakens the institutional credibility of the Inspection Panel.[188] Put differently, developing a consistent compliance review approach – especially one that addresses the problem of unbridled Management discretion – can be a significant mechanism for judicialization.

8.4.2. *China Qinghai* and the Elements of Compliance

The Inspection Panel articulated its compliance review approach for the first time in the 1999 *China Qinghai* case while deliberating the issue of the project's environmental screening.[189] Management argued that "[s]creening a project into either Category A or B requires *judgement* about the overall risks […] of the project as well as the nature and magnitude of / potential impacts", and that this "judgement" was a call Bank staff had to make based on the circumstances of the "specific project".[190] Responding to Management's position, the Panel stated that when it reviewed whether the environmental screening process was compliant, it "consider[ed] the screening decision that was made from the perspective of *both the process and the substance requirements* of OD 4.01".[191] The Panel elaborated:

> […] in appraising compliance, Management had an obligation to satisfy itself not only that the process and procedures mandated by the policies had been followed, but also that the work under review met *professionally acceptable standards of quality*. In other words, *both process and quality were essential components of compliance*.[192]

Thus, determining whether a particular project component is compliant with the relevant OP&P does not simply constitute of a series of procedural "checks

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[187] *See* section 8.2 above.

[188] The importance of institutional credibility is discussed in Chapter 7.

[189] *See* section 8.2.2 above. Note that the *Qinghai* case was the first opportunity for the Panel to develop such 'doctrine' since *Qinghai* was the first full or unlimited investigation since the Panel's first case in 1994 – *see* section 7.3.1 above.

[190] 1999 *China Western Poverty Reduction Project*, MR, at 64, 79 & 80 (emphasis added).

[191] 1999 *China Western Poverty Reduction Project*, IR, at §140 (emphasis added).

[192] 1999 *China Western Poverty Reduction Project*, IR, at §§180- 186 (emphasis added).

on paper". Compliance review has to go beyond checking the procedural or 'formal' requirements and has to consider whether the underlying analysis meets the relevant substantive ('professional') quality requirements.[193]

Over the course of the *Qinghai* investigation, the Panel found that the majority of Bank staff members in principle agreed with this approach. However, a significant portion (including senior staff members involved with the *Qinghai* project implementation) did not regard the consideration of both procedural and substantive components as an intricate part of what the Bank's OP&Ps obliged them to do.[194] The Panel rejected, what it considered to be a 'formalistic approach' towards compliance, arguing that such a viewpoint meant:

> […] even a one-page environmental assessment of a major project could be in compliance if it passed the desks of, and was checked off by, the appropriate persons at the appropriate times in the decision process.[195]

As mentioned above, the Inspection Panel has been criticized for its compliance review approach, mostly from within World Bank circles.[196] Critics argued that the Panel's approach to compliance sets unrealistically high standards and that the Panel expected impractical perfectionism from borrowers with limited capacity, to the detriment of realizing project benefits.[197] This viewpoint was also prevalent among Bank management and staff involved with the *Qinghai* case. The Panel found that many Bank staff members believed that "trade-offs" were required in order for borrowers to take "ownership for sustainable development". Such an approach would imply that the Bank had to accept lower standards, at least initially. However, the argument continued, this gave borrowers and their implementing agencies time to familiarize themselves with the Bank's OP&Ps, which would ultimately lead to better "internalization" of the OP&Ps as part of the local "capacity building" process.[198] The Inspection Panel emphatically rejected the argument that the Bank should accept lower standards from borrowers with low institutional capacity, stating that

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[193] Hence, the Inspection Panel has increased its use of external (i.e., independent from the Bank) subject matter experts to advise them on these aspects of compliance since the *China Qinghai* case. *See* below, note 21 (Ch. 9).

[194] 1999 *China Western Poverty Reduction Project*, IR (ES), at §§12 & 39. Most Bank staff stated that also paying attention to the substantive component was more thorough, and therefore the "right thing to do".

[195] 1999 *China Western Poverty Reduction Project*, IR, at §39.

[196] *See* above, notes 69 and 97 (Ch. 7).

[197] Id. *Also see* Bottelier (2001), at 2 & 11, listing the negative consequences of the *Qinghai* Inspection Panel Investigation Report: "Operational costs of the Bank are likely to increase further as a result of additional reviews and safeguards that may be required by Part I member countries. Bank operational staff has become more risk-averse and less inclined to exercise professional judgment without first consulting internal lawyers."

[198] 1999 *China Western Poverty Reduction Project*, IR, at §40. Note, the Panel also highlighted the opposing view held by other World Bank staff members, namely, even if Bank financed

> to accept what otherwise would be seen as inadequate assessment seems especially patronizing in developing countries whose scientists are clearly capable of world-class contributions in every area where they are provided the opportunity. And, in the meantime, it leaves those countries saddled with the social and environmental costs of inadequate assessments.[199]

The *China Qinghai* case was the Inspection Panel's first opportunity to formulate its compliance review approach, but it had actually evolved over the course of several cases predating *Qinghai*.[200] In *India NTPC Power I*, for instance, the Panel stated that the project's resettlement and rehabilitation components "appea[r] to have complied, *at least on paper*, with the Bank's Operational Directive (OD 4.30) and were [therefore] cleared by the Bank's Legal Department and Environmental Specialists".[201] The Panel added, however, that

> the loan was processed so rapidly – with the [Resettlement Action Plans] completed immediately before the project was presented to the Bank's Board – that there was *no time to ensure that essential mechanisms and preconditions,* such as State Government commitment, capacity of implementing agency, etc. *were in place or adequate*.[202]

The Inspection Panel also hinted at its compliance review approach in *Lesotho Highlands Water II*, where the Bank's compliance with certain disclosure of information requirements was in dispute. BP 17.50 stated:

> [i]f an interested party requests additional technical information about a project under preparation, the country department director *releases* factual technical documents […] after consulting with the government to identify any sections that involve confidential material or that could compromise relations between the government and the Bank.[203]

The Inspection Panel argued that merely referring an interested party to the Bank's 'Infoshop' was not good enough to constitute compliance with BP 17.50, although the Panel did not elaborate on its statement at the time.[204]

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projects were just a small percentage of totally funded development projects, it was important for the Bank's projects to set the example. Therefore, the Bank had to "insist on the best possible practice within the safeguards", noting that it "becomes even more important if the Bank's safeguard practices are being held up as models for development projects elsewhere in the country and the world." *See* IR, at §41.

199 1999 *China Western Poverty Reduction Project*, IR, at §41.

200 The Panel also acknowledged this – *see* 1999 *China Western Poverty Reduction Project*, IR (ES), at 15: "Faced with these widely divergent views among the staff, the Panel was forced to revisit its views on and experience with Bank policies and compliance. In the end, it returned to the approach reflected in its earlier reports."

201 1997 *India NTPC Power Generation Project*, IR, at §19 (emphasis added).

202 Id. (Emphasis added).

203 As quoted in the 1999 *Lesotho Highlands Water Project*, ER, at §25 (emphasis added).

204 Id.

8.4.3. After *Qinghai*

The Inspection Panel has applied its compliance review approach consistently to the cases that followed *Qinghai*.[205] For example, in *Yacyretá II*, the Panel found that the site selected for a future wastewater treatment plant was appropriate, and that the related environmental assessment was not "defective *either procedurally or substantively*".[206] In *Uganda Power Projects (I)*, the Panel noted that

> [a]lthough the RAP, as updated in the EIA of March 2001, may be regarded as *formally in compliance* with the provisions of OD 4.30, the Panel finds that there are important requirements still to be met.[207]

In *Cameroon Pipeline*, Requesters questioned the Bank's compliance concerning the appointment of an "Independent Panel of Experts" (IPE) in terms of OD 4.01 (Environmental Assessment). The Panel stated that the mere appointment of the IPE was not enough to constitute compliance,[208] and concluded that this aspect of the project was non-compliant with OD 4.01 since the IPE "was not fully engaged during the preparation and approval of the 1999 EA/EMP"; and because there had been "no independent review of the 1999 Environmental Management Plan by the IPE and no *significant* full-time participation of an IPE in Cameroon since 1997".[209]

In *Columbia Cartagena Water*, the Panel determined that the project's environmental assessment formally considered project alternatives – as it should have. The Panel nevertheless found the project to be only partially compliant with the OD because it was "concerned about the *diligence* with which alternatives other than the preferred alternative of a submarine outfall were studied".[210] The Requesters also raised concerns about the potential

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[205] The Inspection Panel's elaboration on the specific substantive content of particular OP&P provisions (such as 'meaningful and informed participation' – discussed in section 8.3.1.2 above.), is also in line with its compliance review approach.

[206] 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, IR (ES), at 21 (emphasis added).

[207] 2001 *Uganda Third Power Project, Fourth Power Project, and proposed Bujagali Hydropower Project*, IR (ES), at §71 (emphasis added). The Panel also added in detail what the outstanding requirements were (see IR at §§57-60).

[208] 2002 *Cameroon Petroleum Development and Pipeline Project, and Petroleum Environment Capacity Enhancement Project*, IR (ES), at §13.

[209] 2002 *Cameroon Petroleum Development and Pipeline Project, and Petroleum Environment Capacity Enhancement Project*, IR (ES), at §10.

[210] 2004 *Colombia Cartagena Water Supply, Sewerage and Environmental Management Project*, IR (ES), at 14 (emphasis added). The Panel added: "The voluminous feasibility study and the environmental assessment, which closely follows the feasibility study, give greater attention to the submarine outfall than to other options. They do not demonstrate a systematic comparative study of all the alternatives as required by OD 4.01. The Panel could find only cursory consideration of the option of constructing a sewage treatment plant near Cartagena,

impact of a planned submarine outfall on the economic activities of local fishermen. Bank management insisted that there was "no evidence" to support such claims.[211] The Inspection Panel, again implying that 'compliance' have both procedural and substantive elements, stated:

> […] apart from any scientific analysis of the probable impacts of the outfall, there are also issues of perceptions and public acceptability which can have real impacts on Project outcomes. Thus, if the outfall were perceived to be polluting, and if the evidence to the contrary were not trusted by the public at large, including tourists, then there would be a potential for damage to the markets for local fish. This could significantly affect livelihoods in Punta Canoa and nearby villages.[212]

'Compliance' in this instance, the Panel concluded,

> would have meant giving greater and earlier attention to the risks to and concerns of these communities, whose willingness to accept the location and consequences of the outfall was key to the successful delivery of the potentially very substantial benefits intended for so many of Cartagena's other poor citizens.[213]

The Inspection Panel also continues to develop its compliance review approach. In *Yacyretá II*, for example, the Panel seemed to imply that the requirements for compliance were higher under certain circumstances (such as the *Yacyretá* project, which had been mired in controversy and non-compliance for many years by the time the second Panel Request was filed).[214] The Panel stated that it was "not in a position to comment on the accuracy of the perception of corruption" that was claimed by the Requesters; but added:

> […] *under these circumstances*, the Panel finds that the Bank needs to expect a *higher than usual level of supervision* in order to ensure that corruption does not occur and to assure affected people that this is so. While a larger than average number of supervision missions, which included three High Level Supervision Meetings, demonstrates more intense supervision than is usual, it may not be an adequate response to alleviate the perceptions and suspicions of project-affected persons.[215]

The Panel also made it clear in *Yacyretá II* that 'retrospective' compliance was not good enough to escape a Panel finding of 'non-compliance':

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with the treated waters going to a marine area or alternatively used for agriculture as a supplement to the recommended disposal system." *See* IR (ES), at 14.

[211] 2004 *Colombia Cartagena Water Supply, Sewerage and Environmental Management Project*, IR (ES), at 25-26.

[212] Id.

[213] Id.

[214] *See* discussion of *Yacyretá II* in section 7.3.3 above.

[215] 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, IR (ES), at 29 (emphasis added). *Also see* section 8.1.1 above, for a discussion of 'indirect criticism of the borrower' by the Inspection Panel.

> The Panel notes that the October 2003 supervision mission's conclusions and recommendations regarding the social aspects of the project, as presented in the related Aide Memoire, reflect those that Bank policies require. The problem is that these detailed recommendations were given after 20 years into the project implementation, rather than before approving the projects' resettlement plan and related documents. Indeed, they seemed to have come only after the Panel had completed most of its investigation.[216]

Interestingly, and perhaps indicative of Management's gradual acceptance of the Panel's compliance review approach, Management requested the Panel's assistance in *Cameroon Pipeline* to determine what compliance would mean in specific circumstances:

> [i]]n recognition of the importance of independent advice on highly risky and contentious projects with serious and multidimensional environmental concerns, Management would welcome an opportunity to discuss with the Inspection Panel what constitutes "independent" advice in the context of the Pipeline Project and CAPECE.[217]

And also:

> [i]n conducting EAs, the question of how much data is enough frequently arises, given the need to make case-by-case judgments on the type and amount of data to be collected […]. In the case of the pipeline, Management considered the trade-offs, because the data collected did provide a sufficient basis for mitigative measures through the EASs and for monitoring. In the context of the Pipeline Project, Management would welcome an occasion to exchange views with the Inspection Panel on what should constitute adequate data collection.[218]

To conclude, the Inspection Panel's compliance review efforts have gone beyond the mere interpretation of specific provisions. Instead, the outcome has been the development of a consistent, two-prong approach to compliance review – which first assesses whether the decision meets the formal requirements of the OP&P, before determining whether the substantive content also meets professional quality requirements.

8.5. Summary

The aim of this chapter has been to determine whether the Inspection Panel increases its influence (or, the degree of judicialization) in similar ways than courts exercising judicial oversight.

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[216] 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, IR (ES), at 32.

[217] 2002 *Cameroon Petroleum Development and Pipeline Project, and Petroleum Environment Capacity Enhancement Project*, MR to IR, at §23.

[218] 2002 *Cameroon Petroleum Development and Pipeline Project, and Petroleum Environment Capacity Enhancement Project*, MR to IR, at §28.

First, the chapter found that the Panel has expanded its formal (compliance review) mandate – often without justifying it in terms of the Resolution, or by obtaining explicit Board approval (in a few instances, Board 'approval' was actually tacit approval that emerged over time). For example, the Panel has occasionally commented indirectly about the borrower's obligations. Moreover, the Panel has frequently analysed and commented on the root causes behind project failures, and has also criticised some of the Bank's strategic choices concerning development projects that were the objects of Inspection Panel Requests. Finally, the Inspection Panel has regularly shown concern for future compliance – thereby sensitising the Board for potential compliance issues; and has developed at least two procedures that have not been envisaged by the Resolution, namely preliminary review and deferring making a recommendation on whether an investigation is required.

Second, the chapter has illustrated how the Inspection Panel has interpreted both the Resolution (which outlines e.g., the Panel's mandate, process, composition) and various OP&Ps in expansive manners that have often – but not always – resulted in a broadening of the Panel's influence, or the limitation of Management discretion.

Third, the chapter has shown how the Inspection Panel has significantly expanded its influence through the development of a consistent approach towards compliance review. The Panel's approach – which resembles legal doctrine or principles developed by courts that exercise judicial oversight – highlights two elements of compliance, namely: procedural and substantive. The Inspection Panel requires both elements to be sufficiently present in order for a Bank action or decision to be considered as 'compliant' with OP&Ps.

In conclusion, this chapter has confirmed that the Panel has, over its entire existence, increased its influence to a significant degree. Although there are obvious differences between the *content* of the Panel's judicialization efforts and that of courts with a judicial oversight mandate, the *mechanisms* used by the Panel resemble the judicialization mechanisms employed by courts. Note, however, that this chapter has not analysed or commented on the *degree* of the Inspection Panel judicialization. Granted, the degree of Panel judicialization is likely to be far less than the degree of judicialization of courts in national constitutional systems. This does not mean, however, that the Panel's judicialization efforts are any less significant. As the examples mentioned in this chapter have illustrated, the Resolution (which the Panel cannot interpret authoritatively) gives the Inspection Panel a narrow mandate for reviewing Bank compliance with OP&Ps (which, by contrast, give Management wide discretion). It is important to note that it would have been very easy for the Inspection Panel to justify – both in terms the Resolution and the OP&Ps – a much narrower approach to compliance, and much narrower interpretations of OP&P provisions that would have shown Bank management considerably more deference. Significantly, the Panel has not chosen this path. Therefore,

when determining whether the Inspection Panel increases its degree of judicialization, the question is not whether the Panel is successful *all the time* in expanding its influence and/or limiting Management discretion. The fact that the Panel sustains its judicialization attempts is of far greater importance.

CHAPTER 9

THE INSPECTION PANEL AND THE JUDICIAL OVERSIGHT MODEL: THE EFFECTS OF JUDICIAL OVERSIGHT

> *Management deeply regrets these events. A series of errors was committed throughout the Project cycle […]. These errors are unacceptable and point to a serious breakdown of Management's accountability, responsibility and oversight mechanisms for the Project. Management is appreciative of the Inspection Panel for having brought these errors to its attention […].*[1]

What is the role of the Inspection Panel? Put differently, what are the outcomes or effects of the Inspection Panel function? The answer to this question seems to depend on the party to whom the question is addressed. The Board of Executive Directors, for example, underlines the fact-finding role of the Inspection Panel and views the Panel as its 'instrument'.[2] Civil society commentators underscore the external accountability component of the Panel function.[3] Commentators closely affiliated with the Bank emphasize the Inspection Panel's function as internal accountability mechanism.[4] The Inspection Panel seems to tailor the

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1 2007 *Albania Integrated Coastal Zone Management and Clean-Up Project*, MR to IR, at 5.

2 *See e.g.*, the Board's instruction to the Inspection Panel at the conclusion of the second Board review: "The profile of Panel activities, in-country, during the course of an investigation, should be kept as low as possible in keeping *with its role as a fact-finding body on behalf of the Board*". *See* 1999 Board Review Conclusions, at §12 (emphasis added).

3 *E.g.*, civil society commentators have described the Panel as a "public accountability mechanism" (L. Undall, *The Arun III Dam: A Test Case in World Bank Accountability*, 26 Bulletin of Concerned Asian Scholars 82, at 84 (1994)), an "innovative and *independent* forum" and "a mechanism for *holding the Bank accountable* for violations of its policies and procedures" (D. Clark, A Citizen's Guide to the World Bank Inspection Panel, at 1 and 3 (1999), at <http://www.ciel.org/Publications/citizensguide.pdf>) (emphases added).

4 For instance, Ibrahim Shihata, former World Bank Legal Council, explained the motivations

description of its role according to the particular 'audience' or stakeholder group. For example, in material aimed primarily at potential Requesters and their representatives (typically, civil society), the Panel accentuates its role as an external accountability mechanism.[5] However, in material aimed mainly at the Board or Bank management, the Panel would emphasize that it is a "fact-finding body" acting "on behalf of the Board".[6]

In reality, the Inspection Panel *is* a fact-finding body, internal accountability mechanism, and external accountability mechanism. And in this regard, the Panel's position is not so different from national courts in the sense that courts, too, fulfil multiple roles. But what does the Panel procedure actually *bring about*? In particular, what does the role of 'internal and external accountability mechanism' imply?

The Judicial Oversight Model describes three prominent outcomes or effects of judicial oversight, namely: constitutional dispute resolution, human rights protection (including remedies), and the indirect legitimization of political bodies.[7] This chapter will assess whether the Inspection Panel function also leads to comparable outcomes. However, the Judicial Oversight Model also describes the effects of judicial oversight as context specific and

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for establishing the Inspection Panel as follows: "The creation of an operations inspection function in the World Bank came as a response to a new Bank management's concerns with the efficiency of the Bank's work. These concerns coincided with, and were influenced by the emphasis by sources inside and outside the Bank on what they perceived as the Bank's inadequate attention to the standards reflected in its rules." *See* Shihata (2000), at 1.

5 *See e.g.*, Inspection Panel Operating Procedures, at 1: "[…] providing people directly and adversely affected by a Bank-financed project with an independent forum through which they can request the Bank to act in accordance with its own policies and procedures […]"; Inspection Panel Annual Report (1999/2000), at 7: "[…] the Bank's mechanism to enable people who believe that they or their interests have been or could be harmed by Bank-financed activities to present their concerns to an independent forum through a Request for Inspection"; and Inspection Panel Annual Report (2001/2002), at 1: "[t]o provide *independent judgment* in cases where it is asserted that the *rights and interests* of parties are adversely affected because the Bank failed to follow its operating policies and procedures in the design, appraisal, and/or implementation of Bank lending operations." (Emphases added.)

6 *E.g.*, in 2001 *Chad Petroleum Development & Pipeline Project*, IP Chairperson address, at §4: "[u]nder the Resolution […] the role of the Management Report is to inform the Board about the specific actions Management proposes to address the Panel's findings and not to dispute them. This is clearly stated in the 1999 Clarification to the Panel's Resolution, where the Inspection Panel is defined as 'a fact-finding body on behalf of the Board.' This was confirmed recently during Board discussions on the Lake Victoria Environmental Management Project. We, also, carry our duties impartially, and with the assistance of world-renowned experts in their fields." *But see* 2004 *India Mumbai Urban Transport Project*, IR (ES), at 2: "The Inspection Panel is an instrument for groups of two or more private citizens who believe that they or their interests have been or could be harmed by Bank-financed activities to present their concerns through a Request for Inspection. In short, the Panel provides a link between the Bank and the people who are likely to be affected by the projects it finances."

7 *See* section 2.2 above.

influenced by the degree of judicialization and judicial independence.[8] The chapter will take these elements into account when analyzing whether the Panel engages in dispute resolution (9.1), human rights protection (9.2) – including the provision of remedies (9.2.3), and indirect legitimization of the Bank's 'political institutions' (9.3). The chapter will conclude with a summary (9.4).

9.1. Dispute Resolution and the Role of Fact-Finding

The Inspection Panel's compliance review mandate is not aimed at resolving 'constitutional' disputes since it is not the final arbiter of the meaning of Inspection Panel Resolution provisions. However, as the previous chapter has shown, an integral part of the Requests before the Panel concerns the interpretation of Bank OP&Ps, which arguably includes constitutional elements.[9] The Panel's mandate is primarily aimed at settling 'vertical disputes' – that is, between Requesters and the World Bank – and not at settling 'horizontal disputes' between the Bank's 'political bodies' (the Board and Bank management). Thus, the bulk of this section will focus on the Panel's influence on settling vertical disputes (9.1.2). Nevertheless, the Panel also affects the relationship between the Board and Bank management. This section therefore starts with some cursory remarks about the Panel's role in influencing, if not settling these 'horizontal' conflicts (9.1.1).

The importance of the Panel's fact-finding role should not be underestimated, however. Benjamin Cardozo once observed: "Lawsuits are rare and catastrophic experiences for the vast majority of men, and even when the catastrophe ensues, the controversy relates most often not to the law, but to the facts".[10] Or, as Lord Bingham explained:

> [i]n the hierarchy of legal skills, pride of place is given, and quite rightly, to the great exponents of legal principle, those (whether academic or judicial) who weave disparate threads of authority into coherent doctrine or plant the flag of legal principle in hitherto untrodden factual territory. In comparison with these mandarin arts, the judicial determination of factual issues occupies a somewhat lowly place, an activity of its nature ephemeral, uncreative and particular […]. [However] [t]o the judge, resolution of factual issues is (I think) frequently more difficult and more exacting than the deciding of pure points of law. In deciding the facts, the judge knows that no authority, no historical enquiry

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8 *See* section 2.3.2 above.

9 Specifically insofar as the OP&P guarantees individual rights that are 'fundamental' in nature – such as the right to participate in decision-making (through informed consultative processes – *see* section 8.3.1.2 above), or 'due process' rights, such as the right to effective appeals mechanisms in cases of involuntary resettlement (*see* section 9.2.2.2 below).

10 Cardozo (1921), at 128-129.

> and (save of expert issues) no process of ratiocination will help him. He is dependent, for better or worse, on his own unaided judgment.[11]

The section will therefore also consider the effect of the Panel's independent fact-finding role on vertical and horizontal disputes within the Bank.

9.1.1. 'Horizontal' Dispute Resolution

Before the Inspection Panel existed, Bank management controlled the flow of information regarding development projects (i.e., its appraisal, design and status of implementation) to the Board. In such a scenario, it is conceivable that a situation might arise where Management keeps certain information (such as certain risks, poor implementation progress or known instances of deviances from the OP&Ps) from Board members. While a policy such as *OP/BP 10.00 (Investment Lending: Identification to Board Presentation)* are meant to prevent such a scenario, this problem might still arise because Board members are inundated with information (that may serve to 'hide' specific data), or because Management cloaks information in more favourable terms than the actual situation on the ground merits, without necessarily misrepresenting facts.[12]

The Inspection Panel has changed these dynamics. The Panel gathers and independently verifies facts regarding problematic projects, and presents these facts to the Board in an 'executive' or condensed format.[13] In addition, as discussed in Chapter 7, the Inspection Panel notifies the Board of instances where Bank management had been 'overoptimistic' in their presentation of a project's progress or, worse, of occasions where known facts were deliberately misrepresented.[14] In other words, the Inspection Panel's fact-finding role has an

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[11] Bingham (2000), at 3.

[12] *See e.g.*, the examples discussed in sections 7.3.4 and 7.3.5 above.

[13] While the Panel's Investigation Reports are usually quite lengthy (e.g., an IR report is typically between 100 and 200 pages long), IRs all have executive summaries that contain all the major Inspection Panel findings. Moreover, in the IR, the Panel summarizes the Request, the original MR, as well as the ER.

[14] *See* section 7.3 above. *And see e.g.*, 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, the Panel informed the Board that "[…] the progress reports to the Board are more optimistic than the supervision reports in certain respects. [The Panel] is also concerned that Management's response to the Requesters is more optimistic than the supervision reports. The Panel especially notes that only after it had conducted its own field research from January through December 2003 and conducted follow-up staff interviews did Management produce an Aide Memoire (October 23-30, 2003) that identified many of the problems the Panel had found and the remedial actions which need to be taken." *Also see* 2004 *Pakistan National Drainage Program Project*, IR (ES), at xxxvi: "The Panel is concerned that the ICR [implementation completion report] that was circulated to the Board was insufficiently transparent on important shortcomings of the project. The Panel cannot explain why Management's internal checks and balances did not

important effect on the relationship between the Board and Bank management since it places the two 'political' entities on a more equal footing (if not in terms of hierarchy), which is an important development for managing the conflicts between these entities.[15]

9.1.2. 'Vertical' Dispute Resolution

It can perhaps be questioned whether the Inspection Panel actually *resolves* disputes between Requesters and the Bank since it has no formal decision-making authority, and also plays no formal role in the remedial aspects of the dispute.[16] Whether or not the Panel resolves such vertical disputes is to some extent a question of 'effectiveness' – which, as mentioned in Chapter 1, falls outside the scope of this book.[17]

Nevertheless, the Panel makes at least two important contributions towards resolving disputes between the Bank and Requesters. First, the Inspection Panel frames the conflict throughout the Panel process. For instance, in the process of registering the Request, the Panel often assists Requesters by adding missing information (such as indicating the specific Bank OP&Ps that have potentially been contravened).[18] The Inspection Panel also makes a decision, based on the Request and the original Management Response, on which Bank policies to focus its investigation.[19] Before discussing the investigation and its findings in the investigation report, the Panel will normally set out its own interpretation of the project's background and objectives, an outline of the Requesters' claims, and a summary of Management's responses to the claims. As mentioned in Chapter 2, the entity who frames the conflict enjoys some measure of control over the outcome.[20]

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detect the discrepancies between the final report and supervision reports, and why the final ICR was not amended, once it was shown to have been misleading in its assessment of the Project's outcomes."

15 *See* section 2.2.1 above.

16 Formal decision-making authority resides with the Board – *see* section 6.3.2; for a discussion of the Panel's role in remedies, *see* section 9.2.3 below.

17 *See* section 1.2.3 above.

18 *See e.g.*, 2007 *India Uttaranchal Decentralized Water Development Project*, ER, at §43, in response to Management complaining that the Panel assisted Requesters in this way: "The Panel also would like to emphasize that the Requesters are not required to know about the Bank's internal policies and procedures, nor are they required to make specific references to such policies and procedures when submitting a Request for Inspection. To apply such requirements, particularly in cases where requesters are poor and live in remote areas with no access to information about Bank policies, would be counter to the intent of making the Inspection Panel process available in practice to locally- affected people."

19 *See e.g.*, 2007 *Albania Integrated Coastal Zone Management and Clean-Up Project*, 2nd Request, NOR, at 2.

20 *See* above note 69 (Ch. 2).

Second, the Inspection Panel independently finds and verifies facts that form the heart of the dispute between Requesters and the Bank. The Inspection Panel has increasingly been using external (i.e., non-Bank affiliated) subject matter experts to facilitate this purpose.[21] On occasion, the Inspection Panel's experts contradict the findings of World Bank experts,[22] but on many others, they confirm the Bank experts' analyses.[23] The use of subject matter experts is also aligned with the Inspection Panel's compliance review approach, which requires an assessment of the professional quality (substance) of Bank management and staff's decisions.[24]

In other words, the Inspection Panel is not merely a 'fact-finding' body. The Panel's fact-finding efforts are means to a greater end, namely: settling (or, at least, influencing the outcome) of disputes between the Bank's Board and Management, and between the Bank (as represented by Bank management and staff) and Requesters.

9.2. Human Rights Protection

The debate concerning the human rights obligations of international institutions such as the World Bank has been continuing for some time already.[25] While there appears to be consensus that international institutions are bound, or should be bound by *some* human rights obligations, many questions remain about the nature and modality of such obligations for specific institutions like the World Bank. Because the Inspection Panel interprets the Bank's OP&Ps as part of its compliance review mandate, it has a potential role to play in developing

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[21] *See e.g.*, 1999 *China Western Poverty Reduction Project*, IR (Acknowledgements, at v); and 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, IR, at vii. This is also reflected in the Inspection Panel's budget – *see e.g.*, changes to IP budget item 'consultant fees' (in thousands of U.S. $): 1996/1997 – 17.50; 1998/1999 – 4.50; 1999/2000 – 166.00; 2001/2002 – 280.60; 2003/2004 – 654.50; 2004/2005 – 832.50; 2005/2006 – 646; 2006/2007 – 673.9 (source: Inspection Panel Annual Reports). Note that the budget item from 2003/2004 onwards includes 'Panel Member' fees in this budget item, but excludes the Inspection Panel Chairperson's salary. The IP budget is of course influenced by the demand-driven nature of its work – (i.e., in years where the Panel received more Requests, budget items would normally be higher – and whether or not a full investigation is approved; but the upwards trend is clearly discernable.

[22] *See e.g.*, 2004 *Colombia Cartagena Water Supply, Sewerage and Environmental Management Project*, IR (ES), at 15-16, on the risk of mud volcanism; *and* at 14-15, concerning the proposed design for the submarine outfall.

[23] *See e.g.*, 2004 *India Mumbai Urban Transport Project*, IR (ES), at 34: "[…] in the view of the Panel's expert, the residents of the resettlement sites have no greater risk of exposure to radioactive emissions in the event of a nuclear reactor accident than other residents of Mumbai [as was claimed by Requesters]."

[24] *See* section 8.4 above.

[25] *Also see* above, note 19 (Ch. 6).

the normative content of the Bank's human rights obligations.[26] But does the Panel actually include human rights considerations in its investigation? The aim of this section is to answer this question.

The Inspection Panel's jurisprudence reveals only one instance – *Chad Pipeline* – where the Panel has *directly* addressed the issue of the Bank's human rights obligations (9.2.1). However, as the discussion will reveal, the *Chad Pipeline* case also confirmed that many Bank OP&Ps reflect international human rights standards, thus opening the way for the Panel for further direct considerations of human rights issues. Moreover, there are several other examples where the Panel has shown an *indirect* concern for human rights, or where its compliance review findings were indirectly informed by human rights considerations. These examples will form the bulk of this section (9.2.2). Human rights protection is, for a large part, realized through the eventual provision of remedies to affected people. This section will briefly consider the issue of effective remedies in the Inspection Panel context (9.2.3).

9.2.1. Direct Human Rights Considerations: the *Chad Pipeline* Case

The *Chad Pipeline* Request – which was discussed as a 'landmark' case in Chapter 7[27] – is the only instance to date where the Inspection Panel has directly considered the Bank's human rights obligations. The Request cited, and provided the Inspection Panel with evidence of "massive violations of human rights in the [oil pipeline] production zone".[28] Significantly, this case concerned the civil and political rights of project affected people – while the Bank has consistently argued that its mandate only included socio-economic and cultural rights.[29] In its response to the Request, Management stated that the World Bank was "concerned by human rights in Chad as elsewhere", but that the Bank's "mandate [did] not extend to political human rights".[30] The Inspection Panel countered that human rights considerations were also not formally part of its own mandate, and specifically not insofar as it pertained to borrower obligations.[31] The Panel added that it nevertheless

> felt obliged to examine whether the issues of proper governance or human rights violations in Chad were such *as to impede the implementation of the Project in a manner compatible with the Bank's policies*.[32]

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[26] *E.g.*, developing the substantive meaning of phrases such as 'meaningful participation', which occurs in several Bank OP&Ps – *see* discussion in section 8.3.1.2 above.
[27] *See* section 7.3.2 above.
[28] 2001 *Chad Petroleum Development & Pipeline Project*, Request, at §4.
[29] *See* above, note 19 (Ch. 6).
[30] 2001 *Chad Petroleum Development & Pipeline Project*, MR, at §16.
[31] 2001 *Chad Petroleum Development & Pipeline Project*, IR (ES), at §34.
[32] 2001 *Chad Petroleum Development & Pipeline Project*, IR (ES), at §35 (emphasis added).

In other words, the Inspection Panel successfully linked its formal mandate of compliance review to include human rights considerations insofar as they related to the *Bank's* obligations, which are spelled out in the OP&Ps. The Inspection Panel also pointed to the fact that the Bank had already created a precedent in this regard when it intervened to alleviate specific (civil and political) human rights abuses in Chad:

> […] on more than one occasion when political repression in Chad seemed severe, the Bank's President personally intervened to help free local opposition leaders, including the representative of the Requesters, Mr. Yorongar, who was reported to have been subjected to torture.[33]

Moreover, the Panel confirmed that its investigation revealed the human rights situation in Chad was "far from ideal",[34] which triggered further "questions about compliance with Bank policies, in particular those that related to informed and open consultation". The Panel concluded that the human rights situation in the production zone justified "renewed monitoring by the Bank".[35]

In its response to the Panel's Investigation Report, Bank management yet again affirmed its earlier position, adding that the Bank had no policies that concerned "respect for human rights", which could have been contravened (as the Requesters had claimed).[36] Management affirmed, however, that they would continue to monitor the situation closely, as the Panel had suggested.[37] Edward Ayensu, chairperson of the Inspection Panel at the time, reacted to these Management statements in an unusually strongly worded address to the Board.[38] Board proceedings are normally confidential and are followed only by a formal World Bank press release. To the Bank's credit, however, Ayensu's address was published on the Inspection Panel's website – the first and only such occurrence to date. Ayensu stated emphatically that the Inspection Panel's approach to incorporate human rights considerations was "within the boundaries of the Panel's jurisdiction" because human rights were "implicitly embedded in various policies of the Bank", and the World Bank's policies "on consultation, among others, presume a basic respect for human rights".[39] Ayensu concluded:

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33 2001 *Chad Petroleum Development & Pipeline Project*, IR (ES), at §37. The Bank is often criticized for its double standards (to which the Panel's reference is perhaps a subtle hint), that is: on the one hand, the Bank denies having any mandate regarding civil and political rights and vehemently guards its political neutrality; on the other hand, the Bank sponsors projects aimed at reforming civil and political structures (such as judicial reform and governance capacity projects). *See e.g.*, above, note 39 (Ch. 6).

34 2001 *Chad Petroleum Development & Pipeline Project*, IR (ES), at §37.

35 Id.

36 2001 *Chad Petroleum Development & Pipeline Project*, MR to IR, at §51.

37 Id.

38 Delivered on occasion of the Board's discussion of the *Chad Pipeline* IR and the MR to IR.

39 2001 *Chad Petroleum Development & Pipeline Project*, IP Chairperson address, at 8.

> [t]here was a period in Chad when consultations with affected groups were conducted in the presence of armed gendarmes. This was hardly compatible with the Bank policies concerned. Fortunately, this phase of the consultation process gave way to a much freer atmosphere. Mr. Chairman, perhaps this case should lead the Board to study the wider ramifications of human rights violations as these relate to the overall success or failure of policy compliance in future Bank-financed projects.[40]

The Panel's direct consideration of the human rights issues in the *Chad Pipeline* case is significant in two ways. First, the Inspection Panel has successfully expanded its mandate to include human rights considerations[41] (interestingly, making no distinction between civil and political or socio-economic rights), at least to the extent that human rights abuses "impede[d] the implementation of the Project in a manner compatible with the Bank's policies".[42] Second, the Panel's interpretation of the *Chad Pipeline* case confirmed that the World Bank indeed had broad human rights obligations; and, importantly, that the nature and extent of these obligations could be inferred from the Bank's OP&Ps. As Ayensu noted:

> [w]e are convinced that the approach taken in our Report, *which finds human rights implicitly embedded in various policies of the Bank*, is within the boundaries of the Panel's jurisdiction.[43]

Thus, when the Inspection Panel interprets the OP&Ps as part of its compliance review mandate, it is indirectly expounding the World Bank's human rights obligations – as the examples in the next section will illustrate in more detail. The Panel's reasoning in *Chad Pipeline* moreover created the possibility for future Panel investigations to consider human rights directly, with greater ease.[44]

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[40] Id.

[41] Note that this is another example of judicialization – *see* Chapter 8 above.

[42] 2001 *Chad Petroleum Development & Pipeline Project*, IR (ES), at §35.

[43] 2001 *Chad Petroleum Development & Pipeline Project*, Inspection Panel Chairperson's Address to the Board, at §8. *Also see* Bradlow (1996), at 248: "Given the broad scope of the Bank's operations, the Panel has the potential to influence the evolution of international human rights, environmental, and administrative law."

[44] It is perhaps significant to note that the Panel responded to direct claims of human rights abuses (and claims that the Bank contravened its own human rights obligations) in the *Chad Pipeline* Request. The Inspection Panel engages in judicialization efforts, as has been argued, but – like courts – it is largely bound by the case before it. In other words, if external critics of the Bank and of the Inspection Panel (such as international civil society) want to see the Panel addressing more human rights issues directly, they should, from their side, work towards brining more such cases before the Panel.

9.2.2. Indirect Human Rights Considerations

The Inspection Panel's indirect concern for human rights can be discerned from subtle points, such as its approach to facts and its concern for the welfare of project affected people.[45] Compare, for example, the Panel's response in the *Nepal Arun III* case, with that of Bank management's. Management stated

> Arun III does not involve the resettlement of communities or of very large numbers of people. A total of 1,097 project affected families (PAFs) have been identified in the project area.[46]

The Panel asserted that a "very large number of families (estimated at about 1600) were deprived of their land for purposes of this project".[47] In *Brazil Rodônia PLANAFLORO*, the Panel made the following remark, which had no direct bearing on compliance:

> [t]he Panel notes with concern that the Management proposal to bring into project management, private business organizations (Draft Report para. 11) may result in the inclusion of representatives of the parties behind illegal logging, burning and other anti-zoning activities. The less sophisticated and poor representatives of the Project intended beneficiaries could be outmaneuvered, lose their trust in the Bank and further distance themselves from the Project.[48]

The Inspection Panel sometimes imply that Bank management and staff are indifferent, or even insensitive towards the human suffering caused by development projects. For instance, in *Paraguay Argentina Yacyretá I*, the Panel mentioned "the lack of participation of affected people and local authorities in project related activities *and a tendency by Bank supervision missions to ignore or take lightly the concerns of area people*" as root causes of some of the project's issues.[49] The Panel also noted that "closer contact with, and participation of affected people and local authorities would have provided

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[45] *See e.g.*, Hunter (2003), at 207, describing his initial skepticism at the appointment of the first Panel members: "My own view when reviewing his [Ernst Gunther Bröder, retired World Bank employee and one of the first Inspection Panel members] résumé was that the Bank had successfully controlled the Panel before it ever got up and running. [….] I was wrong. [….] The Panel members and staff seemed to recognize instinctively that their constituency was as much affected people as finance ministries." *And see* Kingsbury (1999), at 336: "The panel's reports also have a public function in drawing attention to the normative importance and implications of particular policies. Several panel reports address the hardship and misery that has all too often been the outcome where people are forced to move by large projects."

[46] 1994 *Nepal Arun III Proposed Hydroelectric Project and Restructuring of IDA Credit*, MR, at §22.

[47] 1994 *Nepal Arun III Proposed Hydroelectric Project and Restructuring of IDA Credit*, ER, at §78.

[48] 1995 *Brazil Rodônia Natural Resources Management Project*, Additional Review, at §72.

[49] 1996 *Paraguay/Argentina Yacyretá Hydroelectric Project*, Review & Assessment, at 11-17 (emphasis added); *also see* 52-53; and §238.

the Bank a better understanding of the problems caused by the project".[50] In *India Coal Environmental & Social Mitigation*, the Panel's investigation revealed serious shortcomings concerning income restoration measures for PAP. Management acknowledged that there were problems and affirmed that it was working on remedying the issue. Management added, however:

> [e]ven with investment assistance from CCL [implementing agency], which has been recommended by the Bank supervision […] there is no guarantee that the [project affected people] will make the necessary effort to turn this assistance into a viable source of income.[51]

The Inspection Panel took issue with Management's 'warning':

> [t]he Panel is surprised that Management would accuse those who never asked to be relocated of 'not making the necessary effort' to do something that was imposed upon them by those who acknowledged that such schemes had mostly failed elsewhere. After all, the PAPs never expressed a preference for non-farm selfemployment; they were erroneously led to believe for years that they would get a job in the mine; and they were in effect forced into this situation for the greater good of others. Most are already suffering the extra traumas of displacement experienced by the poor, many of whom have been forced to give up ownership for land without title, or have been waiting for years to receive compensation for tribal land rights, or who received court awards for increased land compensation that is now being challenged by CCL.[52]

The remainder of this section will discuss two prominent examples that illustrate how the Inspection Panel indirectly incorporates human rights considerations into its investigations, namely: emphasis on 'harm' (9.2.2.1) and concern for 'due process' (9.2.2.2).

9.2.2.1. The Panel's emphasis on 'harm'

The role of harm or "direct adverse affect" is stipulated in the Resolution, namely: it is one of the eligibility criteria a Request has to meet. No particular prominence is given to the existence of harm or direct adverse effect in relation to the other eligibility criteria.[53] In the early years of the Panel's existence,

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[50] 1996 *Paraguay/Argentina Yacyretá Hydroelectric Project*, IR (ES), at 52-53.

[51] 2001 *India Coal Sector Environmental and Social Mitigation Project and Coal Sector Rehabilitation Project*, MR, at §84.

[52] 2001 *India Coal Sector Environmental and Social Mitigation Project and Coal Sector Rehabilitation Project*, IR, at §249. The Panel added that it had noticed during its field visits that many PAPs looked "listless" and "depressed": "The Panel considers that this condition deserves appropriate treatment rather than criticism." (IR, at §250).

[53] *See* Inspection Panel Resolution (1993), at §§13 & 16: "The affected party must demonstrate that its rights or interests have been or are likely to be directly affected [i.e. harmed] by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank (including situations where the Bank is alleged to have failed in its follow-up on the

Bank management frequently accused the Panel of giving the 'mere existence of harm' – thus, without tying it directly to Bank non-compliance – greater weight in its determination of the Request's eligibility. To be sure, however, the Panel could hardly have been expected to determine whether a causal link existed between the harm and Bank non-compliance without having had the ability to conduct full investigations (which, as have been shown, the Panel was largely denied during its early years).[54]

On the other hand, early Panel members like Alvaro Umaña seemed to question the usefulness of the so-called "policing function" aspect of its mandate (i.e., compliance review) since "the Panel's 'verdict' does not lead – nor should it lead to any action beyond correcting failures in project design or execution".[55] Thus, between 1995 and 1999, the Panel saw its role primarily as emphasizing the plight of project affected people to ensure maximum public awareness (including media attention), especially since the Board – in all likelihood – would not approve a full Panel investigation.[56]

As part of the outcome of the 1999 Board Review, the Board instructed the Panel to use the "without-project situation" as the "base case for comparison", and stressed that "[n]on-accomplishments and unfulfilled expectations" would not constitute 'harm' as is meant by the Resolution.[57] Going forward, the Inspection Panel would have to establish a *prima facie* causal link between the (potential) harm and Bank non-compliance, before the Request could be eligible for investigation.[58]

However, since the conclusion of the 1999 Board Review, the Panel has become very effective in making the plight of project affected people 'real'

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borrower's obligations under loan agreements with respect to such policies and procedures) provided in all cases that such failure has had, or threatens to have, a material adverse effect." Moreover, the Request must outline what harm is actually or potentially suffered; and the Panel must ensure that the alleged violation(s) of OP&P is of a "serious character" – i.e., that there is material adverse effect. *And see* Shihata at 50-51.

54 *See* section 7.1.1 above.

55 A. Umaña (Ed.), The World Bank Inspection Panel: The First Four Years, at 326 (1998); *also see* Shihata (2000), at 32.

56 *See e.g.*, 1995 *Brazil Rodônia Natural Resources Management Project*, IR, at §72; 1996 *Paraguay / Argentina Yacyretá Hydroelectric Project*, IP Review & Assessment, at 11-17, 52-53 and §238; and 1996 *Bangladesh Jamuna Multipurpose Bridge Project*, ER, at 54; *and see* 1997 *India NTPC Power Generation Project*, IR, at §15.

57 1999 Board Review Conclusions, at §14.

58 Subsequently, the Inspection Panel deemed three Requests (to date) to be ineligible for investigation because, although there might have been 'harm' or potential harm, there was no apparent link between the harm and policy violations by the World Bank: *see* 1998 *Brazil Land Reform & Poverty Alleviation Project*; 1998 *Lesotho/South Africa Highlands Water Project*; and 2001 *Papua New Guinea Governance Promotion Adjustment Loan*. For criticism of this approach, *see* Ananthanarayanan (2004). On the other hand, it is doubtful whether it can be concluded that the Panel's mandate has been narrowed significantly on the basis of these three cases only.

through its investigation reports. For example, the Panel incorporates actual case studies in its reports[59] and illustrates many of its findings with photos taken from the field.[60] In the *India Coal* case, for instance, the Panel criticized the manner in which project information was made available to project affected people. The Panel stated that

> the location of the [Public Information] Center in the office of the R&R Officer, in the gated CCL mine Headquarters' compound, does nothing to facilitate information being provided '[…] in a timely manner and in a form that is meaningful for, and accessible to, the groups being consulted.' On the contrary, *for poor, vulnerable and now dependent people, it is clearly intimidating to approach an office in that location, let alone walk in and freely request information, register complaints and engage in dialogue.* When a representative of an NGO was present, the Panel witnessed an atmosphere, tone and mood that was not at all conducive to any kind of open exchange of information. Moreover, the information being provided in 2001 was largely technical and inaccessible to project affected people and without summaries '[…] of its conclusions in a form and language meaningful to the groups being consulted.' Management could and should have been aware of this.[61]

The Inspection Panel will even go further than the formal parameters of the Request to illustrate the plight of project affected people, as this Panel comment from *India MUTP* illustrates:

> [t]he Bank Project in Mumbai is part of a larger Mumbai effort to build transportation infrastructure in Mumbai and to further develop the city. As part of this effort, many tens of thousands of additional people are being resettled who are not part of the Bank project. 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. In the Project before us, these hopes have not been realized, as newspapers reported early in 2005 the widespread demolition of slum dwellings not included within the Bank Project, which left occupants without any place to live.[62]

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[59] *See e.g.*, 2004 *India Mumbai Urban Transport Project*, IR, at 94 (*see* Box 5.1); IR, at 164 (*see* Box 5.3); IR, at 168 (*see* Box 5.4); IR, at 169 (*see* Box 5.5); and IR, at 170.

[60] *See e.g.*, 2004 *India Mumbai Urban Transport Project*, IR, at 4, 93, 107, and 113; *and see* 1999 *China Western Poverty Reduction Project*, IR (ES), at 3, 28, and 32.

[61] 2001 *India Coal Sector Environmental and Social Mitigation Project and Coal Sector Rehabilitation Project*, IR, at §408 (emphasis added).

[62] 2004 *India Mumbai Urban Transport Project*, IR (ES), at 19. *Also see* 2004 *Pakistan National Drainage Program Project*, IR (ES), at xxii, and xxxii: "The Panel finds that the Bank failed to take the necessary actions under OD 4.30 to identify and prepare for the possibility of such displacement, and to assess the extent to which it has occurred. For vulnerable groups, OD 4.30 calls for 'land allocation or culturally acceptable alternative income-earning strategies to protect the livelihood of these people.' Given that the NDP Project is closed, the Panel is concerned about what may be done to redress harms, protect against possible ongoing displacement, and support livelihoods." *And see* 2004 *Colombia Cartagena Water Supply, Sewerage and Environmental Management Project*, IR, at §§211-212: "Monitoring, no matter

And in *Pakistan National Drainage Program*, the Panel emphasized

> that the local people have suffered great harm and hardship, which is in significant part a result of these structures and their failures. The Panel notes Management's suggestion to make NDP funds available to mitigate flood damages to people. As the Panel was finalizing this Report, Management informed the Panel that the Government had provided funds to some individuals and families affected by the floods, including 'death compensation' […] and compensation for houses fully damaged and partially damaged.[63]

9.2.2.2. The Panel's concern for 'due process'

The Inspection Panel has exhibited as great variety of 'due process' concerns, and has managed to link those concerns to findings of Bank non-compliance with OP&Ps. For instance, in *Albania Coastal Zone Management*, the Panel criticized the Bank for only applying its policy on Involuntary Resettlement to a small component of the project, noting that

> such a differentiated approach to the application of OP 4.12 could lead to different treatment of the affected people with similar situations under different phases of the Project. The Panel finds that such outcomes should have been envisaged during Project design and that neglecting the possibility of their occurrence represents a failure of policy interpretation and a substantive non-compliance with the necessary application of the Bank's Policy on Involuntary Resettlement.[64]

Chapter 7 has illustrated how the Inspection Panel guards the procedural integrity of the Panel process in order to protect its institutional credibility.[65] Such efforts, by extension, also protect the procedural rights ('due process' rights) of Requesters – as the example from the *Lesotho Highlands Water (I)* case illustrates.[66] Importantly, the Inspection Panel also strives to ensure that procedural fairness or due process is also embedded in the Bank's development projects. In *Yacyretá II*, the Inspection Panel explained that the underlying "presumption of OD 4.30 is that compensation and resettlement will happen relatively quickly". When this assumption fails to be realized, as it had failed in *Yacyretá*, "Bank management must ensure, consistent with the purpose of OD 4.30, that there is a rationale for the sequencing of resettlement and that the *sequencing process is transparent and fair*".[67]

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how diligent, does not protect people if an emergency arises. Monitoring may raise the alarm in an emergency, but has little to do with protecting people from harm […]."

63 2004 *Pakistan National Drainage Program Project*, IR (ES), at xxii-xxiii.

64 2007 *Albania Integrated Coastal Zone Management and Clean-Up Project*, IR (ES) at xvii (emphasis omitted).

65 *See* section 7.4 above.

66 *See* above, note 122 (Ch. 7).

67 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors,*

Protecting the identity of Requesters

A different manifestation of the Inspection Panel's concern for due process, is its continuous efforts to protect the identity of Requesters – both from the borrower and from Bank management.[68] The Resolution is silent on the issue of confidentiality (although it prohibits anonymous Requests),[69] but the Inspection Panel has developed its own procedure to ensure that the identity of Requesters can remain confidential[70] – over repeated objections of Bank management.[71] Management argued that Requesters were concerned about keeping their identities confidential from their governments (borrowers), and not from the Bank. Management also contended that it needed to know the identity of Requesters to "prepare an adequate response" or to "otherwise address the alleged harm".[72] The Inspection Panel rejected these arguments. In the *Argentina Pro Huerta* case, the Panel noted that

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SEGBA V Power Distribution Project (Yacyretá), IR (ES), at 24 (emphasis added). *Also see* examples of the Panel's interpretation with underlying purpose of the OP&P in mind, discussed in section 8.3.1.2 above.

[68] The Panel's efforts are justified by various incidents where Requesters were intimidated, and even physically harmed – *see e.g.,* Clark (1999), at 2: "[…] CIEL would like to honor the memory of Fulgencio Manuel da Silva, farmer, poet and activist. Fulgencio was a leader in the dam-affected peoples movement in Brazil and helped organize the families affected by the Itaparica dam. Fulgencio played a major role in the filing of a claim on the Itaparica Resettlement project. After receiving several death threats, he was killed on October 16, 1997." *And see* the *Chad Pipeline* case, filed by, among others, Ngarlejy Yorongar, opposition leader and presidential candidate in the (then) upcoming Chadian presidential election. In his address to the Board (at §8), Ayensu noted: "given the world-wide attention to the human rights situation in Chad, Mr. Chairman, and the fact that this was an issue raised in the request for inspection by a Requester who alleged that there were human rights violations in the country, *and that he was tortured because of his opposition to the conduct of the project*, the Panel was obliged to examine the situation of human rights and governance in the light of Bank policies" (emphasis added).

[69] Shihata (2000), at 62. With anonymous Requests, the Inspection Panel does not know the identity of the Requester(s) either.

[70] *See* Inspection Panel Operating Procedures, at §18(b). Essentially, the Panel instructs potential Requesters to indicate whether they want their identity to be kept confidential. If confidentiality is required, the Panel will confirm the identity of the Requesters during their Eligibility field visit.

[71] Shihata (2000), at 62-64.

[72] *See e.g.*, 1999 *Argentina Special Structural Adjustment Loan*, MR, at §2, fn 2: "Because the Panel has granted anonymity [sic] to the parties represented by CELS, Bank management is unable to comment on various critical aspects regarding the potential eligibility of the Request under the terms of the Resolution. For example, whether or not any harm was indeed suffered by those whom CELS represents is impossible for Bank management to determine given that anonymity. For the same reason, it is impossible for Bank management to determine whether those whom CELS represents are in fact benefiting from programs, other than the PH Program, covered by the Social Budget Condition. It is conceivable that, as a result of those other programs, at least some of the individuals represented by CELS may be benefiting to an extent

> [t]he Board has so far trusted the Panel's discretion and judgement in this matter. To imply that the Panel should divulge their names to Management to enable it to comment on eligibility reveals a surprising and worrying level of understanding about this part of the Panel's process.[73]

Note, however, that the Board has never formally commented on this Panel practice. The Panel's comment therefore flows from the inference that the Board's silence on the matter has amounted to tacit approval.[74]

Grievance procedures and compensation

According to the Bank's OP&P, development projects that require (involuntary) resettlement must ensure that there are processes in place through which project affected people can appeal compensation decisions.[75] In several Requests, the Inspection Panel has uncovered various instances where these grievance procedures had serious due process related flaws. For instance, in *India Coal Sector Environmental and Social Mitigation*, the Panel stated that:

> it is not appropriate that PAPs should have to go through a lengthy and costly judicial processes [sic] to get just compensation, especially since not all PAPs can afford the direct costs of an appeal process and, even if they could, they would end up losing unless the costs of the appeal were added to their award. Even then, the delays and uncertainties associated with the process could result in tangible harm, especially since the awards are subject to further appeal by CCL [implementing agency].[76]

The Panel further commented that it was "unfortunate to note" that the implementing agency was appealing all compensation decisions already taken at that stage.[77] Bank staff were also "unable to confirm that any independent person was on the grievance committee", and the Panel was also "unable to establish" whether PAP members (that were serving on the grievance tribunal) were "elected democratically", or whether they were "selected

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that might even preclude the need for the direct nutritional support offered by the PH Program, thus rendering them unharmed by the budgetary fate of the PH Program and ineligible to act as affected parties vis-à-vis the Panel."

[73] 1999 *Argentina Special Structural Adjustment Loan*, ER, at §22.

[74] It would appear that Management has subsequently accepted this practice. The first Request where Bank management did not object to the Panel's practice of guaranteeing the confidentiality of Requesters' identity was the 2001 *Chad Petroleum Development & Pipeline Project* case.

[75] *See e.g.*, OP 4.12 (Involuntary Resettlement), at §17.

[76] 2001 *India Coal Sector Environmental and Social Mitigation Project and Coal Sector Rehabilitation Project*, IR (ES), at §16.

[77] 2001 *India Coal Sector Environmental and Social Mitigation Project and Coal Sector Rehabilitation Project*, IR (ES), at §§17 & 37.

by authorities".[78] The Panel concluded it was "clear that, as the Requesters claim, the compensation process in Parej East was and is not transparent" and, hence, the World Bank was not in compliance with its policies on involuntary resettlement.[79]

In *India MUTP*, project affected people objected to the independence of the members of the 'Independent Monitoring Panel' – i.e., the entity where an initial complaint had to be filed.[80] The Panel ultimately found that

> the grievance system lacks clear responsibilities, procedures and rules and has not been independent. Moreover, many PAPs have learned only recently about the existence of a grievance system and were not aware of the details of the process. In other cases, they have been frustrated with the alleged lack of objectivity and independence of the grievance mechanisms. The Panel notes that after its eligibility visit, MMRDA [implementing agency] took significant steps to improve the grievance procedures, but finds that the Bank has not ensured that the grievance mechanism is independent and objective.[81]

Finally, the Inspection Panel uncovered several issues with the project's grievance procedures in *Yacyretá (II)*. For instance, the Panel found that the "procedures for correcting the census or other resettlement related omissions and errors" (on which financial compensation was based) were "inadequate" and that a "standard and transparent appeals procedure" was not "available to affected people".[82] The Inspection Panel also asserted that a new Paraguayan law (governing expropriations) adopted at the time, was partly inconsistent with the Bank's policy on involuntary resettlement. The law only seemed to provide PAP with the option of "judicial proceedings" as a means to address grievances, which the Panel did not regard as "an accessible, simple and effective grievance procedure available to affected people to settle disputes" about resettlement matters.[83] Applying its 'two-prong' approach to compliance

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[78] 2001 *India Coal Sector Environmental and Social Mitigation Project and Coal Sector Rehabilitation Project*, IR (ES), at §17.

[79] Id. On inadequacy of compensation, *also see* 2001 *India Coal Sector Environmental and Social Mitigation Project and Coal Sector Rehabilitation Project*, IR (ES), at §§14,15, 46 & 66; and 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, at IR (ES), 25-26, and IR at §§294 & 322; *and see* 2004 *India Mumbai Urban Transport Project*, IR (ES), at 26, and IR, at §§443, 448 & 451.

[80] 2004 *India Mumbai Urban Transport Project*, IR (ES), at 25.

[81] Id.

[82] 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, IR (ES), at 22.

[83] 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, IR (ES), at 24. *See* also IR, at §§274 & 333: "[…] the Panel observes that the law firm, which prepared the legal opinion upon Management's request acknowledges that even though it is legally possible for the employees to subrogate a passive owner and sue EBY, that option is not a simple lawsuit but one with a restricted scope and an ample range of defences available to EBY. In addition, based on the Treaty, the workers

review (discussed above),[84] the Panel found that the Bank was compliant with OD 4.30 "to the extent that the resettlement plan provides for compensation" for loss of income, but that the "implementation procedures may have resulted in denying compensation to some affected people". Hence, the Bank was not fully compliant.[85]

'Substantive due process'

A final example relates to, what can perhaps be called, the Panel's efforts for ensuring 'substantive due process'.[86] Management often rejects Requesters' claims that they were 'forced' to do something (e.g., resettling) and insists that the project affected people have freely exercised an option. The Panel's position in these cases has consistently been that an option has to be a 'true' option – in the substantive sense of the word – in order for the Bank to be compliant with the relevant operational policy.

In *India Coal Sector Environmental and Social Mitigation*, for example, the Panel considered the compensation options provided to project affected people that had lost property as a result of the project. The Panel found that "both the process and the basis for house compensation [were] open to abuse and raise[d] serious questions".[87] Moreover, the World Bank's Involuntary Resettlement policy states a preference for 'land-for-land compensation' above cash options because it is more effective in realizing the Bank's sustainable development goals. In the *India Coal Sector* case, a cash option was included at a late stage in the project when the implementation of other compensation options ran into various difficulties. Since the inclusion of the cash option, however, most project affected people opted for cash compensation. The Panel concluded that this development was a "reflection of the house compensation option not being a 'real option', especially in the light of the flawed grievance procedure".[88] The Panel stated:

> […] it is difficult, if not impossible, to reconcile the Bank's aim of development with a one time cash grant for acquisition of home and land. Presenting a poor

would also have to travel from Encarnación to Asunción, Paraguay – five hours away – to file and follow such a lawsuit."

[84] *See* section 8.4 above.

[85] 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, IR (ES), at 24.

[86] *I.e.*, the legal notion that 'due process' does not only ensure a right to a fair and equitable legal procedure, but that it also protects substantive rights. In other words, the idea that (government) action should not affect substantive rights without proper justification, regardless of whether the correct procedures were followed. *See e.g.,* Koopmans (2003), at 230-231.

[87] 2001 *India Coal Sector Environmental and Social Mitigation Project and Coal Sector Rehabilitation Project*, IR (ES), at §18.

[88] 2001 *India Coal Sector Environmental and Social Mitigation Project and Coal Sector Rehabilitation Project*, IR (ES), at §19.

> oustee, whose previous source of survival included a small patch of land, with a check may be a legal way of getting them to move on, but it should not be confused with development.[89]

In *India Ecodevelopment*, Bank management "repeatedly stressed" that, contrary to the Requesters' claims, project affected people had two options "of equal weight and value in terms of the support they are to receive from project resources", namely: the affected (indigenous) people could remain in the area that was now designated to be developed as a National Park, or they could be resettled in close proximity outside the Park.[90] The Inspection Panel rejected the accuracy of this statement when it concluded:

> [w]hile the intent of the above [management's position] seems clear enough, the reality on the ground, as witnessed by the Inspector, does not appear to support it. The two options do not in fact appear to have the same weight and value. The voluntary relocation option is very real. For historical and other reasons, however, the stay option appears to be very tenuous, to the point perhaps of not being a real option at all.[91]

9.2.3. Remedies

The lack of legal (i.e., legally enforceable) remedies for individuals at the international level is a problem that is not limited to the World Bank. As Wellens noted:

> [i]n a natural combination with the absence of a system of judicial review of the acts in most international organisations, this lack of legal accountability is one of the most serious deficiencies in the present remedial regime vis-à-vis international organisations. [….] The absence of any kind of legal remedial action at the national or international level for all categories of potential claimants with respect to responsible individual officials is a direct consequence of the privileges and immunities granted to officials for all acts undertaken in the course of their official activities.[92]

The World Bank has established a mechanism that provides individuals with "recourse" – i.e., the Inspection Panel. However, adversely affected individuals also require "redress" – an area of the Inspection Panel process which, as many critics have argued, has so far failed to meet expectations.[93]

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89 2001 *India Coal Sector Environmental and Social Mitigation Project and Coal Sector Rehabilitation Project*, IR (ES), at §20.

90 1998 *India Ecodevelopment Project*, ER, at §52.

91 1998 *India Ecodevelopment Project*, ER, at §58.

92 K. Wellens, Remedies Against International Organisations, at 266-267 (2002).

93 *See* in general, K. Horta, *Rhetoric and Reality: Human Rights and the World Bank*, 15 Harvard Human Rights Journal 227 (2002). However, given that the Resolution explicitly places the provision of remedies outside the purview of the Panel (as will be discussed below), perhaps those expectations (albeit understandable) were unrealistic to begin with. Especially

As mentioned in Chapter 1, the effectiveness of the Inspection Panel as accountability mechanism falls outside the scope of the book.[94] Since, the issue of remedies is, in many respects, situated at the heart of the effectiveness debate, this section will only include a cursory discussion of remedies in the Inspection Panel context. The concluding chapter of this book, however, will make some suggestions for further research concerning this aspect.[95]

Recall that the Judicial Oversight Model describes three interdependent elements of legal remedies associated with the exercise of judicial oversight: development, enforcement, and effectiveness of remedies. The Model postulates that the development, enforcement and effectiveness of remedies are also influenced by the constitutional context and the degree of judicialization and judicial independence in the constitutional system. From these conjectures, the Model makes three observations, namely: legal remedies take a long time to develop, and even longer time to be effective; moreover, since the development and enforcement of remedies are closely linked, remedies are most effective if they are developed with enforcement already in mind. Finally, for legal remedies to be most effective, an (objective) partnership between courts and political institutions is required.

Insofar as the Inspection Panel process is concerned, all three elements – development, enforcement, and effectiveness – fall outside the Panel's mandate, as stipulated by the Resolution. Put differently, the Panel's mandate – as described by paragraphs 12 to 16 of the Resolution – does not contain any of the three elements of remedies. All the Panel is required to do, as paragraph 22 stipulates, is to:

> submit its [investigation] report to the Executive Directors and the President. The report of the Panel shall consider all relevant facts, and shall conclude with the Panel's findings on whether the Bank has complied with all relevant Bank policies and procedures.

The Resolution assigns the tasks of developing and enforcing (in the Bank context, more implementing) effective remedies to Bank management, and provides Management with two opportunities in this regard. First, Management "shall provide the Panel with evidence that it has complied, *or intends to comply* with the Bank's relevant policies and procedures", "[w]ithin 21 days of being notified of a request for inspection" by the Panel.[96] Second,

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in the Panel's earlier cases, Requesters would ask the Panel to provide them with (specific) Remedies. *See e.g.*, 1996 *Paraguay/Argentina Yacyretá Hydroelectric Project*, Request, at §67; 1997 *India NTPC Power Generation Project*, Request, at §67 and ER, at §11 (the Panel here informing the Requesters that the Resolution did not allow them to make recommendations about remedies); and 2001 *Papua New Guinea Governance Promotion Adjustment Loan*, Request, at 1-2.

94 *See* section 1.2.3 above.

95 *See* section 11.4 below.

96 Inspection Panel Resolution (1993), at §18 (emphasis added).

"[w]ithin six weeks" after the Panel has submitted its final investigation report to the Board, Bank management must "submit to the Executive Directors for their consideration a report *indicating its recommendations in response to such findings*".[97] The Board then considers both the Panel's investigation report (consisting of findings of compliance and/or non-compliance) and Management's recommendations (containing suggestions how the situation might be remedied in instances where the Panel found non-compliance).[98] Finally, the Resolution stipulates that the Bank will notify the Requesters "within two weeks of the Executive Directors' consideration of the matter" of the "results of the investigation and the action taken in its respect, *if any*".[99] It is also important to note in this regard, that Bank management is not bound to accept all the Panel's findings, which means that Management is free to reject a finding of 'non-compliance' and to refrain from formulating any remedial action on that particular point.[100]

As discussed above, the Board has instructed the Inspection Panel on occasion to be involved in remedial development (i.e., reviewing the Management remedial action plan) and enforcement (i.e., monitoring progress of Management's implementation of the remedial action plan);[101] but it remains the Board's prerogative to decide whether – and how – to involve the Panel in remedial aspects. It is perhaps questionable whether involving the Inspection Panel in such a manner (even on an *ad hoc* basis) is the best institutional solution.[102] However, it remains the only form (albeit informal, and *ad hoc*) at the moment of the type of objective partnership that is required between the 'quasi-judiciary' (Panel) and the 'political institution' (Management) to realize effective remedies.

On the other hand, the Resolution does not explicitly preclude the Panel from engaging in the development of effective remedies. As with other areas – discussed as examples of judicialization in Chapter 8 – the Inspection Panel might *influence* the development and enforcement of effective remedies.[103] The Panel has arguably done so in three ways. First, by compiling investigation reports that are high in quality and in 'persuasive power' (e.g.,

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97 Inspection Panel Resolution (1993), at §23 (emphasis added).

98 Id.

99 Id (emphasis added).

100 *See e.g.*, below, note 148 (Ch. 10). Although the Board – as masters of the Resolution – can in theory prevent that from happening.

101 *See* section 7.1.1 above.

102 For instance, what is the impact (if any) of this practice on the Inspection Panel's *de facto* independence? *And see* Kingsbury (1999), at 334: "The board's oscillations between encouraging and discouraging a regulatory approach involving the panel, highlight the need for agreement on a coherent scheme integrating quasi-regulatory and quasi-judicial approaches. The lack of such a scheme has led to systemic problems and to unsatisfactory case management, as for instance, in the case of the Yacyretá Hydroelectric Project […]."

103 *But see* the suggestion in section 10.2.3 below, that limitations inherent to the Resolution will probably prevent a high degree of judicialization in this regard.

a well-researched report that is supplemented by ample supportive evidence and independently verified facts),[104] the Panel arguably places more pressure on Bank management to acknowledge failures and to come up with remedial action plans that are, in turn, of high quality (e.g., consisting of quantifiable action steps, of which the implementation can be monitored effectively). Second, by establishing its credibility with the Board (among other things, through the high quality of its investigations), the Panel creates an incentive for the Board to involve the Panel in the remedial aspects.[105] Third, by analysing the root causes of instances of non-compliance (mentioned as an example of judicialization in Chapter 8),[106] the Panel arguably gives the Board pointers towards potentially required remedial action steps.

The *India MUTP* and *Albania Coastal Zone Management* Requests are prominent examples where the Panel's investigation findings led to definite remedial action steps. In *India MUTP*, for instance, the Bank "suspended disbursements on the road and resettlement components" until the satisfactory completion of the Management action plan (which the Panel reviewed, on request of the Board).[107] And in *Albania Coastal Zone Management*, the Bank undertook a series of far-reaching remedial actions, including launching an internal investigation into project irregularities, and providing financial aid to the affected people.[108]

9.3. Indirect Legitimization of the World Bank

Most Inspection Panel cases illustrate how intricate the link is between accountability and legitimacy, especially since Bank and borrower obligations are becoming increasingly intertwined.[109] Many Requests also demonstrate

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[104] *See* section 9.1 above on the role of the Panel's fact-finding.

[105] *See* section 7.2.2 above

[106] *See* section 8.1.2 above.

[107] *See* World Bank Press Release of 29 March 2006 in the 2004 *India MUTP* case, at 3. For a discussion of the 2004 *India MUTP* case, *see* section 7.3.4 above.

[108] For a discussion of the 2007 *Albania Integrated Coastal Zone Management and Clean-Up Project* case, *see* section 7.3.5 above. Note that some commentators also consider China's withdrawal of its loan application at the end of the *Qinghai* investigation to be a remedial "victory" (*see e.g.*, D. Clark & K. Treakle, *The China Western Poverty Reduction Project*, at 211-246, *in* Clark *et al.* (2003)). Given that China decided to fund the project from its own resources – thus without any World Bank safeguard policies and supervision (*see* World Bank Press Release of 7 July 2000) – it was probably a hollow remedial 'victory'.

[109] *See* above, note 12 (Ch. 1). As Bank Management explained in 2006 *Honduras Land Administration Project*, MR, at §29: "Governments are responsible for preparing projects, which includes preparation of background documents (e.g., Social Assessment, EA), policy and operational manuals (e.g., IPDP, Process Framework, Project Operational Manual), and consultations. The Bank's role is to appraise these documents and Management Response processes and, if they are in accordance with Bank policies, including safeguard policies,

how fragile perceptions about the World Bank's legitimacy are. One incident can be devastating for the legitimacy of the Bank, as this excerpt from "field interviews" conducted by the Panel in *Albania Coastal Zone Management* indicates:

> [t]he demolition process caused wrenching and painful scenes of opposition and resistance to demolition, but to no avail. People screamed and cried. According to the people present at the time in Jale, an official of the Construction Police said, 'you are crying now, but don't worry, you will be eating with a silver spoon soon, as this is a part of a big World Bank project. They will invest here and will take care of you.'[110]

Instead, after reviewing the Request, the Bank stated "categorically, that there [was] no direct or indirect linkage between the Project" and the demolitions that [were] the basis of the Request, arguing that "the demolitions were part of an ongoing Government program […]".[111] Claims the Inspection Panel later refuted convincingly.[112]

Recall that 'legitimacy' in the context of this book refers to the sociological and moral aspects of the legitimacy of political institutions.[113] The Judicial Oversight Model describes how courts indirectly contribute – through the exercise of judicial oversight – to strengthening the legitimacy of political institutions. The Model hypothesizes that courts help to legitimize political institutions by painting them in a favourable light concerning their commitment to democracy, human rights and the rule of law. Put differently, judicial oversight mechanisms provide political institutions with the opportunity to enhance their legitimacy.

This section will evaluate whether the Inspection Panel creates opportunities for the World Bank to display its commitment to good governance (in the absence of democracy at the international level) (9.3.1), human rights (9.3.2), and to the rule of law (9.3.3) – thereby indirectly contributing to the legitimization of the Bank. Note, however, that this section is not answering the question whether the Inspection Panel *has*, in fact, improved the legitimacy

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endorse them as the basis for Bank financing. After Project Effectiveness [i.e. loan being effective], the role of the Government is to implement the project whereas the Bank supervises project implementation."

[110] 2007 *Albania Integrated Coastal Zone Management and Clean-Up Project*, IR at §78.

[111] 2007 *Albania Integrated Coastal Zone Management and Clean-Up Project* IR (ES), at ix.

[112] *See* section 7.3.5 above. The Panel is certainly concerned about the Bank's reputation – *see e.g.*, 2001 *Chad Petroleum Development & Pipeline Project*, IR, at §123: "The Panel considers this issue [concerning the Lom River Bridge] to be complex and in need of prompt attention *in order to maintain the Bank's reputation and integrity* and to comply with the provisions of the Project EMP." (Emphasis added.)

[113] *See* section 1.3.4 above.

of World Bank.[114] Therefore, the argument made here hinges primarily on the existence of particular perceptions – which are admittedly supported largely through self-evidence.

9.3.1. Good Governance

In the absence of democracy at the international level, good 'governance' or good 'administration' is arguably an alternative source of (procedural) legitimacy for an international institution such as the World Bank.[115] The ILA has identified the following three elements of 'good governance':

> […] transparency in both the decision-making process and the implementation of the ensuing institutional and operational decisions; a large degree of democracy in the decision-making process; access to information open to all potentially concerned and/or affected by the decisions at stake […].[116]

The World Bank's OP&Ps incorporate all these elements.[117] Several examples from Inspection Panel practice, mentioned in the preceding chapters, have illustrated how the Panel has held the Bank accountable for decisions that failed to comply with the standards of good governance, as reflected by the policies and procedures.[118] For instance, the Panel has developed the substantive meaning of 'meaningful and informed participation', which might result in improved participation of PAP in decision-making procedures and in increased transparency.[119] The Inspection Panel process therefore creates an opportunity for the Bank to rectify failures in this regard, and to demonstrate its ongoing commitment to the principles of good governance.[120]

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[114] Moreover, as with the discussion on remedies, such a question concerns the effectiveness of the Inspection Panel – which falls outside the scope of this book.

[115] *See e.g.*, D.C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 The Yale Law Journal 1490, at 1494 (2006).

[116] ILA Report (2004), at 8.

[117] For a summary of the Bank's current OPM, *see* 6.2.1 section above.

[118] *I.e.*, essentially all the Inspection Panel's findings of 'non-compliance' constitute examples of this.

[119] *See* section 8.3.1.2 above.

[120] *See* above, note 1 (Ch. 6). There is some evidence that the possibility of an Inspection Panel investigation at least influences some Bank behaviour (although it is often criticized as 'Panel proofing') – *see e.g.*, 2004 *India Mumbai Urban Transport Project*, IR, §138: "The staff was also concerned that should those [R&R] issues not be addressed properly, the Project might eventually 'end up on the table of the Bank's Inspection Panel'." *Also see* IR, at §418.

9.3.2. Human Rights

The Inspection Panel's contribution toward human rights protection in the context of the World Bank has been discussed earlier in this chapter.[121] With the *Chad Pipeline* case in particular, the Inspection Panel created a platform on which the Bank could potentially display its commitment to human rights. Given the longstanding criticism of the Bank's narrow definition of its mandate concerning human rights, Management's reiteration (in *Chad Pipeline*) of the Bank's conventional position that its mandate does not extend to include civil and political rights – and especially Management's blunt response that the Bank does not have policies on human rights (that could have been contravened) – have been a disappointment. Indeed, *Chad Pipeline* has arguably been a missed opportunity through which the Bank could have bolstered its legitimacy to a significant degree.

As illustrated in this chapter, the Panel has been largely successful in placing human rights protection on the Bank's agenda through various indirect measures.[122] However, these indirect measures are probably not recognized as 'human rights' measures, and – since legitimacy is to a high degree determined by perception – are therefore likely to be of limited use for legitimizing the Bank.

9.3.3. Rule of Law

It has been noted in Chapter 1 that the 'international rule of law' (which is still in the process of being conceptualized) is likely to incorporate (at least elements of) independent adjudication, public promulgation of laws, consistency with international legal norms and standards, and equal enforcement.[123] From the preceding analyses in Part II, it can be concluded that the Inspection Panel process contributes to the advancement of all four these components in the context of the World Bank, albeit to some elements more so than to others.

For instance, Chapter 7 has illustrated how the Panel has asserted (and thereby increased) its *de facto* independence from Bank management (i.e., ensuring independent adjudication).[124] The World Bank's OP&Ps have been in the public domain for some time already, but the Inspection Panel process has elevated the general (public) awareness of these policies to a new level (i.e., contributing to the public promulgation of laws).[125] In *Chad Pipeline*, the Inspection Panel has argued that the Bank's O&Ps reflect various

[121] *See* section 9.2 above.
[122] *See* section 9.2.2 above.
[123] *See* section 1.3.1 above.
[124] *See* in general Chapter 7 above.
[125] *E.g.*, by linking Requester claims to existing OP&P; and by elaborating on the substantive meanings of certain OP&P provisions – see section 8.3 above.

international (human rights) standards;[126] thereby echoing commentators like Kingsbury who has made similar arguments (i.e., highlighting consistency with international legal norms and standards).[127] Finally, the Inspection Panel has contributed significantly to the consistent enforcement of operational policies across World Bank projects, for instance, by developing a consistent compliance review approach (i.e., ensuring equal enforcement).[128] Another example of the Panel's contribution to equal enforcement is its rejection of Management's 'country precedent' approach in *China Qinghai*, which implied that certain deviances from (binding) OP&Ps had to be allowed in order to incorporate country specific or regional differences. The Panel stated:

> Management's past experience in a country can obviously provide the basis for a certain level of comfort that the work required by the policies will be undertaken successfully. In the Panel's view, it is an entirely different matter, however, to suggest that experience and precedent can determine what is required by the policies.[129]

In sum, given how underdeveloped the international rule of law still is, the Inspection Panel procedure is a reasonably well-developed manifestation of the notion in the context of the World Bank. By committing itself to the Inspection Panel procedure and, importantly, by accepting the outcomes of the Panel's investigation (e.g., by admitting non-compliance)[130] and providing effective remedies to PAP, the Bank stands to benefit from the Panel's legitimizing effect.

9.4. Summary

The aim of this chapter has been to establish whether the Inspection Panel concerns itself with (constitutional) dispute resolution, human rights protection, and indirect legitimization of the World Bank – thus, similar to the outcomes of judicial oversight. First, the chapter has shown that the Inspection Panel's mandate is not aimed at resolving 'constitutional' disputes since it is not the final arbiter of establishing the meaning of Inspection Panel Resolution provisions – the Bank's Board is. On the other hand, a critical component of several disputes before the Panel concerns the interpretation of Bank OP&Ps, which often include – what can be described as – 'constitutional' elements (such as individual rights). Thus, while the Panel's dispute resolution efforts are not

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126 *See* section 9.2.1 above.
127 Kingsbury (1999), at 323, 326, and 327.
128 *See* section 8.4 above.
129 1999 *China Western Poverty Reduction Project*, IR, at §13.
130 *See e.g.*, W. Wallis & D. Mahtani, *World Bank admits Congo omissions*, 6 December 2007, at <www.ft.com>; and 2005 *Cambodia Forest Concession Management and Control Pilot Project*, MR to IR, at §35-39; *also see* note 1 (Ch. 9).

restricted to 'constitutional' disputes, the Panel is instrumental in influencing (if not solving) vertical disputes between Requesters and the Bank; and also contributes to horizontal dispute resolution between Bank management and Board through independent fact verification and finding.

Second, the chapter has illustrated that the Inspection Panel seldom invokes human rights concerns directly (the only example to date being the *Chad Pipeline* case), but its practice reveals a variety of indirect human rights considerations, such as the Panel's emphasis on harm and its concern for various 'due process' elements (e.g., protecting the identify of Requesters, ensuring effective grievance procedures on development projects, and showing concern for 'substantive' due process). Third, the chapter has briefly considered the issue of remedies for Requesters, and has concluded that all three elements of remedies – development, enforcement, and effectiveness – currently fall outside the Inspection Panel mandate, although the Board has involved the Panel on an *ad hoc* basis in some remedial activities. Moreover, it seems plausible that the Panel has influenced the development and enforcement of effective remedies, first, by delivering high-quality investigation reports that raises expectations for Management to come up with remedial action plans that are of similar high quality; second, by establishing its credibility with the Board; and, third, by including root cause analyses in its reports of areas where non-compliance had been found.

Fourth, the chapter has illustrated how the Inspection Panel process creates opportunities for the Bank (if not always utilized by Bank management) to indirectly strengthen its legitimacy. Specifically, the Panel holds the Bank to standards associated with good governance and human rights (albeit mostly indirectly). Ultimately, the Inspection Panel process is an embodiment of the international rule of law in the World Bank context, because the Panel facilitates 'independent adjudication', 'public promulgation of laws', 'consistency with international norms and standards', and 'equal treatment'.

In conclusion, the Inspection Panel realizes effects or outcomes that appear similar in substance (if not in form) to the outcomes of judicial oversight realized by courts in national constitutional systems.

CHAPTER 10

THE INSPECTION PANEL AND THE DYNAMICS OF JUDICIAL OVERSIGHT

Although the creation of the Inspection Panel signifies a positive step by the Bank toward achieving its goal of sustainable development, the public should not overestimate the powers of the Panel.[1]

The 'dynamics' of judicial oversight, as set out in Chapter 5, is concerned with the relationships between system components (such as the relationships between courts and political institutions, and between the nature and effect of judicial oversight relationship), and their consequences for change (i.e., growth and decline), equilibrium and fluctuation, as well as the general evolution of courts.[2] The analyses in Chapters 7, 8 and 9 indicate that the Inspection Panel has expanded its *de facto* independence and judicialization to some degree (suggesting growth).[3] However, the analyses in these chapters have also illustrated that the Inspection Panel has occasionally contracted the degree of its *de facto* independence and judicialization (suggesting decline).[4] For instance, the Inspection Panel's (expansive) interpretations of the Resolution and OP&Ps do not always prevail;[5] and the two Board Reviews of the Inspection Panel have had some limiting effect on the Panel's expansion

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1 K.J. Dunkerton, *The World Bank Inspection Panel and its Affect on Lending Accountability to Citizens of Borrowing Nations*, 5 University of Baltimore Journal of Environmental Law 226, at 260 (1995).

2 *See* in general Chapter 5.

3 For a discussion of the tendency to 'growth', *see* section 2.3.2.3 above.

4 For a discussion of the tendency to 'decline', *see* section 5.1 above.

5 *See* section 8.3 above.

of its *de facto* independence and judicialization (although, in other respects, it has accomplished the opposite).[6]

Is there evidence, however, that the Inspection Panel pays excessive 'deference' toward the World Bank Board and, more importantly, to Bank management? In other words, does the Panel exercise self-restraint to the degree that its *de facto* independence and judicialization is significantly reduced? Several examples from the Inspection Panel's institutional history and practice suggest that the Panel, indeed, does exercise self-restraint on occasion (10.1). Although, as the examples also indicate, there are instances where it might be questioned whether the effect of the Panel's exercise of restraint will ultimately reduce the degree of judicialization (and, through the working of the reinforcing feedback loop, of judicial independence).[7]

Next, working from the basis that the Panel's expansion of judicialization and independence are not indefinite, the chapter will concentrate on the limiting factors that most likely curb growth in the Inspection Panel context (10.2). The chapter will subsequently analyse two examples from the Inspection Panel's institutional history and practice that illustrate the Panel's fluctuation between positions of activism and restraint, as defined earlier in this book (10.3).[8] The next section will consider the Inspection Panel's institutional development and draw tentative conclusions about the Panel's movement across the 'four quadrants' of the Judicial Independence/Judicialization Plane (10.4).[9] The chapter will conclude with a summary of the major findings (10.5).

10.1. The Panel Exercising Restraint?

Given that the final decision-making authority lies with the Board, the Inspection Panel is careful to pay it deference. For instance, it has been noted earlier that one of the ways the Inspection Panel describes its role is 'acting on behalf of the Board'.[10] The Panel is also quick to point out its own faithfulness to the Resolution and other Board decisions (such as the clarifications that came out of the two Board Reviews in 1996 and 1999) – and contrast it with Management's shortcomings in this area. For example, in *Tanzania Power*, the Panel stated that it

> observes with concern the formalistic approach of the [Management] reply. This approach appears to introduce additional eligibility requirements that would modify the Resolution *which is the sole prerogative of the Executive Directors*.[11]

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6 *See* section 7.1.1.1 above.

7 On the working of self-reinforcing feedback loops, *see* sections 2.3.2.3 and 5.1.1 above.

8 *See* section 5.4 above.

9 *See* section 5.3 above.

10 *See* above, note 6 (Ch. 9).

11 1995 *Tanzania Power IV Project*, ER, at §8 (emphasis added). *Also see* ER, at §11: "[t]he

While in *Argentina/Paraguay Yacyretá I*, and similarly in *Brazil Itaparica Resettlement and Irrigation*, the Inspection Panel reminded Management that the "Executive Directors have expressed the hope [in the 1996 Board Review] that the Panel process will not focus on 'narrow technical grounds' with regard to eligibility".[12]

Given borrowers' concerns during the Panel's early years that the process was being manipulated to investigate borrowers instead of the Bank,[13] the Panel took great pains to ensure both Board and borrowers that it was solely focused on investigating World Bank compliance.[14] For example, in *Brazil Rodônia PLANAFLORO*, the Panel affirmed:

> [s]ince the Panel's function is limited to investigating the alleged failure of the *Bank* to follow its own policies and procedures, it cannot comment on actions which are the responsibility of other parties, such as the borrower or project executing agencies. In this instance, however, the Panel would like to record the fact that it is impressed with Federal and State authorities' and agencies' renewed commitment to the objectives and execution of PLANAFLORO.[15]

Of particular interest, however, is whether the Inspection Panel shows notable deference to the Bank's Management – which is the subject of the Panel's compliance review. Based on what has already been demonstrated in the previous chapters (and Chapter 7 in particular), the Panel does not hesitate to differ from – and challenge – Bank management. However, it is difficult to determine with certainty whether the Panel has exercised *unnecessary* or *excessive* restraint towards Management. The Inspection Panel usually reviews Bank compliance with various OP&Ps, based on a variety of Requester claims. Therefore, it is not unusual for Panel reports to contain mixed findings.[16] With this constraint in mind, this section will consider three examples that might be indicative of the Panel exercising self-restraint. First, the section will examine instances where the Panel explicitly limited its own mandate (10.1.1); second, the section will consider occurrences where the Panel allowed for broader Management discretion (10.1.2); and, third, the circumstances surrounding the two *Yacyretá* cases, and the Panel's apparent 'self-restraint' will be assessed (10.1.3).

Panel does not review decisions of the Executive Directors. The Panel did review Management's actions in providing information to the Executive Directors. Based on the above findings the Panel is satisfied that Management has followed the requirements […]."

12 *See* 1996 *Paraguay/Argentina Yacyretá Hydroelectric Project*, ER, at §14; *and see* 1997 *Brazil Itaparica Resettlement & Irrigation Project*, ER, at §12.

13 *See* section 7.1.1.

14 *See e.g.*, 1999 Board Review Conclusions, at §12: "The Panel's methods of investigation should not create the impression that it is investigating the borrower's performance."

15 1995 *Brazil Rodônia Natural Resources Management Project*, ER, at §12 (emphasis in the original).

16 *E.g.*, the Panel typically finds the Bank to be 'compliant', 'partially compliant', and 'non-compliant' – *see e.g.,* below, note 148 (Ch. 10).

10.1.1. The Panel Explicitly Staying within the Boundaries of its Mandate

The Inspection Panel often makes it explicit that it is staying within the boundaries of its mandate. Although, in mentioning a particular issue, the Panel is arguably drawing attention to it, which might have been the Panel's purpose in the first instance.[17] For example, in *Brazil Land Reform & Poverty Alleviation* (I), the Panel noted that the

> Requesters raise a number of political and pragmatic issues that do not relate directly to Bank policies and procedures. The role of expropriation and the legality of alternative methods to carry out the constitutionally mandated agrarian reform program, for example, are clearly outside the purview of the Panel although they provide a useful context to understand the concerns of the Requesters about the Bank's role in the Project.[18]

In *Tanzania Emergency Power*, the Panel affirmed that "allegations concerning possible unauthorized staff actions in relation to political influences or considerations might amount to administrative misconduct" and, therefore, were "clearly outside the Panel's mandate".[19] And in *India NTPC Power Generation I*, the Panel explicitly stated that it would "not deal with some of the Requesters' demands" because if fell outside the ambit of the Resolution. For instance, the Panel affirmed that it would not "review actions of the borrower"; "give 'advice' on remedies" – as this was Management's prerogative;[20] and that it would not apply "pressure" on the Bank to "take actions or decisions".[21] While in the *Cameroon Petroleum Development and Pipeline* case, the Panel reported that, in the course of its investigation,

> nearly 60 workers associated with the Pipeline Project approached the Panel with a variety of concerns, including: compensation for work-related accidents, hiring and dismissal practices, disputes over the employers' contribution to the local social security system, as well as claims that the "Project's poor working conditions" were adversely impacting on the workers' health and safety.[22]

The Panel actively investigated these claims and concluded that, except for the claims concerning "occupational health and safety", "the alleged violations [were] not covered by any Bank policy or procedure" and consequently the Panel was "precluded from reviewing them".[23]

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17 *Also see* the examples of indirect borrower criticism in section 8.1.1 above.

18 1998 *Brazil Land Reform & Poverty Alleviation Project*, ER, at §19.

19 1995 *Tanzania Power IV Project*, ER, at §10.

20 *See* section 9.2.3 above. *Also see* 1997 *India NTPC Power Generation Project*, ER, at §46.

21 1997 *India NTPC Power Generation Project*, ER, at §11.

22 2002 *Cameroon Petroleum Development and Pipeline Project, and Petroleum Environment Capacity Enhancement Project*, IR (ES), at §47, fn 1. *Also see* ER, at §3 and IR, at §80.

23 Id. The Panel also noted, however, that the "Cameroonian authorities including its Judiciary have had a history of involvement with these issues in the context of the Pipeline Project." *Also*

10.1.2. The Panel Allowing for Broader Management Discretion

A prominent issue on which the Panel (ultimately) allowed Bank management a greater 'margin of appreciation' involves the interpretation of paragraph 13 of OD 4.20 (Indigenous People).[24] The Inspection Panel and Bank management have long disagreed about the correct interpretation of this paragraph, which stated:

> [f]or an investment project that affects indigenous peoples, the borrower should prepare an indigenous peoples development plan that is consistent with the Bank's policy. Any project that affects indigenous peoples is expected to include components or provisions that incorporate such a plan. *When the bulk of the direct project beneficiaries are indigenous peoples, the Bank's concerns would be addressed by the project itself and the provisions of this OD would thus apply to the project in its entirety.*[25]

The contentious point between the Panel and Management was whether this provision required Management to develop a separate Indigenous Peoples Development Plan (IPDP) in cases where indigenous peoples formed the majority of project affected people, *in addition to* applying the policy to the entire project. This issue arose in *India Ecodevelopment*,[26] *China Qinghai*,[27] and *India Coal Sector*.[28]

Management's position had consistently been that there was no need to develop a separate IPDP – as OD 4.20 had to be applied to the project in its entirety, all project documents essentially formed the IPDP. On the face of it, Management's interpretation seems to come closest to the text of paragraph 13. The Inspection Panel, however, disagreed with Management's interpretation, arguing that a separate IPDP was required *and* (not 'or') that the policy had to be applied to the entire project.[29] The rationale behind the Panel's position was the 'objective' of OD 4.20 (Indigenous Peoples), and the concern that indigenous peoples' issues would easily be buried in projects.[30] As the Panel explained in the *Qinghai* case:

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see 1998 *Lesotho/South Africa Highlands Water Project*, ER, at 8; 1998 *Brazil Land Reform & Poverty Alleviation Project*, ER, at §18; and 2004 *Pakistan National Drainage Program Project*, IR (ES), at xv.

[24] For another example where the Inspection Panel has (inconsistently) allowed Management greater discretion, *see* section 10.3.2 below.

[25] OD 4.20 (Indigenous Peoples), at §13 (emphasis added).

[26] 1998 *India Ecodevelopment Project*, MR, at §12; and ER, at §§vi, 24 & 48.

[27] 1999 *China Western Poverty Reduction Project*, Request, at 4; and IR (ES), at §63.

[28] 2001 *India Coal Sector Environmental and Social Mitigation Project and Coal Sector Rehabilitation Project*, IR (ES), at §73.

[29] 1999 *China Western Poverty Reduction Project*, Request, at 4; and IR (ES), at §63.

[30] A valid concern, given the Inspection Panel's recurring finding that the Bank overemphasizes infrastructure and technical components over 'sustainable development' components – *see e.g.*, 1997 *Brazil Itaparica Resettlement & Irrigation Project*, ER, at §39; 2005 *Cambodia*

> [t]he danger in this [Management's] approach is that a Bank-financed project could legitimately overwhelm the hopes and aspirations of an indigenous population, so long as the project benefits a larger population of some other indigenous people. And the "project in its entirety" could constitute the "Indigenous Peoples Development Plan" (IPDP) required by the OD since "the bulk of the direct project beneficiaries" would be indigenous people. The Panel is strongly of the view that this interpretation of the last sentence of paragraph 13 was never intended and should not be allowed to stand.[31]

However, the Inspection Panel seems to have accepted Management's interpretation of OD 4.20 paragraph 13, as is reflected in *Mexico COINBIO*:

> [w]ith respect to the requirements of OD 4.20 in the Project preparation, the [Management] Response asserts that the 'Project design incorporates the requisite elements of an IPDP.' The Project Appraisal Document (PAD) has been regarded 'in its entirety' as an IPDP given that 80 percent of the people affected by the Project are indigenous peoples.[32]

Interestingly, however, in this case the Inspection Panel 'used' the fact that the entire PAD was considered to be an IDPD 'against' Management. The major concern of Requesters in *Mexico COINBIO* was that the Bank was supporting a proposed "restructuring of the project without the involvement of the state committees, an action that implies that they [state committees] will be stripped of their powers […]".[33] Management denied these claims, stating that the "proposed measures" were meant "to improve Project implementation" and that no restructuring has happened yet. Management also affirmed that "discussions that may lead to modifying the Project have involved the community representatives and will continue to involve systematic consultation with Project stakeholders".[34] The Panel accepted Management assurances in principle, but still voiced its concern over the future implementation of the project.[35] The Panel stated in an apparent caveat to Management (and, consequently, alerting the Board):

> [s]ince Management has stated clearly that the Project constitutes an IPDP, any amendments that would be detrimental to the active and 'informed participation

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Forest Concession Management and Control Pilot Project, IR (ES), at 16-17; and 2002 *Cameroon Petroleum Development and Pipeline Project, and Petroleum Environment Capacity Enhancement Project*, MR, at §71, and IR (ES), at 17. For a discussion of how the Panel emphasizes the objective behind OP&Ps, *see* section 8.3.1.2 above.

[31] 1999 *China Western Poverty Reduction Project*, IR, at §§171-178 & 276.

[32] 2004 *Mexico Indigenous and Community Biodiversity Project (COINBIO)*, ER, at §21. It is conceivable that the Panel accepted Management's interpretation of paragraph 13 in this case in anticipation of the change made in OP/BP 4.10 – *see below*, note 37 (Ch. 10).

[33] 2004 *Mexico Indigenous and Community Biodiversity Project (COINBIO),* Request, at 2; and ER, at §15.

[34] 2004 *Mexico Indigenous and Community Biodiversity Project (COINBIO),* ER, at §§23, 25 & 30.

[35] 2004 *Mexico Indigenous and Community Biodiversity Project (COINBIO),* ER, at §47.

> of the indigenous peoples themselves' would be contrary to stated Bank policies and procedures.[36]

OD 4.20 was subsequently converted into the new OP/BP 4.10 on Indigenous People, which clearly reflects Management's position on this issue:

> [w]hen Indigenous Peoples are the sole or the overwhelming majority of direct project beneficiaries, the elements of an IPP [Indigenous Peoples Plan] should be included in the overall project design, and a separate IPP is not required.[37]

10.1.3. The 1992 and 2002 *Yacyretá* Requests

The *Yacyretá* project was the subject of two Inspection Panel Requests – 1996 *Paraguay/Argentina Yacyretá Hydroelectric Project* (i.e., *Yacyretá I*) and 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project* (i.e., *Yacyretá II*). These two Requests provide an interesting study of how the Inspection Panel seemingly exercised self-restraint, without necessarily decreasing the degree of judicialization and judicial independence. The core of this discussion concerns the *Yacyretá II* case (10.1.3.2), but a discussion of the Panel's 'Review' mandate in *Yacyretá I* is required first (10.1.3.1).

10.1.3.1. The Panel's 'Review' mandate in *Yacyretá I*

Yacyretá I was a prime example of the Panel's early years during which the Board could not reach agreement on authorizing full Panel investigations.[38] For instance, it took the Board two months to respond to the Panel's ER,[39] and it had to reach a compromise position on a reduced Panel investigation: the investigation had to be called a "review and assessment" since the word "investigation" had become associated with the notion of borrower wrongdoing.[40] Furthermore, the investigative scope of the 'review' was limited to the areas of resettlement and environment,[41] and to an assessment of the adequacy of the remedial action plan (which was agreed upon between the Bank and the borrowers).[42] The Board also allowed the Panel only four

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[36] 2004 *Mexico Indigenous and Community Biodiversity Project (COINBIO),* ER, at §48.

[37] OP/BP 4.10 (Indigenous Peoples), at §12 – affecting projects that are reviewed "on or after July 1, 2005".

[38] *See* section 7.1.1 above.

[39] *See* K. Treakle, *Accountability at the World Bank: What Does It Take? Lessons from the Yacyretá Hydroelectric Project, Argentina/Paraguay*, at 9-10 (1998), at <www.bic.org>.

[40] *See* Shihata (2000), at 121.

[41] *See* 1996 *Argentina/Yacyretá Hydroelectric Project*, Review and Assessment, at §1; *and see* Shihata (2000), at 120.

[42] 1996 *Paraguay/Argentina Yacyretá Hydroelectric Project*, Review and Assessment, at §1.

months to conduct this review.[43] "At the same time," as the Panel described it, "the Executive Directors decided that 'independent of the above decision', *the Inspection Panel was to review the extent to which the Bank staff had followed Bank procedures"* in the *Yacyretá* project.[44] The implication being that 'procedures' referred only to the 'good practice' guidelines that were not binding on Bank staff, whereas 'policies' referred to the 'Operational Directives' which contained elements that were binding on staff.[45]

This last component of the Panel's 'review' mandate proved to be controversial because, during the actual review, the Panel did not limit itself to reviewing Bank compliance with 'procedures' only. The Panel justified this by arguing that "Bank procedures, in practice, flow only from Bank policies".[46] The Panel also questioned the usefulness of distinguishing between 'policies' and 'procedures', arguing that the division was not nearly as clear-cut:

> […] the policy statements in force at the time the different loans for this project were prepared and approved, and therefore, subject to the Panel's review do not distinguish between what is meant to be a policy and what should be regarded as a 'procedure' or just a guidance to staff (or 'good practice'). Also in the words of the Bank's General Counsel [Shihata], the 'limits of flexibility' in their application is 'not always clear either'. For example, OD 4.01 on 'Environmental Assessment' defines it as 'a flexible procedure […] which should vary in breadth, depth, and type of analysis depending on the project.'[47]

This flexible interpretation resulted in some controversy at the time of the Board's discussion of the Panel's Review report. According to Shihata, the controversy was not resolved at the Board meeting; but his own conclusion was that the "Panel's review was certainly not limited to Bank 'procedures'".[48]

In conclusion, whatever its formal designation, (the words 'inspection' or 'investigation' were carefully avoided throughout), the 'review' in *Yacyretá I* amounted to a *de facto* investigation – in no small part due to the Panel's

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[43] Unlike 1997 *India NTPC Power Generation Project* (*see* section 10.3.1 below), the Inspection Panel was allowed to visit the project area once again.

[44] 1996 *Paraguay/Argentina Yacyretá Hydroelectric Project*, Review and Assessment, at §1 (emphasis added). *But see* Shihata (2000), at 120: Shihata noted that this second sentence was not part of the original "negotiated formula", but was introduced (and adopted) during the Board meeting over objections of certain Board members. *And see* Kingsbury (1999), at 335: "Apart from calling for something like an inspection while avoiding the terminology that it had itself established, the board here [in *Yacyretá I*] introduced an element of opacity by referring only to 'Bank procedures'; rather than the 'Bank operational policies and procedures' that ordinarily define the scope of inspection."

[45] Note that this position created lots of uncertainty, as was revealed by *China Qinghai*, necessitating the conversion process – *see* section 6.2.1 above; *and see* Shihata (2000) at 41-46.

[46] Shihata, quoting the Inspection Panel – *see* Shihata (2000), at 121, fn. 63.

[47] 1996 *Paraguay/Argentina Yacyretá Hydroelectric Project*, Panel Review and Assessment, at §247.

[48] Shihata (2000), at 121.

judicialization efforts over the course of the investigation.[49] That the Panel's 'review' in *Yacyretá I* amounted to a proper investigation can also be discerned from the Review report's findings, which contained strong evidence of World Bank non-compliance, framed in no uncertain terms.[50]

10.1.3.2. The *Yacyretá II* eligibility phase

Ten years after the original Request was registered, a different Paraguayan NGO filed a second Request on the *Yacyretá* project with the Inspection Panel. If one accepts the argument that the Panel had already conducted an investigation on the project, it would mean – in terms of the Resolution – that the Panel was barred from registering the second request. That is, unless it could be established that the second Request was based on new facts or on evidence not available to the Panel at the time of the first Request.[51]

On the face of it, *Yacyretá II* contained strikingly similar claims than the first Request. For instance, *Yacyretá I* focused on the adverse effects already suffered by people living in the so-called "76 masl area",[52] and the future harm that would be suffered once the reservoir was raised further as planned. The Requesters asked the Bank to ensure that there was a "satisfactory completion of the Resettlement and Environmental Management programs […], together with an adequate financing plan to carry out the activities under the programs" (as should have been done before the reservoir was raised to 76 masl) before the Bank gave approval for the reservoir to be raised further.[53] The *Yacyretá II* Request was also filed on behalf of those "affected by the pending liabilities at what is referred to as 76 meters above sea level […]". The Requesters, in

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[49] For instance, the Panel incorporated a number of additional requests from Argentinean claimants "asking for inspection of specific aspects of project execution" (upon obtaining Board approval) and gave Management the opportunity to respond to these claims – *see* Shihata (2000), at 121. Concerning these additional claims, the Panel found that "a number of issues raised should have been dealt with by Management earlier on during project execution. The lack of participation of affected people and local authorities in project related activities and a tendency by Bank supervision missions to ignore or take lightly the concerns of area people may be at the root of these problems." *See* 1996 *Paraguay/Argentina Yacyretá Hydroelectric Project*, Panel Review and Assessment, at §238.

[50] *See e.g.*, 1996 *Paraguay/Argentina Yacyretá Hydroelectric Project*, Panel Review and Assessment, at 4: "[d]espite extensive but inconsistent supervision efforts, the Bank has failed to bring the project into compliance with relevant Bank policies and procedures due to a poorly conceived Project design in the first place, compounded by changing standards and regulations over time, EBY bureaucratic procedures and lack of financial resources."

[51] Inspection Panel Resolution (1993), at §14(d); *and see* section 8.1.5 above for a discussion of the Panel's procedural innovation to circumvent the restrictions of this provision.

[52] I.e., metres above sea level.

[53] 1996 *Paraguay/Argentina Yacyretá Hydroelectric Project*, Request, at 1 & 11.

essence, claimed that the project was still not fulfilling the Bank's requirements for the reservoir to be operated at and above 76 masl. Specifically, that the

> social and environmental impacts were neither fully identified, nor was their true extent quantified, and as a result, thousands of families have been unaccountably excluded from the compensation and mitigation plans, despite the fact that they have owned and occupied the lands for more than twenty years.[54]

Management concluded that the two *Yacyretá* Requests were essentially the same, therefore arguing that "only those claims made in Request II that reflect new evidence or circumstances may be considered by the Inspection Panel under the rules governing its activities".[55] The Inspection Panel, however, disagreed, and found the Request to be eligible:

> […] although generally of a similar nature, *most of the particular matters or claims on both Requests are substantially different*. In addition, many apparently similar allegations in Request II seem to be based on new facts or circumstances.[56]

Whether or not the two *Yacyretá* Requests were indeed "substantially different" is probably debatable, and will not be dealt with further. More importantly, the question remained how narrow or broad the Panel's investigative mandate might be in the light of the previous 'review' in *Yacyretá I*. Interestingly, when the Panel addressed this question, it described its previous review mandate in *Yacyretá I* in the narrowest terms possible. The Panel stated that the Board failed to approve "the investigation recommended by the Panel" in *Yacyretá I*, in the light of the remedial action plans submitted at the time.[57] The Panel also reiterated that the Board gave it only a limited review mandate in *Yacyretá I* that "referred only to 'Bank procedures' (as opposed to Bank policies and procedures)", and that the "precise extent and scope of this decision was not subsequently determined by the Board […] in spite of the Panel's request for clarification".[58] Thus, the Panel concluded, during the *Yacyretá I* review, it

> did not look into possible violations of Bank policies and procedures but limited itself "*to highlight the major areas where staff performance could or should*

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[54] 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, Request, at 1.

[55] 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, MR, at §3.

[56] 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, ER, at §42 (emphasis added).

[57] 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, ER, at §37. The Panel formally records the 1996 Yacyretá Request as "investigation not approved by Board" – *see* Inspection Panel Annual Report (2006/2007), at 127.

[58] 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, IR, at §76.

> *have better followed*" the Bank's operational statements, and identified just "*three main areas of concern*": a) participation of affected people, b) supervision and c) institutional strengthening, without conducting an investigation of these particular matters.[59]

On the basis of these arguments, the Panel recommended "an investigation into the matters alleged in the Request", which was approved by the Board without setting any conditions concerning limitations to the Panel's mandate.[60]

In other words, during the *Yacyretá I* review, the Inspection Panel interpreted its narrow investigatory mandate as broadly as possible – specifically, to review Bank compliance with both policies (which, at the time, contained more elements that were binding) and procedures (which, at the time, contained more elements that were non-binding). But when this expansive interpretation meant that the Panel's investigation in *Yacyretá II* would have to be limited since the Panel could not reconsider matters already investigated, the Panel appears to have relied only on the formal (thus, narrow) interpretation of its original *Yacyretá I* mandate. The Inspection Panel has therefore employed apparent 'self-restraint' while still advancing its degree of judicialization and judicial independence.

To conclude, while the examples in section 10.1 might be indicative of the Inspection Panel exercising restraint, it does not necessarily mean that the position of the Panel is weakened. In fact, it might arguably strengthen the Panel's position because apparently exercising 'restraint' might enhance the Panel's credibility with the Board. Furthermore, while these examples are not actively expanding the Panel's mandate, it might actually increase the degree of judicialization because the Panel has nonetheless informed the Board about the existence of the particular issue, without making an explicit 'finding'.

10.2. The Inspection Panel and Limiting Factors

As discussed in Chapter 5, various 'limiting factors', operating in a balancing feedback loop can slow down, or even reverse, the expansion of judicialization and *de facto* independence.[61] This section will briefly analyse the (potential) impact of these limiting factors on the Inspection Panel's expansion and contraction of the degree of judicialization and *de facto* independence.

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[59] 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*, ER, at §37 (emphases in the original).

[60] World Bank Press Release concerning the *Yacyretá* Request, 20 September 2002, at 1.

[61] *See* section 5.1.2 above. Recall that limiting factors affect both judicialization and judicial independence because of the interdependency between these two variables – *see* discussion of reinforcing feedback loops in section 2.3.2.3 above.

10.2.1. Political Pressure from Board, Management and Borrowers

Several of the examples from the Inspection Panel's institutional history and practice included in the previous chapters illustrated the significant impact of political pressure, especially in the period between 1995 and 1999 (up to the *China Qinghai* case).[62] There are strong indications that political pressure – especially exerted by Management, the Board and (indirectly) borrowers – has lessened. Nevertheless, as the examples from the recent *Brazil Parana Biodiversity* and *Albania Coastal Zone Management* cases illustrate, it remains a force to be reckoned with.[63]

10.2.2. Mental Models of Inspection Panel Members

Since the Inspection Panel has not issued separate opinions to date,[64] it is difficult, if not impossible, to form an opinion about the impact of the 'mental models' of individual Panel members. It is only through the writings of former Panel Members like Alvaro Umaña,[65] Jim MacNeill,[66] Maartje van Putten,[67] and the striking address of Edward Ayensu to the Board in the *Chad Pipeline* case[68] that one gets a sense of the role of mental models of Panel Members. And if these writings are anything to go by, it would appear that the mental models of individual Panel Members generally seem to fuel expansion of judicialization and judicial independence, and not contraction.[69]

10.2.3. Inherent Limitations of the Inspection Panel Resolution

While the Inspection Panel has found innovative ways to broaden its mandate, as Chapter 8 has illustrated, the Panel is increasingly hampered by the formal confines of its mandate as set out by the Resolution.[70] For instance, as discussed

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62 *See* section 7.1.1 above.
63 *See* section 7.4 above.
64 *See* section 7.2.1 above; *also see* above, note 32 (Ch. 7).
65 *E.g.*, A. Umaña, *Some Lessons from the Inspection Panel's Experience, in* G. Alfredsson, & R. Ring (Eds.), The Inspection Panel of the World Bank: A Different Complaints Procedure, at 127 (2001); *and see* Umaña (1998).
66 *See e.g.*, article (co-) written by MacNeill in response to Mallaby's depiction of the Inspection Panel and NGOs in his book, *The World's Banker*, *in* P. Bosshard, J. MacNeill, S. Mallaby & B. Rich, *Dammed Project*, 145 Foreign Policy 4 (November-December 2004).
67 M. van Putten, Policing the Banks: Accountability Mechanisms for the Financial Sector (2008).
68 Discussed in section 9.2.1 above.
69 *See* section 5.2.1 above.
70 *See* above, note 58 (Ch. 5).

above, the Panel cannot authorize its own investigations[71] or provide remedies to Requesters[72] – and it is unlikely that the Panel's judicialization efforts can fundamentally change these facts. Put differently, the Panel's judicialization efforts will only be able to expand its mandate 'up to a point' before the inherent limitations of the Resolution will start to impede further expansion.

Another inherent limitation to the Inspection Panel's mandate that might have a debilitating effect on its continued expansion of judicialization and independence, is the fact that the Panel has no influence (in the form of reviewing power) over changes made to the Bank's OP&Ps. For instance, as discussed above, the Bank's new OP/BP on Indigenous Peoples explicitly adopted the longstanding Management interpretation of OD 4.20, paragraph 13, which the Panel had no choice but to accept.[73]

This limiting factor in particular – coupled with issues of credibility (discussed next) – has the potential to limit the Inspection Panel's further expansion of judicialization and *de facto* independence significantly; and might even undermine the Panel's advances in this respect.

10.2.4. External Credibility of the Inspection Panel

It has been indicated in Chapter 7 that the Inspection Panel's institutional credibility and prestige have increased over the years, thereby strengthening the Panel's *de facto* independence. However, the Inspection Panel's credibility as independent accountability mechanism – viewed by *external* parties, such as international civil society (from where many Requests are spearheaded) and (potential) World Bank project affected people – is another important consideration altogether. Should the Panel's external credibility suffer significantly as a result of, for instance, the Panel's inability to provide Requesters with effective remedies, it could act as a significant limiting factor to continued expansion of judicialization and institutional independence. For instance, a significant drop in the Inspection Panel's external credibility might result in fewer Requests, which would mean fewer opportunities for the Inspection Panel to expand its independence and judicialization.

However, are there indications that the Inspection Panel's external credibility is suffering? To date, there has been only two years – 2000 and 2008 – in which the Panel has registered no new Requests.[74] This data by itself, though, cannot be used to draw any (statistically) meaningful conclusions since there are various other factors that might influence how many Requests are filed in a year. For instance, the Inspection Panel's caseload is also determined by the

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71 For a discussion of the Inspection Panel's mandate, *see* section 6.3.2 above.

72 For a discussion of the Inspection Panel's limited role in the provision of remedies, *see* section 9.2.3 above.

73 *See* section 10.1.2 above.

74 *See* <http://www.inspectionpanel.org>.

general awareness of the Panel function among potential and current World Bank project affected people.[75]

External criticism by academic commentators and civil society might be a stronger indication of the state of the Panel's external credibility. The Inspection Panel process has received its fare share of praise and criticism over the years;[76] but what is perhaps more telling at this stage, is not criticism – it is the lack thereof. The interest in the Inspection Panel seems to have peaked with the *China Qinghai* case since many articles and books on the Inspection Panel do not extend beyond *China Qinghai*, and most do not cover Inspection Panel practice beyond *Chad Pipeline*.[77] Most of the literature on the Panel after *China Qinghai* also seem to focus on the lack of effective remedies, and fail to comment on the many other aspects addressed by Inspection Panel cases.[78] These facts would therefore seem to indicate that the Inspection Panel's external credibility *is* suffering.

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[75] The Panel has consistently been involved in so-called 'outreach' activities that are aimed at promoting the Inspection Panel function among potential Requesters (*see e.g.*, Inspection Panel Annual Report (2006/2007), at 86-91), and the Board has also instructed the Bank's Management to engage in similar efforts on more than one occasion – *see e.g.*, 1996 Board Review Clarifications, at 2: "Management will make significant efforts to make the Inspection Panel better known in borrowing countries, but will not provide technical assistance or funding to potential requesters." *And see* 1999 Board Review Conclusions, at 17: "The Board underlines the need for Management to make significant efforts to make the Inspection Panel better known in borrowing countries […]."

[76] For a generally positive assessment of the Inspection Panel, *see e.g.*, 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 Yearbook of the United Nations Law 473 (2001); D. Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, 34 Virginia Journal of International Law 553 (1993-1994); and L. Boisson de Chazournes, *Public Participation in Decision-Making: The World Bank Inspection Panel*, 31 ASIL Studies in Transnational Legal Policy 84 (1999). For stringent criticism of the Inspection Panel, *see e.g.*, Ananthanarayanan (2004); and Bottelier (2001). For a more mixed evaluation of the Inspection Panel function, *see e.g.*, Hunter (2003); and J. Fox, *The World Bank Inspection Panel: Lessons from the First Five Years*, 6 Global Governance 279 (2000).

[77] Even a more recent article – such as that of Ananthanarayanan (2004), does not discuss recent cases in detail. *E.g.*, Ananthanarayanan *refers* to 2003 *Philippines Manila Second Sewerage* and 2004 *India MUTP*, but discusses only older cases – 1997 *India NTPC Power Generation Project* and 2001 *India Coal Sector Environmental and Social Mitigation Project and Coal Sector Rehabilitation Project*.

[78] *See e.g.*, Ananthanarayanan (2004): "Despite the claim that the Panel is an autonomous arm of the Bank, it really is hindered by the fact that it can only recommend and not carry out remedial measures, as well as be on quite a tight leash from the Bank Board. [….] Not surprisingly then, there have been little positive results on the ground both in terms of the Bank's accountability and due relief to the projected affected people. In fact the Panel has fallen woefully short. One has to honestly question the credo with which an undertaking as progressive as the Inspection Panel has been instituted and handled." *Also see* Gowlland Gualtieri (2001), at 252.

10.2.5. Financial Constraints and Consequences for Caseload

The Inspection Panel is, to a meaningful degree, protected against the limiting effect of financial constraints since the Resolution stipulates that the World Bank must provide the Panel with such financial resources as "shall be sufficient to carry out its activities".[79] On the other hand, the Panel's relatively low caseload (registering an average of 1.5 Requests per year) probably means that the Inspection Panel's budgetary requirements have not been a significant expense for the Bank.[80] However, this position could change if the Panel were to experience an upsurge in the number of Requests. In other words, this factor does not seem to have a significant limiting impact on the Inspection Panel's efforts to expand its judicialization and *de facto* independence; but since it is related to the caseload of the Panel, this position might change in future.

10.3. Fluctuation between Growth and Decline

This section will assess the Inspection Panel's fluctuation between positions of higher judicialization and judicial independence (activism) and lower judicialization and judicial independence (restraint). The section will look at examples where the Panel fluctuated between activism and restraint within the same case (10.3.1), and on a particular topic over the course of a few cases (10.3.2).

10.3.1. The 1997 *India NTCP Power* Request

The *India NTCP Power* Request played out against the backdrop of intense political pressure exerted on the Inspection Panel during its initial years.[81] Borrowers viewed an Inspection Panel Request as an "embarrassment" that could even be exploited by their political opposition.[82] As Shihata explained:

> [a]n attitude against investigation whenever it could be avoided thus evolved among borrowing countries and created a divisive climate every time the Board had to discuss a Panel recommendation to investigate a complaint.[83]

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79 Inspection Panel Resolution (1993), at §11.

80 The 2006/2007 Inspection Panel budget totalled just over $3 million; while the Panel was engaged in 5 investigations over the same period – *see* Inspection Panel Annual Report (2006/2007), at 43-70; and at 140.

81 *See* section 7.1.1 above.

82 Shihata (2000), at 221.

83 Id.

10.3.1.1. The eligibility phase

The Eligibility Report in *India NTCP Power* reflects the Panel's efforts to calm these borrower fears. For instance, the Panel explicitly limited its own scope,[84] seemingly granting Management (and, indirectly the borrower) the benefit of the doubt that the project did not include any indigenous people.[85] The Panel noted that it had indeed found "preliminary evidence of harm" related to the implementation of the project's (involuntary) resettlement activities, but that it would need to conduct a full investigation to verify these findings.[86] The Panel added:

> *[i]n relation to this it is worth stressing again that this review is restricted to actions and omissions taken by Bank management. The single and only question for the Panel in this context is whether the PAPs who have [been resettled] appear to have the equivalent standard of living, or better as required by the Bank R&R policy and whether those who have not yet moved are likely to have the same*.[87]

India nevertheless took issue with the Panel's recommendation in this Request. Tensions were probably also fuelled by the fact that, at the time of the Panel's submission of the ER in *NTCP Power*, another Inspection Panel Request originating from India had been registered (*India Ecodevelopment*). Shihata explains that the "Board approved the Panel's recommendation" concerning the need for a full investigation in *NTCP Power*, but "[c]onscious that the Panel had already undertaken a preliminary review at the project site",[88] the Board decided that the investigation should be conducted from the Bank's headquarters in Washington, D.C. Moreover, the Panel had to "report its findings to the Board within three months",[89] after which the Board would determine "whether any further action was appropriate".[90]

Other commentators painted the scenario in less diplomatic terms: in essence, India refused to allow the Inspection Panel access to the project site

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84 For additional examples, *see* section 10.1.1 above.

85 This aspect is discussed in more detail in section 10.3.2 below.

86 1997 *India NTPC Power Generation Project*, ER, at §48.

87 Id (emphasis in the original).

88 For a discussion of the introduction of the 'preliminary review' concept, *see* section 8.1.5 above.

89 In terms of the Resolution, an Inspection Panel investigation is given no time limit – *see* Inspection Panel Resolution (1993), at §20: "The Inspector(s) shall report his/her (their) findings to the Panel within a period to be determined by the Panel taking into account the nature of each request."

90 Shihata (2000), at 131.

to conduct a full investigation.[91] A 'desk study' – therefore, invariably limited – was the only compromise the Board could reach.[92]

10.3.1.2. The 'desk study'

Thus, when the Panel commenced the 'desk study', it probably did so from a lower position of independence and judicialization. However, the Inspection Panel did not remain in this position for long, as several examples from the investigation report illustrate.

The Panel opened the *India NTPC Power* IR with a narrative of the sequence of events that took place, including a few 'behind the scenes' comments that would otherwise not have become known.[93] For example, the Panel explained that Management submitted an updated action plan (agreed with the borrower and the implementing agency) "directly to the Board" after the Panel submitted the ER, and "also just five days prior to the Board decision on an investigation".[94] The Inspection Panel also revealed that the original meeting scheduled to discuss the Panel's ER was postponed once, and had to be reconvened again after the Board failed to reach a decision on the Panel's recommendation for full investigation.[95] The 'compromise solution' eventually reached, as the Panel describe it,

> restricts the Panel investigation to a desk study in Washington, D.C. ("Desk Study"). Preventing the Panel from undertaking a field investigation reflected the views of some Executive Directors who pointed out that it was unavoidable that the public would see it as an investigation – with all that word's connotations of wrongdoing – of Borrower actions.[96]

In its findings, the Panel confirmed the "preliminary conclusions reached" in the ER, although it conceded that this confirmation was based on "information gathered in Washington", thus mainly "from secondary sources and not from field work on the ground".[97] The Panel emphasized that

> [a] major new finding of this desk investigation is that the violations of policies and procedures can be attributed to *pressure* from Senior Regional Management to accelerate the process of loan approval and to not granting the

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[91] The borrowing country must give the Inspection Panel permission to visit the project area – *see* Inspection Panel Resolution (1993), at §21.

[92] *See India NTPC Power Generation Project*, IR, at §10.

[93] Note that Board meetings are confidential. If the Inspection Panel does not include these kinds of explanations in its documentation (which have to be made public, in terms of the Resolution), the broader public would never now about these 'behind the scenes' developments.

[94] 1997 *India NTPC Power Generation Project*, IR, at §8.

[95] 1997 *India NTPC Power Generation Project*, IR, at §9.

[96] 1997 *India NTPC Power Generation Project*, IR, at §10.

[97] 1997 *India NTPC Power Generation Project*, IR, at §15.

> same relevance to Resettlement and Rehabilitation and Environmental Action matters as to other project components.[98]

Illustrative of how the Panel managed to direct the 'blame' back from the borrower to the Bank (thus, staying within its mandate, and placating the borrower), the Panel found that the Bank included R&R components, as required by the policy, but failed to "assure itself that the Borrower had the necessary initial capacity to carry out these tasks". The Panel found that the Bank's failures in this respect were exacerbated by the fact that "the Bank did not have the necessary capacity to support the Borrower in carrying out these tasks".[99] The Panel stated that "NTPC's Resettlement and Rehabilitation policy and the Resettlement Action Plans appear to have complied, at least on paper, with the Bank's Operational Directive (OD 4.30)", but that

> the loan was processed so rapidly – with the RAPs completed immediately before the project was presented to the Bank's Board – that there was no time to ensure that essential mechanisms and preconditions, such as State Government commitment, capacity of implementing agency, etc. were in place or adequate.[100]

The Panel found that the Bank's failures to comply with OD 4.01 (Environmental Assessment) "appear to be even more grave than observed" in the original ER,[101] and that the Bank's supervision of the implementation of the project's R&R components "effectively failed".[102] The Panel's review of the Bank's supervisory and monitoring efforts revealed "a vicious circle of negative events which led to violations of policies and procedures for Resettlement and Rehabilitation and Environmental Assessment" because Management "relied basically on secondary source information" without much "meaningful direct consultation with PAPs".[103]

These assertions constitute assertive language for a Panel report of that time – especially compared to the carefully phrased wording in the ER. Considering the amount of political pressure the Panel was under at the time, one gets the sense that the Inspection Panel was fighting for its institutional life in this case. Arguably, the Panel's assertive tone, and the manner in which it redirected the Bank's arguments (which, in essence, blamed the borrower for the project failures), could potentially placate borrowers. By unambiguously holding the Bank accountable for the project failures, the Panel could also manage to save some of its external credibility. By the end of the desk study, the Panel seems to have strengthened the degree of judicialization and institutional

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98 1997 *India NTPC Power Generation Project*, IR, at §16 (emphasis in the original).

99 1997 *India NTPC Power Generation Project*, IR, at §17.

100 1997 *India NTPC Power Generation Project*, IR, at §19. This comment of the Inspection Panel reflects the later two-prong approach towards compliance formalized in the *China Qinghai* case – *see* section 8.4 above.

101 1997 *India NTPC Power Generation Project*, IR, at §20.

102 1997 *India NTPC Power Generation Project*, IR, at §21.

103 1997 *India NTPC Power Generation Project*, IR, at §22.

independence to some extent – although it required the 1999 Board Review to resolve the political stalemate on the Board so that Panel investigations could be authorized in future.

10.3.2. Classifying 'Indigenous Peoples'

Under which circumstances do a particular group of people qualify as 'indigenous peoples'? As with many World Bank OP&Ps, there are no fixed rules – only a set of criteria that should be used as 'guidelines'. A question the Inspection Panel often has to answer is how much discretion to allow Management on this matter. Since the consequences of a narrow interpretation in this respect are that the Bank's policies on Indigenous Peoples are not applicable to a project, it is perhaps surprising that the Panel seems to allow Management a broader margin of appreciation in this area in some cases.[104]

In *India NTPC Power*, for instance, the Requesters – supported by two international NGOs that conducted research in the region – insisted that there were "tribal and ethnic groups" in the project area that should be considered as 'indigenous peoples' in the World Bank project context.[105] Management opposed this claim, arguing that additional "socio-economic surveys" were conducted to confirm the Bank's initial conclusion that the groups in question did not qualify as 'indigenous peoples'. Management added that the Requesters' claims were based on a misunderstanding, namely: "a small portion of tribal people in a related, but non-Bank financed project" was classified as indigenous people; however, this fact did not mean the tribal people in the *NTPC* project would automatically be considered as indigenous people as well.[106] As mentioned above, the Inspection Panel announced in its eligibility report that it had confirmed the accuracy of this information with the borrower. Hence, the Panel concluded: "[s]ince the Inspector received no contradictory information during his field visit, the Panel will therefore not further investigate this allegation".[107]

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[104] For a discussion of the Bank's longstanding difficulties in applying the OP&P on Indigenous People (specifically, in defining indigenous people), *see* Kingsbury (1999), at 327-328. Kingsbury notes that the relevant policy "refers to, but is not controlled by, definitions used by the borrowing government. In practice, local juridical and social categories are often adapted as a starting-point in identifying relevant groups. Attempts to apply the policy have been met with sustained hostility by the governments of some borrowing states, such as China and Indonesia, which do not accept that the category of 'indigenous peoples' is relevant in their circumstances […]."

[105] 1997 *India NTPC Power Generation Project*, ER, at §19.

[106] Id.

[107] Id. The Panel's later 'desk study' therefore did not include any investigation into this matter – *see* discussion in section 10.3.1 below.

The Inspection Panel noted in *Columbia Cartagena Water* that there was no single definition of 'indigenous people'; but that the policy (at the time, OD 4.20)

> provides for a number of criteria, whose 'presence in varying degrees' is useful to identify indigenous peoples. [….] The policy adds that 'Task managers (TMs) must exercise *judgment* in determining the populations to which this directive applies and should make use of specialized anthropological and sociological experts throughout the project cycle'.[108]

The Panel nevertheless scrutinized Management's decision in this case. The Panel noted that the project did not recognize "the communities living in the North zone of Cartagena" (and thus, within the project area) as indigenous peoples, and neither did the Columbian authorities in terms of national legislation. The Panel emphasized that, regardless of these facts, the "issue under investigation" was still

> whether the Bank followed OD 4.20 on Indigenous Peoples during the design, appraisal and execution stages of the Project with regards to the Afro-Colombian communities living in the area of the proposed outfall. The classification of certain groups as indigenous peoples under Bank policy OD 4.20 is not necessarily consistent with, or subject to, local legislation, but is still binding on the Bank.[109]

In other words, the Panel asserted its right to review Management's decision not to classify the people in question as 'indigenous people'.

Management asserted that the Bank's Quality Assurance Team "approved the decision reflected in the Project's Social Assessment that no indigenous people would be affected by the Project"; however, the Inspection Panel noted that it "could find no discussion as to whether the Afro-Colombian communities should trigger the Indigenous Peoples Policy".[110] The Inspection Panel also found that "no 'specialized anthropological and sociological experts' were consulted on making this decision, contrary to the intention of OD 4.20".[111] The Inspection Panel's conclusion on the matter, however, suggests a significant measure of self-restraint. On the one hand, the Panel found that the "Afro-Columbians" in question (also the Requesters) met most – but not all – of the criteria set out in the policy that are used to classify a group as 'indigenous

[108] 2004 *Colombia Cartagena Water Supply, Sewerage and Environmental Management Project*, IR, at §186 (emphasis added by the Inspection Panel).
[109] 2004 *Colombia Cartagena Water Supply, Sewerage and Environmental Management Project*, IR, at §185.
[110] 2004 *Colombia Cartagena Water Supply, Sewerage and Environmental Management Project*, IR (ES), at 19.
[111] 2004 *Colombia Cartagena Water Supply, Sewerage and Environmental Management Project*, IR, at §187.

peoples'.[112] The Panel emphasized, however, that OD 4.20 "does not say that all the criteria have to be met in order for the policy to be triggered", and that the criteria were not "ranked in any hierarchy of importance".[113]
On the other hand, the Panel concluded that, while the

> Afro-Colombians could *reasonably* have been regarded as indigenous peoples under Bank policies […] failure to do so *in this specific case* may not be deemed as noncompliance with the 'judgment' called for in OD 4.20, paragraph 5

due to the "the absence of arguably two of the policy criteria".[114] The Inspection Panel nevertheless added that Management "would have been well advised" to develop an IPDP

> or a similar document identifying impacts of the Project on these people and providing mitigation measures for risks and potential harm, particularly in light of the inadequacies of the Social Impact Assessment.[115]

In other words, the Panel seemed to have adopted a more circumspect, incremental approach in *Columbia Cartagena Water* – focussing on the 'reasonableness' of Management's decision in the context of the particular case.[116]

Within a year after the Panel presented its investigation report in the *Cartagena* case to the Board, the Inspection Panel essentially followed the opposite approach in *Pakistan National Drainage Program* (NDP).[117] The Panel noted that, under the *NDP*'s predecessor project, the 'Mallah' people in Badin were not regarded as "so distinct or separate – whether culturally, socially, or economically – as to be considered a tribal group" in terms of OMS 2.34, which was in force at the time.[118] When the *NDP* was prepared, however, OD 4.20 was in force, which "broadened the scope of Bank policy from 'tribal groups' to include 'indigenous peoples,' 'indigenous ethnic minorities,' and 'scheduled tribes'".[119]

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[112] 2004 *Colombia Cartagena Water Supply, Sewerage and Environmental Management Project,* IR, at §191: "[…] in the case of the Afro-Colombians who submitted the Request, the affected community meets most of the OD's criteria, except for an 'indigenous language' and arguably a predominant 'primarily-oriented subsistence production'."

[113] 2004 *Colombia Cartagena Water Supply, Sewerage and Environmental Management Project,* IR, at §188.

[114] 2004 *Colombia Cartagena Water Supply, Sewerage and Environmental Management Project*, IR (ES), at 19 (emphases added).

[115] Id.

[116] Thus, in contrast to an approach that develops doctrines / principles that are to be applied to all cases, such as the approach toward determining compliance formulated by the Panel in the *China Qinghai* case – *see* section 8.4 above.

[117] *Columbia Cartagena* was registered in April 2004 and the Panel delivered the IR to the Board in November 2005. *Pakistan NDP* was registered in September 2004 and the Panel delivered the IR to the Board in November 2006.

[118] 2004 *Pakistan National Drainage Program Project*, IR (ES), at xxviii-xxix.

[119] 2004 *Pakistan National Drainage Program Project,* IR (ES), at xxix.

The Inspection Panel argued, as it did in the *Cartagena* case, that the policy did not "require that all criteria be met for the policy to be triggered"; and that the Mallah appeared to "fit more, but not all, of the criteria in OD 4.20".[120] The Panel found that Management also neglected to

> consult with local anthropological and/or sociological experts to determine whether or not any of the ethnic groups living within or near the Project area would qualify as indigenous peoples under OD 4.20.[121]

However, unlike the Panel's finding in the *Cartagena* case, the Inspection Panel determined that Bank management was not in compliance with OD 4.20 because Management failed to "initiate a process to determine whether the NDP Project would affect any group of people which would qualify as indigenous peoples under OD 4.20".[122] The Panel concluded that "at least some of these groups may have required" an IPDP "under OD 4.20 during Project preparation", since "[s]uch a document, or a similar document, could have identified potential Project impacts on these people and set forth measures to mitigate risks and potential harm".[123]

Is the difference between the Panel's interpretation of OD 4.20 in *Columbia Cartagena Water* and *Pakistan NDP* merely the result of an inconsistent approach towards determining compliance with OD 4.20? Panel members Edith Brown Weiss[124] and Tongroj Onchan led *Columbia Cartagena*,[125] while *Pakistan NDP* was led by Panel member Werner Kiene[126] – which might explain the different outcomes in these cases. On the other hand, both cases were adopted by a unanimous Panel, within a year of each other. And all three members in question were on the Panel at the time when both cases were registered and investigated. This example clearly leaves some unanswered questions that would require further (and probably a different kind of) research to answer conclusively. Suffice to say that, in terms of the Judicial Oversight Model, the Inspection Panel fluctuated between positions of higher and lower levels of judicialization and independence concerning the classification of indigenous people.

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120 Id.

121 2004 *Pakistan National Drainage Program Project,* IR (ES), at xxix. Note that this was also a finding in *Cartagena Water* case – *see* 2004 *Colombia Cartagena Water Supply, Sewerage and Environmental Management Project*, IR, at §187.

122 2004 *Pakistan National Drainage Program Project,* IR (ES), at xxix.

123 Id.

124 Term: September 2002 to August 2007 – *see* <http://www.inspectionpanel.org>.

125 Term: September 2003 to August 2008 – *see* <http://www.inspectionpanel.org>.

126 Term: November 2004 to present date – *see* <http://www.inspectionpanel.org>.

10.4. The Inspection Panel and Movement Across the Judicial Independence / Judicialization Plane

Recall that the Judicial Oversight Model describes five potential development paths across the 'four quadrants' of the Judicial Independence/Judicialization Plane, i.e.: rapid judicialization from a basis of low independence; leveraging high judicialization to expand judicial independence; catapulting from minimal to optimal position; expansion of judicial independence to the exclusion of judicialization; and the line of general progression.[127] The line of general progression describes the gradual expansion of judicial independence and judicialization, and incorporates the oscillation between higher and lower degrees of judicialization and judicial independence – as punctuated by points of temporary equilibrium. The Model hypothesizes that courts exercising a mandate of judicial oversight tend to evolve along this line, because it offers growth (i.e., expansion of judicialization and judicial independence) in a more sustainable manner.[128]

The aim of this section is to determine whether any conclusions can be drawn regarding the Inspection Panel's evolutionary path. However, such conclusions at this point would, at best, be tentative and even speculative in nature since the analysis required to develop such conclusions would require more data, spanning a longer period. Moreover, such a study would also benefit from attempts to further qualify the degree of judicial independence and judicialization, as well as the degree of fluctuation between levels of activism and restraint – something for which this research project has not been set up.[129] Nevertheless, the analysis contained in this section can be considered a first step in that direction.

Thus, as a preparatory step, this section will consider the jurisprudence of the Inspection Panel as a whole, and analyze whether certain patterns can be discerned in order to group the Panel's cases into different stages of development (10.4.1). On the basis of this analysis, the section will conclude by formulating a tentative conclusion regarding the Inspection Panel's development along the line of general progression (10.4.2).

10.4.1. Four Phases of Development

For the purpose of this analysis, all registered Inspection Panel cases between October 1994 and March 2009 have been considered from the perspective of the 'Judicial Oversight Model'. Based on the observations made in the course

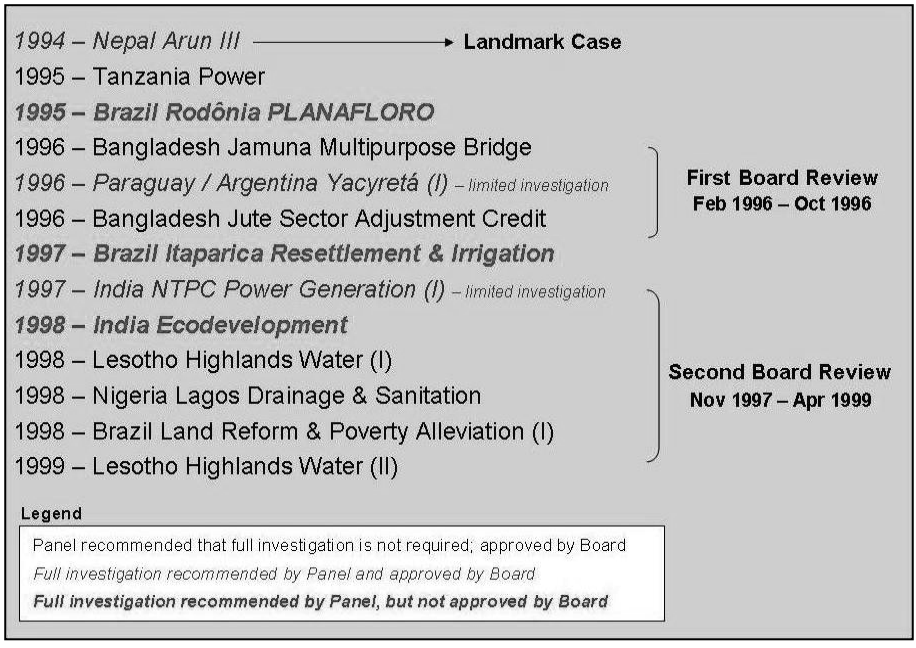
[127] *See* section 5.3 above.
[128] *See* section 5.3.5 above.
[129] Such as the kind of analysis suggested by Cohn & Kremnitzer – *see* below, note 55 (Ch. 11). *Also see* section 11.4 below, for suggestions for further research.

of this analysis – as reflected in Chapters 7, 8, 9 and 10 – the Inspection Panel cases have been roughly grouped into four developmental phases, i.e.: 'struggling for relevance and credibility'; 'turning the corner'; 'the Panel comes of age'; and 'equilibrium and beyond'. Note, however, that this grouping is meant to be used as an analytical tool. Therefore, even though the grouping of specific Requests into particular developmental phases might be debatable, it should not detract from the broader analysis – which is aimed at drawing conclusions about the evolutionary path of the Inspection Panel.

10.4.1.1. Phase I: struggling for relevance and credibility

Phase I consists of 13 registered Requests dating from the Inspection Panel's first case received in 1994 (*Nepal Arun III*) to 1999 (*Lesotho Highlands Water II* Request) – see Figure 17 below.

Figure 17: Phase I – Struggling for Relevance and Credibility



The Inspection Panel made a successful start with *Nepal Arun III* – a 'landmark' case[130] that captured the attention of external and internal (Bank) stakeholders and bolstered the Panel's *de facto* independence from

[130] For a definition of 'landmark' cases, *see* sections 2.1.1.2 and 7.3 above.

Bank management.[131] However, the Panel faced an uphill struggle from this point onwards. As mentioned above,[132] the Inspection Panel only managed to obtain Board approval for *limited* investigations in two other cases during this stage (*Yacyretá I* and *India NTPC Power I*),[133] while failing to obtain authorisation for any investigation in three other cases for which it recommended an investigation.[134] In seven out of the 13 'Phase I Requests', the Panel recommended that no investigation was required. Unsurprisingly, given the Board's tendency to avoid Panel investigations, the Board approved the Panel's recommendations in these seven instances.[135]

It would be inaccurate to state that the Panel had not increased the degree of its judicialization and independence during this stage, since several examples cited in Chapters 7, 8, and 9 date from Phase I.[136] On the other hand, political pressure from the Board and Bank management was also at its most severe during Phase I. In many respects, the political pressure bubbled to the surface during the two Board Reviews (both spanning several months), which, as Figure 17 visually illustrates, hung like a sombre cloud over the Inspection Panel – preventing it from significantly expanding independence and judicialization. Further indications of the limiting effect of political pressure exerted during Phase I were Management's action plans introduced directly after Requests were filed that effectively circumvented the need for a full Panel investigation; as well as the frequent Management challenges of Requests' eligibility.[137]

Thus, despite making several advances in establishing a meaningful degree of judicialization and *de facto* institutional independence, the Inspection Panel

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[131] *See e.g.*, Bradlow (1996), at 265-288.

[132] *See* section 7.1.1 above.

[133] *See* sections 10.1.3.1 and 10.3.1 above.

[134] *I.e.*, 1995 *Brazil Rodônia Natural Resources Management Project*; 1997 *Brazil Itaparica Resettlement & Irrigation Project*; and 1998 *India Ecodvelopment Project*.

[135] *I.e.*, 1995 *Tanzania Power IV Project*; 1996 *Bangladesh Jamuna Multipurpose Bridge Project*; 1996 *Bangladesh Jute Sector Adjustment Credit Project*; 1998 *Lesotho/South Africa Highlands Water Project*; 1998 *Nigeria Lagos Drainage and Sanitation Project*; 1998 *Brazil Land Reform & Poverty Alleviation Project*; and 1999 *Lesotho Highlands Water Project*. Arguably, at least the *Jamuna Bridge, Jute Sector* and *Brazil Land Reform* cases could have led to full investigations if they were registered during any of the later stages.

[136] *See e.g.*, the Panel's broad interpretations of the Resolution (*see* section 8.3.1.1 above); the procedural innovation of 'preliminary review' (*see* section 8.1.5 above). An indication of the Inspection Panel's credibility (at least with some Board members), is the Board's request that the Panel remain involved by assessing and monitoring the implementation of Management's remedial action plan – *e.g.*, in 1995 *Brazil Rodônia Natural Resources Management Project*; 1996 *Paraguay/Argentina Yacyretá Hydroelectric Project*; and 1996 *Bangladesh Jamuna Multipurpose Bridge Project* (here, the Panel was only asked to comment on the compensation aspects of the Management remedial action plan).

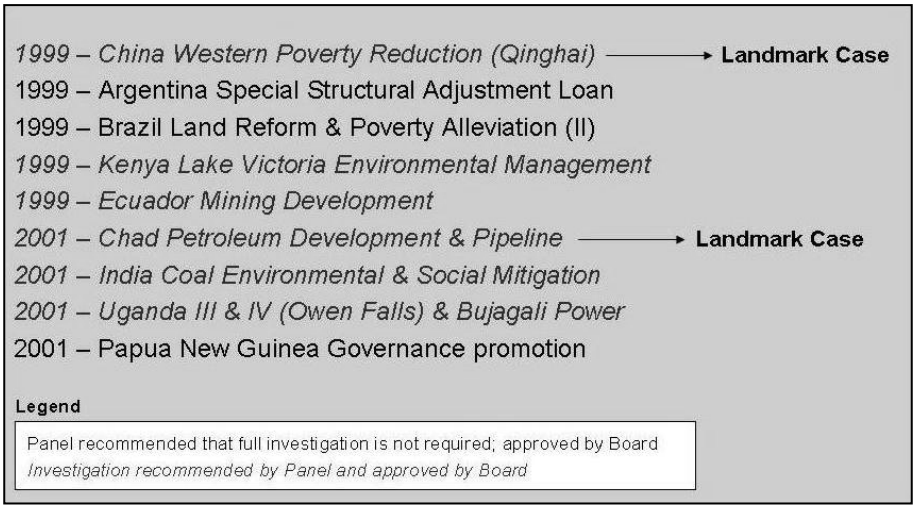
[137] *See* section 7.1.1 above.

was largely in 'survival mode' during Phase I due to the limiting effect of political pressure.

10.4.1.2. Phase II: turning the corner

Phase II covers nine Inspection Panel Requests dating from 1999 (*China Qinghai*) up to 2001 (*Papua New Guinea Governance Promotion*) – see Figure 18 below. No new Inspection Panel cases were registered in 2000.

Figure 18: Phase II – Turning the Corner



The Inspection Panel initiated Phase II when it successfully leveraged a landmark case – *China Qinghai* – to strengthen its degree of judicialization and judicial independence. The stronger position of the Panel after *China Qinghai* is evidenced by the fact that the Board approved all the Inspection Panel's recommendations for full investigations (six in total during Phase II), while the Panel only recommended that no investigations were required in three instances.[138]

The political pressures, seemingly ever-present during Phase I, seem to have subsided significantly during Phase II, which is quite a significant development considering that prominent cases such as *China Qinghai*, *Chad Pipeline*, and even *Uganda Power* were highly politicized cases.[139] The fact that the *China Qinghai* case followed so soon after the completion of the 1999

[138] *I.e.*, 1999 *Argentina Special Structural Adjustment Loan*; 1999 *Brazil Land Reform Poverty Alleviation Project, 2nd Request*; and 2001 *Papua New Guinea Governance Promotion Adjustment Loan*.

[139] For a discussion of the *China Qinghai* and *Chad Pipeline* cases, *see* sections 7.3.1 and 7.3.2

Board review was especially fortuitous since it provided the Inspection Panel with a prominent opportunity to put the 1999 Board review decisions into practice, while also gaining newfound momentum. The 'Phase II Requests' are also strong indications that the Panel's existing mandate and *de facto* independence were not significantly diluted by the outcomes of the 1999 Board review, as external stakeholders (many who were also participants during the 1999 Board review) had feared.[140] On the other hand, the nature of the friction between the Inspection Panel and Bank management also changed from the typical 'jurisdictional' clashes about the mandate of the Inspection Panel (observed in Phase I), to conflicts about the limits of Management's discretion provided for by the OP&Ps, and regarding the Panel's compliance review approach.[141]

The preceding chapters have already mentioned several examples from Phase II (from the two landmark cases in particular) that can be considered as examples of how the Panel strengthened its degree of judicialization and independence during this stage. The Panel's formalization of its compliance review approach, as outlined in *China Qinghai*,[142] and the Panel's contribution toward human rights protection in *Chad Pipeline* stand out in this regard.[143]

Phase II also saw the stabilization of the Inspection Panel procedure. From *Qinghai* onwards, all major parties involved in the Panel process (i.e., the Board, Bank management and staff, and the Panel itself) adhered more closely to the original Panel Resolution. For instance, Bank management submitted no remedial action plans outside the purview of the Inspection Panel Resolution. The Inspection Panel, moreover, assessed only the 'technical' eligibility of the Request during the Eligibility Phase, while its recommendations pertained only to the necessity for further investigation. Importantly, the Board approved all the Panel's recommendations, mostly on a non-objection basis.

Thus, the Inspection Panel's advancements in strengthening both judicial independence and judicialization during Phase II can hardly be overstated. The Inspection Panel had truly managed to 'turn the corner.'

10.4.1.3. Phase III: the Inspection Panel 'comes of age'

Phase III covers 10 Inspection Panel Requests, ranging from 2002 (*Paraguay / Argentina Yacyretá II*) up to 2006 (*Honduras Land Administration* – see Figure 19 below.

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respectively. On the *Uganda Power* case, *see* D. White, *Ugandan President Attacks 'Foreign Meddlers'*, 21 February 2006, at <www.ft.com>.

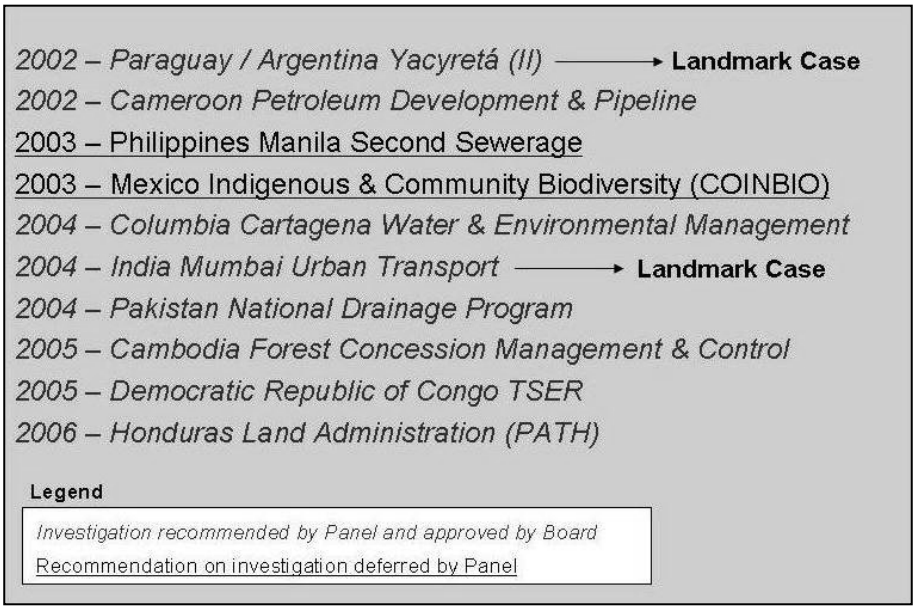
140 *See* section 7.1.1.1 above.

141 *See* section 8.4 above.

142 Id.

143 *See* section 9.2.1 above.

Figure 19: Phase III – The Inspection Panel Coming of Age



In eight of the 10 cases in this phase, the Panel recommended full investigations – all of which were approved by the Board. In the two remaining cases, the Panel employed a procedural innovation to defer a final recommendation as to whether an investigation was required – thus, leaving the way open for Requesters to re-file Request at later stage.[144]

Phase III commenced just short of the Inspection Panel's 10-year anniversary with another landmark case – the *2002 Paraguay / Argentina Yacyretá II* Request.[145] *Yacyretá II* makes an interesting comparison to illustrate how far the Panel has come since it had 'reviewed' *Yacyretá I* case during Phase I, as the discussion in Chapter 10 has illustrated.[146] The Inspection Panel seems to have established a significant degree of institutional credibility and prestige with the Board and, at least, an adequate level of acceptance from Bank management and staff. With landmark cases such as *Yacyretá II* and *India MUTP* in particular, the Panel demonstrated "its worth". For instance,

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[144] *See* section 8.1.5 above.

[145] *See* section 7.3.3 above.

[146] *See* section 10.1.3 above. *Note e.g.*, David de Ferranti's (World Bank Vice President for Latin American and the Caribbean at the time) response to the Inspection Panel's 2002 *Yacyretá* Investigation Report: "We are extremely grateful for the work of the Inspection Panel, and the positive relationship we have enjoyed during this process. Its findings are constructive, and we believe the Action Plan we have put together responds to the issues raised in the Panel's report." – *see* World Bank Press Release of 7 May 2004.

in both these cases, the Panel highlighted instances where Bank management had misrepresented facts pertaining to the project design and implementation status to the Board. Illustrative of the Board's growing trust in the Panel, is the Board's renewed practice during this stage of involving the Inspection Panel in remedial aspects after the conclusion of the Panel investigation.[147]

The cases dating from this era also indicate a gradual acceptance of the Panel's credibility by Bank management. For example, Management has been increasingly acknowledging the Panel's findings of non-compliance during this stage; whereas the quality of Management remedial action plans also appears to have been improving in the course of Phases II and III.[148]

By the end of Phase III, the Inspection Panel has further expanded its degree of judicialization and *de facto* independence from Bank management. With the Panel procedure thus stabilizing and multiple investigations conducted that further contributed to the Panel's expanding judicialization and independence, the Panel had truly 'come of age'. On the other hand, two limiting factors have started to pose a threat to the Panel's continued expansion of judicialization and institutional independence (if they have not already started to reduce the degree of judicialization and independence), namely: the external credibility of the Panel (e.g., in the light of the Inspection Panel's inability to provide Requesters with effective remedies);[149] and limitations inherent to the Resolution (e.g., reflected in the fact that the Panel has no formal decision-making authority).[150]

10.4.1.4. Phase IV: equilibrium and beyond?

Phase IV consists of 13 cases ranging from 2006 (*Romania Mine Closure and Social Mitigation*) up to 2009 (*DRC Private Sector Development and*

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147 *I.e.*, in 2002 *Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá)*; and in 2004 *India Mumbai Urban Transport Project*.

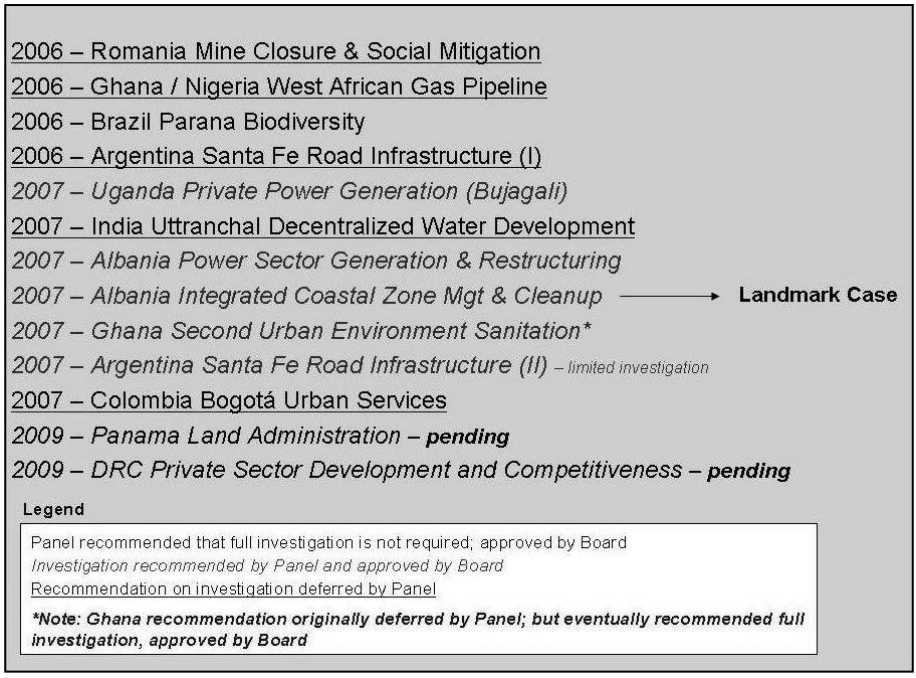
148 *See e.g.*, the Management Response in the earlier case, 2001 *India Coal Sector Environmental and Social Mitigation Project and Coal Sector Rehabilitation Project* (*see* MR to IR, Annex 1 – where Management "noted" the Panel's findings of non-compliance in many instances, but concluded that there was "no action to be taken" or that the Bank would "continue supervision" – *see e.g.,* action numbers 1, 3, 4, 10, 11, 12, 13, 14, 17, 21, 22, 23, 24, 26, 28, 31). Compare this with later Management responses such as the 2004 *Pakistan National Drainage Program Project* (*e.g.*, in this case, Management acknowledged that categorizing the project as a 'category B' for environmental assessment purposes was "premature" and "that it would have been more appropriate to categorize this as an EA category 'A' project." (MR, at §43); *and see* the 2005 *Cambodia Forest Concession Management & Control Pilot Project*, *e.g.,* where "Management acknowledges that the project did not succeed in adequately addressing the concerns of local communities and Indigenous Peoples." (MR to IR, at §23)

149 *See* sections 9.2.3 and 10.2.4 above.

150 *See* section 6.3.2 above.

Competitiveness) – see Figure 20 below. No new Inspection Panel cases were registered in 2008.

Figure 20: Phase IV – Equilibrium and Beyond?



The Inspection Panel recommended investigations in only five instances during Phase IV (all approved by the Board); and the *Ghana/Nigeria West African Gas Pipeline* recommendation for full investigation was only made after the Inspection Panel had deferred a decision on the original Request.[151] In the *Brazil Parana Biodiversity* case, the Panel ultimately decided that an investigation was not warranted – again after deferring the recommendation in the original Request.[152] In five other cases, the Panel deferred recommendations about the necessity for a full investigation, leaving the way open for Requesters to file another Request – on the same facts – in future.[153] At time of writing, the Eligibility Reports of the two Requests received by 31 March 2009 (i.e.,

[151] *See* 2006 *Ghana/Nigeria West African Gas Pipeline Project*, Second ER, at §§6-7. *Also see* section 8.1.5.2 above.

[152] *See* 2006 *Brazil Parana Biodiversity Project*, Second ER, at §§5-6, and §§59-60.

[153] *I.e.*, 2006 *Romania Mine Closure and Social Mitigation Project*; 2006 *Argentina Santa Fe Road Infrastructure Project and Provincial Road Infrastructure Project*; 2007 I*ndia Uttaranchal Decentralized Water Development Project*; 2007 *Albania Power Sector Generation and Restructuring Project*; and 2007 *Colombia Bogotá Urban Services Project*.

Panama Land Administration and *DRC Private Sector Development and Competitiveness*) were still pending.

Clearly, comments pertaining to Phase IV would have to be the most tentative of all comments included in this section, due to the recentness of the cases. Tentatively speaking, therefore, during Phase IV, the Inspection Panel seems to have entered a pronounced period of equilibrium; and, possibly, might be showing signs of decline to a position of lower independence and judicialization. For instance, in two of the 'Phase IV Requests' (i.e., *Brazil Parana Biodiversity* and *India Uttranchal Decentralized Watershed Development*), the Panel specifically had to defend the integrity of the Inspection Panel procedure from the type of political pressure exerted by Management that resembles Phase I.[154]

As mentioned in the discussion of Phase III (above), it is plausible that the limiting effects of the Panel's external credibility and the limitations inherent to the Resolution might be starting to have a negative impact on the Panel's degree of judicialization and independence. Thus, the only landmark case in Phase IV (to date) – *Albania Coastal Zone Management* – is to be welcomed because it might provide the Panel with an impetus for further development.[155]

The concern remains, however, that the Inspection Panel's external credibility continues to deteriorate, especially due to the (continuously) unmet expectations concerning the provision of remedies to project affected people. It is difficult to foresee, at this point, how the Panel could address this particular issue without Board intervention – e.g., in the form of a 'third review of the Inspection Panel function'.[156]

10.4.2. Development along the Line of General Progression?

This section will draw tentative conclusions regarding the developmental path the Inspection Panel has followed so far. Based on the analysis contained in the previous section, the Inspection Panel's four phases of development roughly

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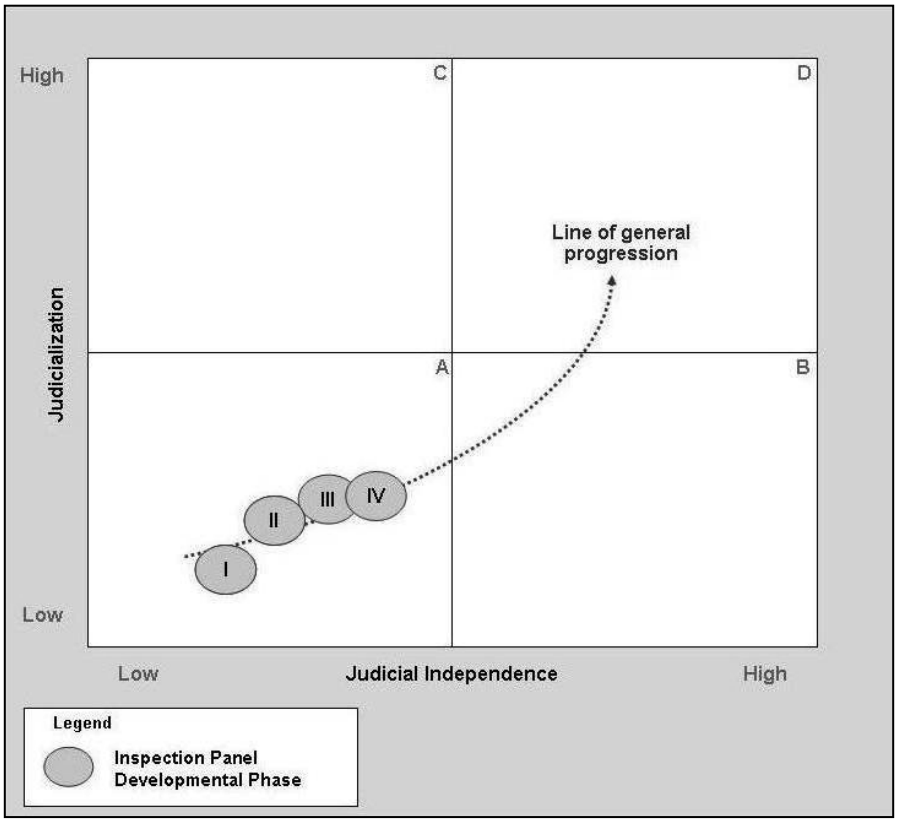
[154] *See* 2006 *Brazil Parana Biodiversity Project*, ER, at §43: "In the context of the review of the Request (which includes the March 21 letter to the Panel and the World Bank, as noted above), the Panel found that the Requesters felt unduly pressured by Bank staff and others not to file a Request for Inspection and then to withdraw the Request. The Requesters have cited various arguments as having been used to exert pressure. The Panel finds that this practice threatens the integrity of the Panel process, and may have a chilling effect on local people who genuinely feel harmed or potentially harmed by Bank projects. The Panel wants to call the attention of the Board of Executive Directors and Bank Senior Management to this matter, and trusts that these kinds of practices will not occur in the future." *And see* 2007 *India Uttaranchal Decentralized Water Development Project*, ER, at §§42-43.

[155] For a discussion of this case, *see* section 7.3.5 above.

[156] *See* section 11.4 below for suggestions for further research on this issue.

seem to correspond with the line of general progression – as illustrated by Figure 21 (below).[157]

Figure 21: The World Bank Inspection Panel – Development along the Line of General Progression



At the end of Phase I, the Inspection Panel has probably strengthened its position relative to where it started, although its position still remained quite low within quadrant A (i.e., low judicialization, low judicial independence). At the end of Phase II, however, the Inspection Panel has likely improved its position relative to Phase I, perhaps advancing its degree of judicialization more than the degree of *de facto* independence (i.e., movement towards quadrant C – reflecting higher judicialization, with lower judicial independence). The Panel's biggest advancement was most likely between Phases II and III (i.e., movement towards quadrant D, reflecting increases in both judicialization and judicial independence). Conversely, there has probably not been such

[157] Note that Figure 21 is an illustrative diagram, therefore not strictly 'drawn to scale'.

a marked expansion of judicialization and judicial independence between Phases III and IV – which could be reflecting an expansion in the direction of quadrant B (i.e., expansion of judicial independence to the exclusion of further judicialization), or – potentially of greater concern – which could be indicative of an equilibrium position.

Note, however, that the Inspection Panel has probably started from a much lower base, within quadrant A, than most courts that exercise a mandate of judicial oversight – except, perhaps for judicial institutions such as the Dutch *Raad van State* or the French *Conseil d'Etat*, which started off without having a formal judicial mandate.[158] The Inspection Panel's advancement along the line of general progression therefore might seem painstakingly slow – even bordering on the insignificant – but it must be understood within the context of the World Bank, and also within the larger context of public international law. It is unlikely that (quasi-) judicial institutions in the public international law context will, at least in the foreseeable future, exhibit similar high degrees of judicialization and independence as their non-international counterparts. This does not necessarily mean, however, that their advancements on the Judicial Independence/Judicialization Plane are insignificant for the development of public international law.

Finally, as the history of the great courts discussed in Part I of this book illustrate, the expansion of judicialization and judicial independence hardly ever occurs in a continued 'straight line', undeterred by limiting factors such as political pressure. Instead, courts fluctuate between activism and constraint due to various limiting factors at work; while, over time, they slowly expand the degree of their influence and power.[159] The Inspection Panel has shown marked structural, institutional and functional similarities with courts exercising judicial oversight. But, like the courts discussed in Part I, the Inspection Panel is also vulnerable. To sustain its expansion along the line of general progression, the Inspection Panel would probably need to continue its efforts to form an objective partnership with the Board and Bank management – and will most likely require Board intervention at some stage to expand its formal mandate once more.

10.5. Summary

Based on the analyses in the preceding chapters, this chapter set off from the basis that the Inspection Panel has been increasing the degree of judicial independence and judicialization over time, similar to courts in national constitutional systems exercising judicial oversight. This chapter set out to analyse whether the institutional history and practice of the Inspection Panel

[158] *See* above, note 52 (Ch. 1).
[159] *See* section 5.3.5 above.

reflected the other elements of the dynamics of judicial oversight, namely: decline (contraction of judicial independence and judicialization) – including the exercise of 'judicial' self-restraint – and fluctuation between positions of higher and lower judicial independence and judicialization.

First, the chapter illustrated that the Inspection Panel exercises self-restraint, especially towards the Board. However, not all of these instances necessarily resulted in a contraction of judicialization and judicial independence because some instances were only 'restraint' in form and not in substance (as the *Yacyretá* example illustrates).

Second, the chapter has shown that the Panel experiences backlash from limiting factors, which limits growth or further expansion of judicialization and judicial independence. Political pressure from the Bank's Board, Management, and borrowers have been particularly intense during the early years of the Panel, although its limiting effect remains a force to recon with. The limiting effects (on growth) of the Panel's external credibility and limitations inherent to the Inspection Panel Resolution appear to be increasing, while financial constraints (as it pertains to case load) do not appear to be of significant limiting consequence at the moment. Conversely, it appears plausible that the mental models of individual panel members have acted more as limiting factor to prevent decline (contraction of judicialization and judicial independence), and thus, have fuelled (renewed) growth.

Third, the institutional history and practice of the Inspection Panel have revealed instances where the Panel has fluctuated between higher and lower levels of activism and restraint – such as the difference between the Eligibility and Investigation Phases in the *India NTPC Power* case, and the Panel's position on the classification of indigenous peoples.

Fourth, the chapter has concluded that the Panel's case law might be divided into four 'phases of development'; and that these four phases, when plotted on the Judicial Independence / Judicialization Plane (although tentatively, based on the relatively short life span of the Panel), appear to be corresponding with the line of general progression.

To conclude, it seems plausible that the analysis of the Inspection Panel's history and practice reflects the dynamics of judicial oversight to a considerable degree; although, to be sure, tracing the dynamics of judicial oversight probably requires more data – covering a longer period – than what is currently available.

Chapter 11

Conclusion: (Quasi-) Judicial Oversight as a Model for Enhancing Accountability and Legitimacy of International Institutions

> *And, irrespective of what one might assume, in the life of a science, problems do not arise by themselves. It is precisely this that marks out a problem as being of the true scientific spirit: all knowledge is in response to a question. If there were no question, there would be no scientific knowledge. Nothing proceeds from itself. Nothing is given. All is constructed.*[1]

This book is a response to a particular problem in public international law, namely, the accountability and legitimacy of international institutions. The point of departure for this book is the suggestion that judicial oversight in non-international systems curbs the exercise of public power and, thus, enhances the accountability and, indirectly, the legitimacy of the political institutions exercising that power. Hence, this book hypothesizes that there is functional, procedural and institutional equivalence between judicial oversight mechanisms in non-international legal systems and the World Bank Inspection Panel. Consequently, the book sets out to answer two questions: first, what is judicial oversight – as conceptualized in terms of its 'nature, effect and dynamics'? And second, does the World Bank Inspection Panel – a non-judicial body with a limited compliance review mandate – reflect the 'nature, effect and dynamics' of judicial oversight to any significant degree?

This chapter summarizes the salient points from Part I, which aimed to answer the first question (11.1), before summarizing the major findings of Part II, which set out to answer the second question (11.2). Next, the chapter considers the implications of the findings from Parts I and II for the

[1] G. Bachelard, La formation de l'esprit scientifique (1934).

Inspection Panel, and, possibly, for other accountability mechanisms in public international law (11.3) before making suggestions for further research (11.4). The chapter concludes by appraising the Inspection Panel's contribution – seen in the context of the broader issue of the accountability and legitimacy of international institutions – toward the 'search' for the "judicial spirit" in public international law (11.4).

11.1. The Judicial Oversight Model

Judicial oversight has been defined as a process by which a court reviews the actions or decisions of the political institutions of the constitutional system against normative standards set out in the constitution or in other normative instruments containing 'higher law' (such as international human rights instruments). Moreover, the exercise of judicial oversight might lead to the provision of remedies to individuals that have been adversely affected by the exercise of unconstitutional public power.[2] Part I of this book developed a conceptual model (the Judicial Oversight Model) that served as the *tertium comparationis* for the analysis contained in Part II.

The Model conceptualizes three core aspects of judicial oversight, namely: its *nature* or key characteristics (11.1.1); its *effect* or important outcomes (11.1.2); and its *dynamics* – which describes the interrelationship and interaction between various systems components, that typically result in movement (growth and decline), equilibrium, and fluctuation (11.1.3).

11.1.1. The Nature of Judicial Oversight

The Judicial Oversight Model describes two particular facets of the nature of judicial oversight: courts asserting their *de facto* judicial independence from the political institutions;[3] and courts expanding their judicial influence and power, or the degree of judicialization.[4]

11.1.1.1. Asserting *de facto* independence

The Model suggests that courts assert their *de facto* independence from the political institutions in a constitutional system in order to exercise their mandate of judicial oversight, regardless of the existence of (potentially extensive) formal measures that safeguard judicial independence. The Model highlights three potential mechanisms through which courts might assert their

2 *See* section 1.3.2 above.
3 *See* sections 2.1.1 and 3.1 above.
4 *See* sections 2.1.2 and 3.2 above.

independence. First, courts build the integrity and prestige of their institutions because it helps to shield them from excessive political interference. These measures, often non-substantive in nature, can include e.g., the forging of unanimous rulings, or the wearing of special attire and the occupancy of a building that reflects the gravitas of the institution. More on the substantive side, courts establish and maintain the integrity of the judicial oversight procedure, thereby creating trust with the society it serves and also with political institutions which decisions it reviews.

Second, courts employ landmark cases – i.e., cases of specific constitutional importance – to assert their *de facto* independence from political institutions. Some cases are landmark cases by virtue of the nature of the claims they contain. In such instances, all a court has to do in order to leverage the case to strengthen its independence, is to 'rise to the occasion', so to speak. In other instances, however, it is the court's ruling that turns a particular case into a landmark case. With these cases, the court creates an opportunity for strengthening its institutional credibility and prestige.

Third, in exceptional circumstances, courts might generate specific awareness (often through the news media) about what they regard as excessive political interference with judicial independence. Courts are not likely to use this mechanism often, because it involves certain risks. For instance, such a strategy might diminish the credibility and prestige of the court in the eyes of the public, and thereby weakenen the *de facto* judicial independence.

11.1.1.2. Expanding judicial influence ('judicialization')

The Model proposes that courts exercising a mandate of judicial oversight have the tendency to expand their power and influence, here defined as judicialization. Put differently, the process of judicialization involves the enlargement of judicial discretion, at the cost of political discretion. The Judicial Oversight Model focuses on three substantive methods through which courts might accomplish judicialization. First, courts often merely assume additional roles or expand its power without having a strong legal (constitutional) basis, or even without justifying their expansive behaviour in any way. Second, courts use expansive interpretation techniques, such as teleological interpretation, when interpreting constitutional clauses that pertain to their mandate, or that pertain to the substantive and procedural (constitutional) rights of individuals. Second, courts develop legal principles or doctrines – such as the proportionality principle and the political question doctrine – to determine the scope of judicial oversight – or, put differently, to establish the specific boundaries between politics and law. The Model suggests that the deployment of these principles and doctrines often leads to judicialization, even in instances where the application of a particular doctrine (such as the margin of appreciation) apparently leads to the limitation

of judicial discretion. These instances might still be considered as examples of judicialization because they are examples of the exercise of judicial *self*-restraint (as opposed to restraints imposed by political institutions), which is, by itself, a manifestation of judicial authority.

11.1.2. The Effect of Judicial Oversight

The Judicial Oversight Model emphasizes three outcomes of judicial oversight, namely: constitutional dispute resolution;[5] human rights protection;[6] and the indirect legitimization of political institutions.[7]

First, courts with a mandate of judicial oversight resolve constitutional disputes that arise at a vertical level – i.e., conflicts involving a public entity and a private party that typically concern an alleged violation of the private party's (constitutional) right by the public entity. Courts also resolve constitutional disputes that arise at a horizontal level – i.e., conflicts involving two political (public) institutions.

Second, courts realize human rights protection by developing the substantive content of constitutional provisions that guarantee specific human rights – often through employing expansive interpretation techniques and legal doctrines or principles. Courts also realize human rights protection by guarding procedural fairness, or ensuring due process. An outcome often closely associated with human rights protection is the provision of legal remedies. The Model suggests that courts develop remedies to provide adversely affected individuals with specific redress. However, courts often develop such remedies over a significant period of time, and remedies are most effective when they are developed with enforcement already in mind. Therefore, the development and enforcement of effective remedies (meant to provide redress to individuals that suffered harm as a result of unconstitutional actions or decisions by those exercising public power) often require an objective partnership between courts and political institutions.

Third, a more indirect outcome of judicial oversight is the legitimization of political institutions. The Model suggests that the process of judicial oversight contributes to the strengthening of moral and sociological legitimacy largely because political institutions are seen (primarily by the electorate, but in a globalized world, increasingly also by other stakeholders) to be submissive to democratic processes, the rule of law, and respect for human rights. This outcome of judicial oversight would therefore be an example of 'weak' or 'input' legitimacy.

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5 *See* sections 2.2.1 and 4.1 above.
6 *See* sections 2.2.2 and 4.2 above.
7 *See* sections 2.2.3 and 4.3 above.

11.1.3. The Dynamics of Judicial Oversight

The 'dynamics' of judicial oversight is a multifaceted notion. It concerns, in the first place, the relationships between courts and political institutions, and between the nature and effect of judicial oversight.[8] Second, the dynamics of judicial oversight relates to the consequences of those relationships, namely: movement (growth and decline), equilibrium, and oscillation – as reflected by the fluctuations between lower and higher positions of judicialization and/or judicial independence, punctuated by periods of temporary equilibrium.[9] Third, the dynamics of judicial oversight employs the first two facets to describe the longer-term evolutionary paths of courts.

11.1.3.1. Relationship between courts and political institutions

The relationship between courts and political institutions affects all three components of the Model – nature, effect, and dynamics. At its core, this relationship concerns the determination of the boundary between law and politics – a boundary that is often determined by courts when they exercise judicial oversight, and that is therefore context specific. Hence, this boundary reflects the current state of equilibrium between politics and law in a particular constitutional system.

11.1.3.2. Relationship between nature and effect of judicial oversight

The Judicial Oversight Model describes three potential manifestations of the relationship between the nature and effect of judicial oversight. First, the Model suggests that courts can be analysed in terms of their relative degrees of *de facto* judicial independence and judicialization. Second, the Model proposes that the realization of specific outcomes associated with judicial oversight require different degrees of judicialization and judicial independence. Third, the Model holds that the relationship between judicialization and judicial independence is reinforcing, hence fuelling exponential 'growth', or, expansion of the degree of judicialization and the degree of judicial independence.

11.1.3.3. Movement, equilibrium, fluctuation and evolutionary paths

The Judicial Oversight Model postulates that the degree of judicialization and judicial independence will increase as a result of the workings of a positive reinforcing feedback loop (growth). However, there are limits to how far

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8 *See* sections 2.3.1 and 2.3.2 above.

9 *See* section 2.3.2.3 above, *and see* in general Chapter 5 above.

courts can expand the degree of judicialization and judicial independence. As the expansion nears or exceeds the system's equilibrium, or the equilibrium point of judicial oversight, it will trigger backlash from limiting factors (e.g., political pressure, judicial mental models, limitations inherent to the constitution, judicial credibility and financial constraints), which results in a 'balancing feedback loop' (decline). In a balancing feedback loop, a continued increase of one variable will result in the decrease (i.e., diminishing returns) of the other variable until a point of equilibrium is reached.

However, the Model also suggests that courts oscillate or fluctuate between positions of higher judicialization and judicial independence (here, described as judicial activism) and lower judicialization and judicial independence (here, described as judicial restraint). This fluctuation is explained by the existence of a delay between the triggering of limiting factors (as the equilibrium point is neared or exceeded) and the actual realization of the backlash from those limiting factors. Because of this delay, courts overshoot (exceeding the equilibrium point even further). Once the backlash or corrective actions from limiting factors are being realized, however, the balancing feedback loop forces decline to a point that is lower than the point of equilibrium, causing the court to undershoot, and so forth.

The Judicial Oversight Model hypothesizes that courts have a high propensity to evolve along the 'line of general progression' (thus, a curved line from quadrant A, to B, to D on the 'Judicial Independence / Judicialization Plane)[10] because of the sustainability of growth among this developmental path. Put differently, development along other paths is possible, but it might trigger backlash from limiting factors that is more severe – thus, limiting the expansion of judicialization and judicial independence, and also the realization of the effects of judicial oversight.

However, the line of general progression is not literally a smooth line – it is punctuated with fluctuations between higher and lower levels of judicialization and judicial independence, followed by periods of temporary equilibrium. Finally, the Model allows for gradual or incremental changes to the degree of judicialization and judicial independence, but does not preclude the possibility of significant 'bursts' of judicialization when required – typically in circumstances where specific pressing social needs are not satisfactorily addressed by the political institutions.

[10] *See* Figure 11 above.

11.2. The World Bank Inspection Panel as a Quasi-Judicial Oversight Mechanism

Officially, the World Bank Inspection Panel is not a judicial body; yet, the exact nature of its mandate has been described in different terms.[11] Some have suggested, for instance, that

> [t]he judicial character of the Panel has been masked by the terminology used in the Resolutions of 22 September 1993 and some of the provisions made therein, such as the control exercised by the Executive Directors, the requirement of consultations with the Legal Department of the Bank on some matters and the absence of a lawyer in the initial appointments to the Panel. None the less, the Panel can be effective if it recognizes that it is required to resolve disputes between the Bank and an outside party and has to decide, eventually, whether the Bank has acted improperly or not – essentially a judicial task.[12]

Others have argued that the apparent lack of effective remedies seems to detract from describing the Panel in more certain legal terms:

> [t]he World Bank Inspection Panel ('WBIP') is a hybrid. In part, it is an instrument of judicial review. The investigation closes with the evaluation of the legitimacy of an administrative decision that harmed the right of a private party. This finding, however, is not followed by any remedies, that is, 'the possible consequence of a judgment enforcing the requester's violated rights'. For this reason, the WBIP is first and foremost a mechanism of accountability. It triggers the responsibility of the World Bank's administration with respect to member states by utilizing the requests for inspection by private parties to this end. Indeed, it is this triggering mechanism of accountability that is of most interest here. It refutes the traditional dualistic framework. Private parties immediately challenge an international decision and not its domestic application. They set in motion the accountability of an international bureaucracy without having to act through their government delegate.[13]

The major conclusion of this book, based on the analyses contained in Part II, is that *what* the Panel does (irrespective of its official mandate) and, importantly, *how* the Panel exercises this *de facto* mandate, resemble judicial oversight to a much greater extent than is generally anticipated or, perhaps, acknowledged.[14]

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[11] *See* above, note 9 (Ch. 1).

[12] Nathan (1995), at 147.

[13] S. Battini, *International Organizations and Private Subjects: A Move Toward A Global Administrative Law?*, 3 IILJ Working Paper Series 2005/3, at 28 (2005), at <www.iilj.org>. *Also see* Bradlow, describing the Panel is a "quasi-judicial supervisory body" *in* Bradlow (2005), at 602.

[14] The Inspection Panel has been reluctant to subscribe to any legal or (quasi-) judicial description of its process. Arguably, this is because the Panel views itself as a pragmatic institution, and because legalism has, over the course of the Panel's institutional history, become associated with unnecessary formalism – perhaps largely in response Bank management's (including the Bank's legal department's) early efforts to legalize the Panel process. *See e.g.*, 1995 *Tanzania*

In other words, it is suggested that the World Bank Inspection Panel operates like a quasi-judicial oversight mechanism because, despite several differences between the Panel and courts exercising judicial oversight, the Panel's institutional history and practice exhibit the nature, effect, and dynamics of judicial oversight to a significant degree – as this section will summarize.

11.2.1. Assertion of *de facto* Independence

The Inspection Panel is not formally independent from the World Bank's Board of Executive Directors, but there are measures in place to ensure the Panel's independence from World Bank management – which is the object of Panel investigations. The analysis in Chapter 7 indicates that the Inspection Panel has been (largely) successful in fending off challenges to its independence made by Bank management, admittedly aided by the Board through its 'reviews' of the Inspection Panel function.[15] Specifically, the Panel asserts its *de facto* independence from Bank management – and, to a certain degree, also from the Bank's Board[16] – by establishing its institutional credibility, by leveraging landmark cases, and by generating awareness of undue political interference exerted by Management.

The Panel builds its institutional credibility and prestige within the World Bank primarily by guarding the procedural integrity of the Inspection Panel process and by continuously improving the quality of its investigation reports. The Inspection Panel has also leveraged at least five 'landmark' cases – *China Qinghai*, *Chad Pipeline*, *Yacyretá II*, *India MUTP*, and *Albania Coastal Zone Management* – at pivotal moments throughout its institutional history. On occasion, the Panel moreover alerts the Board about significant Bank management interference with its procedure, thereby generating general awareness since all Inspection Panel documents are made public.

Power IV Project, ER, at §8: "The Panel observes with concern the formalistic approach of the [MR] reply. This approach appears to introduce additional eligibility requirements that would modify the Resolution which is the sole prerogative of the Executive Directors. The Resolution was designed to establish a non-juridical forum with nonlegalistic requirements and procedures to help direct access by adversely affected people on the ground. Experience to date suggests that existing requirements, if strictly interpreted and applied, could become far too complex to enable adversely affected people themselves – often poor and illiterate – to file a legitimate claim."

15 *See* in general Chapter 7 above.

16 Reflected *e.g.*, in the fact that the Board has approved all Inspection Panel recommendations on a non-objection basis since 1999 – *see* section 7.1.2 above.

11.2.2. Judicialization

The analysis in Chapter 8 indicates that Inspection Panel's practice bears ample evidence of both aspects to judicialization (i.e., expanding judicial discretion, and narrowing political discretion). For instance, the Panel increases its own mandate by taking on additional tasks that have not been specifically included in its mandate of compliance review (or, that have not been explicitly prohibited by the Resolution) – such as indirectly commenting on borrower obligations; analysing the root causes behind prominent project difficulties highlighted by Requests; criticizing Bank strategic project decisions; showing concern for future compliance; and developing innovations regarding its own procedure.[17] The Panel also narrows the discretion of Bank management, for example, by reviewing how Management has classified a project for environmental screening purposes, or commenting about the need for the Bank to exercise its legal (contractual) rights against the borrower.[18]

In addition, the Inspection Panel increases its influence by employing expansive interpretation techniques to the Inspection Panel Resolution (see e.g., the Panel's interpretations of 'project' and 'affected party'), as well as the World Bank OP&Ps. In its interpretations of the OP&Ps, the Inspection Panel frequently emphasizes the underlying objectives of a policy, which often results in a broader meaning of a particular provision – thus, comparable to the effect of purposive interpretation. Such expansive interpretations might lead, for instance, to a broadening of the scope of investigation;[19] and have resulted in the substantive expansion of OP&P provisions requiring the 'meaningful and informed' consultation with PAP.

Finally, the Inspection Panel has expanded its influence (and has narrowed Management discretion to a significant degree) by developing an expansive approach to determining what constitutes 'compliance' – i.e., the beginnings of 'doctrine'.[20] The Panel has determined that compliance consists of both procedural (formal) and professional quality (substantive) elements; and that the mere existence of formal elements does not constitute compliance.

11.2.3. Effects Associated with Judicial Oversight

While it can perhaps be questioned whether the Inspection Panel fully resolves disputes between Bank management and Board ('horizontal' disputes) and between Bank management and the Requesters ('vertical' disputes), the Panel certainly contributes to the resolution of such disputes. In horizontal disputes,

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17 *See* section 8.1 above.
18 *See* section 8.2 above.
19 *And see e.g.*, the example of the *Yacyretá* cases, discussed in section 10.1.3 above.
20 *See* section 8.4 above.

the Inspection Panel's fact-finding and fact-verification role is especially significant. The Inspection Panel independently verifies information – often by using independent subject-matter experts. The Panel then conveys this information directly to the Board; thereby altering a process that is usually fully controlled by Management. Chapters 7 and 9 (in particular) provided several examples where the Panel highlighted instances where Management conveyed incorrect information to the Board, or where Management gave the Board overoptimistic feedback concerning the status of development projects.[21] The independent verification of facts also plays a crucial role in resolving horizontal disputes between Bank management and Requesters insofar as the Panel uses fact-finding and verification to assess the substantive or professional quality elements of 'compliance'. Moreover, the Inspection Panel exerts a definite influence over the outcome of the dispute because it frames the conflict.[22]

The Inspection Panel has referred directly to the World Bank's human rights obligations in one instance only – in the *Chad Pipeline* case. Importantly, however, the Panel connected the Bank's human rights obligations with the OP&Ps (consequently, falling within the Inspection Panel's review mandate) in *Chad Pipeline*; arguing that the policies and procedures reflect various international human rights standards.[23] However, the Inspection Panel also contributes to the human rights protection of project affected people in various other – indirect – ways. First, the Panel develops the substantive content of OP&P provisions that contain individual and group rights – see for instance the Panel's expansive interpretation concerning the substantive content of 'meaningful and informed consultation'.[24] Second, the Panel emphasizes 'harm' or adverse affects to project affected people – thus raising awareness about the human cost of World Bank development projects.[25] And, third, the Inspection Panel shows concern for various 'due process' elements in its investigations.[26] For example, the Inspection Panel emphasizes the importance of fair and effective project grievance procedures and insists that project alternatives should be 'real' options for project affected people (in order for the Bank to be fully compliant with the relevant OP&P).

Concerning remedies, all three components associated with remedies (as described by the Judicial Oversight Model) – i.e., development, enforcement, and effectiveness – fall outside the formal parameters of the Inspection Panel's mandate. Nevertheless, the Inspection Panel has arguably made meaningful contributions to influence the development and enforcement of effective remedies, for example, by delivering compelling investigation reports (e.g.,

21 *See* section 9.1.1 above.
22 *See* section 9.1.2 above.
23 *See* section 9.2.1 above.
24 *See* section 8.3.1.2 above.
25 *See* section 9.2.2.1 above.
26 *See* section 9.2.2.2 above.

grounded in objectively verified facts and including root cause analysis into project failures) that exert pressure on Bank management to acknowledge failures and to come up with remedial action plans that will address Requesters' claims effectively. In doing so, the Inspection Panel has probably also created an incentive for the Board to involve it in various remedial aspects – outside the parameters of the Inspection Panel Resolution – as it has done in a few occasions.[27]

Finally, the Inspection Panel indirectly contributes to the sociological and moral legitimacy of the World Bank by creating opportunities for the Bank (if not always taken up by the Bank) to illustrate its commitment towards good governance (e.g., ensuring transparency in its operations and effective participation of PAP), human rights (as exemplified by the *Chad Pipeline* case), and the international rule of law within the World Bank context. Regarding the international rule of law, the Inspection Panel process appears to contribute towards the advancement of elements that are usually associated with the rule of law in the state context, i.e., independent adjudication, public promulgation of laws, consistency with international legal norms and standards, and equal enforcement.[28]

11.2.4. The Dynamics of Judicial Oversight

There is ample evidence that the Inspection Panel has expanded the degree of *de facto* judicial independence and judicialization over time (growth).[29] However, there is also evidence of decline (or, the contraction of the degree of judicialization and judicial independence) in the Inspection Panel's history and practice – especially during the periods surrounding the two Board Reviews of the Inspection Panel function.[30] On the other hand, some examples of apparent self-restraint (e.g., where the Panel explicitly stayed within the boundaries of its mandate, or the Panel's seemingly 'narrow' (retroactive) interpretation of its review mandate in *Yacyretá I*) might not necessarily have resulted in a significant contraction in the degree of judicialization and judicial independence.

The effect of most of the limiting factors associated with judicial oversight is also clearly discernable in the Inspection Panel's history and practice.[31] Political pressure exerted by both the World Bank's Board and Management played a definite role in the early stages of the Inspection Panel's history in particular. For instance, Board members representing borrowing countries blocked full Inspection Panel investigations due the perception that the

27 *See* section 9.2.3 above.
28 *See* section 1.3.1 above.
29 *See* in general Chapter 7 and Chapter 8 above.
30 *See* sections 10.1 and 10.4.1.1 above.
31 *See* section 10.2 above.

Panel was investigating the borrower, and not the Bank; while Management frequently tried to prevent full investigations by insisting that the Request was not eligible, or to circumvent the need for an investigation by submitting remedial action plans even before the Panel has considered the eligibility of the Request. The effect of 'judicial' mental models of individual Panel members appears to be acting more often as limiting decline, than limiting growth. The Inspection Panel Resolution, on the other hand, has several inherent limitations that prevent the continued expansion of judicialization and judicial independence – the primary limitation being that the Inspection Panel has no formal decision-making authority.

The Inspection Panel's current budget is but a fraction of World Bank costs, thus, financial constraints are not likely to limit expansion of judicialization and judicial independence significantly at this stage. Of greater concern is the Inspection Panel's current caseload, which has not increased substantially on a year-to-year basis. This relatively constant case load could perhaps be explained by the fact that potential Requesters remain uninformed about the existence of the Inspection Panel function (despite continued outreach programmes sponsored by the World Bank). However, it could also be an indication that the Inspection Panel's external credibility is suffering or, at least, is not expanding in line with the internal credibility of the Inspection Panel.

Moreover, the Inspection Panel also fluctuates between higher and lower positions of judicial independence / judicialization – thus, between 'activism' and 'restraint'. For instance, the Panel has supported both broader and narrower interpretations of particular OP&P provisions, such as the definition of 'indigenous peoples'.[32] In the 1997 *India NTCP Power* case, the Panel's degree of activism and restraint fluctuated over time, within the same case.[33]

Finally, the analysis of the Inspection Panel's history and practice suggests that the Panel's evolution roughly falls within four developmental stages ('struggling for relevance'; 'turning the corner'; 'coming of age' and 'equilibrium and beyond');[34] and that these four stages – when tentatively plotted on the 'Judicial Independence/Judicialization Plane' roughly correspond with the line of general progression.[35]

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32 *See* section 10.3.2 above.
33 *See* section 10.3.1 above.
34 *See* section 10.4.1 above.
35 *See* section 10.4.2 above; *and see* Figure 21 above.

11.3. Implications for Strengthening Accountability Mechanisms such as the Inspection Panel

This section assesses three recurring criticisms of the Inspection Panel viewed in the context of the Judicial Oversight Model and its application to the Inspection Panel (11.3.1). The objective of this assessment is not to 'defend' the Inspection Panel, and it certainly does not imply that the criticisms are invalid. Nevertheless, it *is* suggested that these criticisms might be viewed differently in light of the earlier conclusion that the Inspection Panel exercises quasi-judicial oversight. The section concludes by drawing two general inferences from the application of the Judicial Oversight Model to the World Bank Inspection Panel, which might also be of broader relevance for other accountability mechanisms in public international law (11.3.2).

11.3.1. Three Recurring Criticisms in Perspective

> The Inspection Panel is not 'independent' since the Executive Board has to authorize full investigations and approve the final Panel investigation report.[36]

This statement is an accurate reflection of the formal situation, and it has undoubtedly made the Inspection Panel considerably less effective – although not irrelevant – during Phase I.[37] However, since the conclusion of the second Board Review in 1999, the Board has approved all Inspection Panel recommendations, which seems to suggest that the Panel's degree of *de facto* independence is significantly higher than the formal position would suggest. While the Inspection Panel consistently shows the Board deference, the Panel simultaneously enhances its *de facto* independence by building its institutional credibility with the Board – especially through the independent verification of facts, and by conveying those facts (which, on occasion, have differed significantly from the position painted by Management) directly to the Board through high quality investigation reports.

Moreover, this point of criticism often fails to incorporate a different aspect of Panel-independence that might be of even greater concern – that is, whether

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[36] *See e.g.* Roos (2001), at 482: "[…] the Panel is not a truly independent body despite these safeguards for independence. The Panel's independence is primarily 'counterbalanced by the fact that it only has advisory powers'." *Also see* Ananthanarayanan (2004): "Despite the claim that the Panel is an autonomous arm of the Bank, it really is hindered by the fact that it can only recommend and not carry out remedial measures, as well as be on quite a tight leash from the Bank Board."; *and see* Dunkerton (1995), at 240, questioning the true "authority and validity of the Panel", arguing that "[…] the Panel's independence is further inhibited by the Bank President's control over the Panel's salaries, travel expense reimbursement, and selection of the Panel's executive secretary."

[37] *See* section 10.4.1.1 above.

the Inspection Panel is sufficiently independent from Bank management and staff, who are, after all, the primary object of the Panel's investigation. The analysis contained in Part II of this book illustrates that the Panel consistently asserts its *de facto* independence from Bank management and staff – at times, in a highly assertive manner.

> The Inspection Panel's review mandate – i.e., the assessment of Management compliance against World Bank OP&P – is too narrow; and should, for instance, specifically include assessment against international legal standards.[38]

The Inspection Panel's formal review mandate *is* narrow, but the analysis in Part II of this book offers ample evidence that the Panel consistently broadens its mandate through its judicialization efforts, including the expansive interpretation of various OP&Ps. While the Bank's policies and procedures do not explicitly include extensive references to international law, many authors have argued that the OP&Ps do, in fact, reflect public international law rules, as the Panel has also argued in the *Chad Pipeline* case.[39] In *Chad Pipeline*, the Panel has managed to link certain international human rights (including 'civil and political' rights, which the Bank has consistently argued as falling outside its own mandate) with particular OP&P provisions, thereby incorporating these international human rights standards into its review mandate.[40]

> Neither the Inspection Panel nor the Requesters play a formal role in the development and enforcement of effective remedies since the Inspection Panel Resolution places this aspect within the purview of Bank management.[41]

Indeed, as the analysis in Chapter 9 has shown, neither development nor enforcement of effective remedies is formally part of the Panel's mandate – it falls within Bank management's ambit. The Resolution does not afford the Requesters with any opportunity to respond to suggested Management

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[38] *See e.g.*, Kingsbury (1999), at 330-331: "The panel has thus far not specifically invoked international law standards, other than Bank policies and project documents, in relation to indigenous peoples and resettlement issues, although the argument will be made below [as it has been made in this book, at section 9.2 above] that such standards might properly be invoked as part of the corpus of norms and practice that may guide the Panel in making useful recommendations."

[39] *See* section 9.2.1 above. Note, however, that in the Panel's early years especially, the Panel avoided addressing any references to public international law (i.e. borrower *or* Bank obligations in terms of PIL) made by the Requesters – *see e.g.*, 1996 *Paraguay/Argentina Yacyretá Hydroelectric Project*, Request, at §63; and 1998 *India Ecodevelopment Project*, Request, at §§3-4. In more recent cases, however, the Panel did address PIL issues mentioned by Requesters (including borrower obligations under PIL) – *see e.g.*, 2003 *Philippines Manila Second Sewerage Project*, ER, at §§48-51; 2004 *Colombia Cartagena Water Supply, Sewerage and Environmental Management Project*, ER, at §§211-212; and 2006 *Honduras Land Administration Project*, Request, at 2-3, MR at §71, ER at § 58.

[40] *See* section 9.2.1 above.

[41] *See e.g.*, Ananthanarayanan (2004); Clark (2002), at 223-226; Hunter (2003), at 210; and Bradlow (2005), at 419.

remedial action plans either. On the other hand, the Resolution does not explicitly preclude the Panel from participating in remedial activities – which arguably leaves the Panel with an opportunity to increase its influence regarding the area of remedies, if only indirectly.

The analysis in Chapter 9 illustrates that there is evidence of the Panel's judicialization efforts in this regard – such as the Panel's inclusion of root cause analysis of problems raised by Requesters. Furthermore, the improved quality of Panel investigation reports has raised the Panel's credibility with the Board and has arguably resulted in higher quality Management remedial action plans. Moreover, although the Board decided during the 1999 Review to stop the practice of involving the Panel in remedial activities, the Board has subsequently reversed this decision on two occasions to date.

Conversely, the Panel's judicialization efforts regarding remedies can only extend up to a point before the limitations inherent to the Resolution start to have a marked limiting effect on the expansion of judicialization.[42] Given these constraints, there is a real concern that, going forward, the Inspection Panel's inability to provide at least for the development – if not the enforcement – of effective remedies might increasingly jeopardize the Panel's external credibility, which, in turn, might lead to a decline in the Panel's degree of judicialization and institutional independence. It is therefore suggested that the Bank should pay urgent attention to this issue by expanding the Panel's remedial role, and preferably by formalizing such expansion through amendments of the Inspection Panel Resolution.

11.3.2. Further Inferences from the Application of the Judicial Oversight Model to the Inspection Panel

Two general inferences can be drawn from the application of the Judicial Oversight Model to the Inspection Panel's institutional history and practice. First, a systems approach to intricate problems such as the accountability and legitimacy of international institutions – issues that certainly do not have a legal dimension only – has definite benefits. For instance, such an approach facilitates empirical analysis that does not only look at 'snapshots' in the life of an institution, but searches for patterns that evolve over time – seeking out the underlying 'structures' in the system that are causing the recurring patterns. In other words, a systems approach indicates when a problem has to be addressed "at the event, pattern, or structural level, and when to use an approach that combines the three".[43] Moreover, systems theory is concerned with the effect of unintended consequences[44] and the influence of delays between an action

[42] *See* section 10.2.3 above.
[43] Anderson & Johnson (1997), at 8-9.
[44] *See* above, note 89 (Ch. 1).

and the time before the effects of that action become know,[45] thereby raising awareness that potential 'improvements' might have unintended consequences and / or delayed side-effects.

However, a systems approach, like other scientific methods, has to be firmly empirically grounded, and preferably based on a considerable amount of data. International lawyers often appear to be unaware of the great wealth of data that are already generated by existing accountability mechanisms such as the Panel – data that are 'ripe' for being converted into information and insight. This study's experience with researching the Inspection Panel's case law – and being confronted with an unexpectedly overwhelming richness of data – would seem to suggest that international lawyers searching for solutions to the problems of accountability and legitimacy of international institutions might want to dive into the thousands of pages of reports generated by the 'panels', the 'committees', the 'commissions', the 'mechanisms', and the 'ombudsmans'.[46] Many of the answers we are looking for might already be there.

Second, the conclusion that the Panel exercises quasi-judicial oversight has broader implications, which are a bit like the proverbial double-edged sword. One the one hand, quasi-judicial oversight – as conceptualized in this book in terms of its nature, effect and dynamics – holds definite potential for enhancing the accountability and legitimacy of international institutions. On the other hand, quasi-judicial oversight has definite limits. An entity engaged in quasi-judicial oversight can only expand its degree of judicialization and *de facto* judicial independence to a certain extent. That is, before triggering backlash from one or more of the limiting factors discussed in this book, resulting in decline. It is clearly possible for a quasi-judicial institution to restart a cycle of growth after such a period of decline, as the theory and practice discussed in this book indicate. However, in the case of the Inspection Panel, it required two interventions from the Board (the 1996 and 1999 Board Reviews) to reignite the expansion of Inspection Panel independence and judicialization. The analysis contained in Part II of this book (especially indications that the Panel's external credibility might be suffering) would seem to suggest that the Inspection Panel is, once again, nearing an important crossroad in its development along the line of general progression.

[45] *See* section 5.2.1 above.
[46] *See e.g.*, section 6.2.2 above.

11.4. Suggestions for Further Research

Apply the (Quasi-) Judicial Oversight Model to additional non-international constitutional systems, as well as additional (quasi-) legal regimes within public international law

The horizontal comparative law analysis conducted in Part I, which served as the basis for developing the Judicial Oversight Model, invariably required a selection of constitutional systems.[47] Similarly, the Model was applied in Part II to one particular international accountability mechanism – the World Bank Inspection Panel. The (Quasi-) Judicial Oversight Model might therefore benefit from being applied to additional legal regimes, both in the non-international and international context.

Additional non-international constitutional systems to which the Model might be applied could include, for instance, the United Kingdom and the Netherlands. It might be specifically interesting to apply the Model to these domestic legal systems, because they are examples of 'hybrid' constitutional systems.[48] In such hybrid systems, the judiciary has no authority to review constitutionality, but can, under certain circumstances, review national legislation and executive action against international human rights treaties, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms.[49]

An additional legal regime in public international law to which the Model could be applied, is the jurisprudence of the European Court of Human Rights, which enforces the European Convention for the Protection of Human Rights and Fundamental Freedoms. Concerning other quasi-legal regimes in public international law, the Model could be applied to other accountability and compliance mechanisms, such as the bodies at regional multi-lateral development banks that have been largely modelled on the Inspection Panel;[50] as well as various other international compliance mechanisms, such as those associated with Multilateral Environmental Agreements (MEA) and international human rights conventions. Both the inclusion of the European Court of Human Rights and international compliance bodies would extend the current focus on international institutions to including the accountability and legitimacy of states.

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47 *See* section 1.5.3.3 above.
48 *See* above, note 49 (Ch. 1).
49 Id.
50 *See* above, note 78 (Ch. 6).

Further refine the (Quasi-) Judicial Oversight Model

The (Quasi-) Judicial Oversight Model could be further refined based on insights drawn from the application of the Model to additional non-international constitutional systems and to (quasi-) legal regimes in international law, as set out above. In addition, specific aspects of the Model could be refined. For instance, the 'strategic' use of 'activism' and 'restraint', and the idea of 'gradation' or further qualification of the degree judicialization and judicial independence could be developed further.[51]

The 'strategic' use of activism and restraint (as the terms have been defined in this book) refers, for instance, to the phenomena where the exercise of judicial self-restraint might not always be what it seems.[52] For instance, it might be a way of preserving longer-term *de facto* judicial independence, and would therefore be an instance of 'thinner' judicial restraint.[53] Alternatively, the 'restraint' might not result in a significant reduction of the degree of judicialization and judicialization (or not as much as anticipated) because the court's decision is actually 'activism' in disguise. Courts' employment of doctrines that narrow judicial discretion (or, that allow for broader political discretion) might be examples of this phenomenon.[54]

The 'gradation' or further qualification of the degree of judicialization and judicial independence[55] might allow for a more differentiated picture to emerge concerning the degree of 'activism' and 'restraint' of a particular court or quasi-judicial tribunal.

Lastly, the Model could be further developed concerning the 'effectiveness' aspect, which has been excluded from the scope of this book.[56] Since the outcomes of such an analysis could also strengthen the Inspection Panel function (and mechanisms like the Panel), it will be discussed as a separate point.

Conduct multidisciplinary research into the effectiveness of international accountability mechanisms such as the Inspection Panel

This book does not answer the question whether or not (or to what degree) the Inspection Panel *has* actually enhanced the accountability and, indirectly, the legitimacy of the World Bank.[57] This question needs answering, but it should

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[51] *See* section 5.4 above; *and see* below, note 55 (Ch. 11).

[52] Some of the examples mentioned in section 10.1 above might hint at this, notably, the *Yacyretá II* case. *Also see* comments made about the *Chad Pipeline* case in section 7.3.2 above.

[53] *See* Figure 12 above.

[54] *See* section 2.1.2.3 above.

[55] *See e.g.*, Cohn & Kremnitzer (2005). *Also see* Brand (2007), at 441-446.

[56] As clarified in section 1.2.3 above.

[57] There appears to be various (strong, and diverging) opinions about the issue, but substantial

be substantiated by (preferably) multi-disciplinary research that is firmly grounded in empirical work. One obvious aspect to include in such a research study would be the area of remedies.[58] Specific considerations could be, for instance, how effective are World Bank management's 'remedial action plans' at addressing (thus, remedying) claims brought by Requesters as part of the Panel process. In addition, the Inspection Panel's contribution toward influencing the content of these Management remedial action plans could be qualified further.

11.5. In Search of the "Judicial Spirit" in Public International Law

The question 'how to improve the accountability and legitimacy of international institutions' is not new. Indeed, much proverbial ink has been spilt on the topic, and much time has already been spent as part of various efforts to address the issue. However, informal debate and formal efforts – both necessary and useful from a theoretical stance – have not yielded many results in practice.[59] Some might even argue that, despite all these efforts, the international community is nowhere *near* realizing the kind of 'responsibility' regime for international institutions like what was established for states.[60] As Alvarez pointed out:

> […] states have had plenty of opportunity to accord judicial remedies for those injured by IO action but have generally refused to do so. With some exceptions dealing with European institutions and complaints brought by some IO employees before internal IO administrative bodies, the international tribunals thus far established lack the jurisdiction to consider binding decisions directed at IOs and even the advisory jurisdiction of the ICJ is premised on being of assistance to the IO that presents a question and does not anticipate putting the IO, in effect, on the dock. [….] While it is true that the lack of remedies sometimes reflects merely a political but not a doctrinal problem, in

(empirical) research to substantiate those opinions seems to be largely lacking – *see e.g.*, Kingsbury (1999), at 331: "Although anecdotal accounts suggest that the mere existence of the panel has not had a great impact on the routine project-related activities of the Bank's operational staff, its creation was part of a more general shift in the dynamics of the Bank's system for assuring internal compliance with policies."

[58] *See* section 9.2.3 above.

[59] *See* section 1.2.1 above.

[60] *I.e.*, the ILC's draft articles on State Responsibility were adopted by the UN's General Assembly, *see* GA Res. 56/83, 12 December 2001. For international institutions, such a regime would probably be the equivalent of 'third level' accountability (as defined by the ILA), which is "responsibility arising out of acts or omissions which do constitute a breach of a rule of international and/or institutional law (e.g. violations of human rights or humanitarian law, breach of contract, gross negligence, or as far as institutional law is concerned acts of organs which are ultra vires or violate the law of employment relations." *See* ILA 2004 Report, at 5.

> this instance it is both. There is a very strong probability that many states do not intend their rules of obligation to apply to their IOs – at least outside a few pockets of the law dealing with specific issues such as responsibility towards predictable third parties who need to have reassurance that they are dealing with a responsible entity.[61]

Alvarez further makes the point that it is premature to establish a general responsibility regime for international institutions, and that we should rather focus our energy on "carefully tailored attempts to make particular IOs or organs doctrinally responsible".[62] The World Bank Inspection Panel, and other mechanisms like it, would appear to fit this suggestion.

On the other hand, perhaps we will never realize the more ambitious outcomes such as establishing a comprehensive legal regime to ensure the accountability of international organizations if the proper seeds are not sown, and if the seedlings are not nurtured. In that sense, I add my voice to Esty's and others from the emerging school of Global Administrative Law, when arguing that the central goal is not "to make the normative case for more supranational governance", but, "[m]ore modestly" that

> whether the decisionmaking role assigned to international bodies is narrow or broad – supporting mere intergovernmental exchange or full-scale supranational decisionmaking – these institutions must adopt basic administrative law procedures to achieve better results and bolster public confidence in the choices they make and the policies they advance. This argument has both an empirical element, drawn from a close review of the performance of existing international institutions, and a normative logic, derived from political theory and the functioning of administrative law on the national level.[63]

Put differently, in the absence of a formal legal regime with all the "outward features" that can ensure the accountability and legitimacy of international institutions, we need to realize the "judicial spirit" in public international law.[64]

If the analysis of the Inspection Panel's institutional history and practice has shown us one thing, it is that the nature, effect and dynamics of judicial oversight – indeed, the "judicial spirit" – are more alive in this area of public international law than we might think.

Of the many examples from the Inspection Panel's case law that illustrate these arguments, I was particularly struck by one photograph taken during the *Chad Pipeline* investigation in which the World Bank Inspection Panel members consulted with project affected people in the shade of a big tree (see

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61 Alvarez (2006), at 30-31.
62 Alvarez (2006), at 32-33.
63 Esty (2006), at 1494-1495.
64 *See* above, note ** (Ch. 1).

Figure 22 below).[65] This image spoke directly to my own African roots and brought the African theme of "justice under a tree" to mind.[66]

Figure 22: The Inspection Panel Engaging with Project Affected People in the *Chad Pipeline* Case

As the debate about the accountability and legitimacy of international institutions continues, *this* is the image we should not forget: 'project affected people' – real people – sitting in the shade of a tree. Asking, through the Inspection Panel, a powerful institution such as the World Bank to account for its exercise of public power; hoping for eventual justice.

[65] Inspection Panel Annual Report (2001/2002), at 30 (permission to reproduce this photograph obtained from the World Bank Inspection Panel – on file with the author).

[66] "Justice under a tree" is also the inspiration behind the logo of the South African Constitutional Court, *see* <www.constitutionalcourt.org.za/site/thecourt/thelogo.htm>.

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Andria Naudé Fourie was born on 24 April 1975 in Delmas, South Africa. After graduating from Sundra High School in 1993, she studied South African law at the University of Pretoria – completing a BLC degree (1996) and an LL.B degree (1998). During her student years, Naudé Fourie was very active in student politics and served as a member of the Executive Student Council in 1997, and as President of the Executive Student Council in 1998. After completing her studies in 1999, she joined *Accenture*, an international business consulting firm, in their Johannesburg practice. Naudé Fourie completed a Post-Graduate Diploma in Business Administration (*cum laude*) at the Gordon Institute of Business (GIBS, University of Pretoria) in 2001. During 2001, Naudé Fourie moved to The Netherlands and continued her career in business consulting with *Accenture*, working on various business improvement projects across Europe until 2006. She completed an LL.M. in Public International Law between 2003 and 2005 at the Erasmus University Rotterdam (*cum laude*). Naudé Fourie has been working as *promovenda* and lecturer at the department of Public International Law at the Erasmus School of Law since September 2007. She was appointed as *universitair docent* / assistant professor in public international law at the Erasmus School of Law in June 2009, and completed her PhD in October 2009.