

**CAN THE EU ADMINISTRATION LEARN FROM THE  
EXPERIENCE OF INDEPENDENT ACCOUNTABILITY  
MECHANISMS?**

by Ian Harden and Jacques Ziller

The two following papers are being published in *Il Politico* as research outcomes of the Pavia Unit of the Italian Research Project of National Interest (PRIN) project 2012 (2012SAM3KM) on Codification of EU Administrative Procedures, financed by the *Ministero dell'Istruzione, dell'Università e Della Ricerca*, Italy. The project started in October 2013 and was concluded in March 2017. In the framework of that project, a workshop was organised in early 2017, the aim of which was to explore how far the example of the Independent Accountability Mechanisms (IAMS) of the international financial institutions (IFIS) could provide inspiration to the EU administration, especially the EU agencies, as a way of engaging with people and interests that may feel excluded from current processes of administrative policy-making and implementation.

In 1993, the World Bank was the first multilateral development bank to establish a mechanism that could be invoked by people who believe that they or their environment might be harmed by a project funded by the Bank. Since then, many IFIS involved in lending for development have created IAMS<sup>1</sup>, e.g. the *African Development Bank's* In-

Ian Harden is Honorary Professor at the University of Sheffield; In 1996, he joined the newly-established European Ombudsman and served as Head of the Legal Department from 2000, before becoming Secretary General in 2006. He retired from the Ombudsman's office at the end of July 2015. Jacques Ziller is full professor at the University of Pavia, Italy; Formerly Université de Paris 1 Panthéon-Sorbonne and European University Institute, Fiesole; he was Principal investigator for the PRIN Project mentioned in introduction.

<sup>1</sup> See E. MITZMAN, *The Proliferation of Independent Accountability Mechanisms in the Field of Development Finance*, NYU School of Law, Jean Monnet working paper,

dependent Review Mechanism, the *Asian Development Bank's* Accountability Mechanism, the *Black Sea Trade and Development Bank's* Internal Audit Department, the *Caribbean Development Bank's* "Complaints", the *Deutsche Investitions-und Entwicklungsgesellschaft's* Independent Complaints Mechanism, the *European Bank for Reconstruction and Development's* Project Complaint Mechanism, the *European Investment Bank's* Complaints Mechanism, the *Green Climate Fund's* Independent Redress Mechanism, the *Inter-American Development Bank's* Independent Consultation and Investigation Mechanism, the *International Finance Corporation and Multilateral Investment Guarantee Agency's* Compliance Advisor Ombudsman, the *Japan Bank for International Cooperation's* Office of Examiner for Environmental Guidelines, the *Netherlands Development Finance Company's* Independent Complaints Mechanism, the *Nippon Export and Investment Insurance's* Objection Procedures on Environmental Guidelines, the *Nordic Investment Bank's* "Complaints", the *Overseas Private Investment Corporation's* Office of Accountability, the *United Nations Development Programme's* Social and Environmental Compliance Review and Stakeholder Response Mechanism or the *World Bank's* Inspection Panel. Seventeen of those IAMS were represented at the latest annual meeting of the IAM network<sup>2</sup>.

IAMS are very different in their functions and structure, but have in common a number of features which we can sum up as: i) their reviewing functions as regards the implementation of programmes financed by the organisation they are part of; ii) their independence from the management and hierarchy of the organisation; iii) a complex environment of stakeholders in the operations they are reviewing, including governments of recipient and donor states and organisations as well as a number of private financial organisations and numerous non-governmental organisations (NGOS); iv) the absence (for most of them) of any mechanism of judicial review, as they pertain to international governmental organisations.

2010; M. VAN PUTTEN, *Independent Accountability Mechanisms; How Multilateral Financial Institutions Can Be the Front Runners for Commercial Financial Institutions*, in E. SCISO (ed.) *Accountability, Transparency and Democracy in the Functioning of Bretton Woods Institutions*, Cham, Springer, 2017, pp. 137-156.

<sup>2</sup> See <http://independentaccountabilitymechanism.net/>

What makes the IAMS interesting from the perspective of the protection of Third Parties/Non-Parties is that the people who turn to IAMS mostly have no judicial remedies and little or no political weight. The IAMS thus give a voice to interests that might otherwise be excluded from a decision-making process that typically involves only the funding body, the project promoter and government structures in the country concerned. To be credible and effective, IAMS need the independence embodied in their name. At the same time, they are voluntary creations of the organisations that they hold accountable. Experience shows that managing the inherent tension between these two aspects of their functioning is not always an easy task.

Unlike most IFIS, the European administration is part of a legal/constitutional framework containing external institutions that scrutinise its activities and hold it to account: in particular, the European Parliament, Court of Auditors and Ombudsman. As the complaints mechanism of the European Investment Bank demonstrates, however, the iam formula can also provide added value within that framework.

Mitzman noted more than eight years ago:

“For the moment, what IAMS seem to have done is create a legally relevant relationship - between a specific type of activity (*i.e.*, development financing) and the rights and interests of those affected by it - that appears framed as an original form of administrative relationship, conditioned and shaped by the financial nature of the activity in question. In this respect, it is interesting to observe how IAMS have multiplied, and, in particular, how national and EU administrations have followed the lead of global administrations in creating avenues of participation and review for project-affected people, who are clearly non-citizens, non-residents, and are in no contractual relationship with the financing organization. Though the effectiveness of these latter instruments appears still problematic, there is a sense that IAMS may constitute a model for starting to frame those social and environmental responsibilities of financing organizations that are otherwise difficult to pin down by national and supranational legal orders<sup>3</sup>.”

On that basis, that author made a number of proposals based upon the idea that “the use of administrative law tools and principles may

<sup>3</sup> E. MITZMAN, *The Proliferation of Independent Accountability Mechanisms in the Field of Development Finance*, cit., pp. 49-50.

help to strengthen the position of IAMS and the accountability framework of financing institutions<sup>4</sup>.” The idea of the workshop organised by the Pavia PRIN unit was to look at the subject the other way round; *i.e.*, to explore if and to what extent some of the IAMS’ ways of handling complaints could help to fill some existing gaps in the protection of diffuse interests, as well as of Third Parties that do not have access to judicial review. In addressing this question, it is important to recognise that a number of factors make the context of the EU administration very different from that of most IAMS: the breadth of EU policy fields that go far beyond development financing, the far greater level of development of the legal and administrative framework of EU institutions, bodies, offices and agencies, and, last but not least, the existence of a stable and strong system of judicial review provided by the Court of Justice of the European Union (CJEU).

The workshop brought together practitioners from the IAMS community and from selected EU agencies, as well as academics working on administrative procedures and accountability. It was intended as a forum for discussion, in which participants could try out and explore ideas. The workshop was therefore held under the Chatham House Rule<sup>5</sup>, which implies that the names and affiliations of participants may only be disclosed with their consent, and that no statements will be attributed to specific participants.

The agenda of the meeting covered two series of topics. The first series covered the main questions about the structure and operation of the IAMS: commonalities and similarities amongst the IAMS; independence; staffing and budget; decision on admissibility of cases and scope of inquiry; investigative powers; publication of reports; institutional setting; composition; working modes/rules of procedure; reporting: to whom (president, board, ...), is a response to the report mandatory?; involvement of the complainant(s) in the procedure. The second series of topics concerned some of the current issues faced by the IAMS; changes in mode of operation of IFIS (intermediary lending, programme lending...); international standard-setting; cooperation between IAMS; pressures on the IAMS model; how effective are the IAMS in ensuring and

<sup>4</sup> E. MITZMAN, *The Proliferation of Independent Accountability Mechanisms in the Field of Development Finance*, cit., p. 50.

<sup>5</sup> See <https://www.chathamhouse.org/about/chatham-house-rule>.

reviewing genuine public participation? and dissemination of lessons learned.

The practitioners coming from EU agencies, as well as the academics working on those agencies, were initially sceptical about the possibility to replicate some of the ways of proceeding of IAMS in the EU context. As discussions proceeded, however, they eventually admitted that a number of very interesting points had emerged, especially as practitioners from the European Investment Bank's Complaints Mechanism (EIB/CM) took part in the workshop. The EIB/CM, although fully embedded in the general EU context of judicial review, European Ombudsman review and the applicability of principles of European administrative law, also shares the main features of the IAMS, which are acknowledged by its stakeholders as positive complements to both judicial and Ombudsman review of the EIB. Our idea is that as EU agencies – be they free-standing or part of the European Commission – will gradually realise that something more can be done for the protection of Third Parties and Non-Parties without creating excessive burdens on the functioning of administration. The experience with establishing ombudsmen in Europe reinforces this belief: typically the discussion in France in the late nineteen sixties and early nineteen seventies was opposing those, in practice and scholarship, who saw no use for a supplementary review body in the French context of a long established and solid system of administrative courts, and those who on the contrary pointed to existing lacunae due to rules of standing, limited powers of courts and social reluctance to go to court that fully justified the creation of the *Médiateur*, which was eventually established by a statute of 1973<sup>6</sup>.

**Riassunto** - Vengono presentati i due articoli che seguono, relativi agli *Independent Accountability Mechanisms* (IAMS) delle istituzioni finanziarie internazionali. Si tratta di alcuni risultati di un Workshop tenuto nell'ambito del PRIN 2012 (2012SAM3KM)

in materia di Codificazione dei procedimenti amministrativi europei, nel quale sono state discusse le potenzialità del sistema degli IAMS per le agenzie, le istituzioni e gli organismi dell'Unione Europea.

<sup>6</sup> Loi n°73-6 du 3 janvier 1973 instituant un Médiateur de la République. The role of the *Médiateur* was later subsumed within that of the *Défenseur des Droits*, following the constitutional reform of 23 July 2008.