

are operating with their own risk—when it is clear that they could be financially affected by future risk scenarios, even those risks derived from social, environmental, human rights, or political sources, as in project finance—they can exercise a moderating effect on the most destructive aspects of unconstrained finance and development.

## **CITIZEN-DRIVEN ACCOUNTABILITY: THE INSPECTION PANEL AND OTHER INDEPENDENT ACCOUNTABILITY MECHANISMS**

*By Peter L. Lallas\**

### A TALE OF TWO CITIES

It is an honor to join this session on “Regulating the Impacts of International Project Financing,” as part of the larger conversation about “International Law in a Multipolar World.” I am grateful to be here with two other terrific colleagues and speakers, Jessica Evans and Cynthia Williams, and our distinguished Chair for the session, Professor Edith Brown Weiss—from whom we all have learned so much. Many thanks also to the American Society of International Law for the invitation and for the rich dialogue and learning generated by these Annual Meetings, and to Professor Nienke Grossman for guiding us so well in bringing this discussion together.

I will focus my remarks on two related topics. The first is the evolution of policies and norms at international financial institutions (IFIs), such as the World Bank, to help ensure social and environmental sustainability in international project financing. These have become, in an important sense, a subset of international law in the field of international development work. The second is the role and practice of the World Bank Inspection Panel and other Independent Accountability Mechanisms (IAMs) in providing an avenue for project-affected people to seek accountability and recourse from the IFIs to respect these policies and norms, beyond the realm of actions by states.

This latter idea of citizen-led or “bottom-up” accountability is now both well established and a continuing work in progress. For the Annual Meeting this week, it may perhaps be seen as another “pole” on the landscape (or shape in the “kaleidoscope”<sup>1</sup>) of international law in a “multipolar” world. Its basic aim is to give greater voice to people and communities affected by decisions made at the international level, to help find solutions to their concerns, and to support the broader stated missions of those organizations to fight poverty and promote more sustainable and inclusive international development.

In my remarks, I will touch briefly on how these independent accountability systems work, the issues they address as international fact-finding bodies, and a few of their more significant findings over the years on issues of policy compliance and harm—with a principal focus on the World Bank Inspection Panel. I will conclude with a few thoughts on the evolving landscape both for the policies and the systems of accountability, with a look ahead to the future. But to get there, it is helpful first to look back to the beginnings.

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<sup>1</sup> See Edith Brown Weiss, *International Law in a Kaleidoscopic World*, 1 *ASIAN J. INT’L L.* 21 (2011).

## ORIGINS

During the late 1980s and early 1990s, there was rising concern about the social and environmental impacts of some projects financed by international financial institutions, including the World Bank. Perhaps the most well-known of these was the proposed financing of dams by the World Bank on the Narmada River in India, involving large-scale displacement of people and impacts on the environment and cultural resources. Some projects were considered to be “development disasters,” and civil society and local communities rose up strongly to speak out against them.<sup>2</sup> In parallel, there was major concern about a lack of transparency and openness in the deliberations and decisionmaking process relating not only to IFIs but also, for example, in the institutions of the international trading system.

One of the key critiques that arose during these years was that the World Bank was not properly applying its own environmental and social safeguard policies that it had been developing to reduce or avoid social and environmental impacts of projects which it had decided to finance. These policies, which have evolved significantly over the years, set forth both procedural and substantive rights and obligations on a range of social and environmental topics relevant to international development work.<sup>3</sup> Several of them address the particular needs and rights of vulnerable groups which may be affected by projects financed by the World Bank.

In the swirl of controversy surrounding the Narmada project, the World Bank commissioned an independent report to examine the various claims and concerns. The so-called “Morse Commission,” reviewing the relevant facts, determined that there were serious violations of World Bank safeguard policies and “[d]evastating human and environmental consequences of those violations.” Shortly thereafter, the Bank carried out an internal report on its operations, led by Vice-President Willi Wappenhans. This so-called “Wappenhans” Report identified, more systemically, that the Bank had developed a “culture of approval” under which projects were approved without adequate consideration of social and environmental impacts and safeguards, or capacity needs within countries to help address such concerns and support positive results during project implementation.<sup>4</sup>

These concerns about the impacts of operations financed by IFIs joined with many others in the lead-up to the landmark Rio Earth Summit in 1992. At Rio, the international community generated a new mandate and blueprint for international cooperation for sustainable development, recognizing the linkages between poverty, environmental protection and development, and the fundamental importance and rights of citizen participation, transparency, and access to justice at all levels, including the international level (e.g., in Rio Principle 10).

In this larger context, and in the spirit of Rio, the World Bank Board of Directors established an “independent Inspection Panel” in 1993,<sup>5</sup> with the strong engagement and support of voices from communities, civil society, and many governments. The Panel, and the other

<sup>2</sup> See, e.g., World Bank Inspection Panel, *Accountability at the World Bank: The Inspection Panel at 15 Years* (2009) (and sources cited therein); DANA CLARK, JONATHAN FOX & KAY TREAKLE, DEMANDING ACCOUNTABILITY: CIVIL-SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL (2003).

<sup>3</sup> They include policies on Indigenous Peoples, Involuntary Resettlement, Poverty Reduction, Physical Cultural Resources, Environmental Assessment, Natural Habitat, Forests, Pesticides, Dam Safety, and International Waterways. Beyond these social and environmental “safeguard” policies, the World Bank (and other IFIs) have developed other operational policies and procedures in areas such as Project Supervision, Economic Analysis, Project Appraisal, and Access to Information, among many others, as well as policies specific to certain types of lending (e.g., at the World Bank, development policy and sector-based lending). The policies are reproduced at [www.worldbank.org](http://www.worldbank.org), and [www.inspectionpanel.org](http://www.inspectionpanel.org).

<sup>4</sup> See, e.g., World Bank Inspection Panel, *supra* note 2.

<sup>5</sup> Resolution Establishing the Inspection Panel, para. 1, Sept. 1993, reproduced at [www.inspectionpanel.org](http://www.inspectionpanel.org).

IAMs which have followed, provide one way to try to operationalize the principles of Rio (the first city in this tale), especially Principle 10 of the Rio Declaration, by giving voice and rights of recourse to people affected by actions and decisions taken at the international level. Let me turn now to how this works.<sup>6</sup>

### THE INSPECTION PANEL—ITS ROLE AND FUNCTION

The Inspection Panel is an independent accountability and recourse unit of the World Bank. Its role and mandate are set forth in the 1993 Board Resolution establishing the Panel, and Clarifications to that Resolution adopted by the Board in 1996 and 1999.<sup>7</sup> The Panel has adopted its own Operating Procedures (now being updated) and Administrative Procedures, and a number of materials describing its role and work are posted on its website.

The Panel responds to complaints, known as Requests for Inspection, from people who believe that they are suffering, or may suffer, from harm caused by a World Bank-financed project. In line with its governing framework, the Panel has the authority to investigate whether the Bank has followed its own operational policies and procedures in the design, appraisal, and implementation of a project, and whether any instances of non-compliance have contributed to harm or potential harm.

#### *Accessing the Panel*

The Panel process is designed to be readily accessible to affected people, according to a few simple but important requirements. A Request for Inspection may be submitted by two or more people who live in the territory of the borrower and who believe that actual or likely harm may result from the failure of the Bank to follow its policies and procedures, including its social and environmental safeguard policies. The affected people may be represented by local representatives, including nongovernmental organizations, or in certain exceptional circumstances by a foreign representative if no local representation is available.

A Request must be in writing and signed, but it can be a simple letter, in any language. Importantly, before the Panel can hear a case, the subject matter of the Request must be brought to the attention of Bank Management, and a Request may proceed to investigation only if the Requesters are not satisfied that their concerns are being adequately addressed. This “eligibility” requirement provides an incentive for early efforts and action to address issues, before the Panel process is triggered. Another “eligibility” requirement is that the Panel may not hear a Request for Inspection in relation to a project that is closed or where at least 95% of funds have been disbursed. In addition, the World Bank has established a separate entity to address claims about corruption, and the Panel does not handle issues of procurement.<sup>8</sup>

#### *The Panel at a Glance*

The Inspection Panel consists of three members selected on the basis of independence and development experience, for non-renewable terms of five years. In support of this core

<sup>6</sup> For a more detailed description and analysis of various types of mechanisms designed to give voice and rights of recourse to non-state actors in the context of law relating to international economic relations, see Peter L. Lallas, *International Investment Activities: Giving Affected People Greater Voice and Rights of Recourse*, in *TRANSPARENCY IN INTERNATIONAL TRADE AND INVESTMENT DISPUTE SETTLEMENT* 159–216 (Junji Nakagawa ed., 2012).

<sup>7</sup> See [www.inspectionpanel.org](http://www.inspectionpanel.org).

<sup>8</sup> These and a couple of other basic eligibility requirements are set forth in the Panel’s governing framework, at [www.inspectionpanel.org](http://www.inspectionpanel.org).

principle of independence, Panel members can never work for the World Bank after the conclusion of their term. The Panel is independent of Bank Management, and reports its findings directly to the Board of Directors. In this way, the Panel provides an independent avenue for affected people and communities to take their concerns to the highest decisionmaking body at the World Bank. The Panel is supported by a small Secretariat, and retains independent experts to assist its fact-finding work. It operates its budget independently, and its governing framework states that the Panel shall be provided such resources as are necessary to carry out its responsibilities. The Panel makes its reports and findings public, as well as the reports and actions taken by the Bank in response to its findings.

### *The Panel Process*

When the Panel receives a Request for Inspection, it determines whether the Request meets certain threshold (or “admissibility”) requirements to ensure that it is not manifestly outside the Panel’s mandate. If this threshold is met, the Panel registers the Request and the process enters into the eligibility phase. Bank Management then has 21 working days to provide a response to the claims in the Request, and the Panel then has 21 days to report to the Board on whether the Request meets the relevant “eligibility” criteria, noted above, and whether an investigation is warranted. Normally, the Panel visits the affected people, project area, and government authorities of the borrowing country in making this assessment.

Where the Panel recommends an investigation, and the Board so approves, the process enters the investigation phase. Here, the Panel operates as an independent fact-finding body to ascertain all relevant facts and information in considering the claims in the Request. The Panel generally hires one or more independent and well-recognized experts to assist it in this fact-finding process, and carries out an in-country investigation visit to carefully consider information and documentation relevant to the claims. The Panel acts impartially and independently, considering information from all sources, as a basis to make its findings on whether Bank Management has complied with the Bank’s safeguard and other policies, and—if not—whether instances of non-compliance have contributed to harm or potential harm.

At the conclusion of the investigation, the Panel presents its Report and findings on issues of policy compliance and harm to the Board of Directors, and Bank Management has six weeks to make recommendations to address the Panel’s findings. During this period, Management consults with the Borrower, the Requesters, and other affected people, and in many cases develops an action plan jointly with the Borrower. The Panel Report and the Management Response are presented to the Board of Directors, which has on some occasions requested Management to take additional actions in response to the findings of the Panel. Frequently, the Board has requested Management to provide progress reports on implementation of actions set forth in the Management Response, and in some cases the Board has asked the Panel to carry out follow-up fact-finding and report to the Board.

### *Protecting the Right of Recourse*

There have been occasions when people who have come to the Panel faced pressure and retaliation for doing so. The Panel has strict procedures to protect the confidentiality of requesters upon their request, and takes immediate steps to inform the highest levels of the World Bank of any instances of pressure or worse on affected people. This is an ongoing concern of the highest importance.

*Accountability, Solutions, and Learning—Results of the Panel Process*

The Panel process is designed to achieve results at different levels. At the project level, the process is first and foremost designed to provide accountability and redress for people and communities who come to the Panel. Following an investigation, Management has a responsibility to recommend actions to address the findings of the Panel, which is a critical element in providing results for people and accountability on the part of the institutions. In addition, the Panel is making concerted efforts to encourage and foster solutions and results in the earlier stages of its process. People who come to the Panel often are poor and vulnerable, and may have few or no available avenues to seek either recourse or accountability.

The Panel process also can provide important lessons and insights for the institution on some of the core challenges in development work. The claims brought to the Panel involve Bank-supported projects in a wide range of areas, including energy production (e.g., hydro-electric plants, coal-fired power plants), agriculture, transport, forests, land use, mining, water use, and many others, in countries around the world. The Panel's reports, and the responses by Bank Management, have addressed issues in areas such as:

- Protecting the rights of indigenous peoples, including their customary rights to land as well as rights relating to participation, consultation, and broad community support (in the UN context, prior informed consent) as a condition to supporting actions that affect them (e.g., investigations relating to the Panama Land Administration project, DRC Forest project, Papua New Guinea Small Agriculture Development project, Honduras Land Administration project)
- Protecting the rights of people and communities faced with displacement and resettlement, including actions to avoid displacement and to protect and restore livelihoods (e.g., Mumbai Urban Transport project, West Africa Gas Pipeline, Albania Coastal Zone Management project, Cambodia Land Administration project)
- Assessing, preventing, and mitigating adverse environmental and social impacts, including through a proper identification of the “project area of influence,” a careful analysis of feasible project alternatives, and consideration of direct, indirect, cumulative, and associated impacts (yes, all of these!); some reports have also have addressed transboundary and global impacts, including issues of climate change (e.g., Uganda Bujagali Falls Hydro-Electric project, South Africa Eskom Energy Investment/Coal Fired Plant project)
- Conserving and ensuring the sustainable use of natural habitats, cultural resources, and sacred places, including protection of areas determined to be “critical natural habitat” (e.g., Uganda Bujagali Falls project, DRC and Cambodia forest projects, Pakistan Natural Drainage Program project)
- Providing for meaningful and adequate consultation and participation on the part of project-affected people and other stakeholders, and appropriate supervision of social, environmental, and other issues that may arise during project implementation (e.g., Cambodia and DRC forest projects, West Africa Gas Pipeline project, among many others)
- Considering issues of human rights to the extent covered by, or “embedded in,” Bank policies (e.g., in the Chad-Cameroon Pipeline investigation, Panama Land Administration project), including the right to recourse.

The Panel is pursuing opportunities both within and outside the Bank to describe and highlight some key findings, especially those which reflect recurrent issues or problems in project design, appraisal, or implementation. The Requests, Panel Reports, and Management Responses are reproduced under the cases link on the Panel website, noted above, and several of these key findings are noted in more detail (with references to cases) in the Panel's recent submission (May 2013) to the ongoing review of Bank safeguard policies, at [www.world-bank.org](http://www.world-bank.org).

### *Check and Balance for the Board*

Through its work, the Panel provides an independent, technically based check and balance for the World Bank's Board of Directors on what is happening on the ground in Bank projects in terms of policy compliance and related issues of harm. The Panel reports both positive findings of compliance as well as instances of non-compliance, and over the years has made a number of findings in both directions. The Panel also recognizes cases where Bank Management has taken steps to address legitimate concerns once a Request for Inspection was submitted.

### INCENTIVES FOR THE INSTITUTION AND THE ISSUE OF RISK

As described in *Accountability at the World Bank: The Inspection Panel at 15 Years* and other studies noted therein, the existence of a citizen-led accountability mechanism like the Inspection Panel can provide an important incentive for the Bank to apply its policies properly. The Panel has heard of many examples over the years where this has been the case.

At the same time, there has been concern in the institution that the Panel process contributes to risk aversion on the part of Bank staff, who may feel concerned that getting engaged in challenging projects could increase the likelihood of an investigation by the Panel. The Panel has stated on many occasions that it fully recognizes the importance for the institution of engaging in challenging circumstances, and to innovate in support of better development. The Panel in fact hopes to help empower the Bank's staff and help the organization achieve positive outcomes in challenging circumstances, by providing a safety net and a means to address concerns in the event that risks materialize.

It is also important to consider the question of risks to whom, and to prevent risks from falling disproportionately on those who may be poor or vulnerable, in line with Bank safeguard policies. A recent "Message from the Panel Chair" in the April 2013 Newsletter of the Panel addresses this subject in some detail (reproduced on the Panel website)—describing the problem as just like "a fast car needs brakes."

### THE ESTABLISHMENT OF OTHER IAMs—TWENTY YEARS ON

Since the creation of the Inspection Panel in 1993, other IFIs have followed this example by creating their own IAMs. There are now citizen-led IAMs at the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the European Investment Bank, the European Bank for Reconstruction and Development, the International Finance Corporation of the World Bank Group, among others, and there are also such mechanisms at several bilateral entities such as the Overseas Private Investment Corporation within the U.S. government.

These mechanisms each have their own particular structures, but the core missions are similar: to provide accountability, recourse, and redress/solutions in response to complaints

from project-affected people. They have evolved to include some new or elaborated functions as well, including formal ombudsman and advisory functions and a more formal post-investigation monitoring role. Over the years, the IAMs have received a total of some 250 complaints (the Panel has received some 90 of these).

The mechanisms have formed a network of IAMs, which has met annually for some 10 years. In June 2012, the network gathered together as a UN-designated “Major Group” at the Rio+20 Conference on Sustainable Development, and developed collectively a new publication to describe their work and some of the key results and findings in their cases over the years.<sup>9</sup> The gathering at Rio offered an opportunity to reflect on this work, exchange ideas and best practices among the IAMs, civil society, governments and other interested stakeholders, and look ahead to opportunities and challenges for the future.

In a sense, the IAMs were also returning home. In a meaningful way, they are children of Rio, also the second city in this “tale,” in a dynamic and changing world.

### LOOKING AHEAD

The IAMs represent a pioneering means to provide voice and rights of recourse to people affected by international development work, and to support the larger missions of the IFIs which established them. Their extensive body of findings may now be seen as an important contribution to the field of international development, cooperation, and law.

The IAMs also have evolved over time to address the changing nature of the world around them, and the challenges of this work. One area of focus, for example, is to enhance opportunities for early solutions to address the concerns of affected people, while maintaining rights of access to the IAMs in support of accountability. There are also many efforts to stay abreast of changes in lending instruments, policies and procedures, and overall approaches to development at the IFIs (including country ownership), which themselves reflect the dynamic context of international cooperation in the field of development.

There are other challenges too, including a persistent lack of awareness of the availability of IAMs on the part of people who may wish to know about such avenues for accountability and redress. There is also a continuing effort to find the right balance between accountability for policy compliance and fostering early solutions, but also a recognition that these are complementary features of a larger effort. The basic premise is to have good policies well applied, with opportunities for early solutions, in support of sustainable development, to help tackle poverty and build shared prosperity.

It is this recognition as well that connects the IAMs to the two cities in this tale. At the time of the Rio Summit in 1992, there was a sense of good policies on paper, but an absence of effective means to help ensure their effective application. At the Rio+20 Summit in 2012, with the systems of accountability now well established, one could ask, “What is the newer version of this story?” But that one we shall have to leave for the discussion which follows.

<sup>9</sup> This publication is entitled *Citizen-Driven Accountability for Sustainable Development: Giving Affected People a Greater Voice—20 Years On* and is also posted on the Inspection Panel website.