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David Hunter

American University Washington College of Law, dhunter@wcl.american.edu

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Using the World Bank Inspection Panel to Defend the Interests of Project-Affected People

David Hunter*

On the banks of Argentina's Parana River, local brickmakers took advantage of the unique qualities of the river's sand and mud to build sustainable, small-scale businesses. Over time, the brickmakers built networks of clients and suppliers—a social fabric that allowed them to carve out comfortable lifestyles. In the 1980s, this social fabric was destroyed, inundated by the rising waters behind the massive Yacyreta Dam.¹

For centuries, thousands of impoverished people scraped out a living on the shifting sand islands (known as chars) located in Bangladesh's Jamuna River. The so-called Char people are among the poorest in Bangladesh. Although under normal circumstances, chars might remain for years or decades, in 1999 thousands of the Char people faced losing their homes due to flooding caused by the construction of the Jamuna Bridge project. None of the Char people was scheduled to receive any compensation for the loss of their homes.²

In a remote village one thousand kilometers from Delhi, thousands of rural farmers who live in the Singrauli coal-mining region have seen their villages uprooted and resettled, sometimes more than once. Resistance has been met with police brutality and violence.³

What these communities have in common is that their misfortune resulted from development projects funded by the World Bank—projects ironically aimed at benefiting just such poor and disempowered communities. None of

* Senior Attorney, Center for International Environmental Law; Adjunct Professor, Washington College of Law, American University.

¹ Letter from Oscar Rivas, Coordinator, Sobrevivencia, Friends of the Earth Paraguay, to Richard Bissell, Chairman, The Inspection Panel (Sept 12, 1996) (on file with CJIL).

² Jamuna Char Development Project, *Request for Inspection, Jamuna Bridge Project*, IPN Request RQ96/1 (Aug 18, 1996) (on file with CJIL).

³ Madhu Kohli, *Request for Inspection, NTPC Power Generation Project*, IPN Request RQ97/2 (Apr 30, 1997) (on file with CJIL). For a summary of each of these cases, see Dana Clark, Jonathan Fox, and Kay Treakle, *Demanding Accountability: Lessons From the World Bank Inspection Panel* (Rowman & Littlefield, forthcoming 2003).

these rural communities was informed of, or allowed to participate in, the decisions that would fundamentally change their lives. The underlying Bank projects were typically designed in closed consultations between their country's finance ministries and World Bank economists.

These communities also have another thing in common: they organized against these development projects, seeking the support of the international activist community, and ultimately bringing claims before the World Bank Inspection Panel ("Panel"). These communities benefited from remarkable local activists who ably linked these communities with international nongovernmental organizations ("NGOs") active in reforming the World Bank. Oscar Rivas and Elias Dias Pena in Paraguay, Majibul Huq Dulu in Bangladesh, and Madhu Kohli in India were key links in the chain of support that allowed the local communities first to learn about their rights under World Bank policies and then to assert those rights at the Panel.

My work at the Center for International Environmental Law ("CIEL") privileged me to be another link in that chain. My colleague Dana Clark and I advised these and other similarly affected people on how to file claims with the Panel. This Essay reflects my experience as an NGO lawyer in pushing for the creation of the Panel, supporting project-affected people in bringing their claims, and then defending the Panel against attacks emanating from inside the World Bank. At times this work has seemed far from the realm of public international law, but that is in fact the point of the Panel—it is a substantial departure from traditional public international law.

Operationalizing the Panel took the active participation of many different players, but the original vision and conceptualization of the Panel came from outside the World Bank—from critics who were looking for ways to make the Bank accountable to the poor communities it was created to serve.⁴ The Panel was thus created to bridge the gap between international institutions and the people they serve. It was the first international institution that allowed citizens to bypass their national governments in lodging formal complaints that addressed how an international institution affected their lives. Citizens, and the lawyers that represented them, were given direct access to an international forum to press rights-based arguments regarding whether the institution had met its responsibilities. The Panel, then, reflects a citizen advocacy model that has no precedent in international law, outside of a few human rights tribunals.

⁴ For a good discussion of the creation of the Panel, see Lori Udall, *The World Bank and Public Accountability: Has Anything Changed?*, in Jonathan A. Fox and L. David Brown, eds, *The Struggle for Accountability: The World Bank, NGOs, and Grassroots Movements* 391 (MIT 1998). See also Ibrahim F. I. Shihata, *The World Bank Inspection Panel* (Oxford 1994).

I. A BRIEF INTRODUCTION TO THE WORLD BANK

The World Bank Group is the largest multilateral development agency in the world.⁵ In fiscal year 2001, the World Bank provided \$17.3 billion in loans to its client countries⁶ and leveraged an additional \$5 billion from other financial institutions.⁷ The Bank is also the recognized leader among development organizations, often coordinating other donors, mobilizing bilateral and increasingly private-sector financing, conducting policy research, and providing technical assistance to countries.

The Bank is governed by a Board of Governors, representing each of the Member Countries, which meets once a year to set broad policy directions for the institution. Other policy decisions at the Bank as well as decisions on specific loans are made by a twenty-four member Board of Executive Directors that meets several times a week. Voting at the Board of Executive Directors and at the Board of Governors is based on a country's contribution to the Bank's working capital. The United States has the largest voting share (almost 17 percent), and all the donor countries together comprise a clear voting majority. The Board meetings, voting records, and minutes are not made public. The World Bank President, James Wolfensohn, serves as the Chair of the Board and presides over the Bank's ten-thousand employees. The Management is responsible for the day-to-day operations of the Bank, subject to the policies set by the Board of Executive Directors or Board of Governors.

Prior to the Panel's creation, the World Bank was perhaps best considered a 'renegade' institution, subject to no meaningful set of laws or binding standards. The Bank enjoys immunity from national courts, and international law provides only limited recourse against the Bank because of its status as a nonstate actor. Contractors or borrowers from the Bank could bring claims relating to contracts or loan agreements to the International Centre for Settlement of Investment Disputes ("ICSID"). Project-affected people,

⁵ The World Bank Group is comprised of five separate, but related, institutions: the International Bank for Reconstruction and Development ("IBRD"), the International Development Association ("IDA"), the International Finance Corporation ("IFC"), the Multilateral Investment Guarantee Agency ("MIGA"), and the International Centre for Settlement of Investment Disputes ("ICSID"). The IBRD and the IDA provide loans to support public-sector projects. Together the IBRD and the IDA are most frequently referred to as the "World Bank." The primary difference between the IBRD and the IDA is that the IDA provides concessional or lower cost loans to the poorest countries (those having per capita annual income below \$1465 in 1994 US dollars). The IFC and the MIGA provide financial support to private sector projects. The Panel currently only has jurisdiction over public sector projects (those financed by the IBRD and the IDA). ICSID is a dispute settlement body that addresses international investment-related disputes.

⁶ World Bank, 1 *The World Bank Annual Report 2001* 25 (2001), available online at <<http://www.worldbank.org/annualreport/2001/pdf/wbarvol1.pdf>> (visited Jan 27, 2003).

⁷ Id at 20.

however, had no opportunity in any forum to seek an adjudication of their rights and interests. Affected communities are not parties to loan agreements or contracts with the Bank, and have not yet successfully asserted third-party rights before the ICSID.

This, of course, is the traditional trap of public international law. Because only states are the subjects of international law, international organizations are accountable to them and to them alone. The underlying theory is that states will represent the rights and interests of their citizens in these international organizations, and that the institution will be held accountable through the influence of the Member governments. Direct citizen participation or representation is therefore unnecessary (and in fact impossible).

The strategy for addressing the World Bank's insulated position in international law eventually involved two phases. First, the Bank was pressured to adopt environmental and social policies that set, among other things, standards for environmental assessment, public consultation, access to information, involuntary resettlement, and indigenous peoples. In essence, these policies comprised a body of laws or norms that the Bank staff was expected to meet in designing their projects. Looked at another way, these policies also delineated the rights and interests of project-affected people. The policies obligated the Bank staff to meet minimum standards—for example, to ensure that those involuntarily resettled by Bank-financed projects receive comparable land elsewhere, that environmental impacts are analyzed with input from local communities, and that indigenous peoples are consulted in projects that affect their territories.

Adopting environmental and social policies did not necessarily change the practice on the ground. Over time, those of us in the NGO community came to believe that the policy framework was either largely ignored or implemented according to the discretion of project officers based on their own interests or those of the borrowing government.⁸ The Bank, having adopted some standards for itself, was still lawless in the sense that there was no independent monitoring or enforcement mechanism.

Working with allies in the legislatures of the United States, Switzerland, and Germany, NGOs such as CIEL, the Environmental Defense Fund, the Bank Information Center, Friends of the Earth, and others, laid out three criteria for an accountability mechanism—that it be (1) independent of Bank Management; (2) transparent; and (3) driven by the local communities most affected by the

⁸ See, for example, Bradford Morse and Thomas Berger, *Sardar Sarovar: Report of the Independent Review* (Resource Futures Intl 1992) (chronicling the Bank's failure to ensure policy compliance in the controversial Sardar Sarovar dam projects on India's Narmada River).

Bank's projects.⁹ Both the US Congress and the Swiss Parliament heard testimony on the potential for an accountability mechanism. Several of the donor governments, including the United States, linked increased funding of the Bank to the creation of an independent, transparent, and citizen-based accountability mechanism. Faced with this pressure, the Bank proposed an "Independent Inspection Panel" in the summer of 1993. After several rounds of 'negotiation' conducted through the Executive Directors' offices of the Bank, the Panel was formally established in 1993.¹⁰

II. HOW THE PANEL WORKS

The Panel was created "for the purpose of 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."¹¹ The Panel evaluates the Bank's performance against the standards set forth in the Bank's operational policies and procedures. It is comprised of three permanent members, each of whom serves for five years. To ensure independence, Panel members cannot have served the Bank in any capacity for the two years preceding their selection. More importantly, Panel members can never work for the Bank again. The Panel also has a permanent Secretariat with five staff.¹²

Claims can be filed by any affected party or parties (other than a single individual) in the borrower's territory.¹³ The affected parties' local representative, the Bank's Board of Executive Directors, or, in some cases, any one Executive Director, is also eligible to file claims. In a deliberate attempt to limit the role of NGOs and their lawyers, nonlocal representatives can represent affected parties

⁹ Memorandum from Lori Udall, Environmental Defense Fund, et al, to Clinton Administration, *Comments on World Bank Draft Paper on "Functions and Operations of An Inspection Function"* (Aug 20, 1993) (on file with CJIL).

¹⁰ See International Bank for Reconstruction and Development, Res No 93-10 and International Development Association, Res No IDA 93-6, reprinted in 34 ILM 520 (1995) (hereinafter Panel Resolution). The Bank released several drafts of the Panel proposal, which were subsequently circulated in secret to the US Congress and to several NGOs. NGOs provided comments to the US Treasury and Congress, as well as to officials of other governments.

¹¹ Inspection Panel, *The Inspection Panel for the International Bank for Reconstruction and Development and International Development Association: Operating Procedures*, reprinted in 34 ILM 510, 511 (1995). For a general discussion of how the Panel operates, see Dana L. Clark, *A Citizen's Guide to the World Bank Inspection Panel* (CIEL 2d ed 1999), available online at <<http://www.ciel.org/Publications/citizensguide.pdf>> (visited Jan 27, 2003).

¹² For more information, see the Inspection Panel website, available online at <<http://wbIn0018.worldbank.org/ipn/ipnweb.nsf>> (visited Jan 27, 2003).

¹³ Panel Resolution, reprinted in 34 ILM at 521 (cited in note 10).

only in “exceptional cases” where “appropriate representation is not locally available.”¹⁴

Claims must be in writing and must explain how the affected parties’ interests have been, or are likely to be, directly affected by “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.”¹⁵ The claimant must demonstrate that it has exhausted other remedies by first providing Bank staff a reasonable opportunity to respond to the allegations.

Upon receiving a complete request for inspection that is not clearly outside the scope of the Panel’s authority,¹⁶ the Panel registers the claim, notifies the claimant and the Board of Executive Directors, and forwards a copy of the claim to Bank Management, which has twenty-one days to respond.¹⁷ The Panel then has twenty-one days to review Management’s response and to make a recommendation to the Board of Executive Directors regarding whether the claim warrants a full investigation.¹⁸

The Board of Executive Directors has exclusive authority to authorize or deny a full investigation. Although this led to significant politicization of the Panel process in the first few years, since changes made in 1999, the Board has supported every Panel recommendation for an investigation.¹⁹ Once an investigation is authorized, the Panel enjoys broad investigatory powers including access to all Bank staff. Members of the public may also provide the Panel with supplemental information relevant to the claim. After the investigation, the Panel issues a report evaluating the Bank’s compliance with its policies. Within six weeks, Management must submit to the Board of Executive Directors a report and recommendations in response to the Panel’s findings. The Panel’s Report, Management’s recommendations, and the Board’s decision are released two weeks after Board consideration.

¹⁴ Id.

¹⁵ Id.

¹⁶ Several types of complaints are explicitly beyond the Panel’s jurisdiction, including complaints (i) addressing actions that are the responsibility of parties other than the Bank, (ii) relating to procurement decisions, (iii) filed after a loan’s closing date or after 95 percent of the loan has been disbursed, or (iv) matters already heard by the Panel unless justified by new evidence.

¹⁷ Id at 522.

¹⁸ Id.

¹⁹ See World Bank, *Conclusions of the Second Review of the World Bank Inspection Panel*, reprinted in 39 ILM 249, 250 (2000). Prior to the 1999 clarification, the Executive Directors frequently rejected the Panel’s recommendations for an investigation, typically deciding instead to adopt “action plans” that Bank Management had prepared in response to the claims. Although in some cases these action plans were responsive to the claimants’ concerns, the Board’s preemptive approval of the action plans meant that the claims were never fully evaluated nor was implementation of the action plans adequately monitored. The claimants also never received their “day in court” to have their allegations formally validated.

As of January 1, 2003, the Panel has received twenty-seven formal requests for inspection.²⁰ The Panel has recommended an investigation of fourteen claims, and the Board has approved ten.²¹

III. LAWYERING AROUND THE PANEL

The Board's resolutions creating the Panel created new challenges for those of us pushing for an independent and rules-based accountability mechanism.²² In the beginning, we felt as if we were in a constant struggle with Bank Management to ensure the independence of the Panel. Bank Management selected the first staff of the Panel without any public input or transparency. Likewise, the first three Panel members were selected through a shadowy process dominated by Bank Management and the Board of Executive Directors. Civil society's suggestions for Panel members went largely unnoticed. The first Panel chairperson, Mr. Ernst Gunther Bröder, was a retired President of the European Investment Bank and a former employee at the World Bank. He had substantial stature in the field of international development, but had not often worked with nongovernmental organizations. My own view when reviewing his résumé was that the Bank had successfully controlled the Panel before it ever got up and running. There was no reason to believe he would be sensitive to local community concerns or other outside critics of the Bank's hierarchy.

I was wrong. Mr. Bröder and the other two initial Panel members (Mr. Richard Bissell and Mr. Alvaro Umaña-Quesada), as well as the Panel staff, including most notably a Chilean lawyer named Eduardo Abbott who remains the Panel's Secretary, quickly asserted their independence from Bank Management, their interest in creating a lasting and credible investigatory mechanism, and their integrity in dealing with all claims openly, fairly, and effectively. The Panel members and staff seemed to recognize instinctively that their constituency was as much affected people as finance ministries. They

²⁰ See Inspection Panel, *Summary of Requests for Inspection*, available online at <[http://wbln0018.worldbank.org/IPN/ipnweb.nsf/\(attachmentweb\)/SummaryofRequests/\\$FILE/Summary+of+Requests.pdf](http://wbln0018.worldbank.org/IPN/ipnweb.nsf/(attachmentweb)/SummaryofRequests/$FILE/Summary+of+Requests.pdf)> (visited Jan 27, 2003).

²¹ Id. Although the Summary of Requests for Inspection indicates that only nine of the recommended investigations were approved, the World Bank Board has approved an additional investigation since the document was updated. See Press Release, Inspection Panel, *World Bank Board Approves the Inspection Panel's Recommendation: The Panel to Investigate Whether the Bank has Observed its Policies and Procedures in the Cameroon Pipeline Project* (Dec 18, 2002), available online at <[http://wbln0018.worldbank.org/ipn/ipnweb.nsf/\(attachmentweb\)/pressrelease12182002/\\$FILE/press+release+12+18+2002.pdf](http://wbln0018.worldbank.org/ipn/ipnweb.nsf/(attachmentweb)/pressrelease12182002/$FILE/press+release+12+18+2002.pdf)> (visited Jan 27, 2003).

²² For a discussion of the problems encountered in the first years of the Panel's operation, see Dana Clark and David Hunter, *The World Bank Inspection Panel – Amplifying Citizen Voices for Sustainable Development*, in Gudmundur Alfredsson and Rolf Ring, eds, *The Inspection Panel of the World Bank: A Different Complaints Procedure* 167 (Martinus Nijhoff 2001). See also Richard E. Bissell, *Institutional and Procedural Aspects of the Inspection Panel*, in Alfredsson and Ring, eds, *The Inspection Panel of the World Bank*, supra at 107.

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.

One of the Panel's first struggles concerned its relationship to the Office of the General Counsel ("OGC"). The Bank's General Counsel argued that only his office had the authority to interpret Board resolutions, including the resolution creating the Panel. Shortly after the first claim was filed, the General Counsel issued a memorandum providing a narrow interpretation of standing for claimants. This raised serious issues of conflicts of interest given the multiple potential roles of the OGC. The OGC was already tasked with preparing Management's response to any claims and is the primary legal advisor to the Board and President on the obligations of the Bank. Allowing OGC also to interpret the procedures and rules governing the Panel threatened the credibility, if not actual independence, of the Panel process, and no amount of firewalls would provide sufficient credibility to the outside world.

Several US NGOs outlined our concerns regarding the role of the OGC in a short letter sent to all Executive Directors. Almost immediately, we received a phone call from the General Counsel requesting a meeting. As Lori Udall of the Environmental Defense Fund and I walked in, a senior Bank official asked: "Do you know how rare it is for people in our position to meet with people like you?" The meeting would subsequently become more cordial, but it was a reminder of the pervasiveness at that time of the view in international institutions that civil society had little or no business voicing its concerns. We ultimately were able to restrict the OGC's role because the donor governments could see how the independence of the Panel would be jeopardized if the General Counsel controlled the interpretation of the Resolution.

Our goal of making the Panel a viable option for affected communities did not rest only on how the Bank addressed the Panel. Also important was whether the Panel would be viewed as a plausible forum for affected communities and the networks of organizations that were monitoring Bank reforms. To most in these networks, the Panel was either too legalistic or too closely aligned to the Bank. Some of the strongest Bank critics believed the Panel was not sufficiently independent, and not worth engaging.

The Panel members were reluctant in the first few years to conduct much proactive outreach. They did not want to be accused of 'drumming up business' nor did they have an explicit mandate from the Board to seek complaints. They adopted the reasonable position that they would attend conferences, workshops, and speaking engagements when invited. Except during the Bank's annual meetings they would not organize proactive efforts to reach out to potential claimants.

CIEL and the Bank Information Center accepted the role of disseminating information about the Panel among the civil society activists and community leaders concerned with the Bank.²³ In the spring of 1994 at an international strategy session on Bank reforms, I remember that only a few people advocated for even trying the Panel. I led a workshop on how to use the Panel, answered questions, and tried to encourage people to give the Panel a chance. The response was decidedly mixed as many people saw the Panel as simply a public relations arm of the Bank. In fact, in the early stages it was hard to argue any differently. At that time, the Panel's acceptance as a viable place to take community-based concerns seemed far from certain.

In later workshops around the world, CIEL was continually asked: "What will we get if we file a claim with the Panel?" The only thing we could promise was that their complaint would be fairly reviewed and if it met the technical criteria the claimants would be visited by a Panel member who would listen openly to their concerns. We could make no promises that the Bank would change its behavior. This answer resonated well with project-affected people, in part because it was in stark contrast to the rest of the Bank, which was notorious for not listening to local concerns (particularly in the controversial projects that percolate through to the Panel). At least knowing that someone would listen openly was often sufficient for community leaders to take the bold step of filing a complaint.

Although the Panel process is intended to be approachable without the help of lawyers, CIEL wanted to ensure that the early claims were technically and factually strong. Translating the concerns of local people into the language of specific policy violations is a lawyer's task, and one rarely faced by international lawyers. This is particularly challenging cross-culturally, because of the need to ensure that the true voices of the community emerge through the legalese of policy violations. By working with the claimants to express their concerns in terms of Bank policy violations, we might generate support from the Panel, donor governments, and perhaps even top Management of the Bank. Where donor governments and Bank Management might not be able or willing to second-guess a project supported by a major borrowing country on political or policy grounds, they could at least question projects that were not prepared according to the standards set for Bank operations. This was a technical, and thus apolitical, position that could embolden the Bank hierarchy to challenge even the most powerful borrowers.

Over time, affected people became more comfortable considering the Panel as an option. This occurred because the Panel showed its independence and fairness beginning with its very first claim involving the Arun Dam in

²³ See, for example, Clark, *A Citizen's Guide to the World Bank Inspection Panel* (cited in note 11).

Nepal.²⁴ Even the filing of the claims seemed to have some immediate positive impact. Where letters written from the communities were frequently ignored, Panel claims immediately triggered attention from the highest levels of the Bank. Meetings with World Bank President Wolfensohn and various Executive Directors were relatively common results from Panel claims. Short-term results also occurred on the ground. Filing of the first claim, for example, led directly to the cancellation of the Arun Dam by President Wolfensohn. Similarly, filing the Jamuna Bridge claim led almost immediately to the inclusion of the Char people in the Bank-financed resettlement program.

IV. CONCLUSION

The Panel is still a work in progress. Today, the Panel is well-known and credible to outside critics of the Bank. But a recent collection of case studies from various claims suggests that the short-term benefits that come from the added attention brought by filing a Panel claim do not necessarily translate into long-term sustainable benefits.²⁵ Too often, the Panel's recommendations and the subsequent Board decision provide momentum for change—momentum that is lost once the Panel's and civil society's attention turns. For longer lasting improvements, the Panel must be able to conduct ongoing monitoring. Additionally, the Panel's remedies are limited. The Bank has not yet shown strong commitment to holding developing countries responsible for the promises they make at the time of project approval, nor has the Bank considered paying restitution for damage resulting from violations of its policies. In the Yacyreta claim, for example, Argentina has not lived up to its promise to provide funding for environmental and social mitigation, and the Bank has not accepted fiscal responsibility for failing to enforce those loan terms meant to protect the local communities. When the borrowing country's underlying commitment to comply with the Bank's policies disappears, the Bank typically looks the other way or more precisely has already moved on to developing the next loan. Only continued vigilance from civil society and the Panel can lead to long-term gains.

Despite its ongoing shortcomings, the Panel set an important precedent for citizen-based accountability mechanisms. The Asian Development Bank and the Inter-American Development Bank created inspection mechanisms patterned loosely after the World Bank's (although substantially less independent and credible). The International Finance Corporation ("IFC") and Multilateral Investment Guarantee Agency ("MIGA") created an Office of the Compliance Advisor and Ombudsman to try to resolve complaints from affected communities through more flexible dispute resolution techniques. Accountability

²⁴ See Alvaro Umaña, ed, *The World Bank Inspection Panel: The First Four Years (1994–1998)* 17–77 (World Bank 1998).

²⁵ See Clark, Fox, and Treakle, *Demanding Accountability* (cited in note 3).

mechanisms are also emerging at export credit agencies and other regional development banks.

In my view, innovations like the Panel and these other accountability mechanisms are the vanguard of a shift in international governance that will reflect the demands of civil society for a greater and more direct role. Gone are the days when the foreign service essentially monopolized international institutions and, similarly, when the role of international lawyers was solely to represent nation-states. Local communities as well as international activists will continue to demand and receive clearer and stronger rights of participation, and the role of the international lawyer will shift toward representing a broader range of interests and sectors of society.