

THE EMERGENCE OF CITIZEN ENFORCEMENT IN INTERNATIONAL ORGANIZATIONS

HUNTER, DAVID B.

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

1 INTRODUCTION

In recent years, the nation-state's monopoly over international law and institutions has been eroding. The rise of an effective and active global civil society on the one hand and that of increasingly powerful international institutions on the other have created a powerful dynamic that is reshaping the way international law is made and enforced. Perhaps the most vivid examples are the emergence of influential environmental and social standards at international financial institutions and the parallel emergence of citizen-based mechanisms to enforce those standards.

Since the 1980s, international financial institutions led by the World Bank Group have been developing environmental and social policies that are oriented towards protecting certain rights and interests of affected communities. These policies address, for example, issues relating to environmental assessment,¹ involuntary resettlement² and indigenous peoples.³ The influence of these standards extend well beyond the substantial sphere of World Bank Group operations, however, as they have become the models for regional development banks and national laws in some countries.

More recently and importantly, the standards of the International Finance Corporation (IFC), the private sector arm of the World Bank Group, have emerged as the predominant standards for all international project finance in developing countries.⁴ Export Credit Agencies from the OECD countries have agreed to benchmark their environmental and social standards against those of the IFC.⁵ In addition, the world's largest commercial banks, who collectively are responsible for arranging more than 80% of all foreign project finance in developing countries, have agreed to follow IFC standards.⁶

The development and strengthening of these standards, and their application to the full range of financial institutions, has resulted in large part from pressure brought by international civil society in collaboration with local affected communities. These stakeholders recognize, however, that standards without any enforcement or oversight mechanism will not result in improved practice on the ground. For that reason, the call for enhanced environmental and social standards has been met by a parallel call for effective, transparent and independent enforcement mechanisms.

Beginning with the 1993 creation of the World Bank Inspection Panel, affected citizens have been given new rights to hold international institutions accountable for compliance with their policies and procedures. Today citizens enjoy enforcement mechanisms at five multilateral financial institutions⁷ and three bilateral financial institutions⁸ where they can seek to enforce the environmental and social policies of the institutions. Each of these enforcement mechanisms differs to some degree, but they share one thing: they all provide local people with an opportunity to seek the institution's compliance with applicable environmental and social policies. The original conception for these mechanisms emanated from civil society organizations and academics outside of the traditional international legal order who recognized the need for enhanced citizen involvement in international institutions.⁹ These mechanisms were viewed both as a response to the international organizations' immunity and as a way to ensure that those people most affected by the organization's activities have some sort of mechanism to ensure their rights and interests under the policies were met.

Generally speaking, the citizen enforcement mechanisms at international financial mechanisms can be categorized as reflecting a "compliance model" exemplified by the World

Bank Inspection Panel, a “problemsolving” model exemplified by the IFC’s Compliance Advisor and Ombudsman office (CAO), or a hybrid of both systems exemplified by both the CAO and the Asian Development Bank’s Accountability Mechanism. Brief descriptions of the Inspection Panel and the CAO’s ombudsman processes are provided below.

2 HOW THE WORLD BANK INSPECTION PANEL WORKS¹⁰

The World Bank 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, non-local representatives can represent affected parties 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.

As of January 1, 2005, the Inspection Panel had received thirty-three formal requests for inspection and registered thirty of them.²⁰ The Panel has found the eligibility requirements have been met and recommended an investigation in seventeen claims, and the Board has approved investigations in thirteen of those requests.²¹ The Board has approved every investigation recommended by the Panel since a clarification of the eligibility procedures was made in 2000.

3 HOW THE IFC OMBUDSMAN’S OFFICE WORKS

The President of the World Bank Group created the Office of the Compliance Advisor/Ombudsman (CAO) in 1999 to address complaints relating to the Group’s private sector arms – the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) – neither of which were covered by the Inspection Panel. Although the CAO’s

office has both an advisory and compliance function, it considers its ombudsman function as its primary and most important responsibility. The ombudsman function was designed to respond “to complaints by persons who are affected by projects by attempting to resolve the issues raised using a flexible, problem-solving approach.”²² Any individual, group, community, entity or other party affected or likely to be affected by the social or environmental impacts of an IFC or MIGA project may make a complaint to the ombudsman. Representatives of those affected by a project may also file a complaint, with appropriate proof of the representation.

The CAO acknowledges receipt of all complaints, typically within five days of receipt. The CAO then evaluates whether the complaint falls within its mandate, and, if it does, whether to accept or reject the complaint. Complaints must demonstrate that the complainant has been, or is likely to be, affected by actual or potential social or environmental impacts on the ground. The complaint must relate to an aspect of the planning, implementation or impact of an IFC or MIGA project. Complaints that are “malicious, trivial or which have been generated to gain competitive advantage” are not accepted.²³ The CAO also determines whether it thinks a problem-solving approach – for example facilitated dialogue, consultation or mediation – could be effective in addressing the complainant’s concerns.

Once a complaint is accepted, the CAO immediately notifies the complainant, registers the complaint, refers the complaint to the relevant IFC or MIGA personnel with a request for information, and informs the project sponsor of the complaint. Management has 20 working days to respond to the request for information.

The CAO then undertakes a preliminary assessment to determine how it proposes to handle the complaint. This process is not time-bound but normally takes 30 working days after the decision to accept the complaint. After the preliminary assessment, the CAO provides to the claimant a specific proposal for how it proposes to address their complaint.

The CAO’s proposal may include anything from convening informal consultations with IFC/MIGA or the project sponsor to organizing a more formal mediation process. One of the options outlined will also be a compliance audit in complaints that raise any issue of compliance with the IFC/MIGA policies. Overall, the ombudsman’s office seeks to take a proactive and flexible approach where the “aim is to identify problems, recommend practical remedial action and address systemic issues that have contributed to the problems, rather than to find fault.”²⁴

The CAO has broad investigatory powers, including authority to review IFC or MIGA files; meet with the affected people, IFC or MIGA staff, project sponsors, and host country government officials; conduct project site visits; hold public meetings in the project area; request written submissions from any source; and engage expert consultants to research or address specific issues.²⁵ The CAO concludes the complaint process either when a settlement agreement has been reached or when further investigation or problem-solving efforts are unlikely to be productive. At that point, the CAO informs the complainant of its decision and provides a report to the President of the World Bank Group, which may include specific recommendations regarding issues raised by the complaint. The CAO may also conduct a compliance audit to address non-compliance issues identified in the course of responding to the complaint or may refer any policy issues to the advisory role of CAO’s office.

As of January 2005, the CAO’s ombudsman function has received approximately 40 claims, 20 of which had come from one project – the Baku-Tbilisi-Ceyhan pipeline. Some of these claims have resulted in long and complex involvements by the CAO, for example complaints relating to the Newmont Corporation’s Yanacocha gold mine in Peru, and others have involved relatively short interventions, for example a case involving one family’s inadequate compensation for land lost to the construction of Chile’s Pangué Dam. The CAO is still too new to evaluate its ultimate effectiveness in meeting the aspirations of the claimants, but it is pioneering the use of alternative dispute resolution methodologies for civil society complaints in the international context. The compliance side of the CAO has had less experience thus far (with only its first two compliance reviews in process), but may yet provide

citizen-based compliance oversight similar to that of the Inspection Panel

4 ASIA DEVELOPMENT BANK

In theory at least, the two approaches – of an ombudsman and a compliance mechanism – can coexist in one accountability system. That theory is now being tested by the Asian Development Bank's new mechanism created in 2004.²⁶ The ADB accountability mechanism requires complainants to go first to a "special project facilitator," which despite the name is intended to raise the affected persons' concerns with the project to the project sponsor and ADB staff and seek a mutually acceptable solution through flexible dispute resolution processes. If the claimant is unsatisfied with the process, the claimant can at any time request a compliance review from an independent "compliance review panel" patterned closely after the World Bank Inspection Panel. The ADB mechanism has already received several complaints in just its first year of operation.

5 CONCLUDING REFLECTIONS

Innovations like the Inspection Panel, the IFC's CAO and the other citizenbased enforcement mechanisms reflect major shifts in the paradigm of how environmental and social policies are enforced, and who enforces them, at the international level. This shift reflects civil society's demands for a greater and more direct role in decisions that profoundly affect the quality of their lives and environment. It extends to the international sphere the important role citizen enforcement played in securing environmental protection at the national level. It also reflects the increasingly outward orientation of international organizations in their efforts to interact directly with civil society.

Less clear yet is whether these citizen enforcement mechanisms will ultimately be sufficiently robust to provide positive results for the affected people who bring the claims. An evaluation of the Inspection Panel showed that about half of the claimants who brought cases felt that the process resulted in some important benefits for them.²⁷ Others saw initial advantages from the press and pressure that was created by filing the claims, but those advantages disappeared as the spotlight from the Panel process faded. These findings argue for more monitoring authority and for more commitment from the underlying institutions to implement the findings of these enforcement mechanisms.

6 REFERENCES

¹ IBRD/IDA Operational Policy 4.01: Environmental Assessment (1999).

² IBRD/IDA Operational Policy 4.12: Involuntary Resettlement (2001).

³ IBRD/IDA Operational Directive 4.20: Indigenous Peoples (1991).

⁴ IFC Safeguard Policies, last viewed at <http://ifcln1.ifc.org/ifcext/enviro.nsf/Content/Safeguardpolicies> on February 22, 2005; The World Bank, Pollution Prevention and Abatement Handbook: Toward Cleaner Production (1998).

⁵ OECD Recommendation on Common Approaches on Environment and Officially Supported Export Credits, Dec. 18, 2003. The OECD Common Approaches allow export credit agencies to benchmark their standards against regional development banks as well as the IFC.

⁶ The Equator Principles: An industry approach for financial institutions in determining, assessing and managing environmental & social risk in project financing (June 4, 2003), available at <http://www.equator-principles.com/principles.shtm>.

⁷ The five citizen enforcement mechanisms include: (1) the World Bank Inspection Panel; (2) the International Finance Corporation's Compliance Advisor and Ombudsman; (3) the Asian Development Bank's Accountability Mechanism; (4) the InterAmerican Development Bank's Independent Investigation Mechanism; and (5) the European Bank for Reconstruction and

Development's Compliance Office.

⁸ The three bilateral financial institutions are (1) the Japan Bank for Investment Cooperation's Compliance Examiners; (2) the Environment Development Canada's Compliance Officer; and (3) the US Overseas Private Investment Corporation's ombudsman.

⁹ See e.g., Wold & Zaelke, *Establishing an Independent Review Board at the European Bank for Reconstruction and Development: A Model for Improving MDB Decision-making*, 2 DUKE ENV'TL LAW & POLICY FORUM 59 (1992); *The World Bank's New Inspection Panel and the Need to Create an International Framework Agreement for Administrative Procedures*, Testimony of Durwood Zaelke, President, and David Hunter, Senior Staff Attorney, Center for International Environmental Law, in WORLD BANK DISCLOSURE POLICY AND INSPECTION PANEL: HEARING BEFORE THE SUBCOMMITTEE ON INTERNATIONAL DEVELOPMENT, FINANCE, TRADE AND MONETARY POLICY OF THE COMMITTEE ON BANKING, FINANCE AND URBAN AFFAIRS, HOUSE OF REP, 103RD CONGRESS, 2ND SESSION 152-63 (June 21, 1994).

¹⁰ This summary of the Panel's operations was adopted from D. Hunter, *Using the World Bank Inspection Panel to Defend the Interests of Project-Affected People*, 4 CHI. J. INT'L L. 201(2003).

¹¹ Inspection Panel, *The Inspection Panel for the International Bank for Reconstruction and Development and International Development Association: Operating Procedures*, 34 ILM 510, 511 (1995) [hereinafter Inspection Panel Procedures]. 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 Inspection Panel website, available online at <http://worldbank.org/ipn/ipnweb.nsf> (visited Jan 27, 2003).

¹³ Inspection Panel Procedures, *supra* note 11.

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*, 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.

²⁰ See Inspection Panel, *Summary of Requests for Inspection*, available online at <http://wbln0018.worldbank.org/IPN/SummaryofRequests> (visited Feb. 17, 2005).

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/pressrelease12182002/\\$FILE/press+release+12+18+2002.pdf](http://wbln0018.worldbank.org/ipn/ipnweb.nsf/pressrelease12182002/$FILE/press+release+12+18+2002.pdf) (visited Jan 27, 2003).

²² *CAO Operational Guidelines*, April 2000, at p. 7.

²³ *Id.* at p. 17.

²⁴ *Id.* at p. 13.

²⁵ *Id.*, at p. 22-23.

²⁶ Asian Development Bank, *Review of the Inspection Function: Establishment of a New ADB Accountability Mechanism* (May, 2003).

²⁷ D. Clark, J. Fox & K. Treakle, *Demanding Accountability: Civil-Society Claims and the World Bank Inspection Panel* (2003).