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Three Decades of Seeking Elusive Remedies

Richard E. Bissell¹

Remedy is a topic to be approached with some trepidation in the area of accountability. Throughout three decades of proliferating International Accountability Mechanisms (IAMs), remedy has been the issue least addressed by leadership. Most management and board members find it threatening, wherever a remedial action falls on the spectrum, from an apology for error to financial compensation. The pursuit of remedy builds on the demonstrated existence of harm, which is embarrassing at the least, and brings a focus on consequences and actionable steps for those people whose lives have been damaged as well as for environmental violations. This short essay addresses the evolution of remedy, beginning with the experience of the first mechanism, the Inspection Panel (IPN), which included only a compliance review function without associated authority to make recommendations or monitor the institution's responses. The essay considers these authorities and the addition of a dispute resolution function at other IAMs.

The Inspection Panel's Design Flaws Regarding Remedy

The logical framework for the IPN and subsequent compliance mechanisms was that a compliance investigation would examine whether damage has been caused by IFI non-compliance, and if so, the outcome would be a remedy of the situation. In reality, those holding the levers of power in IFIs, whether Board members, Presidents, or senior Managers, found that hard to accept. For those who wish to systematize our understanding of remedy in IAMs, therefore, there is a paucity of logic, consistent practice, or theory to draw upon. We need to reconsider how we stumbled into this structural dilemma, and tease out the case-based experience on which we can start to build a knowledge base. Much of what follows draws upon practical experience across a broad and representative sample of the IAM community, including the World Bank, ADB, AfDB, EBRD and UNDP.

It is important to begin with 30 years of experience of the IPN on this topic because the World Bank's struggles provide an opportunity to see progress, or lack thereof, on the ability of the accountability community to deliver sufficient remedies to affected publics/communities/populations and environments. Some might be surprised by that, since the Panel only had a compliance review function, has never had the power to make recommendations, and was carefully mandated to be a fact-finding or independent investigative body, with any potential remedies left to Management and the Board to sort out. For some of the designers of the IPN, the requesters' complaints of harm served only to launch the case, rather than shaping the ultimate impact of an investigation. For others, it was optimistically assumed that a responsible Bank management would not only bring a project

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into compliance in response to an IPN report, but also provide remedies/remedy to those who had brought the allegations of harm to the attention of the IPN.

From the first days of the Panel, the issue of remedy and remedial actions stimulated intractable disputes both within and outside the Bank. As reflected in General Counsel Ibrahim Shihata's book in 1994 on the Panel,² the provision of remedial action plans included in the original 1993 Resolution sparked controversy with civil society. It provided Management with an opportunity, to provide the Panel with an action plan, within three weeks of the submission of a complaint, with "evidence that it has complied, or intends to comply with the Bank's relevant policies and procedures."³ Note that the question of mitigating harm to the complainants was not mentioned. Shihata cites objections from Daniel Bradlow, Lori Udall, and David Hunter that such a provision would be abused to shut down a potential investigation before the complainant had a chance to engage fully with the Panel. Shihata thought the concerns were overblown – after all "if the complainant remains dissatisfied in spite of the declared remedial actions by the Bank's management, because of the inadequacy of such actions or because they have not been properly implemented, it can pursue its complaint before the Panel...." If Shihata thought that giving a complainant a chance to file a second complaint would address their concerns, he misunderstood the limited capacity of community groups to engage in a protracted struggle to get justice from the World Bank.

By the time of issuance of his second volume on the Panel, *The World Bank Inspection Panel: In Practice* (2000),⁴ Shihata had to devote copious space to the way in which the Panel and Management jostled over the place of remedy at that early stage in the process after a complaint was received. Management quickly perceived that an over-the-top response to the complaint, addressed primarily to the Board, could persuade the Board to reject or reduce the proposal for an investigation at the eligibility phase. Faced with an elaborate plan from management to bring a project into compliance, the Panel members began to undertake field-based mini-investigations (called a "preliminary assessment") after registration, to gather sufficient evidence to prove that the management response was inadequate. Board meetings over a recommendation from the Panel that a complaint was eligible for an investigation became battlegrounds.

The crucial issue was that Management and much of the Board wanted the Panel to focus only on management actions that might lead to non-compliance with Bank policies. But the trigger for registering a complaint was that harm had been done to communities and the environment. Bank management professed that such harm was a failure of the borrowers as implementers, not of the Bank. The Panel circumvented this argument by using the policy on project supervision as a keystone of most subsequent inspections, with a focus on the failures of Bank staff to keep a project compliant with Bank policies to avoid and mitigate any harm to communities. An early case for the Panel, regarding the Jamuna Bridge investigation, brought

² IBRAHIM F.I. SHIHATA, *THE WORLD BANK INSPECTION PANEL*, 100-101 (Oxford University Press, 1994).

³ Paragraph 18 of Resolution No. 93-10, Resolution No. IDA 93-6, September 22, 1993, discussed in SHIHATA, *supra* note 2, at 76-77.

⁴ IBRAHIM F.I. SHIHATA, *THE WORLD BANK INSPECTION PANEL: IN PRACTICE*, 219-226 (Oxford University Press, 2000).

this issue to light, where the Bank sought to blame the Bangladeshi government for failing to include 75,000 residents on the char islands in the resettlement plan. Because the issue of involuntary resettlement was the most visible of safeguard policies, Bank management soon shifted direction, working closely with the government to include all the displaced in the remedial plan with compensation.

Given that the original Resolution gave the Panel no role in determining remedies and redress for harm after completing their investigation and report to the Board, the remedies debate took place over preliminary steps around eligibility rather than the ability to ensure that there would be remedies for the hardship incurred, and that there would be some tangible incentive for communities to make the effort to complain to the Panel. Intense debates centered on the Board in the late 1990s over this issue, and several others, such as how to clarify the Board's direction to the Panel about how to engage on redress and remedy. Formal "Clarifications" were negotiated in 1996 and 1999 to at minimum call a truce on this aspect of the Panel relationship with Management and the Board. Panel reports on eligibility were more routinely approved in the immediate aftermath of the 1999 Clarification. The Board largely took the issue of "harm" off the table as a criterion of eligibility, and the leadership asked the Members to approve eligibility reports on a no-objection basis.

Controversy over mitigation of harm shifted to the post-investigation phase, and what might be decided by Management and the Board as actions to address the non-compliance findings of the IPN reports. The record did not improve. In one survey of all IPN investigations up to 2004, it was reported that only 10 out of 28 complaints registered by the Panel resulted in any "project level impacts."⁵ For the complainants, there was little or no mitigation of consequence resulting from the findings of non-compliance in a wide range of high-stakes cases, such as Yacyreta, Itaparica, Lesotho Highlands, Lake Victoria, and Chad-Cameroon pipeline. Interestingly, one case that had unexpectedly positive results was the NTPC Singrauli case in India, where Management persuaded the borrower to create an Independent Monitoring Panel to "systematically & regularly review and advise an implementation of R&R program for the NTPC power generation project funded by the World Bank."⁶ Many residents found the IMC to be very helpful and it can be seen as positive for some of those whose complaints were mitigated. As a model for other World Bank responses to IPN investigations, however, the IMC failed -it was a one-off. In no subsequent investigations did Management achieve any visible remedy through the rare instances of creating such mechanisms. The closest was the experience with the Chad-Cameroon Pipeline project investigation, where the review bodies established had little to no impact. IBut it can be argued that it became a precedent for monitoring mandates to be embedded in the accountability mechanisms of other institutions.

⁵ DANA CLARK ET AL, EDs., DEMANDING ACCOUNTABILITY: CIVIL-SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL 257-269 (Rowan & Littlefield, 2003).

⁶ *Id.*, at 180. More generally, see the experience of the Monitoring Panel at 180-183.

The Evolution of the IAMs and Remedy

(a) Dispute Resolution as a Direct Driver of Remedy

As to the present, the world of accountability has moved on. When new accountability mechanisms were established over the last three decades, there were additional institutional models other than the Inspection Panel to draw upon. For example, many development finance institutions created dispute resolution units to work in parallel with their compliance review units. It was argued that specific concerns of harm could be rapidly addressed by a neutral party convening Management and the complainants to provide appropriate relief of harm. Policy compliance was not included in the purview of such units. The first attempt to create a multi-function office was the CAO at the International Finance Corporation, with each of its three functions in separate silos. According to one study, the CAO has achieved measurable mitigation of harm in 10 of its problem-solving cases, and in none of its compliance reviews.⁷ On the other hand, the Asian Development Bank created two very separate offices for the two functions, and there was no collaboration between them. There were demonstrated limitations for dispute resolution units to get results any more rapidly and effectively than the attempts of compliance review units to mitigate harm. In some institutions, too, there was a requirement that any complaints had to be considered first by dispute resolution, in a transparent attempt to reduce the number of compliance investigations. Indeed, in the most recent rewrite of the EBRD IPAM procedures, a new complaint is referred first to the problem-solving unit to determine the attractiveness of dispute resolution to the complainants before considering compliance review. Despite their obvious faults, problem-solving mechanisms provided real-time experimental contexts for considering remedial approaches that might get greater justice for damaged communities and environments.

(b) The Power to Make Recommendations

Unlike the Inspection Panel, many compliance review mechanisms now have some kind of mandate to make recommendations based on the findings of non-compliance in the investigation report. There is no single institutional model. For some, the focus is on the drafting and approval of the Management Action Plan (MAP) both to bring a project into compliance and to mitigate the harm done or that could be done by the project. This is true of the Asian Development Bank, where the Compliance Review Panel (CRP) has the right to comment on a Management Action Plan before its submission to the Board, and the CRP's recommendations are formally submitted to the Board along with the draft MAP. In a somewhat different approach, at the EBRD when the Independent Project Accountability Mechanism (IPAM) finds a project non-compliant, it has the power to recommend changes to the project as well as actions to address the harm or potential harm. In addition, the IPAM is tasked with sharing the draft MAP with the original complainants in order to get their comments on the likely effectiveness of the proposed remedies. At the UNDP, the Social and Environmental Compliance Unit (SECU) is empowered to make recommendations in its

⁷ [Data Doesn't Support IFC/MIGA's Remedy Proposal | Accountability Counsel - Accountability Counsel](#), accessed 26 July 2023.

compliance report about remedying non-compliance, as well as to mitigate damage that has not been otherwise addressed by the Stakeholder Response Mechanism.

(c) Monitoring and Remedies

An important role played by an increasing number of IAMs is to monitor the implementation of the approved MAP, and thus test whether management has sustainably mitigated the harm from the project. At the ADB, the CRP monitors management performance of the MAP for up to three years. At the African Development Bank, the Compliance Review and Mediation Unit (CRMU) monitors implementation for up to five years. Even at the World Bank's last review of the IPN, a limited mandate to monitor was established, to be triggered only at the invitation of the Board. The effectiveness of that provision will need to be tested over time to determine the support of the Board and senior Management for involvement of the IPN. The monitoring mandate at the UNDP's SECU has no time limit, with such oversight to last until the Administrator's decision and the MAP are fully implemented. An important step forward for the EBRD, AfDB, ADB, and UNDP has been to establish that the accountability mechanisms can undertake field monitoring missions if they judge them to be needed, in the course of monitoring. Such missions not only fill in the factual weaknesses in reports submitted by Management, but they also bring the original complainant back into the process. Who would know better than the complainants if the MAP has been successful in mitigating harm?

It is evident that we are in a creative period. New approaches are being designed and tested in real time in the absence of a persuasive "best practice." Fortunately, the IAM community has a strong "learning by doing" attitude, and with periodic reviews of the mechanisms by institutional learning, course corrections can be expected. There is also a fertile debate underway on what constitutes appropriate remedies. The advantage of a dispute resolution process is that both parties are encouraged to put their proposed remedies on the table. The downside of that approach is that the community enters the process in a weak position relative to the financial institution, and there is not a great deal of leverage available to the mediator to change that imbalance.

Compliance review mechanisms attempting to give greater attention to harm and its mitigation have leverage in their ability to make recommendations in their reports, and to shape the MAP before adoption by the Board. In the drafting of the UNDP SECU charter, greater focus on harm was seen in the provision enumerating likely remedies to be invoked for particular circumstances. They range from symbolic measures, such as institutional apologies, to concrete changes in the management of the project, or compensation for specific damage. In the most recent reform of the African Development Bank CRMU, it was specified that an investigation report may not recommend compensation or any other benefits to the complainants.

Finally, one has to address the difficulties posed by having two functions within one accountability mechanism, whether the two parts are unified or separate, and by having requirements for sequencing the use of compliance review and problem-solving. The mistake of specifying a one-approach-fits-all is that each complainant comes to the mechanism with a

specific intent – for some it is to change institutional policies, while for others it may be mitigation of specific harm. Or it could be both. The emerging consensus is that there should be enough flexibility in sequencing to enable the clearest path forward in the judgment of the complainants. Their best estimate of which function will facilitate their goals should be allowed to determine the sequencing. Through decades of experience among the IAMs, it has been found that the preliminary discussion at the registration stage with the complainants about their choice is a learning process invaluable for improving the chances of an outcome that will meet community concerns. Accountability mechanisms are not intuitively obvious to much of the public, and it is important that the choice of venue give effective agency to the complainant. In the UNDP mechanisms, comprising both the SECU and SRM, a complainant can pursue one or the other, or both simultaneously. SECU does not have the power to dictate a solution, but it does have a role as an independent investigative body to present its best expert view on providing remedies in the public final report to the complainants and to the Administrator, as the final decision-maker.

Future of Remedy

The future of remedy can only be imagined; the world of independent accountability mechanisms is awash with new and innovative approaches to the issue. There are generic shortcomings in all of the institutional approaches to development finance that undermine the ability of accountability mechanisms to mitigate harms that result from policy compliance failures. The External Review of IFC/MIGA conducted in 2020 provides a frank and thoughtful consideration of the consequences of findings on non-compliance from the CAO, and how remedial actions may flow from a judgment of non-compliance.⁸ It addresses the thorny issue of responsibility – divided in the IFC’s case between the IFC and the Client. A storm of criticism greeted the 2023 issuance of how IFC proposes to implement the recommendations of the External Review.⁹ The critics focused particularly on the clear unwillingness of IFC Management to forsee taking responsibility for harm done to communities. Indeed, IFC saw a role in remedial measures only “in exceptional circumstances” and that generally the obligation would fall on IFC clients or sovereign guarantors. The commentaries expressed frustration that the IFC draft approach neither adopted the specific reforms on remedial measures proposed by the External Review nor reflected the spirit of the Review that IFC could be a model leader on remedy among international financial institutions.¹⁰

⁸ David Fairman et al., *External Review of IFC/MIGA E&S Accountability, including CAO’s Role and Effectiveness Report and Recommendations*, (June 2020), [ExternalReviewofIFCMIGAESAccountabilitydisclosure.pdf \(worldbank.org\)](#).

⁹ [External Review: IFC/MIGA Update of Non-policy Actions](#), accessed 26 July 2023.

¹⁰ See, for instance, U.N. Human Rights Office of the High Commissioner, *IFC/MIGA Draft Approach to Remedial Action Comments and Recommendations of the UN Human Rights Office* (Apr. 13, 2023), [OHCHR-comments-IFC-MIGA-Approach-to-Remedial-Actions_13-April-2023.pdf](#); See also [ERI-Submission-on-IFC-MIGA-Remedial-Approach-4.20.23.pdf \(earthrights.org\)](#).

Responsibility for remedy will not be a short debate, as indicated by the 2022 report from the UN High Commission on Human Rights, from their Accountability and Remedy Project.¹¹ Its focus on non-state-based grievance mechanisms provides much to inspire those thinking about the future of remedy; to be specific, it has 13 recommendations for action by key stakeholders. Their bottom line is that the accountability community is on an extended journey with the agenda of remedy, and its importance will only increase.

Conceptually, the major challenge remains that too many people in decision-making positions continue to believe the relationship between remedy and policy compliance is “either/or.” The story of the Inspection Panel is instructive in this regard, where the Bank insists that Panel reports must focus on regaining compliance, not on remedying the harm that triggered the case in the first place. Instead, the relationship must become “and.”

Some of the visionaries involved in designing the Panel thought remedy and compliance could be mutually reinforcing; the task of making that proposition a reality falls to an emerging generation, both at the World Bank and the larger world of development finance.

¹¹ U.N. Human Rights Office of the High Commissioner, *Remedy in Development Finance: Guidance and Practice*, (23 February 2022), <https://www.ohchr.org/en/publications/policy-and-methodological-publications/remedy-development-finance>.