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The World Bank, the Inspection Panel & Immunity

Joe Athialy¹

The establishment of the Inspection Panel (the Panel) marked a significant development, driven by the struggles and campaigns by people's movements and civil society organizations (CSOs), during a period when the World Bank Group operated under the shield of absolute immunity. A bold experiment in bolstering transparency and accountability within the Bank, the World Bank Inspection Panel's three-decade journey has been characterized by different highs and lows. The Bank, buoyed by its perceived insulation from legal consequences, indulged in weakening the mandate of the Panel time and again, armed with the confidence that except for some irritant NGO-community, it doesn't have anything else to lose.

However, the landscape shifted with the 2019 judgement by the US Supreme Court, which declared that the World Bank does not enjoy absolute immunity. This judicial ruling has the potential to be a transformative factor for both the Bank and the Panel. Its ramifications compel a re-evaluation of power dynamics, governance structures, and accountability mechanisms.

For the Bank, navigating the new pathways necessitates a recalibration of its practices and approach. The once-steadfast shield, now punctured by legal vulnerabilities, demands a more transparent engagement with affected communities, robust project assessments, and diligent adherence to safeguards. The loss of absolute immunity presents the Bank with an opportunity, perhaps even an imperative, to strengthen its mechanisms for addressing grievances, ensuring its independence and quick actions on the Panel findings.

The Bank can no longer ignore the Panel's findings. In a post-immunity world, the significance of the Panel's role to scrutinize, recommend, and demand corrective actions assumes renewed gravity. An empowered Panel's findings could be used as a beacon to take quick and adequate actions to address the concerns. The Panel's findings and recommendations relating to policy non-compliance may now be subjected to subsequent legal actions brought by affected communities, ushering in potentially new consequences for lapses in adherence to policies and standards. Knowing that the Panel findings could lead to litigations, Bank staff could take their role of assessing the environmental and social risks as well as closely monitoring the impacts more seriously.

The US Supreme Court's landmark decision has the potential to redefine not only the contours of accountability within the Bank but also the landscape of global development finance. As the Bank adjusts to the ramifications of this ruling, the Panel stands poised as a dynamic agent of

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change, assuming a pivotal position in a more transparent, accountable, and equitable future for international development initiatives.

Origins of the Panel

India played a significant role in the creation of the Panel, the genesis of which can be traced back to the Sardar Sarovar Narmada Dam project, which was financed by the World Bank in the 1980s. The Narmada Dam project faced widespread opposition from affected communities and civil society groups, who raised concerns about its social and environmental negative impacts.

The issues raised by the grassroots movement, the Narmada Bachao Andolan (Save Narmada Movement - NBA) resonated globally, putting an international spotlight on the negative impacts of the Narmada Dam, which was approved by the Bank two years before the Indian Environment Ministry cleared the project.

The growing concerns over the negative impacts of the Narmada Dam project forced the World Bank into yielding to the demand for an Independent Review Commission (the Morse Commission) in 1991— then an unprecedented step, marking the first instance of the Bank subjecting a project financed by it for review. The Commission's findings raised serious questions about the efficacy of the Bank's safeguard policies, thereby accentuating the need for an autonomous framework of accountability.

While the Bank tried to downplay the findings of the report, CSOs around the world called for greater transparency and accountability, and the creation of a body that could investigate complaints from affected communities and ensure compliance with safeguard policies. The organised campaign and advocacy efforts by the CSOs resulted in the establishment of the Inspection Panel in 1993—the first of its kind in any multilateral financial institution. Looking back at the Panel, while the Bank feels that it “... (it) has shown that it’s possible to democratize the oversight and accountability process, and hold ourselves accountable to the people we serve,”² it needs to recognise that the Panel, as in the case of most of the progressive policies of the Bank, emerged from grounded, local resistances.

It's another matter that three decades after the Independent Review found serious violations in the Narmada Dam project, and despite the withdrawal of Bank support, the project continued pooling in public resources for its completion. It was inaugurated by the Prime Minister in 2017 as a ‘birthday gift’ to himself, with 200,000 people forced to sacrifice their houses and fields for the dam. Thomas Berger, Deputy Chairman of the Independent Review said, referring to the dam, “Unless a project can be carried out in accordance with existing norms of human

²The World Bank Inspection Panel, *Inspection Panel Marks its 25th Anniversary*, INSPECTION PANEL (Nov. 16, 2018), <https://www.inspectionpanel.org/news/inspection-panel-marks-its-25th-anniversary>

rights and environmental protection, norms espoused and endorsed by both the World Bank and many borrower countries, the project ought not to proceed.”³

The Panel did indeed represent a breakthrough in international law, serving as the prototype for international financial organizations, and as a tool in the hands of the communities to hold investors accountable and to protect peoples’ rights. Today, nearly 20 other similar bodies exist — including at most major development banks — all modelled in some way on the World Bank’s pioneering effort.⁴

Past Challenges

Despite its well-intentioned inception, the Panel has itself been entangled in procedural issues as well as challenges arising from limited mandate and outreach in the past three decades. That it has received only 165 complaints out of the 13,300 projects approved by the Bank in the past 3 decades further demonstrates its issues. Out of this large number of projects, which the Bank itself categorises as high or substantial negative environmental and social impacts, the Panel has accepted only 1.2% as complaints.

Institutionally, the Panel has faced challenges. Time and again, Bank management has tried to clip the Panel’s wings, weakening and limiting its mandate. It started within the first few years of its inception, since the initial cases that the Panel received (in its first three years) were controversial, the actions taken by the Panel did not resonate with the interests of the management and they resulted in growing opposition to the Panel process in the Board.⁵ Attempts to weaken the Panel were evident in multiple review processes thereafter. As late as 3 years back, when a committee of Bank’s board attempted to make significant changes to the Panel’s mandate without a transparent public consultation, experts and activists had warned that “Without input from the very people the panel was designed to serve — communities impacted by the bank — the board risks making decisions in the dark that could lead to a weakened mechanism because it lacks the knowledge and insight gained by people who stand to both gain and lose the most from the reforms.”⁶

The onus of knowing about the Bank’s involvement in projects fell on the affected communities, who were often are less literate, lacking the acumen to navigate through the

³Thomas R. Berger, *The World Bank’s Independent Review of Sardar Sarovar Projects*, 9(1), AM. U. INT’L L.REV, 33 (1993),

<https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1453&context=auilr>.

⁴ See Gonzalo Castro de la Mata et al., *Opinion: Inspection Panel Marks 25 Years Of Accountability At The World Bank*, DEVEX, (Dec. 6, 2018), <https://www.devex.com/news/sponsored/opinion-inspection-panel-marks-25-years-of-accountability-at-the-world-bank-93221>.

⁵ Daniel D. Bradlow, *Lessons From The NGO Campaign Against The Second Review Of The World Bank Inspection Panel: A Participant’s Perspective*, 7(247), ILSA J. INT’L & COMP. LAW, 247 (2001), <https://nsuworks.nova.edu/cgi/viewcontent.cgi?article=1307&context=ilsajournal>.

⁶ Natalie Bridgman Fields et al., *Opinion: The Case for Public Reforms to the World Bank’s Inspection Panel*, DEVEX, (Dec. 13, 2019), <https://www.devex.com/news/opinion-the-case-for-public-reforms-to-the-world-bank-s-inspection-panel-96223>.

Bank's website, often at the receiving end of a farcical public hearing, and unaware about the Bank's safeguard policies. Their grasp of these policies remains sketchy, further compounded by a tenuous understanding of the established complaint mechanisms.

Moreover, impact assessment studies and the monitoring of safeguard policy implementation are carried out by the client and their consultants. The Panel lacks an independent mechanism to verify the authenticity of these assessments or monitoring reports.

The political context in which communities raised complaints is often overlooked. Many countries where these complaints originated from face shrinking democratic spaces, and widespread intimidation and reprisals against people who dared to challenge the government or a corporation is common. With the media heavily controlled and constitutional bodies compromised, avenues for justice or remedies for communities become increasingly limited.

When communities finally file complaints despite all these obstacles, and in cases where the Panel or other Independent Accountability Mechanisms (IAMs) found serious violations of policies, they lacked the power to make recommendations or hold staff accountable for erroneous risk assessments. A case in point is Tata Mundra project in India.

Tata Mundra project

Launched in 2007, this \$4 billion, 4000 MW coal fired thermal power project on the western coast of India was partly financed by the International Finance Corporation (IFC), the private sector arm of the World Bank Group. This venture, heralded as India's pioneering ultra-mega power project to meet the nation's growing energy demands, assumed an air of invincibility, even in the face of documented violations.

Ironically, the involvement of international lending entities like the IFC inadvertently prolonged these violations. IFC's reluctance to wield its influence as a financier, failing to drive course correction in project trajectories, allowed violations to persist. Even when its own policy standards were openly flouted, it often turned a blind eye, resulting in irreversible damages to people's livelihood and environment.

A 2011 complaint to IFC's IAM, the Compliance Advisor Ombudsman (CAO), by the people affected by this project was precisely about that. After an exhaustive investigation, the CAO's report in 2013 laid bare the flagrant breaches of the IFC's Performance Standards, exposing a glaring chasm between proclaimed intention and actual execution. CAO, in its report found that:

- Environmental and Social risks and impacts of the project were not considered and addressed.
- There was no social baseline data
- IFC's policies for land acquisition were not applied, despite physical and economic displacement

- Inadequate attention was paid to the requirement of biodiversity conservation.
- IFC failed in its review and supervision of the impacts on the airshed and marine environment.
- IFC failed to examine the cumulative impact of projects around Tata Mundra

The fishworkers and farmers who were the most severely affected by this project were not even considered as project-affected.

CAO concluded that “...the above weaknesses in IFC’s E&S review of CGPL did not support the formation of a robust view as to whether the project could be expected to meet the requirements of the Performance Standards over a reasonable period of time, the threshold question in terms of IFC’s decision to invest.”⁷

However, the IFC preferred to not act upon that. Not only did this make a mockery of the findings of the IFC’s own accountability mechanism, it also undermined the mandate of the CAO by ignoring its findings and not taking the appropriate recourse actions. CAO’s subsequent monitoring reports revealed that the issues remain unaddressed.

The failure of institutional processes forced the community to knock on the doors of the judicial system of the US, where IFC is registered, for remedy. Hiding behind the immunity clause, IFC tried to evade taking responsibility for the damages their lending caused. After a process of dismissals and appeals, the matter reached the US Supreme Court, where it was heard, and a final judgement delivered.

World Bank Immunity

After exhausting every available recourse, in 2015 the fishing communities and farmers filed a suit in the U.S. District Court of Washington, DC, against the IFC (Jam vs IFC) over the destruction of their livelihoods and property and health hazards caused by the Tata Mundra power plant. The plaintiffs, represented by Earth Rights International (ERI), included fisherfolk adversely affected by the project, farmers affected by increasing groundwater salinity and contamination of their farmland by ash and dust, the Machimar Adhikar Sangharsh Sangathan (Association for the Struggle for Fisherworkers’ Rights) and the Navinal Panchayat (village), a local government entity.

The District Court initially found that the IFC was immune from suit, which the plaintiffs appealed at the D.C. Circuit Court of Appeals. On Appeal, the three-judge panel recognised the “dismal” situation, noting IFC did not deny that the plant had caused substantial damage and yet found IFC could not be sued based on the Circuit’s previous decisions. In her dissenting opinion, however, Judge Nina Pillard highlighted that the Court was bound by earlier

⁷See Office of the Compliance Advisor Ombudsman (CAO) for the International Finance Corporation (IFC) Multilateral Investment Guarantee Agency (MIGA) Members of the World Bank Group [CAO], *CAO Audit of IFC Investment in Coastal Gujarat Power Limited, India*, Audit Report (Aug. 22, 2013), <https://www.cao-ombudsman.org/sites/default/files/downloads/CAOAuditReportC-I-R6-Y12-F160.pdf>.

precedents, which she described as “wrongly decided” and suggested they should be reconsidered. She essentially gave a roadmap for the appeal to the Supreme Court when she suggested the D.C. Circuit had taken “a wrong turn” when it “grant[ed] international organisations a static, absolute immunity”.

In its historic decision on February 27, 2019 the U.S. Supreme Court decided that international organizations like the World Bank Group do not enjoy absolute immunity. The court’s majority decision overturned a 74-year-old presumption that international financial institutions could not be sued when their development projects hurt local communities.⁸ Simply put, with this judgement, the World Bank and other international financial institutions can be sued anywhere for the damages they are causing to people and the environment. For years, the World Bank has operated as if it were above the law, at times pursuing reckless lending projects that inflicted serious human rights abuses, and then leaving the communities to fend for themselves.⁹

Implications for the Bank and IAMs

The establishment of the Panel (and similar other IAMs) occurred during a period when the Bank enjoyed absolute immunity from legal repercussions. This immunity provided the Bank with a sense of impunity, which in turn enabled the institution to tinker at its discretion with the mandate and powers of the Panel, which by then had emerged as a final recourse for communities aggrieved by projects funded by the Bank. These communities found themselves compelled to accept the Panel decisions, regardless of whether their complaints were rejected on technical grounds, met with wishy-washy reports or reports devoid of proactive actions from management, or experienced other such outcomes.

However, the lifting of immunity has brought in a paradigm shift. For communities whose grievances were insufficiently addressed by the Panel or instances in which the Bank chose to disregard findings and abstain from corrective measures, legal remedies now present a viable course of action. The Bank has a choice to make: to pursue its old ways of functioning, or recognise the changing times and take steps to prevent a deluge of legal cases. Since the Supreme Court verdict, the reporting lines of CAO has changed from the World Bank President to the Board, showing a positive response from the Bank.

An empowered Panel, with more powers and authority to deal with and satisfactorily settle the grievances of people and communities, will go a long way in gaining the confidence of communities as a genuine destination for addressing grievances. This includes not only the power to investigate but also the capacity to issue time-bound recommendations for rectifying violations. The pivotal alteration in this regard is the provision of *suo moto* powers of the Panel.

⁸ Sasha Chavkin, *No Longer Above The Law, The World Bank Faces Fight of Its Life*, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Mar. 13, 2019), <https://www.icij.org/investigations/world-bank/no-longer-above-the-law-the-world-bank-faces-fight-of-its-life/>.

⁹ For more on the case, See Earthrights International, *Budha Ismail Jam, et al v. IFC*, EARTHRIGHTS INTERNATIONAL, <https://earthrights.org/case/budha-ismail-jam-et-al-v-ifc/> (last visited Oct. 16, 2023).

This alteration would enable the Panel to initiate investigations into projects that are in high-risk categories, and to take proactive measures to prevent irreparable harm. This departure from the status quo, where communities (in almost all cases) approach the Panel after harm has been incurred, aligns with a preventive approach, an essential departure given the potential legal consequences.

Moreover, to ensure equitable decision-making and robust project oversight, the active engagement of affected communities across all tiers of decision-making and project monitoring is imperative. By affording these communities a voice, their concerns can be duly acknowledged and their interests safeguarded. This not only promotes inclusivity but also contributes to better project outcomes.

Bank has an opportunity

Nothing can restore the faith in the Bank and its IAMs as much as taking proactive action in addressing the harm caused due to projects financed by the Bank. Nowhere during the course of the litigation against IFC in the case of Tata Mundra (Jam vs IFC) that it denied the social and environmental damages caused due to its lending. However, when the case resumed in the Court, on a narrow interpretation of law, it escaped from paying the liabilities for the damages.

Legally speaking the Bank is not liable to pay anything to the fisher-people and farmers who are badly impacted. But, morally it is. Without its lending the project might not have come up. By ignoring the findings of its own accountability mechanism, it not only undermined their mandate but also lost a chance to undo some of the damages did to people and environment.

It could still try to do that. It could reach out to people and help them restore their livelihood and the damaged coastline and farmlands. Such a gesture will convey that the Bank is serious in addressing the violations of its own policies as recorded by its accountability mechanisms. That could prevent future complainants from seeking legal remedy as their first option.

Conclusion

The erosion of the Bank's immunity status has ushered in a new era, necessitating a reconsideration of the dynamics between the Bank, its mechanisms like the Panel, and the communities they impact. The potential for legal recourse now underscores the significance of granting the Panel greater authority, including the ability to proactively investigate high-risk projects and make binding recommendations. Concurrently, involving affected communities in decision-making processes remains a cornerstone of ensuring accountability and equitable development outcomes.