Adios to Paradise: The Yacyreta Dam and the Destruction of Environmental and Human Rights

Itzchak E. Kornfeld

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# Adiós to Paradise:
The Yacyretá Dam and the Destruction of Environmental and Human Rights

*Itzchak E. Kornfeld*

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The field of human rights has for the past six decades, like a river deepening its channel, slowly chipped away at the strata of injustice. Nevertheless, the vaunted words of the Universal Declaration of Human Right's opening sentence continue to be rejected by numerous state-signatories and inter-state institutions. Indeed, one nascent area in the human rights arena, where the lack of freedom and injustice is manifest, is the field of human rights and the environment. This topic is the subject of the present article.

Examples of the abrogation, by sovereign states, of environmental rights and its impact upon human rights are legion, particularly in the developing world. Moreover, it is now quite clear that Multina-

1. Theodore Roosevelt, It Takes More Than That to Kill a Bull Moose (Oct. 14, 1912). Available at http://www.theodoreroosevelt.org/research/speech%20kill%20moose.htm (taken from a stenographic report that differs considerably from the prepared manuscript, because an attempt was made on Roosevelt's life just before he entered the auditorium).


5. See e.g., Burma/Myanmar: Vivienne Walt, Chevron, Total Accused of Human-Rights Abuses in Burma, Time, July 6, 2010, http://www.time.com/time/world/article/0,8599,2001962,00.html#ixzz1FADaTe (Burmesi government, San Francisco based Chevron and the French energy giant Total have been accused of posting soldiers to protect a jointly owned pipeline who dragooned local villagers into manual slave labor.); China: Joseph Kahn and Jim Yardley, As China Roars, Pollution Reaches Deadly Extremes, N.Y. TIMES, Aug. 26, 2007, available at http://www.nytimes.com/2007/08/26/world/asia/26china.html. ("Public health is reeling. Pollution has made cancer China's leading cause of death, the Ministry of Health says. Ambient air pollution alone is blamed for hundreds of
tional Corporations ("MNCs") figure, whether directly or indirectly, into the destruction of the environment and its concomitant violation of the human rights of indigenous peoples around the world.\textsuperscript{6} Nevertheless, States and MNCs are not the only institutions that abrogate human rights norms, as a consequence of their despoliation of the environment. International Organizations, also known as Intergovernmental Organizations,\textsuperscript{7} are also responsible for these types of harms. This article focuses upon the actions of two international organizations, the World Bank and the Inter-American Development Bank. It examines how their loan policies effect the global environment and produce injustices and human rights violations. As part of that discussion, the article delves into the two banks’ dispute resolution procedures, via their respective inspection panels, using the Yacyretá Hydroelectric Dam as a case study.

A. Declarations, Failures and Consequences

The World Bank Group’s ("WBG") International Bank for Reconstruction and Development ("IBRD" or "the Bank") declares that its aim is "to reduce poverty in middle-income and creditworthy poorer countries by promoting sustainable development through loans, guarantees, risk management products, and analytical and advisory services."\textsuperscript{8} Thus, one would be led to believe, from the cited language, thousands of deaths each year. Nearly 500 million people lack access to safe drinking water.\textsuperscript{9}; \textbf{Ecuador}: Lawrence Hurley, \textit{Oil & Gas: Judge at Heart of Landmark Pollution Case Unfazed by Spotlight}, \textit{GREENWIRE}, May 17, 2011, http://www.eenews.net/public/Greenwire/2011/05/17/1. (Ecuador sued Chevron/Texaco over oil contamination “from oil and gas drilling operation pits, topped with a thick coat of oil open to the elements” and “including wastewater from driling operations.” Id.); \textbf{Ethiopia}: International Rivers, \textit{Gibe III Dam, Ethiopia}, (2011), http://www.internationalrivers.org/africa/gibe-3-dam-ethiopia. ("Ethiopia’s plans to build Gibe III Dam now threaten the food security and local economies that support more than half a million people in southwest Ethiopia and along the shores of Lake Turkana. Construction began in 2006 with flagrant violations of Ethiopia’s own laws on environmental protection and procurement practices, and the national constitution.")


that it would therefore be axiomatic that when institutions such as the IBRD, whose mission is to provide funds for development to the nations of the southern hemisphere, offer "aid" in the form of loans, it means to improve the quality of life of the average citizen. One would, however, be mistaken.

Similarly, this error in judgment persists when applied to Multi-Development Banks ("MDB"s). They too declare that they were established to assist poor countries with their development, and in poverty alleviation within their regional purview. These Banks' noble mission statements notwithstanding, there is a fundamental shortcoming with institutions such as the IBRD, and its regional equivalents, the regional Multilateral Development Banks. The failing: these Banks neglect to involve the very people who live within their loans' project areas, in the development process. Accordingly, these institutions in the process ignore the actual communities and people - referred to as "project-affected people" - that they seek to assist.

9. For example, the World Bank Group's International Bank for Reconstruction and Development (hereinafter "IBRD" or "Bank") states that its "aims are to reduce poverty in middle-income and creditworthy poorer countries by promoting sustainable development through loans, guarantees, risk management products, and analytical and advisory services." The World Bank, The International Bank for Reconstruction and Development (2008) available at http://go.worldbank.org/SDUHVGE5SO.

10. See "The Inter-American Development Bank, About the IDB: Mission (2008) at http://www.iadb.org/aboutus/I/mission.cfm?language=English (Thus, the Inter-American Development Bank ("IADB")'s website for instance, avers that its mission is to "contribute to the acceleration of the process of economic and social development of the regional developing member countries, individually and collectively)."

11. Id. (The IADB has also declared that it "helps foster sustainable economic and social development in Latin America and the Caribbean through its lending). See also The Inter-American Development Bank, IDB Sustainability Portal (2008) at http://www.iadb.org/sustainability/index.cfm?language=English (The IADB defines sustainability as follows: "Sustainability at the IDB means promoting development that is equitable and sustainable, both socially and environmentally. It is a concept that frames the Bank's work toward economic growth and poverty reduction in Latin America and the Caribbean). The IADB defines Sustainability as follows: "Sustainability at the IDB means promoting development that is equitable and sustainable, both socially and environmentally. It is a concept that frames the Bank's work toward economic growth and poverty reduction in Latin America and the Caribbean.")

12. E.g., the Inter-American Development Bank ("IADB"), the Asian Development Bank ("ADB"), and the African Development Bank ("AFDB").
In failing to seek public input into a Bank's projects, its executives, who always deal solely with government officials, sequester themselves away from the very communities they claim will be the beneficiaries of the foreign direct investments. There is a bitter irony in this process, since certain governments and international organizations do not have their constituents' best interest in mind. Given the foregoing, the following question begs for an answer: is this aid aimed at playing a positive role in reducing poverty and arresting ecological degradation? If so, why does "the process of consultation often become a kind of managed dialogue among elites rather than a forum for authentic popular expression"?

Indeed, the results of these conversations among elites have been that, more often than not, the Banks' projects, rather than lifting the poor from the morass of poverty, plunges them into further despair and financial precariousness. Consequently, there is a boomerang effect: the more money is lent, the greater the prolongation of the injustice and strain that the average citizen in developing countries feels and is under. In addition, many of these Bank projects, particularly dam construction ventures, have been either total construction or operational failures, or at best have only been partially successful.

Injury to the environment, disastrous resettlement policies and decisions, as well as a lack of work for those resettled, are the outgrowth of these projects. Without a doubt, once a Bank financed project fails, the damage has been done, and attempting to undo it is akin to squeezing the toothpaste back into the tube. Requests for scru-


17. See, e.g., PETR BOSSHARD, et al., Gambling with People's Lives: What the World Bank's New "High-Risk/High-Reward" Strategy Means for the Poor and the Environment (Sept. 2003), available at http://siteresources.worldbank.org/CSO/Resources/EDhighrisk.pdf. ("The environmental destruction, social upheaval, corruption and repression that are associated with the World Bank's high-risk projects have created tremendous public controversy since the 1980s. [footnote omitted]. This is particularly true for large dams, for projects that affect tropical forests, and for investments in the oil, gas and mining sectors.")
tiny regarding whether bank policies were followed, submitted to the IBRD's dispute settlement body, the Inspection Panel\textsuperscript{18}, are an after-the-fact attempt at remedying an already chronic problem. Moreover, in many cases, management fights the Inspection Panel's recommendations and endeavors to convince the Bank's directors that the panel was wholly erroneous and iniquitous in its assessments.

Indeed, the Banks' management, to the detriment of project-affected people, maintain their course with no change in the \textit{status quo}. But, assuming that these managers believe in their banks' missions of helping the poor pull themselves out of their current situation, why do they seem threatened by independent review and fight changes to failing projects? One plausible conclusion is that this behavior is rooted in an institutional intransigence and irreverence for human rights and the environment. Simply stated, Development Banks are banks whose management only seeks to have their loans repaid. Everything else is window dressing.

\textbf{B. A Road Map to the Article}

The IBRD's and IADB's failures have received a good deal of scrutiny in the literature. Commentators have addressed a variety of subjects, including the Bank's lack of accountability for human rights violations,\textsuperscript{19} issues related to public participation,\textsuperscript{20} population displacement and resettlement.\textsuperscript{21} The present article departs from these subjects and concentrates on an area that has yet to be fully examined: how the system works, through the "eyes" of a particular project. As part of this exploration, I posit that dispute settlement procedures offered by the Development Banks is at best wanting. The loan process is meant, as this author sees it, to maintain management's control not only over the loan process, but over the borrower. That is, the IDRB and its four World Bank Group's sisters were designed, in 1944, to deal

\begin{itemize}
  \item \textsuperscript{18} The Inspection Panel is discussed \textit{infra} at Part III.
  \item \textsuperscript{20} See, e.g., Camody, supra note 15, at 1323.
\end{itemize}
solely with sovereigns; this is an antiquated Westphalian mindset, where citizens have no privity in the process and therefore are precluded from seeking a place at the table.

This case study, therefore, examines the IBRD's and the IADB's management's decades-long failure to adhere to their respective policies and procedures, as well as direct circumvention of these policies. It also reveals the consequences of these failures, which include untold harm and anguish to the local populations within the Yacyretá project's area in both Argentina and Paraguay, including indigenous peoples. What is also made clear is that Bank personnel have ignored their responsibility to defend the interests of project-affected people, by side-stepping Bank procedures. In addition, the Yacyretá case study examines the Banks' dispute resolution bodies' efforts at identifying the IBRD's and IADB's deviations from their respective policies and procedures. It further addresses how their findings and recommendations were ignored, thereby often reducing the panels' efforts to pointless exercises. By failing to adhere to their respective policies and procedures, and circumventing these policies, as well as ignoring the Inspection Panel's recommendation, the Banks prolong the damage to the environment and the human rights violations of the affected peoples.

My thesis in the present article is as follows: where dam projects funded and constructed by the IDRB and IADB, in which the citizens are the intended beneficiaries of these projects are excluded from the process, tend to falter, at best, and more often than not, fail.

Part II provides a background into the two lending institutions that have been intertwined with the Yacyretá Project for decades. Part III discusses the origin, make-up, and task of the two banks' Inspection Panels. Part IV presents a detailed history into the development, construction and outcome of the Yacyretá Dam Project, and the human and environmental rights the Dam has caused. In turn, Part V addresses the findings of the IBRD's Inspection Panel and its corresponding body at the IADB. It also examines the despoilment of the environment and its concomitant violation of the human rights of the project-affected people. Part VI discusses and analyzes the environmental assessment industry. Part VII discusses the second request for inspection, submitted in 2002, which demonstrates how little was done in the years since 1996, when the first Request for Inspection was submitted.


A. The World Bank Group’s International Bank for Reconstruction and Development

The World Bank Group ("WBG") is one of the three original Bretton Woods institutions.23 The WBG consists of the International Bank for Reconstruction and Development ("IBRD")24 and the International Development Association ("IDA").25 Three other agencies, unrelated to the subject matter of this paper, also fall under the umbrella of the WBG.26

The WBG is the largest multilateral development agency in the world.27 In fiscal year 2005, the World Bank provided $24.7 billion in loans to its client countries.28 Similarly, the Bank also coordinates other donors, mobilizes finances from bilateral and private-sector sources, and is the accepted leader in the development community.29

23. The two others are the International Money Fund ("IMF") and the World Trade Organization ("WTO"). The latter is headquartered in Geneva while the WBG and IMF are headquartered in Washington, D.C. For the history and functions of these institutions, see generally, The Bretton Woods Committee, About, Bretton Woods Institutions, http://www.brettonwoods.org/index.php/180/Bretton_Woods_Institutions.


27. Hunter, supra note 22, at 203.


29. Hunter, supra note 22, at 203. See generally World Bank, About Us, Articles of Agreement (2008), http://go.worldbank.org/BAEZIH92NH0. See also Jude Webber, More
One major stumbling block for citizens is the IBRD’s opacity. For example, the Bank’s meeting minutes and voting records are hidden from the public, thereby hampering any effort at transparency. The latter fact is particularly disturbing since the money that is being contributed by the Member-States comes from each of their public fiscs. Additionally, this mindset governs the IBRD’s Board of Executive Directors and its Board of Governors in setting policies, and is consequently translated by management into the Bank’s day-to-day operations.

**B. The Inter-American Development Group**

In many ways, the IADB is a mirror image of the World Bank Group. The IADB (or “IDB”) Group is composed of the “IDB, the Inter-American Investment Corporation (IIC) and the Multilateral Investment Fund (MIF). The IIC focuses on support for small and medium-sized businesses, while the MIF promotes private sector growth through grants and investments.” The IADB was formed in 1959 and is owned by forty-seven member nations, including Croatia, Sweden, the United States, the United Kingdom, and includes, among others, many constituent nations within the Caribbean and Latin American Basin.

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30. See e.g., Toby J. McIntosh, *World Bank Proposal Said to Undercut Access Policy*, http://www.freedominfo.org/2011/10/world-bank-proposal-said-to-undercut-access-policy. (The P4R proposal would allow Bank funding without requiring application of the Bank’s environmental and social safeguard policies. The Bank would approve a “program” for a recipient country, not specific projects. The overall goal is to expand the influence of the Bank safeguard policies to more government programs . . .) See also Bruce Jenkins, *World Bank and IMF Launch Disclosure Reviews*, Bretton Woods Project (Apr. 23, 2009), http://www.brettonwoodsproject.org/art-564203. (“Civil society groups . . . [are] painfully aware of information access problems at the World Bank . . . Communities and individuals are often unable to participate in Bank decisions and lack information to hold decision makers accountable.”)


32. “The current distribution of voting power is as follows: the 26 Latin American and Caribbean states, 50.02 percent; the United States, 30 percent; Canada, 4 percent; the 16 European countries, Israel and the Republic of Korea, 10.98 percent; and Japan, 5 percent.” Inter-American Development Bank, *About the IDB: Ownership* (2008), http://www.iadb.org/aboutus/I/ownership.cfm?language=English. (URL no longer available)

From its inception through December 31, 2007, “the Bank had approved over $156 billion in loans and guarantees to finance projects with investments totaling $353 billion, as well as $2.4 billion in grants and contingent-recovery technical cooperation financing.” With regard to the Yacyretd Hydroelectric Project, IADB financing through 2000 was $840 million. The Banks’ dispute resolution bodies are discussed next.

III. THE INSPECTION PANELS AND THE DISPUTE RESOLUTION PROCESS

A. Genesis: The Lead-Up to Creation

From its inception in 1944 until the early 1990’s, the IBRD was considered to be a “lawless” and “a ‘renegade’ institution, subject to no meaningful set of laws or binding standards.” Because of its status as a non-state actor, the Bank “enjoys immunity from national courts, and international law provides only limited recourse against the Bank.” Nevertheless, borrowers and contractors, who have contracted with the Bank, can bring actions that are related to loan agreements or contracts before one of the WBGs’ arms, the International Centre for Settlement of Investment Disputes (“ICSID”). The ICSID is a forum for the arbitration of investment disputes.

However, as noted above, the opportunity to seek relief is unavailable to project-affected people, even though they are considered third party beneficiaries of the Banks’ loans. The reasons: (1) they have no privity with the Bank; and (2) the Bank only deals with state entities.

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34. Inter-American Development Bank, About the IDB: What Does the IDB Do? (2008), http://www.iadb.org/aboutus/II/index.cfm?language=English. Located in Washington, D.C., the Bank is staffed by some 2,000 professionals and administrative staff, not including the Board of Executive Directors and the Office of Evaluation and Oversight. “At the end of 2005, Bank staff funded by the administrative budget, excluding the Board of Executive Directors and the Office of Evaluation and Oversight, totaled 1,852, of whom 1,411 were professional and 441 administrative staff.” Inter-American Development Bank, About the IDB: Bank Staff (2008), http://www.iadb.org/aboutus/IV/bankstaff.cfm?language=English.


36. HUNTER, supra note 22, at 203.

37. Id.

38. See generally The World Bank, supra note 28. (noting that the ICSID helps encourage foreign investment by providing international facilities for conciliation and arbitration of investment disputes, thereby helping foster an atmosphere of mutual confidence between states and foreign investors).
Of course, this is the traditional catch-22 that non-State actors encounter within the regime of public international law. If the Bank is accountable to anyone, it is accountable solely to the governments of the 185 states that have a cooperative interest in it, because only sovereign states are the subjects of international law. This premise, however, is based upon the faulty conclusion that nations are the protectors of their citizens' rights and will represent these rights within the realm of international law, e.g., they will utilize their political sway before international organizations. Not surprisingly, this legal fiction withers away when one looks at the reality of human rights violations by States.

B. The Assault on the Citadel

Notwithstanding the foregoing, in the late 1980s and early 1990s, citizens began to challenge the IBRD's policies. The attack on the citadel—the Bank—came from two separate directions. Beginning in the early 1990s, the Bank and its two Bretton Woods sister institutions were the subject of an "NGO swarm"—the harassment by "amorphous groups of NGOs, linked online, descending on a target." In 1994, the World Bank was targeted by the "Fifty Years is Enough campaign." This impetus was followed by two similar phenomena: the targeting of the International Monetary Fund's Annual Meeting in 1998, and the "Seattle Shock," during the 1999 World Trade Organization's Ministerial Conference in Seattle. One commentator has


41. Id. (noting that in 1994, protesters dominated the World Bank's anniversary meeting with a 'Fifty Years is Enough' campaign, and forced a rethink of the Bank's goals and methods.)

42. The "Seattle Shock"as Business Week called it in an editorial that warned of a popular backlash against "our very economic system"—reflects heartfelt indignation by the financial press at the intrusion of mass democracy into an elite discourse... the demonstrators want to democratize what has been an elite decision-making process, to challenge the global dominance of capital and capital's state institutions. See William K. Tabb, After Seattle: Understanding the Politics of Globalization, Monthly Review (Mar. 2000), http://www.monthlyreview.org/300tabb.htm.
observed that “[i]n each instance, the NGOs’ public criticisms led to institutional soul searching.”

In addition, most NGOs felt that the IBRD was taking refuge behind an “insulated position in international law.” Accordingly, the second front involved two phases. First, the Bank was cajoled into adopting social and environmental policies that, among other things, established norms for access to information, environmental assessment, involuntary resettlement and public consultation, which were to be employed as integral parts of future projects. The second phase targeted the IBRD’s procedures. These procedural steps, especially those providing access to information and public consultation, were aimed at addressing two communities: project-affected people, and the Bank’s employees.

The latter were mandated to put into place the use of environmental factors in assessing project feasibility. Moreover, when project-affected people were displaced, the Bank’s employees were to ensure that those who were resettled received comparable work and lodging to those that they were required to give up. The Bank’s staff was also required to establish a program for the distribution of project information to indigenous communities who would be affected by the Bank’s projects. These and other changes were initiated at the very top of the Bank’s management, by none other than its then President, Lewis Preston, who was appointed in 1991. “Preston made a clear link between poverty and environmental degradation. In a 1992 address to the World Resources Institute, he claimed that alleviation of poverty would eliminate many of the environmentally destructive actions in the developing world and would benefit the world environment.”

43. Camody, supra note 15, at 1325.
44. Hunter, supra note 22, at 204.
Beginning in 1987, under the leadership of Barber Conable, Preston's predecessor, a top to bottom reorganization took place. At that time there was also serious doubt about the Bank's purpose as a multilateral lender in a world of copious private capital; NGOs such as "Fifty Years is Enough" asserted that the Bank's role was superfluous when private capital was extremely abundant. In addition, the approaching membership of the former Soviet and Eastern Bloc States was about to place great demands – as well as accompanying requirements – upon the institution. Lastly, the harsh censure the Bank received during its fiftieth anniversary, became increasingly "strident, culminating in large protests during the Annual Meetings in Madrid."

During this time, the Bank issued its fifteenth World Development Report, which highlighted the environment, and described the World Bank Group’s shift to its subsequent stage of environmental work. One part of this environmental focus was to put into place environmental policies, and to ensure that these strategies were adhered to. Closely related to the environmental programs were policies and

46. Upon his appointment, Conable was shocked to learn that the five major shareholders in the Bank refused to endorse the budget proposed by his predecessor A. W. Clausen. The critics focused on the Bank's administrative budget, which they saw as a bloated, overgrown bureaucracy. These criticisms persuaded Conable that reforms needed to be made, and that it was his mandate to cut costs and restore efficiency within the Bank. See The World Bank, Archives, Barber Conable, 7th President of the World Bank Group, 1986 – 1991 (2008) available at http://web.worldbank.org/WEB/EXTERNAL/EXTABOUTUS/EXTARCHIVES/0,,contentMDK:20487104-pagePK:36726-piPK:437378-theSitePK:29506,00.html.

47. The changes in the Bank's organization were drastic. The rapid and substantial change caused personal stress, organizational tension, and major disruptions in the work process. Four hundred staff positions were cut, and the entire staff had to re-apply for the newly created positions.


49. Id.

50. Id.


52. "Over time, those . . . 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." HUNTER, supra
actions concerning the relocation of indigenous project-affected people.\footnote{53}

\textbf{C. The Arousal and the Beast}

Prior to Mr. Preston’s assumption of the Presidency, the Bank was assailed by NGOs, specifically the India-based Narmada Bachao Andolan (Save the Narmada Movement)\footnote{54} that confronted the Bank regarding the funding of the Sardar Sarovar Dam on the Narmada River. In response to the Narmada firestorm, which began in the mid 1980’s\footnote{55}, Conable commissioned an independent study to be headed by Bradford Morse.\footnote{56} The Morse Commission’s report, which was delivered to the Bank during Preston’s tenure, stated in no uncertain terms that the Bank’s accomplishments on resettlement and environmental issues had “fallen short” of its policies and guidelines.\footnote{57}

\footnote{note 22 at n. 8, (citing Bradford Morse and Thomas Berger, Sardar Sarovar: Report of the Independent Review (Resource Futures Int’l 1992) (chronicling the Bank’s failure to ensure policy compliance in the controversial Sardar Sarovar dam projects on India’s Narmada River).}

\footnote{53. Preston, 8th President, \textit{supra} note 45.}


\footnote{55. “Like any large river valley development scheme, the NVDP will lead to large-scale submergence of land and thus also the displacement of those communities for whom this land provides habitat, livelihood and lifeworld. And for this reason, the projects have become the object of intense contestation by the communities that stand to be affected by submergence and displacement. From the mid-1980s onwards, social action groups working with dam-affected adivasi (indigenous) groups and gradually also in caste Hindu farming communities in Maharashtra, Gujarat and Madhya Pradesh started an intense questioning of the responsible authorities as to the prospects for fair and adequate resettlement and rehabilitation.” Alf Gunvald Nilsen, \textit{The River and The Rage: Dispossession and Resistance in the Narmada Valley, India} (Undated), at 2 - 3. University of Nottingham Centre for the Study of Social and Global Justice, \textit{available at} \url{http://www.nottingham.ac.uk/cssgj/documents/working-papers/wp005.pdf}

\footnote{56. F. Bradford Morse, a five term-former Republican Congressman from Massachusetts spent thirteen years as top-ranking United Nations official, including as “head of the United Nations Development Program, which helps finance and administer development projects in more than 150 nations, Mr. Morse became an advocate for aid to poor countries and for victims of famine in Africa.” Jennifer Kingson Bloom, Bradford Morse Is Dead at 73; Held High-Ranking U.N. Posts, N.Y. Times (Dec. 1994), \textit{available at} \url{http://query.nytimes.com/gst/fullpage.html?res=9A0CEFD61238F93AA25751C1A962958260.}}

\footnote{57. Preston, 8th President, \textit{supra} note 45.}
Following the Morse Commission’s findings, NGOs, including the United States-based Center for International Environmental Law ("CIEL"),58 the Environmental Defense Fund,59 the Bank Information Center,60 Friends of the Earth61 and many others, pressed Congress as well as the Parliaments of Germany and Switzerland to hold public hearings on why the Bank should continue to be funded. Congress and the Swiss Parliament held hearings and took testimony on the "potential for an accountability mechanism"62 for the Bank. Given what they heard, the governments of the United States and a number of other donor governments advised the Bank’s directors that they would link any increased funding of the Bank to the formation “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.”63

The Morse Commission served as a prototype for a new Bank institution.64 On September 22, 1993, the Executive Directors of the IBRD and the IDA created an independent body: the Inspection Panel

58. “The Center for International Environmental Law (CIEL) is a nonprofit organization working to use international law and institutions to protect the environment, promote human health, and ensure a just and sustainable society.” The Center for International Environmental Law, About, (last updated Sept. 26, 2007) at http://www.ciel.org/reciel.html


60. The Bank Information Center (BIC) partners with civil society in developing and transition countries to influence the World Bank and other international financial institutions (IFIs) to promote social and economic justice and ecological sustainability. BIC is an independent, non-profit, non-governmental organization that advocates for the protection of rights, participation, transparency, and public accountability in the governance and operations of the World Bank, regional development banks, and IMF. Bank Information Center, About the Bank Information Center (2012), http://www.bicusa.org/en/Page.About.aspx.

61. “Since our founding in 1969, Friends of the Earth has spent 39 years fighting for the environment. Our history is marked by victories across the years and our commitment to the environment.” Friends of the Earth, Our History (2011), http://action.foe.org/t/6545/content.jsp?key=3653.

62. HUNTER, supra note 22, at 205.

63. Id. See also, 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 U.S. Congress and to several NGOs. NGOs provided comments to the U.S. Treasury and Congress, as well as to officials of other governments.

64. Id.
for both the IBRD and the IDA.\textsuperscript{65} The Panel's mandate is to act as an independent forum and to investigate complaints that it receives from project-affected private citizens or groups, who feel aggrieved by the Bank's failure to abide by its loan policies and procedures \textit{vis a vis} the design, appraisal or implementation of development projects.\textsuperscript{66}

Indeed, Dr. Ibrahim Shihata, a former Bank General Counsel and “the legal architect”\textsuperscript{67} of the Panel, has observed that the Bank established the Inspection Panel more because it had to than because it wanted to. In his words the Bank was “driven by a broader concern that international organizations were not adequately accountable for their activities and by the perception that the Bank, as an important instrument of public policy in areas of international concern, need[s] to be more open and responsive.”\textsuperscript{68} In 1994, by separate resolutions, the regional MDB's, following the Bank's lead, created their own inspection panels.\textsuperscript{69}

\textbf{D. The IBRD's Inspection Panel}

\textit{Never Let the Truth Get in the Way of a Good Story}\textsuperscript{70}

The IBRD's first Inspection Panel members were appointed on September 22, 1993.\textsuperscript{71} The Panel is composed of three members,\textsuperscript{72} a

\textsuperscript{67} Bissell, \textit{supra} note 22 at 741.
\textsuperscript{68} SHIHATA, IBRAHIM F. I., \textit{THE WORLD BANK INSPECTION PANEL 9} (Oxford University Press, 2d ed. 1999).
\textsuperscript{72} \textit{Id.} (“The Panel consists of three members who are appointed by the Board for non-renewable periods of five years . . . In addition to the three Panel members; an Executive
chairperson and two panel members, who pursuant to the Panel's operating rules, cannot have been previously employed by the Bank. Each Panel member is chosen based on his or her related experience and serves a single five year term. All three are chosen based on their decades-long careers in the field of development.

The Panel is invested with its own approved procedures, which are available in English, French, Spanish and Portuguese, and are thereby accessible to a large number of potentially affected communities across the globe. It's jurisdiction is limited solely to reviewing whether the Bank, in carrying out its loan obligations, ensured compliance with its policies, and whether deviations from these policies caused harm or injury to project-affected people, (i.e., it may only evaluate whether the Bank's performance measured-up to the standards set forth within the Bank's operational policies and procedures).

Thus, the Inspection Panel is precluded from determining whether Bank officials acted appropriately within the framework of its policies and procedures. Nor is the Panel charged with overruling Bank policies or procedures.

Indeed, the IBRD's Board of Executive Directors clearly anticipated that this "new mechanism" would advance the IBRD's conformity with its policies more faithfully. The Directors also antic-
ipated that an independent body would demonstrate greater transparency and increased accountability. It is also clear that the Board felt that these goals could only be achieved if the Panel was completely independent of the Bank’s management.

Accordingly, the Panel’s role is narrowly tailored. Its task, which is triggered when it receives a request for inspection, i.e., a complaint, is to inquire and recommend based on the request, whether the Panel will undertake a preliminary review of the request for inspection and the response of management. They then independently assess the information and recommend to the Board of Executive Directors whether or not the concerns raised in the complaint warrant investigation. If, based on the Panel’s recommendations, the Board determines that a given request merits investigation, the Panel proceeds with data and information collection. This compilation of related facts and figures includes, where warranted, traveling to the project area. The Panel then provides its findings, independent assessment and conclusions to the Board. On the basis of the Panel’s findings and management’s recommendations, the Executive Directors will consider the actions, if any, to be taken by the Bank.

From a dispute settlement perspective, the Panel’s mandate and procedures are quite flawed. The IP is solely an investigative

("In establishing the Panel, the Bank’s Board of Executive Directors clearly expected that this new mechanism would promote the Bank’s compliance with its policies more adequately . . . The Board of Executive Directors believed that those objectives could be met only if the Panel was completely independent of Bank Management.").


81. The Inspection Panel 10 Years On, supra note 80 at 15. ("The decision in 1993 by the World Bank’s Board of Executive Directors to create an Inspection Panel that, although an integral part of the Bank, would enjoy complete independence from Bank Management and staff members was indeed an imaginative, courageous, and pace-setting act."). Nevertheless, as will be discussed infra the Panel’s independence goes only so far.


83. The Inspection Panel 10 Years On, supra note 80, at 20. ("Therefore, the Panel reports directly to the Bank’s Board; its reports go directly to the Board without being reviewed by any other party, including Bank Management, or by those who submit a Request for Inspection. The reports are published exactly as written.").

84. Inspection Panel, How to File, supra note 83, at How are Requests Processed?

85. Id.

86. Id.
body, when the Bank’s Board allows such.\textsuperscript{87} The Panel can only make recommendations, which the Executive Directors, at their discretion, can either accept or reject.\textsuperscript{88} Moreover, under the current process, the Bank’s management can and often does, challenge the Panel’s findings. That is, the IP is put in the position of being the investigated party, having to prove the correctness of its findings based upon its investigation.\textsuperscript{89} Accordingly, the IP is neither a tribunal nor a court.\textsuperscript{90} It is akin to a Presidential or Congressional commission, whose reports are left to gather dust once they are submitted. Moreover, as will become apparent below from the Yacyretá case study, once the tumult that led to the Panel’s creation died down, the \textit{status quo ante} seems to have returned.

\section*{E. The Inter-American Development Bank’s Investigative Mechanism}

As noted previously the IADB – as well as the other MDBs – followed the IBRD’s lead in organizing their own respective inspection panels. The IADB however calls its panel the “Independent Investigation Mechanism” (“IIM”).\textsuperscript{91} One key difference between the two investigative bodies is that unlike the Inspection Panel, the IIM is not a permanent body. Rather, the IADB, during the early 2000s hired

\textsuperscript{87} The Inspection Panel, \textit{Panel Process} (2012), (“An investigation is not automatic, and can only be authorized by the Board of Executive Directors. If the Board approves an investigation, the next step is the substantive phase of the inspection process when the Panel evaluates the merits of the Request.”), http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20173251-menuPK:64129467-pagePK:64129751-piPK:64128378-theSitePK:380794,00.html.

\textsuperscript{88} \textit{Id.} Once the investigation phase is complete, the Panel submits its Investigation Report to the Board of Executive Directors of the Bank copying Bank Management. Bank Management then has six weeks to submit to the Board its Report and Recommendation in response to the Panel’s findings. The Board meets to consider both the Panel’s Investigation Report and Management’s recommendations, and decides whether to approve the Management’s recommendations which are intended to bring the Project into compliance in accordance with Bank policies and procedures. The Board may, at this stage, ask the Panel to verify whether Management conducted appropriate consultations with the Requesters and affected people prior to approving Management’s recommendations for remedial measures.

\textsuperscript{89} \textit{Id.}

\textsuperscript{90} Dissatisfaction with the current trajectory of the IP has caused a number of scholars to suggest that it should function like a tribunal. See e.g., Enrique R. Carrasco \& Alison K. Guernsey, \textit{The World Bank’s Inspection Panel: Promoting True Accountability Through Arbitration}, \textit{41 CORNELL INT’L L.J.} 577, 580, 621 (2008).

\textsuperscript{91} For the Independent Investigation Mechanism’s policies and procedures, see generally, IIM Policy (2008) at http://www/iadb.org/cont/poli/mechanism.pdf.
consultants on an as needed basis. Today, the IIM, like the IDB's IP, is populated by a dedicated group of experts.

The IIM's procedures are very similar to those of the IBRD. Thus, they need not be further elaborated upon. We now turn to the IBRD's and the IADB's panels' findings in their respective investigations of the Yacyretá Dam Project.

IV. THE YACYRETA HYDROELECTRIC PROJECT

No one has ever managed to make the World Bank step back from a project before. Least of all a ragtag army of the poorest people in one of the world's poorest countries. After more than fourteen years under construction with investments (including interest) surpassing $8.5 billion, the Yacyreta Hydroelectric Project remains riddled with problems, delays and uncertainties that cast serious doubts about the Project's future and its continued adverse effects on adjacent populations.

The Yacyreta Hydroelectric Project, named after an island in the middle of the Parand River, is a joint venture between the governments of Argentina and Paraguay. The Parand forms the border between the two countries and the Yacyretá straddles it. The project's main objective is to provide hydroelectric energy for use in Argentina's electric grid.

92. The Inter-American Development Bank, Independent Investigation Mechanism, 2003 Annual Report 3 (May 21, 2004) ("the Board of Executive Directors authorized the establishment of an investigative panel made up of Mr. Walter Leal Filho (Chair), Mr. Julio Ruiz Murrieta, and Mr. Arthur Heyman."). http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=316174.


be generated at a reservoir water level of 83 meters above sea level ("masl") is 3,200 Megawatts. The Yacyretá Dam has been under construction since at least 1978, and has cost over $10 billion – some five times its original cost estimate.

The Project is being developed on the Paraná pursuant to a binational treaty between Argentina and Paraguay, The Treaty of Asunción, signed on December 3, 1973, and ratified by both states in 1974. The treaty, which was conceived as an instrument for developing an eighty kilometer (approx. fifty mile) stretch of the Paraná River between Encarnación, Paraguay and Posadas, Argentina, lays out the intentions of the parties regarding the dam and its operation. Two of the objectives in the instrument relevant to this case study are (1) the creation of a binational entity, the Entidad Binacional Yacyretá (Yacyretá Binational Authority) or EBY; and (2) the terms required for purchase of the land, from project-affected people among others, that is to be flooded.

record 20.8 TWh of power in 2011. Of the total, 18.7 TWh went to Argentina’s SADI grid and 2.15 TWh to the SINP Paraguay grid.

With regards to the importance of the reservoir level see text accompanying notes 121-123, infra.


See e.g., Dannin M. Hanratty and Sandra W. Meditz (eds.), Paraguay: A Country Study (Itaipú, Yacyretá, and Corpus, 1988), http://countrystudies.us/paraguay/49.htm. (“Yacyretá was not expected to become fully operational until the mid-1990s, more than twenty years after the treaty’s signing and at a cost of as much as US$10 billion, five times the original calculation.”)


Juan Rodrigo Walsh, Major Infrastructure Projects, Biodiversity and the Precautionary Principle: The Case of the Yacyretá Dam and Iberá Marshes, 13 REV. OF EUR. AND INT’L ENVTL L. 61, 63 (2004). See e.g., Law 20.646 of Argentina (1974) (The instrument was also incorporated into the national law of each state). Id. at 63.

Id. at n. 15 and accompanying text.

The Entidad Binacional Yacyretá, has been characterized as “notoriously corrupt bi-national agency which is supervising completion of the Yacyretá dam project.” International Rivers, Yacyretá Dam (undated), http://www.internationalrivers.org/en/latin-america/paraguay-parana%2C%23A1-basin/yacyret%C3%A1-dam.

Id. (“In 1994, Yacyretá’s floodgates were closed and the reservoir partially filled, flooding river islands that were home to endemic species, decimating fish populations, and causing the expulsion of 15,000 people from their homes. At this writing, a battle rages
EBY is a corporation established by Argentina and Paraguay, and is jointly owned by these two States. Its mission is to manage the dam’s construction; resettle those people who have been displaced; to operate the hydroelectric plant, navigation locks and fish ladders; as well as an extensive infrastructure agenda, which includes construction of irrigation and intake dikes to prevent flooding, relocation and resettlement of project-affected people and environmental impact mitigation. The IRBD and IADB loaned funds to Argentina and Paraguay, who then funnel these funds to EBY. EBY itself has also applied for and received loans from both Banks.

The IDBR has been involved in the Yacyretá Hydroelectric Project since the mid-1970s. It entered into a number of agreements and amendments with the governments of the Republic of Argentina, and the Republic of Paraguay, as well as with EBY. Through fiscal year 1995, the bank loaned both governments at least $941.5 million. Similarly, the IADB has been financing the project to increase the height of the reservoir, thus putting 80,000 people in danger of being flooded out.

107. Id.


109. Loan 1761-AR for $210 million (Yacyretá hydroelectric project approved FY 80); Loan 2998-AR for $252 million (Electric Power Sector Project approved in FY 89); loan 3281-AR for $100 million (Water Supply and Sewerage Project approved FY 91); loan 3521-AR for $20 million (flood rehabilitation project proved in FY 93); financing of $300 million under loan 3520-AR (second Yacyretá Hydroelectric Project, approved in September 1992 and subsequently in August 1994 with an additional amount of $146.6 million, which was reallocated from the uncommitted balance of love 2854-AR (SEGBA V power distribution project) to finance Yacyretá components including the resettlement and environmental protection plan for the project. Furthermore, in February 1995, the board approved a loan of $46.5 million to the Republic of Paraguay (loan to read 3842-PA), “of which $1.2 million is to finance the simple works related to the resettlement activities under the Yacyretá Project.” International Bank for Reconstruction and Development, Inspection Panel, Report and Recommendation of the Inspection Panel, Request for Inspection, Argentina/Paraguay
since 1978, and along with the IDBR, extended credit in an amount exceeding $1.8 billion. The overall project was originally estimated to cost $2.1 billion. However, due to various problems and allegations of corruption, the project costs have exceeded $11.5 billion and at this writing it is still ten years behind schedule.\textsuperscript{110}

Construction of the overall project began in 1978. However, the dam’s construction began in 1983.\textsuperscript{111} By 1992, the dam was essentially completed but for the resettlement.\textsuperscript{112} Behind the dam is an area measuring 19,000 hectares (73 miles) that has been flooded, forming the dam’s reservoir, which has displaced tens of thousands of people. The dam is 808 metres [2,650 feet] long and has [a power house, which contains] 20 turbines . . ."\textsuperscript{113}

Yacyretá’s infrastructure and its associated works are equally held by Argentina and Paraguay. The entirety of the electricity produced, currently 2,100 Megawatts ("MGW"), is transmitted to and utilized solely by Argentina. Paraguay in turn receives its half of the production as royalty payments.\textsuperscript{114} The dam was designed to operate


110. "The Yacyretá dam’s costs soared from an original estimate of $2.7 billion to $11.5 billion, and the still unfinished dam is currently 10 years behind schedule. It has faced technical, financial, social and environmental problems." UK House of Commons, Select Committee on International Development Appendices to the Minutes of Evidence, Appendix 1, Recent Cases of Corruption involving UK Companies and UK Backed International Financial Institutions: Yacyretá Hydroelectric Project, Argentina, Itaipu Hydroelectric Project, Brazil; UK Government Involvement -WORLD BANK (Prepared 5 April 2001), available at http://www.parliament.the-stationery-office.co.uk/pa/cm200001/cmselect/cmintdev/39/39ap06.htm. See also, Abid Aslam, World Bank Dam "Monument To Corruption" ALBION MONITOR, Sept. 29, 1996. When the Yacyretá project started 16 years ago, it was expected to cost around $2.6 billion. Recent estimates put the likely cost on completion, slated for 1998, at between $11 billion and $12 billion. The new price tag makes it the world’s second most expensive dam, with the second highest cost overruns, after the Itaipu dam just upstream," according to Glenn Switkes, Latin America program director of the California-based International Rivers Network (IRN). Runaway project costs moved Argentine President Carlos Menem to dub Yacyretá a “monument to corruption.”


112. Id. at 22, ¶ 64. (Almost ten years later, in 1992, when the Bank reappraised the project for a new loan in support of Yacyretá, 80 percent of the civil works had been completed.").


with a water level of 83 meters above sea level ("masl"). However, it has yet to operate with a water level higher than 76 masl.

Indeed, the Yacyretá reservoir's floodgates were shuttered in 1994 before EBY could put into place a comprehensive environmental and social mitigation plan. In addition, the reservoir has never been filled to its full volume, and in 2001 the dam was operating at barely 60 percent of its installed capacity.115 This volume of water is below the project's financial break-even point. Also, financing has yet to be located for two pressing items: (1) the $857 million worth of additional construction work required to fill the reservoir; and (2) for "past and future resettlement and environmental mitigation costs."116

At its inception, the Yacyretá Hydroelectric Project was economically justified on the unlikely assumption that Argentinean electricity demand would increase by 8-10 percent per year during the 1980s.117 In reality, demand expanded by barely 2 percent.118 Thus, in the mid-1990s, when the first Canadian GE turbines came on-line, Argentina already had an overabundance of generating capacity. A recent World Bank's Performance Audit Report states that, "Based on the foregoing, the Audit concludes that Yacyreta was not a least-cost solution to expanded power supply and its relevance to the country's priorities was negligible. On several occasions, the Bank had good cause for stopping the project before the major civil works were too advanced."119

Finally, although the Project planned for the resettlement of a total of 33,000 people, on both banks of the Parana River, i.e., on the Argentine and Paraguayan sides, it has in fact displaced well over 50,000 people, as of 1997, and possibly as many as 80,000.120

115. UK House of Commons, supra note 111.
116. Id.
117. Id.
118. Id.
119. Id. (emphasis supplied).
120. The figures vary between 50,000 and 80,000 people and at least 10,000 families. See respectively, SOBREVIVENCIA, Amigos de la Tierra Paraguay, Request for Inspection, Attachment to Letter addressed to Richard Bissell, Chairman, World Bank Inspection Panel, dated September 12, 1996, at 3, ¶ 12 (displacement of "approximately 50,000 people); UK House of Commons, supra note 111; Independent Investigative Mechanism Yacyretá Hydroelectric Project, Report of the Review Panel, The Project and its Present Status, at Environmental and Resettlement Program, (Sept. 15, 1997) available at http://www.iadb.org/cont/poli/yacyreta/statuse.htm. "Resettlement of more than 10,000 families displaced by construction of the project"). For the 80,000 figure, see European Rivers Network, The Yacyreta Dam, General Informations (Undated), http://www.rivernet.org/southamerica/parana_basin/yacyreta.htm. (The "additional height [from 76 meters above sea level to 83] of water would cover 500 extra square kilometers and affect the homes of 80,000 people.")
Both EBY and the Yacyretá Dam Project have prompted controversy over the social and environmental impacts, as well as the Project’s economic viability, since construction began. Each Bank received two separate requests for investigation. Moreover, in 1998 the World Bank empanelled a “blue ribbon” team of experts\textsuperscript{121} to investigate raising the reservoir’s water level from 76 masl to 83 masl.\textsuperscript{122}

A. The First (1996) Request for Inspection

Two separate requests for inspection were simultaneously submitted to both Banks. The first was in 1996, while the second was tendered in 2002. Both requests met the Inspection Panel’s and the IADB’s Independent Inspection Mechanism’s jurisdictional requirements. Thus, this subject will not be addressed in the ensuing discussion. The reasons for the second request will be discussed below.

Complaints about the Yacyretá Project’s impacts were submitted jointly to the IBRD and the IADB. Procedurally, a complaint must be submitted as a request where the effected parties feel that they have exhausted their remedies with the Banks’ staff and management. This investigation turned out to be a precedent-setting event. Due to the co-financing of Yacyreta by both IBRD and the IADB, two parallel investigations were to be conducted. In order not to conduct duplicative investigations, in May 1997, the IADB’s board authorized its IIM to cooperate with the IBRD’s team.

The first request for inspection was filed on September 30, 1996, by an organization called “SOBEREVIVENCIA, Amigos de la Tierra Paraguay, a non-profit organization dedicated to protecting the environment and the quality of life of indigenous, peasant and marginalized urban communities living in poverty . . .”\textsuperscript{123} Sober-
evivencia, is located in Asuncion, Paraguay, and filed the claim in its own right and as a representative of persons who live in Encarnacion, Paraguay (hereinafter, the "requesters"). The requesters claimed that due to the IBRD's and IADB's policies, a series of grave effects impaired the environment, as well as their standards of living, health and economic well-being. They also alleged that many activities that should have been completed prior to filling the reservoir were still pending.

In addition, the requesters asserted that the two Banks failed to ensure, via their supervision and enforcement of legal covenants, the adequate implementation of environmental mitigation and resettlement activities in the project area. A full and exhaustive recapitulation of the entire request is beyond the scope of this article. Nevertheless, I will cover some of the more salient human rights and environmental points, in order to provide the reader with a familiarity of the extent of situation.

Soberevivencia alleged that the partial filling of the Yacyretá reservoir, to 76 masl, "and violations of Bank policies" caused serious impacts to their standard of living, their economic well-being, and their health. Indeed, the requesters alleged that the two Banks "violated policies on resettlement, adverse environmental assessment, indigenous peoples, and wildlands." Moreover, these policies, they maintained, also contributed to sanitary and socioeconomic impacts, including that water leaked from the dam area and formed pools of stagnant water which became polluted and bred disease. The claimants also asserted that they suffered increased health problems caused by poor water quality. The rising reservoir has introduced stagnant, polluted water and has contaminated the groundwater supplies used for drinking water. The rising water table has also incapacitated sanitation systems and destroyed crops. In addition, untreated sewage is discharged into the lake and instead of being carried downstream it stagnates in the proximity of homes now near the water level. The municipal slaughterhouse, now on the shore of the reservoir, discharges wastes directly into an arroyo used by local residents for bathing and cooking water. Localized stagnant pools in the reservoir

124. Id. at 2.
125. Id. See also, Bissel, supra note 22, at 742.
127. Id.
128. Id. at 3.
129. Id. at 2.
have also caused concern regarding the presence of vectors for diseases such as malaria, schistosomiasis and skin diseases. Among the health impacts which have been registered, and which probably result from the filling of the reservoir, are increased respiratory infections, diarrhea, skin rashes, skin and intestinal parasites, nutritional disorders, and stress-related conditions.\textsuperscript{130}

That problem caused the contamination of groundwater supplies used for drinking water. In addition, trash and other solid waste triggered the discharge of untreated sewage into the pools [of] stagnant water thereby creating health hazards; destroyed crops; "inundated and destroyed island communities and ecosystems; displaced local people and wildlife; constructed fish migration through dining the river, dramatic impact on subsistence diets and biodiversity. . ."\textsuperscript{131}

Indeed, prior to the flooding of the land, many of the individual indigenous claimants –locally known as oleros\textsuperscript{132} – earned their livelihood by manufacturing bricks and ceramic tiles in a number of locations where the clay was both unique and ideal for the fabrication of these items.\textsuperscript{133} The resettlement plan left hundreds of these businesses and families with meager compensation that was of a derisory amount. Moreover, these indigenous peoples found themselves with inadequate resettlement housing and ancillary facilities, and prolonged economic hardship.

The requesters also alleged that employees of brick and ceramic factories were not compensated for their loss of income. More egregious, however, was the fact that EBY, along with the governments of Argentina and Paraguay, employed club wielding police and military units who both threatened to and beat those locals who either questioned or refused the resettlement offers or the process of being herded into trucks and transported away.\textsuperscript{134}

\textsuperscript{130} Id. at 4. Schistosomiasis also called bilharzia is a tropical disease that may cause serious, long-term illness in humans. It "is caused by parasitic flatworms . . . The worms live in fresh water in the tropics. To infect humans, the worms must first infect and mature in freshwater snails, which are their 'intermediate hosts.'" Directors of Health Promotion and Education, Schistosomiasis (undated), http://www.dhpe.org/infect/schisto.html.

\textsuperscript{131} Id. at 1.


\textsuperscript{133} HUNTER, supra note 22, at 201.

\textsuperscript{134} See e.g., Marisancho Menj6n “Farewell to Paradise”:Yacyretá Dam on the Paraná River – Argentina/Paraguay, UNIVERSIDAD DE ZARGOZA (undated) at 2, available at http://www.unizar.es/aguariospueblos/pdf/caso/4_Yacyreta_Farewell_To_Paradise_Argentina_
Additionally, once these areas were inundated, the *oleros* did not have access to similar quality clay materials. Furthermore, the distances to resettlement areas from the requesters' former homes and jobsites resulted in added economic losses due to the affected peoples' remote locations and the relatively high cost of transportation.135 This loss of income and the high cost of transportation "forced many to withdraw their children from school so that they could work to support their families, with a resulting loss of educational opportunities and hopes for future generations."136 Moreover, the separation from their ancestral lands also caused the tearing of social networks and suffering due to "separation from their families and friends."137

Due to the poorer quality of the clays in the new locales these entrepreneurs also lost business and customers, causing them to lose the higher standard of living that they previously enjoyed.138 Other adverse impacts included socioeconomic ones, such as the loss of jobs, livelihood, and forced resettlement to smaller and lower quality homes.139 Those involved in fishing also lost their resource base as their former environment and habitat were made up of river fish. Those fish suffocated due to a change in the water's oxygen levels, caused by the reservoir that formed behind the dam. They also lost their habitat due to the flooding of the land. Others, including bakers, pastry makers and washerwomen, who were located in the area adjacent to the reservoir, also, "lost customers concerned over the effects of lower water quality on the goods they produce and the services they provide."140

The requesters also asserted that the direct and material adverse effects described above resulted from the IBRD's omissions and

paraguay.pdf. (Eye-witness testimonies and videos show violent evictions of communities by paramilitary gange, including the burning down of houses; the flooding of farms and homes due to the raising of the water level without prior notice; and the callous treatment of thousands of families who have been forced to live in settlements lacking fertile soil, access to fish, or fresh drinking water). *Id.* *See also,* The Center for International Environmental Law, *Singrauli and Yacyreta Update* (May 13, 1998), http://www.ciel.org/Intl_Financial.Inst/pryacsin.html (recently, local non-violent protesters were brutally beaten by private security forces (hired by EBY) wielding lead pipes, sending 22 people to the hospital. 3,000 people had gathered to protest EBY's failure to mitigate the suffering from frequent flooding. Given the recent use of violence against protesters, it is chilling that the Bank is calling for greater use of security without informing the Board of the true situation on the ground).

135. *Id.*  
136. *Id.*  
137. Sobrevivencia, Request for Inspection, supra note 126, at 1.  
138. HUNTER, supra note 22, at 201.  
139. See SOBREVIVENCIA, supra note 126, at 11.  
140. *Id.*
failures in the preparation and implementation of the Project. These lapses and failures, they asserted, violated the Bank’s policies and procedures. Furthermore, these omissions and failures included *inter alia*, “Environmental Aspects of Bank Work, Operational Manual Statement (“OMS” 2.36); Environmental Policy for Dam and Reservoir Projects, Operational Directive (“OD” 4.00 Annex B); Environmental Assessment (OD 4.01); Indigenous Peoples (OD 4.02); Involuntary Resettlement (OD 4.30); Project Monitoring and Evaluation (OD 10.70) . . . Project Supervision (OD 13.05); [and] Suspension of Disbursements (OD 13.40).”

In addition, SOBREVIVENCIA claimed that procedural aspects incorporated into many of the Bank’s policies, including basic rights of participation and access to information, were denied to the requesters or ignored in the preparation and execution of the Yacyretá Project. These included claims that an environmental trust fund was required pursuant to one of the loans (Loan 3520-AR), “with proceeds from the sale of electricity to fund environmental mitigation and resettlement”, was neither established nor properly funded. Other claims included the Bank’s lax supervision of the project and the bank’s failure to enforce its rights under several agreements with the governments of Argentina, Paraguay and the EBY.

**B. The Inspection Panel’s Report**

The Inspection Panel found that indeed the IBRD’s management ignored the bank’s regulations and procedures. When the Panel received its first application for inspection in 1996, it was asked by the requesters to investigate what was claimed to be the “incalculable harm which would result as a consequence of raising the Yacyretá reservoir’s water level to 76 masl.” Following its initial review, the Panel recommended to the IBRD’s Board that an investigation be undertaken. However, at a meeting conducted in February 1997 the Board rejected the investigation recommendation. Thus, the IP’s independent judgment was stymied by the board.

Rather, the Board, following management’s presentation of two Action Plans (Plan A and Plan B) to deal with the Project’s outstanding problems, asked the Panel to investigate the efficacy of the two plans. Plan A provided for concluding the resettlement of the project-affected
people, as well as the required environmental action plan that was never put into action prior to the increase of the reservoir's water level to 76 masl. On the other hand, Plan B sought to deal with a number of discreet problems, which arose as a consequence of holding the reservoir's water level at 76 masl.

The Panel issued its report on these matters on September 16, 1997. In its findings, it initially observed that

The Yacyretá hydroelectric Project was conceived and designed over twenty five years ago under very different circumstances and standards from those of today, in particular with respect to environment and resettlement. The selection of the site locked the project into a series of inevitable and irreversible impacts, including flooding of over 100,000 hectares and affecting over 50,000 people in two major urban areas. Today, there are considerably stricter environmental and resettlement standards, as well as a much deeper appreciation of the social costs and difficulties to communities posed by involuntary resettlement of large numbers of people. Nevertheless, integrated watershed modeling of the Parana River Basin could have exposed alternative generation sites with potentially lower impacts.\textsuperscript{145}

The Inspection Panel also found that since construction began in 1983, even with numerous delays, there was an imbalance between the civil and electro-mechanical works, \textit{i.e.}, the building of the dam, which was 99.8% complete, and the "complementary works", \textit{i.e.}, the environmental and resettlement plans, which the Panel found were less than a third complete.\textsuperscript{146} Indeed, this disparity, the IP observed, was "one of the fundamental problems of the Yacyretá Project."\textsuperscript{147} Moreover, this imbalance was exacerbated by the usual Bank practice of financing the former while leaving the latter for counterpart funding. Similarly, the Panel established that the project experienced significant "environmental and social liabilities that are causing increasing friction with affected populations which could have been foreseen and avoided."\textsuperscript{148}

The Panel also found that two events led to SOBREVENCIA's request. The first was the raising or filling of the reservoir to 76 masl in September 1994.\textsuperscript{149} This incident began prior to EBY, Argentina, and Paraguay completing the agreed upon requirements \textit{vis}
a vis the resettlement and environmental issues contracted for and demanded by the Bank’s policies.150 The second event resulted from Argentina’s economic collapse. Both the IBRD and the IADB jointly executed a “no-objection” to raising the water level to 76 masl, apparently based on the belief “that no irreversible damage would take place and that completion of remaining actions was proceeding satisfactorily.”151 Nevertheless, soon after the reservoir was filled, economic conditions triggered Argentina’s freezing financial support for the Yacyretá enterprise, leading to a two year shutdown of the project.152

Another of the Panel’s findings was that, as a result of the long-term operation of the dam at a reservoir level of 76 masl, the groundwater level rose and flooded low lying areas in yet-to-be resettled villages.153 This link between EBY raising the reservoir level and the concomitant flooding although unintended by EBY, according to the IP, was certainly foreseen and predictable.154 Indeed, the Panel reported that the two plans proposed by the Bank’s management to correct this condition, “including both actions required prior to filling the reservoir (Plan A) and those required due to prolonged operation at this elevation (Plan B)”155 implicitly recognized that both the environmental and resettlement covenants were out of compliance.156

The Panel also found that there were other examples of non-compliance. These included: (1) a complete absence of required hydrogeological studies or monitoring of the impact of the reservoir on lands and soils; (2) problems regarding the creation and management of a compensation reserve; (3) no external review of plans for environmental management; and (4) a two year lingering failure in selecting an environmental coordinator.157 The IP also established that in 1992, when the Bank instituted its new operational directives on Environmental and Resettlement procedures, it made “considerable efforts to bring the project into compliance with the relevant ODs and introduced important changes in the design.”158

Nevertheless, these endeavors, according to the Panel, were met by EBY’s institutional resistance.159 Moreover, the IP noted, it

150. Id.
151. Id.
152. Id.
153. Id. at ¶ 256.
154. Id.
155. Id.
156. Id.
157. Id.
158. Id. at ¶ 257. (the operational directives included OD 4.01 and OD 4.30).
159. Id.
was extremely difficult to get EBY to make progress on these issues, predominantly due to its bureaucratic problems and lack of financial resources. Of course, an obvious question is, what did EBY's officials do with the money that was allotted to them for this phase the project? Indeed, one would expect the IBRD to account for every penny of the funds that it either loaned or granted to Argentina, Paraguay and EBY, but apparently the IBRD did not.

Finally, the Panel stressed that "[t]imely completion of both Plans A and B are the first critical steps in this process, but they do not represent all the actions that are required. For example:

(1) Unsanitary circumstance abound, due to numerous bodies of stagnant water formed by the reservoir, in each of the cities adjacent to the reservoir, including the large municipalities of Encarnación, Carmen del Parana in Paraguay, and Posadas in Argentina. These conditions are caused by a dearth of sewage treatment plants.

(2) Accordingly, such conditions pose health risks to the indigent people who reside in low-lying urban areas.

(3) It will take several years to organize and employ solutions which would effectively resolve some of these problems.

(4) The IADB and IBRD loans require the construction of both sewage and wastewater treatment plants for the cities Encarnación and Posadas. However, in 1997, the IP found that it would take at least three years before these facilities can be operational. The Panel recommended that the construction process be closely monitored.

C. The Inter-American Development Bank's ("IADB") Independent Investigative Mechanism

The IADB's Inspection Panel, formally known as the Independent Investigative Mechanism ("IIM"), also found numerous problems with the Yacyretá Project. In the "General Problems" section of its September 1997 report, the IIM observed that "[t]his situation is especially evident in the management of EBY, with the result that the
spirit and letter of the 1973 Treaty are not really observed in practice.” Furthermore, the IIM noted that a number of the IADB’s documents demonstrated that the “project is plagued by serious problems that are caused by failures to adhere to the established timetables and commitments for completion of the principal work.” This lethargic execution of the project is clearly demonstrated by the IADB’s extremely lengthy delays in taking steps to enforce its own rules. These measures were specifically put into place to mitigate the environmental impacts, particularly those of the complementary works.

In this regard, the IIM found that:

1. The first environmental impact assessment (which it called a “study”) was undertaken in 1992 pursuant to an initiative of the World Bank.
2. This was fully twenty years following the Dam’s feasibility study, and some ten years following the initiation of the dam’s construction.
3. Indeed, the IIM observed that “[i]t cannot be argued that there was no well-developed and general professional understanding of the social and environmental aspects of major dams in 1983, when the construction of this dam was begun.

The latter observation is critical, and points to continuing lapses by the two Banks’ management teams in adhering to their own environmental policies. Specifically, the management teams ignored the World Bank’s Operational Policy/Bank Procedures - OP/BP 4.01, which addresses Environmental Assessments. The IBRD defines the term “environmental impact assessment” (“EIA”) as a mechanism employed in order to identify and assess potential environmental effects of a proposed development plan, which evaluates suitable mitigation, management, and measures to monitor risks and benefits.

Given the IIM’s discussion about the lack of pre-construction environmental impact assessments, I will now address the subject

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168. Id. (specifying delays in execution).
169. Id.
170. Id. (“Thus the Master Environmental Management Plan and the Plan of Action for Resettlement and Rehabilitation were not set in motion until 20 years after the feasibility study of the project and almost 10 years after commencement of the civil works”).
171. Id.
more substantially with a focus on the Yacyretá Project, as well as the IBRD and the IADB.

VI. THE ENVIRONMENTAL IMPACT ASSESSMENT INDUSTRY

“Our experience with environmental impact assessment is that when you put the major environmental impacts, the likelihood is that you will get major environmental impacts. The only problem is, you don’t ever get quite the impacts you expect...”\(^{173}\)

A. Background

Pursuant to its Operational Directive 4.01, the World Bank requires that environmental impact assessments (“EIAs”) be conducted for each and every project proposed for Bank financing. This prerequisite to financing is in place to ensure that projects are both sustainable and environmentally sound, and are to be employed in aid of decision making. The EIA evaluates risks versus benefits over a cross-section of various criteria, including environmental concerns, project effectiveness, and impact on people, among others. But why conduct an EIA generally, and why undertake one for the Yacyretá Hydroelectric Project?

The process of investigating man’s impact on the environment began in 1969, when the United States Congress enacted, and President Nixon signed into law, the National Environmental Policy Act of 1969 (“NEPA”).\(^{174}\) NEPA’s purpose as enunciated by Congress is to

declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation...\(^{175}\)

NEPA is the cornerstone of environmental policy making in the United States. It became the gold standard for other nations and organizations, many of whom have adopted its sweeping breadth. The Act’s procedures are designed to ensure that agencies of the federal govern-


ment employ environmental assessment as a key tool in making informed decisions based on an understanding of the consequences of their actions on the environment. With this knowledge in hand, federal agencies use it to pursue processes that protect, restore, and enhance the environment. To advance this end, NEPA requires federal agencies to draft an environmental impact statement (EIS) for any "major Federal action significantly affecting the quality of the human environment." NEPA also gave birth to the process known as an environmental impact assessment, by requiring the assessment prior to the initiation of any federal project, such as the construction of a dam or other large infrastructure projects. The impact on the environment must become part of the weighing and balancing of the project's viability. Thus, an environmental assessment ("EA") should: (1) identify all direct and long-term adverse impacts; (2) allow the decision maker to determine: (a) whether the Proposed Action should be regarded as a "Major Action"; (b) whether the environmental impact is significant; and (c) whether the action could be environmentally controversial.

In addition, NEPA established such a far reaching precedent that numerous countries and international development agencies have adopted its sweeping goals, and have insisted on written EIAs prior to the initiation of any major infrastructure projects.

176. Id. at 42 U.S.C. §4321 (1970) (part b of section 101 of the Act provides: "In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may — 1. fulfill the responsibilities of each generation as trustee of the environment for succeeding generations; 2. assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings; 3. attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; and 4. enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources").

177. Id. at 42 U.S.C. §4321 (1970) (part C of section 102 of the Act provides: "All agencies of the Federal Government shall include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."


179. See McCULLY, supra note 176, at 54.
A thorough assessment of a proposed dam's possible environmental impacts should indeed be required before any project moves forward. Regrettably, foreign governments, multi-development banks and dam builders have invariably turned the EIA process into a bureaucratic formality, merely another regulatory hurdle, which developers must jump, before they can get their project approved.¹⁸⁰

Furthermore, foreign governments and development agencies such as the IBRD and IADB, seldom regard EIAs as “objective studies [to be employed in order] to inform an open debate on whether or not a project is desirable, but instead employ them as rubber stamps for projects they have already decided to build.”¹⁸¹ But why do the Banks not take environmental assessments seriously, or at least as seriously as they should? There are three answers to this question.

The first and most significant answer is that the Banks – as well as other funders – know that, due to pressure to reform their procedures, they must employ EIAs. But the rub is that the Banks control the EIA process from beginning to end. The reason for the foregoing is quite simple: because international environmental consulting has become a huge and competitive business – and there are only a small handful of these businesses¹⁸² – consultants are therefore willing to bend to their principles' wishes and alter reports on demand, because they want the job for the next project. One reason for this lack of independence is that the international consultancies “have a strong self-interest in underplaying the environmental impacts of projects and exaggerating their benefits.”¹⁸³ If their conclusions are not favorable to the Banks or the dam builders, then the likelihood that they will get future contracts will be greatly diminished.¹⁸⁴ For example, “the World Bank's guidelines on environmental assessment specify that consultants must be ‘acceptable to both the World Bank and the local contracting agencies.’”¹⁸⁵

There exists an obvious conflict of interest, or a quid quo pro, “when the company assessing the environmental viability of a project

¹⁸⁰. Id.
¹⁸¹. Id. (emphasis added).
¹⁸². Id. at 54-55 (“The environmental assessments for large internationally funded dam projects are invariably written by consultants from a relatively small number of companies, some of which, such as German consultants Lahmeyer International, are also directly involved in dam building. Others, such as Norwegian firm Norconsult, are subsidiaries of dam builders.”)
¹⁸³. Id. at 55.
¹⁸⁴. Id.
¹⁸⁵. Id.
is also likely to get the contract to build it.”

In addition, when sections of an EIA are critical of the project or highlight concerns “that some effects cannot be predicted, these points are invariably toned down in the report’s overall conclusions (and criticisms in drafts frequently disappear when they appear in final form).” One example of this phenomenon is a case regarding the construction of a dam on the Mekong River. In that case, Acres International, a Canadian environmental consultant, and a French dam builder, stated in their EIA that the “environmental impacts of the proposed dams are expected to be . . . not severe.” However, a fisheries study conducted by a U.S. company warned of a wholesale decline of fisheries if the dam was constructed.

The second reason is that there is no quality control of the consultants’ EIA reports. They are not peer reviewed, there are no in-house reviews at the Banks, and there is no public input. Moreover, “they are often treated as state or commercial secrets and hidden from public scrutiny” even though the monies that the Banks use to pay for these studies are taxpayer funds from member states.

Alternatively, NEPA requires agencies to provide public notice of their EIS’ by publishing them in the Federal Register, the Government’s daily publication, and to allow the public the opportunity to comment. The agency must then weigh the comments and respond to them prior to making its decision. Additionally, the public has the right to sue the agency if they feel that the agency acted in an arbitrary or capricious manner in arriving at its final evaluation.

The final reason has more to do with the Banks themselves. Their mission is to lend money. This fact drives how things work at all

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186. Id. (Citing critiques of an EIA involving the German company Lahmeyer, in “Reappraisal of the Adequacy of the EIA Report for the Nem Leuk Hydropower Project, Conclusions of a Consultancy Report to the Protected Areas and Watershed Management Division of the Ministry of Forestry, Lao PDR” (Nov. 16, 1994); and an EIA of Norconsult by A.D. Usher and G. Ryder, Vattenfall Abroad: Damming the Theun River, (in ANN DANAYIA USHER, DAMS AS AID: A POLITICAL ANATOMY OF NORDIC DEVELOPMENT THINKING (1997)).

187. MCCULLY, supra note 176, at 55.

188. Id. (Citing CNR. Lyon/Acres International, Calgary/Mekong Secretariat, Mekong Mainstream Run-of-River Hydropower: Main Report 18 (Bangkok, Dec. 1994)).

189. Id.

190. See e.g., 5 U.S.C. § 552 (a)(4)(A)(i) (2009) (provides in pertinent part that “[s]uch schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.”). (emphasis added).

191. See e.g., 5 U.S.C. § 702 (1976) (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”).
of the MDBs, including the IBRD and IADB. Indeed, a former IBRD vice-president observed in a report leaked to the public that there is a pervasive "culture of approval" at the Bank.

Entrenched in this ethos is a mindset that provides incentives to employees and encourages them to move money out the door as quickly as possible, "without adequate attention to project quality or mitigation of the social and environmental impacts of projects." A thorough search produces no evidence, including in the two Banks' Annual Reports or on their websites, that the Banks have rejected out of hand even a single project because it was not practical, too expensive or badly planned. However, the real human rights and environmental tragedy that one sees from the evidence underlying this entire process is that management and staff at these two MDBs appears not to care about what takes place on the ground, in spite of all of their policies and operational directives, and miss a golden opportunity for aiding project-affected people.

B. The Bank's Response to the EIA Farce

How does the IBRD respond to the above? It does not. Rather, it maintains that its "safeguard system", which includes environmental assessments, "is an essential tool for integrating environmental and social concerns into development policies, programs and projects by providing minimum requirements that all Bank-supported operations meet." This statement, as far as the author in concerned, is devoid of any meaning and is typical bureaucratic babble. Moreover, the IBRD maintains that its safeguard policies are the "cornerstone of its support to sustainable poverty reduction." It also asserts that the objective of these policies is to halt and assuage unnecessary injury to project-affected people and their environment during the course of development. Finally, according to the Bank, these policies set procedures for the borrower country as well as for the Bank's staff during the project's preparation and implementation. The findings of the IP and the IIM however belie these claims.

Indeed, the Bank asserts that these policies allow its staff to "operationalize [ ] the 'do no harm' approach to [its] lending and are

192. See Clark, supra note 19, at 217.
fundamental in meeting the three pillars of the World Bank Environment Strategy:

- Improving the quality of life
- Improving the quality of growth
- Protecting the quality of the regional and global commons.”

The preceding discussion notwithstanding, one of the requesters’ 1996 claims is that the Bank violated its own policies on environmental assessment by filling the reservoir to 76 masl without an EIA. Bank management denied this claim, asserting that “even if there has been harm, it is not the result of any policies.” Indeed it denied every claim that the requesters made. Nevertheless, the Inspection Panel agreed with the claimants’ charges noting that the “Panel observes that... Environmental policies require an appropriate sequence of actions to prevent harm... [However, the] sequence of actions in this Project... was allowed to slip badly...”

Moreover, as is discussed below, in its second Report, dated February 24, 2004, the IBRD’s Inspection Panel also found that for specific resettlement sites, documents presented as environmental assessments were “very inadequate and [did] not comply with OD 4.01.” Additionally, the scope of environmental issues detailed is quite limited; unlike NEPA’s requirements there are no alternatives to the resettlement options presented, and mitigation measures are simply not discussed. Furthermore, the affected parties were neither consulted nor even approached.

C. The Independent Inspection Mechanism’s Findings Square With Those of the Inspection Panel’s

Concomitantly, the IADB’s IIM also found that, in this regard, the very first environmental impact assessment (which it called a “study”) was undertaken in 1992 by an initiative of the IBRD, twenty years following the Dam’s feasibility study, and some ten years follow-


197. Id. at 26.

198. See Paraguay – Reform Project, supra note 114, at 128 in Annex A: Table of Findings, at Preparation of Environmental Assessments.
ing the initiation of the dam's construction. Consequently, the IIM stressed that the IADB's Master Environmental Management Plan and its Plan of Action for Resettlement and Rehabilitation were set in motion 20 years following the Yacyretá's feasibility study and some 10 years subsequent to the "commencement of the civil works." "Furthermore, having taken measures to mitigate the social and environmental effects of the reservoir before it was filled in 1994, fresh circumstances arose immediately afterward that caused further delays in execution."199

However, once the filling of the reservoir was underway a calamity of Noahian proportions took place; the flood of water that covered the inundated land caused an enormous number of animals to drown. Despite the Bank's decades-long knowledge that such efforts at salvaging a handful of animals are at best minimal, and the associated voluble, frequent and recurring criticism of these practices from wildlife conservationists, EBY continued with this practice.200 But in order to alleviate public concern over this mass drowning - as is the case in most World Bank dam operations - EBY planned a highly publicized and televised rescue operation. Why is this practice continued? William Partridge, a senior World Bank environmental employee, has contemptuously remarked with regards to the rescue effort at Yacyretá, that "the rescue of individual animals makes good television."201

The IIM also noted the intermittent execution of the project. It went so far as to state that this "is a feature that shows up in each of the components of the complementary works, as in, among other components, the resettlement program . . . the compensatory nature reserves program, the program for the treatment of sewage in the two towns, and the cleanup of the reservoir's banks." Of course, these delays cause the project-affected people's suffering to continue unabated while EBY considers how it will progress.

Furthermore, the IIM reported that there was no public participation in any phase of the project. The members described the situation as follows, "[i]n a project as large and complex as Yacyretá, consensus-building participation by the local population is of critical

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200. MccULLY, supra note 176, at 54 (Other dam builders, apparently with World Bank and IADB approval, continue to persist in undertaking these vile practices).

201. Comment made during an interview for The Dammed, the Canadian Broadcasting Corporation television documentary, broadcast Feb. 17, 1995, cited in, MccULLY, Silenced Rivers, supra note 176 at 54.
importance to generate tangible benefits for that population.”

However, the IIM members also noted that due to a complete lack of social and environmental evaluation and planning prior to EBY’s launching of the actual work, circumstances dictated how the social and environmental programs would be executed. These haphazard conditions, according to IIM, stalled any meaningful or authentic involvement by the local populations – both in Argentina and Paraguay - in conceiving the programs and policies that they would have to live with.

Similarly, the IIM’s members noted, that only recently has the notion of citizen participation and project ownership been instituted into the course of action of the two banks and the two countries. The Mechanism’s members speculated that EBY may be taking its cue from these four entities. Additionally, the members observed that this may be why EBY persisted in not adopting the machinery and measures for enhancing coordination and dialogue with the local populations.

Finally, the IIM asserted a number of other points. First “[i]t has to be understood that genuine participation requires specific policies that create conditions for dialogue.” Second, over the years, EBY failed to respond in a systematic manner to the local population’s demands and complaints, specifically regarding resettlement issues. Indeed, as of 1997 – and as will be demonstrated below, through 2004 – EBY did not offer full compensation for homes and businesses. Third, the fact that EBY still requires in excess of $700 million in loans for its resettlement program is a testament to EBY’s failure to truly deal with the situation, let alone to engage in real consultation and participation. Fourth, in their 1997 report, the Mechanism’s members noted that EBY’s pro forma responses are bereft of legitimacy in the eyes of the local populations. The essential requirement for meaningful participation, the IIM emphasized, requires transparency in action and in policy, as well as ready access to information. This has yet to occur.

203. Id.
204. Id.
205. Id.
206. Id.
207. Id.
208. Id.
VII. Déjà Vu All Over Again: The 2002 Request for Inspection and the 2004 Report

The status quo lingered since the issuance of the IP's and IIM's reports in 1997. Then, on May 17, 2002, the IBRD's Inspection Panel received a Request for Inspection from the Federación de Afectados por Yacyretá de Itapúa y Misiones (FEDAYIM), a Paraguayan NGO. The request was filed on behalf of more than 4,000 family communities in Paraguay, alleging that the Bank had violated its own policies and procedures regarding the design and implementation of the Yacyretá Hydroelectric Project. The requesters asserted that both their lives and their environment would be gravely harmed by the Project. In addition, "Six coordinators of affected people in the San Cosme y Damián, Distrito Cambyreta, Barrio Pacu Cúa, Barrio Santa Rosa Mboy Caé, Arroyo Potiy, and Barrio Santa Rosa areas of Paraguay also signed the Request."209

Once again, the requesters asserted that by raising the Yacyretá reservoir to 76 meters above sea level (masl), EBY caused them serious environmental harm, including persistent flooding of municipal creeks, "a higher water table, and the spreading of disease, which has forced them to live in unbearable conditions."210 They also claimed that a "proposed wastewater treatment plant, to be built under the Project, would further pollute the environment because its location and design are based on a defective environmental assessment and [were] in violation of national environmental laws."211 Moreover, FEDAYIM asserted that EBY's resettlement and compensation plans were not being faithfully put into action.212 The requesters similarly complained that families impacted by the reservoir's elevation were not suitably identified. Likewise, they alleged that EBY's resettlement and compensation program left hundreds of affected families and businesses with deficient or no compensation, feeble resettlement housing and facilities, as well as lingering economic privation.213 As with the previous submission, the requesters charged that "employees of brick

210. Id.
211. Id.
212. Id.
213. Id.
and ceramic factories [the oleros] have not been compensated for their loss of income.”

FEDAYIM also asserted that the Project did not sufficiently consider a range of optional resettlement sites. Once again, the requesters asserted, and the IP found, that the IBRD's management failed to ensure that substitute sites were considered in the environmental assessment for the resettlement areas. That failure was in violation of OD 4.30. Similarly, the Panel found that the Bank's management failed in its efforts in restoring the earning capacity of the people who were resettled. For example, numerous displaced people were relocated far from their products' markets and services. Moreover, others had problems both with the cost, delays and problems, with traveling to their places of work. Indeed, the IP found that the resettlement area suffered from an economic crisis, and that the EA should have found alternative resettlement sites.

OD 4.30 requires that all project-affected people, who, due to the construction and development of a project, lose their sources of income as a consequence of a “Bank-financed project be compensated for their losses even in cases where they have not been physically displaced.” The Panel noted that in its 1997 report, regarding the Yacyretá project, it recommended to the Bank's Directors and management that they should ensure that the affected workers, who, due to the elevation of the height of the reservoir, lost their jobs and livelihoods, be compensated as required by Bank policy. At that time the Panel wrote:

*It is a fact that clay deposits of the quality and amount of the deposits lost because of the reservoir elevation have not been found. . . and therefore it is difficult to accept that the workers lost their jobs because of a simple decision of owners of olerias to change economic activities. There seems to be enough prima facie evidence that the loss of jobs by brick factory workers has been caused mainly—if not directly—by the filling of the reservoir. If this is the case, the workers should be compensated according to Bank policy.*

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214. Id.
215. Inter-American Development Bank, Final Report Of the Panel of the Independent Investigation Mechanism On Yacyretá Hydroelectric Project 760/OC-RG (Feb. 27, 2004), at 9 (“It is important to seek mechanisms which ensure the inclusion of the real interests of the affected population in the design and implementation of resettlement plans.”), www.iadb.org/iimprl9l7l3eng.pdf
216. Id.
217. Id. at xx.
218. Id.
219. Id. at 92, ¶ 303.(Emphasis in original). (Citing 1997 Panel Assessment).
This recommendation however was not followed.

With regards to the compensation of the resettled workers of brick and tile-making industries - commonly called oleros - the Panel found that the owners of medium-to-large industries or businesses were fully compensated. The workers, however, were not. First, under Paraguayan law, the employers, not EBY, were required to provide a severance package. The problem with this compensation scheme, the Panel found, was that not every worker worked on the books or had her social security registered. Accordingly, these workers were not fully compensated. Similarly, with regards to the "small brick" manufacturers, they were generally self-employed. The latter, the poorest workers and those with incomplete documentation were not fully compensated.

Moreover, the Panel found that the Bank's management offered four compensation schemes. One of these options was to offer the oleros private plots, which in and of themselves, did not have any clay. Therefore, EBY was to arrange for a five-year supply of clay from other sources. Indeed, this option was embraced for one of the relocation sites, the San Pedro resettlement site. The Panel visited the San Pedro site and found that although some families reestablished their brick-making efforts, many of them continued to protest their lost income and a lack of sustained access to the clay raw materials, since the five-year clay supply had ended. Other resettlement issues also remained unresolved since the Panel's 1997 report.

As can be seen over the course of more than a decade, the IBRD's Inspection Panel found that resettlement issues were raised several times with both EBY and the bank without any resolution. This is evidenced by the many formal complaints filed over that time period by indigenous peoples who lived within the area that encompassed the Yacyreta Hydroelectric Project. The IADB's Inspection Mechanism made similar findings. There is no question that these insults to the project-affected people violate their human rights, including (1) their right to human dignity; (2) their right to earn a liv-

220. Id. at 93, ¶ 305 (The issue of compensating medium and large industry owners, as distinct from artisanal brick- and tile-makers, was the subject of a meeting of EBY's Executive Directors on June 9, 1994. This meeting approved the "Policy Declaration for Encarnación" which offered solutions to compensate brick and tile industry owners on the Paraguayan side of the river. Priority was to be given to compensating the most vulnerable families—identified as mostly artisanal brickmakers—either through resettlement in areas above 84 masl or through assistance in changing their means of employment.);

221. Id. at xxi. ("However, the Panel expressed concerns about the adequacy of providing only a five year supply of clay, as this appears to be a temporary mitigation measure rather than a solution that would allow the activity to continue in the long-term.")
ing; (3) live in adequate housing; and (4) have a safe and healthful environment, among other abuses.

Following its receipt of the second request and management’s rejoinder, the Inspection Panel traveled to the affected area and urged the Board of Executive Directors to permit an inspection to go forward. This request was approved on September 9, 2002, approximately four months following receipt of FEDAYIM’s request. The Panel found the following policies and procedures to be relevant to the request: “Environmental Assessment OD 4.01 (October 1991);[223] Involuntary Resettlement OD 4.30 (June 1990); Project Supervision OD/OP/BP 13.05 (March 1989 and July 2001);[224] and Monitoring and Evaluation OD 10.70 (November 1989).”[225]

As with the 1996 request, this Panel also found that the Bank violated a number of its directives and policies.[226] For example, OD 4.01 “requires that environmental assessments be prepared for the resettlement activities financed by the Bank.”[227] With regards to that directive, the Panel found that initially management did not provide an environmental assessment (EA). However, in November of 2003, management presented environmental assessments (EA) produced by consultants to EBY. These EAs were said to be able to demonstrate EBY’s compliance with Bank’s requirements.[228] The Panel found that the EAs were prepared for the resettlement of three primary sites, Arroyo Porá, Carmen del Paraná, and Itá Paso.[229]

After its review, the IP found that the Assessments were “very inadequate”[230] and did not comply with the requirements of OD 4.01. The range of environmental matters addressed was limited. For exam-

222. Id. at ix.
226. Id. at xii.
227. Id.
228. Id.
229. Id.
230. Id.
ple, there was no consideration of alternative resettlement sites, and EBY’s consultants suggested few mitigation measures.231 Moreover, the affected parties were not consulted.232 Accordingly, the Panel concluded that the protections built into OD 4.01 were disregarded.233

Furthermore, the IP found that the Yacyretá Project’s future environmental management was seriously threatened by financial issues and therefore, both the “natural environment and project-affected people will suffer additional harm if the project’s environmental management practices deteriorate.”234 The Panel also considered the urban and peri-urban235 environments, and found that an EA prepared for a Second Yacyretá Project.236 was insufficient in a number of ways in its deliberations of these environments. In addition, the EA failed to adequately take into account the impacts of increased population on the city of Encarnación, or the impacts of “the resettlement developments on the city’s infrastructure.”237

Likewise, the IP found that the safeguards to appraise the “implications for water supply, sewers, and urban drainage, which ought to have been in place via OD 4.01, were by-passed. Thus, Management [was] not in compliance with the requirements of OD 4.01.”238 More generally, the Panel found that the Bank’s management failed to consider the effects of the resettlement sites on the global urban framework within the dam and reservoir’s area. This too, the IP observed, was out of compliance with OD 4.30239 and OD 4.01.

231. Id.
232. Id.
233. Id.
234. Id. at xiii.
236. See, See, Paraguay – Reform Project, supra note 114, at xiii (“Before bringing the Second Yacyretá Project to the Board for approval in 1992, the Bank had a full environmental assessment prepared.”).
237. Id. at xiii.
238. Id.
239. Id. (“OD 4.30 requires that after the area affected by the project and the displaced population have been identified, the host government ensure that persons ineligible for compensation do not come into the identified affected area. In the Yacyretá project, there has been a large influx of people into the area.”) For the specific language of OD 4.30 on Involuntary Resettlement, See generally, IFC Environment and Social Development Department, Handbook for Preparing a Resettlement Action Plan (Apr. 2002), available at http://www wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2002/09/13/000094946_02090404022144/Rendered/PDF/multi0page.pdf. IFC Operational Directive OD 4.30 on Involuntary Resettlement, at 67. Some of the items that the Bank’s Management is required to assess under OD 4.30 include whether Bank Managers: (1) Consulted with
Nevertheless, the IP noted, that within the framework of the “Programa Desborde de Arroyos” (“PDA”), or the “Program for Overflowing Urban Creeks” the IBRD’s Management advised EBY to coordinate resettlement in its urban development plans.\textsuperscript{240} Nevertheless, within the perspective of the PDA – the Urban Creeks Program,\textsuperscript{241} the Panel noted that management informed EBY’s directors that they should coordinate resettlement issues within the urban development plans, which the Bank did.\textsuperscript{242}

\section*{VIII. Conclusion}

The saga of the Yacyretá Dam displacement of what euphemistically are called project-affected people is a decades’ long string of violations by EBY, on behalf of Argentina and Paraguay, which were suborned by both the IBRD and the IADB. These long-term violations of both the human and environmental rights of the poor on both sides of the Paraná River are predominantly attributable to both banks. They promulgated rules and operational procedures, loaned the money to the governments and to EBY, and are able to structure the terms of these transactions to comport with the human rights and environmental terms that the banks assert that they are governed by.

Indeed, the fact that two separate formal evaluations by the IP and the IIM of two requests for inspections of EBY’s actions, above and beyond the protests, letter writing campaigns and entreaties to their governments and the banks, leaves one wondering why such neglect takes place. Is it due to corruption, abandonment of moral obligations, or disregard for human beings? Whatever the reason, or reasons, the banks are not powerless to change the status quo. Rather, like puppeteers, they control the totality of the entire lending process. If these banks actually care about human rights and the state of the environment, as opposed to only having their loans repaid, the burden is upon their managements and directors to demonstrate by deeds rather than words that they are concerned. Consequently, the development banks must put their foot down and demand more. Otherwise their govern-locals regarding resettlement activities; (2) provided those who were resettled with timely compensation for lost chattels and other property at full replacement cost; (3) provided those who were to be resettled with alternative sites for relocation; (4) provided those who were to be resettled with resettlement-assistance, if required; and (5) those who were resettled were restored to-livelihoods whose standards. \textit{Id.} at 26.

\textsuperscript{240} \textit{Id.} at 49, 147.

\textsuperscript{241} \textit{Id.} at xxiv.

\textsuperscript{242} \textit{Id.} at 49, 147.
ment members/shareholders\textsuperscript{243} must take the initiative to push the Banks to do what is right and proper.

\textsuperscript{243} Since most countries are members of the United Nations they are governed by the United Nations Universal Declaration of Human Rights (Dec. 10, 1948), available at http://www.un.org/en/documents/udhr/index.shtml. See e.g. pmbl., which provides "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people . . .".