

# ARTICLES

## Contextual Accountability, the World Bank Inspection Panel, and the Transformation of International Law in Edith Brown Weiss's Kaleidoscopic World

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*Being accountable is a key aspect of being legitimate.*<sup>1</sup>

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1. Edith Brown Weiss, *On Being Accountable in a Kaleidoscopic World*, 104 AM. SOC'Y INTL. L. PROC. 477, 479 (2010) [hereinafter Brown Weiss, *On Being Accountable*].

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## INTRODUCTION

In 2018, we celebrated the twenty-fifth anniversary of the World Bank Inspection Panel, which in many ways also marked the twenty-fifth anniversary of the emergence of “accountability” as a concept in international law.<sup>2</sup> Established in 1993, the Inspection Panel aimed to provide people and communities affected by World Bank-financed projects a place to raise concerns over the Bank’s environmental and social performance to the highest levels of the organization: the President and Executive Directors. No longer were the State representatives of the Board the sole channel for discourse between the Bank and those communities and people affected by Bank projects. In so doing, the Inspection Panel disrupted the normal channels of accountability in international law.

The Inspection Panel was quite deliberately revolutionary in the law and practice of international organizations. Those who pushed for the Panel were not only interested in World Bank reform, but also the democratization of international law more generally. The Center for International Environmental Law (“CIEL”) (where I worked at the time) uses international law to protect the public’s interest in the global environment and promote sustainable development.<sup>3</sup> Motivated in part by Phillip Allott’s call for democratizing and socializing international law,<sup>4</sup> CIEL’s citizen-based, public interest approach inherently challenged notions of the state as the sole subject and participant in international law. In addition to

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2. IBRD, Resolution No. 93–10, IDA, Resolution No. 93–6, para. 1 (Sept. 22, 1993) [hereinafter Inspection Panel Resolutions]. For general treatments of the Inspection Panel, see World Bank Group [WBG], *The Inspection Panel: Accountability at the World Bank – 25th Anniversary Book 1*, 11, 14 (2018) [hereinafter *Inspection Panel at 25 Years*]; ANDRIA NAUDÉ FOURIE, WORLD BANK ACCOUNTABILITY: IN THEORY AND PRACTICE 8–9 (2016); ANDRIA NAUDÉ FOURIE, THE WORLD BANK INSPECTION PANEL AND QUASI-JUDICIAL OVERSIGHT 3 (2009); The Inspection Panel, *Accountability at the World Bank: The Inspection Panel at 15*, ix–xiii (2009) [hereinafter *Inspection Panel at 15*]; DEMANDING ACCOUNTABILITY: CIVIL-SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL xi (Dana Clark, Jonathan Fox & Kay Treakle eds., 2003) [hereinafter *DEMANDING ACCOUNTABILITY*]; IBRAHIM F. I. SHIHATA, THE WORLD BANK INSPECTION PANEL: IN PRACTICE xiii (2d ed, 2000); THE INSPECTION PANEL OF THE WORLD BANK: A DIFFERENT COMPLAINTS PROCEDURE (Gudmundur Alfredsson & Rolf Ring eds., 2001); The Inspection Panel, *Accountability at the World Bank: The Inspection Panel 10 Years On* xv (2003) [hereinafter *Inspection Panel at 10*]; Daniel D. Bradlow, *International Organizations and Private Complainants: The Case of the World Bank Inspection Panel*, 34 VA. J. INT’L L. 553, 556 (1994); David Hunter, *Using the World Bank Inspection Panel to Defend the Interests of Project-Affected People*, 4 CHI. J. INT’L L. 201, 202 (2003).

3. See *Our Mission*, CTR. FOR INT’L ENVTL. L., <https://perma.cc/2LKV-684X> (last visited Apr. 15, 2020).

4. PHILIP ALLOTT, THE HEALTH OF NATIONS: SOCIETY AND LAW BEYOND THE STATE 399, 406–07, 420–21 (2002).

promoting citizen-based accountability at the World Bank and other financial institutions, CIEL championed the increased participation of non-state actors in international environmental negotiations; filed the first amicus briefs on behalf of non-state actors at the World Trade Organization; and pushed for information disclosure and consultation policies at a variety of international institutions.

CIEL's efforts were part of a broader trend as a variety of non-state actors pushed for social change through expanded participation in the development and implementation of international norms in diverse fields of international affairs.<sup>5</sup> Many of these efforts have been aimed at strengthening the accountability of non-state actors, such as intergovernmental organizations or transnational corporations, which, although active internationally, often had direct impacts on local communities and their environment. Accountability in this context had to reflect the transnational, non-state nature of the actors while being responsive to the local impact of their actions. State-centric public international law comprised of treaties and rooted in state practice seemed neither relevant nor effective in this context. Non-state actors needed to have a greater presence at the international level, both as norm creators and as subjects of international norms, and intergovernmental organizations had to be more directly accountable to those people whose lives they affected.

In many ways, the World Bank's combination of environmental and social safeguard policies "enforced" by citizen petitions to the Inspection Panel would epitomize this vision of "citizen-driven accountability."<sup>6</sup> The Bank's safeguard policies were developed and revised over time through procedures that regularly involved public consultations and public comment periods. The resulting policies provided a normative framework meant to minimize harm to, and expand the participation of, local communities. The communities could hold the Bank accountable for failing to meet these norms through the Inspection Panel.

The safeguard/Panel system developed over time at the World Bank and reflected the specific political pressures, impacts, and stakeholder interests facing the Bank. Similar systems have since been adopted in some form by virtually all international finance institutions ("IFI").<sup>7</sup> These systems vary in important ways, but generally share similar design features shaped by their common mission of

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5. See, e.g., INTERNATIONAL ACCOUNTABILITY MECHANISMS NETWORK, CITIZEN-DRIVEN ACCOUNTABILITY FOR SUSTAINABLE DEVELOPMENT 4–6 (2012), <https://perma.cc/9YZJ-K5YB> (last visited April 14, 2020) [hereinafter IAM NETWORK, CITIZEN-DRIVEN ACCOUNTABILITY] (describing the development of the Inspection Panel and other accountability mechanisms in the context of the 1992 Earth Summit); ADVOCATING SOCIAL CHANGE THROUGH INTERNATIONAL LAW: EXPLORING THE CHOICE BETWEEN HARD AND SOFT INTERNATIONAL LAW 2–3 (Daniel Bradlow & David Hunter eds., 2020) (collecting essays on the use of international law by social change advocates) [hereinafter ADVOCATING SOCIAL CHANGE THROUGH INTERNATIONAL LAW].

6. IAM NETWORK, CITIZEN-DRIVEN ACCOUNTABILITY, *supra* note 5, at 7 Box 2.

7. See *infra* notes 52–66 and accompanying text.

providing some form of citizen-driven or “bottom-up” accountability in the context of international development finance.

The IFI safeguard/Panel accountability system is context-specific; it does not necessarily fit the needs of other institutions operating in other fields, nor does it fit neatly into the paradigm of public international law. It challenges the monopoly that state-to-state relationships hold in defining the sources, scope, and subjects of international law. Thus, as with all other normative frameworks not enshrined in a form recognized by Article 38 of the Statute of the International Court of Justice (“ICJ”),<sup>8</sup> the Bank’s safeguard policies are relegated to the broad category of “soft law,” regardless of the “hardening” brought to the norms by the existence of the Inspection Panel. Whatever new form of accountability is represented by the safeguard/Panel system of the Bank, it is by definition outside the circle of public international law.

What is needed to capture more generally the positive disruptive potential of new accountability systems, like the Bank’s safeguard/Panel system, is a marriage of practice with theory of how, in specific contexts, non-traditional, *sui generis* accountability systems fit the conception of international law. Professor Brown Weiss in her roles as both practitioner and scholar provides us with a roadmap for this convergence. First, in her role as a member and chair of the Inspection Panel, she increased its independence, legitimacy and stature among international law practitioners.<sup>9</sup> Second, in her subsequent scholarly writings she places the Panel within broader trends in international law, leading her to offer a compelling vision of international law in a “kaleidoscopic” world.<sup>10</sup> In her vision, the parties necessary for participation, the norms that apply, and the mechanisms for accountability are all contextual, changing to meet the functional demands of a kaleidoscopic world. This requires a fundamental rethinking of the definition of public international law and its fidelity to Article 38. Professor Brown Weiss in her scholarship and practice has shown us a path forward.

This Article explores Professor Brown Weiss’s practical and conceptual contributions to the concept of accountability in international law, reflecting on her scholar/practitioner approach to accountability. Part I further introduces accountability and the World Bank Inspection Panel.<sup>11</sup> Part II discusses the contributions made by Professor Brown Weiss to strengthen the Panel in ways that reverberate still today.<sup>12</sup> Part III discusses Professor Brown Weiss’s effort to reconcile the

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8. Statute of the International Court of Justice, art. 38, Apr. 18, 1946 [hereinafter ICJ Statute].

9. Professor Brown Weiss served as a member of the Inspection Panel from 2002–2007, the last four years of which she was chair. Her tenure is discussed further *infra* at notes 38–50 and in the accompanying text.

10. See EDITH BROWN WEISS, ESTABLISHING NORMS IN A KALEIDOSCOPIC WORLD: GENERAL COURSE ON PUBLIC INTERNATIONAL LAW (2018) [hereinafter BROWN WEISS, ESTABLISHING NORMS]; Brown Weiss, *On Being Accountable*, *supra* note 1, at 480, 489–90; Edith Brown Weiss, *International Law in a Kaleidoscopic World*, 1 ASIAN J. INT’L L. 21 (2011).

11. See *infra* notes 16–34 and accompanying text.

12. See *infra* notes 35–51 and accompanying text.

law-like nature of Panel activities with the constrained boundaries of public international law.<sup>13</sup> Her re-conceptualization of international law to fit our “kaleidoscopic world”<sup>14</sup> brings accountability mechanisms like the Inspection Panel fully inside an expanded vision of a new and more inclusive approach to international law. Part IV provides further reflections on the path forward for accountability under law.<sup>15</sup>

## I. ACCOUNTABILITY AND THE WORLD BANK INSPECTION PANEL

### A. THE SHIFTING DEMANDS FOR ACCOUNTABILITY AT THE WORLD BANK

Until the creation of the Inspection Panel, the World Bank Group, like most international organizations, was accountable only to its member states.<sup>16</sup> This fared the Bank well, as long as it was seen as simply a conduit of money from some donor governments to other beneficiary governments for basic development purposes. The financial conditions on the loans could be worked out by the Bank’s Board of Directors. The Bank staff and management would be held accountable by the member governments through the Board’s oversight and decision-making functions.

As part of the broader shift toward the paradigm of sustainable development that surrounded the 1992 Earth Summit, the Bank began to recognize that meeting its development mandate required new obligations to engage local communities and protect the rights of vulnerable communities and their environment.<sup>17</sup> *Sustainable* development, whatever it was, was certainly something different than just development; for the Bank, it meant greater focus was put on the environmental impacts of Bank financing on the ground and on associated rights and interests of local people. In this context, project-affected people demanded greater direct participation and stronger protections from environmental and social harms. Controversial and harmful Bank-financed projects, such as the Sardar Sarovar dam in India’s Narmada Valley and the Polonoeste highway in Brazil’s Amazon, highlighted the shortcomings of top-down development decision-making and catalyzed an alliance between local advocates for project-

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13. See *infra* notes 52–87 and accompanying text.

14. See, e.g., BROWN WEISS, ESTABLISHING NORMS, *supra* note 10; Brown Weiss, *On Being Accountable*, *supra* note 1, at 479; Brown Weiss, *International Law in a Kaleidoscopic World*, *supra* note 10.

15. See *infra* notes 88–99 and accompanying text.

16. The World Bank Group is made up of five separate institutions: the International Bank for Reconstruction and Development (“IBRD”), the International Development Association (“IDA”), the International Finance Corporation (“IFC”), the Multilateral Investment Guarantee Agency (“MIGA”), and the International Center for the Settlement of Investment Disputes (“ICSID”). Together the IBRD and the IDA are most frequently referred to as the “World Bank,” a taxonomy we adopt for this article. The Inspection Panel’s role is limited to reviewing projects from the World Bank. A different accountability mechanism, the Compliance Advisor/Ombudsman reviews projects from IFC and MIGA.

17. WORLD BANK, WORLD DEVELOPMENT REPORT 1992: DEVELOPMENT AND THE ENVIRONMENT (1993), <https://perma.cc/5MAQ-79ML>.

affected people and emergent global human rights and environmental movements in a shared opposition to the Bank.<sup>18</sup> The resulting vertical networks of local community-based advocates supported by national and international advocacy organizations gained power from the project level and exercised it at the top echelons of the Bank and with member states.<sup>19</sup>

This project-centered community engagement with the Bank demanded new forms of accountability beyond representation by their governments on the Board of Executive Directors. Global activists developed a political strategy that leveraged their relationships with legislators in donor countries to advance the rights and interests of affected communities. In the early 1990s, this strategy focused on stronger environmental and social policies, access to information, and some mechanism for affected people to raise their concerns with Bank projects. In response to these criticisms, the World Bank strengthened its safeguard policies and created the World Bank Inspection Panel, both aimed at protecting vulnerable communities and their environment.

#### B. THE WORLD BANK INSPECTION PANEL

The idea for an Inspection Panel originated as early as 1990 when environmental organizations began advancing specific proposals for an appeals or investigative body to increase accountability at the IFIs.<sup>20</sup> In early 1993, the Center for International Environmental Law joined the Environmental Defense Fund in presenting to a U.S. Congressional committee a detailed proposal for an independent appeals board that would allow affected persons standing to enforce the Bank's implementation of its environmental policies.<sup>21</sup> That year, the U.S. Congress identified the creation of an Inspection Panel as a key condition for continued funding of the Bank's concessional loan fund.<sup>22</sup> At the same time, Professor

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18. For a discussion of various controversial projects and the reform campaigns that emerged around them, see *THE STRUGGLE FOR ACCOUNTABILITY: THE WORLD BANK, NGOS, AND GRASSROOTS MOVEMENTS* (Jonathan A. Fox & L. David Brown eds., 1998); CATHERINE CAUFIELD, *MASTERS OF ILLUSION: THE WORLD BANK AND THE POVERTY OF NATIONS* (1997); BRUCE RICH, *MORTGAGING THE EARTH: THE WORLD BANK, ENVIRONMENTAL IMPOVERISHMENT, AND THE CRISIS OF DEVELOPMENT* (1994); RAYMOND F. MIKESSELL & LARRY WILLIAMS, *INTERNATIONAL BANKS AND THE ENVIRONMENT: FROM GROWTH TO SUSTAINABILITY, AN UNFINISHED AGENDA* (1992). For criticism of development institutions more generally, see GRAHAM HANCOCK, *LORDS OF POVERTY: THE POWER, PRESTIGE, AND CORRUPTION OF THE INTERNATIONAL AID BUSINESS* (1989).

19. For a discussion of these vertical civil society networks in Bank advocacy, see David B. Hunter, *Civil Society Networks and the Development of Environmental Standards at International Financial Institutions*, 8 *CHI. J. INT'L L.* 437 (2008).

20. See Eric Christenson, *Green Appeal: A Proposal for an Environmental Commission of Enquiry at the World Bank* (Nat. Res. Def. Council, Working Paper, 1990).

21. Lori Udall & David Hunter, Draft Resolution for an Independent Appeals Commission for the World Bank (Aug. 1993) (unpublished); Testimony of Lori Udall, Hearing before the House Subcommittee on International Development, Finance, Trade and Monetary Policy, May 5, 1993, <https://perma.cc/TM72-P4C2>.

22. For an full account of the genesis of the Panel, see Dana Clark, *Understanding the World Bank Inspection Panel*, in *DEMANDING ACCOUNTABILITY*, *supra* note 2, at 8–9; Lori Udall, *The World Bank*



Daniel Bradlow presented a proposal to Canada's Parliament for an ombudsman at the Bank.<sup>23</sup> Policymakers from other countries, including some of the Bank's Executive Directors, voiced support for an accountability mechanism. Active leadership from the United States, Switzerland, and the Netherlands ensured that the Bank addressed the calls for reform.

On September 22, 1993, the World Bank's Board of Executive Directors created the Inspection Panel.<sup>24</sup> According to the Panel's Operating Procedures, the Panel was "established for the purpose of providing people directly and adversely affected by a Bank-financed project with an independent forum through which they can request the Bank to act in accordance with its own policies and procedures."<sup>25</sup> The three-member Panel reports directly to the Board of Executive Directors.<sup>26</sup> It is thus independent of Bank Management, which is responsible for promoting or developing Bank projects. To enhance its independence, Panel members cannot have served the Bank in any capacity for the two years preceding their selection, nor can they work for the Bank again after serving on the Panel. The Panel's Secretariat supports the Panel's investigations and outreach.<sup>27</sup>

Requests for inspection can be filed by any two or more affected people in the borrower's territory.<sup>28</sup> After receiving a complete request for inspection,<sup>29</sup> the

and Public Accountability: Has Anything Changed, in *THE STRUGGLE FOR ACCOUNTABILITY: THE WORLD BANK, NGOS, AND GRASSROOTS MOVEMENTS*, *supra* note 18, at 391; *see also* Lori Udall & David Hunter, *The World Bank Inspection Panel*, 9 ENV'T 36, at 2–3 (Nov. 1994); SHIHATA, *supra* note 2, at xxii; MAARTJE VAN PUTTEN, *POLICING THE WORLD: ACCOUNTABILITY MECHANISMS FOR MULTILATERAL FINANCIAL INSTITUTIONS AND PRIVATE FINANCIAL INSTITUTIONS* 295–320 (2006) (transcript of interviews with Congressman Barney Frank, David Hunter, and Paul Arlman).

23. Daniel Bradlow, *The Case for a World Bank Ombudsman*, Testimony before the Subcommittee on International Financial Institutions of the Canadian House of Commons Standing Committee on Finance, Feb. 18, 1993.

24. Inspection Panel Resolutions, *supra* note 2.

25. World Bank Inspection Panel, *The Inspection Panel for the International Bank for Reconstruction and Development and International Development Association: Operating Procedures*, 34 I.L.M. 510, 511 (1995) [hereinafter *1994 Panel Operating Procedures*]; *see also* Inspection Panel Resolutions, *supra* note 2, at para. 12. The Panel updated its procedures in 2014. *See* The Inspection Panel at the World Bank, *Operating Procedures* (April, 2014) (with Annex 2 added in February 2016), <https://perma.cc/B72L-YZWA> [hereinafter *2014 Panel Operating Procedures*].

26. The Board of Executive Directors meets several times a week and among other things has the responsibility to approve every loan proposed by the Bank. A Board of Governors, responsible for broad policy, meets once a year. Voting at the Executive Directors' and Board of Governors' meetings is based on financial shareholding percentages; the United States has the largest voting share of just under 17%. The G-7 comprises approximately 45% of the voting shares at the Bank, and all of the donor countries together comprise a solid majority of the vote. The Board meetings and decisions are not open to the public.

27. The Panel Secretariat is being restructured in 2020. For more information, see the Inspection Panel website, at <https://inspectionpanel.org/> (last visited Mar. 23, 2020).

28. *2014 Panel Operating Procedures*, *supra* note 25, at para. 10.

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

Panel registers the claim and forwards a copy to Bank Management, which has twenty-one days to respond.<sup>30</sup> The Panel subsequently has twenty-one days to review Management's response and to make a recommendation to the Executive Directors regarding whether the claim warrants a full investigation.<sup>31</sup> The Executive Directors have the exclusive authority to authorize or deny a full investigation. This unfortunate provision initially paralyzed the Panel process, until the Board issued a clarification in 1999 that has eased the Board's review of recommendations for an investigation.<sup>32</sup> Once an investigation is authorized, the Panel enjoys broad investigatory powers, including access to all Bank staff, documents, and the project site. After the investigation, the Panel issues a report evaluating the Bank's compliance with its policies. Management must respond to the Panel's findings within six weeks and submit to the Executive Directors a report and recommendations. The Panel's report, Management's recommendations, and the Board's decision are released publicly two weeks after Board consideration.<sup>33</sup>

By the beginning of 2020, the Inspection Panel had received 146 formal requests for inspection, had registered 110 of them, recommended investigations in 45, and undertaken investigations in 38.<sup>34</sup>

## II. THE INSPECTION PANEL COMES OF AGE: PROFESSOR BROWN WEISS'S TENURE

In creating the Panel, the Bank would be the first international organization to hold itself directly accountable to affected people where they did not have to go through their governments.<sup>35</sup> It marked an important re-orientation of the Bank's accountability "downward" toward affected people and not just "upward" toward states.

From the beginning, however, the Panel and its underlying concept of bottom-up accountability has elicited conflicting opinions, depending largely on where one is positioned in the World Bank's decision-making eco-system. Although virtually all stakeholders support the Panel's overall mission of Bank accountability, significantly less consensus exists over how independent the Panel should be or what authority the Panel should have.

Perhaps inevitably, the relationship between Bank staff and the Panel is strained. No one prefers to be accountable, and the World Bank staff and management see the Panel as captured by civil society organizations who seek to second-

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30. 2014 *Panel Operating Procedures*, *supra* note 25, at para. 33.

31. *Id.*

32. See World Bank: Conclusions of the Second Review of the World Bank Inspection Panel, reprinted in 39 I.L.M. 249 (2000) [hereinafter 1999 Clarification]; see also Clark, *supra* note 22, at 15–17.

33. 2014 *Panel Operating Procedures*, *supra* note 25, at para. 72.

34. See Inspection Panel, *Panel Cases*, <https://perma.cc/B5WK-UMAA> (last visited Mar. 23, 2020); *Cases Processing History: 1995-2020*, <https://perma.cc/4CBN-E695> (last visited Mar. 23, 2020).

35. See, e.g., Eisuke Suzuki & Suresh Nanwani, *Responsibility of International Organizations: The Accountability of Multilateral Development Banks*, 27 MICH. J. INT'L L. 177 (2005).



guess their professional judgment. Moreover, the power to lend continues to be the over-riding pressure on Bank staff and management.<sup>36</sup> Staff members do not appear to get rewarded for project quality, including avoidance of environmental and social harms, at least if it means significantly slowing or modifying a project's financing. In such an atmosphere, it is no wonder the Panel's investigations are not always welcomed.

Borrowing country governments and their representatives on the Board of Executive Directors frequently share distrust for a mechanism that, at best, redefines their role as the exclusive conduit for communications between their citizens and the Bank and, at worst, infringes significantly on their state sovereignty. Investigations by the Panel are by rule limited to reviewing the Bank's compliance with its own policies, but in practice the investigations take place at the project sites and the reports inherently reflect on the borrowing state's performance. The Bank's failure to monitor project implementation is after all associated with a borrower's failure to implement. Some of this ambivalence is unavoidable; in its first five years, the Panel investigated and validated claims that embarrassed, and thus generated fierce opposition from, some of the Bank's largest and most influential borrowers, including China, India, and Brazil.

Criticism from the borrowers and management helped fuel a continual series of challenges—some calculated and some inadvertent—on its independence and effectiveness.<sup>37</sup> The Panel had to defend its right to interpret its own resolution and not defer to the opinions of the Bank's General Counsel. The Panel had to ensure the Vice President status of the Panel chair, to ensure its voice was taken seriously among Bank staff. The Panel had to push back against management pre-empting investigations by promoting ambiguous action plans while the Panel investigations were ongoing and before the Panel had identified what, if any, issues of compliance existed. They had to wait passively for claimants to learn that the Panel existed, having been given little budget for publicity and cautioned against proactively seeking claims.

The Panel ably navigated these early minefields, primarily due to an extraordinary set of initial Panel members and an equally extraordinary Executive Secretary. After the initial period of continually having to defend itself, the new Panel members were met with an organization developing a siege mentality, uncertain of how far it could go and worried about its existence in the face of unyielding ambivalence if not outright opposition from the institution.

The Panel's lack of support among staff inside the organization did not infect its popularity within civil society and many of the donor governments. Project-

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36. THE WORLD BANK GROUP, INDEPENDENT EVALUATION GROUP, *LEARNING AND RESULTS IN WORLD BANK OPERATIONS: HOW THE BANK LEARNS*, viii (2014), <https://perma.cc/DNG3-NFCZ>; see also World Bank, *Effective Implementation: Key to Development Impact (Wapenhans Report)* (Report of the Portfolio Mgmt. Task Force, Working Paper, 1992).

37. For a discussion of these early challenges, see Clark, *supra* note 22, at 11–17.

affected people and their allies viewed the Bank's environmental and social performance standards as granting rights to project-affected people that were agreed to by the Borrower Country as part of the loan conditions necessary for successful development. The Panel existed to ensure those promised commitments were kept in ways that protect the rights and interests of local communities, even of those marginalized minorities that may oppose the projects completely. Indeed, part of the Borrower Country concern was that the Panel is too effective at strengthening the voice of dissenting communities. Efforts to curtail the Panel were frequently met with "Save the Panel" protests and recurring statements of support from donor governments and others.

Consistent with the notion that imitation is the greatest form of flattery, the Panel's form of bottom-up accountability would be adopted at virtually all international finance and development institutions. Academics, too, generally applauded the Panel, frequently welcoming its challenge to traditional views of how international organizations operate in a globalizing world.

Into this picture of external praise and internal antagonism entered Professor Brown Weiss. She was appointed in September 2002 and served as chairperson from 2003 through 2007, making hers the longest and most impactful tenure as chair, at least since the initial group of Panel members. Her standing among international lawyers lent immediate gravitas and legitimacy to the Panel. More importantly, Professor Brown Weiss brought her unique combination of professionalism, fierce determination to maintain the Panel's independence, a keen strategic mind for the diplomacy needed at the highest levels of the Bank, and a demand for high quality analytical rigor that made Panel decisions unassailable under her leadership. Below, I discuss three areas where the Panel made significant strides under Professor Brown Weiss's leadership in ways that are particularly important to the Panel's long-term contribution to accountability more generally.

#### A. REINFORCING THE PANEL'S RIGHTS-BASED APPROACH TO ACCOUNTABILITY

The Panel as a mechanism serves an important bridging function that requires a mix of skills. At any given time, the Panel must be able to bridge the divide between the top decision makers at the Bank, including the representatives of member governments, and the community-based claimants. This requires among other things: an ability and interest in listening to the unvarnished narratives of a community's lived experience; translating and evaluating that narrative into the policy framework of the Bank; and communicating that evaluation to the elite professionals that occupy the Bank's top management and boardroom. Given the continual need to re-educate revolving Board members of the Panel's importance and the need to defend the Panel's independence from threats, both imaginary and real, one can forgive Panel members if they emphasize their work in headquarters over their attention to what is happening at project sites.

Yet, the Panel exists for the benefit of project-affected communities, and the Panel must meet them on their own terms—many are rural subsistence communities with minimal reading or writing skills. The Panel must provide them a safe and respectful space where their lived experience is not only shared but heard. Sometimes this can happen in the austere luxury of Bank headquarters, but more frequently it requires the Panel to listen in open air village meetings and small community gatherings near project sites.

Professor Brown Weiss was the first Panel member to be an international lawyer, and it would have been understandable if she brought a traditional state-centric view of the law to her Panel tenure. That state-centered view might have distorted or discounted her approach to affected communities, but she never wavered in reaffirming the Panel's focus on the interests of affected communities. She brought her lawyering skills to bear on their behalf in clear and convincing reports about a wide range of projects, involving urban transport in Mumbai, land administration in Honduras, and forests in the Congo, among others.<sup>38</sup> Professor Brown Weiss recognized the shared commonality of these communities and the unique role of the Panel.

Over and over again, regardless of the country, regardless of the language, we heard people who came to us who said: 'We have little, and we fear that what we have is about to be taken away from us. We are maybe putting our own lives at risk, but you are our only hope[.]' . . . That's a very powerful statement. It deserves to be treated as such, and it deserves our utmost respect.<sup>39</sup>

During Professor Brown Weiss's tenure, the Panel reports kept their focus on highlighting the claimants' interest and concerns, reminding the Bank that failure to address concerns at the project site undermines the Bank's legitimacy and effectiveness as a development institution. In the Mumbai Urban Transport Project, she put it this way:

The Panel hopes that by bringing the plight of several thousand shopkeepers and over a hundred thousand other poor affected people to the attention of the Board, the Bank will be able to support such projects more effectively. Compliance with safeguards policies protects poor people . . . The Panel appreciates the Bank's acknowledgement of the Project's problems, its commitment to address them, and its intent to apply the lessons to future urban resettlement.<sup>40</sup>

As a lawyer, Professor Brown Weiss saw the safeguard policies and Panel role as reflecting not only the interests of affected people, but their rights. Although

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38. For Professor Brown Weiss's description of these cases and the lessons learned from them, see Brown Weiss, *On Being Accountable*, *supra* note 1.

39. *Inspection Panel at 25 Years*, *supra* note 2, at 88.

40. Edith Brown Weiss, Speech to Board During Construction of MUTP Inspection, *quoted in Inspection Panel at 15*, *supra* note 2, at 80.

respecting the Bank's aversion to accepting any human rights responsibilities, the Panel did signal a clear path for evaluating claims of affected communities in light of the borrower's human rights obligations.

In the *Honduras: Land Administration Project* claim, a community of indigenous Garífuna people alleged the project infringed on their ancestral lands in violation of the Bank's Indigenous Peoples policy and Honduras' obligations under ILO Convention No. 169. Under the Bank's operational policies, Bank-financed activities should be consistent with a borrower's international agreements "regarding its environment and the health and well-being of its citizens."<sup>41</sup> Accordingly, the Panel found the Bank was required to "consider whether the proposed Project plan and its implementation would be consistent with" the Convention.<sup>42</sup> In so doing, the Panel criticized the Bank General Counsel's interpretation restricting the consistency requirement of OMS 2.20 to agreements that are "essentially of an environmental nature" for ignoring the Bank's internal directives to respect international agreements on human rights when the project country is a signatory.<sup>43</sup> This approach not only reinforced the Panel's independence from the General Counsel's office but also allowed the potential for future cases to raise violations of human rights violations.

Under Professor Brown Weiss, the Panel also turned their conceptual orientation toward affected people into practical changes, quietly pioneering several innovations that would strengthen the Panel's response to communities. For example, the Panel for the first time instituted a regular practice of return visits to communities that submitted requests for inspections in order to explain to them the outcomes of their cases. According to Professor Brown Weiss: "It's an element of respect that we go back and tell them what happened, let them ask questions, have a dialogue and exchange that is fruitful and that they find meaningful and effective."<sup>44</sup>

By testing new approaches, the Panel demonstrated the value to claimants of expanding Panel authorities beyond their restricted mandate to investigate and report on non-compliance. At least three times under Professor Brown Weiss's leadership, the Inspection Panel performed post-report follow up, or monitoring, of the implementation of management's action plan.<sup>45</sup> On the front end, in several instances the Panel used the eligibility requirement period to assist the claimants in resolving their

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41. WORLD BANK, BANK POLICY ON PROJECT APPRAISAL, OPERATIONAL MANUAL STATEMENT 2.20 (Jan. 1984) (stating a "project's possible effects on the country's environment and on the health and well-being of its people must be considered at an early stage. . . Should international agreements exist that are applicable to the project and area, such as those involving the use of international waters, the Bank should be satisfied that the project plan is consistent with the terms of the agreements").

42. *Id.*

43. *Inspection Panel at 15*, *supra* note 2, at 74–75; see also Steven Herz & Anne Perrault, *Bringing Human Rights Claims to the World Bank Inspection Panel* (Oct. 2009), <https://perma.cc/Z35T-LGHU>.

44. *Inspection Panel at 25 Years*, *supra* note 2, at 52.

45. *Id.* at 59.

issues without going through the formal inspection process.<sup>46</sup> In this way, the Panel started to prove the practicality and virtue of the Panel's functions expanding to dispute resolution on the front end and *monitoring* on the back end. The Panel's track record during this time has supported a recent dialogue about expanding the Panel's "toolkit," which the Board of Directors will likely complete this year.<sup>47</sup>

#### B. DEFENDING THE PANEL'S INDEPENDENCE

Even as Panel members are asked to focus on specific claims of affected people, the Panel must simultaneously be vigilant in defending its independence from what are sometimes subtle actions that could significantly impinge on the Bank's independence and effectiveness. One of these was the Bank's decision to adopt a policy on the Use of Country Systems. Under that policy, the Bank staff would be allowed to determine whether the Borrower Country's legal framework gave essentially the same level of protection as afforded by the Bank's safeguard policies. If protections were found to be similar, the Bank would use the "country systems" instead of the safeguard policies in setting environmental and social conditions for the project.

Because the Panel's jurisdiction is to review Bank compliance with its safeguard policies, widespread use of country systems could insulate many projects from Panel review. Indeed, some staff suggested that the Inspection Panel would not have jurisdiction to receive requests from countries in which the Use of Country Systems policy was in effect. Professor Brown Weiss responded strongly and worked at the political levels to ensure that Panel jurisdiction would not be affected. In a tightly worded agreement supported by the Board and Bank Management, the Panel explicitly retained jurisdiction generally over these projects, including to review the determination that the country systems were equivalent in the first place.<sup>48</sup> This stance was eventually fully supported by the Board and Bank Management, an interpretation that was captured in a Joint Statement on the Use of Country Systems.

Although the purpose of the Country Systems approach was to reduce redundancy of standards for the benefit of project implementers, it was not lost on the opponents of the Panel that the policy would also curtail the Panel's jurisdiction. Nor was it lost on those opponents when the Panel swiftly and assuredly persuaded the Board and top management to clarify the Panel's position in the new scheme. Professor Brown Weiss's ability to garner support at this political level

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46. *Id.* at 52–55.

47. See Natalie Bridgeman Fields, David Hunter & Kristin Genovese, *The Case for Public Reforms for World Bank Inspection Panel*, DEVEX (Dec. 13, 2019), <https://perma.cc/EZE4-Q4AV>.

48. Chairperson of the Inspection Panel & Senior Vice President and General Counsel, *Joint Statement on the Use of Country Systems* (June 8, 2004), reprinted in *Inspection Panel at 15*, *supra* note 2, at app. IX.

signaled more generally that the Panel under her leadership would not be easily dismissed or weakened.

C. BUILDING HORIZONTAL ACCOUNTABILITY: INDEPENDENT ACCOUNTABILITY MECHANISMS NETWORK

While strengthening the status of the Panel internally, Professor Brown Weiss also increased the Panel's stature externally. During her tenure, the Panel formalized its de facto leadership position among similar accountability mechanisms by hosting the first annual meeting of those mechanisms in 2004. Over time, the mechanisms would form the Independent Accountability Mechanisms Network ("IAMNet" or "IAM Network"), which meets once a year.<sup>49</sup> This meeting is limited to IAM staff, so that they can candidly share their experiences and discuss the common challenges they face. Topics have included capturing lessons from specific case studies, addressing reprisals against complainants, and coordinating responses to claims filed with more than one mechanism.

Over time, membership in the IAM Network has grown, and the agenda has expanded to include one day of interaction with civil society. The meetings have created a form of horizontal accountability among the mechanisms, each benchmarking against the other while helping them build capacity, share skills and build a habit of cooperation.

The existence of the IAM Network forced questions regarding the criteria for participation. In 2013, the network identified the following basic criteria for membership:

- Citizen-driven complaint and response mechanism;
- Operates at the international level;
- For a public institution which finances or supports development-related activities;
- Operationally independent; and
- Considers social and environmental impacts/concerns.<sup>50</sup>

Beyond these basic criteria, being a member of the IAM Network implies some shared goals and values, particularly the importance of citizen participation, independence and transparency, and thus confers some meaning about the nature of its membership. How membership is defined will shape what is expected from an accountability mechanism in the IFI context. How independent do you have to be to warrant membership in the *Independent* Accountability Mechanism

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49. See INDEPENDENT ACCOUNTABILITY MECHANISMS NETWORK, <https://perma.cc/GZD3-X4NH> (last visited March 25, 2020).

50. IAMNet, Basic Criteria for Participation in the IAM Network, Decision at the 10<sup>th</sup> Annual Meeting of the IAMNet (Sept. 2013) <https://perma.cc/L7JE-AGLL>.



Network? How transparent? This has the potential to become a contested space as the definitions and thus source of independence can vary.<sup>51</sup> Why do you have to be associated with a bilateral or multilateral development organization? Could the World Wildlife Fund's mechanism be a member? Answers to these questions by the Network will in turn help to define the bounds of what accountability means and how it should be assured in the context of international finance and development institutions.

The IAM Network and their annual meetings also created a new space for civil society to interact with all of the IAMs in one place on a shared agenda. This opens up new possibilities for conceiving of accountability at IFIs as a common exercise across multiple institutions. It suggests the IAM Network meetings will evolve into an increasingly important knowledge-sharing venue and will continue the maturation of an epistemic community for accountability in the IFI context. The IAM Network meetings may even have the potential to be policy-setting or coordinating venues, where civil society lobbies the IAMs and the IAMs negotiate coordinated positions. For example, joint IAM statements aimed collectively at their respective institutions could be valuable and appropriate on such issues as the protection of claimants against reprisals, the need for independent IAM budgets, and methods for the institutions to publicize the IAMs.

### III. EVALUATING THE IFIs' ACCOUNTABILITY SYSTEM

By some measures, the Panel's citizen-driven, rights-based model of accountability has been an unqualified success—it has quickly spread to virtually all international finance and development institutions. Today, independent accountability mechanisms exist at all regional development banks;<sup>52</sup> the International Finance Corporation ("IFC") and Multilateral Investment

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51. For example, the independence of the Inspection Panel is secured in part by the fact that a Panel Member can never work for the Bank in any capacity after serving on the Panel, so it minimizes the chance that Panel members will defer to a potential future employer. Independence at the CAO, on the other hand, is secured in part by the selection process, which is run by a multi-stakeholder group that does not include any employee of the World Bank Group. See CAO, Process for Selecting the Vice President, Office for the Compliance Advisor Ombudsman (undated) (available from the author on request).

52. The regional development bank mechanisms, include: the African Development Bank's Independent Review Mechanism, Resolution B/BD/2004/9 (June 30, 2004), <https://perma.cc/2FSA-DDBX>; the Asian Development Bank's Special Project Facilitator & Compliance Review Mechanism, ASIAN DEV. BANK, REVIEW OF THE INSPECTION FUNCTION: ESTABLISHMENT OF A NEW ADB ACCOUNTABILITY MECHANISM (2003), <https://perma.cc/XCC7-AWHH>; Caribbean Development Bank Complaints, *Office of Integrity, Compliance and Accountability*, CARIBBEAN DEV. BANK, <https://perma.cc/SC2T-WWPV> (last visited Apr. 17, 2020); the European Bank for Reconstruction and Development's Project Complaints Mechanism, *Project Complaint Mechanism*, EUR. BANK FOR RECONSTRUCTION AND DEV., <https://perma.cc/PYX5-LELE> (last visited Apr. 17, 2020); and the InterAmerican Development Bank's Independent Consultation and Inspection Mechanism, *The Independent Consultation and Investigation Mechanism*, INTER-AM. DEV. BANK, <https://perma.cc/J65D-AW3K> (last visited Apr. 17, 2020).

Guarantee Agency (“MIGA”);<sup>53</sup> the European Investment Bank;<sup>54</sup> bilateral public finance institutions from the United States,<sup>55</sup> Brazil,<sup>56</sup> Canada,<sup>57</sup> France,<sup>58</sup> Germany,<sup>59</sup> Japan,<sup>60</sup> the Netherlands,<sup>61</sup> and Norway;<sup>62</sup> the Green Climate Fund;<sup>63</sup> the UN Development Programme,<sup>64</sup> and the World Wildlife Fund.<sup>65</sup> The norm of accountability through a set of environmental and social standards ‘enforced’ by a citizen-driven process is now fully accepted in the international finance and development context. Even the China-dominated Asia Infrastructure Investment Bank, established in many respects as an

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53. IFC and MIGA’s mechanism is the Compliance Advisor/Ombudsman, COMPLIANCE ADVISOR OMBUDSMAN, <https://perma.cc/84M6-XZQ3> (last visited Apr. 17, 2020).

54. European Investment Bank Compliance Mechanism, *Accountability*, EUR. INV. BANK, <https://perma.cc/5H88-FR27> (last visited Apr. 17, 2020).

55. U.S. International Development Finance Corporation’s (“DFC”) Office of Accountability, *Office of Accountability*, U.S. INT’L DEV. FIN. CORP., <https://perma.cc/BK68-WX2R> (last visited Apr. 17, 2020); see also Harvey A. Himberg, *The New Accountability and Advisory Mechanism of the Overseas Private Investment Corporation: The Application of International Best Practices of International Financial Institutions*, in DURWOOD ZAELKE ET AL., 7TH INTERNATIONAL CONFERENCE ON ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT 307–16 (2005), <https://perma.cc/Q9NB-BDGW> (this paper analyzes the options and outcomes by which the U.S. Overseas Private Investment Corporation (“OPIC”) designed an accountability and advisory mechanism).

56. The Brazilian Development Bank (“BNDES”), Ombudsperson, *Ombudsperson*, BRAZILIAN DEV. BANK, <https://perma.cc/LYU4-8T2P> (last visited Apr. 17, 2020).

57. *Corporate Sustainability and Responsibility*, EXP. DEV. CAN., <https://perma.cc/R5RD-JYLT> (last visited Apr. 17, 2020).

58. French Development Agency (“ADF”) Environment and Social Complaints Mechanism, *E & S Complaints Mechanism*, FRENCH DEV. AGENCY (“AFD”), <https://perma.cc/5D58-5YMJ> (last visited Apr. 17, 2020). Another French agency that does private sector financing, the French Development Finance Institution (“PROPARCO”), shares the Independent Complaints Mechanism with German and Dutch institutions. See *Independent Complaints Mechanism*, FMO, <https://perma.cc/HN35-TXWE> (last visited Apr. 17, 2020).

59. The German Deutsche Investitions- und Entwicklungsgesellschaft (“DEG”), French Development Finance Institution (PROPARCO), and Dutch Entrepreneurial Development Bank (“FMO”) share the Independent Complaints Mechanism. See *Independent Complaints Mechanism*, FMO, <https://perma.cc/HN35-TXWE> (last visited Apr. 17, 2020).

60. Japan Bank of International Cooperation, Major Rules for Establishment of Examiner for Environmental Guidelines, issued on May 1, 2003, <https://perma.cc/6DK9-XBZT> (last visited January 26, 2007); Nippon Export and Investment Insurance (NEXI) Objection Procedures on Environmental Guidelines, *Objection Procedures on Environmental Guidelines*, NIPPON EXP. AND INV. INS. (“NEXI”), <https://perma.cc/WDP4-4XCF> (last visited Apr. 17, 2020).

61. See *supra* note 59.

62. Nordic Investment Bank Complaints, *Compliance & Anti-Corruption*, NORDIC INV. BANK, <https://perma.cc/HK3U-PYZP> (last visited Apr. 17, 2020).

63. Green Climate Fund Independent Redress Mechanism, *GCF’s Independent Redress Mechanism*, GREEN CLIMATE FUND, <https://perma.cc/L5XX-PH7U> (last visited Apr. 17, 2020).

64. United Nations Development Programme, Social and Environmental Compliance Unit (“SECU”) and Stakeholder Recourse Mechanism, *Social and Environmental Compliance Review and Stakeholder Response Mechanism*, U.N. DEV. PROGRAMME, <https://perma.cc/KFL8-A9TH> (last visited Apr. 17, 2020).

65. World Wildlife Fund Ombudsman, *Ombudsperson*, WORLD WILDLIFE FUND, <https://perma.cc/6MQL-8R7P> (last visited Apr. 17, 2020).

alternative to the World Bank, has adopted environmental policies and an accountability mechanism.<sup>66</sup>

These mechanisms share a lot in common: their mission, goals, eligibility criteria, operating procedures, reporting lines, and remedial authority (or lack of it).<sup>67</sup> The environmental and social norms are also broadly similar to one another. To some extent, the similar design of IAMs reflects the similar political, legal, and structural context of the underlying IFIs. “Independence” means reporting either to the President or the Board. The loans provide the mechanism for imposing the standards. The interest in maintaining state sovereignty limits the investigation powers. The ultimate decision-making power typically rests with the member states as expressed through the executive directors.

The convergence of approaches also reflects civil society’s active advocacy for mechanisms at each institution that reflected certain principles—*independence, transparency, accessibility, and effectiveness*. These principles allow for some variation for purposes of “institutional fit,” but in general the similarities of IFI accountability systems outweigh their differences.<sup>68</sup> This permits evaluation of mechanisms against one another, pushing for adoption of best practice and evaluating each mechanism’s effectiveness in its particular institutional context. It also allows us to evaluate the mechanisms as a group and their collective experience in improving the accountability of IFIs more generally.

Together, the IAMs, the financial institution staff, the member governments, and the civil society organizations that bring cases or work on related policies, have created a *sui generis* system of accountability whereby IFIs are held accountable to affected people for complying with institution-specific norms established to protect their rights and environment. This can be thought of as a form of *contextual accountability*—whereby actors or groups of actors are subject to similar processes to hold them accountable to a similar set of norms with both the process and the norms evolving over time to fit their specific context. What then is meant by accountability in the IFI context?

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66. Asian Infrastructure & Investment Bank, AIIB Project-Affected People’s Mechanism, *Policy on the Project-Affected People’s Mechanism*, ASIAN INFRASTRUCTURE INV. BANK, <https://perma.cc/8MJY-QPYA> (last visited Apr. 17, 2020).

67. Accountability Counsel, an organization dedicated to helping communities avail themselves of the accountability mechanisms, hosts a database of all complaints to the mechanisms called the Accountability Console. For a comparative assessment of the various mechanisms, see Daniel B. Bradlow, *Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*, 36 GEO J. INT’L L. 403, 453–462 (2005); SOMO, ET AL., GLASS HALF FULL? THE STATE OF ACCOUNTABILITY IN DEVELOPMENT FINANCE (2016), <https://perma.cc/D7SH-N9DT> (providing a civil society’s critique of the various IFI accountability systems) [hereinafter *Glass Half Full Report*].

68. See Bradlow, *supra* note 67, at 462–67.

## A. DEFINING ACCOUNTABILITY IN THE IFI CONTEXT

Accountability is a broad term that generally refers “to the process of holding actors responsible for their actions.”<sup>69</sup> Political scientists describe accountability as involving “the justification of an actor’s performance vis-a-vis others, the assessment or judgment of that performance against certain standards, and the possible imposition of consequences if the person fails to live up to applicable standards.”<sup>70</sup> By that definition, a complete and effective accountability system needs to have (1) a normative framework, (2) a process or mechanism for evaluating the actors’ behavior against the norm, and (3) consequences for non-adherent behavior.<sup>71</sup> Given the relational aspect of accountability, a framework that measures the ability of an accountability system to hold an actor (the responsible actor) accountable to another (the benefitting actor) should include:

- (1) the quality and nature of the normative standards in protecting the interests of the benefitting actor;
- (2) the accessibility, objectivity, and predictability of the mechanism or process in evaluating the responsible actor’s behavior against the standards;
- (3) the frequency, availability, and appropriateness of consequences that flow from the responsible actor’s failure to meet the standards, including whether the consequences inure to the benefit of the benefitting actor.

These three components cannot be evaluated separately from one another nor can they be evaluated apart from the specific context for which they were designed. Accountability systems, thus, at a minimum, require a reasonably ambitious normative framework and a process for evaluating performance against that framework. The strength of accountability depends on the strength of the enforcement mechanism and the strength of the normative standards.

Professor Brown Weiss generally embraces this view of accountability, but emphasizes the dynamic nature of accountability as it relates to consequences:

[Accountability involves] actors who hold other actors to certain legal rules, standards, or obligations, judge their fulfillment, and have ensuing consequences. However, accountability needs to be reconceived as mutual accountability and as a dynamic process in which learning takes place in response to holding actors accountable. Moreover, the focus on sanctions as the only consequence needs to be reconsidered to include other consequences for the many cases in

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69. Jonathan A. Fox & L. David Brown, *Introduction*, in FOX & BROWN, *supra* note 18, at 12.

70. Ruth W. Grant & Robert O. Keohane, *Accountability and Abuse of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 29–30 (2005).

71. BROWN WEISS, *ESTABLISHING NORMS*, *supra* note 10, at 329; *see also* Brown Weiss, *On Being Accountable*, *supra* note 1, at 489 (identifying learning lessons and improving performance as the fourth phase of the accountability framework).

which the reason why an actor may not have met the obligation is relevant to holding the actor to account.<sup>72</sup>

Extending the analysis of accountability to envelop its consequences is critical, for it extends the understanding of what we can gain from an accountability system. Beyond the sanctioning purpose implicit in the concept of “holding one accountable,” accountability systems should also, as suggested by Professor Brown Weiss, deliver lessons that can shape future behavior. Learning your lesson is part of being accountable. Imposing sanctions and learning lessons are not sufficient, however. Accountability systems should also lead to restitution and remedy for those harmed by non-compliant behavior. Making right by others is also part of being held accountable.

## B. EVALUATING IFI ACCOUNTABILITY SYSTEMS: THE FAILURE TO DELIVER CONSEQUENCES

A relatively cursory review of the World Bank’s safeguard/Panel accountability system according to the three characteristics above can reveal some general conclusions about its strength as an accountability system. Because the systems at the other IFIs are generally similar, our conclusions reached with respect to the Panel can generally be extended to other accountability systems operating in the IFI context.<sup>73</sup>

### 1. The Quality and Nature of the Normative Standards

In 2018, the World Bank replaced their safeguard policies with “performance standards” as part of a wholly new “Environmental and Social Framework.”<sup>74</sup> The cornerstone of the World Bank’s performance standards remains environmental and social risk assessment, with due diligence and mitigation requirements being shaped by the level of risk. Those classified as “High” or “Significant” risk are subject to stricter obligations.<sup>75</sup> During the assessment process, the Bank is expected to identify any issues relevant to compliance with the performance standards and any steps that should be taken to achieve compliance or mitigate impacts. In addition to addressing the environmental aspects of projects, the Bank’s performance standards include some relatively strong policies on

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72. BROWN WEISS, ESTABLISHING NORMS, *supra* note 10, at 329; *see also* Brown Weiss, *On Being Accountable*, *supra* note 1, at 489 (identifying learning lessons and improving performance as the fourth phase of the accountability framework).

73. For an evaluation of the various IFI accountability systems, *see Glass Half Full Report*, *supra* note 67, at 24–53.

74. In October 2018, the Bank launched a new “Environmental and Social Framework” (“ESF”), which includes a new set of the ten Environmental and Social Standards (“ESS”), which replace the former safeguard policies in setting out the requirements that apply to Borrowers. *See* WORLD BANK, THE WORLD BANK ENVIRONMENTAL AND SOCIAL FRAMEWORK (2017), <https://perma.cc/EK8X-57ND> [hereinafter WORLD BANK ENVTL. & SOC. FRAMEWORK].

75. *See id.* at 15–30 (Envtl. & Soc. Standard 1: Assessment and Management of Environmental and Social Risks and Impacts).

a range of social issues, including community engagement,<sup>76</sup> compensation for people involuntarily resettled,<sup>77</sup> protection of indigenous peoples,<sup>78</sup> and labor standards.<sup>79</sup> These standards provide important protections for affected communities that often go beyond the approaches found in national law.

The standards do have some glaring gaps, most notably the lack of a clear commitment to ensure Bank projects do not contribute to violations of human rights. In addition, the Bank's shift from mandatory "safeguard" policies to aspirational "performance standards" signaled a clear move toward allowing more discretion in the Bank's exercise of its professional judgement. And the Bank occasionally takes steps that could undermine the applicability of the standards, like the initiative to use country systems discussed above. Of course, the bearers of the risks associated with adding discretion or reducing applicability of the standards are exactly the affected communities who are the intended beneficiaries of the standards.

## 2. The Accessibility, Objectivity, and Predictability of the Mechanism

Although CSOs have raised serious concerns regarding the extent to which affected people are informed about their rights to access the Panel, for the most part access to the Panel is fair and reasonable. Requests for inspection can be filed by any two or more affected people in the borrower's territory.<sup>80</sup> The Panel accepts complaints in any language and in any written form. Some of the criteria, for example that there has been a violation of the Bank's policies, can be difficult for affected people to determine without assistance, but the Panel has historically worked with potential claimants to assist them with some of the information needed to file.

The Panel has functioned objectively and, within the constraints of its resolution, has made the Panel a comfortable place for affected claimants to bring their claims. As illustrated by Professor Brown Weiss, Panel members have operated

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76. *Id.* at 97–102 (Envtl. & Soc. Standard 10: Stakeholder Engagement and Information Disclosure).

77. *Id.* at 53–66 (Envtl. & Soc. Standard 5: Land Acquisition, Restrictions on Land Use and Involuntary Resettlement); see also ROBERT PICCIOTTO, WARREN VAN WICKLIN, & EDWARD RICE, *INVOLUNTARY RESETTLEMENT: COMPARATIVE PERSPECTIVES* (2001) (discussing experiences in implementing the World Bank resettlement policy).

78. WORLD BANK ENVTL. & SOC. FRAMEWORK, *supra* note 74, at 75–84 (Envtl. & Soc. Standard 7: Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities). For a discussion of the evolution of the World Bank's indigenous peoples' policy, see Andrew Gray, *Development Policy, Development Protest: The World Bank, Indigenous Peoples, and NGOs*, in FOX & BROWN, *supra* note 18, at 267; see also Fergus MacKay, *Universal Rights or a Universe unto Itself? Indigenous Peoples' Human Rights and The World Bank's Draft Operational Policy 4.10 on Indigenous Peoples*, 17 AM. U. INT'L L. REV. 527 *passim* (2002); EMILY CARUSO, ET AL., *EXTRACTING PROMISES: INDIGENOUS PEOPLES, EXTRACTIVE INDUSTRIES AND THE WORLD BANK passim* (2003), <https://perma.cc/4Y4L-M334>.

79. WORLD BANK ENVTL. & SOC. FRAMEWORK, *supra* note 74, at 31–38 (Envtl. & Soc. Standard 2: Labor and Working Conditions).

80. *2014 Panel Operating Procedures*, *supra* note 25.



independently, while keeping the interests of affected communities squarely in mind. Professor Brown Weiss's practice of returning to the claimants at the end of an investigation is a prime example of improving the Panel experience for claimants without going beyond the limits of the Panel's resolution. The Panel has experimented with dispute resolution in ways that distorted the eligibility requirements in several cases. Otherwise, the Panel has only rarely departed from its relatively detailed operating procedures and resolutions.

### 3. The Frequency, Availability, and Appropriateness of Consequences

Issues relating to the standards and to the Panel's operations although important, pale in comparison to the issue of whether there are consequences for any aberrant behavior of the Bank; yet, this is arguably the ultimate measure of an accountability system's effectiveness. Does the system result in meaningful sanctions, institutional learning and restitution for harm? In the Panel context, the Bank staff are being held accountable to affected people for their compliance with environmental and social standards meant to protect those people from harm. What consequences flow from non-compliant behavior at the Bank or other IFIs as a result of the accountability system?

In this regard, the Panel's authority is so restricted that it undermines any consequences from accountability. The Panel is limited to investigating and making findings of non-compliance in reports sent to the Board of Directors and ultimately made public. The Panel makes no recommendations of any kind, requiring action from the staff to carry out any action plan or other response to the findings. This means that any consequences—whether sanctions, changes in future behavior from lessons learned, or a remedy for people harmed by the non-compliance—are left up to the discretion of the Bank staff and to a lesser extent the Board of Directors. The IAMs' general lack of consequential authority is a major shortcoming of the IFI accountability systems.

#### *a. Sanctions*

The sanctions available in this context include the discomfort that comes from the investigation and the disclosure of maladministration to the top levels of the Bank. This exposure of non-compliance can be embarrassing and can bring significant pressure on to the Bank staff that are implicated. Neither the civil society proponents of the Panel nor the Panel itself see the Panel as a means for singling out or punishing individual staff members for their performance.

On the other hand, there should be consequences for staff who regularly ignore environmental and social concerns during project development. Staff performance evaluations at the Bank should include criteria relating to how the staff member works with environmental and social staff. Ensuring project quality should be part of this review, even though this may require taking into account the outcomes of projects from years earlier. A staff member's cooperation with

the Inspection Panel and willingness to engage constructively with the Panel's findings should be factored into performance evaluations, even if the actual findings are not used to demonstrate poor performance. Such an approach would de-emphasize findings of substantive disagreement between staff and the Panel, and emphasize better staff cooperation with the Panel.

*b. Lessons Learned*

A staff evaluation approach that rewards a willingness to engage with the Panel's findings would be consistent with Professor Brown Weiss's views that the consequences from accountability should focus less on sanctions, and more on learning lessons to avoid future harm. Ensuring the routine "up-take" of lessons learned from Panel cases has proven more difficult than expected. Except in high profile cases, the Bank has largely ignored the broader implications of Panel findings. Even those IAMs that have established formal "advisory services" to publish and communicate their lessons learned have been disappointed in the relative willingness of Bank staff to engage. The Panel has begun issuing advisory papers in a formal effort to provide broader lessons to the Bank and others.

Of course, there is no guarantee that Bank project staff will read them or be incentivized to incorporate lessons learned into how they process loans. This is not just a problem staff has learning from the Panel; it has been well documented for nearly 30 years that the pressure to lend creates an "approval culture" that forecloses institutional learning. As reported by the Bank's Independent Evaluation Group in 2014: "In the Bank, lending pressure—the survival of what Willi A. Wapenhans referred to in 1992 as the 'approval culture'—is seen by staff as crowding out learning even today."<sup>81</sup> The IEG continued: "There is a problem with learning and knowledge sharing in the Bank, 'Something is not working because the problems we are encountering in today's projects are the same problems encountered in projects many years ago . . . . [We] keep making the same mistakes because we do not learn from earlier experience.'"<sup>82</sup> After three decades of diagnosis, what is still missing at the World Bank and most of the other IFIs is an institutional culture that rewards project quality (and thus learning from mistakes) over project quantity.

*c. Remedy*

The Panel and indeed all of the IAMs have been faulted for their failure to consistently provide remedy to affected people, even when their reports have shown

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81. INDEP. EVALUATION GRP., WORLD BANK GRP., *LEARNING AND RESULTS IN WORLD BANK OPERATIONS: HOW THE BANK LEARNS* viii (2014), <https://perma.cc/5SKY-8VHR> (citing WILLI A. WAPENHANS, *EFFECTIVE IMPLEMENTATION: KEY TO DEVELOPMENT IMPACT*, WORLD BANK REPORT OF THE PORTFOLIO MANAGEMENT TASK FORCE 12–13 (1992)).

82. *Id.* at 1 (quoting WAPENHANS, *supra* note 81, at 12–13).

significant non-compliance.<sup>83</sup> Under the Panel's approach and indeed that of all other IAMs, remedy for harm is supposed to be provided by a staff-developed action plan approved by the Board. The Panel's findings are sent to Bank management, who then develop an action plan in response to the findings. That management action plan is then sent along with the Panel findings to the Board for its review. The Panel does not have the opportunity to comment on the action plan's adequacy nor is the action plan sent to the claimants or released to the public. Under new rules, the Bank may make a summary of the action plan available in the future. This approach was intended to ensure the Panel did not become responsible for implementation, but it assumes that Bank management would be proactive in addressing problem areas. This is not evident and in fact an internal review found that "[i]n FY18, all action plans were delayed by an average of more than 200 business days."<sup>84</sup> Ultimately, whether the management action plan provides any effective remedy for affected people depends on the Board's engagement and oversight. Otherwise, internal Bank documents suggest that staff are not effectively monitoring implementation of action plans.

The annual process of tracking and reporting on implementation of management's action plans has problems. Focus group discussions with management counterparts reveal that staff assigned to prepare the annual progress update regard it as a bureaucratic exercise without formal space in their work programs and with unclear links to operational work.<sup>85</sup>

In practice, depending on the Board is also problematic, because the Board cannot easily engage on projects at the technical level—hearing only the management's action plan they are inclined to adopt it. This changes only when public controversy draws the Board's attention to a specific project. Not surprisingly, this incentivizes civil society organizations to seek press coverage and politicize what might otherwise be a technical discussion. Greater transparency and participation of affected people in developing the management action plan would improve the accountability systems' potential to deliver meaningful actions at the project level.

This may not be enough to ensure remedy. In recent years, civil society has pressed the IFI accountability systems to provide effective remedy, consistent with the right to remedy under human rights law.<sup>86</sup> The explicit focus on remedies, as such, is a relatively new development; until recently, remedy was considered implicitly as an inherent component of accountability. CSO demands for remedy have led to recent proposals for a remedy fund at the Bank and other IFIs that would ensure project-affected people are provided restitution for the harms

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83. See *Glass Half Full Report*, *supra* note 67, at 52–53, 63.

84. INDEP. EVALUATION GRP., WORLD BANK GRP., RESULTS AND PERFORMANCE OF THE WORLD BANK GROUP 2018: AN INDEPENDENT EVALUATION 24 (2018), <https://perma.cc/YGR7-6TXM>.

85. *Id.* at 25.

86. See *Glass Half Full Report*, *supra* note 67, at 14, 126–27.

they incurred from the Bank's non-compliance.<sup>87</sup> Under some versions of this approach, the Panel would be provided the authority to compensate for harms that persist or will persist after a management action plan has been implemented.

The lack of meaningful consequences, including the routine failure to provide benefits at the project level (either by forcing a project change or by paying restitution) is a fundamental shortcoming of all of the IFI accountability systems. The problem lies not with the failure of the Panel or other IAMs to carry out their mandate; the failure lies with management who dismiss Panel findings and deliver inadequate action plans. Among other things, this suggests that evaluating the effectiveness of an accountability *mechanism* requires evaluating the entire accountability *system* at work.

#### IV. CONTEXTUAL ACCOUNTABILITY AND INTERNATIONAL LAW IN A KALEIDOSCOPIC WORLD

The CSOs' calls for IFI accountability systems to provide a remedy for people harmed by the Bank's non-compliant behavior highlight the importance of strengthening the "legal" character of IAM reports. By arguing that IFIs have an obligation to fulfill the right to remedy when the Panel and other IAMs find that a claimant is harmed by the Bank's non-compliance, the CSOs are recognizing that the IFI environmental and social standards have some legal character and that the Panel is a quasi-judicial arbiter of whether there is compliance. After all, the right to a remedy is an international law concept that in its original form obligated states to provide a remedy for every legal wrong. To what extent is the safeguard/Panel system a "legal system" that could give rise to derivative rights like the right to remedy? The Bank and other opponents to the proposition that the Bank should be obligated to fulfill the right to remedy argue, persuasively, that the Bank's standards are not international law and thus any non-compliance does not implicate the right to remedy.

The argument that the performance standards are not a form of international law is at first blush quite clear. Although there may be strong pressures to comply with the standards and even though they may be conditions agreed to in specific loan agreements, the performance standards are not in a form that typically indicates a state's consent to be bound generally. That is, the standards were not negotiated with the intention of forming a binding treaty. Rather, they are the regulations of an international organization, governing that organization's behavior and the behavior of those entities that want to borrow from it. These standards are clearly not a treaty nor do they reflect custom or general principles of law—and thus they are not "international law" as widely defined by the Statute of the ICJ.<sup>88</sup> This is not just an academic discussion over labels, because as noted above a right

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87. See Sophie Edwards, *Calls for IFC to Create 'Remedy Fund' to Compensate Harmed Communities*, DEVEX (Oct. 31, 2019), <https://perma.cc/S9CU-8NL6>.

88. See ICJ Statute, *supra* note 8, at art. 38(1).

to remedy flows from a violation of international law. To the extent the definition excludes the standards found in an accountability system, the harder it is to ensure that non-compliance bears consequences.

The issue is raised by a wide range of accountability systems, operating in various contexts and involving the application of standards in the international sphere that clearly do not fit the traditional definition of international law. Carl Bruch, Imad Antoine Ibrahim and Rachel Lerner in this volume highlight the Kimberley Certification System for diamonds and the Extractive Industries Transparency Initiative on payments to governments.<sup>89</sup> Other examples include certification standards enforced through corporate supply chains, such as the norms promoted by the Forest Stewardship Council<sup>90</sup> or the Roundtable on Sustainable Palm Oil;<sup>91</sup> technical standards in the financial sector that are negotiated and “enforced” by financial regulators;<sup>92</sup> or the OECD’s Guidelines for Multinational Enterprises, which are enforced through a system of “national contact points.”<sup>93</sup> How do we square the dynamic growth and increasing scope of these accountability systems with the relatively narrow, state-centered definition of public international law? If we leave the safe harbor of state consent as reflected in the ICJ Charter’s sources of law, what replaces it for understanding the boundaries of international law?

In her recent writings on international law in a kaleidoscopic era, Professor Brown Weiss begins to provide an answer—one in which public international law is defined more broadly to include the range of ways different actors establish norms to constrain the behavior of other actors across borders in a globalized world. Professor Brown Weiss’s metaphor of a kaleidoscope is as brilliant as it is colorful. Our view of international law as a neat beam of light flowing through the consent of states, through the narrow sources of Article 38, and then back on to states again as subjects of the law is too limited to capture the scale, diversity, and complexity of normative frameworks that are being developed, implemented, and in some ways enforced by a host of state and non-state actors. The dizzying array of initiatives, frequently lumped under the catch-all concept of soft law, is to many an unchartable, disorderly mess. But when viewed through Professor Brown Weiss’s kaleidoscope of shifting contexts, these accountability systems can be understood both in their specific context and as collectively forming a

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89. Carl Bruch, Imad Antoine Ibrahim & Rachel Lerner, *Greenish, But with More Dimensions: A Framework for Identifying Binding Instruments of International Environmental Law*, 32 GEO. ENTL. L. REV. 485 (forthcoming 2020); see also BROWN WEISS, ESTABLISHING NORMS, *supra* note 10, at 352–90 (discussing accountability in different contexts).

90. See FOREST STEWARDSHIP COUNCIL, <https://perma.cc/683Y-E7X6> (last visited Mar. 24, 2020).

91. See *About*, RSPO ROUNDTABLE ON SUSTAINABLE PALM OIL, <https://perma.cc/8XF5-HVLW> (last visited Mar. 25, 2020).

92. Daniel Bradlow, *Soft International Law and the Promotion of Financial Regulation and Responsibility*, in *ADVOCATING SOCIAL CHANGE THROUGH INTERNATIONAL LAW*, *supra* note 5, at 203–04, 206–07.

93. ORG. OF ECON. COOPERATION & DEV., *OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* 3, 68 (2011), <https://perma.cc/BWG3-MT5F>.

comprehensive system of accountability. The kaleidoscopic view of international law does not bring order to this chaos as much as it embraces and addresses the chaos on its own terms.

International law in a kaleidoscopic world must inevitably challenge a system based on the consent of only one actor (states) and norms that must meet a certain form (Article 38). Accordingly, this leads Professor Brown Weiss to re-conceptualize public international law in a way that frees it from the constraints of Article 38 formalism and the resulting (and ultimately unsatisfying) differentiation between hard and soft international law. In its place, Professor Brown Weiss proposes a broad and inclusive approach—one that makes room for a diversity of contextual accountability systems comprised of a diversity of norm creators and subjects, stakeholders, sources of law, substantive norms, and accountability mechanisms:

The time has come to consider reconceptualizing public international law in the context of the kaleidoscopic world and the Epoch of the Anthropocene. A reconceptualized public international law would include that body of norms, international agreements, rules and general principles, non-binding legal instruments, and voluntary commitments that address an internationally recognized public purpose or problem. The instruments could address relations between States, a common or global public goods issue, a transnational issue, a problem of an international institution, human rights of individuals or a community, or other issues invoking an internationally recognized public purpose or problem. In such a reconceptualized body of international law, legal instruments could be written or oral, so long as they have been authoritatively proffered.

Thus, the reconceptualization encompasses not only traditional public international law, but also elements of private international law, transnational law and domestic law to the extent that they meet the criteria of addressing an internationally recognized public purpose or problem. It is a useful construct to identify what constitutes international law in a kaleidoscopic world, because it lets us identify and aggregate the multiple laws and legal regimes that may be relevant for addressing any of a broad range of issues, such as workplace safety and health in the textile industry, exploitation of tropical forest, limits to greenhouse gas emissions, advances in gene editing, actions by terrorist networks, or problems of international refugees or displaced persons.

Reconceptualizing the contours of public international law maintains traditional public international law. Traditional public international law rules still govern the relations between states and between states and those subject to their jurisdiction. Inclusive conceptualization of public international law links the relevant actors and legal instruments in ways that bring them to bear on a specific set of problems, without confining them within specific silos.<sup>94</sup>

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94. BROWN WEISS, ESTABLISHING NORMS, *supra* note 10, at 406–08.



Accountability plays a critical role in this kaleidoscopic view of international law. The norm of accountability serves as the enforcement principle for an international system that contains many different state and non-state actors, applying many different norms in many different contexts. As Professor Brown Weiss points out, the principle of accountability provides much the same role in kaleidoscopic international law as does the principle of state responsibility in traditional state-centered international law.

In the kaleidoscopic view of international law, the safeguard/Panel system is one of many contextualized systems that are reshaping and reframing international law. There are others as well that meet some or all of the reconceptualized definition of public international law: “that body of norms, international agreements, rules and general principles, non-binding legal instruments, and voluntary commitments that address an internationally recognized public purpose or problem.”<sup>95</sup> As noted above, examples include certification systems such as the Forest Stewardship Council,<sup>96</sup> the Roundtable on Sustainable Palm Oil,<sup>97</sup> or the Kimberley Process.<sup>98</sup> Within each context, the accountability systems may share common goals, approaches and processes and thus can be benchmarked against each other. Across the systems, we can also examine whether they hold the targeted entities accountable to a set of norms and consequences.

#### CONCLUSION

The Inspection Panel was an experiment born in part by a vision of global society that holds international organizations, like the World Bank, accountable not just to states but directly to the people whose operations they affect. In this vision, international law becomes democratized to reflect broader social values expressed through the voice of people—not only translated through the prism of 200 nation-states and their diplomatic corps.

At the time of its creation, the Panel was a radical departure from the prevailing state-centered view that dominated perspectives of international law. Even as the approach of citizen-oriented, bottom-up accountability spread throughout international financial institutions, it was easy to dismiss the approach as not “hard” international law. It was also easy to dismiss those who sought alternative forms of international accountability as not real international lawyers.

Such arguments risk delegitimizing the evolution of contextual accountability systems like the one epitomized by the Inspection Panel. They also perpetuate a state-centric view of international law that seems increasingly out of place in a world where diverse actors create and enforce diverse standards through diverse processes and mechanisms. Debates over whether these contextual accountability

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95. *Id.* at 406.

96. See FOREST STEWARDSHIP COUNCIL, *supra* note 90.

97. See RSPO ROUNDTABLE ON SUSTAINABLE PALM OIL, *supra* note 91.

98. See Bruch, et al, *supra* note 89.

systems are or are not international law also obscures the more important question of whether they can deliver consequences—sanctions, lessons learned, and remedy—for aberrant behavior that harms others, particularly those who are most vulnerable, most marginalized, and thus most in need of law's ability to deliver justice.

Through her work on the Inspection Panel and her subsequent explanation of how the Panel's contextual accountability fits the evolving nature of our kaleidoscopic world, Professor Brown Weiss helped to legitimize the Inspection Panel as a cutting-edge component of a pluralistic, inclusive conception of international law necessary to tackle the diverse and complex challenges facing our global community. In so doing, she legitimized those of us who promoted these contextual accountability systems as part of the field of international law. More importantly, she legitimized the rights of affected people to defend their interests and have their voices heard directly in the international legal system, clearing the way for future efforts to align international law with justice for those most marginalized and vulnerable.