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1 International Recourse for Environmental and Social Harm

Can environmental and social harm, such as species extinction and loss of land, be effectively addressed at the international level? Although harms such as these may be inflicted on individuals, communities, and ecosystems within the confines of territorial borders, rapid changes in the international political economy over the last few decades has increased the possibility of environmental and social harm caused or facilitated by transnational or international actors such as multinational corporations (MNCs) and intergovernmental organisations (Mason 2005). While environmental and social harm caused by actors operating beyond the state is by no means new, over time the volume of interactions has increased, resulting in further environmental degradation with the likelihood for conflict and greater harm (Carmen and Agyeman 2011; Temper et al. 2018). Moreover, corporations, states, and international organisations increasingly work together in public–private partnerships that raise questions as to their responsibility and accountability (Andonova 2017; Biermann 2014).

In response to these trends there has been an attendant proliferation of global governance, such as multilateral environmental agreements (MEAs) and their secretariats that seek to regulate states environmental impact (Biermann and Siebenhuner 2009; Mitchell 2002–2019). Yet states have also allowed transnational private bodies and international organisations the authority to establish global norms and rules (Block-Lieb and Halliday 2017; Park and Kramarz 2019). This authority has extended to the settlement of international disputes, particularly for commercial actors such as foreign investors, with environmental and social implications (Mattli and Dietz 2014; Tienhaara 2009). It has also led to new avenues for people and communities to hold actors to account for environmental and social harm beyond the state (Hertogh and Kirkham 2018).

This section outlines the difference between legal and non-legal avenues for international recourse to highlight an underexamined global trend towards the proliferation of international grievance mechanisms (IGMs), defined as international mechanisms created by transnational or international actors that give affected or potentially affected people the right to seek recourse for the impacts of their activities, especially where they have no access to a liability mechanism.[1] This is important, given arguments that global governance is undemocratic, state driven, and selective in opening up participation (Moravcsik 2004; Tallberg et al. 2013). As grievance mechanisms move to the international level, there needs to be a thorough investigation of how they address environmental and social harm.

[1] On the absence of liability mechanisms, see Richards (n.d).

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This Element therefore has three aims: first, it identifies the normative standards underpinning international grievance mechanisms globally. It highlights how they seek to uphold procedural environmental rights: specifically, the right to participation, the right to access information, and the right to access justice in environmental matters. To this I add an analysis of how the rights of nature fare in these people-centred recourse processes, given the acceleration of global environmental change and the demands communities make for environmental protection (Park 2019). Investigating the rights of nature is imperative because the environment cannot act for itself and to date has few rights accorded to it (on legal rights accorded to nature, see Kauffman and Sheehan 2019). This is even more compelling considering the global scale and accelerating rate of environmental change (ESG 2018), with precipitous alterations in natural systems (Steffen et al., 2015). The Element is focused on site-specific environmental and social harm, although these do feed into and are affected by larger ecological systems change. Second, the Element examines a class of international grievance mechanisms, the independent accountability mechanisms of the multilateral development banks. This is for three reasons: first, they have amassed considerable experience in responding to environmental and social claims from people harmed by international development projects financed by the MDBs over the last two decades (see Park 2019). Second, they are comparable in function and structure, given they all used the World Bank's Inspection Panel as the template from which to tailor their own mechanisms (Park 2017). This Element questions the activities of the international grievance mechanisms of the World Bank and World Bank Group[2]; the Asian (ADB), African (AfDB), and Inter-American Development Banks (IDB); and the European Bank for Reconstruction and Development (EBRD). Third, analysing these mechanisms is important because as large-scale, high-profile public funders they are 'most likely' cases for international grievance mechanisms to actually operate compared with less transparent private sector (Macdonald and Macdonald 2017) or lesser known and less resourced public funders (Zappile 2016).

[2] The International Bank for Reconstruction and Development (IBRD) is popularly known as the World Bank, which also manages funding from the International Development Association (IDA). The World Bank Group is composed of the International Finance Corporation (IFC), a private-sector lender and investor; the Multilateral Investment Guarantee Agency (MIGA), a political risk insurer; and the International Centre for Settlement of Investment Disputes (ICSID), an arbitration body. IFC and MIGA have the same member states as the World Bank on their Boards but have different voting weights, and decisions for IFC and MIGA are made separately from the World Bank and from each other (i.e. by IFC and MIGA management under their executive vice presidents). The president of the World Bank is also the president of the World Bank Group. Over the last decade, there has been a push to bring the separate entities closer together under a single World Bank Group banner. Combined, in 2018, they committed, disbursed, and issued risk coverage amounting to over $45 billion (World Bank 2019).

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An important contribution to the debate over the value of having international grievance mechanisms at the international level is to examine how communities use them. I undertook a content analysis of 394 publicly available original grievance claims to the independent accountability mechanisms submitted between 1994 and the end of 2018 by people adversely affected by MDB projects. The analysis reveals that people do seek recourse for the Banks' failure to provide access to participation and access to justice, and they do use the mechanisms as a means for access to justice in environmental matters. It also reveals that people also seek recourse for nature beyond their own dependence on it. Finally, the Element empirically investigates the activities of these IAMs aims. In doing so, it evaluates the procedures established by the mechanisms to provide access to justice in environmental matters through two avenues: 'problem-solving', which entails direct discussion and engagement with communities, the project sponsor, and the Bank to rectify the problem and stop the harm; and 'compliance investigations', which determine whether it was Bank non-compliance with its environmental and social policies that led to the harm. In reviewing a database of all of the claims made publicly available by the IAMs (1,052 cases between 1994 and mid-2019) also highlights how access to justice in environmental matters through the problem-solving process does not necessarily solve people's grievances, given the voluntary nature of engagement with communities for the Banks and (often private sector) project sponsors. While the compliance investigation process does generally hold the Banks to account for contributing to harm through environmental and social policy non-compliance, more research is needed as to whether this in turn adequately addresses claimant's grievances. The remainder of this section situates and details the contours of international grievance mechanisms, before outlining the remainder of the Element.[3]

Legal and Non-legal Forms of International Recourse

Two forms of international recourse, legal and non-legal, are available for people who have suffered physical violence, loss of property and livelihoods, and irreparable environmental damage because of the activities of transnational and international actors. Both are important, and the reason for communities choosing one over the other may rest on several factors, as will be discussed. Legal processes like international courts and tribunals have increased in number (Alter 2014). Of these, some, such as the International Court of Justice,

[3] Of the 1,052 cases in the IAM database, only 394 of the original claimants' submissions are publicly accessible. This in part stems from the data collection of the mechanisms themselves, but is also based on whether people want their claims to be confidential or not.

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adjudicate disputes over natural resources, and others, such as the World Trade Organisation's Dispute Settlement Mechanism increasingly deal with environmental and human health risks (Foster 2011; Peel 2010). These are state-based legal processes, which may or may not be linked to the needs and desires of those directly harmed. Indeed, states are often complicit with transnational and international actors in economic activities, including the extraction of natural resources, and in financing large-scale infrastructure projects such as mines and roadways that facilitate harm. Moreover, because of past imperial resource extraction, developing states have used international law to protect their sovereign right to exploit natural resources (Pahuja 2011). This permanent right over natural resources rests with the nation, not with individuals or local communities. Obligations attendant to this right have also increased over time to include environmental conservation, to 'respect the rights and interests of indigenous peoples, and a duty to use natural wealth and resources in a sustainable way' (Schrijver 2010: 7–8).

The idea that individuals and communities have rights to their environment appeared in the 1972 Stockholm Declaration (Principle 1), 1992 Rio Declaration (Principle 10), Agenda 21, and in the 1987 World Commission on Environment and Development report (also known as the Bruntland report). Rio specifically 'formulated the link between human rights and environmental protection in . . . procedural terms' including participation, access to information, and access to redress and remedy. Such procedural rights are beginning to be incorporated into multilateral environmental agreements (Ognibene and Kariuki 2019: 176–7). However, procedural environmental rights are rarely codified on their own in international environmental law (Conca 2015: 74–5). Two exceptions to this are regional United Nations (UN) conventions: the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which is housed under the United Nations Economic Commission for Europe (otherwise known as the Aarhus Convention, Mason 2005); and the 2018 Escazú Agreement, a binding regional treaty for Latin America by the United Nations Economic Commission for Latin America and the Caribbean.

Currently, there are forty-seven parties to the Aarhus Convention, with states agreeing to provide their publics with these rights, while the Escazú Agreement has seventeen signatories and one ratification. While not yet a treaty, there is also the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP). The declaration details that states should consult with Indigenous Peoples in managing resources, including that no forcible relocation can occur without their free, prior and informed consent; that Indigenous Peoples have rights to their traditional lands; and that they have the right to redress and to just, fair, and

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equitable treatment if their land has been taken without free, prior and informed Consent (Schrijver 2010: 72). Multilateral environmental agreements, the regional conventions, and the Declaration relate to how states should advance procedural environmental rights for their citizens. In 2018, the UN Special Rapporteur on Human Rights and the Environment reinforced the need for states to protect these rights (UN 2018).[4]

Recognisably, the main avenue for recourse and remedy for people adversely affected by the activities of transnational and international actors is through national legal or political means. However, there are strong reasons why people may choose international procedures for recourse (Lukas et al. 2016: 4), not least because they may put themselves in grave harm for speaking out to protect their environment (Butt et al. 2019). For this reason, the Escazú Agreement specifically includes protections for environmental defenders (Article 9). Local actors may choose to work with international NGOs to instigate the boomerang process to request international actors to force domestic change (Keck and Sikkink 1998; Matejova et al. 2018). International attention may also provide some protection against state reprisal. Other considerations may also play a deciding role, including the extent to which the transnational or international actor is the primary producer, investor, or financier of the activity contributing to harm, and therefore the best means to stop it (Park 2013). The capacity of the state to address complainants' concerns may also shape the decision to choose international fora.

The second form of recourse, and the focus of this Element, is a non-judicial process of using International Grievance Mechanisms (IGMs).[5] These seek to provide direct recourse for people and their environments adversely affected by the actions of transnational and international actors (Macdonald and Miller Dawkins 2015; Richard 2017).[6] Given that there may be a disjuncture between state-based international law and the interests of people and ecosystems, this Element does not examine international law as a form of recourse. Rather it probes how non-judicial processes work to ameliorate environmental and social harm when claims are instigated by people on behalf of their communities and ecosystems. This is especially important as IGMs may ascertain that they can only play a role if judicial recourse cannot or has not been instigated.

[4] The United Nations Environment Programme also devised the Bali Guidelines in 2010 for how states should meet Rio Principle 10, closely adhering to the Aarhus Convention (Ognibene and Kariuki 2019: 190; UNEP 2010).

[5] Most non-judicial mechanisms do not claim to offer a remedy that will solve the problem, focusing instead on the provision of recourse or the ability to air grievances that may lead to redress, or a means of amending the situation (through, for example, compensation for loss).

[6] Also known as non-state-based non-judicial grievance mechanisms (NSBGM), Zagelmeyer et al. 2018.

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Types of International Grievance Mechanisms

There are a variety of different international grievance mechanisms – from the MDBs' independent accountability mechanisms, to ombudsmen, to multi-stakeholder forums that transnational and international actors may operate globally, regionally, or at the local level. The independent accountability mechanisms of the MDBs seek to provide recourse for people to air their grievance if they identify that the social and environmental harm has been caused by the acts or omission of the Banks (McIntyre and Nanwani 2019). An example of the independent accountability mechanisms is the Inspection Panel of the World Bank (World Bank 2019). A grievance is defined as 'a perceived injustice evoking an individual's or a group's sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities' (UN 2011: 27). This compares and increasingly overlaps with an ombudsman, which is a body that 'offers independent and objective consideration of complaints, aimed at correcting injustices caused to an individual as a result of maladministration' (International Ombudsman Institute 2012: Preamble). Examples include the European Ombudsman within the European Union (EU), the Compliance Advisor/Ombudsman (CAO) for the World Bank Group, and the Ombudsman for the United Nations (UN), although the latter addresses staff grievances rather than those externally affected by the actions of the UN (Hoffman and Megret 2005).

These two categories overlap: the Compliance Advisor Ombudsman of the World Bank Group and the EU Ombudsman both seek to correct injustices through engagement with aggrieved communities and individuals primarily but may also investigate the cause of the harm in order to stop it.[7] For example, while the CAO prioritises its Ombud's role in order to address grievances, it can also undertake a compliance investigation that identifies whether the World Bank Group was responsible for the harm through lending, investing, or guaranteeing an international development project. Many Ombuds also have 'own-motion' powers that enable them to trigger investigations as the EU and the CAO have (Carl 2018: 18). In comparison, the World Bank Inspection Panel is an independent accountability mechanism that can only investigate the cause of the harm through a compliance investigation triggered by claimants. It cannot

[7] Under the Maastricht Treaty, the European Ombudsman has been empowered to respond to citizens and peoples residing in the EU regarding complaints of maladministration of the EU's offices, bodies, agencies, and institutions. It may also instigate its own investigations in the public interest. The European Ombudsman relied on a soft-law European Code of Good Administrative Behaviour as the basis for its work; this was later incorporated as Article 41, the Right to Good Administration, in the binding 2009 EU Charter of Fundamental Rights (Hofmann 2017: 3–4, 9).

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directly mediate with complainants to address harm. Its findings provide indirect recommendations to address the grievance that instantiated the complaint. While all the independent accountability mechanisms for the MDBs were designed similarly, over time they have all taken on both roles, directly seeking to address grievances, with the capacity to investigate cause (Park 2017).[8]

To date, research on the MBDs' independent accountability mechanisms, particularly the World Bank Inspection Panel, has focused on their creation, structure, and impacts in terms of holding the Banks to account for (non) compliance with their environmental and social safeguard policies, procedures, and guidelines (Park 2017). This has implications for international law (Naude Fourie 2016), the accountability and legitimacy of the Banks (Sovacool 2017; Zalcberg 2012), and their development approach (Balaton-Chrimes and Haines 2015). However, it is important to examine how affected people use the different processes in seeking to have environmental and social grievances addressed.

For example, the first claim to the African Development Bank's (AfDB) Independent Accountability Mechanism, in 2007, came from the Ugandan National Association of Professional Environmentalists who sought a compliance investigation into the environmental and social impacts of the Bujagali dam. They wanted to determine whether the large-scale adverse environmental and social impacts of the dam, including climate and water impacts and the potential increasing cost of electricity, were the result of acts or omissions by the AfDB in meeting its own environmental and social policies (IRM 2007). The results of the investigation would then inform any changes the Bank would need oversee in order to ensure the project was environmentally and socially compliant.[9] This compares with a local association in Morocco, the Chichaoua Province Development and Law Association, submitting a claim to the same mechanism in 2010 to address the impacts on twelve farmers and six landowners of building the Marrakech–Agadir Motorway. The impacts of the motorway included, among other things, the construction affecting the stability of houses in the village, separating farmers from their pastures, not providing

[8] After more than two years of deliberations, in March 2020 the World Bank approved changes to its Inspection Panel. It now has a Dispute Resolution Service akin to the problem-solving functions of the other IAMs and will begin to operate to address environmental and social harm directly from September 2020. Previously, the Bank had a Dispute Resolution Service in-house for helping member states address grievances; this change makes the process independent of Bank Management and under the Inspection Panel. Because the World Bank's internal Dispute Resolution Service was advisory for member states rather than mandatory and engaged with communities, it is not analysed here.

[9] The dam was also being co-financed by the World Bank and the International Finance Corporation and would also receive claims to investigate those financiers' adherence to their policies and mediate with claimants in the latter's case (Park 2019).

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canals necessary for irrigation, and redirecting natural water flows away from farmers while facilitating flooding (IRM 2010). In this case, the Bank's Independent Accountability Mechanism was able to facilitate a successful agreement between the requestors, the Bank, and the company undertaking the project regarding six of the eight issues of concern to claimants (IRM 2011: 12).[10] How affected people use the mechanisms is therefore important for understanding whether environmental and social grievances can be addressed.

The outline for the remainder of the Element is as follows: Section 2 explores the human rights and standards for environmental protection upheld by IGMs, pinpointing how they provide recourse for procedural environmental rights. The two normative standards in use are the Guiding Principles for Business and Human Rights (GPs) in relation to human rights and transnational corporations and other business enterprises established by the UN Special Representative of the Secretary-General John Ruggie, and the standards set by the World Bank that have been emulated by other public and private development funders. IGMs have proliferated rapidly and are now used by a range of actors including the MDBs (Park 2017; Zappile 2016), bilateral agencies (Hunter 2008), and corporations and industries (Zagelmeyer et al. 2018). While the spread of such mechanisms is laudable, there remains a dearth of evidence that these mechanisms are effective in providing recourse. The section outlines the type of criteria available to determine whether IGMs provide effective access to justice in environmental matters, and how this compares with our knowledge of their practices. Finally, the section highlights how the 'citizen-driven accountability process' of the IGMs (Lewis 2012) raises concerns that access to justice in environmental matters through IGMs places an undue burden on people to demonstrate harm, which may not capture the full extent of environmental damage.

Sections 3 and 4 investigate the procedures of the international accountability mechanisms of the MDBs. The MDBs are one of the primary means through which states provide official development assistance (OECD 2018). They provide loans, guarantees, and technical assistance to developing countries for development projects. Despite numerous safeguards, the implementation of infrastructure and extractive and energy projects have significant consequences for local communities and ecosystems. For twenty-five years, the World Bank has had its Inspection Panel to provide recourse for grievances from project-affected communities. Yet physical violence, loss of property and livelihoods, damage to ecosystems, and harmful impacts on Indigenous Peoples continue to occur because of projects financed by the Bank. To date, there is little evidence

[10] Requestors and claimants are used interchangeably.

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as to whether the claims process actually leads to remedies for people affected by MDB-financed projects; and the work that has been done thus far is case specific (Clark et al. 2003; Fox and Brown 1998; Rodrigues 2003; Ziai 2016). Investigating the standards and procedures of the IAMs locates people and the environment at the forefront of the analysis rather than as a by-product for assessing MDB non/compliance with their own policies.

Section 3 probes whether the IAMs can provide access to justice in environmental matters through problem-solving. Problem-solving entails consultation, mediation, dialogue, conciliation, and dispute resolution to redress the grievance. The section details the content analysis of 394 publicly accessible original grievance claims submitted to the IAMs.[11] It identifies if claimants were seeking recourse for breaches of environmental procedural standards such as access to information and participation. In addition, the content analysis identifies whether claimants were concerned with environmental harms beyond how they affect people (or the rights of nature). After identifying the main grievances people bring to the IAM for problem-solving, the section analyses data accumulated on all the known claims to the IAMs between 1994 and mid-2019 that are publicly available (Park 2019). This is done to ascertain whether people are better off after engaging in problem-solving. Section 4 repeats the content analysis and the review of the outcomes of the cases submitted to the IAMs but this time for compliance investigations in order to determine whether the process of investigating the Banks for environmental and social policy non-compliance provides recourse for procedural environmental rights and the rights of nature. Compliance investigations are undertaken by the IAM and include desk reviews of the project documents, interviews with Bank project officers and management, and project site visits. In this process, claimants are interviewed but do not otherwise play an active role. They may be allowed to comment on the completed investigation report before it goes to the Bank's Board. The Bank's board of directors (member states) cannot change the report's outcomes, but they can determine how the Bank should respond to its findings of (non)compliance with environmental and social policies. This section seeks to know whether people are people are better off after triggering these mechanisms, and which process provides access to justice, and for what.

[11] While the content analysis represents only 37 per cent of the submissions to the IAMs, it does cover all of the Banks, the entire geographic spread of development lending, all of the Banks' project loan portfolios, and the duration of the IAMs' existence. The content analysis also reflects and reinforces data that demonstrates the policies triggered by claimants across all submissions (for example, a grievance citing a lack of access to information will trigger the Banks' information disclosure policies (see Park 2019; Lewis 2012).

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Section 5 then concludes the Element by reviewing how the IAM procedures are used by claimants, arguing that in general they do provide access to justice in environmental matters. They are used to air grievances over the lack of participation, the lack of access to information, and damage to nature. However, they do not necessarily provide remedies for harm through problem-solving, and much more research is needed to examine how compliance investigations contribute to redress or remedy for harm from international development. Despite the rise of IGMs globally, more work is needed to establish how they can be more effective at providing recourse for environmental and social harm.

2 International Grievance Mechanisms and Procedural Environmental Rights

The evolution of often-separate fights for international human rights and protecting the environment are increasingly converging towards a conception of environmental rights or using human rights for environmental protection (Turner et al. 2019: 2). This Section identifies the human rights and standards for protection upheld by IGMs, highlighting procedural environmental rights. Section 1 distinguishes the Guiding Principles for Business and Human Rights (GPs) in relation to Human Rights and Transnational Corporations and other Business Enterprises established by the UN Special Representative of the Secretary-General John Ruggie, compared with the standards set by the World Bank that have been emulated by other public and private funders. Section 2 details the criteria for IGMs to provide effective access to justice in environmental matters, and how this compares with our knowledge of their practices. Finally, Section 3 raises concerns that access to justice in environmental matters as practised by the IGMs places the onus on people to demonstrate harm which may not capture the full extent of environmental damage.

What Harms, What Rights? Standards of Protection for People and the Environment

IGMs are non-judicial mechanisms for providing access to justice for people who have or may face human rights abuses and environmental and social harm arising from the activities of transnational or international actors. They are triggered by complaints initiated by people, which distinguishes them from transnational accountability mechanisms set up to operate on behalf of affected people, such as international framework agreements between MNCs and trade unions (Zagelmeyer et al. 2018). Transnational accountability mechanisms may include initiatives for the private sector, supported by NGOs such as fair trade associations, the Fair Labor Association, and Rugmark. These operate on behalf

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