

# Essay

## Legitimacy, Accountability, and Partnership: A Model for Advocacy on Third World Environmental Issues

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### INTRODUCTION

The timing of Lalanath de Silva's first trip abroad from his native Sri Lanka could not have been more fortunate. The young environmental lawyer arrived in Washington, D.C. in June 1989 to discover that the World Bank's<sup>1</sup> Board

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1. One of the World Bank's principal functions is "to promote economic development, increase productivity and thus raise standards of living in the less-developed areas of the world . . . in particular by providing finance to meet their important developmental requirements . . ." Articles of Agreement of the International Development Association, Jan. 26, 1960, art. I, 11 U.S.T. 2284, 2285-86, T.I.A.S. No. 4607, at 2-3, 439 U.N.T.S. 249, 252 [hereinafter IDA Articles of Agreement]. The World Bank Group comprises three "windows," each of which technically is a separate international organization: the International Development Association, *see id.*; the International Bank for Reconstruction and Development, *see* Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, 60 Stat. 1440, T.I.A.S. No. 1502, 2 U.N.T.S. 134, *amended* Dec. 16, 1965, 16 U.S.T. 1942, T.I.A.S. No. 5929 [hereinafter IBRD Articles of Agreement]; and the International Finance Corporation, *see* Articles of Agreement of the International Finance Corporation, May 25, 1955, 7 U.S.T. 2197, T.I.A.S. No. 3620, 264 U.N.T.S. 117. As of early 1991, 155 countries were members of the Bank. The principal mechanism by which the Bank

of Directors, headquartered in that city, intended to approve a nearly \$20 million forestry loan to his country in less than a week.<sup>2</sup> The Environmental Foundation, Ltd. (EFL),<sup>3</sup> of which de Silva is chairman, and other Sri Lankan organizations had been concerned about this proposed loan for years.

Tropical forests in Sri Lanka, an island nation to the south of India, have been decimated. Their total area has been reduced from 13 million acres at the end of the eighteenth century to 3.2 million acres today, and activities such as commercial logging and clearing for agriculture and human settlement continue to destroy about 100,000 more acres each year.<sup>4</sup> In an attempt to counteract this alarming rate of destruction, the Sri Lankan government adopted a Forestry Master Plan in 1986.<sup>5</sup> The Plan was the subject of intense criticism for overemphasizing commercial logging and slighting conservation.<sup>6</sup> Despite this controversy, the Bank proposed to finance the implementation of the first five years of the Plan through a new forestry sector development loan.<sup>7</sup>

De Silva immediately sat down with staffers at the Natural Resources Defense Council (NRDC), one of a number of American public interest environmental law firms that have worked for more than a decade to improve the environmental quality of foreign aid, with a recent focus on loans provided by the World Bank.<sup>8</sup> A hastily developed joint strategy targeted at influencing the decision on the World Bank loan drew on the strengths of both organizations. EFL had legitimacy in the form of local perspective, expertise with respect to the project, and a direct stake in the outcome. NRDC had leverage in the form of access, influence, and extensive experience with the Bank.

With a few telephone calls, NRDC obtained meetings with executive branch officials and the United States representative to the Bank. De Silva's impressive grasp of the project's factual, legal, and policy aspects and his compelling advocacy style persuaded the United States officials of the loan's shortcomings. Over the next few days, NRDC staffers, through further follow-up meetings

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pursues its mission is the award of individual loans to borrowing country governments or government agencies. This Essay will not consider the activities of the Multilateral Investment Guarantee Agency, a related organization.

2. WORLD BANK, MEMORANDUM AND RECOMMENDATION OF THE PRESIDENT OF THE INTERNATIONAL DEVELOPMENT ASSOCIATION TO THE EXECUTIVE DIRECTORS ON A PROPOSED CREDIT OF SDR 15.5 MILLION TO THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA FOR A FOREST SECTOR DEVELOPMENT PROJECT (May 17, 1989) (Rep. No. P-5041-CE); WORLD BANK, STAFF APPRAISAL REPORT: SRI LANKA FOREST SECTOR DEVELOPMENT PROJECT (May 17, 1989) (Rep. No. 7699-CE).

3. See Memorandum of Association of the Environmental Foundation Ltd. (describing EFL's objectives and structure) (on file with author).

4. WILDLIFE AND NATURE PROTECTION SOC'Y, FOREST CONSERVATION AND THE FORESTRY MASTER PLAN FOR SRI LANKA: A REVIEW I (1988).

5. See *id.* (discussing JAAKKO PORY INT'L OY & MINISTRY OF LANDS AND LAND DEV. OF SRI LANKA, FOREST RESOURCES DEVELOPMENT PROJECT: FORESTRY MASTER PLAN (1986)).

6. *Id.*

7. See sources cited *supra* note 2.

8. A consortium of five Washington-based organizations including, in addition to NRDC, the Environmental Defense Fund, Friends of the Earth, the National Wildlife Federation, and the Sierra Club have been active in encouraging reform of the World Bank's environmental policies. See, e.g., Stokes, *Storming the Bank*, 20 NAT'L J. 3250, 3253 (1988) (describing activities of NRDC and National Wildlife Federation).

with executive branch officials, were able to translate the momentum from this initial meeting into a communication from the United States to Bank staff questioning whether the Bank had properly evaluated the environmental consequences of the proposed loan. At the request of the United States Executive Director to the World Bank, the Bank delayed formal consideration of the loan for two days to permit further investigation into the project's environmental integrity.

A subsequent meeting with environmental officers at the Bank itself was considerably more confrontational than the earlier contacts with executive branch staff. Because of the need for a firm grasp of the factual context of the project, de Silva's local perspective was at a premium here. From my previous experience as the NRDC lawyer on similar projects, I decided to defer to de Silva's local perspective and direct stake in the loan and said very little. Nevertheless, my mere presence served as a reminder of the substantial sense of urgency that NRDC and EFL, through the United States government, had already generated at the Bank. Although the Bank officers were very cordial to de Silva, one Bank official snapped at me the few times that I spoke, perhaps as a result of frustration from previous dealings with American public interest organizations which intervened in the Bank's decisionmaking procedures. He made it quite clear that he did not consider this project to be of any concern to either the citizenry or the government of the United States.

At one point, this official began to change the focus of the conversation with de Silva from the question of *whether* the loan should be approved in the upcoming vote to prospects for the project *after* the Bank approved the loan. I slipped de Silva a note saying, "Be careful not to leave him with the impression that you are satisfied with this loan if you are not." De Silva then politely but firmly returned the conversation to the issue of the project's defects, which earned us both glowers from the Bank official.

Following this encounter at the Bank, de Silva and the NRDC staffers then called on the Sri Lankan government's representative to the Bank. In addition, de Silva sent a telex reporting on recent developments from Washington to an EFL colleague in Sri Lanka. In response to that colleague's intervention, and after an inquiry from the Department of State,<sup>9</sup> the mission of the United States Agency for International Development (AID)<sup>10</sup> in Colombo, Sri Lanka cabled Washington, expressing serious reservations about the environmental implications of the project.<sup>11</sup> At the last minute before the vote, the Sri Lankan gov-

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9. Telegram from James A. Baker III, U.S. Secretary of State, to American Embassy, Colombo, Sri Lanka (June 8, 1989) (on file with author).

10. The Agency for International Development [hereinafter AID] is the principal conduit for bilateral foreign assistance, primarily in the form of grants, from the United States. See 22 U.S.C. §§ 2151-2151z (1988) (AID's principal mandates). The Agency is represented overseas by "missions," similar to embassies, in approximately 65 foreign countries.

11. Telegram from American Embassy, Colombo, Sri Lanka to U.S. Department of Treasury, Washington, D.C. (June 12, 1989) ("We would like to suggest that a moratorium be placed on logging until the forest

ernment—presumably as a result of the combined pressure from the Bank, the United States, and representatives of its own citizenry—adopted the position recommended by EFL and announced a moratorium on logging operations in 45,000 acres of natural forests until ecological surveys were completed.<sup>12</sup> Sri Lanka similarly followed EFL's exhortation that the government require preparation of detailed environmental impact statements for proposed logging sites under a new law providing for public scrutiny and comment by groups like EFL.<sup>13</sup> At the World Bank Board meeting, the United States supported the proposed loan, subject to the full implementation of the Sri Lankan government's promises.<sup>14</sup> Ironically, despite its hostile reaction to EFL's and NRDC's intervention in this proposed loan, the World Bank, in a subsequent environmental progress report, cited this loan as one of its best.<sup>15</sup>

EFL's and NRDC's experience with the Sri Lankan forestry loan illustrates the need for a new approach to guide public interest advocacy for decisions taken in the United States that may have significant environmental consequences in the Third World. However, to date, there has been little effort to define the characteristics of responsible environmental reform efforts by private citizens and organizations in the United States on foreign environmental problems, such as the quality of foreign aid. Moreover, there have been virtually no attempts to identify a principled role for American lawyers in Third World environmental issues. This Essay will respond to these lacunae by articulating a new approach to advocacy based on a partnership model.

conservation unit . . . is functional and a conservation review completed of those areas included in the Forest Department's immediate felling program.") (on file with author).

12. Telegram from A.A. Wijetunga, Secretary, Ministry of Lands, Irrigation, and Mahaweli Development of Sri Lanka to C. Helman, Chief, Agriculture Operations Division, World Bank (June 13, 1989) ("[B]efore commencement of the forest sector project during 1990/1991 the areas earmarked for plantation and management would be subjected to an environmental impact assessment. As an immediate interim [sic] measure [sic] an accelerated review of natural [sic] and near natural areas will be critically examined for preservation of bio-diversity and watersheds.") (on file with author).

13. Telegram from C. Helman, Chief, Agriculture Operations Division, World Bank to A.A. Wijetunga, Secretary, Ministry of Lands, Irrigation and Mahaweli Development of Sri Lanka (June 14, 1989) ("Eye [sic] am pleased to learn . . . that during a June 14, 1989 telephone conversation, you confirmed that all environmental assessment studies in connection with the [forestry] project will be carried out under the new legislation.") (on file with author); see National Environmental Act No. 47 (1980), amended Act No. 56 (1988) (Sri Lanka).

14. Statement of Mark T. Cox, IV, Alternate Executive Director of the United States to the World Bank (June 15, 1989) ("We were very pleased to hear of the Sri Lankan Government's new policy to refrain from logging in natural forests until environmental impact assessments are completed. Our support for this loan is based on the understanding that the Government has indicated that the environmental impact assessments will be done according to the new law on environmental assessment promulgated last December.") (on file with author); see Stammer, *Environmental String Tied to Sri Lanka Loan*, L.A. Times, June 17, 1989, § 1, at 1, col. 3.

15. WORLD BANK DEV. COMM., WORLD BANK SUPPORT FOR THE ENVIRONMENT: A PROGRESS REPORT 17-18 (1989). Since the approval of the World Bank loan, the Government of Sri Lanka has created a working group of nongovernmental organizations to review prospective logging sites and to decide which should be preserved as protected areas because of their hydrological importance or value from the point of view of biodiversity.

Given the limitations of existing international structures, a partnership model of advocacy can be an effective tool for domestic and Third World public interest organizations to achieve responsible environmental policies in developing nations. Moreover, past successes with such a model show that it can provide a basis for substantially improving access by individuals and public interest organizations in the Third World to international decisionmaking processes in the future. In Part I, this Essay identifies the need for American public interest advocates to establish partnerships with directly affected groups on Third World environmental issues. Next, Part II examines another case study of partnership advocacy by nongovernmental organizations in Sri Lanka and the United States. Elaborating on this specific experience, Part III of this Essay evaluates the general benefits and responsibilities of the partnership relationship. After articulating the limitations of partnership advocacy, Part IV then proposes an extension of that model that focuses on establishing formal international adjudicatory mechanisms to provide remedies to those members of the public injured by decisions of international institutions.

#### I. THE NEED FOR PARTNERSHIP

The World Bank-financed Sri Lankan forestry loan is just one of many examples of development assistance decisions with a nexus in the United States that can have serious environmental consequences in the Third World. For some time, the environmental integrity of foreign aid, whether of bilateral<sup>16</sup> or multilateral<sup>17</sup> origin, has been the subject of significant concern. Partnerships

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16. AID had no systematic environmental review procedures until it was prodded with a suit by a number of domestic environmental organizations. See *Environmental Defense Fund, Inc. v. United States Agency for Int'l Dev.*, 6 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 20,121 (D.D.C. 1975) (stipulation requiring AID to promulgate regulations on environmental impact assessment for activities with effects outside United States). Now, the Agency's regulations require an environmental assessment to precede actions that have a significant effect on the environment of the recipient country. 22 *C.F.R.* § 216.3 (1990). The Organization for Economic Cooperation and Development (OECD) over the past few years has undertaken to harmonize environmental standards for bilateral aid provided by the Organization's 24 member countries. See *Recommendation of the Council Concerning an Environmental Checklist for Possible Use by High-level Decision-makers in Bilateral and Multilateral Development Assistance Institutions*, O.E.C.D. Doc. C(89)2 (Mar. 3, 1989); *Recommendation of the Council on Measures Required to Facilitate the Environmental Assessment of Development Assistance Projects and Programmes*, O.E.C.D. Doc. C(86)26 (Oct. 23, 1986); *Recommendation on Environmental Assessment of Development Assistance Projects and Programmes*, O.E.C.D. Doc. C(85)104 (June 20, 1985), reprinted in *ORG. FOR ECON. CO-OPERATION AND DEV., OECD AND THE ENVIRONMENT* 30 (1986).

17. In 1980, six multilateral development banks (the World Bank, the African Development Bank, the Asian Development Bank, the Inter-American Development Bank, the Arab Bank for Economic Development of Africa, and the Caribbean Development Bank) along with the UN Development Program, the European Communities, the UN Environment Program, and the Organization of American States signed a statement formally pledging to "[i]nstitute procedures for systematic examination of all development activities, including policies, programmes and projects, under consideration for financing to ensure that appropriate measures are proposed" to mitigate or eliminate adverse environmental effects. *Declaration of Environmental Policies and Procedures Relating to Economic Development*, Feb. 1, 1980, § II(1), 19 *I.L.M.* 524, 525 (1980).

of the kind EFL and NRDC established are not only desirable, but, in many cases, necessary to improve the environmental integrity of development assistance, both generally as well as on a case-by-case basis.<sup>18</sup> A partnership bene-

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Nonetheless, development assistance provided through the multilateral development banks has been the subject of intense criticism since then for lack of procedural and substantive environmental safeguards. See, e.g., INT'L INST. FOR ENV'T AND DEV., *BANKING ON THE BIOSPHERE?* (1979) (case studies of World Bank, Inter-American Development Bank, Asian Development Bank, Caribbean Development Bank, African Development Bank, Arab Bank for Economic Development of Africa, European Development Fund, UN Development Program, and Organization of American States); Aufderheide & Rich, *Environmental Reform and the Multilateral Banks*, 5 WORLD POL'Y J. 301 (1988); Horberry, *The Accountability of Development Assistance Agencies: The Case of Environmental Policy*, 12 ECOLOGY L.Q. 817 (1985) (case studies of AID, World Bank, and UN Food and Agriculture Organization); Plater, *Multilateral Development Banks, Environmental Diseconomies, and International Reform Pressures on the Lending Process*, 17 DEN. J. INT'L L. & POL'Y 23 (1989), revised and reprinted in 9 B.C. THIRD WORLD L.J. 169 (1989); Rich, *The Emperor's New Clothes: The World Bank and Environmental Reform*, 7 WORLD POL'Y J. 305 (1990) [hereinafter Rich, *Emperor's New Clothes*]; Rich, *The Multilateral Development Banks, Environmental Policy, and the United States*, 12 ECOLOGY L.Q. 681 (1985); Wirth, *The World Bank and the Environment*, ENV'T, Dec. 1986, at 33. For example, the World Bank-funded \$112 million "Bura" irrigation and resettlement project in Kenya resulted in tropical forest destruction, pesticide contamination of drinking water supplies, and rampant disease among settlers. WORLD BANK, BURA IRRIGATION SETTLEMENT PROJECT, MID-TERM EVALUATION REPORT 1984 (Jan. 1985). The Bank's own mid-term evaluation declared the project an environmental disaster and concluded that "[l]arge-scale irrigation schemes as a means to promote settlement are costly and questionable." *Id.* at 47. The "Polonoroeste" tropical forest colonization project in northwest Brazil, which the Bank supported with a total of \$457 million in loans, has also caused massive tropical forest destruction and devastating rates of disease among native Indians. The Bank's president admitted that, in designing this project, "[t]he Bank misread the human, institutional and physical realities of the jungle and the frontier." Address by Barber B. Conable, President, The World Bank and International Finance Corporation, World Resources Institute, Washington, D.C. (May 5, 1987) (on file with author). In addition, in December 1985, the Bank approved a loan of \$11 million to support a cattle development project in Botswana, despite the conclusion of the Bank's own consultants that a previous project in that country, based on the same assumptions as the new project, had "no ability to halt or reduce damage to range resources—if anything, the reverse. . . . [W]ithout the benefit of the doubt it seems unlikely that any African livestock development project would ever be funded." INT'L LIVESTOCK CENTRE FOR AFRICA, THE OPERATION AND VIABILITY OF THE BOTSWANA SECOND LIVESTOCK DEVELOPMENT PROJECT (1497-BT): SELECTED ISSUES 2 (1982). Finally, in December 1987, the World Bank approved a controversial \$50 million credit to the Sudan for the purchase of dangerous chemical insecticides and herbicides, despite the existence of clear Bank policy directing that every effort should be made to encourage alternative pest management techniques. WORLD BANK, REPORT AND RECOMMENDATION OF THE PRESIDENT OF THE INTERNATIONAL DEVELOPMENT ASSOCIATION TO THE EXECUTIVE DIRECTORS ON A PROPOSED CREDIT OF SDR 64.4 MILLION TO THE REPUBLIC OF SUDAN FOR THE AGRICULTURAL REHABILITATION PROJECT III (Dec. 1, 1987); see also WORLD BANK, GUIDELINES FOR THE SELECTION AND USE OF PESTICIDES IN BANK FINANCED PROJECTS AND THEIR PROCUREMENT WHEN FINANCED BY THE BANK (1985).

18. Development assistance is an important, but not the only, area in which activities in the United States may implicate foreign environmental interests. For instance, 388 million pounds of chemical pesticides—preparations intentionally formulated as poisons—were exported from the United States in 1987. GEN. ACCOUNTING OFFICE, EXPORT OF UNREGISTERED PESTICIDES IS NOT ADEQUATELY MONITORED BY EPA 4 (1989). The Environmental Protection Agency (EPA) had prohibited substances representing nearly a quarter of this amount from use in this country because those substances were not registered under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (1989). GEN. ACCOUNTING OFFICE, *supra*, at 4. EPA has canceled or suspended some of these substances pursuant to FIFRA because they may cause cancer or otherwise endanger human beings, wildlife, or the environment. *Id.* Manufacturers have voluntarily removed others from the market in anticipation of regulatory action. *Id.* The United States is also home to multinational corporations whose overseas facilities—such as Union Carbide's chemical manufacturing plant in Bhopal, India—may cause pollution, suffer industrial accidents, or injure the health of workers. See generally MULTINATIONAL CORPORATIONS, ENVIRONMENT, AND THE THIRD WORLD: BUSINESS MATTERS (C. Pearson ed. 1987); C. PEARSON, DOWN TO BUSINESS: MULTINATIONAL CORPORATIONS, THE ENVIRONMENT, AND DEVELOPMENT (1985); TRANSFERRING HAZARDOUS TECHNOLOGIES AND SUBSTANCES: THE INTERNATIONAL LEGAL CHALLENGE (G. Handl & R. Lutz ed. 1989).

fits from both the Third World group's stake in environmental issues directly affecting it and the American organization's leverage in international decision-making bodies. Combining the elements of legitimacy and leverage synergistically augment each group's ability to advance the partnership's agenda.

#### A. *Joining Legitimacy and Leverage Through Partnership*

The model of the public interest law firm, designed to advocate aggressively the needs of underrepresented constituencies such as the poor and victims of racial discrimination, has existed in the United States for some time.<sup>19</sup> This structure has been adopted abroad as well. For example, EFL consciously modeled its structure in part on American public interest law firms like the Sierra Club Legal Defense Fund and NRDC.<sup>20</sup>

A number of public interest law firms are membership organizations<sup>21</sup> whose members are the underrepresented interests to which the organization is ultimately accountable. Implicit in the model of a membership-based public interest law firm is a minimum connection between the issues the organization takes on and its members' interests. For domestic membership organizations engaged in public policy advocacy in American judicial, legislative, or administrative fora on domestic environmental and public health issues, establishing that nexus is relatively straightforward. In the domestic context, the legal and policymaking system also ensures a minimum level of accountability to the interests an advocate purports to represent. For instance, the doctrine of "associational" or "organizational" standing articulates an analysis for substantiating the connection between an organization and the interests on whose behalf it acts.<sup>22</sup> If this inquiry reveals such a connection, then the organization can bring suit in its own name on behalf of its members.

The question of an advocacy group's legitimacy becomes considerably more problematic if any component of this formula is missing, especially if the locus of the problem the group seeks to address is in a foreign country. If there is inadequate linkage between, on the one hand, a domestic organization and its constituent members and, on the other, the foreign interests it purports to represent, serious questions arise about the organization's authority to represent those interests. This principle applies regardless of how meritorious the underlying issue seems. While it is credible to assert that forest preservation interests

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19. See, e.g., N. ARON, *LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND* 3 (1989) ("Public interest law is the name given to efforts to provide legal representation to interests that historically have been unrepresented or underrepresented in the legal process.")

20. See Memorandum of Association of the Environmental Foundation Ltd., *supra* note 3; see also Baldwin, *Beyond the Barriers: Environmental Law Activism in Sri Lanka*, ENVTL. F., May-June 1989, at 31 (description of EFL).

21. See, e.g., Restated By-Laws of Natural Resources Defense Council, Inc. (June 13, 1985).

22. See, e.g., Wirth, *Keeping the Courthouse Door Open*, F. FOR APPLIED RES. & PUB. POL'Y, Fall 1988, at 85; Note, *Divided We Fall: Associational Standing and Collective Interest*, 87 MICH. L. REV. 733 (1988); Note, *Organizational Standing in Environmental Litigation*, 6 TOURO L. REV. 295 (1990).

in Sri Lanka are underrepresented, that does not, in itself, legitimize NRDC's representation of those interests before the World Bank. Of NRDC's more than 113,000 members as of September 1990, only 213—less than one-fifth of one per cent—reside in foreign countries, and none in Sri Lanka.<sup>23</sup>

The question of legitimacy aside, American environmental organizations like NRDC potentially exercise a great deal of leverage over issues such as forest preservation in Sri Lanka. Over time, these organizations have built up reputations for expertise on domestic environmental issues with the United States government. Their influence on United States policymaking extends easily to the area of international relations, such as bilateral foreign aid. In addition, the United States is typically a significant, if not the predominant, player in intergovernmental organizations. Among the 155 members of the World Bank, the United States government currently holds over fifteen percent of the voting power, nearly twice as much as any other country.<sup>24</sup> The physical presence of the Bank in Washington further magnifies the importance of the United States government within the institution. Ironically, American environmental organizations often have far greater leverage than the real stakeholders, members of the public in developing countries.

In the case of the World Bank-financed Sri Lankan forestry loan, partnership with EFL provided NRDC with the connection to local interests necessary for legitimate use of its institutional leverage. EFL was an established voice for underrepresented interests in Sri Lanka and had cooperated closely with other groups in Sri Lanka with similar constituencies. EFL had previously contacted NRDC about a number of Sri Lankan environmental issues with a connection to the United States. Somewhat fortuitously, de Silva was in the United States on an NRDC-sponsored fellowship for Third World environmentalists on the eve of the World Bank's vote on the Sri Lankan forestry loan. The two groups soon discovered a commonality of interest, and their informal relationship rapidly evolved into a partnership as the strategic need for collaboration and the long-term benefits of joint action became apparent.

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23. Internal Memorandum from Linda Lopez, NRDC Director of Membership, to NRDC staff (Oct. 24, 1990) (discussing member counts) (on file with author). One individual resident of Sri Lanka contributes to NRDC, but does not identify himself as a member of the organization. Telephone interview with Darlene Davis, NRDC Membership Associate (Mar. 5, 1991). In addition, NRDC provides complimentary memberships to two nonprofit Sri Lankan environmental organizations, including EFL. *Id.*

24. See WORLD BANK, ANNUAL REPORT 225 (1990). Presently, the United States holds over 15% of the total voting power in the International Bank for Reconstruction and Development and over 17% of the total in the International Development Association. *Id.*; see also IBRD Articles of Agreement, *supra* note 1, 60 Stat. at 1451, T.I.A.S. No. 1502 at 13, 2 U.N.T.S. at 162 (describing allocation of voting power in IBRD); IDA Articles of Agreement, *supra* note 1, 11 U.S.T. at 2296, T.I.A.S. No. 4607 at 13, 439 U.N.T.S. at 270 (describing allocation of voting power in IDA).



## B. *Overcoming Obstacles at Multilateral Institutions*

EFL and NRDC surely needed the powerful combination of legitimacy and leverage that partnership provides in their campaign to protect Sri Lanka's forests from the adverse consequences of approval of the World Bank forestry loan. Public interest organizations like EFL and NRDC find multilateral institutions like the World Bank significantly more difficult to monitor and influence than bilateral assistance agencies. The latter are ultimately accountable to national legislatures that are able to exercise legislative and oversight power to ensure the environmental integrity of those agencies' projects, policies, and programs.<sup>25</sup> In the United States, additional domestic legal requirements, like the procedural and substantive guarantees of the Administrative Procedure Act<sup>26</sup> and the Privacy Act of 1974 (Freedom of Information Act),<sup>27</sup> give the public additional safeguards and remedies it can use to hold bilateral assistance organizations accountable.

By contrast, the multilateral development banks are considerably more intractable and less accountable to the public. For more than a decade, one of the World Bank's primary mandates has been to help alleviate poverty.<sup>28</sup> Nonetheless, Bank management has repeatedly asserted that the institution's professional staff is accountable principally, if not exclusively, to the institution's member governments.<sup>29</sup> As a result, there is virtually no role in the institution's governance or policymaking processes for members of the public in borrowing countries, the intended beneficiaries of Bank lending. Progress toward greater public participation in the institution's decisionmaking procedures has been slow and ad hoc at best.<sup>30</sup> In addition, the institution's highly secret decisionmaking procedures routinely shield its actions from public scrutiny in borrowing and donor nations alike.<sup>31</sup> This means that members of

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25. See, e.g., 22 U.S.C. §§ 2151p-2151q (1989) (statutory directives to AID concerning environment, natural resources, and endangered species).

26. 5 U.S.C. §§ 551-559, 701-706 (1989).

27. 5 U.S.C. § 552a (1989).

28. See generally R. AYRES, *BANKING ON THE POOR: THE WORLD BANK AND WORLD POVERTY* (1983).

29. See *Environment, Economic Development and Human Rights: A Triangular Relationship?*, 82 PRCC. AM. SOC'Y INT'L L. 60-62 (1988) (statement by Ibrahim Shihata, World Bank Vice President and General Counsel).

30. See, e.g., Foreign Operations, Export, Financing and Related Programs Appropriations Acts, Pub. L. No. 101-513, § 562, 104 Stat. 1979, 2033 (1990) (directing United States Executive Director at World Bank to advocate "open hearings on [a] proposed project during project identification and project preparation" and "[t]he establishment of assessment procedures which allow affected parties and nongovernmental organizations to review information describing a prospective project or policy loan design, in a timely manner, before the loan is submitted to the Executive Board for approval"); Rich, *Emperor's New Clothes*, *supra* note 17, at 324.

31. See, e.g., Rich, *Emperor's New Clothes*, *supra* note 17, at 323. The World Bank typically justifies its restrictive document policies by asserting the need to protect the confidential relationship between the Bank and borrowing country governments. However, in the controversy over a World Bank-financed livestock development loan to Botswana, see *supra* note 17, the government of Botswana actively supported NRDC's request for World Bank documents pertaining to projects and policies in that country. Letter from

the public in borrowing countries may have little or no notice of crucial decisions that will affect the very world in which they live.

Even World Bank member nations have only highly attenuated control over Bank management. Twenty-two Executive Directors, appointed or elected by member country governments, represent member nations in Washington on a day-to-day basis. The authority of member country governments, acting through the Executive Directors, over the Bank's operations and its management and professional staff is cloudy. The Bank's General Counsel has issued a legal opinion concluding that member governments "are under an obligation not to influence the Bank's President and staff in the discharge of their duties, and Executive Directors are under the duty not to act as the instrumentality of members to exert such prohibited influence."<sup>32</sup>

As a practical matter, for many member country governments the Bank's system of representation results in a highly diluted presence at the institution. For instance, one executive director represents the unlikely configuration of the Netherlands, Romania, Yugoslavia, Israel, and Cyprus.<sup>33</sup> Another, often referred to as the "Canadian" Executive Director, also represents most of the Caribbean countries.<sup>34</sup> Such odd juxtapositions of donor and borrowing countries—whose interests at the institution are unlikely to converge—can create serious conflicts for executive directors. Sri Lanka is represented on the Board

S.D. Liphuko, Ministry of Local Government and Lands of Botswana, to D.A. Wirth, NRDC (Aug. 24, 1988) (on file with author); *see also* Letter from P.K. Balopi, Minister of Local Government and Lands of Botswana, to D. Wirth, NRDC, and L. Williams, Sierra Club (Apr. 28, 1988) (on file with author). Despite this support, the Bank still refused to release some of the documents requested. This refusal compellingly demonstrates that the Bank withholds information about its activities even absent concerns for maintaining confidentiality with borrowing countries. *See generally* WORLD BANK, DIRECTIVE ON DISCLOSURE OF INFORMATION (1989) (establishing exclusive list of documents which may be released and categorically excluding from release key documents, such as president's reports and memoranda, supervision reports, and project completion reports, regardless of information contained therein). The World Bank itself has recently taken up similar issues in the context of the Bank's evaluation of the policies of its borrowing countries. *See, e.g.*, Issues of "Governance" in Borrowing Members: The Extent of Their Relevance Under the Bank's Articles of Agreement 49-50 (Dec. 21, 1990) (on file with author) (memorandum of World Bank Vice President and General Counsel identifying necessity for legal reform in borrowing country as relevant to Bank operations and implementation of Bank's mandate). *Cf.* note 33 *infra* (discussing prohibition on interference in political matters by World Bank).

32. *See* Shihata, *The World Bank and Human Rights: An Analysis of the Legal Issues and the Record of Achievements*, 17 DEN. J. INT'L L. & POL'Y 39, 46 (1988) (analysis by Vice President and General Counsel of World Bank). The General Counsel to the World Bank cites his own internal memorandum, which concludes that the Executive Directors, who are appointed or elected by the institution's member governments, are "official[s] of the Bank" within the meaning of Article IV, Section 10 of the Articles of Agreement of the International Bank for Reconstruction and Development, *supra* note 1, one of the institution's constitutive treaties. Prohibition of Political Activities Under the IBRD Articles of Agreement and its Relevance to the Work of the Executive Directors, sec. M87-1409, at 8 (Dec. 23, 1987) (unpublished World Bank doc.), *quoted in* Shihata, *supra*, at 46. According to this theory, the Board of Executive Directors is barred in its votes on individual loans from "interfering in the political affairs of any member" because "[o]nly economic considerations . . . are relevant to the Board's decisions." *Id.* However, as in the case of the Sri Lankan forestry loan, most objections to the environmental quality of World Bank loans are not political in character, but technical, scientific, legal, and methodological.

33. *See* WORLD BANK, *supra* note 24, at 225.

34. *Id.*

of Executive Directors by a national of India,<sup>35</sup> a country whose relationship with Sri Lanka has been characterized by considerable tension over the past several years because of Sri Lankan fears of Indian hegemony.<sup>36</sup> In addition, executive directors often receive background documents as little as ten days in advance of a vote on a proposed loan,<sup>37</sup> demonstrating that the central governments of member countries, particularly those that do not appoint their own executive director, are likely to have virtually no opportunity to examine proposed loans before Board action.

## II. PARTNERSHIP IN ACTION: ENERGY POLICY IN SRI LANKA

The worldwide campaign for environmental reform of the World Bank compellingly demonstrates a new approach to advocacy on Third World environmental issues. As concern for the environment has intensified worldwide, the number of private environmental organizations in the developing world has exploded. The relationship between the environment and development assistance from industrialized country governments and multilateral financial institutions has been a principal concern for many of these organizations.<sup>38</sup> At the same time, the limitations on public policy advocacy on Third World issues by public interest law firms based in the United States have become abundantly clear. The resulting ad hoc working relationships between Third World and American organizations provide background for articulating a new model for advocacy in this largely unexplored realm.

In February 1989, EFL was instrumental in stopping an Asian Development Bank-financed project to construct a massive coal-fired power installation near the city of Trincomalee in northeastern Sri Lanka. The Trincomalee project ultimately could have been as large as 900 megawatts and would have been the first large-scale, fossil-fuel-fired generating facility in Sri Lanka, a country whose principal source of electricity is hydropower. EFL successfully led a coalition of nine Sri Lankan environmental organizations that objected to both

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35. *Id.*

36. *See, e.g., Sri Lanka Edges Towards Showdown With India*, *Fin. Times*, July 26, 1989, § 1, at 4, col. 1; *India's Crisis In Sri Lanka*, *Fin. Times*, July 21, 1989, § 1, at 20, col. 1.

37. *See, e.g., Foreign Assistance and Related Programs Appropriation Act*, Pub. L. No. 99-500, § 539(a)(10), 100 Stat. 1783-214, 1783-234 (1986) (directing United States Executive Directors to World Bank and regional development banks to seek "at least a four week project review period between the time when staff recommendations are presented to the board and board action on any projects"); U.S. Treasury Department, *Plan of Action for the Implementation of Section 539 of the Foreign Assistance and Related Programs Act, 1987: The Multilateral Development Banks and the Environment 15* (1987) ("The two weeks currently provided to U.S. agencies [to review World Bank loan projects prior to Board action] is not adequate for their internal needs.") (unpublished document) (on file with author).

38. In September 1990, for example, more than 50 individuals representing a similar number of organizations from about 30 countries in Africa, Asia, and Latin America gathered in Washington to express their concerns to the World Bank/International Monetary Fund annual meeting about the environmental performance of these international financial institutions. *See World Bank Stressing Environmental Issues*, *N.Y. Times*, Sep. 24, 1990, at D13, col. 5.

the location of the facility near an ecologically sensitive coastal ecosystem and the lack of pollution control technology in the power station's design. In a tremendous victory for the Sri Lankan environmental movement, the Ministry of Power and Energy withdrew the proposal, citing serious environmental difficulties with the site selected.<sup>39</sup> The Ministry recently briefly resuscitated the proposal for the plant, suggesting a site on the southern coast of the country. After a consortium of local organizations objected, the President of Sri Lanka personally decided to abandon that proposal.<sup>40</sup>

Building on their successful collaboration on the World Bank forestry loan, EFL and NRDC have entered into a formal relationship to examine in broad terms Sri Lanka's national energy needs and policies.<sup>41</sup> Further, EFL and NRDC are seeking to evaluate the viability of alternative energy strategies in Third World countries generally, with Sri Lanka acting as a model for future energy sector development programs financed by the World Bank, the Asian Development Bank, and other development assistance institutions. Finally, the partnership intends to enhance EFL's institutional capabilities in the energy policy field, creating new EFL staff positions for Sri Lankan nationals.

The EFL/NRDC energy project in Sri Lanka has great potential for identifying effective responses to the environmental problems which multilateral bank lending for Third World energy projects poses. Responsible lending could meet much of the Third World's growing energy needs by tapping the tremendous potential for energy conservation and improving end use energy efficiency.<sup>42</sup> These strategies would avoid serious environmental and social problems like land degradation, local air pollution, and population displacement that often accompany the construction of fossil fuel-fired power installations.<sup>43</sup> They

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39. See *No Coal Power Plant at Trinco*, Daily News (Colombo, Sri Lanka), Feb. 24, 1989, at 1, col. 1.

40. See *President Orders Ministry to Abandon Coal Fired Power Plant Project*, Island News (Colombo, Sri Lanka), Oct. 31, 1990, at 1, col. 2.

41. EFL & NRDC, Research and Advocacy on Energy and Environmental Policy in Sri Lanka: Terms of Reference and Time Line (1990) (on file with author).

42. Indeed, by the year 2020, it may be possible to achieve a universal standard of living far beyond that necessary to satisfy basic needs with little or no increase in global energy consumption from today's levels. J. GOLDEMBERG, T. JOHANSSON, A. REDDY & R. WILLIAMS, ENERGY FOR A SUSTAINABLE WORLD 4 (1988). Significant potential exists in most developing countries to improve efficiency—which can be defined as services produced per unit input—in the use of energy. In the industrial sector, the leading consumer of conventional energy in most Third World countries, the World Bank estimates that energy consumption can be reduced by 20-30% through relatively inexpensive investments with short payback periods. J. GAMBA, D. CAPLIN & J. MULCKHUYSE, INDUSTRIAL ENERGY RATIONALIZATION IN DEVELOPING COUNTRIES 6 (1986) (published for World Bank). Actual technical potential for efficiency improvements in all sectors may be significantly higher. Electricity efficiency gains in commercial buildings and residences have enormous technical potential, with possible savings in lighting, refrigeration, and cooling systems of 50% or more. See generally WORLD BANK, END-USE ELECTRICITY CONSERVATION: OPTIONS FOR DEVELOPING COUNTRIES (Oct. 1986) (Energy Dep't Paper No. 32). Substantial fuel savings in the transport sector are possible through improvements in vehicle fuel efficiency, road and vehicle maintenance, traffic management, and mass transit systems. See generally WORLD BANK, THE ENERGY TRANSITION IN DEVELOPING COUNTRIES (1983).

43. See, e.g., Aufderheide & Rich, *supra* note 17, at 314 (description of World Bank-supported construction of coal-fired power plants in Singrauli, India).

would also mitigate regional and global environmental problems, such as acid rain and the greenhouse effect.<sup>44</sup>

Furthermore, such strategies could significantly improve the economic situation of developing countries. Investments in efficiency gains typically require less capital and less foreign exchange than comparable amounts of new power supply, contributing to overall economic productivity.<sup>45</sup> Through improvements in efficiency and conservation, developing countries could avoid at least \$1.4 trillion in power supply expansion costs between now and the year 2008.<sup>46</sup>

Unfortunately, multilateral development banks have a poor record for financing projects focusing on energy efficiency, energy conservation, and renewable energy resources.<sup>47</sup> For example, since 1980, the World Bank has devoted less than one percent of its total energy lending to improvements in end use efficiency.<sup>48</sup> The Bank's methodologies for evaluating proposed energy sector loans, moreover, do not systematically consider efficiency improvements, conservation, and renewable energy resources as alternatives to supply-expansion projects like the proposed Trincomalee power plant.<sup>49</sup> Instead, these so-called "alternative" energy projects are the responsibility of a marginalized staff unit funded primarily by bilateral aid agencies and the U.N. Development Program, and only in part by the Bank's ordinary budget.<sup>50</sup> The goal of the EFL/NRDC Sri Lankan energy undertaking is to reverse these trends in development bank lending by producing viable prototype lending proposals that either the World Bank or the Asian Development Bank could fund.<sup>51</sup>

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44. See, e.g., E. ARRHENIUS & T. WALTZ, *THE GREENHOUSE EFFECT: IMPLICATIONS FOR ECONOMIC DEVELOPMENT* (1990) (World Bank Discussion Paper No. 78).

45. See, e.g., Aufderheide & Rich, *supra* note 17, at 318.

46. U.S. AGENCY FOR INT'L DEV., *POWER SHORTAGES IN DEVELOPING COUNTRIES: MAGNITUDE, IMPACTS, SOLUTIONS, AND THE ROLE OF THE PRIVATE SECTOR* 13 (Mar. 1988).

47. So-called "renewable energy resources" with potential application in Third World countries include biomass, small-scale hydropower, geothermal, solar, and wind technologies.

48. See M. PHILIPS, *THE LEAST COST ENERGY PATH FOR DEVELOPING COUNTRIES: ENERGY EFFICIENT INVESTMENTS FOR THE MULTILATERAL DEVELOPMENT BANKS* 52, 59 (1991) (analysis of and recommendations for multilateral development bank energy sector lending).

49. WORLD BANK, *OPERATIONAL MANUAL STATEMENT NO. 3.72: ENERGY, WATER SUPPLY AND SANITATION AND TELECOMMUNICATIONS (EWT)* (Sept. 1978).

50. U.N. DEV. PROGRAM, *ESMAP IN THE NINETEEN-NINETIES: THE FINDINGS OF THE COMMISSION TO REVIEW ESMAP* (1990) (report of high-level review commission containing 14 recommendations, including suggestion that World Bank's Energy Sector Management Assistance Programme "be responsive to . . . the vastly increased importance attached to producing energy in an environmentally benign manner," *id.* at 12.) (on file with author). See also PHILIPS, *supra* note 48, at 69-75 (concluding that ESMAP's attention to end use energy efficiency is "inadequate"). One of the principal reasons development bank staff give for a lack of institutional commitment to efficiency, conservation, and renewables is a lack of potential projects to fund. See G. Prickett & D. Wirth, *Banking on Sustainable Energy* 79-80 (draft Oct. 15, 1990) (unpublished manuscript on file with author). This perception feeds on itself, resulting in thin staff expertise in so-called "alternative" energy approaches, lack of interest in methodologies for comparing existing lending priorities to these "alternative" approaches, and a general sense that "alternative" energy is not, in the words of one World Bank staffer, the institution's "comparative advantage." Wirth, *supra*, at 94-95.

51. Generic issues, such as the Bank's institutional energy policies, are often more susceptible to effective advocacy from the United States than individual loans that raise complicated substantive issues. On these broad-gauge problems, access, leverage, and experience with the institution is at a premium.

### III. LESSONS LEARNED: UNDERSTANDING ADVOCACY THROUGH PARTNERSHIP

With the growing concern about the environmental effects on Third World countries of capital infusions from international financial institutions like the World Bank, a partnership model of advocacy has begun to coalesce. A developing country group first establishes a relationship with an American organization, which then communicates the developing country group's concerns to the United States government. Next, the United States, which has identified as a foreign policy goal improving the environmental quality of multilateral development bank lending,<sup>52</sup> intervenes with the World Bank, which, in turn, makes representations to the developing country's government. Incredibly, this circuitous method of partnership advocacy is often more effective in achieving environmental improvement than direct communication between a foreign public interest group and its own government. These partnerships also create significant additional benefits, such as empowerment of Third World organizations and long-term linkages between nongovernmental advocacy groups in developing and industrialized countries.

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Conversely, a steady stream of up-to-date factual information is less essential. On all environmental issues connected with the World Bank, but particularly on these questions of procedural and structural reform, Washington-based advocates receive a general mandate from a yearly convocation of Third World environmentalists that coincides with the World Bank/International Monetary Fund annual meeting in early fall. *See supra* note 39.

American advocates are in an excellent position to promote this nongovernmental multilateral agenda with their own government, which can fill gaps left by the generic policies of the international institution. Strict congressional instructions command the United States executive directors to the multilateral development banks vigorously to promote improvements in the environmental quality of the banks' lending portfolios. *See* 22 U.S.C. §§ 262m to 262m-7 (1988) (directing United States representatives to multilateral development banks to promote improved environmental performance); *see also* SUBCOMM. ON INTERNATIONAL DEVELOPMENT INSTITUTIONS AND FINANCE OF THE HOUSE COMM. ON BANKING, FINANCE AND URBAN AFFAIRS, 98TH CONG., 2D SESS., MULTILATERAL DEVELOPMENT BANK ACTIVITY AND THE ENVIRONMENT (Comm. Print 1984) (recommendations to United States government and multilateral development banks concerning improved environmental performance). A statutory mandate directs AID to establish an "early warning system" to collect information on proposed development bank loans that may have harmful environmental impacts and to publish that information in the form of an "alert list" every six months. 22 U.S.C. § 262m-2 (1988); *see Bankrolling Debacles?*, U.S. NEWS & WORLD REP., Sept. 25, 1989, at 43; *U.S. Takes Aim at Development Plans That Seem Unsound: Congress "Hit List" Seeks Public Scrutiny of Lenders*, Christian Sci. Monitor, Jan. 15, 1987, at 9, col. 1; *US to Monitor Impact in 28 Foreign Projects*, Boston Globe, Jan. 13, 1987, at 16, col. 4. The Executive Branch has adopted its own voting standards for actions on development bank proposals that may harm sensitive ecosystems, such as tropical forests and wetlands. *See, e.g., Standards For Evaluating Projects Affecting Wetlands*, 18 ENVTL. POL'Y & L. 191 (1988) (issued by U.S. Secretary of Treasury); Memorandum from James A. Baker III, U.S. Secretary of the Treasury, to Robert B. Keating, U.S. Executive Director to the World Bank (Apr. 29, 1988) (establishing standards for evaluation of tropical moist forest projects) (on file with author); Memorandum from James A. Baker III, U.S. Secretary of the Treasury, to Hugh W. Foster, Alternate U.S. Executive Director to the World Bank (Aug. 11, 1986) (establishing standards for evaluation of loans for cattle projects in open range savannas of Sub-Saharan Africa) (on file with the author).

52. *See, e.g.,* 22 U.S.C. § 262l (1988) ("It is the policy of the United States that sustainable economic growth [in developing countries] must be predicated on sustainable use of natural resources.").

### A. *The Benefits of Partnership*

Typically, a policymaking nexus in both the developing country in question and the United States is part of a successful cooperative advocacy relationship. For instance, American citizens are ordinarily more effective advocates with their own government, through which they can indirectly exert pressure over multilateral institutions like the World Bank. By contrast, at the Bank itself, Americans are often perceived as lacking an immediate connection to problems in foreign countries; nationals of borrowing countries usually have a greater impact. A joint undertaking with Third World activists fills this lacuna by providing legitimacy for American advocates when they deal directly with the Bank. In addition, judging the merits of a particular advocacy goal or strategy in its own legal, social, political, and economic context requires the perspective provided by a foreign counterpart. In other words, cooperation with those who hold a direct stake in the outcome is necessary to identify the public interest in any particular situation.

When working effectively, collaborations like that between EFL and NRDC synergistically magnify the strengths of the individual participants many times. The empowerment of citizens' organizations in developing countries is a particularly important benefit from this interdependent relationship. Partnership advocacy creates new opportunities for these organizations to overcome barriers to effectiveness in their own countries. Paradoxically, the indirect route by which Washington-based organizations act as interlocutor with the United States government and the World Bank is often a more effective mechanism for Third World activists to achieve their goals than dialogue with their own governments. Ideally, there should be channels for individuals and organizations in the Third World to obtain remedies directly for environmental harm anticipated from or caused by Bank-financed projects.<sup>53</sup> The world order, however, has not yet responded to this need. Until this occurs, the convoluted path of partnership advocacy provides a means for Third World organizations to acquire greater leverage and influence both internationally—with multilateral organizations and foreign governments—and domestically—with their own governments.

American public interest groups also benefit from partnership with developing country groups. A close relationship with those who hold a direct stake in policy decisions gives the United States-based organization stature and credibility that it would not have if it were representing purely American interests. The American group can then effectively use its preferential access to factual information of accuracy, depth, and breadth from the foreign organization to make a unique contribution to the public policy debate within the United States and on the international level. For example, after de Silva's departure from the United States, executive branch officials crafting policy on

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53. See *infra* Part V.

the Sri Lanka forestry loan looked to NRDC for information and advice, virtually all of which was obtained from EFL. Moreover, interaction with Third World groups provides American nongovernmental organizations with a more nuanced perspective on related international questions similar to the particular issue for which the partnership was formed.

### B. *The Responsibilities of Partnership*

Although, on its face, collaboration between Third World and American public interest organizations has some elements of an attorney-client relationship, closer inspection reveals that this analogy is imperfect. First, more than just the needs of the foreign "clients" shapes the priorities of the American "attorneys" in these joint undertakings. American organizations like NRDC are players in their own capacity in their domestic political and legal system.<sup>54</sup> Their success as advocates for Third World environmental concerns derives from the leverage they use not only for their "clients"—foreign organizations like EFL—but for themselves as well.

American organizations working in cooperative relationships with Third World groups ordinarily have their own constituencies to which they are accountable as well as their own substantive stake in international issues. Consequently, they cannot, as a "real" attorney would, act purely as agents or instrumentalities of interests distinct from those domestic constituencies. For example, public policies concerning forests and power plants in Sri Lanka, whether of domestic or international origin, have obvious implications for the greenhouse effect and preservation of biological diversity. Both issues are global in character and top priorities for American environmental organizations.

The attorney-client analogy might appear somewhat more appropriate in an international forum, such as at the World Bank. In this context, American advocacy groups use superior information<sup>55</sup> and other resources to introduce the concerns of Third World groups into international decisionmaking processes. However, even on the international level the parallel breaks down. Most of an American organization's access to and leverage at the World Bank stems from its influence with the United States government, which wields disproportionate influence in most multilateral financial institutions.<sup>56</sup> The American organization's duty to its domestic constituency requires that it preserve its ability to influence American policymaking and, accordingly, can restrict its ability to represent the interests of its foreign "client." The American partner faces additional limitations on generic policy issues, like energy lending

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54. See *supra* notes 21-23 and accompanying text.

55. For instance, NRDC's Washington, D.C. location inherently generates better information about decisions at the Bank's headquarters on a daily basis than would be available to EFL in Sri Lanka.

56. See *supra* note 24 and accompanying text.



priorities or Bank document disclosure, where it may represent a multitude of "clients" whose interests are not identical.

The conflicts between an American organization's various constituencies can render extremely difficult the identification of the "public interest" that the American advocate seeks to advance. For example, the greenhouse effect engages issues of the global commons, of which the United States is a part.<sup>57</sup> The United States contributes, directly through AID and indirectly through the World Bank and other multilateral organizations, to the formulation of energy policies in foreign countries. An American organization can quite credibly argue that it, as distinct from Third World organizations, has its own interest in assuring that public funds do not exacerbate the threat of global warming. In such a situation, there may be tension between an American organization's strictly domestic agenda, grafted onto an international issue, and the needs of a foreign organization that expects to realize its goals in part through a relationship with the American organization.

Even if American environmental advocates can assert some interest in Third World environmental issues because of their connection to problems of the global commons, they cannot ignore parties with a considerably greater stake in those issues and fail to give those voices the commensurately greater deference and weight they deserve. Even when an American organization claims a stake in a geographically remote problem, it needs a foreign counterpart's on-the-spot perspective in order to craft a credible and effective remedy.<sup>58</sup>

This analogy demonstrates that collaborative relationships between American and foreign environmental organizations are best characterized as partnerships, with the terms of each relationship defined on a case-by-case basis to meet the needs of the participants in a particular context. This conclusion, however, does not imply the absence of ethical considerations. In advocacy on the international level, there is no court to police a standing requirement. It is entirely possible for well-intentioned, but poorly informed American advocates to urge reform with little or no accountability to those in the Third World who will be affected, perhaps adversely, by those changes. Without the legitimacy and perspective that come from an alliance with a Third World partner, there is a sizeable risk that American environmental organizations will operate as unaccountably as, for example, the World Bank. This suggests, at a minimum, the necessity for an American group to locate those with a significant stake in

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57. See, e.g., Exec. Order No. 12,114, 3 C.F.R. 356 (1980), reprinted in 42 U.S.C. § 4321 app. at 978 (1988).

58. A purely client-based model, in which a public interest law firm represents foreign individuals and organizations, overcomes only some of these difficulties. For example, by choosing one issue over another, the public interest law firm will most likely rely on principles that reflect its own values, rather than the client's. See generally Weissbrodt, *Strategies for the Selection and Pursuit of International Human Rights Objectives*, 8 YALE J. WORLD PUB. ORD. 62 (1981). Moreover, there is still the problem of identifying the public interest when confronted with multiple potential clients with differing views on the same issue. See *supra* note 25.

a problem and to create a partnership with, and joint strategy acceptable to, those interest groups before undertaking public policy advocacy on that issue.

Once the American advocate has recognized the need for a partnership and identified a prospective partner, the terms of the relationship are up to the participants. The purposes for which a partnership may be formed, the goals of the partnership, and the needs of the participants are so context-specific that it is difficult to make generalizations about the content of the partnership relationship. However, common aspects of most successful partnerships include the open sharing of information, consultation in the formulation of joint strategies, and consensus decisionmaking.

#### IV. BEYOND PARTNERSHIP

Notwithstanding its substantial success, the partnership advocacy model still provides strictly ad hoc remedies. From the point of view of Third World environmentalists, the necessity to speak through the mouth of a foreign organization to resolve important questions of environmental and public health policy in their own countries may be unsatisfying in practice and unsatisfactory in principle. These makeshift arrangements are not a substitute for direct access to meaningful remedies by those with a direct stake in the problem.

##### A. *Limitations of the Partnership Model*

The roundabout partnership strategy, while acquiring greater resilience with increasing use, can break down at any step along the way for reasons that have nothing to do with environmental quality. First, nonenvironmental factors may color the United States' reaction to allegations of environmental shortcomings in a World Bank loan. In January 1989, for example, environmental and economic concerns motivated the World Bank to defer indefinitely consideration of a proposed \$500 million electric sector loan to Brazil that would have supported that country's nuclear energy program and a power expansion agenda involving up to seventy-nine dams in the Amazon basin.<sup>59</sup> The fact that \$600 million in additional lending by private American banks was contingent on approval of the World Bank proposal significantly complicated the position of the United States government. While sympathetic to environmental concerns about the World Bank loan, the Department of the Treasury also had an interest in assuring approval of the proposal as a component of the executive branch's policy for alleviating the Third World debt crisis. Moreover, even when it is sympathetic to the partnership's goals, the United States may be wary of adverse reactions from other member countries at the Bank.

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59. See *World Bank Shelves Vote on Brazilian Loan*, *Fin. Times*, Jan. 12, 1989, at 5, col. 1; see also *Jenkins, Brazil's Future Tied to Bank Fight*, *INSIGHT*, Feb. 6, 1989, at 44; *Citing Environment, Wis. Senator Assails Loan Plan for Brazil*, *Boston Globe*, Jan. 10, 1989, at 7, col. 1.

Among Bank staff, the likelihood of conflicting goals is at least as great. Enumerated policies, such as the new operational directive on environmental assessment, govern the design of Bank-financed loans and projects.<sup>60</sup> But many of these standards, such as the Bank's environmental assessment procedures, are hortatory rather than binding.<sup>61</sup> The day-to-day dynamics within the institution tend to discourage the stringent enforcement of environmental conditions after loan approval. A strong institutional imperative, reinforced by career incentives to professional staff, encourages the Bank's management to move large amounts of capital out the door and into the hands of borrowing country governments.<sup>62</sup> Environmental concerns may delay or impede this objective. These same staffers, who have often invested months or years in the development of a particular loan, are the same individuals who respond to environmental concerns from member country governments, citizens organizations in the United States and abroad, and members of the public both before and after loan approval. The extreme difficulty of obtaining access to both the Bank's decisionmaking process and the documents it generates exacerbates these problems.<sup>63</sup>

### B. *Adjudicatory Mechanisms*

Loan agreements between the World Bank and a member country government are analogous to treaties<sup>64</sup> and contain enforceable obligations. The Bank also has internal operating procedures and requirements that reflect evolving international standards in the areas in which the Bank operates.<sup>65</sup> At present, however, the remedies for failures by borrowing countries to observe

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60. See, e.g., WORLD BANK, OPERATIONAL DIRECTIVE NO. 4.00, ANNEX A: ENVIRONMENTAL ASSESSMENT (Oct. 31, 1989); see also, WORLD BANK, OPERATIONAL MANUAL STATEMENT NO. 2.34: TRIBAL PEOPLE IN BANK-FINANCED PROJECTS (Feb. 1982).

61. See sources cited *supra* note 61.

62. See R. AYRES, *supra* note 28, at 10; E. CHRISTENSEN, GREEN APPEAL: A PROPOSAL FOR AN ENVIRONMENTAL COMMISSION OF ENQUIRY AT THE WORLD BANK 3-4 (1990); Rich, *Emperor's New Clothes*, *supra* note 17, at 315-18.

63. See *supra* notes 30-38 and accompanying text.

64. Nurick, *Certain Aspects of the Law and Practice of the International Bank for Reconstruction and Development*, in THE EFFECTIVENESS OF INTERNATIONAL DECISIONS 100, 127 (1971) (statement by World Bank Deputy General Counsel).

65. See, e.g., WORLD BANK, OPERATIONAL DIRECTIVE NO. 4.00, ANNEX A, *supra* note 60 (standards for environmental assessment); WORLD BANK, OPERATIONAL MANUAL STATEMENT NO. 2.34, *supra* note 60 (standards for design of projects affecting indigenous peoples); cf. ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, adopted June 27, 1989, 28 I.L.M. 1384 (1989) (not in force); World Charter for Nature, G.A. Res. 37/7, 37 U.N. GAOR Supp. (No. 51) at 17, U.N. Doc. A/RES/37/7 (1982), reprinted in 22 I.L.M. 456 (1983); Goals and Principles of Environmental Impact Assessment, U.N. Doc. UNEP/WG. 152/4 Annex III (1987), reprinted in 17 ENV'T'L POL'Y & L. 36 (1987), adopted G.C. Dec. 14/25 (1987), 42 U.N. GAOR Supp. (No. 25) at 77, U.N. Doc. A/42/25 (1987) (nonbinding standards adopted by U.N. Environment Program); Recommendation on Environmental Assessment of Development Assistance Projects and Programmes, O.E.C.D. Doc. C(85)104, reprinted in ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD AND THE ENVIRONMENT 30 (1986).

loan conditions and for deviations by Bank professional staffers from their own operating procedures are discretionary and largely within the hands of the World Bank's staff, who are often the very same individuals who negotiate and implement the loan agreement with the borrowing country.<sup>66</sup>

A neutral adjudicatory mechanism would fill this gaping inadequacy in the existing international structure. In addition to creating a remedy for individual grievances, the adoption of a "private attorney general" model of citizen enforcement would advance the public interest by encouraging compliance with applicable standards.<sup>67</sup> Moreover, the creation of an adjudicatory mechanism to resolve grievances arising from the development assistance process would further the goals of accountability and empowerment at least as well as, and probably better than, the stopgap partnership model.

There are several precedents for access by private parties to multilaterally-established mechanisms to adjudicate violations of treaty obligations by states and failures to observe internal operating procedures by the staff of multilateral organizations.<sup>68</sup> The International Labor Organization (ILO) grants members of the public—in that case workers' and employers' organizations—access to a number of mechanisms to adjudicate nonobservance of binding standards established under ILO auspices.<sup>69</sup> These procedures have been highly successful in encouraging ILO member states' adherence to binding treaty obligations like those in World Bank loan agreements. In one of the most celebrated cases, after the Polish government declared martial law in December 1981 and dissolved all existing trade unions, two workers' delegates initiated a successful proceeding against the Polish government under the ILO's constitution and ILO conventions guaranteeing the right to organize and bargain collectively.<sup>70</sup> Similar mechanisms at institutions such as the UN Human Rights Committee, the UN Commission on Human Rights, and regional courts and commissions have been highly successful in responding to both individuals' and organizations' complaints concerning human rights violations.<sup>71</sup>

Likewise, there are precedents for adjudicatory mechanisms which are available to individuals to remedy infringements of the internal procedures of international organizations. Most international organizations, such as the UN

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66. See E. CHRISTENSEN, *supra* note 62, at 3-4.

67. See, e.g., Timbers & Wirth, *Private Rights of Action and Judicial Review in Federal Environmental Law*, 70 CORNELL L. REV. 403 (1985).

68. See E. CHRISTENSEN, *supra* note 62, at 6-9.

69. See generally E. LANDY, *THE EFFECTIVENESS OF INTERNATIONAL SUPERVISION* (1966); Landy, *The Implementation Procedures of the International Labor Organization*, 20 SANTA CLARA L. REV. 633 (1980).

70. See Wirth, *Trade Union Rights in the Workers' State: Poland and the ILO*, 13 DEN. J. INT'L L. & POL'Y 269 (1984).

71. See generally M. TARDU, *HUMAN RIGHTS: THE INTERNATIONAL PETITION SYSTEM* (1985); Bossuyt, *The Development of Special Procedures of the United Nations Commission on Human Rights*, 6 HUM. RTS. L.J. 179 (1985); Shelton, *Judicial Review of State Action by International Courts*, 12 FORDHAM INT'L L.J. 361 (1989) (discussing procedures of European Court of Human Rights, European Court of Justice, and Inter-American Court of Human Rights).

and the ILO, have an administrative tribunal for adjudicating disputes, primarily employee grievances, between officials of the organization and the organization itself.<sup>72</sup> In 1980, the World Bank, relying on the "principle . . . that where administrative power is exercised there should be available machinery, in the event of disputes, to accord a fair hearing and due process to the aggrieved party," created an administrative tribunal along the lines of the UN and ILO precedents.<sup>73</sup> This principle should apply equally to "aggrieved parties" other than Bank staff, and in particular to members of the public in borrowing countries injured by Bank-financed activities.<sup>74</sup> Creating causes of action for those with a direct stake in Third World environmental issues would enable them uniformly to seek effective remedies for their injuries. Unlike the partnership model, which leaves developing country groups dependent on American advocates, such new adjudicatory mechanisms would directly empower members of the public in Third World countries.

### CONCLUSION

Until the international community creates adjudicatory mechanisms to give aggrieved members of the public in developing countries direct access to the foreign aid decisionmaking process, the partnership model of public policy advocacy is the best prospect for improving the environmental quality of development assistance. While passions in the United States about tropical forests, energy policy, and other Third World environmental issues run high, our ability effectively to craft public policy that is responsive to local needs overseas often does not. With an attenuated or nonexistent stake in the outcome, we can find ourselves doing more harm than good. The American role in public policy advocacy on Third World issues comes into clear focus only when seen

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72. While practice from organization to organization varies, these mechanisms share a number of characteristics. First, they are generally composed of independent experts. Second, these administrative tribunals apply "internal administrative law," consisting of staff regulations and operating procedures. Third, they have the authority to award necessary remedies, including, in appropriate cases, specific performance. Finally, most international organizations' tribunals hold public sessions. *See generally* D. BOWETT, *THE LAW OF INTERNATIONAL INSTITUTIONS* 317-28 (4th ed. 1982).

73. Amerasinghe, *The World Bank Administrative Tribunal*, 31 *INT'L & COMP. L.Q.* 748, 749 (1982) (description by Executive Secretary of World Bank Administrative Tribunal).

74. As a technical matter, the impediments to amending the World Bank Administrative Tribunal's statute to extend its jurisdiction to these disputes are far from insurmountable. Indeed, the establishment of the Administrative Tribunal required neither an amendment to the Bank's constitutive treaties nor to its bylaws. Instead, the Bank exercised its implied power under the Articles of Agreement to adopt the statute of the Administrative Tribunal merely on the approval of the Board of Executive Directors. *Id.* at 752-53. Government officials from Bulgaria and Hungary have endorsed the creation within the recently-established European Bank for Reconstruction and Development of an administrative review tribunal that would adjudicate petitions from governments, individuals, and private organizations. *See* Workshop Statement, Workshop on Environmental Protection and Citizen Participation in the Lending Practices of the European Bank for Reconstruction and Development ¶¶ 22029 (1991) (declaration of conference held in Budapest, Hungary, March 26-27, 1991 under auspices of Center For International Environmental Law—U.S.) (on file with author). *See generally* Agreement Establishing the European Bank for Reconstruction and Development, 29 *I.L.M.* 1083 (1990).

in relation to those who hold a direct stake in the outcome: the public in the developing world. Partnerships with overseas counterparts enhance the legitimacy, efficacy, and accuracy of American environmental activism on these issues. Over time, and with continued successes, such partnerships may pave the way for greater accountability in development assistance and, ultimately, international legal processes generally.