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2023

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Recommended Citation

Bradlow, Daniel D., "The Inspection Panel and International Law" (2023). *Perspectives*. 1. <https://digitalcommons.wcl.american.edu/accountability-perspectives/1>

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The Inspection Panel and International Law

Daniel D. Bradlow¹

This essay argues that the creation of the Inspection Panel (Panel) was an important international legal development. It was the first time that an international organization established a mechanism that enabled those communities and individuals who claimed they had been harmed by the decisions and actions of the international organization to hold the organization accountable. The creation of the Panel also promoted the role of non-state actors in making the soft international law that is applicable to the international financing of development projects. This essay will discuss each of these developments before drawing some conclusions about the Panel and international law.

The Panel and the Accountability of International Organizations

A general characteristic of international organizations is that, unless they specifically give consent, they are immune from being sued in any national court. Historically, they have only been willing to give this consent in cases arising from their commercial contracts. For example, the World Bank (the Bank) waives its immunity in the debt instruments that it uses to finance its operations.² However, it has not waived its immunity in any case brought by a party that does not have a contractual relationship with the Bank.

The Bank's position is unsurprising. The Bank's founding member states understood that the design, construction and operation of new infrastructure projects could have significant social and environmental impacts and political implications. However, they maintained that it was each sovereign state's prerogative to decide, through its political and administrative processes, how to allocate the costs and benefits of the projects and how to manage their impacts. The Bank, as an external funder, was expected to respect these sovereign decisions. This meant that the Bank should take these decisions as given and only assess the economics and technical and financial feasibility of the projects that it financed. This division of labor was formalized in the IBRD's Articles of Agreement, which prohibited the Bank from taking the political character of the member state or any other political considerations into account in its decisions.³

It followed from this division of responsibility that the IBRD concentrated on engaging with its borrower governments, financing technically and economically feasible projects, and ensuring that the loans were being repaid in a timely manner. Any necessary interactions with affected communities or the project contractors about the projects were the responsibility of the borrowing states.

The establishment of the Panel⁴ challenged this division of responsibility. It was the first time that an international organization had created a mechanism that was independent of the

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² See, e.g., Articles of Agreement of the IBRD, art. VII (3), Jul. 22, 1944
<https://www.jus.uio.no/english/services/library/treaties/14/14-01/reconstruction-bank.html>.

³ See *id.* at art. III (5)(b) and IV (10).

⁴ See Int'l Bank for Reconstruction and Development [IBRD], *The World Bank Inspection Panel*, Resolution No. IBRD 93-10, Resolution No. IDA 93-6 (Sep. 22, 1993),
<https://www.inspectionpanel.org/sites/default/files/documents/Resolution1993.pdf>. The original resolution has

organization's management, and that could receive and investigate complaints from external stakeholders who claimed they had been harmed by the organization's failure to comply with its own policies and procedures. The Panel would report these findings to the Bank's Board of Executive Directors (EDs), who could require the management to take corrective action.

The establishment of the Panel was an important milestone in the law applicable to international organizations in five ways. First, it was a formal acknowledgement that the decisions and operations of international organizations, like the Bank, were in fact directly affecting individuals and communities, and that these impacts had consequences for which they could be held accountable. Second, it clarified that these organizations' internal operational policies and procedures⁵ were the standards that external stakeholders could use to determine if the organization's actions were the cause of their harm. Third, it demonstrated that international organizations like the Bank had a responsibility to provide these individuals and communities with some mechanism that they could use to hold the organization accountable. Fourth, it established that this mechanism should enable the individuals and communities who are most directly impacted by its projects to communicate their experiences and concerns to the organization's supervisory organs, for example the Bank's Executive Directors, without the mediation of the organization's staff and management, and without directly implicating the sovereignty of the member state. Fifth, the findings of mechanisms like the Panel imposed on the international organization some responsibility to respond to their investigations and findings and, when appropriate, to take actions to correct the harm that the organization's non-compliance had caused.

The establishment of the Panel also had a broader significance for international development financing institutions like the Bank. It represented, in effect, an acknowledgement by the Bank and its member states that the original view of the division of responsibility between the international financial institutions and their member states was no longer tenable. Several factors contributed to this realization. One was the entry into force in the 1970s of the international human rights treaties. They meant that the sovereignty of the state even in its domestic affairs was no longer absolute and that it was legitimate, at least in some circumstances, for external actors to express an interest in the way in which the state interacted with its own subjects. This raised the issue of whether the Bank, while not a signatory to these human rights treaties, had any responsibility to take human rights considerations into account in its operations. This was particularly pertinent because the projects that it funded often gave rise to important human rights issues. These issues ranged from providing financing to governments that were generally engaged in wide-spread human rights violations⁶ to funding specific projects that had human rights impacts such as the involuntary resettlement of communities, or the destruction of sites that had cultural and religious importance for the local communities.

A second pressure arose from the rising concerns around the world about the social and environmental impacts of large development projects. The first manifestations of this concern were protests in the borrower countries about particularly controversial projects funded by the

been amended and the most current version was adopted in 2020, <https://www.inspectionpanel.org/sites/default/files/documents/InspectionPanelResolution.pdf> (last visited Jul. 27 2023).

⁵ The World Bank, *Operations Manual*, <https://policies.worldbank.org/en/policies/operational-manual> (last visited Jul. 27 2023).

⁶ See, e.g., S. Bleicher, *UN v IBRD: A Dilemma of Functionalism*, 24(1) INTERNATIONAL ORGANIZATION, Winter 1970, at 31, <https://doi.org/10.1017/S0020818300017380>.

World Bank. In addition, citizens in non-borrower countries, often cooperating with the protesters in the borrower countries, began to express concern about the way in which their taxes were being used to support controversial and environmentally damaging projects. They also began to object to the lack of transparency and participation by affected communities in Bank-funded projects.

These pressures and the Bank's failure to adequately respond to them highlighted the problem that the Bank's immunity posed to communities seeking relief from the adverse impacts of Bank-funded projects. It demonstrated how limited their chances of getting relief were. Their only options were either to lobby their governments to take up their case, or to create enough political noise about the organization's operations that it was forced into giving them redress.

The Panel was a principled response to this failing for two reasons. First, it is a mechanism that focuses only on the Bank's compliance with its own operational policies and procedures.⁷ This means that the Panel focuses only on the conduct of Bank staff and, if relevant, on the consequences of their non-compliance with the Bank's operational policies and procedures. Second, the Panel is precluded from investigating the actions and decisions of the borrower state. In this way, the Panel both demonstrates respect for and avoids undermining the sovereignty of the borrower state.

The Panel and international law making.

An important consequence of the Panel's operations is that it has become a maker of soft international law. In this context, "soft" international law refers to international norms and standards that are non-binding and do not satisfy the formal requirements of "hard", binding, international law. Nevertheless, soft international law can still exert a compliance pull on its target's conduct.

The Panel's role as a maker of soft international law arises from the way in which it interprets and applies the World Bank's operational policies and procedures in its investigations and reports, and the consequences that flow from this.

The World Bank's operational policies and procedures are intended to provide guidance to Bank staff on how they should conduct the Bank's business. These policies cover all aspects of Bank operations, including how the staff should deal with the social and environmental aspects of Bank operations. It is important to note that they do not bind the Bank's borrowers, member states, or contractors unless they are specifically incorporated into the relevant loan agreements or related contractual documents.

While any of the Bank's operational policies and procedures can be the focus of a Panel complaint, most Panel cases involve the Bank's environmental and social policies.⁸ These policies tend to be written in general terms because their subject matter is complex, and they are applicable across the full range of the Bank's operations. This means that Bank staff and management and the Panel must interpret the policies when they apply them in their work. The Panel's interpretations can influence its decisions about which issues are eligible for

⁷ See Resolution No. IBRD 93-10, Resolution No. IDA 93-6, *supra* note 4.

⁸ The World Bank, *The World Bank Environmental and Social Framework*, <https://www.worldbank.org/en/projects-operations/environmental-and-social-framework> (last visited Jul. 27 2023).

investigation, the scope of the investigation, and its findings regarding staff compliance with the applicable policies in particular Bank operations.

While the Panel does not have the power to make binding decisions on how these policies should be interpreted, the management and staff cannot afford to completely ignore its interpretations of the applicable policies. Firstly, the Board will expect them to develop and implement a plan for correcting any acts of non-compliance identified by the Panel and accepted by the Board. Second, the Panel can be expected to follow its own precedents in future Panel cases. Consequently, the Bank's staff, its borrowers, and potential Panel complainants can be expected to pay close attention to the Panel's interpretations of Bank policies.

The operational policies and procedures also inform the Bank's member states, particularly the borrower states and other non-state stakeholders in these states about how the Bank organizes its operations and the standards of conduct with which its staff should comply in these operations. These policies and procedures therefore help shape the expectations of these external actors and establish the standards of conduct on which they can rely in their dealings with Bank staff. They also help guide the Bank's clients and stakeholders in understanding the norms and standards with which the Bank will expect them to comply in their transactions with the Bank. It is important to note that even though the operational policies and procedures are not binding and enforceable against borrowers, they understand that if their conduct diverges too markedly from the policies, they risk the Bank either declining to fund them or denying them access to loan proceeds. In addition, both the Bank staff and the borrowers understand that communities and other external stakeholders will rely both on the policies and the way in which the Panel has interpreted and applied them in formulating their complaints to the Panel.

A useful illustration of the Panel's law making role is a Panel case dealing with a land administration project in Honduras.⁹ In this case, the Panel, in the course of its investigation had to interpret and apply the Bank's policies dealing with the adequacy of its consultations with affected communities, the implications of the proposed land titling scheme for the rights of indigenous people, and the adequacy of the protection granted to the rights of local communities when designating environmentally protected areas. While later cases¹⁰ interpreting the same Bank policies do not explicitly refer to the Honduras case, the Panel's findings and reports need to be consistent with its policy interpretations in the Honduras case. If they are not, they risk undermining the credibility of later Panel reports and the Panel's reputation as being independent and competent. They also risk undermining the predictability of Bank policies and generating confusion among Bank staff and external stakeholders about the requirements of Bank policies and procedures.

The result is that Bank staff and management should take the precedents set by the Panel into account in their interpretation of the operational policies and procedures, and in how they prepare their projects. It is also noteworthy that other MDBs and even private companies look to the Bank and how it interprets and applies its operational policies in developing their own

⁹ *Honduras: Land Administration Case*, Case No. 38, Request 06/01, The World Bank Inspection Panel, (Received 3 January 2006), <https://www.inspectionpanel.org/Panel-cases/land-administration-project>.

¹⁰ See, e.g., *Cambodia; Land Management and Administration Project*, Case No.60, Request 09/08, The World Bank Inspection Panel, (Received Sep. 4, 2009), <https://www.inspectionpanel.org/Panel-cases/land-management-and-administration-project>; See also *Panama; Land Administration Project* (First Request), Case No. 53, Request: 09./01, The World Bank Inspection Panel, (Received Feb. 25 2009), <https://www.inspectionpanel.org/Panel-cases/land-administration-project-first-request>.

policies and applying them in their operations. Similarly, borrowers may look at these precedents when preparing project proposals for the Bank.

The second way in which the Panel has affected the development of soft international law is in its impact on rulemaking in the Bank. This can be seen for example in the effort the Bank made in 1999 during its second review of the Panel procedures. In this case, the Board of the Bank decided that it would not complete the second review without first consulting with interested stakeholders in the Panel.¹¹ In fact, to ensure that it had consulted with affected communities and the civil society organizations that represent them, it paid for some of these representatives to travel to a meeting in Washington DC, that was jointly chaired by the most senior Board member and an official from one of the civil society organizations. During this meeting, the Board presented its proposed amendments and listened to the views of these representatives. In the end, it adopted amendments that were more acceptable to these external stakeholders.

Another example of this impact is that the Bank adopted an open and consultative process for developing its Environmental and Social Framework. It circulated its draft of the Framework for public comment and arranged a series of consultative meetings around the world at which the draft was presented and discussed. The result was that the finalization of the Framework was slower than anticipated but that it ultimately had more credibility than if it had been merely adopted by the Bank without adequate consultation. The framework, which took almost 4 years to complete, was adopted in 2016 and became fully operational in 2018.¹²

The Panel has had a third, perhaps less anticipated but perhaps more profound, impact on international law. Because it is driven by complaints from affected communities, the Panel has opened a channel through which these communities can have an influence in the way in which Bank operational policies are interpreted and applied. In this sense, the Panel has become a mechanism for making international law from below.

One way in which this process of lawmaking from below can be seen is in connection with human rights. Given that the Bank policies on environmental and social issues address such issues as impacts on indigenous people, involuntarily resettled people, and communities; and access to land, water, health care and educational facilities, and livelihoods, it is inevitable that human rights issues arise in Panel cases. These issues pose a significant challenge for both the Panel and the Bank. The reason for this is that pursuant to the political prohibition¹³ in its Articles of Agreement, the Bank is reluctant to explicitly take human rights issues into account in its operations. Nevertheless, Panel cases involving these issues require the Bank management and staff, at least implicitly, to explain how they interpreted and applied the applicable policies to these human rights issues.¹⁴ Similarly, the Panel in its compliance review reports must apply the operational policies to these human rights issues. In this way, the Panel's

¹¹ Daniel D. Bradlow, *Precedent-Setting NGO Campaign Saves the World Bank's Inspection Panel*, 6 (3) HUMAN RIGHTS BRIEF 71 (1999), <https://ssrn.com/abstract=2972451>.

¹² The Environmental and Social Framework, *supra* note 8. <https://www.worldbank.org/en/projects-operations/environmental-and-social-framework>. For an analysis of the process leading to its adoption and of its content, see, Philipp Dann et al., *The World Bank's Environmental and Social Safeguards and the Evolution of Global Order* 32 LEIDEN JOURNAL OF INTERNATIONAL LAW 537 (2019), <https://ssrn.com/abstract=3556161>.

¹³ See IBRD Articles of Agreement, *supra*, note 2, art (10).

¹⁴ See, e.g., *Uganda: Transport Sector Development Project-Additional Financing*, Case No. 98, Request No. 14/07, The World Bank Inspection Panel (received Dec. 19, 2014), <https://www.inspectionpanel.org/Panel-cases/transport-sector-development-project-additional-financing>, (dealing with, *inter alia*, issues like gender based violence).

cases are helping to produce a form of jurisprudence on how human rights apply in the development financing context.¹⁵

An Assessment of the Panel's contribution to International Law

Thirty years of Panel operations have convincingly demonstrated the benefits that follow when operational international organizations become more accountable, transparent, and participatory. It has helped make the Bank responsive to the individuals and communities that are most affected by Bank-financed projects and operations. In addition, the Panel has made a positive and creative contribution to the development and interpretation of the soft international law applicable to international development finance.

The work of the Panel and other independent accountability mechanisms is also influencing the development of soft international norms and standards applicable to responsible business conduct.¹⁶ It is also influencing the evolution and interpretation of such international human rights principles as the rights of indigenous people to free, prior, informed consent and the adequacy of the compensation given to communities involuntarily resettled because of large infrastructure projects.

However, the experience of the last 30 years has also helped to underline some of the Panel's shortcomings. The most significant of these arises from the failure of the Bank to fully meet its customary international law obligation to offer an effective remedy to those who have been harmed by its actions and decisions. This obligation is expressed in the UDHR, in the core international human rights conventions, in all regional human rights conventions, and it has been recognized by international human rights bodies and is acknowledged by all states.

While the principle is clear, the precise contents of the obligation are not easily determined. The European Court of Human Rights has stated that it must be a remedy that is functionally equivalent to that awarded by a court.¹⁷ The Panel does not meet this standard in two respects. First, while the Panel is independent of Bank management, it is not fully independent of the Bank. Second, the Panel does not offer complainants anything comparable to the remedy that they could obtain from a court.

While it will be challenging for the Bank to meet these two requirements, it could be more creative in trying to meet them. For example, to improve the Panel's independence, it could enhance the Panel's ability to make remedial recommendations based on its findings and to limit the grounds on which the Board and management could reject these recommendations. Alternatively, it could work with other IFIs to establish one truly independent IAM for all IFIs.

The challenge for the Bank in meeting the second requirement is to identify a remedy that it can offer the complainants that does not unduly penalize the Bank's other member states. This would be the case if the Bank used its own resources to compensate the complainants since it would mean that the Bank has less resources available to lend to other member states. However, this does not preclude the Bank from seeking to devise, either on its own or in collaboration

¹⁵ See, e.g., Kelebogile Zvogbo et al., *The World Bank as an Enforcer of Human Rights*, 19(4) JOURNAL OF HUMAN RIGHTS. 425 (2018), https://www.peio.me/wp-content/uploads/2018/01/PEIO11_paper_52-1.pdf.

¹⁶ See, e.g., Equator Principles, <https://equator-principles.com/> (last visited Sep. 28, 2023).

¹⁷ Waite and Kennedy v. Germany, App. No. 26083/94, (Feb. 18, 1999), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-58912%22%5D%7D>.

with its member states and other IFIs, meaningful financial or non-financial remedies for complainants who have been harmed by the Bank's non-compliance.