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Reflections on the Role of the Panel

Charles Di Leva

Introduction

Over the past thirty years, the World Bank and the Inspection Panel have had a supportive relationship regarding the principle of accountability, particularly as applied to the field of development finance operations and the role and responsibility of the Bank as a multilateral public sector financial institution. This relationship has been apparent in at least three key aspects: i) following the Bank's lead, many development institutions around the globe have taken steps to improve their own accountability and developed independent accountability mechanisms (IAMs) modeled on the Inspection Panel; ii) the Bank and other development institutions have been supporting the development of stronger and more comprehensive environmental and social policies for which they hold themselves to account; and iii) there has been steady growth in the availability and breadth of grievance services and mechanisms, at the management and project level, to help implement policy requirements and resolve issues for affected people.

These initiatives to strengthen accountability are consistent with the understanding of the importance of the "Rule of Law" and efforts to support it by the Bank. Unfortunately, as discussed below, while the Bank's own systems for accountability have grown over the years, the trend toward accountability and the rule of law in many of the Bank's member states has been disappointing. This is one of the reasons why, at least in part, the role of the Panel and IAMs remains vital.

The Panel's Origins – a Personal Perspective

The creation of the Panel dovetailed with my career goals when I joined the Bank in 1992. I entered the Bank's Legal Department as a "mid-career" hire, after litigating environmental matters in the Environmental Enforcement Section of the US Department of Justice. I joined the Bank expecting that most of my work would be to help countries develop their environmental law and capacity, and to help Bank teams who were working to ensure borrower projects were in compliance with applicable environmental and social policies. The first expectation reflected my experience working in Nairobi in the then-named "Environmental Law and Machineries Unit" at the United Nations Environmental Programme. The second expectation dovetailed with my view that environmental compliance is essential for sound development.

My Bank assignment was with the newly formed Environmental Law Unit, (later, the Environmental and International Law Unit) under Chief Counsel W. Paatii Ofosu-Amaah. Among many matters, our office assisted in the drafting of the proposed Resolution to establish the Panel under the direction of Ibrahim F.I. Shihata, General Counsel and Senior Vice President. Mr. Shihata was deeply engaged with both the Board and civil society in the creation of the Panel. As the first IAM, the drafting process was intense and challenging. It was also precedent-setting in that lawyers representing civil society, such as Professors Hunter and Bradlow, would have a role in the process of drafting a World Bank Resolution.

During this time period, the Bank was the largest funder of infrastructure projects in a number of developing countries, and issues surrounding compliance with Bank environmental policies were attracting increasing attention. This issue became especially prominent with the release of the Morse Berger Report on the Sardar Sarovar Project in India. The Report identified how the Bank had failed to ensure environmental and social policies were properly applied, and was a major impetus in civil society groups calling for the establishment of the Panel.

The Morse Berger Report findings resonated during one of my first assignments when I differed with a Bank task team member working on another large hydro project about whether certain aspects were mandatory or optional in the Bank's Environmental Assessment Operational Directive on EA.

The disagreement highlighted to me how difficult it would be to hold anyone accountable,, given the lack of clarity in the way the then-existing environmental and social directives were drafted. It was logical that the Morse Berger report would have provided the impetus for the need for a stronger system for accountability. Bank management also understood that some major donors were uncomfortable with a lack of clarity on what was required to avoid harm associated with Bank projects. Thus, to Bank Board members representing a significant number of Bank shareholders, the launch of the Panel was both necessary and timely, and not long after the release of the Morse report, on September 22, 1993, the World Bank Executive Directors established the independent Inspection Panel.

The crux of the Panel's role on compliance is laid out as follows:

“The affected party must demonstrate that its rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank (including situations where the Bank is alleged to have failed in its follow-up on the borrower's obligations under loan agreements with respect to such policies and procedures) provided in all cases that such failure has had, or threatens to have, a material adverse effect.”¹

Once in place, for the first time in the 48-year history of the Bank, requests to an independent fact-finding body could be filed alleging two or more people had been harmed due to the Bank's actions. The ability to investigate compliance also meant that, for the first time, task teams would understand that there was a new system of accountability to take into consideration during project preparation and the Borrower's implementation of the project.

¹ While there have been several revisions to the Panel Mandate, the most recent Resolution continues to keep in effect the crux of the requirements for a complaint being eligible; namely potential threat or actual material harm to two or more persons due to the Bank's failure to adhere to its mandatory policies and procedures. <https://www.inspectionpanel.org/about-us/panel-mandate-and-procedures>.

The Panel and Evolution of Environmental and Social Concerns

With the creation of the Panel, it was important for the Panel, Borrowers, civil society, and Bank staff to understand what Bank policies were mandatory and reviewable by the Panel, to ensure, *inter alia*, clarity between the Bank and the borrower.² However, as some investigations revealed, including the high visibility Western China Poverty Reduction Project, the policies were not models of clarity and this made it difficult to define roles and responsibilities.³ Thus, following the Panel's establishment, efforts were made to redraft the former "Operational Directives" to more clearly assign who is responsible for what, and "safeguard" training courses were launched to help teams follow Bank policies, particularly around EA, involuntary resettlement and indigenous peoples. These efforts included a steady growth in E and S staff, but also a long process of redrafting the directives into "operational policies and Bank procedures" to try to better distinguish the mandatory from the aspirational, and the Bank and Borrower responsibilities.⁴

Thus, the Panel's investigatory role helped compel a much needed, Management-supported process of organizing and clarifying the then-existing suite of environmental and social instruments. In addition to the influence of the Panel in the move toward a more unified set of environmental and social safeguards/standards in the Bank and other institutions, Panel reports to the Board and the Board and Management's reactions to those findings also had an impact on the application of those policies. As one relatively recent example are incidents of gender-based violence that were uncovered in the Panel's investigation of the "Uganda Transport Sector Project - Additional Financing". The Panel's investigation led the Bank's Board and Bank Management to enhance existing Bank policies by putting in place provisions to protect against gender-based violence (GBV) and sexual exploitation, sexual abuse, and sexual harassment (SEAH).⁵ Other development institutions have followed these important developments. Thereafter, the Panel captured some of the lessons learned from this investigation in its Emerging Lessons series.⁶

In addition, that projects like Uganda Transport had initially been classified as risk level Category B contributed to the Bank recognizing how social risks were becoming more prominent, and along with the launch of the Environmental and Social Framework (ESF), led to social risk management tools like the Good Practice Notes that address issues like GBV and SEAH, security personnel, labor influx, sexual orientation and gender identity (SOGI), race, and gender across the Bank portfolio, and contributed to changing the risk classification from a three-pronged listing of "A,B,C" to a more nuanced and comprehensive approach that includes far more in the way of

² It was particularly true then, and remains true today, that these policies would almost always be concerned with environmental and social issues. In those cases where the policies were not environmental or social, such as allegations of harm due to poor supervision or failure to properly disclose information, the alleged related impact of those failings was inevitably environmental or social harm.

³ *China: Western Poverty Reduction Project*; Case No. 3, Request No. 99/3, (Received June 18, 1999), <https://www.inspectionpanel.org/panel-cases/western-poverty-reduction-project>.

⁴ For example, the Directive on Environmental Assessment became effective as the new Environmental Assessment Operational Policy (OP 4.01) and Bank Procedures (BP 4.01) (1999).

⁵ See *Uganda Transport Sector Project - Additional Financing*, Project No. P121097, <https://projects.worldbank.org/en/projects-operations/project-detail/P121097>

⁶ The World Bank Inspection Panel, *Responding to Project Gender Based Violence through Independent Accountability Mechanisms*, Emerging Lessons Series, No 6, (2021); <https://www.inspectionpanel.org/sites/default/files/publications/Emerging%20Lessons%20Series%20No.%206-GBV.pdf>.

required contextual and social analysis. This risk-tiering approach requires placing into risk classification of High, Significant, Moderate and Low.

Development of a Management led GRS

The founding 1993 Panel Resolution recognized that eligibility should be conditioned on the certainty that Management had an opportunity to help resolve a complaint before the Panel would have to exercise its competence. Thus, the Resolution included this condition:

“The Panel shall satisfy itself before a request for inspection is heard that the subject matter of the request has been dealt with by the Management of the Bank and Management has failed to demonstrate that it has followed, or is taking adequate steps to follow the Bank's policies and procedures. The Panel shall also satisfy itself that the alleged violation of the Bank's policies and procedures is of a serious character.”⁷

In other words, eligibility was meant to be in line with an approach akin to exhaustion of administrative remedies, under which the Panel process should not gear up if Management can resolve the matter on its own. Unfortunately, for quite some time, the Panel and Management had different views on whether Management had been given an opportunity to respond to a complaint. There were some complaints that were registered for which Management felt they had not been notified, though the Panel had indications of the opposite. Indeed, there were some instances where Management, wishing to be responsible, had wanted to be given a chance to engage with requesters, only to find out that there were staff who failed to respond to requesters, making the request eligible.

Fortunately - though it should have happened sooner - in 2015 Management established the Grievance Redress Service (GRS). The GRS was set up following one of the recommendations of the Bank's Internal Evaluation Group evaluation of the Bank's safeguard policies. Without any authority to impede a requester from wanting to go to the Panel with their request, the GRS has been established to fulfill in a centralized and coordinated role the function that Para 14 had arguably long encouraged. Moreover, given the extensive number of matters it has been handling, GRS can be seen as allowing the Panel to conserve its resources for the more serious matters that deserve its attention. Indeed, the GRS notes it has processed an average of 302 cases annually over the last three years.⁸ Moreover, because of the nature of its access to Project teams and Borrowers, the GRS may be able to help resolve some concerns more quickly. Further, other developing institutions appear to have seen the benefit of providing a service like the GRS, and have developed similar offices.⁹

⁷ See Panel Resolution at Para 14.

⁸ The World Bank Grievance Redress Service; <https://projects.worldbank.org/en/projects-operations/products-and-services/grievance-redress-service#>

⁹ See, e.g., Inter-American Development Bank Group, IDB Invest; <https://idbinvest.org/en/how-we-work/engagement-and-response-platform>; the World Bank Group private sector arm, IFC, has also created this service for stakeholders.

The Strengthening of Project level Grievance Mechanisms

Another positive evolution that can be associated with the drive for accountability and the evolution of the Panel is the enhancement of project-level grievance mechanisms. It is noteworthy that the ESF makes mandatory that all Bank-financed investment projects include grievance mechanisms. Today's setting can be contrasted with the situation when the Panel faced one of its more difficult, early investigations. The Yacyretá hydroelectric project was a binational effort between Paraguay and Argentina that required large-scale resettlement of low-income workers and communities on both sides of the Parana River.¹⁰ In the recognition that this project would be controversial, the project design called for conflict resolution services to be provided by the Green Cross.

During the Panel's investigation, it was established that, unfortunately, the Green Cross service was never made effective. The failure of the service to launch may well have been contributed to by the absence of a Bank policy requirement for a project-based grievance mechanism. Indeed, even when the relevant Bank policy on Environmental Assessment was updated in 1999, there remained no readily apparent requirement to have a project level grievance mechanism.

Today, it is accepted that well-designed and functioning project-level grievance mechanisms¹¹ are essential where projects carry potential risk of disputes with project-affected people. Almost thirty years after Yacyretá, every investment project should have access to at least one grievance mechanism, process, or procedure. It is a responsibility of Management to help the Borrower ensure project design includes grievance mechanisms that can handle any relevant aspect of the Environmental and Social Standards, as well as a separate one to address grievances pertaining to Labor and Working Conditions, and to address risks related to GBV/SEA. The design must include elements that ensure the GRM is flexible, transparent, maintains a log and database, advertise its procedures, and an appeals process.¹²

Moreover, in recognition that past projects often had non-functioning GRMs, Bank supervision reports that Bank staff are required to be prepared for all Bank investment projects to now be required to include information on whether the GRM is up and running. The ESF also provided an opportunity to address a long-standing request of the Panel that the Bank's system of safeguards makes the opportunity to come to the Panel more visible. Thus, the ESF Environmental and Social Policy section on "Grievance Mechanism and Accountability" specifically informs communities about the access to the Panel and the GRS.¹³

¹⁰ *Argentina, Paraguay: Yacyreta Hydroelectric Project*; Case No. 7. Request No. 96/2, (received Sep. 30, 1996), <https://www.inspectionpanel.org/panel-cases/yacyreta-hydroelectric-project>

¹¹ The World Bank, *The World Bank Environmental and Social Framework (ESF)*, (2018), Environmental and Social Policy, at para 60: "The Bank will require the Borrower to provide a grievance mechanism, process, or procedure to receive and facilitate resolution of concerns and grievances of project-affected parties arising in connection with the project, in particular about the Borrower's environmental and social performance. Par. 61 informs that project-affected parties can also file complaints with the GRS and, "After bringing their concerns directly to the World Bank's attention and giving Bank Management a reasonable opportunity to respond, ... may submit their complaint to the Inspection Panel.

¹² ESF, Environmental and Social Standard 10, Paras 26, 27 and Annex 1 "Grievance Mechanism".

¹³ ESF, Environmental and Social Policy, Para 61.

During the ESF consultation process, there were some in civil society who voiced concern that the move from the “do no harm” approach associated with the safeguard policies could somehow be hindered by the move to the ESF Policy and Standards. Five years after the effectiveness of the ESF, there is probably enough data now to make such a comparison. However, in my view, the much broader scope, uniform and comprehensive drafting, and intellectual approach to the ESF, and the added capacity the Bank brought on board to address the ESF demands, makes the new system much better at providing opportunities for improved development and accountability.

Recognition of the Importance of the Rule of Law

Despite the internal advancements in accountability and environmental and social standards, there is a larger issue that still bears mentioning when discussing accountability. It is worth recalling the enthusiasm generated by the 1992 Rio Conference on Environment and Development and the role foreseen for the international community, including the Bank, in helping fulfill a number of its Principles. Key to this essay and the future of accountability are those principles relating to the underlying issue of accountability: Principle 10 on “Effective access to judicial and administrative proceedings”; 11 on “States enacting effective environmental legislation”; and 13 on States developing “national law on liability and compensation”.

Thirty years later, to what extent have those principles been observed? The World Bank Rule of Law Project recently noted that rule of law declined for the fifth year in a row in 61% of countries surveyed as part of the World Bank Rules of Law Project.¹⁴ According to the Report: “Since 2015, the rule of law has weakened in 64% of countries studied in the WJP Index and overall scores have declined by an average of 2.6% globally over this period. This deterioration has been driven by authoritarian tendencies, including weaker checks and balances, diminished accountability, and eroded protection of fundamental rights.” These concerns are not necessarily due to the absence of environmental and social legislation, which in many cases was strengthened due to the influence of the Bank and other multilateral financial institutions, though there have been some countries, developed and developing, that have weakened EIA laws relevant to development finance. For the most part, these WJP concerns are about weakening of the independence of the judiciary and enforcement capacity.

These sobering facts bring home a number of salient points regarding this effort at looking at the past and future of the Inspection Panel. The first is the development community faces a continued uphill climb in helping client countries offer access to justice. Until it does, we can expect the continuing need for accountability and grievance redress mechanisms at all levels of the development industry. This is especially the case given the degree to which many in civil society come to the Panel because they are discouraged at the chance for justice when they challenge the actions of their own governments who are responsible for implementing Bank projects. Second, we need to take into account that in the future, there could be an increasing number of conflicts between communities and projects that do not offer World Bank style accountability. This “accountability gap” could occur because finance is provided by sovereign funds or private entities that do not offer such systems.

¹⁴ World Justice Project, *World Justice Project Rule of Law Index: Between 2022 and 2023, Rule of Law Once Again Weakened in a Majority of Countries*, <https://worldjusticeproject.org/rule-of-law-index/insights>.