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Precedent-Setting NGO Campaign Saves the World Bank's Inspection Panel

by Daniel Bradlow*

This article, after describing the stakes in the ongoing debate about the operating procedures of the World Bank's Inspection Panel (Panel), explains the causes of this controversy. Thereafter it discusses the evolution of the proposal of the Working Group of the Bank's Board of Directors to correct the problems in the Panel's operating procedures. It suggests that, if the Board has the political will to adopt it, the final proposal of the Working Group has the potential to create a Panel process that is effective, independent, and impartial. The reason for this possibility is that the Bank, in an innovative rule-making procedure, allowed interested parties to submit comments on the proposal to the Bank, and the Board held an unprecedented meeting with nongovernmental organizations (NGOs) to discuss the proposal of the Working Group.

The Stakes in the Debate

One of the most difficult issues facing policy makers engaged in the economic development of their countries is how to allocate and use resources so that they maximize public welfare. Part of the reason this issue is so difficult is that it often involves deciding that a certain group of people must suffer so that the majority may advance. For example, the decision to build a hydro-power project might bring great benefits to many people for a long period of time, but it does so at the cost of forcibly resettling some people and of requiring the current population to forego other development opportunities and incur significant debt obligations for the benefit of future generations. Such a project may also impose significant environmental costs.

The result is that all development projects, whether they be the building of new dams, highways, power systems, or sports stadiums, involve conflict between those who believe that legitimately chosen policy makers have the right to expect that their decisions regarding development will be respected and those who believe that development projects imposing an unfair burden on any specific group of people are unacceptable. This dispute often also becomes a dispute between national policy makers, who believe that sovereignty should protect their decisions from outside interference, and those who believe that certain internationally recognized standards of good practice are universally applicable. This latter group also contends that project decision makers who fall below these standards in their decisions and actions should be held internationally accountable.

The World Bank (Bank) and other multilateral development banks, because they provide funding and advice for large and complex development projects, have increasingly been drawn into these disputes. The Bank has developed detailed operating policies and procedures to guide Bank officials in addressing such complicated issues as the environmental and social effects of Bank-funded projects and the monitoring of Borrower compliance with the covenants in Bank loan agreements. Experience has demonstrated, however, that the Bank has not always been able to comply with these policies and procedures and that, on occasion, this has caused serious social and environmental problems.

The Bank's involvement in the problems associated with the projects that it funds encouraged NGOs and others to demand that the Bank should be held accountable for its actions. In response to these demands, the Bank, in 1993, passed the Resolution Establishing the Inspection Panel (Resolution), which established the World Bank Inspection Panel. The mandate of the Panel is to investigate allegations, known as Requests for Inspection (Requests), made by two or more peo-

ple who claim that they have suffered or are threatened with "material adverse effects" caused by the failure of the Bank's staff and Management to act in compliance with the Bank's operating policies and procedures in a specific Bank-funded project or operation.

The Panel process consists of two stages. The first stage determines the eligibility of the Request for Inspection. This stage ends in a Panel recommendation to the Bank Board of Directors and a Board decision on whether or not to authorize an investigation. The second stage is the investigation itself. At the end of the investigation, during which the Panel can use whatever investigative techniques it deems most appropriate, the Panel submits a report with its factual findings to the Board of Directors. Six weeks later, the Bank Management provides the Board with a response to these findings. Based on these two documents, the Board makes its final decision. The Panel reports, together with the Request, the Management response to the Request, the Panel's findings, and the decisions of the Board, are all made public. They are released after the Board decision at each stage of the process.

The Panel's First Five Years

To date, the World Bank Inspection Panel has received 14 Requests for Inspection. None of these 14 Requests resulted in an investigation that followed the exact procedure spelled out in the Board of Directors' Resolution. One case resulted in a full Panel investigation, but the President of the Bank withdrew the

Bank offer to fund the disputed project before the Board had reviewed the Panel's report on the investigation. In one other case, the Board refused to authorize a Panel visit to the project site but authorized an investigation limited to documents and other evidence available in Washington, D.C., where the Bank's headquarters are located. Most of the other cases did not follow strict Resolution procedures. Instead, the

Panel was required to undertake an extensive preliminary investigation of these Requests to determine their eligibility. This preliminary investigation was often followed by the Bank Management submitting a remedial action plan directly to the Board before the Board had had an opportunity to decide whether to authorize a full investigation.

Although these action plans provided some relief to the requestors, they are troubling. The Management's submission of the plans to the Board is not consistent with the requirements of the Resolution, which does not authorize (1) any direct communications between the Management and the Board until after the Board has received the Panel's report on its investigation; or (2) Management responses to the issues raised in the Request until after the Panel has had an opportunity to conduct an independent investigation of the facts of the case. In addition, the Management action plans generally were developed without consulting the people affected by the project and did not necessarily address all the issues raised by the requestor or all the concerns raised by the Panel in its preliminary report.

The lessons learned from these cases suggest that the process is producing some benefits for requestors but that there have been significant problems associated with the Panel procedures.

The Benefits

Those filing Requests during the last five years received three benefits. The first is that, in some cases, the Request resulted in the Bank or the Borrower taking some remedial

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actions. For example, an investigation into a project to build a bridge over the Jamuna River in Bangladesh resulted in approximately 70,000 people being incorporated into the resettlement plan from which they had originally been excluded. Other Panel proceedings resulted in additional moneys being spent to deal with the adverse social and environmental consequences of Bank-funded projects in Brazil and Argentina. A final example is a Panel proceeding that resulted in the cancellation of a Bank offer of funding for a controversial dam project in Nepal.

Second, the filing of a Request resulted in at least one member of the Inspection Panel visiting the requestors as part of the Panel's preliminary review. These visits helped ensure that, at a minimum, the requestors could be confident that their concerns and the information they provided to the Panel would be included in the Panel's report to the Board of Directors. Eventually, when the Bank makes the Panel reports publicly available, the reports could, if necessary, be used by the requestors and their supporters to increase the pressure on the Bank's Directors and Management to resolve the problems with the project.

Third, in a number of cases, the mere filing of the Request generated publicity that increased the pressure on the Bank to respond to the issues raised in the Request. This helped tip the balance of power in the struggle over how the costs and benefits associated with the development project were allocated in favor of those who were likely to suffer from the project, who were usually poor and powerless. Thus, the Panel helped to empower those whose weakness, poverty, and powerlessness previously had made them invisible and had enabled the rich and powerful to impose the costs of the project on them in the first place.

The Problems

The Panel's experience has exposed three major problems. The first is that borrowing countries are very suspicious of the Panel. They suspect that the Panel process, in effect, is an unwarranted intervention by the Bank into their sovereign affairs and unduly complicates their efforts to achieve sustainable development. Moreover, they believe that the Panel process is unfair in the sense that it was imposed on them by rich member countries who were looking for a way to appease their nongovernmental critics but who will never have to live with or finance the consequences of their decision. They, no doubt, also note that the richest countries have shown no inclination to tolerate such interventions by international organizations into their own domestic affairs.

The second problem is that, partially due to tensions between Executive Directors who represent borrower countries and those who represent creditor countries, the eligibility phase of the Panel process has become unduly complex and politicized. Instead of this phase being limited to a simple determination of the eligibility of the requestor to file the Request, it now involves the Panel undertaking a "preliminary assessment" that almost amounts to a full investigation. This preliminary investigation, however, is undertaken at a stage when the Panel's mandate is limited to a determination of eligibility and the Panel lacks the authority either to fully investigate if the harm suffered by the requestors is caused by the Bank's failure to act in compliance with its rules and procedures or to make findings on these issues.

The third problem is that the Bank Management's response to Panel investigations, particularly its premature submission of remedial action plans, has cast doubt on the impartiality and independence of the Panel process. There are two reasons for this. First, the unauthorized direct communications between the Board and Management amount to *ex parte* communications between the target of the investigation (Bank staff and Man-

agement) and the final decision maker in the Panel process (the Board) at a time when the Board is still deciding whether or not to accept the Panel's recommendation regarding an investigation. Second, because these action plans are developed before the Panel has completed its final investigation and made its findings about the Bank's conduct, they can only remedy the problems that the Management identifies as being amenable to solution, usually through actions by the Borrower. The Management plans, therefore, may exclude certain additional issues that the Panel's investigation would also find to be at least partially the Bank's responsibility.

The problems caused by the Management's action plans are very serious. The process set out in the Resolution is designed to ensure that the Panel is fully and independently able to investigate the issues raised in the Request. The resulting factual record and Panel findings should be the exclusive basis for the Board's decisions on whether or not the Bank staff's actions were in compliance with Bank operating policies and procedures; whether they caused material adverse effects for the requestors; and whether or not to accept the subsequent Management recommendations for bringing the actions of the staff into compliance with the applicable policies and procedures and for correcting the problems caused by the prior non-conforming acts of the Bank staff and Management. Consequently, any communication between the Management and the Board prior to the completion of the Panel investigation taints the Panel process. It undermines the Board's ability to make an impartial decision at the end of the eligibility phase of the process, and, as experience has demonstrated, it diminishes the Panel's capacity to conduct the independent and impartial investigation of troubled Bank projects that the Resolution seemed to promise.

Consequently, any communication between the Management and the Board prior to the completion of the Panel investigation taints the Panel process.

The net effect of the Management's behavior has been that the Board has been confronted with two reports, each with a different perspective, when it has met to consider the Panel's eligibility recommendations. It has had the Panel's extensive preliminary assessment of the issues raised in the Request, including the harm caused by the Bank-funded

operation, and the Management's report stating that it has developed a plan for resolving the problems that are caused by the Bank. The Board, therefore, has been confronted with having to decide whether to authorize an investigation of a project that seemed already to have been investigated by the Panel during the eligibility phase and for which a Management plan of action to solve all problems caused by the Bank already appeared to exist. This made it seem like there was no need for an additional Panel investigation of the Bank's conduct and that the only purpose of such an investigation was to determine who, besides the Bank, was responsible for the harm suffered by the requestors—such as the Borrower. This confirmed some Board members' suspicions that the Panel is a mechanism for challenging the conduct of Borrowers and not a mechanism for ensuring transparency and accountability in Bank operations. The result is that the Board meetings on the Panel recommendations regarding eligibility have been bitter and polarized.

Requestors and NGOs also have become very suspicious of the process as a result of the Management's actions. They argue that they have not received the benefits of the process and investigation that they were promised in the Resolution. In addition, they contend that, although the relief contained in the Management's action plans has been welcome, they cannot be confident that the plans have addressed all their concerns because the Management has not consulted them about the action plans and they have not received copies of the plans. Consequently, they have become wary of relying completely on

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tine military officers who subverted the legal order of Argentina, including ruling *junta* members. In addition, Spanish judges have frozen Swiss bank accounts of these leaders, leading to charges of income tax evasion. This, in turn, resulted in the near impeachment of retired general Antonio Domingo Bussi, governor of Argentina's Tucumán province. More than 150 other Argentine military leaders are under active investigation by Spain for their complicity in the same array of international crimes that originally faced General Pinochet. Finally, several of the Argentine *junta* leaders are now under house arrest in Argentina based on new

domestic charges of kidnapping infants from their "disappeared" mothers during the period of military rule in that country. Many believe that Adolfo Luis Bagnasco, the Argentine federal investigating judge who upheld charges in Argentina in the child kidnapping cases, was emboldened by the courage and independence of the Spanish judge who is moving to hold General Pinochet accountable for his crimes. ☐

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The Washington College of Law (WCL) International Human Rights Law Clinic, under the direction of WCL Professor Richard J. Wilson, has been involved actively in the Spanish case against General Pinochet since early 1997. WCL clinic students provided the Spanish prosecutors with key research, some of which appears in the lawyers' pleadings and in Investigating Magistrate Baltazar Garzón's arrest orders for Augusto Pinochet. Student work also proved key to Judge Garzón's amended request for U.S. cooperation through use of a Mutual Legal Assistance Treaty between Spain the United States. Finally, in October 1998, two WCL clinic students accompanied WCL Professor Michael Tigar to London, where all assisted in the preparation of briefs for the Crown, arguing against immunity for the Chilean dictator.

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the Panel procedures and have begun to use political means to pressure the Board in order to get a full Panel investigation approved. This also has contributed to the politicization of the process and to the difficult atmosphere in Board meetings on Panel issues.

Lastly, the current procedures have not satisfied the Panel, whose members feel that the Bank Management is manipulating the process in a way that undermines their ability to function. They have also suffered from the growing hostility that some members of the Board feel towards the Panel.

Board Response to the Situation

By September 1997, the tensions between members of the Board over matters related to the Panel reached such a serious level that the Board decided to review the Panel process and see if some resolution to these problems could be found. This decision resulted in the Board appointing a Working Group of six Executive Directors to develop and propose a solution to the problems the Board had with the Panel process. By late 1998, the Working Group had prepared a proposal for the full Board.

The Working Group's 1998 proposal represented a significant weakening of the Panel. In fact, it would have made the Panel's situation untenable. In brief, the Working Group proposed that, in the initial phase of the Panel process, the Panel would limit itself only to investigating the issue of eligibility in any field visit it might make. In addition, the Group proposed that the Panel should base its recommendation for or against an investigation only on the information contained in the Request, the Management response, and the results of this limited field trip. The Management, on the other hand, would have been allowed to submit a "compliance plan" with its response to a Request for Inspection, which would have described the steps it had taken or expected to take in order to bring its actions into compliance with the applicable policies and procedures. This would have given the Management an opportunity to provide the Board with its own version of the facts of the project. In fact, it is difficult to see how the Management could have submitted a coherent compliance plan without including factual information that supported its view of the problems with the project and how its compliance plan will help resolve these problems. The result of the Working Group's proposal,

therefore, would have been to recognize formally the Management's current informal efforts to undermine the independence and impartiality of the Panel process. This, in turn, suggested that the Working Group proposal would have increased the likelihood for polarizing and politicized discussions at the Board level.

The second problem with the Working Group's proposal was that it stated that the Board would accept "without discussion" the Panel's recommendation of an investigation "except with respect to the technical eligibility criteria, i.e. criteria other than the existence of *prima facie* evidence of serious failure of the Bank to follow its operational policies and procedures and the resulting material adverse effect." However, the Working Group did not define what it meant by "technical eligibility criteria." According to the Resolution establishing the Panel, eligibility also requires a showing that, *inter alia*, the requestor is "an affected party in the territory of the borrower which is not a single individual (i.e. a community of persons such as an organization, association, society or other group of individuals) or by the local representative of such party" (in exceptional cases, non-local representatives can also file Requests with the permission of the Board) (paragraph 12 of the Resolution); the affected party must demonstrate that its rights or interests have been or are likely to be directly affected by the acts or omissions of the Bank (paragraph 12); and the Request does not relate to matters that are the responsibility of other parties and do not involve any act or omission on the part of the Bank (paragraph 14). None of these three criteria is "technical" in the sense of being objective and easily determined. Consequently, without a clear definition of "technical criteria," this proposal could have become the vehicle that Executive Directors interested in blocking an investigation could have used to seek rejection of the Panel's recommendation. This would have further politicized Board discussions over Panel recommendations and would have recreated the polarizing conditions that currently plague Board discussions on the Panel.

The initial Working Group proposal also sought to impose a standard on the Panel for determining harm. The standard, which required a comparison between the situation of an affected people after the development project and what it would have been if there had been no project, was unrealistic. Because it is impossible to determine what an affected people's situation would have been without the project, the standard

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was speculative and any conclusion reached by the Panel and the Board on the issue of harm will seem arbitrary.

Subsequent Developments

Originally the Board of Directors planned to treat the Working Group Report as a confidential document that would not be released to the public until after it was adopted by the full Board. Due to significant pressure from NGOs, academics, and adverse press reports, however, the Board decided to release the Working Group Report and seek public comments. It posted the Working Group Report on the Bank website, solicited comments from interested parties, and held an unprecedented meeting with NGOs from around the world in Washington, D.C., in late March 1999.

Based on the comments submitted and the results of the NGO meeting, the Working Group decided to make changes to its Proposal. These changes improved the Proposal and increased the likelihood that the Panel will be able to undertake truly independent investigations of eligible Requests. The first significant change the Working Group made is to adopt a definition of "technical eligibility criteria." Although this definition contains ambiguous elements that invite differing interpretations and thus can be exploited by interested Executive Directors, it will nonetheless impose some limits on the Board's ability to deny the Panel's recommendation for an investigation. The second major change by the Working Group is to remove the option for the Management to submit a "compliance report." It allows the Management, however, in cases in which it acknowledges at least partial responsibility for the harm caused to the requestors, to submit evidence of its intent to comply with applicable policies and procedures in the future. The Working Group's third important change is to encourage the Management to undertake more vigorous efforts to educate people about the Panel's function. Finally, the fourth Working Group change is to require the translation of documents related to Panel investigations into the language of the requestors. The Board of Directors adopted the Working Group Report, including these changes, at a meeting on April 20, 1999.

Conclusion

The Panel is an important experiment in holding international organizations directly accountable for the adverse effects that their decisions and actions may have on the environment and people who live in the areas of their operations. Its experience over the past nearly five years demonstrates that this mechanism has the potential to highlight the injuries caused by the actions of international organizations and to provide some relief to those who suffer these injuries. Its experience also suggests that, by highlighting these injuries, the Inspection Panel has forced the Management and staff of the Bank to confront the complex issue of how to balance respect for the sovereign right of legitimate governments to make decisions allocating the costs and benefits of their development policies with concern for ensuring that these costs are not unfairly imposed on vulnerable and poor population groups and on the environment.

The tensions within the membership of the Bank regarding the Panel's operations have seriously affected the Panel and its ability to perform its mandate, but have not precluded it from sometimes producing benefits for those who file Requests with it. This suggests that, although the Panel process is far from perfect, its benefits outweigh its costs. In this regard, it is useful to remember that this precedent setting mechanism is only five years old. When its five years of experience are compared to the first five years of existence of most human rights bodies, it becomes apparent that its record is quite impressive.

The current review of the Panel has produced a process that, if the Board of Directors has the political will, can result

in a Panel mechanism that works effectively, independently, and impartially. To achieve this outcome, the Board must strictly follow the measures set out in the Working Group Report and must insist that the Management respect the procedures established for the Panel.

Finally, the story of the current review of the Panel sets a significant precedent for the Management and Executive Directors of the World Bank: when dealing with important changes in the rules and policies of the Bank, these groups should consult with members of civil society during the development of the rules or policies. This consultation should include the public release of drafts of the proposed changes to the rules or procedures, an opportunity for public comments, and, in appropriate cases, a public meeting with key NGOs and other civil society actors. The experience with the Working Group Report demonstrates that such a procedure can substantially improve the rules and policies of the Bank. It will also help make the Bank a more transparent and accountable institution. Proponents of this approach should work to ensure that it becomes standard Bank operating practice. ☉

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