

# LESSONS FROM THE NGO CAMPAIGN AGAINST THE SECOND REVIEW OF THE WORLD BANK INSPECTION PANEL: A PARTICIPANT'S PERSPECTIVE\*

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## I. INTRODUCTION

This case study of the Non-Governmental Organization (NGO) campaign against the second review of the World Bank's Inspection Panel is intended as an example of the impact international civil society can have on international financial institutions (IFIs). It also serves to highlight three important lessons about the relationship between civil society and the IFIs, particularly the World Bank (Bank) and the International Monetary Fund (IMF or Fund), and their member states.

The first of the three lessons is that the IFIs are slowly developing administrative procedures that create limited but important opportunities for NGOs to influence policy and rule-making in the IFIs. The second lesson is that power relations in the Bank and the IMF are developing in a troubling direction. The G-7 countries, and particularly the United States, are exercising power without responsibility in these institutions in the sense that they can influence the Bank and the Fund to adopt policies that will have no impact on their citizens or on anyone to whom they are directly accountable. The third lesson is that the tension that exists in these organizations between the NGOs and their member states is largely attributable to the fact that they have different visions of development.

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In order to make the case for these findings, the next section of this paper, after a short explanation of the Inspection Panel (Panel), will describe the campaign that the NGOs mounted around the second review of the Panel and the outcome of the campaign. The third section of the paper will discuss the lessons that can be learned from this case study.

## II. THE CASE STUDY

### A. *Background on the Inspection Panel*

In 1994, the World Bank's Board of Executive Directors voted to establish the Panel.<sup>1</sup> Its motivation for doing so was that it was under pressure from NGOs, the United States Congress, and others to take steps to correct the problems that had been exposed in some high-profile cases of problematic Bank projects. The Bank's executive directors had also expressed some concern about the Bank's performance and were looking for ways to improve it.<sup>2</sup>

Briefly, the Panel has been empowered to respond to Requests for Inspection (Requests) from any affected people, except a single person, who claim that they have been or are threatened with material injury or harm because of the failure of the Bank staff and management to act in compliance with the Bank's operating policies and procedures.<sup>3</sup> The Resolution establishing the Panel provides for a two step process for handling such requests for inspection. In the first step, the Panel reviews the Request and the management response to the request to see if it meets all the eligibility requirements<sup>4</sup> and to decide whether or not the Panel should recommend that it conduct an investigation to the Bank's Board of Executive Directors (Board). The Board makes the final decision about whether or not to authorize an investigation. The Request, the Management response, the Panel recommendation and the Board decision are all made publicly available. In the second stage the Panel conducts the investigation and submits its findings to the Board. The Management is entitled to submit a response to the Panel report. The Board then decides how to respond. The Panel report, the management response thereto and any Board decision on the report are all made publicly available.

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1. *International Bank for Reconstruction and Development*, Res. 93-10, The World Bank Inspection Panel, Res. 93-6, International Development Association (September 22, 1993). See also *Operating Procedures of the Inspection Panel* (August 1994), available at <http://www.worldbank.org/html/ins-panel/> (last visited March 24, 2001) [hereinafter Resolution].

2. See I.F., I. Shihata, *THE WORLD BANK INSPECTION PANEL IN PRACTICE* (2000), for history of Inspection Panel. Daniel D. Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, 34 VA. J. INT'L L. 553 (1994).

3. Resolution, *supra* note 1.

4. The eligibility criteria are in Paragraphs 12-14 of the Resolution, *supra* note 1.

When the Panel was established, it was the first formal mechanism through which non-state actors could attempt to hold an international organization directly accountable for its actions. NGOs hailed its establishment as an important milestone in their campaign to make the Bank more accountable and responsive to those who are supposed to be the beneficiaries of its operations.

During the first three years of its existence, the Panel received ten Requests for Inspection. Most of these cases were controversial and they resulted in growing opposition to the Panel process in the Board.<sup>5</sup> There were several causes for this controversy. First, even though the goal of the initial stage of the process is only to determine eligibility and not the more difficult issues of harm and causation, it had become, in practice, very complex. In fact, the Panel's report included almost all the findings and issues one would expect to see included in a final investigation report. It should be noted that, from the perspective of the Requester, this was not bad because it meant that there was a strong likelihood that the filing of a Request would lead to a field visit by the Panel. This tended to generate publicity and an "on the record" report about the project and the Requester's concerns with it. However, from the Board's perspective the Panel's detailed initial report called into question the need for a full investigation.

The second reason that the Panel was becoming so controversial was that the Bank Management used its response to the Request as an opportunity to deny its responsibility for any of the harm alleged in the Request. In addition, it used the time from the filing of the Request, until the Panel submitted its recommendation to the Board, to work with the borrower to develop an action plan that was designed to correct the problems that the Requester had identified with the project. The plan was developed without consultation with the Requester. It also often involved unauthorized communications between the Management and the Board about the Request that the Panel was considering. These communications were not provided for under the Resolution or the Operating Procedures of the Panel. They also undermined the perceived fairness and independence of the Panel process, at least in the eyes of outside observers.

The result was that the Board, when it considered the Panel's recommendation, was confronted with the following information: a detailed Panel report that found harm and eligibility but did not fully analyze the issue of causation; a Management response that denied it was responsible for the problems in the project; and an action plan in which the borrower agreed to undertake certain actions to correct the problems with the project. The

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5. For an overview of the Panel's first years, see L. UDALL, *THE WORLD BANK INSPECTION PANEL: A THREE YEAR REVIEW* (Oct. 1997, Bank Information Center). See also *THE WORLD BANK INSPECTION PANEL: THE FIRST FOUR YEARS* (Alvaro Umana ed. 1998); Shihata, *supra*, note 2.

combined effect of these documents was to create the impression that the only remaining issue to investigate was what the borrower had done that had caused the harm to the Requester.

Confronted with this information, the Board members from part II countries (that is representing the countries that actually borrow from the Bank) argued that this was not consistent with the purpose of the Panel, which was to investigate problems attributable to the acts or omissions of the Bank's staff and management. They usually opposed Panel recommendations to investigate. Bitter fights ensued between those Executive Directors who supported the recommendation (usually from Part I countries) and those who opposed it. The result was that the Board failed to authorize full-scale investigations like those envisaged in the Resolution establishing the Panel. Instead, it authorized very limited follow up investigations to the Panel report, for example a desk review or a Panel review of the implementation of the action plans.

These compromises satisfied no one. The affected people and their NGO representatives felt that they were not getting what they were entitled to under the Resolution. The borrower countries and their representatives on the Executive Board felt that they, rather than the Bank staff and Management, were becoming the real targets of the Panel. In many ways, they felt that the function of the Panel was becoming to assign blame rather than to correct problems in the implementation of the Bank's operational policies and to solve problems in Bank projects. The Board felt frustrated that a mechanism that had been designed to help reduce their problems in dealing with difficult projects was instead generating more conflict in the Board. In fact, the only partially satisfied party was the original target of the Panel—the staff and management—who were successfully avoiding investigations that may have revealed problems in their operations and conduct.

It is important to recognize that despite these criticisms, the Panel process was producing real benefits for the requesters. Often it offered them the first opportunity to raise their concerns with senior officials of the Bank who would listen to their complaints. In some cases, they were able to gain compensation for affected people. In others they managed to get either the borrower or the Bank to implement promised project elements that were of particular interest to affected people, or to increase spending on issues of importance to them. These results were sometimes precipitated by the site visit by Panel and on other occasions were the result of the action plan or the management response to the filing of the Request.<sup>6</sup>

As a result of these problems, the Board decided to initiate a review of the Panel process in late 1997. After receiving papers from and consulting with

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6. See *supra* note 5, for a detailed discussion of the Panel's cases. See also Daniel D. Bradlow, *A Test Case for the World Bank*, 11 AM. J. INT'L L POL'Y 247 (1996) (describing the Panel's first case).

management and the Panel, the Board, in early 1998, appointed a Working Group to recommend a solution to the Board. The Working Group, which consisted of six Executive Directors—three from part I countries (that is the capital contributing countries) and three from part II countries—after difficult discussions prepared a report that recommended changes to the Panel process, that it believed would both improve the Panel process and correct the current problems. This report was distributed to the Board in December 1998 and was scheduled for consideration by the full Board in late January 1999. Before this could happen, the report, which was supposed to be confidential, was leaked and obtained by some Washington-based NGOs. It was also obtained by some journalists, who wrote about the report.

When the NGOs reviewed the leaked Working Group report they reacted with alarm. They felt that the Working Group's proposals, instead of resolving the problems with the Panel, were more likely to make the position of the Panel untenable. They argued that it would effectively strip the Panel of any meaningful function.

The NGOs identified three major problems with the Working Group proposal. The first was that the Working Group proposed, to limit the Panel's role in the first phase of the process to consideration of the issue of eligibility and to preclude investigation of any other factual issues at this stage. However, at the same time it proposed to allow the Bank's Management to submit a plan showing what it would do to bring itself into compliance with the Bank's operating policies and procedures with its response to the Request for an Investigation. The net effect of this proposal would have been to allow the Management to provide the Board with its view of the facts and the solution to the problems it was alleged to have caused before the Board had received a report from the Panel based on an independent investigation of the facts of the case. In other words, the Working Group seemed to be endorsing the management's "informal" practice of submitting an action plan to the Board before it had reviewed the Panel's recommendation. From the NGO perspective, this seemed to be formalizing precisely that management practice which the NGOs saw as a major cause of the problems with the Panel process.

The second problem was that the Working Group proposed that the Board should accept the Panel's recommendation regarding the Request without discussion except with respect to "technical criteria" relating to eligibility. However, the working group report did not define technical criteria, leaving this up to the discretion of each board member. This was troubling because the eligibility criteria contained in the Resolution establishing the Panel contains some obviously "non-technical" criteria.<sup>7</sup> For example, it requires requesters to show that the "rights or interests" of the requesters "have been or are likely

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7. Resolution, *supra* note 1.

to be directly affected by the acts or the omissions of the Bank.”<sup>8</sup> This is clearly a factual issue that goes to the heart of the merits of the Request. Consequently, the NGOs were concerned that the absence of a definition of “technical criteria” opened a huge loophole which any Executive Director who was opposed to an investigation would exploit, or through which the management could lead the Board to reject an investigation.

The third problem was that the report sought to set a standard for determining harm that compared the current situation of the requesters to what it would have been if there had been no project as opposed to what it would have been if there had been full compliance with all the Bank’s operating rules and procedures. This would make it more difficult for the Requesters to show harm. It also seemed to reduce the burden on the management to comply with all the applicable operating rules and procedures.

There were other problems with the report. These related to the flexibility of the deadlines for the Panel to submit its recommendation to the Board and limits on the Panel contacts with the media during a Panel process.

#### *B. The NGO Campaign Against the Working Group Report*

The Washington-based NGOs, knowing that the Board had scheduled a meeting for late January 1999 to discuss the Working Group report, reacted swiftly to the report. Acting through the United States Treasury and the United States Executive Director at the Bank, they demanded that the Board publicly release the report and asked for consultations with the Board to discuss the report. Faced with the fact that the report had been leaked and had engendered such a strong response, the Board decided to delay its scheduled January meeting. This was done so that the Working Group could meet informally with an invited group of NGO representatives and one academic to discuss the report that the NGOs supposedly had not seen.<sup>9</sup> This meeting was unprecedented in that it was the first time that a committee of the Board had discussed its report with outsiders before it formally presented the report to the whole Board.

As a result of this meeting, the Board decided to publicly release the Working Group report, and call for public comments on the Report. It also scheduled a Board meeting for March 16, 1999. In response to these developments, the NGOs and the one academic who had attended the meeting, began distributing information about the report and encouraging people to submit comments to the Bank. There were also a number of unfavorable press reports. In addition, the NGOs and the one academic began lobbying the Executive Directors.<sup>10</sup> In the event, the Bank received twenty-two comments

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8. *Id.*

9. The author was the one academic participating in this meeting.

10. During this time, the author met personally with almost all the Executive Directors representing

from United States, Mexican and Brazilian NGOs, and from a number of private individuals. These comments were from all sides of the issue.<sup>11</sup> In addition, members of the United States Congress sent a letter to the President of Bank opposing the Working Group's proposal.

As a result of these efforts, and concerned about the impression that the Board was trying to undermine the Panel, the Working Group took an unprecedented step. It once again delayed the meeting of the Board, scheduled for March 16, 1999, and invited representatives of civil society, including a number of groups that had submitted Requests for Inspection, to attend, at Bank expense, an informal meeting with the Board of Directors. The purpose of the meeting, which was held on March 24, 1999, was to discuss the Working Group Report. This meeting was the first time that the Board had agreed to meet to discuss a policy matter with NGOs and other representatives of civil society.

The meeting was attended by all the Executive Directors or a representative from their offices. It was co-chaired by the Dean of the Board, the Russian Executive Director, and a representative of the NGOs, Kay Treacle of the Bank Information Center. It was also attended by the members and staff of the Panel. The meeting was remarkably cordial. It was dominated by a frank discussion of the NGO concerns with the Report. The Board members discussed their need to balance different interests in their report and in the design of the Panel procedures. They also sought to assure the NGOs that their goal was not to undermine the Panel. In fact, a number of Directors made a point of expressing their support for the Panel. After the meeting, some NGOs submitted a second round of comments to the Board.

In April 1999, the Working Group completed the final version of their Report and presented it to the Board, which duly adopted it. This final version contained some significant modifications from the first version of the Report. The changes represented an important victory for the NGOs in that they addressed some of the NGOs key concerns. In addition, the Report adopted a number of the proposals that had been made in the comments that had been submitted to the Bank.

The effect of the Final Report is to reduce the first phase of the proceedings to a relatively simple determination of whether or not, on the face of the documents, the requester has stated an eligible claim. This should be clear on the basis of the documents submitted by the Requesters and should not require any detailed field investigation by the Panel. In cases where the Panel has made a positive recommendation for an investigation, the Board should adopt the

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Part II countries.

11. The author was one of the individuals who submitted comments. A copy of the author's comments are available from the author. See Shihata, *supra* note 2, at 193-96, for a biased discussion of these public submissions.

recommendation without discussion, unless there are technical issues that can be raised.

Importantly, the Working Group defined the “technical criteria” that could trigger a Board discussion of the Panel’s recommendation. The “technical criteria” are limited to such clearly verifiable facts as whether or not the affected party consists of two or more people; the request includes an assertion of serious violations by the Bank; the request asserts that the subject matter of the request has been brought to the attention of Bank management and management has failed to respond; and the matter is not precluded from being the subject of a Panel investigation because it relates to issues of procurement, a substantially disbursed loan, or the Panel has already investigated the complaint.<sup>12</sup>

The second important change was that the final report eliminated any reference to the Bank Management submitting a compliance plan to the Board. It was replaced by the language of the Resolution, which requires management to provide the Panel with “evidence that it has complied or intends to comply with” the Bank’s operating policies and procedures. The Panel then decides if the evidence submitted is adequate. The Management is now only allowed to submit an action plan together with its response to the Panel report on its investigation during the second phase of the proceedings. It is no longer allowed to submit an action plan during the first phase of the Panel proceeding.

Another notable change was that the final report insists on the strict observance of time deadlines by all parties. The Working Group also stipulated that the Panel needs to keep a low profile when conducting its work and should limit its contacts with the press. Finally, the Board decided that the Bank must engage in more effective outreach to educate the public about the Panel and should release information on the Panel proceedings in the language of the requesters.

It is important to note that the Board retained the original Working Group’s recommendation on the standard for determination of harm.

### III. LESSONS FROM THE SECOND REVIEW

There are four key lessons that can be learned from this case study. The first is the value to international organizations of having clear rulemaking procedures that allow for public comment before the rule is actually finalized. While the Board did not originally choose to follow this procedure in regard to the Working Group report, the Bank Management seems to have adopted an informal rule making procedure in other cases. This informal procedure is that the proposed rule or policy is published on the World Bank website and public

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12. This definition was similar to the one contained in the comments the author submitted to the Bank. A copy of these comments is available from the author.



comments are invited. The final rule or policy is only decided after the end of this comment period.

The Bank has followed this rule in regard to some particularly contentious social and environmental policies, for example its policy on indigenous people. Interestingly, some other international organizations have followed the Bank's example. The International Finance Corporation adopted this approach in developing its social and environmental policies. The International Monetary Fund, albeit under some public pressure, utilized a similar procedure in developing the guidelines for its newly established independent Evaluation Office.

The problem with this informal approach to rulemaking is precisely that it is informal and can be used on an *ad hoc* basis. Thus, the Working Group was not required to follow this procedure and only did so under the threat of NGO protests. The use of outside pressure to force the Bank to follow its informal procedures suggests that the Bank would be well-served by formalizing the procedure. It would add an element of predictability and transparency to its rulemaking that would have a positive impact on its governance.

The second lesson is that NGOs, particularly Washington-based NGOs and their transnational allies, have sufficient influence that they are coming to play a growing role in policymaking in the Bank. While their role is still limited to specific issues, it is clear from the case of the second review of the Inspection Panel that they are gaining influence and the ability to play a role in policymaking in regard to those issues of most interest to them. Other examples of where they have played an influential policymaking role are in the design and creation of the new Compliance Advisor/Ombudsman in the International Finance Corporation; the development of the Bank's policy on indigenous people, and in the IMF Board's decision to establish a permanent independent Evaluation Office.

The third lesson is that even though the NGOs have gained some influence in policymaking in the Bank and the IMF, their influence is still dependent on their national governments' being willing to support them. This can be seen from the fact that the United States Treasury and United States Executive Director played an important role in persuading the Working Group and the Bank's Board to meet with the Washington based NGOs. They also helped persuade the Bank to post the first draft of the Working Group report on the Bank's website and invite comments on it. The United States was able to gain support from other Part I countries for these positions. It is not clear that the NGO campaign against the Working Group report would have been as successful without the support of these governments.

The final lesson is that this case study is one of a growing number of examples of increasing conflict between developing country governments and, primarily, Northern NGOs. It is intriguing that these two groups, both of which

are seeking to change the current international economic system from the current one that is dominated by the G-7 countries, are in conflict with each other rather than tactical allies. In fact, in regard to issues like the Inspection Panel, the NGOs find their allies among the G-7 powers, who are the primary beneficiaries of the system they are trying to change, rather than among the developing countries.

There are two reasons that seem to explain the current tension between the developing country governments and the NGOs. The first is that they are the protagonists for two competing visions of development.<sup>13</sup> The developing country governments advocate a traditional view of development. According to this view, the development process is primarily about economic growth and the economic aspects of development can be treated separately from the social, environmental, political and cultural aspects of life. It sees development projects (such as dams, roads, telecommunications systems, mining projects or building a new factory) as discrete, well defined events. The responsibility of the project sponsor and the project contractors, who supply the goods and services required by the project, can be analyzed only in economic, technical and financial terms. The non-economic, that is, social, environmental, political and cultural impacts of the project, are the prerogative of the sovereign in whose territory the project is being constructed. The project sponsor and contractors can treat these issues as externalities and its primary responsibility in this regard is to defer to the sovereign's decision on these issues.

The NGOs, on the other hand, view development as an integrated process in which the economic, social, environmental, political, cultural, and technical dimensions of development projects and policies are all so intertwined that they must be considered together as part of one complex holistic process. According to this view of development, development projects should be seen as episodes of social, economic, environmental, cultural and political transformation that form part of an ongoing process of change. In this process, all actors must account for all the impacts of their own actions. This suggests that this view involves a reduction of the authority of the sovereign who, in reality, is only one out of many actors in the development process. Since each actor is responsible for all the consequences of their actions, it may not be prudent for the other actors to defer to the views of the sovereign in regard to dealing with the impacts of a particular project.

The second reason is that it is relatively cheap and easy for the governments of the G-7 countries to support the NGOs in their efforts to reform the Bank. The work of the Bank has no direct impact on the citizens of the G-7

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13. See Daniel D. Bradlow, *The Times They Are A-Changin': Competing Conceptions of Development and the Reform of the WTO*, GEO. WASH. INT'L L. REV. (forthcoming 2001) for more detailed discussion of these competing views of development and some of their international legal ramifications.

countries and therefore is unlikely to influence the outcome of any elections in the G-7 countries. Furthermore, these governments can show that they are doing something to deal with the difficult social and environmental issues that affect all societies without actually having to engage in a full debate about the domestic implications of these issues. This means, in effect, that the G-7 countries are able to exercise power without responsibility in relation to the Bank and the IMF.

#### IV. CONCLUSION

The campaign around the second review of the Inspection Panel was an important victory for the NGOs. They were able to block proposed changes in the Panel proceedings that would have substantially undermined the legitimacy and efficacy of the Panel. In addition, they were able to get the Bank's Board of Directors to agree to unprecedented consultations with them. They were also given some role in the rulemaking process relating to the Panel. Interestingly, this is not an isolated episode of NGOs playing a policymaking role in the international financial institutions. They have, on occasion, played a similar role in the International Finance Corporation and the International Monetary Fund.

This case study, however, also serves to highlight that, to some extent, the influence of the NGOs is dependent on the inordinate power that the G-7 countries have in these institutions. In addition, it indicates that the tension that exists between the NGOs and the developing countries is attributable to their very different views of development and to the existing power relations in the international financial institutions.