Comments on the Review of the Inspection Panel's "Toolkit"

This year marks the 25th anniversary of the establishment of the World Bank Inspection Panel and with it the advent of independent accountability mechanisms (IAMs) at international financial institutions (IFIs). Despite being the first IAM, the Panel now lags behind other IAMs, which have developed new approaches and have been vested with additional authorities that the Panel currently lacks. Accordingly, we understand the World Bank's Board of Directors is actively reviewing the Panel's "toolkit" and considering some revisions to strengthen the Panel's ability to deliver on its promise of providing accountability.

We, the undersigned organizations and practitioners, appreciate the opportunity to comment on current opportunities to strengthen the Panel's operations. Proposed changes to something as important as the Panel's operations requires broad and effective consultation, with draft changes made available for review before a final decision is made. We understand that after this very brief and limited consultation period is over, a Working Group of the Board will make recommendations to the Committee on Development Effectiveness (CODE). We request that those recommendations be made public for further engagement with civil society prior to their adoption by the Board. In the meantime, we welcome the opportunity to comment on the following seven issues flagged by the Bank's notice[1]:

1. Authority to offer advisory services;
2. Authority to monitor action plans;
3. Approach to problem solving/dispute resolution;
4. The cutoff date for filing complaints (time limit eligibility);
5. Extending communication with requesters;
6. Assessing the Panel's role in reviewing Bank-Executed Trust Funds (BETFs); and
7. How to avoid accountability gaps in the context of Bank co-financing operations with IFIs that have different accountability mechanisms.

We are providing these comments based on the understanding that the discussion is currently limited to this short list of issues that aim at strengthening the Panel and that the proposed decisions will be open to further consultation prior to any substantive changes being made.

1. The Panel Should Be Explicitly Authorized to Provide Advice and Lessons Learned

Accountability mechanisms like the Inspection Panel are uniquely qualified to provide insights into the challenges and issues associated with the "last mile" of development and impacts on communities. The Inspection Panel has no explicit mandate to provide advice or lessons learned to the institution, despite having a unique and valuable perspective on its development effectiveness.

[1] World Bank Group, "Review of the Inspection Panel's Toolkit," Sept. 18, 2018, *available at* http://pubdocs.worldbank.org/en/224761537302420323/Web-consultation-Review-of-the-Inspection-Panel-s-Toolkit.pdf (last accessed Sept. 28, 2018).

In recent years the Panel has issued four "Emerging Lessons" reports[2] that have covered recurring issues identified in Panel cases over time. The Board should explicitly empower the Panel to develop lessons learned and other advice based on its experience. This advice could, for example, cover recurring challenges to implementing policies as well as situations where harm is due to gaps or weaknesses in the policy framework. The only restrictions on the advisory services offered by the Panel should be: (1) that the advice derive from the experience and insights gained through its case investigations; (2) that the advice not relate to specific, on-going Bank activities for which a complaint has not been filed and concluded (to avoid future conflicts of interest); (3) that the advice be in writing; and (4) that it be shared publicly.

This practice is consistent with that of the Compliance Advisor Ombudsman (CAO), which has a clear mandate to provide advice to the International Finance Corporation (IFC) or Multilateral Investment Guarantee Agency (MIGA) and has issued many Advisory Notes, held workshops, and provided other forms of advice. Additionally, the Independent Review Mechanism of the African Development Bank has the authority to provide non-project specific advice, including advice that can bring about systemic improvements in environmental and social policies and guidelines, among others. This advice, which is in writing, is designed to facilitate institutional learning and provide technical advice from an independent body. Also, building off best practice, one of the newer mechanisms, the Green Climate Fund's Independent Redress Mechanism, has the authority to recommend a review of relevant policies, procedures, and guidelines based on the insights and lessons learned from handling cases.[3]

In addition, Bank Management and the Panel should regularize the process for requesting advice, sharing the advice, and for Management's consideration and uptake of the advice. It is critical to ensure that this process is holistic and transparent, as it is currently unclear whether and to what extent Management has considered changes as a result of the Panel's advisory reports.

2. The Inspection Panel Should Be Authorized to Monitor Implementation of Action Plans to Ensure that Harm is Remedied

Among the powers the Panel lacks in comparison to the majority of other IAMs is the ability to monitor the implementation of action plans approved by the Board in response to Panel findings of non-compliance. Monitoring is a key component to ensuring that the complaint process results in actual remediation and/or prevention of harm—a result that is not guaranteed through the publication of an investigation report. The Bank's Board of Directors should therefore empower the Inspection Panel to monitor implementation of action plans as the Panel is best

[2] These include: "Emerging Lessons Series No. 1: Involuntary Resettlement" (Apr. 2016); "Emerging Lessons Series No. 2: Indigenous Peoples" (Oct. 2016); "Emerging Lessons Series No. 3: Environmental Assessment" (Apr. 2017); "Emerging Lessons Series No. 4: Consultation, participation and disclosure of information" (Oct. 2017). Reports are available at https://inspectionpanel.org/publications.

[3] While the Independent Redress Mechanism of the GCF is still in the process of developing its guidelines and procedures, the Terms of Reference for the mechanism were adopted in 2017 and include that the mechanism has the authority to provide advice based on lessons learned. Green Climate Fund, "Decision of the Board on Updated Terms of Reference of the Independent Redress Mechanism (Revised)," B.BM-2017/10, para. 16 (Sept. 2017); Independent Redress Mechanism, Role and Functions, https://irm.greenclimate.fund/about-the-irm/role-and-functions (including in its list of functions a description of the "Advisory" function) (last accessed Sept. 30, 2018).

positioned to provide an independent assessment of whether actions taken are effectively remediating harms.

Currently, the Panel's involvement in a case ends with an investigation report on whether the World Bank complied with its environmental and social policies. Equipped with the findings of non-compliance, Bank Management is charged with designing an action plan that remedies the non-compliance and, once the Board approves the plan, to implement it. This action plan should include explicit responses to the findings of non-compliance as well as both the project-level and systemic actions that will be taken to address each finding, by whom, and by when. Accountability requires a transparent, comprehensive, and systematic response to each finding of non-compliance. However, neither the Panel nor any other entity is currently tasked with monitoring the implementation of the action plan and reporting to the Board whether the non-compliance has been remedied. The result is that the accountability framework is "completed" prior to non-compliance and harms actually being remedied. Largely owing to the absence of monitoring, the implementation of action plans is inconsistent. Full implementation and remediation have been called into question in several cases. The Board can, and at times has, required Management to make changes to improve its action plan. However, the Board, having approved a specific action plan, currently has no means of ensuring the action plan is well implemented or whether harms have been remedied.

Concerns over implementation have led the boards of most other IFIs to vest their IAMs with explicit authority to monitor the implementation of action plans. The approach to monitoring varies, as some IAMs automatically monitor every case until compliance is achieved while others can only monitor against an action plan or for a limited amount of time or until compliance is achieved in selected cases. For example, the CAO regularly reports on whether the IFC or MIGA has taken sufficient action to achieve compliance in every case where the CAO has found non-compliance. While this potentially keeps the pressure on to remedy problem projects, the CAO monitoring process has led to little Management engagement in improving implementation, suggesting that more is needed. Monitoring is not merely a check-the-box exercise. A monitoring function for the Panel should be coupled with a requirement for a Management response to monitoring reports, and both the Panel's findings and the response should be provided to the Board in a way that promotes cooperation and a focus on improving outcomes. The Panel's monitoring report and Management's response should go to the Board, and the Board should decide when additional measures are required to address any continuing instances of non-compliance, and to ensure harm is remedied.

Every case investigated by the Inspection Panel may not require the same extent of monitoring. Instead, the Panel should prepare an appropriate monitoring plan that accounts for Management's proposed action plan, Management's own plan for monitoring implementation, the potential seriousness of the harm to the complainants, discussions with the complainants, risk of further harm, and other relevant factors. Where appropriate, the Panel should proactively work with complainants to include community-based social monitoring activities. Reliance on social monitoring could empower communities, lower costs to the Panel, and promote the Bank's interest in expanding civic engagement through the entire project cycle, which is a primary goal

of the World Bank Group's Strategic Framework for Mainstreaming Citizen Engagement.[4] The Panel's proposed monitoring plan should then be provided to the Board along with Management's action plan to ensure that the Board is fully informed and able to determine what, if any, steps are needed to ensure better outcomes.

3. The Dispute Resolution Function

The emergence of dispute resolution as part of an effective accountability framework at the other institutions has led to a recognized "dispute resolution gap" at the public sector side of the World Bank's accountability framework. As is the case with virtually every other IFI, the World Bank should offer project-affected people a neutral, safe, fair, and accessible opportunity to resolve grievances and conflicts that arise from Bank-financed projects through a facilitated dialogue and other dispute resolution tools.

A well-functioning dispute resolution process is a critical part of a robust accountability framework. This can help to ensure that project-affected people do not bear an unfair and disproportionate burden of otherwise positive development projects, by providing them an impartial forum to engage constructively with project proponents in an effort to reach a mutually satisfactory resolution. Dispute resolution processes thus can improve the development outcomes (and reputation) of Bank-financed projects by focusing on the distribution of benefits and costs.

Dispute resolution as meant in this context is a process controlled by the parties that requires the voluntary ongoing participation of both the complainant and the Borrower—in the case of the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA), this would typically be a public, state-owned project proponent. If the Borrower does not agree, dispute resolution cannot proceed. For this reason, dispute resolution, including as it is practiced by the CAO, creates no threat to a Borrower's sovereignty because it will not go forward without all parties agreeing to participate throughout the process.

Most outside observers agree that the public sector side of the World Bank should also offer project-affected people a dispute resolution option, though questions still remain about how this can best be done.

A number of limited options exist for the institutional home for a dispute resolution function at the World Bank. The function could be housed at (1) the Inspection Panel, which would require new expertise, and expanded operating procedures and staff, but has the advantage of an existing independent structure and culture; (2) the Grievance Redress System (GRS), which would require a complete revamp, including changes in reporting lines, staff selection and expertise, mission, and operating procedures, ensuring, inter alia, its independence from

[4] World Bank Group, "Citizen Engagement," (Mar. 27, 2018), *available at* http://www.worldbank.org/en/about/what-we-do/brief/citizen-engagement (last accessed Sept. 29. 2018).

Management; (3) the CAO, which would require an extended scope to cover public sector projects funded by IBRD/IDA; or (4) a new office created to conduct dispute resolution in coordination with the Panel. ***Given that the Board has agreed to review the CAO in the near term, we recommend that the decision of where to house dispute resolution for IBRD/IDA funded projects be addressed after that review. In the meantime, until that review is complete and a final decision is made, we believe the Inspection Panel should be authorized to contract any dispute resolution case that arises to the CAO's dispute resolution function.***

In the short term, why we do not recommend adding dispute resolution to the Panel's operations

Ultimately, housing a dispute resolution within the Panel might be the best option because of the Panel's independence and legitimacy with potential Requesters. However, the Panel currently does not have the capacity, expertise, or resources to run an effective dispute resolution function. Placing dispute resolution at the Panel would require additional staff, a restructuring of reporting lines within the Panel, and changes to the Panel's mission and operating procedures. Thus, for now, the best option would be for the Panel to contract with the CAO and make further determinations after the anticipated review of the CAO.

Why we do not recommend the GRS be authorized to conduct dispute resolution

The GRS has an important, yet limited, role to play in the Bank's overall framework for improving development effectiveness by responding proactively to solve project-specific problems raised by external stakeholders. The Bank should have an office providing an in-house problem-solving approach that can investigate and proactively attempt to resolve problems as they arise. In this role, the GRS should not be involved in the development of projects and instead should be what it is designed to be—an extension of Management, whose mandate is to serve as a point of contact for affected people and other external stakeholders with the ability to trigger necessary project modifications. This technical and proactive Management-led effort to resolve problems is welcomed, but it should not be confused for, nor seen as, dispute resolution as offered by IAMs.

Based on comparative case experience, the CAO sees its role as facilitating or convening a mediation or dispute resolution process between the IFC client on the one side and the affected people on the other side. A high degree of independence is critical to an accountability mechanism's ability to serve this role. All parties must be able to trust the mechanism's representatives in order to share information with them and move the process forward. In an independent dispute resolution process, the parties together determine the process and solution. Among other things, the CAO employs experienced mediators on staff who select, train, and manage other professional mediators who are trained to facilitate difficult conversations and find common ground between the parties. An independent neutral, properly managed, brings an outside perspective that can build trust among the parties and enable them to find creative solutions.

The GRS is not well-positioned to play a convening role. The GRS process states that it will internally develop a solution—an action plan to resolve the community concerns and will then consult with community members on that plan. This is similar to the role of a project team in response to the findings in the case of a compliance report. It is markedly different from the facilitation and dispute resolution role played by the CAO dispute resolution team and the professional mediators with whom they work.

The GRS appears rightly to see itself as part of Management. In meetings with civil society, the GRS has focused on the Bank's minimum obligations, stating, in some cases, that the Bank has already done the minimum actions required by its safeguards, emphasizing that it has no fault if it meets those obligations even if the client ultimately fails to do what is required of them. This evidences a mentality that is unproductive to solving complainants' problems in contrast to the type of dispute resolution orientation we would typically see in a CAO mediator.

As another example, for over a year the GRS was involved in a case that one of our organizations has supported. During this time and without having traveled to the project site, the GRS regularly questioned the veracity of complainants' claims, explaining that reports from the client reflected a very different scenario. *The GRS suggested that complainants' claims were likely exaggerated*. Only after the GRS traveled to the project site did they begin to take complainants' claims more seriously and exhibit a greater willingness to focus on developing practical recommendations to resolve them. This is the type of skeptical and defensive response we frequently receive from World Bank project teams, but it would be a highly unusual response from the CAO or another IAM. The CAO sees itself as playing an independent role in facilitating dispute resolution processes, so they explicitly avoid taking sides with any party involved in a case allowing the parties to drive the process.

These problems are likely heightened by the fact that the GRS has no policy against hiring GRS staff from other parts of Management or preventing them from moving back to another Management role in the future. An independent approach and reporting line and some protections against revolving-door hiring practices are all necessary to give the bare minimum degree of independence to carry out an effective dispute resolution role that is deemed legitimate by potential complainants.

Furthermore, the GRS does not make any commitment to keep information confidential from project teams. They can, when requested, keep the identities of complainants confidential from clients, but complainants must assume that their identities and all information shared with the GRS will be communicated back to the project teams. This can create significant risks when claims relate to the actions of the project team, and may in some cases prevent complainants from raising concerns at all or may limit which concerns they feel comfortable raising. This not only denies remedy to complainants, but also an opportunity for the Bank to ensure positive outcomes.

Following a site visit in one case, the GRS scheduled a call with a lead complainant to relay findings verbally. When the complainant asked for a copy of the trip report it had prepared, the GRS refused, explaining that its reports are meant for internal audiences only and need to remain confidential. Only after further advocacy did the GRS eventually agree to provide a summary of the trip report to the complainant. Three months after that promise was made, complainants still have not received the summary. Although the GRS has assured the complainant that the delay is due to a busy schedule and that the staff still plan to provide the summary, the limited GRS procedures posted online do not include any commitment to share information or updates with complainants at any point in their process. This means that any information sharing is done on a discretionary and inconsistent basis, and given its workload may not be prioritized above other tasks. The GRS does not appear to conceive of the office as having any obligation to act with transparency toward community members raising concerns about investments.

The GRS's inability to keep information confidential from the project team, coupled with its lack of independence and transparency, prevent it from establishing the trust-based relationship with complainants that would be necessary to successfully facilitate a dispute resolution process. Without this, any solution that the GRS offers will be less likely to provide a lasting solution to community concerns.

The dispute resolution process as intended by the IAMs (and as practiced most effectively by the CAO) is fundamentally different. Effective dispute resolution requires the voluntary and ongoing participation of all parties. Creating the atmosphere for such a dialogue process requires more than having a list of mediators. Outside mediators have to be managed and trained effectively, which requires in-house mediation experience. More importantly, it requires the creation of a trusted and completely independent space that can address the power imbalances between affected communities and the project proponents in a facilitated dialogue—and only as long as *all* parties see the value in the process continuing. This trusted space is best situated outside of Management because the Bank will frequently be viewed as having a position in line with the Borrower or as being an interested party in the dispute.

The same institution cannot both be using its influence as part of Management to resolve proactively certain problems with Bank operations (the GRS function) and then be viewed as independent of Management for creating a safe space for facilitated dispute resolution. For example, the CAO does not have the mission of trying to resolve problems raised with IFC operations, but to resolve complainants' problems and to mutually find ways to remedy them. Thus, to serve the dispute resolution function, the GRS would essentially have to be wholly recreated as an independent unit—not a Management-led function—and would have to be re-tooled with different expertise, a new orientation, a new hiring process, and a revamped procedure (all to proximate what the CAO is already doing)—and it would have to abandon its current mission of providing the more immediate, Management-led approach to technical problem-solving that it should continue.

Learning from the Pending CAO and IFC/MIGA Review Process

At this point in the review of the Panel toolkit process, and with the CAO review coming, rather than rushing to build or retool the Inspection Panel or GRS, or create a new, independent dispute resolution office for complaints related to IBRD/IDA projects, the cost-effective and prudent approach would be to temporarily contract any dispute resolution functions for projects funded by IBRD/IDA to the CAO. As the CAO is about to undergo a review, we believe that this review can assist the Board in deciding whether the CAO dispute resolution should be extended over the long term or whether some other arrangement is necessary. Until that time, contracting cases, to the CAO, in the event that any complainants are seeking dispute resolution at the Panel, would also give valuable insight into the Board's final decision and would be the most cost-effective and prudent solution for the time being.

4. The Cut-Off Date for Filing Complaints (Time Limits for Eligibility)

The Bank's "95% disbursement rule" is an arbitrary and unnecessary time limit on eligibility. Although other IAMs initially followed the rule, all of them have recognized it is not defensible. In part, this limit was included initially out of a fear that the Panel would be "flooded with claims." With 25 years of experience at the Panel and other mechanisms, we can confidently say there will not be a flood of claims.[5] A rule based on a certain number of years after closure is also more transparent and easier for affected communities to understand, thus leading to a more predictable process. Extending the time limit for eligibility also reflects the extended reach of the environmental and social framework, with its emphasis on working with Borrowers throughout the life cycle of the project.

As such, the time limit should be at least two years from closure of the loan. Environmental and social harms do not necessarily manifest themselves immediately or before the loan is closed. Additionally, it is often difficult for project-affected communities to know which institutions are funding the project and/or how to seek remedy. Two years after closure will allow additional time for valid concerns to emerge and for claims to be presented. It will also provide the Board with a more complete picture of project impacts and the opportunity for Management to ensure positive outcomes from the Bank's investments.

5. The Panel Process Should Expand Communications with the Requesters and Enhance their Opportunity to Participate

The Panel process should be revised to reflect best practice at other IAMs in order to ensure that complainants can participate in an effective and fair way throughout the process. Therefore, the Panel's draft compliance report should be disclosed to complainants and Management for their comments before it is finalized. Both Management's and complainants' comments should be included in the final report that goes to the Board. Allowing the complainants to comment on the

[5] According to the Panel's registry, as of today it has had 127 cases in the past 25 years. Inspection Panel, Panel cases, https://inspectionpanel.org/panel-cases (last accessed on Oct. 1, 2018).

draft compliance report as well as Management's proposed action plan means the Board would then be better informed when deliberating on the compliance report and proposed action plans.

At a minimum, the full compliance report should be disclosed to the complainants and their duly-authorized advisors, if any, prior to its consideration at the Board and to the complainants being consulted about the Management action plan. One of the most important parts of a complaint process arises when Management consults complainants on the action plan. It is then that Management and the complainants can come together and agree on the measures needed to address the non-compliance in a way that resolves their grievances and results in positive outcomes. However, currently complainants are at a disadvantage in participating fully in this process as they do not have the benefit of knowing the Panel's full analysis (as the Panel can only disclose the table of findings) when Management consults them on the action plan. This not only impairs the effectiveness of any proposed remedial actions and the Bank's goals related to citizen engagement,[6] but it also undermines the fundamental principle of fairness in the process. Thus, the Panel should be able to share the final Inspection Panel report with the complainants and any duly-authorized advisors before they are consulted on the action plan.

While we recognize that "leaks" of drafts can happen, it is exceedingly rare. Moreover, it has not happened with the information that the Panel has shared with complainants since the Panel began sharing its table of findings with them. In fact, the incentive to leak draft reports is diminished by sharing the full reports directly with the complainants, as the leaks are intended to address the inequality of a process where the complainants lack the information necessary to meaningfully engage.

6. Assessing the Panel's Role in Reviewing Bank-Executed Trust Funds (BETFs)

The Panel should have jurisdiction over any project funded with money administered by the World Bank, regardless of the financing vehicle. There should be no loophole for avoiding accountability by funding through one vehicle or another; the focus should be on whether Bank-administered funds have been linked with activities that caused environmental and social harm. From our understanding, BETFs should not normally be used for financing projects that would have any environmental or social footprint—if used as intended the funds should not ordinarily cause significant environmental and social harms. BETF-funded activities that do give rise to environmental and social harm are likely beyond the scope of what should be funded by the BETF vehicle, so the decision to use BETF as the funding vehicle should be reviewable by the Panel.[7]

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[6] World Bank Group, "Citizen Engagement," *supra* note 4.

[7] In 2015, the Inspection Panel found that because the World Bank will not apply social and environmental safeguards when it funds activities through BETFs, the Panel did not have authority to assess complaints from communities that may be negatively affected by those activities. The decision stems from a BETF-supported operation in 2013 where the Bank provided the Haitian government with technical legal assistance aimed at reforming the country's mining regulations. The legislative drafting process was marred by a lack of meaningful community consultation and resulted in a Draft Mineral Law that failed to incorporate adequate social and environmental protections. Civil society organizations filed a complaint at the Inspection Panel, alleging that the

7. How to Avoid Accountability Gaps in the Context of Bank Co-financing Operations with IFIs that have Different Accountability Mechanisms

Our starting point is the same principle as above—that the Panel should have jurisdiction over any project funded with money administered by the World Bank, regardless of the financing vehicle. This applies equally to activities that are co-financed with other institutions. The World Bank's environmental and social framework should apply, and its accountability mechanism should be available, to address any activity that has World Bank funding. The Panel can be trusted to work out how to coordinate its process with that of other mechanisms. In the rare case where co-financiers have decided that another institution's policies should be the only ones that are applied, the Panel can review compliance with the policies that are applied. In that way, the Bank's accountability will not be avoided by a Management decision to defer to another institution's policies.

Conclusion

For 25 years, the Inspection Panel has played a catalytic role in ensuring accountability of the Bank, providing redress for impacted communities, and, until recently, providing a model for the creation of other IAMs. The modernization of the Panel should be completed with the goal of returning the Panel to its leadership position. Accordingly, we appreciate the opportunity to comment on the review of the Panel's "toolkit" and to contribute to the strengthening of the Panel. Please do not hesitate to contact us if you have any questions or would like to discuss this submission further. We also look forward to engaging in the process proposing any substantive changes that will be made to the Panel once the Board has made decisions based on this initial review.

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Bank's assistance in drafting the law violated a spectrum of human and environmental rights, including rights protected by the Haitian Constitution and the Bank's own safeguards. For more information, see Accountability Counsel, "Haiti: Mining Laws," (2015), *available at* https://www.accountabilitycounsel.org/client-case/haiti-mining-laws/#case-story (last accessed Sept. 30, 2018).

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