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The World Bank Inspection Panel: A Record of the First International Accountability Mechanism and Its Role for Human Rights

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The World Bank Inspection Panel: A Record of the First International Accountability Mechanism and Its Role for Human Rights

by Dr. Sabine Schlemmer-Schulte*

Introduction

In September 1993, the Board of Executive Directors of the World Bank adopted the Resolution Establishing the Inspection Panel (Resolution). On the basis of this Resolution, the Inspection Panel was subsequently created when the Bank's Board appointed the first three Panel members in April 1994. They took office in August 1994, and the Panel's office opened for business in September 1994.

The Bank established the Inspection Panel to provide a formal mechanism for receiving complaints from people directly affected by Bank-supported projects on the grounds of the Bank's failure to abide by its own policies, including environmental and social policies, when designing, appraising, and supervising the implementation of projects.

The creation by the Bank of an independent mechanism to assess whether the Bank lives up to its own standards in its operations was unprecedented in the work of international organizations. The European Court of Justice at the European Union (EU), which has jurisdiction over EU decisions, cannot be counted as a comparable precedent because of the distinct supranational nature of the EU. The World Bank's decision to create an inspection mechanism was followed by the Inter-American Development Bank and the

Asian Development Bank, which established internal inspection functions in 1994 and 1995, respectively.

Since the Inspection Panel started operating in September 1994, it has built up an impressive case record, with 13 requests received by October 31, 1998, from people allegedly adversely affected by the Bank's non-compliance with primarily environmental and social policies in the design, appraisal, and implementation of projects it finances. It has also been subject to two reviews by the Bank's Board of Executive Directors.

As an independent watch-dog mechanism driven by affected people's initiatives, the Panel has been able to enhance the efficiency of Bank operations, thereby enhancing these operations' contribution to the achievement of human rights.

The Panel's Creation

The Inspection Panel's creation was the result of both internal and external demands on the Bank to be more transparent and accountable in its operational work by providing the Bank's Board with an independent review of controversial Bank projects. This review capability improves quality control in project design, appraisal, and implementation.

Within the Bank, the impetus for creating an inspection function emanated from an internal review of Bank work, which started in the fall of 1991. The review task force submitted its report, which came later to be known as the "Wapenhans Report," to the Board in November 1992.

Human and Environmental Rights in the Trial of Alexander Nikitin

by Stephen L. Kass*

Introduction

Human rights and environmental rights are adjacent pillars in the fragile structures we erect to bring a sense of justice, harmony, and permanence to our lives and our communities. But they are not the same thing. Sometimes these pillars appear as one, sometimes they seem to lean in opposite directions, and sometimes they are overshadowed by other pillars on which our societies rely, like defense from invasion, protection against epidemics, or an acceptable allocation of wealth. Both pillars, however, are based on the rule of law, without which neither has meaning. The recent trial of Alexander Nikitin in Russia illustrates the interplay between these two sets of rights, including their points of convergence and conflict.

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It found that the Bank gave insufficient attention to the implementation and supervision of projects. Based on the task force's recommendations, the Bank's Management introduced new business practices

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and processes in July 1993, including greater participation of affected people in the design and implementation of Bank-financed projects. Management also started thinking about the establishment of an independent inspection function.

External criticism of the Bank by non-governmental organizations (NGOs) and influential circles in certain member countries that made large contributions to the Bank's affiliate, the International Development Association (IDA), also influenced the conclusion that an independent inspection function was needed. In 1993, during the course of negotiations by donor countries regarding the Tenth Replenishment of the IDA, a process for replenishing IDA funds, the United States linked its willingness to contribute to the IDA with the establishment of an independent inspection function by the Bank.

Another major external pressure pushing the Bank to consider the establishment of a special accountability mechanism came from the mistakes it made in connection with a dam and canal project in India's Narmada Valley. Although the Bank only financed ten percent of the project, this project was criticized for not responding to major environmental concerns and for having greatly underestimated the number of people that needed to be resettled from the submersion area of the dam. An independent review of the project, commissioned by the Bank, concluded in its June 1992 report, known as the "Morse Report," that the Bank failed to incorporate Bank policies into the Narmada project credit and loan agreements. The Morse Report also found that the Bank subsequently failed to require adherence to enforceable provisions of these agreements. Management accepted many of the report's findings, particularly its criticisms of the flawed implementation of Bank policies.

The above-mentioned circumstances led several of the Bank's Executive Directors to come forward in February 1993 with a proposal for the establishment of an in-house inspection capacity for ongoing projects. Outsiders also submitted suggestions, and their proposals included a Bank-appointed ombudsman and an independent commission with judicial powers, including the power to issue binding decisions on the Bank. Because of political support for these external proposals in the U.S. House of Representatives during negotiations for the IDA Tenth Replenishment, Bank Management began developing a plan for the establishment of a standing inspection function. The Board of Executive Directors adopted the final text of the Resolution Establishing the Inspection Panel on September 22, 1993.

The Panel's Procedures

Under the Resolution, the Panel has a mandate to receive complaints by groups of individuals whose rights or interests were or are likely to be directly and adversely affected by the Bank's failure to comply with its policies and procedures during the cycle of a project financed or to be financed by the Bank. The Panel's mandate extends explicitly to projects financed by the International Bank for Reconstruction and Development (IBRD) and the IDA. Activities of other World Bank Group affiliates, such as the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency, are, due to the absence of any reference to them in the Resolution, not subject to investigation by the Panel. Bank actions as trustee of the Global Environment Facility and other trust funds are implicitly subject to the Panel's "jurisdiction."

After receiving a request for inspection, the Panel registers the request unless it lies manifestly outside its "jurisdiction," i.e. the matter does not fall under the Panel's mandate as it is set out in the Resolution. The Panel then notifies the Board and the President of the Bank of the request. Within a certain period of time, the Bank's Management must provide the Panel with evidence either that it has complied with relevant Bank policies and procedures regarding the project referred to in the request, or that it intends to now comply with such policies and procedures in the face of the formal request.

Upon receipt of Management's response to the request, the Panel's core function begins. Under the Resolution, the Panel exercises this function in two stages. In the first stage, it assesses whether the request for inspection meets the eligibility requirements of the Resolution.

The Panel's assessment of the eligibility of the complaint involves examining four elements of the Panel's jurisdiction. Here, the Panel must ascertain: (i) its competence regarding the *standing* of the complainant; (ii) its competence regarding the *subject matter of the complaint*; (iii) its competence relating to the *timing of the complaint* in terms of the project cycle; and (iv) the admissibility of the complaint in the absence of *other grounds* barring it under the Resolution. Based on this assessment, it either recommends that the Bank's Executive Directors should authorize an investigation of the matter or does not recommend the authorization of an investigation.

The second stage will only take place if the Board of Executive Directors authorizes the Panel to conduct an investigation based on the Panel's initial assessment. During this stage, the Panel carries out an investigation. The Panel's investigation may include checking the pertinent Bank records, interviewing Bank staff and other persons, and, if needed, undertaking an on-site visit to the project in the territory of the borrowing country. Investigative action in the borrowing country requires that country's prior consent.

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Based on its investigation, the Panel issues findings to the Board indicating whether the Bank has seriously violated its operational policies and procedures with respect to the design, appraisal, and/or implementation of the project referred to in the request. Bank Management is given the opportunity to comment on the Panel's findings and propose remedial actions. After the inspection is completed, the Board of Executive Directors, based on all information before it, decides on any actions to be taken.

All information regarding the request, including the text of the request, Management's response to the request, the Panel's recommendation on the eligibility of the request, the Board's decision to authorize or deny investigations, the Panel's findings, Management's comments,

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and the final Board decision, are made publicly available after Board consideration in each case. The Panel also issues publicly available annual reports.

The Panel's Case Record

As of October 31, 1998, the Panel had received 13 requests and had registered 11 of them for review. The two requests that were not registered fell clearly outside the Panel's mandate as described in the Resolution. The first request that was not registered challenged the Bank's lending to a country while the complainants had a claim concerning an expropriation action in that country. This request was thus not related to the Bank's operational activities (i.e., a Bank-financed project), which is the limited scope that Panel investigations are meant to cover. The other request that was not registered concerned an IFC investment in the construction of a hydroelectric project, rather than an IBRD or IDA operation.

Out of the other 11 requests, five related to IBRD and six to IDA projects. Ten of the requests concerned large infrastructure projects such as hydroelectric dams, power stations, natural resources Management projects, bridges, an irrigation area and water reservoir, and a drainage and sanitation project. One request related to a sector adjustment operation. In all the requests concerning infrastructure projects, the complainants alleged non-compliance with Bank policies and procedures concerning the environment and the social rights of people. Nine of the 11 registered requests were dealt with as required by the Resolution, while two requests are currently pending. A follow-up on remedial actions taken in connection with several requests upon the Board's request, which was not envisaged by the Resolution but instead developed by the practice under it, also took place.

Geographically, two of the 11 registered requests were brought regarding Bank-financed projects in Bangladesh, two regarding projects in Brazil, and two regarding projects in India. One request was brought concerning a Bank-financed project in Argentina, one regarding a project in Nepal, one regarding a project in Nigeria, one regarding a project in Lesotho, and one regarding a project in Tanzania.

Of the nine registered cases that reached the stage of the Panel recommendation, the Panel suggested an investigation in five cases. The Board formally approved the Panel's recommendation in favor of an investigation in two cases and asked the Panel to make assessments that amounted

de facto to an investigation in a third case. In four cases, the Panel did not recommend an investigation and the Board approved these recommendations.

Although the Board formally authorized an investigation in only two cases and *de facto* asked the Panel to investigate in a third case, the Panel ultimately played an active role in the supervision of the implementation of projects in six cases. In all these cases, Management adopted a remedial action plan. The Panel's role in these six cases consisted of assisting the review of the implementation of the remedial action plan, or in carrying out the investigation.

From a legal point of view, the Panel's case record directly contributed to the development of a body of "case law" that interpreted several terms in the Resolution and the development of certain practices under it. In a more indirect way, the cases also contributed to the resolution of issues

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discussed in the two reviews of the Bank's experience with the Inspection Panel. The first review resulted in the issuance of the 1996 Clarifications, which may be regarded as an "authoritative commentary" on the Resolution, and the second review is awaiting a similar conclusion and is likely to produce further clarifications of or an amendment to the Resolution.

The First Board Review

The first review by the Board of the experience under the Resolution Establishing the Inspection Panel took place in 1996. The Resolution provides in Paragraph 27 that "[t]he Executive Directors shall review the experience of the inspection function established by this Resolution after two years from the date of the appointment of the first members of the Panel." The first review consisted of an in-depth discussion of all-important issues related to the Panel process that the Panel encountered during the first two years after the appointment of the first Panel members.

This review started in February 1996 with an informal meeting of the Executive Directors, who agreed that the Board's Committee on Development Effectiveness (CODE) would first review the matter and then make final recommendations to the Board. CODE based its review on a Man-

agement paper and additional papers received from NGOs, as well as information from the Panel. This process revealed a broad preference among CODE members to keep the original Resolution Establishing the Panel intact, as Management suggested, while providing for more flexibility in its implementation. CODE, therefore, recommended that the Board issue guidelines on the Resolution's application in practice, which would complement the Resolution. In October 1996, the Board approved these guidelines, which were called "Clarifications of Certain Aspects of the Resolution Establishing the Panel."

The Second Board Review

The Executive Directors agreed upon the second review in September 1997, when, during a Board meeting discussing the Inspection Panel's recommendations in two cases, major differences emerged on how to best deal with the Panel's recommendations to investigate particular requests for inspection. This led the Executive Directors to agree on a second review of the Bank's experience with the Panel.

Since September 1997, two informal Board meetings have been held. As a result of the lack of consensus among Board members, a Working Group comprised of six Executive Directors was established to formulate a solution for the most controversial issues. The major problems currently being discussed in the second review relate to (a) the handling of remedial action plans adopted by Management at a stage in the process not envisaged by the Resolution; (b) the lack of a distinction between actions and omissions by the Bank or the borrower with respect to obligations in connection with projects in Management's responses, as well as in Panel recommendations; and (c) the meaning of the Inspection Panel as an accountability mechanism as opposed to a liability mechanism. The Working Group has met several times and, in light of the progress of its deliberations, a full Board meeting on the issues of the second review may be scheduled for early 1999.

The Panel's Role in Promoting Human Rights

The Inspection Panel plays a role in the promotion and protection of human rights. It does so by complementing and reinforcing the World Bank's role as a transformer of human rights ideals into realities. Neither the Bank's nor the Panel's role in this respect, however, are obvious. The Bank is a development finance institution with a mandate to promote economic and social development in

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its borrowing member countries through the financing of specific projects and programs. In the realization of its mission, the Bank creates the conditions for the attainment of a broad range of human rights. The Inspection Panel was created to facilitate the Board of Executive Directors' supervision of Management's work in designing and supervising the implementation of Bank-financed projects. The Panel contributes to the Bank's work for human rights by increasing the efficiency of Management's work relating to projects.

As an international organization with a mandate limited to economic considerations in its decisions and prohibited from taking political considerations into account, the Bank's promotion of human rights operates through its focus on economic, social, and cultural human rights. Through its financial support for projects in education, health care and nutrition, sanitation, housing, and the environment, the Bank is helping people to attain economic and social rights. But its development assistance also is indirectly conducive to indigenous efforts to develop an even broader range of human rights. By financing measures that reduce corruption; improve the transparency, accountability, and governance of public institutions; strengthen judicial systems; modernize financial sectors; and build infrastructure, trade, industrial, and agricultural sectors, the Bank contributes to the creation of an environment in which people can enjoy and further develop a broader range of human rights.

The Bank's financial support in many of these areas builds on the Bank's standards for promoting sustainable development, which the Bank developed over its years of experience in development assistance. These standards invariably were inspired by general international standards, including human rights. Examples in which Bank guidelines represent model human rights standards are the Bank's policies for resettlement, the rights of indigenous peoples, and environmental impact assessment and participation.

In addition, in several instances, the Bank's financial support may serve as a catalyst for the development of improved standards in borrowing member countries. This occurs when countries whose national standards are lower than Bank standards establish new standards in light of their experience with Bank policies appearing in loan agreements. Experience with Bank-financed projects may, in such cases, thus encourage these countries

to promulgate higher national standards, whose scope extends beyond Bank-financed projects.

It must be emphasized, however, that implementation of the Bank's policy standards in projects does not result in substantive rights that individuals in borrowing countries may claim against the Bank, nor does the Inspection Panel represent a legal remedy mechanism through which positions described in the Bank's policies or rights referred to in the Resolution could be enforced against the Bank. The Bank's policies are internal instructions, which Bank managers issue to staff members for their guidance. These guidelines are binding on staff, and the standards embodied in the policies create a duty for staff to exert their best efforts to achieve them. Their actual achievement, however, depends primarily on the action of other parties, most notably the borrower. The policies become binding on the Bank's borrowing member countries when they are incorporated in loan documentation that binds borrowers. They do not give enforceable rights against the Bank to the people potentially affected by Bank-financed projects, as the Bank does not enter into a contractual relationship with these people. People are included in a project's design and implementation through the actions of the borrower, who assumes the obligation of implementing Bank standards contained in the loan agreement.

The Inspection Panel Resolution accords people standing before an independent investigatory body or accountability mechanism, but does not give them

As a result of the lack of consensus among Board members, a Working Group comprised of six Executive Directors was established to formulate a solution for the most controversial issues.

the remedy of a legal action in a court. People's requests before the Inspection Panel nevertheless ensure that the Bank identifies its failures to comply with its own standards and may eventually lead to the correction of mistakes through decisions of the Board of Executive Directors in fulfillment of its role of supervising Management. Such decisions are, however, not judicial decisions either in favor of or against affected parties.

Conclusion

The Inspection Panel is the first accountability mechanism established by an international organization. Although not a court of law, it offers non-state actors the possibility of triggering the Bank's own detection and eventual correction of fail-

The Panel contributes to the Bank's work for human rights by increasing the efficiency of Management's work relating to projects.

ures resulting from non-compliance with its own standards for development finance.

With 13 requests received for review and two Board reviews since its creation, the World Bank's experience with its Inspection Panel can clearly be characterized as a rich one. Many problems, particularly those related to the definition of notions in the Resolution and procedural aspects of the Panel process, were clarified in the meantime. The case law, the authoritative commentary of the Clarifications issued after the first review, and the Panel's investigatory activity also confirmed the Panel's role as an independent investigatory body receiving complaints from non-state actors adversely affected by Bank-financed projects. There is a general consensus about its usefulness, which is expected to help solve the main problems under discussion in the ongoing second Board review. The Panel's existence proves how seriously the Bank takes its commitment to abide by its own standards, which, in comparison with general international principles, include model human rights standards. ☐

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