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1. Introduction

The relationship between the legal status of international financial institutions and the individual, human rights of people affected by projects (PAPs), financed by these institutions, has increasingly gained relevance in the international legal discourse of the past decades. The expression 'International Financial Institutions' (henceforth referred to as IFIs) refers to a varied set of organizations with the common characteristics of being established by treaties entered into by States, with financial, either development or monetary, mandates.¹ The emergence of a new model of global governance, rooted in principles of multilateral cooperation, combined with the conventional framework of international legal standards appears to have left little room for individuals to seek redress for injuries caused by adverse effects of development projects. This particularly becomes relevant when the traditional notion of subjects of international law is applied, according to which the main two categories are States and international organizations.²

Today IFIs, among them primarily multilateral development banks (henceforth referred to as MDBs), lead development projects across the globe. Through their agency, they have a central role in translating normative frameworks and scope of application of the growing body of global governance standards into their own operations.³ In practical terms, this means that normative standards are extended to environmental and social sustainability aspects of the diverse fields of development projects, including public health, infrastructure, transportation, energy and other. As the development of the environmental and social standards and safeguards gained momentum in the 1990s, their scope and complexity required the establishment of new mechanism of institutional governance in MDBs. This trend became evident through an increasingly strong quest for human rights protection of individuals and local communities. As a response to the evolving complexities, MDBs developed institutional, yet independent accountability mechanisms in the pursuit of greater protection of the rights of people affected by projects (PAPs). People affected by projects or PAPs, are third parties, understood as individuals who are not in a contractual

¹ Daniel Bradlow, Maurizio Ragazzi, and Gerard Sanders, "The Role of International Financial Institutions in Postconflict Situations.", *American Society of International Law*, Proceedings of the Annual Meeting, (2001): 236-50, p. 241.

² Chitharanjan F. Amerasinghe, "Principles of the Institutional Law of International Organizations" *Commonwealth Law Bulletin* 23, no. 3 (1997): 1336.

³ Owen McIntyre and Suresh Nanwani, *The Practice of Independent Accountability Mechanisms (IAMs: A Towards Good Governance in Development Finance* (Leiden; Boston : Brill | Nijhoff, 2020), p. 2.

relationship with IFIs, but whose lives and livelihoods are influenced by the actions of said organizations.⁴ Independent Accountability Mechanisms (IAMs) play a crucial role in the definition and implementation of environmental and social standards by assessing the performance of MDB managements' respect of safeguard policies. They are understood as structures that provide 'recourse for citizens and communities adversely affected by IFI-funded projects, particularly in instances when IFIs are alleged to have failed to follow their own social and environmental safeguard policies, guidelines, standards, or procedures'.⁵

As a result, IAMs today represent a unique vehicle that aims at enhancing accountability, transparency and efficiency of international organizations in the broader arena of international law. They provide a pioneering model whereby they enable individuals to demand accountability and occasionally obtain redress and they facilitate institutional learning and progressive development. Nevertheless, the current IAMs maintain certain conceptual and procedural limitations that appear to impede full protection of individuals affected by MDB-financed projects.

1.1. Research Questions and Methodology

The present paper analyzes the existing mechanisms which aim at assuring legal accountability of IFIs, in particular multilateral development banks (MDBs), in the context of development projects, and their alleged adverse effects on individuals. This particular topic became pertinent as the quest for assuring international organizations' accountability towards citizens ("downward accountability") in addition to donor governments ("upward accountability") became increasingly relevant.⁶ In this context, the present thesis addresses the following questions: To what extent have the established mechanisms of legal accountability in MDBs achieved the protection of rights of individuals affected by their projects? What are the opportunities and limitations of these accountability mechanisms and what are their practical consequences? What are the lessons learned and to what degree has the practice of these mechanisms affected the behavior of MDBs? In order to answer these questions, this author focuses on projects supported by the World Bank

⁴ Ebrahim Alnoor and Steven Herz, "The World Bank and Democratic Accountability: The Role of Civil Society," in *Building Global Democracy? Civil Society and Accountable Global Governance*, ed. Jan Scholte. 58-77. (Cambridge: Cambridge University Press, 2011), p 7.

⁵ Kristen Lewis, Citizen-driven Accountability for Sustainable Development: Giving Affected People a Greater Voice—20 Years On ,A contribution to Rio+20 by the Independent Accountability Mechanisms Network (Independent Accountability Mechanisms Network, June 2012) <https://www.opic.gov/sites/default/files/files/citizen-driven-accountability.pdf>, accessed 15 August 2018.

⁶ Alnoor and Herz, *supra* note 4 at p. 5.

and the AfDB and on the practice of their internal accountability mechanisms, namely the Inspection Panel and Internal Review Mechanism (IRM).

The first chapter provides an overview of the law applicable to IFIs and the two MDBs, in particular in the context of assuring that they are held to account for the alleged harm inflicted to third parties. The following section sets out the main theoretical framework of accountability by addressing some of the key principles relevant for the analysis. The paper then proceeds to present the accountability mechanism put in place by the World Bank, as one of the universal IFIs, highlighting some key cases and practice of the Inspection Panel thus addressing participation, influence and instruments of redress. After this, the author presents the AfDB's IRM, by describing its structure, function and practice. Through the analysis of the evolution of the World Bank's Inspection Panel as well as the AfDB's practice, the author identifies some of the existing gaps and challenges and provides suggestions on how to bridge these inconsistencies towards assuring appropriate protection of individual rights. The notion of "accountability mechanism" for the purpose of this analysis is understood as "an avenue for private individuals and groups to file claims against the institution for redress of their grievances on poorly-designed and/or/implemented projects."⁷

The two mechanisms were chosen as cases for comparison due to their peculiarities. While the World Bank's Inspection Panel represents the first accountability mechanism among MDBs, established in 1993, the AfDB's IRM was established a decade later and represents the latest accountability mechanism of the main regional MDBs (which includes World Bank, Asian Development Bank, Europe Bank for Reconstruction and Development).⁸ Through the analysis of the two cases, the author identifies emerging trends in the broader IAMs discourse, as well as concrete shifts in MDBs behaviors.

The paper also highlights the dichotomy between two particular legal issues, that is: the quest for assuring immunities to international organizations for their proper functioning and the need to uphold and guarantee (human) rights of individuals affected by the actions of those organizations in the context of development projects. This author argues that MDBs and in particular the World

⁷ Richard Bissell and Suresh Nanwani, "Multilateral Development Bank Accountability Mechanisms: Developments and Challenges." *Central European Journal of International & Security Studies* 3, no. 2 (2009): 154-197, p. 154.

⁸ *Ibid.*

Bank as the lead institution among them, have an important role in the development and advancement of international law. While the accountability mechanisms put in place by the World Bank and the AfDB have their limitation, their existence and practice have influenced the behavior of the Banks towards increased awareness of the need for enhanced and reliable accountability avenues to individuals. This in turn has created new trends in international organizations, whose practice contributes to the evolution of international law. By providing a systemic analysis, beginning from the broader international legal context, and narrowing the assessment to the two case studies, namely the World Bank and the African Development Bank, the author concludes that international organizations operate within their own normative frameworks, to which often international treaty law (related to human rights) almost does not apply, giving them vast independence. In this setting, there is a persistent challenge that people affected by their operations do not have an appropriate channel to raise their concerns and seek redress. The challenging position of these individuals is enhanced further due to the privileges and immunities MDBs enjoy. Yet, independent accountability mechanisms, through their quasi-judicial oversight function, represent an important instrument for the development of international normative standards and more broadly the international legal system. In line with this, MDBs should work to modernize the IAMs procedures and enable the mechanisms to impose obligatory measures to the Banks in order to incentivize their management to comply with findings and assure remedies and in particular assuring compensation of PAPs.

In order to provide a comprehensive analysis, the research utilizes primary and secondary materials. In particular, the author conducted a comprehensive literature review as well as analysis of a body of reports and other relevant documents pertaining to complaints brought before the Inspection Panel and the Independent Review Mechanism. In addition, the research relies on the comparative and substantial analysis of internal and external regulatory framework of the World Bank and the African Development Bank.

2. The Legal Personality of MDBs: The World Bank and the African Development Bank

International organizations are, along with States, the primary subjects of international law. In the case of *Reparation for Injuries Suffered in the Service of the UN*, the ICJ found that “*the United Nations is a subject of international law and capable of possessing international rights and duties and that it has capacity to maintain its rights by bringing international claims.*”⁹ This is in line with the principle of reciprocity and mutuality of obligations which requires that legal personality of international organizations entails them also to be accountable and responsible for their conduct, “*under general rules of international law, their constitutions or under international agreements to which they are parties*”, as emphasized by the ICJ.¹⁰ A consensus seems to have been reached in terms of what the legal responsibilities, based on the legal personalities of international organizations are, namely the capacity of bearing rights and obligations enforceable on the international or domestic planes.¹¹

Consequently, for the purposes of this study, a question to be addressed here is whether IFIs (and MDBs as their subcategory) are responsible under international law and what the legal frameworks governing such responsibility are. In particular, are IFIs responsible for alleged harm caused to people affected by projects they themselves finance? The present section provides an explanation on how IFIs responsibility under international law is derived and highlights the applicable legal framework for this analysis. IFIs, as international organizations created by States for a public purpose, carry both rights and responsibilities in the context of the implementation of their mandates related to macroeconomic policy, poverty alleviation and development.¹² In order to determine the context and execution of those rights and duties, it is crucial to define what legal frameworks govern the relations between these organizations and subjects affected by their rights and obligations.¹³ This discourse becomes the basis for the delineation of legal personality of IFIs.

⁹ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174 (11 April).

¹⁰ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 1980 I.C.J. 73 (30 December).

¹¹ Henry G. Schermers and Niels M Blokker, *International Institutional Law: Unity within Diversity: Fifth Revised Edition* (Martinus Nijhoff Publishers, 2011), p. 58.

¹² Steven Herz, “Rethinking International Financial Institution Immunity”, in *International Financial Institutions and International Law*, ed. Daniel D Bradlow, David B. Hunter, (New York: Law & Business, Wolters Kluwer Legal Issuing Body, 2010), p.145.

¹³ Kaare Strom, “Democracy, Accountability, and Coalition Bargaining”, *European Journal of Political Research*, vol. 31, (1997): 47-62;

For the purposes of this paper, IFIs principally refer to the multilateral development banks, in particular the World Bank, created at the Bretton Woods conference in 1944¹⁴ and the African Development Bank, established through an international agreement in 1963.¹⁵

The mandate of the World Bank Group is to fight poverty for lasting results. The World Bank Group encompasses five organizations: the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA) and the International Center for the Settlement of Investment Disputes (ICSID).¹⁶ The IBRD provides loans to governments for development and poverty alleviation initiatives, charging interest to recover the cost of borrowing. IDA provides grants, as well as loans on highly concessional terms, to governments of the poorest countries. The IFC and MIGA seek to encourage private sector investment in middle- and low-income countries: the IFC by providing loans and equity finance and MIGA by providing political risk insurance. ICSID provides a forum for settling investment disputes between foreign investors and host countries.¹⁷ The AfDB Group, on the other hand, comprises three entities: the AfDB, the African Development Fund (ADF), which was created in 1972 and the Nigeria Trust Fund (NTF), established in 1976.¹⁸

While the responsibility of States has been analyzed and systematized by the International Law Commission in its milestone Articles on State Responsibility (ASR)¹⁹, the quest to produce a comprehensive set of rules governing international organizations' responsibility was never fully realized.²⁰ The ILC followed a similar approach to state responsibility when providing in article 3 of its General Principles that "*Every internationally wrongful act of an international organization*

¹⁴ Eisuke Suzuki and Suresh Nanwani, "Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks," *Michigan Journal of International Law* 27, no. 1 (2005): 177-225.

¹⁵ Anonymous. "The African Development Bank Group." *African Business*, no. 331 (2007): 31.

¹⁶ Gunther Handl, "The Legal Mandate of Multilateral Development Banks as Agents for Change toward Sustainable Development," *American Journal Of International Law* 92, no. 4 (1998): 642-65.

¹⁷ Roberto Laver, "The World Bank and Judicial Reform: Overcoming "blind Spots" in the Approach to Judicial Independence," *Duke Journal of Comparative & International Law* 22, no. 2 (2012): 183.

¹⁸ African Development Bank Group, Agreement Establishing the African Development Bank, (AFDB, 2016), available at: <https://www.afdb.org/en/documents/agreement-establishing-african-development-bank-2016-edition>, [accessed 10 August 2020]

¹⁹ UN General Assembly, Responsibility of States for internationally wrongful acts : resolution / adopted by the General Assembly, 8 January 2008, A/RES/62/61, available at: <https://www.refworld.org/docid/478f60c52.html> [accessed 10 August 2020]

²⁰ Mark Bovens, "Analyzing and Assessing Accountability: A Conceptual Framework1," *European Law Journal* 13, no. 4 (2007): 447-68, p. 451.

*entails the international responsibility of the international organization” where an internationally wrongful act of these subjects exists “when conduct consisting of an action or omission: a) is attributed to the international organization under international law and b) constitutes a breach of an international obligation of that organization”.*²¹

Though at first glance this definition seems to define the responsibility of international organizations in a clear manner, the peculiar position of these subjects of international law, which are mostly not bound by multilateral treaties, such as human rights treaties, adds a layer of complexity in the analysis of the matter.²² Since treaty law, as primary source of international law, does not apply in most instances, as international organizations are not parties to many relevant treaties, a natural step would be to look at the rules under customary international law, with the hope to obtain further clarity. The following chapter will provide a deeper analysis of the relevant applicable law. The presupposition for the analysis is that two main challenges related to the nature of international organizations persist. Firstly, international organizations differ significantly in their scope, mandate, governance and internal power dynamic. This means that they are not equal in the international context, as States are, and that the limits of their rights and duties are defined primarily in the multilateral agreements establishing them.²³ Secondly, international organizations enjoy a wide range of privileges and immunities from national jurisdiction, which positions them, arguably, in an advantageous position in relation to individuals who are affected by their activities since judicial review of their acts is not applicable.²⁴

3. Applicable Legal Framework

The World Bank is one of the leading IFI that served as a model for other institutions, such as the African Development Bank, in the context of legal accountability to third parties. In line with Article 38 of the Statute of the International Court of Justice, which sets out the following sources of international law: international treaties, customary international law and general principles of

²¹ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: <https://www.refworld.org/docid/3ddb8f804.html> [accessed 17 August 2020]

²² Eisuke Suzuki, “Responsibility of International Financial Institutions under International Law” in *International Financial Institutions and International Law*, ed. Daniel D Bradlow, David B. Hunter, (New York: Law & Business, Wolters Kluwer Legal Issuing Body, 2010), p.231

²³ William E Holde, "International Organizations: Accountability and Responsibility." Proceedings of the ASIL Annual Meeting 97 (2003): 231-36.

²⁴ Schermers and Blokker, *supra* note 11 at 66-67.

international law accepted by all nations, it is conducive to state that the applicable law to MDBs are the Article of Agreements of MDBs as the international legal instruments establishing them, any treaty IFIs are parties to, to as well as international customary law and internal rules and regulations.²⁵ All listed sources, apart from the last one, are understood to fall in the category of external legal framework. In addition, it is relevant to state that in the analysis of MDBs' responsibility related to projects' adverse effects on human rights of PAPs, authors differentiate between obligations arising from legal and those arising from contractual relations. The first category refers to customary law, international law principles and the borrowing State's law, whereas the second category relates to loan agreements.²⁶ The subsequent section will follow the first categorization for ease of analysis.

3.1. External Legal framework

The following section presents the international legal instruments applicable to the work and operations of the MDBs and their relationship to PAPs.

3.1.1. International Treaty Law

The most relevant international treaties applicable to IFIs are their founding treaties, in the case of the World Bank the Articles of Agreement, which set the main legal framework for the operationalization of its mandate and in the case of AfDB the Agreement Establishing the African Development Bank. The Articles of Agreement of the IBRD provide that the Bank possess full juridical personality, in particular, "the capacity: (1) to contract; (2) to acquire and dispose of immovable and movable property; (3) to institute legal proceedings"²⁷ Similarly, the Agreement establishing the AfDB stipulates under Article 50 that the Bank shall enjoy full international personality, thus being able to enter into agreements with other international law subjects, as well as enjoying immunities and privileges.²⁸

²⁵ United Nations, Statute of the International Court of Justice, 18 April 1946, available at: <https://www.refworld.org/docid/3deb4b9c0.html> [accessed 19 August 2020].

²⁶ Ciprian N. Radavoi, "Indirect Responsibility in Development Lending: Do Multilateral Banks Have an Obligation to Monitor Project Loans," *Texas International Law Journal* 53, no. 1 (Spring 2018), p.10.

²⁷ Articles of Agreements: International Bank for Reconstruction and Development, Articles of Agreement, 2 U.N.T.S. 13 (27 Dec. 1945), <https://www.worldbank.org/en/about/articles-of-agreement/ibrd-articles-of-agreement>

²⁸ Agreement Establishing the African Development Bank, 10 September 1964, No. 7408, available: https://www.afdb.org/fileadmin/uploads/afdb/Documents/Legal-Documents/Agreement_establishing_the_African_development_bank_-_2016_edition.pdf

In addition, other relevant international treaties include host State agreements which are the basis of immunities and privileges granted to the institutions as well as agreements with the United Nations defining the terms of relationship with the UN.²⁹ The treaties founding them are thus the main legal framework governing the MDBs as international organizations, including the World Bank, and the AfDB. The articles specify interpretation methods, according to which the Board of Executive Directors of the Banks as main authorities vested with the rights to interpret the Articles, apply them as appropriate for the purposes of their operations.³⁰

The Vienna Convention on the Law of Treaties remains the main guiding framework for interpretation of the Articles for Agreement. Thus the Articles of Agreements of MDBs should be interpreted according to the ordinary meaning of their words, in light of their purpose and the context in which they operate.³¹ It is important to note that the Articles of Agreement are usually very general, at times vague, allowing for multiple interpretations that can occasionally contribute to uncertainties, such as the rules on the prohibition of political activity of the World Bank.³² The discourse of the interpretation of these rules became more relevant as calls for the Bank to respect minimum environmental and social standards became louder. In this context the founding instrument of the Bank became further relevant as it developed its institutional engagement through time, adapting to changing circumstances in the global structures.³³

This in particular became visible with the increasing need to address human rights of people affected by projects. The general terms of the founding agreements that provide for a flexible interpretation of the scopes, mandates and operational framework of the IFIs have been particularly criticized by the doctrine. Projects financed by MDBs usually target aspects of social and environmental context in a state and can have significant negative impacts. When this happens, the question of applicable law becomes crucial. However, some major constraints are obvious from the outset. In most cases, IFIs/MDBs are not signatories of treaties protecting social and environmental rights of individuals and thus they are not directly bound to conform with rules

²⁹ *Ibid.*

³⁰ Andria Fourie, "The World Bank Inspection Panel's Normative Potential: A Critical Assessment, and a Restatement," *Netherlands International Law Review* 59, no. 2 (2012): 199-234, p.221.

³¹ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <https://www.refworld.org/docid/3ae6b3a10.html> [accessed 17 August 2020]

³² Laver, *supra* note 17 at 182.

³³ Ibrahim F.I. Shihata, "The Creative Role of the Lawyer - Example: The Office of the World Bank's General Counsel," *Catholic University Law Review* 48, no. 4 (1999): 1041-1053.

emerging from these instruments.³⁴ While it could be argued that Member States, due to their dual role as main constituencies of MDBs and signatories of such internationally binding treaties could bridge the identified gap, the question of whether MDBs would have legitimacy to pressure Members to comply with regulations or to interpret such treaties to their discretion, remains problematic.³⁵

Some of the constituent instruments of MDBs explicitly exclude accountability of Member States for obligations MDBs, they are members of, enter into, such as the Articles of Agreement of the AfDB.³⁶ On the one hand, the alleged visible mission creep and the expansion of the mandate of IFIs, and the World Bank as prominent example, has been seen as a politization of its work, which ultimately hampers the efficiency of its operations. These claims were countered with arguments that the legitimate rules of treaty interpretation allow for a broader interpretation of the mandates of the Bank stipulated in the Agreements, thus including human rights considerations.³⁷ On the other hand, criticism was raised also on the content of operations, in particular with relations to human rights and environmental law. While some critiques are radical in stating that IFIs should not engage with any of the political issues and should leave this matter to other intergovernmental organizations, other commentators state that IFIs should be accountable for the impact their operations have on the political rights of individuals.³⁸

Authors have argued that a solution to the presented problem could be offered in the context of the monitoring of projects' implementation by MDBs.³⁹ However, there appear to be no contractual sources for such obligations, which would indicate that the only remaining source for this duty are the internal rules of MDBs, that the Draft Articles on the Responsibilities of International organizations define as the bylaws of the institutions, namely "*the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with*

³⁴ Schermers and Blokker, *supra* note 11 at p. 86.

³⁵ Gerd Oberleitner, "Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law, by Mac Darrow." *Modern Law Review* 69, no. 4 (2006): 669-72.

³⁶ Articles of Agreement establishing the Asian Development Bank, available at: <https://www.adb.org/documents/agreement-establishing-asian-development-bank-adb-charter>

³⁷ Daniel D. Bradlow; Megan S. Chapman, "Public Participation and the Private Sector: The Role of Multilateral Development Banks in the Evolution of International Legal Standards," *Erasmus Law Review* 4, no. 2 (2011): 91-126, p. 111.

³⁸ Daniel Bradlow & Claudio Grossman, "Limited Mandates and Inter-twined Problems: A New Challenge for the World Bank and the IMF", *Human Rights Quarterly* 17 (1995): 411-442, p. 411.

³⁹ Radavoi, *supra* note 19 at p. 11.

those instruments, and established practice of the organization[.]"⁴⁰ This remains today perhaps one of the core gaps in understanding both the legal responsibility, as well as broader international role of MDBs: while they do impact the rights protected by international instruments, they themselves, as subjects of international law, are not directly bound by those instruments. Nevertheless, MDBs have an obligation, to the least, ensure that their operations do not support the violation of legal commitments of their Member States.⁴¹ In this context, customary international law is often cited as a source of law that can fill the existing gap between international law and IFIs/MDBs in the context of protection of people affected by projects.

3.1.2. Customary International Law and the Question

Customary international law in the context of MDBs applies in their relations with Member States, namely through the principle of respect for State sovereignty. In practical terms this means that the World Bank and the AfDB are to refrain from any possible interference in domestic matters of the State. Furthermore, all agreements between MDBs and sovereign states, such as loan agreements, must be recognized and treated as international agreements, where all applicable procedures of ratification should be respected, as well as the requirements of Article 102 UN Charter related to registration.⁴² However, one of the most relevant areas where the question of the extent of applicability of international customary law is discussed is the area of human rights, especially in the context of social and environmental rights where there is no clear delineation of the limits of IFIs/MDBs responsibility.⁴³

An illustrative example of the ambiguities surrounding this particular matter can be the understanding of the role of the Universal Declaration of Human Rights (UNDHR), which according to some interpretations, though not binding, can be seen as part of customary international law, hence applicable to IFIs and their operations.⁴⁴ The extent to which this is true,

⁴⁰ Draft Articles on the Responsibility of International Organizations, with Commentaries, 2 Y.B. Int'l L. Comm'n 46, U.N. Doc A/CN.4/SER.A/2011/Add.1, 49.

⁴¹ Daniel D. Bradlow and David B. Hunter, *International Financial Institutions and International Law*, (Alphen aan den Rijn: Wolter Kluwer Law & Business, 2010). p.16.

⁴² Aron Broches, "International Legal Aspects of the Operations of the World Bank", *Recueil des Cours de l'Académie du Droit International, Collected Courses of the Hague Academy of International Law*, vol. 98, (1959): 297-408, p.298.

⁴³ Makane Moïse Mbengue and Stéphanie de Moerloose, "Multilateral Development Banks and Sustainable Development: On Emulation, Fragmentation and a Common Law of Sustainable Development," *Law and Development Review* 10, no. 2 (2017): 389-424, p. 411.

⁴⁴ Mac Darrow, "Human Rights Accountability of the World Bank and IMF: Possibilities and Limits of Legal Analysis." *Social & Legal Studies* 12, no. 1 (2003): 133-44, p. 135.

and the absolute priority that the Articles of Agreement have in governing the legal framework of IFIs, result in the persistence of the ambiguity. For example, in his opinion, the General Counsel of the IMF has stated that “*IMF’s relationship with the UN does not require it to give effect to resolutions of the UN such as the resolutions under which the members of the General Assembly adopted the Universal Declaration or the Covenant (on Economic, Social and Cultural Rights) or to international agreements such as the Covenant entered into by the members of the UN*”.⁴⁵

The present discussion, however, should be approached taking into account some *erga omnes* obligations resulting from “*intransgressible principles of international customary law*”.⁴⁶ As customary international law applies even when the same matter is addressed by a treaty, it would be conducive to state that international organizations are bound by such law.⁴⁷ This precisely reveals the aforementioned ambiguity—while customary international law in general appears to be applicable to MDBs, especially with regards to human rights obligations, it is not universally agreed upon what rules of the customary law are applicable to MDBs.⁴⁸ According to the International Law Association final report, the principle that international organizations can be held internationally responsible for their tortious acts is part of customary international law.⁴⁹ In line with this, an obligation under customary law towards the duty of reparations would be activated, as explained by the ICJ in the *Rainbow Warrior* arbitration case, where it was found that “*reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would in all probability have existed if that act had not been committed*”.⁵⁰ This means that restitution in kind, or payment of a sum correspondent to the value of the loss

⁴⁵ Francois Gianviti, *Economic, Social and Cultural Human Rights and the International Monetary Fund*, UN Doc. E/C 12/2001/WP.5 (7 May 2001), para 16.

⁴⁶ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1. C.J. Reports 1996, p. 226

⁴⁷ James Crawford and Vereinte Nationen International Law Commission. *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*. 1. Publ. ed. Cambridge [u.a.]: Cambridge Univ. Press, 2002. 126, para 3.

⁴⁸ Erdem Türkelli Gamze, “The Best of Both Worlds or the Worst of Both Worlds? Multilateral Development Banks, Immunities and Accountability to Rights-Holders,” *Hague Journal on the Rule of Law* 12, no. 2 (2020): 251-81, p.261.

⁴⁹ International Law Association Final Report of the Commission on Accountability of International Organization (Belrin 2004) p.26.

⁵⁰ Report of International Arbitral Awards, *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements*, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair ,30 April 1990 VOLUME XX pp. 215-284 Rainbow Warrior, France-New Zealand Arbitration Tribunal, 82 I.L.R. 500 (1990).

should be seen as the principle to determine the amount of compensation due for an act contrary to international law.”⁵¹

While the ICJ has indeed *prima facie* addressed international organizations’ immunity by limiting the scope and stating that international organizations should be responsible for damages resulting from their performance, it has also qualified such responsibility with the requirement of finding “appropriate modes of settlement” of disputes arising in such instances.⁵² Furthermore, in Article VII of the Convention on the Privileges and Immunities of the United Nations, disputes are to be settled through appropriate modes, which are defined as ones “arising out of contracts or other disputes of a private law character to which the United Nations is party.”⁵³ The same article states that some procedure for dispute settlement should be provided, with no further provision on what kind. This would indicate that MDBs are not completely independent from considering the broader international legal regime when it comes to their relations with third parties.

Although the immunities of MDBs are not dependent on the availability and existence of dispute settlement mechanisms, which is required as merely a substantive obligation, the duties of enacting these mechanisms, in line with article IX(31) remains.⁵⁴ The *travaux preparatoires* of the Convention, led by William E Beckett, then Rapporteur in charge, indicate that the requirement for dispute settlement frameworks were only relevant for disputes (with private law features) related to the performance of the party in the context of its constitutional functions, thus leaving a redress gap for the unconstitutional functions.⁵⁵

Indeed, the World Bank managed to maintain a certain level of autonomy from the broader UN system despite becoming a specialized agency under articles 57 and 63 of the United Nations Charter. However, as a specialized agency, the World Bank is bound by Chapter VII of the UN Charter as under article 103 UN Charter, the Charter holds primacy over any other international

⁵¹ Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ), 9 July 2004, p. 136. available at: <https://www.refworld.org/cases,ICJ,414ad9a719.html> [accessed 17 August 2020]

⁵² *Supra* note 27, p. 345.

⁵³ UN General Assembly, Convention on the Privileges and Immunities of the Specialized Agencies, 21 November 1947, art IX(31), available at: <https://www.refworld.org/docid/3ae6b3b10.html> [accessed 17 August 2020]

⁵⁴ Kirsten Schmalenbach, ‘Article IX Sections 31–32 SAC’ in August Reinisch (ed), *The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies – A Commentary* (Oxford University Press, 2016) [8]–[9].

⁵⁵ William E Beckett, *Final Report of Sub-Committee I of the Sixth Committee, Co-ordination of the Privileges and Immunities of the United Nations and of the Specialized Agencies*, UN Doc A/C.6/191 (15 November 1947) 12–13 [32].

agreement. This would entail that the Bank is not completely independent as it wished to be perceived pursuant to the arrangement between the Bank and the UN according to which “*the action to be taken by the Bank on any loan is a matter to be determined by the independent exercise of the Bank’s own judgment in accordance with the Bank’s Articles of Agreement*’.”⁵⁶ Nevertheless, analyzed in light of Article 55(c) of the UN Charter, IFIs’ obligation would include the need to take human rights in consideration and operate in a manner that ensures respect for human rights and the duty to refrain from actions that would undermine their enjoyment, respecting thus the do no harm principle.⁵⁷

However, today there is a tendency to restrict immunities of MDBs. Doctrine and practice have witnessed a shift in the understating MDBs, moving away from the notion that international organizations are merely agents of their Member States and thus have only relations with them. As many argue today, the wide-ranging immunities enjoyed by MDBs lost their *raison d’être*, which was reconfirmed in the *Jam et al.v. IFC* case, due to the broadened scope of MDBs operations which now include direct impact on lives of individuals.⁵⁸ This new trend is a consequence of three congruent factors. Firstly, there is a tendency to restrict immunities of MDBs as it became clear that third parties should have the right to file claims against these organizations. Secondly, the judicial revision of MDBs’ activities by domestic or regional courts and finally a strong insistence, by a significant portion of practitioners and authors for greater accountability towards responsibility.⁵⁹ In the aftermath of *Jam*, it is likely that the practice of immunity will converge more closely with immunity as ascribed in the foundational documents of many MDBs. Two distinct but interrelated processes expose the limits of functionalist imagery: the complexity of interactions that underpin the operations of MDBs and their growing autonomy from their member states.

In addition, as a specialized agency, the Bank should not place its members in a position where they would be violating obligations under the UN Charter.⁶⁰ Finally, as the author resorts to citing

⁵⁶ Agreements between the United Nations and the International Monetary Fund and the United Nations and the International Bank for Reconstruction and Development, 16 U.N.T.S. 328, 346(1948).

⁵⁷ Siobhan McInerney-Lankford, in Bradlow, Daniel D., David B. Hunter, and Wolters Kluwer Law & Business , Issuing Body. *International Financial Institutions and International Law*, 2010, p.260.

⁵⁸ Daniel D. Bradlow, “Using a shield as a sword: are international organizations abusing their immunity?” *Temple Int Comp Law J* 31.no.1, (2017):45–67, p.47

⁵⁹ Türkelli, *supra* note 48 at p. 278.

⁶⁰ Schermers and Blokker, *supra* note 11 at p. 73.

ICJ findings, it is important to note that such findings can be solicited only by Member States and entities part of the UN system, which the World Bank is, but the AfDB is not. This is relevant for the present analysis, since the ICJ in this context can represent an appropriate forum for the assessment of accountability mechanisms, as parties to an agreement can agree for its opinions to be binding.⁶¹ However, the political context under which such opinions are requested and consequently become binding, represent the real challenge in the attempt to bridge the accountability, and the related responsibility gap between IFIs and third parties. In other words, it is not likely that the subject that should be held accountable (i.e. the World Bank) will request an ICJ's opinion, just to be held responsible. Individuals of course, whose interest is to have this implemented, are not entitled to solicit such assessments.⁶²

3.2. Internal Legal Framework

The previous sections of the chapter delineated the challenges of applicability of treaty law as well as the multiple layers of discussion related to customary international law. Contrary to these sources that represent external law to IFIs, the rules and regulations of international organizations represent their internal law and comprise of their constituent documents, which are a result of decisions and instruments in line with their internal procedures.⁶³ According to the ILC, the internal rules of international organizations, unlike internal law of States, are part of the international legal system and thus constitute part of international legal corpus, including the practice of the organization.⁶⁴ If this notion is interpreted in conjunction with article 27 Vienna Convention on the Law of treaties (1969), it would mean that any breach of internal policies and rules would constitute a wrongful act under international law, and thus as consequence have the activation of related responsibility of international organizations.⁶⁵ However, as examined in practice, the UN has never taken these provisions as “imposing local law upon contracts concluded at the Headquarters”.⁶⁶

⁶¹ Supra note 25.

⁶² Laver, supra note 17.

⁶³ Bissel and Nanwani, *supra* note 8, p. 78.

⁶⁴ Eisuke Suzuki and Suresh Nanwani, "Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks," *Michigan Journal of International Law* 27, no. 1 (Fall 2005): 177-226.

⁶⁵ Shihata, *supra* note 33, p. 86.

⁶⁶ UN Secretariat, Office of Legal Affairs, Law Applicable to Contracts Concluded by the United Nation with Private Parties Procedures for Settling Disputes Arising out of such contracts – relevant rules and practices', 1976 UN Juridical Yearbook, 159, 160-161.

The two MDBs analyzed through this paper, the World Bank, and the AfDB following suit, have adopted a set of safeguard policies addressing particularly relevant impacts that projects can have on the environment, indigenous people, involuntary resettlement and other.⁶⁷ These regulations became the body of their bylaws and the backbone for their accountability in the eyes of civil society and people affected by projects. They are understood as the normative frameworks which spell out the Banks' commitment to the processes and outcomes of projects deemed eligible for financing. This in return means that such rules and regulations set the minimum standards for protection of peoples affected by projects, aiming to guarantee that their rights will be protected and that the long-term costs of projects (often non quantifiable in monetary terms) will not be borne by vulnerable members of the local communities.⁶⁸

3.2.1. World Bank's Internal Regulatory Framework

In October 2018 the World Bank has enacted its Environmental and Social Framework (ESF) which sets a framework for both the Bank and its Borrowers to manage the social and environmental risks of projects, aiming thus to improve development outcomes and increasing protection of PAPs. The ESF represents an effort to integrate a human rights-based approach into the Bank's projects.⁶⁹ The World Bank's current environmental and social policies, consist of eleven 11 Operational Policies, as defined by the World Bank.⁷⁰ The ESF deals with an elaborate set of matters related to the environmental and social aspect of projects such as, public participation, non-discrimination, transparency and grievances mechanisms. Specifically, it stipulates ten standards with a broad scope, including the following: Assessment and management of environmental and social risks and impacts; Labor and working conditions; Resource efficiency and pollution prevention; and management; Community health and safety; Land acquisition, restrictions on land use and involuntary resettlement; 6. Biodiversity conservation and sustainable management of living natural resources; Indigenous Peoples/Sub-Saharan historically underserved

⁶⁷ OP/BP 4.01 Environmental Assessment, OP/BP 4.04 Natural Habitats, OP 4.09 Pest Management, OP/BP 4.12 Involuntary Resettlement, OD 4.20 Indigenous Peoples, OP 4.36 Forestry, OP/BP 4.37 Safety of Dams, OPN 11.03 Cultural Property, OP/BP 7.50 Projects on International Waterways, OP/BP 7.60 Projects in Disputed Areas. Accessed via: <http://go.worldbank.org/WTa1ODE7T0>.

⁶⁸Ebrahim Alnoor and Steve Herz, "Accountability in Complex Organizations: World Bank Responses to Civil Society", *IDEAS Working Paper Series from RePEc*, 2007, 10.

⁶⁹ Mara Tignino, "Human Rights Standards in International Finance and Development: the Challenges Ahead" in *The Practice of Independent Accountability Mechanisms (IAMs): A Towards Good Governance in Development Finance*, ed. Owen McIntyre and Suresh Nanwani. (Leiden; Boston: Brill | Nijhoff, 2020), p. 122.

⁷⁰List of Environmental and Social Policies', World Bank, available at: <https://www.worldbank.org/en/projects-operations/environmental-and-social-policies>, [accessed 17 August 2020]

traditional local communities; Cultural heritage; Financial intermediaries and Stakeholder engagement and information disclosure.⁷¹

Following revisions and updates in 2013, the World Bank's social and environmental safeguards include the following: OP/BP 4.01, Environmental Assessment; OP/BP 4.04, Natural Habitats; OP 4.09, Pest Management; OP/BP 4.10, Indigenous Peoples; OP/BP 4.11, Physical Cultural Resources; OP/BP 4.12, Involuntary Resettlement; OP 4.36, Forests; and OP/BP 4.37, Safety of Dams..⁷² The World Bank is also encouraging Member countries to adopt and implement systems that would ensure they meet the objectives of development while upholding efficiency and transparency. In this context it requires the Borrower to undertake an environmental assessment of the project which is to secure that its components are environmentally sustainable. The process includes the identification of potential risks and impacts as well as project alternatives. The assessment also aims at listing ways for the improvement of the project by means of preventing, minimizing or alternatively mitigating negative effects the project can have on the environment while aiming at fostering its positive impacts.⁷³ The environmental assessment is a key pillar in the Bank's considerations for the financing of projects and it takes into consideration different natural and social aspects of environment. This includes natural aspects (such as water and air), social considerations (such as involuntary resettlement) and transboundary and global environmental aspects.⁷⁴ The World Bank includes sustainable development in its safeguarding system as a consequence of the broader 'emulation phenomenon' in the relationship between MDBs and sustainable development.⁷⁵

The EFS upholds the principle of non-discrimination, requesting the Bank to assist the Borrowers in the mitigation and management of discrimination occurrences. Related to land acquisition, standard 5 focuses specifically on redress mechanisms in favor of displaced or resettled people, requiring consultation with affected people. In this context, the ESF has shifted from 'free, prior,

⁷¹ Tignino, *supra* note 67 at p. 124.

⁷² Daniel B Braaten, "Ambivalent Engagement: Human Rights and the Multilateral Development Banks, in *Global Economic Governance and the Development Practices of the Multilateral Development Banks*, ed. Park, Susan and Jonathan R. Strand, (Routledge, 2015), 99-118, p. 107.

⁷³ World Bank Operational Manual Operations Policies, OP/BP 4.01 Environmental Assessment available at: <https://ppfdocuments.azureedge.net/1565.pdf>, [accessed 17 August 2020]

⁷⁴ *Ibid.*

⁷⁵ Mbengue and De Moerloose, *supra* note 43 at p. 404.

and informed consultation’ towards ‘free, prior, and informed consent’.⁷⁶ It can be argued that the ESF thus provides an advanced understanding of the Bank’s and Borrower’s divided responsibilities, arguably harmonizing its stipulation with other international law standards. According to its rules, it expects borrowers to apply a ‘precautionary approach’ in the management of natural resources.⁷⁷ Furthermore, it states that the environmental assessment is to take into consideration the global environmental developments such as climate change.⁷⁸ Finally, explicit consideration is given to indigenous people, in line with the ILO Convention 169⁷⁹ as well as the UN Declaration on the Rights of Indigenous People.⁸⁰

According to its OP, the Bank gives precedence to preventive measures over mitigatory or compensatory measures, whenever this is feasible. The Bank’s ESF provides that PAPs have the chance to submit their complaints to specific “project grievance mechanism, appropriate project and/or local grievance mechanism, or the World Bank’s corporate Grievance Redress Service (GRS).”⁸¹ People adversely affected by the projects can also rely on the Bank’s Inspection Panel, once they raised to the Bank’s attention the claim and do not receive a reasonable solution. The Panel performs an inspection in order to determine whether the project has respected the policies of the Bank and whether harm has resulted from Bank’s noncompliance.⁸² The ESF’s emphasis on the right to access to justice indicates a trend in acknowledging the need to provide avenues for redress.⁸³

Nevertheless, despite the diverse operational policies, authors and practitioners continue to criticize the Bank’s resistance to incorporating clear reference to human rights standards. Among them, Philip Alston, UN Special Rapporteur on extreme poverty and human rights has criticized

⁷⁶ World Bank, “Environmental and Social Framework”, “The World Bank Group (Environmental and Social Framework)” 21, 2017 International Bank for Reconstruction and Development/The World Bank, <http://pubdocs.worldbank.org/en/837721522762050108/Environmental-and-Social-Framework.pdf>

⁷⁷ World Bank, Operational Policy 4.01 Environmental Assessment, available at: <https://ppfdocuments.azureedge.net/1565.pdf>

⁷⁸ *Idem*.

⁷⁹ International Labor Organization (ILO), Indigenous and Tribal Peoples Convention, C169, 27 June 1989, C169, available at: <https://www.refworld.org/docid/3ddb6d514.html> [accessed 17 August 2020]

⁸⁰ UN Office of the High Commissioner for Human Rights (OHCHR), The United Nations Declaration on the Rights of Indigenous Peoples, August 2013, HR/PUB/13/2, available at: <https://www.refworld.org/docid/5289e4fc4.html> [accessed 17 August 2020]

⁸¹ World Bank, *supra* note 71 at p.11.

⁸² *Ibid*.

⁸³ ‘Overview of the World Bank Environmental and Social Framework’ (Environmental and Social Framework) 3.

the Bank's conservative understanding of human rights as internal political matters, stating that: '[f]or most purposes, the World Bank is currently a human rights-free zone. In its operational policies, in particular, it treats human rights more like an infectious disease than universal values and obligations'.⁸⁴

3.2.2. AfDB's Internal Regulatory Framework

Coinciding with the World Bank's revision of its internal policies, in 2013 the AfDB established a coherent, streamlined Integrated Safeguards System (ISS) which includes: Environmental and Social Assessment, Involuntary Resettlement, Land Acquisition, Population Displacement and Compensation, Biodiversity and Ecosystem Services, Pollution Prevention and Controls, Hazardous Materials and Resource Efficiency and Labor Conditions, Health and Safety.⁸⁵ While commentators have welcomed the new framework, in particular the open reference to human rights in its preamble, criticism was raised with regards to the lack of support for indigenous people's rights.⁸⁶ The ISS delineates the Bank's commitment to assure that systemic assessments of environmental and social impacts of projects are implemented, the standards are applied to the full portfolio of the Bank's operations, the clients receive support to meet the ISS requirements and that the Bank will implement an '*adaptive and proportionate approach to environmental and social management measures to be agreed with clients as a condition of project financing*', as well as the assurance that clients engage in substantial consultations with affected groups including the promotion of the protection of vulnerable groups.⁸⁷

Similarly to the sustainable development requirements included in internal regulatory framework of the World Bank, the AfDB also includes safeguards regimes for borrower's compliance, such as screening for climate change risks of projects, the implementation of meaningful consultations

⁸⁴ United Nations High Commissioner for Refugees. "Report of the Special Rapporteur on Extreme Poverty and Human Rights on His Mission to Saudi Arabia." Refworld. United Nations High Commissioner for Refugees, April 28, 2017. <https://www.refworld.org/docid/593a935e4.html>

⁸⁵ African Development Bank, *African Development Bank Group's Integrated Safeguards System*. (Cote d'Ivoire: African Development Bank 2013), https://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/December_2013_-_AfDB%E2%80%99S_Integrated_Safeguards_System_-_Policy_Statement_and_Operational_Safeguards.pdf

⁸⁶ World Bank, *The Inspection Panel, Consultation, Participation & Disclosure of Information, Emerging Lessons Series No. 4*. (Washington, D.C.: The World Bank, October 2017), available: <http://ewebapps.worldbank.org/apps/ip/Pages/Emerging-Lessons.aspx>

⁸⁷ Tignino, *supra* note 67, p. 10.

with affected parties, as well as the environmental screening with the goal to avoid significant changes in the local ecosystems.⁸⁸

Based on the provided analyses of the regulatory frameworks put in place by the two Banks, it can be concluded that significant effort was put in providing the basis for protection of rights of local communities and individuals. However, the question of how these regulations are materialized through practice and to what degree they are effective in their scope, remains to be determined. The following chapters will provide a deeper analysis of the Banks' practice with the aim of addressing precisely this question.

4. The Notion of Accountability

The present chapter provides a general overview of the notion of accountability and its application in the context of MDBs. It also provides an overview of the core principles and standards of accountability. Accountability as a term is usually linked to a power relationship. It requires at least a minimum 'ability of accountability holders to sanction power-wielders, where a relationship of accountability can only exist if the accountability holder can exercise some degree of influence over the power-wielder'.⁸⁹ Accountability is also defined as "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences."⁹⁰

Accountability, usually, refers to the responsibility, "answerability, or blameworthiness of a party performing a duty or working in an official capacity".⁹¹ When analyzed through the social or political lenses, the concept of accountability usually goes beyond the legal delineation of liability of responsibility, understood here as the legal consequence arising from a breach of an obligation, especially to provide reparation. Nevertheless, the content of accountability usually does not entail reparation.⁹² The dominant perspective in the context of accountability of international organizations is that such organizations are accountable only to Member States, which are then

⁸⁸ Mbengue and De Moerloose, *supra* note 43 at 411.

⁸⁹ Robert O Keohane, 'The Concept of Accountability in World Politics and the Use of Force', *Michigan Journal of International Law* 24 (2003), p. 1125.

⁹⁰ Marc Bovens, "Analyzing and Assessing Accountability: A Conceptual Framework", *European Law Journal* 13. No.4 (2007): 447-468

⁹¹ Yvonne Wong, "Inspection Panel: World Bank", *The Max Planck Encyclopedia of Public International Law* (December 2019), p.6-7 <https://opil.ouplaw.com/view/10.1093/law-mpeipro/e2298.013.2298/law-mpeipro-e2298>

⁹² *Ibid.*

charged with the responsibility of exercising public power over individuals. This is a result of the fact that national courts usually do not have the jurisdiction to address claims of individuals related to actions or omissions of international organizations, since the majority of international organizations enjoy immunity, based on either on a treaty or domestic legislation.⁹³

4.1. Principles for effective accountability mechanisms

The main *raison d'être* of accountability mechanisms in international organizations is the ultimate aim of assuring administrative efficiency and operational effectiveness of the institution. This should be analyzed in conjunction with the mandates specified in the establishing instruments of international organizations, which usually address the development of livelihoods leading to an increased quality of life of individuals. It would consequently mean that these mechanisms aim at assuring a level of protection to people affected by their operations.⁹⁴ The International Law Association (ILA) has adopted a broader concept of accountability, linking it to authority and real power of an international organization.⁹⁵ The ILA defined three layers of accountability of international organizations, encompassing a dual regime. Firstly, the legal context which includes legal norms and remedies applicable to an international organization's activities which may influence legal rights or interests of the constituency entitled to claim accountability against the organization.⁹⁶ These can exist as a result of a breach or omission of international legal instruments (or internal instruments), as well as tortious injurious not resulting from a breach of an international norm. Secondly, accountability also entails a nonlegal framework, such as administrative, political and financial layers of internal and external analysis and monitoring of an acts and omissions.⁹⁷ Parallels can be drawn with the classical notion of liability and responsibility as analyzed by the International Law Commission of United Nations (ILC) in its works related to international responsibility, mentioned in previous sections.⁹⁸ Some authors here, however, note that this is a relatively classical approach and that there is no justification to leave unspecified the question

⁹³ August Reinisch, "Securing the Accountability of International Organizations." *Global Governance* 7, no. 2 (2001): 131-49.

⁹⁴ Schermers and Blokker, *supra* note 11 at p. 81.

⁹⁵ International Law Association Final Report (2004) pp.18-35.

⁹⁶ *Ibid.*

⁹⁷ *Idem.* 18-50.

⁹⁸ ILC, 'Draft Articles on Responsibility of International Organizations, with Commentaries', in the 'Report of the International Law Commission' Sixty-third Session, (26 April to 3 June and 4 July to 12 August 2011) UN General Assembly, (A/66/10).

whether the non-legal forms of accountability and the governing rules and principles, belong to the legal paradigm of IOs' accountability.⁹⁹

Development represents a multi-layered and cross-sectoral challenge that goes beyond alleviating income poverty, and entails the assurance of certain standards of guaranteeing the protection of individual rights and participation in decision making.¹⁰⁰ Consequently, it is recognized that IFIs and MDBs as their subcategory, have a central role in empowering their final beneficiaries, to express, advocate for, and achieve their interests while at the same time assuring mechanisms of effective redress in those instances where decisions makers fail to enable such dynamics through concrete sanctions.¹⁰¹ This can be achieved through procedures that allow for the public to participate in the design and monitoring of project implementation, access to information and most importantly access to instruments of redress.¹⁰² This in practice means that accountability, as a notion, is multifaceted in nature, and in the context of international organizations, by default relies heavily on political accountability. However, political accountability has proven not to be enough in an ever more interconnected world where the development of global administrative law entails the need for stronger legal mechanisms of redress. This is visible in the case of the World Bank and its move towards the establishment of the Inspection Panel, followed by a proliferation of independent accountability mechanisms.¹⁰³

In order to understand the IAMs in a comprehensive manner, some key substantial and procedural principles are identified by the doctrine. Firstly, accountability can be understood as a principle *per se*, in which the MDB is accountable to its shareholders, the Member States it grants the loans to, as well as the local communities in whose interest, arguably, the projects are implemented.¹⁰⁴ Secondly, the principle of redress, which entails that the MDB is responsible to assure appropriate measures of redress if the project it finances provokes harm to the end beneficiaries. Thirdly, the

⁹⁹ I. F Dekker, 'Making Sense of Accountability in International Institutional Law', *Netherlands Yearbook of International Law*, vol. 36, (2005) pp. 83-118, p.105.

¹⁰⁰ "Accountability of the International Monetary Fund. (Book Review)." *Journal of Economic Literature* 43, no. 4 (2005): 1108., p.207.

¹⁰¹ World Development Report 2004: Making services work for poor people - Overview (English). World Development Report Washington, D.C.: World Bank Group. P.79.
<http://documents.worldbank.org/curated/en/527371468166770790/World-Development-Report-2004-Making-services-work-for-poor-people-Overview>.

¹⁰² Ebrahim Alnoor and Steve Herz, "Accountability in Complex Organizations: World Bank Responses to Civil Society," *IDEAS Working Paper Series from RePEc*, 2007, P. 4.

¹⁰³ Supra note 8.

¹⁰⁴ Gunther Handl, "The Legal Mandate of Multilateral Development Banks as Agents for Change toward Sustainable Development," *American Journal Of International Law* 92, no. 4 (1998): 642-65, p. 651.

principle of development effectiveness entails that lessons learned from compliance and redress throughout the project's cycle (from design to implementation) should feed into the development effectiveness fostering thus quality of operations.¹⁰⁵ The latter is clearly stated in the AfDB's IAM infrastructure, which will be explained in the following chapter. The aforementioned cornerstone principles are enacted through procedural aspects that govern successful accountability mechanism, such as transparency, due process, including participation of PAPs and efficiency of the processes, which is reflected both in the timely and qualitative delivery of the review mechanism. Finally, all these principles will contribute to a positive result only if they are realistically achievable, both in the context of the political setting and administrative context.¹⁰⁶

4.2. Accountability through monitoring

Throughout time, part of the doctrine has developed an understanding that MDBs should be accountable for adverse effects projects they finance can have on human rights, in particular with regards to adverse effects that occur after the approval of the project, or in other words, the MDBs' obligation to monitor project implementation and the ability to react to possible negative effects on human rights in this period.¹⁰⁷ The projects' monitoring role of MDBs is referred to in the various environmental, social and governance policies, which are, as we saw, understood as specific instruments mainly encompassing instructions to staff, including mandatory operational policies and procedures.¹⁰⁸ Nevertheless, MDBs' indirect responsibility for the adverse effects projects have on human rights cannot be based on these documents due to two intertwined reasons. Firstly, the nature of the sources as internal normative framework is often discarded by external stakeholders to the MDBs as merely internal rules that govern staff of the Banks but not third parties.¹⁰⁹ Secondly, the monitoring flexibility that each project entails is not uniform and thus cannot generate uniform MDBs accountability.¹¹⁰

¹⁰⁵ *Idem.*

¹⁰⁶ McIntyre and Nanwani, *supra* note 3 at p.14

¹⁰⁷ Fatma E Marouf, "Holding the World Bank Accountable for Leakage of Funds from Africa's Health Sector," *Health and Human Rights* 12, no. 1 (2010), 95-108, p.111.

¹⁰⁸ Laurence Boisson De Chazournes, "Policy Guidance and Compliance: The World Bank Operational Standards," in *Commitment and Compliance : The Role of Non-Binding Norms in the International Legal System*, ed. Dinah Shelton (Oxford and New York: Oxford University Press. 2000), p. 281-303

¹⁰⁹ Enrique R. Carrasco, Wesley V Carrington, and HeeJin Lee, "Governance and Accountability: The Regional Development Banks," *Boston University International Law Journal*, Spring, 2009, Vol.27 no. 1 (2009), p.1-60, p.27.

¹¹⁰ *Ibid.*

Furthermore, it is evident that the MDBs, leave out reference to monitoring of project implementation, or stipulate related rules to the degree acceptable to Member States, which creates occurring and often long standing challenges to the Banks' operations.¹¹¹ It is thus reasonable to conclude that internal regulatory framework mostly stipulate a participatory, rather than hierarchical monitoring, which possibly has a weaker effect in terms lender's responsibility, as much of the monitoring tasks are transferred to the borrowing state.¹¹²

IFIs' responsibility is most contested in situations where the dual relationship between IFIs and Member States, on the one hand, and IFIs and individual citizens of those Member States, on the other hand is analyzed. In this context, immunities are set to allow for IFIs to operate and fulfil a quasi "legislative" function by adopting the policies and other operational directives that address their activities. However, immunity arguably does not preclude obligations created under the internal policies and procedures, as the institutions adopting and enacting them, the MDBs, are subject to international law.¹¹³ Consequently they can be understood as unilateral declarations of international organizations. This approach is compatible with the commentary of the ILC articles on international organizations responsibility, in particular the previously cited article VIII.¹¹⁴ The main dilemma in this discussion thus appears to arise when operating policies and procedures can be understood as unilateral (binding) declarations. If one is to make a comparison analogical to the practice among States, unilateral declarations of international organizations are binding when there is a clear intent, publicly communicated by the relevant authority of the organization.¹¹⁵

Nevertheless, limitations of the World Bank's accountability mechanism, for example, pointed out by Ibrahim Shihata, Senior Vice President and general counsel of the World Bank at the time, appear to prevail in today's practice, and can be summarized in two key conclusions. Firstly, violations of its policy by the Bank, even if recognized by its internal accountability mechanism, do not entail automatically violations of applicable law that would consequently trigger liability

¹¹¹ U.N. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Interim Rep. on the Promotion and Protection of Human Rights, para. 53, U.N. Doc. E/CN.4/2006/97 (February 22, 2002)

¹¹² Supra note 20, p. 12.

¹¹³ Schermers and Blokker, *supra* note 11p. 80.

¹¹⁴ ILC, 'Draft Articles on Responsibility of International Organisations, with Commentaries', in the 'Report of the International Law Commission' Sixty-third Session, (26 April to 3 June and 4 July to 12 August 2011) UN General Assembly, (A/66/10).

¹¹⁵ Michel Virally, "Unilateral Acts of International Organizations," in *International Law: Achievements and Prospects*, ed. Mohammed Bedjaoui. (Martinus Nijhoff, 1991), p. 256-57

for damages. Secondly, such violations are not to be taken *ipso facto* as determined evidence against the Bank's judicial proceedings.¹¹⁶ The first point can be especially frustrating if the analysis of article VIII is taken into account as it would appear that the preclusion or limitation of the Banks's responsibility would indicate a rather arbitrary or self-serving interpretation of international law.¹¹⁷

4.3. A shift towards greater accountability: A historic overview

The World Bank's mandate, along with the mandates and activities of other MDBs, including the AfDB, have drastically changed through decades of operations, assuming a prominent (if not leading) role in international financing for development. The main shift in the World Bank's activities is reflected in its goals: while it started off as a reconstruction project for western Europe following World War II, it has arguably evolved in the leading supporter of good governance and poverty eradication, which implicitly entails, if not expressly addressing, then at least tackling indirectly human rights of individuals.

Paradoxically, the World Bank's core statutory documents prevent it to address fully human rights as they are understood, both by its Member States as well as its officials, since its Articles state that the Bank should refrain from political matters.¹¹⁸ While in the 1960s the predominant notion in the Banks activities was that economic growth as a precondition for international development, in the subsequent two decades the focus on the rights of the individuals as end audience became stronger, emphasizing their needs rather than systemic, infrastructure-based growth. This slogan was incorporated through the notion that all human beings are to be provided with the opportunity for a fully satisfactory life.¹¹⁹ This is in line with the UNGA resolution on the right to development, which was defined as "an inalienable right" in which 'states have the duty to take steps individually

¹¹⁶ Ibrahim F. Shihata, *The World Bank Inspection Panel*. 1. Print. ed. New York [u.a.]: Oxford Univ. Pr., 1994.p. 234.

¹¹⁷ Suzuki and Nanwani, *supra* note 14, p. 82.

¹¹⁸ Francesco Seatzu, "Speculating on the World Bank's Involvement in Post-Conflict Reconstruction Operations and Activities." *International Organizations Law Review* 16, no. 1 (2019): 192-228, p.200.

¹¹⁹ Jacqui Zalberg, "The World Bank Inspection Panel: A Tool for Ensuring the World Bank's Compliance with International Law?" *Macquarie Journal of International and Comparative Environmental Law* 8, no. 2 (2012): 75-93, p.81.

and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development”.¹²⁰

By the late 1970s, due to soaring oil prices and the breakdown of the Bretton Woods exchange-rate system, developing countries started acquiring unmanageable foreign debt. With the end of the Cold War, coupled with structural adjustment lending policies and the lack of private finance for countries suffering debt burden, the Bank expanded its traditional mandate to incorporate a wide range of endeavors. As the activities expanded, the Bank’s nature transformed towards a development and aid agency, also engaging in post-conflict reconstruction¹²¹ biodiversity,¹²² crime,¹²³ and public participation in development planning.¹²⁴ The expansion of the World Bank’s mandate and the overall nature of engagement of the Bank implied that the Bank-financed projects and their increasing impact on national environments became increasingly relevant. This process was accompanied by a proliferation of regional multilateral development banks, including the establishment of the African Development Bank Group in 1963. It is worth noting though that despite the expansion of focus, the Bank has mainly adhered to its mandate of economic reform in the context of its engagement, providing loans based 'only on economic factors.'¹²⁵

Although grand words were embedded in the rhetoric of the World Bank, towards the end of the 1970s it became evident that there was a discrepancy with the reality on the ground, especially with regards to environmental impact.¹²⁶ It comes, thus, not as a surprise that the 1970s and 1980s were referred to as decades of debacles with regards to international financial institutions, causing

¹²⁰ UN General Assembly, Declaration on the Right to Development: resolution / adopted by the General Assembly, 4 December 1986, A/RES/41/128, available at: <https://www.refworld.org/docid/3b00f22544.html> [accessed 10 August 2020]

¹²¹ Steven Holtzman, Ann Elwan and Colin Scott, *Post-Conflict Reconstruction: The Role of the World Bank* (The World Bank, 1998), available at: <http://documents1.worldbank.org/curated/en/175771468198561613/pdf/multi-page.pdf>

¹²² The World Bank, *The World Bank Group’s Partnership with the Global Environment Facility*, (World Bank Group, 2013), available at: <http://documents1.worldbank.org/curated/pt/615441468197627671/pdf/101597-NWP-IEG-GEF-Box393263B-PUBLIC.pdf>

¹²³ Anne-Marie Leroy. “Legal Note on Bank Involvement in the Criminal Justice Sector, ” (Washington, DC: The World Bank, 2012), available online at <http://siteresources.org/INTLAWJUSTINST/Resources/CriminalJustice>

¹²⁴ Carmen Malena, Reiner Forster and Janmejay Singh, *Social Accountability: An Introduction to the Concept and Emerging Practice* (The World Bank, 2004); available at: www.worldbank.org/socialdevelopment, [accessed 10 August 2020]

¹²⁵ Hassane Cissé . *International Financial Institutions and Global Legal Governance. The World Bank Legal Review* 3, (Washington, DC: World Bank, 2012). p. 77.

¹²⁶ Bruce Rich, *Mortgaging the Earth: The World Bank, Environmental Impoverishment, and the Crisis of Development*. (Washington, DC: Island Press, 2013), p.102.

ecological destruction.¹²⁷ For example, the *Carajás Project*¹²⁸ resulted in the deforestation of 150,000 square kilometers of Amazonian jungle.¹²⁹ In early 1990s, the environmental disasters related to projects financed by the World Bank gained great visibility and emphasized the underlining criticism that the 'words on paper and the fundamental objectives of the policies did not match the reality of implementation at the project level.'"¹³⁰ With the aim to mitigate negative effects on the environment by projects it financed, and being under constant public pressure, the Bank developed an environmental agenda, encompassing an environmental Operational Directive in 1984; the establishment a new environment department in 1987; and the creation of the Global Environment Facility in 1991.¹³¹

Today, the Bank understands development as a multidimensional process that concentrates on individuals in societies in which it operates, thus giving a prominent place to projects where human rights aspects are relevant.¹³² The Bank's activities, which often encompass large-scale lending, entail both moral and political responsibility for the organization, which can have implications in both the domestic and international legal contexts, in particular related to alleged violations of human rights, such as environmental and social rights.¹³³ To alleviate the potential negative effects of their activities, the World Bank has adopted the already-mentioned substantive policy and legal frameworks delineating rules and standards the projects they finance need to meet. The existence of these frameworks represents the basis for the development of accountability mechanisms that could tackle and respond to adverse effects that projects can have on the human rights of the local communities.¹³⁴ Despite this, authors like Pastor and Boyce, De Soto and de Castillo, Stevenson, and Van Door noted that the World Bank has often demonstrated an undesirable tendency to

¹²⁷ Supra note 123 at p. 77.

¹²⁸ Carmen Malena, Reiner Forster and Janmejay Singh, *Social Accountability: An Introduction to the Concept and Emerging Practice* (The World Bank, 2004), available at: <http://documents1.worldbank.org/curated/en/327691468779445304/pdf/310420PAPER0So1ity0SDP0Civic0no1076.pdf>

¹²⁹ Zalcberg, supra note 117.

¹³⁰ Dana Clarke, 'Understanding the World Bank Inspection Panel' in *Demanding Accountability: Civil-Society Claims and the World Bank Inspection Panel*, ed. Dana Clark, Jonathan Fox and Kay Treakle, (Rowman & Littlefield Publishers, 2003) 1, 2.

¹³¹ Robert Wade, "Greening the Bank: The Struggle Over the Environment 1970-1995." in *The World Bank: Its First Half-Century*, ed. Devesh Kapur, John P Lewis and Richard Webb (Brookings, 1997).

¹³² Howard Stein, *Beyond the World Bank Agenda: An Institutional Approach to Development* (The University of Chicago Press, 2008), p. 173–249.

¹³³ Clemens Treichl and August Reinisch, "Domestic Jurisdiction over International Financial Institutions for Injuries to Project-Affected Individuals," *International Organizations Law Review* 16, no. 1 (2019): 105-36, p.109.

¹³⁴ *Ibid.*, p.110.

impose its own policies, conditionalities to peace and liberalization recipes in post-conflict territories, irrespective of their potential negative or positive valence.¹³⁵

This approach by the Bank is based in Article V, section 5 (c) of the World Bank's Articles of Agreement that expresses the so-called "doctrine of economic neutrality" of the World Bank group which bans the Bank and its officials to be involved in the political affairs of its members.¹³⁶ The two assumptions that govern this principle, namely that politics should be kept separate from the Bank, and that decisions can be made on neutral, purely economic grounds in this international organization, were widely met with criticism and were rejected by a significant and authoritative segment of legal analysis.¹³⁷ In addition, it is central for this discussion to consider that the prohibition for the World Bank to be involved in the internal political affairs of Member States cannot be interpreted literally and narrowly, but in an evolutive manner, progressively as indirectly confirmed by a well-consolidated internal practice of the World Bank group.¹³⁸ Arguably, although the political prohibition clauses in the Bank's Establishing Agreements are interpreted as non-absolute prohibitions against all the political factors since there are "certain political circumstances that cannot be ignored by these institutions", they cannot, however, be considered as no longer existing clauses.¹³⁹ This has led to the establishment and enactment of an internal accountability mechanism, a break-through in the demand for greater accountability of IFIs. The World Bank accountability mechanism served as a pioneering model for other Banks, such as the AfDB to establish similar models. This can be understood as the system's response to the quest towards greater accountability by these institutions to the people they serve through Bank-financed project. The subsequent chapter provides a detailed analysis of the mechanisms the World Bank and the AfDB put in place, as well as some of the key features of these mechanisms and emerging tendencies. The analysis indicates an evolution of the concept of accountability in the international financial system, which by default affects trends in the wider international legal framework and is thus pertinent to address.¹⁴⁰

¹³⁵ Supra note 62.

¹³⁶ Hassane Cissé, "Should the Political Prohibition in Charters of International Financial Institutions Be Revisited? The Case of the World Bank," (Washington, DC: The World Bank Legal Review, 2011), 59–92.

¹³⁷ Richard Swedberg, 'The Doctrine of Economic Neutrality of the IMF and the World Bank' (1986) *Journal of Peace Research* <<http://journals.sagepub.com/doi/pdf/10.1177/002234338602300406>>.

¹³⁸ Supra note 62, p. 217.

¹³⁹ Idem.

¹⁴⁰ Jan Klabbers, "International Organizations and the Fight for Accountability: The Remedies and Reparations Gap, Written by Carla Ferstman," *International Organizations Law Review* 15, no. 2 (2018): 411-15, p. 411.

5. The Accountability Mechanisms of the World Bank and the African Development Bank

While the previous sections provided a broader analysis of MDBs' accountability mechanisms, the present section explores in greater detail two particular mechanisms: The World Bank's Inspection Panel and the African Development Bank's Internal Review Mechanism (IRM). The notion of "accountability mechanism" for the purpose of this analysis is understood as "an avenue for private individuals and groups to file claims against the institution for redress of their grievances on poorly-designed and/or/implemented projects."¹⁴¹

The mandates of multilateral development banks, as a subcategory to international financial institutions is to promote and finance economic development of the borrowing countries.¹⁴² The first decades of MDB's existence were characterized by intensive economic activity with little regard towards the rights of individuals and a limited space for civil society organizations to participate in the design and monitoring of the implemented projects. This has shifted through time, with the 1980s being marked by progressively louder requests for the establishment of mechanisms that would assure greater accountability of MDBs for the potentially negative effects projects they financed provoke to local communities.¹⁴³

The present chapter provides an outline of two distinct IAMs by providing an overview of their nature, structure, functions and practice. The chapter furthermore provides an analysis of the progressive efforts of the MDBs to foster accountability while not jeopardizing the overall efficiency of the projects they finance. The two mechanisms were chosen as cases for comparison due to their peculiarities. While the World Bank's Inspection Panel represents the first accountability mechanism among MDBs, established in 1993, the AfDB's IRM was established a decade later and represents the latest accountability mechanism of the main MDBs (which includes World Bank, Asian Development Bank, Europe Bank for Reconstruction and Development). The relevance of the World Bank's accountability mechanism, as the pioneering model for other development Banks has been widely accepted by the doctrine, citing it as a "profoundly important

¹⁴¹ Bissell and Nanwani, *supra* note 7, p. 174

¹⁴² Buiter, Willem, and Steven Fries. "What Should the Multilateral Development Banks Do?" *IDEAS Working Paper Series from RePEc*, 2002.

¹⁴³ Bissell and Nanwani, *supra* note 7, p. 162

infrastructure for the promotion of a right-based approach to development".¹⁴⁴ The first part of the Chapter provides an overview of the structure and functions of the Inspection Panel, followed by highlights from the Panel's practice, through which the behavioral shifts of the Panel, and consequently the Bank, are examined. It is important to note that at the time of writing, a revision of the World Bank's accountability mechanism was underway. The changes in the mechanism appear to mostly aim at increasing transparency and accountability which supports this author's argument that the Panel's practice has shown an increased need for PAPs participation, which can possibly be achieved through problem-solving or mediation mechanisms. This aspect will be discussed in more detail in subsequent sections.

The second part of the chapter follows a similar approach and highlights the practice of the AfDB's IRM, pointing out to the similarities and differences with the Inspection Panel. The section highlights the IRM's practice and provides a comparative analysis of the IRM's practice. Through its examination, the chapter aims at answering the following question: What are the structural and operational similarities and differences between the Inspection Panel and the Independent Review Mechanism? To what extent were these mechanisms able to accomplish their mandates? The information presented in this chapter allows the study to identify some key trends that are elaborated in the following chapter of the study. The present chapter utilizes the body of practice of the World Bank's Inspection Panel and AfDB's Internal Review Mechanism, the archives and cases available on the websites of the respective mechanisms, as primary sources for the study. In addition, secondary sources, namely peer reviewed literature, are used in order to complement the analysis of the trends and shifts in the behavior of the two Banks. The author specifically emphasizes that the provided cases are highlights rather than a systemic analysis of the chosen IAMs as a systemic analysis of the wealth of cases would be beyond the scope of this study.

5.1. The World Bank Inspection Panel

The Inspection Panel was established in 1993 as an independent and permanent organ in the structures of the Bank with the main goal to encourage and enhance the Bank's compliance with its own policies. It was granted the competence to receive and, subject to the approval of the Bank's Board of Executive Directors ('the Board'), to investigate complaints. Reporting only to the Board,

¹⁴⁴ Natalie Bugalski, "The Demise Of Accountability At The World Bank?" *American University International Law Review* 31, no. 1 (2016): 1-56, 34.

this mechanism provides individuals who believe that are being directly and adversely affected by a Bank-financed project, direct access to the Bank. In order to be successful in their claims, the petitioners must demonstrate that the harm they suffered is related to the Bank's failure to comply with its internal operating policies. The individuals filing a complaint are also required to prove that the particular matter was already brought to project management and no response was given.”¹⁴⁵ The panel was created to allow citizens to bypass their national governments and provide for a forum where to lodge a formal complaint about an international organizations’ actions or omissions that affected their lives, thus bridging the gap between international institutions and the people they serve through their projects”.¹⁴⁶ Nevertheless, the two core functions, namely the enhancement of the efficiency of the Bank’s Operational Policies and the enhancement of accountability and transparency of the Bank’s structures, often proved to be competing.¹⁴⁷

The Panel was created, and through the policy framework of the Bank mandated, to present a report to the Board on the findings of its inspection with regards to projects’ alignment with internal rules and regulations, and not to prescribe or oversee the implementation of solutions to reported problems/challenges. In this regard, it remains at the discretion of the Board alone to decide whether remedial measures will be undertaken. In addition, the claimants have no right to comment on the remedial measures they deem appropriate as a response to the alleged policy breach.¹⁴⁸ Despite these limitations, it can be argued that the Bank has moved towards increased accountability, partially due to the practice of the Panel, which, as some authors argue, operates through a system of quasi-judicial oversight”.¹⁴⁹

¹⁴⁵ Mariarita Circi, “Is the World Bank Inspection Panel: Is It Really Effective?”, *Global Jurist Advances* 6, no. (2006) Gale Academic OneFile (accessed August 19, 2020), available at: <https://link-gale-com.uaccess.univie.ac.at/apps/doc/A567547757/AONE?u=43wien&sid=AONE&xid=a75c41de>.

¹⁴⁶ David Hunter, "Using the World Bank Inspection Panel to Defend the Interests of Project-affected People," *Chicago Journal of International Law* 4, no. 1 (2003): 201-11, p. 208.

¹⁴⁷ Maurizio Ragazzi, "The World Bank and the ILC's Project on the Responsibility of International Organizations." *In Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie*, 235-48. (Brill, 2013), p.243.

¹⁴⁸ The World Bank, *Accountability at the World Bank: The Inspection Panel at 15 Years* (Washington DC, World Bank 2009), <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/380793-1254158345788/InspectionPanel2009.pdf>;

¹⁴⁹ Andria Naudé Fourie, "The World Bank Inspection Panel's Normative Potential: A Critical Assessment, and a Restatement." *Netherlands International Law Review* 59, no. 2 (2012): 199-234, p.200.

The analysis of this chapter is framed bearing in mind that, as mentioned earlier, in public sector Bank-financed projects, the borrowing government, rather than the Bank, is responsible for the implementation of the project. Nevertheless, as lead actors in the international development MDBs maintain a centrifugal role in the implementation of sustainable development standards through their projects. Having said that, the setting in which MDBs grant loans, and the internal policies delineating standards, such as the environmental and social standards, have substantial influence and often direct effect on the economic, as well as political decisions of borrowing states consequently affecting individuals and local communities.¹⁵⁰ The Inspection Panel thus acts as a procedural instrument that enables the translation of sustainable development in the safeguards of the Brower's system, where it can shape and regulate behavior.¹⁵¹

The Panel's jurisdiction is defined in the policy framework of the World Bank, enabling it to evaluate the extent to which a project is in compliance with Bank's policies and the harm suffered as a result of policy violations.¹⁵² In January 1999, all official Bank procedures were revised to encompass three broad categories: mandatory Operational Policies ('OP'), Bank Procedures ('BPs') also referred to as Operational Policies and Procedures (OP/P) and Good Practices ('GPs'), the latter having an advisory character.¹⁵³ The Resolution establishing the Panel, however, clearly states that the only standard of review for complaints to the Panel is the inspection of a breach of an OP. Formally, complaints regarding Bank action taken in breach of guidelines and best practices, and similar documents or statements are excluded from review.¹⁵⁴ The Bank's OP/Ps, aimed at regulating the Bank's operations are a critical component in the management of environmental, social and economic risks of the projects. Divergent views exist on their significance: seen by internal stakeholders, the OP/Ps are understood as non-legal and internal in nature, however external commentators view the OP/Ps as hybrid additions to the Panel's significance, as they are placed at the nexus between judicial review and fact-finding and

¹⁵⁰ Daniel D. Bradlow; Megan S. Chapman, "Public Participation and the Private Sector: The Role of Multilateral Development Banks in the Evolution of International Legal Standards," *Erasmus Law Review* 4, no. 2 (2011): 91-126, p. 93.

¹⁵¹ The World Bank, *supra* note 146.

¹⁵² Dana Clarke, 'Understanding the World Bank Inspection Panel', in *Demanding Accountability: Civil-Society Claims and the World Bank Inspection Panel*, ed. Dana Clark, Jonathan Fox and Kay Treake (Rowman & Littlefield Publishers, 2003) 1, 2.

¹⁵³ *Idem*.

¹⁵⁴ World Bank, "The World Bank Inspection Panel", *Resolution No. IBRD 93-10, Resolution No. IDA 93-6* available at <https://www.inspectionpanel.org/sites/ip-ms8.extcc.com/files/documents/Resolution1993.pdf>

compliance.¹⁵⁵ Nevertheless, as the analysis below demonstrates, the Panel has increasingly expanded its review, including these documents in its assessments.

As mentioned in previous sections, the arrangement of Panel's operations has its limitations, especially reflected in the consequences the procedures before the Panel can produce. Even when the Panel finds that the project is not in conformity with the rules and regulations, this does not constitute immediately violations of applicable law which would trigger liability for damages and these violations cannot be taken as evidence against the Bank's judicial proceedings.¹⁵⁶ Additionally, in order for the Panel to be set in motion, a failure of the World Bank has to exist in relation to its compliance with policies and procedures throughout all stages of the project. This refers to any action or omission in the preparation, fact-finding, pre-appraisal and appraisal stages of the project as well as the IFI's respect for these rules in implementation of the project, including its monitoring of the executing party. IFIs' accountability mechanisms, and the Panel, does not have the scope of investigating the Borrower's accountability and management of the project.¹⁵⁷

5.1.1. Structure and Functions of the WBIP

The Inspection Panel (Panel) was created through establishing Resolutions, which have been supplemented with two amendments since their initial adoption,. The initial operation procedures, dating from 1994, were completely revised twenty years after, which resulted in a new policy and procedural framework governing the work of the Panel. Today, the main reference documents are the resolutions establishing the Panel dated 22 September 1993 (IBRD 93-10 and IDA 93-6, called together 'the Resolutions'), the clarifications adopted by the Board in 1996 and 1999; the Operating Procedures adopted by the Panel on 19 August 1994 and revised in April 2014 and the Administrative Procedures adopted by the Panel.¹⁵⁸

¹⁵⁵ Benjamin K Sovacool, Andria Naudé Fourie, and May Tan-Mullins, "Disequilibrium in Development Finance: The Contested Politics of Institutional Accountability and Transparency at the World Bank Inspection Panel," *Development and Change* 50, no. 4 (2019): 867-95, 872.

¹⁵⁶ Ibrahim F. I. Shihata, *The World Bank Inspection Panel: In Practice*, 2nd edition (Washington, DC: A World Bank Publication, 2001), p. 234.

¹⁵⁷ Supra note 11, p. 83.

¹⁵⁸ Yvonne Wong and Benoit Mayer, "The World Bank Inspection Panel: A Tool for Accountability?" in *Improving Delivery in Development: The Role of Voice, Social Contract, and Accountability*, ed. Jan Wouters and others, (The World Bank Legal Review, 2015) 495-530

According to its Administrative Procedures, the Inspection Panel serves the following two accountability functions:

“a. It provides a forum for people, including those who are often poor and vulnerable, to seek recourse for harm which they believe result from Bank-supported operations. As such, the Panel is a “bottom-up” or citizen-driven accountability mechanism that responds to grievances and demands for redress. This promotes more inclusive and sustainable development by giving project-affected people a greater voice in Bank-financed projects that impact them.

b. It provides an independent and impartial assessment of claims about harm and related non-compliance with Bank policies as a check-and-balance for the Board and other concerned stakeholders. This contributes towards institutional learning and helps to improve development effectiveness of World Bank operations.”¹⁵⁹

5.1.2. The Complaints Process

According to the Operating Procedures, a request for review can be registered to the Panel by at least two or more individuals, who are either directly affected by the alleged Bank’s violation of its policies and who allegedly have been or could be harmed by such violations.¹⁶⁰ In addition, a local non-governmental organization or other representative can submit the claim on behalf of people affected by projects (PAPs), subject to the provision of a legitimate proof of authorization. Exceptionally, a non-local representative can also file a complaint on behalf of the PAPs, when local representation is not available, which in this case must be proved. Finally, the Executive Directors as Board, are empowered to initiate an investigation at any time by instruction to the Panel.¹⁶¹ To date, most complaints submitted to the Panel have been done so by PAPs or local representatives.¹⁶²

A claim is eligible, hence, if it is filed by one of the aforementioned claimants, it relates to alleged Bank’s violation of its policies and procedures as well as interests and/or rights of individuals, usually local communities affected by adverse effects of a project financed by the Bank. In addition, other eligibility criteria include the requirement for individuals to have attempted to raise

¹⁵⁹ World Bank Group, The Inspection Panel at the World Bank Operating Procedures, (Washington, DC: World Bank, 2012)

¹⁶⁰ Carrasco, *supra* note 107 p. 43.

¹⁶¹ World Bank, *supra* note 157.

¹⁶² Wong, *supra* note 156 at p. 8.

their concerns with the Bank prior to submitting the complaint, as well as the requirement for the status of the project in question to be under consideration or approved and the loan must have not been completely disbursed.¹⁶³ Furthermore, the Rules on the Panel's operations provide that the panel shall not accept complaints about actions that do not involve any action or omission of the Bank, claims related to procurement, any requests filed after the loan is closed or 95% of the loan is disbursed as well as matters that were already dealt with Panel, except in situations where new circumstances arose. In addition, the Panel does not deal with complaints related to projects financed by MIGA or IFC.¹⁶⁴ These rules provided for a rather rigid framework of operations that is now being revised, based on calls for amendments.

The process in the Inspection panel entails several phases, including the receipt and registration of the request, the consideration of the request's technical eligibility, as well as the recommendation whether an investigation is required. If this is the case, the next phase entails the investigation, the development of the investigation report and the resulting actions following the investigation.

In practical terms, the process begins when the Panel receives the request, reviews and registers it, unless deemed ineligible, which is followed by the Bank Management's response to the claim, due within twenty-one business days.¹⁶⁵ The management can either challenge the allegations of policy violations or acknowledge the claims of the requesters and propose measures to mitigate the potentially negative effects. This step is followed by the development of the Panel's report on eligibility and its submission to the Board. In this report the Panel can recommend either for the investigation to be triggered or it can recommend the rejection of the request.¹⁶⁶ Most recent practice, as will be discussed below, indicates the Panel's often deferral of the request. Furthermore, the report includes the Panel's consideration on the causal relationship between the alleged harm and implemented projects, whether the Management dealt with the issue in an appropriate manner and/or whether the management offered a specific remedial action.¹⁶⁷ In

¹⁶³ World Bank, supra note 157, para 39, p.16.

¹⁶⁴ World Bank, Inspection Panel Annual Report 2003-2004, (Washington, DC: World Bank, 2004) <https://inspectionpanel.org/sites/inspectionpanel.org/files/publications/InspectionPanelAnnualReport2003-2004.pdf> 1999 Clarification of the Board's Second Review of the Inspection Panel, para 9. Available at: <https://www.inspectionpanel.org/sites/ip-ms8.extcc.com/files/documents/ClarificationSecondReview.pdf>

¹⁶⁵ World Bank, supra note 157, para 29, p.13

¹⁶⁶ Gianviti, supra note 45. p. 9

¹⁶⁷ World Bank supra note 157, para 30, p.13.

drafting the report, the Panel relies on the information provided in the request by the claimant, as well as the Borrower, as it might require an explanation of the justification on the Panel's recommendation whether the investigation is warranted.¹⁶⁸ It is worth noting that the Panel is not obliged to recommend an investigation despite the fact that it confirmed that all requirements are met. Following the submission of the report, the Board decides whether it will request the Panel to initiate an investigation. The Panel must notify the Requesters when the Report and Recommendation have been submitted to the Board and two weeks following the Board's decision, the Panel informs the Requesters of the Board's decision, sending the Requesters a copy of the Panel's Report and Recommendation.

Should this be the case, the Panel begins the investigation, which includes among other, the preparation and gathering of relevant materials, field visits and regular contacts with the Requestors and Management. After the investigation is concluded within the anticipated timeline, set in the announcement of the investigation, the Panel develops a report which includes inter alia, an overview and/or Executive Summary of the Request for Inspection and the main findings resulting from the investigation, including an analysis of the facts and information related to harm and compliance. The final Investigation Report is submitted to the Board and conveyed to Management via the President.¹⁶⁹ In response to this report, within a timeframe of six weeks after receiving the document, the Management is required to submit to the Board a Report and Recommendations, the so-called Management Report and Recommendation (MRR). The MRR includes mainly the remedial action that the Management plans to implement, including, possibly a proposal to report periodically on the progress achieved.¹⁷⁰

Once the Management submits the MRR, the Board considers both the Investigation report produced by the Panel as well as the MRR and decides on the approval of the suggested action provided in the reports. The requestors are only informed two weeks after the Board meeting, when the Report, the MRR are publicized. Following Management's submission of the MRR, the Board meets to consider the Panel's Investigation Report and the MRR. In this meeting the Board decides

¹⁶⁸ Ibid, para 45. Available at: <https://www.inspectionpanel.org/sites/ip-ms8.extcc.com/files/documents/2014%20Updated%20Operating%20Procedures.pdf>

¹⁶⁹ World Bank, *supra* note para 65, p. 21.

¹⁷⁰ *Ibid.*

whether to approve the plans of action that Management may have included in its Report. All subsequent documentation, including Managements progress are made available publicly. As visible from the presented information, the main function of the Inspection Panel is the investigation of the Bank's compliance with policies and internal regulations.¹⁷¹

5.1.3. The Inspection Panel in Practice

From a macroeconomic perspective, the World Bank aims at creating the necessary conditions for the promotion human rights, by financing and promoting economic development, closely linked to the social development of Member States.¹⁷² There are two types of challenges in terms of assuring accountability of the World Bank through the Inspection Panel: one that reflects a conceptual matter and the other which relates to the practical, legal context and outcomes. As a dispute mechanism, the Panel does not offer redress under international law but asserts whether a project followed the internal standards and regulations of the Bank. The members of the Panel, though experts with particular competences, are still nominated by the Bank and their de facto independence is often subject to scrutiny.¹⁷³ In addition, the Inspection Panel does not hold any powers to initiate internal investigation and it cannot adopt any sort of provisional measures during the inspection.¹⁷⁴ Additional problems with this mechanism relate to the outcome of its work, the reports, which are published on the website of the Bank and there are no mechanisms to appeal to them. Another relevant limitation in the procedures is that the reports do not oblige the Bank's management to follow them, though the development of high quality reports has influenced the management to take the reports in account.¹⁷⁵ This is visible, for example, in the case of *Paraguay/Argentina Reform Project for the Water and Telecommunications Sectors, SEGBA V Power Distribution Project (Yacyretá)*, where the management acknowledged the Panel's recommendations, finding them constructive, and believing that the proposed Action Plan

¹⁷¹ Supra note 162.

¹⁷² Noël Izenzama Mafouta, "Le Paradigme écologique Du Développement Durable En Afrique Subsaharienne à L'ère De La Mondialisation: Une Lecture éthico-théologique De L'écodéveloppement," *Publications Universitaires Européennes* ; Reihe 23, Theologie; 874. Bern Wien [u.a.]: (Lang, 2008), p 87.

¹⁷³ Fabrizio Marrella e Arianna Vettorel, "Banca mondiale e diritti umani :il ruolo dell'Inspection Panel" in *Diritto Internazionale Dell'economia*, ed. S.M. Carbone, A. Comba et al. (Torino: G. Giappichelli Editore, 2017), p.43.

¹⁷⁴ Human Rights Watch, *At Your Own Risk. Reprisals against Critics of World Bank Group Projects*, June 2015, p. 21. available: www.hrw.org/report/2015/06/22/yourown-risk/reprisals-against-critics-world-bank-group-projects [Accessed 10 July 2020]

¹⁷⁵ Federico Lenzerini, "Laurent Manderieux and Michele Vellano (eds.), *Éthique Globale, Bonne Gouvernance Et Droit International économique*, (Torino: Giappichelli, 2017), Pp. XXIV-184." *The Italian Yearbook of International Law Online* 27, no. 1 (2018): 576-83. p.47.

responds to the issues raised in the report: “*Management is committed to applying its policies and procedures in full and will make every effort to pursue its mission statement in the context of the Project*”.¹⁷⁶ Despite its limitations as an accountability mechanism, the Panel has developed its credibility which is best analyzed through the requests it has processed and its practice as a quasi-judicial institution.¹⁷⁷ This, in practical terms, means that the Panel has had the tendency to reinforce its *de facto* independence from the broader political context governing the Bank and an inclination to expand its influence through the so-called process of ‘judicialization’, thus positioning itself as the lead mechanism to address PAPs’ grievances.¹⁷⁸

According to published data available at the time of writing, to date there were 147 registered cases, out of which investigation was recommended for less than half, specifically 45.¹⁷⁹ From the 45 recommended requests, the Panel has undertaken investigation in 38 cases.¹⁸⁰ In addition, it is visible that most cases are geographically related to the African continent, and the majority are submitted by local/community representatives. The forthcoming analysis will provide highlights related to the Panel’s evolving practice. It will focus on policy issues that are most often raised in requests submitted by PAPs, including environmental concerns (based on the *OP401 Environmental Assessment*, financing of the project (*OP1000 Investment Project Financing*), Consultation/Disclosure and Involuntary Resettlement (OP412). The following cases will be particularly highlighted: *Albania: Integrated Coastal Zone Management and Clean-Up Project*, *Argentina, Paraguay: Yacyretá Hydroelectric Project*, *China Quinghai* and the *Chad: Petroleum Development and Pipeline Project*, *Management of the Petroleum Economy Project*, and *Petroleum Sector Management Capacity Building Project*, as well as *South Africa: Eskom Investment Support Project*. The cases are chosen as they have prompted vivid discussions among practitioners, civil society as well as academicians due to the Panel’s assessments and positioning. All of these cases tackle the aforementioned topics, as they relate to complex, multi-layered projects.

¹⁷⁶ Inspection panel, Paraguay/Argentina Reform Project for the Water and Telecommunications Sectors, SEGBA V Power Distribution Project (Yacyretá), Managment Report (2004), par. 78.

¹⁷⁷ Cissé, *supra* note 123 p. 405.

¹⁷⁸ Holde, *supra* note 23, p. 203

¹⁷⁹ World Bank, *Inspection Panel at 25, Accountability at The World Bank*, (Washington DC: World Bank, 2018), <http://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/publications/25th%20Anniversary%20Book-PDF%20Version.pdf> [Accessed 10 July 2020]

¹⁸⁰ *Idem*.

5.1.4. Summary of Highlighted Cases

The following section provides background on highlighted cases that were scrutinized by the Inspection Panel and represent some of the cornerstones in the Panel's practice. They are highlighted due to the peculiar Panel's stance with regards to substantial and/or procedural aspects of the projects. They also indicate an evolution of the role and powers of the Panel.

a) Argentina, Paraguay: Yacyretá Hydroelectric Project¹⁸¹

The *Paraguay/Argentina Yacyreta* refers to a case which was submitted by a representative of an NGO of Paraguay, representing people who live in the project area, in 1996. The Bank had been involved in the design and implementation of Yacyretá project since the mid-1970s. The Project was related to the construction of a hydroelectric dam on the Paraná River, which represents part of the border between Argentina and Paraguay. The Treaty of Yacyreta was signed with the aim to develop the hydroelectric potential of the Parana River, improving thus navigation in the area, mitigating the effect of severe river floods and promoting irrigation. The Treaty established the "Entidad Binacional Yacyreta" (EBY), an autonomous bi-national entity, which had full legal, financial, administrative and technical capacity.¹⁸² The project's value amounted to \$895.10 million, and it was comprised of a number of components, out of which the most contested were the resettlement and environmental protection plan for the Project.¹⁸³ The requestors claimed that their standards of living, health and economic well-being were adversely affected as a result of the filling of the Yacyretá Reservoir and the Bank's omissions and failures in the preparation and implementation of the project. In particular they raised alleged violations of policies and procedures by the Bank's management and the claim addressees alleged violations of policies related to Environmental Assessment, Involuntary Resettlement and Supervision regarding the implementation of the Project. The investigation procedure resulted in the Panel observing that both the Resettlement and Environmental policies, which usually entail actions to be taken in order

¹⁸¹ World Bank, *Argentina, Paraguay: Yacyretá Hydroelectric Project*, Inspection Panel Report and Recommendation, December 26, 1996, available at:

<https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/ip/PanelCases/7-Eligibility%20Report%20%28English%29.pdf> [Accessed 10 July 2020]

¹⁸² World Bank, *Argentina, Paraguay: Yacyretá Hydroelectric Project, Management Response*, 30 September 1996, p.2., available at: <https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/ip/PanelCases/7-Management%20Response%20%28English%29.pdf> [Accessed 10 July 2020]

¹⁸³ World Bank, *supra* note 162.

to prevent harm to both potentially affected populations and the environment, was not taken. An interesting analysis of the role of legal remedies in the process was provided. The Panel made reference to Managements response which stated that the exercise of available legal remedies is a discretionary tool, rather than a requirement, and should be applied if other means of persuasion are ineffective.¹⁸⁴ The Panel, however, interestingly, insisted that Management, with its discretion to decide whether to exercise legal remedies “*must note that the Resolution itself defines as an instance of failure in the compliance of Bank policies and procedures situations where the Bank has “failed in its follow-up on the borrower’s obligations under loan agreements with respect to such policies or procedures”*”¹⁸⁵ In other words, the Panel concluded that the Bank’s policy clearly stipulates that compliance was not achieved by only including reference to covenants in Loan Agreements, but by actively ensuring that these provisions are taken into account and implemented by the Borrower and executing bodies, respecting the envisioned timelines.

b) Chad: Petroleum Development and Pipeline Project ¹⁸⁶

The Panel has received a request for investigation related to the *Chad Petroleum Development and Pipeline Project* in March 2001, submitted on behalf of 120 residents of the Cantons of Miandoum, Komé, Béro, Mbikou, Bébédjia and Béboni. According to the credit agreement governing the project, the “objective of the Project is to assist the Borrower in building capacity to implement its petroleum revenue management strategy to enable it to effectively absorb and allocate expected oil revenue, and thus pursue the poverty-reduction objective of petroleum resources development.”¹⁸⁷ The case represents a historic example as the allegations of violations that were raised in the request included for the first time human rights explicitly, among other such as: environment, involuntary resettlement and compensation, indigenous peoples, cultural property, use of oil revenues, governance.¹⁸⁸ The request claimed lack of compliance with the OD

¹⁸⁴ World Bank, supra note 163, p. 60, para 144.

¹⁸⁵ World Bank, supra note, p.7, para 30.

¹⁸⁶ World Bank, Chad: Petroleum Development and Pipeline Project, Management of the Petroleum Economy Project, and Petroleum Sector Management Capacity Building Project, 22 March 2001, Eligibility Report, available at <https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/ip/PanelCases/22-eligibility%20Report%20%28English%29.pdf> [Accessed 10 July 2020]

¹⁸⁷ World Bank, Chad - Petroleum Development and Pipeline Project, Management of the Petroleum Economy Project, and Petroleum Sector Management Capacity Building Project, Investigation Report, 17 July 2002, p. 14.

¹⁸⁸ World Bank, Chad - Petroleum Development and Pipeline Project: Report and Recommendation on Request for Inspection. Washington, D.C: World Bank Group. para 11.
<http://documents.worldbank.org/curated/en/740981468768846131/Chad-Petroleum-Development-and-Pipeline-> [Accessed 10 July 2020]

4.30 on Involuntary Resettlement, which included irregularities with compensation and the disregard of the expropriation legislation, lack of “environmental attention” as well as pollution of waters in the project are, lack of consultation, as stipulated in OD 4.20 (Indigenous Peoples) and the non-compliance of the Bank with policy on Cultural property as well as the Bank’s directives on human rights and governance.¹⁸⁹ The process concluded in 2002. The Management’s response included reference to the Articles of Agreement and a rigid stance that the Bank should focus mainly on economic consideration rather than on political influences as the fundamentals for its decision and that the Project did provide room for dialogue: “Having carefully considered all aspects of this issue, Management’s conclusion is that the Project can achieve its developmental objectives. The Project in many aspects has been instrumental in creating a space for dialogue for certain groups of Chadian citizens to exercise their rights. Management adds that the Project’s institutional structure allows for human rights groups to voice their concerns.”¹⁹⁰

Throughout the process it became evident that during the evaluation of economic aspects of any project, human rights issues are relevant to the Bank’s work, particularly if they potentially have a substantial direct economic effect on the project.

The Inspection Panel noted that broad terms such as human rights and governance can have relevance in the context of Bank’s operations. In its analysis, it expressly opposed the “Management’s narrow view” and emphasized the United Nations Universal Declaration of Human Rights. The Panel proceeded by citing the Bank’s statement *“The Bank believed that creating the conditions for the attainment of human rights is a central and irreducible goal of development. By placing dignity of every human being – especially the poorest at the very foundation of its approach to development, the Bank helps people in every part of the world build lives of purpose and hope. And while the Bank has always taken measures to ensure that human rights are fully respected in connection with the projects it supports, it has been less forthcoming about articulating its role in promoting human rights within the countries in which it operates.”*¹⁹¹

¹⁸⁹ World Bank, *Chad-Petroleum Development and Pipeline Project, Eligibility report*, Washington, D.C. : World Bank Group. <http://documents.worldbank.org/curated/en/661461468770125206/Chad-Petroleum-Development-and-Pipeline-Project-Eligibility-Report>

¹⁹⁰ World Bank, *Chad-Petroleum Development and Pipeline Project, Management Report and Recommendations in response to the Inspection Panel Investigation report*, Report No.24667, 21 August 2002, p.13-15, para 37, available at: <https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/ip/PanelCases/22-Management%20Report%20and%20Recommendation%20%28English%29.pdf> [Accessed 10 July 2020]

¹⁹¹ Publication on the Fiftieth Anniversary of the World Bank, available at: <http://www.worldbank.org/html/extdr/rights/hrintro.htm>

The Panel, thus, called on international legal instruments in assessing the requests of PAPs, despite acknowledging that it was not mandated to assess the status of human rights in Chad. As it stated, it “*felt obliged to examine whether the issues of proper governance or human rights violations in Chad were such as to impede the implementation of the Project in a manner compatible with the Bank’s policies.*”¹⁹² The inspection Panel found non-compliance occurrences, prompting Bank management to identify and recommend an action plan to mitigate or correct the non-compliance and adverse effects, which was subsequently implemented.¹⁹³

c) China Western Poverty Reduction Project¹⁹⁴

In September 1999, the Executive Directors authorized the Inspection Panel to conduct an investigation in the context Western Poverty Reduction Project in China, in response to a request submitted by the U.S. based nongovernmental organization, the International Campaign for Tibet (ICT). The project’s goal was to alleviate poverty of local population by voluntarily resettling over 55,000 poor farmers who practiced high-altitude rainfed agriculture. The population was resettled in a new irrigation area and was set to renovate an existing dam as well as to construct a new one.¹⁹⁵ The request alleged that the project was set to inflict harm to the Tibetan and Mongolian ethnic peoples originating from Management’s failure to comply with Bank’s policies and operational procedures, in particular BP 17.50 (Disclosure of Information); OD 4.01 (Environmental Assessment); OD 4.20 (Indigenous Peoples); OD 4.30 (Involuntary Resettlement); OP 4.09 (Pest Management); OP/BP 4.37 (Safety of Dams); OP/BP 12.10 (Retroactive Financing); and OP/BP 10.00 (Investment Lending-Identification to the Board Presentation). Following an investigation of the alleged adverse effects, the report concluded that Management was substantially in compliance with the Bank’s Environmental Policy for Dam and Reservoir Projects and Safety of Dams, Investment Lending. Nevertheless, the Inspection found that the Bank was in violation of several provisions of OD 4.01, OD 4.20, OD 4.30, OP 4.09, OP 10.00 (Investment Lending: Identification to Board Presentation), and BP 17.50 (Disclosure of

¹⁹² World Bank, *supra* note 185 at para 215, p.62.

¹⁹³ Suzuki and Nanwani, *supra* note at p. 211.

¹⁹⁴ World Bank, *China-Western Poverty Reduction Project, The Inspection Eligibility Report*, Washington, D.C.: World Bank Group, 1999, available at: <https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/ip/PanelCases/16-Eligibility%20Report%20%28English%29.pdf> [Accessed 10 July 2020]

¹⁹⁵ World Bank, *China - Gansu and Inner Mongolia Poverty Reduction Project: Qinghai Component - Inspection Panel Investigation Report*, Washington, D.C.: World Bank Group, 2002, vii, p.3
Available at: <http://documents.worldbank.org/curated/en/396891468770438479/China-Gansu-and-Inner-Mongolia-Poverty-Reduction-Project-Qinghai-Component-Inspection-Panel-Investigation-Report> [Accessed 10 July 2020]

Information).¹⁹⁶ As a result of the review, the Panel found incompliance with ODs 4.01, 4.20 taking into account the scale of the area that was set to be affected by the Qinghai Project, as well as the ethnic structure of the PAPs, including minorities the delineation of the project's area.¹⁹⁷

The case provoked controversies and highlights the often divergent and discretionary understanding and application of the Bank's policies by staff and Management, which through practice impacted the local communities. In particular, the investigation report underlines that precedents were used to justify irregularities. The Management response states "[...] *past practice with ... a large number of similar integrated agricultural development projects financed by the Bank in China over the last 10 years,*"¹⁹⁸ as a basis for categorizing the project as B rather than A. After a careful examination the Panel concluded that it is not acceptable that "*precedents in a country, or a country's 'social and political systems,' can in any way determine what is required by the policies to suggest that experience and precedent can determine what is required by the policies.*"¹⁹⁹ Following the publication of the report, Management provided a remedial plan, which was agreeable to the Borrower's government, however the Board requested to further review and approve the remedial action which resulted in the Borrower's withdrawal from the agreement with the Bank. Chinese Executive Director, Zhu Xian on behalf of his authorities stated that: "*China accepts no conditions beyond Management's original recommendations that had been agreed between Management and my authorities [...]*We regret that because of political opposition from some shareholders the World Bank has lost a good opportunity to assist some of the poorest people in China, probably in the world, after so much effort by World Bank management and staff."²⁰⁰

d) South Africa: Eskom Investment Support Project²⁰¹

In April 2010, member of local Community from South Africa submitted a request for inspections related to the Medupi power plant, which is a core component of the Bank-financed South Africa's

¹⁹⁶ *Ibid.*, p. 6

¹⁹⁷ *Ibid.*, xxiii

¹⁹⁸ World Bank, *China - Gansu and Inner Mongolia Poverty Reduction Project: Qinghai Component - Management Response*, Washington, D.C.: World Bank Group, 19 July 1999, p. 18

¹⁹⁹ Investigation Report, *supra* note 193 para 4, p. 21.

²⁰⁰ World Bank, *Press Release on China Western Poverty Reduction Project*, Jul 07, 2000, available at: <https://www.inspectionpanel.org/news/world-bank-press-release-china-western-poverty-reduction-project> [Accessed 10 July 2020]

²⁰¹ World Bank, *South Africa - Eskom Investment Support Project, Investigation Report* (IBRD Loan No. 78620-ZA), Washington, D.C.: World Bank Group, November 21, 2011. Available at <https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/ip/PanelCases/65-Investigation%20Report%20%28English%29.pdf> [Accessed 10 July 2020]

Eskom Investment Support Project (EISP). The request referred to concerns about potential harm from the Eskom project, with regards to, *inter alia*, health, environment, involuntary resettlement, cumulative impact, as well human rights, citing the South African Constitution and the African Charter on Human and Peoples' Rights.²⁰² The Inspection Panel reviewed all claims, and came to the conclusion that 11 of the submitted claims warranted an investigation of the Bank's compliance with the relevant internal policies. The peculiarity of this case was laid in the fact that the Panel reviewed for the first time the application of the policy *Piloting the Use of Borrower Systems to Address Environmental and Social Safeguard Issues in Bank-Supported Projects* – OP 4.00 (or “Use of Country Systems”), which provided for an assessment on both the project and system level. The project was the largest loan given to date by the Bank. The Medupi Plant's construction began before the Bank received the request for financing and thus the Bank had to review the environmental impact assessment which was already developed. The Panel found that there were three deficiencies in the Safeguard Diagnostic Review which were linked to the management of the project's risks and oversight. In particular the Panel emphasized that the Policies required appropriate studies that would address the cumulative impacts of the project, which was not encompassed by the applicable South African when the EIA was developed. Consequently the EIA did not encompass these impacts. Furthermore, the Panel found that the assessment of the capacity of local authorities was not appropriately conducted by the Management, since local authorities were disregarded despite their crucial role in the oversight and monitoring of compliance as well as their mandate to enforce environmental laws, which constituted part of the request. Finally, the requirement of the involvement of qualified experts in the design and implementation of the projects, included in Bank's policy, was not existent in South African law at the time.²⁰³ The Panel found that there has been inadequate consideration of the Project's direct, indirect and cumulative impacts on availability and quality of surface and ground water resources. This was thus not consistent with OP/BP 4.00.²⁰⁴

²⁰² World Bank, *South Africa - Eskom Investment Support Project, Request for Inspection*, Washington, D.C.: World Bank Group, Para 6-15. Available at: <https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/ip/PanelCases/65-Request%20for%20Inspection%20%28English%29.pdf> [Accessed 10 July 2020]

²⁰³ World Bank, *supra* note 199.

²⁰⁴ World Bank, *supra* note 200, para 13-17, p. 3.

e) Uganda Bujagali Hydropower Project²⁰⁵

In July 2001 the Inspection Panel received a Request for Inspection regarding the Power III Project, the Power IV Project, and the Bujagali Hydropower Project (the Projects). The Request was filed by the National Association of Professional Environmentalists of Kampala (NAPE), Uganda Save Bujagali Crusade (SBC) and other local institutions and individuals (the Requesters), claiming that IDA, who financed the project failed to respect internal policies in the design appraisal and implementation of the projects which consequently led to material harm of the PAPs and in particular their environmental, social and cultural rights. The claim alleged harm due to a lack of cumulative assessment regarding the dams build under the project, the lack of an environmental assessment of the Power III Project as well as deficiencies in resettlement, inadequate consultation, participation and disclosure of information and other.²⁰⁶ The Panel's findings were relevant for both the economic and financial aspects which have led to the increased expenses of the project. Among the more positive findings, the Panel acknowledged that PAPs compensation was satisfactory and that the sponsor acted in good faith when trying to mitigate the adverse effects on the cultural aspects of the project. Some of the final recommendations included the requirement to enhance sectoral environmental assessment, transparency of the project through the publication of project materials and increasing information sharing.

f) Albania: Integrated Coastal Zone Management and Clean-Up Project²⁰⁷

In July 2007 the Inspection Panel received a Request related to the Albania: Integrated Coastal Zone Management and Clean-Up Project submitted by local representatives of families living in Jal. Shortly after that the Panel received another request related to the same project, but from representatives of Association of Tourist Operators working and living in the area Vlora. The

²⁰⁵ World Bank, *Uganda-Private Power Generation (Bujagali), Water Management and Development, and Energy for Rural Transformation III Projects, Inspection Panel Investigation Report*, 3 August 2018, Washington, D.C.:

World Bank Group available at:

<https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/cases/documents/110-113-Inspection%20Panel%20Second%20Report%20and%20Recommendation-03%20May%202018.pdf> [Accessed 10 July 2020]

²⁰⁶ *Ibid.*

²⁰⁷ World Bank, *Albania - Integrated Coastal Zone Management and Clean-Up Project*, The Inspection Panel Report and Recommendation on Requests for Inspection (IDA Credit No. 4083-ALB), Washington, D.C.: World Bank Group Available at: <https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/ip/PanelCases/47-Eligibility%20Report%20%28English%29.pdf> [Accessed 10 July 2020]

objectives of the Project were to establish an integrated approach to coastal zone management in the southern area of Albania leading to the protection of coastal resources and the promotion of sustainable development and management. The project was financed by IDA and included components on policy reform, institutional development and investments. The Requesters claimed that the Construction Police of the Municipality of Vlora, acting under supervision of the Ministry of Public Works and in accordance the Project demolished or damaged their permanent residences in violation of the Bank's policy.²⁰⁸ An argument utilized by the local authorities was that the local communities did not possess building permits, for which the requestors claimed that authorities withheld their issuance. As a result of the demolitions requestors claim that their livelihoods were affected as many members lost shelter and increased poverty. Finally, the requestors claimed that the Bank violated its policies thus resulting in the projects violation of requestors rights to shelter, housing as well as fair trial raising human rights violations. Finally, the claims reiterate that the Bank also violated the policies on supervision of project activities and alleged corruption among public officials.²⁰⁹ The Panel found that *“the main causes of the problems under review are largely, although not exclusively: Management's failure to apply the Bank Policy on Involuntary Resettlement to ongoing demolitions in the Project area; incorrect information included in the PAD; and noncompliance with Bank Policy on Supervision during Project implementation in response to demolitions in Jale.”*²¹⁰

5.1.5. Evolving Practice and Implications

Since the beginning of its operation, the Panel has worked on positioning itself as an independent, quasi-judicial system, by pointing out on major procedural irregularities, often openly indicating Management's misconduct leading to failure to respect operational policies. Especially in the first years of its activity, also referred to as the *“protracted resistance phase”*²¹¹, the Bank's management has often rejected the criticism. For example in the *Argentina/Paraguay Hydroelectric* case, in its response, the management stated: *“Management believes it has carried out its obligations in accordance with its relevant policies and procedures and therefore submits*

²⁰⁸ *Idem.*

²⁰⁹ World Bank, *supra* note 205.

²¹⁰ *Ibid*, xiii.

²¹¹ Sovacool, Fourie, and Tan-Mullins, *supra* note 153, p. 877.

*that an Inspection Panel investigation based on Request II is not warranted.”*²¹² Very often, management responses included direct reference to the Borrower’s government, such as in the same case: *“This Response makes clear that Argentine, Paraguayan and EBY compliance with their obligations has at times been slow and uneven (largely because of the significant financial and institutional constraints they face), but Management submitted that its supervision efforts have helped keep the Yacyretá Project moving in a positive direction that would have been jeopardized had the Bank chosen to exercise legal remedies as part of such supervision”.*²¹³

In *Albania Coastal Zone Management*, the Panel openly criticized the Management’s response as *“particularly unhelpful and non-informative and at time in total conflict with factual information which had been long known to Management.”*²¹⁴ The omission of known key information in the Management Response distorts the overall picture and further compounds many less than straight forward answers received by the Panel to its questions from some of the staff involved in Project management and implementation.²¹⁵ Often the Panel did not hesitate to use strict language to indicate Management’s behavior, as is clear in the following statement related to the previously-cited case in Albania: *“The Panel is very concerned about Management’s actions that obstructed the Panel’s investigation. Management’s misrepresentation of important factual information to the Panel. This is contrary to the process established by the Board Resolution establishing the Panel and the provisions of BP 17.55”*²¹⁶. In addition to irregularities related to internal procedures and disclosure of information, the Panel has often dealt with allegations of pressure exercised with the aim to persuade requestors not to file a request. In the famous *2001 Bujugali Hydropower Project* the Panel informed the Board that *“Individuals indicated to the Panel that they were threatened for wanting to speak out about their concerns.”*²¹⁷ These examples showcase the added

²¹² World Bank, *Paraguay Reform Project for The Water and Telecommunications Sectors* (P0-3842-Pa) And *Argentina Segba V Power Distribution Project* (P0-2854), Management Response to Request for Inspection Panel Review, Washington, D.C.: World Bank Group, para 149, p.42.

Available at: <https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/ip/PanelCases/26-Management%20Response%20%28English%29.pdf>

²¹³ *Ibid.*

²¹⁴ World Bank, *Albania - Integrated Coastal Zone Management and Clean-Up Project: Management report and recommendation in response to the Inspection Panel Investigation Report*, Washington, D.C.: World Bank Group. p.xxvii. Available at: <http://documents.worldbank.org/curated/en/206901468006651042/Albania-Integrated-Coastal-Zone-Management-and-Clean-Up-Project-Management-report-and-recommendation-in-response-to-the-Inspection-Panel-Investigation-Report>

²¹⁵ *Ibid.*

²¹⁶ *Supra* note 188, para 270, p.68.

²¹⁷ 2001 Uganda Third Power Project p. 82

value the Panel can play in increasing the quality of operations, mainly through assuring a higher quality of governance, through transparency and accountability.²¹⁸

5.1.5.1. Towards greater judicialization

A visible tendency identified in the practice of the Panel is a move towards *judicialization*, understood as a mechanism through which quasi-judicial institutions expand their influence through either the assertion of power without solid legal justification, the utilization of expansive techniques of interpretation and the development of new principles.²¹⁹ Authors argue that judicialization of the World Bank's Inspection Panel occurred despite the fact that it operates in a relatively limited context applying only the Bank's operational policies and investigating only the Bank and not the Borrower, as the relationship between the requestor, Bank and adjudicator creates an enabling context for greater jurisprudence, further reinforced by civil society organizations supporting such developments.²²⁰ In this context and based on the complex body of cases the Panel dealt with, it is noticeable that, it has moved towards greater independence reflected in the execution of functions beyond mere fact-finding, limiting the political discretion of the Management and the utilizing theological interpretations.²²¹ The following section provides some examples of this tendency.

The analysis of root causes of a request submitted to the Panel, often provided in the Panel's reports, has frequently provoked unease on the side of the Management, which cited this practice as an exercise beyond the Panel's mandate. By pointing out the root causes of requests, however, the Panel has raised important issues, such as the question of participation of PAPs (or lack thereof) in the design and other related activities of the *Argentina/Paraguay Hydroelectric Project* as well as the Bank's disregard of PAPs' concerns as the "*roots of these problems*."²²² In the same case, the Panel also criticized the way in which technical aspects of the project were prioritized

²¹⁸ Jessica Evans, "The Record of International Financial Institutions on Business and Human Rights," *Business and Human Rights Journal* 1, no. 2 (2016): 327-32, p.330.

²¹⁹ Fourie, Andria Naudé. *The World Bank Inspection Panel and Quasi-judicial Oversight: In search of the 'judicial Spirit' in Public International Law*. Utrecht: : Eleven International Publishing, 2009.

²²⁰ Kingsbury, Benedict, "Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples," in *The Reality of International Law* (Oxford: Oxford University Press, 1999), p. 323.

²²¹ Fourie, *supra* note 217.

²²² World Bank, *Argentina, Paraguay: Yacyretá Hydroelectric Project*, *supra* note 179.

over societal and environmental impacts, emphasizing the that: “*Imbalance in execution between civil/electro-mechanical works on the one hand and resettlement and environmental measures on the other has been one of the fundamental problems of the Yacyreta Project [...]*.”²²³

Similarly, the Panel often criticized the Management’s decision to merge issues of particular relevance, causing a less detailed analysis, such as in the cases *2004 India Mumbai Urban Transport Project*²²⁴ and *2001 India Coal Sector Environmental and Social Mitigation Project and Coal Sector Rehabilitation Project*.²²⁵ The Panel has often criticized the flexibility and discretion of Management in implementing the OP/Ps, in particular Management’s ‘*professional judgement*’ in applying policies. This remains a contested area, as many policies utilize relatively broad expressions, as visible in the following cases: “*The Bank favors preventive measures over mitigatory or compensatory measures, whenever feasible*”;²²⁶ or “[t]he Bank does not finance projects that, in its opinion, would involve significant conversion or degradation of critical forest areas or related critical natural habitats”.²²⁷ And finally the statement ‘*the Bank satisfies itself that the borrower has explored all viable alternative project designs to avoid physical displacement of these [indigenous] groups. When it is not feasible to avoid such displacement, preference is given to land-based resettlement strategies...*’²²⁸

As it was pointed out in the *China Qinghai*, the Panel highlighted that directives of Management cannot have the power to “*authorize a level of ‘interpretation’ and ‘flexibility’ that would permit those who must follow these directives to simply override the portions of the directives that are clearly binding.*”²²⁹ The discretionary application of operational policies and procedures is in particular criticized with regards to the application of legal remedies against the borrower that are usually injected in the loan agreements and that, based on the Resolution, can be triggered should

²²³ *Ibid*, para 255

²²⁴ World Bank, *India Mumbai Urban Transport Project*, IR (ES), World Bank, pp. 19-20, available at: <https://www.inspectionpanel.org/panel-cases/mumbai-urban-transport-project-second-request>

²²⁵ World Bank, *India - Coal Sector Environmental and Social Mitigation Project and Coal Sector Rehabilitation Project, Report and Recommendation on Request for Inspection*, Washington DC, 1996, para. 347. Available at: <http://documents1.worldbank.org/curated/ru/565111468774704530/pdf/22636.pdf>

²²⁶ World Bank, *supra* note 75 at para. 2.

²²⁷ *Ibid*. para. 5.

²²⁸ World Bank, Operational Policy Involuntary Resettlement, OP 4.12, para. 9, World Bank, Operational Policy Indigenous Peoples, OP 4.10, para. 20, available at: <https://www.worldbank.org/en/topic/indigenouspeoples>

²²⁹ World Bank, *China Western Poverty Reduction Project*, Management Response, paras. 2.2.2 and 2.4; and Management Response to Investigation Report, para. 20.

the Bank's OP/P not be complied with by the Borrower.²³⁰ As described above, in *Argentina, Paraguay: Yacyretá Hydroelectric Project*, the Panel opposed Managements statement that the exercise of available legal remedies is a discretionary tool, rather than a requirement, and should be applied if other means of persuasion are ineffective.

Another area of restriction of Management's flexibility and/or discretion, through the Panel's practice is the environmental screening of projects, such as in the famous cases of *China Qinghai or the Chad Petroleum*. In these cases, the Panel reiterated continuously that the screening and categorization of projects necessitates an assessment of the overall risks of the project and its context, rather than just a formalistic assessment, which has a direct influence on the outcomes of the projects and thus on the lives of PAPs.²³¹ When analyzing the Bank's compliance with OD 4.01 on Environment, the Panel expressly stated that the Management is required to fulfil both procedural as well as substantive requirements.²³² In certain instances, the Panel went as far as assessing qualitatively alternatives to a certain project design. While providing alternatives was required by policies, the Panel often stressed that merely procedurally provided alternatives were not satisfactory due to lcks in substance. This in turn led the Panel to conclude that the overall project was only partially compliant with the OP.²³³ The described development of standards for assessing compliance has arguably enhanced the quality of the projects by bringing Management, and thus the Bank, to account.

Through its practice, the Panel has expanded its influence towards greater judicialization. This is visible in the introductions of deferral of decisions on eligibility of a request, which de facto means a procedural innovation, not envisioned nor legally based in the Resolution.²³⁴ In other words, by adopting this practice, the Panel has provided the opportunity for concerns to eb addressed, while leaving the option for Requestors to submit again the request should the Management not meet their expectation. This has practically meant that the Management was given a chance to adopt

²³⁰ World Bank, *supra* note 152, para 13.

²³¹ World Bank, *China - Gansu and Inner Mongolia Poverty Reduction Project: Qinghai Component*, Inspection Panel Investigation Report, Washington, D.C.: World Bank Group. <http://documents.worldbank.org/curated/en/396891468770438479/China-Gansu-and-Inner-Mongolia-Poverty-Reduction-Project-Qinghai-Component-Inspection-Panel-Investigation-Report>

²³² *Ibid.* para.180-186.

²³³ World Bank, *Colombia - Cartagena Water Supply Sewerage and Environmental Management Project*, Inspection Panel Investigation Report, p.14

²³⁴ Fourie, *supra* note 30 at p. 210.

remedial action, usually with the approval of the Board, and limited to a certain period.²³⁵ The presented novelty can, on the one hand, indicate the flexibility and judicial innovation of the Panel, however, it can also be understood as a recourse to procedures for the resolution of complaints beyond the framework of the mechanism's typical review process.²³⁶

Furthermore, a relevant contribution of the Panel's practice with regards to keeping the Bank accountable, was the broader interpretation of the term "*project affected people*" in contrast to the usual interpretation of the term by the Bank's management. This was reflected in the case of *Cameroon: Petroleum Development and Pipeline Project, and Petroleum Environment Capacity Enhancement Project*, where the investigation report stated that "*By limiting the IPP to this narrow band of settlements along the road, the Panel agrees with the Requesters that the EMP (and IPP) lack a wider regional assessment of the potential risks posed by the pipeline project in the larger area utilized by the Bakola/Bagyeli*".²³⁷ Finally, in its process of judicialization, the Panel has utilized techniques of expansive interpretation when analyzing requests and interpreting the Resolution as well as operational policies, citing the need to assess cases based on the purpose and spirit of the relevant texts.²³⁸ As visible in the documentation of some of the highlighted cases, the Panel increasingly adopted a theological interpretation of the OP/BP. In the investigation report on the case of *Albania: Power Sector Generation and Restoring Project*, the Panel based its considerations and evaluation on the Guidelines of the Bank (*Guidelines for new thermal power stations*) that not only do not fall under the 1993 Resolution, but are expressly excluded.²³⁹ In the *China Qinghai* case, the Panel stated that Management cannot define projects in a limited manner in order to fulfil the Operational Directive as "*that does not ensure against adverse impacts on indigenous populations who live and work beyond the immediate project are*."²⁴⁰ Similarly, the Panel criticized the Management's formalistic interpretation of the Operational Directive in the *Bangladesh Jamuna Multipurpose Bridge case*, as well as in the case of *Argentina Special*

²³⁵ Carla Garcia Zendejas, "Glass Half Full? The State of Accountability in Development Finance", January 2016. Available at: <https://www.ciel.org/glass-half-full-the-state-of-accountability-in-development-finance/>

²³⁶ *Ibid.*

²³⁷ World Bank, *Cameroon: Petroleum Development and Pipeline Project, and Petroleum Environment Capacity Enhancement Project*, Inspection Panel Investigation Report (2002), par. 202.

²³⁸ Kingsbury, *supra* note 218, p 337.

²³⁹ World Bank, *Albania - Power Sector Generation and Restoring Project*, Inspection Panel Investigation report (2009), p. 46, available at: <https://www.inspectionpanel.org/panel-cases/power-sector-generation-and-restructuring-project>

²⁴⁰ World Bank, *supra* note 229, Inspection Panel Investigation report para 79.

Structural Adjustment Loan, where it stated that a more comprehensive, broader reading of the Operational Directive by Management would have arguably avoided the request in the first place.²⁴¹

5.1.5.2. Application of External Legal sources and Human rights in the Panel's practice

In the context of broader interpretations, it is worth mentioning that the Panel utilized and applied external legal sources to the Bank's Operational Policies and Banks Procedures (OP/BP), as visible in the *Honduras Land Administration Project*, where the investigation report states: “[t]he Panel notes that it is a matter for Honduras to implement the obligations of an international agreement to which it is party and does not comment on this matter. However, the Panel is concerned that the Bank, consistently with OMS 2.20, did not adequately consider whether the proposed Project plan and its implementation would be consistent with ILO Convention No. 169”.²⁴² Other, recent examples include *Uzbekistan: Second Rural Enterprise Support Project*²⁴³ and the *Mongolia Mining Infrastructure Investment Support and Mining Infrastructure Investment Support – Additional Financing*, which analyzes Bank's compliance with international legal instruments, in particular the World Heritage Convention and the Ramsar Convention.²⁴⁴ The Management stated that “the Bank is monitoring Mongolia's actions related to its international treaty obligations”²⁴⁵ adding that “the activities carried out under MINIS are consistent with the World Heritage Committee's decision requiring that the potential impacts of the sub-projects are duly assessed and the assessment results are made public. Management adds that if the Assessment Studies

²⁴¹ World Bank, *Bangladesh - Jamuna Multipurpose Bridge Project*, Investigation Report, para. 47. Available at: <https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/ip/PanelCases/8-Management%20Response%20%28English%29.pdf>, and 1999 *Argentina Special Structural Adjustment Loan*, ER, para. 27, available at: <https://www.inspectionpanel.org/panel-cases/special-structural-adjustment-loan>

²⁴² World Bank, *Honduras - Land Administration Project*, Inspection Panel Investigation report (2007), par. 258, available at: <https://www.inspectionpanel.org/panel-cases/land-administration-project>

²⁴³ World Bank, *Uzbekistan-Second Rural Enterprise Support Project*, Inspection Panel Eligibility Report and Recommendation (2013), par. 101, available at: <https://www.inspectionpanel.org/panel-cases/second-rural-enterprise-support-project>

²⁴⁴ World Bank, *Mongolia - Mongolia Mining Infrastructure Investment Support (P118109) and Mining infrastructure Investment Support – Additional Financing (P145439)*, Inspection Panel Second eligibility report (2016), par. 32, 59, *ove vengono richiamate la World Heritage Convention e la Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention)*, available at: <https://www.inspectionpanel.org/panel-cases/mining-infrastructure-investment-support-and-mining-infrastructure-support-additional-2>

²⁴⁵ World Bank, *Mongolia: Mining Infrastructure Investment Support Project (P118109) and Mining Infrastructure Investment Support Project*, The Inspection Panel Report and Recommendation On a Request for Inspection, Para 32, available at: <https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/ip/PanelCases/102-Report%20and%20Recommendation%28English%29.pdf>

determine that the proposed subprojects will lead to the significant conversion or degradation of critical natural habitats, the Bank's recommendation to the Government of Mongolia will be not to proceed with the subprojects, as required by OP 4.04 on Natural Habitats. “²⁴⁶

As stated in other chapters of the study, the Bank acknowledges the importance of human rights considerations as intrinsic components of the Bank's mission and operations.²⁴⁷ Nevertheless, the Bank's full recognition of the human rights role in its projects has often been disputed by management, stating that it represents political rather than economic considerations. An appropriate example of this approach is the *China Western Poverty Reduction Project*. As briefly mentioned at the beginning of this chapter, the Panel did consider, albeit in a manner haphazard, the role of human rights in its application of the OP/BP and how it has contributed to increased awareness of projects' implications on human rights.²⁴⁸ The Panel has usually included reference to human rights through the analysis of hardships PAPs suffered due to relocations or other effects of large projects, recalling the normative (human rights) implications of policies.²⁴⁹

The historic example where the Panel openly addressed the Bank's human rights obligations was in the case of *Chad Petroleum Development & Pipeline Project*, where the complainants alleged human rights violations as a consequence of the Bank's conduct in contrast to its own rules and regulations. This resulted in the Board itself stating that “[t]he Bank is concerned by human rights in Chad as elsewhere, but its mandate does not extend to political human rights”²⁵⁰. In this case the Panel did affirm that the valuation of human rights violations is beyond its scope but affirmed that “the Panel felt obliged to examine whether the issues of proper governance or human rights violations in Chad were such as to impede the implementation of the Project in a manner compatible with the Bank's policies”²⁵¹. This particular instance is often cited by the doctrine as a prime example of judicialization.²⁵²

²⁴⁶ *Ibid.*

²⁴⁷ Willem Van Genugten, *The World Bank Group, the IMF and Human Rights: A Contextualized Way Forward*, (Oxford: Intersentia, 2017).

²⁴⁸ Fourie, *supra* note 147 at p. 229.

²⁴⁹ *Ibid.*, p. 222

²⁵⁰ World Bank, *Chad - Petroleum Development & Pipeline Project*, Management Response (2001), par.16.

²⁵¹ World Bank, *Chad - Petroleum Development & Pipeline Project*, Inspection Panel Investigating report (2002), par. 35.

²⁵² *Supra* note 199, p. 326-327.

In the case of *Ethiopia: Protection of Basic Services Program Phase II Additional Financing and Promoting Basic Services Phase III Project*, the Panel's report states that the Panel noted that at the eligibility stage the "investigation will not seek to verify allegations of specific human rights abuses linked to the project, nor will it examine the underlying purposes of" as the Panel does not see this to be within its mandate.²⁵³ As a result, the investigation report does not include findings of facts and compliance on the issues of harm. Nevertheless, in the course of the Panel's review of documents and interviews in the field, the Panel came across information regarding those allegations. Given that these issues were raised in the Request for Inspection, the Panel recorded this information below, without attempting to verify them or otherwise"²⁵⁴ In a way, this and similar cases contributed to the "judicialization" of the panel, implying that when the Panel pursues to interpret the OP through its review, it analyzes the substantive content of the Bank's human rights obligations reflecting as much as possible, existing standards in other international legal instruments.²⁵⁵

In addition to material human rights considerations, through its operation, the Panel has raised attention to procedural irregularities, such as the discriminatory application of policies to people, i.e. the Resettlement Policy, to fractions of PAPs.²⁵⁶ Equal enforcement of standards, as well as due process for requestors was particularly visible in the *2007 Albania Integrated Coastal Zone Management and Cleanup Project* as well as the *China Qinghai*.²⁵⁷ In 2002 Paraguay Argentina Yacyreta, the Panel addressed the grievance and compensation procedures, pointing out the need for PAPs to receive quick and appropriate compensation, which would otherwise trigger sequencing of resettlement that should be implemented in a fair and transparent manner.²⁵⁸ The Panel often stated the inappropriateness for PAPs to be submitted through lengthy and costly judicial processes to obtain compensation.²⁵⁹ In this context, the Panel went as far as analyzing

²⁵³ World Bank, *Ethiopia - Protection of Basic Services Program Phase II Additional Financing and Promoting Basic Services Phase III Project*, available at: <https://www.inspectionpanel.org/panel-cases/protection-basic-services-program-phase-ii-additional-financing-and-promoting-basic>

²⁵⁴ World Bank, *Albania - Integrated Coastal Zone Management and Clean-Up Project*, *supra* note 205, p. VIII.

²⁵⁵ Fourie, *supra* note 147 at p.223.

²⁵⁶ *Idem*.

²⁵⁷ World Bank, *Albania - Integrated Coastal Zone Management and Clean-Up Project*, *supra* note 205 p.xvii and *China - Western Poverty Reduction Project*, *Supra* note 229, para. 116.

²⁵⁸ 1996 Argentina, Paraguay: Yacyretá Hydroelectric Project, Inspection Panel Investigation Report and Recommendation, p.24

²⁵⁹ World Bank, *India - Coal Sector Mitigation Project and Coal Sector Rehabilitation Project*, Inspection Panel Investigation Report, para 16,p. ix, available at: <https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/ip/PanelCases/23-Investigation%20Report%20%28English%29.pdf>

local law, and concluding that the existing Paraguayan law, providing for judicial proceedings as the only manner for PAPs to address grievances, was inconsistent with the Bank's operations and regarded it as inaccessible and effective avenue for dispute settlement.²⁶⁰

The World Bank's Inspection Panel also addressed the substantive aspects of due process, understood as a process that provides for the substantive protection of rights, beyond procedural.²⁶¹ Due process is particularly relevant taking into account the abundance of projects entailing resettlements, such as the *India Coal case*, where the Bank's resettlement policy rule that compensation in the form of land for land is preferred was applied.²⁶² However, experience has proven that very often these compensations are unrealistic and result in cash compensation, which evidently raises questions of due process indicating defects in the grievances procedures.²⁶³

In its normative development activities, the panel has contributed to the enhancement of the participation of PAPs in the appraisal design and implementation of projects, by pointing out to irregularities as it is part of several OPPs. Here again it is not a matter of procedural compliance but also substantial compliance. In other words, it is important how the PAPs are included in the consultation, the sessions not being only information sessions but qualitatively involving PAPs in the process.²⁶⁴ Often Panel has emphasized that the spirit and substance of the ODs require an active involvement of the PAPs in the processes of design and implementation.²⁶⁵

Preliminary Conclusions and Outlook to the Future

These cases demonstrate that the Bank's inspection mechanism has, through practice, surpassed the limits of its competences and powers and has included in its considerations a broader scope, including the consideration and explicit reference to human rights. Though this particular development does not have implications on the protection and redress to project affected people,

²⁶⁰ *Supra* note 238.

²⁶¹ R.C. Van Caenegem, "Tim Koopmans, Courts and Political Institutions. A Comparative View (Cambridge, Cambridge University Press 2003) XXI 299 P., ISBN 0521 82662 4 (hard) 0521 53399 6 (paper)," *European Constitutional Law Review* 2, no. 2 (2006): 230-231.

²⁶² World Bank, *supra* note 229, *Ibid*.

²⁶³ Sovacool, Fourie, and Tan-Mullins, *supra* note 153, p. 226

²⁶⁴ World Bank, *India Mumbai Urban Transport Project*, IR (ES), World Bank, pp. 19-20, available at: <https://www.inspectionpanel.org/panel-cases/mumbai-urban-transport-project-second-request>

²⁶⁵ World Bank, *Bangladesh - Jamuna Multipurpose Bridge Project*, Investigation Report, para. 47. Available at: <https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/ip/PanelCases/8-Management%20Response%20%28English%29.pdf>, and 1999 *Argentina Special Structural Adjustment Loan*, ER, para. 27, available at: <https://www.inspectionpanel.org/panel-cases/special-structural-adjustment-loan>

it does represent a step in the direction of increased awareness and potentially advances on the path of building effective access to remedies. Furthermore, it is visible that some key trends were identified, such as the need to strengthen the involvement of PAPs in the Panel's proceedings. Through the Panel's practice some key procedural limitations became evident. In line with this, the World Bank has commissioned a review of its IAM in 2017. The review aimed at assessing whether any updates of the system were required in order to fully be able to implement the ESF. A Working Group of the Committee on Development Effectiveness (CODE) was established with the mandate to discuss areas for review. Based on this exercise, a new IAM is established, comprising of the existent Inspection Panel and a new function, namely the Dispute Resolution Service, headed and coordinated by a new function called the Accountability Mechanism Secretary thus acknowledging the unique value of dispute resolution in comparison to investigation.²⁶⁶ In this function, the parties to dispute are identified the Requesters and the Borrower's relevant project implementing agency and the Panel will not have a role as such in the procedure.²⁶⁷

In addition, the review result in updated procedures which now the following changes. Firstly, the Investigation report will be shared with requestors after it is shared thus enhancing their participation in the process. Secondly, the Panel will now officially have an advisory role, as is the case of the AfDB's IRM. Thirdly, a formal coordination with other IAMs towards greater efficiency.²⁶⁸ Fourthly, an extension of the time limit for filing a complaint has been introduced, whereby now requests can be submitted up to fifteen months after the loan was closed, which resembles other IAMs (such as the AfDB's) and is a significant departure from the previous arrangement only linked to the amount of disbursement (95 per cent of the projects funds). Finally, the management's action plans, submitted as remedial action upon Panel's recommendations are issued, will now be subject to verification by the Panel and audit functions, enabling the Panel to have a more active and supervisory role.

Commenting on the outcomes of the reform, David Malpass, World Bank Group President stated "*These important changes to the Inspection Panel Toolkit will enhance the independence and*

²⁶⁶ World Bank, *External Review of the Inspection Panel's Toolkit*, Washington, D.C. : World Bank Group. <http://documents.worldbank.org/curated/en/562131583764988998/External-Review-of-the-Inspection-Panel-s-Toolkit>, p. 13.

²⁶⁷ World Bank, *Report and Recommendations on the Inspection Panel's Toolkit Review (English)*. Washington, D.C: World Bank Group, p.4. available at: <http://documents.worldbank.org/curated/en/972351583772786218/Report-and-Recommendations-on-the-Inspection-Panel-s-Toolkit-Review>

²⁶⁸ *Idem*.

*Board oversight of the accountability framework and will give further recourse for people and communities.”*²⁶⁹

5.2 The AfDB Independent Review Mechanism

The Internal Review Mechanism (IRM) of the African Development Bank (AfDB) was officially established on 30 June 2004 through the *Enabling Resolution B/BD/2004/9 - F/BD/2004/7*, adopted by the AfDB’s Board of Directors, following a study produced by an external consultant to identify the appropriate accountability mechanism for this institution.²⁷⁰ The study included a considerable degree of broad, informal consultations, soliciting comments on the report from the public, prior to the adoption of the mechanism.²⁷¹ The study provided a set of recommendations, such as the inclusion of public and private sector projects, compliance with a broad set of operational policies and both investigation and problem-solving services, as well as an internal structure of a small administrative unit comprised of a permanent staff and roster of experts that would be engaged in the review process.²⁷² The preparatory process resulted in a dual model of the mechanism, which includes both, problem solving and compliance review, unlike the World Bank’s Inspection Panel, which thus far only provided for the investigation of compliance.²⁷³

The IRM became operational in 2006 following the appointment of the director of the IRM’s compliance and mediation unit.²⁷⁴ The formation of the accountability mechanism was accompanied by the development of Operating Rules and Procedures (OPP), submitted to the Committee on Development Effectiveness in order to confirm the consistency with the enabling resolution. Finally, the Rules and Procedures were approved by the Board on 27 July 2006.²⁷⁵ Shortly after its establishment, specifically four years later, the IRM went through its first review and resulted in streamlined rules which made it easier for individuals to access the IRM.

²⁶⁹World Bank, *World Bank Enhances Its Accountability*, Press Release March 9, 2020, available at: <https://www.worldbank.org/en/news/press-release/2020/03/09/world-bank-enhances-its-accountability>

²⁷⁰ Bissell and Nanwani, *supra note* 7, p. 159

²⁷¹ Bissell and Nanwani, *supra note* 7, p. 183

²⁷² AfDB, Independent Review Mechanism Annual Report, 2006, p. 3, available:

<https://www.afdb.org/en/documents/document/2006-annual-report-of-the-independent-review-mechanism-irm-8776>

²⁷³ D. M. Kiara, ‘The African Development Bank Group and the Establishment of the Independent Review Mechanism’, *Law for Development Review*, vol. 1 (2006), p. 216.

²⁷⁴ AfDB Group, Resolution B/BD/2004/9— F/BD/2004/7, Boards of Directors, 30 June 2004 [hereafter IRM’s Enabling Resolution (2004)], available at:

https://www.afdb.org/sites/default/files/2019/09/11/irm_boards_resolution_16_june_2010_english.pdf

²⁷⁵ AfDB, *supra note* 270, p. 190.

The main goal of the first review, as explained in the documents of the Bank, was to offer the Board of Directors with an analysis of the experience and practice of the IRM three years after its establishment. The first three years encapsulated a fast learning period, with four complaints filed by groups including people affected by projects, their representatives, as well as civil society organizations. Out of the four cases, one was registered and handled through compliance review, one went through the preliminary steps of compliance review and the final two were handled through problem-solving.²⁷⁶ In the first years of the operations, prior to the first review, it was apparent that complainants and general stakeholders lacked information on the policies, guidelines and procedures of the Bank as well as Project's Environmental and Social Impact Assessment (ESIA). In addition, the continuous lack of the consultations with actors related to the request, especially local communities and similar civil societies was emphasized in addition to the need to engage them in a meaningful manner.²⁷⁷ The First Review of the IRM resulted in the adoption of the revised IRM Rules and Procedures and the IRM Establishing Resolution on 16 June 2010 (B/BD/2010/10 – F/BD/2010/04) by Boards of Directors.²⁷⁸ The changes that were introduced modified the rules on admissibility of requests allowing requestors to use any means to register a complaint. The amendments also excluded the Director from the Compliance Review And Mediation Unit (CRMU) and the requirement for Management to send the response and action plan to both CRMU/IRM and the Board.²⁷⁹

The second review of the IRM was undertaken between 2014 and 2015. The Boards of Directors approved the changes to the Establishing Resolution of the IRM and Operating Rules and Procedures on 28 January 2015.²⁸⁰ The second review's main goal was the assessment of the effectiveness of the IRM to provide PAPs with a suitable recourse tool, based on the experience

²⁷⁶ AfDB, *Second Review of the Independent Review Mechanism of the African Development Bank Group*, Report of the Consultant, 2014 p. 12-13, available at: <https://www.afdb.org/en/consultations/second-review-of-the-independent-review-mechanism>

²⁷⁷ AfDB, *Bujagali Hydropower Project/ Bujagali Interconnection Project Country: Uganda*, Eligibility Report for Compliance Review, Compliance Review Request No.: RQ2007/1, p.13, available at: <https://www.afdb.org/en/independent-review-mechanism/management-of-complaints/registered-requests/rq-20071-uganda>

²⁷⁸ Bissel and Nanwani, *supra* note 8, p. 187.

²⁷⁹ *Supra* note 205, p. VIII.

²⁸⁰ AfDB, *supra* note 274, Idem. https://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/2nd_IRM_Review_-_Consultant_s_Report_-_ENG.pdf (accessed on 10 July 2020)

with cases filed since 2007. According to the records of the bank, by June 2014, out of 17 requests which were received by the IRM, nine were registered by the Director of BCRM and eight were not accepted as they fell out of the realm of IRM's mandate. The second IRM review happened closely after the Board of Directors adopted the AfDB's Integrated Safeguard Systems (ISS) in December 2013 thus prompting the bank to harmonize the Operating rules and Procedures with the ISS. This resulted in the establishment of a clear basis for the IRM's mandate to deal with complaints related to human rights violations, in particular social and economic rights, resulting from actions or omissions by the Bank.²⁸¹

The review prompted concrete changes that are detailed in following sections. Firstly, the accessibility to the IRM mechanism by PAPs was enhanced by simplifying the rules governing the registration of requests which now does not entail intricate technical requirements such as proving the casual relationship between the suffered or expected harm and Banks non-compliance with internal policies. Another technical obstacle, the requirement to attempt to solve the matter with the Bank Management prior to filing an official complaint, was also eliminated.²⁸² Furthermore, the initial time limitation for submitting a complaint, regulated as 12 months was expanded to 24 months after the physical completion of the project, the disbursement of payments or the date of its cancellation. Secondly, the requestors were granted greater say in the type of IRM mechanism to be employed in their cases. In other words, complainants now can choose how their complaint should be dealt with (problem-solving, compliance review, or both). Thirdly, IRM was mandated to assess all private sector operations, rather than being limited to breaches related to education, health, gender, good governance and environment, as previously stipulated. In addition, the IRM was mandated to have an advisory role, in addition to problem-solving, complaint review and outreach functions.²⁸³

The advisory functions are implemented through opinions on technical matters as well as spot-check reviews of project compliance. Finally, changes were introduced regarding the relevant IRM actors. The Board took over a more active role as it now actively engaged in considering IRM

²⁸¹ *Ibid.*

²⁸² AfDB, *The Third Review of the Independent Review Mechanism of the African Development Bank Group*, Concept Note Compliance Review And Mediation Unit (Bcrm), March 2019, <https://www.afdb.org/en/documents/document/the-third-review-of-the-independent-review-mechanism-irm-of-the-african-development-bank-group-concept-note-108472>

²⁸³ AfDB, *supra* note 274.

documents, rather than just receiving them for information. This change was complemented with changes related to transparency in the selection of the director of BCRM and limitations of engagement with Bank for any aspiring IRM expert as any person that worked with the Bank is not eligible to serve as expert on the roster.²⁸⁴ In 2019 the AfDB launched a new review, based on the lessons learned and the encountered challenges in the IRM's practice.²⁸⁵

5.2.1. Structure and Functions of the Independent Review Mechanism

The Operational Rules and Procedures state that:

*“IRM was established for the purpose of providing people adversely affected by a project financed by the Bank, the Fund, the Nigeria Trust Fund and other Special Funds administered by the Bank (collectively the ‘Bank Group’) with an independent mechanism through which they can request the Bank Group to comply with all its own policies and procedures.”*²⁸⁶

Operationally, the AfDB's IRM is composed of two distinct sections: The Compliance Review and Mediation Unit (previously known as CRMU and now called BCRM) and a Roster of Experts, composed of three individuals, nationals of a Member State of the Bank or participating states in the African Development Fund.²⁸⁷

The CRMU, headed by a director, represents the central focal point of the IRM. The director is appointed by the President of the Bank, in consultation with the Board of the AfDB and has both, a compliance review and problem-solving function. He/she is appointed for a 5-year, renewable mandate, and plays a key role in determining whether the filed requests are to be registered at all, and if yes, for which of the two services provided.²⁸⁸ The Roster of Experts is comprised of three part-time individuals that perform investigative functions once a complaint is lodged alleging the adverse effects of a project resulting from the Bank's non-compliance with its operational policies

²⁸⁴ McIntyre and Nanwani, *supra* note 3, p.87.

²⁸⁵ AfDB, *Third review of African Development Bank's Independent Review Mechanism to take place this year*, Press release 15 Feb 2019, available at: <https://www.afdb.org/en/news-and-events/third-review-of-african-development-banks-independent-review-mechanism-to-take-place-this-year-19007>

²⁸⁶ AfDB, “*Operating Rules and Procedures*”, the Independent Review Mechanism, January 2015, p.5., available at: https://www.afdb.org/sites/default/files/2019/09/11/irm_operating_rules_and_procedures-january_2015-en.pdf

²⁸⁷ *Idem*.

²⁸⁸ AfDB, *Compliance Review and Mediation Unit of the Independent Review Mechanism, Operating Rules and Procedures* (July 27, 2006), para. 20

and procedures related to the designs/implementation of the said project.²⁸⁹ The experts are usually appointed by the Board of Directors, pursuant to a recommendation of the President for non-renewable mandate of five years. However, should an expert be involved in a review that goes beyond the timeframe of his/her mandate, the Board can prolong the mandate of the expert for an additional six months in order for the expert to provide a written report, unless otherwise decided by the Board.²⁹⁰

It is visible that the Bank had envisioned the rules governing the selection of experts to safeguard their independence and credibility. In this context the founding resolution provides that the Executive Directors, their alternates, advisors, assistants and other staff of the Bank, including consultants, cannot serve on the roster of experts at least for two years from the end of their engagement with the AfDB. This limitation applies equally to the experts who might want to take up a position in the Bank.²⁹¹

Functionally, the IRM holds three distinct roles. Unlike the Inspection Panel of the World Bank, which only performs a compliance review function, the IRM's role was initially envisioned as a problem-solving and compliance review function, which was further expanded through an amendment of the enabling resolution with an advisory function. An outreach function persists as a means to raising awareness on the role and relevance of the IRM. The acknowledgement of the problem-solving function is however visible in the most recent review of the World Bank's IAM, in which the Bank anticipated the inclusion of this function in its accountability mechanisms.²⁹²

Arguably, the IRM framework provides the Director of the CRMU/BCRM with a lead position in the procedure, as he/she plays an essential role in determining whether a request is to be registered for problem solving or compliance review.²⁹³ Furthermore, the director, together with two experts

²⁸⁹ AfDB, Independent Review Mechanism Operating Rules and Procedures, at para. 13, available at: https://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/Revised_IRM_Operating_Rules_and_Procedures_2015.pdf

²⁹⁰ African Development Group, Board of Directors, Resolution B/BD/2015/03 – F/BD/2015/02 Amending Resolution B/BD/2010/10 – F/BD/2010/04 concerning the Independent Review Mechanism, (AfDB, 2004), at para. 5.

Available at: https://www.accountabilitycounsel.org/wp-content/uploads/2017/07/Boards_Resolution_on_Establishment_of_IRM_2015.pdf

²⁹¹ *Ibid*, para 6.

²⁹² World Bank Group, *World Bank Enhances Its Accountability*, Press release 9 March 2020, available at: <https://www.worldbank.org/en/news/press-release/2020/03/09/world-bank-enhances-its-accountability> [Accessed 10 July 2020]

²⁹³ AfDB, *supra* note 286, at para 20.

from the expert roster, form the review panel which conducts the compliance review. In this role, the director is empowered to determine whether a compliance review is warranted following a problem-solving procedure, independently of the latter's success.²⁹⁴ The director also plays a relevant role in the advisory function of the IRM, which is activated either upon the CRMU's receipt of a request for advice by the President and/or Boards, or upon approval of a proposal submitted by the CRMU's director and approved by the President and/or Board.²⁹⁵

The IRM is not available to individuals, but can be triggered only “*when two or more affected persons believe that the Bank Group has failed to comply with any of its policies and procedures and that failure has, or threatens, to adversely affect them.*”²⁹⁶ This means that the IRM addresses primarily violations of applicable internal AfDB policies and regulation, as explained in more detail under section 3 of this paper. In this context, the Operational Rules and Regulations specifically stipulate that they do not apply to procurement-related issues, frivolous, malicious, or anonymous complaints fraud or corruption since they are handled by another unit within the Bank Group. To this list are added other matters handled by the Administrative Tribunal of the Bank, and other review bodies, as well as matters that were already reviewed, unless new evidence or circumstances arose, and actions under responsibility of other as well as alleged violations of Human Rights with the exception of matters related to social and economic rights that might be violated through the Bank's conduct in the context of a development project.²⁹⁷ While the scope is similar to the Inspection Panel, the inclusion of human rights considerations, though in a qualified manner, represents a major development of the independent accountability mechanisms.

The IRM, as the World Bank's Inspection Panel, is not a court of law nor is it entrusted with power regarding judicial or arbitral processes. Among the three identified functions of the IRM, the first two, namely, problem-solving and compliance review functions are the most relevant to for the present study. Nevertheless, these functions have their limitations, which will be addressed in a broader manner in the following section.

²⁹⁴ *Ibid* para 43.

²⁹⁵ AfDB, *supra* note 286, at p. 3, para. 2 (j).

²⁹⁶ *Ibid*.

²⁹⁷ AfDB, *supra* note 286.

5.2.2. The Complaint Process

The IRM proceedings are triggered with a complaint lodged by two or more people and received by the CRMU.²⁹⁸ The procedure can be summarized in several steps, namely, submission of the complaint, screening and registration, assessment and Director's determination of the best course of action (either problem-solving or compliance review), monitoring of the implemented plan of action and follow-up, and finally conclusion of the AfDB's involvement in the review.

The Operating Rules and Procedures stipulate three different actors that can initiate the process. Firstly, it can be initiated directly by any group of at least two individuals, who believe that an AfDB- financed project, which is being implemented, has or is likely to have adverse effects on their rights, who can submit a complaint to the CRMU. The complaint has to be based on the alleged failure by the Bank to respect the OP/P in any phase of the project - the design, appraisal and implementation.²⁹⁹ Secondly, the process can be initiated on behalf of the PAPs through a local, or exceptionally foreign, representative, who shall provide evidence of the representation authority transferred to her/him by the complainants. Finally, the Boards have also the authority to initiate a problem-solving process with the CRMU if the people affected by projects do not.³⁰⁰ It is notable that in the Inspection Panel model this role is held by the President of the Bank.³⁰¹

Like the Inspection Panel, the IRM also does not provide for a specific format (though, a form is available on both the Panel's as well as the IRM's website for convenience) and it can be submitted in any language if the complainant does not have the means to submit the complaint in French or English, the official working languages of the AfDB. If a submission is made orally the BCRM is to provide guidance on how to lodge a complaint. This arguably indicates a general benevolence of the Banks to provide PAPs flexibility in the manner to lodge a complaint. In general, the complaint should contain basic information about the requesters (such as name, address and contact information), authority of representation in case the PAPs are not initiating the request by themselves, reference to the project, including a statement of all relevant facts including the harm suffered by or threatened to the affected parties, information on how the complainants have been or are likely to be materially and adversely affected by the act or omission and what rights or

²⁹⁸ *Idem* at 3, para. 4.

²⁹⁹ *Idem*, at 2, para. 1.

³⁰⁰ *Idem*, at 3 para. 6 (d).

³⁰¹ *Supra* note 210.

interests of the parties were directly affected, particular reference to the Bank's policies, procedures and/or contractual documents that have been allegedly violated and an indication if there was any previous communication with the Bank.³⁰²

It is worth noting here that the IRM does not allow for the resubmission of a complaint reacted to the same issue, once it has undergone the review mechanism, unless there is new evidence. In this case, information on the specific new evidence and/or changed circumstances which justify revisiting the issue should be included.³⁰³ Once the complaint is received by the CRMU, it undergoes the screening procedure for registration. The Director CRMU/ BCRM acknowledges the receipt of the complaint and screens the complaint based on the internal rules and regulations, in particular the Operating Rules and Procedures. This phase takes no more than fourteen business days. Should the complaint meet the criteria, the Director of the CRMU registers it and issues a notification to the complainants, as well as the President and the Board. In addition, the registration notice also contains a request directed to the Bank's management to provide written evidence that it either has or plans to comply with the Bank's operational policies. The time frame for the Management to response is 21 business days upon receipt.

As mentioned previously, the Director of the CRMU/ BCRM plays a key role throughout the process. This is particularly visible in the determination which function the IRM will play, based on the management response to the complaint. In the choice between problem-solving, compliance review or both problem-solving and compliance review, the Director is guided by some criteria, including the appropriateness and expected effectiveness of the function employed by the IRM. This is a key difference from the Inspection Panel, which performs only a compliance review function.

The goal of problem-solving, according to the Operating Rules and Procedures *"is to restore an effective dialogue between the [complainants] and any interested persons with a view to facilitating a solution to the issue or issues underlying a [complaint], without seeking to attribute blame to any such party."*³⁰⁴ This function can entail a variety of techniques, such as fact-finding, mediation, conciliation and dialogue facilitation. Thirty days after the end of the problem-solving

³⁰² AfDB, Independent Review Mechanism Annual Report 2019, available at: <https://www.afdb.org/en/documents/independent-review-mechanism-annual-report-2019>

³⁰³ AfDB, *supra* note 286 at 3.

³⁰⁴ *Idem*, at, 9, para. 41.

exercise, the Director is required to submit a report on the problem solving. The report is sent for consideration to parties involved as well as the President and the Board. The operating Rules and Regulations also call for monitoring of the implementation of the agreement reached through problem-solving, including through monitoring missions. If, by the conclusion of the problem solving, the Director assess that a compliance review is warranted, then he/she may include in the Problem-Solving Report such recommendation, which is then submitted to the President or the Board.³⁰⁵

The compliance review function is triggered, thus, either as a continuation of the problem-solving function or from the lodging of the complaint. This IRM function is initiated when there is a determination of “prima facie evidence that the Requestors have been harmed or threatened with harm by a Bank Group-financed project and that the harm or threat was caused by the failure of the Bank Group’s staff and Management to comply with any of the Bank Group’s relevant policies and procedures”³⁰⁶ Should the Director and IRM experts identify that there is reason to conduct a compliance review, they will produce a report within 30 days of this realization, including a recommendation to conduct the compliance review, as well terms of reference and a timeframe for this procedure and submit it to the President and/or the Board (depending on the approving authority), which shall then either endorse the review with no objection or remit the request. The compliance review is then conducted in accordance with the approved terms of reference. The Panel recourses to all necessary action, required to complete the compliance review within the required time frame, including holding meetings with interested parties and requestors, traveling to the project sites, seeking additional expertise support.³⁰⁷

The Panel is recommended to decide by consensus. The director in this process, as one of the three members of the panel, alongside the two experts, participates in all aspects of the compliance investigation and has a particularly relevant role in case a deadlock in the panel occurs.³⁰⁸ Thirty days after the completion of the investigation the panel is required to submit a draft compliance review report and share it with management for comments. Following this step, the panel drafts

³⁰⁵ *Supra* note 268.

³⁰⁶ AfDB, *supra* note 286, para. 51.

³⁰⁷ *Ibid* 56.

³⁰⁸ *Supra* note 246, p.

the final version of the report that, in addition to providing relevant information on the context of the project and the complains, assesses a material breach of internal policies and provides three types of remedies. Firstly, the panel can include remedial changes in the “scope or implementation of the Bank Group-financed project, however taking into account any restrictions or agreements related to the project. Secondly, it can make recommendations on any remedial changes to systems or procedures within the Bank to avoid a recurrence of such similar violations.”³⁰⁹ This appears to be particularly relevant for the present study, as it indicates that MDBs are including reference to learning from their own practice and avoiding same occurrences in multiple projects. The Operational Rules and Procedures also provide for monitoring of the IRM outcome implementation, which represents an important aspect particularly for the claimants affected by the Projects as highlighted in Chapter 3.

5.2.3. The IRM in practice

The AfDB published a paper in 2014 at a regional level, presenting the results of a survey of four MDBs (WB, EIB, AfDB, IFC) analyzing the collective scope of activities over the prior 10-year, especially with regards to the independent review mechanisms in Africa.³¹⁰ The results stated that out of 242 registered cases of the aforementioned MDBs, 24% (59) were related to projects in Africa. Furthermore, out of the 59 cases, the World Bank dealt with 16, the European Investment Bank with 13, the IFC with 16, and the AfDB handled 14.³¹¹ Among the cases the AfDB dealt with, some stand out prominently due to their relevance both in terms of procedural matters as well as the magnitude of the projects they relate to. The following section will provide highlighted cases and related practice by the IRM.

³⁰⁹ African Development Bank, *The Independent Review Mechanism Annual Report 2013* (2014), available at: http://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/2013_Annual_Report_of_the_Independent_Review_Mechanism.pdf, [accessed 10 July]

³¹⁰ McIntyre and Nanwani, *supra* note 3, p.57.

³¹¹ *Ibid.*

5.2.4. Summary of Highlighted cases

a) Uganda: The Bujagali Hydropower Project³¹²

The Bujagali Hydropower Project (BHP) and the Bujagali Interconnection Projects in Uganda were approved by the AfDB in 2007 and included the construction of a dam as well as the transmission infrastructure to connect the hydropower station to the electricity grid. The Uganda Electricity Transmission Company Ltd. (UETCL) was the implementor of the project. Shortly after the beginning of the project the, BCRM received a complaint by an NGO called National Association of Professional Environmentalists (NAPE) which claimed inter alia inadequate Environmental and Social Impact Assessments (ESIAs), irregularities during the consultation affected communities as well as inadequate compensation. In addition, a cornerstone in the complaint was the spiritual and cultural aspect of the Bujagali falls for the local PAPS and their loss in this regard. The Bank Management developed and implemented remedial action as a response to the submitted claim, as approved by the Board. After this the IRM conducted four monitoring missions to Uganda in the period between 2009 and 2012, with the final report recommending the Bank to ensure all remaining compliance issues, in particular related to the resettlement and compensation of the PAPs to be fulfilled. The procedure had an extensive duration due to the postponement of the closure date as well as a new complaint received by the IRM and related to the project.³¹³ The main issues in the case were resettlement and compensation, for which the Management included regular updates to the IRM. With the aim to close the complaint case, the IRM requested the Project Completion Report, which was submitted to the Board. The report included Managements action for successful completion of resettlement and compensations pending matters and the case closed.

b) Senegal: The Dakar-Diamniadio Highway project³¹⁴

In July 2011 two complaints were submitted to the CRM and related to the Dakar Diamniadio Highway. The first was submitted by a school teacher, alleging that the project deprived students

³¹² AfDB, *Report On Closure Of The Request And Monitoring By The Independent Review Mechanism*, Bujagali Hydropower Project And Bujagali Interconnection Project – Uganda, available at: <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/30740990-EN-BUJAGALI-FINAL-REPORT-17-06-08.PDF>

³¹³ *Ibid.*

³¹⁴ AfDB, *The Dakar-Diamniadio Highway project*, Problem-Solving Report, available at: <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/IRM%20Report-%20Request%20for%20Problem%20solving%20-%20Dakar-%20Diamniadio%20Highway%20Project%20web.pdf>

of their studies and the school staff of their income. The second complainant represented an NGO the Tenants Association (CLAP) of the local community alleging that the paid compensation was not satisfactory and enough to find a suitable housing replacement. The CRMI decided to merge the two claims into one request as they referred to the same project and the preferred manner of addressing the claims was problem-solving. Following the procedure stipulated in the IRM Operating Rules, the Director submitted the notice of registration for problem-solving to the Board, the President and the Requestors. In August 2011 the Management submitted its response and confirming its engagement in the problem-solving mechanism. The Dakar-Diamniadio Highway project is a public-private partnership by its nature and it relates to the construction of a highway. It was categorized as a high-risk project due to its potential negative impact on the environment as well as local communities since it displaces over 3000 families. The executing agency of the project was *L'Agence Nationale de Promotion de l'Investissement des Grands Travaux* (APIX). The process included a fact-finding mission by the CRMU in late 2011 to meet the requestors and organize a joint meeting of all parties in order to facilitate a solution to the concerns raised in the claim.³¹⁵ The first requestor insisted on a specified amount of financial support to construct a new school in a suitable area, the compensation of teachers the loss of their income, the compensation of fees for enrolled pupils and the refund for the old school's demolition as well as the facilitation of transport for the students who lived away from the new school's location. The respondent offered to design the plan for a new school and liaise with authorities to facilitate the constructions as well as providing the necessary construction materials. This has not met the claimants' expectations and the matter required a second round of mediation. The second requestor demanded the payment of compensations to tenants that were not yet refunded as well as to help them reach access to social housing and land and to help the, build houses under a facilitated payment plan.³¹⁶ The respondent agreed to pay the remaining compensation, to support the tenants advocate for their rights to access land by establishing their cooperative. This was agreeable to the claimants and the agreement was signed. The first requestor and the APIX held two more facilitated meetings as the requestor did not want to settle, and finally the CRMU facilitated a solution under which APIX would pay the requestor a compensation for loss of income and disruption of the school year due to the resettlement and offer other benefits related to the resettlement such as the costs of

³¹⁵ AfDB, *The Independent Review Mechanism Annual Report 2013*, p.25. Available at: <https://www.afdb.org/en/irm/institutional-documents/irm-annual-reports>

³¹⁶ *Ibid.*

school materials, design of the school etc.³¹⁷ Upon successful resolution of the complaints of the Head Teacher and the CLAP, a report on the successful completion of problem solving was submitted to the President, the Boards of Directors and the Requestors in 2012. As the implementing entity had 8 months to implement the agreement, the CRMU recommended the monitoring for the following year. As the monitoring mission provided satisfactory updates, the Director closed the problem solving.

c) Morocco: Construction of the Marrakech – Agadir Motorway³¹⁸

In July 2010 the CRMU received a complaint from the Centre de Développement de la Région de Tensift (CDRT) on behalf of associations and affected local people along the motorway's ChichaouaImintanout section (33 km) financed by the African Development Bank (ADB).³¹⁹ The project was approved in 2006 and it entailed the implementation of works on the aforementioned section. The implementing agency was the Société Nationale des Autoroutes du Maroc (ADM). The aim of the project was to “improve the living standards of people by supporting the country’s economic development, tourism and the agro-based industry.”³²⁰ A comprehensive environmental and social impact was required due to the high risk that the project entailed. The complainants raised concerns regarding harm to the local communities and land along the motorway section and requested both a compliance review and problem solving. In particular, the alleged adverse effects included, inter alia: limitations in crossing the ands, restricted access to water, degradation of agro-lands etc. As a result, the request was registered for problem-solving in July 2010. The Management submitted remedial action, including a plan that was agreeable to both CDRT and ADM. The main steps undertaken during the problem-solving exercise entailed a fact-finding mission in during which the action plan was signed by the three parties: the bank, the CDRT as requestors and the ADM as the implementing agency. ADM committed to deliver remedial action and the AfDB to monitor the developments. In 2011 the problem solving report identified that the Bank and ADM should have supervised the contractor and that the CRMU agreed with the

³¹⁷ AfDB, *Senegal Dakar-Diamniadio Highway Project, Closure of the IRM Problem Solving Exercise Request No. RQ2011/01*, December 2012, p.2-3. Available at: <https://www.afdb.org/en/independent-review-mechanism/management-of-complaints/registered-requests/rq-20111-senegal>

³¹⁸ AfDB, *Construction of the Marrakech – Agadir Motorway*, Request No.: RQ2010/01 <https://www.afdb.org/en/independent-review-mechanism/management-of-complaints/registered-requests/rq-20101-morocco>

³¹⁹ AfDB, *Construction of the Marrakech – Agadir Motorway, Request No.: RQ2010/01, Problem Solving Report*, November 2011, iii, available at: <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/IIRM%20Problem%20Solving%20Report%20Morocco%20Request%20web.pdf>

³²⁰ *Ibid.*

parties to review the situation in the field a year after the report was submitted in order to provide the requestors the opportunity to submit a request for compliance review should no progress be achieved. Following new requests that arose in 2012-2015, which were clarified as misunderstandings, the case was closed in 2016, based on a decision of the Director of CRMU and on the confirmation of the requestors that they were satisfied with the provided solution.³²¹

5.2.5. Evolving Practice

In the period between 2004 and 2018 the IRM has received a total of 51 complaints, out of which 23 met the requirement for registration. Out of those, 17 were registered and adding one in 2019 the total number of registered complaints to date stands at 18.³²² The claimants raised a variety of alleged violations, nevertheless, it is visible that in most cases issues of resettlement of people, participation of local communities, as well as the environmental impacts of projects were the most commonly cited. The IRM has resorted to problem-solving as a preferred practice as it has resulted more often in substantial agreements for the benefit of the PAPs.³²³ As mentioned by the CRMU in the Construction of the Marrakech – Agadir Motorway case, “*the costs of conducting a compliance review outweigh the costs to be incurred for restoring the affected lands*”³²⁴ This visible move towards favoring problem-solving as a way to mediate the existing grievances and assure a level of satisfaction of the complainants is furthermore illustrated in the same case where the Report On Closure Of Problem-Solving Exercise stated that six out of eight complaints were resolved.³²⁵ The fact that the project was not elected for compliance review indicates the CRMU’s preference to monitor implementation of agreed upon outcomes of problem-solving, rather than exercising additional compliance review.³²⁶

³²¹ AfDB, *Report on Closure of Problem-Solving Exercise of Request No.: RQ2010/01 Request Registered for Problem-Solving and Compliance Review, Project: Construction of the Marrakech – Agadir Motorway, Morocco* 11 December 2016, available at: <https://www.afdb.org/en/documents/morocco-construction-marrakech-agadir-motorway-project-problem-solving-closure-report>

³²² African Development Bank, *The Independent Review Mechanism Annual Report 2018 (2019)*, available at: http://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/2013_Annual_Report_of_the_Independent_Review_Mechanism.pdf, [accessed 10 July]

³²³ *Idem*.

³²⁴ AfDB, *Independent Review Mechanism Experts Memo on Eligibility of the Request for Compliance Review*, November 2011, available at <https://www.afdb.org/en/independent-review-mechanism/management-of-complaints/registered-requests/rq-20101-morocco>

³²⁵ AfDB, *Report on Closure Of Problem-Solving Exercise Of Request No.: RQ2010/01 Request Registered for Problem-Solving and Compliance Review Project: Construction of the Marrakech – Agadir Motorway, Morocco* 11 December 2016, available at: <https://www.afdb.org/en/documents/morocco-construction-marrakech-agadir-motorway-project-problem-solving-closure-report>

³²⁶ *Ibid*.

A distinctive characteristic of the revised IRM is the official inclusion of human rights violations in the list of breaches that can be invoked by PAPs, provided that they “*involve social and economic rights [and are related] to any action or omission on the part of the Bank Group.*”³²⁷ A relevant observation by the Board is the need to address the timeline of some cases.

With regards to human rights, the Bank, in line with the mandate stipulated in articles 1 and 38 of the Bank Agreement and article 2 and 21 of the African Development Fund, views economic and social rights as a vital component of human rights, and consequently affirms that it respects the values of human rights as indicated in the UN Charter and the African Charter of Human and Peoples’ Rights. Furthermore, the Bank acknowledges that human rights principles guided the production of the Integrated Safeguard System with the aim to encourage Member States to observe the human rights norms and respect the commitments made to international human rights instruments.³²⁸ In this regard, the request for review in *Nuweiba Combined Cycle Power Project in Egypt*, submitted by an NGO requesting relocation of the planed power plant due to the potential harm to the marine life and livelihoods of the local population was successful.³²⁹ Following the initiation of the problem-solving procedure the implementor decided to relocate the project which resulted in the termination of the claims.

The Bank appears to prioritize the grievances redress mechanism and due diligence through its practice, in particular related to the resettlement questions, which remains one of the three main issues in the Bank’s practice, alongside loss of livelihoods and compensation requests.³³⁰ Additionally, the emphasis on Borrower’s role in respect to safeguard policies and provision of appropriate remedies in agreements governing credits was openly cited as crucial. It appears overall that the IRM takes a proactive, very often advisory role.³³¹ In 2016, the requests nature expanded, when a project on agrobusiness industry was included, which is a different field from the most common issues at stake, such as land, health pollution etc.

³²⁷ *Supra* note 313.

³²⁸ Safeguards and Sustainability Series Volume 1 - Issue 1 (Dec. 2013), p.1.

³²⁹ AfDB, *Independent Review Mechanism Problem-Solving Report RQ2009/02, Nuweiba Combined Cycle Power Plant Egypt*, p.10-11. Available at: <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/Problem%20Solving%20Report%20March%2025%202010f.pdf>

³³⁰ *Supra* note 320, at p. 22.

³³¹ *Ibid.*

A visible trend in the IRM's practice is the increasing reliance of requestors on the problem-solving intervention, in the majority of Complaints. For example, in cases involving disputes over compensation, reparations are provided to PAPs despite occurring differences between the Bank's policies and national legislations on compensations, such as in the case Road Sector Support Project II in Tanzania and Marrakech – Agadir Motorway, Morocco.³³² In other words, the majority of cases, provide for a challenging multifaceted legal framework where the Bank's policies are not in alignment with the national regulatory framework of the Borrower.³³³ It is also visible, however, that the existing discrepancies in the regulatory frameworks are rarely addressed prior to project implementation, thus contributing to a greater list of cases reaching the IRM. This arguably also jeopardizes the credibility of the Bank, which comes under question by frustrated Borrowers.³³⁴

As visible in the case of the *Construction of a 125 MW Coal-Fired Power Plant in Sendou, Senegal*, the CRMU recommended the Management to address systemic issues in order to avoid the repetition of non-compliance with Bank's policies. A notable stance of the IRM is the recommendation to include “*credit agreements signed for coal-fired power plants should include policy covenants on key environmental and social measures required to meet AfDB standards.*”³³⁵

Similarly to the occurrences in the Inspection Panel's work, the IRM too, pointed out frequently on irregularities with Managements provision of information to the Board, which often is not in accordance to due diligence requirements, thus provoking direct negative impact on Boards considerations of project components leading to harm to PAPs, such as loan agreement information. A prominent case among the 18 registered in the IRM is the the Diversification of the Activities of Moulin Moderne du Mali Project, Mali.³³⁶ As the Inspection Panel, the IRM as well, throughout its practice raises the question of meaningful participation of PAPs, such as in the case of *Marrakech – Agadir Motorway*, where the review Panel stated : “*The consultations with the*

³³² Supra note 31.

³³³ AfDB, *African Development Bank Annual Report 2016*, p.37. available at: <https://www.afdb.org/en/documents/document/the-independent-review-mechanism-annual-report-2016-99410>

³³⁴ *Ibid*, p.35-38.

³³⁵ AfDB, *Action Plan concerning the compliance review report on the Construction of a 125 MW Coal-Fired Power Plant in Sendou, Senegal*, p. 29, available at: https://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/Sendou_-_Eligibility_Report-EN.pdf

³³⁶ Supra note 320, at p. 16.

*people affected by the project could have been meaningful, had the project implementation units mandate their public relation offices to refer the complaints to their Social Experts to help the people make conscious decisions when being affected by construction activities.”*³³⁷ Similarly, in the *Road Sector Support Project II (RSSP II) in Tanzania*, the CRMU points to the need for information sharing and transparency with the PAPs as a key instrument for enhancing transparency, trust in the Bank and ultimately assuring accountability.³³⁸

While problem-solving appears to have created immediate remedial action and durable solutions, it poses a persisting challenge to the IRM. Namely, monitoring the enactment of the settlement agreements requires a continuous engagement of the CRMU and an extended monitoring of implemented steps. The IRM’s second review has pointed out an important question, as visible in the case of Morocco, which is the level of satisfaction of People affected by projects, signatories of agreements resulting from problem-solving.³³⁹ Despite the implementation of agreed plans of action, an independent report has indicated a lack of satisfaction by local communities. It might be pertinent thus to include a mechanism of consultation to validate the outcome of mediation, taking into account the perception of all the parties, including the PAPs.³⁴⁰ Overall, the practice of the IRM indicates that PAPs face similar challenges in achieving adequate satisfaction based on their complaints to the challenges faces by their peers participating in the World Bank Inspection Panel processes. Most cases indicate the persisting need for greater participation, transparency as well as adequate and timely compensation.

6. Emerging Trends, Challenges and Opportunities

As demonstrated in previous sections, both accountability mechanisms analyzed in this study provide to people affected by projects (PAPs) a channel to register complaints in order for their

³³⁷ AfDB, *Report on Closure of Problem-Solving Exercise of Request, No.: RQ2010/01 Request Registered for Problem-Solving and Compliance Review Project: Construction of the Marrakech – Agadir Motorway*, Morocco11 December 2016

<https://www.afdb.org/en/documents/morocco-construction-marrakech-agadir-motorway-project-problem-solving-closure-report11>

³³⁸ AfDB, *Closure of Problem-Solving Exercise Report Request No.: Rq2012/01 Project: Road Sector Support Project Ii Country: Tanzania*, 2017, P.6.

³³⁹ AfDB, *Second Review of The Independent Review Mechanism of The African Development Bank Group*, 24 September, Report Of The Consultant, African Development Bank Group, 2014, available at: https://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/2nd_IRM_Review_-_Consultant_s_Report_-_ENG.pdf

³⁴⁰ AfDB, *supra* note 331.

grievances to be addressed. The World Bank's Inspection Panel served as the pioneering model of independent accountability mechanisms (IAMs) for other multilateral development banks (MDBs) that saw the need to establish similar procedures. While each individual procedure is based on the uniqueness of the institution it is part of, commonalities are apparent. As the Inspection Panel and IRM continue to shape the work of the World Bank and the African Development Bank respectively, and as practice seemingly shapes the work of the two IAMs as well, opportunities and trends common to both institutions emerge. Following the analysis of the mechanisms' practice in previous sections, this chapter provides an analysis of emerging trends in the World Bank and AfDB, influenced by their practice and the need to adapt to new global circumstances. The chapter presents an overview of changes in conceptual and procedural matters related to the work of the two independent accountability mechanisms. The following part will summarize some of the main challenges identified in the pursuit of legal protection of the people affected by projects. Finally, under it provides an outlook to the future, related to both material and procedural aspects of the protection of PAPs, establishing a relationship between the accountability mechanisms and the evolution of accountability in international law in the context of global administrative law.

6.1. Emerging Trends

The practice of both the World Banks's and AfDB's review mechanisms has prompted the mechanisms to undergo revisions with the aim of increasing their efficiency. Several trends can be observed in this context.

Firstly, *the type of procedures* that are provided to people affected by projects have been diversified. The Inspection Panel has initially provided for only the compliance review function. This was supplemented, in subsequent models of accountability mechanisms of other MDBs, with problem-solving functions and outreach activities, which is the case of the AfDB's IRM.³⁴¹ The trend to provide other avenues for PAPs to enter in dialogue with the Banks' leadership and thus find alternatives to the classical investigation function, is further confirmed through the World Bank's adoption of a new independent accountability mechanism structure which will comprise of the Inspection Panel and a new dispute resolution service, planned to be operational in September

³⁴¹ Wong, *Supra* note 156, p.230.

2020.³⁴² The need for MDBs to address the problems and complaints of affected people on the ground through problem-solving functions, in addition to assuring that all projects comply with institutional policies, has been widely recognized. This approach contributes to an enhanced human approach to the challenges, which is in line with the core values of human dignity, an essential principle of sustainable development.³⁴³ For example, the outcomes of the AfDB's compliance review mechanisms - the compliance review reports, started including through time a growing set of recommendations, moving, thus, from mere fact-finding towards providing recommendations on compliance and remedies.³⁴⁴

Secondly, the “consolidation” or “institutionalization” of panels in the form of a lasting setting is visible in many MDBs. In the case of the AfDB the roster of three experts is similar, in a way, to permanent panel structures. This consequently enables greater commitment of the panel experts to their role, as well as to the institution they serve.³⁴⁵

Thirdly, there is a notable increase in accessibility to the review mechanisms by PAPs. This is reflected both, in terms of operational requirements to register a complaint, as well as in the time frame of such a registration. While the Inspection Panel initially envisioned a long list of requirements to be fulfilled for the complaints to be admitted, this was later streamlined.³⁴⁶ On the other hand, the AfDB, being established some 10 years later, provides enabling contexts for PAPs to apply even in a local language, or orally, which can be seen as an indication of the Bank's willingness to alleviate the burden on the side of the people allegedly negatively affected by its projects. Additionally, the timelines for submission of complaints were further expanded. The AfDB allows for PAPs to initiate a procedure 24 months after the physical completion of the project.³⁴⁷ This trend is confirmed by the most recent developments in the World Bank, which now allows for the complainants to file a complaint up to 15 months after the closing date of the loan, credit or grant. The previous rules were tied to the amount of the project's funds' disbursement.

³⁴² External Review of the Inspection Panel's Toolkit (English). Washington, D.C. : World Bank Group. <http://documents.worldbank.org/curated/en/562131583764988998/External-Review-of-the-Inspection-Panel-s-Toolkit>

³⁴³ M.J.A., Van Putten, Rijsman, John, Curtis, M., and Dean Office, *"Policing the World: Accountability Mechanisms for Multilateral Financial Institutions and Private Financial Institutions," Tilburg University 2006, p. 129*

³⁴⁴ Suzuki and Nanwani, *supra* note 64 at p. 174

³⁴⁵ *Idem*, p. 179

³⁴⁶ *Supra* 343.

³⁴⁷ *Supra* note 278.

More precisely, a complaint could not be filed if 95% of the funds were disbursed or the project was closed.³⁴⁸

Fourthly, an increasingly notable occurrence is a strong emphasis on the monitoring of outcomes from procedures of IAMs, both in the context of problem solving and investigation. The AfDB has expressly stipulated such a function in the Operating Rules and Regulations, recurring to monitoring in most of its reviewed cases, such as in the *Road Sector Support Project II in Tanzania*, the *Marrakech – Agadir Motorway* case as well as the *South Africa: Medupi Power Project*. Similarly, the World Bank has repeatedly requested the Panel to determine the impact of remedial measures implemented based on Management’s action plans, such as in the case of *Yacyreta Hydroelectric Project in Argentina and Paraguay*.

Finally, there is a visible tendency to include the requestors in the review processes. While the World Bank’s Inspection Panel did not envision claimants to actively participate in the review mechanism in the previous setting, the recent changes in the procedures envision that those who filed a request for inspection are entitled to view the Inspection Panel Investigation Report after it is submitted to the Board but before the Board meets to consider the report.³⁴⁹ This is a major change in comparison to the initial procedure where claimants were involved only when the panel would request meetings as part of the investigation process. The AfDB, as other regional MDBs that were established after the World Bank, included procedures for the inclusion of claimants in the process from the beginning. This was done through the submission of the investigation report by the panel of experts to PAPs simultaneously with the submission to the Board. Despite the progress that IAMs rules such as the AfDB’s have made with regards to the inclusion of PAPs, informing them about the developments, the landmark *Bujugali Hydropower Project* case, discussed in the previous section, highlighted persisting flaws in the system. In particular, final reports, rather than drafts, are sent to PAPs, which precludes the claimants to provide comments and thus state their position. This opportunity is, on the other hand, provided to Management through the institutionalized ‘Management Response’. Even when they provide comments, they can arrive late, such as in the landmark Bujugalu case, which resulted in the Panel’s adoption of the report without taking into account their stance. This points us towards some of the persisting

³⁴⁸ Bradlow, supra note 58 at p.47

³⁴⁹ Report and Recommendations on the Inspection Panel’s Toolkit Review (English). Washington, D.C. : World Bank Group. <http://documents.worldbank.org/curated/en/972351583772786218/Report-and-Recommendations-on-the-Inspection-Panel-s-Toolkit-Review>

challenges PAPs face in their quest for protection and redress, which are analyzed in the following section.

6.2. Challenges and Opportunities

Authors argue that existing accountability mechanisms of MDBs have raised awareness of the importance of providing channels for citizens' grievances in the context of internationally funded development projects. However, the limits of existing structures are visible as soon as one starts analyzing the processes in more detail. Arguably, the mere existence of such frameworks is not enough as is visible by increasing demands of civil society organizations (CSOs) for greater accountability.³⁵⁰ The CSOs pressures for reform and greater accountability have proven to be essential in the behavioral change of MDBs. Throughout the years, testimonies of civil society groups have pointed out to ways of increasing institutional development effectiveness, achievable through reforms of IAMs, though also acknowledging that mechanisms such as the World Bank's Inspection Panel created project level reforms and "political space for affected people in developing countries".³⁵¹

In such a convoluted context, is crucial to address what these mechanisms can achieve beyond accountability, in particular is there a way to demonstrate responsibility of the MDBs. This relates MDBs' financial obligations pertaining to the damage caused by violating the policies and procedures. A direct consequence of these emerging financial obligations would be the requirement for the Bank to provide additional grants financing to the borrower to cover costs resulting from the Bank's conduct and/or the Bank should compensate the PAPs for damages resulting from non-compliance.³⁵²

In this context, so far, the IRM, as well as the Inspection Panel, have provided only limited satisfaction to the claimants by merely listening to their concerns. In particular problem solving appears to be a relevant model for acknowledging the complaints, yet it does not guarantee that PAPs will receive timely and efficient redress. The World Bank's operational policies and procedures establish obligations that do not entail corresponding rights on third parties as

³⁵⁰ McIntyre and Nanwani, *supra* note 14, p.

³⁵¹ Eisuke Suzuki and Suresh Nanwani. "Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks," *Michigan Journal of International Law* 27, no. 1 (2005): 177-225, p. 183

³⁵² *Idem*.

international law does not directly apply in the context of remedies to private individuals, as discussed under Chapter 2.

In line with this analysis, the internal oversight and control mechanisms established by MDBs, such as the Inspection Panel, do not provide a genuine prospect of redress to the aggrieved. This is mostly caused by the nature of the mechanism itself and related most importantly to two aspects: the initiation of the process, which is conditioned by the voluntary submission of the parties and the termination of the process which results in non-binding recommendations.³⁵³

In practical terms, this means that individuals are left without reparations or compensations and consequently that private parties increasingly attempt to obtain redress before domestic courts of member states. This covertly, opens the complex debate on privileges and immunities of international organizations according to which domestic courts do not have jurisdiction to rule on such cases, unless explicit waiver is provided by the MDBs.

In this context, the state maintains a prominent role in providing relevant channels of redress through its government's involvement in arbitration proceedings on behalf of the individual. But in the context of MDBs, this creates further layers of complexity, reflected in the fact that the state, which in theory acts on behalf of an individual, is itself the borrower and project owner and thus really the source of the complaint.³⁵⁴ It is the responsibility of the Borrower to implement the operational policies of the Bank, which are often very complicated. An emerging challenge is that. MDBs need to invest in resources to be able to provide all technical know-how to Borrowers, especially in the context of baseline studies and other action in the preliminary phase. The Borrowers have additional requirements to fulfil in the form of policies, which can be burdensome, taking into account that the implementer usually has to obtain necessary licenses from domestic authorities based on local regulatory framework. This can be seen by MDBs as a challenge that makes them less competitive.

In addition, the global setting has changes, and today Borrowers have a larger number of diverse alternatives for borrowing money from MDBs. The tight ESS can possibly put the MDBs in an unfavorable position on the market. It is visible that there is a tension between two phenomena:

³⁵³ Rekha Oleschak-Pillai, 'Accountability of International Organizations: An Analysis of the World Bank's Inspection Panel' in Jan Wouters et al (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia, 2010) 401, 406–407.

³⁵⁴ Suzuki and Nanwani, *supra* note 14, p. 200-201.

On the one hand MDBs aim at building relationships with the Borrower and serving them. On the other hand, MDBs work towards assuring the projects they finance respect environmental and social standards, which often are perceived as too strict. This is arguably a reflection of a broader discussion related to what the mandate of the MDBs is and to what degree to they exceed purely monetary/financial activities and reach the domain of human rights. It is important to emphasize that normative frameworks, though sometimes seen as too strict, can be seen as an opportunity to empower Borrowers to increase quality.

Article 10 of the UNDHR states that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligation and of any criminal charge against him, which would include both procedural and substantial right to remedy.³⁵⁵ The internal independent mechanisms that World Bank has developed indeed a step towards greater accountability, however they cannot be seen as the “appropriate modes of settlement” as stipulated in article VIII of the General Convention on the Privileges and Immunities of the United Nations.³⁵⁶ The Panel nor the IRM are not judicial bodies, which means that they cannot interpret the Charter loan or guarantee agreements as well as other instruments in a definite matter and they are not entitled to adjudicate rights and obligations between the Bank and individuals.³⁵⁷ This gap is one of the most obvious obstacles in the quest for effective protections of people affected by projects financed by MDBs, which could possibly be mitigated through the establishment of other avenues for redress such as special tribunals that would address complaints. Nevertheless, so far none of the MDBs has introduced this reform.

Authors have, proposed an arbitration-based accountability mechanism for the Bank that builds upon the third-generation mechanisms. An arbitration model 'would give claimant communities a true voice and remedy' by 'actively involving members of the claimant community in an independent claim resolution mechanism that combines the compliance and problem-solving functions that currently are separately administrated.'³⁵⁸ Both doctrine and practice indicate significant weight has been given to the administrative procedures rather than the ultimate goal of

³⁵⁵ UN General Assembly, "Universal Declaration of Human Rights." United Nations, 217 (III) A, 1948, Paris, art. 1, <http://www.un.org/en/universal-declaration-human-rights/>. Accessed 6 Sept. 2016, Art.18.

³⁵⁶ UN General Assembly, *Privileges and Immunities of The United Nations*, 13 February 1946, A/RES/22, available at: <https://www.refworld.org/docid/3b00f47a1c.html> [accessed 14 August 2020]

³⁵⁷ Johanna Aleria P. Lorenzo, "Development versus Sustainable Development: (Re-)Constructing the International Bank for Sustainable Development," *Vanderbilt Journal of Transnational Law* 51, no. 2 (March 2018): 399-476, 469.

³⁵⁸ Carrasco, *supra* note 107, at 594.

accountability, which is the protection of individuals affected by projects. It is important to remember that the limits of the Banks' power are a function of their Member States common interests, whose promotion those states entrust to them.³⁵⁹ The mandates of the Banks are to promote development and it would consequently mean that they should not exclude the rights of individuals, which accountability mechanism are set to protect.

By establishing the IAMs, both the World Bank and the AfDB have recognized the normative principle that international organizations should be held publicly accountable, which in this case means being compliant with *their own promises* of social and environmental reform.³⁶⁰ The need to bridge the existing gap between the individuals affected by development projects and the international organizations financing such projects has become significantly evident. It is thus natural to state that the practice of IFIs accountability mechanisms, such as the Inspection Panel and the IRM represent an important step towards assuring redress to project-affected people. Nevertheless, these mechanisms has also demonstrated that policy developments and shifts in organizational behavior do not always guarantee a substantive outcome that complainants seek, since evidence shows that tangible results from the Panel's practice have been limited and the related impact ambiguous. Despite the general notions that the existence of a right is not dependent on the possibility of redress, the existence of mechanisms that allow the implementation of rights is crucial for the complainants whose rights are put at risk or violated. This would not only support their organizational effectiveness but would also enhance the trust in MDBs, who through their activities, remain at the forefront of the development of international law.

An increasingly relevant movement, led by the civil society is the pursuit of responsibility of MDBs which entails not only holding the institution accountable but also responsible, usually financially, for damages caused through the violation of policies and procedures. This level seems to be problematic in practice as the question of the source of financial means that would be used for the individuals' redress becomes essential. Authors suggest that the Bank should either be able to provide the necessary financing to the borrower in order to cover the damages, or it should be in a position to compensate individual adversely affected by projects directly. This notion of responsibility is to be understood as a separate avenue from international responsibility and legal

³⁵⁹ Ibid.

³⁶⁰ Jonathan A Fox, 'The World Bank Inspection Panel and the Limits of Accountability' in Jonathan R Pincus and Jeffrey A Winters (eds), *Reinventing the World Bank* (Cornell University Press, 2002) 132.

liability. In order to materialize this idea, a dose of flexibility is required, to which this author has pointed in several occasions. Since MDBs accountability mechanisms do not provide classical legal remedies understood as damages and injunctions the quest for a new approach to redress is increasingly vocal, mostly rooted in the legal and moral duties of MDBs towards local communities.³⁶¹

One of doctrinal suggestions is the establishment of arbitration mechanisms as a means to avoid national courts, which do not have jurisdiction over MDBs due to the privileges and immunities they enjoy. In this context MDBs could establish a way to provide private parties a chance to submit claims through administrative tribunals of MDBs, either by expanding their jurisdiction to these cases or the transformation of such tribunals to deal with these cases upon agreement of parties to the dispute.³⁶² Another view is that the existent practice of problem-solving could be strengthened focusing thus on the needs of PAPs more effectively, including them in the review process and addressing their complaints more effectively and promptly unlike investigation which mostly focuses on the institutions compliance. The acknowledgment of this option is visible in the most recent reform of the World Bank's IAM and its move towards incorporating problem-solving as a means of assuring greater protection of PAPs.

A third option put forward by the doctrine is the establishment of separate functions within the MDBs, Offices or Units which would deal exclusively with claims, through mediation.³⁶³ Similarly to problem-solving, the head of the suggested office or units would receive the complaint, appoint a mediator to try to solve the dispute and if this first step would not be fruitful, PAPs would have the chance to institute arbitration based on the amended Optional Rules for Arbitration between International Organizations and Private Parties, developed by the Permanent Court of Arbitration. In this scenario, PAPs would be able to obtain damages, awarded by the tribunal, assuming the MDBs' willingness to waive immunities.³⁶⁴

³⁶¹ Letter from International Accountability Project to Executive Director Carole Brookins dated 23 June 2003 at <http://www.narmada.org/resources/DanaWBLetter.pdf> (accessed October 1, 2008), p. 3.

³⁶² Eisuke Suzuki and Suresh Nanwani, "Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks", *Michigan Journal of International Law* 27(1) (2005), 224.

³⁶³ Enrique R. Carrasco and Alison K. Guernsey, "The World Bank's Inspection Panel: Promoting True Accountability through Arbitration" *Cornell International Law Journal* (2008), p.41.

³⁶⁴ Suzuki and Nanwani, *supra* note 360 at p. 185.

Finally, the most radical suggestion by the doctrine is for a comprehensive reform of the legal standards on privileges and immunities permitting the piercing the immunities veil of MDBs and allowing for the institution of proceedings before domestic courts.³⁶⁵ The last scenario seems fairly unattainable as it would entail a reassessment of some of the most traditional principles of international law. This however leaves individuals in a loophole which leads the individual, traditionally not subject of international law, but increasingly affected by the conduct of international organizations, vulnerable in the broader arena of international development. In other words, one can go as far as stating that today's international organizations, including MDBs, operate within a regulatory framework created and upheld by themselves. The current context in which the accountability regulations are developed and implemented by the same subject that is to be held accountable, individuals are faced with multiple loopholes, that are often kept unaddressed in a sustainable manner.

The persisting functional imagery of MDBs, entails their claim for far-reaching immunities is often seen as a major obstacle to accountability, especially with regards to adverse effects of development projects they finance. Some authors started arguing that an option to avoid such obstacles would be to treat MDBs as 'corporate-like' actors, especially with regards to non-sovereign activities. This would consequently subsume them to domestic laws in countries where they operate or where they have offices.

Both practice and doctrine have accepted the understanding that international organizations, as subjects of international law, are functionalist, based on the 'principal-agent' paradigm. They are "functional entities, set up to perform specific tasks for the greater good of mankind and, as such, in need of legal protection."³⁶⁶ However, it is clear today it is clearer than ever that MDBs operations do not only deal with Borrower countries but directly reach and affect individuals.³⁶⁷ In the most recent *Jam et al. v. the IFC* case, the IFC's Counsel put forward the argument that restricting immunities to the "IFC and other development institutions" was not beneficial as "[t]he prospect of becoming enmeshed in contentious litigation threatening billions in damages would force IFC to reevaluate its operations and policies to minimize litigation risk—a perspective that

³⁶⁵ Gerhard Thallinger, "Piercing jurisdictional immunity: The possible role of domestic courts in enhancing World Bank accountability," *Vienna Online Journal on International Constitutional Law* Vol. 1,1. (2008), p. 30.

³⁶⁶ Jan Klabbbers, "The EJIL foreword: the transformation of international organizations law", *European Journal of International Law* 26, no.1 (2015):9–82, p.11.

³⁶⁷ Daniel D Bradlow, Multilaterals must earn the right to limited immunity. *Financial Times*. 28 March 2019, <https://www.ft.com/content/2512a-a84-515d-11e9-9c76-bf4a0-ce37d49>. Accessed 1 March 2020

would be inimical to its development mission”³⁶⁸ This argument, however, is constructed on the assumption that MDBS, due to their international mandate from states, operate on a level above the regular legal constraints. However, this assumption is understood today by many authors as a standing challenge to rule of law understood as a tool to assure legal and social justice.³⁶⁹ According to the UN Independent Expert on foreign debt, other financial obligations and human rights, IFIs may be held responsible for complicity under international law, if they influence economic reforms in countries that imply violations of human rights, in the context of sovereign operation.³⁷⁰

Through immunities of MDBs rooted in the argument on functional necessity, these institutions ended up being accountable for human rights to a much less extent than their founding/member states, which delegated specific mandates and functions to them. As a result, the credibility of MDBs was seriously questioned criticized as they continuously “fail to respect their stakeholders’ right of access to an effective remedy.”³⁷¹ In light of this, it is natural to conclude that the doctrine of immunities should be updates in order to assure judicial review and accountability. Authors argue that the hybrid nature of MDBs is the main tool they utilize to bypass external accountability. In other words, MDBs on the one hand, focus on economic mandates and detach themselves from any political considerations and on the other hand, they focus on the link with states, thus avoiding accountability for their operations domestically.³⁷²

³⁶⁸ IFC (2018) Brief for Respondent, Budha Ismail Jam, Et Al., V. International Finance Corporation, On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, 10 September 2018, p.18.

³⁶⁹ Khan I, “Shifting the paradigm: rule of law and the 2030 agenda for sustainable development,” in *Financing and implementing the post-2015 development agenda: the role of law and justice systems*, ed. Fariello F et al, *The World Bank Legal Review*, vol 7. World Bank, Washington D.C., (2017)221–253, p.223

³⁷⁰ United Nations General Assembly, *Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights: Responsibility for complicity of IFIs in human rights violations in the context of retrogressive economic reforms*, A/74/178., 2019.

³⁷¹ Bradlow, supra note 384 at 48.

³⁷² Gamze Erdem Türkelli, "The Best of Both Worlds or the Worst of Both Worlds? Multilateral Development Banks, Immunities and Accountability to Rights-Holders," *Hague Journal on the Rule of Law* 12, no. 2 (2020): 251-8, p.261

7. Conclusion

MDBs play a key role in the broader framework of sustainable development, which has been evolving through time in light of global challenges and needs. Just one year prior to the establishment of the World Bank Inspection Panel, the Rio Conference on Environment and Development took place launching a new international approach to development based on cooperation and rooted in three distinct pillars, namely social inclusiveness, economic growth and the protection of the environment.³⁷³ Principle 10 of the Rio Declaration on Environment and Development openly addressed the relevance of securing protection to people affected by development operations, stating that: *‘[e]ffective access to judicial and administrative proceedings, including redress and remedy, shall be provided’*.³⁷⁴ The institutionalization of IAMs has since established an important channel of direct communication between PAPs and the MDBs decision making structures.³⁷⁵ The evolving nature of MDBs’ IAMs is visible through the multiple reforms they have undergone, including the most recent World Bank’s Environmental and Social Framework.³⁷⁶

In this context, key considerations related to the legal status of MDBs, in particular with regards to their immunities and privileges have to be made. The World Bank’s Inspection Panel and the AfDB’s IRM were established to fill the growing accountability gap between MDBs as international organizations as subjects of international law and individuals. The establishment IAMs was widely commented as “strengthening the role of the individual, pushing forward an element of an international rule of law”³⁷⁷ Some authors argue that the investigative mechanisms established through the IAMs are a direct consequence of immunities enjoyed by MDBs. In other words, as MDBs enjoy immunities, they established IAMs as a response to public quest for greater accountability³⁷⁸. Indeed, many of the topics of vital relevance for people affected by MDB

³⁷³ ‘The Inspection Panel at 15 Years’ (n 16) 4.

³⁷⁴ Rio Declaration on Environment and Development (1992) <http://www.unesco.org/education/pdf/RIO_E.PDF> accessed 10 August 2018

³⁷⁵ ‘The Inspection Panel at 15 Years’ (World Bank, 2009) 5.

³⁷⁶ World Bank, Environmental and Social Framework – Setting Environmental and Social Standards for Investment Project Financing (August 2016), available at: <http://pubdocs.worldbank.org/en/360141554756701078/World-Bank-Environmental-and-Social-Policy-for-Investment-Project-Financing.pdf>

³⁷⁷ P Dann, “The global administrative law of development cooperation,” in *Research handbook on global administrative law*, ed. Cassese (Cheltham: Edward Elgar, 2017) pp 415–435, p.432

³⁷⁸ Benedict Kingsbury, “Global administrative law in the institutional practice of global regulatory governance,” in *The World Bank legal review: law, international financial institutions and global legal governance*, ed. Cissé H et al, vol 3. World Bank, Washington D.C., pp 3–33

operations, were addressed through the regulatory framework governing the MDBs and the IAMs. However, even if the practice of IAMs led to a form practicing legality through procedural certainty, the system itself has not by default resulted in strengthened accountability to affected rights-holders.³⁷⁹

As demonstrated, though these mechanisms provide individuals with a channel to voice their concerns, they do not directly interpret and/or apply international law. They are not adjudicatory bodies and as such are not mandated to establish rights and obligations of plaintiffs.³⁸⁰ Independent accountability mechanisms are not fully judicial in nature as they do not directly serve as a mechanism for achieving full justice and redress for individuals, as they might hope for. However, authors maintain that these models, as quasi-judicial bodies, transpose the right to access to justice (provided for in international instruments) into the operations of MDBs.³⁸¹ Similarly to the grievances mechanisms established by private entities, in line with the Guiding Principles on Business and Human Rights adopted by the Human Rights Council in 2011³⁸², IAMs enable individuals to seek remedy at a relatively early stage, which if addressed adequately can prevent harm from escalating.³⁸³

The present paper analyzed the effectiveness of the World Bank's and AfDB's accountability mechanisms, addressing their institutional set-up and practice. Effectiveness was understood as the extent to which an institution addresses compliance failures by correcting them or, the degree to which it takes into account complaints by persons potentially adversely affected by its projects.³⁸⁴ Criteria for effectiveness include independence of the mechanisms as well as the capacity to provide benefits to affected individuals, echoed usually in the quest for due process. In

The World Bank legal review, volume 3 : international financial institutions and global legal governance (English). The World Bank Legal Review ; Volume 3; Law, justice, and development series Washington, D.C. : World Bank Group. <http://documents.worldbank.org/curated/en/825721468333054677/The-World-Bank-legal-review-volume-3-international-financial-institutions-and-global-legal-governance>

³⁷⁹ Erdem Türkelli, *supra* note 390 at p.274

³⁸⁰ Adam McBeth, *International Economic Actors and Human Rights* (Routledge, 2010), p. 222.

³⁸¹ Mara Tignino, 'Quasi-Judicial Bodies' in Catherine Brolmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar 2016) 242–261.

³⁸² UNHCR 'Guiding Principles on Business and Human Rights: Commentary to Principle 25' (2011) UN Doc HR/PUB/11/04 27m http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. [Accessed 20 January 2017.]

³⁸³ Tignino, *supra* note 67, p. 111.

³⁸⁴ *Ibid*, p.115.

order to be effective in providing a means for redress to people affected by projects, the IAMs are required to maintain a certain level of independence. This is particularly reflected in the context of the independence of experts from management's interference. The paper illustrated in previous chapters, that the Inspection Panel is relatively independent from management and it reports to the Board, as reflected in its governing documents.³⁸⁵

The presented cases have highlighted that the Panel often criticized the work of the Management and has directly provoked, or at least influenced, Management's remedial action in the context of alignment of projects with internal rules and regulations. Similarly, the 2015 Operating Rules and Procedures governing the operations of the Independent Review Mechanisms clearly emphasize the requirement of impartiality and independence of its members.³⁸⁶ However, a systemic issue that limits Inspection Panel's activity is the fact that the Board must approve investigation. This is a political interference in the mechanism and arguably weakens accountability. The role of the Boards of MDBs is important as the outcome of cases are often heavily influenced by their stance. While the Boards' action can at times be influenced significantly by political considerations, thus affecting the outcomes of the review, they also can be key in leading systemic change.

Though there seems to be a strong understanding of the independence requirement, reflected in the rules and procedures, it is important to note that multiple reviews have pointed out to the need to avoid portraying review of projects as review of Borrower's performance.³⁸⁷ In today's legal setting of MDBs, it is clear that States are the main duty-bearers under both domestic and international law. Corporations that take part in development projects financed by MDBs are also subject to laws of the state where the projects are implemented and home state where they are registered. For example, the introduction of the World Bank's Environmental and Social Framework (ESF) has formalized the requirement for consultation with PAPs related to resettlement or the rights of indigenous peoples. However, as visible in the case of the World Bank's ESF, duties were transferred from the Bank onto Borrower's.³⁸⁸

³⁸⁵ Operating Procedures April 2014 (with Annex 2 added in February 2016)' (Inspection Panel at the World Bank) [5(b)] <<http://www.accessfacility.org/file/674>> accessed 18 August 2019

³⁸⁶ AfDB, Independent Review Mechanism: Operating Rules and Procedures, (African Development Bank, January 2015), p. 86, available at: http://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-review/IRM_Operating_Rules_and_Procedures-january_2015_-_En.pdf [accessed 10 August 2018.]

³⁸⁷ *Supra* note 374.

³⁸⁸ World Bank (WB) (2020) Bank Directive: Environmental and Social Directive for Investment Project

The analyses of chapter III and IV have addressed the question of due process in the context of IAMs operations. Due process requires, inter alia, the participation of affected individual, including the right to information, the capacity of the mechanism to issue sanctions for non-compliance. While neither the Inspection Panel nor the Independent Review Mechanism can rule sanctions for non-compliance, both have established rules to engage the requestors/complainants. According to the operating procedures of the Inspection Panel, the assessment of the investigation should include consultations with requestors, as well as local affected communities and civil society.³⁸⁹ It is relevant to note here that the World Bank's management is requested to communicate to the Panel the results of the consultations, after the approval of the Board, with the affected parties on the action plan agreed between the Bank and the Borrower. The process also requires the Panel to contact the requestors to convey the result of the inspection. Indeed, this does not include the right to appeal.³⁹⁰

It is important to note that the Inspection Panel has moved in this direction only relatively recently with the reforms initiated in 2015. The shift in this direction is a prime illustration of the dynamic and evolving nature of the IAMs and their realizations of the need for greater accountability.

As visible in the practice of the World Bank and AfDB, the right to remedies is implemented only in part. Nevertheless, the added value and particular strength of the IAMs rests with the fact that they contribute to enhancing the quality of management of MDBs and thus directly act as pre-emptive mechanisms that facilitate precautions in the project design, resulting in the prevention of possible violations of PAPs rights. Thus, the extent to which the IAMs are effective in protecting the rights of PAPs remains in the domain of prevention, mostly analyzed through institutional management and governance, rather than international justice.³⁹¹

Unlike the World Bank, the AfDB's Operating Rules and Regulation state that, when non-compliance is established, the Compliance Review Panel is required to both recommend remedial changes in the scope and modalities of implementation project as well as to take into account these violation and introduce adjustments in the system and procedures in order for this occurrences to

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³⁸⁹ World Bank Inspection Panel, *Operating Procedures*, 2015, p. 54.

³⁹⁰ *Idem*, p. 54-74.

³⁹¹ Owen McIntyre and Suresh Nanwani, *supra* note 3, at p.17.

be avoided.³⁹² In other words, the AfDB's accountability mechanism requires the management to seriously consider the findings of the IAM thus contributing, arguably, to a greater degree of accountability of the Bank. ³⁹³

As emphasized throughout the paper, the normative framework of MDBs is composed by their operational policies and procedures, which represent the regulatory framework and the backdrop against which IAMs assess Bank's operations. These include diverse social and environmental regulations and requirements for borrowers. Though these documents cannot be qualified as primary source of international law, they act as vehicles to translate human rights concerns of PAPs. Based on the presented analysis, it can be concluded that the relationship between values of international law and operational policies highlight the function of these policies as an enabling mechanism that promotes the World Bank's and AfDB's compliance with international normative standards. In other words, internal regulatory frameworks of the World Bank and the AfDB act as the catalyst for both, the development and implementation of international law by MDBs.

Some of the emerging trends that were identified in this regard confirm this. Firstly, the overall access to IAMs appears to be facilitated through clear rules and there is a tendency to move towards incorporating problem-solving as a technique in the review mechanisms. While the Inspection Panel initially envisioned only the performance of compliance investigation, the AfDB's IAM has expanded the services it provides including problem solving. This resulted in the evolution of IAMs from mere fact-finding mechanisms to mechanism providing recommendations and thus entailing enhanced authority to creating norms which is a characteristic of quasi-judicial entities and their judicialization practice. This trend has led the both the World Bank and the AfDB to address human rights in the context of development, highlighting the relevance of conflict prevention prior to the escalation to investigation.³⁹⁴ It might be useful in this context to strengthen early problem-solving with regards to project grievance mechanism. In addition, monitoring functions, related to follow-up remedial action, were identified as important in the quest of assuring reactivity and accountability of MDBs to the people affected by projects they finance.

³⁹² AfDB, *supra* note 287, at 59(a) and 59(b)].

³⁹³ Tignino, *supra* note 67.

³⁹⁴ Latorre López, Andrés Felipe F, "In Defence of Direct Obligations for Businesses under International Human Rights Law," *Business and Human Rights Journal* 20 (2020): 1-28.

Problem solving appears to be very efficient in assuring remedies to people affected by projects. The main reason is that compliance investigation entails the process to be public and for one party to be accused (the MDB), which often provokes a defensive approach by the MDBs that can have negative consequences on the reputation of the organization. However, the interest of the affected party is mainly to obtain a remedy rather than entering in political. In the case of problem-solving, on the other hand, the process happens behind closed doors and the likelihood of reaching an agreement between parties is higher. The likelihood to find a solution which meets the complainants' needs is higher than in compliance investigation. Nevertheless, not infrequently the two parties agree to solutions that are not in line with the standards. In this context, MDBs could play a more substantial role in assuring mediation agreements meet the minimum standards. We do not have enough data on the numbers of mediation agreements in line with the minimum standards. Hence, if one has a choice to address a complaint in problem-solving with an expected outcome, one should pursue it, prior to resort to compliance review which is lengthy and burdensome process and the likelihood of the complainant to receive redress is perhaps not as high. However, one has to point out to as systemic issue. While on the other hand, the limitation of problem-solving is that remedy will be provided only to the parties of the process, whereas in the compliance review it is everybody affected. Compliance investigation furthermore has the preventive role that is important in the context of MDB's institutional effectiveness, which problem-solving does not have. Overall, it can be concluded that the compliance review acts as an incentive for parties in problem solving to find a solution, in order to avoid the compliance review. We observe basically that the two functions play a complementary role towards greater accountability.

In order to assure accountability in the new, complex circumstances of MDBs operations, which now entail accountability to both shareholders and affected people, the doctrine and practice need to rethink the way legal terms and notions under international law.³⁹⁵

³⁹⁵ José Enrique Alvarez and Chia-Jui Cheng, "International Organizations and the Rule of Law: Challenges Ahead," in *A New International Legal Order: In Commemoration of the Tenth Anniversary of the Xiamen Academy of International Law*, 145-87. Vol. 8. *The Composition of the Curatorium of the Xiamen Academy of International Law*, 2016. p. 155.

A set of legally binding rules regulating conduct of corporations could be introduced, building on the UN Human Rights Council instrument on business and human rights. This would allow for a greater protection of PAPs who could have at their disposal both political and legal channels of redress.³⁹⁶ It is visible that MDBs have avoided to be bound by both domestic and international legal obligations related to human rights. Furthermore, MDBs themselves should develop *“independent legal obligations, since a number of functions are typically delegated to secretariats, panels or subcommittees and are therefore not the direct result of collective State action.”*³⁹⁷ To date, MDBs decisions are only measured against their own internal rules which falls short of enabling human rights protection of PAPs. This setting allows MDBs to enjoy immunities which has a direct opposite effect on PAPs whose human rights are not protected. A solution would be that in exchange for extensive immunities in domestic legal frameworks, MDBs should enact *“veritable alternatives to adjudicate and remedy third party claims against the organization.”*³⁹⁸

MDBs need to strengthen their IAMs as a first step to a comprehensive rethinking of accountability of MDBs and broader IFIs in international law. External accountability cannot be seen anymore as an option, but an essential requirement without which existing global structural inequalities will be reinforced. This in turn will allow us to move a step beyond conceptual analysis of human rights violations and establishing accountability.³⁹⁹ While complainants certainly benefit from the existence of IAMs, effective accountability to PAPs requires that rule of law and access to justice are underpinned by comprehensive legal structures that would encompass a body of rules, including human rights protection, possibly relying on various sources of law (both national and international) and creating real obligations of MDBs. Finally, from a moral point of view, the current extensive immunities enjoyed by MDBs, which largely impede the establishment of MDBs’ legal responsibility for harm caused to people affected by their projects and consequently related redress, seems unjustifiable and practically unsustainable.

³⁹⁶ Daniel Bradlow, Brief of Amicus Curiae Professor Daniel Bradlow In Support of Plaintiffs-Appellants, No. 16-7051, the United States Court of Appeals for the District of Columbia (2016), available at: https://earthrights.org/wp-content/uploads/2016-08-17_amicus_for_appellant_dckt_.pdf

³⁹⁷ Adam McBeth, *International Economic Actors and Human Rights*, (New York: Routledge, 2010), p. 67.

³⁹⁸ Martha RSJ (2011) International financial institutions and claims of private parties: immunity obliges. In: Cissé H et al (eds) *International financial institutions and global legal governance*, the World Bank legal review, vol 3. World Bank, Washington D.C., pp 93–131

³⁹⁹ C. Tan, “Human rights and the Bretton Woods Institutions: Moving beyond institutional remedies,” *Bretton Woods Project, Bretton Woods at 75: a series of critical essays*. Bretton Woods Project, London, pp 12–14, p.14.

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Abstract

Multilateral Development Banks (MDBs) play a leading role in the context of sustainable development, which has evolved through time in light of the emergence of new models of global governance, rooted in principles of multilateral cooperation and the conventional framework of international law. In this setting, the quest for effective mechanisms of accountability of MDBs towards people affected by projects they finance, entrenched in principles of accessibility, efficiency, fairness and transparency became critical. As a response to the growing complexities, MDBs developed independent accountability mechanisms (IAMs); through their quasi-judicial oversight function, IAMs represent an important instrument for the development of international normative standards and the protection of individuals' rights. The present study examines to what extent the established mechanisms of legal accountability in MDBs achieved the protection of rights of individuals affected by their projects. To address this question, the study provides a comparative analysis of the governing regulatory framework and the operational practice of the World Bank's Inspection Panel and the African Development Bank's Internal Review Mechanism. The study highlights key systemic challenges and opportunities that characterize IAMs, which through their existence bridge the gap between the agency of international organizations and the rights of individuals in the context of sustainable development. Finally, the analysis concludes that, despite existing limitations, IAMs have demonstrated to have the potential of leaving a lasting impact on the evolving landscape of international law through the continuous evolution of the normative contributions they make through their existence and practice.

Abstract (German)

Als Reaktion auf die zunehmende Komplexität der Interaktion von Zivilgesellschaft und Multilateralen Entwicklungsbanken (Multilateral Development Banks - MDBs), haben letztere unabhängige Rechenschaftspflichtmechanismen entwickelt (independent accountability mechanisms - IAMs), die den Rechtsschutz von Individuen sicherstellen sollen, die von MDB-finanzierten Projekten direkt betroffen sind. Aufgrund ihrer geradezu gerichtlichen Aufsichtsfunktion stellen diese ein wichtiges Instrument für die Entwicklung normativer internationaler Standards zum Rechtsschutz solcher Einzelpersonen dar. Die vorliegende Studie untersucht, in welchem Maße derartige Mechanismen aufgrund ihrer geradezu gerichtlichen Aufsichtsfunktion die rechtliche Lücke zwischen dem Handlungsspielraum Internationaler Organisationen und Individualrechten im Kontext nachhaltiger Entwicklungszusammenarbeit schliessen. Hierzu wird zunächst eine Vergleichsanalyse der rechtlichen Rahmenbedingungen und deren Umsetzung durch den Untersuchungsausschuss der Weltbank und den internen Überprüfungsmechanismus der Afrikanischen Entwicklungsbank vorgenommen. Es folgt eine Betrachtung der zentralen systemischen Herausforderungen und Chancen, die mit IAMs einhergehen, um abschliessend zu verdeutlichen, dass IAMs anhand ihrer normativen Einflussnahme das Potential haben, das wachsende Feld internationalen Rechts nachhaltig zu beeinflussen.