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LEGAL ACCOUNTABILITY OF INTERNATIONAL FINANCIAL INSTITUTIONS IN FINANCING DEVELOPMENT

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By

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ABSTRACT

This study interrogated the softness and hardness of the law of IFIs to determine the extent to which underlying accountability mechanisms have achieved or failed to achieve the level of accountability and justice expected by affected non-state third parties. It also aimed at investigating the process of financing for development in order to further the understanding of the challenges of holding IFIs to account for the unintended consequences of the projects they have funded. The study critically examined the legal accountability mechanisms of selected IFIs at the institutional, international, and domestic levels to highlight their strengths and weaknesses. The study showed that the robustness, practicability, and comprehensiveness of the standards against which the performance of IFIs is assessed are the determining factors of a better accountability process outcome. An outcome which truly advances the interests of an account holder without diluting his/her/it legally protected rights. However, the legal framework of IFI-operations does not provide the same standard of protections to IFIs, their clients, and affected non-state third parties. While the first two categories of stakeholders seem to enjoy a robust protection, laws and policies have been used sparingly regarding the protection of the last category of stakeholders. The weakness of the standards that apply to affected non-state third parties during the design, appraisal, and implementation of IFI-funded projects does not enhance a prospect of an accountability process outcome which truly advances the interest of this category of stakeholders. The study made some recommendations, including a shift in the focus of existing laws and policies towards a greater protection of the interests of affected non-state third parties. It also recommended the inclusion of community development agreements in the overall project structure to ensuring that affected non-state third parties and other local stakeholders benefit from an IFI-funded project.

Keywords: Legal accountability, accountability of IFIs, accountability of MDBs, law of IFIs, primary rules of IFIs, accountability standards, internal law of IFIs, external law of IFIs, safeguard policies, legal accountability fora, accountability forum, IFIs before domestic courts, IFIs before international jurisdictions, Immunity of IFIs, Independent Review Mechanism (IRM), Compliance Advisor Ombudsman (CAO), Human rights and IFIs, affected communities, legal avenues for project affected people, financial products and services, project finance, IFC, AfDB.

ABBREVIATIONS AND ACRONYMS

AAC: Anglo America Corp. of South Africa Limited

ACBF: African Capacity Building Foundation

ADB: Asian Development Bank

AfDB: African Development Bank

AfDF: African Development Fund

AIP: Access to Information Policy

ALSF: African Legal Support Facility

AMC: IFC Asset Management Company

AMF: American Mineral Fields Inc.

ARIOs: Articles on International Responsibility of International Organisations

BEL: Bujagali Energy Limited

BHP: Bujagali Hydropower Project

BIP: Bujagali Interconnection Project

BITs: Bilateral Investment Treaties

BUA: Bank Unit of Account

BWAA: Bretton Woods Agreements Act

CAF: Corporaión Andina de Fomento (Development Bank of Latin America)

CAO: Compliance Advisor/Ombudsman

CCF: Commission for Control of INTERPOL Files

CDA: Community Development Agreements

CDC: Commonwealth Development Corporation

CDRT: Centre de Développement de la Région de Tensift

CMD: Congo Mineral Development Limited

CMIM: Chaing Mai Initiative Multilateralisation

CODE: Committee on Development Effectiveness

CRMU: Compliance Review and Mediation Unit

DAC: Development Assistance Committee

DFIs: Development Finance Institutions

DTC: Developing and Transition Countries

EBRD: European Bank for Reconstruction and Development

ECR: European Court Reports

EIB-CM: European Investment Bank Complaint Mechanism

EIB: European Investment Bank

ELF: Emergency Liquidity Facility

EO: European Ombudsman

ESA: European Space Agency

ESAP: Environmental and Social Assessment Procedures

ESRP: Environmental and Social Review Procedures

FAPA: Fund for African Private Sector Assistance

FDA: French Development Agency

FDI: Foreign Direct Investment

FSF: Fragile State Facility

GABB: Grupo por Accion de Bio-Bio

GAP: General Assessment Policy

GIZ: Deutsche Gesellschaft für Internationale Zusammenarbeit

HIPC: Heavily Indebted Poor Countries

HQA: Headquarters Agreement

IAD: Internal Audit Vice Presidency

IBRD: International Bank for Reconstruction and Development

ICE: Inventory of Conflict and Environment

ICGL: International Conference on the Great Lakes Region

ICJ: International Court of Justice

ICSID: International Centre for Settlement of Investment Disputes

IDA: International Development Association

IDB: Inter-American Development Bank

IEG: Independent Evaluation Group

IEG: World Bank Group's Independent Evaluation Group

IESIA: Integrated Environmental and Social Impact Assessment

IFC: International Financial Corporation

IFIs: International Financial Institutions

IIC: Inter-American Investment Corporation

IIM: Independent Investigation Mechanism

ILA: International Law Association

ILC: International Law Commission

ILO: International Labour Organisation

IMF: International Monetary Fund

IOIA: US International Organizations Immunities Act of 1945

IOs: International Governmental Organisations

IP: Inspection Panel

IRM: AfDB's Independent Review Mechanism

IRM: EBRD's Independent Recourse Mechanism

ISDA: International Swap and Derivatives Association

ITA6: Sixth International Tin Agreement

ITC: International Tin Council

ITO: International Trade Organisation

IUCN: International Union for Conservation of Nature

Jibar: Johannesburg Interbank Agreed Rate

JPY: Japanese Yen

KfW: Kreditanstalt für Wiederaufbau

KfW: Kreditanstalt für Wiederaufbau

KTM: Kingamyambo Musonoi Tailings SARL

LHDA: Lesotho Highlands Development Authority

LHWP: Lesotho Highlands Water Project

Libor: London Interbank Offered Rate

MATR: Management Tracing Record

MCA: Master Cooperation Agreement

MDA: Master Derivatives Agreement

MDBs: Multilateral Development Banks

MDRI: Multilateral Debt Relief Initiative

MIC TAF: Technical Assistance Fund for Middle-Income Countries

MIC: Middle-Income Countries

MICI: Independent Consultation and Investigation Mechanism

MIGA: Multilateral Investment and Guarantee Agency

MW: megawatts

NAFTA: North American Free Trade Agreement

NEPAD: New Partnership for Africa's Development

NSGLs: Non-Sovereign Guaranteed Loans

ODA: Official Development Aid

OECD: Organisation for Economic Co-operation and Development

OP/P: Operational Policies & Procedures

OS: Operational Safeguards

OSFU: Fragile State Unit

PBG: Policy Based Guarantee

PCGs: Partial Credit Guarantees

PCIJ: Permanent Court of International Justice

PCM: Project Complaint Mechanism

PIDA: Programme for Infrastructure Development in Africa

PPSSES: Policy on Environmental and Social Sustainability and Performance Standards on Social and Environmental Sustainability

PRGs: Partial Risk Guarantees

PSSES: Performance Standards on Social and Environmental Sustainability

RMCs: Regional Member Countries

RMP: Risk Management Products

RPA: Risk Participation Agreement

SCFF: Soft Commodity Finance Facility

SEK: Svensk Exportkredit

SGLs: Sovereign Guaranteed Loans

SLCLs: Synthetic Local Currency Loans

SPV: Special Purpose Vehicle

TFLOC: Trade Finance Line of Credit

TFP: Trade Finance Programme

UA: Unit of Account

UETCL: Uganda Electricity Transmission Company Limited

UK: United Kingdom

UN: United Nations

UNCIO: United Nations Conference on International Organization

UNCITRAL: United Nations Commission on International Trade Law

UNESCO: United Nations Organization for Education, Science, and Culture

WBIP: World Bank's Inspection Panel

WCED: World Commission on Environment and Development

WHO: World Health Organization

ZAR: South African Rand

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CHAPTER ONE
EMERGENCE OF A LEGAL PARADIGM OF ACCOUNTABILITY IN INTERNATIONAL INSTITUTION LAW: THE CASE OF IFIs

1.1. Introduction

Accountability of international organisations (IOs) has been the subject of considerable debate, and concern among various stakeholders, including IOs, member States, academics, civil societies, and communities.[1] These stakeholders have come to realise that IOs have grown considerably in power and influence beyond what their respective founding States allotted to them. That has not been matched with a corresponding rise in the oversight of their operations. Non-state third parties have suffered unintended consequences as a result of the operations of IOs without being able to hold these latter to account. This situation has been compounded by the lack of clarity regarding the accountability regime of IOs. Undoubtedly, the issue of accountability has been at the centre of international debates for almost three decades.[2] Notwithstanding that, it remains difficult to delineate its precise features, precisely because the issue of accountability conveys multiple facets, of which each comprises various components. Addressing the issue of accountability of IOs is certainly a very complex undertaking which, if it ought to be taken seriously, should avoid falling into the trap of oversimplified approaches.

Most ordinarily put, the notion of accountability involves an actor being held to account for its performance.[3] This simple definition raises many questions: Who is the actor whose action or omission is to be scrutinised? Who could demand such a scrutiny? Against what standards the performance of an actor be assessed? What mechanisms and processes should facilitate holding an actor to account? Who should enforce them? What should be the purpose or expected outcome of the whole accountability process? Other questions include: Who should be involved in the decision-making process? How should decisions be taken, and what degree of transparency should be applied? The intent of this research is to inform further the debate on

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[1] A. Reinisch, 'Securing the Accountability of International Organizations', *Global Governance,* vol. 7, No. 2 (Apr.–June 2001), pp. 131-149; G. Hafner, 'Accountability of International Organizations', *American Society of International Law*, Proceedings of the 97th Annual Meeting, (2003) pp. 236-240 ; A. Ladley, 'Peacekeeper abuse, immunity and impunity: the need for effective criminal and civil accountability on international peace operations', *Politics and Ethics Review*, vol. 1, No. 1, (2005) pp. 81-90; Carrasco, E. et al, 'Governance and Accountability: The Regional Development Banks', *Boston University International Law Journal*, vol. 27, No. 1, (2009) pp. 1-60; J. Wouters et al. 'Accountability for Human Rights Violations by International Organisations: Introductory Remarks', in J. Wouters et al. (eds), *Accountability for Human Rights Violations By International Organisations,* Intersentia, (2010); S. Park, 'Designing accountability, international economic organisations and the World Bank's Inspection Panel', *Australian Journal of International Affairs*, vol. 64, No. 1, (2010) pp. 13-36; Martha, R. S. J., 'International Financial Institutions and Claims of Private Parties: Immunity Obliges', in Cissé, H. Bradlow, D. D. & Kingsbury, B. (eds), International Financial Institutions and Global Legal Governance, The Worl Bank Legal Review Vol. 3, The World Bank, (2012); Stephenson, P., 'Twenty years of multi-level governance: 'Where Does It Come From? What Is It? Where Is It Going?'', *Journal of European Public Policy*, vol. 20, No. 6, (2013) pp. 817-837.

[2] S. Park (2010) at 25.

[3] See Black's Law Dictionary Free Online Dictionary 2nd Edition, available at https://thelawdictionary.org/accountability/ , accessed 25 April 2018.

accountability of IOs in general, and International Financial Institutions (IFIs) in particular, towards their stakeholders.

In this thesis, the concept of IFIs is used to refer to inter-governmental entities that provide financial services to their clients or members. It includes multilateral development banks (MDBs) and to some extent the International Monetary Fund (IMF). While there are few mentions of the IMF here and there, the real focus of the thesis remains MDBs.MDBs and the IMF[4] are the most prominent institutions among IFIs.[5] While the latter provides regulatory, financial and technical support to its client States in connection with their monetary and macroeconomic issues, the former provides financial assistance to developing countries in order to promote economic and social development. The IMF operates as a global institution and did not until recently, have regional counterparts.[6] By contrast, MDBs operate either as global or regional institutions.[7]

Since the last few decades, IFIs have expanded their influence over sovereign and public entities, private corporations, communities and individuals within consumer States going beyond the limit explicitly set out in their original Articles of Agreements.[8] The one blatant example of this situation is the expansion of policy advice and conditions attached to the IMF financing. These policies and conditions have covered, in some instances, non-monetary and non-macroeconomic issues — such as good governance, privatisation, legal and judicial reform — on the pretext of the IMF's efforts to address structural issues experienced by some of its consumer States.[9] The same goes for the projects funded by International Bank for

[4] The IMF constitutes a category of its own because of its monetary policy mandate. Originally, it was not designed to be a development institution as compared to MDBs. See V. Bhargava, 'The Role of the International Financial Institutions in Addressing Global Issues', in V. Bhargava (ed.), *Global Issues for* Global Citizens: In An Introduction to Key Development Challenges, IBRD / The World Bank, 2006 at 394.

[5] Export-credit agencies and some development finance institutions and agencies, such as Svensk Exportkredit (SEK), French Development Agency (FDA), Kreditanstalt für Wiederaufbau (KfW) are also considered as IFIs. See The International Finance Corporation, 'International Financial Institutions' available at https://www.ifc.org/wps/wcm/connect/region__ext_content/ifc_external_corporate_site/western+europe/priorities/internationalfinanceinstitutions, accessed accessed 25 April 2018.

6 Following the 20028 financial crisis, some small regional counterparts such as the Chaing Mai Initiative Multilateralisation (CMIM), BRICS contingent reserve arrangement and some entities in Latin America have emerged to foster deeper regional financial and monetary cooperation.

[7] The most influential MDBs are: a) At the global level: the International Bank for Reconstruction and Development (IBRD) and the International Financial Corporation. b) At the regional level, African Development Bank, Asian Development Bank (AfBD), European Bank for Reconstruction and Development (EBRD), Inter-American Development Bank (IDB),

[8] Article IV of the IMF Articles of Agreement and Article 1of the IBRD Article of Agreement. see also NG Woods 'Making the IMF and the World Bank more Accountable' *International Affair (Royal Institute of Internal Affaire 1944-),* vol. 77, No. 1, (2001) pp. 83-100.

[9] The IMF 'The IMF and Good Governance' available at http://www.imf.org/external/np/exr/facts/gov.htm accessed 20 September 2012, see also D. D. Bradlow, 'Stuffing New Wine into Old Bottles: The Troubling Case of the IMF', *Journal of International Banking Regulation,* vol. 3, No. 1, (2001) pp. 9-36; J.H. Williams & R.

Reconstruction and Development (IBRD). Alongside with physical infrastructure projects, IBRD sponsoring increasingly involves both general and sector-specific support programmes whereby borrowers receive quick disbursing general purpose support conditioned upon adoption of certain policy reforms. certain policy reforms. The conditions, which are contractually binding, relate to the adoption of certain institutional or legislative measures intended to adjust the structures within which social and economic policy is made, so that these structures are more conducive of the economic growth.[10]

In the very context of developing countries characterised by poor infrastructure, lack of technical expertise and ineffective public management, the sponsoring of development projects or policies by IFIs should positively affect beneficiary States and their inhabitants. In fact, policies and projects backed by these institutions yield tremendous impacts in developing and least developed countries.[11] Financial services extended by IFIs to these economic regions improve infrastructure, increase opportunities for employment and business for the local population and corporations. Moreover, they facilitate the implementation of social and environmental global commitments that many States cannot easily afford due to the significant cost associated with their implementation. Lastly, financial services provided by IFIs contribute to the awareness of environmental issues in circumstances where such issues would have been disregarded, owing to the high level of social expectations prevailing in developing and least countries.

However, IFI-funded projects and policies do not always have a positive impact on stakeholders. Projects involving the construction of dams or mining facilities or large-scale land acquisition for agricultural development often imply dislocation, loss of livelihoods and threats to the cultural identity of the local population. In some instances, when appropriate safeguards are not taken, they can even compromise health and safety of a whole community.[12]

Ghanadan 'Electricity Reform in Developing and Transition Countries: A Reappraisal', *Energy,* vol. 31, (2006) pp. 815-844; R. Robison & A. Rosser, 'Contesting reform: Indonesia's new order and the IMF', *World* Development, vol. 26, Issue 8, (1998) pp. 1593-1609.

[10] See D. D. Bradlow & C. Grossman, 'Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF', Human Rights Quarterly, vol. 17, No. 7, (1995) pp. 411-442.

[11] See P. Quartey, 'Innovative Ways of Making Aid Effective in Ghana: Tied Aid versus Direct Budgetary Support', *Journal of International Development*, vol. 17, (2005) pp.1077-1092; E. M. Ekanayake, 'The Effect of Foreign Aid on Economic Growth in Developing Countries', *Journal of International Business and Cultural Studies*, (2010) pp.1-14; D. B. Braaten, 'Ambivalent Engagement: Human Rights and Multilateral Development Banks', in S. Park & J. R. Strand, *Global Economic Governance and the Development Practices of the Multilateral Development Banks,* Routledge*, (2015) at 100*; R. N. Nelson, 'Multilateral Development Banks: Overview and Issues for Congress', Congressional Research Service Report, December 2, (2015) at 15.

[12] Instances of cyanide spillage have been reported in the Ahafo project, in Ghana, funded by the IFC. See Bretton Woods Project, 'IFC's Mining Investments: A Black Hole for Human Rights?", in *Bretton Woods* Update, No. 70, March-April 2010, 7. Similarly, in the Zambian Copper-belt, local communities have been exposed to hazardous materials emitted from smelters or released into drinking water as a result of IFI-funded projects. See

The same adverse effects flow from the IFI sponsoring of macroeconomic reforms. When these reforms involve substantial cuts in social spending or privatization of essential services, such as transport or water supply, they can result in denying access to services to vulnerable groups.

The side effects of IFI-funded projects and policies are compounded by embryonic, contentious and sometimes inadequate accountability rules. In general, domestic courts are barred from adjudicating claims against IFIs due to the immunities these organisations enjoy. The Draft Articles on Responsibility of International Organisation[13] adopted by the International Law Commission set out the general rules that govern the issue of international responsibilities brought by and against IOs and States solely. The institutional channels of accountability established so far seem to give uneven opportunities for redress to potential injured third parties as compared to those available to other stakeholders such as member States and contractors. There seems to be no alternative judicial or quasi-judicial avenue for injured non-state third parties to seek redress against IFIs. This situation gives the impression that IFIs can successfully be accountable only to a limited number of stakeholders.

There is a connection between the perceived lack of accountability of IFIs towards certain category of stakeholders and the characterization of the obligations of IFIs as so-called 'legal' (or binding) and 'non-legal' (or non-binding).[14] Like any IO, IFIs are governed by a set of rules that are biding and of which the violation would entail the responsibility and/or liability of the IFI concerned. At the same time, IFIs seem to rely on a set of rules which are non-binding and of which the infringement would not necessary trigger any responsibility or liability on the part of the IFI concerned. This situation is complicated by the lack of clarity in the applicable law. The jurisprudential debate about what constitutes international law of IFIs and how this law is created, is ongoing,[15] while operations of IFIs have expanded beyond direct interactions with states to include complex direct interaction with individual and communities in member states.

From a practical perspective, IFI-financing agreements usually involve two or three parties, namely the lender, in this case IFIs; a borrower, which can be a sovereign or public entity or a combination of the two. A borrower can also be a private entity within the beneficiary State or

S Mwambwa 'Strategy and reality: Impacts of EIB's Projects in Zambia; Case Study of the Mining Industry in Zambia', in *Counter Balance Challenge for the European Investment Bank: Coherence for Development? Development Check of the financing activities of the European Investment Bank*. (Dec. 2008), at 17.

[13] 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) pp. 52-172, [hereafter ARIO (A/66/10)].

[14] For further development on the legal obligations of IFIs see Chapter II.

[15] D. D. Bradlow & D. B. Hunter (eds.), 'Introduction', in D. D. Bradlow & D. B. Hunter, *International Financial Institutions & International Law*, Kluwer law International, (2010) at XXV.

an entity set up as a result of the interaction between the public and private sectors. Another component of this arrangement, particularly where the state is not borrower, is a guarantor. There is no direct connection with non-state third parties, in the first instance. A legal claim for a breach of contractual obligations is, in principle, vested in entities tied to this relationship.

Because there is no apparent connection between non-state third parties and participants to an IFI-financing agreement, the former do not have a direct action against the latter where the implementation of the underlying agreement leads to unintended outcomes or inflicts harms. Also, where room for such a claim exists on the international level, the non-state third parties lack of standing hampers any attempt from this category of plaintiffs to vindicate their complaint before an international adjudicatory body. An attempt to seek redress before a domestic court does not have better chance to succeed due to the immunities from suit and execution vested to these institutions. The complainants' challenge to seek a legal remedy is compounded by the non-justiciability of member States for the non-fulfilment by IFIs of their obligations toward third parties.[16] Put differently, the international law do no provide a norm stipulating that member states are legally liable to third parties for a breach by IFIs of any obligation IFIs could have towards non-state third parties.

The limitations of a non-state third party to have recourse to a legal remedy in the context of an IFI-funded project can be rooted in the Latin maxim *res inter alios acta, aliis nec prodesse nec necere potest*, [a thing done between others can neither harm nor benefit others]. Under the traditional conception of a contract, an agreement between two parties is legally binding for the parties who have voluntarily promised something to each other. It does not involve a third party, in the sense that it confers rights or imposes obligations only to the contracting parties. Of course, this hypothesis applies to contractual arrangements of which the effects solely impact the participants to the contract.

Notwithstanding the above, it is worth keeping in mind that the implementation of IFI-financing agreements sometimes affects the rights of non-state third parties negatively. Taking this factor into account, an aggrieved party should have the right to seek reparation for the injury suffered. If contractual law does not seem to impose a general duty to act affirmatively to benefit a third party, tort law however does impose a duty to repair the injuries caused by a

[16] R. Higgins, 'The Legal Consequences for Member States of The Non-Fulfilment by International Organizations of Their Obligations toward Third Parties', *Institut of International Law – Yearbook*, volume 66-I, (1995), pp. 251 *ff.*

person, though not obliged to act, undertakes to do so, and does it carelessly.[17] From a pure logical stand point, the probable consequences which the contract law regards as the measure of liability for negligent act includes the likelihood that a third party will be injured as well as the likelihood that they will be injured in a certain manner as a result of the implementation of a contract. If, therefore, the courts had been given an opportunity to apply that doctrine with respect to IFI-financing agreements, the question whether the plaintiff was one of those persons to whom the duty of exercising reasonable care was owed by the participants to an IFI-financial agreement, would be decided by the same standard as the question whether there was a causal connexion between the given breach of that duty and the physical changes which constituted the injury in suit. But, the extent to which all the aforementioned legal theories actually offer an opportunity of advancing the interests of non-state third parties and holding IFIs to account needs to be investigated.

However, it would be unfair not to acknowledge the existence of the other stakeholder groups — in particular the internal constituencies that are IFI member states and organisations, represented in the IFIs' governance structures.[18] Moreover, IFIs could be accountable to those non-state actors whom they had entered into contractual arrangements.

Furthermore, since an important criticism of proponents of IFI-accountability to non-state third parties is that it makes it appear as though IFIs have never been accountable to anyone but themselves, whereas their internal stakeholder groups have always had the possibility to demand accountability through the IFIs' governance structures.[19] The extension of IFI-accountability to non-state parties with whom it has no legal relationship, and particularly to project-affected people, is what is at stake here. Furthermore, while some have argued that IFIs' establishment of independent accountability mechanisms has been the starting point of recognition of 'legally-relevant' relationships between individuals and IOs,[20] much tension remains with regard to the conceptual and practical ramifications of formally recognising this relationship and of extending IFI-unrestricted accountability to this category of stakeholder.

[17] See 'Negligence: Privity of Contract: Liability to Stranger for Negligent Performance', *Michigan Law Review*, vol. 21, No. 4 (Feb., 1923), pp. 474-475; C. B. Labatt, 'Negligence in Relation to Privity of Contract', *The Law Quarterly Review,* vol. 16, (1900) pp. 168-190.
[18] A. Reinisch (Apr.–June 2001) at 136.
[19] Ngaire Woods, 'The Challenge of Good Governance for the IMF and the World Bank Themselves', *World Development*, Vol. 28, No. 5, (2000) pp. 823-841.
[20] Ellen Hey, 'The World Bank inspection panel: towards the recognition of a new legally relevant relationship in international law', *Hofstra Law & Policy Symposium,* vol. 2, (1997) at 61.

The legal accountability, in particular, the analysis presented in this thesis underscores this tension.

1.2. Problem Statement

There is a gap in the current accountability regime of IFIs. This regime does not capture all legal avenues available to non-state third parties affected by IFI-sponsored projects and policy-oriented reforms. This situation is compounded by the lack of clarity over the legal framework applicable to IFIs operations. The law of IFIs does not specify which of the participants in programme or project finance transactions would bear the blame where non-state third parties' legal rights or interests were injured. These limitations of the current accountability framework of IFIs have left many project-affected people remediless.

1.3. Research Questions

To understand the issue of accountability of IOs fully, one needs to undertake a disaggregate analysis of the concept, its components and mechanisms associated with each of such components. As the review of selected scholarly works shows, it is not easy to grasp the notion of accountability because this concept can be used in many contexts — including, financial, political, administrative, professional and legal — of which each comprises various mechanisms structured with different levels of technicalities.

This research focuses on one of the components of accountability of IOs; that is, the legal accountability of IFIs, understood here as an assessment of an IFI's conduct against the applicable standard (whether international law, or internal of IFI law or domestic law) and the imposition of a sanction if an IFI fails to live up to the applicable standard.[21] Then, the primary question to be asked is: What does legal accountability of IFIs entail specifically? This question is addressed in part, through the literature review, as an attempt to framing the debate about the legal accountability of IFIs. It is also addressed in the substance of the research as an attempt to analyse the applicable law (from different perspectives including international law, internal law of IFI and domestic law) and the enforcement thereof through an international, internal (such as an independent review mechanism) or a domestic forum, particularly the extent to which positive law helps advance the interest of project affected people. Moreover, the substance of the research discusses a secondary question that arises from the conceptual clarification of legal accountability and the analysis of the positive law: to what extent the

[21] Further development on the legal accountability is provided in the literature review.

enforcement of the applicable law has achieved or failed to achieve the level of accountability and justice that project affected parties would reasonably expect? In addressing this latter question, the thesis underscores the limits of legal accountability mechanisms to provide relief and doing justice to affected parties. The substance of the thesis also shows how the quest for accountability of IFIs would create another contestation for primacy of interests between different stakeholder groups. Indeed, stakeholder groups have different expectations and demands as to what the outcomes of various accountability processes should be, especially where they represent very different interests.

As the review of selected scholarly works shows,[22] studies on accountability usually build on a series of fundamental questions regardless of the context under which they occur. These are accountability by whom, about what, to whom, against what standard, before which forum, and for what purpose. This research builds on this approach to interrogating the softness and hardness of the law[23] of IFIs in order to determine the extent to which underlying accountability mechanisms have achieved or failed to achieve the level of accountability and justice expected by project affected parties. It also relies on the aforesaid approach to investigate how understanding the process of financing for development from both financial and investment perspectives can further the understanding of the challenges of holding IFIs to account for the unintended consequences of the projects they have funded.

1.4. Objective of the Study

The notion of legal accountability of IOs is one of the top issues in contemporary discussions of international lawyers. It grows out from a number of fairly recent situations in the history of public international law, such as the bombing of the Chinese embassy during the North Atlantic Treaty Organisation's intervention in Kosovo,[24] the United Nations (UN) oil-for-food scandal,[25] the allegations of sexual abuses by UN Peacekeepers (in Bosnia and Herzegovina (Bosnia), Rwanda, Somalia, DR Congo, among others; and territorial administration from

[22] See Section 1.7. below for the analysis of scholarly works on the issue of accountability.
[23] Softness and hardness here refer to the extent to which different stakeholders can rely on the law of IFIs to compel compliance effectively or enjoy some leeway.
[24] P. Lee, 'The Bombing of the Chinese Embassy in Belgrade in 1999, Reconsidered', in *Counter Punch*, 25 Mai 2015, available at http://www.counterpunch.org/2015/05/25/the-bombing-of-the-chinese-embassy-in-belgrade-in-1999-reconsidered/, accessed 06 January 2016.
[25] D. Asman, 'Oil-for-Food Scandal Draws Scrutiny to U.N.', in Fox News, 20 September 2016, available at http://www.foxnews.com/story/2004/09/20/oil-for-food-scandal-draws-scrutiny-to-un.html, accessed 06 January 2016.

Cambodia and East Timor),[26] the World Health Organisation scandal over H1N1 pandemic,[27] the allegations of corruption, mismanagement in the Food and Agriculture Organisation,[28] the disastrous social effect of some IFI-policy advice or funded projects and many more similar issues. Just like States, IOs are capable of doing wrong to their counterparts, to their member and non-member States, and even to individuals and other legal persons.

The focus on legal accountability of IFIs is part of this greater debate wishing to fill the gap in the accountability regime that exists toward IOs. This research project aims at contributing to the growing debate over individual/community driven accountability of IFIs for damaging implementation of projects that they have sponsored. It examines the emerging understanding of the issues of liability and responsibility of IFIs. The study tries to bring more accuracy in the widely spread loose conceptualisation of accountability of IFIs. It assesses the prospect and the limit of legal or quasi-legal accountability mechanisms that are available to non-state third parties in the case unintended or harmful consequences supervene as a result of an IFI-funded project.

This research wishes to shed more light on the capacity of the current international legal order to subject subjects other than just States to proper accountability processes and mechanisms. In particular, the issue of accountability as applied to the MDBs and the IMFs receive attention, yet not all other possible actors in the public financial sector such as export credit agencies and bilateral development agencies could be included within the confines of this research.

The paradigm of accountability against which the acts and omissions of the selected IFIs is assessed is the legal one. Nonetheless, references to other forms of accountability are made with a view to clarifying the issue at hand.

This research is not limited to a sectorial type of IFIs' operations as the distinction between public and non-state projects, or that between global and regional IFIs, is irrelevant in the qualification of the harm suffered by project third parties. The existence of an infringed legal interest is not contingent on the public or non-state character of the project or the global or regional character of the IFI involved, as far as project affected parties are concerned. The aforesaid distinction becomes relevant only with respect to the standards against which the

[26] R. S. Burke, *Sexual Exploitation and Abuse by UN Military Contingents: Moving Beyond the Current Status Quo and Responsibility under International Law*, Martinus Nijhoff Publishers, (2014).
[27] D. Cohen & P. Carter, 'WHO and the pandemic flu "conspiracies"', *The British Medical Journal*, vol. 340, (June 2010) pp. 1274-1279.
[28] P. A. Volcker et al., 'Interim Report of the Independent Inquiry Committee into the United Nations Oil-For-Food Programme', The Independent Inquiry Committee, February 3, (2005).

performance of an IFI is to be assessed and the forum of accountability, but it has no bearing on the identification of project affected people. The thesis explores both non-state and public operations of IFIs. However, the investigations are focused on the projects and policy-oriented reforms financed by the AfDB and the IFC as much of the existing scholarly works address the issue of accountability at the two biggest IFIs namely, the World Bank and the IMF. No additional limitation is applied apart from that regarding the categorization of IFIs as indicated in the introductory remarks of this chapter.

1.5. Methodology of the Study

To achieve the proposed objectives, this research adopts a comprehensive library-based study involving historical, comparative and critical analysis of primary and secondary literature relevant to the topic.

This research examines the conceptual framework of accountability to understand its exact meaning. It delves into different contexts where the concept of accountability has been used before it emerges as a legal phenomenon. The purpose of this analysis is to discern the fundamental pattern that emerges from prior studies to inform the examination of legal accountability of IFIs.

This research analyses the factors that led to the establishment of selected IFIs, namely the IFC and the AfDB. It provides a disaggregated analysis of their operations and circumstances that may give rise to a legal accountability claim. The research looks at the legal order of selected IFIs to unveil the source of their legal obligations in their relationship with the external world such as non-state third parties. As a result, the research analyses internal and external laws of selected IFIs. In particular, the research critically analyses the constituent instruments of IFIs and the decisions adopted by these organisations to regulate their internal legal order. The analysis of the secondary literature at this point is an interesting vehicle to practical constraints that cannot be easily identified through the analysis of the primary materials. To have a complete picture of the legal framework of IFIs, the research also takes into account their external law. This involves the examination of primary and secondary materials that are relevant to IFIs in their relationship with States and non-state parties. Financial agreements defining the rights and duties of the parties, customary, general principles and domestic laws relevant to IFIs and their operations are some of the things that are examined.

Although attempts to interact with staff of the selected IFIs were unsuccessful, there are many electronic publications from staff members and other interested parties that were involved in the operations of selected organisations. There were no formal interviews with or questionnaires to affected non-state parties, but rather, reliance on reports and papers summarising the unintended and harmful impacts that resulted from projects and programmes supported by IFIs. Some of these issues led to formal complaints against IFIs or the vehicle company through which the concerned IFIs channelled their funds. The analysed materials provided a useful account of the constraints experienced in enforcing the rights of non-state third parties. Those materials have also contributed to a better understanding of the practical context in which the law of IFIs is applied. Moreover, the examined materials have also contributed to identifying and understanding the possible advantages and disadvantages of adopting some of the various paradigms of legal accountability discussed in this research.

The critiques proposed in this research aim at two main things: firstly, to identify deficiencies in the current regime and, secondly, to consider the arguments for and against various possible alternative approaches that might be adopted. The critiques were drafted based on the primary materials and the academic literature addressing issues ranging from liability and responsibility to accountability in both the public and the non-state sectors. These critiques also refer to existing experiences in the national and international systems that can illustrate the specific problems addressed in each Chapter. The solutions adopted by existing literature for the different mechanisms of legal accountability, and the reasons behind them, were also considered where they embodied some potential opportunities to advance the interests of affected third parties. The value of those options was considered, taking into account the particular context of both the IFC and AfDB legal framework.

Notwithstanding the above, the methodological approach adopted in the critiques does not use a predefined set of standards. In order words, it is not the aim of this research to establish a predefined framework and assess the paradigm of legal accountability used by IFIs against it. Instead, the research examines several models found in the accountability literature, the combination of which could achieve a level of accountability and justice expected by affected individuals and communities. Consequently, the internal review mechanisms adopted by IFIs are used as a component of a wider system rather than accepted benchmarks. The choice of other materials that are used to elucidate the analyses provided in this research has been a careful one. Five main accountability fora provided important case laws that contribute to shaping the analysis undertaken in this work; namely, the domestic courts in US and EU,

international arbitration tribunal constituted under ICSID and UNCITRAL rules, independent review mechanisms of selected IFIs, regional human rights courts and the international court of justice.

Lastly, the thesis relies on case studies to help underscore the practical aspects of some of the analyses developed throughout the thesis. Each case study involves either public or non-state operations of selected or the both. Overall, the case studies show that the legal framework of IFI-operations does not provide the same standard of protections to IFIs, their clients, and project affected people. While the first two categories of stakeholders seem to enjoy a robust protection, law and policies have been used sparingly concerning the protection of the last category of stakeholders.

1.6. Literature Review

Existing literature relevant to the proposed research has largely taken political, institutional and social approaches to the issue of accountability. Those that have taken a legal approach have extensively analysed the issue of accountability irrespective of the type of IOs whose actions and omissions were scrutinised. Writings centred on IFIs and more specifically on MDBs have confined their analysis to the institutional approach that places greater emphasis on securing compliance with directions and requirements that IFIs have laid down in their respective internal policies. This approach is not satisfactory to my view because it has failed to consider other equally important accountability standards that apply to IFIs and their operations such as the financial agreements concluded by IFIs, domestic regulations of the State where the IFI-funded project is being implemented to name a few.[29] The institutional approach to the issue of accountability of IFIs towards project affected parties assesses the performance of IFIs against a single set of accountability standards essentially, the safeguard policies. It disregards the other accountability standards that apply to IFIs and their operations and the fact that the assessment of IFIs' performance against these latter can help advancing the interests of project affected parties. The institutional approach of accountability advocates a less adversarial process[30] for addressing the harmful impacts non-state third parties have suffered as a result of the implementation of IFI-funded projects. This process obscures the ultimate purpose[31] of accountability of IFIs which is to strengthen and support the ability of IFIs to achieve their mission to promote economic and social development. The institutional approach of

[29] For further analysis of accountability standards against which the performance of IFIs can be assessed, see Chapter 3.
[30] This issue is further developed in Section 4.3.
[31] For further development on the ultimate purpose of accountability of IFIs see Chapter 5.

accountability also overlooks the potential for other mechanisms to provide remedies for and do justice to this category of plaintiffs.

The major trend that emerges from the literature is that accountability is a very broad concept that has yet to acquire a clear meaning in international law. Earlier writers stressed out the non-judiciary nature of internal mechanisms IFIs have established to address the side effects of IFI-funded projects towards non-state third parties. By contrast, today's scholars endeavour, sometimes too much, in identifying them to a quasi-judicial oversight mechanism that resembles the administrative or constitutionality review at the domestic level.

The originality of this research lies in the incorporation of aspects of liability and responsibility of IOs through the study of accountability of IFIs. It also stands for the fact that the research advocates the use of additional mechanisms of accountability to increase the chance of non-state third parties to obtain remedy. Another difference between this research and those previously done is that this study attempts to narrow down the issue of accountability to its legal facet. The study refers to other forms of accountability including financial, administrative and political to inform the analysis of the legal accountability facet. Furthermore, this research intends to explore the extent to which the legal paradigm of accountability of IOs would operate within the context of IFIs and the potential limits such a model may have.

Given that accountability can be used in many contexts including, financial, political, administrative, professional and legal, it seems appropriate to start this review with its meaning in other academic fields before analysing its meaning in international law as well as its application to IFI-funded operations. The paradigm of legal accountability that emerges from legal writings has not been developed in a vacuum. It is, in my view, a result of the emulation of non-legal paradigms of accountability, mainly the political and administrative paradigms of accountability.[32] The framing of the studies of the World Bank Inspection Panel (WBIP), the first mechanism of this kind to have ever been developed by an IFI, evidence that emulation.[33] A 2009 Report commissioned by the WBIP argued the following with the respect to the issue of how to frame a study of the WBIP as an accountability mechanism: "experience and studies over the years indicate that 'accountability' needs to be understood in context, and certain questions need to be answered to understand its meaning in a particular setting. These questions

[32] See R. W. Grant & R. O. Keohane 'Accountability and Abuses of Power in World Politics', *American Political Science Review,* vol. 99, No 1 (Feb. 2005) pp. 29-43.
[33] See, The Inspection Panel, 'Accountability at the World Bank: The Inspection Panel 10 Years on', The World Bank, (2003); The Inspection Panel, 'Accountability at The World Bank: The Inspection Panel at 15 Years', the World Bank (2009).

include accountability by whom, to whom, against what standard, and for what purpose."[34] This framing of the study of WBIP resembles much the structure that political and public administration scholars have been using to addressing the issue of accountability in their respective fields.[35] An analysis of accountability paradigms which have influenced the conceptualisation of the legal facet of accountability could further the understanding of the latter. Another parameter is that such an analysis could help showcase the level of sophistication other disciplines but law has reached in the conceptualisation of accountability and the similar efforts that begin to take place in law.

1.6.1. Accountability: A Multidisciplinary Concept

In general, one erroneously mirrors the concept accountability to that of responsibility. Others languages, such as French, Spanish, German, Portuguese or Dutch, have no exact equivalent and, by way of consequence, do not semantically distinguish accountability from responsibility.[36] The standard English definition of accountability is also blurred. The Oxford Dictionary of English, for instance, refers to it as the condition of being required or expected to justify one's action or decision, the fact of being (held) responsible.[37] This unveils a need to clarify the ambiguous application of the term accountability before analysing its legal meaning; and yet some have flagged the warning sign: accountability is at the least complementary to responsibility and undoubtedly not equivalent to it.[38]

Joseph Stiglitz analysed the issue of accountability in his study on accountability and governance in the main global financial institutions.[39] This author regards accountability as a condition of being given certain objectives tied up with a reliable way of assessing the performance, whether these objectives are met or not, and drawing a consequence. However, Stiglitz acknowledges that this definition mirrors the political concept of accountability. He then went on to say that, from an economic perspective, political accountability corresponds

[34] The Inspection Panel (2009) at 6.
[35] B. S. Romzek & M. J. Dubnick, 'Accountability in Public sector: Lessons from Challenger Tragedy', *Public Administration Review* vol. 47 No 3, (1987) p. 229; J. Uhr, 'Redesigning Accountability: From Muddles to Maps', *The Australian Quarterly*, vol. 65, No. 2, (Winter 1993) at 3-5; R.Mulgan 'Accountability: An Ever-Expanding Concept?' *Public Administration* vol 78 (2000) p. 566; R. W. Grant & R. O. Keohane (Feb. 2005) pp. 29-43.
[36] M. J. Dubnick, 'Clarifying Accountability: An Ethical Frameork', in C. Sampford et al. (eds), *Public Sector Ethics: Finding and Implementing Values,* Routledge/Leichardt, (1998) at. 69-72
[37] The Oxford Dictionary of English third edition 2010 at 11.
[38] I. Thynne & J. Goldring 'Government "Responsibility" and Responsible Government', *Politics* vol. 16 Issue 2 (1981) pp. 197-207; J. Uhr, 'Redesigning Accountability: From Muddles to Maps', *The Australian Quarterly,* vol. 65, No. 2, (Winter 1993) pp. 3-5.
[39] J. E. Stiglitz ,'Democratizing the International Monetary Fund and the World Bank: governance and Accountability', *Governance an International Journal of Policy, Administration, and Institution,* vol. 16, No 1, (January 2003) 111–139.

closely to the economic notion of incentive.[40] This author does not provide any further clarifications as to why political accountability should be associated with the economists' concept of incentives. A fairly contemporaneous study envisage financial accountability as the mechanisms that aim at managing accounting-related performance, financial and non-financial matters that are associated with revenue raising, budgetary and appropriation processes, expenditure reporting, financial management and statements, annual reports, audit, and review.[41]

Conversely, the political idea of accountability is rooted in the English system of local administration governance which −as shown in James Givens' comparative study of two local societies which come under foreign rule in the 13th century: Gwynedd and Languedoc, respectively ruled by the English and the French monarchy− was characterised by a great decentralisation of power at the local level mixed with a strong mechanism making the power holders responsive to their citizens.[42]

Contemporary political scholarly works refer to political accountability as a mechanism that is exercised, as a result of the delegation of power, either along the chain of principal-agent relationship[43] or throughout a trustee-beneficiary relationship.[44] However, the difference between political scholars lies in the manner each school of thought operationalises the accountability mechanism. Some scholars suggest that political accountability should include various methods that aim at imposing *control* over public institutions and officials.[45] Others opine that political accountability should also involve the notion of *responsiveness* as it refers to the aim of making public agencies and officials compliant with the preference of the

[40] J. E. Stiglitz (January 2003) at 111.
[41] L. D. Parker & J. Guthrie, 'The Australian Public Sector in the 1990s: New Accountability Regimes in Motion', *Journal of International Accounting Auditing & Taxation*, Vol. 2, No. 1, (1993) pp. 59- 81; Th. Ahrens, 'Style of Accountability', *Accounting, Organizations and Society,* vol. 21, No. 2/3, (1996) pp. 139-173; G. D. Carnegie & B. P. West, 'Making accounting accountable in the public sector' *Critical Perspectives on Accounting* vol. 16 (2005) pp. 905–928.
[42] J. B. Given, *State and Society in Medieval Europe: Gwynedd and Languedoc under Outside Rule* Cornell University Press (1990) p. 42.
[43] P. Day & R. Klein *Accountabilities: Five Public Services* Tavistock Publications (1987) Chap.1; K. Strom, 'Democracy, Accountability, and Coalition Bargaining', *European Journal of Political Research,* vol. 31, (1997) pp. 47-62; K. Strom 'Delegation and accountability in Parliamentary Democracies' *European Journal of Political Research* vol 37 (2000) pp. 261-289; S. Mainwaring, 'Introduction: Democratic Accountability in Latin America', in Sc. Mainwarning & C. Welna (eds), *Democratic Accountability in Latin America,* Oxford University Press, (2003) p. 7.
[44] The proponents of this variant of delegation model argue that R. W. Grant & R. O. Keohane (Feb. 2005) pp. 29-43.
[45] L. L. Jaffe, 'An Essai on Delegation of Legislative Power: I', *Columbia Law Review,* vol. 47, No. 03, (1947) pp. 366 -376; C. McGowan, 'Congress, Court, and Control of Delegated Power' Columbia Law Review, Vol. 77, No. 8 (1977), pp. 1119-1174; R Gregory, 'Parliamentary Control and the Use of English', *Parliamentary Affairs,* vol. 43, issue 1, (1990) pp. 59-76; A. Adserà et al., 'Are you Being Severed? Political Accountability and Quality of Government', *The Journal of Law, Economic, and Organization,* vol. 19, No. 2, (2003) pp.445- 490.

people.[46] Furthermore, existing literature highlights the notion of *answerability*, the obligation of public agencies and officials to disclose and explain what they are doing.[47] Notwithstanding the above, the one common feature that emerges from these selected applications of the concept of political accountability is that they all attach great importance to aspects of judgment or drawing consequences through the mechanism in place. In other words, they insist on the capacity of accounting agencies to rewarding good and punishing bad behaviour.[48]

Alternatively, administrative accountability (also referred to as hierarchical or bureaucratic accountability) involves the methods by which public institutions and their personnel manage the multiple expectations generated within and outside the organisation.[49] On this point, Mulgan argues that the distinction between the internal and external source of accountability is insignificant because, from the particular official's perspective, all accountability involve an extraneous element, in particular, the control from someone other than the officials whose performance is under scrutiny.[50] Existing literature distinguishes hierarchical accountability from the bureaucratic one. While the former occurs along the chain of supervisor-subordinate relationship and thus confining the process of calling to account within the limits of the 'chain of command',[51] bureaucratic accountability (sometimes referred to as managerial accountability) [52] focuses the attention 'on the priorities of those at the top of the bureaucracies hierarchy'.[53]

Moreover, accountability can be envisaged in a professional context. This approach refers to the instance where administrators or officials perceive a duty to materialise the agreed

[46] M. J. Dubnick (1998) p. 77; B. S. Romzek & M. J. Dubnick (1987) p. 229; R.Mulgan (2000) p. 566.
[47] P. Day & R. Klein (1987) p.5; A. Schedler, 'Conceptualizing Accountability', in A. Schedler et al. (eds), *The Self-Restraining State: Power and Accountability in New Democracies,* Lynne Rienner Publishers, (1999) p. 13.
[48] J. D. Fearon, 'Electoral Accountability and the Control of Politicians: Selecting Good versus Sanctioning poor Performance', in A. Przeworski, S. C. Stokes & B. Manin (eds), *Democracy, Accountability and Representation,* Cambridge University Press, (1999) at. 44; G. O'Donnell 'Horizontal Accountability and New Polyarchies', in A. Schedler, L. Diamond & M. F. Plattners (eds), *The Self-Restraining State: Power and Accountability in New Democracies,* Lynne Rienner Publishers, (1999) p 38; P. C. Shmitter, 'The Ambiguous Virtue of Accountability', *Journal of Democracy*, vol. 15, No. 4,(Oct. 2004) pp. 47-60.
[49] B. S. Romzek & M. J. Dubnick (1987) p. 228.
[50] R.Mulgan (2000) p. 559.
[51] M Bovens (2007) p. 458.
[52] See P. Day & R. Klein (1987) p. 27; B. Jantz & W. Jann, 'Mapping Accountability Changes in Labour Market Administrations: From Concentrated to shared Accountability?', *International Review of Administrative Sciences,* vol. 79, Issue 2, (2013) p. 231. However, Sinclair opines that the two approaches, in particular administrative and managerial accountabilities, are not equivalent. While the latter is concerned with monitoring inputs and outcomes, the former focuses on monitoring the process by which inputs is transformed. See A. Sinclair 'Chameleon of Accountability: Forms and Discourses' *Accounting, Organizations and Society*, vol.20, No. 2/3, (1995) p. 227.
[53] B. S. Romzek & M. J. Dubnick (1987) p. 228.

standards of performance within their profession or that of specific expert groups.[54] Contrary to administrative accountability which is based on a superior-subordinate relationship, professional accountability is built upon a relationship parallel to that existing between a layperson (here taking the role of agency manager) and an expert (the workers, of whom expertise is needed to perform the work rested). In this type of accountability, the experts, employees or officials are granted appropriate discretion to get the job done, and their performances are mainly assessed by professional associations and disciplinary tribunals.[55]

Another approach developed in literature is legal accountability. To put it fairly, this refers to the processes of legal nature involving the assessment of an agent's actions against formal rules and, if the circumstances so require, the assertion of a legal obligation or imposition of a sanction by the controlling party.[56] Mulgan notes that compliance with the law is not an act of accountability *per se*, neither is the law itself a mechanism of accountability.[57] Considering the core sense of 'external scrutiny', this author observes that legal accountability mechanism is restricted to that aspect of the law which establishes enforcement procedures. Thus, mechanisms aiming at controlling or constraining power wielders, such as constitutional constraints, legal, or regulatory limits of freedom of action, do not qualify as accountability instrument insofar as they are restricted to control the behaviour of power holders but not to hold them to account.[58]

Scholarly works suggest that legal accountability may be of judicial or quasi-judicial nature and encompass different types of mechanisms including a review of administration decisions, civil liability, and criminal liability.[59] For many commentators, however, this paradigm rests

[54] See B. S. Romzek & M. J. Dubnick (1987) p. 229, A Sinclair (1995) p. 223, and R. Mulgan (2000) pp. 558-560.
[55] B. S. Romzek & M. J. Dubnick (1987) p. 228-229; M. Bovens (Jul.2007) p.456.
[56] B. S. Romzek & M. J. Dubnick (1987) at 229, R. W. Grant & R. O. Keohane (2005) pp. 36-37.
[57] R.Mulgan (2000) pp.563- 564.
[58] The idea here is that under the realm of accountability, there are instruments that aim at constraining the powers of power wielders without necessarily enabling another party to hold the former to account legally. There are also instruments that are designed in a way enabling another party to hold power wielders to account legally. There are also instruments that are designed to hold power wielders to account legally. To borrow the words of Mulgan, "Public official usually have full knowledge of these legal constraints and frame their policies and decisions so that they stay within the limits imposed upon them. For the most part, their compliance is unquestioning and unquestioned and issues of formal accountability do not arise."R.Mulgan (2000) p.564. That does not mean that an instrument which does not fall under the category of legal accountability does not qualify as one or many of the other facets of accountability.
[59]E. J. Haughey 'The Liability of Administrative Authorities' a research paper for the Public and Administrative Law Reform Committee *Legal Research Foundation* (1975) pp. 1-29 available at http://132.181.2.68/Data/Library4/law_reports/pubad_201213.pdf accessed 10 October 2013, R. Mulgan 'Contracting out and Accountability' *Graduate Public Policy Program* Australian National University Discussion Paper No 51 (1997) pp.13-16, C. Scott, 'Accountability in the Regulatory State', *Journal of Law and Society* Vol. 27 No. 1 (2000) pp. 38-60, M. E. Gilman, 'Legal Accountability in an Era of Privatized Welfare', *California Law Review,* vol. 89, No. 3, (2001) pp. 569-642, W. W. Burke-White 'The International Criminal Court and The Future

the most ambiguous type of accountability. The concept has not acquired a clear legal meaning and, as far as legal conceptualization is concerned, it is believed to be foreign to common law and other systems of law alike.[60] That contrasts with the growing importance modern institutions and societies attach to this issue. Indeed, scholars note that the public tends to place greater trust in court than in parliament, although legal accountability plays a supplementary role to its political counterpart.[61] Like other paradigms of accountability, legal accountability has its limits with respect to legal remedies.[62] Most notably, the prospect that one would face unwelcome legal consequences of his actions makes this paradigm unattractive to any rational being as well as to any institution.[63] Yet, legal accountability is an important component of an effective accountability system.

1.6.2. Constructing Legal Accountability in International Law

Accountability has become an important issue in international law since the last decade of the twentieth century. Scholars, practitioners and NGOs have documented this issue, mostly with reference to side effects of IFI-funded projects and UN peacekeeping operations, without coming up, suffice it at a theoretical level, with a clear definition as to what precisely this concept entails in international law. The most important attempt in this respect was made by the International Law Association (ILA) in its works on accountability of IOs. Although the ILA *ad hoc* committee does not provide a definition of the concept accountability, it nonetheless identifies the problem and gives an interesting starting point to a study of its legal framework.

The ILA *ad hoc* committee envisions the issue of accountability as a normal fact of the international legal system in general, and that of IOs in particular. Specifically, the ILA *ad hoc* committee notes that accountability is a multifaceted phenomenon that constituency of the international community can arise following a three-layered model:

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of Legal Accountability' *ILSA Journal of International & Comparative Law* vol. 10 (2003) pp. 195-204, R. O. Keohane 'Exploring the Governance Agenda of Corporate Responsibility Complex Accountability and Power in Global Governance: Issues for Global Business', *Corporate Governance,* vol. 8, No. 4, (2008) pp. 361-367.

[60] G. Hafner, 'Accountability of International Organizations', *American Society of International Law*, Proceedings of the 97th Annual Meeting, (2003) p. 236, Bovens (Jul.2007) p.456,

[61] C. Harlow and R. Rawlings, 'Promoting Accountability in Multi-Level Governance: A Network Approach' European Governance Papers, No C-06-02 (2006) p. 8, available at http://www.ihs.ac.at/publications/lib/ep9.pdf accessed 10 October 2013, C. O'Cinneide 'Legal Accountability and Social Justice' in N. Bamforth & P. Leyland (eds) *Accountability in Contemporary Constitutions* Oxford University Press (2012), M Bovens (2007) p. 456.

[62] C. Harlow & R. Rawlings, *Law and Administration* 3th ed., Cambridge University Press, (2009) Ch. 1.

[63] J. Gardner 'The Mark of Responsibility' *Oxford Journal of Legal Studies,* vol. 23, No. 2 ,(2003) p. 161; W. G. Werner, 'Responding to the Undesired: State Responsibility, Mismanagement and Precaution' *Netherland Yearbook of International Law*, vol. 36, (2005) pp. 57-82.

> [The first level refers to] the extent to which international Organisations, in the fulfilment of their functions as established in their constituent instruments, are and should be subject to, or should exercise, forms of internal and external scrutiny and monitoring, irrespective of potential and subsequent liability and/or responsibility;
>
> [The second level covers] tortious liability for injurious consequences arising out of acts or omissions not involving a breach of any rule of international and/or institutional law (e.g. environmental damage as a result of lawful nuclear or space activities);
>
> [The third level relates to] responsibility arising out of acts or omissions which do constitute a breach of a rule of international and/or institutional law (e.g. violations of human rights or humanitarian law, breach of contract, gross negligence, or as far as institutional law is concerned acts of organs which are ultra vires or violate the law of employment relations).[64]

The ILA *ad hoc* committee opines that accountability of IOs encompasses a dual regime. On the one hand, a legal regime that covers legal norms and remedies applicable to the activities of an IO, which have or may affect legal rights or interests of the constituency entitled to claim accountability against the organisation.[65] On the other hand, accountability consists of non-legal regime including political, administrative and financial modes of internal and external scrutiny and monitoring of an IO's acts and omissions. Then, referring to the above mentioned three-layered framework of accountability, non-legal mechanisms correspond to the first level of accountability as it refers to standards of good behaviour IOs should abide by.[66] By contrast, the second and third levels of accountability would be regarded as legal mechanisms of accountability.[67] They resemble the classical notion of liability and responsibility as discussed by the International Law Commission of United Nations (ILC) in its works related to international responsibility.[68]

The ILA *ad hoc* committee is of the view that compliance with the letter and spirit of the constituent instrument of an IO does not prevent an act of an IO to be wrongful under

[64] International Law Association Final Report of the Commission on Accountability of International Organization (2004) p. 5.
[65] ILA final report (2004) pp.18-35. The ILA lists as follows the constituency of the international community: "intergovernmental Organisations, including their staff, member States of intergovernmental Organisations, non-members of intergovernmental Organisations, supervisory organs within intergovernmental Organisations, domestic and international courts and tribunals, supervisory and monitoring organs within domestic systems (e.g. parliaments) and non-governmental Organisations working on both the national and international level, and private parties (both legal and natural persons)", ILA final report (2004) p.5.
[66] ILA final report (2004) pp. 8-17.
[67] Idem, at 18-50.
[68] See Articles 1 & 2, Draft Articles on Responsibility of States for Internationally Wrongful Acts, *Report of the International Law Commission on the Work of Its Fifty-third Session*, UN GAOR 56th Sess. Supp. No 10, p. 43, UN Doc. A/56/10 (2001); Articles 1 & 3, Draft Article on the draft articles on the Responsibility of International Organizations, *Report of the International Law Commission on the Work of Its* Sixty-third *Session,* UN GAOR 66th Sess. Supp. No 10 UN Doc. A/66/10 (2011), International Liability for Injurious Consequences Arising out of Acts Not Prohibited By International Law, *Report of the International Law Commission on the Work of Its* Fifty-fifth *Session,* UN GAOR 58th Sess. Supp. No 10 UN Doc. A/58/10 (2003) p. 106, para. 162.

international law as a result of its non-conformity with other applicable rules of international law. In essence,

> IO-s may incur international legal responsibility if the exercise of their powers is not in compliance with general principles of law, such as the principles of good faith, unjust enrichment, estoppel, equality, non-discrimination, proportionality and fair hearing;
> IO-s may incur international legal responsibility if their use of force and their imposition of economic coercive measures are not in conformity with relevant rules of international law, and in particular the humanitarian law principles of proportionality and necessity;
> IO-s may incur international legal responsibility if the exercise of discretionary powers entails a sufficiently serious breach of a superior rule of law such as the right to life, food and medicine of the individual or guarantees for due process of law;
> IO-s may incur international legal responsibility if their activities infringe the rights of third parties, and the Organisation has failed to take all precautionary measures as required by international law in order to avoid such injury.[69]

The ILA *ad hoc* committee asserts that legal accountability of IOs can arise out of a contractual or tortious act or omission of an IO, or an IO's wrongful act under international law. In this respect, the ILA *ad hoc* committee indicates that there is no general principle that the exhaustion of local remedy rule is automatically applicable to third party claims against IOs. Disputes arising out of a contract between non-state parties and IOs should be settled by an independent body such as an arbitral tribunal set up either as a permanent jurisdiction or in pursuance of an ad hoc clause. Such body can also be a tribunal set up by an IO or a national judicial body if that is compatible with the status and functions of the IO.[70] By contrast, non-state claimants who have sustained damage as a result of operational activities undertaken by an IO do not enjoy standing mechanisms equivalents to contractual claimants. The ILA *ad hoc* Committee notes in this respect that under the holding-harmless clauses, non-state plaintiffs are compelled to file their claims with a government that exercises territorial jurisdiction over the operational zone. Claimants would only revert to the IO in cases of gross negligence or wilful misconduct.[71]

Alternatively, the ILA *ad hoc* Committee points out that the main obstacles that non-state actors face when they attempt to raise and implement accountability are jurisdictional immunity of IOs before domestic courts and the burden of proof. The ILA *ad hoc* Committee goes on noting that the remedy to the barrier of immunity lies in the availability of 'adequate' alternative

[69] ILA final report (2004) p 28.
[70] Idem, at 38-39.
[71] Idem, at 39.

remedial protection within IOs. The ILA *ad hoc* Committee is of the view that the combination of immunity of jurisdiction plus the lack of adequate alternative remedies within IOs could amount to a denial of justice. More importantly, it espouses the view of Emmanuel Gaillard and Isabelle Pingel-Lenzza that says:

> Just as the reinforcement of the authority of the State made possible its submission to the rule of law, so international organisations have achieved a sufficiently solid foundation in the international legal order for private persons to be able to have their disputes with those organisations heard, when this is required by the imperatives of justice[72]

However, the ILA *ad hoc* committee does not specify the standard upon which the 'adequate' alternative remedial protection should be assessed. The ILA *ad hoc* committee concludes nevertheless that the principle of fairness towards third parties affected by the operations of IOs calls for limited immunity, in the same way as that principle frames a restricted notion of state immunity.[73]

Ige F. Dekker castigates the ILA for its lack of clarity on the general legal approach underlying its conceptualisation of the accountability of IOs. He contends among other things the ILA's categorisation of legal and non-legal forms of OIs' accountability. In particular he criticises the ILA's distinction between legal and non-legal interests and the associated remedies; the levels of accountability which have been characterised on the one hand by legal forms, norms, interests and remedies, and on the other hand by non-legal forms, norms, interests and remedies. This author opines that the ILA *ad hoc* committee has been predominantly influenced by the traditional approach to what is legal and not, restricting the realm of legality to 'a set of duty-imposing rules of conduct and competences-conferring rules.'[74] The recommended rules and practices developed under the second and the third levels of accountability reflect a regime of accountability which lies on 'a set of mandatory rules of conduct and competence to deal with breaches of those rules.'[75] Yet, this traditional approach has proven to be unsatisfactory as it fails to explain and assess the existence and effects of a number of facts in international institutional law due to an *a priori* rejection of those facts from the legal system of IOs.

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[72] E. Gaillard & I. Pingel-Lenzza 'International Organisations and Immunity from Jurisdiction: to Restrict or to Bypass', *International & Comparative Law Quarterly,* vol. 51, part 1, (2002) p. 2; see ILA final report (2004) p.41.
[73] ILA final report (2004) p.41.
[74] I F Dekker 'Making Sense of Accountability in International Institutional Law', *Netherlands Yearbook of International Law,* vol. 36, (2005) at 105.
[75] Idem, at 105.

Dekker notes that the traditional approach to international institutional law is debatable in contemporary society on both theoretical and empirical levels. From a theoretical perspective, there is no ground whatsoever to limit in advance all possible components of the legal system of IOs to the rule of conduct.[76] The author suggests that the issue of the legal system of IOs should be approached without prejudice as to its possible contents because nobody has a priori access to the true nature and function of law. On the other hand, the author notes that from an empirical point of view, it is widely accepted that significant parts of law applicable to IOs consist of varied types of legally related regime — such as resolutions formulating certain goals to be achieved, or expression an opinion, non-binding advisory opinion of the International Court of Justice (ICJ) —, which are definitely not to be seen as a separate legally binding rules of conduct.[77] From these premises, this author concludes that there is no reason to leave uncertain whether the so-called non-legal forms, norms, interests and remedies, more specifically the first level of accountability and its subsequent recommended rules and principles, belong to the legal paradigm of IOs' accountability.[78]

For Karel Wellens, the legal regime of accountability of IOs comprises primary and secondary rules of international law. Despite the principle of functional necessity, the range of primary rules is continually broadening as a result of the expansion of IO activities. This situation prompts uncertainty over the substantive rules applicable to IOs.[79]

In a different publication, the same author observes that the efficacy of any accountability regime for IOs hinges to a large extent, if not entirely, upon the type of remedy afforded. In this respect, the author indicates that three factors need to be taken into account. The first is the source of the IOs' obligation to provide appropriate means of redress and remedy. This can be found in conventional instruments such the constituent agreement, the particulars conventions on privileges and immunities and/or the headquarter agreements. The second and equally important factor is the protection of basic human rights. In this respect, the author notes that IOs have been reluctant for years to acknowledge in unequivocal terms a legal obligation to comply with human rights. However, recent trends show that human rights imperatives have been incorporated, to varying degrees, into internal and external primary rules governing the conduct of IOs. Although the outcome of this development is yet to be seen, it is undoubtedly giving rise to rather far-reaching demands in the substantial area of remedy against IOs. The

[76] Idem, at 106.
[77] Ibidem.
[78] Ibidem.
[79] K Wellens, 'Accountability of International Organizations: Some Salient Features', (April 2-5, 2003) 241 in Proceedings of the Annual Meeting (American Society of International Law) Vol. 97.

author is of the view that the functional necessity theory is not a sufficient ground to deny the rights of individuals to adequate means of redress and remedy against IOs because the protection basic international human rights is a prevailing obligation. An effective legal protection of these rights is a general principle of law, which underpins the common constitutional traditions of the member States of IOs. Lastly, any regime of accountability of IOs should address individual and community concerns from its inception and carry it through the process of formulating primary rules and secondary remedial ones. The consequence of this duality of interests is that despite the compliance with primary rules, remedial actions will still be worth pursuing to establish the grounds upon which an organisation could be held liable as a result of its default.[80]

There is an extensive literature on the issue of accountability of IOs for human rights violations raised by Karel Wellens, which discusses the sources of the human rights obligations of IOs and attempts to clarify the extent of their binding character.[81] The current legal framework of international human right law is predominantly designed for States. The main regional and global human rights treaties make no provision for adherence of non-state actors, therefore excluding the possibility of IO adherence. The European Court of Justice (ECJ) has made a pronouncement in that respect when it addressed the issue of whether or not the European Community could adhere to the European Convention on Human Rights.[82] In this instance, the ECJ found that, without amendment to the existing treaties, the organisation would lack competence to do so.[83] This situation seems to suggest that there is no opportunity of a direct claim against an IO for its violation of international human rights law. However, proponents of the application of international human rights law to IOs have never regarded this backdrop as the end of the matter as far as international law is concerned. On the contrary, they have developed several proposals to the effect of supporting direct international human rights accountability by IOs. Some of these proposals suggest that human rights form part of

[80] K Wellens, *Remedies against International Organisations,* Cambridge University Press, (2002) pp. 13-16.
[81] R. W. Kneller, 'Human Rights, Politics, and the Multilateral Development Banks', *Yale Journal of International Law*, vol. 6, No. 2 (1981) pp 361-428; J. D. Ciorciari, 'The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement', *Cornell International Law Journal*, vol. 33, No. 2 (2000) pp. 331- 371; A. Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions', *The American Journal of International Law*, vol. 95, No. 4 (Oct., 2001), pp. 851-872; N. Wahi, 'Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of A Theory of Horizontal Accountability' *Journal of International Law & Policy* vol. 12 (2006) pp.333-407; T. Ahmed & I. de Jesús Butler, 'The European Union and Human Rights: An International Law Perspective', *European Journal of International Law*, vol. 17, No. 4 (2006) pp. 771-801; J. Wouters et al. (eds), *Accountability for Human Rights Violations by International Organisations,* Intersentia, (2010).
[82] Opinion 2/94 *Accession by the Community to the European Convention on Human Rights* [1996] ECR I–1759, paras. 23–36.
[83] Ibidem.

customary international law and/or general principles of international law.[84] Thus, they bind all IOs and provide a ground for a direct claim of accountability against these organisations. Others claim that member States of IOs are also party to the various human rights treaties and, as such, they have an obligation to seek implementation of these treaties not only in their bilateral relations with other parties, but also through their involvement in IOs.[85] Supporters of this latter approach consider that there is an indirect obligation upon the IO concerned to comply with human rights norms or, at the very least, an obligation not to impede with the realisation of such norms, while performing their functions.[86] Nonetheless, if IOs bear any human rights obligations, a few clarifications are still needed as to the scope and contents of such obligations.

Jutta Brunée has made an interesting contribution to the issue of legal accountability through her publication on 'International Legal Accountability through the Lens of the Law of State Responsibility'.[87] This author squares the topic of accountability in the proper field of international law. She defines international legal accountability as a process involving the justification of an international actor's performance, the assessment of this latter against legal standards, and possibility to impose a sanction in case the actor fails to live up to applicable legal standard.[88] The author analyses the interplay between the traditional notion of state responsibility and the elusive concept of international legal accountability.

The author suggests a useful approach to the issue at hand. She envisages international legal accountability as a set of concentric circles where responsibility and liability form the core and alternative modes of international legal accountability feature in more distant circles.[89] The author categorizes three broad groupings under the label of 'alternative modes of international accountability'. These include (i) the mechanisms of accountability of non-state actors, (ii) the mechanisms of accountability to non-state actors, and (iii) the inter-state accountability

[84] See T. Meron, *Human Rights and Humanitarian Norms as Customary Law,* Clarendon Press, (1989) at 94*ff;* B. Simma & P. Alston, ' The Sources of Human Rights Law: Custom, Jus Cogens and General Principles', *Australian Yearbook of International Law*, vol. 12 (1988-1989) at 102*ff*; H. G. Schermers, 'The Legal Bases of International Organization Action', in R. J. Dupuy, (ed.), *Manuel sur les organisations internationales – A Handbook on International Organizations,* Martinus Nijhoff Publishers (1998) at 402; J. D. Ciorciari (2000) at 357; S. Skogly, *Human Rights Obligations of the World Bank and the IMF*, Cavendish Publishing, (2001) at 80*ff*; T. Ahmed & I. de Jesús Butler (2006) at 776*ff*.
[85] A. McBeth, 'A Right by Any Other Name: The Evasive Engagement of International Financial Institutions with Human Rights', *The George Washington International Law Review*, vol. 40, (2009) pp. 1101-1156.
[86] Idem, at 1111.
[87] J. Brunée 'International Legal Accountability through the Lens of Law of State Responsibility' *Netherlands Yearbook of International Law* vol. 36 (2005) pp. 21-56.
[88] Idem, at at 22.
[89] Idem, at 39*ff*.

mechanisms.[90] The author supports the view that the rise of these alternative modes of international legal accountability is justified by the fact that state responsibility has lost much of its initial conceptual and political power; a limitation which she believes to be rooted in the normative structure of law of international state responsibility itself and intensified by its procedural impairments.[91] The international responsibility of a State is only triggered by breaches of positive international law and only applies to breaches attributable to a State and only operates when responsibility can be invoked by other states.[92] The violation of international law by non-state actors does not trigger the responsibility of a State, unless the State concerned either had an obligation to prevent the conduct in question, or the conduct can be imputed to it.

The author notes however that, even if the violation by a non-state actor was imputed to the state, it will be difficult to actually hold accountable that State for non-state conduct because in many cases, Sates' obligations hinge upon a due diligence standard.[93] Another factor that limits the law of state responsibility is the fact that it circumscribes the legal consequences and remedies for a breach of international law[94] and limits the countermeasures that are available to States to induce compliance.[95] The frameworks of international legal accountability have grown beyond the state responsibility just like the international law has expanded at the level of primary and secondary norms through both hard and soft legalisation of norms and processes.

This contribution of the author shows that the international legal accountability relies on the same elements that are used to construe non-legal paradigms of accountability analysed above.[96] In both case, accountability involves aspects of justification of an actor's performance vis-à-vis others, the assessment or judgment of that performance against some standards, and

[90] According to this author, the mechanisms of accountability to non-state actors involve the international mechanisms which set the parameters for the implementation of civil liability regimes by states in the environmental field, the mechanisms of accountability of individuals in the field of international criminal law and the emergence of a distinct system of accountability for IOs. As for the mechanisms of accountability to non-state actors, the author puts in this category mechanisms such as the disputes settlement mechanisms under investment treaties and the regional enforcement mechanisms of human rights treaties through regional courts of human rights. With regard to the inter-state accountability mechanisms, the author argues that this category include specific dispute settlement mechanisms provided for by a variety of treaty regimes to address disagreements on rights and obligations under the treaty. The spectrum goes from formal judicial forum such as the International Court of Justice or the International Tribunal on the Law of the Sea, to quasi-judicial process such as the World trade Organisation's dispute settlement mechanism. Idem, at 47-53.
[91] Idem, at 24.
[92] Idem, at 25.
[93] Idem, at 29.
[94] Idem, at 33-36.
[95] Idem, at 36-39.
[96] See supra Section 1.7.1.

the reward of the actor (positively or negatively) based on the level of his/her/its performance. Interestingly, in the realm of international responsibility portrayed by the author, accountability appear to be a 'softer' responses to situations involving responsibility for wrongful act to include situations where some forum (e.g., an IFI's independent review mechanism) assesses conduct of IFI against some international standards, without making determinations of an internationally wrongful act. In this regard, the author's approach to responsibility corroborates the view expressed later by Boisson De Chazournes and Nollkaemper: "the term responsibility then covers what is often referred to as accountability".[97]

The International Law Commission (ILC) tackled the issue of responsibility of international organizations[98] when it finished the Articles on State Responsibility for Internationally Wrongful Acts in 2001.[99] After just a few years of work, the ILC concluded its work and the UN General Assembly in 2011 adopted resolution 66/100, in which it took note of the ILC's Articles on the Responsibility of International Organizations (ARIOs). These ARIOs have met with a mixed reaction and have provoked passionate discussion, which has resulted in valuable publications including a book entitled Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie, edited by Maurizio Ragazzi.[100]

This book is divided into four parts.[101] The first part is entitled Setting the Stage: International Organizations' Responsibility between Codification and Progressive Development. It comprises five general introductory essays in which authors discuss, inter alia, the issue of the binding nature of ius cogens (Antônio Augusto Cançado Trindade), history of the works of the ILC on issues related with international organizations (Kenneth Keith), and the variety of final products in the works of the ILC (Sean D. Murphy). Alain Pellet reveals the way in which the final content of the most controversial norms was drafted and points out the main weaknesses of the ILC's articles. He underlines that the ILC did not pay sufficient attention to the special status of IOs. Furthermore, Michael Wood tries to weigh the value of the Articles based on different measures. The second part, entitled Assessing the Commission's Approach: State Responsibility and Responsibility of International Organizations, focuses on one of the most

[97] L. Boisson De Chazournes & A. Nollkaemper, 'Partnerships between International Institutions and Issues of (Shared) Responsibility', International Organizations Law Review, vol. 13, No. 1, (2016) at 10.
[98] See recommendation of the Working-Group on the long-term programme of work of 2000 (A/55/10), and GA resolutions 55/152 of 12 December 2000, 56/82 of 12 December 2001 and 57/21 of 19 November 2002.
[99] See GA resolution 56/83 of 12 December 2001.
[100] Maurizio Ragazzi (ed), *Responsibility of International Organizations:Essays in Memory of Sir Ian Brownlie*, Martinus Nijhoff Publishers, (2013).
[101] The analysis of this book relies on the Book review by Patrycja Grzebyk published in the Polish Yearbook of International Law vol.23 (2013).

controversial issues related to the ILC's work on the Articles, for example a methodology adopted by Special Rapporteur Giorgio Gaja, who decided to rely (too strongly according to his critics) on the Articles on State Responsibility of 2001. Some other methodological issues are discussed in this part as well, like the role of lex specialis (Kristen Boon) and the role of practice (Emmanuel Roucounas) in the codification of the responsibility of IOs. Arnold Pronto, in his essay on the scope of application of the Articles, combines a description of the extent of the Articles' application with a critical analysis of the working methods of the ILC.

The third part of the book – Particular Perspectives: International Organizations and Other Entities, is composed of chapters written from the perspective of the UN (Daphna Shraga), European Union (José Manuel Cortés Martin), World Health Organization (Gian Luca Burci, Clemens Feinäugle) and also International Financial Institutions (Laurence Boisson de Chazournes), including the International Monetary Fund (Ross Leckow, Erik Plith) and the World Bank (Maurizio Ragazzi). In addition to these chapters, the third part includes remarks written from the perspective of other participants in international relations such as the Holy See (Robert John Araujo) and the Quartet on the Middle East (John Dugard, Annemarieke Vermeer-Künzli). The essay on the Quartet is particularly interesting because the authors successfully apply the rules codified by the ILC to a specific entity such as the Quartet.

Part four, Special Concerns: Selected Issues Regarding the Articles, is devoted to the most critical issues related to responsibility of IOs, for example the relationship between the responsibility of IOs and member states. In this part Sienho Yee demonstrates that the solution adopted in the ILC's proposition is, at the very least, immature and indicates the main gaps in the system. Paolo Palchetti discusses the existence and scope of the obligation of member states to enable the organization to make reparations. Kazuhiro Nakatani focuses on the issue of the responsibility of member states for internationally wrongful acts of the organization, and Pavel Šturma, after summarizing the content of the ILC's articles referring to relation between the responsibility of an organization and its member states, uses the situation of the European Union and its member states as an example of a unique case. In a subsequent division, the problem of justiciability of disputes is discussed (Sergio Puig) and the (non) role of the International Court of Justice with reference to responsibility of IOs is underlined, in combination with an analysis of all the ICJ's jurisprudence on IOs (Hugh Thirlway). The last essays in this part of the book are focused on issues related to using the force authorized by an IO and its responsibility for actions of groups controlled by it (Blanca Montejo, P.S. Rao, Francesco Salerno).

Neils M Blokker has commented the ILC's approach of accountability of IOs. He notes that there is a link between the notion of responsibility and the idea of obligation. Any legal person – be it a State, other legal person or an individual – that infringes its obligations may be held responsible for such infringement, in accordance with the rules of the relevant legal system. The author observes that it took almost half a century of operation and five successive Special Rapporteurs before the ILC could deliver the 'draft articles on responsibility of States for internationally wrongful acts'. The idea that the principle of responsibility could be applied to IOs developed gradually in the course of the twentieth century. It had taken so long before it was accepted probably simply that only limited number of IOs carried out operational activities by which substantial wrongs could be done. In addition, it took considerable time before IOs were seen as international legal persons that could themselves be subject to international obligations.[102]

Blokker opines that at present, a consensus seems to have emerged as that there exists a principle of responsibility of IOs and that key elements of such responsibility are similar to those of the state responsibility. The author summarized these key elements as follows:

> Almost all international organisations are international legal persons. Being legal persons, they are capable of bearing rights and obligations.
> To the extent that international organizations have obligations under international law, it may happen that they violate such obligations.
> International organisations have to make good violations of their international obligations by making reparation for any injury caused by such violations.[103]

Examining the issue of settling disputes between IOs and private parties,[104] Kirsten Schmalenbach argues that the positive image of IOs' openness towards international judicial remedies somewhat darkens when claims of private parties outside the organizations' institutional framework are concerned. Since international organisations do not act in artificial isolation, contractual and tortious claims of private parties are unavoidable. The author does not differentiate between the situation in regard to contractual claims and that involving tortious claims in settling disputes between IOs and privates parties. She is of the view that claimants are in both cases barred from taking legal action before municipal courts by virtue of the

[102] N. M. Blokker, 'Preparing Articles on Responsibility of International Organisations: Does the International Law Commission take International Organisations Seriously? A mid-term review' in J. Klabbers & A. Wallendahl (eds), *Research Handbook on the Law of International Organizations,* Edward Elgar Publishing Limited, (2011) 314
[103] Idem p. 315.
[104] K. Schmalenbach, 'Dispute Settlement', in J. Klabbers & A. Wallendahl, *Research Handbook on the Law of International organizations*, Edward Elgar Publishing Limited, (2011), at 262.

jurisdictional immunity of the organizations and their officials.[105] Then the author goes on to say that given that exceptions from these rules are rare, alternative settlement mechanisms dominate the overall picture. She argues that the legal starting points for these mechanisms consist of the diverse agreements on privilege and immunities which, to a large extent, demand alternative claim settlement procedures when disputes of a 'private law character' arise.[106] The author notes, however, that most provisions do not specify the necessary arrangements expect that they have to be 'appropriate'. This situation leaves much room for a wide range of solutions, going from insurance contracts to arbitration clauses.[107]

1.6.3. Accountability of IFIs

The World Bank's Inspection Panel (WBIP) was probably the first forum of its genre to providing access to potential injured third parties.[108] Theoretically, this body was designed to be independent of the Bank governing organs. It has the power to investigate third party complaints in connection with the Bank's acts and omissions that contravene its own operational policies and procedures. However, it was not empowered to play the role of a judicial or quasi-judicial forum for affected parties. As Ibrahim F I Shihata, the then senior vice president and general counsel of the World Bank, asserted:

> The violation by the Bank of its policy, even if established by the Panel, is not necessary a violation of applicable law that entails liability for ensuring damages; and since the Panel is not a court of law, its findings on the bank violations cannot be taken ipso facto as a conclusive evidence against the Bank in Judicial proceedings.[109]

The majority of other IFIs have subsequently established their own internal accountability mechanism for potential injured third parties, which they have shaped more or less into the WBIP model. [110]

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[105] Ibidem.
[106] Ibidem.
[107] Ibidem.
[108] Rutsel Martha opined that the International Criminal Police Organisation (INTERPOL) established the Commission for Control of INTERPOL Files (CCF) to address non-contractual related claims long before the World Bank's Inspection Panel saw the light of the day. See R. S. J. Martha, 'International Financial Institutions and Claims of Private Parties: Immunity Obliges', in H. Cissé, D. D. Bradlow & B. Kingsbury (eds), *International Financial Institutions and Global Legal Governance*, The World Bank Legal Review Vol. 3, The World Bank, (2012) at 127*ff.*
[109] I Shihata *The World Bank Inspection Panel: In Practice* 2nd ed (2001) 234 World Bank Publication
[110] The trend started in 1994 with Inter-American Development Bank (IDB) which set-up the IDB's Independent Investigation mechanism, then Asian Development Bank (ADB) established in 1995 its Inspection Function which was updated into ADB's Accountability Mechanism in 2003, after that International Financial Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA) established the Compliance Advisor/Ombudsman (CAO) in 1999, followed by the European Bank for Reconstruction and Development (EBRD) with its Independent

Adriana Naudé Fourie examined the same pioneer body providing access to potential third party individuals. Her publication conceptualizes the WBIP as a quasi-judicial review (or oversight) mechanism, whose aim is to enhance the accountability and legitimacy World Bank. The author undertakes a comparative constitutional law analysis, analysing three constitutional systems, namely: the United States, the European Union, and post-Apartheid South Africa, to develop 'a conceptual model of judicial oversight that reflects the concept's nature, effect, and dynamics'. The author uses this model to examine the institutional history and practice of the WBIP. The author concludes that the nature, effects, and dynamics of judicial oversight indeed, the 'judicial spirit' is more alive in this area of public international law than what might be expected.[111]

Alternatively, Namita Wahi examined the human rights accountability of the IMF and the World Bank.[112] The author shows the failure of institutional accountability mechanisms due to ad hoc and selective application of human rights accountability.[113] In addition, he notes that the limited mandate and the lack of independence of the established mechanisms greatly limit their efficacy in securing human rights accountability for affected people.[114] The author observes that both the IMF and the World Bank possess judicial personality at the municipal as well as at the international level, which in principle make possible the devising of independent human rights accountability mechanisms. While it is almost impossible in practice to bring a direct human rights claim against these institutions because the host State is seen as the sole actor implementing the litigious policies and projects; a tort claim can be brought against the borrowing State and (at least) the World Bank as joint tortfeasors. Although IMF and the World Bank are subject to international law, it is not correct to infer that international human rights law bind these institutions. The author opines that the existing argument advocating the application of international human rights law to IOs by way of customary international law needs some refinements as such law affords protection only against state abuse of power only.[115] For this author, "international law is not an undifferentiated body of law, but rather it is an area of law comprised of various subfields that have their own internally

Recourse mechanism (IRM) set-up in 2003, and finally, the African Development Bank (AfDB) with its Independent review Mechanism (IRM) established in 2004.

[111] A. N. Fourie *The World Bank Inspection Panel And Quasi-Judicial Oversight: In Search Of The 'Judicial Spirit' In Public International Law* Boom Eleven International (2009) pp. 367.

[112] N. Wahi 'Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of A Theory of Horizontal Accountability' *Journal of International Law & Policy* vol. 12 (2006) pp.333-407.

[113] Idem, at 352.

[114] Idem, at 57*ff*.

[115] Idem, at 336.

evolved conventions regarding scope and application."[116] The preamble to the UDHR and Article 2 of both the International Covenant on Civil and Political Rights, [adopted on December 16, 1966, (entered into force on March 23, 1976)] and the International Covenant on Economic, Social and Cultural Rights, [adopted on December 16, 1966, (entered into force on January 3, 1976)] impose obligations to member States only. Neither these instruments nor the charters of the selected IFIs provide any specific mandate to the selected IFIs in the area of human rights.[117] Therefore, any extension of such obligations to these IFIs must be propounded and not assumed. The author suggests that the establishment of any accountability mechanism at the municipal of international level would require changes in existing international law doctrines and the constituent instruments of the two institutions.[118] He also suggests the transplantation of the horizontal thesis from constitutional law to international human rights law to make the IMF and the World Bank accountable to individuals for human rights violations.[119]

Dana Clark, Jonathan Fox and Kay Treakle published a well-documented account of the real disasters that follow on from ill-conceived development projects and the stories of affected people trying to hold the World Bank to account. The authors recall that the World Bank set these standards after a number of high-profile disasters in the 1980s. They highlight the fact that the pressure to meet lending targets keeps resulting in poor lending decisions, badly designed projects, lack of local participation, and, eventually, development disasters. The authors present a range of case studies based on complaints investigated by the Inspection Panel. A number of countries are represented including Nepal, Brazil, Argentina, Paraguay, Bangladesh, Chile, India, and China. Of a total of 28 complaints with the Inspection Panel, only nine cases had gone through the investigation, three of which were still pending at the time of writing, including the high profile Chad-Cameroon Pipeline case. Under the Inspection Panel regime, an investigation can only proceed if a complaint meets certain criteria. Among other things, the claim must involve two or more people living in the affected area who have been or are likely to be harmed by the project; it cannot be retroactive; and can only involve complaints directly involving Bank staff and projects.[120]

[116] Ibidem.
[117] Ibidem.
[118] Idem, at 405.
[119].Idem, at 406*ff*.
[120] D. Clark et al. (eds), *Demanding Accountability: Civil-Society Claims and the World Bank Inspection Panel*, Rowman & Littlefield Publishers (2003) pp. 1-311.

Carrasco, Carrington and Lee undertook a comparative survey of governance and accountability issues pertaining to the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, and the Inter-American Development Bank. They recall that in the last decade or so calls for good governance, transparency and accountability have been made for reforms in the international financial institutions, particularly the world bank and the IMF. However, calls for reform have been made not only in respect of the World Bank and the IMF but also in respect of regional development banks listed above. The authors note that the academic literature on the regional development banks is sparse compared to what has been written on the World Bank and IMF. The Three authors examine the basic organisational structure of each of the regional development banks. They also review the information disclosure policies of the regional development banks. On this, the authors conclude that the banks have weak disclosure policies in respect of internal documents, a situation that 'threaten[s] to make these institutions accountable to their stakeholders'. They then explore issues of internal accountability and oversight, independent review mechanisms (which allow individuals or groups directly affected by bank projects to claim redress at the banks) and the role of civil society vis-à-vis the regional banks. The final part of their publication provides some observations and recommendations in respect of governance and accountability at the regional development banks. In this respect, they make certain important observations. [121]

Daniel D. Bradlow and David Hunter edited a book entitled 'International Financial Institutions and International Law'. This book examines the question as to whom IFIs are accountable. It also analyses the extent to which accountability is either evaded or honoured by the main global financial institutions and the regional development banks. The book acknowledges that the delineation of international legal principles that apply to the operations of the IFIs is an important task that would benefit from a more rigorous study. The book comprises twelve contributions from academic, activists and policy makers. On the one hand, contributors tackle the general principles of international law that apply to the IFIs and analyse how these are or should be evolving to produce IFIs that are respectful subjects of international law and accountable to all relevant stakeholders for their compliance with international law. On the other hand, contributors focus on selected aspects of the IFIs' operations that raise important and challenging legal issues and have substantial impacts on the stakeholders and the sustainability the operations of IFIs. Among other issues, some contributors discuss IFIs as key

[121] E Carrasco et al 'Governance and Accountability: The Regional Development Banks', *Boston University International Law Journal, v*ol. 27, No. 1, (2009) pp. 1-60.

players in the creation of international law and bearers of human rights obligations under international human rights law or as participants in the UN system. Other contributors delve into the consequences of IFIs' breach of its own internal policies or directives, and the ability of various claimants to sue IFIs in domestic courts. Special attention is given to the issue of immunities of IFIs.

1.6.4. Summary of Gaps

- There is not a clear definition of legal accountability in the law of IFIs.
- Scholarly works on accountability of IFIs in general and MDB, in particular, have confined their analysis to the institutional approach of accountability.
- While earlier writers stressed out the non-judiciary nature of internal mechanisms that IFIs have established to addressing side effects of projects and policies they supported, today's scholars endeavour in identifying the very same mechanisms to quasi-judicial oversight mechanisms which resemble the administrative or constitutionality review at the domestic level.
- This dominant approach on accountability of IFIs tends to give too much emphasis to IFIs' internal mechanism — particularly the recourse to an inspection panel function which is tasked to enforce safeguard policies only — when it comes to remedying harmful impacts that non-state third parties suffered as a result of the implementation of IFI-funded projects. That obscures the ultimate purpose of accountability of IFIs towards non-state third parties which is to strengthen and support the ability of IFIs to achieve their mission to promote economic and social development. It also overlooks the potential for using other mechanisms that may be more effective in providing relief and doing justice to this category of plaintiffs.
- There is not clarity as to what should be considered as primary rules of IFIs.
- The secondary rules of IFIs have not been analysed comprehensively.

1.7. Structure of the Study

This research consists of six chapters.

Chapter 1: Emergence of A Legal Paradigm of Accountability in International Institution Law: The Case of IFIs

This chapter conceptualises accountability as a multifaceted phenomenon that can be envisaged in many contexts — including, financial, political, administrative, professional and legal — of

which each comprises various mechanisms structured with different levels of technicalities. The chapter also examines the existence and relevance of a legal accountability paradigm that is specific to the law of international institutions in general and the law of IFIs in particular. It broadly analyses the aim, actors, and process of legal accountability.

Chapter 2: Accountability by Whom and to Whom: An Overview of IFI-Funded Projects and Policy Reforms

This chapter is aimed at addressing some of the preliminary questions inherent in any study of accountability, including accountability by whom and to whom. Accountability is by selected IFIs, the International Finance Corporation (IFC) and African Development Bank (AfDB), (by Whom) to project affected people (to Whom) on the question of whether these institutions have abided by the laws applicable to them (standards) as far as the interests of third parties to IFI-financial agreements are concerned. The chapter only deals with the issue accountability by whom and to whom; whereas the issue of the standards of accountability is addressed in the next chapter. This chapter analyses the documents that are involved in the job of selected IFIs as well as other conducts about which account is to be rendered. It also reviews some case studies to further the understanding of the circumstances under which the operations of IFIs could negatively impact the interests of project third parties and, therefore, raise the issue of accountability by these institutions towards the affected parties.

Chapter 3: Accountability Standards Applicable to IFIs and Their Operations

This chapter surveys the standards against which operations of IFIs are to be assessed. In particular, it examines the sources and contents of IFIs' legal obligations arising out of their relations with their contracting parties and the outside world, including individual third parties. In this regard, the chapter assesses the extent to which human rights and environmental standards apply to IFI-funded projects and policy reforms. This chapter also examines the issue of enforcement of the legal obligations of IFIs. It assessed the extent to which the adoption of legal steps required by the applicable laws and regulations effectively meet the substantive requirements such laws and regulations intended to impose on IFIs and the participants to their operations.

Chapter 4: Legal Accountability Fora and Their Mechanisms

This chapter addresses the mechanisms of accountability that are available to project affected parties. It assesses the potential of available accountability avenues to protect, restore or

advance the legally protected rights of this category of plaintiffs. The chapter examines the forum before which an IFI is to be held to account for its conduct, be it a positive action or an omission. In particular, this chapter analyses the accountability jurisdictions and associated mechanisms as far as the relationship between IFIs and affected individuals or groups is concerned. It assesses the limits of accountability fora which provide direct access to non-state third parties in a dispute involving IFIs. It also explores alternative accountability fora that can provide indirect access to non-state third parties that have been affected by operations of IFIs.

Chapter 5: Legal Challenges of Keeping IFI Operations on Track

This chapter discusses the purpose of legal accountability of IFIs. It aims at analysing the objectives of promoting legal accountability for non-state third parties affected by IFI-funded projects. The chapter also seek assessing the extent to which the mechanisms that have been made available to this category of plaintiffs are likely to meet their intended purposes. This chapter highlights the strengths and weaknesses of existing legal accountability mechanisms with a view to establishing whether and to what extent affected people could rely on them to further their interests.

Chapter 6: Concluding Remarks and Recommendations

This chapter summarises the findings of the different chapters of this research and suggests some recommendations.

1.8 Conclusion

This chapter conceptualised as a multifaceted phenomenon that can be envisaged in many contexts — including, financial, political, administrative, professional and legal — of which each comprises various mechanisms structured with different levels of technicalities. It examined the existence and relevance of a legal accountability paradigm that is specific to the law of international institutions in general and the law of IFIs in particular. It analysed the aim, actors, and process of legal accountability. This chapter surveyed scholarly works relevant to this research and found that studies on accountability build on a series of fundamental questions, regardless the context in which they occur. These are accountability by whom, about what, to whom, against what standard, before which forum, and for what purpose. Building on this approach, the chapter outlined the research's chapters that explore the extent to which the law of IFIs and underlying accountability mechanisms have achieved or failed to achieve a level of accountability and justice expected by affected third parties.

CHAPTER TWO

ACCOUNTABILITY BY WHOM AND TO WHOM: AN OVERVIEW OF IFI-FUNDED PROJECTS AND POLICY REFORMS

2.1. Introduction

The previous chapter has shown that the notion of "accountability" needs to be understood in a specific context as it carries various meaning including political, administrative, financial, and legal. Certain questions need to be answered to understand its meaning in a particular setting.[1] These questions include accountability by whom, about what, to whom, against what standard, before which forum, and for what purpose. In this research, accountability is by selected IFIs, namely the IFC and AfDB (by Whom), to project affected people (to Whom), on the question of whether these institutions have abided by their internal and external laws (hereinafter collectively referred to as standards) as far as the interests of third parties to IFI-financial agreements are concerned.

This chapter discusses the context in which IFIs operate and showcases how the issue of accountability vis-à-vis project affected parties may arise. It does not delve into substantial analysis of accountability, which is the focus of chapters 3, 4 and to some extent chapter 5. This chapter offers a glimpse of what IFIs do and how the implementations of their activities may give rise to accountability issues towards third parties. The main assumption here is that investigation into the process of financing for development would further the understanding of the challenges of holding IFIs to account for the unintended consequences of the projects they have funded. Although this chapter intends to centre its focus on selected IFIs, some references to the World Bank and the IMF still appear here and there given the influence these institutions have had on selected IFIs in particular and the other existing IFIs in general.

The International Bank for Reconstruction and Development (IBRD), along with the International Monetary Fund (IMF), was among the first IFIs created toward the end of World War II. The founding States anticipated that these two institutions would keep the world economic system from degenerating into a destructive depression similar to that experienced during the Great Depression or, more generally, the inter-war period.[2] The founding States also

[1] M. Bovens, 'Analysing and assessing Accountability: A Conceptual Framework' *European Law Journal,* vol. 13, No 4, (Jul.2007) pp. 453-455, D. Curtin & A. Nollkaemper, 'Conceptualizing Accountability in International and European Law', *Netherlands yearbook of International Law*, vol. 36 (2005) pp. 9-14; A. Schedler, 'Conceptualizing Accountability', in A. Schedler et al. (eds), *The Self-Restraining State: Power and Accountability in New Democracies,* Lynne Rienner Publishers, (1999) at 10*ff.*

[2] See J. M. Boughton & K. S. Latee (eds), *Fifty Years After Bretton Woods: The Future of the IMF and the World Bank: Proceedings of a Conference Held in Madrid, Spain, September 29-30, 1994*, International Monetary Fund (1995) pp 280; E. Helleiner, *States and the Reemergence of Global Finance: From Bretton Woods to the 1990s,* Cornell University Press (1996) pp. 244; Sara Hsu, *Financial Crises, 1929 to the Present,* Edward Elgar Publishing, (2013) pp 186.

expected each organisation to confine its activities to its specific mandates. For example, economic development issues such as the encouragement of the development of productive facilities and resources in developing countries were assigned to the World Bank. By contrast, issues such the promotion of international monetary cooperation and exchange stability were part of the IMF's mandate. States attending the Breton Woods conference also envisaged the creation of a third institution, the International Trade Organisation (ITO), to deal with trade issues.[3]

The Bretton Woods twins were perfectly suitable for the needs in the immediate aftermath World War II. Prevailing constraints including the restricting flow of private capital and the perception that any such movement was financially risky had hindered many countries in their efforts to develop socially sound investments by way of foreign private capital lending.[4] The solution was to create an institution where States with urgent needs, first those ravaged by war and later States in the early stages of economic development, could borrow at the lowest market rates. Another institution, the IMF, would ensure stable international currency regimes to facilitating international trade. Ultimately, the Bretton Woods system was meant to ensure full employment, price stability, economic growth and balance of payment equilibrium.[5] Although the founding States differentiated the twin institutions in terms of their charter, funding, staff and governance, they decided that the membership in the IBRD would be subject to the membership in the IMF.[6]

Since then, the world has undergone profound changes.[7] Many IFIs have come into existence sharing the Bretton Woods model relatively. The underlying idea was to achieve co-operation

[3] The idea of founding an international organisation to develop and coordinate international trade was tabled at the Bretton Woods' conference. But, the details were left for latter. Negotiations over the ITO were held in different stages which culminated in the completion of the work on the ITO charter at the Havana Conference in 1948. However, the ITO charter never entered in to force. See Article 1 of the Havana Charter for an International Trade Organization, World Trade Organization, 'Pre-WTO legal texts: Havana Charter', available at http://www.wto.org/english/docs_e/legal_e/prewto_legal_e.htm, accessed 20 May 2014.

[4] See E. Helleiner (1996) at Chapter two; M. D. Bordo, 'The Bretton Woods International Monetary System: A Historical Overview', in M. D. Bordo & B. Eichengreen, A Retrospective on the Bretton Woods System: Lessons for International Monetary Reform, University of Chicago Press & the National Bureau of Economic Research (1993) pp. 3-108.

[5] See J. W. Pehle, 'The Bretton Woods Institutions', *The Yale Law Journal*, vol. 55, No. 5 (Aug., 1946) pp. 1127-1139; S. K. Roxas, 'Principle for Institutional Reform', in J. M. Griesgraber & B. G. Gunter (eds), *Development: New Paradigms and Principles for the twenty-first Century*, Pluto Press (1996) at 5; K. M. Dominguez, 'The Role of International Organizations in the Bretton Woods System', in M. D. Bordo & B. Eichengreen, *A Retrospective on the Bretton Woods System: Lessons for International Monetary Reform,* University of Chicago Press & the National Bureau of Economic Research (1993) pp. 357-404.

[6] Article 2(1)(a) of the IBRD Articles of Agreement.

[7] See J. Tobin, 'A Proposal for International Monetary Reform', *Eastern Economic Journal, v*ol. 4, No. 3/4 (Jul. - Oct., 1978), pp. 153-159; P. B. Kenen (ed.), *Managing the World Economy: Fifty Years after Bretton Woods,*

among capital-rich and borrowing countries while acknowledging their difference stemming from regional orientation and uniqueness.[8] The first three regional banks, namely the Inter-American Development Bank (IDB), the African Development Bank (AfDB) and the Asian Development Bank (ADB), followed more closely the World Bank model. The European Investment Bank (EIB) and, later on, the European Bank for Reconstruction and Development (EBRD), on the other hand, adopted a different model to international cooperation and development finance. The EIB's approach to resolve complaints was a reflection of the EU model of accountability, with a two-tier mechanism namely the EIB-Complaint Mechanism and the European Ombudsman (EO).[9]

There is a wealth of scholarly works focussing on development strategies the World Bank and IMF have been promoting since their inception.[10] These works discuss governance issues,[11] human rights and environmental concerns associated with the operations of the two institutions.[12] A number of reasons justify the proliferation of scholarly works on the World

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Institute for International Economics, (1994) pp. 430; E. Helleiner (1996); B. Eichengreen, 'Global imbalances and the lessons of Bretton Woods', *Économie Internationale,* vol. 4, No 100 (2004) pp. 39-50.

[8] In addition to the World Bank Group (IBRD, International Development Association or IDA, the International Finance Corporation or IFC, and the Multilateral Investment Guarantee Agency or MIGA) and the large regional banks, many more IFIs operate at a sub-regional level, including the Andean Development Bank, the Central American Development Bank, and the Islamic Development Bank. As with their regional counterparts, these intuitions provide medium-and long-term capital for productive investment, often accompanied by technical assistance, in less-developed areas.

9 Under the 2008 EIB complaint mechanism, any member of the public had access to a two-tier procedure:

i. Internal - Initially, the Complaints Mechanism Division (EIB-CM), which was operationally independent from the EIB's other departments, sought a solution and advised the EIB on corrective action.
ii. External – Should EIB-CM fail to find a satisfactory response, the complaint could be referred to the European Ombudsman, a fully independent EU body.

For further development, see EIB, Complaints Office Activity Report 2008, EIB Complaint Office, 2009; EIB, The EIB Complaints Mechanism: Principles, Terms of Reference and Rules of Procedures, 2010.

[10] J. Havnevik (ed.), *The IMF and the World Bank in Africa: Conditionality, Impact and Alternatives*, Scandinavian Institute of African Studies, (1989) pp. 189; B. RichK, *Mortgaging the Earth: The World Bank, Environmental Impoverishment, and the Crisis of Development,* Granite Hill Publishers, (1994) pp. 376; J. E. Stiglitz, 'The Role of International Financial Institutions in the Current Global Economy', Address to the Chicago Council on Foreign Relations, February 27 (1998) pp. 15, available at http://kleinteilige-loesungen.de/globalisierte_finanzmaerkte/texte_abc/s/stiglitz_financial_institutions.pdf, accessed 28 may 2014; D William, 'Aid and sovereignty: Quasi-states and the International Financial Institutions', *Review of International Studies,* vol. 26 (2000) pp. 557-573; D. Craig & D. Porter, 'Poverty Reduction Strategy Papers: A New Convergence', *World Development*, vol. 31, No. 1 (2003) pp. 53-69.

[11] Ngaire Woods, 'The Challenge of Good Governance for the IMF and the World Bank Themselves', World Development, Vol. 28, No. 5, (2000) pp. 823-841; D. D. Bradlow, 'Stuffing New Wine into Old Bottles: The Troubling Case of The IMF', *Journal of International Banking Regulation,* vol. 3, No 1 (2001) pp. 9-36; J. Pincus & J. A. Winters (eds), Reinventing the World Bank, Cornell University Press, (2002) pp. 263; D. D. Bradlow, 'The Reform of The Governance of the IFIs: A Critical Assessment', in H. Cissé, D. D. Bradlow & B. Kingsbury (eds), *International Financial Institutions and Global Legal Governance,* The World Bank Legal Review Vol. 3, The World Bank, (2012) pp.405.

[12] I. F.I. Shihata, 'Human Rights, Development, and International Financial Institutions', *American University International Law Review*, vol. 8, No 1 (1992) pp. 27-36; D. D. Bradlow, International Organizations and private Complaints: The Case of the World Bank Inspection Panel', *Virginia Journal of International Law*, vol. 34 (Spring, 1994) pp. 553-613; Sigrun Skogly, *Human Rights Obligations of the World Bank and the IMF*, Cavendish

Bank and the IMF. Indeed, the Bretton Woods twins are the most important IFIs in terms of resource capacity.[13] Their operations are believed to have more influence on the economic and political development of developing and poorest countries.[14] Moreover, the nearly universal membership of the World Bank and the IMF enables these two institutions to serve the global economy in a more effective way than comparable regional or sub-regional institutions would.[15]

It is not easy to generalise about IFIs since each of them was set up to perform specific functions.[16] The above notwithstanding, most IFIs with the exception of the IMF, which was originally set up to serve a monetary purpose, seem to share a common core function. That is filling the gap left by undeveloped capital markets and the reluctance of commercial banks to offer long-term financing to developing and poorest States. Put differently, IFIs perform a development function through direct lending to developing and poorest countries on more advantageous terms than would be available to them on the basis of their international credit standing. They also attract additional financing sources for private sector projects and provide technical assistance to member States aimed at creating favourable conditions for private investment. Their primary vehicle of development assistance is through direct lending in infrastructure projects.

Publishing, (2001) pp. 240; D. Clark, 'The World Bank and Human Rights: The Need for Greater Accountability', *Harvard Human Rights Journal*, vol. 15 (2002) pp. 205-226; K. Horta, 'Rhetoric and Reality: Human Rights and the World Bank', *Harvard Human Rights Journal*, vol. 15 (2002) pp.227-243; M. Darraw, *Between Light And Shadow: The World Bank, the International Monetary Fund and International Human Rights Law*, Hart Publishing, (2003) pp. 376; B. Ghazi, *The IMF, The World Bank Group and the Question of Human Rights*, Transnational Publishers, (2005) pp. 468; N. Wahi, 'Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of Horizontal Accountability', *University of California Davis Journal of International Law and Policy*, vol. 12 (2005-2006) pp. 332-407.

[13] The IBRD's actual amount for liquid assets was US$32.6 billion for the fiscal year ended June 30, 2013, see IBRD, Information Statement, September 18, (2013) at 2; the IMF's Financial Resources and Liquidity Position was $ 845 billion for the period 2012-April 2014, see IMF, 'IMF's Financial Resources and Liquidity Position 2012-April 2014', available at http://www.imf.org/external/np/tre/liquid/2014/0414.htm#note,, accessed 28 May 2014.

[14] See R. Culpeper, 'Multinational Development banks: Towards a New Division of Labor' in J. M. Griesgraber & B. G. Gunter (eds), *Development: New Paradigms and Principles for the twenty-first Century*, Pluto Press (1996) pp. 61-74.

[15] The relevance of the Bretton Woods institutions to the global economy lies in the fact that global economic growth and stability is a global public good that benefits to all, and requires the participation of, all members of the global community. See M. Parkinson (Secretary to The Australian Treasury), 'Are the Bretton Woods Institutions Still Relevant for the Emerging Market Economies?', Speech delivered at the Reinventing Bretton Woods Conference, Washington DC, United States of America, April 11, (2014) available at http://www.treasury.gov.au/PublicationsAndMedia/Speeches/2014/The-Bretton-Woods-institutions, accessed 28 May 2014.

[16] See Article 1 of the both IFC Article of Agreement (2012) and Agreement Establishing the AfDB (2011).

This backdrop does not make the examination of IFIs operations any easier. Indeed, IFI-funded projects and policies are very complex. Not only do they involve the provision of one or several financial products but also, they imply the implementation and carrying out of underlying projects and policy reforms. For example, building roads in a remote area can take many years and involve the execution of numerous ancillary agreements as well as the compliance with various domestic regulations.[17] Another determinant in respect of the issues that may arise out the operations of IFIs is the nature of the borrowing party which can be either a sovereign or public or private borrower. Each of these categories entails different issues including the capacity to enter into a binding agreement with an IFI, enforceability of the terms and conditions of such an agreement, protection of thirds parties' interests, and the nature of the accountability mechanism to be called upon by aggrieved parties.[18]

2.2. Financial Services Offered by IFIs

IFIs typically provide financial services to sovereign, public and private clients in countries that need them most. The business model of IFIs can differ in the nature of their clients. While some IFIs do not discriminate among clients, others focus their activities on a particular category of clients. For example, the IFC invest in productive private enterprises or an enterprise partly owned by the public sector or in the process of being totally or partially privatised. Pursuant to its Charter, such an enterprise shall be incorporated in the host country and operates free of the host government control in a market context, according to profitability criteria.[19] By contrast, the AfDB Group provides financial services to both the public and private entities. Access to the Bank Group's soft loan window is however limited to the poor RMCs.[20] That is to contribute to poverty reduction and economic and social development in the least developed African countries.

Over the years, both IFC and the AfDB Group have developed a broad range of financial products to meet the various needs of their growing clientele. They also act, subject to their respective mandate, as a catalytic agent through facilitating the mobilization of capital to projects in both the public and private sectors. Overall, the standard products consist of loans, guarantees, equity and quasi-equity investments, and risk management products. Other

[17] In particular, such a project would involve construction contracts, management agreements, and purchase and sale contacts. Additionally, the developer must ensure that the operation of the project is consistency with relevant central and local regulations, including road construction regulation, traffic systems and sign.
[18] The next chapter provides a comprehensive study of those issues.
[19] See Article III (1) of the IFC Article of Agreement (2012); IFC, 'Annual Report 2012', vol. 2 (2013) at 5.
[20] Article 14 of the Agreement Establishing the African Development Fond (2011).

products include trade finance, loan participations, technical assistance, financial infrastructure, MSME (micro, small and medium enterprise) finance, retail finance, trade and supply chains, private equity funds, sustainability, and climate business. Unlike the AfDB Group, IFC provides asset management facilities to its various clients.[21]

2.3. Overview of the Operations of IFIs

This section provides a short analysis of selected IFIs and the context in which their operations takes place.

2.3.1. Short Analysis of Selected IFIs

The gaol here is to provide some background information of selected IFIs including the IFC and the AfDB. The focus on these two IFIs is justified by the fact that there are fewer scholarly work focussing on these institutions as opposed to the work focusing on the World Bank and IMF. An other determinant factor is that the analysis of selected IFIs provide highly informative descriptive elements on the public and private sector operations of IFIs.

[21] For further development on Financial services offered by IFIs, see IFC, 'Financial Products', IFC, available at http://www.ifc.org/wps/wcm/connect/Industry_EXT_Content/IFC_External_Corporate_Site/Industries/Financial+Markets/What+We+Do/Financial+Products/, accessed 10 August 2014; J. D. Hutchins, 'What Exactly Is A Loan Participation?', *Rutgers Law Journal,* vol. 9 (1977-1978) at 447*ff*; S. Gatti, *Project Finance in Theory and Practice: Designing, Structuring, and Financing Private and Public Projects,* Academic Press, (2013) at 195; F. Jaspersen, 'Aguas Argentinas', in World Bank Publications, *The Private Sector and Development: Five Case Studies*, Volume 1, World Bank and IFC (1997) at 19*ff*; IFC, 'Overview of Risk Management Products', available at http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+finance/derivative+based+products/risk+management, accessed 14 August 2014; IFC, 'Blended Finance at IFC: Blending Donor Funds for Impact', IFC Blended Finance Unit (October 2012); AfDB Group, 'Sovereign guaranteed loans for public sector', available at http://www.afdb.org/en/projects-and-operations/financial-products/loans/sovereign-guaranteed-loans-for-public-sector/, accessed 10 July 2014; P. van Peteghem, 'Financial products offered by the AfDB', AfDB Group, April (2011) at 5; African Development Bank, 'General Conditions Applicable to the African Development Bank Loan Agreements and Guarantee Agreements (Sovereign Entities)', AfDB, February (2009); African Development Bank, 'General Conditions Applicable to the African Development Bank Loan Agreements and Guarantee Agreements (Non Sovereign Entities)', AfDB, December 31, (2008); African Development Bank Group, 'Operational Guidelines for Non-Sovereign Guaranteed Loans to Public Sector Enterprises', AfDB Group, (September 2003) at 11, para. 6.1.3.; African Development Bank, 'Revised Financial Guidelines for Non-Sovereign Guaranteed Loans', AfDB (February 2006) at 1, para. 2.3.; African Development Bank, 'Equity Investment Policy Guidelines', AfDB, (March 1995); African Development Bank, 'Guidelines for Use of Risk Management Products', AfDB, (January 2002) pp 5-6; African Development bank group, 'Bank Group Policy on Program-Based Operations', AfDB Group, (February 2012); African Development Bank, ' New Guidelines on the Middle Income Country Technical Assistance Fund', (February 2012); AfDB Group, 'Supporting the Transformation of the Private Sector in Africa; Private Sector Development Strategy 2013-2017', AfDB Group, (2013); AfDB Group, 'Operations Guidelines of the Fragile States Facility (FSF)', AfDB Group, (Mach 2008); African Development Bank Group, 'The African Development Bank Group Response to the Economic Impact of the Financial Crisis, AfDB Group, (March 2009).

2.3.1.1. The International Financial Corporation

The International Finance Corporation (IFC or the Corporation) is an autonomous intergovernmental institution, established in 1956, at the initiative of the World Bank staff members with significant support from the US International Development Advisory.[22] The IFC is a member of the World Bank Group ─ which also includes the IBRD, the International Development Association (IDA), and the Multilateral Investment Guarantee Agency (MIGA) ─ but, it differs from other constituents of the World Bank Group in terms of Articles of Agreement, share capital, functions, and staff members. However, the Corporation shares its board of directors and governors as well as its president with the World Bank. Membership in the IFC is open only to member countries of the World Bank.[23]

The rationale behind the creation of the IFC was to assist the World Bank in contributing to the development capacity of developing countries through investing in private sector projects.[24] For those involved in the establishment of the Corporation, it was unlikely that public efforts would yield enough growth as they were limited to provide enabling environment including a regulatory framework, social services such as educations and health, and other basic services. The private entrepreneurship was regarded as the best engine of economic growth in less developed countries.[25] Addressing the Inaugural Meeting of IFC's Board of Governors on November 15, 1956, the then IFC's President and greatest supporter of the private entrepreneurship's approach, Robert Garner, said:

> I believe deeply that the most dynamic force in producing a better life for people, and a more worthy life, comes from the initiative of the individual—the opportunity to create, to produce, to achieve for himself and his family—each to the best of his individual talents. And this is the essence of the system of competitive private enterprise—20th century model—as it has been developed by the most enlightened and successful business concerns. It holds the promise of rewards according to what the individual accomplishes. It is based on the concept that it will benefit most its owners and managers if it best satisfies its customers; if it promotes the legitimate interests of its employees; if in all regards it acts as a good citizen of the community. It is moved by the desire to earn a profit—a most respectable and important motive, so long as profit comes from providing useful and desirable goods and services. It is my belief

[22] See B. E. Matecki, *Establishment of the International Finance Corporation and United States Policy: A Case Study of International Organization*, F. A. Praeger, (1957) pp 194; The World Bank Group, 'The World Bank Group Historical Chronology', *The World Bank Group Archives*, November (2008) at 37.
[23] Article II (1)(b) of the IFC Article of Agreement, April 11, (1955).
[24] See Article I (i) of the IFC Article of Agreement, (1955).
[25] J. Haralz, 'The International Finance Corporation', in D. Kapur et al. (eds), *The World Bank: Its First Half Century,* volume I: History, Brookings Institution Press, (1997) at 806.

> that the best services and the best profits result from a competitive system wherein skill and efficiency get their just reward.[26]

To that end, the Corporation was to act both as a supplier of resources and catalytic agent for improving and expanding private enterprises in underdeveloped areas, given the insufficient access to private capital. Indeed, major transnational corporations and commercial banks at the time showed little enthusiasm for investing in underdeveloped regions, including Africa, Latin America, Asia, and even the Middle East. Their economies were still very immature, lacking the human resources, physical infrastructure and sound institutional framework needed to raise the funds in international capital markets and improve living standards at the domestic plane.[27]

Unlike the World Bank whose financings are only meant to governments or to projects that are subject to government guarantees, the IFC is prohibited from accepting such guarantees or from lending directly to governments.[28] The IFC embraces a rather mercantile orientation, taking on the full commercial risks of its investments, accepting no government guarantees and earning a profit from its operations.[29] Its core function is to bring together prospective investors and entrepreneurs, and facilitate enabling conditions for increasing the flow of private capital, domestic and foreign, into productive investment in poorest and developing countries.[30] Pursuant to its Charter, the IFC can use its resources only in association with private investors or public-private partnerships provided that such partnerships be mostly composed of private capitals. However, the Corporation is prohibited from financing any project for which, in its opinion, sufficient private capital can be obtained on reasonable terms.[31]

Originally, the IFC could only participate in operations of private enterprises through debt financing. Its Charter did not allow the Corporation making equity investment.[32] This

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[26] The World Bank, 'Pages from World Bank History: Origins of the International Finance Corporation (IFC)' March 28, (2003) available at http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTARCHIVES/0,,contentMDK:20101830~pagePK:36726~piPK:36092~theSitePK:29506,00.html, accessed 04 June 2014.

[27] See A. Coudert & A. Lans, 'Direct Foreign Investment in Undeveloped Countries: Some Practical Problems', *Law and Contemporary Problems,* vol. 11 No 4 International Trade Barriers (Summer-Autumn 1946) pp. 741-759, S. H. Hymer, *The International Operation of National Firms: A Study of Direct Foreign Investment,* The Massachusetts Institute of Technology Press, (this work dated back 1960 but was published in 1976); R. Vernon, 'International Investment and International Trade in the Product Cycle', *The Quarterly Journal of Economics,* vol. 80, Issue 2 (1966) pp. 190-207.

[28] See Article III (1) of the IFC Article of Agreement, as amended through June 27, (2012).

[29] Article 1 of the IFC Article of Agreement, (2012).

[30] Article I (ii & iii) of the IFC Article of Agreement, (2012).

[31] Article III (3)(i) of the IFC Article of Agreement, (2012).

[32] Article III (2)(a & b) of the IFC Article of Agreement (1955).

constraint on the Corporation's operational capability was found to impede the effective fulfilment of its goals. On September 21, 1961, under the powers vested on them by Article VII, the Board of Governors amended the Charter of the Corporation to enable the provision of equity investments to its clients within the member countries.[33] For many years, Corporation had been the sole MDBs providing such facility.[34]

Another distinguished feature of its Charter is that the IFC is not allowed to assume responsibility for managing any enterprise in which it has invested or exercising voting rights in managerial affairs.[35] Nevertheless, the Corporation is free to carry out its financing operations on such terms and conditions it deems appropriate in light of prevailing market conditions and the risk involved. In particular, IFC would invest in and assist a private enterprise building its productivity to make the enterprise more attractive to hesitant investors. Once the enterprise is fully established and has gained sufficient confidence built on its productivity, the IFC would sell its investment whenever it could be done on satisfactory terms.[36] This aspect of the Corporation's activity is crucial for the replenishment of its funds.

IFC mainly funds its operations from its capital stock, which is entirely held by 184 member countries and subscribed as pay-in capital.[37] The Corporation also funds its operations from debt obligations in the international financial markets and earnings from its investments. In March 2012, IFC's Board of Governors approved a U.S. $130 million increase in the authorized capital stock to $2,580 million, through the issuance of $200 million in shares (including $70 million in unallocated shares). [38] This decision was part of a broader policy, known as the IFC's Voice Reform, which aims at increasing the voice and participation of developing and transition countries (DTC) by increasing their voting power by 6.1% to 39.5%.[39] This decision required an amendment to IFC's Articles of Agreement which became effective on June 27, 2012. As of the same date, eligible members were authorized to subscribe to their allocated

[33] IFC, 'An Act to amend the International Finance Corporation Act 1955', Board of Governors, Resolution No. 21, September 21, (1961).
[34] Other MDBs including IDB, EBRD, EID and to some extent the AfDB, now have authority to provide equity investments.
[35] See Article III (3)(iv) of the IFC Article of Agreement, (2012).
[36] See Article III (3)(v & iv) of the IFC Article of Agreement, (2012).
[37] IFC's capital structure does not include the callable capital that is a factor supporting the AAA ratings of other MDBs.
[38] See IFC, 'Amendment to the Articles of Agreement and 2010 Selective Capital Increase', *Board of Governors*, Resolution No. 256, March 9, (2012).
[39] See World Bank Group, 'World Bank Group Voice Reform: Enhancing Voice and Participation of Developing and Transition Countries in 2010 and Beyond', *Development Committee* DC2010-0006, April 19, (2010) at 14.

IFC shares.[40] Currently, the IFC's total authorized capital amounts to $2.58 billion, of which $2.40 billion was subscribed and paid in on June 30, 2013, and the remaining was to be paid no later than December 30, 2014. As of June 30, 2015, IFC had received payments with respect to the Selective Capital Increase (SCI) totaling $194.303 million and the balance of $5.697 million has become part of IFC's authorized and unallocated capital stock.[41]

The IFC has undergone many changes since its inception in 1956. Between the 1990s and early 2000s, its operations increased dramatically as a result of a growing trend towards financing private sector enterprises in international development. This phenomenon stimulated a significant rise in foreign direct investment (FDI) flows to developing countries at the expense of the official development aid (ODA).[42] The IFC along with other MDBs saw an opportunity for developing countries to reap a larger benefit of the financial globalisation that was taking place. In particular, they anticipated that developing countries would tap the increased accumulation of global capital to raise investments, diversify risks and smooth the growth of consumption and investment.[43] More importantly, they projected that developing countries would benefit from incidental effects of the global financial integration, including knowledge spillover effects, better resource allocation, and strengthening of the domestic financial markets.[44]

Notwithstanding this huge potential, the massive inflow of private capital to developing countries did not quite yield the expected development outcome.[45] At the same time, the IFC was under mounting criticisms from scholars and socio-environmental advocates regarding the role it had played in the expansion of private capital inflow into developing countries that resulted in such mixed outcomes but with far-reaching consequences.[46] The turning point

[40] IFC, 'Annual Report 2016', vol. 2 (2016) at 17.
[41] Ibidem.
[42] FDI flows in developing countries raised by almost twenty percent between 1990 and 1996. See The World Bank, *Private Capital Flows to Developing Countries: The Road to Financial Integration,* Oxford University Press, (1997), at. 9
[43] Idem, at 3.
[44] Idem.
[45] See T. Gunter, 'International Mechanisms Shaping the Environmental Impact of Transboundary Capital Flows', paper prepared for the International Flows and the Environment Project, *World Resources Institute,* September, (1997) pp.1- 56; J. E. STIGLITZ, 'Capital Market Liberalization, Economic Growth, and Instability', *World Development*, vol. 28, No. 6 (2000) pp. 1075-1086; R. Broad & J. Cavanagh, 'The Death of the Washington Consensus?', in W. F. Bello et al. (eds), *Global Finance: New Thinking on Regulating Speculative Capital Markets,* Zed Books, (2000) pp. 83-95.
[46] See H. French, 'Making private capital flows to developing countries environmentally sustainable: the policy challenge', *Natural Resources Forum,* Vol. 22, Issue 2, (1998) p. 77–85; S. Park, 'Greening' the International Finance Corporation: Transnational Environmental Advocacy Networks and Sustainable Development', *Australasian Politics Studies Association Conference, v*ol. 29 (2003) at 6.

seems to have come on November 17, 1995, when the Chilean socio-environmental advocacy network, *Grupo por Accion de Bio-Bio* or Action Group in Defence of the Bio-Bio (GABB), and some 400 citizens filed a complaint with the World Bank Inspection Panel regarding the construction of the Pangue and Ralco hydroelectric dams on the Bio-Bio River in Chile.[47] The claim alleged that the IFC violated Bank policies on the environment, indigenous peoples, wildlands, management of cultural property, and involuntary resettlement in their loan to ENDESA, a private Chilean utility, which had begun the construction of the Pangue Dam and planned to build the Ralco power plant on the Bio-Bio River. [48]

However, the World Bank Inspection Panel rejected the Chilean citizens' claim on the ground that the resolution that established the panel does not permit them to investigate loans of the IFC. This incident provided for James Wolfensohn, the then World Bank President, the motivation for personally commissioning an independent audit of environmental and social issues associated with the Pangue project. In May 1996, Dr. Jay Hair, the former head of the National Wildlife Federation and the International Union for Conservation of Nature (IUCN), was appointed to undertake the evaluation. [49] The independent investigation confirmed that the IFC failed to comply with World Bank social and environmental guidelines. The report also suggested that IFC staff deliberately withheld critical environmental and social information from the IFC Board of Directors to ensure the project's approval.[50]

The Pangue Hydroelectric Project backlash provided the impetus for the Corporation to adopt formally the World Bank's *Pollution Prevention and Abatement Handbook* to its operations, which until then were loosely implemented by IFC staff.[51] Furthermore, the Corporation has internalised sustainable development norms in its operations and developed its own guidelines for sectors for which no guidelines were available in the Handbook.[52] In 1998, the IFC undertook a more comprehensive review of the World Bank's safeguard policies and adapted

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[47] See Inventory of Conflict and Environment (ICE), 'ICE Case Studies: The Bio-Bio River Case, Chile', *The Mandala Projects,* available at http://www1.american.edu/ted/ice/CHILEDAM.HTM#r1, accessed 28 June 2014.
[48] See D. Hunter, C. Opaso, & M. Orellana, 'The Biobío's Legacy: Institutional Reforms and Unfulfilled Promises at the International Finance Corporation', in D. Clark et al. (eds), *Demanding Accountability: Civil-Society Claims and the World Bank Inspection Panel*, Rowman & Littlefield Publishers, (2003) pp. 115-143.
[49] See D. Hunter C. Opaso, & M Orellana (2003) at 128.
[50] See J. D. Hair (Audit Team Leader), 'Pangue Hydroelectric Project (Chile): An Independent Review of the International Finance Corporation's Compliance with Applicable World Bank Group Environmental and Social Requirements', Pangue Audit Team, April 4, (1997) pp 146-152.
[51] S. Miller, 'Building a Sustainable Development Roadmap: IFC's Strategy to Ensure Environmental and Social Responsibility', *Environment Matters*, (2001) at 48
[52] A. Liebenthal, R. Michelitsch & E. I. tarazona, 'Extractive Industries and Sustainable development: An Evalution of the World bank Group Experience', World Bank Publication, January 01, (2005) at 118.

it for the private sector. That also prompted the World Bank to update its Pollution Prevention and Abatement Handbook to provide industry-specific guidelines that apply to WBG projects.

As of 1998, the IFC had in place the following operational policies (OP) and directives (OD): Environmental Assessment (OP 4.01); Natural Habitats (OP 4.04), Pest Management (OP 4.09); Forestry (OP 4.36); Safety of Dams (OP 4.37); International Waterways (OP 7.50); Indigenous Peoples (OD 4.20); Involuntary Resettlement (OD 4.30); Cultural Property (OP Note 11.03); Child and Forced Labour Policy Statement, and Disclosure Policy.[53] The IFC also established Environmental and Social Review Unit to monitoring to monitor the effectiveness of the safeguard policies.

Ever Since, IFC has developed a wider body of policies, documents, and procedures codifying its social and environmental operating procedures and practices that it keeps adapting continuously. Noticeably, IFC adopted the Sustainability Framework in 2006, which utters its commitment to sustainable development and forms an integral part of its approach to risk management.[54] An updated version of this Framework, incorporating valuable lessons from IFC's implementation experience and feedback from its stakeholders around the world, has become effective as of January 01, 2012.[55] Perhaps the most innovative aspect of IFC's increased focus on sustainability is the establishment of a Compliance Advisor/Ombudsman (CAO) ―an accountability office aimed at providing non-judicial problem-solving approaches to contentious aspects of projects. This office is deemed to be independent of the IFC managements and reports directly to the World Bank Group's president.[56]

The IFC claims that its investments and technical assistance advice helped achieve significant impact for the poor.[57] From its relatively modest beginnings ―nearly U.S. $42 million net investment commitments in seventeen countries,[58] IFC totalled investment commitments of about U.S. $25 billion in the fiscal year 2013, $6.5 billion of which was mobilized from investment partners. IFC partnered with nearly 2,000 private enterprises providing capital to

[53] See International Finance Corporation, 'Procedure For Environmental And Social Review Of Projects', IFC, (December 1998) at 3.
[54] IFC, 'International Finance Corporation's Policy on Social & Environmental Sustainability', IFC, April 30, (2006) pp 10.
[55] IFC, 'International Finance Corporation's Policy on Environmental and Social Sustainability', IFC, January 01, (2012).pp. 82.
[56] For further development on the CAO, see infra Section 4.3.1.1.
[57] IFC, 'Annual Report 2013', vol. 1 (2014) at 26.
[58] IFC, 'Annual Report 1956-1960', (1960) at 13.

more than 600 projects in one hundred and twenty-six countries.[59] These investments ranged from infrastructure to agribusiness, general manufacturing, extractive industries, and the financial markets. In 2012, IFC claimed that its investments yielded a wide range of development impacts in beneficiary countries.[60] These included providing job for 2.7 million people, generating power for 52.2 million customers, and distributing water to 42 million people. IFC also claimed that its investment provided access to health services for 17.2 million patients and improved opportunities for 3.1 million farmers.

2.3.1.2. The African Development Bank

The AfDB was established in 1964, entirely at the initiative of countries from the region. Its founding members somewhat expected to replicate the ideals of pan-Africanism in the organisation as they limited its membership to African States. Consequently, the Bank had operated for nearly two decades as an all-African institution, without non-regional members. Another reflexion of the founding members' concern for preserving the African character of the Bank was and still is the use of a particular unit account, Bank Unit of Account, as its reporting currency, instead of using the IMF's Special Drawing Rights (SDR) or any other major currency like its regional counterparts.[61]

The founding members overestimated the capability of the Bank to operate as an African-only institution. Its self-reliance strategy implied a substantial increase in the subscription costs and put many original member States in an awkward position as many of them had struggled for many years to meet their obligations.[62] Moreover, the Bank did not have a quality callable capital to back its efforts to raise the funds on international capital markets. The incapability to secure the full faith and credit of international financial market had, therefore, constrained the Bank's operations to be carried out merely from the small paid-in capital it had collected from its members. More importantly, the Bank could not afford to attract and retain staff of the highest calibre to help in its organisation and management.[63]

[59] IFC, 'Annual Report 2013', vol. 1 (2014) at 28.
[60] Idem, pp. 67-69 & 101.
[61] The UA is equivalent to the IMF's Special Drawing Right (SDR). See AfDB, 'Information Statement', (2011) at 2, available at http://www.afdb.org/fileadmin/uploads/afdb/Documents/Financial-Information/2011%20Information%20Statement.pdf, accessed 04 June 2014.
[62] The original capital amounted to equivalent U.S. $250 million, half of which was paid-in capital. See E. P. English & H. M. Mule (1996) at 20.
[63] S. Babb (2009) at 30.

The Bank had had a very slow take-off compared to its regional counterparts. It provided loans on a concessional basis,[64] with repayment periods of twelve to twenty years, tied to policies designed to make the best use of its limited resources. On the one hand, the Bank set loan ceilings for multinational and national projects at equivalent to U.S. $8 million and U.S. $3 million respectively.[65] The immediate consequence of this policy was that the Bank had to engross the high administrative costs resulting from its lending operations. On the other hand, the Bank was reluctant to support projects initiated by the least-developed of its member States. The reason put forward by the Board of Governors was that for its early periods, "the Bank should not make any loans from its own capital resources to countries that are not good risks, that it should invest its resources in bankable projects in creditworthy countries."[66] Alternatively, the Bank was not able to provide non-concessional loans to its poorest members as these implied additional burdens in terms of lower interest rates and service charge, longer repayment periods, and regular replenishment, all of which were beyond its financial capacity and that of then its members. For the period 1970-1972, the Bank totalled annual loan approvals for about equivalent U.S. $21 million only whereas the comparable figure for the IDB and the ADB equalled U.S. $685 million and U.S. $275 million respectively.[67]

In 1972, the Bank established its soft lending window, the African Development Fund (AfDF), which became operational in 1974 with grants totalling BUA80.6 million (about U.S. $97.3 million) from the Bank's hard lending window included fourteen non-regional members.[68] Again, to maintain African control over the Bank, regional members set up a separate governance structure in which non-regional members would not enjoy any additional privileges beyond those allotted for the Fund. Perhaps most notably, both regional and non-regional members were expected to share equal representation and voting power in the Board of Directors of the Fund irrespective of their financial contribution.[69] However, the President of the Bank should serve as President of the Fund and chairman of its Board of Directors.[70]

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[64] The AfDB was set up to run as a hard lending window just like the IBRD and the IDA.

[65] See C. S. Barnes, 'The African Development Bank' s Role in Promoting Regional Integration in the Economic Community of West African States', *Boston College Third World Law Journal*, vol. 4, Issue 2 (1984) at 158.

[66] African Development Bank, Board of Governors, 3rd Meeting, Working Paper on Special Programme for Relatively Less Developed Member Countries 4-5 (August, 1967), cited by C. S. Barnes (1984) at 166.

[67] E. P. English & H. M. Mule (1996) at 20.

[68] See African Development Bank, 1974 Annual Report 14 (1975) & I. E. Ebong, *Development Financing under Constraints: A Decade of African Development Bank,* Bonn: Neue Gesellshaft, (1974) at 63, both cited by C. S. Barnes (1984) at 166 notes 49 & 50.

[69] E. P. English & H. M. Mule (1996) at 21.

[70] Article 30(1) of the Agreement Establishing the African Development Fund.

In the late 1970s, the Bank began to reach the limit of its lending capacity, and resorted to extending the membership of its hard lending window to non-regional members in order to increase its capital base. However, the underlying agreement could not become effective until 1982.[71] Meanwhile, the development imbalance between rich and poorer regional members deepened because most of the Bank's investments were directed into the former. Despite an increase in the investment portfolio of the Fund,[72] poorer regional member countries did not benefit from new infrastructure investments to supporting their industrialisation. The reason was presumably the concentration of AfDF-sponsored investments in existing growth pole areas.[73] To address this issue, the Bank put in place a strategy aimed at scaling up co-financing activities with the Fund in the area of multinational projects.[74] However, the Bank's resources were not enough to meet the rapidly increasing demand for financings from its regional member countries (RMCs). Various endeavours to attract additional resources from member and non-member countries proved disappointing except for Nigeria, which agreed to set up the Nigeria Trust Fund (NTF).

With a sharp increase in revenues as a result of favourable market conditions, Nigeria felt the need to channel a portion of its resources through the Bank's facilities. The underlying objective was to assist the development efforts in RMCs, particularly those with low-income and those affected by unpredictable catastrophes.[75] The NTF was designed to operate relatively as a soft lending window by providing financing at intermediate rates ─which are lower than the conventional Bank's rate but higher than the non-concessional Fund terms.[76] Its initial capital stock of equivalent U.S. $ 80 million was replenished in 1981 with U.S. $ 71 million.[77] The NTF alongside with the Bank and the Fund compose the AfDB Group.

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[71] S. Babb (2009) at 30.

[72] African Development Bank, 1979 Annual Report, Lending Policy 5 (1980), cited by C. S. Barnes (1984) at 168.

[73] The main idea of the growth poles theory is that economic development, or growth, is not uniform over an entire region, but instead takes place around a specific pole (or cluster) which is often characterized by core industries around which linked industries develop, mainly through direct and indirect effects. For further development on the "Growth Pole" theory, see N. M. Hansen, 'Development pole theory in a regional context', *Kyklos,* vol. 20 No. 4 (1967) pp. 709-727. M. Mønsted, 'Francois Perroux's Theory of "Growth Pole" and "Development" Pole: A Critique', *Antipode,* vol. 6, No.2 (1974) pp. 106-113; V. Komarovskiy, & V. Bondaruk, 'The Role of the Concept of "Growth Poles" for Regional Development', *Journal of Public Administration, Finance and Law*, Issue 4 (2013) pp. 31-42.

[74] C. S. Barnes (1984) at 168.

[75] Section 1(2) of the Agreement for the establishment of the Nigeria Trust Fund.

[76] Section 6(1) of the Agreement for the establishment of the Nigeria Trust Fund; Article 16(2) of the Agreement Establishing the African Development Fund; Articles 17 & 18 of the Agreement Establishing the African Development Bank.

[77] African Development Bank Group, 'The Nigeria Trust Fund', available at http://www.afdb.org/en/about-us/nigeria-trust-fund-ntf/, accessed 12 June 2014.

The late 80s and early 90s were characterised by the most severe crisis the Bank group has ever experienced, after non-regional members lost confidence in its lending policies and management practices.[78] This was exacerbated by the climate in which it operates, perhaps the most difficult development environment in the world ─with the bulk of its clients that were among the poorest, and had experienced serious political, economic and budgetary problems for years. Although many RMCs were becoming more and more uncreditworthy, the Bank Group had continued to extend non-concessional loans to them.[79] By early 1994, the Bank Group arrears had reached U.S. $700 million, twice their level in 1992.[80]

After protracted negotiations between non-countries members and RMCs, the Bank Group introduced significant reforms to improve its financial policy and strengthen its development impact.[81] Despite that, many RMCs remained economically vulnerable and highly indebted. Recognizing the seriousness of the debt issue, the Bank Group joined the World Bank-IFM debt relief initiatives[82], including the HIPCs and the more comprehensive MDRI, and created its own Supplementary Financing Mechanism (SFM) to provide debt relief and help finance increased poverty reduction projects.[83] The Bank Group has also endorsed new regional integration initiatives such as the New Partnership for Africa's Development (NEPAD) and the Programme for Infrastructure Development in Africa (PIDA) as part of its development efforts. However, a further complication arose, after the civil war in Côte d'Ivoire prompted the Bank to move provisionally its headquarters to Tunis, Tunisia in 2003. The Bank moved back to Abidjan in 2014.

Another important point that needs to be made before concluding this section is the Bank's quest for quality of its interventions. 1994 was a turning point for the Bank Group as it initiated a process of self-examination and soul searching of what was wrong with its operations in

[78] See African Development Bank Group, 'The Quest for Quality', April (1994) at 1, as cited by E. P. English & H. M. Mule (1996)at 89; African Development Bank Group, 'The Bank Group Credit Policy', *Document B/BD/94/07/Rev.1,* May 16, (1995)

[79] African Development Bank Group, 'The Bank Group Credit Policy', *Documents ADB/BD/WP/98/40 & ADF/BD/WP/98/33,* March 08, (1998) at para. 1.2.

[80] E. P. English & H. M. Mule (1996) at 29.

[81] See United States General Accounting Office (GAO) 'Multilateral Development Banks: Financial Condition of the African Development Bank', *GAO/NSIAD-95-143BR*, April 21, (1995) & The Bank Group Credit Policy (1998).

[82] This includes the HIPCs and the more comprehensive MDRI.

[83] See African Development Bank Group, 'The Bank Group Credit Policy', Documents ADB/BD/WP/98/40 & ADF/BD/WP/98/33, March 08, (1998) at para. 4.2.

Africa.[84] To undertake this task, Mr. Babacar Ndiaye, the then President of the AfDB Group, commissioned a Panel of three eminent persons to undertake a special study on the Bank's governance and related issues.[85] The Panel studied governance and accountability issues at various levels within the Bank Group's management structures and made a number of recommendations to restructure the Bank Group with a view of at strengthening its governance.[86] As part of the implementation of the Panel's recommendations, the Bank Group adopted, in 1999, a new Vision for the Bank Group, together with a policy on Good Governance aimed at improving standards in the quality of the Bank's operations, while fostering accountability and transparency in the management of public resources and combating corruption in regional member countries.[87]

In addition, the Bank Group witnessed an increased demand for the establishment of an inspection function, to be supported by a compliance unit together with an independent fraud and corruption investigation unit, from a number of stakeholders including certain member states.[88] Following this insistent request, the Bank Group's Board of Directors mandated Management to develop a proposal in light of best practices in other IFIs with regard to inspection function. Management then initiated a study on the establishment of an Inspection Function and retained the services of Prof. Daniel Bradlow to assist Management in conducting this review.[89]

Prof. Bradlow conducted an extensive review of the existing inspection mechanisms at other IFIs and their experiences and recommended, in November 2003, that the Bank Group adopt a combined compliance review and problem-solving mechanism.[90] Based on these recommendations, Management of the Bank Group proceeded to develop proposals for the establishment of the inspection function and invited interested stakeholders to offer their comments on the proposals over a 3-month period spanning from 12th December 2003 to 15th March 2004.[91] This process culminated in the establishment by the Boards of Directors of the

84 L. A. L. Deng, *Rethinking African Development: Toward a Framework for Social Integration and Ecological Harmony*, Africa World Press, (1998) at 254.
85 Idem, at 245.
86 The Panel report entitled "The Quest for Quality", also referred to as Knox report after the panel chairman, David Knox, was released in April 1994. For further analysis of its findings, see E. P. English & H. M. Mule (1996) at 34*ff*; L. A. L. Deng (1998) at 255*ff*.
87 D. M. Kiara, 'The African Development Bank Group and the Establishment of the Independent Review Mechanism', *Law for Development Review,* vol. 1 (2006) at, 215.
88 Idem, at 216.
89 Ibidem.
90 Ibidem
91 Ibidem.

Bank and Fund, pursuant to Resolutions adopted on 30 June 2004, of an Independent Review Mechanism (IRM) comprising the Compliance Review and Mediation Unit (CRMU), as the focal point, and a roster of experts (Roster).[92]

The Bank Group has come a long way since 1964. It marked its 'Golden Jubilee' in September 2014. From its inauspicious beginnings, ten staff members[93] and the equivalent to U.S. $ 250 million capital stock, the Bank Group has expanded both its membership and financial portfolio to become the Continent's primary financial institution.[94] Currently, the Bank has 79 member States, of which 26 are non-regionals. By contrast, the Fund has 31 contributing members including the Bank, 26 non-regionals members, and four RMCs, namely South Africa, Egypt, Libya and Angola.

Recent capital increases have seen the Bank Group raise its total asset base to nearly UA 66.98 billion, approximately US $103.14 billion, of which UA 60.25 billion, approximately US $92.78 billion, are callable capital.[95] The Bank Group financing amounts to UA 4.39 billion ─approximately US $6.76 billion.[96] The Bank group announced that it is looking into different options to develop its operations further. These include providing eligible AfDF-only RMCs access to the AfDB sovereign windows under well-stipulated conditions; augmenting the proportion of public-private partnerships and co-financing opportunities; and exploring new financing sources, such as equity, pension funds and the emerging economies.[97]

Overall, the Bank group provides financing for a broad range of development projects and programmes.[98] In addition, it provides policy-based loans and equity investments, finances non-publicly guaranteed private sector loans, offers technical assistance for projects and programmes that provide institutional support, promotes the investment of public and private capital, and responds to requests for assistance in coordinating RMC development policies and plans.[99] National and multinational projects and programmes that promote regional economic cooperation and integration are also given high priority. The AfDB group allocates its resources

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[92] Ibidem.
[93] D. Kaberuka, President of the African Development Bank Group, *Speech at the Launch of the 50th Anniversary Celebration of the Bank Group*, Tunis, Republic of Tunisia, April 22, (2014).
[94] African Development Bank Group, 'Private Sector Development Strategy of the African Development Bank Group2012-2017' AfDB, (May 2012) at 1, http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/2013-2017_-_Private_Sector_Development_Strategy.pdf, accessed 04 June 2014.
[95] African Development Bank Group, 'About us', http://www.afdb.org/en/about-us/, accessed 04 June 2014.
[96] African Development Bank Group, 'Annual Report 2013', AfDB Group, April 17,(2014) at xv.
[97] AfDB Group, 'Annual Report 2013', (2014) at xi.
[98] AfDB Group, 'Information Statement', (2016), at 4.
[99] Ibidem.

and supports projects in RMCs in accordance with its credit policy that classifies RMCs under three categories (A, B and C) on the basis of their country-creditworthiness and Gross Domestic Product-related considerations.[100] The first category (A) is made up of countries with a per capita GDP of less than U.S. $540. RMCs falling in this category are only eligible for concessionary resources from the AfDF. By contrast, the second category (B) encompasses countries with access to a blend of AfDB and AfDF resources. These countries have a GDP per capita of between U.S. $540 and U.S. $1,050. Lastly, the third category (C) comprises middle-income countries with a GDP per capita higher than U.S. $1,050 and allows access to only AfDB loans.

2.3.2. Context in which operations of IFIs takes place

The IFIs referred to here are categorised as Multilateral Development Banks (MDBs).[101] These are independent inter-governmental institutions that pursue the public good of socio-economic development and stability. From this perspective, they are not as profitable institutions as commercial bank. Profit maximisation is not the overarching goal of IFIs. In contrast to private financial institutions, the shareholders of IFIs do not expect financial dividends. To promote the economic and social development of poorest and developing countries, MDBs rely on a core bank or non-concessional harm with a number of affiliates attached to it, including a concessional window, a private sector financing arm, and guarantee facilities. The primary vehicle of development assistance is issuing loans to the sovereign member countries and private sector enterprises for development projects within borrowing member States. In some instances, a member State is required to guarantee loans made to private sector enterprises for projects within its territory and, as a result, such a State may be held liable for the defaulted loans.

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[100] See African Development Bank Group, 'The Bank Group Credit Policy', Documents ADB/BD/WP/98/40 & ADF/BD/WP/98/33, March 08, (1998); African Development Bank Group, 'The AfDB in 10 ', AfDB Group, December 18, (2012) at 6.

[101] Most academic literatures include in this category the World Bank Group, the main regional banks and a number of sub-regional and specialised development institutions such as the Andean Development Bank, the European Bank of Investment, the Central American Development Bank, the Islamic Development Bank, and the International Fund for Agricultural Development (IFAD). The IMF, whose mandate is to ensure international financial stability, is not an MDB. See J. w. Head, 'Evolution of the Governing Law for Loan Agreements of the World Bank and other Multilateral Development Banks', *The American Journal of International Law,* vol. 90, (1996) at 214; J. E. Sanford & M. A. Weiss, 'Multilateral Development Banks: Issues for the 108th Congress', *Congressional Research Service,* June 03, (2003) at summary; D. D Bradlow, 'International Law and Operations of the International Financial Institutions', in D. D. Bradlow & D. Hunter (eds), *International Financial Institutions & International Law,* Kluwer Law International, (2010) at 3, note 4.

Ordinarily, IFIs do not grant further loan disbursements to a borrowing country if previous loans to, or guarantees by, the very same member are in default. The rationale behind this approach is to provide the borrowing or guaranteeing country with a strong incentive to maintain servicing the loan — to pay in the interest and principal on the scheduled due dates — and to enhance its institutional commitments. Strikingly, IFIs have claimed to enjoy a 'preferred creditor status'[102] due to their development financing function coupled with their role as lenders of last resort to countries suffering from poor credit worthiness.[103] A failure to fulfil debt obligations used to be mitigated through mechanisms involving a 'haircut' of the defaulted loan without forgiving the debt.[104] The reason for that was that debt forgiveness would impede IFIs' ability to meet financial needs of other developing and poorest countries. There were also concerns about the moral hazard such an approach would generate and the fact that debt forgiveness would give debtor countries the impression that they could borrow from the IFIs without a commitment to reimburse the loan.[105]

For most creditors, debt relief was an exceptional measure and should include a battery of policy reforms to be implemented to reduce the likelihood of its recurrence. At the same time, IFIs offered new loans to debtor countries to support the reforms they were undertaking. Negotiations for refinancing the debt on easier terms took place under the auspices of a group of major creditor nations, known as the Paris Club.[106] When it became evident that debt

[102] Although there is no legal base, IFIs have transposed this municipal insolvency concept of preferred creditor status to the international plan. Indeed, it is customarily in municipal insolvency laws to differentiate groups of creditors according to various standards. Certain claims such as unpaid taxes and social security contributions are given preference. Comparatively, IFIs have argued that debts owed to them would be paid in full before any other creditors and would not be reduced under any circumstances. See African Development Bank Group, 'Financial Information: Rating', http://www.afdb.org/en/about-us/financial-information/ratings/, accessed 02 June 2014; International Financial Corporation, 'Syndicated Loan & Management: Preferred Creditor Status', http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Syndications/Overview_Benefits_Structure/Syndications/Preferred+Creditor+Status/, accessed 02 June 2014; N. Roubini, B. Setser, *Bailouts or Bail-Ins? Responding to Fincancial Crisis in Emerging Economies*, the Institute for International Economics, (2004) at Chapter 7; K. Raffer, 'Preferred or Not Preferred: Thoughts on Priority Structures of Creditors', Paper prepared for discussions at the 2nd Meeting of the ILA Sovereign Insolvency Study Group, October 16, (2009) pp. 20.

[103] See E. Fernández-Arias, 'International Lending of Last Resort and Debt Restructuring', *Inter-American Development Bank Research Department,* Discussion Paper No. IDB-DP-103 (2010) at 11.

[104] See Udaibir Das et al., 'Sovereign Debt Restructurings 1950–2010: Concepts, Literature Survey, and Stylized Facts', *IMF Working Paper,* WP/12/203 (August 2012) pp.128; M. Fuentes & D. Saravia, 'Sovereign defaulters: Do international capital markets punish them?', *Journal of Development Economics,* vol. 91 (2010) at 338.

[105] See W. Easterly, 'Think Again: Debt Relief', *Foreign Policy,* No. 127 (Nov. - Dec., 2001) pp. 20-26

[106] The Paris Club a voluntary, informal group of creditor nations whose objective is to find workable solutions to payment problems faced by debtor nations. For further development on this group see R. P.Brown & T. J. Bulman, 'The Clubs: Their Role in the Management of International Debt', in P. M. Sgro. (eds.), *International*

rescheduling initiatives under the Paris Club fell short of achieving sustainable levels, the World Bank and the IMF introduced the Heavily Indebted Poor Countries (HIPC) Initiative, later followed by the Multilateral Debt Relief Initiative (MDRI), to allow HIPC to finance increased poverty reduction projects as a result of a substantial reduction (almost by 90 percent) of their debt service burdens.[107] A recent report issued by the IMF suggests that the costs incured by MDBs in providing relief under the MDRI is estimated to be US $41.1 billion in end-2013.[108]

2.4. Financial Structure Underpinning IFI-Funded Operations

The financial structure associated with a proposed IFI-funded operation has a bearing on the legal issues that arise from it. IFIs utilise different methods to deliver their support to their clients. These methods can broadly be categorised in two groupings. On the one hand, IFIs' support is provided through the funding of specific projects (project support).[109] This technique involves direct participation in the design and implementation of the project that is being financed. It also enables IFIs to have direct control over the allocation of resources. On the other hand, IFIs' support can be delivered through assistance of the recipient government's programme (budget support).[110] This method entails the imposition of conditionality on how to retain and allocate the available resources.

Despite the broad discontent with the use of conditionality, IFIs have extensively utilised the budget support-related arrangement to induce policy reforms, with the ultimate goal of increasing effectiveness of their intervention in the beneficiary countries.[111] However, the rather disappointing result of this approach has led both IFIs and beneficiary countries to

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Economics, Finance and Trade, Volume 1, EOLSS Publications, (2009); S. Griffith-Jones, 'The Paris Club and the Poorer Countries', *Savings and Development*, vol. 11, No. 2 (1987) pp. 137-159;

[107] For further development see IDA and IMF, 'Heavily Indebted Poor Countries (HIPC) Initiative and Multilateral Debt Relief Initiative (MDRI):Status of Implementation', Aug. 21, (2006) pp. 87, available at http://www.imf.org/external/pp/longres.aspx?id=3887, accessed 02 June 2014; IDA and IMF, 'Heavily Indebted Poor Countries (HIPC) Initiative and Multilateral Debt Relief Initiative (MDRI): Status of Implementation' Sept. 15, (2009) pp. 62, available at http://www.imf.org/external/pp/longres.aspx?id=4365, accessed 02 June 2014.

[108] IMF, 'Heavily Indebted Poor Countries (HIPC) Initiative And Multilateral Debt Relief Initiative (MDRI)—Statistical Update', Dec. 12, (2014) at 1.

[109] T. Cordella & G. Dell' Arriccia, 'Budget Support versus Project Aid', paper (2003) pp 1-4.

[110] M. Foster & A. Fozzar, 'Aide and Public Expenditure: A Guide', Centre for Aid and Public Expenditure, Working paper No 141 (October 2000) pp. 50-67.

[111] J. D. Sachs, 'Conditionality, Debt Relief, and the Developing Country Debt Crisis', in J. D. Sachs (ed), *Developing Country Debt and Economic Performance*, vol. 1: The International Financial System, University of Chicago Press, (1989) pp 255-296; G. Ranis, 'Toward the Enhanced Effectiveness of Foreign Aid', Economic Growth Center, University of Yale, Center Discussion Paper No. 938 (June 2006) pp. 1- 19.

redesign this arrangement toward a greater ownership of the recipient country.[112] In many countries nowadays budget support originates from the use of debt relief funds, specifically the HIPC and MDRI initiatives. With the debt crisis experienced by many low income countries in the 1990s an international consensus emerged to form a comprehensive debt relief mechanism based on good policies in the partner country.[113] Parallel to the budget and project support techniques, IFIs rely on the sector programme support to assist the development of specific sector within a beneficiary country, region or sub-region.[114] This method is concerned with improving the outcome of IFI financings through the promotion of consistent and coherent policies and investments and close coordination among all the different actors. An important determinant of this method is the involvement of local stakeholders in project and programme formulation.

Over the past two decades, there has been a surge in the private-sector financing of public projects, especially in industrial and infrastructural sectors.[115] IFIs have utilised project finance techniques to attract private investors in those sectors as a result of the decrease in the flow of public funding for development projects.[116] Supporters of this approach argue that the private sector provides greater levels of effectiveness than the public sector when it comes to operating infrastructure projects.[117] They also put forward the fact that project finance arrangements tend to enable an efficient allocation and management of risks associated with large infrastructural projects.[118] Most IFIs have come to an understanding that their chief challenge is to foster

[112] For further development on budget support issue, See P. Harrold et al., 'The Broad Sector Approach to Investment Lending: Sector Investment Programs', World Bank Discussion Papers No 302, (August 1995); S Bandstein, 'What Determines the Choice of Aid Modalities?', report commissioned by the Swedish Agency for Development Evaluation, (December 2007).

[113] The Paris Declaration on Aid Effectiveness.

[114] P. Harrold et al., 'The Broad Sector Approach to Investment Lending: Sector Investment Programs', World Bank Discussion Papers No 302, (August 1995); S Bandstein, 'What Determines the Choice of Aid Modalities?', report commissioned by the Swedish Agency for Development Evaluation, (December 2007).

[115] R. A. Brealey et ali., 'Using Project Finance to Fund Infrastructure Investments', *Journal of Applied Corporate Finance,* vol. 9 No 3, (Fall 1996) at 25; P. Nijkamp & S. A. Rienstra, 'Private Sector Involvement in Financing and Operating Transport Infrastructure, *The Annals of Regional Science,* vol. 29 (1995) pp. 221-235; J. Delmon, *Private Sector Investment in Infrastructure: Project Finance, PPP Projects and Risks,* Kluwer Law International, (2009) pp 1- 640.

[116] N. H. Stern & H. P. Lankes, 'Making the most of markets: The role of IFIs', *EIB Papers*, vol. 3 No 2 (1998) pp. 102-114; P. A. Ahmed & X. Fang, Project Finance in Developing Countries, World Bank Publications, (January 1999) pp 102.

[117] K.Gassner et ali., 'Does the Private Sector Deliver on its Promises? Evidence from a Global Study in Water and Electricity', *GridLines*, Note No 36, the World Bank Publications (May 2008) pp. 1-4.

[118] P. A. Ahmed & X. Fang, *Project Finance in Developing Countries,* World Bank Publications, (January 1999) pp 102.

development through the private sector that they increasingly consider as the primary vehicle for achieving development goals.[119]

This is not to say that individual projects constitute an ultimate substitute for budget support arrangements and associated conditionality. It is not my intention to sort through the complexity of all existing financial structures that could be associated with an IFI funding. Such a exercise goes beyond the scope of this research. e choice of this financial arrangement is meant to lay the foundations for the analyses of the standards and forum of accountability in the next two chapters.

2.5. Oversight of IFI Activities

The board of governors representing the interests of each shareholder oversees activities of IFIs. Generally, the board of governors is in charge of the following duties: admitting new members, increasing or decreasing capital, suspending members, authorizing agreements for cooperation with other international organisations (IOs), approving the organisation's financial statements, making decisions about the board of executive directors, determining the reserves and allocation of profits, and making decisions about the scope of the organisation's operations. Moreover, IFIs have a board of executive directors to whom the governors have delegated oversight of day-to-day activities. Each board of executive director is responsible for ensuring the implementation of the decisions of the board of governors; making decisions concerning loans, guarantees, investments, technical assistance, and borrowing funds; submitting accounts to the board of governors, and approving the budget of the organisation. The daily operations are carried out by IFIs own management and staffs.

2.6. Case Studies

Previous sections have shown how the operations of IFIs are structured. This section analyses three case studies to help understand the interaction between participants to an IFI-funded project. Each of these cases lays the basis of further insight into the analysis of the standards and fora of accountability in the next two chapters. In particular, this section intends to explore the practical circumstances under which a legal issue may arise between participants to an IFI-funded project and third party individuals. The selected case studies do not intend to address the issue of how an accountability process unfolds in practice, as that will prejudge the developments in chapter 3 (accountability standards) and chattier 4 (accountability fora). The

[119] This is a contentious issue of with a full discussion is outside the scope of a focus this research.

first case study involves IFI financing of the Mega hydropower scheme in Democratic Republic of the Congo (DRC). The Second case study refers to IFC financing of The Kingamyambo Musonoi Tailings SARL (KMT) Project in DRC. The last case deals with IFI-financing of the Lesotho Highlands Water Project in Lesotho and South Africa. The analysis of these cases show that third parties do not access meaningful information, during the project design phase, to weigh more carefully what is at stake if the envisaged project goes forward. However, they pay the higher price when the project is being implemented and even long after it completed. The examination of these cases also shows that non-state third parties do not access legal accountability mechanism in the manner other participants to the project do. I will return to talk about this issues in the recommendations. Moreover, selected case studies show that operations of IFIs involve different stakeholder groups that have different expectations and demands. While, some stakeholders have the means and capability of protecting their interests others, particularly individual and communities, do not.

2.6.1. The Grand Inga Project in DRC.

Grand Inga is the Congolese government long-standing plan to build a mega hydropower scheme on the Congo River that could generate almost twice as much energy as the current record-holder, the Three Gorges Dam on the Yangtze River in China.[120] This project has attracted the interest of various IFIs and Congolese officials since the colonial period in the 1950s, and has given rise to giant projects to ship cheap hydropower from Pretoria in South Africa to Cairo in Egypt and beyond, into Europe.[121] It was envisaged at the time that the project would be carried out in two phases. Phase I would comprise Inga 1, Inga 2 and Inga 3 to realise about 4,500 megawatts (MW) of electricity. Phase II, referred to as Inga 4 (or Grand Inga), would produce the full power potential for the site about 40,000 MW — enough electricity for Sub-Sahara Africa and export outside the sub-continent.[122]

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[120] IDA, 'Project Appraisal Documentation a Proposed Grant in The Amount Of SDR 47.7 Million (US $ 73.1 Million Equivalent) to The Democratic Republic of Congo for an Inga 3 Basse Chute and Mid-Size Hydropower Development Technical Assistance Project', Report No: 77420-ZR, Document of the World Bank, March 5,(2014) at 1.

[121] The French electricity utility Eléctricité de France (EDF) and the AfDB have financed studies regarding the feasibility of taping Inga hydropower in 1974 and 1997 respectively. See International Conference on the Great Lakes Region (ICGL), 'Regional Programme of Action for Economic Development and Regional Integration: Rehabilitation and Connectivity of INGA Dam', Project No. 3.3.7, (March 2006) at 5; A. Lustgarten, 'Conrad's Nightmare The World's Biggest Dam and Development's Heart of Darkness', *Counter Balance,* (November 2009) at 1.

[122] ICGL, Project No. 3.3.7 (March 2006) at i.

Notwithstanding such a huge potential, only two power stations have been developed to date. Inga 1 Dam (351 MW) and Inga 2 Dam (1,424 MW) were respectively commissioned in 1972 and 1982 with the World Bank financing. Remarkably, a 1,770 km transmission line (Kolwezi transmission line) was built along with Inga 2 to deliver power to large copper mines in the Katanga province, bypassing virtually every town and community underneath. Disappointingly, this economic choice to prioritize access to electricity for large mining corporations did not yield the expected economic benefits. The two existing dams have never operated to full capacity because of financial mismanagement and due to lack of maintenance.[123] However, they contributed heavily to the country's escalating debt burden.[124]

In 2003, funds were earmarked by IDA to rehabilitate Inga 1 and 2 dams, and the Kolwezi transmission line. IDA financing for this project received Board approval only on May 29, 2007, and became effective on April 2, 2008.[125] At the time of writing, about ten years after the initiation of this project, the rehabilitation of the two dams has yet to be completed. Despite the early planning for rehabilitation, implementation of this project has proved challenging. IDA failed to diagnose adequately the extent of repair required for these old poorly maintained dams and the related transmission line, as well as other critical issues in the original assessment.[126] From 2008 to 2012, nevertheless, the project have received additional financing from IDA, AfDB, EIB, and a German development agency Kreditanstalt für Wiederaufbau (KfW) bringing the overall rehabilitation costs to over $1.2 billion. While rehabilitation works are expected to be completed in 2016, a 2014 intermediate evaluation report rated the implementation progress as moderately unsatisfactory.[127]

Disturbingly, the same IFIs that have been striving to rehabilitate the two existing Inga dams and the Kolwezi transmission line have embarked on the construction of a new larger dam, the

[123] The available operational capacity is known to be much less than the installed capacity of 1775 MW. See IDA, Report No: 77420-ZR (2014) at 4.
[124] DRC's debt burden has only been relief in 2010. See IMF, 'IMF and World Bank Announce US$12.3 billion in Debt Relief for the Democratic Republic of the Congo', press release No. 10/274, July 1,(2010) available at https://www.imf.org/external/np/sec/pr/2010/pr10274.htm, accessed 01 September 2014.
[125] IDA, 'Project Paper on a Proposed Additional Financing Grant to the Democratic Republic of Congo for the Regional and Domestic Power Markets Development Project (Southern Africa Power Market Project: APL-1B)' Report No: 61654-ZR, Document of the World Bank, June 01, (2011) at 13.
[126] Idem, pp 14-15.
[127] IDA, 'Restructuring Paper on a Proposed Project Restructuring of Regional and Domestic Power Markets Development Project (Southern Africa Power Market Project: APL-1B) to the Democratic Republic of Congo', Report No: RES12718, Document of The World Bank, March 27, (2014) at 6; see also the World Bank, 'Implementation Status & Results Africa Regional and Domestic Power Markets Development Project (Southern Africa Power Market Project: APL-1b) (P097201)', Report No: ISR12007, October 05, (2013) at 1.

Inga 3 *Basse Chute* (BC), across a tributary of the Congo River in the Bundi Valley.[128] Seemingly, this is to complete the development of phase I of the above-mentioned mega hydropower scheme that they perceive as a development game-changer for the sub-Saharan Africa Region. In late 2013, the AfDB approved equivalent of U.S. $33.4 million to finance technical assistance for this project.[129] On March 20, 2014, IDA also approved a U.S. $73.1 million grant to the DRC for this same project.[130] Likewise, Jin-Yon Cai, the then head of the IFC, expressed interest in providing funding for the Inga 3 BC project that he considers to be the top priority of his tenure at the Corporation.[131]

Inga 3 BC is expected to produce about 4800 MW electricity and would entail an overall construction cost, associated transmission lines included, that is estimated at U.S. $11 billion. [132] The project has taken a mercantile approach. It focuses more on getting the highest returns on investments than improving access to electricity in DRC. 2500 MG of the 4800 MW to be produced by Inga 3 BC have already been sold to ESKOM, the national utility of South Africa.[133] The remaining electricity is allocated as follows: 1,300 MG will be sold to mining corporations in the Katanga province and the balance, of which only 600 MW is firm power, will be allocated to Kinshasa.[134] There will be no electricity for local communities surrounding the proposed dam or other urban poor in DRC. The reason being that the allocation most of the power produced by Inga 3 BC to the public power grid would result in a low bankability of the project.[135]

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[128] IDA, 'Strengthening Support for Regional Projects Background Note', Report No: 81803, October (2013) at 7.

[129] AfDB Group, 'Inga Site Development and Electricity Access Support Project (PASEL): Project Appraisal Report', ONEC Department, (October 2013) at iii.

[130] The World Bank, 'World Bank Group Supports DRC with Technical Assistance for Preparation of Inga 3 BC Hydropower Development', Press release, March 20, (2014) available at http://www.worldbank.org/en/news/press-release/2014/03/20/world-bank-group-supports-drc-with-technical-assistance-for-preparation-of-inga-3-bc-hydropower-development, accessed 10 September 2014.

[131] P. Stephens, 'IFC's CEO says Inga dam is his number one priority', Devex Impact, June 06, (2014), available at https://www.devex.com/news/ifc-s-ceo-says-inga-dam-is-his-number-one-priority-83624 accessed 10 September 2014.

[132] IDA, Report No: 77420-ZR (2014) at 21.

[133] South Africa and the DRC signed a treaty on Inga hydropower scheme governing the electricity trade between the two countries. See Department of Energy, Republic of South Africa, 'Media Release: Signing of Energy Agreement between South Africa and the Democratic Republic of Congo', available at http://www.energy.gov.za/files/media/pr/2014/MediaRelease-Signing-seremony-between-DRC-and-RSA-09September-2014.pdf, accessed 10 September 2014.

[134] IDA, Report No: 77420-ZR (2014) at 92.

[135] Idem, at 91.

Perhaps most disturbingly and least emphasised, however, the development of Inga 1 and 2 dams along with the related transmission line have left a social legacy that has yet to be addressed. Inga's displaced communities have been struggling to obtain fair compensation since the outset of these projects about 40 years ago. They live in inadequate housing without basic services such as access to education, water and sanitation.[136] Civil societies have collected a series of documents that seem to show that compensation sums were agreed with displaced communities by the end of the colonial period.[137] There is, however, no evidence indicating the actual payment of such compensation by the Congolese government or the *Société Nationale d'Eléctricité* (SNEL), the national utility that manages Inga 1 and 2 dams.

Notwithstanding this unsettled social legacy, the proposed Inga 3 dam will negatively affect many communities including the very same already-displaced communities who have yet to be compensated for the impact resulting from the construction of the previous Inga dams.[138] If history has taught us anything, it is that a debt accumulated by a kleptocratic regime, under the auspices of IFIs which were fully aware that this money would never help or even reach the normal economy, is paid back by the citizens.[139] Likewise, Congolese citizens will still have to pay for the dam's construction cost although they will not benefit from it as the power line will bypass their cities sending most electricity in South Africa and mining corporations in the Katanga province.

In late July 2016, the World Bank suspended finding for Inga 3 BC citing the Congolese Government's "decision to take the project in a different strategic direction to that agreed between the World Bank and the Government in 2014",[140] without giving further detail. At the time of the suspension the Bank had disbursed approximately 6 per cent of the funding.

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[136] International Rivers provide a summary of the social and environmental impact associated with Inga 1 and 2 dams. See International Revers, 'World Bank Should Address Legacy in Inga Rehab', available at http://www.internationalrivers.org/resources/world-bank-should-address-legacy-in-inga-rehab-3236, accessed 10 September 2014.

[137] See A. Lustgarten, (November 2009) at 11; International Revers, 'Community History of Inga 1 and Inga 2', available at http://www.internationalrivers.org/resources/community-history-of-inga-1-and-inga-2-3622, accessed 10 September 2014.

[138] Cellule de Gestion du Projet Inga 3, 'Etudes Environnementales et Sociales Relatives au projet Inga 3 y inclus la nouvelle ligne de transmission jusqu'à la frontière zambienne', E4241 V13, (Mai 2014) pp. 33-35.

[139] M. Kremer & S. Jayachandran, 'Odious Debt', Finance & Development vol. 39, No. 2 (2002); R. Howse, 'The Concept of Odious Debt in Public International Law', UNCTAD, Discussion Paper No 185, (2007); J. K. Boyce & L. Ndikumana, *Africa's Odious Debts: How Foreign Loans and Capital Flight Bled a Continent*, Zed Books, (2011).

[140] The World Bank, 'The World Bank Group Suspends Financing to the Inga-3 Basse Chute Technical Assistance', available at http://www.worldbank.org/en/news/press-release/2016/07/25/world-bank-group-suspends-financing-to-the-inga-3-basse-chute-technical-assistance-project, accessed 28 October 2016.

The eventual impact of this decision remains unclear. The head of the government agency overseeing Inga-3 development argued that the project would still go ahead.[141]

2.6.2. The Kingamyambo Musonoi Tailings SARL (KMT) Project

The KMT project involves the construction of a copper and cobalt processing plant and associated facilities to process tailings from the Kingamyambo tailings dam and the Musonoi River Valley, both located in the Copper Belt region of the DRC. These deposits were generated by copper and cobalt mineral concentrators at mines in Kolwezi owned by Gecamines, the national metals and mineral trading company, from 1952 onward. Although these wastes have contaminated the surrounding areas, they are estimated to contain copper and cobalt at such grades that there is significant commercial potential for recovering the remaining metal values.[142]

Kolwezi tailing deposits were off-limits to foreign investors during almost the entire reign of President Mobutu which lasted for 32 years from 1965 until 1997. However, that changed when the *Alliance des Forces Démocratiques pour la Libération du Congo* (AFDL), one of the most prominent rebel factions that attempted to depose Mobutu, took control of important mining cities in 1996 as they advanced towards Kinshasa. American Mineral Fields Inc (AMF), a Canadian junior mining company that was listed on the Toronto Stock Exchange and the Alternative Investment Market in London, ceased that opportunity to begin negotiating with Kabila for the allocation of mineral concessions. In 997, AMF secured the right for the development of what was then termed the Kolwezi Copper/Cobalt Tailings project (the Kolwezi project).[143]

However, Gecamines, which still owned mineral rights on the coveted tailing deposits did not ratify the deal between Kabila and AMF. In 1998, it made a deal with Anglo-America Corp. of South Africa Limited (AAC) for the development of the same Kolwezi project.[144] However, AMF had not given up. It entered into a joint venture agreement with Anglo-America Corp. of South Africa Limited (AAC) in July 1998 to make a takeover bid for the development of the

[141] E. McAllister, 'World Bank pulls funding for Congo's Inga-3 hydropower project', Reuters Africa, Jul 26, 2016, available at http://af.reuters.com/article/topNews/idAFKCN1061CN?sp=true, accessed 28 October 2016.
[142] Murray & Roberts, 'Kolwezi Tailings Definitive Feasibility Study Final Report 3 March 2006' Murray & Roberts (2006) at 3.
[143] M. Basedau, *Resource Politics in Sub-Saharan Africa,* Giga-Hamburg, (January 2005) at 156.
[144] R. Hendrickson, Promoting U.S. Investment in Sub-Saharan Africa, Palgrave Macmillan, (August 2014) at 81.

Kolwezi project.[145] This joint venture was managed by Congo Mineral Development Limited (CMD), a Shell Company incorporated in the British Virgin Islands and which was a 50% owned subsidiary of AMF. The remaining 50% shares in CMD were held by AAC.[146]

CDM's bid for the development of the Kolwezi project was successful. A partnership agreement was signed between CDM and Gecamines. This partnership agreement structured the ownership of the company project as follows: 40% of the company's shares were held by Gecamines and the remaining shares were held by CDM.[147] Following the enactment of the new Mining Law in July 2002, the parties decided to review the terms of their original contract and made a new deal. This new deal was formally finalised in March 2004,[148] on suspicion of corruption and political interference from President Kabila's office.[149] Meanwhile, AMF scheduled the change of its own name to Adastra Minerals Inc and claimed that it has acquired 100% ownership of CMD.[150] Under the formalised agreement between CMD, and Gecamines, the new operating company Kingamyambo Musonoi Tailings SARL (KMT) was formed. The ownership of KMT was structured as follows: CMD 82.5%, Gecamines 12.5% and DRC 5%.[151]

Given its lack of proven mining capacity and expertise to develop a project like KMT, Adastra Minerals had begun to seek business partners to help it operate the KMT project while negotiations with Gecamines were pending. In December 2004, Adastra Minerals announced that the Industrial Development Corporation (IDC), of South Africa, has decided to exercise its option to earn 10% equity interest in KMT from CDM, subject to the Exchange control approval from the South African Reserve Bank.[152] In May 2005, Adastra Minerals managed to secure an investment of approximatively US $6 million from the IFC to prepare a definitive feasibility study, in exchange for 10% equity interest in KMT from CMD.[153] Adastra Minerals'

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[145] America Mineral Fields Inc., 'Annual Information Form Fiscal year Ended October 31, 1997', October 31, (1998) at 2.
[146] Ibidem.
[147] Commission de Revisitation des Contrats Miniers, Rapport des Travaux, tome 2 : 'Partenariats Conclus par la Gecamines' (Novembre 2007) page 63.
[148] Contrat d'Association Portant sur Un Projet d'Industrie : Minière Rejets de Kingamyambo, Vallée de La Musonoi et Kasobantu, page 63.
[149] Global Witness, 'Digging in Corruption: Fraud, Abuse and Exploitation in Katanga's Copper and Cobalt Mines' (July 2006) at 37.
[150] Securities Exchange Commission (SEC), 'Report of Foreign Private Issuer', file number 0-29546, November 18, (2003) at 4 & May 12, (2004) at 7.
[151] SEC, file number 0-29546, November 18, (2003) at4.
[152] Engineering News, ' Under Pressure, Adastra Moves on DRC-project finance
[153] IFC, 'Summary of Project Information (SPI)', Project number: 11703 available at http://ifcext.ifc.org/ifcext/spiwebsite1.nsf/1ca07340e47a35cd85256efb00700cee/725973353968227E852576BA000E32B2, accessed 10 September 2014.

adventure in DRC ended in 2006 when First Quantum Minerals Limited, a larger Canadian mining company, acquired control of all its outstanding shares, including those in CDM, after a protracted takeover battle.[154]

In April 2007 the DRC established a 'Revisitation Commission,' the purpose of which was to review all mining contracts between the DRC (or state owned enterprises) and investors in order to correct the supposed imbalances and related flaws.[155] The Revisitation process resulted in the cancellation of some mining contracts including that signed between CDM and Gecamines for the development of the KMT project. According to the Congolese government's notice of cancellation, this project featured many irregularities ranging from breach of the performance schedule (i) and lack of evidence that the project company had been properly incorporated (ii); to breach of the terms and conditions of the tender (iii) and non-payment of fees due to Gécamines and the external financing parties (iv).[156] It is alleged that about US $450 million had been invested by the time the project was cancelled.[157]

CDM tried to win back the control of KMT project with a multifaceted campaign involving business and diplomatic channels as well as several multi-million dollar proceedings.[158] Meanwhile, Gécamines entered into partnership agreement with a conglomerate of Shell Companies incorporated in the British Virgin Islands for the exploitation of the same deposits which had been the subject of the CMD contract, but providing for a higher return for the DRC and Gécamines.[159] Under this contract, a new project company Metalkol SARL was established

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[154] First Quantum Minerals Ltd., 'First Quantum Acquires Adastra', Press Release Details, available at http://www.first-quantum.com/Media-Centre/Press-Releases/Press-Release-Details/2006/First-Quantum-Acquires-Adastra/default.aspx, accessed 10 September 2014.

[155] Arrêté ministérielle No 2745/Cab.Min/Mines/01/du 20/04/2007 portant mise sur pied de la commission ministérielle chargée de la revisitation des contrats miniers (2007)

[156] See, Congo Mineral Developments Ltd v Highwind Properties Ltd et al., BVIHC (COM) 2010/0125, (unpublished) September 16, (2011) at 3; Commission de Revisitation des Contrats Miniers (Novembre 2007) pp. 63-70.

[157] J Acharjee, "First Quantum Minerals says court upholds its $2 billion Congo claim" (September 2011), available at file:///H:/First%20Quantum%20Minerals%20says%20court%20upholds%20its%20$2%-20billion%20Congo%20claim.mht, accessed 18 September, 2014.

[158] See Cobalt Development Institute, 'International Arbitration for Kolwezi Project' February 1, (2010), available at http://www.thecdi.com/general.php?r=O33JXI73924, accessed 18 September 2014; Les Whittington Ottawa Bureau, 'Canada blocks debt relief as Congo marks jubilee', the Star.com, Jun 30 (2010) available at http://www.thestar.com/news/world/2010/06/30/canada_blocks_debt_relief_as_congo_marks_jubilee.html, accessed 18 September 2014; Congo Mineral Developments Ltd v Highwind Properties Ltd et al., BVIHC (COM) 2010/0125, (unpublished) September 16, (2011).

[159] Contrat d'Association entre la République Démocratique du Congo, Le Groupe Gecamines et Le Groupe Highwinds Properties Ldt Relatif à L'Exploitation des Rejets de Kingamyambo, de la Vallée de Musonoi et Kasobantu

to carry out the KMT project. The ownership of Metalkol SARL was structured as follows: Highwind Properties Ltd. group 70%, Gecamines group 25% and DRC 5%. The partnership agreement also contained provisions limiting the liability of the DRC and Gecamines to the conglomerate of shell companies in case they were sued for damages arising out of the breach of the CMD contract.

On the other hand, Highwind Properties Ltd group was acquired by Eurasian Natural Resources Corp (ENRC), a Kazakh publicly listed company member of the FTSE 100 index, from an entity called the Gertler Family Trust.[160] The subsequent international litigations initiated by First Quantum Minerals and the other shareholders in CDM against ENRC and the DRC did not last longer.[161] In 2012, First Quantum, IFC and IDC settled Congo disputes for US $1.25-billion. This settlement covers the Kolwezi project and three other First Quantum's mineral assets in DRC that were sealed by the Congolese government and sold out to the Gertler Family Trust's controlled subsidiaries before ENRC takeover.[162]

2.6.3. The Lesotho Highlands Water Project

The Lesotho Highlands Water Project (LHWP) is a transnational project aimed at harnessing the water resources of the highlands of Lesotho to the mutual benefit of South Africa and the Kingdom of Lesotho.[163] South Africa had a long-standing interest in exploiting water from Lesotho highlands to meet a growing demand for water by the country's industrial heartland of Gauteng. Feasibility studies conducted in this respect in the 1950s, 1970s and 1980s, respectively, determined that the LHWP was the least-cost solutions to meet water demand in Gauteng.[164] The project involved the construction of five dams and over 200 kilometres (124 miles) along with a system of tunnels and pumping stations to divert a portion of the water currently leaving Lesotho in the Senqu and Orange Rivers northward to the Vaal River Basin

[160] ENRC, 'Eurasian Natural Resources Corporation PLC Acquisition of 50.5% of the Shares of Camrose Resources Limited', RNS Number : 4192R, August 20, 2010, Available at http://www.enrc.com/ru/regulatory_news_article/2003, accessed 18 September 2014.

[161] M. McClearn, 'How First Quantum Settled with ENRC for Compensation over Congolese Mine', *Canadian Business*, Jun 5, (2012), available at http://www.canadianbusiness.com/business-strategy/how-first-quantum-settled-with-enrc-for-compensation-over-congolese-mine/, accessed 18 September 2014.

[162] ENCR, 'Agreement signed with First Quantum Minerals Ltd. to acquire their residual assets and settle all claims in relation to their Democratic Republic of Congo operations', RNS Number : 0633V, January 05, 2012, available at http://www.enrc.com/ru/regulatory_news_article/2037, accessed 18 septemeber 2014.

[163] S.K. Fullalove (ed.), *Lesotho Highlands Water*, Thomas Telford, (1997) pp. 64.

[164] The World Bank, 'Lesotho Highlands Water Project (Phase 1A)', Staff Appraisal Report, No. 8853-LSO, July 2, (1991) pp. 8-9.

in Gauteng.[165] This would alleviate South Africa's chronically water shortage while providing Lesotho with much-needed electric power, and revenue from the export of water to South Africa.

In 1986, the governments of Lesotho and South Africa signed a Water Treaty to carry out the LHWP.[166] The project was divided into four phases stretched in 30 years, with the ultimate goal to transfer 70m^3/sec water from Lesotho to South Africa. The two countries committed to implementing Phases 1A and 1B of the LHWP through transferring water amounting to 18m^3/sec and 12m^3/sec, respectively, and agreed to leave subsequent phases for further negotiations. Under the concluded treaty, South Africa was in charge of all the cost of the transfer scheme and the payment of a water royalty to Lesotho totalling 56 percent of the cost saving realized by South Africa.[167] Both Lesotho and South Africa agreed that the project shall be administered by the Lesotho Highlands Development Authority (LHDA) in Lesotho and Trans-Caledon Tunnel Authority (TCTA) in South Africa.[168] In addition, the parties established a bi-national body, the Joint Permanent Technical Commission (JPTC), to safeguard the interests of both the governments of Lesotho and South Africa.[169]

In September 1991, the World Bank approved a loan of U.S. $110 million out of a total cost of U.S. $2.5 billion for the project Phase 1A.[170] Co-financing for the project was to be provided by some MDBs, developments agencies and commercial banks including the AfDB, the European Development Fund, the EIB, the UN Development Programme, the Development Bank of Southern Africa and Commonwealth Development Corporation (CDC), Dresdner Bank and KfW. Both the AfDB and the CDC were expected to finance the project's hydropower component. However, AfDB withdrew from financing this component due to disagreement over the award of the main construction contract for the hydropower plant while CDC pulled out because of the component's low rate of return.[171] Phase 1A of LHWP was implemented from 1990 to 1998 and administered by LHDA while Phase 1B of LHWP was implemented

[165] The World Bank, 'Lesotho Highlands Water Project (Phase 1A)', Staff Appraisal Report, No. 8853-LSO, July 2, (1991) at i.
[166] Treaty on the Lesotho Highlands Water Project between the government of the Kingdom of Lesotho and the government of the Republic of South Africa signed at Maseru, 24 October 1986 available at http://www.fao.org/docrep/w7414b/w7414b0w.htm, accessed 20 September 2014.
[167] Articles 10 and 12 of the Treaty on the LHWP.
[168] Article 6(4 and 5) of the Treaty on the LHWP.
[169] Article 6(6) OF The Treaty on the LHWP.
[170] The World Bank, 'Lesotho Highlands Water Project (Phase 1A)', Implementation Completion Report, No: 19169, December 13, (1999) at i
[171] Idem, at iv.

between 1998 and 2003 and administered by TCTA.[172] The project Phases 1A and 1B have been completed at a cost of approximately US $3.5 billion.[173]

Following the country's national wide election in 1993, the elected government took steps towards improving governance in public institutions through promoting transparency and accountability. By that time rumours of mismanagement within the LHWP's oversight bodies had begun to surface, chiefly with respect to both financial issues and staff appointments.[174] To clarify this issue, the newly elected government commissioned an audit into the affairs of the LHDA and the JPTC. This audit revealed substantial administrative irregularities within the LHDA.[175] In particular, it uncovered several types of corrupt activity by government officials, including Masupha Ephraim Sole, the then LHDA's Chief Executive Officer (CEO). Sole abused the fringe benefits provided to him, charged personal expenditures at LHDA's expense, and provided jobs for members of his family.[176] He also took advantage of his position of LHDA's CEO to solicit and receive a bribe from multinational corporations that had tendered for contracts in connection with LHWP. A number of contracts negotiated under Sole's supervision had caused the LHDA to suffer substantial losses.[177]

In 1996, the government of Lesotho initiated civil proceedings against Sole to recover the funds that he misappropriated and transferred into his Swiss bank account. Judgement was passed against him in October 1999, a decision upheld on appeal in 2001.[178] The government of Lesotho also proposed to prosecute Sole along with the corporations, consortia and middlemen or intermediaries who acted as catalyst.[179] In December 1999, Sole and 18 other defendants

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[172] See TCTA, 'Lesotho Highlands Water Project: Project profile' available at http://www.tcta.co.za/Projects/Pages/LesothoHighlands.aspx accessed 20 September 2014.

[173] K. Horta, 'The World Bank's Decade for Africa: A New Dawn for Development Aid?', *Yale Journal of Internal Affairs,* vol. 1 (2005-2006) at 15.

[174] F. Darroch, 'The Lesotho Highlands Water Project: Bribery on a Massive Scale', *Pambazuka News,* issue 172, September 2, (2004), available at http://www.pambazuka.net/en/category/features/24372, accessed 20 September 2014.

[175] SC. Guido Penzhorn, 'Discussion paper on the Lesotho highlands bribery prosecutions', deliverer to the Institute for Security Studies (ISS) seminar on the impact of high-profile corruption cases in Lesotho, Mozambique and South Africa, held in Gauteng, South Africa, March 15-17, 2004.

[176] F. Darroch, 'Case Study: Lesotho Puts International Business in the Dock', in Global Corruption Report 2005, Trasparency International, (2005) at 32.

[177] Idem.

[178] F. Darroch (2004).

[179] S. Bracking, 'The Lesotho Highlands Corruption Trial: Who Has Been Airbrushed from the Dock?', *Review of African Political Economy*, vol. 28, No. 88, Africa's Future: That Sinking Feeling (June 2001), pp. 302-306

were charged with bribery, but Sole faced additional charges of fraud and perjury. The defendants insisted on being tried separately and were successful in this application. [180]

Although Lesotho prosecuting authority did not enjoy financial supports from IFIs involved in LHWP, by 2004 he had obtained the conviction of three of the world's leading construction companies, namely Acres International of Canada, Lahmeyer International of Germany, and Spie Batignolles of France, for paying bribes to Mr. Sole, who was sentenced to 15 years prison.[181] Conversely, IFIs has been slow to sanction the companies convicted in Lesotho. The World Bank was particularly criticised for its inadequate response to the corruption probe and subsequent legal proceedings in connection with LHWP. Despite Acres International's conviction for bribery, the Bank continued to sign contracts with them.[182]

In 2004, following the Lesotho lead prosecutor testimony in hearings held by the U.S. Senate Foreign Relations Committee on corruption in projects funded by multilateral development banks, the World Bank finally debarred Acres International for three years of tendering for World Bank contracts. Two years later, the World Bank debarred Lahmeyer International.[183] Astoundingly, The World Bank allowed corporations convict of bribery to attend their Sanctions Committee hearing, but they failed or did not want to provide a Lesotho government representative or prosecutor access to the hearing.[184]

While LHWP has moved to Phase 2, the social and environmental legacy left during the implementation of the project Phase 1A and 1B has yet to be addressed. On many occasion affected people who have been resettled have expressed their dissatisfaction with the compensation package they were assigned, and some communities have not received the compensation promised to them yet.[185] In March 2004, The World Bank stated in a project report that the involuntary resettlement operated in LHWP Phase 1 have failed to meet the Bank minimum standard.[186] This standard requires that the standard of living of all people

[180] P. Bluestein, "Big Firms Accused of Bribery in African Dam Project," *Washington Post*, August13, (1999)
[181] D. Pallister, 'World Bank Corruption Inquiry May Blacklist Firm', *The Guardian*, March 16, (2004)
[182] See F. Darroch (2005) at 34; Development Today, 'Acres Signs Bank Contract in Uganda One Week Before Debarment, *Development Today*, September 21, (2004)
[183] N. Gunaratne et al., 'The International Financial Institutions: A Call for Change', A Report to The Committee on Foreign Relations United States Senate, 111th Congress, 2nd Session, March 10, (2010) at 34.
[184] Idem.
[185] L. Wentworth, 'Lesotho Highlands: Water Woes or Win–Wins?', PERISA Case Study 4 Infrastructure, SAIIA, (August 2013) at 5; Nilmini Gunaratne et al. (2010) pp. 34-35; K. Horta (2005-2006) at 16; Nilmini Gunaratne et al. (2010) at 34.
[186] World Bank, 'Lesotho Highlands Water Project: World Bank Supervision Mission, March 22-30, 2004, Aide Memoire,' Washington, D.C., March 2004, cited by K. Horta (2005-2006) at 17.

affected by the implementation of a World Bank-financed project not be compromised and where possible improved.

Moreover, there is a growing concern that Lesotho is leading itself to water scarcity as a result of persistent droughts and climate change experienced since the completion of the project Phase1.[187] This impact was not forecast at the time IFIs extended their support to LHWP. Furthermore, Communities near the Kaste dam are barred from utilising the dam for fishing or crossing to access other villages where there are medical, social and other facilities important for their living unless they pay a licensing fee to LHDA.[188] The power produced at Muela hydropower station has proven too expensive for the ordinary Lesotho citizen, the large majority of who still depends on candles, paraffin and the traditional firewood.

Notwithstanding these social and environmental legacy burdens, On 16 May 2013 officials from both countries agreed on the terms of Phase II of the project, involving the construction of the Polihali dam, additional tunnels and a pumping plant. This would cost the South African government about ZAR 9.2 billion. Although tenders are yet to be issued, the completion of Phase II of the LHWP is scheduled for August 2020.

2.7. Conclusion

This chapter discussed the context in which IFIs operate and showcased how the issue of accountability vis-à-vis project affected parties may arise. It did not delve into substantial analysis of accountability issues, which is the focus of chapters 3, 4 and to some extent chapter 5. This chapter offered few glimpses of what IFIs do and how the implementations of their activities may give rise to accountability issues towards third parties. The investigation into the process of financing for development provided useful insights into the challenges of holding IFIs to account for the unintended consequences of the projects they have funded.

This chapter showed that although it is not easy to generalise about IFIs, most of these institutions seem to share a common core function that is to fill the gap left by undeveloped capital markets and the reluctance of commercial banks to offer long-term financing. IFIs perform a development function through direct lending to developing and poorest countries on more advantageous terms than would be available to them on the basis of their international credit standing. IFIs also attract additional financing sources to the projects and provide

[187] See L. Wentworth (2010) at 5; Nilmini Gunaratne et al. (2010) at 35; K. Horta (2005-2006) at 16.
[188] Nilmini Gunaratne et al. (2010) at 35.

assistance in the form of equity investments, guarantees, and technical assistance aimed at fostering a business friendly environment.

This chapter showed that the examination of IFI operations is not an easy task due to the complexity thereof. Not only do IFI operations involve the provision of one or several financial products, but they can also imply the implementation and carrying out of the underlying project through a vehicle company that is bestowed with a separate legal existence. This chapter showed that IFIs provide funding to both sovereign and private borrowers. Each of these categories entails different issues such as the protection against default, the incorporation of the entity which shall carry out the underlying projects and the accountability mechanism to be called upon by aggrieved parties.

To enrich further the understanding of IFI operations, this chapter examined three case studies namely the Mega hydropower plant project in Democratic Republic of the Congo (DRC), the Kingamyambo Musonoi Tailings SARL (KMT) Project in DRC, and the Lesotho Highlands Water Project in Lesotho and South Africa. These cases showed that third parties do not access meaningful information, during the project design phase, to weigh more carefully what is at stake if the envisaged project goes forward. However, they pay the higher price when the project is being implemented and even long after it is completed. This chapter showed that third parties (individuals and communities) do not have access to redress mechanisms in the manner other participants to IFI-funded projects do.

CHAPTER THREE

ACCOUNTABILITY STANDARDS APPLICABLE TO IFIs AND THEIR OPERATIONS

3.1. Introduction

The two preceding chapters discussed the structure, functions and the operational of IFIs (Chap. II), and the emergence of a legal paradigm of accountability in international law (Chap. I). While chapter four deals with the manner in which operations of IFIs are legally held accountable at both the national and international levels, this chapter surveys the standards against which such putatively accountable operations are to be assessed. In particular, it examines the sources and contents of IFIs' legal obligations arising out of their relations with their contracting parties and the outside world, including individual third parties. In this regard, it assesses the extent to which human rights and environmental standards apply to IFI-funded projects and policy reforms.

As it is the case with any intergovernmental organisation, the rights and obligations of an IFI are embedded in the internal and external laws that apply to it.[1] The internal law of an IFI refers to a set of rules that govern the structure of the institution and lay down the principles and procedures that apply to its operations. More specifically, it includes the constituent instrument of the IFI concerned, the decisions and resolutions adopted in accordance with its constituent instrument, and established practice peculiar to that IFI.[2] On the other hand, an IFI is governed by a set of rules that seek to regulate its external relations. Usually, those rules regulate the relations between an IFI with member and non-member States, other IOs, and natural and legal persons, insofar as these relations are not governed by its constituent instrument.[3]

From a purely legal perspective, the precise categories of rules that apply to IFIs are still uncertain,[4] and that holds true with respect to all other IOs. Unlike States, IFIs are neither

[1] A. 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) pp. 297-408; C.W. Jenks, *The Proper Law of International Organisations*, Stevens (1962) pp 4*ff*; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, (Advisory Opinion) I.C.J. Reports 1980, 76, para. 11*ff*.

[2] Article 2 (j) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

[3] A. Broches (1959) at 298.

[4] D. D. Bradlow, 'International Law and Operations of International Financial Institutions', in D. D. Bradlow & D. B. Hunter (eds)*, International Financial Institutions & International Law*, Kluwer law International, (2010) at 2; J. W. Head, 'Law and Policy in International Financial Institutions: The Changing Role of Law in the IMF and the Multilateral Development Banks', *Kansas Journal of Law & Public Policy,* vol. 17, No. 2 (2008) pp. 194-229; L. R. Blank, 'The Role of International Financial Institutions in International Humanitarian Law', *United States Institute of Peace*, peaceworks No. 42 (2002); I. F.I. Shihata, 'Human Rights, Development, and International Financial Institutions', *American University International Law Review*, vol.8, No 1 (1992) pp 27-36.

sovereigns nor equals. They are governed by the principle of speciality,[5] meaning IOs operate in limited fields; whereas States exercise general competence within their legally recognised geographical space. IFIs do not share the same functions; nor do they all operate in the same geographical region. Like most IOs, IFIs are institutions of limited and delegated powers, lacking the plenary capacity to act out of their own volition.[6] They are invested by States with powers, the limits of which are a function of the common interests, the promotion of which is also untrusted to them.[7] It is further admitted that, in addition to their explicitly conferred powers, IFIs have whatever additional implied, or inherent, powers that may be essential to the performance of their functions.[8] The use of certain techniques of interpretation can also result in expanding the powers and mandate of IFIs beyond what their constitutive instruments conferred to them explicitly.[9] These include the purposive interpretation of their constitutive instruments and the practice as supported by or acquiesced to by member States or other relevant actors.

However, the extent to which one can invoke the doctrine of "implied powers" or any similar legal doctrine needs to be clarified to explain the expansion of the functions of IOs, in general, and IFIs, in particular.[10] Normally, an IO only has the functions bestowed upon it by the definitive Charter with a view to fulfiling its given objects and purposes. But it has power to exercise those functions to promote its efficiency, in so far as its Charter does not impose restrictions to it.[11] The deepening of the understanding of development issues has somewhat compelled IFIs to change the ways they operate far beyond what their original Charters

[5] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict,* (Advisory Opinion) I.C.J. Reports 1996, at 78, par. 25

[6] J. E. Alvarez, *International Organizations as Law-Makers,* Oxford University Press, (2005) at 15.

[7] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict [the Use of Nuclear Weapons* case*],* (Advisory Opinion) I.C.J. Reports 1996, 66, para. 78.

[8] B. Kingsbury, 'Global Administrative Law in the Institutional Practice of Global Regulatory Governance', , in H. Cissé, D. D. Bradlow & B. Kingsbury (eds), *International Financial Institutions and Global Legal Governance,* The Worl Bank Legal Review Vol. 3, The World Bank, (2012) at 12.

[9] See I. F. I. Shihata, *The World Bank Legal Papers,* Martinus Nijhoff Publishers, (2000), pp. XLiX-LX; G. Fitzmaurice, 'Vae Victis or Woe to the Negotiators! Your Treaty or Our "Interpretation" of It?', *The American Journal of International Law*, vol. 65, No. 2 (Apr., 1971), pp. 358-373; J. Stone, 'Fictional Elements in Treaty Interpretation - A Study in the International Judicial Process', *Sydney Law Review,* vol. 1, No. 3, (1954) at 344*ff.*

[10] For further development on the question of "implied powers" of IFIs, see J. W. Head, 'Suspension of Debtor Countries' Voting Rights in the IMF: An Assessment of the Third Amendment to the IMF Charter', *Virginia Journal of International Law,* vol. 33 (1993) pp. 607-612.

[11] *Jurisdiction of the European Commission of the Danube*, (Advisory Opinion) P.C.I.J., Series B. No. 14. at 64, December 8, 1927.

envisioned explicitly.[12] For example, since the United Nations Conference on the Human Environment held in Stockholm in 1972, it is accepted that the protection of the environment is an essential feature of the well-being of peoples and economic development throughout the world.[13] Building on the conclusion of this conference, the World Commission on Environment and Development (WCED), also known as the Brundtland Commission, gave prominence to the notion of 'sustainable development'.

According to the Brundtland Commission, sustainable development refers to the "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[14] Multilateral development banks (MBDs),[15] a subset of IFIs, and other development agencies have since then reoriented their operations to reflect a much higher sensitivity to environmental issues.[16] Similar endeavours undertaken with respect to human rights concerns have so far resulted in mixed outcomes.[17] An in-depth analysis of the scope and contents of human rights and environmental obligations of IFIs is provided elsewhere in this chapter.[18]

[12] See I. F. I. Shihata, 'The World Bank and the Environment: a Legal Perspective', *Maryland Journal of International Law,* vol. 16 No. 1 (1993) pp 1-42; G. Handl, 'The Legal Mandate of Multinational Development Banks as Agent for Change Toward Sustainable Development', *The American Journal of International Law,* vol. 92, No. 4 (Oct. 1998), pp. 642-665.

[13] United Nations, Report of The United Nations Conference on The Human Environment Held in Stockholm, 5-16 June 1972, UN General Assembly, UN Doc. A/CONF.48/14/Rev. 1, (1972) at Chapter I.

[14] United Nations, WCED report 1987, *Our Common Future,* UN General Assembly, UN Doc. A/42/427, August 4, (1987), at 43

[15] For Further development on the relationship between sustainable development and IFIs, see Dire Tladi, 'Sustainable Development, Integration and International Law and Policy: Some reflections on World Bank Efforts', *South African Year Book of International Law*, vol. 29, No. 1, (Jan. 2004) pp. 164 – 192; Dire Tladi, 'International Monetary Fund Conditionality, Debt and Poverty: Toward a Strong Anthropocentric Model of Sustainability', *South Africa Mercantile Law Journal,* vol. 16 (2004) p. 31.

[16] See I. F. I. Shihata (1993) pp 1-42; G. Handl (Oct. 1998), pp. 642-665.

[17] See V. E. Marmorstein, 'World Bank Power to Consider Human Rights Factors in Loan Decisions', *Journal of International Law and Economics,* vol. 13, (1978-1979) pp. 113-136; I. F. I. Shihata, 'Human Rights, Development, and International Financial Institutions, *American University International Law Review,* vol. 8, No. 1 (1992), pp. 27-36; A. McBeth, 'Breaching the Vacuum: A Consideration of the Role of International Human Rights Law in the Operations of the International Financial Institutions, *The International Journal of Human Rights,* vol. 10, No 4 (2006) pp. 385-404; A. McBeth, 'A Right by Any Other Name: The Evasive Engagement of International Financial Institutions with Human Rights', *The George Washington International Law Review*, vol. 40 (2009), pp. 1101-1156; M. Darrow & L. Arbour, 'The Pillar of Glass: Human Rights in the Development Operations of the United Nations', *The American Journal of International Law*, vol. 103, No. 3 (Jul. 2009), pp. 446-501.

[18] See below Section 3.3.1.2.b.(iii),Section 3.4, and Section 3.5.

Getting back to the matter at hand, it is worth noting that attributing implied powers to an IFI or expanding its mandate through the use of similar legal doctrines,[19] carries an important legal impediment which lies in the fact that such an institution is intrinsically an instrumentality of delegated powers.[20] In other words, an IFI has only those powers that are given to it by States. Therefore, an IFI's governing board cannot appropriately interpret the powers and mandate of the institution loosely without interfering with the sovereignty of the States and disregarding the rule of law.[21] Following this fundamental limitation of the powers of an IFI, opponents to the doctrine of implied powers contend the presumption that States have surrendered to IFIs, or any IO in general, more of their sovereign powers than they have expressly authorised under the constitutive instruments of the respective institutions.[22]

Notwithstanding the above, international courts have long upheld the doctrine of implied powers of IOs.[23] Pursuant to the decisions of international courts, the exercise of certain powers by an IO which are not expressly provided for in its constitutive instrument can only be envisaged in limited circumstances.[24] The most important enunciations of the doctrine have appeared in advisory opinions of the International Court of Justice (ICJ) and its predecessor, the Permanent Court of International Justice (PCIJ).[25]

An early articulation of the doctrine of implied powers of IOs appears in a 1926 advisory opinion of the PCIJ concerning the competence of the International Labour Organisation

[19] For example, Schermers and Blokker distinguish the doctrine of implied powers from that of customary powers. The former is grounded in the powers explicitly attributed to the organisation in its constitutive instrument. The latter postdates the constitutive instrument of the organisation. See H. G. Schermers & N. M. Blokker, *International Institution Law,* Martinus Nijhoff Publishers, (2003) at §232.

[20] J. W. Head, (1993) at 608.

[21] J.W. Head, (2008) at 210.

[22] See, A. Cassese, *International Law*, Oxford University Press, (2005) at 180*;* J. W. Head (2008) at 210.

[23] For a summary of the recognition of implied powers by international courts see Ed. Gordon, 'The World Court and the Interpretation of Constitutive Treaties: Some Observations on the Development of an International Constitutional Law', *The American Journal of International Law*, vol. 59, No. 4 (Oct., 1965), pp. 716-721.

[24] See A. I. L. Campbell, 'The Limits of the Powers of International Organisations', *The International and Comparative Law Quarterly*, vol. 32, No. 2 (Apr., 1983), pp. 523-533.

[25] See *Competence of the International Labour Organisation to Regulate, Incidentally, the Personnel Work of the Employer*, PCIJ 1926, (series B) No 13, July 23, 1926; *Reparation for Injury Suffered in the Service of the United Nations,* (Advisory Opinion) I.C.J. Reports 1949, at 174. Other international courts have also applied the doctrine of implied powers. See H. G. Schermers & N. M. Blokker (2003) at § 233 finale quoting a 1956 opinion of the Court of Justice of the European Communities stating the following: "rules laid down by an international treaty (…) presuppose the rules without which that treaty (…) would have no meaning or could not be reasonably usefully applied." Case 8/55, *Fédéchar Case*, European Court Reports (ECR) 1954-1956, at 299.

(ILO).[26] The question asked to the court was whether the ILO had authority to formulate and propose legislations that incidentally regulated the worker, they intended to protect, when perform by the employer. The court opined that although the ILO's constitutive instrument did not expressly provide for such particular power, that power could nevertheless be judged to have been conferred as an implied power, provided the constitutive instrument revealed no contrary intention and, subject to, such power were essential to achieving the objectives of the organisation as set forth in the constitutive instrument.[27]

Likewise, the ICJ has endorsed the doctrine of implied powers of IOs, especially in instances related to authority of the United Nations (UN). In the *Reparation for Injury* case, the ICJ upheld the position of the PCIJ in considering whether the UN has the capacity to bring claims for reparation due with respect to damages to its personnel, even though the Charter of the UN did not expressly confer such a power on the organisation.[28] The court responded to that question in the affirmative holding the following:

> Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.[29]

Similar pronouncements by the ICJ of the doctrine of implied powers of IOs, but with divergent views on the scope of such powers, appear later in subsequent advisory opinions rendered by the court. These include the advisory opinion regarding the competence of a particular organ of the UN (the General Assembly), the advisory opinion concerning the meaning of expenses of the UN, advisory opinion on the *Namibia* case, and the advisory opinion requested by the World Health Organization on the question of the Legality of the Use by State of Nuclear Weapons in Armed Conflict.[30]

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[26] *Competence of the International Labour Organisation to Regulate, Incidentally, the Personnel Work of the Employer*, PCIJ 1926, (series B) No 13, July 23, 1926.

[27] Idem, at 18. Similar pronouncements by the PCIJ of the doctrine of implied powers appear later in the advisory opinion regarding the interpretation of the ILO convention of 1919 regarding employment of women during the night. See *Interpretation of the Convention of 1919 Concerning Employment of Women During the Night,* PCIJ 1932, (Series A/B) No. 50, November 15, 1932

[28] *Reparation for Injury Suffered in the Service of the United Nations,* (Advisory Opinion) I.C.J. Reports 1949, at 174.

[29] Idem, at 182.

[30] For further development on the limits of implied powers of IOs, see Ed. Gordon (Oct., 1965), pp. 716-721; A. I. L. Campbell, (Apr., 1983), pp. 523-533; J. W. Head (1993) pp 591-646.

Despite the divergent view of international courts on the scope of implied powers of IOs, four limitations emerge from the rulings of the international court, according to Schermers and Blokker.[31] The first limitation concerns the necessity test.[32] The recourse to implied powers must be judged necessary or essential for the organisation to carry out its functions, as mentioned by the PCIJ and the ICJ in the competence of the ILO to regulate and the reparation for injuries opinions respectively. The second limitation covers the consistency test.[33] The recourse to implied powers must be consistent with the express provisions of the constitutive treaty. The justification of this test rests on the need to preserve the significance of the express powers bestowed upon an organisation from being infringed, nullified or reduced as a result of the recourse to the implied powers.[34] The third limitation involves the rule of law test.[35] The reason for this limitation is that the invocation of implied powers may not contravene fundamental rules and principles of international law.[36] The fourth limitation concerns the need to preserve the distribution of function within an organisation, as mentioned by the ICJ in its *Certain Expenses* opinion. The exercise of implied powers must not alter the distribution of competence between the organs of the organisation concerned.[37]

Therefore, it seems right to argue that the fact that there is no formal rule regarding the exercise of implied powers does not mean that the use of such powers lies totally within the discretion of an institution governing board. The above-outlined four tests exemplify the existence of ascertainable standards an IFI can rely on to exercise the properly powers that were not expressly conferred upon it. These requirements reflect the concern, grounded in the principle of rule of law and sovereignty of States, that an IFI does not exercise functions beyond those its member States intended to surrender. If all IOs have some implied powers, the challenge is to determine the scope of these powers — this will depend on their constituent documents. An

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[31] H. G. Schermers & N. M. Blokker (2003) at § 233A.

[32] See *Competence of the International Labour Organisation to Regulate, Incidentally, the Personnel Work of the Employer*, PCIJ 1926, (series B) No 13, July 23, 1926; *Reparation for Injury Suffered in the Service of the United Nations,* (Advisory Opinion) I.C.J. Reports 1949 at 182; *Effect of Awards of Compensation Made by the UN Administrative Tribunal,* (Advisory Opinion), ICJ Reports 1954, at 56.

[33] See *Certain expenses of the United Nations [Article 17, paragraph 2, of the Charter],* Advisory Opinion of 20 July 1962, ICJ Reports 1962, at 151; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict [the Use of Nuclear Weapons case],* (Advisory Opinion), ICJ Reports 1996, at 66.

[34] See A. I. L. Campbell, (Apr., 1983),pp. 523-534; *Effect of the Awards of Compensation Made by the UN Administrative Tribunal,* Advisory Opinion, ICJ Reports 1954, at 79.

[35] See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution276 (1970),* (Advisory Opinion), ICJ Reports 1976, at 16.

[36] T. D. Gill, 'Legal and some political limitations on the power of the UN Security Council to exercise its enforcement powers under Chapter VII of the Charter', *Netherlands Yearbook of International Law,* vol. 26 (Dec. 1995) at 71.

[37] See A. I. L. Campbell, (Apr., 1983) at 528; J. W. Head (1993) at 611.

IFI's governing board can also look into other sources of international law to determine whether a presumed implied power exists.

In sum, internal law of IFIs refers to this body of laws which deal with the structure, functions and other internal operations and procedures of the organisation. Through express or implied authorisation, IFIs are empowered to regulate their internal legal system by means of regulations which appear under different names including by-laws, resolutions, policies, procedures, directives, guidelines, code of conduct and performance standards.[38] In addition, IFIs are governed by a set of rules that seek to regulate their external relationships. These rules regulate the relationships between IFIs with both non-member and member States. They also regulate the relationships between IFIs and other stakeholders including other IOs, and natural and legal persons, insofar as the relevant charter does not regulate the envisaged relationship. Usually, external law of IFIs encompasses other sources of international law that apply to IFIs as a result of their legal personality.[39]

In addressing the issue of the legal framework of IFIs and their operations, this chapter first examines the legal personality of IFIs, then focuses on the sources and contents of the internal and external law of IFIs.

3.2. Legal Personality of IFIs

Traditionally, international law was considered to be a set of rules and principles made by and for sovereign States. The reason was that States were the only subjects of international law and the only legal persons, over the period before 1800, possessing the totality of rights and duties recognised by international law.[40] The fundamental principle governing this community of States was the sovereignty of each of them, thus contributing to a legal system based on a limited number of rules that were necessary to ensure peaceful relations between States. The control exercised by States in the making and development of international law had somewhat contributed to its effectiveness. With the establishment of IOs in the nineteenth century, it

[38] See C. F. Amerasinghe (2005) at 273; Resolutions No. IBRD 93-10 and IDA 93-6 establishing the Inspection Panel, the Terms of Reference setting up the Office of the Compliance Advisor/Ombudsman (CAO) , and Resolution B/BD/2004/9 – F/BD/2004/7 instituting the Independent Review Mechanism.
[39] See Article 38 of the statute of the ICJ.
[40] See C. F. Amerasinghe, *Principles of Institutional Law of International Organisations,* Cambridge University Press, (2005) pp. 66-67; J. O'Brien, *International Law*, Taylor & Francis, (2001) at 137.

became clear that States are not the only subject of international law.[41] This situation has raised the question as to the extent to which these new international bodies possess legal personality.[42]

The rationale behind the concept of legal personality is to determine the rights and obligations of IOs that can be enforced on the international or domestic planes. Indeed, this concept enables the identification of the subjects of international or domestic law, to which the law attributes rights and duties[43]. As Kelsen has noted, the law cannot just think in terms of rights and duties, but also needs to be able to point to someone or something possessing those rights and duties.[44] "There must exist something that 'has' the duty or the right."[45] To borrow the words of Weissberg, Legal personality is the "means by which a particular legal system attributes rights and obligations to an entity separate from and independent of those who created it or are part of it."[46] Thus, the term personality has to be seen only as a "shorthand for a proposition that an entity is endowed by international law with legal capacity."[47] .

Notwithstanding its fundamental role in both international and domestic legal systems, the notion of legal personality has no fixed content. This is to say that the extent of the rights and duties which derive from it vary with each legal entity. Like in municipal law, subjects of international law are not necessarily identical in nature, and the extent of their rights differs in many respects. In other words, all legal persons are not equal and do not necessarily possess the same rights and obligations. For example, in municipal law, the rights and duties of a natural person are not the same as those of a corporation. Natural persons are entitled to political and labour rights, to name a few, while corporations are not. Similarly, States remaining the principal legal person of international law have an original personality as an inherent attribute of statehood.[48] They have the absolute competence and total rights and duties recognised by

[41] P. R. Menon, 'The Legal Personality of International Organizations', *Sri Lanka Journal of International Law*, vol. 04, (1992) at 79.
[42] C. F. Amerasinghe, (2005) at 67.
[43] See H. Kelsen, *General Theory of Law and State*, The Lawbook Exchange, Ltd, (1945) at 93; G. Schwarzenberger, *A Manual Of International Law*, Stevens & Sons, (1960) at 53.
[44] H. Kelsen, (1945) at 93.
[45] Ibidem.
[46] G. Weissberg, *International Status of the United Nations*, Oceana Publications Inc., (1961) at 21.
[47] D. P. O'Connell, *International Law*, Stevens & Sons, (1970) at 81.
[48] The essential criteria of statehood, and the general starting point, are laid out in the Montevideo Convention on Rights and Duties of States 1933.

international law, but the same cannot be said for other participants in international law. The PCIJ endorsed that in the *Lotus* case in 1927:[49]

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.[50]

Since the end of World War II, the scope of international legal personality has expanded to non-State entities such as IOs and, under special circumstances, multinational enterprises and individuals. For the purposes of this study, the important question is that regarding the legal personality of IOs in general and IFIs in particular. Discussions over the international legal personality of multinational enterprises and individuals are therefore inopportune.

3.2.1. Controversy over the Personality of IOs and its Relevance to IFIs

Before the ICJ's advisory opinion in the *Reparations case*, there were many controversies on whether IOs are subjects of international law possessing international legal personality or whether they could function without having a legal personality.[51] Other entities but States were precluded from attaining legal personality in international law due to the prevalence of the notion of absolute sovereignty of States.[52] The controversies over the personality of IOs exacerbated when the U.N. considered whether it could start proceedings against a non-member State, after its representative had been killed in the Middle East in the late 1940s.[53] The issue was again in the spotlight in the mid-1980s when the status of the International Tin Council, which had gone bankrupt, forced English courts to decide the extent to which the member States of the Council should bear responsibility for the Council's bankruptcy.[54] The issue also arose in the early 1990s, when an English court raised concern about the status of

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[49] *S.S. "Lotus", France v Turkey*,(Judgment), PCIJ 1927, Series A, No. 9, 1927.
[50] Idem, par. 48.
[51] See W. S. Penfield, 'The Legal Status of the Pan American Union', *The American Journal of International Law,* vol. 20, No. 2 (Apr., 1926), pp. 257-262; J. F. Williams, 'The Legal Character of the Bank for International Settlements', *The American Journal of International Law*, vol. 24, No. 4 (Oct., 1930) pp. 665-673; H. J. Hahn, 'Euratom: The Conception of an International Personality', *Harvard Law Review,* vol. 71, No. 6 (Apr., 1958), pp. 1001-1056.
[52] H. G. Schermers & N. M. Blokker (2003) at § 1562.
[53] *Reparation for Injury Suffered in the Service of the United Nations,* (Advisory Opinion) I.C.J. Reports 1949, at 174.
[54] See J. Klabbers, *An Introduction to International Institutional Law,* Cambridge University Press, (2002) pp. 303-306.

the Arab Monetary Fund, whose managing director was indicted for having committed misappropriation and embezzlement.[55] Lastly, in 2003, the first report of the International Law Commission (ILC) on the responsibility of international organisations under international law suggested that international legal personality is thought to be a *conditio sine qua non* for the possibility of acting within a given legal situation.[56] The ILC's report affirms the following:

> Norms of international law cannot impose on an entity primary obligations or secondary obligations in case of a breach of one of the primary obligations unless that entity has legal personality under international law.[57]

Since the *Reparation* case, it has been admitted that IOs may possess international legal personality, separate from that of its members. In 1948, the question arose on whether the UN was a subject of international law and possessed the capacity to bring an international claim against Israel (a non-member State at the time), following the killing of its representatives, the Count Folke Bernadotte and some of his associates. The General Assembly, by Resolution 258 (III) of December 03, 1948, submitted this question to the ICJ for an advisory opinion on the status and capacity of the United Nations under international law. To answer this question, the ICJ had first to establish whether the UN had international legal personality. After considering the characteristics of the UN under the UN Charter, the ICJ came to the conclusion that although the Charter did not expressly confer international legal personality on the UN,

> The organization was intended to exercise and enjoy, and is in fact exercising and enjoying functions and rights which can only be explained on the basis of possession of a large measure of international personality, and the capacity to operate upon an international plane. (…) [I]ts Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.[58]

The ICJ, therefore, concluded that the UN had a derived legal personality implied by the UN Charter and the organisation's given functions, and not merely because it was recognised by member States alone.[59] Legal personality must have been intended; otherwise, the UN would not be able to carry out its purposes as intended by its founding members. [60]The main effect of

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[55] *Arab Monetary Fund v. Hashim & Others, decision of the House of Lords, 21 February 1991, in Arab Law Quarterly, Vol. 6, No. 1 (1991), pp. 90-111.*

[56] G. Gaja, 'First Report on Responsibility of International Organizations', UN Doc A/CN.4/532, March 23, (2003), para. 15-20

[57] Idem, at 15.

[58] *Reparations* Case, at 179.

[59] Idem, at 185.

[60] Idem, at 179.

the recognition of such personality consists in the distinction from that of the single member States.[61] Thus, while States have original personality allowing them a general competence and equal capacity under international law, IOs entities only have personality to the degree necessary for the achievement of their roles within the international legal system. This point was confirmed in the Advisory Opinion concerning the *Legality of the Use of Nuclear Weapons*[62] where the ICJ stressed that the legal competence of IOs was governed by the 'principle of speciality', that is to say, the States can award them with powers limited to their function. [63]

The European Court of Justice (ECJ) upheld this approach in the case 22/70 *Commission v. Council* (*ERTA* case).[64] The question asked to the ECJ was to determine whether the European Community (EC) was empowered to conclude a treaty with Switzerland on road transportation, or whether the power to conclude such agreements still rested with the member States.[65] The Court preliminary dealt with the issue of the international personality of the EC in order to legitimate its treaty-making power in the fields of transportation. The Court noted that the drafters of the EC treaty had endowed the Community with internal transport powers, but had not added any external transport powers. The Court found that powers that, at the outset, have not been conferred exclusively upon the EC may become so progressively through the exercise of those powers by the Community.[66]

The decisions of international courts addressing the controversy over the personality IOs, have plenty of relevance to the determination of the legal personality of IFIs.[67] Both the UN and the EC were and still are, *mutatis mutandis*, special organisations as far as membership, purpose and range of activities are concerned. While the purpose of the UN is, among others, to maintain international peace and security,[68] the aim of the EC was to achieve integration through trade with a view to economic expansion ultimately leading to political union.[69]

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[61] P. Klein, Pierre, *La Responsabilité des Organisations Internationales dans les Ordres Juridiques Internes et en Droit de Gents*, Bruylant, (1998), pp. 430-431.
[62] *The Use of Nuclear Weapons* case, at 66
[63] Idem, at 78, par. 25.
[64] *Commission of the European Communities v Council of the European Communities*, *AERTR* Case 22/70, ECJ Judgement of 31st of March 1971, Reports of Cases before the Court, 1971, S. 263.
[65] Idem, at 3.
[66] Idem, at 11.
[67] The constitutive instruments of most IFIs do not explicitly provide for the existence of legal personality on the international plane with the exception ofthe AfDB. See Article 50 of the Agreement establishing the AfDB.
[68] See Article 1(1) of the Charter of the UN.
[69] See the Preamble of the Treaty establishing the European Economic Community.

Operations of these organisations range from sending peacekeeping forces to areas in conflict, maintaining food programmes and administering a large number of specialised and subordinate agencies to establishing a common market, a customs union and common policies of member States. Considering the aspects that make the UN and EC different from each other and most other IOs, one might think that the decisions of international courts addressing the issue of personality are not a valid argument for giving other IOs legal personality.

However, many of the arguments given by international Courts support the validity thereof for other organisations, such as the IFIs. For example, The ICJ highlights the possibility of different types of subjects within one legal order and speaks of entities other than States acting in the international sphere.[70] It emphasises the fact that the rights and obligations of subjects of the international legal system are contingent on the needs of its main constituents. These needs have been expressed through the creation of some organisations in the aftermath of the World War II. The important place of these organisations in the international community has been acknowledged widely.[71] Decisions of international courts suggest that IOs need legal personality in order to perform their functions as the latter are preconditions of acting in a given legal system. The application of the same reasoning to other IOs including IFIs is, therefore, inevitable. In fact, it has been widely accepted.[72]

3.2.2. Legal Personality of IOs in International Law

Following the obsolescence of the notion of absolute sovereignty of States in the 20th century, and given the increasing necessity for IOs to operate independently from their members on the international plane, the circle of legal person in international law has expanded.[73]The prerequisite for attributing international personality to IOs became accepted. The remaining issue was then to determine the scope of such international personality.

[70] *Reparation* case, at 178.

[71] See A. Iriye, *Global Community: The Role of International Organizations in the Making of the Contemporary World*, University of California Press, (2002) pp. 246; E. B. Haas, *Beyond the Nation State: Functionalism and International Organization*, ECPR Press, (2008) pp. 584.

[72] See H. G. Schermers & N. M. Blokker (2003) at § 1568; G. Gaja, (2003), at 15; C. F. Amerasinghe, (2005) pp. 66-104; D. D. Bradlow & D. B. Hunter (eds.), 'Introduction', in D. D. Bradlow & D. B. Hunter, *International Financial Institutions & International Law*, Kluwer law International, (2010) at xxiv.

[73] H. G. Schermers & N. M. Blokker (2003) at § 1563.

Scholars have examined the existence and extent of the international legal personality of IOs employing different approaches.[74] These theories can be summarised in two main approaches, namely subjective and objective approaches. The first approach is rooted in the conceptualization of personality as a metaphor whereby an entity deprived of consciousness (basically non-human) is described in legal discourse to have mental and moral consciousness.[75] The reason for this fictionalisation is that any legal order expects to stimulate a sense of certainty by bestowing some rights and duties on its subjects.[76] The personification of a legal order by which the rights and obligations are stipulated helps differentiate between the subjects of that legal order. Supporters of this theory link the personality of an IO to the will of its member States, be it expressly present in the constitution or by implication. To put it differently, the existence of legal personality of an IO is contingent to the will member States explicitly expressed in the constitutive treaty of an organisation. In the case the latter is silent, member States' will to confer legal personality can be inferred from the functions and practice of the organisation.[77]

The other main approach to the issue of international personality of IOs is the objective approach. Proponents of this approach do not consider the will of the member States as a fundamental element for the determination of legal personality of an OI.[78] They rather rely on a number of criteria pertaining to the structure of the organisation itself and the capability of the organs of the organisation concerned to assume rights and obligations on the international plane.[79] Professor Brownlie summarised these criteria as follows:

(1) a permanent association of States, with lawful objects, equipped with organs;
(2) a distinction, in terms of legal powers and purposes, between the organization and its member States;

[74] For a complete survey of the different approaches to the legal personality of IOs see C. W. Jenks, 'The Legal Personality Of International Organisations', *British Year Book of International Law*, vol. 22 (1945) at 267; M. Rama-Montaldo, 'International Legal Personality and Implied Powers of International Organizations', *British Year Book of International Law,* vol. 44 (1970) pp. 111-155; Reparation case, at 174.
[75] See M. N. S. Sellers, 'International Legal Personality', *Ius Gentium*, vol. 11 (2005) at 67; G. W. Keeton, The Elementary Principles of Jurisprudence, A. & C. Black, (1930) at 120;
[76] See H. Kelsen, (1945) at 93.
[77] See *Reparation* Case, at 180; M. N. Shaw, 'International Law', Cambridge University Press, (2003) at 1868; H. G. Schermers & N. M. Blokker (2003) at § 1565.
[78] M. Rama-Montaldo (1970) at 112.
[79] See F. Seyersted, 'Objective International Personality of Intergovernmental Organizations. Do their Capacities really Depend upon The conventions establishing Them?', *Nordisk Tidsskrift for International Ret,* vol 34, (1964) pp. 45-61.

(3) the existence of legal powers exercisable on the international plane and not solely within the national systems of one or more States.[80]

Once these criteria are met, the international personality of the organisation is established. The comparison can be drawn to statehood. When certain internationally recognised objective criteria are met, a State is considered to exist as a legal person in accordance with international law.[81] The ICJ followed the objective approach to the international legal personality of IOs in its *Reparation* case's opinion.[82]

Irrespective of the point of view to be preferred, the chief problem is how to distinguish the will of the entity from that of its member States, more specifically, if the organisation concerned is considered to have a legal existence distinct from that of its members. As previously shown, the justification of legal personality is to determine the rights and obligations of IOs that can be enforced on the international or domestic planes. When the decision-making within an IO is controlled by member States, generally the most powerful ones, the question might arise as to whether the liability or responsibility of such an organisation should be shared with its member States. The problems encountered by the International Tin Council (ITC) during 1985 and 1986 are enlightening in this regard.[83]

Pursuant to an International Tin Agreement, the ITC was established in 1956 and composed of thirty-two members, including the European Community (EC). In 1985, ITC run out of funds and credit and member States refused to guarantee the debts of the organisation which raised the issue of legal liability. Both the Sixth International Tin Agreement (ITA6) and the Headquarters Agreement (HQA) merely stated that the ITC should " have the legal capacities of a body corporate."[84] ITC also enjoyed immunity from the jurisdiction of courts except in cases of enforcement on an arbitral award and waiver by the organisation.[85]

A number of creditors proceeded directly against the members of the ITC, including the Department of Trade and Industry of the British government, on the ground that they were

[80] I. Brownlie, *Principles of Public International Law,* Clarendon Press, (1990) pp. 681-682.
[81] See Article 1 of the Montevideo Convention on Rights and Duties of States 1933.
[82] *Reparation* case, at 185.
[83] See R. Higgins, 'The Legal Consequences for Member States of The Non-Fulfilment by International Organizations of Their Obligations toward Third Parties', *Institut of International Law – Yearbook*, volume 66-I, (1995), pp. 251 *ff* .
[84] Idem, at 257.
[85] See *Standard Chartered Bank vs. International Tin Council*, United Kingdom High Court of Justice (Queen's Bench Division) Judgment April 17, 1986, in *International Legal Materials*, vol. 25, No. 3 (MAY 1986), pp. 650-660.

liable on the contracts concluded by the ITC.[86] Complainants argued that under international law members of an IO bear joint and several liabilities for its debts unless the constituent instrument expressly states otherwise.

The English Court emphasised that it could not

> [F]ind any basis for concluding that it has been shown that there is any rule of international law, binding upon the member States of the ITC, whereby they can be held liable — let alone jointly and separately— in any national court to the creditors of the ITC for the debts of the ITC resulting from contracts concluded by the ITC in its own name.[87]

Similarly, Lord Templeman insisted that no plausible evidence was produced of the existence of such rule of international law.[88]

Following this ruling, one may argue that the liability of member States could arise through an express provision, or one that implies such an intention, in the charter of the organisation. The liability of member States could also arise in the case the organisation was under direct control of the States concerned or acted as its agents or by virtue of a guarantee by the States.[89] Another instance where the liability of member States was engaged involves *Matthews vs. the UK*. In this case, the European Court of Human Rights stressed that the European Convention on Human Rights did not exclude the transfer of competence to IOs "provided that Convention rights continue to be secured. Member States' responsibility, therefore, continues even after such a transfer." [90] Similarly, where member States act together with an IO in the commission of an unlawful act, in this case too, member States will be liable.[91]

3.2.3. Legal Personality of IOs in Domestic Law

The attribution of legal personality to IOs in domestic legal systems raises fewer problems and concerns than on the international plane. States have been accepting without difficulties the

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[86] See *Maclaine Watson vs. Department of Trade and Industry, J. H. Rayner (Mincing Lane) Ldt. and others vs Department of Trade and Industry, Judgement of April 27, 1988, in International Law Report (ILR), vol. 80 (1994) at 109*

[87] Ibidem, *per* Lord Kerr.

[88] Ibidem, *per* Lord Templeman.

[89] See Articles 7 and 8 of the Resolution of the Institute of International Law on 'The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties', (fifth commission) 1995, at par. 32.

[90] *Denise Matthews vs. the United Kingdom*, Application No. 24833/94, European Court of Human Rights, Judgement of February 18, 1999.

[91] See Article 61 of the Draft Articles on the Responsibility of International Organizations.

need for acknowledging the personality of IOs within their respective legal orders. Indeed, without domestic legal personality IOs would not be able to deliver their functions. For example, as part of the normal course of its operations, any IO needs to lease or purchase office buildings, vehicles, and office furniture from either a public or private entity in the host State. These transactions are embodied in the contracts signed on behalf of that organisation, which is to say, the rights and obligations contained therein are endowed to such an organisation.[92] Similarly, regardless the global nature of their resources, IOs must rely on the currency of a limited number of States in order to perform their activities and, more importantly, to pay their personals.[93] Pursuant to relevant applicable law, their funds are kept in domestic banking institutions.[94] Once used in domestic transactions, these funds are partly subject to domestic law including the legislation regulating the currency (*lex monetae*) in which assets are denominated. Such assets will also be subject to the *lex situs* principle.[95] The same is true for zoning and safety regulations.[96]

Normally, the constituent treaties of IOs grant them legal personality in the domestic system of their member States. The Articles of Agreement of the IFC and the AfDB provides that the Corporation and the Bank respectively shall possess full juridical personality and, in particular, the capacity:

(1) to contract;

(2) to acquire and dispose of immovable and movable property:

(3) to institute legal proceedings.[97]

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[92] A. S. Muller, *International Organisations and their Host States,* Martinus Nijhoff Publishers, (1995) at 8.

[93] C. Proctor & F. A. Mann, *Mann on the Legal Aspect of Money*, Oxford University Press, (2005) pp. 587-588; R. S. J. Martha, 'International Organizations and the Global Financial Crisis: The Status of Their Assets in Insolvency and Forced Liquidation Proceedings', *International Organisations Law Review*, vol. 6, (2009) pp. 118-120.

[94] See Chapter XI of the AfDB Financial Regulations; Article 22 of the ILO Financial Regulations; Regulation 8 of the ICC Financial Regulations and Rules; World Bank Treasury, 'Clearance and Settlement', available at http://treasury.worldbank.org/cmd/htm/documents/ClearanceandSettlement.pdf, at 44, accessed 10 February 2015.

[95] This (unabridged *Lex loci rei sitae)* is the law of the place where the asset is located. For further development on this issue, see J. A. McLaughlin, 'Conflict of Laws: The Choice of Law Lex Loci Doctrine, the Beguiling Appeal of a Dead Tradition, Part One', *West Virginia Law Review,* vol. 93, (1990-1991) pp. 957-999.

[96] R. S. J. Martha, 'International Financial Institutions and Claims of Private Parties: Immunity Obliges', in H. Cissé, D. D. Bradlow & B. Kingsbury (eds), *International Financial Institutions and Global Legal Governance,* The Worl Bank Legal Review Vol. 3, The World Bank, (2012) at 99.

[97] Article VI (2) of the IFC Agreement & Articles 51 of the AfDB Agreement. See also Article IX (2) of the IMF Agreement; Article VII(2) of the IBRD Agreement; Article VIII(2) of the IDA Agreement; Article 45 of the EBRD Agreement; Article IX(2) of the IDB Agreement; Article 49 of the ADB Agreement.

These are often supplemented by more specific instruments such as bilateral treaties concluded between one IO and its host State to further define the organisation's legal status in that country (commonly known as headquarter host or seat agreement) or the multilateral convention detailing the privileges and immunities of the IOs concerned.[98] Consequently, the domestic personality of IFIs rarely poses any problem in member States or in the headquarter State. Indeed, even without an express clause in the constituent instruments or ancillary instruments that regulate the status of OIs, the domestic legal personality of OIs can still be acknowledged. The reason is that such personality is indispensable for the fulfilment of the organisation's functions.[99] As for non-member States, the personality of an IO in their domestic legal systems can be attained through a bilateral status or host agreement with the IO concerned.[100]

Interestingly, the domestic legal personality of IOs derives from international law as far as its sources, the constitutive instruments of such organisations or bilateral agreements signed with a non-member State to governing the status of the organisations in the country, are concerned. States parties to either of these agreements are bound to recognise the domestic personality of IOs as it flows from an international legal undertaking.[101] Usually, two distinct positions arise in terms of implementing an international agreement in the domestic legal orders.[102] In monist States, the rules of international law binding on the State can be automatically enforceable before national tribunals.[103] By contrast, such enforcement will only be possible in dualist States, if the international law from which the domestic personality derives has been incorporated into the State's legal order.[104]

The possession of legal personality entails a number of consequences for the organisation including the capacity to perform rights and obligations on both domestic and international level. These usually include: (1) right to enter into treaties or contracts, (2) right to send and receive legations, (3) right to acquire and dispose of movable and immovable properties, (4) right to immunity from States jurisdiction for acts and activities performed by the organisation

[98] See P. Sands & P. Klien, *Bowett's Law of International Institutions,* Thomson Reuters (2009) at 480.
[99] See *Reparation* Case, at 179 & 185.
[100] See A. S. Muller (1995) at Chapter 2.
[101] Article 26 of both the Vienna Convention on the Law of Treaties (1969) & the Vienna Convention on the Law of Treaties between States and IOs and between IOs.
[102] See H. Kelsen, *Principles of International Law,* The Lawbook Exchange, Ldt. (1952, reprinted 2003) at 403*ff.*
[103] E. Borchard, 'The Relation between International Law and Municipal Law', *Virginia Law Review,* vol. 27, No. 2 (Dec. , 1940) at 144.
[104] J. G. Starke, ' Monism and Dualism in the Theory of International Law' *British YearBook of International Law,* vol. 17 (1936) pp. 67-74.

or its agents, (5) right to institute legal proceedings and bring international claim, (6) duty to provide compensation for damages caused by the organisation or its agents.[105] The following development examines the manner in which the possession of legal capacity affects the legal order of IFIs.

3.3. Legal Order of IFIs

The legal order of IFIs comprises a number of features, of which some have been examined in the previous section. While the constituent treaties set the framework of their legal order, the decisions of IFIs constitute the flesh of such legal order. These decisions partly concern the internal functioning of IFIs, such as adopting its operational capital and laying down the rules for its personnel; they are also partly directed towards the external environment of the organisation, including borrowers, contractors, suppliers and local communities. Furthermore, the legal order of IFIs includes other rules of international law which apply to IFIs as a result of their international legal personality. Moreover, the legal order of IFIs comprises a number of domestic rules that apply to these organisation and their operations as a result of their domestic legal personality.

The elements of IFIs' legal order can be categorised in two broad groupings, namely the internal and external law of IFIs.[106]

3.3.1. Internal Law of IFIs

The concept of «internal law» has not yet acquired a precise meaning in international law. It is used interchangeably with domestic or municipal law in relation to the States. In this latter regard, it has been defined by the ILC as including "the constitution of the State and any other kind of internal legal rules, written or unwritten, including those which affect the incorporation into internal law of international agreements."[107] In the context of this thesis, the notion of

[105] See Article 6 of the Vienna Convention on the Law of Treaties between States and IOs or between IOs; Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Character; Article VI (2) of the IFC Agreement & Articles 51 of the AfDB Agreement; Article IX (2) of the IMF Agreement; Article VII(2) of the IBRD Agreement; Article VIII(2) of the IDA Agreement; Article 45 of the EBRD Agreement; Article IX(2) of the IDB Agreement; Article 49 of the ADB Agreement.
[106] A. Broches (1959) at 298.
[107] ILC, 'Report of The Commission to The General Assembly on The Work of Its Thirty-Third Session', A/CN.4/SER.A/1981/Add.1 (Part 2), *Yearbook of The International Law Commission* (1981) at 44, par. 4.

internal law refers to the body of laws that deals with the structure, functions and internal organisation of IFIs and their operations.

Like any IO, IFIs know of a certain minimum of decisions that they have to make on their own. These decisions are adopted by the organs representing the organisation in accordance with their constituent instrument and the established practice of IFIs.[108] In that respect, there is a similarity between the internal law of IFIs and internal constitutional or administrative law of member States insofar as the process of formulating the internal law is concerned.[109] Indeed, just like States, IFIs are empowered to regulate their internal legal system. These regulations contain prescriptions meant to both IFIs' staff and governing organs, but also to the parties involved in or affected by the IFI-funded operations including borrowers, contractors, suppliers and local communities.

3.3.1.1. Constituent Instrument

The constituent instrument is the foundation for the legal order of an IFI from which various legal rules are developed.[110] The very nature of the structure, powers and functions of an IFI is dependent primarily upon the terms of the instrument under which it is created. Such an instrument has a dual character, namely contractual and constitutional.[111] From the law of treaty's perspective, the constituent instrument of an IFI is primarily a multilateral contract between sovereign States whereby substantive rights and obligations are created horizontally between States.[112] On the other hand, the constitutional or institutional stance regards this contract as a constitution because it establishes a new legal person that is bestowed with its

[108] L. Boisson de Chazournes, 'Partnerships, Emulation, and Coordination: Toward the Emergence of a *Droit Commun* in the Field of Development Finance', in H. Cissé, D. D. Bradlow & B. Kingsbury (eds), *International Financial Institutions and Global Legal Governance,* The World Bank Legal Review Vol. 3, The World Bank, (2012) pp 173-187.

[109] N. Krisch & B. Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order'*, The European Journal of International Law,* vol. 17, No. 1 (2006) pp. 10-13.

[110] E. P. Hexner, 'Interpretation by Public International Organizations of their Basic Instruments, '*The American Journal of International Law,* vol. 53, No. 2 (Apr., 1959) pp. 341-370; I. Brownlie (1990) at 683 *ff*; H. G. Schermers & N. M. Blokker (2003) at § 1145; P. Sands & P. Klien (2009) at 483*ff.*

[111] See C. W. Jenks, 'Some Constitutional Problems of International Organizations'*, British Year Book of International Law,* vol. 22 (1945) pp. 11-72; S. Rosenne, 'Is the Constitution of an International Organization an International Treaty?: Reflection on the Codification of the Law of Treaties', *Comunicazioni e Studi,* vol. 12, (1966) pp. 21-89, C. Brölmann, *The Institutional Veil in Public International Law,* Hart Publishing, (2007) at 144.

[112] See D. D. Bradlow (2010) at 1; M. N. Shaw (2003) at Chapter 16.

own legal order whereby rights and obligations are created vertically between the new international being and its members.[113]

a. Contractual Aspects of the Constituent Instruments of IFIs

Most IFIs are created by virtue of a treaty called articles of agreement or simply agreement establishing the organisation concerned. For example, the constituent instruments of the IBRD, IDA, IFC and IMF are referred to as 'Articles of Agreement';[114] whereas those of most regional banks are termed 'Agreement establishing', say, the AfDB, the ADB and so on.[115] In contrast, the EIB constituent instrument forms part of the Treaty establishing the European Economic Community that was originally concluded between six countries (Belgium, France, Germany, Italy, Luxembourg and the Netherlands) on 27 March 1957.[116] The name given to a constituent instrument is irrelevant, so long as that document embodies an agreement between subjects of international law possessing the capacity to act on the international sphere.

The mutual consent of the parties to an agreement establishing an IFI constitutes the contractual element that binds each party to carry out its obligations in good faith vis-à-vis the other contracting parties.[117] Conversely, since such an agreement is merely an undertaking between contracting parties, by virtue of the *pacta tertiis*[118] principle, it does not create either obligations or rights for third parties without their consents as for them it is a *res inter alios acta (a thing done between others does not harm or benefit others)*.[119] Consequently, a contracting party to a constituent agreement of an IFI solely assumes the obligations in relation to the other contracting parties at a horizontal level. However, for that to materialise, the agreement concerned needs to comply with the treaty-making process as provided by the law of treaties.[120]

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[113] See L. Focsaneanu, 'Le Droit Intene de l'Organisation des Nations Unies', *Annuaire français de Droit International,* vol. 3 (1957) at 326.

[114] IBRD Articles of Agreement (as amended effective February 16, 1989), IDA Articles of Agreement, IFC Articles of Agreement (as amended through June 27, 2012), IMF Articles of Agreement (as amended effective March 3, 2011).

[115] Agreement establishing the African Development Bank (Edition 2011), Agreement establishing the Inter-American Development Bank as effective on July 31, 1995, Agreement establishing the Asian Development Bank as effective August 22, 1966. Agreement establishing the Caribbean Development Bank as effective on August 31, 2007, Agreement establishing the Corporación Andina de Fomento (CAF) as effective on March 12, 2012.

116 See Articles 129 and 130 of the Treaty establishing the European Economic Community.

117 Article 26 of both the Vienna Convention on the Law of Treaties (1969) & the Vienna Convention on the Law of Treaties between States and IOs and between IOs (1986).

118 Pacta tertiis (nec nocent nec prosunt): Treaties (neither harm nor benefit) third parties.

119 Article 34 of both the Vienna Convention on the Law of Treaties (1969) & the Vienna Convention on the Law of Treaties between States and IOs and between IOs (1986).

[120] See Article IX of the IFC Articles of agreement and Articles 63& 64 of the Agreement establishing the AfDB; M. Fitzmaurice, 'The Practical Working of the Law of Treaties', in M. Evans (ed.), *International Law,* Oxford University Press, (2014) pp 166-197.

The Articles of Agreement of the IFC signed on April 11, 1955, entered into force on July 20, 1956; those the AfDB signed on August 04, 1963 entered into force on September 10, 1964. Original members of these organisations were bound to subscribe to the number of shares of stock outlined in the agreement. The same is true for members that joined these organisations after their constitutive agreements were in force.[121] On the other hand, the liability of IFC's members is limited to their subscribed paid-in capital.[122] However, the liability of the AfDB's members extends to their uncalled subscriptions.[123] Another aspect of the rights and obligations that derive from the constitutive agreements of the IFC and the AfDB is that both agreements provide for the manner in which the voting power of each member shall be exercised within the organs of the respective organisations.[124] A member's failure to fulfil an end of its commitments under the constitutive instrument of either organisation results in the suspension, or eventually cessation, of its membership.[125]

b. Constitutional Aspects of the Constituent Instruments of IFIs

Notwithstanding their contractual facet, the constituent instruments of IFIs possess a special character. That is the creation of a new subject of international law bestowed with a separate personality from its members, along with the framework of a new legal order.[126] To put it differently, constituent instruments of IFIs define, besides the rights and obligations of contracting parties, the structure, functions and competence of the organisations being created. Thus, having come into existence and empowered to operate independently, IFIs perform the public good mission of socio-economic development and stability of its clients through a number of transactions that resemble most closely market-based financial transactions.[127] This

[121] Article II(3) of the IFC Articles of Agreement & Article 6 of the Agreement establishing the AfDB.
[122] Articles II(4) & V(5)(b-c) of the IFC Articles of agreement.
[123] Article 48 of the Agreement establishing the AfDB.
[124] Article IV(3) of the IFC Articles of Agreement & Article 35 of the Agreement establishing the AfDB.
[125] Article V(2-4) of the IFC Articles of Agreement & Article 44 of the Agreement establishing the AfDB
[126] M. Sørensen, 'Autonomous Legal Orders: Some Considerations Relating to a Systems Analysis of International Organisations in the World Legal Order', *The International and Comparative Law Quarterly*, vol. 32, No. 3 (Jul., 1983) pp. 559-576; E. Zoller, 'The "Corporate Will" of the United Nations and the Rights of the Minority, *The American Journal of International Law,* vol. 81, No. 3 (Jul., 1987) pp 610-634; D. M. Curtin & I. F. Dekker, 'The European Union from Maastricht to Lisbon: Institutional and Legal Unity out of the Shadows', in P. Craig & G. De Búrca, *The Evolution of EU Law,* Oxford University Press, (2011) pp. 154-185
[127] D. D. Bradlow (2010) at 1.

Janus-faced nature has a bearing on the interpretation of IFIs' constituent instruments.[128] The ICJ reaffirmed this in its *Nuclear Weapons'* opinion.[129] The Court held the following:

> The Constituent instruments of international organisations are also treaties of a particular type; their object is to create new subject of law endowed with a certain autonomy, to which the parties entrust the task of realising common goals. Such treaties can raise specific problems of interpretation owing, inter alia, to their character which is conventional and at the same time institutional; the very nature of the organisation created, the objectives which have been assigned to it by its founder, the imperatives associated with the effective performance of its functions, as well as its own practice are all elements which may deserve special attention when comes to interpret these constituent treaties.[130]

Unlike other IOs, interpretation of IFIs' constituent instruments has never been brought to a court of law.[131] The same body that approves the IFIs' rules and operations is the one that performs the interpretation function. The Articles of Agreement of the IBRD prescribe that any question regarding its interpretation between members and the organisation or between members must first be referred to the Executive Directors.[132] The decision rendered by this organ is final unless the unsatisfied member requires that the decision be referred to the Board of Governors and such decision is then reversed. Pending the recourse to the Board, the organisation may proceed with its performance on the basis of the decisions of the Executives Directors.[133] Similar provisions were in 1955 and 1963, included in the Articles of Agreement of the IFC and AfDB,[134] and have also found its way into the constitutions of other IFIs.[135] Despite the decisions on interpretation in IFIs are not subject to a judicial or arbitration control, the interpretation performed by the governing organs is not exempt from the rule of law.[136]

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[128] See E. P. Hexner (Apr., 1959) at 341; I. F. I. Shihata (2000) at Introductory Chapter; J. W. Head (2008) pp. 204-210.
[129] *The Use of Nuclear Weapon* case, at 66.
[130] Idem, at 75, par. 20.
[131] I. F. I. Shihata (2000) at LVII.
[132] Article IX(a) of the IBRD Articles of agreement.
[133] Article IX(b) of the IBRD Articles of agreement.
[134] Article VIII of the IFC Articles of agreement & Article 61 of the Agreement establishing the AfDB.
[135] See Article XXIV of the IMF Article of Agreement, Article X of the IDA Articles of Agreement, Article XIII(1) of the Agreement establishing the IADB, Article 52 of the Agreement establishing the ADF, Article 57 of the Agreement establishing the EBRD, Article 59 of the Agreement establishing the CDB, Article 62 (2-3) of IDB Articles of Agreement.
[136] See I. F. I. Shihata (2000) at LVII; J. W. Head (2008) at 210.

The constituent instruments of IFIs set a normative pattern for their respective legal order whereby a number of legal rules are developed, the validity of which is contingent to their conformity to the constitutional norms that is the basis of the legal order. The constituent instruments also confer on IFIs domestic and international legal personality. Both the IFC and AfDB constituent agreements enable these organisations to perform legal acts within the limit of their functions. According to the IFC's Articles of Agreement, the purpose of the Corporation is to further economic development through investments in productive private enterprises in member countries. The purpose of the AfDB is to contribute to the sustainable economic development and social progress of its regional members.[137] Unlike the IFC, the AfDB provides financial services to both the public and private sector entities.

Furthermore, the constitutions of the IFC and AfDB determine their respective structure, competence and regulate their functioning. They cover an array of issues including functions, membership and capital, operations, organisation and management, status, immunities and privileges, suspension and withdrawal of membership, termination of operations, interpretation, amendment and arbitration. The operations of both organisations are overseen by a Board of Governors representing the interests of each member. It is assisted in its tasks by Board of (Executive) Directors to whom the Board of Governors has delegated the oversight of day-to-day activities. The voting power on the questions brought before these two organs are weighted according to the share of capital each director represent.[138] Both the Boards of Governors and Directors are empowered to adopt such rules and regulation they deem necessary or appropriate to conduct the business of these respective organisations.[139]

3.3.1.2. Decisions of IFIs

Under their constitutions, organs of IFIs adopt some decisions to regulate their own legal order. While some decisions have an internal character and concern mostly the internal organisations of IFIs, others deal with aspects of their operations.

[137] Article 1 of the Agreement establishing the AfDB.
[138] Article IV (3)&(4)(c) of the IFC Articles of Agreement and Article 35 of the Agreement establishing the AfDB.
[139] Article IV(2)(h) of the IFC Articles of Agreement & Article 31(4) of the Agreement establishing the AfDB.

a. Rules Concerning the Internal Organisation of IFIs[140]

These rules may relate to the functioning of the governing organs themselves (commonly known as by-laws).[141] In this respect, they seek to complement the Articles of IFIs by dealing with such matters as the conduct of the meetings of the Boards of Directors and Governors, the appointment of Directors, voting, the ability of members not entitled to appoint a Director to be represented at meetings of the Board of Director, budgets, audits and membership issues. In addition, decisions on the internal functioning of IFIs may involve the organisation and regulation of administrative services.[142] These deal with such issues as appointment, remuneration, advancement of staff. Moreover, IFIs may provide a code of conduct for staff and a separate code of conduct for executive directors outlining the basic principles of professional ethic expected from them in the performance of their duties and outside the workplace.[143] These cover such issues as ethic in the management of projects and programmes, observance of domestic laws, conflict of interest and financial disclosure, corruption and money laundering, government, private sector and civil society relationships. Furthermore, IFIs may regulate their own functioning through the admission, suspension and expulsion of members, as well as the approbation of budgets and financial regulations.[144]

b. Rules Concerning the Operations of IFIs

In the course of their operations, IFIs have developed a large number of rules, commonly known as operational policies and procedures (OP/P). These rules are embodied in integrated frameworks or scattered in many documents. Originally, OP/P were adopted to assist IFI staff in the fulfilment of their tasks, pursuant to the mandate set out in IFIs' Articles of Agreements.[145] However, with the changing landscape of development assistance[146] and the

[140] The following development is provided for informational purposes only and should not be construed as a comprehensive account of the rules concerning the internal organisation of IFIs.

[141] See IFC By-Laws (as amended though February 18, 1980) & The General By-Laws and other Instruments of the AfDB (2009).

[142] See C. F. Amerasinghe, (2005) pp.271-314.

[143] See Code of Conduct for Staff Members of the AfDB (1999), Code of Conduct for Executive Directors of the AfDB and ADF (2007), The World Bank Group Code of Conduct for Board Officials (2007), The World Bank Group Code of Conduct (2013).

[144] See Financial Regulation of The AfDB (2007), AfDB Group, 'The 2014–2016 Rolling Plan and Budget' (2013); IFC's Board of Governors, 'Resolution No. 105 concerning Membership of Fiji' (1979); AfDB's Board of Governors, 'Resolution B/BG/2012/05 Resolution Authorizing the Accession of the Republic of South Sudan to the African Development Bank Agreement' (2012); ADF's Board of Governors, 'Resolution F/BG/2014/01 concerning (among other) the Increase in the Resources of the Fund' (2014)

[145] See I. F. I. Shihata, *The World Bank Inspection Panel: In practice,* Oxford University Press, (2000) at 41.

[146] For further development on the changing landscape of development assistance, see OECD Development Assistance Committee (DAC) and Overseas Development Institute (ODI), 'The New Development Finance

increasingly social and environmental awareness, IFIs have adjusted their operational rules to reflect these changing circumstances.[147] OP/P now contain prescriptions meant to both IFIs' staff and parties to or affected by IFI-funded operations, including borrowers, contractors, suppliers and local communities.[148]

i) Classification of Operational Policies and Procedures

The classification of OP/P is not homogenous across IFIs. An early attempt was made in this regard, by the World Bank's management in 1998, taking into account the functional nature of the rules and procedures adopted by the organisation.[149] Five groupings emerged from this categorisation. These include Operational Strategies, Environmental, Social, and International Law Safeguards, Fiduciary Requirements, Project Analysis and Review Requirements, and Internal Processing requirements.[150] These were supplemented with financial products offered by the World Bank.[151] Recently, Bradlow and Fourié revisited this categorisation in order to reflect the most common tendency within the main MDBs.[152] The revisited classification of OP/P is as follows:

> (1) "safeguard" policies that aim to manage various social and environmental risks inherent in development projects, and to ensure sustainable development (e.g., policies on environmental impact assessments, indigenous people, involuntary resettlement);

Landscape: Emerging and Preliminary Perspective from the Cases of Ghana, Senegal and Timor –Leste', DAC/ODI, (2014); R. Greenhill et al., 'The Age of Choice: Developing Countries in the New Aid Landscape', ODI Working Paper 364, (2013); JM. Severino & O. Ray, 'The End of ODA: Death and Rebirth of a Global Public Policy', Centre for Global Development, Working Paper 167,(2009).

[147] See D. D. Bradlow, 'Operational Policies and Procedures and an Ombudsman' in B. Carin & A. Wood (eds), *Accountability of the International Monetary Fund*, IDRC/Ashgate (2005) at 93; E. P. Hexner (Apr., 1959) at 350; D. D. Bradlow & A. Naudé Fourié, 'The Evolution of Operational Policies and Procedures at International Financial Institutions: Normative Significance and Enforcement Potential', Working Papers (2011) at 6; The World Bank, 'Policies & Procedures', available at http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:20120722~menuPK:41392~pagePK:41367~piPK:51533~theSitePK:40941,00.html, accessed 20 February 2015.

[148] B. Kingsbury, 'Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous People', in G. S. Goodwin-Gill & St.Talmom (eds), *The Reality of International Law, Essays in Honour of Ian Brownlie,* Clarendon Press (1999) pp 323-342; L. Boisson de Chazournes, 'Standards and Guidelines: Some Interfaces with Private Investments', in: T. Treves et al. (eds), *Foreign Investment, International Law and Common Concerns*, Routledge, (2013) pp. 107-109.

[149] I. F. I. Shihata, *The World Bank Inspection Panel : in practice,* The World Bank, (2000) at 46; L. Boisson de Chazournes et al., 'The Environmental and Social Safeguard Policies of the World Bank and the Evolving Role of the Inspection Panel', in D. Freestone, *The World Bank and Sustainable Development: Legal Essays*, Martinus Nijhoff Publishers, (2012) pp. 43-62, at 48 note 20.

[150] The World Bank, 'World Bank Operational Policy Reform: Progress Report*',* Code 98-13, March 5, (1998) at Annex2 as cited by I. F. I. Shihata (2000) at 46.

[151] Idem.

[152] D. D. Bradlow & A. Naudé Fourié (2011) at 5.

(2) public information disclosure policies, clarifying which project-related information must be made available to different stakeholders (e.g., project affected people (PAP) or civil society), and at what stage of the project cycle;
(3) management and project supervision policies, which set out MDB obligations (often vis-à-vis the borrower) in the appraisal, design, and implementation of development projects;
(4) policies detailing the procedures concerning the MDB's independent accountability mechanism (IAM), as well as other internal and external accountability and development effectiveness measures (e.g., procurement policies, and policies ensuring institutional integrity, detecting fraud and corruption);
(5) policies aiding staff in the development and application of its lending products (e.g., lending eligibility and terms);
(6) policies aimed at higher strategic levels in the MDB, such as regional, country and sector-specific strategy policies that aim to assist the MDB in its formulation of development strategies (e.g., country assistance management, poverty reduction).[153]

Moreover, IFIs utilise other categorisations that distinguish between sector-specific (e.g., transport, energy, mining, and agriculture) and cross-sectoral policies (e.g., procurement, anti-corruption, credit and engagement with civil society organisations) or differentiate between the substantive and procedural element in operational policies. Another categorisation might relate to the differentiation between country and region-specific policies (e.g., country assistance, regional and sub-regional cooperation).[154]

ii) Appellations, Scope and Normative Value

Generally, OP/P adopted by IFIs do not bear identical appellations nor do they share the same contents. They do not carry either the same normative values. These are usually contingent to the practice developed by each of the IFIs. However, despite the particularities pertaining to the practice of each institution, common appellations of OP/P seem to emerge across IFIs. These include policies, procedures, directives, performance standards, operational safeguards, safeguards requirements, performance requirements, good practices, guidance notes, manuals, handbooks, and operational memoranda.[155]

[153] Idem, at 7.
[154] Ibidem.
[155] See AfDB, 'Policy Statement and Operational Safeguards' (2013); IFC, 'Policy on Environmental and Social Sustainability and Performance Standards on Environmental and Social Sustainability'(2012); ADB, Safeguard Policy Statement and Safeguard Requirements (2009); World Bank, 'Pollution Prevention and Abatement Handbook' (1999); World Bank, 'Operational Memorandum on Supervision of Carbon Finance Operations' (2013), AfDB Group, 'Directive Concerning Continuity of Operations and Engagement with *De Facto* Governments and Regional Country Members'(2010); IFC, 'Environmental and Social Review Procedures Manual' (2013); AfDB Group, 'Staff Guidance Note on the Governance Rating of the AfDB's Country Performance Assessment' (2009).

Normally, the scope of OP/P encompasses aspects of IFI activities ranging from their inception to their closure. It extends to every aspect of a project cycle including design, appraisal, implementation, and evaluation development projects and programmes, as well as the prevention and mitigation of potential adverse effects that may arise from such operations.[156] More specifically, the contents of OP/P cover an array of issues including poverty reduction, disclosure of information, social and environmental sustainability, due diligence, project categorization, supervision and monitoring, as well as grievance mechanisms.[157] In other words, OP/P deal with actions IFIs should seek from its borrowers and the responsibility these institutions should bear, as well as the mitigation mechanisms that are made available to affected parties.

Although their normative value differs from one institution to another, OP/P seem to be developed into three tiers or levels.[158] The first two tiers contain a set of norms, rules or policies that are mandatory for IFI staff and stakeholders.[159] By contrast, the last tier, typically termed as guidance-notes, operational memoranda, or manuals, is considered to be non-policy in nature and have a non-mandatory character for IFI Staff and stakeholders.[160] Usually, third tier of OP/P is drafted in very concrete terms to allow IFI staff to handle and process mandatory policies. Notwithstanding the above, the normative hierarchy of OP/P appears to consist in an 'Umbrella Policies or Rules' that define the basic roles and responsibilities as well as the general commitments and objectives with regard to the conduct of specified aspects of IFI operations.[161] These policies provide a substantial and procedural framework for the next tiers of OP/P. They constitute the highest level of the normative hierarchy among OP/P adopted by IFIs.[162] They are mandatory for all IFI Staff and stakeholders.

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[156] See D. D. Bradlow & A. Naudé Fourié (2011) at 6; A. Dani et al. 'Evaluative Directions for the World Bank Group's Safeguards and Sustainability Policies: Evaluation Brief 15', The World Bank Group's Independent Evaluation Group (IEG), (2011).

[157] See J. von Bernstorff & Ph. Dann (2013) at 11.

[158] See J. von Bernstorff & Ph. Dann, 'Reforming the World Bank's Safeguards A comparative legal analysis', Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), (2013) pp. 9-16.

[159] Idem, at 9.

[160] Ibidem.

[161] See The World Bank, 'Operational Manuel: Definitions', available at http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20249090~menuPK:64701643~pagePK:64141683~piPK:64141620~theSitePK:502184,00.html, accessed 20 February 2015; IFC Policy on Environmental and Social Sustainability (2012).

[162] For Example, both the World Bank's Operational Policies (OP) and Bank Procedures (BP) fall within this category as they provides mandatory principles and procedures for Bank staff and stakeholders to carry out.

The second tier appears to contain two categories of policies, namely the 'General Assessment Policy' and 'Issue-Specific Policies'. This structure is very common in safeguard policies. Overall, the second tier of OP/P provides short and focused policy statements that complement IFIs' commitments set out in the umbrella policy. It establishes concrete substantive and procedural rules for IFI staff, borrowers and even third parties to observe. It may contain both binding and non-binding normative elements, and are implemented in conformity with the upper tier of OP/P.[163]

Alternatively, the third tier of OP/P seems to deal with practical guidance on how to implement policies and procedures established in the two higher-ranking tiers of OP/P. This consists in non-binding norms called non-policies, guidance notes, manuals, handbooks or operational memoranda. The scope of these guidance documents may vary depending on the nature of the issue being examined. [164] While some guidance documents are issue-specific, others have a cross-cutting purpose, relating to multiple or all issue-specific-policies. Overall, they describe and specify the processes through which policies are implemented by IFI staff and stakeholders.

iii) Analysis of IFI Safeguard Policies

Safeguard policies or safeguards refer to the rules and procedures aimed at managing risks and unintended social and environmental consequences resulting from IFI-funded operations. They play a crucial role in ensuring that activities of IFIs yield sustainable outcomes[165]. Safeguard policies provide mechanisms for integration of environmental and social concerns in the identification, preparation and implementation of programmes or projects.[166] In addition, they enhance the legitimacy of IFI operations through the use of transparency and participatory approaches.[167] Safeguard policies provide a platform for the participation of stakeholders in project design, hence building ownership between local populations and borrowers.[168]

[163] The World Bank's Directives, IFC's Performance Standards, the AfDB's Operational Safeguards fall within this category.
[164] See IFC-CESI Environmental and Social Review Procedures Manual (2012); Handbook on Stakeholder Consultation and Participation in AfDB Operations (2009), AfDB Disbursement Handbook (2012).
[165] IEG, 'Safeguards and Sustainability Policies in a Changing World', the World Bank Group's IEG, (2010) at 3.
[166] D. D. Bradlow & A. Naudé Fourié (2011) at 7.
[167] See B. Kingsbury (2012) at 9; L. Boisson de Chazournes (2012) at 187.
[168] ; A. Dani et al. (2011) at 15*ff.*

Ultimately, they enable stakeholders to participate in the creation of evolving IFI standards or soft law.[169]

The need for social and environmental safeguards emerged in the 1980s following the controversy that surrounded a number of World Bank projects including the Polonoroeste highway project in the Brazilian Amazon and dam projects in India's Narmada Valley.[170] The development of safeguard policies for investment lending operations was an important policy innovation at that time. Since the late 1980s, the Word Bank has adopted eight environmental and social safeguard policies[171] as well as two legal safeguard policies, [172]each of which deals with a particular environmental, social or legal risk through specific procedural and substantive norms.

Many of the individual safeguard policies originally developed by the World Bank were emulated by other IFIs, despite their lack of a common normative framework and unified internal structure.[173] However, the role of policy innovator within IFIs has shifted from the World Bank to IFC and other MDBs, after the safeguard system of the former had come under mounting criticisms over its effectiveness and limited thematic coverage.[174]

The IFC has led the way in adapting the content of the World Bank's safeguard policies to the desires and capabilities of private sector clients. The Policy on Environmental and Social Sustainability and its ancillary Performance Standards on Social and Environmental Sustainability (PPSSES), approved in 2006 and revised in 2012, introduced an integrated safeguard system which was meant to be more responsive to the needs of its clients and the norms and understandings that govern business management practices. Central to this framing was the idea that the relationships between private sector development, environmental

[169] D. D. Bradlow & M. S. Chapman, 'Public Participation and the Private Sector: The Role of Multilateral Development Banks in the Evolution of International Legal Standards', *Erasmus Law Review*, vol. 04 (2011-2012) pp. 91-125.
[170] R. Wade, 'Greening the Bank: The Struggle over the Environment, 1970-1995', in D. Kapur et al., *The World Bank: Its First Half Century,* volume 2: 'The World Bank Perspective', (1997) at 613.
[171] The World Bank's environmental and social policies include OP 4.01 Environmental Assessment (1999), OP 4.04 Natural Habitats (2001), OP 4.36 Forests (2002), OP 4.09 Pest Management (1998), OP 4.11 Physical Cultural Resources (2006), OP 4.37 Safety of Dams (2001), OP 4.12 Involuntary Resettlement (2001), OP 4.10 Indigenous Peoples (2005).
[172] The legal safeguard policies developed by the Word Bank include OP 7.50 International Waterways (2001) and OP 7.60 Disputed Areas (2001).
[173] IEG (2010) at 87.
[174] Idem, pp. xx-xxiii; J. von Bernstorff & Ph. Dann (2013)at 8.

protection and poverty alleviation can be complementary and mutually consolidating.[175] By focusing on synergies rather than trade-offs, the IFC conceptualizes the environment-development relationship in non-adversarial terms and does not scare clients away by framing environmental and social issues as sources of costly mitigation measures for them.[176] Ultimately, this new IFC's approach to safeguard policies proved to be more tailored to the private sector needs than the World Bank safeguard system. It was also considered more flexible and outcome oriented, and favouring client capacity building.[177]

IFC's model sounded very appealing to other MDBs and even to commercial banks.[178] The EBRD adopted an integrated framework in 2008,[179] followed by the ADB, which implemented a similar structure in 2009.[180] The AfDB completed a comparable reform in December 2013.[181] In the light of this spectrum of emulation, commercial banks updated the Equator Principles in June 2013 to reflect a better awareness of social and environmental issues associated with investment projects.[182] The World Bank also followed suit with the launch, in October 2012, of the review and update the environmental and social safeguard policies it developed more than 20 years ago.[183] A proposal document was released in July 30, 2014, for consultation purposes.[184] On August 4, 2016, the World Bank's Board of Executive Directors approved a new Environmental and Social Framework (ESF). The bank claims that those safeguards are meant to respond to new and varied development demands and challenges that have arisen over time.[185]

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[175] C. Wright, 'From Safeguards to Sustainability: The Evolution of Environmental Discourse inside the International Finance Corporation', in D. L. Stone, C. Wright, *The World Bank and Governance: A Decade of Reform and Reaction*, Routledge, (2006) pp. 67-87, at 78.
[176] Ibidem.
[177] J. von Bernstorff & Ph. Dann (2013)at 8; IEG (2010) at 8.
[178] See IEG (2010) at 89; J. von Bernstorff & Ph. Dann (2013) at 10; United States Comments on World Bank Safeguards Review April 29, (2014); V. Thomas, 'The Real Purpose for Safeguard Reform at MDBs', (2014) available at https://www.devex.com/news/the-real-purpose-for-safeguard-reform-at-mdbs-84495.
[179] EBRD, 'Environmental and Social Policy', (2008).
[180] ADB, 'Safeguard Policy Statement and Safeguard Requirements',(2009).
[181] AfDB, African Development Bank's Integrated Safeguards System, (2013).
[182] Equator Principles, 'The Equator Principles III', (2013)
[183] World Bank, 'The World Bank's Safeguard Policies: Proposed Review and Update — Approach Paper', (2012).
[184] World Bank, 'Environmental and Social Framework: Setting Standards for Sustainable Development — First Draft for Consultation', July 30, (2014).
[185] The World Bank, 'The New Environmental and Social Framework', available at http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTSAFEPOL/0,,menuPK:584441~pagePK:64168427~piPK:64168435~theSitePK:584435,00.html, accessed 28 October 2016.

As has been mentioned, the normative architecture of the IFC and other MDBs' safeguards policies is structured in the form of a pyramid of rules, consisting of three tiers of norms namely: umbrella policy (first tier), issue-specific policies (second tier) and guidance notes on each issue-specific policy (third tier). In the case of the IFC, the umbrella policy is the Policy on Environmental and Social Sustainability.[186] For the AfDB's safeguard system, the umbrella policy is included in the Integrated Safeguard Policy Statement.[187] The second tier of the safeguard systems developed by these two institutions is composed of the Performance Standards on Environmental and Social Sustainability and the Operational Safeguards respectively.[188] The last tier comprises guidance documents providing sectoral, thematic and methodological guidance on the implementation of the policies set out in the first two tiers of the respective safeguard system.[189]

Both IFC and AfDB umbrella policies set out the respective organisations' own commitments to and responsibilities for delivering the safeguard system. In particular, the IFC's umbrella policy comprises a commitment to fight poverty with lasting result, to the 'do no harm' principle,[190] to address climate change, to gender-sensitivity and human rights as well as to the participation of affected communities, and to the provision of accurate and timely information regarding its operations.[191] The AfDB's umbrella policy has similar commitments and some additional features reflecting lessons learned from both its own experience and that of other IFIs.[192] These include, the commitment to perform a systematic assessment of impacts and risks associated with its public and private sector operations, to apply safeguards to the entire portfolio (policy and investment-based operations), to use proportionality and adaptive management approach, to promote gender equality, poverty reduction, transparency, good

[186] IFC, 'Policy on Environmental and Social Sustainability', (2012)
[187] AfDB, Integrated Safeguards Policy Statement, (2013).
[188] IFC, 'Performance Standards on Environmental and Social Sustainability', (2012); AfDB Group, 'Integrated Safeguards System—Operational Safeguards', (Dec. 2013) pp. 21-29.
[189] IFC, 'IFC-CESI Environmental and Social Review Procedures Manual', (2012); AfDB Environmental and Social Assessment Procedures (ESAPs) & AfDB Integrated Environmental and Social Impact Assessment (IESIA)
[190] For further development on the 'Do no Harm' principle, see M. B. Anderson, *Do No Harm: How Aid Can Support Peace--or War,* Lynne Rienner Publishers, (1999) pp 161; J. Baron, 'Blind Justice: Fairness to Groups and the Do-no-harm Principle', *Journal of Behavioral Decision Making,* vol. 8, (1995) pp. 71-83.
[191] IFC, 'Policy on Environmental and Social Sustainability', par. 8-18.
[192] AfDB, Integrated Safeguards Policy Statement, (2013)

governance and inclusivity, to protect the most vulnerable (groups), and to ensure responsive grievance and redress mechanisms.[193]

As previously mentioned, the second tier of the IFC's safeguard system is the Performance Standards on Environmental and Social Sustainability (PSESS).[194] In the case of the AfDB, it is the Operational Safeguards (OSs).[195] Both PSESS and OSs supplement the umbrella policies adopted by the Corporation and the AfDB respectively. They comprise a general assessment policy (GAP), which is a set of brief and focused policy statements that establish operational requirements with which operations being funded must comply. In practice, they integrate all social and environmental risks and impacts into one common assessment regime and provide general requirements for their identification, avoidance, mitigation, and management. In addition, PSESS and OSs include a set of issue-specific policies to support the implementation the GAP. The Issue-specific policies provide further substantive and procedural rules for potential environmental and social risks and impacts that require particular attention.

The IFC's GAP is enshrined in the first Performance Standard. It provides substantive and procedural rules with a focus on client ownership and continuous management of

[193] AfDB Group, 'African Development Bank Group's Integrated Safeguards System: Policy Statement and Operational Safeguards', *Safeguards and Sustainability Series*, volume 1 - Issue 1 (Dec. 2013) pp. 16-18.

[194] The PSESS comprise height standards that the party responsible for implementing and operating the project shall meet throughout the life of an investment by the Corporation. These include :

(1) Performance Standard 1: Assessment and Management of Environmental and Social Risks and Impacts
(2) Performance Standard 2: Labour and Working Conditions
(3) Performance Standard 3: Resource Efficiency and Pollution Prevention
(4) Performance Standard 4: Community Health, Safety, and Security
(5) Performance Standard 5: Land Acquisition and Involuntary Resettlement
(6) Performance Standard 6: Biodiversity Conservation and Sustainable Management of Living Natural Resources
(7) Performance Standard 7: Indigenous Peoples
(8) Performance Standard 8: Cultural Heritage

[195] The OS comprise a series of five safeguards which apply to all Bank public and private sector lending operations— including programme-based operations, programme lending that leads to individual subprojects, and lending to financial intermediaries— and project activities funded through other financial instruments managed by the Bank, except for short-term emergency relief, which is specifically exempted. These include:

(1) Operational Safeguard 1: Environmental and Social Assessment;
(2) Operational Safeguard 2: Involuntary Resettlement: Land Acquisition, Population Displacement and Compensation;
(3) Operational Safeguard 3: Biodiversity and Ecosystem Services;
(4) Operational Safeguard 4: Pollution Prevention and Control, Greenhouse Gases, Hazardous Materials and Resource Efficiency; and
(5) Operational Safeguard 5: Labour Conditions, Health and Safety.

environmental and social risks and impacts.[196] The IFC's GAP contains a set of principles that should guide its approach to social and environmental issues associated with a project. Among those are provisions on the risk and impact assessment processes,[197] on client capacity building for continuous risk-management, [198] on monitoring and review,[199] as well as on stakeholder engagement,[200] grievance mechanisms and disclosure policies.[201]

The AfDB's GAP very much resembles the IFC model in terms of the scope and contents. It is enshrined in the first OS and provides an all-encompassing framework governing the assessment, management and mitigation of social and environmental risks and impacts. In particular, besides its scope of application, the AfDB's GAP addresses the general requirements for borrowers to comply with and the role of the Bank;[202] it lays out the procedural requirements for effectively assessing and managing potential social and environmental risks and impacts of projects;[203] furthermore, it requires borrowers to establish and maintain the organizational structure necessary for implementing the safeguard.[204] Like the IFC's first Performance Standard, the AfDB's first OS also sets out requirements concerning stakeholder engagement,[205] disclosure and access to information,[206] and the establishment of grievance and redress mechanisms.[207] Unlike IFC's GAP, the AfDB's GAP regulates the project categorization.[208] Category 1 involves Bank operations likely to cause significant environmental and social impacts; Category 2 involves Bank operations likely to cause less adverse environmental and social impacts than Category 1; Category 3 involves Bank operations with negligible adverse environmental and social risks; and Category 4 involves Bank operations involving lending to financial intermediaries.

However, the AfDB's GAP does not place much emphasis on building borrowers capacities for continuously managing risks and impacts of projects compared to the IFC counterpart.[209] The reason is that the AfDB's broader scope of operations calls for a greater sensibility to the needs and capabilities of both public and private sectors.[210] From the Bank's perspective, the strengthening of borrowers capabilities for implementing and managing social and environmental safeguards tend to have more relevance for public sector clients.[211] As a result, the assessments conducted by such borrowers under AfDB's GPA (OS1) are expected not only

[196] IFC Performance Standard 1, para. 7-36.
[197] Idem, para. 7-12.
[198] Idem, para. 13-21.
[199] Idem, para. 22-24.
[200] Idem, para. 25-33.
[201] Idem, para. 34-36, see also IFC, 'Access to Information Policy', (2012).
[202] AfDB Group, 'Integrated Safeguards System', (Dec. 2013) at 22.
[203] Idem, pp.22-23.
[204] Idem, at 29.
[205] Idem, pp. 26-28
[206] Idem, at 28.
[207] Idem, at 29.
[208] Idem, pp. 24-25.
[209] Idem, at 2; see also IFC Performance Standard 1, para. 17.
[210] Ibidem.
[211] AfDB Group, 'Integrated Safeguards System', (Dec. 2013) at 9 & 17.

to meet AfDB's requirements, but also comply with the relevant legislations and standards at both the domestic and regional levels.[212] However, provided the national systems are sufficiently strong, the AfDB remains committed to making the use of country systems a default option.[213]

In addition to GAP, IFC's safeguard system comprises of seven issue-specific policies on the second layer of norms.[214] Five of these issue-specific policies, also known as performance standards, deal with social issues including labour conditions, community health, resettlement, indigenous peoples, and cultural heritage.[215] The remaining performance standards address specific environmental issues including resource efficiency and pollution prevention, and biodiversity and natural resources.[216] Similarly, the AfDB's safeguard system comprises of four issue-specific policies on the second layer of norms,[217] besides the GAP. There are two OSs which deal with specific social issues including involuntary resettlement, labour conditions as well as health and safety issues.[218] The remaining OSs deal with specific environmental issues including biodiversity and ecosystem, pollution, prevention and control, as well as resource efficiency.[219]

All issue-specific Performance Standards are presented in a tripartite structure setting out their general objectives, the scope of application and individual requirements for projects. The AfDB's issue-specific Operational Safeguards also use a similar structure to define applicable rules under its issue-specific policies.

The last tier of IFI safeguards consists of guidance documents which are non-policy documents providing methodological guidance on the implementation of the policies set out in the first two tiers of the safeguard system. Guidance documents define and specify internal procedures through which social and environmental risks and impacts of projects are to be assessed, mitigated and monitored by staff members as well as clients throughout the project cycle.

The IFC has developed an easy to access and fully integrated guidance-note structure that accompanies the GAP (Performance Standard 1) and each issue-specific policy (Performance

[212] Idem, at 23.
[213] AfDB, 'A Roadmap for Improving Performance on Aid Effectiveness and Promoting Effective Development: Turning Commitments into Action' (April 2011) par. 3.6.
[214] IFC Performance Standards 2- 8.
[215] IFC Performance Standards 2, 4, 5, 7 & 8.
[216] IFC Performance Standards 3 & 6.
[217] AfDB Operational Safeguards 2-5.
[218] AfDB Operational Safeguards 2 & 5.
[219] AfDB Operational Safeguards 3& 4.

standards 2-8). These guidance notes have been integrated into a single document.[220] In addition to the guidance notes, the IFC provides an Environmental and Social Review Procedures (ESRP) Manual in order to assist its staff in the conduct of their due diligence for the business activities under consideration.[221] ESRP Manual also provides a structured approach for the IFC's Environmental and Social Development Department to monitoring and recording a client's performance following the typical chronology of events in the investment project cycle.[222]

Similarly, the AfDB has developed guidance documents to support its GAP (OS 1) and issue-specific policies (OSs 2-5) on the third tier of its safeguard system. Those guidance documents consist of the Environmental and Social Assessment Procedures (ESAP), and Integrated Environmental and Social Impact Assessment (IESIA). Overall, the ESAP provides practical information necessary to project categorisation and integrates social consideration in policy-based lending. It also aligns the ESAP with the provisions of OSs and provides further procedural guidance for the conduct of social and environmental due diligence at each stage of the Bank's project cycle.[223] By contrast, the IESIA provides detailed guidance on GAP, Issue-specific policies and sector specific issues ―such as fisheries, hydropower, and roads― that the clients are expected to adopt to meet the OSs.[224]

3.3.2. External Law of IFIs

The concept of 'external law' is used in opposition to internal law to refer to other sources of international law which apply to IFIs as a result of their legal personality. Previous development showed how the internal law shape the legal order of IFIs. It has been established that the constituent instruments of IFIs and the decisions based upon them regulate the structure, functions and internal organisation of these organisations. However, those are just a partial description of the legal order of IFIs as they do not explain and account for the existence of a number of other legal rules that influence IFIs and their operations. For example, the

[220] IFC, 'IFC's Guidance Notes: Performance Standards on Environmental and Social Sustainability', (2012).
[221] IFC, 'Environmental and Social Review Procedures Manual', (2013).
[222] Idem, at 1.
[223] See AfDB Group, 'African Development Bank Group's Integrated Safeguards System: Policy Statement and Operational Safeguards', Safeguards and Sustainability Series, volume 1 - Issue 1 (Dec. 2013) at 2; AfDB, 'Integrated Safeguards System Working Progress: Strategic Choices Made in the Design of the Integrated Safeguard System (ISS): Draft Report on Options for the ISS, (March 2012) pp. 7-8.
[224] See AfDB Group, 'African Development Bank Group's Integrated Safeguards System' (Dec. 2013) pp. 2-3; AfDB, 'Integrated Safeguards System Working Progress' (March 2012) pp. 9-10.

constituent instruments of IFIs and the decisions based upon them do not explain and account for the application of other rules of international law, besides treaty laws, to the external relations of IFIs. Neither can they fully explain do not explain the terms of the provisions that appear in the various transactions between IFIs and their clients. The internal law of IFIs do not satisfactorily account for the terms of the lease, sale or purchase agreements of office buildings, vehicles, and office furniture signed between IFIs and their clients.

Like other IOs[225] and owing to their international and domestic legal personality, IFIs rely on other rules of international law as well as on some domestic rules to deliver their functions. On the one hand, the determination of the rules affecting the external relations of IFIs requires, as a matter of general principle, the recourse to the sources of international law authoritatively listed in Article 38(1) of the ICJ Statute.[226] On the other hand, such determination may require the analysis of the legal position of IFIs in the domestic legal system as well as the examination of the governing law of the agreements entered into between IFIs and their clients.

Many aspects of the external law of IFIs have been examined. For example, Chapter 2 provided a detailed analysis of the rules underpinning the financial services offered by selected IFIs. Section 3.1 of this chapter also developed certain important features of the legal personality of IFIs, which will not be included in this section. The intention here is to review succinctly the aspects of the external law of IFIs that affect their relations with stakeholders, but which have not yet been developed elsewhere in this thesis. Some of these fall in the categories listed in Article 38 of the ICJ Statute, others are contingent to the relation between an IFI and its clients.

[225] Schermers and Blokker note in this regards that the constitution and the decisions based upon it will never constitute the complete legal order. For many of the required rules, the organization will refer (usually tacitly) to general principles common to the laws of its members. H. G. Schermers & N. M. Blokker (2003) at 723.

[226] Article 38 (1) of the ICJ Statute provide:

"The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

3.3.2.1. International Law Applicable Law to IFIs

Article 38(1) of the ICJ Statute has come to constitute the irreducible foundation for any plausible discussion on the source of international law,[227] although it was initially meant to be just an injunction identifying what rules the ICJ will apply in resolving legal disputes.[228] International courts and tribunals have frequently recourse to this provision even though their own constituent instruments have included provisions on applicable law.[229] As a result, an analysis of the legal framework of any subject of international law inevitably has to incorporate it.

Notwithstanding its importance in the determination of the sources of international law, Article 38(1) of the ICJ Statute is not free from any controversy among scholars. This controversy has mostly revolved around its perceived under-inclusiveness or the fact that it comprises features, such as judicial decisions and teachings, which are not genuine sources of international law.[230] In this regard, Higgins contends the views that confine international law to that which the ICJ would apply in a given case.[231] She considers this approach too restricted as "international law has to be identified by reference to what actors (most often States), often without benefit to pronouncement by the International Court, believe normative in their relations with each other."[232] Addressing the question whether international or municipal decisions should be considered as a direct source of international law,[233] Jennings notes the following:

> I see the language of Article 38 as essential in principle and see no great difficulty in seeing a subsidiary means for the determination of rules of law as being a source of the law, not merely by analogy but directly.[234]

The dominant position in the literature regarding the interpretation of Article 38 (1) of the ICJ Statute suggests that one needs to differentiate between law creating process and law

[227] M. N. Shaw, *International Law*, Cambridge University Press, (2014) at 50.
[228] R. Higgins, *Problems and process: International Law and How We Use It,* Oxford University Press, (1995) at 18.
[229] *Prosecutor v. Zejnil Delalic, Zdravko Mucic,* Judgment, IT-96-21-T, ICTY Trial Chamber, 16 Nov. 1998, at 414 and *Prosecutor v. Dragen Erdemovic*, Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah, Case No. IT-96-22-A, ICTY Appeals Chamber, 7 Oct. 1997, at 40.
[230] See P. Malanczuck*, Akehurst's Modern Introduction to International Law*, Psychology Press, (1997) at 36; M. Koskenniemi (ed.), *Sources of International Law*, Ashgate/Darmouth, (2000) at xi.
[231] R. Higgins (1995) at 18.
[232] Ibidem.
[233] R. Y. Jennings, 'Judiciary, International and National, and the Development of International Law', *The International and Comparative Law Quarterly,* vol. 45, No. 1, (Jan., 1996) pp. 1-12.
[234] Idem, at 3.

determining agencies.[235] Article 38(1) of the ICJ Statute creates two distinct lists. The first list that includes sub-paragraphs (a) to (c) lays down exhaustively the formal sources from which legal rules of international law may emerge.[236] The second list that comprises sub-paragraph (d) lays down some of the means by which such rules of law may be uncovered.[237]

In accordance with this approach, the international law applicable to IFIs consists of international agreements, relevant customary international law, and applicable general principles of law accepted by all nations.

a. International Agreements or Treaty Law

The first category of applicable international law includes international agreements. Usually, these refer to the constituent instruments of IFIs and other treaties or agreements to which IFIs are party. Sub-paragraph (a) of the Article 38 (1) of the ICJ Statute recognises international agreements as one of the law-creating processes by which, on a multilateral or bilateral footing, IFIs and States (and even other categories of IOs) may create articulate rules of international law. The Vienna Convention on the Law of Treaties between States and IOs or between IOs endorses this approach. This Convention codified the customary law and general principle which holds that agreements freely entered constitute the law to those who have made them.[238] Like any IO, the treaty-making capacity of an IFI is determined by its constituent instrument.[239] That capacity normally extends to the financial agreements and other types of agreements that IFIs enter into for the purpose of carrying out their constitutional functions.[240]

A financial agreement is a document that defines the legal framework applicable to the financial services (loan, guarantee, equity, technical assistance, etc.) offered by IFIs to their clients across the public or private sector, or both. Chapter 2 provided for encompassing information regarding the financial services offered by IFIs.[241] It is unnecessary to illustrate

[235] G. Schwarzenberger, *International Law,* volume 1: 'International Law as Applied by International Court and Tribunals, Part I', Stevens & Sons Limited (1957) pp. 25-30; G. J. H. Van Hoof, *Rethinking the Sources of International Law,* Kluwer Publishing, (1983) at 170*ff.*

[236] G. Schwarzenberger (1957), at 26.

[237] Ibidem.

[238] Articles 26 and 27 of both the Vienna Convention on the Law of Treaties (1969) & the Vienna Convention on the Law of Treaties between States and IOs and between IOs (1986); Article 1134 of the French Civil Code; Article 33 of the Congolese (DRC) Civil Code Book III.

[239] Previous development revealed how crucial constituent instruments are for the legal order of IFIs. See Section 3.2.1.1 supra.

[240] See A. Broches (1959)at 23.

[241] See Section 2.2. of Chapter 2 supra.

them again here. However, it is essential to determine the status that such services would have, and the rules that applied to them, since the need to solve problems of interpretation, validity, enforcement or liability for damage may arise at some point. In particular, the legal position of IFIs in relation to borrowers and third parties involved in and affected by the financing agreements underpinning a development project warrant further analysis.

From a strictly legal perspective, all financial agreements between IFIs and others subject of international law cannot be categorised as treaties because parties may, if they deem necessary, subject their agreements to municipal law.[242] However, a mere reference to municipal law or its incorporation into a financial agreement concluded between subjects of international law does not immediately make such an agreement to lose its international character, unless the parties intended otherwise.[243] Considering not all financing agreements entered into are made for the purpose of a public sector development, it is worth addressing the issue of the governing law of such agreements in order to identify the obligations of each party. In particular, it is important to establish the legal position of IFIs in relation to borrowers and third parties involved in or affected by that process, taking into account the private sector financing type performed by the IFC and regional MBDs.

i) The Governing Law of Financial Agreements with Public Entities

Commercial contracts usually comprise a choice of law rule established by the contracting parties. The reason is that the achievement of the economic outcome intended at the outset of the contractual relationship be as certain and predictable as possible.[244] Moreover, parties anticipate that the inclusion of governing law clauses in the transaction will prevent future conflicts between them becoming, even more, difficult to solve, given the divergences on the approach or rules that would be applied when interpreting its terms.[245] For financial agreements entered into between IFIs and sovereign or public entities, the need to define such parameters is, even more, prevalent given the public character of the funds that are at stake and the range

[242] A. Broches (1959)at 30.

[243] See Broches' discussion on Lauterpacht and Fitzmaurice's Draft Code of Treaties. A. Broches (1959) pp. 30-31.

[244] R. J. Weintraub, 'Choice of Law in Contract', *Iowa Law Review,* vol. 54, No. 3(Dec. 1968) pp. 399-433; H. J. Berman & C. Kaufman, 'Law of International Commercial Transactions (Lex Mercatoria)', *Harvard International Law Journal,* vol. 19, No. 1(1978) pp. 221-277; A. F.M. Maniruzzaman, 'The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?,' *American University International Law Review,* vol. 14, No 3, (1999) pp. 657-734.

[245] A. F.M. Maniruzzaman (1999) at 658.

of stakeholders involved in projects or programmes being funded.[246] Indeed, the rules governing a financing agreement could be challenged by borrowers, guarantors, or a lender within the lenders' coalition. These rules can also be challenged by third parties affected by the impact of the projects on issues such as the local growth and prosperity, environment, or displacement of people.

As lender institutions, IFIs would probably choose a system of law that can guarantee its position in case the borrower eventually defaults payment or ignores the conditionality attached to the financial service offered.[247] Like commercial lenders, IFIs will certainly subject the financial agreement to a system of law different from the client's national system in order to avoid inconsistency between applicable rules and political interference from the host State's government. As Head notes in this regard,[248] for example,

> [I]f the World Bank loan agreement could be construed as being subject to local law, some public sector borrower (government or public-owned enterprises) might try claiming that obligations undertaken in such an agreement […] are void because of inconsistency with the local law. If on these grounds the borrower were to stop following the World Bank's [applicable] guidelines, financial support for the World Bank itself could crumble.
>
> Beyond that, if World Bank loan agreements were subject to local law, validity of the agreement themselves might, in the extreme circumstances, be thrown in to question. In a borrowing country where the executive and judiciary branches of government are engaged in sharp political rivality, for instance, a citizens' group might persuade the court to declare a loan agreement with the World Bank to be null and void on grounds that it is inconsistent with the State's public policy — for example, the policy of protecting the State's rights of sovereignty and self-determination. Indeed, a legal attack on the validity of a loan agreement might even be made by the executive branch itself, especially in a borrowing country that has experienced a radical change of leadership, resulting in the refusal to repay the World Bank loan.[249]

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[246] See K. Mettälä, 'Governing-Law Clauses of Loan Agreements in International Project Financing', *The International Lawyer*, Vol. 20, No. 1 (Winter 1986), pp. 219-245; R. M. Auerback, 'Governing Law Issues in International Financial Transactions', *The International Lawyer*, vol. 27, No. 2 (Summer 1993) pp. 303-316;

[247] M. Gruson, 'Governing-Law Clauses in International and Interstate Loan Agreements - New York's Approach', *University of Illinois Law Review, (1982)* pp. 207-228; D. Cohen et al., 'Loans or Grants?', *The World Institute for Development Economics Research,* United Nations University, Discussion Paper No. 2007/06, (2007) pp. 1-15.

[248] J. W. Head, 'Evolution of the Governing Law for Loan Agreements of the World Bank and other Multilateral Development Banks', *The American Journal of International Law,* vol. 90, No. 2 (Apr., 1996) at 216.

[249] J. W. Head (Apr., 1996) pp. 216-217.

All legal agreements under which IFIs extend financial services to sovereign or public sector entities include a set of standard provisions aimed at guiding the parties to perform their respective obligations and resolve future eventual controversies.[250] In the case of loan or guaranty agreement, the standard provisions, termed 'General or Standard Conditions', usually deals with issues such as scope of application of the agreement, loan account, service and commitment charges, repayment, disbursement, loan suspension and cancellation, arbitration and enforceability, entry into force, operational conditions precedent to disbursement and termination of the loan.

Section 10.01(a) of the General Conditions Applicable to the African Development Bank Loan Agreements and Guarantee Agreements (AfDB General Conditions), under the heading of 'enforceability', establishes the following:

> The rights and obligations of the Bank, the Borrower and the Guarantor under the Loan Agreement and the Guarantee Agreement shall be valid and enforceable in accordance with their terms notwithstanding the law of any State or political subdivision thereof to the contrary. Neither the Bank nor the Borrower nor the Guarantor shall be entitled in any proceeding under this Article to assert any claim that any provision of these General Conditions or of the Loan Agreement or the Guarantee Agreement is invalid or unenforceable for any reason.[251]

This provision provides guidance as to the governing law of the loan and guarantee agreements entered into between the AfDB and regional member countries,[252] public entities and political or administrative subdivisions in regional member countries and eligible IOs.[253] It does not single out a third legal system, commonly called *Lex Mercatoria*, as the governing law of the financial agreement in accordance with the prevailing practice in international commercial transactions.[254] Instead, it submits such an agreement to its own terms and introduces a negative obligation that domestic law will not apply. Moreover, it bars any party from initiating proceedings which shall render any provision under the financial agreement entered into null and void or unenforceable.

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[250] See AfDB, 'General Conditions Applicable to the African Development Bank Loan Agreements and Guarantee Agreements (Sovereign Entities), (Feb. 2009); AfDB, 'General Conditions Applicable to the African Development Bank Loan Agreements and Guarantee Agreements (Non-Sovereign Entities), (Feb. 2009); EBRD, 'Standard Terms and Conditions' (2007); IBRD, 'General Conditions for Loan', (Jul. 2010).

[251] Section 10.01(a) of both AfDB General Conditions for Sovereign and Non-Sovereign Entities.

[252] Section 1.01 of AfDB General Conditions for Sovereign Entities.

[253] Section 1.01 of AfDB General Conditions for Non-Sovereign Entities.

[254] A. F.M. Maniruzzaman (1999) pp. 658-693.

Section 1.01 of AfDB General Conditions very much resembles Section 8.01 of the IBRD General Conditions now in force.[255] Interestingly, this latter does not substantively depart from Section 7. 01. of IBRD Loan Regulation No 3 which Aron Broches analysed in a lecture given in 1959,[256] and that many observers have considered as the traditional view of the legal character of the World Bank loan agreement.[257] It is worth recalling the view expressed on this issue at the time in order to comprehend better the current approach to the issue of the governing law of IFIs agreements.

In 1959, Broches noted that although Section 7. 01. of 1956 IBRD Loan Regulation No 3 is not a straightforward provision, it should be read as reflecting a choice for the international law.[258] He further posited that the loan agreements between the Bank and a member State are to be governed by international law, and would have the status of 'treaty' as a result of the international legal capacity of both the parties to those agreements.[259] An extensive line of reasoning supports this approach to the legal character of the loan agreement between the Bank and a member State. First, Broches ascertained the Bank's international personality and its treaty making capacity. Then, turning to the issue of whether the agreement is governed by international law, he admitted that the rather strange draft of this provision is a reflection of the legal uncertainty, prevailing in 1947, related to the personality of international organisations and their legal capacity. However, he concluded that the impact of Section 7.01 was not only denationalising the governing law of the loan and guarantee agreements but also submitting such agreements in all respects to international law.[260]

As for the loan agreements entered into between the Bank and other entities, such as a state-owned enterprise or a political or administrative subdivision of the State (hereafter non-members), Broches argued that they do not have a status of treaty because the borrower does not have the international legal personality.[261] However, he argued that the application of international law is justified since the loan agreement between the Bank and the state-owned enterprise is part of the negotiations undertaken between the Bank and the member government

[255] See Section 8.01 of the IBRD General Conditions for Loans (2010). Other IFIs involved in public sector's development activities have included a similar provision in their general conditions applicable to loan agreements.
[256] A. Broches (1959) at 33*ff*
[257] See K. Mettälä, 'Governing-Law Clauses of Loan Agreements in International Project Financing', *The International Lawyer*, vol. 20, No. 1 (Winter 1986) at 228; J. W. Head (Apr., 1996) at 221.
[258] A. Broches (1959) at 33.
[259] Idem, at 34*ff*.
[260] Idem, pp 33-37.
[261] Idem, at 38.

leading to the accompanying guarantee agreement, and both contracts should be understood as a unity.[262] However, considered separately from the guarantee agreement, the loan agreement is merely insulated against the influence of the municipal law. According to Broches, such an agreement is subject to the loan regulation, now known as General Conditions for Loans.

The reasons for this stance run as follows: under the Section 4, Article III of the IBRD Articles of Agreement, a loan agreement entered into between the Bank and non-members shall be subject to the government guarantee. Consequently, when the Bank lends directly to an entity other than a member State, that loan always involves an additional agreement (the guarantee agreement) with the member State in whose territory such an entity is located. Unlike the principal (loan) agreement, the guarantee agreement is subject to international law since it is concluded between two subjects of international law. Besides, under the guarantee agreement entered into by the Bank, the guarantor's obligation is construed as a primary obligor and not as a surety merely, making the guarantor a joint co-debtor.[263] Despite the fact that loan agreements entered into between the Bank and non-members are not treaties, the obligations arising out of such loans and the related guarantee agreements are interdependent; therefore, it would be inappropriate to consider them separately.[264]

Notwithstanding the logical character of this stance, this leaves the loan agreement between the Bank and non-members in an awkward position as it does not clarify the set of rules that shall regulate them. However, as Head rightfully noted, the use of public international law by parties who are not subjects of international law, although difficult to defend in 1959, is now well accepted.[265] This opinion reflects the autonomy of the parties to choose the law governing the loan agreement in accordance with the principle of freedom of contract upheld in almost all jurisdictions.[266] This autonomy applies irrespective of the nature of the parties. Like domestic law persons, international subjects can freely decide to submit their agreements to a system of law of their choice, be it international or municipal law. Agreements entered into between an international subject and a domestic legal person enjoy the same autonomy.[267]

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[262] Ibidem.
[263] Ibidem.
[264] Ibidem.
[265] J. W. Head (Apr., 1996) at 228.
[266] K. Mettälä (Winter 1986) pp. 228-229.
[267] G. R. Delaume, 'Issues of applicable law in the context of the World Bank's operations', in N. Horn & C. M. Schitthoff (eds.), *The Transnational Law of International Commercial Transactions,* Kluwer, (1982) pp. 317-328

To come back to the analysis of the AfDB General Conditions, another provision that provides some guidance on the question of the governing law is Section 10. 04. This provision deals with the issue of settlement of disputes. First, Section 10. 04(a) elaborate on the requirement that parties shall initially endeavour to resolve any controversy amicably, except for liens and other securities, taken under Section 9.04, which are subject to the law governing their creation. Section 10.04(b) provides that if parties fail to reach an amicable settlement, the arbitration shall be conducted in accordance with the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. Section 10.04 (c) to (j) provide further details as to the appointment of arbitrators, the prohibition to seek from any judicial authority an interim measure of protection or a pre-award relief against the Bank, and the enforcement of the arbitral award.[268]

The most significant provision of the AfDB General Conditions that addresses the issue of governing law is Section 10. 05. This provision, under the heading 'applicable law', reads as follows:

> Unless otherwise provided in the Loan Agreement or the Guarantee Agreement, the law to be applied to the Loan Agreement and to the Guarantee Agreement shall be public international law, the sources of which shall be taken for these purposes to include:
>
> (a) any relevant treaty obligations that are binding reciprocally on the parties to these agreements;
>
> (b) the provisions of any international conventions and treaties (whether or not binding directly as such on the parties) generally recognized as having codified or ripened into binding rules of customary law applicable to States and to international financial institutions, as appropriate;
>
> (c) international custom, as evidence of a practice accepted as law; and
>
> (d) general principles of law applicable to multilateral economic development activities.[269]

This enumeration of the source of public international law for the purpose of governing any loan or guarantee agreement extended to a sovereign or public entity is similar to the enumeration of sources in Article 38(1) of the ICJ Statute mentioned previously. This submission echoes Head's finding on the governing law of loan agreements entered into by between EBRD and sovereign or public entities.[270] The traditional position that insulated loan agreement between an IFI and a public entity against the impact of the municipal law, and only

[268] The reference to the UNCITRAL Arbitration Rules can be also found in Section 8.04 of the 2007 Standard Terms and Conditions of the EBRD.
[269] Section 10. 05 of both AfDB General Conditions for Sovereign and Non-Sovereign Entities.
[270] J. W. Head (Apr., 1996) at 230.

favoured the application of international law in the agreements with sovereign entities, has been superseded by an unequivocal pronouncement for the application of international law in all respects.

This pronouncement reflects the autonomy of contracting parties to choose a legal system which in their opinion is most appropriate to give to the transaction its legal setting, regardless of the legal system that governs their personality.[271] Another illustration of a wider application of international law to international transactions with domestic legal persons is found in the provision of Article 42 of the Convention on Settlement of Investment Dispute between States and Nationals of other Contracting States (the ICSID Convention).[272] This article confers upon the Tribunal adjudicating on an investment dispute, in the case of the absence of an express stipulation of applicable law, the right to refer to the rules of international law as the applicable law to the investment relationship.

The fact that IFI-financing agreements with sovereign or public entities are governed by international law does not mean that the entire relation is governed by that law only. Some issues may require a different treatment. These include the legal capacity of the of the representatives of a sovereign or public entity to enter into the agreement, the capacity of the parties to perform their obligations under the agreement, the due authorisation of the transaction, the incorporation of the public entity, the rights of third parties, etc. As with commercial transactions, IFIs do not hesitate to have recourse to techniques of *dépeçage* (split law) and to submit certain specific issues of the overall relationship to another system of law.[273]

Previous development showed that decisions of IFIs, which form part of their internal law, apply to some aspects of the financial agreements concluded with sovereign or public entities including the social and environmental concerns associated with such agreements.[274] Alternatively, the domestic law applies to ascertain whether the constitutional and other

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[271] G. R. Delaume (1982) at 323.

[272] Article 42(1) of the ICSID Convention reads as follows:

> (1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

[273] G. R. Delaume (1982) at 320 & 323; M. Gruson (1982) pp. 222-224; K. Mettälä (Winter 1986) at 225; R. M. Auerback (Summer 1993) at 311; P. R Wood, *Conflict of Laws and International Finance,* Sweet & Maxwell, (2007) at par. 2-086.

[274] See Section 3.2.1.2.(b)(iii) supra.

requirements imposed domestically on sovereign or public entity in respect of financial transactions have been duly complied with. These requirements differ from State to State. In some States, financial agreements entered into by representatives of the government or public entity requires legislative sanctions.[275] There are quite a few instances where legislative intervention is not required to approve a financial agreement between IFIs and representative of sovereign or public entities.[276] Considering the lack of uniformity in domestic legal systems, it is customary for IFIs, before declaring a financial agreement effective, to require satisfactory evidence, including opinions of counsel, that the undertaken agreement has been duly authorised or is compliant with the laws of the State in whose territory the implementation will occur.[277]

ii) The Governing Law of Financial Agreements with Private Entities

Previous development highlighted the motivation for choosing the governing law of financial transactions entered into between IFIs and sovereign or public entities. Those reasons apply mutatis mutandis here. Unlike most agreements concluded with sovereign or public entities, agreements entered into between IFIs and private entities, including corporations and transnational enterprises, are usually governed by national law or translational law.[278] As, this latter also governs most commercial transactions that occur between private entities, the rules pertaining to the selection of the governing law in such transactions will also be relevant to the choice of the governing law in financial agreements between IFIs and private entities.

Under the financial agreements entered into between commercial banks and private entities, commercial banks usually seek to achieve a position of legal confidence concerning their rights and obligations. They also seek predictability as to the interpretations and enforcement of the agreement. In particular, commercial lenders are interested to know whether the foreign currencies will be freely transmitted abroad to make all payments under the financial agreement. They are also interested to know whether a security interest has been validly created and whether it has priority over competing interests. When the financial arrangement forms

[275] See A. Motter et al., ´Parliamentary Oversight of International Loan Agreements and Related Process: A Global Survey, Inter-Parlementary Union & The World Bank, (2013); M. Megliani, *Sovereign Debt: Genesis – Restructuration – Litigation*, Springer, (2014) at 110*ff*.

[276] G. R. Delaume (1982) at 319.

[277] Such legal opinion does not amount to a guarantee that the transaction is valid and binding, since they only relate to the laws of the borrower's jurisdiction and do not cover any legal system which impacts upon the financial agreement. See M. Megliani (2014) at 175.

[278] C. F. Amerasinghe, (2005) at 388.

part of a project finance structure, commercial lenders require that the project to be undertaken complies with all social and environmental laws and regulations binding to it. They also require the development of, and compliance with, an agreed environmental and social risk management plan.

Any dispute arising out of commercial banks and private entities arrangements is referred to and resolved by a specific domestic court or tribunal with well-publicised case law precedents that provide clarity as to how the law is likely to be applied in specific circumstances. A court or tribunal affiliated to the elected system of law will normally accept jurisdiction to hear disputes submit to it even when there is little connection to that jurisdiction other than the election of the parties.

As for financial agreements entered into between IFIs and private entities, they do not depart from prevailing commercial practices. They are subject to a specific domestic law— usually New York or English law— that has acquired the status of leading international commercial and banking centre.[279] Moreover, subject to the specific requirements of the financial agreement entered into between an IFI and a private entity, the domestic legal system of the host State may become relevant in connection with issues such as human rights, environmental liability and indebtedness.[280] Any dispute arising out of financial agreements between IFIs and private enterprises is normally referred to and resolved by arbitration.

The financial agreements entered into between the IFC and private entities can serve as examples. Like ordinary commercial arrangement, financial agreements concluded by the IFC include governing law considerations. These involve (1) the choice of law to govern the agreement; (2) the enforceability of the agreement concerned under that law; and (2) the choice of forum for disputes arising from the transaction, including whether judgements or awards from that forum will be enforced in each relevant jurisdiction. Under Section 8.6.(a) of the 2006 Subscription Agreement between BPZ Energy, INC and the IFC, the law of the State of

[279] See M. Gruson (1982) at 208; B. W. Semkow, 'Syndicating and Rescheduling International Financial Transactions: A Survey of the Legal Issues Encountered by Commercial Banks', *The International Lawyer*, vol. 18, No. 4 (Fall 1984) at 903; R. M. Auerback (Summer 1993) at 306; U. S. Das, M. G. Papaioannou & C. Trebesch, 'Sovereign Debt Restructurings 1950–2010: Literature Survey, Data, and Stylized Facts', IMF Working Paper 12/203, (2012) at 41.

[280] See R. M. Auerback (Summer 1993) pp. 311-313; M. Marco, 'Accountability in International Project Finance: The Equator Principles and the Creation of Third-Party-Beneficiary Status for Project-Affected Communities', Fordham International Law Journal, vol. 34, No 3 (2011) pp. 376-394; M. Megliani (2014) at 510*ff*.

New York governs the rights and obligations of the parties under the agreement thereof.[281] Section 8.6.(b) stipulates the nature of the forum where any disputes in connection with the agreement will be heard. This Section reads as follows:

> Any dispute, controversy or claim arising out of, relating to, or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration. The arbitration shall be conducted in accordance with the Rules of Arbitration of the International Chamber of Commerce (the "ICC") in effect at the time the arbitration is initiated, except as they may be modified herein or by mutual agreement of the parties. The place of arbitration shall be New York. The arbitration shall be conducted in the English language.[282]

Sections 8.6.(c) to (g) provide further details as to the appointment of arbitrators, the authority of the arbitration tribunal, the right to seek from any judicial authority an interim measure of protection or a pre-award relief against the other party, and the enforcement of the arbitral award. Notwithstanding the above, the parties acknowledge that neither any provision of this Section 8.6 nor the submission by IFC to any courts of competent jurisdiction pursuant to that section shall constitute a waiver either before any Authority or court of law of any of the privileges and immunities outlined in IFC's Articles of Agreement.[283]

The parties to the agreements are those who are entitled to have recourse to the arbitral procedure. That is to say, only the IFI concerned, the borrower or eventually the guarantor can rely on the arbitration clause to trigger the dispute resolution mechanism provided in the financial agreement. As for third parties — including individuals and communities affected by the financial agreement — this category of plaintiffs have no direct claim against the IFI or any other party involved in the financial agreement. This position reflects the contractual nature of arbitration mechanisms in the sense that a party cannot be subject to an arbitration process requested by another party unless he has agreed to such a process. Thus, any arrangement involving third parties' participation in the arbitration process must be based on, or at least take into account the contractual nature of the financial agreement that bind the parties.[284]

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[281] Section 8.6.(a) of the 2006 Subscription Agreement between BPZ Energy, INC. and the IFC reads as follows:
> This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of New York applicable to contracts entered into and to be wholly performed therein.

[282] Section 8.6.(b) of the 2006 Subscription Agreement between BPZ Energy, INC. and the IFC.

[283] Section 8.6.(h) of the 2006 Subscription Agreement between BPZ Energy, INC. and the IFC.

[284] For further development on the issue of third party's participation in arbitration process, see generally J. M. Hosking, 'The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice Without Destroying Consent', *Pepperdine Dispute Resolution Law Journal*, vol. 4, No. 3, (2004) pp. 469-587.

As some commentators note, "party autonomy is certainly the *differentia specifica* of the arbitration process."[285] In other words, the "crucial difference between arbitration and courts lies in the fact that the basis of the jurisdiction of an arbitral tribunal is the will of the parties, while courts owe their competence to procedural norms of state or of an international convention."[286] In courts, substantive law and procedural rules (supported by the jurisdictional authority of the court) create procedural rights, not contingent upon consent, enforceable by and against a third party.[287] In this instance, a third party can bring an action (for example alleging a tort) against an entity to which it has no contractual relationship; can intervene in proceedings merely on the basis that it is an interested party; or can itself be compelled to join a proceeding by way of a third party joinder application.[288] None of these situations require consenting to the jurisdiction of the court.

The arbitration clause under a financial agreement typically limits the right to request the enforcement of any obligation arising out the financial agreement to the sole contracting parties.[289] Third party beneficiaries to IFI-financial agreements cannot sue an IFI or any other participants to a financial agreement in case a promise made by contracting parties to the effect of benefiting third parties fails to materialise. However, exceptions to the contractual nature of arbitration are allowed under some legal systems.[290] The spectrum of these exceptions runs from novation, assumption of obligations, estoppel, agency, incorporation by reference, veil piercing, subrogation, succession, to third party beneficiary.[291]

Notwithstanding the above, the choice of a specific domestic legal system as a governing law of the transaction between an IFI and a private entity does not mean that the entire relation is governed by that law only. As with financial agreements with sovereign or public entities, IFIs

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[285] T. Varady et al., *International Commercial Arbitration: A Transnational Perspective*, West, (1999) at 61.
[286] Ibidem.
[287] J. M. Hosking (2004) at 476.
[288] See S. I. Strong, 'Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?' *Vanderbilt Journal of Transnational Law,* vol. 31 (1998) pp. 915-996.
[289] See Section 2.3.2.1.a.
[290] See E. A. Posner, 'Erga Omnes Norms, Institutionalization, and Constitutionalism in International Law', U of Chicago Law & Economics, Olin Working Paper No. 419 (Aug. 7, 2008) pp 1-29; C. Engel, 'Erga Omnes: Why does Public International Law Ignore Privity of Contract: Comment', *Journal of Institutional and Theoretical Economics*, vol. 165, No. 1 (March 2009) pp. 24-28; S. Whittaker, 'Privity of Contract and the Law of Tort: The French Experience', *Oxford Journal of Legal Studies*, vol. 15, No. 3 (Autumn, 1995) pp. 327-370; M. Trebilcock, 'The Doctrine of Privity of Contract: Judicial Activism in the Supreme Court of Canada', *The University of Toronto Law Journal,* vol. 57, No. 2 (Spring, 2007) pp. 269-291.
[291] For further development on the exception to the privity of contract and the contractual nature of arbitration. see generally, J. M. Hosking (2004) pp. 469-587.

have recourse to the *dépeçage* technique whenever appropriate. Under the 2006 Subscription Agreement between BPZ Energy, INC. and he IFC, the implementation of the transaction is contingent upon its compliance with the laws and regulations to which each party is subject.[292] In particular, with respect to social and environmental issues, parties have agreed that the operations of the Company and its Subsidiaries shall be compliant with social and environmental laws applicable in the territories where their respective operations are located. Those operations shall also comply with the IFC Performance Standards.[293]

b. Customary Law and General Principles

Besides the constituent instruments of IFIs and other treaties or agreements to which they are party, the categories of applicable international law to IFIs and their operations include customary law and general principles of law. These last two sources of law are very hard to distinguish in practice as they both require wide acceptance by a representative majority of the principal legal systems in order to have a binding character.[294] Nonetheless, it is acknowledged that a constant and uniform practice accepted as law is the test by which an alleged rule must be determined as an authentic rule of international customary law.[295] By contrast, general principles usually arise from parallel recognition of certain basic rules applied in similar situations, without the need of an actual enactment either at national or international levels.[296] The nature of general principles is to complement the two other sources whenever they are either insufficient (the case of lacunae) or have reached such a level of complexity and abundance that some form of coordination is needed from the judge or arbitrator to determine which rule to use first and what validity to give to them.[297]

Mosler categorised general principles in three broad groups, namely (1) principles taken from generally recognized national law, (2) general principles originating in international relations,

[292] Sections 2.11 & 4.4. of the 2006 Subscription Agreement between BPZ Energy, INC. and the IFC.
[293] Section 5.7.(a) of the 2006 Subscription Agreement between BPZ Energy, INC. and the IFC.
[294] See G. Gaja, 'General Principles of Law', *Max Planck Encyclopaedia of Public International Law,* (May 2013) paras. 21-24; A. da Rocha Ferreira et al., 'Formation and Evidence of Customary International Law, *UFRGS Model United nations Journal,* Vol. 1 (2013) pp.182-201.
[295] *Colombian-Peruvian asylum case,* (Judgment, Nov. 20, 1950) ICJ Reports 1950, at 276.
[296] H. Mosler, 'General Principles of Law', in: R. Bernhardt (ed.), *Encyclopaedia of Public International Law,* volume 2, Elsevier (1995) pp. 511-527.
[297] M. Panezi, 'Sources of Law in Transition: Re-visiting General Principles of International Law', *Ancilla Iuris (anci. ch),* (2007) at 72.

and (3) general principles applicable to all kinds of legal relations.[298] Each group includes a number of subcategories.[299]

A number of principles that appear in this classification might be relevant to IFIs and their operations. These include the principle of liability for negligence (although the conditions for its determination may be debatable),[300] responsibility (for every violation of legally protected rights which the law provides a remedy)[301] and reparation of damages caused by illegal acts. It

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[298] H. Mosler (1995) at 518-525.

[299]Ibidem; the general principles categorised by Mosler include:

1. Principles taken from Generally Recognized National Law:
    - a) Liability, responsibility, reparation
    - b) Unjust enrichment
    - c) Property, expropriation, indemnity
    - d) Denial of justice
    - e) Right of passage
    - f) Prescription
    - g) Error
    - h) Implied agreement
    - i) Preclusion by conduct
    - j) Principles of presumption in certain circumstances
    - k) General principles of administrative law
    - l) Procedural principles:
        - i) Drawing conclusions from one's own precedent
        - ii) *Res judicata*
        - iii) *Res judicata* affecting distribution of powers in other UN bodies
        - iv) Requirements of judicial process (equality of the parties)
        - v) Admission of indirect evidence.
2. General Principles Originating in International Relations:
    - a) Principles resulting from specific features of the international legal community:
        - i) Protection of diplomats and consuls
        - ii) Sovereign immunity
        - iii) Primacy of international law, limits between domestic and national jurisdiction
        - iv) Territorial jurisdiction
    - b) Generally accepted principles:
        - i) Freedom of the high seas
        - ii) Diplomatic protection, exhaustion of local remedies
        - iii) Laws of war
        - iv) Delimitation of boundaries on the sea, equidistant lines
    - c) Principles connected with treaties
    - d) Elementary considerations of humanity.
3. General Principles Applicable to all Kinds of Legal Relations:
    - a) Good faith, *pacta sunt servanda*, unilateral declarations
    - b) Equity
    - c) Estoppel
    - d) Principles of judicial procedure
    - e) Respect of basic human rights.

[300] H. Mosler (1995), at 519.

[301] *The Lusitania* Cases, (Opinion), Reports of International Arbitral Awards, volume VII, (Nov. 1, 1923) at 35.

is admitted that such reparation should go as far as possible to "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if the act had not been committed."[302] Moreover, Mosler's classification include some principles concerning the application and interpretation of treaties such as those defined in Articles 31 to 33 of both the Vienna Convention on the Law of Treaties [adopted on May 23, 1969, (entered into force on January 27, 1980)] and the Vienna Convention on the Law of Treaties between States and IOs and between IOs [adopted on March 21, 1969, (not yet entered into force)].The rules codified in those conventions also have the status of customary international law. As a result, when Article 26 of either the Vienna Convention requires good faith in the creation and performance of a legal obligation, such rule is regarded not merely as a treaty-based obligation but also as a general principle and an international law customary law principle.[303]

Procedural rules can also be part of international law and recognised as a general source. In that regard, the ICJ recognises that often the injured party will find difficulties in furnishing direct proof of the facts, giving rise to state responsibility and therefore, in those cases, a more liberal approach towards circumstantial evidence is necessary. According to the Court, "this indirect evidence is admitted in all systems of law, and its use is recognised by international decisions."[304]

3.3.2.2. Domestic Law Applicable to IFIs

There are two broad hypotheses regarding the issue of the application of domestic law to IFIs. First, the domestic law applies to IFIs as part of the governing law of financial agreements concluded with sovereign, public or private entities. Second, the domestic law applies to IFIs as a result of their legal personality at the domestic level.

a. Domestic Law as Part of the Laws Governing Financial Agreements

It has been mentioned that IFIs do not hesitate to have recourse to the technique of dépeçage in order to submit certain aspects of the financial agreements with sovereign or public entities to another system of law but the international law.[305] In this regard, IFIs rely on the relevant laws of its contracting parties to assess and manage the issues that are likely to affect the

[302] *The Factory at Chorzow [Claim for Indemnity],* (Merits Judgement), P.C.I.J. 1928, (series A) No. 17, September 13, 1928, at 47.
[303] *Nuclear Tests (Australia v. France),* Judgement, I.C.J. Reports 1974, at 268, para. 46.
[304] *Corfu Channel* case, Judgment of April 9th, 1949, I.C.J. Reports 1949, at 18.
[305] Section 3.2.2.1. (a) (i) supra.

validity, implementation and enforcement of financial agreements they conclude with their clients. These include the legal capacity of other contracting parties to enter into such agreements, their capacity to perform their obligations and the rights of third parties.

As for financial agreements between IFIs and private entities, previous development showed that IFIs do not depart from prevailing commercial practices that submit an international commercial transaction to a specific domestic law.[306] As with financial agreements Between IFIs and sovereign or public entities, the technique of dépeçage applies to financial agreements between IFIs and private entities but with far-reaching consequences. When the agreement entered into involves the acquisition of equity participations in a private enterprise, it is likely that the laws and regulations which control the activities of that enterprise beyond the borders of its natural jurisdiction will also be relevant to an IFI which owns stocks in such an enterprise. These extraterritorial laws and regulations[307] will apply to the IFI concerned in the same manner territorial laws apply to it. Mining activities occurring in a country such as the Democratic Republic of Congo (DRC), for instance, are subject to a wide range of territorial laws but also to some extraterritorial laws, including the US Foreign Corrupt Practices Act, UK Bribery Act 2010, and the Cardin-Lugar provision in the US Dodd-Frank Wall Street Reform and Consumer Protection Act (known as Dodd-Frank Act).[308] A financial agreement between an IFI and a private entity operating in that sector is expected to comply with all the laws and regulations applicable to that private entity, including the extraterritorial laws and regulations relevant to the mining sector in the DRC.

b. Application of Domestic Law as a Result of Domestic Personality

It has been mentioned that the legal personality of IFIs in domestic legal system grants them the capacity to create rights and obligations at the domestic level.[309] IFIs have recourse to this capacity on a daily basis to facilitate the performance of their mandate. That transpires trough the transactions such as lease or purchase of office buildings, vehicles, and furniture from either

[306] Section 3.2.2.1. (a) (ii) supra.

[307] For further development on extraterritorial laws and regulations, see J. C. Coffee Jr., 'Extraterritorial Financial Regulation: Why E.T. Can't Come Home', *Cornell Law Review*, vol. 99, (2014) pp. 1259-1302; J. A. Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas', *Corporate Social Responsibility Initiative,* Working Paper No. 59, John F. Kennedy School of Government, Harvard University, (2010).

[308] See K.F. Lukanda, 'Renegotiating Investment Contracts: The Case of Mining Contracts in the Democratic Republic Of the Congo', *George Mason Journal of International Commercial Law,* vol. 5, No. 3, (2014) pp. 330-341.

[309] Section 3.1.3. supra.

a public or private entity in the host State. The application of domestic law to IFIs also emerges from the use of the domestic banking system for the payment of wages and other contractual services.

While the laws and regulations of the host State —or those of the State in whose territory the activities being financed occur— may prove indispensable for the fulfilment of the mandate of an IFI, it is uncertain that the same is true for extraterritorial laws and regulations. Unlike the previous hypothesis where the application of extraterritorial laws and regulations to IFIs was envisaged as part of the laws governing a financial agreement, the application of extraterritorial laws and regulations to IFIs on the sole ground of their domestic personality is highly questionable.

From a strictly legal perspective, extraterritorial laws and regulations are domestic laws aimed at filling the gaps of the territorially-based system of control over natural persons and activities of corporations[310]. The capacity of States to enact extraterritorial laws and regulations results from their their capacity to regulate those subject to their jurisdiction. That capacity does not extend to the control of an IO's operations as it would be incompatible with the idea of autonomy of IOs.[311] Consequently, the attribution of domestic personality to IFIs does not confer to the State in whose territory such personality is recognised the power to regulate the operations of these institutions either in its own territory or the territory of another State. This position is consistent with the principle of privileges and immunities of IOs,[312] which will be discussed elsewhere in this research.

3.4. Enforcement of IFI Laws

The introduction to this chapter suggests that the rights and obligations of IFIs are embedded in the internal and external laws that apply to them. The analysis that followed this remark strives to detail the exact content of the internal and external laws applicable to IFIs. With that in mind, before examining the issue of enforcement of the laws and regulations applicable to IFIs, is worth noting that the concept of enforcement differs from the notions of implementation and compliance, although they all are means to ensure the effectiveness of the laws and

[310] J. A. Zerk (2010) at 5.
[311] J. d'Aspremont, 'The Multifaceted Concept of the Autonomy of International Organizations and International Legal Discourse', in R. Collins & N. D. White (eds), *International Organizations and the Idea of Autonomy: Institutional Independence in International Legal Order,* Routledge, (2011) at Chapter 4.
[312] See P. Sands & P. Klien (2009) pp. 490-516.

regulations. The following analysis does not include an assessment of factors that make for the success or failure of IFI laws to achieve their intended effects. Instead, it provides an account of the mechanisms that helps to enforce IFI laws and the challenges associated with that process.

The notion of implementation is normally used in legal literature to encompass all actions required to carry out the commitments resulting from a legal undertaking or rule.[313] On the other hand, enforcement is ordinarily defined as "the act of compelling compliance with a law."[314] In domestic legal systems, it refers to the measures and processes mostly taken by a public authority with a view "to impel compliance, by forcible and other coerce means, with the law."[315] In the international legal system, the notion of enforcement entails all those measures jointly or unilaterally adopted by a competent authority to ensure respect for a legal obligation if the latter is not honoured voluntarily.[316] By contrast, "compliance, whether voluntary or enforced, formally occurs when the legal requirements of international agreements are met by the […] parties to them."[317]

Historically, enforcement of international law was state-centred in two main respects.[318] On the one hand, international law was a self-help system without any central authorities or institutions through which rights and obligations could be vindicated or enforced. On the other hand, it was a self-judging system in the sense that only the aggrieved State was entitled to decide for itself whether its rights had been violated and what response action to take. While, auto-interpretation processes remain an important feature of the dynamic horizontal structure of contemporary international law,[319] the traditional conception of enforcement has come to be both tempered and widened in significant ways. The States' response to a violation of their

[313] I.F.I. Shihata, 'Implementation, Enforcement, and Compliance with International Environmental Agreements— Practical Suggestions in Light of the World Bank's Experience', *The Georgetown International Environmental Law Review*, vol. 9 (1996-1997) at 37.
[314] B. A. Garner (ed.), *Black's Law Dictionary*, 8th ed., (2004) at 569.
[315] A. Cassese (2005) at 296.
[316] Idem, at 297*ff*.
[317] Ibidem.
[318] J. Brunée, 'Enforcement Mechanisms in International Law and International Environmental Law', in U. Beyerlin et al, (eds.), *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue Between Practitioners and Academia,* Martinus Nijhoff Publishers (2006) at 3.
[319] For further development on the horizontal structure of international law see C. Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm for International-Law?', *European Journal of International Law,* vol. 4 (1993) pp. 447-471; S. Murphy, *Murphy's Principles of International Law, 2d (Concise Hornbook Series),* West Academic (2012) at chapter 3.

rights, also known as countermeasures, no longer includes forcible measures, except in the narrow circumstances of self-defence.[320]

Interestingly, the spectrum of potential enforcers of international law has grown to include collective actions of States in respect of obligations that are owed to the international community as a whole (*erga omnes* obligations).[321] Furthermore, there has been a "shift in emphasis from efforts to develop enforcement processes, be they self-help or collective enforcement, to efforts to establish processes of deliberation, justification and judgment."[322] The self-judgment of violations and assessment of appropriate responses has come to be significantly constrained by collective processes and by the involvement of a widening range of non-state actors.[323] For instance, States have created and submitted themselves to the compulsory jurisdiction of international adjudicatory bodies. The spectrum goes from formal judicial forums, such as the International Court of Justice, the International Criminal Court or the International Tribunal for the Law of the Sea, to alternative dispute resolution processes, such as the World Bank's centre for settlement of investment disputes and the World Trade Organization's dispute settlement procedure. In addition, state conduct with international norms is scrutinized through an array of reporting, review and justificatory processes within IOs and treaty-based institutions.[324] Furthermore, individuals and non-governmental organisations also contribute to the enforcement of international norms by triggering a variety of informal and formal assessment processes, both at the international and domestic levels.[325]

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[320] Articles 2(4), 51 UN Charter; Article 50, Draft Articles on Responsibility of States for International Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Suppl. No. 10, 43, UN Doc. A/56/10 (2001).

[321] Article 60 of Vienna Convention on the Law of Treaties, [adopted on May 23, 1969, (entered into force on January 27, 1980)]; 42, 48, 49 & 54 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR 56th Sess. Supp. No 10, p. 43, UN Doc. A/56/10 (2001);*Barcelona Traction, Light and Power Company, Limited [hereafter Barcelona traction Case], Judgment of 05 February 1970, I.C.J. Reports 1970, p. 3*, paras 33-34.

[322] J. Brunée, (2006) at 6.

[323] T. Stein, 'Decentralized International Law Enforcement: The Changing Role of the State as Law Enforcement Agent', in J. Delbrück & U. E. Heinz, *Allocation of Law Enforcement Authority in the International System — Proceedings of an International Symposium of the Kiel Institute of International Law*, Drunker & Humblot, (1995) pp. 107-126; J. Brunée, (2006) at 4; M. Noortmann et al. (eds), *Non-State Actors in International Law*, Bloomsbury Publishing, (2015).

[324] J. Brunée, (2006) at 4.

[325] See A. Alkoby, 'Non-State Actors and the Legitimacy of International Environmental Law', *Non-State Actors and International Law*, vol. 3, No. 1, (2003) at 23*ff*; E. M. Hafner-Burton, 'Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem', *International Organization*, vol. 62, No 4 (2008) pp. 689-716; B. Van Schaack, 'In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention', *Harvard International Law Journal,* vol. 42, No. 1 (2001) pp. 141-200.

However, the capacity of collective penalties or other coercive measures to induce compliance of international law should not be overstated. Collective enforcement through penalties and binding judicial processes play only a limited role in the compliance with international norms. There is another factor to the ways in which compliance with law can be compelled, one that is not captured by focusing only upon enforcement or formal judgment. It involves the voluntary compliance with international law.[326] Jutta Brunée summarises the different explanations to the question as to what brings about states' compliance with international law. She argues as follows:

> De Visscher points to "social conscience." But how is it that international law comes to reflect social conscience? Thomas Franck, in explaining why states obey "powerless rules," stresses the importance of legal legitimacy. Louis Henkin, who famously observed that "almost all states comply with almost all of international law almost all of the time," finds the explanation in states' interest in orderly relations.
>
> Ultimately, then, solving the puzzle of "voluntary" compliance presupposes a theory of compliance. Similarly, whether one sees the above-noted shift from enforcement to justification and judgment as recognition of the strength of international law or as admission of its weakness, depends in part upon the theoretical vantage point from which one contemplates the question.[327]

As for the enforcement of IFI laws, there are some similarities with the ways States ensure enforcement with international norms. Just like States, IFIs rely on the self-judgment feature of their legal system to ensure compliance with law. The self-judgment of violations of IFI laws is constrained by independent processes involving of a wide range enforcement bodies at the institutional, international; and domestic levels.

Although legal factors play a key role in the establishment and operations of IFIs, they are not so influential as to lead the way to the judicial settlement of all the disputes arising out their activities. IFIs are known to be self-contained, that is to say, they do not fall under the authority of any entity either national or international.[328] Their governing boards have authority to interpret their constitutions, as noted above.[329] The decisions rendered by these organs are not subject to appeal before an international court or tribunal, or any arbitral jurisdiction.

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[326] P. De Visscher, 'Cours général de droit international public', *Récueil des Cours de l'Academie de Droit International*, (1972), pp. 138-153, as cited by J. Brunée (2006) at 5.
[327] J. Brunée, (2006) at 5.
[328] J.W. Head, (2008) at 219.
[329] See Section 3.2.1.1.(b) supra, at 20.

Notwithstanding the above, IFIs have at their disposal machinery of a judicial nature, known as administrative tribunals, designed for the settlement of disputes in staff matters.[330] This machinery has the power to overrule IFI-management decisions and to provide plaintiffs with compensation for the harm they have suffered and to order their reinstatement.[331] As it will be discussed in the next chapter, administrative tribunals, along with the review mechanisms established for injured third parties, are complementary to the immunity enjoyed by IFIs from disputes brought by private parties, including staff members, before national jurisdictions. Also, administrative tribunals are regarded as a legal requirement stemming from treaty obligations incumbent upon IFIs, as well as a result of human rights obligations involving access to justice. Ultimately, they are essential tools for an effective functioning of IOs, including IFIs.[332]

As for financial agreements entered into with borrowers, both IFIs and borrowing parties can rely on the provisions regarding enforceability contained in the IFIs' policies applicable to these agreements to resolve any dispute between them. As previously noted, AfDB General Conditions require that parties shall endeavour to settle any controversy between them amicably before proceeding to arbitration.[333] However, AfDB General Conditions provide no special means for enforcing an award against a sovereign or public entity unwilling to comply with it. There does not seem to exist either, at the time of writing, a record suggesting that the borrowing sovereign or public entities have had recourse to arbitration in order to assert their rights arising from a financial agreement against the AfDB or any other IFI which provides similar dispute resolution mechanisms.

The provisions on the enforceability financial policies and agreements concluded by IFIs as part of their public sector operations seem to be of little relevance in the case of sovereign insolvency. Unlike a private individual or a corporation, sovereign entities cannot be declared

[330] See Statute of the Administrative Tribunal of the International Bank for Reconstruction and Development, International Development Association and International Finance Corporation as amended on 18 June 2009; Statute of the Administrative Tribunal of the African Development Bank as adopted on 16 July 1997.
[331] See *Tah Asongwed* case, Judgement No 2001/02 of the Administrative Tribunal rendered on 9 November 2001; *S. Z. M* Case, Judgement No 71 of the Administrative Tribunal rendered on 13 November 2009; *J. B.* case, Judgement No 85 of the Administrative Tribunal rendered on 12 November 2013.
[332] See *The Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, (Advisory Opinion) ICJ report 1954, 47.
[333] See Section 3.2.2.1.(a)(i) supra, at 41.

bankrupt and their assets allocated to their creditors.[334] Usually, sovereign debts are not backed by any guarantee, as noted in chapter 2, and only a few attachable assets of a sovereign entity are located outside national borders. Even if an IFI secures an award asserting its rights, it is not certain that the IFI concerned will obtain the enforcement of that award in a foreign jurisdiction. Indeed, sovereign debtors can always rely on a number of defences to prevent any attachment of their assets. These include sovereign immunity, protection of sovereign assets or act of State.[335] The only remedy is for an IFI to agree to new and less burdensome terms, commonly known as debt restructuring, which the sovereign or public borrowers will be able to meet.[336]

A recent IMF report suggests that international debt relief efforts have aided reduce the external debt burden of heavily indebted poor countries (HIPC). This report also submits that debt relief initiatives have contributed to the creation of resources to be channelled to poverty-reducing expenditures and economic development in the countries concerned.[337]

Another limit to the provisions as to enforceability, contained in the IFI policies applicable to financial agreements, is the case of a dispute with injured third parties. As noted before, the parties to a financial agreement are the only ones entitled to initiate an arbitral procedure for the settlement of any dispute arising between them.[338] To circumvent that, most IFIs have taken initiatives to permit some form of review of their actions concerning injured or affected third parties. This mechanism was pioneered by the World Bank in September 1993. The review function is performed by the World Bank Inspection Panel. Its primary purpose is "to address the concerns of people who might be affected by [the World Bank] projects and to ensure that

[334] N. Roubini & B. Setser, *Bailouts or Bail-Ins: Responding to Financial Crises in Emerging Economies*, Institute for International Economics, (2004) at 249.
[335] See H. N. Scott, 'Enforceability of Loan Agreements between the World Bank and its Member Countries', *American University Law Review,* vol. 13 (1963-1964) at 187*ff*
[336] For further development on sovereign debt restructuring, see M. Miller, 'Sovereign Debt Restructuring: New Articles, New Contracts–or No Change?', *Institute for International Economics*, Policy Briefs No PB02-3, (April 2002) pp. 1-12; U. S. Das, M. G. Papaioannou & C. Trebesch (2012) pp. 1-127; The World Bank, 'Global Development Finance: External Debt of Developing Countries', the World Bank, (2012).
[337] IMF, 'Heavily Indebted Poor Countries (HIPC) Initiative And Multilateral Debt Relief Initiative (MDRI)—Statistical Update', Dec. 12, (2014) pp. 1-46, available at https://www.imf.org/external/np/pp/eng/2014/121214.pdf, accessed 15 February 2015.
[338] See Section 3.2.2.1. (a) supra.

the Bank adheres to its operational policies and procedures in the design, preparation, and implementation of such projects."[339]

Other IFIs have emulated this mechanism with varied structures and approaches. For example, the IDB inaugurated its Independent Investigation Mechanism (IIM) in 1994, the ADB introduced its Accountability Mechanism in 2003 in replacement to its Inspection Function of 1995, IFC and MIGA initiated its Compliance Advisor/Ombudsman (CAO) in 1999, and the AfDB established its Independent Review Mechanism (IRM) in 2004. A number of criticisms have been raised over the inadequacy and limited scope of these review mechanisms. Professor Head argues in this regard that he "would prefer to see more extensive and objective forms of "judicial review" in the IFI context—that is, review by a more independent, more judicial, and, therefore, more externally trustworthy system."[340] A more detailed examination of the review mechanisms established by IFIs and related criticisms is provided in the next chapter.

3.5. Compliance with IFI Laws

The issue of compliance with IFI laws involves a state of conformity whereby the legal requirements pertaining to such laws are met by the very parties they intended to govern. It embraces the circumstances where substantive requirements of the applicable law are reflected in the actual behaviour of the actors involved in the IFI operations. That cannot be attained through a mere adoption of legal steps required by the laws and regulations applicable to IFI operations.[341] Likewise, the existence of enforcement mechanisms does not guarantee the effectiveness of substantive obligations provided in the IFI laws.[342] The constraints of this research do not allow a systematic assessment of the issue of compliance with IFI laws. The following development sketches out some features of and obstacles to such an assessment.

Attempts to assess compliance with IFI laws have been made in the past with a particular focus on the rules (policies and procedures) pertaining to IFI operations. In that regard, Boisson De Chazournes notes that the World Bank's OP/P "create normative and procedural expectations for staff and partners [stakeholders] of the Bank and contribute in many ways to forging and

[339] The Inspection Panel, 'Accountability at the World Bank: The Inspection Panel 10 Years on', The World Bank, (2003) at 3.
[340] J.W. Head, (2008) at 220.
[341] See I.F.I. Shihata (1996-1997) at 37.
[342] See D. D. Bradlow & A. Naudé Fourié (2011) pp. 13-15.

developing accepted practices under international law."[343] By the same token, Mac Darrow observes that the influence of OP/P can be capitalised further through a co-financing arrangement with private consortia seeking to benefit from "the Bank's relative 'moral authority' and credibility, thereby, minimising their own investment risks."[344] However, as OP/P are not the sole components of the law that governs IFI operations, it is important to adopt a more encompassing approach to performing a compressive assessment of the issue of compliance with IFI laws.

With that in mind, Professor Daniel Bradlow observes that the compliance of IFI operations with international law should be appraised in terms of three standards, namely (i) the observance of international law in the major phases of the project lifecycle, (ii) the structuring of financial agreements entered into between IFIs and their clients, (iii) and the relation between IFIs and all stakeholders in the conduct of their operations.[345] This approach could serve as a roadmap for assessing compliance with both the internal and external laws of IFIs, even though it was originally developed to assess the operations of IFIs against the applicable international law only.

The self-contained nature of IFIs does not make it easy to determine whether their operations are compliant with their Articles of agreement as interpreted and implemented by themselves. Nevertheless, observers have raised criticisms that IFIs are engaged in 'mission creep'— that is, that their operations are not lawfully confined within the scope of their charters.[346] The argument of the proponents of this criticism is that IFIs have expanded their functions beyond those explicitly conferred to them by their respective charters.[347] However, as Head righteously contends, if IFIs are guilty of anything, it is definitely not for mission creep. Indeed,

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[343] L. Boisson de Chazournes (2000) at 289.

[344] M. Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law*, Hart Publishing, (2003) at 143.

[345] D. D. Bradlow (2010) pp. 23-25.

[346] See T. L. Gutner, 'Explaining the Gaps between Mandate and Performance: Agency Theory and World Bank Environment Reform, *Global Environmental Politics*, vol. 5, No 2 (Mai 2005) pp. 21-22; A. H. Meltzer, 'The Report of the International Financial Institution Advisory Commission: Comments on the Critics' (2000) at 10, available at http://repository.cmu.edu/cgi/viewcontent.cgi?article=1029&context=tepper, accessed 25 April 2015; P. Adams, 'The World Bank's Finances: AN International S&L Crisis', *Cato Institute Policy Analysis,* No. 215, (October 1994) pp. 1-17.

[347] For a comprehensive analysis of the mission creep criticism see R. C. Hockett, 'From Macro to Micro to "Mission-Creep": Defending the IMF's Emerging Concern with the Infrastructural Prerequisites to Global Financial Stability', *Columbia Journal of Transnational Law,* vol. 41, (2002) pp. 153-193; R. C. Hockett, 'From

> [IFI charters]are surely broad enough to permit [them] to give at least some attention to such issues as those I enumerated above—environmental protection and so forth—because any and all of these can have a bearing on the central objective of economic growth and development prescribed for all of the [IFIs] in their charters.[348]

However, an outright rejection of the mission creep criticism warrants caution. The expansion of IFI mandate beyond the parameters of their charters might entail other legal implications in connection with the doctrine of implied powers and similar doctrines as discussed in the introduction to this chapter. Indeed, from a purely legal perspective, IFIs have only those powers that are given to them by their members which are sovereign States mostly. Therefore, one cannot presume that such members have surrendered to IFIs more powers than they have expressly authorised under the charters of the respective institutions. The extent to which the doctrine of implied power can be invoked has already been clarified.[349] It is needless to address that again here.

Alternatively, IFIs rely on a number of tools to foster compliance with the terms and conditions of their financing operations. These include the potential for repeatedly extending their financial services to their sovereign and public clients, together with the threat to cut off future financial services. Moreover, IFIs rely on a range of financial and administrative sanctions to help ensure client compliance. These include membership suspension and exclusion, acceleration of existing loans, discontinuation of tranched loan disbursements, debarment or imposing financial penalties such set-ups in interest rates.[350] These tools have not always proven effective particularly with respect to sovereign and public borrowers. There are many instances where IFIs have continued to extend their financial support to such entities despite the inadequate compliance with the terms and conditions of the financial agreement concerned.

Conversely, most IFIs have a set of units committed to ensuring compliance with their policies, investigating allegations of fraud and corruption, and evaluating the effectiveness and impact of completed IFI-funded projects, policies, and programs. These entities have access to appraisal and supervision documents produced by staff and management over the course of a

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"Mission Creep" to Gestalt Shift: Justice, Finance, the IFIs, and Globalization's Intended Beneficiaries', *The George Washington International Law Review,* vol. 37, (2005) pp. 167-205; J.W. Head, (2008) pp. 204-207.

[348] J.W. Head, (2008) at 207.

[349] See the introductory remarks to this chapter supra.

[350] See J.W. Head, (1993) at 614*ff.*; W. Builem & S. Fries, 'What Should the Multilateral Development Banks Do?', EBRD, Working Paper No 74, (2002) at 7; N. Seiler & J. Madir, 'Fight against Corruption: Sanctions Regimes of Multilateral Development Banks', *Journal of International Economic Law*, (2012) pp. 1-24.

project cycle. For example, the oversight functions within the IFC include the following: (1) Compliance Advisor/Ombudsman Office (CAO), (2) Internal Audit Vice Presidency (IAD), and (3) Independent Evaluation Group (IEG) for Private Sector.

The CAO was established in 2000 by IFC and the Multilateral Investment and Guarantee Agency (MIGA). Its roles include the appraisal of compliance with the IFC's Sustainability Framework. It also carries out an ombudsman function by endeavouring to mediate disputes among companies, governments, and affected communities. The CAO also provides advice to the President of the World Bank Group and senior management of IFC and MIGA on broader environmental and social issues. On the other hand, IAD is responsible for evaluating the effectiveness of the organisation's risk management and governance processes. It provides advice in the development of risk control solutions and monitors implementation of corrective actions to mitigate risk. By contrast, the IEG for Private Sector is responsible for the post evaluation function within IFC. Its work aims, among others, to help provide accountability for achievement of IFC's objectives; identify lessons from past experience for improving IFC's operational performance, and help reinforce corporate objectives and values among staff.

As for the compliance of IFI operations with their external law, there is little guidance as to the practical incorporation into IFI activities of the substantive obligations contained in that source, especially its international component. As a result, IFIs have resolved this issue in a manner suitable to their interests. For example, IFIs use carefully drafted language in order not to recognise their direct obligations with respect to substantive legal duties under international human rights and environmental treaties.[351] However, such a reference rises to the level of a limited legal obligation not to disregard the objectives of environmental treaties and offers an opportunity to work on human rights in an implicit manner.

With particular reference to binding human rights, IFIs concede that IFI-funded projects or programmes should not interfere with obligations of countries under these treaties.[352] As a

[351] See A. Marx et al., 'Human Rights and Service Delivery A Review of Current Policies, Practices, and Challenges', in J. Wouters et al. (eds), *Improving Delivery in Development: The Role of Voice, Social Contract, and Accountability*, The World Bank Legal Review Vol. 6, The World Bank, (2015) pp. 39-99.

[352] See H. Cissé, 'Should the Political Prohibition in Charters of International Financial Institutions be Revisited? The Case of the World Bank', in H. Cissé, D. D. Bradlow & B. Kingsbury (eds), *International Financial Institutions and Global Legal Governance,* The World Bank Legal Review Vol. 3, The World Bank, (2012) pp. 59-92; K. Gadio, 'Fostering Opportunity through Development Finance in Africa: Legal Perspectives from the African Development Bank', in H. Cissé et al. (eds), *Fostering Development Through Opportunity, Inclusion and Equity*, The World Bank Legal Review Vol. 5, The World Bank, (2014) pp. 453-479.

result, the mandatory component of safeguard policies is drafted in a way to avoid IFIs' commitment to binding obligations under human rights treaty law, which is traditionally attributed only to States. Both the AfDB and IFC umbrella policies can serve as examples:

> The AfDB, in accordance with its mandate as set out in Article 1 of the Bank Agreement and Article 2 of the Fund Agreement, and the provisions in Article 38 of the Bank Agreement and Article 21 of the Fund Agreement, views economic and social rights as an integral part of human rights, and accordingly affirms that it respects the principles and values of human rights as set out in the UN Charter and the African Charter of Human and Peoples' Rights. (…)The AfDB encourages member countries to observe international human rights norms, standards, and best practices on the basis of their commitments made under the International Human Rights Covenants and the African Charter of Human and Peoples' Rights. [353]

> IFC recognizes the responsibility of business to respect human rights, independently of the state duties to respect, protect, and fulfil human rights. This responsibility means to avoid infringing on the human rights of others and to address adverse human rights impacts business may cause or contribute to. Meeting this responsibility also means creating access to an effective grievance mechanism that can facilitate early indication of, and prompt remediation of various project-related grievances.[354]

As already mentioned, these policies would amount to an indirect commitment relating to binding constitutional or treaty obligations of the borrowing countries only at best. In fact, they have changed the way human rights-related issues are being dealt with.[355] However, the possibility of seeking their enforcement in judicial or quasi-judicial proceedings remains very unlikely as IFIs are not parties to international human rights conventions. The same goes, *mutatis mutandis,* for environmental obligations provided in international environmental treaties.

The argument that human rights and environmental treaty obligations under international law should apply to IFIs has been put forward from both a procedural and substantive perspective.[356] However, the question of whether or not IFIs are bound by international human

[353] Preamble of the AfDB Integrated Safeguards Policy Statement (2013) at 1 para. 3.
[354] IFC Policy on Environmental and Social Sustainability (2012) at 3, para. 12.
[355] See OECD & the World Bank, *Integrating Human Rights into Development: Donor Approaches, Experiences and Challenges*, OECD Publishing (2013) at chapters 1 - 3.
[356] D.D. Bradlow, 'World Bank, the IMF, and Human Rights', *Transnational Law and Contemporary Problems,* vol. 6, No 1 (1996) pp. 47-90; G. Handl, 'The Legal Mandate of Multilateral Development Banks as Agents for Change Toward Sustainable Development', *The American Journal of International Law,* vol. 92, No. 4, (Oct. 1998) pp. 642-665; M. Darrow (2003) at Chapter IV *ff,* S. Skogly, *Human Rights Obligations of the World Bank and the IMF*, Cavendish Publishing, (2001); D. L. Clark, 'The World bank and Human Rights: The Need for Greater Accountability', *Harvard Human Rights Journal,* vol. 15, (2002) pp. 205-226; A. Mcbeth, 'Breaching the

rights and environmental obligations without having ratified the treaties that underpin such obligations is far from being clarified.[357]

Supporters of the application of international human rights and environmental obligations under international treaties to IFIs claim that these institutions are bound to respect such obligations by virtue of customary international law.[358] If that is the case, the question needs to be asked which specific obligations have acquired the status of customary law and to what extent such customary obligations can be implemented and enforced.[359] Most importantly, however, any attempt at extending the reach of human rights and environmental treaty obligations to IFIs beg the question of "third organisation", as Handl noted it.[360] Pursuant to Article 35 of the Vienna Convention on the Law of Treaties between States and IOs and between IOs, a treaty obligation arises for a third organisation only "if the parties to the treaty intend the provision to be the means of establishing the obligation and the (…) third organisations expressly accepts that obligation in writing."

Given the lack of clarity as to the legal obligations of IFIs under international human rights and environmental treaties coupled with the self-contained nature of IFIs, it is submitted that stakeholders should focus their attention on the primary duty bearers. Human rights and environmental treaties obligations, "like other international treaties obligations, are the voluntarily entered commitments of the States, and as such, they potentially offer clear reference points and legitimacy."[361] As McInerney-Lankford pointed out concerning human rights obligations of IFIs, the expansion of the subjecthood landscape in international law has

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Vacuum: A Consideration of the Role of International Human Rights Law in the Operations of the International Financial Institutions', *The International Journal of Human Rights*, vol. 10, No:4 (2006), pp. 385-404; S. McInerney-Lankford, ' International Financial Institutions and Human Rights: Selective Perspectives on Legal Obligations', in D. D. Bradlow & D. B. Hunter, International Financial Institutions & International Law, Kluwer law International, (2010).pp. 239-285.

[357] Idem.

[358] J. Wouters et al. 'Accountability for Human Rights Violations by International Organisations: Introductory Remarks', in J. Wouters et al. (eds), *Accountabilty for Human Rights Violations By International Organisations,* Intersentia, (2010) at 6.

[359] For further analysis of the process by which provisions of a treaty pass into the body of international customary law, see *North Sea Continental Shelf* [Federal Republic of Germany/Netherlands], (Judgement), I.C.J. Report 1969, 3; see also Article 38 of the Vienna Convention on the Law of Treaties between States and IOs and between IOs which stipulates de following: " Nothing (…) precludes a rule set forth in a treaty from becoming binding upon a third State or a third organisation as a customary rule of international law, recognized as such". The text of this provision is essentially identical to that of Article 38 of the Vienna Convention on Law of Treaties.

[360] G. Handl (Oct. 1998) at 659.

[361] OECD & the World Bank (2013) at 70.

unveiled the limitations of existing treaties.[362] This position may prove true for other areas of international law. One needs to learn how to cope with such limitations and take advantage of the unexplored potential of existing treaties.[363]

3.6. Conclusion

This chapter discussed the standards against which IFI operations are to be assessed. It examined the sources, contents and extent of the legal obligations of IFIs in their relationship with other contracting parties to a financial agreement and the outside world, particularly individuals and communities who do not enjoy a contractual relationship with IFIs.

This chapter showed that legal obligations of IFIs are embedded in their legal framework which this are categorised in two broad groupings, namely the internal and external law of IFIs. Internal law of IFIs refers to this body of laws that deal with the structure, functions and other internal operations and procedures of the organisation. Through express or implied authorisation, IFIs regulate their internal legal system using regulations which appear under different appellations including by-laws, resolutions, policies, procedures, directives, guidelines, code of conduct and performance standards. Parallel to their internal law, IFIs are governed by a set of rules that seek to regulate their external relations. These rules regulate the relationships between an IFI with member and non-member States, other IOs, and natural and legal persons, insofar as the envisaged relationships are not governed by their constituent instruments.

By contrast, external law IFIs encompasses other sources of international law which apply to IFIs as a result of their legal personality. This chapter provided a detailed analysis of different components of the legal framework of IFIs and their operations. It also provided an account of the mechanisms the help to enforce IFI laws and the challenges associated with that process.

[362] S. McInerney-Lankford (2010) at 261.
[363] Idem, at 262.

CHAPTER FOUR

LEGAL ACCOUNTABILITY FORA AND THEIR MECHANISMS

4.1. Introduction

Studies on accountability usually ask the question 'accountability to whom' to determine the fora before which an actor is to be held to account for his/her/its conduct, be it a positive action or an omission. Literature uses the concept of accountability forum to describe an entity or individual that triggers an accountability process.[1] It also refers to accountability forum to define the authority before which an actor is to appear for the purpose of giving account of his/her/its conduct and, eventually, facing positive or negative consequences.[2] From a legal perspective, that can be confusing as accountability forum may refer to two different connotations. On the one hand, it may refer to a party that has been affected by the performance of an actor. On the other hand, accountability forum may refer to the entity that has jurisdiction over an affected party's claim. While previous chapters addressed aspects regarding to the first leg of this issue, this chapter is centred on the second leg of the issue of accountability forum. In particular, this chapter analyses the accountability jurisdictions and associated mechanisms as far as the relationship between IFIs and affected individuals or groups is concerned.

In ordinary social relationships involving natural persons, it is usually easy to provide an answer to the question accountability to whom because the accounter is clearly identifiable. However, things are far more complicated when the accountability relation at play involves a domestic or international public entity due to the agency aspect and the nature of the operation such an entity is to be held accountable for.[3] The same goes for a domestic or an international private entity. Financial agreements concluded for the purpose of carrying out a development project or programme in capital importing countries include many participants including International Financial Institutions (IFIs). The focus on this category of international organisation (IO) is justified by the need to assess the extent to which these organisations are held accountable under their own legal order. That does not mean that the issue of

[1] M. Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', *European Law Journal*, vol. 13, No 4, (Jul. 2007) at 454, The Inspection Panel, 'Accountability at The World Bank: The Inspection Panel at 15 Years', the World Bank (2009) at 6; T. Schillemans & M. Bovens, 'The Challenge of Multiple Accountability: Does Redundancy Lead to Overload?' in M. Bovens, R.E. Goodin & T. Schillemans, *The Oxford Handbook of Public Accountability,* Oxford University Press, (2014).

[2] Ibidem.

[3] B. S. Romzek & M. J. Dubnick, 'Accountability in Public sector: Lessons from Challenger Tragedy', *Public Administration Review,* vol. 47, No. 3, (1987) pp. 227-238; R. Mulgan, 'Accountability: An Ever-Expanding Concept?', *Public Administration,* vol. 78, (2000) pp. 555-573; D. Curtin & A. Nollkaemper, 'Conceptualizing Accountability in International and European Law', *Netherlands yearbook of International Law,* vol. 36 (2005) at 7*ff*.

accountability does not arise with respect of other contracting parties to a financial agreement concluded to carry out a development project. But the analysis of this latter issue is beyond the scope of this research.

The context of the accountability relationship examined here is a legal one. Constitutional and administrative lawyers in a well-established democratic State would be familiar with this sort of analysis. The reason is that the examination to be carried out under an accountability relationship between IFIs and affected third parties relies on the same approach that is utilised in the examination of ordinary accountability relationships. These include accountability between citizens and power wielders or between politicians and bureaucrats or between a superior and a subordinate. By contrast, international lawyers would find a study of legal accountability a bit unusual as they are more conversant with the concept of responsibility and that the development of a legal paradigm of accountability remains at an early stage.[4]

As has been shown elsewhere in this research, the notion of accountability comprises legal and non-legal regimes including political, administrative, financial and legal modes of internal and external scrutiny and monitoring of acts and omissions of a public or private entity or IO. Unlike its counterparts, legal accountability consists in a legal scrutiny of the observance of standards prescribed by applicable laws. It usually involves an assessment of the conduct of an actor against its responsibilities, as enshrined in the applicable standards, and the possibility of imposing consequences if such an actor fails to live up to the relevant standards.[5]

As a result, the determination of the forum hinges upon the standards to be applied across the accountability processes. The more legal standards apply to an entity that is required to render account; the many are likely to be the accountability fora that would assess the behaviour of such an actor. In a setting involving accountability of States or their representatives, two broad categories of legal standards would come into play. On the one hand, there is a set of intrinsically municipal rules (such as administrative, civil, criminal rules) that are likely to

[4] G. Hafner, 'Accountability of International Organizations', *American Society of International Law, Proceedings of the 97th Annual Meeting*, (2003) at 236; International Law Association Final Report of the Commission on Accountability of International Organization (2004) p. 5; D. Curtin & A. Nollkaemper (2005) at 9*ff;* N. M. Blokker, 'Preparing Articles on Responsibility of International Organisations: Does the International Law Commission take International Organisations Seriously? A mid-term review' in J. Klabbers & A. Wallendahl (eds), *Research Handbook on the Law of International Organizations,* Edward Elgar Publishing Limited, (2011) 314.

[5] R. W. Grant & R. O. Keohane 'Accountability and Abuses of Power in World Politics', American Political Science Review vol. 99 No 1 (Feb. 2005) pp. 36-37; M. Bovens (Jul.2007) at 456; R. Mulgan (2000) at 571; B. S. Romzek & M. J. Dubnick (1987) at 229.

trigger a number of accountability mechanisms on the domestic plane including review of administration decisions, civil liability, and criminal liability.[6] On the other hand, there is a set of intrinsically international rules that are likely to trigger a number of accountability mechanisms on the international plane. These include the mechanisms of state responsibility and liability that most international lawyers are familiar with. In addition, international legal accountability of States would involve alternative or *ad hoc* mechanisms such as peer review or non-complacence procedures under human rights and environmental treaties, the World Trade Organisation's dispute settlement procedure, the mechanisms of settlement of dispute under bilateral investment treaties (BITs) and to some extent the procedure before the international criminal court.[7] There is no apparent reason not to apply this paradigm to non-state actors.

The legal standards applicable to the operations of an IFI are rooted in its internal and external laws. They comprise a large variety of norms that were extensively analysed in chapter 3. These norms carry a corresponding set of accountability fora scattered across the various components of an IFI's legal order. As with the legal accountability of a State, an IFI can be held accountable before both international and domestic fora. The classification of such fora would take into consideration the nature of the process to be used or the standards against which the operations of an IFI are to be assessed. In that regard, accountability of an IFI can be sought before domestic courts, independent review and compliance bodies, an international

[6] E. J. Haughey 'The Liability of Administrative Authorities' a research paper for the Public and Administrative Law Reform Committee *Legal Research Foundation* (1975) pp. 1-29 available at http://132.181.2.68/Data/Library4/law_reports/pubad_201213.pdf accessed 10 October 2013, R. Mulgan 'Contracting out and Accountability' *Graduate Public Policy Program* Australian National University Discussion Paper No 51 (1997) pp.13-16, C. Scott, 'Accountability in the Regulatory State', *Journal of Law and Society* Vol. 27 No. 1 (2000) pp. 38-60, M. E. Gilman, 'Legal Accountability in an Era of Privatized Welfare', *California Law Review,* vol. 89, No 3, (2001) pp. 569-642, R. O. Keohane, 'Exploring the Governance Agenda of Corporate Responsibility Complex Accountability and Power in Global Governance: Issues for Global Business', *Corporate Governance,* vol. 8, No. 4, (2008) pp. 361-367.

[7] S. N. Guha Roy, 'Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?', *The American Journal of International Law*, vol. 55, No. 4 (Oct., 1961), pp. 863-891; A. Boyle, 'State Responsibility and Liability for Injurious Consequences of Acts not Prohibited by International law: A Necessary Distinction?', *International & Comparative Law Quarterly,* vol. 39, (1990) pp. 1-26; R. O. Keohane et al., 'Legalized Dispute Resolution: Interstate and Transnational', in J. L. Goldstein et al. (eds), *Legalisation and World Politics,* MIT Press, (2001) at 73 *f;* J. Collier & V. Lowe, *The Settlement of Dispute in International Law: Institutions and Procedures,* Oxford University Press, (1999) pp. 59-73; W. W. Burke-White, 'The International Criminal Court and The Future of Legal Accountability', *ILSA Journal of International & Comparative Law,* vol. 10, (2003) pp. 195-204; M. Kaplan, 'Using Collective Interests to Ensure Human Rights: An Analysis of the Article on State Responsibility', *New York University Law Review,* vol. 79 (2004) at 1902 *ff;* J. Brunée, 'Compliance Control', in G. Ulfstein et al. (eds), *Making Treaties Work, Environment and Arms Control,* Cambridge University Press, (2007) pp. 373-390.

jurisdiction or arbitration tribunal. Alternatively, the classification of accountability fora can hinge upon the distinction between processes that involve a direct claim against an IFI and those that do not.

The study of accountability forum before which third parties affected by IFI-funded projects could bring their claims contributes to the research endeavours to assess the extent to which IFIs, as the primary subjects of their own legal order, is adequately held accountable for the consequences of their operations. The following development addresses the mechanism of legal accountability of IFIs before domestic and international jurisdictions. It also analyses the independent review mechanisms establish by IFIs.

4.2. Accountability of IFIs before Domestic Jurisdictions

Some preliminary conditions must be met to trigger the legal accountability mechanisms against IFIs before domestic adjudicatory jurisdictions. First, IFIs must be endowed with legal personality under the domestic legal order of their respective client States. Second, IFIs must be subject to substantive obligations under the domestic legal orders concerned. Third, the establishment of a breach of such obligations by IFIs in undertaking development operations shall be permissible under the relevant domestic legal systems as a domestic court can only assume power over a claim that the laws of the jurisdiction authorize it to hear.

Usually, the legal status and capacities of an entity are determined by its 'personal law'.[8] The personal law of IFIs is international law, or more precisely their respective charters[9] as they set out the framework of their respective legal orders. When the domestic personality of IFIs derives from their constituent instruments, member States are bound to recognise it in their respective legal orders. The reason for that is embedded in the codified customary international law principles regarding international undertakings between sovereign entities.[10] On the other hand, the domestic legal personality of IFIs may stem from bilateral treaties, known as

[8] See Y. Hadari, 'The Choice of national Law Applicable to The Multinational Enterprise and The Nationality of Such Enterprises', *Duke Law Journal,* vol. 1974 No 1, (1974) pp. 1-58; M.M. Boguslavskii, *Private International Law: The Soviet Approach,* Martinus Nijhoff Publishers, (1988) at 87 *ff*; C. F. Amerasinghe, *Principles of Institutional Law of International Organisations,* Cambridge University Press, (2005) pp. 71-72; M. C. Najm, 'Codification of Private International Law in the Civil Code of Qatar', in P. Sarcevic et al., *Yearbook of Private International Law,* Vol. VIII 2006, Sellier. European Law Publishers, (2007) pp. 249-266, at 262*ff*.

[9] See Article VI (2) of the IFC Agreement & Articles 51 of the AfDB Agreement. See also Article IX (2) of the IMF Agreement; Article VII(2) of the IBRD Agreement; Article VIII(2) of the IDA Agreement; Article 45 of the EBRD Agreement; Article IX(2) of the IDB Agreement; Article 49 of the ADB Agreement.

[10] See Articles 26 and 27 of the Vienna Convention on the Law of Treaties (1969).

headquarter or seat agreements, concluded with member States to clarify the legal status of IFIs in the host States.

The recognition of the domestic personality of IFIs in non-member States does not encounter serious difficulties in practice. Each State has its own methods to determine the legal personality in its domestic legal system. Although these methods may vary, most national courts will use their rules of conflict of laws. For Example, the United Kingdom (UK) court system will only recognise entities created by a specific statutory provision, by an Order in Council, or by the law of a sovereign State recognised by the UK.[11] The *Arab Monetary Fund v Hashim* case can serve as an example. The House of Lords whom the question whether or not an IFI of which the United Kingdom was not member could have legal personality under English law was asked found that

> Although when sovereign States entered into an agreement by treaty to confer legal personality on an international organisation the treaty did not create a corporate body with capacity to sue and be sued in English courts, the registration of that treaty in one of the sovereign States conferred legal personality on the international organisation and thus created a corporate body which the United Kingdom recognised corporate bodies created by the law of a foreign State recognised by the Crown.[12]

The House of Lords further stated that

> There is no uniform practice with regard to international organisations in this country. […] [In] cases where the United Kingdom is not a party to the treaty, no legislative steps are taken in the United Kingdom […] this does not debar Her Majesty's government from recognising the international organisation and does not debar the courts of the United Kingdom from recognising the international organisation as a separate entity by comity provided that the separate entity is created not by the treaty but by one or more of the member States.[13]

As for the application of substantive obligations under the domestic law of host States to IFIs, two hypotheses are to be considered. First, substantive domestic obligations would apply to IFIs as part of the governing law of financial agreements concluded with sovereign, public or private entities. Second, substantive domestic obligations would apply to IFIs as a result of their legal personality at the domestic level.

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[11] G. Marston, 'The Personality of International Organisations in English Law', *Hofstra Law & Policy Symposium,* vol. 2, (1997) at 108.

[12] *Arab Monetary Fund v Hashim*, House of Lords, 21 Feb. 1991 [1991] 1 All E. R. pp 871-872.

[13] Idem, at 879, see also *In Re Jawad Mahmoud Hashim et al.* 188 Bankr. 633 (D. Arizona 1995); 27 Bankr. Ct. Dec. 1161 (D. Arizona 1995); 107 ILR (1997), 405.

Nonetheless, the scope of application of domestic law and the requirement that a plaintiff has standing to sue are the main impediment to the capacity of domestic jurisdiction to adjudicate a dispute between IFIs and affected third parties.[14] The founding States of IFIs took appropriate steps to spare private contracting parties from such limitations. That reflects in the limitation of immunity from legal process ordinarily enjoyed by IOs. For example, the constituent instruments of IFIs have afforded private contracting parties to bring claims against IFIs before the relevant domestic jurisdiction, in cases arising from the exercise of IFIs' borrowing powers.[15] However it is important to note that the amenability to domestic legal process is not restricted to claims for the enforcement of obligations arising out of borrowing and guarantees undertaken by IFIs, but can extend to other courses of action.[16] The United States Court of Appeal, in the case *Lutcher S.A. Celulose e Papel v. Inter-American Development Bank*, had to decide whether or not the Bank enjoyed immunity from suit from a private borrower. The Court stated that there was

> [N]o reason to believe that suits by creditors are less harassing to Bank management, or less expensive than are other kinds of suits. Just as it is necessary for the Bank to be subject to suits by bondholders in order to raise its lending capital, it may be that responsible borrowers committing large sums and plans on the strength of the Bank's agreement to lend would be reluctant to enter into borrowing contracts if thereafter they were at the mercy of the Bank's good will, devoid of means of enforcement.[17]

Furthermore, the capability of contracting parties to initiating domestic legal proceedings against IFIs may be extended to the lending operations of IFIs by virtue of the freedom of contract principle.[18] The jurisdiction provision in the loan agreement between Ambow Education Holding LTD, its subsidiaries and the IFC corroborates this view.[19]

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[14] As discussed in the next section, IFIs have tried to mitigate that through the independent review mechanisms.

[15] See Article 52 of the AfDB Articles of Agreement (2011) and Article VI section 3 of the IFC Articles of Agreement (2012).

[16] See *Lutcher S. A. Celulose e Papel v. Inter-American Development Bank*, 382 F.2d 454, 455 (D.C. Cir. 1967)

[17] Idem.

[18] M. J. Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts,* 3rd Edition, Martinus Nijhoff Publishers, (2009) pp. 88-96.

[19] See Section 8.05 of the Loan Agreement between Ambow Education Holding LTD, its subsidiaries and the IFC dated June 12, 2012 (Investment Number 31749). Part (b) of this provision reads as follows:

> For the exclusive benefit of IFC, the Borrower and each Co-Borrower irrevocably agrees that any legal action, suit or proceeding arising out of or relating to this Agreement may be brought in the courts of the United States located in the Southern District of New York or in the courts of the State of New York located in the Borough of Manhattan. By the execution of this Agreement, each party irrevocably submits to the jurisdiction of any such court and any appellate court from any thereof in any such action, suit or proceeding or appeal therefrom. A final non-appealable judgment in any such action, suit or proceeding or appeal therefrom shall be conclusive and may be enforced in any other jurisdiction, by suit on the

By contrast, affected parties without a contracting relationship with IFIs do not enjoy the same treatment. The founding States or members of IFIs did not see fit to allow this category of plaintiffs the capacity to bring a claim against IFIs before a domestic jurisdiction. Most legal instruments underpinning the financial agreements concluded for the purpose of carrying out development projects exclude a role for domestic courts in the settlement of disputes between injured third parties and IFIs. Any claim initiated by affected third parties before a domestic court will give rise to a number of defences including lack of jurisdiction over the subject matter and immunity for suits. However, the limitation of domestic courts in respect of claims arising out the operations of IFIs would evaporate if a third party's claim is logged against another legal entity that is part of the financial structure of the litigious IFI-funded project. That would be the case if a domestic court is asked to settle a dispute between affected third parties and a vehicle company through which an IFI has channelled its financial services.

The following development examines the reach of domestic adjudicatory jurisdiction over IFIs and their operations.

4.2.1. Provisions on Immunities and Privileges in the Charters of IFIs

To contextualise better the role that domestic courts could play in settling disputes between IFIs and affected third parties, it is important from the beginning to understand the *raison d'être* of immunities bestowed to IFIs. The status of immunities and privileges of IFIs are determined by their constituent instruments and can be further elaborated in the headquarter agreements and other treaties addressing the status of IFIs in the domestic legal order of a State.[20] The rationale behind is to ensure that the agreed upon objectives of all the member States participating in IFIs are met without a domestic interference from any individual member State.[21] Indeed, the common benefits to be achieved from the organised cooperation between all members would not be attainable if individual members were permitted to apply their own laws at will to the functions and activities of IFIs.

judgment, a certified or exemplified copy of which shall be conclusive evidence of the judgment, or in any other manner provided by law.

[20] See Article VII of the IBRD Articles of Agreement (1989), Article IX of the IMF Articles of Agreement (2011), Article VI of the IFC Articles of Agreement (2012), and Chapter VII of the Agreement establishing the AfDB (2011).

[21] K. Ahluwalia, *The Legal Status, Privileges and Immunities of the Specialized Agencies of the United Nations and Certain Other International Organizations and their Headquarters*, Springer Netherlands, (1964) at 49.

Unlike States, which are created on the principle of self-determination, most OIs are created out of functional necessity. The common functions of IFIs include fostering economic and social progress in developing countries by financing projects, supporting investment and generating capital. IFIs also play a major role on the international capital markets by annually raising the large volume of funds required to finance their operations. Commercial lenders tend to discriminate among borrowers. Indeed, sovereign, public or private borrowers whose ability to repay are considered uncertain are subject to onerously lending conditions as opposed to those perceived as creditworthy. IFIs have been set up to address the limitation of some sovereign and private entities to raise money from commercial lenders. The statute of most IFIs include a provision requiring that these organisations ascertain that a client is unable to obtain similar financial services under prevailing market conditions.[22]

Operations of IFIs are consequently not equivalent to those of other market participants at the domestic level such as commercial banks, hedge funds, or private equity funds. IFIs deliver the public good mission of socio-economic development and stability of their clients thanks to the cash contribution of the members and retained earnings. The performance of these functions would be seriously hampered if nationals of the host State could freely bring a claim against IFIs. That would amount to allowing domestic courts to make pronouncements over issues that are inherently international in nature such as policy decisions of IFIs. However, as research on the issue of responsibility of IOs has shown, the fact that an act is functional does not necessarily mean it cannot engage the responsibility or liability of IFIs.[23]

As has been showed, IFI operations do not always have a positive impact on stakeholders in terms of improved infrastructures, increased opportunities for employment and business for the local population and other constituencies in the client States. They can also involve an array of side effects including environmental damage and harm to third parties. These side effects could still prevail many years after the completion of the project. As noted in Chapter 2, the LHWP moved to Phase 2 whereas the social and environmental legacy left during the implementation of the project Phase 1A and 1B has yet to be addressed. Some community members affected by the resettlement measures have expressed their dissatisfaction regarding the compensation package they were assigned. Others have yet to receive the compensation promised to them.

[22] See Article 1 (ii) of the IBRD Articles of Agreement and Article 1 (i) of the IFC Articles of Agreement.
[23] See Article 5 of the Draft Articles on the Responsibility of International Organizations (2011) & Final Report of the Commission on Accountability of International Organization (2004) p. 5.

Similar issues have occurred in respect of the Grand Inga Project, which has moved to Phase 3, despite the pending social legacy of Phase 1 and 2. Despite the fact that there has been no attempt to challenge the performance of IFIs concerned before an adjudicatory jurisdiction, this case exemplifies of the kind of issues that affect third parties to IFI operations.

By conferring immunities to IFIs, founding States have prevented thwarting the will of the majority by way of interference from domestic authorities or inconsistent judgments by independent national courts.[24] Indeed, the separation of powers is more of an ideal in many countries, rather than the reality. The independence of the judiciary from the other branches of government cannot be presumed. Immunities and privileges guarantee protection for IFIs and their officials from those instances in which reality strays from the ideal. That reflects the doctrine of *ne impediatur officia* articulated by the IV/2 Committee of the United Nations Conference on International Organization (UNCIO). "No member State may hinder in any way the working of the Organization or take measures the effect of which might increase its burdens, financial or others."[25] The International Court of Justice (ICJ) has also endorsed the view that the obligation not to intervene is inherent in the status of a member of an IO. In its separate opinion appended to the Advisory Opinion of the Court in *Cumaraswamy* case, Judge Rezek explained the following:

> There is no obligation on sovereign States to found international organizations, or to remain Members of them against their will. However, the fact of membership—even in the case of an organization whose objectives are less essential than those of the United Nations, and in fields less salient than that of human rights—requires that every State, in its relations with the Organization and its agents, display an attitude at least as constructive as that which characterizes diplomatic relations between States.[26]

Undoubtedly, immunities and privileges of IOs create legal obligations on States under international law as they result from international undertakings enshrined whether in the charters of OIs or a bilateral treaty or any ad hoc instrument. By their very nature, these obligations need to produce effects within the domestic legal system of member States. For that reason, member States need to ensure that the rights of IOs to immunities and privileges

[24] For example, adjudication by the courts of one member state declaring the activities of an IFI illegal or arresting its officials for detention in penal facilities on trumped-up charges could frustrate the objectives of that organisation. An injunction from the court of one member state or a multi-million dollar judgment, particularly in the courts of the host country where the organisation's accounts are maintained, could virtually cripple that organisation if not shielded by immunity.

[25] UNCIO, Report of the Rapporteur of Committee IV/2, DOC. 933, IV/2/42, at 3.

[26] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* [*hereafter Cumaraswamy* case] , Advisory Opinion., 1999 I.C.J. 62, pp. 109-110.

are domestically enforceable. Typical examples of such domestication can be found in the US International Organizations Immunities Act of December 29, 1945, the Australia International Organizations (Privileges and Immunities) Act of October 18, 1963, or the UK International Organizations (Privileges and Immunities) Act of July 26, 1968. However, in the absence of a treaty obligation, a State cannot be said to be under any duty to concede privileges and immunities to an IO.[27]

One further issue remains before the analysis of the provisions on immunities and privileges in the charters of the selected IFIs. That is the use of analogy in examining the immunities and privileges granted to IOs. There is a tendency in the literature to analyse the issue of immunities from jurisdiction of IOs by comparison with the immunities of States. However, one should remain mindful of the fact that although IOs are subject of international law, they cannot be comparable with States.[28] As a result, IOs "cannot be treated in the same way as States for the purpose of the application of the doctrine of Immunity."[29] The usual distinction between public activities or *acta iure imperii* and commercial activities or *acta iure gestionis* for operationalising immunities of States do not apply for IOs.[30] Instead, the activities of IOs must be divided between functional activities and those that are not.[31] In *Broadbent v. Organisation of American States*, the United States Court of Appeals upheld the doctrine of non-interference and clarified that the immunities of IOs, as opposed to sovereign States, were limited by the principle of functional necessity.[32]

A typical stipulation that the immunities and privileges conferred to an IO are limited to its functional necessity provision can be found in Article 105 of the UN Charter:

> (1) The Organisation shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

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[27] *Economic Community of West African States and Another v. Bank of Credit and Commerce International*, Court of Appeal of Paris, 13 January 1993, International Law Reports, volume 113, pp. 473-477.
[28] See *S.S. "Lotus", France v Turkey*,(Judgment), P.C.I.J. 1927, Series A, No. 9, 1927 & *Legality of the Use by a State of Nuclear Weapons in Armed Conflict,* (Advisory Opinion) I.C.J. Reports 1996, 66, para. 78.
[29] R. S. J. Martha (2012) at 118.
[30] P. H. F. Bekker & T.M.C. Asser Instituut, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities*, Martinus Nijhoff, (1994) pp. 156-159.
[31] Ibidem.
[32] *Broadbent v. Organisation of American States*, 628 F.2nd 27 (D.C. Cir. 1980).

(2) Representatives of the member of the United Nations and officials of the organisation shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the organisation.[33]

We should now turn to the analysis of immunity and privilege provisions in the charters of selected IFIs. A quick look at these provisions suggests that their wording is quite different from that of their counterparts in the constitutions of other IOs.[34] Immunity and privilege provisions in the constitutions of other IOs are very concise and do not provide specifics as to the features of immunities and privileges conferred to the organisations concerned. By contrast, the corresponding provisions in the charters of IFIs are more encompassing. Overall, they embrace various specifications as to the immunities and privileges afforded to IFIs. These include immunity from judicial proceedings (i) and execution (ii), immunity of assets (iii) and archives (iv), freedom of assets from restrictions (v), privilege of communications (vi), personal immunities and privileges (vii) and exemption from taxation (viii).

Most provisions on immunities and privileges in the Charters of IFIs start with a stipulation on the purpose of the immunities and privileges conceded to the organisations followed by a provision on immunity from every form of legal process or the position of the organisation with regard to judicial process. Article VI of the IFC Articles of Agreement can serve as an example. Sections 1 and 3 of this article read as follows:

> [Section 1] To enable the Corporation to fulfil the functions with which it is entrusted, the status, immunities and privileges set forth in this Article shall be accorded to the Corporation in the territories of each member.
>
> [Section 3] Actions may be brought against the Corporation only in a court of competent jurisdiction in the territories of a member in which the Corporation has an office, has appointed an agent for the purpose of accepting service of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. (…)

The equivalent provisions in the Agreement establishing the AfDB read as follows:

> [Article 50] To enable it to fulfil its purpose and the functions with which it is entrusted, the Bank shall possess full international personality. To those ends, it may enter into agreements with members, non-member States and other international organizations. To the same ends, the status, immunities,

[33] Similar wording can be found in Article 40 of the ILO Constitution, Article 12 of the UNESCO Constitution, Article 10(2) of the IFAD Agreement, and Article 21(1) of the UNIDO Constitution.
[34] Ibidem.

> exemptions and privileges set forth in this chapter shall be accorded to the Bank in the territory of each member.
>
> [Article 52(1)] The Bank shall enjoy immunity from every form of legal process except in cases arising out of the exercise of its borrowing powers when it may be sued only in a court of competent jurisdiction in the territory of a member in which the Bank has its principal office, or in the territory of a member or non-member State where it has appointed an agent for the purpose of accepting service or notice of process or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members.

In contrast to the immunity provisions in the constituent instruments of most other IOs, the immunity provisions in the charters of IFIs do not afford them broad immunities from legal process before national courts, as suggested above. Instead, they determine that actions may be brought against IFIs, but only in a court of competent jurisdiction in the territory of a member in which they have an office, have appointed an agent for the purpose of accepting service of process, or have issued or guaranteed securities.[35] The justification of this limitation is that IFIs need to build confidence in private lenders to keep pooling a larger share of their lending resources in the financial market. Otherwise, private parties would be hesitant to transact business with them. However, member States of IFIs are banned from bringing claims before their respective national courts.[36] The reason, as noted above, is to insulate any controversy that may arise from a financial agreement against the influence of a member State by way of its courts. Otherwise, such a member will would become both judge and party in the dispute; should the matter be adjudicated in its own courts and or administrative fora.

The immunity from every form of legal process proclaimed in the charters of selected IFIs extends to immunity from all measures of executions against the properties and assets of the organisations concerned.[37] This immunity from execution can, however, be waived by the governing organs in the case where, in the opinion of the latter, such action would further the interest of the organisation. [38] In line with the limitation of the immunity from every form of legal process, the charters of IFIs provide an exception to the principle of immunities from executions which consist in enunciating the conditions under which measures of executions

[35] See Article VII(3) of the IBRD Articles of Agreement, Article VI(3) of the IFC Articles of Agreement, Article 52(1) of the Agreement establishing the AfDB, Article 46 of the Agreement establishing the EBRD, Article 50(1-2) of the Agreement establishing the ADB.
[36] Ibidem.
[37] See Article VI(3) of the IFC Articles of Agreement, Article 52(2) of the Agreement establishing the AfDB, Article 46 of the Agreement establishing the EBRD, Article 50(3) of the Agreement establishing the ADB.
[38] Article 59 of the AfDB Article of Agreement.

can be carried out on the organisations' property and assets. Article VI(3) of the IFC Articles of Agreement provides as follows:

> (…) The property and assets of the Corporation shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Corporation.[39]

Another feature of the immunity provisions in the charters of the IFIs is that the assets of these organisations, wheresoever located and by whomsoever held, are protected from search, requisition, confiscation, expropriation or any other form of taking or foreclosure by executive or legislative action.[40] Their archives are inviolable wherever they are located. This protection extends to other official documents. The reason for that is to preserve the confidential character of communications between IFIs and the outside world. As a result, IFIs are not under a duty to produce any official document or part of their archives in the context of domestic litigations.[41] It is worth noting however that in the *International Tin Council* case, the House of Lords held that the inviolability only applied to documents and archives that remain in possession of the organisation, and not to those which have been communicated to third parties by an official of the organisation in the exercise of his or her functions.[42]

Likewise, all property and assets of IFIs are protected from restrictions, regulations, controls and moratoria of any nature.[43] The same goes for the official communications of IFIs. Most charter of IFIs requires each member to accord IFIs a treatment not less favourable than that is accorded to the official communications of any government.[44] Another feature of the immunity and privilege provisions in the charters of IFIs is the exemption from taxation. This exemption covers all assets, properties, income, operations and transactions of IFIs. It also includes the

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[39] Similar provisions can be found in Article 52(2) of the Agreement establishing the AfDB, Article 46 finale of the Agreement establishing the EBRD, Article VII(3) finale of the IBRD Article of Agreement, Article 50(3) of the Agreement establishing the ADB.

[40] Article 53(1) of the Agreement establishing the AfDB, Article VI(4) of the IFC Articles of Agreement, Article VII(4) of the IBRD Articles of Agreement, Article 47 of the Agreement establishing the EBRD, Article 51 of the Agreement establishing the ADB.

[41] C.W. Jenks, The Proper Law of International Organisations, Stevens, (1962) at 234.

[42] *Shearson Lehman v Maclaine,Watson* (No. 2), December 3, 1987, 77 ILR 154-158 (Per Lord Bridge of Harwich)

[43] See Article VI(6) of the IFC Articles of Agreement, Article VII (6) of the IBRD Articles of Agreement, Article 54 of the Agreement establishing the AfDB, Article 49 of the Agreement establishing the EBRD, Article 53 of the Agreement establishing the ADB.

[44] See Article Article VI(7) of the IFC Articles of Agreement, Article VII(7) of the IBRD Articles of Agreement, Article 55 of the Agreement establishing the AfDB, Article 50 of the Agreement establishing the EBRD, Article 54 of the Agreement establishing the ADB.

salaries and emoluments paid by IFIs to their employees, except where a member deposits with its instrument of ratification or acceptance a declaration that it retains for itself and its political subdivisions the right to tax salaries and emoluments paid to its nationals.[45]

In addition, to the privileges and immunities granted to IFIs *qualitate qua,* the charters of IFIs provide for privileges and immunities attaching to individuals related to these organisations. As with the previous category, the purpose of this category of privileges and immunities is to enable IFIs to function efficiently and fulfil their objectives without being impeded by any adverse action of member States or private individuals. The charters of IFIs provide for immunities and privileges of various categories of personnel including governors, directors, alternates, officers, employees, experts and consultants.[46]

However, the governing organs of IFIs may waive the immunities and privileges granted to these organisations. As for the waiver of the immunities and privileges granted to the personnel of IFIs, such power is vested in the President of each IFI. Normally, the decision to waive the immunities and privileges of IFIs rests on the discretion of the competent organ. Notwithstanding the above, it is admitted that any waiver of immunities and privileges shall be contingent on its capability to further the goals of the organisation concerned.[47] In other words, an IFI would not give up immunities and privileges granted to them unless it would gain a corresponding benefit that would further its goals.[48]

4.2.2. Jurisdictional Limitations of Domestic Courts v. Right to Fair Trial

A domestic court confronted with a claim against an IFI would probably first be tempted to determine whether the organisation concerned enjoys jurisdictional immunities as a respondent.[49] That would lead the court to assess the scope of the immunity claimed by such an IFI. In particular, a domestic court would assess whether the invoked immunities apply for

[45] See Article VI(9) of the IFC Articles of Agreement, Article VII(9) of the IBRD Articles of Agreement, Article 57 of the Agreement establishing the AfDB, Article 53 of the Agreement establishing the EBRD, Article 56 of the Agreement establishing the ADB.

[46] See Article VI(8) of the IFC Article of Agreement, Article 56 of the Agreement establishing the AfDB, Article VII(8) of the IBRD Article of Agreement, Articles 51 & 52 of the Agreement establishing the EBRD, Article 55 of the Agreement establishing the ADB.

[47] See *Mendaro v. World Bank*. 717 F. 2d 610, U.S. Court of Appeals, D.C. Cir., September 27, 1983; *Salah N. Osseiran v the International Financial Corporation,* (No. 07-7122) United States Court of Appeals, District of Columbia Circuit, January 13, 2009.

[48] See Article VI(11) of the IFC Articles of Agreement, Article 59 of the Agreement establishing the AfDB, Article 55 of the Agreement establishing the EBRD, Article 58 of the Agreement establishing the ADB.

[49] See *Mendaro v. World Bank* 717 F. 2d 610, U.S. Court of Appeals, D.C. Cir., September 27, 1983.

all activities or only those intrinsically linked to the functions of the IFI concerned. This process inevitably puts the court in a predicament situation as it will have to choose between two opposing valid principles, namely the immunity that allows an IFI to deliver the functions it was established for and, on the other hand, the necessity to uphold an individual's right to fair trial.

A domestic court's determination of the exact scope of immunities of an IFI, or any IO in general, is a major point of controversy among scholars. Practices across national courts do not seem to be uniform either.[50] Given this uncertainty, an assessment of IFI operations through the prism of immunity from jurisdiction warrants a cautious approach. A domestic court would infringe the law by overlooking an important preliminary question, which is its jurisdiction on the subject matter.[51] Both the issues of immunity from legal process and subject matter jurisdiction impose a significant limitation on a domestic court's ability to adjudicate third party claims involving an IFI. Such plaintiffs may be left remediless if no effort is made to balance a plaintiff's right to fair trial against the necessity to prevent a single member State from exercising undue influence on an IFI by way of its courts.

Pursuant to Article 2 of the International Law Commission's Draft Declaration on Rights and Duties of States, "every State has the right to exercise jurisdiction over its territory and over all persons and things therein, subject to the immunities recognised by international law".[52] In the *Arrest Warrant* case, the ICJ noted the need for domestic courts to consider the substance of the question of jurisdiction. In particular, the ICJ held "it is only where State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction."[53] In his separate opinion appended to this judgement, Judge G. Guillaume explained that this means that a domestic "court's

[50] See A. Reinish (ed), *The Privileges and Immunities of International Organisations in Domestic Courts,* Oxford University Press, (2013).

[51] Not to be confused with personal jurisdiction which is the legal requirement that a defendant have certain minimum contacts with the forum in which the court sits so that said court may exercise power over the defendant. By contrast subject-matter jurisdiction is the requirement that a given court have power to hear the specific kind of claim that is brought to that court. Unlike subject matter jurisdiction, personal jurisdiction can be waived. A defendant who fails to timely raise the defense is deemed to have acquiesced to the court's jurisdiction and may not subsequently seek dismissal on jurisdictional grounds. See Lott & Fische, 'Personal Jurisdiction in the Internet World', available at http://lottfischer.com/general.php?category=Resources&subhead=Articles&headline=Personal+Jurisdiction+in+the+Internet+World, accessed 20 September 20 June 2015.

[52] The Work of the International Law Commission, *Yearbook of the International Law Commission*, 6th ed. Volume I, p. 262.

[53] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium),* Judgment, I.C.J. Reports 2002, p. 3, at 20 para. 46.

jurisdiction is a question which it must decide before considering the immunity of those before it. In other words, there can only be immunity from jurisdiction where there is jurisdiction."[54] This opinion mirrors the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal which stated: "If there is no jurisdiction *en principe*, then the question of immunity from a jurisdiction which would otherwise exist simply does not arise".[55]

The requirement that a plaintiff bears the burden of establishing the court has jurisdiction on the subject matter is a matter of procedural law relevant to the domestic court concerned. The *Polak v. International Monetary Fund* case before the US District Court for the District of Columbia can serve as an example.[56] The cause of action arose on November 15, 2007, when the plaintiff, renowned economist Dr. Jacques Polak, attended the defendant's Eighth Annual Jacques Polak Research Conference at the defendant's headquarters in Washington, D.C. While descending the stairs in the headquarters conference room, the plaintiff fell and struck his head, sustaining severe injuries.[57] The plaintiff claimed these injuries required ongoing medical care. As a result, he brought an action against the IMF, alleging its negligence in failing to construct and maintain the stairs at a safe incline, warn him about the condition of the stairs and provide an adequate handrail.[58] The defendant moved to dismiss the case under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) contending that it was immune from suit under both the Bretton Woods Agreements Act (BWAA) and the International Organizations Immunities Act (IOIA), and that such immunity deprived the court of subject-matter jurisdiction. The District Court granted the defendant's motion to dismiss for lack of subject matter jurisdiction and denied the plaintiff's motion to stay the action pending jurisdictional discovery.[59]

Given that a court's determination of its subject matter jurisdiction is preliminary to any examination of any question put before it, any analysis of judicial factors related to such a question is logically contingent to a court's determination of its jurisdiction. Among these factors, a court may find needful to determine the extent to which an IFI could rely on the defence of immunity from jurisdiction. In other words, a domestic court would determine whether an action or omission of an IFI is covered by the immunity provisions outlined in its

[54] Idem, at 35.
[55] Idem, at 64.
[56] *Polak v. International Monetary Fund,* Civil Action No. 2008-1416 (D.C. 2009).
[57] Idem.
[58] Idem.
[59] Idem.

charter? According to Rutsel Silvestre J. Martha, the answer to the question whether a claimed immunity is functionally necessary is a prerogative of the competent international body.[60]This echoes the articulation by Judge Weeramanty in the *Cumaraswamy* case:

> The Secretary-General's determination as to whether a particular action is within an official's or rapporteur's sphere of authority should therefore be binding on the domestic tribunal, unless compelling reasons can be established for displacing that weighty presumption (. . .) if a State disputes such a ruling by the Secretary General, there is always room for the matter to be brought to the Court.[61]

However, most U.S. and European courts do not follow this approach. Taking advantage of the statutory provisions in their respective legal order, they rather assert their independence to decide on the matters brought before them without very much denying the immunities accorded to IFIs.[62] In the Belgian case of *Scimet v. African Development Bank*[63], the Court of First Instance of Brussel made a determination on the functional immunity of the Bank. The case was initiated by a Belgian enterprise that had provided services to an AfDB-funded project in Chad. The claimant tried to challenge the immunity of the AfDB by contending that the Bank should not enjoy immunity on the ground that it had acted outside the performance of its functions as stipulated in Article 50 of its Agreement. However, this attempt failed to persuade the Belgian Court to side with the claimant in this case. In its reasoning, the Belgian Court noted that:

> The text of Article 50 clearly indicates that the immunities conferred on the African Development Bank are intended to enable it to achieve its purpose and perform its functions but that the drafters of this provision thereby merely indicated the reason for granting the immunities in question, without intending to restrict their scope.[64]

The Belgian Court further noted that:

> [B]y participating in a project with the object of furthering the economic and social development of Chad (purification of rainwater in the city of N'Djamena), and by cooperating with the African Development Fund, the defendant acted within the limits of its objects and functions.[65]

[60] R. S. J. Martha (2012) at 105.
[61] The *Cumaraswamy* case, at 97.
[62] See A. Reinish (ed) (2013).
[63] *Scimet v. African Development Bank,* Court of First Instance of Brussels, 14 February 1997, 128, I.L.R. 582.
[64] Idem, at 584.
[65] Ibidem.

In *Mendaro v. World Bank* case,[66] the Court of Appeals for the District of Columbia Circuit upheld jurisdictional immunities of IFIs in respect of employment-related grievances, despite the absence of an alternative remedy for the plaintiff.[67] This case involves a former staff member, Susana Mendaro, who brought suit against her former employee, the IBRD, alleging various employment-related grievances. These included sexual harassment and discrimination regarding inequitable work assignment, unwanted physical advances and denial of promotions.[68] The District Court dismissed her action on the ground that the Bank's Article of Agreement did not waive the Bank's immunity concerning the plaintiff's suit.[69] While admitting that the IBRD could have chosen to waive its immunity expressly, the Court refused to read such a waiver into the IBRD Articles of Agreement.[70] A waiver of immunity for employment-related causes arguably would not give any benefit to the Bank. The District Court explained that

> [R]ather than furthering the purposes and operations of the Bank, this waiver would lay the Bank open to disruptive interference with its employment policies in each of the thirty-six countries in which it has resident missions (....).[71]

When Mendaro's cause of action arose, the World Bank did not have an internal administrative tribunal to handle employment disputes.[72] Although the District Court expressed sympathy for the plaintiff in that regard, it emphasised that "employee dissatisfaction with the efficacy of the administrative remedy is insufficient to dissolve the immunity of international organisations."[73] Mendaro was left remediless by the IBRD with inadequate employment regulations and grievance procedures, and by a domestic court that refused to pierce the veil of immunity of IOs.

However, the *Mendaro* case is very important to any study of immunities of IFIs because it defines the manner the waiver of immunities and privileges in the charters of IFIs will apply. In this respect, the Court said that

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[66] *Mendaro v. World Bank,* 717 F.2d 610 (D.C. Cir. 1983).
[67] Idem, at 612.
[68] Ibidem.
[69] Idem, pp. 614-615.
[70] Idem, at 615.
[71] Idem, at 618.
[72] Idem at 616.
[73] Ibidem.

> Since the purpose of the immunities accorded international organizations is to enable the organization to fulfil their functions, applying the same rationale in reverse, it is likely that most organizations would be unwilling to relinquish their immunity without receiving a corresponding benefit which would further the organization's goals.[74]

In *Atkinson v. the IDB* case, the United States District Court for the District of Columbia endorsed the immunity of IFIs with respect to a proceeding to garnish one of its employee's wages.[75] The case involves Janet Atkinson's attempt to enforce two state court judgments against her former husband, Robert Kestell, by garnishing his wages from his employer, the IDB.[76] The IDB requested the dismissal of the action, invoking its status as a protected organisation under the International Organizations Immunities Act of 1945 (IOIA) and contending that it had not waived its immunity with respect to this type of proceeding.[77] Reviewing the arguments of the parties and several cases in which the Court interpreted the extent to which the Articles of agreement of the Bank and similar organisations constitute a waiver of immunity, the District Court granted the Bank's motion.

The *Atkinson* case is also interesting because it discussed the *Mendaro* test for restricting the immunity of IFIs. The claimant argued that a wage garnishment action does not threaten the IDB's ability to fulfil its purpose and the functions with which it was entrusted for such an action will simply result in a clerical operation, the garnishment order, which would not cause any impairment to the Bank.[78] According to the plaintiff, the IDB's immunity should be construed as waived unless the particular type of suit would impair the Bank's objectives. The District Court, however, held that its formulation of the Mendaro test rather supported the opposite default rule:

> [T]he Bank's immunity should be construed as not waived unless the particular type of suit would further the Bank's objectives. In Mendaro, we deemed the benefit of attracting talented employees by virtue of permitting suits by employees to be minimal given that employees already could invoke an internal grievance mechanism. Here, waiver of immunity from garnishment proceedings, unlike waiver of immunity from employee suits, provides no conceivable benefit in attracting talented employees; in fact, garnishment of an employee's wages makes the (prospective) employee worse off, not better off. This clear lack of benefit--indeed, disadvantage-- of a [332 U.S.App.D.C. 311] waiver of immunity from

[74] Idem at 617.
[75] *Atkinson v. Inter-American Development Bank*, 156 F.3d 1335 (D.C. Cir. 1998).
[76] Idem, pp. 1336-37.
[77] Idem, at 1342.
[78] Ibidem.

> garnishment proceedings compels the conclusion that Section 3 of the agreement should not be construed to waive the Bank's immunity in this case.[79]

There are few cases where domestic courts ruled in favour of a waiver of the immunity claimed by an IFI. In *Salah Osseiran v the IFC* case,[80] the United States Court of Appeals, District of Columbia Circuit, held that the IFC had waived its immunity from a promissory estoppel claim concerning the Corporation's alleged representations during negotiations for a sale of its investments to private parties. The Court emphasised that "parties may hesitate to do business with an entity insulated from judicial process; promises founded on good faith alone are worth less than obligations enforceable in court."[81] As the Corporation had identified "no unique countervailing costs,"[82] the Court concluded that the broad terms of the waiver provision in the Corporation's Charter were controlling and held that the Corporation was not immune from a lawsuit for promissory estoppel and breach of confidentiality.[83]

A similar decision had been rendered in *Jorge VILA v. Inter-American Investment Corporation* case involving a consultant's unjust enrichment claim.[84] Likewise, the New York District Court had decided in favour of denial of immunity in *Concesionaria DHM v. International Finance Corporation and Corporacion Andina de Fomento* case involving the breach of contract and the implied covenant of good faith and fair dealing.[85]

In *Budha Ismail Jam, et al v. IFC* case,[86] the construction and operation of the 4,150MW power plant along the Gujarat coast has destroyed the natural resources relied upon by generations of local families for fishing, farming, salt-panning and animal rearing. The Compliance Advisor Ombusman (CAO) has found the IFC to be non-compliant with its policies[87] It is important to point out that the IFC failed to take action to correct the non-compliance and therefore the communities turned to the courts, marking the first time project-affected communities have

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[79] Idem, at 1343.
[80] *Salah N. Osseiran v the International Financial Corporation,* (No. 07-7122) United States Court of Appeals, District of Columbia Circuit.552 F.3d 836 (D.C. CIR. 2009).
[81] Idem, at 840.
[82] Ibidem.
[83] Idem, at 841.
[84] *Jorge VILA v. Inter-American Investment Corporation* (No. 08-7042) United States Court of Appeals, District of Columbia Circuit, 570 F.3d 274 (D.C. Cir. 2009).
[85] *Concesionaria DHM v. International Finance Corporation and Corporacion Andina de Fomento* U.S. District Court, S.D. New York. 03 Civ. 845 (JGK) (S.D.N.Y. Mar 06, 2004).
[86] *Budha Ismail Jam, et al v. IFC*
[87] CAO, India / Tata Ultra Mega-01/Mundra and Anjar, case Staus, available at http://www.cao-ombudsman.org/cases/case_detail.aspx?id=171, accessed 28 June 2018.

taken legal action to hold an IFI accountable for funding and enabling a harmful project. IFC has not denied causing harm – instead, it has responded by arguing it has complete immunity from suit and simply cannot be held accountable, regardless of how much harm it causes. The question of immunity, particularly IFC's express or implied waiver of immunity from suit has been challenged by the plaintiffs. This case is currently pending before the US Supreme Court.[88]

In light of the above, the approach of domestic courts in connection with the issue of immunities and privileges seems to point in the same direction. Domestic courts regularly acknowledge the immunities and privileges of IFIs to facilitate these organisations to deliver their functions in the territory of the States. However, domestic courts would deny immunities and privileges to an IFI when a claim would yield a corresponding benefit for the IFI concerned in terms of promoting its chartered objectives. The functional approach to immunities and privileges of IFIs do not bring a satisfactory solution to the conflict between immunities and privileges of IFIs and a claimant's right to fair trial, as the analysed case laws showed. That leaves claimants remediless whenever an IFI successfully manage to establish that the claimant's suit will not benefit the organisation by furthering the objectives outlined in its charter.

However, the protection of the immunities and privileges of IFIs does not necessarily have to be to the expense of a claimant's right to fair trial. The grant of immunities and privileges to an IFI does not mean impunity as a matter of principle.[89] Both an IFI and a claimant's interests can be protected by ensuring that affected parties have access to alternative mechanisms of dispute resolution. That would curb the adverse impact of immunities and privileges on the plaintiff's right to a fair trial. Hence, States need to include in the legislation or treaty recognising immunities and privileges a provision which requires IFIs to provide alternative measures for the resolution of its disputes with non-contracting parties. That would give enough legal ground to a domestic court to deny immunities and privileges to IFIs rather than allow such a decision and the fate of a claimant's suit to be contingent on the technical legal capacity and courage of the domestic court concerned.

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[88] FristPost, US Supreme Court to hear Gujarat villagers' appeal against power plant funded by Washington-based IFC available at https://www.firstpost.com/india/us-supreme-court-to-hear-gujarat-villagers-appeal-against-power-plant-funded-by-washington-based-ifc-4477799.html, accessed 28 June 2018.

[89] See *Effect of Awards* case. See *Effect of awards of Compensation Made by the U.N. Administrative Tribunal,* Advisory Opinion of July 13th, I954, ICJ. Reports 1954, at 57; *Cumaraswamy* case, pp. 88-89.

Most IFIs have established a specialised labour court, known as Administrative Tribunal, for the adjudication of employment-related claims against the organisation. Similar step needs to be taken with regards to the settlement of others disputes including commercial claims, environmental and human rights-related disputes, and tort claims which cannot be reasonably settled otherwise.

Certainly, as William Berenson notes, the effectiveness of the alternative mechanisms provided by IFIs as a substitute for a trial in the domestic courts of the member States depends on their degree of independence and accessibility.[90] Indeed, domestic courts in Europe and America are increasingly balancing the immunities of IOs, including IFIs, and other competing normative considerations.[91] While these courts regularly acknowledge that there are legitimate grounds to grant immunity to IOs before domestic courts, such immunity can directly interfere with plaintiffs' ability to enjoy the right to a remedy. Domestic courts in Europe and Argentina have repeatedly accepted that granting such immunities is only lawful if balanced with adversely affected individuals' due process rights.[92]

In *Cabrera* case,[93] the Argentine Supreme Court had declared unconstitutional the immunity from jurisdiction conceded to an IO by virtue of the headquarters agreement which was not paired with alternative means to settle disputes with private parties. The Court reasoned that the failure of the treaty to include an obligation for the organisation to set up dispute settlement mechanisms for private claims violated the right to judicial protection enshrined in international law and the Argentine Constitution. However, the most striking feature of this decision is that the denial of immunity decided by the first judges and confirmed by the Court stemmed from Article 53 of the Vienna Convention on the Law of Treaties. The Argentine

[90] W. M. Berenson, 'Squaring the Concept of Immunity with the Fundamental Right to Fair Trial: The Case of the OAS', in in H. Cissé, D. D. Bradlow & B. Kingsbury (eds), *International Financial Institutions and Global Legal Governance*, The World Bank Legal Review Vol. 3, The World Bank, (2012) at 137.

[91] See A. Reinish & J. Wurm, 'International financial Institutions before National Courts', in D. D. Bradlow & D. B. Hunter (eds), *International Financial Institutions & International Law*, Kluwer law International, (2010) pp. 103-135; S. Herz, 'Rethinking International Financial Institutions Immunities', in D. D. Bradlow & D. B. Hunter, *International Financial Institutions & International Law*, Kluwer law International, (2010) pp.137-165; R. S. J. Martha (2012) pp. 118-131.

[92] See *Cabrera, Washington JE. c. Comisión Técnica Mixta de Salto Grande* (*Cabrera* case), 305 Fallos de la Corte Suprema de Justicia de la Nación 2150 (5 December 1983) ; *Waite and Kennedy v. Germany*, App. No. 26083/94, 30 European Court of Human Rights 261 (1999); *Banque africaine de développement v. M.A. Degboe*, Cour de Cassation [Cass.] [supreme court for judicial matters], soc., Jan. 25, 2005, Bull. civ. V, No. 04-41.012, *Journal du droit international* (2005), 1142; *UNESCO v. Boulois*, Cour d'appel de Paris (14e Ch. A), Paris, 19 June 1998, *Yearbook Commercial Arbitration*, vol. XXIVa, (1999) at 294.

[93] *Cabrera, Washington JE. c. Comisión Técnica Mixta de Salto Grande* (*Cabrera* case), 305 Fallos de la Corte Suprema de Justicia de la Nación 2150 (5 December 1983).

Courts relied on that provision to invalidate the immunity provisions in the headquarters agreement for breach of a peremptory norm of international law, namely the right to access to justice.

The need for balancing the immunities and privileges accorded to IOs was captured by the European Court of Human Rights in *Waite and Kennedy* case.[94] This case arose from a domestic litigation before the German Labour Court initiated by two British nationals, Mr. Richard Waite and Mr. Terry Kennedy, following the termination of their contract by the consulting company that had signed a cooperation agreement with the plaintiffs to perform services at the European Space Agency (ESA).[95] Waite and Kennedy logged these proceedings against ESA, arguing that, under the German Provision of Labour (Temporary Staff) Act, they had acquired the status of employees of ESA.[96] They further argued that the termination of their contracts by the company CDP had no bearing on their labour relationship with ESA.[97] The German court dismissed the plaintiffs' actions on the ground that ESA had validly relied on its immunity from jurisdiction.[98] The domestic recourse, including the cases brought before the Federal Appeal Court and the Constitutional Court, against this decision were unsuccessful.[99]

Then, Waite and Kennedy applied to the Commission alleging the infringement of Article 6 § 1 of the Convention. In particular, they contended that they had been denied access to a court for a determination of their dispute with ESA in connection with an employment dispute under German law.[100] However, the Commission took the opposite view.[101] The European Court of Human Rights shared the Commission's conclusion that Germany had not violated Article 6(1) of the European Convention on Human Rights by granting the ESA immunity from suit. The Court stressed that the right to access to courts invoked by the plaintiffs was not absolute as it may be subject to limitation of states by means of their respective regulations.[102] However, such limitations should not amount to restricting or reducing "the access left to the individual

[94] *Waite and Kennedy v. Germany*, App. No. 26083/94, 30 European Court of Human Rights 261 (1999).
[95] Idem, at para. 10-14.
[96] Idem, at para. 15.
[97] Ibidem.
[98] Idem, at para. 17.
[99] Idem, at para. 26-29.
[100] Idem, at para. 43.
[101] Idem, at para. 44.
[102] Idem, at para. 54.

in such a way or to such an extent that the very essence of the right is impaired."[103] Moreover, unlike the *Cabrera* case which invoked peremptory norm of international law, the Court highlighted the need for exerting a proportionality test when assessing a limitation to a claimant's right to court. In that regards, there must be a reasonable relationship of proportionality between the means employed and the aim sought.[104] According to the Court, the immunity from domestic suit as applied to ESA by the German courts fulfilled the proportionality test. It concluded that the proportionality test could not be applied in such a way as to compel an IO to submit itself to a national labour law for that would thwart the proper functioning of IOs.[105]

Similarly, in *Banque africaine de développement v. M.A. Degboe* case,[106] the French Court de Cassation (Supreme Court for judicial matters) refused to allow the AfDB's immunity from an employment-related suit on the ground that there was no reasonable alternative means for redress available to the plaintiff. The Court de Cassation reasoned that the impossibility of access to justice would constitute a denial of justice as the plaintiff, former employee of the AfDB could not bring its claim before the organisation's administrative tribunal because it was set up after his dismissal and thus lacked jurisdiction over his claim.[107] In another case, the Court decided to give no effect to the immunity of the United Nations Organization for Education, Science and Culture (UNESCO),[108] a UN specialised agency, on the ground that the immunity from jurisdiction should not be a means to escape from the principle of *pacta sunt servanda*, which in the case at hand required the UN agency to appoint an arbitrator pursuant to the arbitration clause in the contract it had entered with the claimant.[109]

The foregoing case laws provide important guidelines as to how to approach the immunities of IFIs and the right to fair trial. These guidelines point to the necessity for domestic courts to strike the right balance between the protection of IFIs against undue domestic interferences and the right of a plaintiff to access remedy. It is not clear whether this position would resonate beyond the territorial jurisdiction of the courts that have taken it. From a purely legal

[103] Ibidem.
[104] Idem, at para. 59.
[105] Idem, at para. 72.
[106] *Banque africaine de développement v. M.A. Degboe*, Cour de Cassation [Cass.] [supreme court for judicial matters], soc., Jan. 25, 2005, Bull. civ. V, No. 04-41.012, *Journal du droit international* (2005), 1142
[107] Idibem.
[108] *UNESCO v. Boulois*, Cour d'appel de Paris (14e Ch. A), Paris, 19 June 1998, *Yearbook Commercial Arbitration*, vol. XXIVa, (1999) at 294.
[109] Idem.

perspective, foreign judgments cannot be a sufficient legal basis for a domestic court decision as they would compromise the independence of such a court. Certainly, a plaintiff aspires to a due process rights regardless his/her or it geographical location. It would take courage, technical capacity and undeniably an enabling legal environment for a domestic court to meet that expectation. Instead of blaming a domestic court for not relying on foreign judgments, States should endeavour that legal instruments pertaining to immunities and privileges include a specific requirement for IFIs to provide alternative means for settling disputes of a private law character arising out the operations of IFIs. Failure to do so could enable a plaintiff to seek redress before a domestic court.

Interestingly, some developing countries have taken steps to incorporate in the legal instruments pertaining to immunities of IFIs a specific provision that requires the signatory IFI to provide alternative means for settling disputes of a private law character.[110] In another instance the immunities instruments concluded by the host country provide a negative list of disputes which fall out of the ambit of the immunities from suits enjoyed by the signatory IFI.[111] Overall, these efforts do not consider tortious actions that might arise out the operations of IFIs except for a tortious claim from a road traffic accident as provided by Article VII (1) (b) of the Host Country Agreement between the republic of Kenya and the African Capacity Building Foundation (ACBF).[112] However, they do provide a good starting point for the practical steps that States should take to bolster the domestic jurisdiction capacity to adjudicate disputes between an IFI and a non-state third party.

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[110] According to Article XX (4) of the Headquarters agreement between the republic of Zimbabwe and the African Capacity Building Foundation (hereafter ACBF):

> The ACBF shall make provision within its organisation for appropriate modes of settlements of :
>
> (a) disputes of private law character arising out of contracts or other transactions to which ACBF is a party; and
>
> (b) disputes involving an official of ACBF who, by reason of his position, enjoy immunities if such immunities has not been waived.

Similar requirements ca be found in Article XVI (4) of the Host Country Agreement between the republic of Ghana and the African Capacity Building Foundation, Article XIII (2) of the Host Country Agreement between the republic of Kenya and the African Capacity Building Foundation.

[111] Pursuant to Article VII (1) (b) of the Host Country Agreement between the republic of Kenya and the African Capacity Building Foundation, the immunities from suits "shall not apply to liability arising out from a road traffic accident, a traffic offence, a labour dispute by a person they engage in employment and disputes arising out of commercial and contractual transactions."

[112] ACBF is regional financing institution established in November 1999 through the collaborative efforts of three multilateral development banks (the World Bank, the African Development Bank and the United Nations Development Programme), bilateral donors and Africans Governments. It focused initially on addressing capacity needs in the areas of macroeconomic policy analysis and development management. It has developed a niche in addressing the paucity of expertise in these areas by providing direct support for capacity-building actions throughout the African Capacity Building Fund.

4.2.3. Domestic Settlement of Dispute between a Project Company and Affected Parties

From a litigation perspective, a third party's claim arising out the operations of IFIs has a better chance to succeed if the action before a domestic court is brought against a project participant or entity which cannot raise the immunities of jurisdiction defence. Undoubtedly, the goal of accountability mechanisms of an IFI is to enable an affected party to hold the institution to account for the way it has performed its obligations. From an affected party's standpoint, it is not just a matter of asking the IFI concerned to justify its conduct and, depending on its answer, imposing a positive or negative sanction provided by the applicable standards. But, perhaps more important than just ensuring that the applicable standards are complied with and enforced, it is about addressing the harm suffered by affected parties as a result of the implementation of an IFI-funded project. The identity of the defendant in a claim logged before a domestic court becomes therefore irrelevant provided that the claimant stand a chance to receive reparation. An affected party stand a better chance to have domestic court ordered reparation if the claim underpinning the court referral is directed against a defendant that does not enjoy a privilege which exempt them from the jurisdiction of the court.

The limitations of a domestic court in respect of the settlement of disputes between IFIs and affected third parties would evaporate if a third party's claim is logged against another legal entity that is part of the financial structure of the litigious IFI-funded project.[113] That would be the case if a domestic court is asked to settle a dispute between affected third parties and a project company through which an IFI has channelled its financial services.[114] This approach would save a plaintiff's claim from the obstacles they would have faced if the action was directed against an IFI. The reason for that lies in the nature of a project company, which from a legal perspective is an investment in the host State.[115] A domestic court would assert its

[113] Although this approach would not involve accountability of the IFI itself, it would have the merit of providing an alternative of redress to the affected party whose interests have been violated as a result of the implementation of an IFI-funded project.

[114] The KTM project and LHWP exemplify the use of a project company by IFIs to channel their financial services, see Section 2.3.1., Section 2.4.2., and Section 2.4.3. supra.

[115] For further development on the concept of investments see M. Sornarajah, *The International Law on Foreign Investment,* Second Edition, Cambridge (2004); R Dolzer & C Schreuer*, Principles of International Investment Law*, Oxford University Press, (2008); F. Francioni, 'Access to Justice, Denial of Justice and International Investment Law', *The European Journal of International Law,* vol. 20 No. 3 (2009) pp. 729–747; S. Schadendorf, 'Human Rights Arguments in Amicus Curiae Submissions: Analysis of ICSID and NAFTA Investor-State Arbitrations', *Transnational Dispute Management*, vol. 10, No. 1, (2013) pp. 1-23.

jurisdiction over the activities of a project company in the same manner it would control any indigenous or foreign investment in the host State.

Under an investment dispute setting, the rights of a third party individual or community would be engaged if the dispute involves issues such as land tenure, indigenous rights, access to water or access to a clean environment.[116] Under normal circumstances, the impact of an investment on third parties requires remedial proceedings before a domestic court. However, the peculiar feature of investment law shows that the host State ultimately delegates to an international arbitration institution the settlement of disputes that arise from an investment undertaken in their territory by way of foreign capital.[117] This delegation weakens the authority of domestic courts to adjudicate on investment disputes and makes the judicial protection that they may provide to affected parties contingent to a review by an arbitration tribunal. Indeed, an investor would challenge the decision of a domestic court upholding a complaint brought by affected parties on the ground that it constitutes a wrongful interference with the investment.[118] Given the privacy of arbitration proceedings, in other words, the fact that non-contracting (or third) parties are unable to bring a claim, individuals and groups affected by a given investment agreement would be deprived of their right to fair trial.

4.3. Independent Review Mechanisms

This category refers to the process by which third parties without contractual ties with IFIs can seek redress against the latter as a result of the poorly designed or implemented projects they have supported. The World Bank was the first to create in 1993 a mechanism of this kind, known as the Inspection Panel (IP),[119] to address the complaints of individuals and groups affected by IBRD and IDA-financed projects so their concerns could be heard. As the IP was

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[116] See L. Cotula, *Investment Contracts and Sustainable Development: How to Make Contracts for Fairer and More Sustainable Natural Resource Investments*, International Institute for Environment and Development, (2010) at chap 8.

[117] BITs are international agreements between States that aim at promoting investment flows in the territory of contracting parties by establishing obligations about how investments by nationals of one State will be admitted and protected in the territory of the other State. Although they do not involve IFIs directly, BITs have a bearing on the project structure in the context of private operations of IFIs. See A. Broches, *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law*, Martinus Nijhoff Publishers (1995) at Parts IV & V; L. Cotula, *Foreign Investment, Law and Sustainable Development: A Hand Book on Agriculture and Extractive Industries*, International Institute for Environment and Development, (2016).

[118] See *Chevron Corporation & Texaco Petroleum Company v. The Republic of Ecuador, UNCITRAL, PCA case No 34877, Partial Award on the Merits,* 30 March 2010; see also *First Quantum v. DRC* before the International Chamber of Commerce in Paris as reported by GOXI on October 30, 2010, available at http://goxi.org/profiles/blogs/first-quantum-v-drc-they-said, accessed 26 June 2015.

[119] The World Bank, 'Resolution No. IBRD 93-10/No. IDA 93-6', September 22, (1993).

only concerned with public sector operations, a different mechanism was created in 1999 within the broader Wold Bank Group to accommodate the needs of private sector lender and guarantor affiliates. The Compliance Advisor Ombudsman (CAO) serves as the IFC's and MIGA's independent review mechanism allowing third parties affected by the projects funded by these institutions to seek redress.

Similarly, other multilateral development banks (MBDs) established their own independent review mechanisms. In 1994, the IDB inaugurated its Independent Investigation Mechanism (IIM) and replaced it in 2010 by the Independent Consultation and Investigation Mechanism (MICI). In 2003, the ADB introduced its Accountability Mechanism which replaced its Inspection Function of 1995. These were followed by the EBRD's Independent Recourse Mechanism (IRM) which served as the organisation's independent review mechanism from 2004 and was replaced by the Project Complaint Mechanism (PCM) in 2010. In tune with the development which has taken place in other MDBs, the AfDB established its independent review mechanism, the Independent Review Mechanism (IRM), in June 2004. However, the latter mechanism only became operational in December 2006.

The categorisation of the independent review mechanisms in terms of legal accountability mechanisms is somewhat questionable under the International Law Association's definition of legal accountability.[120] This latter suggests that legal accountability regime covers legal norms and remedies applicable to an IO's activities which have affected or may affect legal rights or interests of a constituency of the international community.[121] The relevant constituency would claim accountability against an organisation owing to its contractual or tortious act or omission. The same constituency would also trigger a legal accountability mechanism against an IO as a result of its wrongful act under international law.[122]

However, as the next development will show, IFIs' independent review mechanisms are not adjudicatory fora to determine whether third parties' rights have been infringed during the design or implementation of a project supported by IFIs. These mechanisms do not provide an enforcement opportunity of legally protected interests by third parties, nor do they make binding decisions on the IFIs. They serve a compliance function, which is to ensure that IFIs

[120] International Law Association, 'Final Report of the Commission on Accountability of International Organization', (2004) p. 5.
[121] Ibidem.
[122] Ibidem.

follow their own policies and procedures (OP/P), particularly their safeguard policies, in the design and implementation of their projects. It is a common understanding, however, that IFIs' safeguard policies are aimed at managing risks and unintended social and environmental consequences resulting from IFI-funded operations. Although some of their components contain normative elements that are binding for IFI staff and stakeholders, the infringement of IFIs' policies does not give rise to any legal liability. More importantly, however, and depending on one institution to another, independent review mechanisms perform problem-solving and advisory functions.

Eventually, independent review mechanisms provide affected parties with an avenue to voice their concerns. Undoubtedly, they serve as a composite accountability mechanism vis-à-vis IFI management and staff as they provide governing bodies with effective tools to supervising and securing compliance with the directions and requirements they have laid down in the OP/P of the respective organisations.[123]

4.3.1. Examination of Selected Review Mechanisms

The World Bank has been at the forefront of establishing an independent review mechanism allowing third parties affected by its projects to seek redress. There is a wealth of literature which examines the structures, functions and procedures of the World Bank's IP. This section will focus on independent review mechanisms established by the IFC and the AfDB to reduced accountability gap between these organisations and affected third party individuals or groups.

4.3.1.1. IFC's Compliance Advisor/Ombudsman

The Compliance Advisor/Ombudsman (CAO) was established in 1999 to serve as an independent recourse mechanism for the private sector lending arms of the World Bank Group: the IFC and the MIGA. Its mandate is "to assist the IFC and MIGA to address complaints of people affected by projects in a manner that is fair, objective and constructive."[124]

a. CAO Structure and Functions

The CAO operates independently from the line management structure of both the IFC and MIGA. The CAO is headed by a person appointed at the vice-presidential level by the World

[123] B. Kingsbury, 'Global Administrative Law in the Institutional Practice of Global Regulatory Governance', in H. Cissé, D. D. Bradlow & B. Kingsbury (eds), *International Financial Institutions and Global Legal Governance*, The World Bank Legal Review Vol. 3, The World Bank, (2012) at 18.

[124] Office of the Compliance Advisor/Ombudsman (CAO), Term of Reference, (1999)

Bank President. Mr. Osvaldo Gratacós has been headed the CAO since July 2014. He was appointed as Vice President, Compliance Advisor Ombudsman by World Bank Group President, Jim Kim, following an independent selection process led by civil society, industry and academia. He took over from Ms. Meg Taylor who had headed the CAO from its inauguration in 1999.[125] The CAO vice president appoints CAO staff members, including mediators and technical specialists, who are also segregated from the IFC/MIGA management structure. While CAO staff members are restricted from obtaining employment with the IFC/MIGA for a period of two years after the termination or completion of their engagement with CAO.[126] The CAO vice president is restricted for life from obtaining employment with the Bank Group. The CAO is banned from giving project-specific advice to either the IFC or MIGA.[127] Its main office is physically separated from other World Bank offices, and only CAO staff has direct access to it.[128]

Although CAO structure suggests that this office is insulated from the IFC and MIGA, there still exist some concerns as to the extent of its institutional independence. The CAO reports directly to the President and informs the Board of the Bank Group (the Board) of its activities.[129] It provides quarterly reports and briefings to the President of the World Bank Group, in accordance with its terms of reference of 1999, who has discretionary authority to terminate a CAO oversight process. The CAO also informs the Board of its activities through Annual reports. Similarly, the CAO provide the Board's Committee on Development Effectiveness (CODE) with annual update which is eventually supplemented with technical briefings. The CAO also provides CODE with a Management Tracing Record (MATR) which annually records actions taken by IFC/MIGA in response to CAO's recommendations and findings.[130]

Moreover, the CAO informs both the President and the Board when a complaint has been found eligible for assessment. In particular, the CAO reports of the outcome of a CAO Ombudsman assessment to the President, who determines the actions to be taken.[131] The CAO also informs

[125] CAO, '2014 Annual Report', (2014) at 7.
[126] CAO, '2013 Operational Guidelines', (2013) at 5, para. 1.3.
[127] Ibidem.
[128] Ibidem.
[129] CAO, 2013 Operational Guidelines, at 6, para. 1.4-5.
[130] CAO, 2013 Operational Guidelines, at 7, para. 1.5.
[131] CAO, Term of Reference, (1999) at, 2.

the Boards of the findings of a compliance audit, after clearance from the President.[132] In turn, the President reports to the Bank Group's Executive Directors chosen from among the Board of Governors representing the member countries the Bank Group. In the end, as Benjamin Saper rightly noted it,[133] the CAO aligns itself with the expectations of the most powerful members of the Bank Group to enforce certain safeguard policies.[134] This situation illustrates the problem of disregard, as analysed by Stewart.[135]

Like its World Bank counterpart, the CAO is not a court of law. The CAO's terms of reference does not give it a mandate with respect to judicial processes. Pursuant to its Operational Guidelines, the "CAO is not an appeals court or a legal enforcement mechanism, nor is CAO a substitute for international court systems or court systems in host countries."[136] By the same token, the CAO does not initiate the ombudsman mechanisms nor does it police IFC/MIGA compliance with safeguard policies of its own volition. In the absence of a complaint initiated by affected parties, the CAO does not have the mandate to get involved by virtue of its ombudsman's function. However, CAO Vice President has authority to initiate a compliance appraisal process based on project-specific or systemic concerns resulting from the ombudsman and Compliance case work.[137] By contrast, the CAO Vice President can also initiate the advisory role based on lessons learned from CAO's ombudsman and compliance roles.[138] The CAO can also provide advice on project specific issues at the request of IFC's or MIGA's environmental and social staff.[139]

Notwithstanding its shortcomings, the CAO has provided many projects affected people with an opportunity to be heard. The CAO's problem-solving approach was, and still is, a huge step forward for the IFC and MIGA in their endeavours to improve the impact of projects they have

[132] Ibidem, see also CAO, 2007 Operational Guidelines, at 9, para. 1.6.
[133] B. M. Saper, 'The International Finance Corporation's Compliance Advisor/Ombudsman (CAO): An Examination of Accountability and Effectiveness from a Global Administrative Law Perspective', *International Law and Politics*, vol. 44 (2012) pp. 1279-1329.
[134] Idem, at 1296.
[135] For Stewart, the invocation of accountability and participation gaps in the discussion of global governance represent diagnoses of the larger problem of disregard, which he defines in part as "an exercise of power that unjustifi[ably] harms or unjustly treats some of those affected." He further notes: "The most powerful global regulatory regimes promote the objectives of dominant states and economic actors, whereas regimes to protect weaker groups and individuals are often less effective or virtually non-existent and are thus unable to protect their interests and concerns." R. B. Stewart, (2014) at 211.
[136] CAO, 2013 Operational Guidelines, at 4, para. 1.1.
[137] Idem, at 22, para 4.2.1.
[138] CAO, 2013 Operational Guidelines, at 28, para. 5.2.1.
[139] CAO, Term of Reference, (1999) at, 2.

supported or actively considered to support. Indeed, as noted in chapter two, it is not easy to structure a development project in a manner that does not do harm. That should not, however, stop these organisations from continuously upgrading the structure they use to extend their services. If the overarching goal of IFIs is to promote economic and social development of the poorest and developing countries, then the IFC and MIGA should strive to sustain and improve the lives of the people whom development projects ultimately intend to benefit.

Pursuant to its terms of reference, which have been endorsed by the President of the World Bank Group, the CAO has three functions:[140]

1. The Ombudsman (renamed Depute Resolution since 2013) Function[141]— responding to complaints initiated by project-affected people and attempting to resolve the issues raised by the complainants through a flexible process aimed primarily at correcting project failures and achieving better results on the ground (the problem-solving approach)
2. The Compliance function — overseeing audits of IFC's and MIGA's overall social and environmental performance, both on project specific and systemic issues.
3. The Advisory function — advising and assisting the World Bank Group president and IFC/MIGA senior management in dealing with systemic environmental and social issues associated with sensitive or controversial projects.

Of the three functions, the Ombudsman role is the most crucial in terms of providing an accountability forum where third parties can voice their complaints about the environmental and social impacts of IFC/MIGA-sponsored projects. It focuses on the interests of the complainants by striving to provide them with a project-level remedy through a collaborative, problem solving approaches, to help improve outcomes on the ground. By contrast, the compliance and advisory functions seem to contribute more to the efficiency of IFC/MIGA-sponsored projects than actually advancing the interests of project affected parties. They help inform the IFC/MIGA senior management into mitigating future claims by third party individuals and groups.

Since its inauguration in 1999, the CAO has accepted 159 complaints and requests for audits spanning 42 countries.[142] While complaints from Latin America and Central Asia have accounted for two-thirds of CAO cases, Sub-Saharan Africa and the rest of the world account for the remaining share of complaints that have been received by the CAO since1999.[143] CAO

[140] CAO, Term of Reference, (1999), pp. 1-2.
[141] CAO, 2013 Annual Report, at 9.
[142] CAO, 2016 Annual Report, at 50; CAO, 2015 Annual Report, at 6; CAO Annual Report at 69.
[143] CAO, 2016 Annual Report, at 13.

received 29 complaints during the 2016 fiscal year, of which 17 were found ineligible as they did not relate to IFC or MIGA projects, or did not raise environmental and social concerns.[144] At the end of 2016 fiscal year, CAO was still determining eligibility for some of these complaints whereas 8 complaints had been accepted accordance with its eligibility criteria.[145] As for industry sector, infrastructure predominates in CAO cases. The other dominant sectors include extractive industries, agribusiness, financial markets, and manufacturing.[146] The CAO has settled forty percent of cases lodged with it since 2000 through dispute resolution.[147] It also claims that an additional twenty-five percent of cases have been handled by CAO Compliance to assess IFC/MIGA environmental and social performance related to a project(s). Of this twenty-five percent, 6 percent of cases resulted in a full audit/investigation of IFC or MIGA.[148]

b. CAO Complaints Process

The complaints process include lodging a complaint, screening a case for eligibility, assessment of the complaint, parties' determination of which CAO's role they seek to initiate (either dispute resolution or compliance), monitoring and follow-up, and conclusion of the CAO's involvement.[149]

i) Lodging a Compliant

Any individual, group, community, entity, or party that believes it is affected — or potentially affected — by the social and/or environmental impacts of an IFC/MIGA project may lodge a complaint with the CAO. They can also rely on the service of a representative who should clearly identify the people on whose behalf a complaint is made and provide explicit evidence of authority to represent them. The complaint should be submitted in writing and may be presented in any language. Although the CAO can provide guidance on how to lodge a complaint, this latter usually include the following information:

1. The complainant's name, address, and other contact information.
2. If the complaint is initiated by a representative, the identity of those on whose behalf the complaint is made and an explicit evidence of authority to represent them.

[144] CAO, 2016 Annual Report, at 12.
[145] These include the complaints i) shall involve an IFC/MIGA project(s); ii) shall raise social and environmental issues related to the project(s); and iii) are filed by individual(s) or communities directly affected by the project(s) or by their designated representatives. See, CAO, 2013 Operational Guidelines, at 11, para. 2.2.1.
[146] CAO, 2016 Annual Report, at 13.
[147] CAO, 2014 Annual Report, at 69.
[148] Ibidem.
[149] CAO, 2013 Operational Guidelines, pp. 8-22.

3. A statement as to whether the complainant wishes his/her/their identity or any information communicated as part of the complaint be kept confidential (stating reasons).
4. The identity and nature of the project.
5. A statement of the way in which the complainant believes it has been, or is likely to be, affected by social or environmental impacts of the project.

The complainant may provide additional information as to: (1) what has been done by them to attempt to resolve the problem, including specifically any contact with IFC/MIGA personnel, the sponsor, or host government; (2) what aspects of a problem remain unsettled; (3) where noncompliance with IFC/MIGA environmental and social policies, guidelines, or procedures is thought to have occurred, which policies, guidelines, or procedures are thought to have been violated; (4) a clear statement of results that the complainant views as the most desirable outcome of the process; (5) any other relevant facts (any supporting documents or other relevant materials should be attached).

ii) Screening a Case for Eligibility

After receiving a complaint, the CAO acknowledges its receipt and screens it against the CAO's eligibility criteria.[150] This process is expected to take no more than 15 working days. When a complaint has been determined to be eligible, the CAO will notify the complainants, IFC/MIGA, the President of the World Bank Group and the Board that the CAO will undertake an assessment of issues raised in the complaint. That does not mean that the CAO endorses the complaint, rather, it solely indicates that the CAO has determined that the complaint has met the eligibility criteria set forth in section 2.2.1. of the Operational Guidelines.

iii) Assessment of the Complaint

This phase does not entail any judgement on the merit of the complaint. Its purpose is to clarify the issues and concerns raised by the complainants, to engage with the parties (the complainants and IFC/MIGA client) and identify other stakeholders, and eventually to explain to them the different roles of the CAO. The assessment of the complaint is carried out by the Ombudsman

[150] Pursuant to section 2.2.1. of the CAO's 2013 Operational Guidelines, a complain must demonstrate the following criteria to be eligible for assessment:

1. The complaint pertains to a project that IFC/MIGA is participating in, or is actively considering.
2. The issues raised in the complaint pertain to the CAO's mandate to address environmental
3. and social impacts of IFC/MIGA investments.
4. The complainant (or those whom the complainant has authority to represent) may be affected if the social and/or environmental impacts raised in the complaint occurred.

function's experts. They fulfil any combination of the following activities: (1) reviewing IFC/MIGA files; (2) meeting with the complainant, IFC/MIGA staff and client, government official of the country where the project is located, representatives of local and international NGOs, and other stakeholders; (3) visiting project sites; (4) holding public meetings in the project area.

iv) Parties' Determination of which CAO's role They Seek to Initiate

Under the 2007 Operational Guidelines, assessments were carried out by the CAO's Ombudsman function, with an emphasis on exploring problem-solving options first to help resolve the issues.[151] Where a collaborative resolution was not possible, the Ombudsman referred the complaint to the compliance office for compliance appraisal. The CAO's new Operational Guidelines, launched in March 2013, incorporates some changes. The parties can now choose which of the CAO functions they wish to pursue: Ombudsman or Compliance. The term "ombudsman" has been changed to "dispute resolution".[152] If the parties fail to agree to continue with the CAO-facilitated dispute resolution, the complaint will proceed to the CAO compliance role.

The dispute resolution process cannot be carried out without a voluntary agreement between the complainant and client. Its main objective is to help resolve issues that have been raised about environmental and social impacts of IFC/MIGA projects and improve outcomes on the ground.[153] The CAO claims that its dispute resolution is a neutral forum that is non-judicial and non-adversarial.[154] In other words, it "does not make a judgment about the merits of a complaint, nor does it find fault or impose solutions as a conciliator, arbiter, or judge."[155] Rather, the process is solely designed to facilitate addressing specific issues that have contributed to conflict and help the parties work together toward practical solutions.[156] The CAO and relevant stakeholders use a number of different approaches in attempting to find a solution to the issues that led to the conflict including (1) facilitation and information sharing, (2) joint fact-finding, (3) mediation and conciliation.[157]

[151] CAO, 2007 Operational Guidelines, at 16, para. 2.3.3.
[152] CAO, 2013 Operational Guidelines, at 12, para.2.3.
[153] Idem, at 14, para. 3.1.
[154] Ibidem.
[155] CAO, 2013 Annual Report, at 12.
[156] Ibidem.
[157] CAO, 2013 Operational Guidelines, at 14, para.3.2.1.

If one party participates in collaborative methods to resolve the complaint while another party declines, dispute resolution will not be possible. The complaint will automatically proceed to the CAO compliance. This phase includes a two-step approach. The first step involves a compliance appraisal. It assesses the outcomes on the ground and their relevance in the context of IFC's or MIGA's policy provisions. If the appraisal determines that a compliance audit or investigation is not warranted, the case will be closed after releasing an Appraisal report.[158] Otherwise, the CAO will proceed to the second step and conduct an investigation.

v) Monitoring and Follow-up

Where the parties have reached an agreement through the dispute resolution process, the CAO team will assist them to monitor whether it has been implemented and publicly disclose the outcome on its website.

As for the compliance possess, if IFC/MIGA is found to be out of compliance, the CAO will monitor the situation until actions taken by IFC/MIGA assure CAO that the organisation is addressing the noncompliance. Otherwise, CAO will close the investigation.

c. CAO Selected Cases

The following development summarises two cases involving the CAO's endeavours to assess conflicts, facilitate dispute resolutions and conduct compliance auditing on social and environmental issues arising out of IFC/MIGA-funded projects. The first case concerns the complaint about MIGA's failure to undertake due diligence by extending its investment guarantee to a Canadian company's subsidiary, Anvil Mining SARL, which has been linked to massive human rights in the town of Kilwa of the Katanga province in the Democratic Republic of the Congo (DRC). The second case deals with the complaint about IFC's non-compliance with its safeguard policy as a result of the Corporation's investment in a British Company's subsidiary, Lonmin PLC, whose platinum mining development project in South Africa was entangled in labour-related issues.

i) MIGA Investment Guarantees in the Dikulushi Copper-Silver Mining Project, DRC

The project was developed by Anvil Mining, a Canadian company, and has been in production since 2002.[159] In October 2004, Anvil Mining was required to provide logistical support to the army when the town of Kilwa, some 50 kilometers from Dikulushi, was taken over by a small

[158] Idem, at 13, para. 24.

[159] CAO, 'CAO Audit of MIGA's Due Diligence of the Dikulushi Copper-Silver Mining Project in the DRC', Final Report, November 2005, at 1.

rebel group.[160] Kilwa is the point of export for Dikulushi copper and silver concentrates to Zambia. In re-establishing control over the town, the armed forces of the DRC killed civilians, including by summary execution, looted, and carried out other crimes, including extortion and illegal detention.[161] In April 2005, MIGA provided $13.3 million of political risk insurance to the project.

In July 2005, Rights and Accountability in Development, a UK-Based NGO wrote to the then World Bank Group President, Paul Wolfowitz, on behalf of a number of local NGOs, alleging some failures in the due diligence undertaken by MIGA.[162] Consequently, the Former President Paul Wolfowitz requested that CAO conducts an audit on MIGA's due diligence for the Dikulushi Copper-Silver Mining Project in Katanga Province of the DRC.[163] A key issue was MIGA's due diligence with respect to security and human rights.

CAO issued an audit report in February 2006. CAO found that MIGA adequately followed its underwriting and risk management due diligence, but that these core business processes did not address whether the project might either influence the dynamics of conflict or whether security provisions for the project could indirectly lead to adverse impacts on the local community.[164] CAO found that while MIGA's initial adherence to its Environmental and Social Review Procedures (ESRPs) was adequate, its follow-through on some social aspects was weak. CAO also found that weaknesses in the ESRP due diligence, and on the conflict and security issues corroborated the concerns it had expressed in its 2002 review of MIGA's ESRPs.[165]

As for the security and human rights issues, CAO found that MIGA did not fully understand the implications for its client of implementing the Voluntary Principles on Security and Human Rights (as required by the Management Response to the Extractive Industries Review), nor did it assess whether its client had the capacity to implement them properly.[166] CAO also noted that in its due diligence, MIGA had included provisions in the Contracts of Guarantee to

[160] Ibidem.
[161] Ibidem.
[162] Idem, at annex 2.
[163] Idem, at 25.
[164] Idem, at 22.
[165] Ibidem.
[166] Ibime.

reinforce the potential local benefits. According to the 2006 CAO annual report, MIGA had responded to CAO's recommendations and started to address the issues raised.[167]

ii) IFC Investment in Lonmin Platinum Group Metals Project, South Africa

Lonmin plc is a producer of platinum group metals operating in the Bushveld Complex in South Africa. IFC approved an investment and advisory project in 2006 to support Lonmin's multi-year expansion programme.[168] The project consists of (1) the development, expansion, and mechanization of Lonmin's South African mines; (2) the financing of planned transactions regarding broader and more equitable ownership of South African businesses through Black Economic Empowerment (BEE) participation in Lonmin's development programs; and (3) through an IFC Advisory Service project, a comprehensive, large-scale community and Local Economic Development Program (LEDP) for the community of about 350,000 people living on and around Lonmin's main operations.[169]

Following media reports of serious violence that clashed between striking miners and members of the South African police near Lonmin's Marikana mine, claiming 44 lives in earlier the same month,[170] the CAO Vice President initiated a compliance appraisal of IFC's investment in the mine on August 21, 2012.[171] The scope of the compliance appraisal was to consider the adequacy of IFC's appraisal and supervision of its Lonmin investment.[172]

CAO's appraisal sought to look at how IFC reviewed, interacted, and advised its client on matters related to the workforce, labour conflicts, labour unions, and the broader social impacts of unattended labour unrest and latent conflict, as well as how IFC has assured itself of the implementation of the relevant policy provisions.[173] The appraisal raised concerns as to the adequacy of IFC's 2006 environmental and social performance in relation to this investment and identified potentially systemic issues regarding the way in which IFC's Sustainability

[167] CAO, 2006 Annual Report, at 8.
[168] CAO, 'CAO Appraisal Report of IFC Investment in Lonmin Platinum Group Metals Project, South Africa', August 30, (2013), at 4.
[169] Ibidem.
[170] Criminal cases were brought before the South African Police officers involved in the shooting. This cases is currently ongoing. See Reuters, PortalsCivil Security Bail for six police who were part of "Marikana massacre" Friday, 16 March 2018, available at http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=51073:bail-for-six-police-who-were-part-of-marikana-massacre&catid=3:Civil%20Security&Itemid=113, accessed 28 April 2018.
[171] Ibidem.
[172] Ibidem.
[173] Ibidem.

Framework was applied to an equity investment in a publically-listed company.[174] In particular, IFC failed to convert the Performance Standards into a contractual requirement as would be expected under the Sustainability Framework for category A projects.[175] In addition, CAO appraisal revealed that IFC's environmental and social performance supervision reports do not adequately engage with industrial relations and worker security issues which were publicly reported in the 18 months before the violence on August 2012.[176] However, in the absence of a direct complaint from affected workers, CAO found that the nexus between the environmental and social performance issues outlined in the appraisal and the tragic outcomes of the August 2012 dispute were insufficiently established.[177] CAO decided that an investigation was not warranted and closed the case in August 2013.[178]

In 2015, affected community members and a local organization filed a formal complaint with CAO regarding the Lonmin's Marikana mine.[179] The complaint cites contamination of air and groundwater, and negative impacts on the living conditions of nearby communities, including on housing, water and sanitation, infrastructure and employment. The complaint also mentions concerns about the project's social and environmental commitments, IFC's social and environmental due diligence, and non-compliance with the national law.[180]

Following CAO's determination on the eligibility of the complaint, parties agreed to engage in a CAO convened dispute resolution process.[181] A series of joint meeting were organised under CAO's supervision as part of the mediation process. However, in December 2016 the complainants decided to withdraw from the process citing lack of progress. CAO confirmed this decision in March 2017.[182] As a result, the case was transferred to the CAO's compliance function for appraisal. CAO concluded its compliance appraisal in December 2017. After assessing the accounts of adverse impact provided by the complainants and the questions CAO identified in relation to IFC's review and supervision of the project's related aspects, CAO concludes that the complaint meets CAO's criteria for investigation. Under the terms of

[174] Idem, pp. 6-14.
[175] Idem at 15.
[176] Ibidem.
[177] Ibidem.
[178] CAO, 2014 Annual Report, at 32.
[179] CAO Cases, South Africa / Lonmin-02/Marikana, available at http://www.cao-ombudsman.org/cases/case_detail.aspx?id=235, accessed 17 July 2018.
[180] Idem.
[181] Idem
[182] Idem

reference for this compliance investigation, the Compliance Investigation Report is expected by July 2018.[183]

4.3.1.2. AfDB's Independent Review Mechanism

In 2004, the AfDB Group approved the creation of its Independent Review Mechanism (IRM) following a study commissioned by the Bank Group's Boards of Directors (the Boards) on similar review mechanisms in other IFIs.[184] This study investigated different options for an AfDB Group review mechanism function and recommended a mechanism having both a mediation function (problem-solving) and compliance review.[185] In addition, the study recommended that the review mechanism include both public and private sector projects, and structure comprising a small administrative unit with few permanent staff and a Roster of part time external experts to conduct compliance reviews.[186] These recommendations were accepted, in principles, by the Bank group's management that proceeded to develop a proposal for the establishment of an independent review mechanism. Then, the Management invited interested stakeholders to present their comments on the proposed independent review mechanism.[187] This process cumulated in the establishment of the IRM by the Boards of Directors of the Bank and the Fund.[188]

Although the Boards approved the enabling resolution since June 2004,[189] the IRM only became operational in mid-2006 upon the appointment of the first director of its compliance and mediation unit.[190] Parallel to the Boards' resolution to establish the IRM, Operating Rules and Procedures were prepared and referred to the Committee on Development Effectiveness (CODE) to corroborate whether or not they were consistent with the Boards 'enabling Resolution. The Boards only approved These operating rules on July 27, 2006.[191] After that, a new version of the IRM was adopted in 2010.[192] This version did not substantially modify the

[183] Idem.
[184] D. M. Kiara, 'The African Development Bank Group and the Establishment of the Independent Review Mechanism', *Law for Development Review,* vol. 1 (2006) at, 216.
[185] IRM, 2006 Annual Report, at 3.
[186] Ibidem.
[187] D. M. Kiara (2006) at 216.
[188] AfDB Group, Resolution B/BD/2004/9— F/BD/2004/7, Boards of Directors, 30 June 2004 [hereafter IRM's Enabling Resolution (2004)].
[189] Idem, at para. 1.
[190] IRM, 2006 Annual Report, at 3.
[191] Ibidem.
[192] AfDB Group, Resolution B/BD/2010/10 —F/BD/2010/04, Boards of Directors, 16 June 2010 [hereafter IRM's Enabling Resolution (2010 amendment)].

rules and procedures, but it made it a little easier to access the IRM and revised a bit the way compliance review can be achieved. The Boards approved the latest version of the IRM on 28 January 2015.[193]

a. IRM Structure and Functions

Pursuant to the Boards' enabling resolution of the IRM as amended to date, the IRM comprises a Compliance Review and Mediation Unit (CRMU) and a Roster of Experts.[194] The CRMU is the focal unit of the IRM. It is headed by a Director who is selected by a panel composed of a Board member, a representative of Management and an independent external advisor. He or she is appointed by the President for a five-year term renewable once and may only be removed from his or her position through the same process by which he or she was appointed.[195] The Director shall not have worked for the Bank Group in any capacity for the period of at least five years prior to his or her appointment and shall not be entitled to work for the Bank Group in any capacity whatsoever following the expiry of his or her appointment.[196] The Director is entrusted with the overall responsibility for the day-to-day operations and external relations of the IRM.[197] He or she also plays a pivotal role in the determination of the procedure. In particular, he or she determines whether an eligible case will be handled through problem-solving or compliance review or both.[198]

The second component of the IRM is the Roster of Experts. This latter comprises three part-time experts who are called upon as needed to investigate complaints lodged by adversely affected people as a result of the Bank Group's non-compliance with its operational policies and procedures in respect of the design, appraisal and/or implementation of such project.[199] The experts are appointed by the Boards of Directors on the recommendation of the President for a non-renewable term of five years. However, the first appointment had been staged in a way that one expert served for three years, one for four years and one for five years.[200] Pursuant to paragraph 5 of the 2015 amendment of the enabling resolution of the IRM, if the expert's

[193] AfDB Group, Resolution B/BD/2015/03 — F/BD/2010/02, Boards of Directors, 28 January 2015. [hereafter IRM's Enabling Resolution (2015 amendment)].
[194] AfDB Group, Resolution B/BD/2004/9— F/BD/2004/7, Board of Directors, 30 June 2004 (hereafter Enabling Resolution).
[195] AfDB Group, 'IRM Operating Rules and Procedures, para 78.
[196] Ibidem.
[197] Idem, at para. 79.
[198] IRM's Enabling Resolution (2015 amendment), at para. 13.
[199] Idem, at paras. 4 & 11.
[200] IRM's Enabling Resolution (2004), at para. 5.

term expires while he or she is still engaged in compliance review, it shall be extended for a period not exceeding six months, to enable him or her to complete writing the compliance review report, unless the Boards decide otherwise.

The Boards appoint a Chairperson of the Roster of Experts from amongst the Experts, in consultation with the members of the Roster of Experts, on the recommendation of the President. The Chairperson serves in such capacity until a member of the Roster of Experts is replaced.[201] The Executive Directors, Alternate Executive Directors, Advisers, Assistants, any Officer or Staff member of the AfDB Group or persons holding consultant appointments are ban from serving on the Roster of Experts until two years have elapsed since the end of their service to the Bank or the Fund.[202] Likewise, If an Expert was called upon to work for the IRM during his or her term, he or she will not be entitled to work for the Bank or the Fund (either as staff member, Bank Officer, Executive Director, Alternate Executive Director, Adviser, Assistant or Consultant) for a period of two years after the expiry of his or her term.[203]

From the onset, the IRM has performed two main functions, namely a problem-solving and compliance review functions.[204] However, since the latest amendment of its enabling resolution, the IRM is further entrusted with an advisory function.[205] While the first function of the IRM is triggered when the CRMU receives a complaint from affected parties, the compliance review takes place upon a joint determination of the eligibility of the request by the Director if the CRMU and the IRM Experts. The new advisory function can be triggered (1) upon receipt by the CRMU of a request for advice or technical opinion from the President and /or the Boards, or (2) upon approval by the President and/or the Boards of a proposal submitted by the Director of the CRMU for such a service. Another distinctive feature of the latest IRM's version is the endorsement of the inclusion of human rights violations among the kinds of violation which can be invoked, provided that they "involve social and economic rights [and are related] to any action or omission on the part of the Bank Group."[206]

Pursuant to its Operating Rules and Procedures, the purpose of the IRM is to provide affected people with "an independent mechanism through which they can request the Bank Group to

[201] IRM's Enabling Resolution (2015), at para.5.
[202] Idem, para. 6.
[203] Ibidem.
[204] See IRM's Enabling Resolution (2004), at para. 13; IRM's Enabling Resolution (2010), at para.13.
[205] IRM's Enabling Resolution (2015), at para. 14.
[206] AfDB Group, 'IRM Operating Rules and Procedures, (2015) at 3, para. 2 (j).

comply with its own policies and procedures."[207] The mechanism only becomes available "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." [208] In other words, access to the IRM is contingent to the fact that affected parties lodge a complaint alleging the violation of an applicable policy by an institution within the Bank Group.

Like the CAO, the IRM is not a court of law nor is it entrusted with power regarding judicial or arbitral processes. Of the three functions of the IRM, the problem-solving and the compliance review functions are the most crucial in terms of providing an accountability forum to affected third parties. However, these functions are delivered in a way that does not place blame on any party involved including the Bank Group. The CRMU does not have authority to suspend the processing of or disbursements in respect of, the relevant Bank Group-financed project.[209] The Director of the CRMU or the Review Panel may only make an interim recommendation to suspend further work or disbursement if, during the processing of a complaint, he/she/it " is of the opinion that serious, irreparable harm shall be caused by the continued processing or implementation of the Bank Group-financed project." [210] The CRMU does not have authority to compel any party in the problem-solving process nor can it guarantee that harm being caused by the Bank-supported project will be stopped, prevented or repaired in a way that is consistent with general principles of international law.[211]

Overall, project-affected groups seem to be unaware of the existence and availability of the IRM. This is corroborated by the number of complaints that have been lodged with the IRM after almost ten years of operation. CRMU has received 14 complaints since its inception of which 8 were registered and the rest were presumably rejected as they did not meet the registration requirements or dealt with by the Bank Management.[212] Moreover, of the eight registered complaints, five proceeded to problem-solving, and 3 went for compliance review. All the registered complaints concern infrastructure projects developed in one of the following regional country members: Uganda, Ethiopia, Egypt, Morocco, South Africa, Senegal, and

[207] AfDB Group, 'IRM Operating Rules and Procedures, (2015) at 1
[208] Ibidem.
[209] AfDB Group, 'IRM Operating Rules and Procedures, (2015) at 5, para. 20.
[210]Ibidem.
[211] See the *The Factory at Chorzow [Claim for Indemnity],* (Merits Judgement), P.C.I.J. 1928, (series A) No. 17, September 13, 1928, at 47. See also H. Kelsen, *Principles of International Law,* The Lawbook Exchange, Ldt. (1952, reprinted 2003) at 20*ff.*
[212] E. S. Ayensu, 'Report of the Consultant: Second Review of the Independent Review Mechanism (IRM) of the African Development Bank Group', AfDB Group, September 24, (2014) at 14.

Tanzania. The main issues raised by the complainants include inadequate consultation, involuntary resettlement, inadequate compensation, environmental damage, and inadequate economic analysis.[213]

b. IRM Complaint Process

The Operating Rules and Procedures interchangeably use the concepts "request" and "complaint" to term the document that triggers the CRMU's operational proceedings when it is received by the CRMU's office.[214] The following development retains the concept of complaint, as a matter of coherence. In addition, it relies on the same structure that was used for the examination of the CAO complaint process. This includes, *mutatis mutandis*, lodging a complaint, screening a complaint for registration, assessment of the complaint, Director's determination of the best course of action (either problem-solving or compliance review), monitoring and follow-up, and conclusion of the IRM's involvement.

i) Lodging a Complaint

Any group of two or more people in the country or countries where the Bank Group financed project is located can lodge a complaint with the CRMU if they believe that their rights or interests are likely to be adversely affected in a direct and material way as a result of the failure by un institution of the Bank Group to follow any of its OP/P during the design, appraisal and/or implementation of a Bank Group-financed project.[215] Affected people can also rely on a local representative acting on explicit instructions as their agent.[216] In exceptional cases, affected people can rely on a foreign representative provided that this latter submit evidence attesting that "there is inadequate or inappropriate representation in the country where the project is located or as a direct material impact."[217] Either way, a non-affected representative shall provide evidence of the representational authority consisting of the original signatures, names and contact addresses of the affected parties.[218] Alternatively, affected people can still rely on the good will of the Boards to initiate a problem-solving process with the CRMU.[219]

[213] Idem, at 16.
[214] AfDB Group, 'IRM Operating Rules and Procedures, (2015) at 3, para. 4.
[215] Idem, at 2, para. 1.
[216] Idem, at 3, para. 6 (b)
[217] Idem, paras. 6 (c) & 16.
[218] Idem, at 5 para. 15.
[219] Idem, at 3 para. 6 (d).

Unlike the CAO, the IRM's website does not provide any model of complaint. Admittedly, this latter should be in writing and may be presented in the local language of the plaintiffs if they are unable to obtain a translation to any of the official languages of the Bank Group.[220] When a complaint is made orally, CRMU will assist in submitting the complaint in writing.[221] Although CRMU can provide guidance on how to lodge a complaint, it is admitted that this latter should include the following information

1. The complainants' name, address, and other contact information
2. If the complaint is initiated by a representative, the identity of those on whose behalf the complaint is made and an explicit evidence of authority to represent them, subject to the specific requirements pertaining to a foreign representative
3. A statement as to whether the complainant wishes his/her/their identity or any information communicated as part of the complaint be kept confidential (stating reasons).
4. A reference to the project and, if possible, the OP/P or contractual documents that have been violated by the Bank Group entity.
5. An explanation of the harm suffered by or threatened to affect the complainants and a reference to the rights or interests of the parties that are directly affected.
6. An outline of the change they would like to see as a result of the CRMU process.
7. A description of steps already taken to resolve the problem with the AfDB staff and the reason why any responses have been inadequate.
8. In a request relating to matters previously submitted to the CRMU, a statement specifying what new evidence or changed circumstances justify revisiting the issue.
9. Supporting materials, such as relevant correspondence with the Bank Group staff and notes of meetings, if any; a description of the location of the project affected parties; maps or diagrams of the area, or an explanation of why those materials are not available, and any other evidence supporting the complaint.

Finally, it is worth noting that although the complainants can express their preference as to how to channel the complaint (problem-solving or compliance review), it is the Director who ultimately decides which process to follow.

Some requests are excluded from the IRM's scope. These include complaints filed "more than 24 months after the physical completion of the project concerned or more than 24 months after

[220] Idem, paras. 12 & 13.
[221] Idem, at 4, para. 9.

the final disbursement under the loan or grant agreement or date of cancellation of the disbursement amount, whichever comes first."[222] Moreover, Paragraph 2 of the Operating Rules and Procedures expands the list of requests that are excluded from the IRM's scope. These include the complaints relating to:

1. Any procurement by the Bank Group or its borrowers from suppliers of goods and services financed by or expected to be financed by the Bank Group under a loan or grant agreement, or from losing tenders for the supply of such goods and services which shall continue to be addressed under other existing procedures. These are handled by another unit within the Bank Group;
2. Fraud or corruption since they are handled by another unit within the Bank Group;
3. Matters before the Administrative Tribunal of the Bank;
4. Matters before other judicial review or similar bodies;
5. Frivolous, malicious, or anonymous complaints;
6. Complaints motivated by an intention to gain competitive advantage;
7. Matters over which the CRMU, a Panel, the President or the Boards has/have already made a recommendation or reached a decision after having received and reviewed a Complaint unless justified by clear and compelling new evidence or circumstances not known at the time of the prior request;
8. Actions that are the sole responsibility of other parties, including the borrower or potential borrower, and which do not involve any action or omission on the part of the Bank Group;
9. Adequacy or unsuitability of the Bank Group policies or procedures; and
10. Alleged Human Rights violations, other than those involving social and economic rights alleging any action or omission on the part of the Bank Group.

A complaint duly prepared in line with the Operating Rules and Procedures must be addressed to the Director of CRMU at the Bank Group's principal office by any suitable means. However, it can be delivered to any of the Bank Group field offices. In this instance, after issuing a receipt to the complainants, the Bank Group's resident representative will promptly and without reviewing its content forward the complaint to the Director of CRMU.[223]

[222] Idem, at 3. Para. 3.
[223] Idem, at 5. Para. 19.

ii) Screening a Complaint for Registration

After receiving a complaint, the Director acknowledges its receipt and then screens the complaint against the IRM's mandate and the prescription of paragraph 7 of the Operating Rules and Procedures. This process is expected to take no more than 14 business days. When a complaint has been determined to meet the registration requirements, the Director will enter it in the register and notify the complainants, the President and the Board of the registration. The Director will also transmit to the Boards and/or President as the case may be. The notice of registration includes a request to the Bank Group's Management to provide CRM with written evidence that it has complied, or intends to comply with the Bank Group's OP/P. The management should not take more than 21 business day to submit its response.

iii) Director's Determination of which IRM's Role to Proceed with

After receiving the Management response to the complaint, the Director makes a determination on whether the complaint will be handled through: (1) problem-solving function, (2) compliance review or, (3) both problem-solving and compliance review. It is worth noting that certain criteria guide Director's determination to proceed with the problem-solving exercise. There must be a mutual consent between the complainants and interested parties to proceed to the problem-solving exercise.[224] The Director shall also take into account whether the selected function is appropriate and may assist in addressing undue, incidental effects; whether it is likely to have a positive result; whether the Bank Group has sufficient leverage to influence change; whether it may interfere with, or may be impeded by, any other procedure actively considered by a court, arbitration tribunal or review body in respect of the same matter or a matter closely related to the complaint.[225] Once this determination is made, the case will proceed to the next step starting with the problem-solving exercise and, eventually, followed by the compliance review.

Pursuant to Paragraph 41 of the Operating Rules and Procedures, the purpose of the problem-solving process "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."[226] In conducting the problem-solving process, the Director may have recourse to a variety of problem-solving techniques, including independent fact-finding, mediation, conciliation and dialogue

[224] Idem, at 8, para. 39 (a).
[225] Idem at 8, para. 39 (b) –(g)
[226] Idem, at, 9, para. 41.

facilitation. After a problem-solving process, whether successful or not, the Director can recommend a compliance review to the Board or the President.

The compliance review recommendation is triggered by a joint determination of the eligibility of the complaint by the Director and the IRM Experts, in the case of a deadlock in determining the eligibility of the complaint, the former shall make the final decision.[227] The main criterion to take into consideration for proceeding to the compliance review process is whether there is *prima facie* evidence that the complainants 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 OP/P.[228] The compliance review recommendation includes draft Terms of Reference which set out the scope and time frame for the compliance and estimate of the budget and description of additional resources required to complete the review.[229]

If the compliance review is authorised, the IRM Experts will set up the Review Panel, which shall conduct the compliance review with administrative and technical support from CRMU. In performing the compliance review, the Panel should aim to reach a consensus on all decision. Otherwise, all the opinions shall be reported to the Boards. The Panel must issue a draft compliance review report, within 30 days after completing its investigations, and must circulate it to the Bank Management for review and comments on factual matters only. The final compliance review report shall include the respective positions of interested parties, the findings and recommendations of the Panel.

iv) Outcome of the IRM's Involvement

A successful problem-solving exercise will result in a solution agreed upon by the complainants, Management and interested party. The Director will include such an agreement in a problem-solving report and send it to all parties, and to the Boards and the President for consideration.[230] If the problem-solving is unsuccessful, such a report will describe the efforts made, reasons for their failure and will include recommendations on steps the Bank Group

[227] Idem, at 10, para 50.
[228] Idem, at 10, para. 51.
[229] Idem, at 10, para. 52.
[230] Idem, at 9, para. 45.

could take to deal with the unresolved issue. The Boards or President will inform all participants whether those recommendations have been approved or rejected.[231]

As for the outcome of the compliance review process, after a compliance review report is submitted to the Boards or President, the latter decide whether or not to accept the recommendations in the compliance review report. In case such recommendations are accepted, the Management will prepare a Management Action Plan and will submit it to the Boards for approval. The approved Management Action Plan shall be communicated to the complainants within 90 business days.

v) Monitoring and Follow-up

The CRMU will meet with the complainants to ascertain that the problem-solving exercise worked as intended and the Bank group has met its commitments. The Director will submit a monitoring report to the President and send a copy to the Boards, in case the project forming the subject matter of the complaint has not yet been presented to the Boards for approval.[232]

As for the approved recommendations of the compliance review report and the approved management action plan, the Management will consult with CRMU and agree on the preparation and submission to the Board of any reports on their progress implementation.[233] The monitoring reports on such implementation shall be submitted to the Boards or President for consideration. The final report will conclude the compliance review process.[234]

c. IRM Selected Cases

The following development summarises two cases involving the IRM's endeavours to assess conflicts, stimulate dialogue between parties with a view to facilitating resolving the underpinning issues, and conduct a compliance review on issues arising from the Bank-Group-funded projects. The first case deals with the complaint about the negative impact of the Marrakech-Agadir Motorway construction project, in Morocco, which inflicted direct and material harm to the complainants and constrained their access to water and social amenities. The second case concerns the complaint about Bank's inadequate economic analysis, social

[231] Idem, at 10, para. 48.
[232] Idem, at 9, para. 46.
[233] Idem, at 13, para. 64.
[234] Idem, at 14, para. 67.

and environmental impact assessment and consultations with affected communities in the design and implementation of the Bujagali Hydropower Project in Uganda.

i) Construction of the Marrakech–Agadir Motorway Project, Morocco

In July 2006, the Board of Directors of the AfDB approved a loan to finance the construction of Marrakech-Agadir Motorway project in Morocco.[235] This project was developed by the *Société Nationale des Autoroutes* (National Motorways Company). It comprised the construction of 233.5 kilometres of the motorway linking two cities, consisting of two 7 metres wide carriageways, a 2.5 metres emergency lane, a 1 metre berm, a 5 metres central reserve and two shoulders of 1 metre each.[236] The project aimed at facilitating the export of farm products by enhancing transportation between the two Moroccan cities (Marrakesh and Agadir) and the safety of road users.

In early July 2010, the Centre de Développement de la Région de Tensift (CDRT) lodged a complaint with the CRMU on behalf of the Chichaoua Province Development and Law Association and other affected communities.[237] The complaint opposed the negative impact of the project on the Chichaoua – Imintanout section of the motorway. It also alleged that the construction of the motorway inflicted a direct and material harm on surrounding communities' lands and constrained their access to water and social services.[238] CRMU registered this complaint on 29 July 2010, for problem solving and compliance review.

In performing the problem-solving exercise, the CRMU engaged in dialogues with the Bank's Management, the project promoter and the affected parties with the view to facilitating a solution to the issues underlying the complaint.[239] By the end of August 2010, the Management submitted its response to the complaint, including a remedial action plan that the Bank had discussed with the project promoter (*Société Nationale des Autoroutes*) and the affected parties. The parties signed a time-bound action plan to implement necessary remedial civil works in October 2010.[240] CRMU conducted several field missions to overseeing the implementation of the remedial civil works agreed upon by the parties. Although the project promoter had not

[235] AfDB Group, 'Morocco - AfDB Approves 119 million Euro Loan for Marrakech-Agadir Road Project', available at, http://www.afdb.org/en/news-and-events/article/morocco-afdb-approves-119-million-euro-loan-for-marrakech-agadir-road-project-3545/, accessed 10 September 2015.
[236] Ibidem.
[237] IRM, '2010 Annual Report, at 16.
[238] Ibidem.
[239] Ibidem.
[240] Ibidem.

completed all the remedial civil works agreed upon,[241] the IRM's 2013 Annual Report suggested that this case had been closed to the satisfaction of the complainants in 2011.[242]

Interestingly, on 15 December 2011, the Director recommended to the Boards and the President that the complaint was ineligible for compliance review; then, referred the case the IRM Experts to determine its eligibility for compliance review.[243] In January 2012, the Experts submitted their assessment to the President and the Boards concluding that the project was not eligible for compliance review since the issues raised had been resolved through IRM problem-solving. The Experts went on to suggest that the CRMU could "monitor the resolution of the two pending issues that is, the restoration of five affected agricultural lands and increasing access to water to same affected communities."[244]

ii) Bujagali Hydropower and Interconnection Projects, Uganda

The Bujagali Hydropower and Interconnection project is a Ugandan government's project initiated in 1999 and aimed at constructing and operating the Bujagali hydropower plant and related transmission line in order to address the national energy shortage.[245] The project was divided into two phases: the Bujagali Hydropower Project (BHP) which was commissioned to a single purpose company, Bujagali Energy Limited (BEL), and the Bujagali Interconnection Project (BIP) for which a State own company, the Uganda Electricity Transmission Company Ltd (UETCL), assumed the responsibility.[246] The BHP received financial support from several IFIs, including the AfDB, while the African Development Fund and the Japanese Bank for International Cooperation financed the BIP.[247]

In May 2007, a group of Ugandan NGOs and individuals filed a complaint with the CRMU[248] requesting a compliance review of BHP and BIP on the ground that the projects failed to comply with a number of Bank Group's OP/P.[249] In particular, they claimed among other things

[241] IRM, '2011 Annual Report, at 12
[242] IRM, '2013 Annual Report, at 22.
[243] IRM, '2011 Annual Report, at 12.
[244] IRM, '2012 Annual Report, at 4.
[245] Independent Review Panel, 'Compliance Review Report on the Bujagali Hydropower and Interconnection Projects', IRM, June 20, (2008) at 7.
[246] Ibidem.
[247] Ibidem.
[248] Another complaint was filed with CAO alleging IFI's non-compliance with its Performance Standard 5 (Land Acquisition and Resettlement). The conclusions of CAO's investigations leaned in favour of the complainants. See CAO Investigation of IFC/MIGA Social and Environmental Performance in relation to: Bujagali Energy Limited and World Power Holdings, Uganda (Bujagali-07), December 15, 2017.
[249] Ibidem.

that the appraisal of the projects was based on inadequate economic analysis and social and environmental impact assessment and that the projects did not conduct any consultation with affected communities. The CRMU registered a complaint for compliance review on 16 May 2007 and recommended it to the Boards, which they authorised four months later.[250]

After conducting the compliance review, the IRM Experts submitted their report to the Boards on 9 July 2008. The Experts found the Bank Group to be non-compliant with some applicable OP/P including the Operational Manuel (OM 600), the Integrated Environment and Social Impact Assessment Guidelines, the Policies on Involuntary Resettlement, Gender, and Poverty Reduction.[251] The Experts also submitted a number of recommendations to the Boards with the view to contributing to lesson-learning to improve the Bank's OP/P systems. After duly endorsing the IRM Experts' report, The Boards requested the Management to prepare an Action Plan to address the instances of non-compliance found by the compliance review panel.[252]

CRMU and IRM Experts conducted four monitoring missions between 2009 and 2012 to track the implementation of the action plan prepared by the Bank management and approved by the Boards in 2009.[253] In their fourth monitoring report, the CRMU and IRM Experts recommended that the Bank Management work with BEL and UETCL, and submits to CRMU/IRM the outcome of compliance issues regarding resettlement and compensation before the Bank Group completes its supervision of the projects' loan.[254] The IRM Experts and CRMU concluded that they will consider closing the IRM monitoring process upon a determination that the completion reports which the Bank Management shall submit to them in this regard is satisfactory.[255]

The Bank Management's progress report on the implementation of the approved action plan was expected in 2014.[256] At the time of writing, there is no information whether the

[250] Ibidem.
[251] Idem, pp. 9-15.
[252] IRM, '2009 Annual Report', at 17.
[253] See IRM's 1st, 2nd, 3rd, and 4th, Monitoring report on the Implementation of findings of Non-Compliance and Related Actions to be Undertaken by the ADB Management submitted in July2009, July2010, June 2011 and September 2012 respectively.
[254] IRM, 4th Monitoring Report, (September 2012), at 12.
[255] Ibidem.
[256] IRM, '2013 Annual Report', at 28.

Management had met this expectation. The completion reports for the two projects were reported to be prepared in 2015.[257]

4.3.2. Benefits and Limitations of Selected Review Mechanisms

Lodging a complaint with the selected review mechanisms could yield the following benefits:

1. Allowing complainants to voice directly their concerns to IFIs about the project they have financed or seriously considered.
2. Helping raise awareness about what is happening in projects financed by the relevant IFIs, both locally and internationally;
3. Allowing a direct engagement with the project company through problem-solving approach, if the company agrees to participate in such a process;
4. Leading to a formal investigation of the relevant IFI to determine whether or not there have been violations of IFIs' policies;

Lodging a complaint with the selected review mechanisms cannot:

1. Guarantee that a harm being caused by an IFI-funded project will be stopped or prevented or redressed.
2. Have the effect of suspending processing of, or disbursements in respect of, the relevant IFI-financed project.
3. Have the effect of cancelling the investment service provided by the relevant IFI.
4. Force a project company to participate in a problem-solving process as this function is carried out following a mutual consent of the parties, if a party refuses to cooperate, the problem-solving process ends
5. Attribute blame or lead to findings that the project company or the relevant IFI is guilty
6. Guarantee that an investigation will be conducted.

4.4. Accountability of IFIs before International Judicial or Quasi-Judicial Bodies

This category investigates instances where disputes between IFIs and affected third parties would be settled by an international judicial or quasi-judicial bodies such as international arbitration tribunals and international judicial bodies. Certain aspects of this category of legal accountability have already been discussed elsewhere. It has been shown in Chapter 3 that any dispute arising from financial agreements entered into between IFIs and their clients across the

[257] Ibidem.

public and private sector is generally referred to and resolved by arbitration. It has also been shown that recourse to such a dispute settlement mechanism can only be made by a contracting party. By contrast, a non-contracting party can only petition the tribunal to intervene in ongoing arbitral proceedings, provided such interference is permissible under the relevant procedural rules.

Moreover, it has been shown in Chapter 2 that IFIs may have recourse to various financial structures for channelling their financial services. These include project finance structures that have gained considerable attraction among public and private lenders due to their efficient allocation and management of risks associated with large projects. These structures enable IFIs to channel their financial services through a special public or private body (known as the vehicle or project company) which is financially designed to retain all the risks associated with the implementation of the underpinning project. Normally, project affected parties would not face an insurmountable obstacle if they challenge an act or omission of a vehicle company before a domestic jurisdiction. However, that will not be the case if the settlement of any dispute arising from the operations of a vehicle company is delegated to an international arbitration institution. As noted above with respect to arbitration proceedings between IFIs and their clients, third parties can always petition the tribunal to intervene in ongoing arbitral proceedings involving a vehicle company, its sponsors and the host State.

Another alternative for third parties that have been affected by an IFI-financed project would have been to have recourse to global, regional and local mechanisms for the protection of human rights. But, this avenue is filled with an important legal impediment which erodes the relevance of this option. A claimant who intends to initiate a direct claim against IFIs has no chance of success because the enforcement of human rights treaties cannot be sought against IFIs given that these latter are not signatories of those treaties. Therefore, IFIs are not subject to the corresponding dispute settlement mechanisms. However, an affected party can still bring a claim grounded on the same facts, before a local or regional mechanism for the protection of human rights, so long as they frame the claim in a way that clearly identifies a State party to human rights treaty as the primary duty bearer of the human rights obligation vindicated. Most regional mechanisms for the protection of human rights enable individuals to bring a claim about the violation of their treaties-based rights by State parties before a regional court, which in turns can render a decision that is binding on the recalcitrant State.

4.4.1. Third Parties Intervention in International Arbitration Proceedings

The following analyses are a follow up to the issues that have been raised previously in Section 4.2.3 in connection with the domestic settlement of disputes between a project company and affected parties. They also speak to some of the issues that were discussed in Section 3.3.2.1.(a)(i) and (ii) in respect of third parties' limitations to influence the arbitration process between IFIs and its clients. The idea here is to showcase how the technique of third parties intervention in ongoing arbitration proceedings can afford project affected parties the possibility to voice their concerns and eventually influence the outcome of an arbitration process. Although this approach would not in accountability of the IFI itself, it would have the merit of providing an alternative of redress to the affected party whose interests have been violated as a result of the implementation of an IFI-funded project.

As has been shown, domestic courts are normally the primary forum for adjudicating disputes arising from an investment project funded by IFIs. However, by virtue of a delegation of competence by the host State, such disputes may ultimately be resolved by an international arbitration institution. The forgoing delegation of competence is usually evidenced in various instruments including the BITs entered into by the host State, the contract underpinning the financial structure of the project, and the investment legislation enacted by the host State. The rationale behind the delegation of adjudicative competence to an international arbitration body is to provide a guarantee of protection to investors that would be reluctant to invest in the host State due to a lack of confidence in its judicial system. To attract foreign capital, many developing countries have no choice but to make this kind of concession.

The prevalence of investor-state disputes before international arbitrations intuitions has risen significantly in recent years.[258] This rise has come with a parallel mounting public concern regarding the system's legitimacy as it is centred on the protection of commercial interests of the investor.[259] As already mentioned, arbitration is traditionally a confidential and private dispute resolution mechanism. The involvement of a State in such a dispute can lead to far-reaching consequences that affect a significantly broader range of actors than the parties to the

[258] UNCTAD, 'Investor-State Disputes Arising from Investment Treaties: A Review', UNCTAD Series on International Investment Policies for Development (2005) at 1.

[259] For further development on the legitimacy of investor state arbitration, see J. A. VanDuzer, 'Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation', *McGill Law Journal*, vol. 52, (2007) pp. 681-723; E. De Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications,* Cambridge University Press, (2014).

dispute.[260] In light of those concerns, commentators and civil society groups have resorted to the institution of amici curiae and have insisted that arbitration tribunals allow non-parties to make amicus curiae submissions.[261] In so doing, they expect to generate a substantial increase in opportunities for affected parties in the host State to access to justice.

International arbitration tribunals have made pronouncements on the suitability of third parties to participate in investor-state disputes. In the *Aguas del Tunari, S.A. v. Republic of Bolivia* case that was brought before an ICSID Tribunal, several non-governmental organisations (NGOs) and individuals had petitioned for amici curiae status.[262] At the time, the ICSID Arbitration Rules did not contain any reference to non-disputing party submissions. The petitioners requested among others for permission to make submissions as well as the right to attend all hearings, to make oral presentations, to have immediate access to all submissions made to the Tribunal, and to respond to arguments made by either party.[263]

The cause of action arose with the Bolivia's attempt to privatize the water services of its third largest city, Cochabamba. After a 40-year concession was awarded to the company Aguas del Tunari (a subsidiary of Bechtel Corporation), water prices skyrocketed resulting in widespread public protest.[264] The claimant, Aguas del Tunari S.A., abandoned the project and initiated arbitration proceedings against Bolivia claiming that this latter violated some provisions of the Netherlands-Bolivia BIT.[265] In addressing the petition to intervene as amici curiae, the ICSID Tribunal found the initiative admirable and claimed to have seriously considered it.[266]

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[260] See *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case no. ARB/05/22, Award of July 24, 2008; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic,* ICSID Case no. ARB/97/3, Award of August 20, 2007; *Suez*, *Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to the Petition for Amicus Curiae Submission, February 12, 2007.

[261] B. Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?', *Vanderbilt Journal of Transnational Law*, vol. 41, (2008) pp. 775-832; A. Newcombe & A. Lemaire, 'Should Amici Curiae Participate in Investment Treaty Arbitrations?'*, Vindobona Journal of International Commercial Law,* vol. 5 (2001) at 20; E. De Brabandere, 'Human Rights Considerations in International Investment Arbitration', in M. Fitzmaurice & P. Merkouris (Eds.), *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications,* Martinus Nijhoff Publishers, (2012) pp. 183-215.

[262] *Aguas del Tunari, S.A. v. Republic of Bolivia,* ICSID case No ARB/02/03, Decision on Respondent's Objection to Jurisdiction, 21 October 2005, at appendix III.

[263] Petition of La Coordinadora Para la Defensa del Agua y Vida, La Federacion Departmental Cochabamba de Organizaciones Regantes, Sempa Sur, Friends of the Earth Netherlands, Oscar Olivera, Omar Ferdandez, Father Luis Sanchez, and Congressman Jorge Alvarado to the Arbitral Tribunal (29 August 2002)

[264] Ibidem.

[265] *Aguas del Tunari, S.A. v. Republic of Bolivia* case, at 1 para. 3.

[266] *Aguas del Tunari, S.A. v. Republic of Bolivia* case, at appendix III-2.

However, the Tribunal concluded that it was beyond it authority to decide whether or not a non-disputing party could join the proceedings.[267]

Although the early ICSID tribunal decision had refused non-disputing parties' petitions to intervene as amici curiae, several subsequent decisions confirmed the authority of an ICSID tribunal to receive such submissions.[268] The first decision in this regard has been rendered in *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A, v. the Argentine Republic.*[269] This case concerns an investment dispute over the world's largest water distribution and waste water treatment privatisations in the city of Buenos Aires in Argentina. To achieve the privatisation, the Argentine Republic granted an exclusive concession to an entity, Aguas Argentinas S.A., controlled and managed by some local and European investors as well as the IFC.[270] This concession was to extend over thirty years until the year 2023.

The cause of action arose when the claimant alleged harm caused to its business on account of certain general measures adopted by the Argentine Government in response to the 2001-2003 financial crisis. On 17 April 2003, Aguas Argentinas and its European shareholders initiated arbitration proceedings against the Argentine Republic claiming it had violated provisions in the 1993 Argentina-France, the 1991 Argentina-Spain and the 1990 Argentina-U.K. BITs.[271] Meanwhile, a group of NGOs submitted a "Petition for Transparency and Participation as Amicus Curiae" with the Secretary of the Tribunal.[272] The arbitration tribunal allowed the

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[267] Ibidem.

[268] See ICSID, 'Decisions on Non-Disputing Party Participation', available at https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Decisions-on-Non-Disputing-Party-Participation.aspx, accessed 20 July 2015.

[269] *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic,* Order in Response to a Petition for Transparency and Participation as Amicus Curiae, ICSID Case No. ARB/03/19, 19 May 2005.

[270] IFC, 'Summary of Project Information (SPI)', available at http://ifcext.ifc.org/ifcext/spiwebsite1.nsf/ProjectDisplay/DataConversion4932, accessed 20 July 2015. See also *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability (*Suez/Vivendi* case), 30 July 2010, at para. 1.

[271] *Suez/Vivendi* case, at para. 1.

[272] Asociación Civil por la Igualdad y la Justicia (ACIJ) et al., 'Petition for Transparency and Participation as Amicus Curiae', In case No. ARB/03/19 before the ICSID, 27 January 2005, available at https://www.escr-net.org/sites/default/files/SuezAmicus_27January_05_English.pdf, accessed 20 July 2015.

petitioners to file amicus submissions to provide the Tribunal with their perspectives, arguments or specific information on the subject matter of the case.[273]

The Tribunal first relied on Article 44 of the ICSID Convention, which grants the arbitration tribunal the power to decide procedural questions that are not regulated by the rules of the ICSID Convention. It further relied on international arbitral proceedings in the practices of NAFTA, the Iran-United States Claims Tribunal, and the World Trade Organisation (WTO) to support its power to admit amici curiae submissions.[274] Furthermore, the Tribunal set forth three basic criteria required to accept amicus submissions, namely "a) the appropriateness of the subject matter of the case; b) the suitability of a given non-party to act as amicus curiae in that case, and c) the procedure by which the amicus submission is made and considered."[275]

In applying these criteria to the subject matter of the case, the tribunal found that this case involves a "particular public interest" because it focuses on the water distribution and sewage systems of a large metropolitan area.[276] The Tribunal also noted that the acceptance of amicus submissions would have the further positive outcome to increase transparency in arbitration proceedings between investors and States.[277] However, the Tribunal emphasised that participation as amicus curiae is not identical to participation as a party to arbitration and recalled the purpose of amicus submissions, which is to assist the tribunal with expertise and experience that parties might not provide.[278]

The foregoing decision introduced a fundamental precedent in the practice of arbitrations tribunals operating under the ICSID rules. Indeed, it was the first time that an arbitration tribunal decided to accept the participation of civil society organisations as amicus curiae within the framework of proceedings in which some parties had opposed to it. In subsequent cases, the authority of the tribunal to accept amicus submissions was confirmed in accordance with the criteria outlined in the *Aguas Argentinas* case.[279] In 2006, ICSID updated its rules of

[273] *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic,* Order in Response to a Petition for Transparency and Participation as Amicus Curiae, ICSID Case No. ARB/03/19, 19 May 2005.
[274] Idem, at para. 15.
[275] Idem, at para. 17.
[276] Idem, at para. 19.
[277] Idem, at para. 22.
[278] Idem, at para. 24.
[279] See *Aguas Provinciales de Santa Fé SA*, *Suez Sociedad General de Aguas de Barcelona SA and Interagua Servicios Integrales de Agua SA v. Argentina*, ICSID Case No. ARB/03/17, Order of 17 March 2006.

procedure for arbitration proceedings to introduce, among other things, a formal acceptance of the authority for investment tribunals to receive amicus curiae submissions.[280]

In the *Methanex Corporation v. the United State of America (USA),*[281] the arbitration tribunal decided in favour of third parties that had petitioned to intervene as amici curiae. This case arose under the NAFTA Chapter Eleven and was resolved under the *ad hoc* Arbitration Rules of the UNCITRAL. Methanex Corporation, a Canadian-based company that produces methanol which is a key component of methyl tertiary butyl ether (MTBE), claimed US$ 979 million in compensation from the USA. Methanex alleged to have suffered a loss of profit following the State of California's ban on the sale and use of the gasoline additive or MTBE. As for the State of California, banning MTBE was necessary because this additive is a potential groundwater contaminant that poses significant risks to human health and safety, and the environment.

A group of NGOs submitted two requests for permission to file amicus curiae briefs, to make oral submissions and have observer status at oral hearings.[282] Neither the UNCITRAL Arbitration Rules nor Chapter Eleven of the NAFTA Agreement contained any explicit provision in respect of amicus curiae submissions. The Claimant and Mexico opposed the acceptance of amicus curiae briefs, while both Canada and the US showed support. The Tribunal inferred from its general procedural powers under Article 15(1) of the UNCITRAL Rules to find that it has discretion to accept amicus curiae submissions.[283] In support of this approach, the tribunal cited the practice of the WTO dispute settlement mechanism and the Iran-US Claims Tribunal.[284] Furthermore, the Tribunal highlighted that the subject matter of the case implied a public interest and that the Chapter 11 arbitral process could appear more open and transparent.[285] However, the Tribunal made it clear that UNCITRAL Rule 25(4), which requires hearings to be private unless otherwise agreed by the parties, limits the

[280] The Amended Rules and Regulations came into effect on 10 April 2006 and are available at https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Pages/ICSID-Convention-Arbitration-Rules.aspx, accessed 20 July 2015.

[281] *Methanex Corporation v. The United State of America,* UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 03 August 2005. For comment, see P. Dumberry, 'The Admissibility of Amicus Curiae Briefs by NGOs in Investors-States Arbitration: The Precedent Set by the Methanex Case in the Context of NAFTA Chapter 11 proceedings', *Non-States Actors and International Law,* vol. 1, No 3, (2001) pp. 201-214.

[282] See *Methanex Corporation v. USA*, Decision of The Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", 15 January 2001 paras 6-8.

[283] Idem, at para. 25-31.

[284] Idem, at para. 32-33.

[285] Idem, at para. 49.

flexibility of Article 15(1). The Ad Hoc Tribunal granted the petitioners leave to file written submissions as amici curiae, but it rejected all other requests due to the private character of the dispute.[286]

A similar application was considered in *United Parcel Service of America Inc (UPS) v Canada*[287] by another ad hoc tribunal instituted under the NAFTA Chapter Eleven. This tribunal operated under the UNCITRAL arbitration rules. The claimant challenged Canadian measures which it alleged unfairly restricted access to the Canadian postal services market. A Union of workers and one NGO sought to be joined as parties or, failing that, to participate as amici curiae.[288] In that capacity, the petitioners applied for the right, among others, to make submissions and access to case materials.[289] The Tribunal invoked Article 15(1) of the UNCITRAL Arbitration Rules in order to allow the amici curiae to file written submissions, but relied on Article 25(4) to refuse them access to the oral hearing.[290] As for the access to the case's materials, the tribunal concluded it was a matter for the parties to agree.

Notwithstanding the above, third parties whose rights have been violated as a result of the operations of a project company would always have recourse to global, regional and local mechanisms for the protection of human rights, whenever they are available.[291]

4.4.2. Third Parties Recourse under Human Rights Treaties

Notwithstanding the IFIs are not signatories of human rights treaties and thus human rights treaties' obligations cannot be enforced against them, human rights courts can still play an adjudicatory role in a dispute arising out of the implementation of an IFI-funded project. That would be case when affected parties frame their claim in a way that clearly identify a State party to human rights treaty as the primary duty bearer of the human rights obligation vindicated. As already mentioned most regional mechanisms for the protection of human rights enable individuals to bring a claim about the violation of their treaties-based rights by state parties before a regional court, which in turns can render a decision that is binding on the

[286] Idem, at para. 53.
[287] *United Parcel Service of America Inc (UPS) v Canada,* UNCITRAL (NAFTA), Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001,
[288] Idem, at 2*ff*.
[289] Ibidem.
[290] Idem, at para. 66-69.
[291] For a comprehensive development of remedies for human rights violations, see D. Shelton, *Remedies in International Human Rights Law*, Oxford University Press, (2005).

recalcitrant State. The European Court of Human Rights has rendered extensive decisions in this regard that has substantively impacted on the development of human rights throughout the European Union.[292] The American and African counterparts have equally contributed to the development of human rights with landmark cases involving individuals and groups whose rights were affected by an investment.

The *Awas Tingi v. Nicaragua* can serve as an example.[293] This cause arose with the Nicaragua's decision to grant Sol del Caribe S.A. (SOLCARSA), a South Korea-controlled corporation, a concession for logging in the communal lands of the Mayagna indigenous community, the Awas Tingni.[294] This community claimed the propriety in the land on the basis of traditional tenure. After several unsuccessful attempts at resolving the issue before domestic courts, the case was brought before the Inter-American Commission on Human Rights, and then before the Inter-American Court of Human Rights.[295] These proceedings ended up with the cancellation of the controversial logging concession and the endorsement by the Inter-American Court on Human Rights of the customary right of the Awas Tingni community over the disputed lands, alongside their right to the preservation of their cultural integrity.[296]

Another case that bears particular significance for individuals and communities affected by the harmful impact of investments is the 2001 case of Social and Economic Rights Action (SERAC) and another v. Nigeria.[297] In March 1996, a group of NGOs initiated a complaint against Nigeria alleging that the military government of Nigeria had been directly involved in reckless oil development practices in the Ogoni region.[298] The state oil company, Nigerian National Petroleum Company (NNPC), formed a joint venture with a subsidiary of a subsidiary of Royal Dutch Shell plc, Shell Petroleum Development Corporation (SPDC), whose activities in the Ogoni region allegedly caused environmental degradation and health problems among the Ogoni people.[299]

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[292] See M. Scheinin, 'Access to Justice before International Human Rights Bodies: Reflections on the Practice of the UN Human Rights Committee and the European Court of Human Rights', in F. Francioni (ed.), *Access to Justice as a Human Right*, Oxford, Oxford University Press, (2007) pp. 135-152.
[293] *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001, Inter-American Court of Human Rights, Series C No. 79 (2001).
[294] Idem, at para. 6.
[295] Idem, at para. 6 & 29.
[296] Idem, at para. 173.
[297] *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).
[298] Idem, at para. 1 & 11.
[299] Idem, at para. 2.

The African Commission on Human and Peoples' Rights (the Commission) asserted its jurisdiction to hear a complaint in October 1996 and reached a decision on the merits in October 2001. The Commission found the Nigeria in violation of several provisions of the African Charter and recommended some measures to ensure the protection of the environment, health and livelihood of the people of Ogoniland.[300] African regional courts such as the SADC Tribunal and the East African court can also play a determinant role in advancing the interests individuals and communities affected by IFI-funded projects.[301]

The relevance of the third parties' intervention in arbitrations proceedings and third parties' recourse under human treaties is that they both provide project affected parties with an indirect means to seek accountability. The foregoing case laws attest that affected third parties can have recourse to the indirect means of amici curiae to voice their concerns in investment arbitration disputes. They also suggest that affected individuals and groups can, whenever possible, resort to regional human rights courts to redress the harmful impact of foreign investments on their rights and the environment.

However, too much reliance should not be placed on these two regimes as they do not always coincide. Indeed, a closer examination of human rights and investment law regimes suggests that member States did not see fit to address legal issues that arose from the two regimes in the same way. The examination of case laws in both regimes suggests that States may have made a choice to provide a much robust protection regime to investors as opposed to what individuals enjoy in identical settings.[302] The differentiation between the norms that protect the interests of individuals and those that protect commercials interests of the participants to IFI-funded projects is a big and complex topic which cannot be fully analysed in the confines of this research. But, at the very least, a reference to that differentiation helps justifying the limited prospects for affected third parties to receive reparation by using the legal avenues available to them. An accountably forum cannot provide more relief to a claimant if the primary norms which that forum is supposed to enforced do not protect the interests of the claimant adequately.

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[300] Idem, at 10.

[301] See K. J. Alter et al., 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences', The European Journal of International Law, vol. 27, No. 2 (2016) pp. 293–328.

[302] See O. Mayorga, 'Arbitrating War: Military Necessity as a Defense to the Breach of Investment Treaty Obligations', *Harvard Program on Humanitarian Policy and Conflict Research*, Policy Brief August (2013) pp. 1-9; L. E. Peterson, *Human Rights and Bilateral Investment Treaties: Mapping the Role of Human Rights Law Within Investor-State Arbitration,* International Centre for Human Rights and Democratic Development, (2009) at 7.

That is perhaps one main thread that emerges from the examination of the standards which apply to IFI-funded operations and the fora that enforce those standards. The weakness of the standards that apply to affected parties during the design and implementations of IFI-funded projects, as compared to what governs the relationship between contracting parties, translates into the limitations of accountability fora to provide reparation. This situation highlights the need to integrate the interests of project affected communities into the design and implementation of projects whose main participants are more concerned with meeting their personal interests than they are concerned with the fate of non-contracting parties

4.5. Accountability of IFIs in the Lens of Law of International Responsibility

This category covers the articles on international responsibility of IOs (ARIOs) of which the UN General Assembly has taken note of and handed over to the world as of December 9, 2011.[303] The ARIOs were adopted by the International Law Commission (ILC) in August 2011, as part of its contribution to the codification and progressive development of international law.[304] The adoption of the ARIOs brought to a conclusion nearly ten years of reflexion by the ILC, governments, and organisations on this specific topic, but also decades of studies of wider subject of international responsibility, which had initially focused on state responsibility.[305]

Responsibility and liability are often associated with the core sense of legal accountability. Scholars characterise the international legal responsibility as "a particular form of legal accountability, focused upon the legal consequences of breaches of international law that are attributable to an international actor."[306] While responsibility under international law is incurred by subjects of international law for wrongful committed by them, liability is often associated with civil liability under domestic or in the context of international arbitration law. It occurs regardless of the lawfulness of the conduct. However, accountability is considered as going beyond responsibility and liability and includes models that are less stringent, such IFIs' independent review mechanisms.

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[303] UN General Assembly, 'Resolution Adopted by the General Assembly on 9 December 2011, (A/Res/66/100).
[304] 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) pp. 52-172, [hereafter ARIO (A/66/10)].
[305] ILC, 'Draft Article on Responsibility of States for Internationally Wrongful Acts, With Comments', UN General Assembly, (A/56/10), in the *Yearbook of the International Law Commission,* vol. II, Part Two, (2001) pp. 31-143, [hereafter the ARS (A/56/10)].
[306] J. Brunée, 'International legal Accountability through the Lens of the Law of State Responsibility', *Netherlands Yearbook of International Law,* vol. 36 (2005), at 22.

As it is the case with the articles on state responsibility, the scope of the ARIO regime is limited in many respects. The ARIOs apply only to issues of international responsibility that concern IOs and that were not addressed in the articles on state responsibility.[307] The ARIOs formulate the basic rules of international law concerning the responsibility of IOs for their wrongful acts.[308] The ARIOs place great emphasis on secondary rules of responsibility of IOs and do not define the content of international obligations, the breach of which gives rise to responsibility.[309] To put it differently, the ARIOs establish the general conditions under international law for an IO and a State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom.

Article 3 of the ARIOs posits the following general principle: "[e]very internationally wrongful act of an international organisation entails the international responsibility of that organisation". An internationally wrongful act consists of two elements. [310] The first element is the conduct (positive act or omission) of the organisation that constitutes a breach of an obligation under international law. Such an obligation may result from a treaty binding the IO or from any other source applicable to the organisation. The second element of an internationally wrongful act is the attribution of the wrongful conduct to an IO. Article 7 regulates the allocation of responsibility between an IO and its member States. The conduct of organs of a State or organs or agents of an IO placed at the disposal of another IO are attributable to the latter organisation, if it exercises effective control over that conduct.[311]

In addition to responsibility for an organisation own conduct, the ARIOs provide for further possibility for incurring responsibility. This includes instances where a wrongful conduct materialised in terms of aid or assistance, direction and control or coercion, is attributable to the State or, as the case may be, jointly to the State and IO.[312] An IO may also incur responsibility if it circumvents its international obligations by adopting a decision binding members or authorising them to commit an act that would be internationally wrongful if committed by the organisation itself.[313] The latter option is quite remarkable as it addresses the case where the implementation of an act in breach of international obligations is attributable to

[307] Article 1 of the ARIOs (A/66/10) at 54; Article 57 of the ARS (A/56/10) at 144; the ARIOs (A/66/10) at 69.
[308] Articles 3 to 27 of the ARIOs (A/66/10).
[309] Articles 3 to 42 of the ARIOs (A/66/10).
[310] Article 4 of the ARIOs (A/66/10).
[311] For further development on this issue, see ILC commentaries beneath article 7 of the ARIOs (A/66/10).
[312] Article 16 of the ARIOs (A/66/10).
[313] Article 17 of the ARIOs (A/66/10).

a Member State which is, however, not in a position to lawfully remedy the wrong, as its conduct is determined by an act of an IO.

The regime of responsibility under the ARIOs can only be invoked by an IO or a State.[314] The ARIOs do not consider the content of responsibility and its invocations by an actor other than an IO or a State. It is worth noting however that the ARIOs circumscribe the legal consequences and remedies for a breach of a primary rule of positive international law.[315] Such legal consequences are the same regardless the obligation concerned is owed to a State or an IO individually,[316] or to several States or IOs,[317] or to the international community as a whole.[318] In all instances, the responsible entity must cease the violation[319] and make full reparation for injury caused,[320] in addition to offering the necessary assurance of non-repetition.[321] These secondary obligations arise directly from the breach by an IO or, in certain exceptional cases,[322] the breach by a State of its primary legal obligations.

Like the articles on state responsibility, the ARIOs provide for a distinction between injured and non-injured IOs or States to limit not only the ability of any of these plaintiffs to invoke the responsibility but also the remedies that they could seek.[323] While non-injured States or IOs may only claim cessation and assurance of non-repetition, injured States or IOs can claim the full spectrum of remedies from the responsible entity, including reparation for the injury suffered.[324] Moreover, non-injured IOs or States can claim reparation in the interest of the injured State or IO or the beneficiary of the obligation breached.[325] The latter option is intended to provide the means of protection for the collective interest at stake.

Although the ARIOs intends to cover instances an IO incurs international responsibility, they seem not to be of immediate relevance to this research, which is concerned with the issue of legal accountability of IFIs towards affected third parties. But, the ARIOs seem to reconcile

[314] Articles 43 of the ARIOs (A/66/10).
[315] Articles 28 to 42 of the ARIOs (A/66/10).
[316] Articles 43 (a) of the ARIOs (A/66/10).
[317] Article 43 (b) of the ARIOs (A/66/10).
[318] Ibidem.
[319] Article 30 (a) of the ARIOs (A/66/10).
[320] Article 31 of the ARIOs (A/66/10).
[321] Article 30 (b) of the ARIOs (A/66/10).
[322] Articles 58 to 62 of the ARIOs (A/66/10).
[323] Articles 43 and 49 §4 (a) of the ARIOs (A/66/10).
[324] Article 34 of the ARIOs (A/66/10).
[325] Article 49 §4 (b) of the ARIOs (A/66/10).

with the purpose of this chapter which is to examine accountability fora of IFIs and their mechanisms. They may have enhanced the overall regime of accountability of IOs by shedding some light on the set of secondary rules that are applicable once an IO has breached a norm of international law. However, the ARIOs fail to provide individuals and groups with practical means of holding IO to account as their underpinning regime of responsibility can only be invoked by an IO or a State.

4.6. Conclusion

This chapter discussed legal accountability fora and related mechanisms as far as the relationship between IFIs and affected individuals or groups is concerned. It began with a conceptual clarification of the notion accountability forum as this latter conveys two different meanings. It showed that literature uses the notion of accountability forum to describe an entity or individual that triggers an accountability process. It also refers to that notion to represent a party or entity that has jurisdiction over such a claim. The chapter adopted this last meaning. Then the chapter moved to clarify its scope as the examination of accountability fora can only be done in reference to the nature of the mechanisms at stake. The chapter stressed that accountability comprises not only legal but also non-legal regimes including political, administrative, financial and legal modes of internal and external scrutiny and monitoring of acts and omissions of an authority, a public entity or an IO. The chapter only focused on accountability fora in the context of legal accountability mechanisms.

Under a legal accountability mechanism, the performance of an actor is assessed against their responsibilities enshrined in the applicable standards. Such an actor would face legal consequences if their performance fails to live up to the relevant standards. The determination of a forum hinges upon the standards to be applied across the accountability processes. The more legal standards apply to an actor; the many are likely to be the accountability fora that would assess the performance of that actor. In a setting involving the performance of States in their respective internal orders, applicable domestic standards (administrative, civil or criminal norms) would give rise to corresponding accountability mechanisms (review of administration decisions, civil liability, and criminal liability). By contrast, applicable international standards would give rise to international accountability mechanisms such as international state responsibility, international enforcement mechanisms of human rights, and commercial or investment arbitration to name a few.

The legal standards applicable to the operations of an IFI are rooted in its internal and external laws. They comprise a large variety of norms that were extensively analysed in chapter 3. These norms carry a corresponding set of accountability fora scattered across the various components of an IFI's legal order. As with the legal accountability of a State, an IFI can be held accountable before an international forum and to a certain extent before a domestic forum, subject to how that forum deals with the immunities of jurisdiction issue. The classification of such fora would take into consideration the nature of the process to be used or the standards against which the operations of an IFI are to be assessed. In that regard, accountability of an IFI can be sought before domestic courts, independent review and compliance bodies, and international judicial jurisdictions or arbitration tribunals. Alternatively, the classification of accountability fora can also hinge upon the distinction between processes that involve a direct claim against an IFI and those that do not.

This chapter also showed that domestic jurisdictions are the most convenient accountability fora as far as the relationship between IFIs and affected individuals or groups is concerned. However, when a domestic court is confronted with a claim against an IFI, it tends to assess whether immunities of jurisdictions impede such a claim. This process inevitably puts the court in a predicament situation. That is to choose between two opposing valid principles, namely the immunity that allows an IFI to deliver the functions it was established for and, on the other hand, the necessity to uphold an individual's right to fair trial. This whole predicament would be inexistent should the court decide to assess its jurisdiction on the subject matter. Either way, the plaintiffs may be left remediless if no effort is made to balance their right to a fair trial against the necessity to prevent a single member state from exercising undue influence on an IFI by way of its courts.

Contrary to immunity provisions in the constituent instruments of most other IOs, immunity provisions in the charters of IFIs do not afford them broad immunities from legal process before national courts. Instead, they determine that actions may be brought against IFIs, but only in a court of competent jurisdiction in the territory of a member in which they have an office, have appointed an agent for the purpose of accepting service of process, or have issued or guaranteed securities. Because the scope of immunity of IFIs is less wide compared to other IOs, domestic courts tend to interpret it broadly to avoid adjudicating a dispute involving non-contractual parties. Notwithstanding the above, the analysis of domestic case law showed that there is still room for arguments in favour of a waiver of immunities. The immunities of an IFI can be

waived when the particular type of suit would further its objectives. A domestic court would allow suit against an IFI if there is no other reasonable alternative means to pursue the claim.

The jurisdictional limitations of a domestic court would vanish if the underpinning claim does not involve an IFI as a defendant. That would be the case if a domestic court is asked to settle a dispute between affected third parties and a vehicle company through which an IFI has channelled its financial services. A domestic court would assert its jurisdiction over the activities of the vehicle company in the same manner it would control any indigenous or foreign investment in the host State. Alternatively, affected third parties can always have recourse to the indirect means of amici curiae to voice their concerns in investment arbitration disputes. Affected third parties can also, whenever possible, resort to compliance mechanisms under human rights treaties to redress the harmful impact of foreign investments on their rights and the environment. However, they should not put too much reliance upon these two regimes as they do not always coincide.

In light of the jurisdictional limitation of domestic courts, IFIs provide for independent review mechanisms enabling third parties without contractual ties with IFIs to seek redress against them as a result of the poorly designed or implemented projects they have supported. This chapter showed that these mechanisms should not be equated to adjudicatory fora capable of determining whether the rights of the plaintiffs have been infringed during the design or implementation of a project supported by IFIs. These mechanisms do not provide an enforcement opportunity of legally protected interests of third parties, nor do they make binding decisions on the IFIs. They merely serve a compliance function, which is to ensure that IFIs follow their own policies and procedures, particularly their safeguard policies, in the design and implementation of IFI-funded projects. It is a common understanding, however, that IFIs' safeguard policies are aimed at managing risks and unintended social and environmental consequences resulting from IFI-funded operations. Although some of their components contain normative elements that are binding for IFI staff and stakeholders, the infringement of IFIs' policies does not give rise to any legal liability. More importantly, however, and depending on one institution to another, independent review mechanisms perform problem-solving and advisory functions.

This chapter also analysed the issue of accountability of IFIs in the lens of the law of international responsibility. It characterised international legal responsibility as a particular form of legal accountability that focuses on the legal consequences of breaches of international

law that are attributable to an international actor. It showed that responsibility and liability are often associated with the core sense of legal accountability. While responsibility under international law is incurred by subjects of international law for wrongful committed by them, liability is often associated with civil liability under domestic or in the context of international law.

This chapter examined the salient feature of the articles on international responsibility of IOs adopted by the ILC. It showed that the ARIOs may have enhanced the overall regime of accountability of IOs by shedding some light on the set of secondary rules applicable once an IO has breached a norm of international law. However, they fail to provide individuals and groups with practical means of holding IO to account as their underpinning regime of responsibility can only be invoked by an IO or a State.

CHAPTER FIVE

LEGAL CHALLENGES OF KEEPING IFI OPERATIONS ON TRACK

5.1. Introduction

To close the loop on this study on legal accountability of IFIs, the last question in the series of fundamental questions relating to any study of accountability must be addressed; that is accountability for what purpose? The aim here is to analyse the objectives of promoting legal accountability for IFI-funded project affected third parties. It is also about assessing whether this category of plaintiffs could expect a reasonable level of accountability and justice from the current legal framework of IFIs and associated accountability mechanisms.In a sense this chapter draws some conclusions of what has been developed in the previous chapters and lay out a fondation for the recommendations of this research.

As has been shown in the previous chapters, accountability is a multifaceted phenomenon that can be envisaged in many contexts including, financial, political, administrative, professional and legal. Although they rely on different principles and procedures, all existing accountability paradigms seek to ensure that the norms governing the operations of IFIs are applied accordingly and responsive measures are taken or enforced to account for the performance of the relevant actors, be they IFIs or the related project company. Ultimately, accountability mechanisms seek to strengthen and support the ability of IFIs to achieve their mission to promote economic and social development. In other words, they contribute to IFIs' endeavours to achieving sustainable development in its three dimensions through economic growth, protecting the environment and promoting social inclusion.[1] Accountability mechanisms could increase the prospect of achieving these goals by ensuring that those who design and implement development projects will take to account the interests and concerns of those affected, particularly, by acknowledging the legitimate right of the latter to invoke accountability. However, it is worth noting that the opposite argument could also be equally valid. Indeed, different stakeholder groups have different expectations and demands as to what the outcomes should be of various accountability processes, and these expectations and demands could be competing or, at least they cannot be complementary. Notwithstanding the above, another factor that could increase the effectiveness of developments projects in the participation of affected people in the formulation of development projects and policies.[2] Both accountability

[1] UN General Assembly, Resolution adopted by the General Assembly on 27 July 205: Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda) (A/RES/69/313), at 1-2.

[2] S. Paul, 'Community Participation in Development Projects: The World Bank Experience, World Bank Discussion Papers 6, (1987) pp. 1-34; P. Boone, 'Politics and the Effectiveness of Foreign Aid', *European Economic Review,* vol. 40, (1996) pp. 290-329; S. Herz & A. Ebrahim, 'A Call for Participatory Decision-Making: Discussion Paper on World Bank-Civil Society Engagement', Commissioned and Presented by the Civil Society Members of World Bank-Civil Society Joint Facilitation Committee, June 15, (2005) pp. 1-210.

and people participation are important tools for strengthening and supporting the ability of IFIs and related project company to achieve their mission.

The correlation between project quality and the extent and quality of public participation and accountability has long been recognised by Governments, IFIs, civil societies and academics.[3] The Paris Declaration on Aid Effectiveness highlights the need for both partner countries and donors to enhance mutual accountability and transparency in the use of development resources.[4] An accountability mechanism within the World Bank Group, the Independent Evaluation Group, made a claim in 2006 that accountability is essential if projects are to be successful.[5] The UNDP had also stressed the link between a lack of accountability and poor development results in key areas such as sustainable livelihoods in terms of education, healthcare, wages and lands, the quality of the environment or even the physical security of affected populations.[6] In particular, the UNDP linked failures of large infrastructure projects financed by IFIs with inadequacies of accountability of those projects,[7] as was the case with the Lesotho Dam and Inga 1 and 2 dams analysed in chapter 2.

As has been shown elsewhere in this research, the infrastructure of the legal paradigm of accountability of IFIs is underpinned by a set of standards that comprises a body of hard and soft laws. These standards govern the rights and obligations of the participants to and other stakeholders of IFI-funded projects. They are enforced through a verity of fora ranging from domestic courts to independent review bodies, international judicial bodies and arbitration tribunals.[8] Each of these fora is governed by specific procedural rules that deal with issues such legal standing, competence and enforcement of decisions.

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[3] For further development on this issue see S. Paul (1987) pp. 1-34; K. Finsterbusch & W. A. van Wicklin III, 'Beneficiary Participation in Development Projects: Empirical Tests for Popular Theories', *Economic Development and Cultural change,* Vol. 37, No. 3 (Apr., 1989) pp 573-593*;* F. Cleaver, 'Paradoxes of Participation: Questioning Participatory Approaches to Development', *Journal of International Development,* vol. 11, No. 4, (1999) pp. 597-612; L. B. Bingham et al., 'The New Governance: Practice and Process for Stakeholder and Citizen Participation in the Work of Government', *Public Administration Review*, vol. 65, No. 5, (Sept.-Oct. 2005) pp 547-558; J. Prno & D. S. Slocombe, 'Exploring the Origins of "Social Licence to Operate" in The Mining Sector: Perspectives From Governance and Sustainability Theories', *Resources Policy,* vol. 37 (2012) pp. 346-357; C. Espósito, Y. Li & J. P. Bohoslavsky, *Sovereign Financing and International Law: The UNCTAD Principle on Responsible Sovereign Lending and Borrowing*, Oxford University Press, (2013); S. Edwards, 'Economic Development and The Effectiveness of Foreign Aid: A Historical Perspective', *National Bureau of Economic Research*, Working Paper 20685, (2014) pp. 1-47.

[4] The Paris Declaration on Aid Effectiveness, (2005) at 8.

[5] Independent Evaluation Group, 'Annual Review of Development Effectiveness 2006: Getting Results', The World Bank Group, (2006) at 33.

[6] A. M. Goetz & R. Jenkins, 'Voice, Accountability and Human Development: The Emergence of A New Agenda', Occasional Paper-Human Development Report Office, UNPD, (2002) pp. 11-34.

[7] Idem, at 27.

[8] See Section

Ideally, all these mechanisms should share the same overreaching objective to contributing to the effectiveness of IFI-funded projects. However, this ability is limited by noticeable mismatches in the level of protection that various stakeholders enjoy. Just like in commercial undertakings, individual players in IFI-funded projects pursue often divergent interests on the ground, while maintaining an illusion of coherence through the use of a shared development discourse. On the other hand, legal accountability mechanisms associated with these projects are not designed to be altruistic. It is important to keep in mind that the primary objective at this stage is not to propose reform of standards applicable to IFI-funded operations or fora where those standards are enforced, even though such an outcome would be desirable. Rather, the intention is to highlight the strengths and weaknesses legal accountability mechanisms with a view to establishing whether and to what extent affected people could rely on them to further their interests.

This chapter concludes that the infrastructure of legal accountability create an opportunity for affected people to seek accountability of an IFI or a project company before an accountability forum. However, it does not give such a forum an unequivocal authority to protect the interests of this category of plaintiffs. While this conclusion has been reached elsewhere,[9] the reading of the findings of relevant accountability fora through the lens of the affected parties' perspective would help unveiling the inherent restrictions of accountability mechanisms and how this translate into limitations for this category of plaintiffs. It also speaks to the selective manner in which legal tools are utilised in the legal order of IFIs.

5.2. Limited Capability of Applicable Standards to Protect the Interests of Stakeholder Groupings Equally

The current landscape of standards that apply to IFIs and their operations provide multiple layers of protection for contracting parties at both the national and international level. While the applicable norms cover a wide range of issues that affect every category of stakeholders, they seem to exhibit an emphasis on protecting the interests of contracting parties to a financial agreement.[10] These include IFIs and the vehicle company through which a project funding is channelled as well as the sovereign, public and private borrowers that have applied for the project funding and, eventually, the guarantors that have committed to reimbursing such funding in case the borrowers fail to do so.

[9] See Section 4.2., Section 4.3., and Section 4.3 .supra.
[10] See Section 3.3 of the Chapter 3, supra.

This legal framework is entrenched, robust and designed to remove risks and ensure profit from IFI-funded projects. The crafting of the laws and policies that govern the operations of IFIs reconciles the differing objectives of contracting parties and enables each of them to stand to gain if the project is completed.[11] Admittedly, the existing legal framework of IFI operations provides some level of legal protection for non-contracting parties such as project affected peoples. However, as has been shown elsewhere, this protection is neither adequate nor fully enforceable.[12] In fact, it gives the impression that when laws and policies have been used to protect the interests of this category of stakeholders, they have been used very sparingly.

The large infrastructure projects can facilitate economic growth and development. IFIs, governments and multinational corporations are attracted to them because of their potential to bring big and profitable contracts. On the flip side, however, these projects carry high risk and high impact for the project participants and third parties. Regardless of the underpinning objectives of large infrastructure projects, the materialisation thereof has often dictated the device policies and legal frameworks that are conducive to private investments. All IFIs have developed strategies to improve the investment and business climate in host States. At the AfDB for example, these strategies include "supporting governments 'efforts to strengthen the laws, policies tax systems, rights, regulations and procedures that govern business, as they nurture not just their domestic private sectors, but also those of their regions."[13] There is a consensus between IFIs, governments and businesses that the applicable legal framework must protect the interests of those investing in the host countries. This legal framework provides multiple layers of protection both at the national and international levels.[14]

As has been shown elsewhere, IFIs enjoy a robust legal protection in their dealings with the sovereign, public or private clients.[15] Financial agreements concluded between IFIs and their clients are insulated from judicial process in the country where the implementation is carried

[11] See F. Cleaver (1999) at 598; G. D. Vinter et al., *Project Finance: A Legal Guide*, Sweet & Maxwell, (2006) at 1; L. Cotula, *Human Rights, Natural Resource and Investment Law in a Globalised World: Shades of grey in the Shadow of the Law*, Routledge, (2012) at 15*ff*.
[12] See Section 3.3*ff*. and Chapter 4, supra.
[13] AfDB Group, 'Supporting the Transformation of the Private Sector in Africa: Private Sector Development Strategy 2013-2017', AfDB Group, (July 2013) at vii.
[14] See R Geiger, 'The Unilateral Change of Economic Development Agreements', *The International and Comparative Law Quarterly,* vol. 23, No. 1, (1974) pp. 73-104; J. W. Salacuse, 'Direct Foreign Investment and the Law in Developing Countries'*, ICSID Review*, vol. 15, No. 2, (2000) pp. 382-400; M. Sornarajah, *The International Law on Foreign Investment*, Cambridge University Press, (2010); L. Cotula (2012) at 15*ff,* O. De Shutter et al., *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements*, Routledge, (2012).
[15] See Section 3.3.2 supra.

out. There is no comparable legal infrastructure for the protection the interests of project affected people.

This mismatch in the standard of protection among stakeholder groupings limits the capacity of powerless stakeholders to rely on the laws and policies that apply to IFIs and their operations to further their interests. Ironically, however, the canny application of the law has not stopped IFIs and governments from portraying an apparent altruism and commitment to development goals shared by the entire international community, whenever they implement an IFI-funded project. This situation prevails regardless the inadequacy of existing legal framework to back that altruism and commitment. By contrast, IFIs and governments have upheld an impressive array of legal infrastructure that protects the assets and other interests of contracting parties to an IFI-funded project, particularly the investors, the project company and the lenders.

Interestingly, laws and policies that apply to IFIs and their operations have weakened some of the embedded theories in general international law. This is the case of the functions of a State in connection with its population. Indeed, IFIs, public participation scholars, and civil societies have begun to question the validity of the widely held assumption in general international law that States act on behalf of their people.[16] While the limitations of this assumption have been highlighted,[17] the view that governments are proper representatives of their peoples remains most prevalent. This explains why, for example, the constitutions of IFIs do not provide for affected people representation in the governing bodies of these institutions, but rather for State representation. At the domestic level, the function of levying taxes with a view to redistributing income remains with governments.

At the institutional level, the Boards of IFIs operate like an accountability forum allowing member States' constituencies to exert direct accountability at the institutional level over the operations of IFIs.[18] In particular, these constituencies rely on the constitutions and internal policies of the IFI concerned not only to approve or reject management's proposal on a project, but also to assess the suitability of remedial actions suggested by the relevant independent review mechanism such as the AfDB's Compliance Review and Mediation Unit. However, the possibilities for affected people to wield some kind of influence over any of these processes are quite limited.

[16] See S. Paul (1987) pp. 1-34; A. M. Goetz & R. Jenkins (2002) at 11-34; F. Cleaver (1999) at 598; S. Herz & A. Ebrahim (2005) pp. 1-210.
[17] Ibidem.
[18] See Section 3.3.1.1.(b) supra.

A number of reasons justify this situation. The Boards of IFIs rarely indulged in direct interaction with the public. The secrecy around the deliberations within the Boards is another factor. Finally, the possibilities for affected people to influence Boards' decisions are compromised by the fact that voting power is disproportionately allocated to member States concerning the oversight of day-to-day activities.[19] In practice, this voting power is exercised by the Director representing each member.[20] State constituencies have no influence over the vote the Director representing their State would cast, even though they might be adversary impacted by it. Most concerned States have little to say concerning the social aspects of a financial service they seek to obtain from IFIs because they are too concerned with an always-expanding range of conditionality attached to such a service. The conditionality-based lending has permitted IFIs to interfere in such areas as the education or judicial system but, most importantly in the business sector by pushing for the enactment of business-friendly legal regimes to attract investors. This approach would make sense if it has led to some commendable outcome. As has been shown elsewhere, that is not the case, unfortunately.[21]

Perhaps most importantly, the capability of applicable standards to protect the interests of affected people is undermined by what some critics have referred to as "the culture of loan approval".[22] This culture is characterised by persistent, powerful and unwritten incentives to move money out the door quickly and in large volume at the expense of project quality.[23] It relies on two sets of intertwined subordinate-superior relationships to keep on happening,

[19] Article IV (3)&(4)(c) of the IFC Articles of Agreement and Article 35 of the Agreement establishing the AfDB. See also IFC, 'Annual Report 2015'(2016) at 82; AfDB, 'Annual Report 2014', (2015) at 165-166.
[20].Ibidem.
[21] See Section 2.4. supra, at introductory comments.
[22] R. Wade, 'Greening the Bank: The Struggle over the Environment, 1970-1995', in D. Kapur et al., *The World Bank: Its First Half Century,* volume 2: 'The World Bank Perspective', (1997) at 612ff; B. Upton, *The Multilateral Development Banks: Improving U.S. Leadership*, Greenwood Publishing Group, (2000) at 27; B. Rich, 'The Wold Bank under James Wolfensohn', in J. Pincus & J. A. Winters (eds), *Reinventing the World Bank,* Cornell University Press, (2002) at 26*ff*; A. Banerjee et al., 'An Evaluation of World Bank Research 1998-2005', World Bank September 24, (2006), pp. 1-165, at 5, 6, 20–21, 126–27; D. Roodman, 'Creditor Initiatives in the 1980s and 1990s', in C. Jochnick & F. A. Preston (eds), *Sovereign Debt at the Crossroads: Challenges and Proposals for Resolving the Third World Debt Crisis,* Oxford University Press, (2006) at 21*ff*; C. Weaver, *Hypocrisy Trap: The World Bank and the Poverty of Reform,* Princeton University Press, (2008); P. Riggirozzi, *Advancing Governance in the South: What Roles for International Financial Institutions in Developing States?,* Springer, (2008) at 88*ff;* S. Berkman, *The World Bank and Gods of Lending,* Kumaran Press, (2008); at 44*ff*; N. Gunaratne et al., 'The International Financial Institutions: A Call for Change', A Report to The Committee on Foreign Relations United States Senate, 111th Congress, 2nd Session, March 10, (2010) at 4; B. Rich, *Foreclosing the Future: The Wold Bank and the Politics of Environmental Destruction,* Island Press, (2013); E. Missoni & D. Alesani, *Management of International Institutions and NGOs: Frameworks, Practices and Challenges,* Routledge, (2013) at 36; K. A. Mingst, 'The African Development Bank: From Follower to broker and Partner', in S. Park & J. R. Strand (eds), *Global Economic Governance and the Development Practices of Multilateral development Banks,* Routledge, (2015) at 82*ff*; Y. Komori, 'The Asian Development Bank: Joining the Fight against Corruption?, in S. Park & J. R. Strand (eds), Global Economic Governance and the Development Practices of Multilateral development Banks, Routledge, (2015) at 32*ff.*
[23] S. Berkman (2008) at 44*ff*; N. Gunaratne et al. (2010) at 4; B. Rich (2013) at 25; Y. Komori (2015) at 33.

namely the staff-management and management-board relationships. The staff are accountable to the management, who in turn, is accountable to the Executive Board. Both staff's and management's performances are assessed against the quantity of the loans that has been approved rather than their quality or compliance with applicable standards.

When it was first evidenced by a World Bank internal task force lead by Willi Wapenhans in 1992 (hereafter the Wapenhans Report),[24] the culture of approval was believed to stem from a combination of systemic issues. In particular, the Wapenhans Report highlighted the lack of interest from the part of the Bank Group, its donors and its clients on the effectiveness of the development impact of projects funded by the Bank Group, at least in terms of social and environmental protection.[25] The pressure to lend was compounded by the Bank Group's deference to borrowing governments, in other words, the desire to please or least not to offend the latter;[26] not to mention the factor concerning the personal career advancement.[27] Furthermore, the report noted that the projects appraisal process that was supposed to evaluate the environmental and social impacts of the proposed projects was used mainly as a marketing device for securing loans.[28]

Other IFIs followed the same patterns lending more and more to member States and organisations, and to financial intermediaries that in turn would lend for specific projects.[29] These institutions were not subject to IFIs' safeguard policies, or least the said policies were not properly implemented as existing incentives acted as barriers to desirable changes in behaviour. This contradiction between the declared aim of poverty alleviation and environmentally sustainable development and the practice of IFIs is well captured in the following excerpt of the famous March 12, 1996, meeting between the then president of the World Bank, James Wolfensohn, and 300 senior managers:

> Mr. President, the second-most recurrent theme in your appeals, after today's theme of cynicism and lack of trust [of Bank staff vis-à-vis management], is client responsiveness, which can be rephrased as "Why can't we be more like merchant banks, which are quick in providing what their customers ask…. We keep assuming the client is the government…. [But] we can't have our cake and eat it too. We have to

[24]W. A. Wapenhans et al., 'Effective Implementation: Key to Development Impact' (Wapenhans report), Report of the Portfolio Management Task Force, September 22, (1992) pp. 128.
[25] Idem, at iii-iv.
[26] Idem, at 16.
[27] Idem, at 17.
[28] Idem, at 14.
[29] D. Knox et al. 'Report of the Task Force on Project Quality for The African Development Bank: Quest for Quality, AfDB, (1994), quoted by E. P. English & H. M. Mule, *The African Development Bank*, Volume. 1 of The Multilateral Development Banks, Lynne Rienner publishers, (1996) at 89-90; B. Upton (2000) at 27; B. Rich (2013) at 136; K. A. Mingst (2015) at 82.

> make a choice. *Either we treat our governments as clients and we behave like merchant banks, in which case we owe it—again, to ourselves, in the first place, and to our counterparts, second—to stop talking about the environment, about women in development, about poverty alleviation, and so on, as priorities.* … If the government is not our client … [then] the client is the people of the countries we work with, and the governments are agencies, instruments, with whom we work to meet our clients' needs.[30]

Without much conviction, Wolfensohn replied as follows:

> I, obviously, have perceived the task of moving from investment banking to development banking in a too-simplistic fashion…. There are no generalizations about governments and their relationships with people…. We have a legal client that is the government…. By law the Bank can lend only to governments…. We're ultimately serving the people... But our instrument is to work with government…. So it is a process of persuasion, of discussion, of cajoling, of advice and, in some cases, agreeing not to agree and doing no lending … to help a government and not help the people is not going to come through, in terms of economic stability, political stability, social stability…. And I still go back, as I said before … I judge our effectiveness by the smile on the child's face in the village. I would extend it to the mother.[31]

The criticisms about the culture of loan approval are still relevant today.[32] The tendency of IFIs to push money out under the cloak of a politically correct plan that, however, result in less laudable outcomes in terms of sustainable development, may have new ground to persist. This stems from a desire for the IFIs to remain relevant in a world of growing private-sector and emerging development institutions, such as the newly established BRICs development bank, that offer an alternative source of financing for large-scale infrastructure projects. Evidence of the persistence of this perverse incentive culture has been documented with data from contemporary projects,[33] including the Lesotho Highlands Water Project, the Bujagali Hydropower Project, and the Lonmin Platinum Mining Project alluded to elsewhere in this thesis to name a few.

This situation undermines all the IFIs' efforts to become more accountable, not to mention that it utterly contradicts these institutions' endorsement of sustainable development, understood as a comprehensive process which does not merely focus on economic growth. Certainly, IFIs are to blame, but governments in donor and borrowing countries alike bear the ultimate blame for

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[30] World Bank, 'Meeting of President Wolfensohn with Senior Management, March 12, 1996', World Bank, (1996) at 17, as quoted by B. Rich (2013) at 137.
[31] Idem, at 17-19, as quoted by B. Rich at 137-138.
[32] Independent Evaluation Group, 'Cost-Benefit Analysis in World Bank Projects', The World Bank, (2010) at 4*ff*.
[33] B. Rich (2013); Independent Evaluation Group (2010). See also E. S. Ayensu, 'Report of the Consultant: Second Review of the Independent Review Mechanism (IRM) of the African Development Bank Group', AfDB Group, September 24, (2014) at 17-18.

failing to act effectively to change this situation for the greater good of the shared planet and its inhabitants. That begs for an increasing protection of people as their interests do not necessarily align with those of IFIs, donors, sovereign, public and private borrowers.

5.3. Limited capability of Accountability Fora to Enforce the Interests of Affected Peoples and Increase the Effectiveness of IFI-Funded Projects

As development institutions, IFIs are supposed to promote economic and social development of their sovereign, public or private clients in accordance with their constituent instruments. Unofficially, going beyond the scope of their respective charters, the interventions of IFIs not only contribute to alleviating poverty but also giving individuals and communities in the country where projects have been implemented the leverage to determine their own existence. In other words, while their legal clients remain sovereign, public and private entities, the position of IFIs on their operations is that they contribute to impact positively on people's lives within the countries where IFI-funded projects have been implemented.

Remarkably, the welfare of individuals and communities in the recipient countries has become an important ingredient of development projects since the international community acknowledged that the growth-focused approach to development was inadequate.[34] Most development institutions have stopped using the gross domestic product (GDP) as the sole measurement of development to focus on a wider range of statistics that deal with how people are actually affected. These include the levels of literacy, education standards and health care, the quality, and availability of housing, and the life expectancy. On the other hand, IFIs have increased their influence over some recipient countries as they heavily rely on IFI-support to meet their budgetary expenditures due to their limited ability to mobilise domestic revenues coupled with the limited access to other forms of external capital.[35]

Notwithstanding the above, the implementation of IFI-funded projects does not always result in positive outcomes. To address these shortcomings, stakeholders have recourse to some techniques to ensure that things go according to the plan. One of these techniques is the use of legal accountability fora at the internal, international and domestic levels to ensure that IFI-

[34] See H. T. Patrick, 'Financial Development and Economic Growth in Underdeveloped Countries', *Economic Development and Cultural Change,* vol. 14 No. 2, (Jan., 1966) pp. 174-189; D. A. Rondinelli, *Development Projects as Policy Experiments: An Adaptive Approach to Development administrations,* Psychology Press, (1993) at 61; The Paris Declaration on Aid Effectiveness, (2005); A. O. Hirschman, *Development Project Observed*, Brookings Institution Press, (Apr. 01, 2011) at 177.
[35] UNDP, 'Towards Human Resilience: Sustaining MDG Progress in an Age of Economic Uncertainty', (2011) at 162.

funded project yield expected outcomes. However, the execution of this plan is hampered by hurdles stemming from the imbalance stakeholders concerning the extent and robustness of their legal protection. Another factor is the mismatch of interests that each stakeholder pursuits individually in an accountability process.

As has been noted elsewhere, the legal framework of IFI-operations does not provide the same standard of protections to IFIs, their clients, and project affected people. While the first two categories of stakeholders seem to enjoy a robust protection, law and policies have been used sparingly concerning the protection of the last category of stakeholders. Likewise, IFIs, their clients, and the project affected people do not pursue the same interest during an accountability process. Independent review mechanisms, such as the IFC's CAO or the AfDB's IRM, enable IFIs to secure the efficiency of their operations by discharging more effectively the functions entrusted to them. From IFIs' perspective, their main goal is to legitimize the operations of IFIs vis-à-vis project affected people and provide for shareholders and clients an assessment tool enabling them to measure the efficiency of IFI-operations. By contrast, that mechanism provides project affected people or their representatives with an avenue to seek redress for unintended and harmful consequences they have or are about to suffer as a result of the implementation of an IFI-funded project. From this perspective, independent review mechanisms are means that project affected people use to obtain reparation for the adverse impact of an IFI-funded project.

These seemingly conflicting approaches somehow contribute to making IFI-funded projects meet better development outcomes. A World Bank Inspection Panel's report commissioned at its 15 year work anniversary noted the followings with respect of this accountability paradigm:[36]

- It recognises that the actions of the institutions like the World Bank can have significant impacts on populations, and that these effects can be negative (even if not intentionally so) as well as positive.
- It gives affected people a stronger voice, enlisting and respecting their knowledge, expertise, and experience in the ongoing cooperative work to protect rights and redress implementation problems that arise.
- It expands internal checks-and-balance mechanisms so the people affected by the actions of international institutions can bring their concerns to the attention of decision makers, including concerns about noncompliance and harm.

[36] The Inspection Panel, Accountability at the World Bank: The Inspection Panel 15 Years, The World Bank, (2009) at 6-7.

- It creates a public record of both how well the institution is complying with its own operational policies and procedures and, importantly, how well the institution responds to the concerns of affected people when noncompliance is found.
- It can improve the credibility, and hence legitimacy, of the institution to the extent that the process helps the institution listen to affected people, respect its own policies, avoid harm, and take responsive measures to account for its conduct.
- In all these ways, this type of bottom-up accountability is designed to strengthen and support the ability of the Bank to achieve its mission to fight poverty and promote equitable and sustainable development.[37]

These conclusions are also relevant, *mutatis mutandis,* to other paradigms of accountability which project affected people may have recourse to. However, the ability of these plaintiffs to obtain redress for harm caused by IFI-funded projects should not be exaggerated, as it remains quite restricted in practice. As has been shown elsewhere, the current legal framework of IFI-operations and accountability mechanisms that derive therefrom do not emphasise enough on protecting the interests of affected third parties.[38] These plaintiffs often find themselves in a situation catch-22 because too many legal technicalities shield IFIs from being held accountable. Where a possibility to proceed with a claim at any layer of the accountability system presents, the outcome does not always materialise in terms of appropriate remedies for the plaintiffs. That is why the capability of non-legal accountability mechanisms to hold IFIs more accountable should not be underestimated.[39] A combination of legal and non-legal accountability mechanisms would offer a better chance to project affected individuals and communities to achieve the level accountability and justice a reasonable person can legitimately expect.

It is not an accident that adverse impacts of IFI-funded projects prevail in poor and developing countries. Developed countries have in many respects put in place strong legal framework and accountability for protecting and enforcing the rights of their populations. A similar infrastructure is desperately lacking in poor and developing countries. Professor Richard Stewart offers a powerful explanation of that situation:

> Many developing countries do not have the capacities to provide such protections to their citizens. Further, authoritarian governments often have little regard for the welfare of most of their citizens. As a result, they fail to protect their citizens against market failures and other adverse by-products of globalized economic activity. Global institutional systems also fail to redress many of these harms and deprivations, frustrating realization of an embedded liberal social compact at the global level. The result

[37] Idem, at 6.
[38] See Section 5.2. supra.
[39] For the discussion of non-legal paradigms of accountability see Section 1.7.1. supra.

> is to subject many people, especially those in developing countries, to serious risks of insecurity and harm.[40]

These challenges should not discourage leaders in developing countries in their endeavours to improve the welfare of their populations whenever they are embarked upon IFI-funded projects. The strengthening of accountability processes at the domestic level through parliamentary oversight[41] and judicial control could be a great step forward. Theoretically, immunities and privileges of IFIs can be circumvented at the domestic level to afford affected parties with greater opportunities to vindicating their legally protected rights before domestic jurisdictions. That can only be possible if the legal instruments pertaining to immunities and privileges of IFIs, such as headquarter or seat agreements, include a specific requirement for these institutions to provide alternative measures for redress. A plaintiff who cannot obtain compensation or redress from an IFI would, therefore, be able to seek remedy before a domestic court.

With respect to claims against a vehicle company, as has been shown elsewhere, a domestic court would normally assert its jurisdiction in the manner it would do regarding any claim against a corporation operating in the host country. However, the peculiar feature of investment law shows that the host countries ultimately delegates to an international arbitration institution the settlement of disputes that arise from an investment undertaken in their territory by way of foreign capital. This delegation weakens the authority of domestic courts to adjudicate on investment disputes and makes the judicial protection that they may provide to affected parties contingent to a review by an arbitration tribunal. Affected individuals and communities can always vindicate their legally protected rights through indirect means including a claim against a vehicle company, intervention in international arbitration proceedings and recourse under human rights treaties.

On the institutional level, independent review mechanisms (IRMs) provide affected parties with an avenue to voice their concerns against harmful and unintended consequences of IFI-funded projects. However, as already noted elsewhere, seeking accountability through IRMs does not guarantee that the harm being caused will be stopped or prevented or redressed. As such, IRMs are more accountability mechanisms for IFI management and Boards than accountability mechanisms for project affected people. They provide management and

[40] R. B. Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness', *The American Journal of International Law,* vol. 108 (2014) at 230.
[41] A. Motte et al., 'Parliamentary Oversight of International Loan Agreements & Related Processes: A Global Survey', research commissioned by the Inter-Parliamentary Union & the World Bank, (2013) pp. 1-45.

governing bodies with effective tools to supervising and securing compliance with the directions and requirements they have laid down in the OP/P. In a sense, this latter paradigm of legal accountability overlaps with the notion compliance with the internal law of IFIs.

Undoubtedly, the point of determining whether IFIs is accountable or not for the consequences of their operations is to allocate the financial responsibilities to redress the harm caused to legally protected rights of the plaintiffs. By doing so, the powerful Member States that have largely contributed to the organisation in terms of capital subscriptions, ODA contributions and grants are the ones who would ultimately be bearing the financial burden of the outcome of the accountability process. In particular, the revenues and interests made out of the contributions of powerful member States will somewhat be used to service the interests other than those they would have wanted to. As it is the case in other categories of IOs, powerful member States and governing bodies in IFIs are unprepared for or reluctant to bear all financial costs associated with an effective accountability system.

5.4. Conclusion

The aim of any paradigm of accountability of IFIs is to ensure that the norms governing the operations of IFIs are applied accordingly and responsive measures are taken or enforced to account for the performance of the relevant actors, be they IFIs or the related project company. Ultimately, accountability mechanisms seek to strengthen and support the ability of IFIs to achieve their mission to promote economic and social development. Stakeholders have recourse to different types of accountability techniques to ensure that these objectives are met. One of these techniques is the use of legal accountability mechanisms at the internal, international and domestic levels to ensure that IFI-funded project yields the expected outcomes. However, the execution of this strategy is hampered by hurdles stemming from the imbalance treatment of stakeholders with respect to the extent and robustness of their legal protection. Another factor is the mismatch of interests that each stakeholder pursuits individually in an accountability process.

The robustness, practicability, and comprehensiveness of the standards against which the performance of IFIs or a vehicle company are assessed are important factors that can increase the likelihood of better outcomes of the accountability processes. So are an effective empowerment and independence of accountability fora. If these factors are managed properly, legal accountability mechanisms can be an instrument of promoting regard for the interests, concerns, and rights of non-contracting parties, particularly those adversely affected.

Ultimately, there is a better chance to achieve a level of accountability and justice expected by project affected individuals and communities if appropriate combinations of existing legal accountability paradigms, and possibly non-legal accountability mechanisms, are used.

CHAPTER SIX

FINDINGS AND RECOMMENDATIONS

6.1. Introduction

6.2. Findings

6.3. Recommendations

6.4. Conclusion

6.1. Introduction

This study started out with the objective of interrogating the softness and hardness of the law of IFIs to determine the extent to which underlying accountability mechanisms have achieved or failed to achieve a level of accountability and justice expected by affected third parties. It also sought to investigate how understanding the process of financing for development, from both financial and investment perspectives, can further the understanding of the challenges of holding IFIs to account for the unintended and harmful consequences of the projects they have funded. The five chapters contained in this thesis have discussed the following issues: the emergence of legal accountability in international institutional law, accountability by whom and to whom: an overview of IFI-funded projects and policy reforms, accountability standards applicable to IFIs and their operations, legal accountability fora and their mechanisms, and legal challenges of keeping IFI operations on track. I shall now proceed to discuss the main findings and conclude with some recommendations.

6.2. Findings

It has been established that accountability of IFIs has been the subject of considerable debate, and concern among various stakeholders. These stakeholders have come to realise that IFIs have grown considerably in power and influence beyond what their constituent instruments allotted to them; that seemingly without a corresponding rise in oversight of their operations. Many international lawyers have become aware of the importance to ensuring accountability and/or responsibility of the acts that inflict harm to member and non-member States and, more importantly, to non-state third parties. Individual scholars and academic institutions like the Institute de Droit International, the International Law Association, and the International Law Commission have started to deal with the issue of accountability and responsibility of IOs, in general, and IFIs, in particular.

While the responsibility of IOs concerns a fairly-well established notion in international law which deals with secondary rules governing the legal consequence of an internationally wrongful act of an IO, the accountability of IOs has yet to acquire a clear legal meaning. The concept of accountability is often erroneously mirrored to that of responsibility. Others languages such as French, Spanish, German or Dutch have no exact equivalent and, therefore, do not semantically distinguish accountability from responsibility. The study highlighted that accountability is a multifaceted phenomenon, which includes financial, political, administrative and legal forms. The legal paradigm of accountability is characterised as a

process involving the justification of an actor's performance, the assessment of this latter against legal standards, and possibility to impose a sanction in case the actor fails to live up to the applicable legal standards. In the context international institutions, legal accountability covers legal norm and remedies applicable to the activities of an IO, which have or may affect legal rights or interests of the constituency entitled to claim accountability against the organisation.

The study established that writings on accountability of IFIs have confined their analysis to the institutional approach, such as the World Bank Inspection Panel, which places greater emphasis on securing compliance with directions and requirements IFIs have laid down in their internal policies. This stance is not satisfactory because it has failed to consider other equally important standards that apply to IFIs and their operations such as the financial and financing structure agreements, the domestic regulations of the host State and the international law to name a few. The institutional approach to accountability of IFIs advocates an entirely non-adversarial process for addressing the harmful impacts of IFI-funded projects to non-state third parties. This practice has obscured the ultimate purpose of accountability of IFIs towards non-state third parties and overlooks the potential for other mechanisms to provide remedies for and do justice to this category of plaintiffs.

Moreover, the survey of scholarly works revealed that studies on accountability build on a series of fundamental questions, regardless the context in which they occur. These are accountability by whom, about what, to whom, against what standard, before which forum, and for what purpose. Building on this approach the study explored the extent to which the law of IFIs and underlying accountability mechanisms have achieved or failed to achieve a level of accountability and justice expected by affected third parties.

Following the introductory remarks in chapter one regarding the emergence of legal accountability in international institution law, chapter two of this study discussed the context in which IFIs operate and showcased how the issue of accountability vis-à-vis project affected parties may arise. It did not delve into substantial analysis of accountability issues, which was the focus of chapters 3, 4 and to some extent chapter 5. It offered few glimpses of what IFIs do and how the implementations of their activities may give rise to accountability issues towards third parties. The investigation into the process of financing for development provided useful insights into the challenges of holding IFIs to account for the unintended consequences of the projects they have funded.

In particular, chapter two established that IFIs deliver their functions through a range of operations on both the international and domestic levels. The goal of these operations is to fill the gap left by undeveloped capital markets and the reluctance of commercial banks to offer long-term financing to developing and poor countries. On the international level, IFIs provides financial services to States and publics entities. IFIs perform this development function through direct lending to developing and poorest countries on more advantageous terms than would be available to them on the basis of their international credit standing. IFIs also attract financing resources to public sector projects and provide assistance in the form of guarantees, and technical assistance. In addition to providing financial services to their sovereign and public clients, IFIs have the capacity to create rights and duties on the international level through their interaction with States and/or other IOs. This capacity to create rights and duties on the international level is evidenced by the conclusion of headquarter agreements and multilateral conventions on privileges and immunities with States and the conclusion of relationship and cooperation agreements between with and other categories of IO.

Alternatively, IFIs can operate in the national legal order of States by taking equity or quasi-equity participations in private sector enterprises.

There is a connection between the financial structure of a project and legal issues that would arise from it. One cannot fully understand the latter without understanding the dynamic surrounding the financing of the whole project. IFIs have often recourse to complex financing structure involving a combination of various financial products, of which each has a specific legal regime. Moreover, the involvement of IFIs in a project can also imply implementing and carrying out such a project through an SPV. The legal regime and associated accountability mechanisms under a given project are contingent on the financial structure underpinning that project. Likewise, the categorisation as public or private sector operation has a bearing on the types of legal issues that would arise and the nature of accountability mechanism to be called upon by aggrieved parties.

To enrich further the understanding of IFI operations, especially the manner legal issues may arise between IFIs, or the vehicle company through which IFIs channelled their funding, and non-state third parties, chapter two examined three cases of IFI-funded projects. These include the Mega hydropower plant project in Democratic Republic of the Congo (DRC), the Kingamyambo Musonoi Tailings SARL (KMT) Project in DRC, and the Lesotho Highlands Water Project in Lesotho and South Africa. The analysis of these cases showed that third parties do not access meaningful information, during the project design phase, to weigh more carefully

what is at stake if the envisaged project goes forward. However, they pay the higher price when the project is being implemented and even long after it completed. The examination of these cases also showed that non-state third parties do not access legal accountability mechanism in the manner other participants to the project do.

After analysing IFIs as an accounter and unpacking their operations to unveil the circumstances under wish legal issues between these institutions and non-state third parties may arise, the study went on to discuss the standards against which IFI operations are to be assessed. It examined the sources, contents and extent of the legal obligations of IFIs in their relationship with other contracting parties to a financial agreement and the outside world, particularly individuals and communities who do not enjoy a contractual relationship with IFIs.

It has been established that legal obligations of IFIs are embedded in their legal framework which the study categorised in two broad groupings, namely the internal and external law of IFIs. Internal law of IFIs refers to this body of laws that deal with the structure, functions and other internal operations and procedures of the organisation. Through express or implied authorisation, IFIs regulate their internal legal system using regulations which appear under different appellations including by-laws, resolutions, policies, procedures, directives, guidelines, code of conduct and performance standards.

Parallel to their internal law, IFIs are governed by a set of rules that regulate their external relations. These rules normally regulate the relations between an IFI with a non-member and its member States, other IOs, and natural and legal persons, insofar as their constituent instruments do not govern the envisaged relations. Usually, external law of IFIs encompasses other sources of international law which apply to IFIs as a result of their legal personality. These include treaties concluded by IFIs including the financial agreements concluded with sovereign and public entities, the customary international law and general principles of the law of IFIs. The external law of IFIs also includes the financial agreements concluded with private entities and the domestic law of the States.

Although legal factors play a key role in the establishment and operations of IFIs, they are not so influential as to lead the way to the judicial settlement of all disputes arising out their activities. IFIs do not fall under the authority of any entity either national or international. Their governing boards have the authority to interpret their constitutions and the decisions rendered by these organs are not subject to appeal before an international court or any arbitral jurisdiction. However, IFIs have at their disposal machinery of a judicial nature, known as

administrative tribunals, designed for the settlement of disputes in staff matters. As for financial agreements entered into with borrowers, the study showed that both IFIs and borrowing parties can rely on the provisions on enforceability contained in the relevant IFI policies and financial agreements to resolve any dispute between them. Usually, these provisions require that parties shall endeavour to settle any controversy between them amicably before proceeding to arbitration.

IFIs have never had recourse to enforcement mechanisms against sovereign borrowers in the case of insolvency of the latter. The reason is that sovereign borrowers can always rely on a number of defences including sovereign immunities or act of State to prevent any attachment of their assets. Instead, IFIs have had recourse to debt restructuring and debt relief techniques to alleviate the burden of the debt. However, the voluntary nature of debt relief measures has created opportunities for some commercial creditors to eschew such efforts and attempt to recover the full value of their debt through litigation. These plaintiffs, known as vulture funds, have averaged recovery rates of approximately 3 to 20 times their investment, equivalent to returns of 300 to 2,000 percent, according to the AfDB's estimates.

With respect to disputes involving injured third parties, provisions on the enforceability of financial agreements do not afford this category of plaintiffs a direct access to the arbitration procedure. Participants to a financial agreement are the sole entities entitled to initiate the arbitral proceedings for the settlement of any dispute arising over the course of an IFI-funded project cycle. To circumvent that, most IFIs have taken initiatives to permit some form of review of their actions with respect to the concerns of affected third parties.

As for the issue of compliance with IFI laws, it has been established that attempts to assess compliance with IFI laws have been made in the past with a particular focus on operational policies and procedures (OP/P) of IFIs. These rules are not the sole components of the laws that govern IFI operations. It is important to adopt a more encompassing approach to performing a comprehensive assessment of the issue of compliance with IFI laws.

The self-contained nature of IFIs does not make it easy to determine whether their operations are compliant with their Articles of agreement as interpreted and implemented by themselves. IFIs rely on a number of tools to foster compliance with the terms and conditions of their financing operations. These include the potential for repeatedly extending their financial services to their sovereign and public clients, together with the threat to cut off future financial services. Moreover, IFIs rely on a range of financial and administrative sanctions to help ensure

client compliance. These include membership suspension and exclusion, acceleration of existing loans, discontinuation of tranched loan disbursements, debarment or imposing financial penalties such set-ups in interest rates. More importantly, IFIs have a set of units committed to ensuring compliance with their safeguard policies, investigating allegations of fraud and corruption, and evaluating the effectiveness and impact of completed IFI-funded projects, policies, and programs.

With particular reference to binding human rights, IFIs concede that IFI-funded projects or programmes should not interfere with the obligations of member States under these treaties. As a result, the mandatory component of safeguard policies is drafted in a way to avoid IFIs' commitment to binding obligations under human rights treaty law, which is traditionally attributed only to States. The question of whether or not IFIs are bound by international human rights and environmental obligations without having ratified the treaties that underpin such obligations is highly questionable. The expansion of the subjecthood landscape in international law has unveiled the limitations of existing human right treaties which are, in large majority, state-centric. This position may prove true for other areas of international law. One needs to learn how to cope with such limitations and take advantage of the unexplored potential of existing treaties.

With those clarifications on the standards that apply to IFIs and their operations, the study went on to discuss accountability fora and related mechanisms as far as the relationship between IFIs and affected individuals or groups is concerned. It began with a conceptual clarification of the notion accountability forum as this latter conveys two different meanings. It showed that literature uses the notion of accountability forum to describe an entity or individual that triggers an accountability process. It also refers to that notion to represent a party or entity that has jurisdiction over such a claim. The chapter adopted this last meaning. Then the chapter moved to clarify its scope as the examination of accountability fora can only be done in reference to the nature of the mechanisms at stake. The chapter stressed that accountability comprises not only legal but also non-legal regimes including political, administrative, financial and legal modes of internal and external scrutiny and monitoring of acts and omissions of an authority, a public entity or an IO. The chapter only focused on accountability fora in the context of legal accountability mechanisms.

Under a legal accountability mechanism, the performance of an actor is assessed against their responsibilities enshrined in the applicable standards. Such an actor will face legal consequences whenever its performance fails to live up to the relevant standards. The

determination of a forum hinges upon the standards to be applied across the accountability processes. The more legal standards apply to an actor; the many are likely to be the accountability fora that would assess the performance of that actor. In a setting involving the performance of States in their respective internal orders, applicable domestic standards (administrative, civil or criminal norms) would give rise to corresponding accountability mechanisms (review of administration decisions, civil liability, and criminal liability). By contrast, applicable international standards would give rise to international accountability mechanisms such as international state responsibility, international enforcement mechanisms of human rights, and commercial or investment arbitration to name a few.

The legal standards applicable to the operations of an IFI are rooted in its internal and external laws. They comprise a large variety of norms that were extensively analysed elsewhere in this study. These norms carry a corresponding set of accountability fora scattered across the various components of an IFI's legal order. As with the legal accountability of a State, an IFI can be held accountable before both international and domestic fora. The classification of such fora would take into consideration the nature of the process to be used or the standards against which the operations of an IFI are to be assessed. In that regard, accountability of an IFI can be sought before domestic courts, independent review and compliance bodies, an international judicial jurisdictions or arbitration tribunals. Alternatively, the classification of accountability fora can hinge upon the distinction between processes that involve a direct claim against an IFI and those that do not.

The study also showed that domestic jurisdictions are the most convenient accountability fora as far as the relationship between IFIs and affected individuals or groups is concerned. However, when a domestic court is confronted with a claim against an IFI, it tends to assess whether immunity of jurisdictions impedes such a claim. This process inevitably puts the court in a predicament situation. It has to choose between two opposing valid principles, namely the immunity that allows an IFI to deliver the functions it was established for and, on the other hand, the necessity to uphold an individual's right to fair trial. This whole predicament would be inexistent if the court were to assess its jurisdiction on the subject matter. The plaintiffs may be left remediless if no effort is made to balance their right to a fair trial against the necessity to prevent a single member State from exercising undue influence on an IFI by way of its courts.

Contrary to the immunity provisions in the constituent instruments of most other IOs, the immunity provisions in the charters of IFIs do not afford them broad immunities from the legal

process before national courts. Instead, they determine that actions may be brought against IFIs, but only in a court of competent jurisdiction in the territory of a member in which they have an office, have appointed an agent for the purpose of accepting service of process, or have issued or guaranteed securities. Because the scope of immunity of IFIs is less wide compared to other IOs, domestic courts tend to interpret it broadly to avoid adjudicating a dispute involving non-contractual parties. Notwithstanding the above, the analysis of domestic case law showed that there is still room for arguments in favour of a waiver of immunities. The immunities of an IFI can be waived when the particular type of suit would further its objectives. A domestic court can also allow the suit when no other reasonable alternative means to pursue the claim exist.

The jurisdictional limitations of a domestic court would vanish if the underpinning claim does not involve an IFI as a defendant. That would be the case if a domestic court is asked to settle a dispute between affected third parties and a vehicle company through which an IFI has channelled its financial services. In this case the issue of IFI accountability disappears in legal terms. A domestic court would assert its jurisdiction over the activities of the vehicle company in the manner it would control any indigenous or foreign investment in the host State. Alternatively, affected third parties can always have recourse to the indirect means of amici curiae to voice their concerns in investment arbitration disputes. Affected third parties can also, whenever possible, resort to compliance mechanisms under human rights treaties to redress the harmful impact of foreign investments on their rights and the environment. However, they should not put too much reliance on these two regimes as they do not always coincide.

In light of the jurisdictional limitation of domestic courts, IFIs provide for independent review mechanisms enabling third parties without contractual ties with IFIs to seek redress against them as a result of the poorly designed or implemented projects they have supported. This chapter showed that these mechanisms should not be equated to adjudicatory fora capable of determining whether the rights of the plaintiffs have been infringed during the design or implementation of a project supported by IFIs. These mechanisms do not provide an enforcement opportunity of legally protected interests by third parties, nor do they make binding decisions on the IFIs. They merely serve a compliance function, which is to ensure that IFIs follow their own policies and procedures (OP/P), particularly their safeguard policies, in the design and implementation of their projects. It is a common understanding, however, that IFIs' safeguard policies are aimed at managing risks and unintended social and environmental consequences resulting from IFI-funded operations. Although some of their components

contain normative elements that are binding for IFI staff and stakeholders, the infringement of IFIs' policies does not give rise to any legal liability. More importantly, however, and depending on one institution to another, independent review mechanisms perform problem-solving and advisory functions.

Moreover, the study analysed the issue of accountability of IFIs in the lens of the law of international responsibility. It characterised international legal responsibility as a particular form of legal accountability that focuses on the legal consequences of breaches of international law that are attributable to an international actor. The study showed that responsibility and liability are often associated with the core sense of legal accountability. While responsibility under international law is incurred by subjects of international law for wrongful committed by them, liability is often associated with civil liability under domestic or in the context of international law.

The study examined the salient features of the articles on international responsibility of IOs adopted by the ILC. It showed that the ARIOs may have enhanced the overall regime of accountability of IOs by shedding some light on the set of secondary rules applicable once an IO has breached a norm of international law. However, they fail to provide individuals and groups with practical means of holding IO to account as their underpinning regime of responsibility can only be invoked by an IO or a State.

After providing a complete review of legal accountability fora, the study analysed the objectives of promoting legal accountability for non-state third parties affected by IFI-funded projects. It also assessed whether this category of plaintiffs could expect a reasonable level of accountability and justice from the current legal framework of IFIs and associated accountability mechanisms. Ideally, any paradigm of accountability of IFIs seeks to ensure that the norms governing the operations of IFIs are applied accordingly and responsive measures are taken or enforced to account for the performance of the relevant actors, be they IFIs or the related project company. Ultimately, all these mechanisms share the same overreaching objective to contributing to the effectiveness of IFI-funded projects.

However, this capability is limited by noticeable mismatches in the level of protection that various stakeholders enjoy. Just like in commercial undertakings, individual players in IFI-funded projects pursue often divergent interests on the ground, while maintaining an illusion of coherence through the use of a shared development discourse. Likewise, applicable

standards and accountability mechanisms associated with these projects are not designed to be altruistic.

The robustness, practicability, and comprehensiveness of the standards against which the performance of IFIs or a vehicle company are assessed are important factors that can increase the likelihood of better outcomes of an accountability process. So are an effective empowerment and independence of accountability fora. If these factors are managed properly, legal accountability mechanisms can be an instrument of promoting regard for the interests, concerns, and rights of non-contracting parties, particularly those adversely affected. Ultimately, there is a better chance to achieve a level of accountability and justice expected by project affected individuals and communities if appropriate combinations of existing legal accountability paradigms, and possibly non-legal accountability mechanisms, are used.

6.3. Recommendations

Taking into account all these problematic situations, this study moves in questioning what can be done to increase the chance of furthering peoples' and communities' interests through the design and implementation of IFI-funded projects and policies. To this end, this study attempts to give recommendations to different stakeholders. Firstly, it proposes that legal academics, activists, and practitioners embrace a coherent and comprehensive approach to the issue of accountability of IFIs. Secondly, the study recommends promoting non-contracting parties' access to project information to increase the prospect for this category of stakeholders to have recourse to accountability mechanisms as a means of addressing a harm resulting from an IFI-funded project. Thirdly, the study proposes a shift in the focus of existing laws and policies towards a greater protection of the interests of project affected communities. Fourthly, the study recommends that contracting parties to IFI-financial agreements underlying an industrial or infrastructure project ensure that project affected communities derive benefit from and are protected against adverse impacts of proposed projects. Lastly, the study recommends increasing domestic oversight over the lending activities of governments.

Recommendation One: Legal academics, activists, and practitioners should embrace a coherent and comprehensive approach to the issue of accountability of IFIs and their operations.

As has been shown elsewhere in this study, there is a consensus in the literature about the multifaceted features of accountability. While political, financial, and public administration

scholars and practitioners have developed a structured, coherent and comprehensive theory of accountability in their respective fields,[1] legal counterparts seem to be lagging behind and show little interest in developing a paradigm of accountability that is specific to their discipline. The level of sophistication achieved by political, financial and public administration scholars and practitioners with respect to accountability is quite impressive compared to what their legal counterparts have done.[2] Legal literature tackling the issue of accountability of international organisations offers scant information to chew over in terms of the structure, coherence and comprehensiveness of what is to be considered as the legal paradigm of accountability.[3] Some of them even show a tendency to allude to accountability without specifying which of its many paradigms they refer to. Scholarly works on accountability of IFIs, in general, and MDB, in particular, confine their analyses to the institutional approach of accountability. Others compound this latter approach with some features borrowed from other paradigms of

[1] See M. J. Dubnick 'Clarifying Accountability: An Ethical Frameork', in C. Sampford et al. (eds), *Public Sector Ethics: Finding and Implementing Values,* Routledge/Leichardt, (1998) at. 69-72; J. Uhr, 'Redesigning Accountability: From Muddles to Maps', *The Australian Quarterly*, vol. 65, No. 2, (Winter 1993) at 3-5; L. D. Parker & J. Guthrie 'The Australian Public Sector in the 1990s: New Accountability Regimes in Motion' *Journal of International Accounting Auditing & Taxation*, Vol. 2, No. 1, (1993) pp. 59- 81; Th. Ahrens 'Style of Accountability' *Accounting, Organizations and Society,* vol. 21, No. 2/3, (1996) pp. 139-173; G. D. Carnegie & B. P. West, 'Making accounting accountable in the public sector', *Critical Perspectives on Accounting,* vol. 16, (2005) pp. 905–928; P. Day & R. Klein *Accountabilities: Five Public Services* Tavistock Publications (1987) Chap.1; K. Strom, 'Democracy, Accountability, and Coalition Bargaining', *European Journal of Political Research,* vol. 31, (1997) pp. 47-62; K. Strom 'Delegation and accountability in Parliamentary Democracies' *European Journal of Political Research,* vol. 37, (2000) pp. 261-289; S. Mainwaring, 'Introduction: Democratic Accountability in Latin America', in Sc. Mainwarning & C. Welna (eds), *Democratic Accountability in Latin America,* Oxford University Press, (2003) p. 7; B. S. Romzek & M. J. Dubnick, 'Accountability in Public sector: Lessons from Challenger Tragedy', *Public Administration Review,* vol. 47, No 3, (1987) pp. 227-238; R. Mulgan 'Accountability: An Ever-Expanding Concept?' *Public Administration* vol 78 (2000) pp. 555-573; A. Schedler,'Conceptualizing Accountability', in A. Schedler et al. (eds), *The Self-Restraining State: Power and Accountability in New Democracies,* Lynne Rienner Publishers, (1999); R. W. Grant & R. O. Keohane 'Accountability and Abuses of Power in World Politics', *American Political Science Review,* vol. 99 No. 1, (Feb. 2005) pp. 29-43; J. D. Fearon, 'Electoral Accountability and the Control of Politicians: Selecting Good versus Sanctioning poor Performance', in A. Przeworski, S. C. Stokes & B. Manin (eds) *Democracy, Accountability and Representation,* Cambridge University Press, (1999) at. 44; G. O'Donnell 'Horizontal Accountability and New Polyarchies', in A. Schedler, L. Diamond & M. F. Plattners (eds), *The Self-Restraining State: Power and Accountability in New Democracies,* Lynne Rienner Publishers, (1999) p 38; P. C. Shmitter 'The Ambiguous Virtue of Accountability', *Journal of Democracy*, vol. 15, No. 4,(Oct. 2004) pp. 47-60.

[2] Ibidem.

[3] M. Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', *European Law Journal,* vol. 13, No. 4, (Jul. 2007) pp. 447-468; M. E. Gilman 'Legal Accountability in an Era of Privatized Welfare', *California Law Review,* vol. 89, No 3, (2001) pp. 569-642; C. Scott, 'Accountability in the Regulatory State', *Journal of Law and Society,* Vol. 27, No. 1, (2000) pp. 38-60; C. Harlow and R. Rawlings, 'Promoting Accountability in Multi-Level Governance: A Network Approach' European Governance Papers, No C-06-02 (2006); A. Adserà et al., 'Are you Being Severed? Political Accountability and Quality of Government', *The Journal of Law, Economic, and Organization*, vol. 19, No. 2, (2003) pp.445- 490; K Wellens, 'Accountability of International Organizations: Some Salient Features' (April 2-5, 2003) 241 in Proceedings of the Annual Meeting (*American Society of International Law*) Vol. 97; G. Hafner, 'Accountability of International Organizations', American Society of International Law, Proceedings of the 97th Annual Meeting, (2003).

accountability including political, financial and public administration accountability paradigms.

Legal scholars and practitioners should use more rigorous standards to characterise and structure accountability in their discipline. The danger of not having a clear legal meaning and structure of accountability enable international organisations such as IFIs to claim always to be accountable to project affected people even though the evidence suggests otherwise. The lack of a clear benchmark characterising this paradigm of accountability relegates its reference by some legal scholars and practitioners into a public relations exercise for IFIs. There is a clear need to shift the focus of any accountability discourse from the institutional perspective that places more emphasis on protecting IFIs' interests and image to that of project affected people that would care more about affected people's interests. Besides contributing to the emergence of a clear meaning of legal accountability of IFIs and its differentiation from other accountability paradigms, this approach will have the advantage of expanding the opportunities for project-affected people to seek remedy and justice beyond the internal mechanisms established by IFIs.

Some scholars have already begun to distance themselves from the mainstream approach of Accountability of IFIs towards third parties individuals that characterizes accountability of IFIs in terms of Inspection Panel function.[4] The best way to advance the interests of affected parties is to characterize legal accountability for what it is (or should be); that is a process of asserting legal rights and duties.[5] Unlike other paradigms of accountability, legal accountability involves processes in which the conduct of the accounter is legally prohibited or invalidated or for which it is required a payment of compensation or another redress.[6] As Richard Stewart puts it, the account holder or aggrieved party "has the authority to bring a legal action against the accounter in a court or other tribunal or reviewing body to determine whether the account holder's legal rights have been infringed and, if so, to obtain an appropriate remedy."[7] From Stewart's perspective, legal accountability only exist when an affected party has authority and ability to

[4] See B. Kingsbury, 'Global Administrative Law in the Institutional Practice of Global Regulatory Governance', in H. Cissé, D. D. Bradlow & B. Kingsbury (eds), *International Financial Institutions and Global Legal Governance*, The World Bank Legal Review Vol. 3, The World Bank, (2012) at 18.
[5] R. B. Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness', *The American Journal of International Law,* vol. 108 (2014) at 234.
[6] Idem, at 246.
[7] Ibidem.

obtain appropriate remedy from an identified accounter as a result of the infringement by the later an affected party's legally protected right.

Recommendation Two: Promoting non-contracting parties' access to project information to increase the prospect for this category of stakeholders to have recourse to accountability mechanisms as a means of addressing a harm resulting from an IFI-funded project.

The existing literature emphasises the importance of information in the decision-making and access to justice.[8] Under an ordinary IFI-funded project, the requirement to disclose and provide access to information does not only rest with IFIs, but it also extends to other contracting parties including governments and the investors.

All IFIs have policies on disclosure of information enabling their clients and other stakeholders to understand better and to engage in informed discussion about the activities of the IFI concerned and their impact on development. However, a recent survey of the implementation of IFIs' policies on information disclosure found that

(i) IFIs are expected to operate under the assumption of public disclosure of information. But in practice, they only disclose the documents which their internal policies explicitly require to be disclosed.

(ii) Revisions of information disclosure policies have only led to incremental reform because of their emphasis on the positive list, rather than improving access to information more generally.

(iii) Insufficient time and resources have been invested in technologies to enable adequate disclosure capacity.

(iv) Country offices and local country communication networks should increasingly be used as means for disseminating information as widely as possible to complement websites which have been the preferred mode of dissemination of information by IFIs.

[8] G. R. Pring & S. Y. Noé, 'The emerging international law of public participation affecting global mining, energy and resources development', in in D. N. Zillman et al., *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources,* Oxford University Press (2002) at 29;

(v) Grounds for refusal to access information are often arbitrary and inconsistent, partly due to the lack of an appeal mechanism to ensure proper recourse for dissatisfied stakeholders.

(vi) Information disclosure policies should constantly be aligned with the best practice approaches to disclosure of information and therefore requires constant review accompanied by adequate resources for implementation.[9]

In light of these findings, the AfDB Group has introduced a new disclosure and access to information policy since 2012.[10] This policy moves from a list-based eligibility approach for disclosure to one under which the presumption of disclosure applies to any information in the Bank Group's possession that is not on a list of exceptions. Under this new policy, the information is supposed to be accessible to the widest external audience possible to increase public awareness and broaden stakeholder understanding of the Bank group's operations. Key changes include the following new features:[11]

(i) A strengthened presumption of disclosure eliminating the positive list (documents that will be disclosed) and emphasizing a limited negative list (document that will not be disclosed) which are stipulated in the list of exceptions;[12]

(ii) Introduction of an appeal mechanism;

(iii) Provision for simultaneous disclosure; and

(iv) Increased access to a broad range of stakeholders.[13]

[9] AfDB Group's Disclosure and Access to Information, Developing Africa Openly and Transparently: The Policy (2012) at 7-8.
[10] AfDB Group's Disclosure and Access to Information, Developing Africa Openly and Transparently: Staff Handbook (2013).
[11] Idem, at 6.
[12] This list of exception includes the following elements: (i) deliberative Information and Incomplete Reports (especially information classified as restricted, this includes information communicated through the Bank e-mail system and filed in the Bank's documents management system; draft economic sector works, notes or memoranda, and statistical analysis aimed to inform the Bank Group's Decision making process, and individual internal audit reports); (ii) communications involving the Bank group's President, Executive Directors and the Governors; (iii) Legal, disciplinary or investigative matters; (iv) the information provided in confidence by member countries, private-sector entities or third parties; (v) administrative information; (vi) financial information, (vii) safety and security related to its personnel and assets; (viii) personal information. See AfDB Group's Disclosure and Access to Information, Developing Africa Openly and Transparently: The Policy (2012) at 10-15.
[13] AfDB Group's Disclosure and Access to Information, Developing Africa Openly and Transparently: Staff Handbook (2013) at 6.

Despite the presumption in favour of maximum disclosure and access to information by the public, the new policy has afforded the Bank Group to maintain the right to disclose or withhold information regardless of whether the requested information is on the list of exceptions.[14] However, this prerogative can be challenged before the Information Disclosure Committee.[15] The decision of this latter body can be appealed before the Appel Panel.[16]

Likewise, the IFC has introduced a new policy on access to information amending its 2006 Disclosure of Information Policy.[17] Just like its regional counterpart, this new policy attempts to improve the IFC's system of access to information to enable its clients and the public to understand better and engage in informed discussion about the operations of the IFC and their development impacts. The new policy draws a difference between the information the disclosure of which falls under its responsibility and that which is the responsibility of its clients. There is a presumption in favour of disclosure regarding any institutional information and project-level information concerning investment and advisory services supported by IFC.[18] However, there is a caveat that before making any determination on the disclosure, IFC must consider whether the requested disclosure is likely to cause harm to specific parties or interests that outweigh the benefit of disclosure.[19] Under the new policy, the IFC must also consider whether the information contains or makes reference to the information described in the list of exceptions,[20] deemed non-exhaustive.[21]

In addition, the IFC's new policy on access to information has introduced an appeal process against the institution's denial to disclose information. A requester's appeal is dealt with by the Access to Information Policy (AIP) Advisor, who report directly to the IFC's Executive Vice President.[22] A negative decision from this organ can be appealed before the Access to Information Appeals Panel.[23]

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[14] AfDB Group's Disclosure and Access to Information, Developing Africa Openly and Transparently: The Policy (2012) at 15-16.
[15] Idem, at 19.
[16] Idem, at 21.
[17] IFC's Access to Information Policy (2012).
[18] Idem, at 2.
[19] Ibidem.
[20] Ibidem.
[21] The list of exception in the new IFC's Access to Information Policy includes the following elements: (i) Commercially sensitive and confidential information; (ii) personal information about its personnel; (iii) communications of Executive Directors' Offices; (iv) Ethic Committee; (v) attorney-client privilege; (vi) security and safety; (vii) information restricted under separate disclosure regimes, (viii) corporate administrative matters; (ix) deliberative information; (x) certain financial information; (xi) violation of national laws or other applicable regulations; (xii) investigative information. See IFC's Access to Information Policy (2012) at 3-5.
[22] Idem, at 14.
[23] Idem, at 15.

Alternatively, project-affected communities and other stakeholders can always seek access to IFI-funded project's information from other contracting parties including the sovereign, public or private entities involved in the project. A stakeholder's right to access information that is in possession of the State or any public body is protected in the constitution of most countries.[24] This right is further articulated by laws enacted in accordance with the relevant constitutional provisions. As with IFIs, the right to access to information at the domestic level is not absolute. State or any public body can legally withhold information if the release of such information poses a risk to State security or interferes with another's person's private rights, unless such information was already publicly available.[25] In other words, information can be withheld whenever it relates to a proprietary interest of a third party or put this latter in a disadvantaged position with regard to his/her/its contractual or commercial undertakings.

The main challenge here is to establish the right balance between what is public and what part of the information relates to the proprietary interests of a person or to his/her/its trade or commercial secrets. This is the major stumbling block to promoting effective access to IFI-funded project information for project-affected communities and other third party stakeholders. Without an effective access to information, these parties cannot meaningfully organise to protect their interests against the adverse impact of IFI-funded projects. States and investors prefer to keep their contractual arrangements confidential using, for the most part, the excuse technical and commercial secrets. There are very few exceptions to that. The law giving effect to the constitutional right of access to information in South Africa is one of them. This legislation provides a solution to the challenge to choose between the right of the public to access information and the right of a party involved in the project of which the information is sought by the public to protect its proprietary interests. According to this legislation, a mandatory disclosure or information shall be imposed whenever the public interest is at stake.[26]

IFIs can emulate the approach taken by the South African law on the protection of access to information by prioritising the disclosure of information whenever the public interest is at stake. Because the development of large infrastructure projects cannot be possible without a substantial support from IFIs, these institutions should also take the necessary steps to promote practices that prioritise the interest of the public over all others. However, the reality is a bit

[24] In South Africa the Right to information is protected under section 32 of the Constitution; in DRC that right is protected under Article 24; in Uganda the right to access to information is protected under Article 41(1) of the Constitution.
[25] See Section 27 of the Access to Information Act, 2005 Laws of Uganda; Sections 63-69 of the Promotion of Access to Information Act 2 of 2000, Laws of South Africa.
[26] Section 46 of the Promotion of Access to Information Act 2 of 2000, Laws of South Africa.

disappointing. IFIs are uncertain about the right course of action. That is probably due to the fact that there is a missing legal connection between project-affected communities or other third party stakeholders and the IFIs that binds the latter to make a determination in favour of the former. Notwithstanding the above, IFIs' efforts to improve their policies on access to information are commendable. The effectiveness of these changes in terms of enabling greater transparency on their activities is yet to be seen.

Recommendation Three: Shifting the Focus of Existing Laws and Policies towards a Greater Protection of the Interests of Project Affected Communities.

The major challenge for project affected communities is the weakness of the standards that apply to them during the design and implementations of IFI-funded projects as compared to what governs the relationship between contracting parties. Usually, project contracting parties are more concerned with meetings their personal needs in a way that does not compromise the entire project as they stand a greater chance to achieve their personal goals if the project is completed.[27] Then, the main problem is how to integrate the interests of project affected communities into the design and implementation of projects whose main participants are more concerned with meeting their personal interests than they are concerned with the fate of non-contracting parties? To answer this question, the study will mainly rely on public participation literature.[28]

Public participation literature deconstructs established assumption about the "public" to demonstrate the unsuitability of existing theories that consider governments as the proper representatives of their citizens.[29] Proponents of this approach rather view governments as part of the problem than the solution.[30] They expand the concept of public to include local and municipal governments, local citizens, landowners and occupiers, indigenous communities,

[27] G. D. Vinter et al., Project Finance: A Legal Guide, Sweet & Maxwell, (2006) at 1-5.
[28] See K. Finsterbusch & W. A. van Wicklin III, 'Beneficiary Participation in Development Projects: Empirical Tests for Popular Theories', *Economic Development and Cultural change,* Vol. 37, No. 3 (Apr., 1989) pp 573-593; A. von Bogdandy et al., 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', *German Law Journal,* vol. 9, No. 11, (2008) pp. 1375-1400; E. W. Welch & W. Wong, 'Effects of Global Pressures on Public Bureaucracy: Modelling a New Theoretical Framework', *Administration & Society,* vol. 33, No. 4, (2001) 371-402; J. Prno & D. S. Slocombe, 'Exploring the Origins of "Social Licence to Operate" in The Mining Sector: Perspectives From Governance and Sustainability Theories', *Resources Policy,* vol. 37 (2012) pp. 346-357; C. Espósito, Y. Li & J. P. Bohoslavsky, *Sovereign Financing and International Law: The UNCTAD Principle on Responsible Sovereign Lending and Borrowing*, Oxford University Press, (2013); S. Edwards, 'Economic Development and The Effectiveness of Foreign Aid: A Historical Perspective', *National Bureau of Economic Research*, Working Paper 20685, (2014) pp. 1-47.
[29] D. N. Zillman, 'Introduction to Public Participation in the Twenty-first Century', in D. N. Zillman et al. (eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources,* Oxford University Press (2002) at 1.
[30] Idem, at 2; A. von Bogdandy et al. (2008) at 1376*ff*.

academic institutions, non-governmental organisations and some public and private institutions.[31] Public participation scholars have transformed the of 'public participation' from simply meaning the participation of people in electing and lobbying their public officials, to connoting the fact that these people are involved in the decision-making process concerning their interests.[32] To borrow the words of some commentators:

> The most significant form of this broadened public involvement is public participation in decision-making. These public-participations laws serve to inject new 'players' ─ citizens, NGOs, indigenous peoples' interests, local communities, etc. ─ and therefore new challenges into one or more stages of developmental decision-making that were previously the province only of the project developer, landowner, financier, and government officialdom. … These public participation requirements have emerged along two parallel paths. First and older are the 'environmental impact assessment' or EIA laws which typically require public consultation as an integral component. Second and more modern are the laws injecting public participation into decision processes other than EIAs or into environmentally decision-making generally.[33]

According to Barry Barton, the features of an effective public participation arrangement include: education, access to information, participation in decision-making, transparency in the decision-making process, post-project analyses and monitoring, enforcement and access to an independent tribunal for redress.[34] Other scholars have adopted a framework based on three pillars including access to environmental information, participation by the public in decision-making procedures, and access to justice.[35]

International and domestic have begun incorporating the human element into the design, financing, and operation of large-scale development projects as a result of the public participation movement. For example, IFIs such as the IFC and the AfDB have incorporated public participation into their lending requirement.[36] However, some cautionary approach

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[31] A. R. Lucas, 'Canadian Participatory Rights in Mining and Energy Resource Development: The Bridges to Empowerment?, in D. N. Zillman et al. (eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources,* Oxford University Press (2002) at 307-308.

[32] D. N. Zillman (2002) at 1; A. von Bogdandy et al. (2008) at 1376*ff*.

[33] G. R. Pring & S. Y. Noé (2002) at 37. See also B. Barton, 'Underlying Concepts and Theoretical Issues in Public Particiapation', in D. N. Zillman et al.(eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources,* Oxford University Press (2002) at 80.

[34] B. Barton (2002) at 79.

[35] J. Ebbesson, 'The Notion of Public Participation in International Environmental Law', *Yearbook of International Environmental Law*, vol. 8, No. 1 (1998) pp. 51-97; E. Dannenmaier, 'Democracy in Development: Toward a Legal Framework for the Americas', *Tulane Environmental Law Journal,* vol. 11, No. 1, (1997) pp. 1-32; L. Kramer, 'Public Interest Litigation in Environmental matters before European Courts, *Journal of Environmental Law,* vol. 8, No. 1, (1996) pp. 1-18.

[36] See IFC Policy on Environmental and Social Sustainability and Performance Standards on Environmental and Social Sustainability (2012) and the African Development Bank's Integrated Safeguards System, (2013).

needs to be taken against the blind faith in public participation as an instrument of inclusion. Some of the criticisms raised at the beginning of the public participation movement are still relevant today. In 1980, John Cohen and Norman Uphoff warned the following: "there is a real danger that with growing faddishness and lot of lip service, participation could become drained of substance and its relevance to development programmes disputable."[37] Some scholars contend that there is little evidence to suggest that public participation has either positively contributed to social change or meaningfully improve the conditions of vulnerable peoples.[38] As has been shown elsewhere, the participation of project affected communities in projects that adversely affect them is largely devoid of both legal backing and palpable long-term achievement.

The next two recommendations analyse the way in with public participation can be a transformative tool for project affected people and other local stakeholders.

Recommendation Four: Contracting parties to IFI-financial agreements underlying an industrial or infrastructure project should ensure that project affected communities derive benefit from and are protected against adverse impacts of IFI-funded projects by introducing contractual arrangement between the project sponsors and affected communities.

As has been shown elsewhere, the legal framework of IFI-operations does not provide the same standard of protections to IFIs, their clients, and project affected people. While the first two categories of stakeholders seem to enjoy a robust protection, laws and policies have been used sparingly regarding the protection of the last category of stakeholders. Project affected communities deserve their rights secured in the similar manner the rights of investors and other contracting parties are secured. Moreover, there is a legitimate expectation that IFI-funded projects in infrastructure and industrial sector contribute positively to the development of project affected communities, the region in which they are being implemented, and even benefit the entire nation. This expectation can be express in a regulatory framework that developers

[37] J. M. Cohen & N. T. Uphoff, 'Participation's Place in Rurale Development: Seeking Clarity through Specificity', *World Development,* vol. 8, No. 3, (1980) pp. 213-235.
[38] F. Cleaver, 'Paradoxes of Participation: Questioning Participatory Approaches to Development', *Journal of International Development,* vol. 11, No. 4, (1999) at 597.

are formally required to abide by.[39] It can also be negotiated voluntarily between investors and local stakeholders.[40]

These arrangements, commonly known as Community Development Agreements (CDAs), have gained popularity as a critical mechanism for ensuring that project-affected communities and other local stakeholders benefit from large-scale development projects.[41] These agreements go by different names depending on the context of their formation. These include Community Development Agreements, Community Development Initiatives, Voluntary Agreements, Indigenous Land use Agreements, Community Contracts, Landowner Agreements, Shared Responsibility Agreement, Community Joint Venture Agreements, Empowerment Agreements, Impact Benefit Agreements, Social Trust Funds, Benefit Sharing Agreements, Social Responsibility Agreements, Participation Agreements, and Socio-economic Monitoring Agreements.[42]

CDAs have been abundantly used in developed countries such as Canada, Australia, and the United States to protect project affected communities and other local stakeholders in oil, mining, large-scale housing and other infrastructure projects. These arrangements have also been experienced in developing countries such as South Africa, Ghana, Nigeria, Papua New Guinea, Argentina, Costa Rica, and El Salvador.[43] Commentators summarised the prominent practices on CDAs with project-affected communities and other local stakeholders.[44] These include:

- Undertaking extensive research and consultation to identify all communities and the individuals who will represent them in the CDAs negotiation process
- Developing a pre-negotiation agreement, such as a memorandum of understanding, that establishes among other things the negotiation framework and funding for each stage.

[39] See J. M. Otto, 'Community Development Agreement Model Regulations & Example Guidelines', Report commissioned by the World Bank Group, (2010) at 1; D. Brereton et al., 'Mining Community Development Agreements: Source Book', Centre for Social Responsibility in Mining, (2011) at 1; The World Bank, 'Mining Community Development Agreements: Source Book', The World Bank, (2012) at 5-9; S. Sarkar et al., 'Mining Community Development Agreements : Practical Experiences and Field Studies', Report commissioned by the World Bank, Environmental Resources Management, (2010) at 16*ff.*
[40] Ibidem.
[41] J. Loutit et al., 'Emerging Practices in Community Development Agreements', Columbia Center on Sustainable Investment, (2016) at 1.
[42] S. Sarkar et al. (2010) at 5; D. Brereton et al. (2011) at 5.
[43] See R. J. Lewis-Lettington & S. Mwanyki (eds), *Case Studies on Access and Benefit-Sharing,* International Plant Genetic Resources Institute, (2006); S. Sarkar et al. (2010) pp. 1-90; D. Brereton et al. (2011) pp. 4-40.
[44] D. Brereton et al. (2011) pp. 1-40; J. Loutit et al. (2016) pp. 1-15.

Commencement of culturally sensitive orientation programmes and/or negotiations training to ensure meaningful negotiations and approval of the final agreement.

- Facilitating the local community's articulation of a negotiation position
- Ensuring community participation in the agreement-making process, including informed decision-making during negotiations and involvement in completing impact assessments
- Ensuring a commitment to share benefits flowing from the project development to promote broader long-term and ongoing economic and social participation in the project. Such benefits may include financial and non-financial features including financial contributions, such as a royalty stream linked to production, funding scholarship programmes, provision of local employment and training opportunities, and commitments to source goods and services from local providers.
- Ensuring strong governance arrangement to facilitate effective implementation of the CDAs including after the closure of the project. This arrangement should also involve a system of ongoing monitoring and review mechanisms that allow for adjustment of the terms of the CDAs when necessary. A strong grievance and enforcement mechanisms will strengthen the impetus on the investors to implement the agreement effectively.
- Ensuring that the project's environmental effects are appropriately managed and remediated even after the termination of the project. Ensuring also that such a termination does not abruptly halt the community's socio-economic development.
- Avoiding any confidentiality ty clause in the CDAs to ensure transparency of the whole process, good governance, and accountability in all its dimensions.[45]

CDAs present many benefits for all stakeholders including the investors, project-affected communities, and governments. They enable affected communities to articulate and have addressed their development goals and aspirations. Through engaging in dialogue and negotiation, these communities are likely to acquire a better understanding of the financial and other constraints under which a developer is operating, which in turn facilitates the mutual understanding of expectations.

CDAs provide a guarantee of security and predictability for all stakeholders. This is very important as it clarifies the obligations and expectations of the parties and reduces the possibilities of conflicts between them even though the ownership of the project was to change

[45] Ibidem.

over its lifecycle. CDAs assist in building a sense of shared responsibility. Local communities have an opportunity to become partners in the project, thereby strengthening the project's 'social licence to operate'.

However, CDAs have a number of disadvantages. Some studies of CDAs have showed that the process ranging from the preparatory stage to the actual conclusion of a CDA can be time-consuming[46] and expensive, in terms of lawyers' and other experts' fees, cost of disseminating information to community members, holding meetings, and travel expenses.[47] That could scare away project sponsors that might have considered embarking into a CDA. The imbalance bargaining power between communities and investors may result in an unfair deal for the former or CDAs that do not adequately protect the interests of project affected communities.[48] Concerns have been raised that inclusion of environmental impact issues in CDAs often weakens regulatory requirements of environmental assessment and exposes project affected communities to more risks.[49] There are also concerns that the recourse to CDAs for large-scale infrastructure and industrial projects could result in governments abdicating their responsibility for local and regional development and service provision.[50]

Despite these shortcomings, there is stronger evidence that if carefully drafted and properly implemented, CDAs can ensure that vulnerable groups such as project affected communities benefit from and are protected against the adverse impact caused by IFI-funded infrastructure and industrial projects.[51]

Recommendation Five: Increase domestic oversight over the lending activities of governments.

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[46] P. D. Cameron & E. Correa, 'Towards the Contractual Management of Public-Participation Issues: A Review of Corporate Initiatives', in D. N. Zillman et al., *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources,* Oxford University Press (2002) at 225.

[47] S. A. Kennett, 'Issues and Options for a Policy on Impact and Benefits Agreements', report commissioned by the Mineral Resources Directorate, Canadian Institute of Resources Law (1999) at 18

[48] J. Keeping, 'Thinking about benefits agreements: An Analytical Framework', report commissioned by the Canadian Arctic Resources Committee, Canadian Institute of Resources Law, (1998) at 5; K. O'Reilly & E. Eacott, 'Aboriginal Peoples and Impact and Benefit Agreements: Report of a National Workshop', Northern Mineral Working Paper No. 7 (1998) at 16; C. Fidler & M.Hitch, 'Impact and Benefit Agreements: A Contentious Issue for Environmental and Aboriginal Justice', *Environments Journal,* vol. 35, No. 2, (2007) at 63; E. R. Grégoire, 'The Contribution of Impact and Benefit Agreements to the Regulation of Mining Projects: Lessons from the Raglan Agreement In Northern Quebec', in the proceeding of the 23rd World Mining Congress in Montreal, August 11-15 2013, Paper No. 828 (2013) at 9.

[49] C. Fidler & M.Hitch (2007) at 62-65.

[50] I. Sosa & K. Keenan, 'Impact Benefit Agreements between Aboriginal Communities and Mining Companies: their Use in Canada', Environmental Mining Council of British Columbia et al. (2001) at 9; S. Sarkar et al. (2010) at 24.

[51] J. M. Otto (2010) pp 1-82; D. Brereton et al. (2011) pp. 1-40; J. Loutit et al. (2016) pp. 1-15.

The effectiveness of public sector's development projects and programmes funded by IFIs depends on the strong ownership of the beneficiary country. One way of ensuring such ownership is to enable an active and informed engagement of the parliament. This can be achieved in countries where parliaments play an oversight role with respect to budget processes and the design and implementation of national development strategies. It can also be achieved where parliaments are bestowed with the power to scrutinise loans, guarantees or technical advice from IFIs. There are a number of reasons for this: financial or technical support agreements between the government and IFIs may have wider budget or policy impacts on the beneficiary country. They may provide the necessary support to sector-specific developments or free up resources for other expenditures. They may also have environmental or social costs, and future budget cycles must take into account loan repayments and the expected returns on the investments.[52]

Parliaments have plenty of room to exert their influence in the approval process of an IFI's financial service by introducing legal frameworks or by strengthening existing ones, as well as by improving a number of oversight practices.[53] Parliaments can exert informal influence through meetings, briefings or consultations with the executive branch representatives. They can also influence the approval process of an IFI's financial service through formal legislation imposing a debt ceiling to the borrowing activities of the executive branch.[54] To exercise effective oversight of public finances, parliaments are expected to be transparent fully informed on all budget related issues of the country. Another important element for an effective parliamentary oversight of financial activities of the executive branch is technical knowledge. Through capacity building, parliaments can effectively strengthen their oversight role.

A recent survey on parliamentary oversight of international loan agreements and related process found that parliaments often underutilise the legal frameworks at their disposal.[55] Specifically, this study suggests that

(i) Legal frameworks for parliamentary oversight of World Bank and IMF lending are common, though far from universal;
(ii) Legal frameworks cannot be easily bypassed by the executive;
(iii)The legal authority for parliaments to request amendments is often lacking;

[52] A. Motter et al., ´Parliamentary Oversight of International Loan Agreements and Related Process: A Global Survey, Inter-Parliamentary Union & The World Bank, (2013) at 5.
[53] Ibidem.
[54] Idem, at 8.
[55] Idem, at 1-45.

(iv) Parliaments' oversight practices appear to be weak;
(v) There is, however, a positive correlation between the existence of legal frameworks and more effective parliamentary oversight practices.[56]

Taking stock of these findings, parliaments can improve the domestic oversight of international lending activities of the executive branch. In the context of developing countries, that might be a bit elusive because a parliament does not always demonstrate enough independence from the executive branch nor does it show a sense of duty to exercise the proposed oversight functions efficiently.

5.4. Conclusion

What conclusions might one draw from all this? Although the issue of accountability of IFIs has been at the centre of international debates for almost three decades, it remains difficult to delineate its precise features, precisely because the concept itself conveys multiples facets, of which each comprises different components. With particular reference to the legal facet of accountability, the standards applicable to IFI-funded projects shape the accountability mechanisms that would be available to non-state third parties. However, the ability of this category of plaintiffs to seek redress for the harm caused by IFI-funded projects remains quite restricted in practice. The reason is that the current legal framework of IFIs and associated accountability mechanisms do not emphasise enough on protecting the interests of individuals in the territory of member States where IFI-funded project are implemented. Participants to IFI-funded projects can play a helping role by shifting the focus of development projects to the interests of individuals in the territory of the beneficiary State. They must tread lightly and cautiously in order to facilitate, rather than frustrate, this process.

[56] Idem, at 5.

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