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Accountability towards Individuals and Communities Affected by the World Bank Development Interventions: A Project Law Approach

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Abstract

This thesis sets out to explore the reasons why individuals and communities affected by development operations are generally unable to influence and control the content of development interventions, and also how this disadvantaged position could potentially be ameliorated. The aim is to identify systematic and conceptual shortcomings at the governance level – that is, the issues that are valid on their own account and do not rely on the ideological stance about sustainable development. Accordingly, the thesis suggests four principles of accountability that, if implemented, would ensure a more balanced governance of development projects. It then explores whether and how decision-making in the context of World Bank financing currently adheres to these principles, both in terms of substantive standards of accountability and the procedural mechanisms that are put in place to uphold these standards.

The analysis goes beyond the classic emphasis on the World Bank’s founding treaties, or enforcement of operational policies through the Inspection Panel. Instead, the thesis introduces the distinction between general (public international and domestic law), specialized (operational policies) and project-specific (agreements) rules, which, it is argued, are all directly relevant in the context of individual interventions. The notion of ‘project law’ is suggested as a helpful theoretical construct that enables such an analysis across traditional categories of sources. On the whole, ‘project law’ emphasizes the problematic link between different rules at the project level and points towards some fundamental difficulties of ensuring accountability for development transactions.

The key argument of the thesis is that affected persons should be explicitly recognised under ‘project law’ and that such status could be useful in devising a system of accountability at the project level. It is also suggested that the governance of development interventions would benefit from better defined and more stringent public law rules and procedures, since these would clarify the limits of contractual freedom within ‘project law’. As a result of such greater certainty, it would be easier to hold decision-makers to account. Under the current system of World Bank financing, such improvements would be contingent primarily on the will of those who hold decision-making power, and their consent to be subjected to a more stringent accountability regime. In other words, whilst the legal tools may exist, there is also a need for the political will to use them.
Lay summary

Traditionally, development financing was associated with projects that create large scale infrastructure, such as dams, roads, irrigation systems, etc. At present, the idea of a ‘development project’ captures virtually any planned and systemic reform that fosters progress – it covers such contentious areas as fiscal governance, environmental management, education, public resource administration, etc. The one aspect that connects these various reforms is that they all require substantial funding, which in the case of developing countries is normally acquired from resources pooled at the global level. This thesis is focusing on development interventions that are funded by the World Bank – one of the oldest public institutions distributing funding for these purposes.

The Bank rarely funds projects solely from the contributions of its wealthy member states; instead it either lends money borrowed from financial markets, or it facilitates the funding by other donors and investors. This poses serious challenges to governance of these funding deals, because each source of funding comes with the specific interests and agendas of the original funder. Decisions about development are therefore never made solely by those who borrow funds, but also by those who provide them. This means that it is impossible to assess and challenge these decisions based on a traditional citizen-government model of accountability.

The Bank on the other hand is supposed to be accountable to its member states, although this system too has proved ineffective. It is generally accepted that many development projects are risky and at times have detrimental effects on local populations. This research is motivated by these perceived inadequacies of traditional models of accountability. It therefore explains why direct accountability towards individuals and communities affected by development operations is necessary. It also explores how those who are likely to encounter the negative consequences of development financing can be empowered. The enquiry is aiming to pin down the role of law in addressing this issue and is therefore concerned with the rules that guide the World Bank’s financing, as well as scholarly debates that explain their functioning.

The conclusion of this work is that law has two roles in this set-up. It enables the transactions, but also stabilises the social and political relationships that surround them. In order to enhance accountability towards affected people, the Bank should pay more attention to improving this latter function of its rules and regulations.
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Declaration

I declare that this thesis has been composed by myself. It is my own work and it has not been submitted for any other degree or professional qualification.

Giedre Jokubauskaite

Edinburgh, 04 January 2016
Acronyms

ACHPR – African Charter of Human and Peoples’ Rights
AfDB – African Development Bank
AJIL – American Journal of International Law
CSO – civil society organisation
DRC – Democratic Republic of the Congo
EIB – European Investment Bank
EJIL – European Journal of International Law
EMP – Environmental Management Plan
ESS – Environmental and Social standard
EU – European Union
FPIC – Free, Prior and Informed Consent
GAL – Global Administrative Law
GDP – gross domestic product
GHG – green gas house
GRS – Grievance Redress Service
HR – human rights
IBRD – International Bank for Reconstruction and Development
ICCPR – International Covenant on Civil and Political Rights
ICJ – International Court of Justice
ICSID – International Centre for Investment Disputes
IDA – International Development Association
IFC – International Finance Corporation
IFC CAO – International Finance Corporation Compliance Advisory Ombudsman
IFIs – international financial institutions
IIILJ – Institute for International Law and Justice
IPA – Exercise of International Public Authority
IPP – Indigenous Peoples’ Plan
IRP – Involuntary Resettlement Plan
MIGA – Multilateral Investment Guarantee Agency
MoU – Memorandum of Understanding
NGO – non-governmental organisation
OECD – Organisation for Economic Cooperation and Development
PAD – Project Appraisal Document
PCIJ – Permanent Court of International Justice
PID – Project Information Document
PNG – Papua New Guinea
ToR – terms of reference
UK – United Kingdom
UN – United Nations
UN HRC – United Nations Human Rights Committee
WB – the World Bank
WB ESF – the World Bank Environmental and Social Framework
Chapter One

Introduction to the research problem

I remember the first time I was able to accompany the World Bank’s Country Director – the Bank’s top official working in Indonesia – to one of the villages in central Java. [...] We arrived toward the end of the rainy season. On one side of the highway the land was flooded; on the other side it was suffering from drought. The contractor who built the highway had ignored the design requirements to build culverts so that water could drain across the barrier formed by the newly build road. As a result, farmers on both sides of the road had lost their crops. We next walked to an irrigation drain, where two farmers were prying open a large iron gate. Our hopes of hearing a song of thanks for bringing precious irrigation to the fields where dashed when one of the farmers explained that what they were actually doing was trying to tear down the gates, which had been so poorly hung that they were causing saltwater intrusions into their fields. (Fortunately, this was a project funded by Asian Development Bank). And so it went: Water supply projects had stopped producing water just weeks after the NGO that provided them left; a health clinic had no medicine because it was being rented out to a television-watching rental business owned by the village head’s family; and a dam safety project’s quality was so poor that the engineers overseeing the reservoir re-lining fled under cover of night so that the villagers wouldn’t catch them. Stories like these lasted well into the night, with villagers and our young research team laying bare for our visiting director just how different life in the villages was from the descriptions in the reports arriving on the desk.

Guggenheim, ‘Crises and Contradictions’

The very idea of fostering development is an old one. Most of the structural reforms and innovations – such as roads, irrigation systems, division into administrative units and the like – had been introduced through some form of development planning and implementation; although they were probably not ‘branded’ under this particular term. However, the tendency that is relatively new and peculiar to the last century or so, is to foster development through financial resources that are pooled at the global level. The World Bank (hereinafter – the Bank), the institution that is at the centre of attention in this work, was one of the first international mechanisms to start providing such packages of multilateral assistance. The model of funding

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2 See R.N. Gardner, Dollar-Sterling Diplomacy (1956) for a vivid description of the origins of this particular model.
used by the Bank – that is, to borrow from global markets in order to fund development projects – has now been mainstreamed and is used by various institutions and organisations across the globe. Moreover, this same model is gaining traction amongst those who are advocating the fair (re)distribution of (global) resources, as means of spreading global wealth according to the local needs\(^3\). On the whole, the model of globalized financing for development is currently employed with an increasing intensity; and for a wide range of purposes from all sides of ideological debate\(^4\).

Nonetheless, the senior analyst’s description extracted above provides an insight into the sort of issues that are triggered in this conjunction between global funding and local effects. The mismatch between theory and practice, between aspirations and results; also between those with power, and those who are governed in such instances, can be outstanding. And although some of these problems can indeed be attributed to cultural factors (e.g. lack of administrative capacity), or to managerial shortcomings (e.g. corruption) – one would have to be highly cynical or rather short-sighted to be persuaded that these can fully explain the constant challenges that Guggenheim is pointing towards in his description.

Accordingly, this work belongs to a more cautious and sceptical line of thinking about the globalized trends of fostering development. Alongside many scholars in development studies this thesis is preoccupied with the capacity of the international legal system and its institutional structure to manage and restrain the risks that come with global development efforts. More specifically, the key concern is whether the legal framework applicable to these transactions is capable of involving, empowering and protecting the weakest party in development interventions – that is, the individuals and communities affected by these operations. I repackage the general problem through the notion of accountability towards affected people. I address the problem through the analysis of relevant legal framework, also the means and institutions that are put in place to implement it.

In practice there has been substantial pressure on the Bank to pay more attention to the local populations affected by its operations. In response, several decades ago the Bank adopted a set of safeguard policies that are binding on its staff and management\(^5\). Shortly afterwards this

\(^3\) One of the main protagonists here is Thomas Pogge, who is both a theorist and an advocate of redistribution of wealth at the global level (see for instance, T.Pogge, ‘Real Global Justice’, 9(1) The Journal of Ethics (2005) 29.
\(^4\) See for instance UN-REDD programme on the one hand, and New Development Bank (BRICS) on the other.
\(^5\) See discussion in s.3.2.1. for a full overview of how these policies evolved.
was followed by a creation of the World Bank Inspection Panel (hereinafter – the Panel), an accountability mechanism intended to oversee institution’s compliance with these internal rules. For the last couple of years the Bank’s policies had been under a major reform, which also sparked much debate about the issues driving this work. Nonetheless, in this thesis I wish to emphasize the Bank’s own rules and mechanisms only tell us a part of the story about the governance of development cooperation. Accordingly, we must first and foremost appreciate the full institutional terrain in which global funds are distributed. Only then will it become possible to hold a constructive debate about the possibilities of improving the governance of individual institutions. This thesis thus puts forward an idea of ‘project law’ – a theoretical tool that enables such analysis of the entire institutional and contractual realm pertaining to each intervention.

The upcoming sections in this chapter spell out exactly why the focus on affected people in development financing remains necessary and deserves further academic scrutiny. In order to do so, I will illustrate the disadvantaged position of affected people through real-life examples. The chapter will then explain how this research fits into the existing literature, and what sort of knowledge it will contribute to the current understanding on the matter. It will end with a more detailed overview of the methodology and structure of this research.

1.1. The disadvantaged position of the affected people in the context of development financing

1.1.1. Examples of social and political controversies created by development projects

Some of the most visible issues in development financing are triggered by projects aimed at creating new infrastructure, such as the Bujagali Dam project in Uganda (hereinafter –

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6 Panel’s mandate is set by its founding resolution, see ‘The World Bank Inspection Panel (IBRD 93-10; IDA 93-6)’ (September 1993); available online at http://ewebapps.worldbank.org/apps/ip/Pages/Panel-Mandate.aspx.
8 I will introduce two distinct projects, in order to illustrate the range of controversies that can be triggered.
The Bujagali project was supported by a wide range of international financial institutions (IFIs), and marked by the substantial involvement of the private sector. While the idea itself – to increase Ugandan power generation capacity by building a new hydropower plant – was reportedly initiated by the Government of Uganda, the project design largely owed its shape to the technical assistance from these IFIs (the World Bank in particular).

During the preparation stage the area of Bujagali falls was chosen as the site for construction – this decision was predominantly driven by the anticipation that this represented the cheapest option of power generation available in Uganda.

The controversy surrounding Bujagali hydropower plant project stemmed from many factors. Firstly, it was argued that the increased power supply would not ensure better and cheaper access to electricity to the majority of the country’s population, but that it would be detrimental to local economy since many people in the surrounding areas relied on the income from tourism. Secondly, according to the request for inspection, the falls were claimed to be the spiritual centre of surrounding communities, which inevitably would have been devoured by construction of this new power generating estate. Thirdly, there was a strong criticism about the lack of engagement with alternatives to Bujagali project, which might have been more costly at the outset of the intervention, yet potentially less risky and less damaging in terms of affected population and their environment. All in all, Bujagali dam is a classic example of large infrastructure intervention that altered cultural and economic practices of a certain ethnic group, under the excuse that such change was necessary for the well-being of the larger political entity.


The abovementioned IFC, AfDB, EIB, also several national development agencies (German, French and Dutch); the political risk of private investors was insured by Multilateral Investment Guarantee Agency (MIGA).

See AfDB IRP ‘Compliance report’ for further details.

This takes us onto the second example, *Papua New Guinea (PNG) Smallholders Agriculture Development* project\(^\text{16}\) (hereinafter – *PNG Smallholders*). This is an example of a typical ‘soft’ intervention, aimed at reforming the way in which societies function on a day to day basis. The structure of this project was less complicated with regards to constellation of actors and interests involved than that in *Bujagali*. Nonetheless, it was no less problematic in terms of relationship between the affected people and the policies of the state government. The intervention was funded solely by International Development Association (IDA). The recipients of assistance were the Government of PNG and the Palm Oil Industry Corporation, i.e. the national agency in charge of coordination and support to this type of commercial activities. The project was essentially aimed at improving and expanding the functioning of the country’s palm oil industry, and it therefore contained a significant element of institutional reform and adjustment.

If compared to *Bujagali*, this project was more subtle in terms of its structure and mode of intervention: it functioned almost exclusively through existing institutions; it allowed them to change and adapt; and by creating new modes of taxation, it helped them to acquire stronger financial ‘muscles’. Yet the controversy surrounding *PNG Smallholders* was such that strengthening overarching institutional mechanisms at the central level came at the expense of distortion of existing social patterns of affected population\(^\text{17}\). It was argued that in granting more power to centralized institutions the project had weakened traditional and more horizontal structures of governance, reduced the options of income generating activities for the affected people and increased the dependency of the surrounding communities on the production of palm oil. Moreover, the smallholders within the industry had become even more tied to industrial mills, and more intimately reliant on top-down power structures.

1.1.2. Unpacking the issue: the ‘institutional trap’ of affected people

If we consider the two projects together, we can see that the intentions of contracting parties in both cases were legitimate and difficult to challenge on their own account. In both cases the objective was to create benefits for the country as a whole: in one case through strengthening


\(^{17}\) *Ibid.* (Panel report, in particular ‘Executive Summary’).
its infrastructure; and in the other its institutions. Both projects followed formal project deliberation procedures, and were implemented with consent of the responsible authorities in the borrowing states. They were conducted under the laws of the borrowing state, and also the policies of participating funders.

However, if we take a step back and evaluate the opposing claims of affected people – their concerns appear to be equally legitimate and deserving of serious reflection. Yet, in neither of the two cases was it possible to reverse the course of the project; nor was it possible to mandate the institutions in charge of decision-making to revise them. This, in a nutshell, is why the position of affected persons is disadvantaged: notwithstanding whether their concerns and objections to development project are legitimate or not, they generally have no means or possibility to influence and challenge the decision-making that affects them.

There are numerous factors that contribute to such a disadvantaged position of affected populations. Some of these are beyond the focus of this work. For instance, the core choices in both of these projects can probably best be explained through geopolitical and economic reasons, such as Uganda’s choice to foster private investment, or PNG’s decision to enhance competitiveness of their industry. However, looking at these factors alone tells us little about the role and position of affected communities; notably because, more often than not, the affected persons play no part in global economic and political arena. Hence, the focus on economics and international relations can only explain why the affected people are excluded from decision-making about development. Yet, it cannot explain the reasons why the position of the affected persons remains disadvantaged, even in the face of a supposedly strong and elaborate institutional framework.

Therefore, in the present research I focus on the logic of governance behind development transactions, and attempt to pin down the issues of institutional and legal design that keep the affected people so disempowered. The intention is to leave the political and economic issues in the background, and to only bring them into the analysis in the instances where they clearly affect the functioning of the measures of governance.

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18 Similar notion is posited by Stewart, who is concerned with the problem of ‘unjustified disregard’ in global governance. According to him, such disregard causes harm to the interests (i.e. certain material conditions) and concerns (i.e. more subjective values) of the ‘weaker groups and targeted individuals’; see R.B.Stewart, ‘Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness’, 108(2) AJIL (2014) 211
*Bujagali* and *PNG Smallholders* projects point towards a range of governance issues that are readily found in development interventions, even in the absence of an in-depth analysis. These can roughly be grouped into three major areas. To start with, we can observe a distinct area of issues related to *procedural arrangements* used in this type of international cooperation. Note, for instance, the questionable role of technical assistance that determined project design in case of Bujagali dam; also how the institutional reforms in PNG have failed to react to the negative feedback from affected smallholders. The entire ‘project cycle’\(^{19}\) contains procedures through which the parties to development transactions interact. These seem to be decisive in determining the extent to which the views of affected people are welcomed and appreciated. Depending on their design, procedural arrangements can either sustain or ameliorate the disadvantaged position of affected persons.

The second area of issues underlined by both of these different projects concerns the economic rationale of decision-making; and in particular its tendency to prevent the alternative ways of thinking about development. On the whole, such a rationale is likely to come at odds with the interests and views of affected people – and no existing rules seem to be able to prevent such an ideological inclination. In the *Bujagali* case the government was guided to choose by the cheapest type of infrastructure; and not because it would produce the cheapest electricity for the consumers, but because it was the most viable option for the investor. In *PNG Smallholders* the government was drawn towards strengthening the existing (centralized) institutions – although those were potentially most harmful to the affected people. In both of these projects the logic of effectiveness and resource efficiency readily trumped the chances of legitimate alternatives; which arguably was in tension with some of the basic principles of protection accorded to the affected people under domestic constitutions and public international law. This group of issues is related to the *substantive rules* that govern development interventions.

Finally, a third area of problems exemplified by these two projects stems from the institutional (in the broadest sense of a word) context in which development transactions are taking place. In both scenarios the intervention was designed and approved by both, domestic and international authorities; and in the case of the *Bujagali*, the project was funded from both public and private sources. Arguably the disagreement and resulting tensions would be addressed differently if these projects were designed domestically, funded from the national budget, and conducted without external conditions attached. This is not to say that the

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\(^{19}\) See s.4.1. for a discussion on ‘project cycle’ and its stages of decision-making.
outcomes of deliberation and review in such domestic institutional setting would necessarily be better; but that the form of a dispute, the type of available review procedures, and the outcomes to be expected from those would be different. In other words, globalized development projects with a vast range of participants opens up a unique and complex institutional set-up of decision-making. This set-up is uncomfortably exposed to external considerations and generally leaves governmental authorities with little leeway to take into account the views of affected people.

It is apparent even from this basic overview that the disadvantaged position of affected persons is a systemic problem. The governing framework as it is tends to put affected individuals and communities into a sort of ‘institutional trap’, where all operations appear to be taking place in accordance with the law – but where the outcomes are likely to go against the purpose and functions of the law. This issue is not accidently triggered and peculiar to the two projects considered in this work. Instead, similar risks run throughout all the projects implemented in the system of development cooperation enabled by the Bank – because ‘the trap’ stems from the type of procedures, rules and institutional context in which these transactions are taking place.

The concept of accountability employed in this work is meant to aid the scrutiny of these systemic shortcomings. Accountability is suggested as a framework of assessment, helping to trace where exactly the current system the governance falls short of convincing justifications. It is also suggested as the means of scrutinising and improving power balance between the decision-makers and those subjected to their decisions. A closer look at the relevant academic discourses will allow me to position this focus on accountability in a wider terrain of related issues, and to outline the gap in the existing knowledge this work will fill.

1.2. Mapping out the relevant scholarly debates

1.2.1. The field of research

In the most general terms this research belongs to a relatively long line of scholarly attempts to merge (international) law with development studies into a common space of analysis. The academic ancestor of this line of thinking was the Law and Development movement from 1960-70s that focused on the role of domestic law in aid recipient countries, and perceived law
under the instrumental or functional rationale similar to that of Law and Economics. Eventually this field of study evolved and had been transformed into the so-called International Development Law. As the name suggests, the latter trend has granted a more explicit recognition to the international element in development. It increasingly developed critical views about the role that international law plays in shaping the social and economic conditions in developing countries. This way of thinking was mainly directed against exploitative practices by foreign entities in the Global South, and it exposed many structural weaknesses of the system of development financing. Thus far the latest trend in the law and development research agenda follows what Philipp Dann has called the ‘institutional turn in development studies’. Within this line of thinking about development the division between domestic and international legal realms are increasingly being blurred, or at least the two are perceived as closely intertwined. The key preoccupation of this type of literature is to comprehend the role of law, both domestic and international, in the institutional context of development financing. The aspirations of these scholars are normally less radical than those implied by an openly critical reasoning of international development law. This scholarship is more inclined towards the change within existing institutional structures, rather than emphasizing their exploitative nature and thus advocating their replacement with something completely new. This thesis does belong to this latest trend. It is attached to the institutional background of the World Bank, and has the aim to explore the most promising ways of improving the existing legal framework. Within this broad and diverse area of research two scholars have sought to delineate the concrete field of development financing (cooperation) and in that way identify the

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20 For a critical overview of this movement see J.H.Merryman, ‘Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement’, 25(3) (1977) AJCL 457; this strand of literature is still active in contemporary scholarship, but it remains focused on the role of law in development process; rather than the role of law within development assistance. For a comparison and the link between the two strands see A. di Giovani, ‘Linking the Law and Regulation of Development to the Promotion of Law through Development’, forthcoming (on file with the author); presented in GAL X Seminar, Viterbo, Italy (June 2014)).

21 It is indeed difficult to identify a common line of thinking in this strand of literature, possibly with the exception that it takes seriously the post-colonial legacies of international law and relations; two conceptual, quite recent, and most notable monographs that can be placed within this category are B.Rajagopal International Law From Below : Development, Social Movements And Third World Resistance (2011); and R.Sarkar, International Development Law: Rule of Law, Human Rights, and Global Finance (2009).


23 Davis and Dann, also some other authors tend to attach some importance to the distinction between ‘cooperation’ and ‘financing’, but in this work the two terms are used interchangeably (unless specified
conceptual space for related legal debate and analysis. The two scholars are Philipp Dann\textsuperscript{24} and Kevin Davis\textsuperscript{25}. Their accounts on this matter will be analysed extensively in the final chapters of this work. In these chapters I will consider the productive tension between the two accounts. Yet, for the purposes of this introduction the relevant aspect of their ‘debate’ concerns the similarities between the two accounts, rather than their differences.

As mentioned above, these two scholars both recognise development financing as a \textit{distinct field of inquiry for legal analysis}. Within this broad field Kevin Davis avoids any clear distinction between ‘law’ and ‘non-law’\textsuperscript{26}. Legal analysis should gravitate around relevant legal instruments and their content, more so than their precise legal nature. Philipp Dann, on the other hand, explicitly claims there to be a ‘law of development cooperation’; but his ‘law’ is loose enough to include some of the less formal sources that govern this set-up\textsuperscript{27}.

If we consider these two accounts together we can remark that both scholars take development assistance \textit{practices} as the entry point to their argument. By looking at these practices they trace \textit{something} that appears to be normative and exhibits some features of what we might call ‘law’. Put otherwise, the ‘law’ of development financing for both of them is a relatively loose construct that is grasped intuitively through the means of induction, rather than pure analytical reasoning.

Such strategy of the two scholars seems plausible, and in fact comes across as the only way of approaching the normative framework that we are dealing with in this field. That is because, as Philipp Dann convincingly argues in his book\textsuperscript{28}, the process of funding development is inherently political, and therefore not always susceptible to the forms of rigid legal reasoning\textsuperscript{29}. In that respect any relevant inquiry, at least at the outset, should venture beyond the rigid ‘law’ and ‘non-law’ distinction into more policy-oriented sources of normativity, the legal nature of which can be qualified at a later stage. This same strategy will be adopted in the present work.

\textsuperscript{24}See in particular Dann, \textit{The Law of Development Cooperation}.\textsuperscript{25}K. Davis, ‘Financing Development as a Field of Practice, Study and Innovation’, 1 \textit{Acta Juridica} (2009)168, at 168; Dann, \textit{Law of Development Cooperation} at 13.\textsuperscript{26}He mentions several times throughout his paper that ‘law matters’ in understanding the terms of financing development; however nowhere in the text he seems to explain in greater detail the difference between law, and ‘non-legal norms’ (quote from Davis, ‘Financing Development as a Field of Practice’ at 173).\textsuperscript{27}Dann, \textit{Law of Development Cooperation}, at 12-20 (emphasis added).\textsuperscript{28}Dann, \textit{The Law of Development Cooperation}, at 18.\textsuperscript{29}Ibid. at 27.
The overview that follows next will introduce the three major strands of general legal literature that pertain to this specific ‘field’ of legal practices in development assistance, and in particular to the issue of accountability towards affected persons considered in this research.

1.2.2. The three strands of relevant literature

a. ‘Functional’ approach. This first group of academics writing about the research problem considered in this work is highly diverse, and they would hardly see themselves as belonging to the common strand. There are nevertheless broad commonalities in their work, which places them under the same category. These scholars generally examine how accountability towards individuals and communities is presently being set in motion, and often concentrate on the pragmatic solutions of how related mechanisms could be improved. The analysis in this strand mostly departs from one of the obstacles that individuals encounter when they attempt to engage with or challenge development projects; such as lack of information, capacity, access to justice and the like. These scholars then set out to examine the ways through which such obstacles could be removed, and consequently how the disadvantaged position could be ameliorated.

The ‘usual suspects’ of this strand are therefore such matters as the functioning of the World Bank Inspection Panel and its limits\textsuperscript{30}, and the jurisdiction of domestic courts to deal with claims of the affected parties and their capacity to prescribe remedies\textsuperscript{31}. The latter is closely


\textsuperscript{31} Probably the most recent and holistic overview of role of domestic courts is provided in R.S.J. Martha, ‘International Financial Institutions and Claims of Private Parties: Immunity Obliges’, in H. Cissé et el. (eds), The World Bank legal review. Vol. 3 (2012); a good overview from the perspective of legal practitioner is in G. Thallinger, ‘Piercing Jurisdictional Immunity: The Possible Role of Domestic Courts In Enhancing World Bank Accountability’, 1 Vienna Online Journal On International Constitutional Law (2008) 4; most of the work in this field in one way or another builds upon the groundwork on the role of domestic courts in international law by Reinisch; see for instance A. Reinisch ‘Accountability of
linked with the analysis of immunities of international organisations and ways in which individuals could possibly overcome related barriers. A parallel line of inquiry in this strand attempts to question the application of human rights, and how those should but normally cannot be invoked in order to suspend or tailor project implementation. The latter is then intertwined and extended with the analysis of access to justice as well as a right to participation, mostly illustrating how both of these rights are potentially relevant but problematic to employ in practice. All in all, this strand of the debate tends to generate a great volume of empirical evidence and legal arguments that exemplify why the status quo in development financing is far from satisfactory for the third parties of the World Bank loan agreements.

The strength of this literature is that it normally engages with currently functional mechanisms and relatively clear concepts, applied onto the real-life situations. The outcomes of this type of research are therefore realistic, tangible and in many instances readily applicable to legal arguments and practices. However, the weakness in this line of argumentation is that it is mainly concerned with already established legal pathways and their derivative logics, which is why it often misses out on the greater picture of the institutional context in which loan agreements are being negotiated, concluded and implemented. In other words, this kind of analysis functions within the self-imposed limits of pre-existing formal structures. It perceives problems as a lack of (traditional) solutions, which is why, in most instances, it fails to reach

\[\text{international organizations according to national law’, 36 Netherlands Yearbook of International Law (2005) 119.}\]

\[32\text{ See Martha, ‘International Financial Institutions and Claims of Private Parties’ (2012); also W.M.Berenson, ‘Squaring the Concept of Immunity with the fundamental Right of the Fair Trial: The case of OAS’, in H. Cissé et al. (eds), The World Bank legal review. Vol. 3 (2012); also E.Baimu and A.Panou, ‘Responsibility of International Organizations and the World Bank Inspection Panel: Parallel Tracks Unlikely to Converge?’ in the same volume.}\]

\[33\text{ See for instance M.E.Salomon ‘International Economic Governance and Human Rights accountability’ (LSE Law, Society and Economy working papers 9/2007); also Clark, ‘Boundaries in the Field of Human Rights’ (2002).}\]

\[34\text{ The literature here mostly overlaps with analysis of the role of the domestic courts, as well as inspection Panel. For good analysis, see Berenson ‘Squaring the Concept of Immunity with the fundamental Right of the Fair Trial: The case of OAS’ (2012).}\]

the sufficient theoretical depth and take into account the multiplicity of perspectives that shape these pathways in the first place.

**b. Global Administrative Law (GAL).** The second strand of literature that has picked up on the systemic issues identified in the previous section is *Global Administrative Law*. Generally GAL scholars are preoccupied with the functioning of international institutions, together named as the phenomenon of ‘global administration’\(^{36}\). GAL considers the possibilities of constraining the functioning of these administrations, in particular by putting in place viable systems of accountability. Such focus renders GAL scholarship directly relevant to the field of development financing, but also to the issues analysed in the present research.

The strength of the GAL approach is that it is capable of penetrating much deeper into the fundamental reasons for accountability deficit than the first strand. At the same time it also builds upon the case studies derived from international legal disputes\(^{37}\). Hence, its descriptive analytical account is not only grounded in theory, but is also refreshingly realistic, and to a certain point illuminating\(^{38}\). Moreover, Benedict Kingsbury, one of the protagonists of this school of thought, has written extensively about the World Bank’s legal framework. This makes an application of GAL theory in this area of international cooperation both easy, and difficult not to notice\(^{39}\).

Beyond the range of descriptive analytical insights that are directly relevant to this thesis, GAL scholarship is also advancing a normative project\(^{40}\). The attempt is to create a general theory of public accountability applicable to all these ‘global administrations’. It is the limitations

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\(^{40}\) See Kingsbury *et al*. ‘The Emergence of Global Administrative Law’ (2005) for further details.
imposed by this normative theory that seem to be undermining the overall relevance of this strand to the particular problem of accountability towards affected individuals and communities. As with many other general theories that try to cover a range of diverse international legal regimes, this one seems to be sacrificing the depth of the argument for the sake of its breadth.41

Notwithstanding the above, this thesis builds upon the insights provided by GAL scholarship, in particular on the scholars’ diagnosis about the legal issues characterising global governance.42 More specifically, this work aims to pin down the point in GAL’s reasoning beyond which the problem of accountability towards affected persons requires more convincing and specialized solutions than this general theory can offer.43

c. The Exercise of International Public Authority (IPA). As in the case of GAL, the group of scholars pioneering IPA project offer a way of understanding the role of (international) law in the realm of global governance.44 Instead of concentrating on the ‘administrative’ space (which is constructed by GAL merely as some uncharted space between the constitutive and the judicial), IPA emphasizes the need to regulate the bodies that are exercising legitimate public authority at the international level.

The central figure in this strand with regards to law and development studies is the aforementioned Philipp Dann.45 He is probably the only scholar who has addressed the legal

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41 The article by Kingsbury and Casini ‘Global Administrative Law Dimensions of International Organizations Law’ (2009) is a good example of this kind ‘open-ended’ reasoning, in which the examples of practices by numerous international organizations are merged into categories relevant to GAL. This kind of inductive analysis across many areas of international cooperation appears to be highly problematic in terms of its methodology.

42 See in particular the analysis of ‘Global Administrative Space’ in Kingsbury et al. ‘Emergence of Global Administrative Law’ at 24-27.

43 See in particular chapters four and five (the analysis of participation, transparency and review procedures), also discussion in s.7.2.1.


and institutional issues in the area of development financing in such a comprehensive manner, including the problems relating to accountability.

In terms of its methodology IPA is highly theoretical, arguably more so than GAL, and considerably more so than the ‘functional’ strand. Thus, the strength of the IPA approach is that it attempts to provide a conceptual framework to structure the analysis of related legal issues. This framework is based on the role of public law at the international level; and related justifications about why such regulation is necessary. Neither of the two strands explained thus far have crafted a theoretical framework of debate with such rigour as IPA. Dann in particular in his voluminous monograph analyses the current system of development cooperation from a comparative perspective, and suggests a clear set of analytical tools for its evaluation. His text displays all the values of specialized and systemic engagement with the subject. It puts the existing institutions and their practices under the full scrutiny, and not a single problematic element of their functioning gets away unnoticed.

On the whole, Dann appears to employ a similar analytical strategy to other scholars in IPA-related research. This strategy entails taking the theoretical framework created by the general IPA project, and then applying it onto a particular field of international cooperation. In this respect, IPA too tends to get trapped in the same kind of self-imposed limits as the ‘functional’ approach. However in this case the limits are imposed by the pre-set conceptual framework, rather than already existing institutional logics and mechanisms. In case of Dann’s book this means that his analysis is dominated by a focus on the functioning of formal (public) institutions and their internal processes, rather than the actual practices of development financing.

On the whole, such heavy reliance on a rigid theoretical model hinders the capacity of this strand to explain much of what is actually going on in reality, and even distorts our understanding of reality in a ‘theoretically convenient’ way. Most importantly in the context of this work, such focus on the formal institutions leaves the link between these institutions, 46 See in particular A. von Bogdandy, ‘General Principles of International Public Authority: Sketching a Research Field’, 9(11) German Law Journal (2008) 1909.
47 See s.7.2. for more detailed overview of IPA’s theoretical framework.
48 His division into legal and structural principles appears to be most convincing analytical tool, see discussion in s.6.2.1. and 7.2.2. for more detailed analysis.
49 See contributions to the collection of related research; A.von Bogdandy et al. (eds), The exercise of public authority by international institutions (2010).
50 This comes in contrast with GAL literature, which tends to support their claims through reference to real-life issues; but which does so at the expense of not having a sufficiently rigid theoretical framework.
and the local communities affected by their operations, merely as some secondary marginal concern.

At this point it must be emphasized that such observations are not meant to deny the general advantages of conceptual framework offered by IPA. To the contrary, IPA theory informed a lot of analysis in the present work. Because IPA scholars ground their analysis so firmly in a liberal political theory, their account has the normative ‘pull’ that both GAL and functional strand are lacking. As a result, their theory does more than just offer critical conceptual appraisal; it also contains a range of constructive propositions that can inform how the present system of governance can be improved. Due to these reasons, IPA theoretical insights will be employed extensively in the last chapter of this work, and will guide the search for the legal solutions to the issue of accountability deficit51.

1.2.3. Situating this research in the academic debate

The analysis of the three strands above shows the extent of the scholarly analysis dealing with the governance issues addressed in this work. Some of this literature has generated a wealth of evidence about various shortcomings within the functioning of existing institutions (functional strand). Some of it has provided convincing diagnosis about the deeper structural issues that cause these shortcomings in the first place (GAL). Some scholars offer theoretical insights about the ways of improving current system of governance and indicate available legal tools (IPA and GAL).

However, what seems to be either missing or in short supply is the analytical work that would connect these three types of knowledge together; particularly in a way that would explain the reasons for a disadvantaged position of affected persons, and consequently suggest the ways of improving it. Doctrinal analysis seems to be lacking the conceptual space for such inquiry. Theoretical work on the other hand has not thus far paid sufficient attention to this issue. Both GAL and IPA scholars have voiced relevant preoccupations, but generally their questions and therefore their research outcomes are focused on other problems52.

Accordingly, this work aims to contribute to the conceptual debate about the role of law in a governance of development finance; in a way that takes seriously the doctrinal barriers

51 See discussion in s.7.2.
52 See discussion in 7.2.1. for more detailed engagement with theoretical views of GAL and IPA and their concerns.
created by the legal systems governing these transactions. In particular I wish to bring forward and explore the fact that interventions are created through political as well as legal *agreement* between certain actors at the global level. On the other hand, I wish to put an emphasis on the fact that interventions generally affect a group of individuals governed under a *single constitutional system* of the borrowing state. It seems to me that none of the strands of literature outlined above has paid sufficient attention to these contractual and constitutional underpinnings of development assistance, nor managed to appreciate a full range of legal relationships that are triggered and created in this setting.\(^{53}\)

The objective of this thesis is therefore to offer a *conceptual framework*, which is specialized and yet general enough to frame the debate about the role of law in development financing. This framework can then be used to identify the most pertinent doctrinal issues in development financing on the one hand; and to situate potential legal solutions on the other. The main aspiration of this work is to offer an account of governing framework that is not only *mindful of*, but actually *centred around* the people for whom the system of globalized development was designed in the first place. It is an attempt to rethink the global-local connection in this area of international cooperation in a way that does not just rely on the logic and functioning of formal structures and regulations, but instead carves out the conceptual and normative space for their transformation and adjustment.

1.3. Outline of the thesis

1.3.1. Methodology, structure and research questions

The methodology of this thesis combines doctrinal and theoretical analysis of laws and institutional practices that pertain to project financing by the World Bank. In terms of doctrinal overview, the greatest challenge for this research was to find an accurate and comprehensive commentary about the governing framework of the Bank – which, beyond the aforementioned monograph by Philipp Dann, is scarce.\(^{54}\) While many authors mentioned in this chapter tackle

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\(^{53}\) The aforementioned Kevin Davis has suggested that we should understand development financing as a field of inquiry, predominantly governed through contract and administrative law; but I wish to explore such claim from a different angle, and in particular see how such structure of analysis links to the three strands of literature outlined in this section. For detailed analysis of Davis’ account see discussion in s.6.1.2.

\(^{54}\) Some authors had written about policies; some about agreements; and some about the application of general standards (e.g. human rights); but only Philipp Dann attempted to put them into a comprehensive framework and specifically examine the links between different categories.
different aspects of relevant rules and procedures, the bigger institutional ‘puzzle’ often remains uncharted and unresolved. Accordingly, a large part of the argument in this thesis is spent on dissecting and clarifying the existing governing framework; and in particular the role and nature of project-level plans, agreements and resulting institutional structures. This latter part of doctrinal overview required extensive engagement with examples of Bank’s standard contractual instruments, and a comparative analysis of their content.

The theoretical analysis in this thesis – and in particular its final two chapters – is largely structured around the views of Philipp Dann and, to a lesser degree, Kevin Davis. The analysis there is built on the insights of the two scholars and generally acknowledges the value of their ideas; and yet it disagrees with them on several crucial points. These points are either identified through an application of their views to real-life practices in development financing (in most cases, based on the reading of the cases argued in front of the Inspection Panel); or through the reference to other legal and social theorists with a different focus, who argued their point in a more persuasive manner.

This brings me onto the structure of this work. Following this introductory chapter, the thesis starts off by outlining the conceptual framework of accountability (Chapter Two) – which is where I set out the core elements of accountability relationship created in the context of the Bank’s operations (why, who and to whom should it be accountable). This chapter also puts forth the four principles of ‘strong’ accountability, which are all derived from the definition of accountability commonly used in the academic literature. These principles are then used in the next three doctrinal chapters to evaluate the balance of power between the affected people, and ‘power-holders’ in these transactions.

The assessment of institutional practices in these chapters is generally structured around the idea of ‘accountability gap’. This ‘gap’ is identified by applying the four principles of accountability onto the governance framework surrounding the Bank’s interventions. It is structured into the analysis of accountability standards (Chapter Three) which includes a detailed overview of all the main sources that are triggered in these interventions. This chapter addresses the question ‘accountability for what?’ Then the assessment moves onto accountability mechanisms, which includes the analysis of relevant decision-making procedures at the project level (Chapter Four) and formal review procedures that are accessible to affected people (Chapter Five). These two chapters are addressing the question of how decision-makers are currently held to account.
A chapter on conceptual debate about development financing (Chapter Six) sets out to ‘explain the gap’ that causes the disadvantaged position of affected people. This chapter explains in detail the notion of ‘project law’, by positioning it as the missing element capable of connecting the descriptive accounts by Dann and Davis. The last chapter (chapter Seven) focusses on legal ‘solutions’ that could potentially be employed to deal with an issue of accountability gap. More specifically, this is an attempt to rethink the meaning and benefits of the public law analogy that was put forth by IPA scholars, and consequently the possibilities of strengthening the role of public law in this area of international cooperation.

On the whole, by following the argumentative steps explained above, this thesis sets out to explore the reasons why individuals and communities affected by development operations are generally unable to influence and control the content of development interventions, and also how this disadvantaged position could potentially be ameliorated. More specifically, it is aiming to answer the following four questions:

(i) Why should the parties to the World Bank financial agreements be accountable to the people affected by resulting development interventions?
(ii) To what extent are they currently held to account, and how?
(iii) Have legal scholars offered a convincing descriptive account of the legal framework in development financing, and have they argued convincingly for ways of enhancing accountability towards affected people?
(iv) Can public law analogy be useful in framing the governance of these global interventions and enhance the accountability towards affected people, and if so, how?

1.3.2. Original contribution

It was explained in the overview of relevant literature that the intention of this thesis is to contribute to the existing knowledge at the conceptual level. Nonetheless, some of the key observations in this work are meant to be descriptive, i.e. they are bringing to a certain level of abstraction what is already going on in reality. As a means of enabling such inquiry, this research is engaging extensively with legal doctrine. In doing so, it suggests a line of remarks about the application of black letter law, some of which add to the existing knowledge on their own account. However, on the whole the core original contribution of this thesis is meant to be theoretical; and in this regard it is possible to identify three main ideas put forth by this work.
a. **Accountability towards affected people and its principles.** Academics have generated a lot of insights about accountability and its place in the global governance. Because of such an extensive use, but also due to an elusive meaning of the term itself, the notion has been inflated to the point where it becomes difficult to see its limits; and at the same time its essence is truly difficult to pin down. Nonetheless, there are not many other concepts in the current vocabulary of social sciences that are so well suited to theorise about the functioning of global governance, and also to scrutinise its flaws. Above all, it is a concept that is normative and capable of guiding necessary improvements. With such potential advantages and pitfalls in mind, this thesis sets out to rethink and clarify the concept of accountability, and to make it better fit for the context of development interventions.

This part of the research therefore defends the notion of accountability towards affected individuals and communities. This notion is predominantly analytical, and should not be treated as a legal category. Instead, it is meant to create opportunities for intelligible evaluation of current legal and institutional practices. Its main advantage is that it places the position of affected persons at the centre of our attention. This in turn supports the core argument of this thesis; notably that decision-makers should be accountable to these persons in order to uphold and justify the legitimacy of coercion in development interventions. More importantly, the accountability within development interventions should be ‘strong’ enough to ensure a relative balance of power. That is so because only balanced relationship can bring about good governance and ensure that development operations are not based on arbitrary decisions. Accordingly, this research puts forward four principles of strong accountability. They enable the assessment of whether the governing framework of development assistance is indeed sufficiently accountable or not, and also why.

b. **Project law approach.** It was already mentioned that the intention of this work is to go beyond the focus on individual institutions that distribute development aid. The idea of ‘project law’ makes such analysis possible. It opens up the analytical process to a range of sources that are activated in individual transactions, and which are likely to remain unnoticed if we only look at one of the parties to these transactions (e.g. the Bank, the borrower, the investor).

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55 See discussion in s.2.1.
56 See discussion in s.2.2.1. for a detailed outline of dangers and benefits that follow accountability analysis.
57 Note that the concept is adjusted from the scholarship in legal anthropology, see s.6.3.1. for further detail.
A project law approach is constructed on the criterion of *relevance* (to an individual intervention), and it has two major conceptual advantages. Firstly, it enables the analysis of otherwise *contingent governance arrangements*. In other words, project law helps the analysis ‘zoom in’ on the proper complexity of individual development project, not allowing it to get lost in the macro structure of global governance. A specific group of affected persons can be seen as playing a central role within the institutional structures of each such arrangement. As a result, it becomes possible to look at the decision-making and accountability mechanisms at *the project level*. This will be precisely the focus of several chapters in this work\(^58\).

Secondly, project law approach creates a conceptual space in which it becomes possible to grasp a *plurality* of legal sources that govern development financing. In this pluralistic setting it then becomes possible to treat the contractual element with sufficient detail and attention, to trace the challenges and opportunities of governance that it presents, and to scrutinise its link with other sources of law. This, at least partially, explains why so much of my overview about sources and accountability mechanisms is accorded to contractual instruments. It also provides a justification as to why I spend the final two chapters considering the core characteristics, risks and possibilities that come together with the contractual element of project law.

\(c.\) **Limited role of public law.** This research has an ambivalent relationship with the structure, principles and reasoning of public law. On the one hand, because of the focus on accountability and good governance, public law rationale is reflected in most of the chapters in this work. Public law principles feature throughout the entire argument, and inform most of my doctrinal observations and conclusions. On the other hand, because of the recognition that there exists a strong contractual element and freedom of parties within project law, this research often ends up being sceptical about the methodology and solutions based on public law analogy. The contribution that follows from such two-sided engagement is that this research identifies the practical and conceptual limits of public law analogy. In particular it constructs an argument about what realistically, but also conceptually, public law reasoning can achieve in this internationalized setting, which at times goes against the suggestions of GAL scholars and also the reasoning of Philipp Dann. The explicit discussion on this matter is outlined in my final substantive chapter; although related observations also run throughout most of the doctrinal chapters in this work.

\(^{58}\) See in particular chapters 4 and 5.
Chapter Two

Framing the issue through the concept of accountability

Introduction

The aim of the present chapter is to explain the analytical framework proposed by this thesis. In a nutshell, this framework can be described in the following line of reasoning. Firstly, it is argued that the notion of accountability is a good analytical tool for assessing the governance of development financing. Secondly, accountability is traditionally associated with the state-citizen relationship, but in the context of development assistance this traditional understanding must be substituted with a more elaborate framework. Thirdly, in the context of the World Bank interventions the questions who, to whom, why, how and for what (should be held to account) help to set the parameters of the accountability relationship. Fourthly, the concept of project law introduced in the previous chapter adds to the coherence of such accountability framework. It does so by placing the relevant standards and mechanisms of accountability into a single analytical category. Finally, a stringent accountability analysis requires some normative threshold of assessment. Accordingly, the proposal is to adopt a line of evaluative principles that are derived from the defining features that make up the concept of accountability.

The overview of this analytical framework provided in the present chapter consists of two parts. The first part lays the theoretical groundwork for accountability analysis. It describes the scope and the meaning of the term, as well as the benefits and the dangers of conducting accountability-focused research. The second part then applies these general theoretical observations onto the area of World Bank interventions. It defines the parameters of accountability relationship, as well as the four principles of strong accountability that are going to frame the description and the assessment of this relationship in the upcoming chapters of this work.
2.1. Justifying the focus on accountability

2.1.1. Scope and meaning

Social scientists have generated a lot of literature trying to pin down the most accurate definition of accountability. For the purpose of the present research it seems unnecessary to adopt a single definition by one particular author. It is nonetheless paramount to pin down the defining features of the concept. These features are flexible enough to serve a basis for an accountability framework, and at the same time they clarify the content of accountability:

- Accountability describes a relationship of power;
- This relationship is formed between a power-holder, and those subjected to such power (accountability agents);
- Authority of a power-holder is conferred to it via source of law (i.e., constitution, founding treaty, or other);
- A power-holder is vested with a responsibility (in a broad sense of a term) to achieve certain objectives, and therefore has discretion to make decisions affecting accountability agents;
- The conduct of a power-holder in achieving these objectives is guided by a set of pre-defined standards of behaviour.

60 See in particular s.2.3 where these features are transformed into a set of ‘principles’ of strong accountability that will be guiding further assessment in this work.
61 These features summarize an analysis by van Putten who examines a variety of definitions, and attempts to underline their most important elements; see M. van Putten, Policing the Banks. Accountability Mechanisms for the Financial Sector (2008) at 15-25.
62 I owe this term to Lorenzo Cotula with whom we constructed a similar framework of accountability to analyze the (national) governance of large scale land acquisitions; see L. Cotula and G. Jokubauskaite (eds.), Accountability for Large Scale Land Acquisitions: Lessons from West Africa (IIED, forthcoming, 2016).
Accountability agents have an access to *mechanisms* through which they can question whether power-holders adhere to these standards of behaviour; i.e. they have a *level of control* over the relevant decision-making by the power-holders.

The elements outlined above reiterate a relatively standard definition of accountability. Considered in pure theoretical terms, these elements and the concept that follows cause little controversy. However, the disagreements about precise meaning of the term usually begin when social scientists attempt to employ accountability in the specific context, and to translate what it means in practice.

In the context of global governance and this work a lot of confusion is caused in trying to understand (a) how this concept relates to law, and (b) its exact scope. With regards to law, the disagreement seems to be about whether accountability is a legal category, or not. Concerning the scope, there are generally two schools of thought, one of which favours a narrow and predominantly retrospective understanding; and the other that accepts a wider notion that can be applied to all stages of the decision-making process. There seems to be some correlation between the two disagreements: usually the more legalistic is the approach to accountability, the more narrow understanding it advocates. In this work I favour the non-legalistic and a wide notion of accountability; mainly because such understanding better serves the aims and objectives of the present research.

a. **Accountability as an analytical category.** The link between law and accountability in a context of global governance is explained well in a work of Professor Ige Dekker. In his analysis Dekker analyses the International Law Association’s (ILA)\(^{64}\) final report on ‘Accountability of International Organisations’\(^{65}\). Dekker argues that the ILA committee that drafted the report confused the two ways in which one could employ the notion of accountability. On the one hand, says Dekker, accountability can be understood as ‘an

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existing or evolving legal concept. Even if some rules within accountability regime are not binding, the overall institutional set-up in which such regime operates functions as a legal system. In that sense, according to Dekker, accountability would be an evolving legal concept that captures the (potential) legal obligations of international organisations.

In contrast to this, the term accountability can also be used as 'a scientific analytical tool'. Employed in this sense, the concept helps us to assess the existing legal and institutional design, and to argue for ways of improving it. In this sense the framework of accountability helps to appraise whether certain institutional arrangement is functioning in a just and coherent manner; also whether it resonates with general principles of good governance. However, it does not contain the assumption that authority under scrutiny has a legal obligation to be accountable.

Dekker argues in his paper that the ILA Committee had approached the issue of accountability of international organisations by using the concept in a way that merged these two meanings. It had therefore missed out on an opportunity to pin down the legal dimensions of accountability in international institutional law, which Dekker considers to be the more promising route of accountability analysis. Overall I would agree with Dekker that not making a clear choice between the two notions can cause analytical confusion. I do, however, think that his suggestion to ‘legalise’ accountability discourse is flawed in many respects, and cannot realistically be used in the context of development financing.

Firstly, it seems conceptually difficult, if at all possible, to delineate the concept of ‘legal accountability’ from all other dimensions of accountability. Instead, because accountability always describes a relationship of power, there seems to be little sense in drawing bold lines that show where legal accountability ends, and other kinds of

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66 Dekker, ‘Making sense of accountability’ at 102.
67 Ibid. at 106.
68 Ibid. at 102.
69 To be more precise, he argues that the ILA’s approach primarily resembles the second understanding, but that in fact the ‘Committee did not have the intention to use the notion of accountability in a purely scientific way’, see Ibid. at 103.
70 Ibid at 104-112.
accountability get activated. It therefore appears most appropriate to talk about different means of enhancing accountability, rather than classifying accountability itself. These different measures (political, legal, financial, administrative, etc.) are usually mutually reinforcing, and are not necessarily exclusive of one another. The shortcomings of legal framework can therefore lead to a power misbalance that indicates the lack of accountability, yet the link between the two can be more subtle than that of direct causation. Overall, the analysis of so-called ‘legal accountability’ would arguably be only scratching the surface of the power relationship if it did not take into consideration the deeper political structures that it is a part of.

Secondly, Dekker seems to imply that an analytical concept of accountability is potentially weaker in a normative sense. In principle, this is a convincing argument, because the precise content of such a notion, and its practical implications, would depend on the judgement of whoever is conducting the analytical assessment. The more legalistic notion that he advocates, on the other hand, points towards universal and therefore stronger aspirations of normativity. Nonetheless, the problem with such stronger normativity is that it generally has to be grounded in doctrinal justifications – which in turn confine the potential scope of acceptable argumentation. In other words, the more accountability discourse is appropriated exclusively for legal analysis, the more such analysis has to be closed off from extra-legal justifications and modes of assessment. This in turn reduces the analytical potential of the accountability framework, and locks it within the already existing institutional structures instead of opening them for further scrutiny.

Finally, and in the context of development financing, it appears neither realistic nor convincing to claim that there is or should be a legal obligation for all the power-holders in development transactions to be accountable to those affected by development interventions. Instead, I think it is more convincing to stick with an argument about the moral, ethical and political obligation to be accountable, which follows from the general principles that the system of development financing was built upon. Such normativity could then be translated through law into a set of obligations, and reshuffle the balance of power.

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by putting in place the new rules and institutional practices (just as the ILA suggests doing in its final report on the matter\textsuperscript{73}). However, such a shift in power balance would not be taking place because there is a legal obligation to do so in the first place, but because the notion of accountability provides a convincing ethical and political justification for initiating such changes.

\textbf{b. Wide scope of the term.} On the whole, the literature engaging with accountability analysis seems to split into two ‘camps’, pioneering either narrow of wide understanding of the term\textsuperscript{74}. In its deliberations the ILA committee has decided to employ a wider notion, which is also mirrored in this research\textsuperscript{75}. The core aspects of this view are the following:

- Accountability is an umbrella term that includes the notions of \textit{responsibility and liability} and thus changes the focus of related analysis from the breach of obligations under international law to the issues of internal and external \textit{control} of institutions and their activities;

- Accountability is perceived as a concept that is both forward- and backward-looking, which means that it is concerned with the scrutiny of past decisions and also the structure of the entire decision-making process.

Put otherwise, accountability in a narrow sense describes a passive link that arises after the effects of decision-making have already taken place. Contrary to that, accountability in a broad sense is concerned with both making sure that decisions were implemented properly, \textit{and} with the empowerment of those who are subjected to an authority of the power-holder. Understood in this way, accountability triggers more political issues than its narrow equivalent, which is why it is also more elusive, and more problematic in terms of its application in practice. Yet at the same time it appears to be a more promising category, because it tackles precisely the kind of issues of disempowerment that were underlined in the introductory chapter, and that drive this entire research.

\textsuperscript{73} ILA Final Report at 8-17.

\textsuperscript{74} Typically, GAL scholars tend to favour the broad understanding, whereas IPA scholars are defending the narrow view; see Dann and von Engelhardt, ‘Legal Approaches to Global Governance and Accountability’ in Pauwelyn et al., \textit{Informal International Lawmaking}.

\textsuperscript{75} ILA Committee divides its notion of accountability into three levels, and it is the \textit{first level} that is used as a ground concept; for full definition see ILA Final Report at 5.
2.1.2. Opportunities, dangers and differences with a human rights approach

Accountability creates promising opportunities for conceptual analysis because it is a relational concept. It always demands clarification about who is accountable to whom in each individual case. This is arguably one of the main advantages of focusing on accountability as opposed to other similar notions, such as democracy, human rights or legitimacy. Because of its relational qualities, accountability is a flexible tool of assessment that is contingent on a specific situation. It enables the scrutiny of governance arrangements beyond the nation state, precisely at the level where authoritative decisions are being made (local, regional, bilateral or global). Indeed, the scope of the accountability relationship used for analysis can be expanded or contracted, for instance, depending on the geographical area and the amount of people who are affected by a specific development project.

Furthermore, accountability is triggered by a conferral of power; but is also concerned with the limitations of exercising such power. Therefore, unlike the idea of legitimacy, the analysed focused on this concept is concerned with concrete governance arrangement and its capacity to create, but also adjust, the link between the power and its control. Put otherwise, accountability is principled enough to provide a framework of assessment that is mindful of all major dimensions of governance: its input, output, structure, and their changes over time.

Despite this focus on concrete governance arrangements, conceptually, accountability is not limited to the existing rules and institutions. Instead, the analysis focused on accountability can engage with potentially relevant considerations that contribute to the existing balance of power. In other words, such analysis can be sensitive to the surrounding social, political and economic context. This enables a discourse across various disciplines and creates a comprehensive field of research; as exemplified by the fact that accountability has already become the lingua franca of the scholars interested in global governance.

76 This is why the concept is so widely used in public law literature, see for instance P.Craig and A.Tomkins, The executive and public law: power and accountability in comparative perspective (2006).
77 See for instance completely different approaches adopted by Reinisch (A.Reinisch, ‘Accountability of international organizations according to national law’) who is a distinctly legal scholar focusing on accountability in terms of black letter law; then D.Desai and M.Jarvis, ‘Governance and Accountability in Extractive Industries: Theory and Practice at the World Bank’, 30(2) Journal Of Energy & Natural Resources Law (2012) 128, who are dealing with the matter from the perspective of policy-making; and finally Brown Weiss ‘Bottom Up Accountability’, who is approaching the concept from predominantly sociological perspective.
The specific notion of accountability towards affected persons exhibits similarities with an analytical strategy that is concerned with a role of human rights (HR) in development assistance. Nonetheless, the two types of analysis have a slightly different focus. While the methodology concerned with accountability studies the governance of a particular phenomenon, HR approaches generally look at the ways in which governing institutions encroach on the sphere of individual rights and freedoms. The focus of accountability analysis is therefore more holistic and concerned with systemic qualities of governance arrangements. The HR approach on the other hand is more preoccupied with the negative impacts of governance, and therefore it can provide insights about the actual violation of fundamental rights, but not so much about why this violation has taken place.

Such differences in focus are quite nuanced, and the two strategies converge when they share a similar field of analysis. For instance, in the case of development financing, they are both concerned with the legal means that enable affected individuals to challenge an excessive use of power (e.g. judicial review). Also, fundamental rights in state constitutions and international conventions put in place some of the key standards of accountability that the power-holders in development interventions must comply with. It therefore seems that in the context of development assistance the underlying preoccupations of the two types of analysis overlap to a large degree.

In light of the above, probably the main difference between the two strategies concerns the analytical toolkit that each of them brings to the related analysis. An accountability framework arguably opens up an area of research to a wider range of issues. It enables a systemic inquiry that is not restricted to preoccupations of classic individual liberties. It can be mindful of various collective entitlements and public interests that go beyond the traditional scope of human rights. Also, accountability analysis does not have to grapple with the difficult issue of

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whether HR obligations are at all possible beyond the nation state. It therefore enables the possibilities to scrutinise a wider circle of decision-makers. However, probably the key disadvantage of accountability analysis is that in comparison to the HR approach it contains fewer conceptual tools to understand the substantive encroachment on individual and collective liberties. It can therefore offer limited insights about the nuanced ways in which such infringements take place.

All of these advantages and particularities of accountability-focused analysis come with potential pitfalls, which need to be appreciated in order to be avoided. One of the most serious critics of the accountability approach in the context of global governance is David Dyzenhaus. Two of his sceptical observations seem to be convincing enough to be noted here.

Firstly, Dyzenhaus is preoccupied with an "idiom of accountability". He takes an issue with it being an elusive and thus evasive concept. Having originated in political sciences, accountability subsumes various preoccupations of governance, and creates analytical confusion. It seems to me that Dyzenhaus’ critique is difficult to refute with regards to the general phenomenon of global governance. In particular, it provides an insightful critique about the concept of accountability pioneered by GAL. However, his argument appears to be less acute in the context of research about particular areas of international cooperation. That is because elusiveness of the concept applied in specific circumstances can be readily overcome; simply by clarifying the meaning and objectives, as well as the key parameters of the accountability relationship in question (as is precisely the aim of the present chapter).

Secondly, Dyzenhaus marks the tendency of accountability discourse to adopt an instrumental account of law. The analysis centred on accountability, according to him, tends to treat law as more or less any other social fact that influences the balance of power. This in turn means

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81 Dyzenhaus, ‘Accountability and the Concept of (Global) Administrative Law’ at 5-7.
82 Dyzenhaus generally criticises GAL for its tendency to couch legal problems through the ‘idiom of accountability’; see ibid. at 7.
83 He thus takes an issue with the reasoning of Grant and Keohane, and their ‘seven accountability mechanisms’ only one of which is ‘legal’ (Grant and Keohane, ‘Accountability and Abuses of Power in World Politics’ at 35). For Dyzenhaus this account refutes the central role of legitimacy; see ibid. at 13.
that law loses its ‘special legitimacy’\textsuperscript{84}, and instead we are left with a pragmatic perspective about its function in society\textsuperscript{85}. Overall, this concern appears to be pertinent and serious enough to be borne in mind. As explained in the discussion about the meaning of this concept, accountability is indeed created through a range of social systems that reduce the centrality of law and legal mechanisms.

However, this does not necessarily mean that accountability discourse must adhere to a thin and instrumental account of law. Accountability simply positions legal phenomena in a wider social context, and is mindful of its real-life effects. Legality on the other hand is a concept that helps to evaluate the internal coherence of legal rules, and the limits of authoritative behaviour. Thus, there is no direct clash between accountability and legality, at least not in conceptual terms. Accountability does not eliminate the conceptual space that is usually reserved for legality. On the contrary, they share this space; and it is up to an individual researcher to make sure that importance of legality is not underplayed in any given research\textsuperscript{86}.

\textbf{2.2. Adjusting the accountability framework to the context of development financing}

The analysis thus far has illustrated that accountability is a relational concept. Thus, in order to employ accountability framework in a meaningful sense, we need to set out the clear parameters of power relationships that this concept is meant to help scrutinise. The five ‘pillar’ questions that set such parameters are usually \textit{who}, \textit{to whom}, \textit{how}, \textit{for what}, and the overarching \textit{why}\textsuperscript{87}. Most of the remaining thesis is mapping out the standards (\textit{for what}) and mechanisms (\textit{how}) of accountability in the context of World Bank development interventions. These two questions are therefore only briefly tackled in the present section, positioning them as constituent elements of the project law. The remaining three questions on the other hand will be examined here in more detail.

But before that, it is important to articulate clearly what elements of ‘traditional’ understanding this particular framework of accountability sets out to challenge and why.

\textsuperscript{84} Idib. at 7 and 12.

\textsuperscript{85} Dyzenhaus considers GAL perspective to be overly pragmatic and in particular he criticises the position set out in R.B.Stewart ‘U.S. administrative law: a model for global administrative law?’ 68 Law and Contemporary Problems (2005) 63 (where Stewart suggests that administrative law system is possible to conceive without judicial review).

\textsuperscript{86} See s.7.3.3. for further analysis of how the two relate to one another.

\textsuperscript{87} These are borrowed from the analysis by Black; see Black, ‘Constructing and contesting legitimacy and accountability’ at 138.
2.2.1. The shortcomings of traditional understanding

Traditionally, the system of international cooperation (development financing being one of its fields) relies on a two-tier model of accountability. At the national level we talk about the so-called democratic accountability, which is based on the national system of representation. The ultimate source of law that confers authority to a power-holder in this system is the state constitution, with more detailed delegation of powers taking place via relevant laws. On the international level, the so-called intra-institutional accountability prevails. Here the authority of the power-holder is conferred to it via international treaty, and is mainly guided by the principle of oversight and control by the member states. The two notions are closely interrelated in a sense that democratic accountability enables intra-institutional accountability, i.e. governments are only capable of having a representative voice in international organisations because of their constitutional mandate.

Such is a fairly simplistic picture of the most widely accepted model of accountability in conceptual terms. It has dominated the imagination of social scientists for many decades, and it is also reflected in the mainstream philosophy of international law. There is, however, an increasingly loud voice in the related literature that such understanding is losing its pertinence and explanatory value. The issue has been addressed by a number of authors, including those under the umbrella of GAL or IPA. Nonetheless, the ideas behind this classic model are highly resilient, and they continue to dominate the debate about the functioning of international law and affairs – despite many convincing pleas by the scholars.

To an extent, this model is so strong is because it appears to shelter some important political values of our liberal societies. For instance, it is a strict guardian of representative democracies, and the principle of non-intervention. Nonetheless, important as they are, these considerations do not cover up the flaws of the model, which are too apparent to be ignored.

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88 This notion generally corresponds with ‘intra-regime accountability’ suggested by GAL, see Kingsbury et al. ‘The Emergence of Global Administrative Law’ at 44-45.
89 In addition to all the administrative and international law scholars writing on this matter, it also seems necessary to mention an extensive body of literature that deals with this in studies of global governance from more openly political perspectives; Ngaire Woods in particular had offered some thorough analysis about relevant issues in the field of development financing; see for instance N.Woods, ‘Making the IMF and the World Bank More Accountable’, 77(1) International Affairs (2001).
Probably the main issue with this traditional model is that it relies almost exclusively on the state-citizen relationship, which in turn comes with a line of unjustified assumptions. On a practical level, such reliance on citizenship presupposes the existence of well-functioning state institutions that are able to represent and reconcile all sorts of interests at the national level. It also presupposes that these structures are capable of filtering these interests through to international level, and to bring them into the decision-making of international institutions. On a deeper and more theoretical level, this model is wrapped around the idea that each system of representation is somewhat self-contained and sealed off from the rest. It is therefore being constantly balanced out through an ongoing electoral process, and through internal checks and balances.

Both of these assumptions appear to be flawed and invalid in the area of development financing. In development transactions, financial transfers always take place across borders, i.e. they always connect more than one system of representation. In case of the World Bank for instance, the system of voting essentially represents the interests of donor states and their citizens\(^\text{90}\), even if those are restrained to a certain degree\(^\text{91}\). Also, given what is known about both domestic and international governance\(^\text{92}\), a realistic model of accountability should not presume that institutions are by default inclusive, representative and protective, due to internal democratic and administrative processes.

On the whole, it appears that the classic model of accountability remains dominant despite its flaws precisely because of its outstanding theoretical simplicity. What I mean by this is that it generally presupposes the possibility of a single and ultimate power-holder (e.g. the parliament) with a clear mandate and full responsibility. It also draws a clear link between a single source of authority (constitution, founding treaty) and a coherent system of governing structures that are meant to implement it. Underneath it all, it allows the ability to trace everything back to a single source of validity, which in turn contextualizes every element of the system, and according to which every decision can then be appraised.

\(^{90}\) See Art V, ss.1-5 of IBRD Articles of Agreement (as amended 2012).
\(^{91}\) This remark is referring to the so-called ‘Political Activity Prohibited’ clause that is meant to restrain the Bank from involvement in political affairs of the borrowing state; see Art.IV s.10 of IBRD Articles of Agreement (as amended 2012); also see the discussion in s.3.1.
\(^{92}\) The Bank’s history is full of controversies where the funding was issued to non-democratic governments whose legitimacy was only based on their effective rule and not the representative governance based on the rule of law; see generally D.Kapur et al., The World Bank. Its First Half Century. Volume 1: History (1997), ‘Introduction’; also S.Mallaby, The World's Banker: A Story of Failed States, Financial Crises, and the Wealth and Poverty of Nations (2006) for the more recent overview of related controversies.
Unfortunately, no such simplicity can be found even in the most basic type of development transactions. The authorities here are always multiple, and their decisions represent a compromise of institutional objectives rather than the interests of their constituencies. There is no single source of validity that can be referred to in order to assess the process of decision-making, or its effects. As the more detailed analysis in the next chapters will show – there are normally sources of law created within these transactions (e.g. the agreement itself), but there is no single and a priori point of reference that everything can be traced back to. This is precisely why accountability in the context of development financing requires such a category as project law: because this construct completely eliminates the assumption that a single source and its implementing institution can guide even the most simple of development transactions.

The last conceptual mismatch between the traditional model and the system of development cooperation is that development is based on a movement of capital. In liberalized market conditions capital is often detached from specific entities and institutions. Financial flows are fluid in a sense that they can move from one source to another, from private sector to public and back, over relatively short periods of time, and in such amounts that give capital holders a substantive decision-making power. Put otherwise, financial resources for development – even when they are used under the supervision of the Bank – are in most instances acquired from the kind of sources that have little to do with the traditional state-citizen pillar of accountability. In practice this means that depending on the type of project, these resources might carry with them the interests of multinational corporations, private financial institutions, but also domestic elites – all of whom are equally responsible (in a wide sense) for the sort of activities that take place on the ground as a result of such operations.

Such terrain of public-private partnerships is not new to public law theorists at the domestic level, and there is no need to assume that fluidity of capital is only relevant in the context of international development assistance93. Notwithstanding, these public-private partnerships acquire a new and completely different dimension once they are transported onto an international level, and in particular in their dealings with international institutions94.

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94 See the discussion in s.6.1.2. for further arguments on this matter.
The existing literature on accountability has already put forth some suggestions about how to rethink this traditional model. Probably the most widespread idea is to substitute it with a more elaborate public accountability of international institutions. GAL scholars in particular are in favour of such an international equivalent of administrative accountability usually found at the municipal level. They suggest that the functioning of international bureaucracies could be restrained by putting in place the principles of public law (transparency, participation, etc.) that generally guide the decision-making of national administrations.

Nonetheless, I would like to argue that this idea of public accountability pioneered by GAL and other scholars in the area of public administration, although innovative to an extent, does not depart very far from the traditional model described above. Firstly, it is still firmly focused on the constitutive sources of authority, tracing it back to state constitutions. Secondly, it still perceives accountability as something that can only be attached to a single institution, within its proper mandate. In other words, the model of public accountability in its basic shape is not transformed enough to accommodate the kind of governance issues that are found in the field of development financing.

All of these observations are meant to emphasize that there is a stark mismatch between the institutional reality of development financing, and the prevalent theory that is used to explain its functioning. Moreover, the scholars who have addressed this issue so far did not offer convincing alternatives, able to cover up for the gaps in our traditional understanding.

By outlining the framework of accountability in the upcoming sections I wish to propose an alternative that challenges the traditional understanding in a more open and forceful manner. This framework is specifically adjusted to the context of development financing. It is constructed on the rejection of some of the major premises of the traditional view outlined above, notably that:

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95 See generally Bovens et al. (eds) Oxford Handbook on Public Accountability.
97 Admittedly, not all of the emerging suggestions are limited to public accountability and public organisations; for instance the body of literature on ‘Informal International Lawmaking’ regards the need for a completely different type of accountability that would also be able to accommodate private actors, see J. Pawelyn et al., ‘Informal international lawmaking: an assessment and template to keep it both effective and accountable’, in Pauwelyn et al. (eds), Informal International Lawmaking (2012) 500.
- Accountability must necessarily be grounded in state-citizen relationship;

- Accountability can always be traced back to a single, a priori source of authority; and that

- The power-holder in accountability relationship is always a single public entity, endowed with a clear mandate.

All of these elements will be challenged whilst considering the three questions of accountability relationship indicated earlier in this section: that is who is accountable to whom and why in the context of the World Bank development interventions.

2.2.2. Key parameters of accountability (who is accountable to whom and why)

a. Why should the power-holders be held to account? The question addressed in this section is probably the most important one of the entire analysis in this chapter, since it alone justifies all further inquiries. It seems to me that the famous distinction between the two types of accountability made by Grant and Keohane is extremely helpful in providing an answer in this regard⁹⁸.

In their influential article on the abuse of power in world politics these scholars explain that the need for accountability can be generated by two kinds of factors: (i) the source of authority, i.e. towards those who endowed the power-holder with its power; and (ii) the effects of authoritative decision-making, i.e. towards those subjected to the decisions by the power-holder. While in theory both relationships of accountability (especially with regards to functioning of public institutions) overlap, in practice and in particular with regards to global institutions, the two modes drift apart, and so both dimensions deserve distinctive recognition and adequate treatment within the relevant institutional framework.

This kind of conceptual distinction appears to be decisive in the context of development financing. With regards to the position of affected individuals and communities, it is difficult to see how the delegation model alone could ever play a meaningful role⁹⁹. The constellation of

⁹⁸ See Grant and Keohane, ‘Accountability and Abuses of Power in World Politics’ at 30-34.
⁹⁹ Cf. Dickinson who argues that mechanisms of direct participation are also capable of enabling delegation model (see L.A.Dickinson, ‘Public Participation/Private Contract’, 34(3-4) Social Justice (2007-8) 148, at 154). I find this position not convincing, but instead creating further conceptual confusion. It
both global and national actors contributing to decisions in these interventions is simply too complex to be comprehended let alone restrained through this model. In that respect it seems to me that the need for accountability towards affected people in development financing is best justified through reference to the effects of authoritative decision-making. More specifically, the accountability is necessary in order to mitigate the coerciveness of development interventions.

Underneath it all, the justification as to why accountability towards affected people is necessary stems from the basic ideas of liberal political philosophy. Such a notion of liberalism has little to do with a neoliberal economic worldview that the critical scholars tend to underline. Instead, it points to the existence of an autonomous sphere of individuals and communities that cannot be readily violated or ignored, even by those who potentially hold the public mandate to do so. As a result, liberalism demands for a certain organisation of political life – one that is based on mutual respect and equality of choice amongst all human beings.

It seems to me that there is no need to look for deeper justifications to answer the question why accountability towards affected people is so important. That is because such ethical considerations about coerciveness of interventions are relatively ‘old news’ in the practice of development cooperation. IFIs seem to have long acknowledged that affected people should indeed have some recourse of action to protect themselves against negative effects of development interventions, and they had confirmed this by creating their internal accountability mechanisms; such as the World Bank Inspection Panel.

To me, this indicates a relatively well established baseline agreement in development ideology – notably, that without institutionally embedded concern for the consequences of development interventions, related decision-making runs a serious risk of bold political domination over the smaller and more vulnerable entities involved. However, notwithstanding this relatively basic agreement about the core principle, everything else about this idea seems to be ‘up for grabs’. In particular, most issues seem to arise concerning the

merges the ideas of delegation with ad hoc participation, and therefore blurs the distinction that Grant and Koehane are making in their account.

100 For a critique of liberal paradigm in development ideology see for instance B.Rajagopal, International Law From Below (2011)
101 These are the ideas that are explored by IPA scholars. For a general overview of their reasoning on this see s.7.2.1.
102 This is in line with Philip Pettit’s convincing account of ‘freedom as non-domination’, P.Pettit, Republicanism: A Theory of Freedom and Government (1999).
degree of control that should be passed onto the affected people in order to ensure a sufficient level of accountability by the power-holders.

b. Accountability of the Bank, or of all the parties to the transaction? When we talk about development interventions of the World Bank, the most evident power-holder is of course the Bank itself. Nevertheless, each loan agreement is a contractual arrangement where all the parties have a set of equally relevant obligations. Hence, the World Bank animates this relationship through its contractual and policy framework, but it is not the sole entity that could be held to account for the effects of resulting operations. It seems to me neither appropriate nor justifiable to allocate all the duties to the Bank merely because of the fact that it is the most visible power-holder; notwithstanding the fact that it facilitates the projects often inspired and pursued by other entities. It therefore follows that there are always other entities who fall under this category of a ‘power-holder’ that should also be included into the relevant accountability framework.

At the very minimum, each financial agreement entails at least two power-holders – the Bank and the borrower. However, in many development interventions there is also a larger collective of donors and implementing agencies that function together, in pursuit of shared objectives. What is problematic from the perspective of the affected people is that such common enterprise manifests itself as one and the same intervention; and yet there are always several entities who could potentially be held to account. That is why in the context of development financing it makes more sense to emphasise the accountability for (actions and decisions), rather than accountability of (atomised entities). The enabling function that a given party exercises in a given project should be a sufficient condition to include such an entity into the realm of accountability relationship.

The key question that is triggered by this idea of collective power-holders is whether accountability is at all possible, if the decisions cannot be traced back to a single entity in charge? To my understanding, the answer to this question is positive precisely because accountability is not a distinctly legal category. Arguably, framing the relationship of accountability is about enabling those subjected to the decision-making in a meaningful manner (to challenge and influence the exercise of authority), rather than allocating the blame to one particular entity (which itself can be dealt with under the subsequent regime of liability or responsibility). If the decision-making power can be linked to the fiction of legal personality, then it can be just as easily linked to the collective based on a contractual arrangement with its proper decision-making logic and structure.
Finally, I see no compelling reasons to limit the circle of power-holders based on the source of their authority. I would argue that introducing such delimitation at the level of conceptual framework would run a major risk of distorting our understanding of reality. It would place many private power-holders involved in these interactions (e.g. private borrowers) beyond the scope of analysis, and would risk creating similar traps as traditional model of accountability.

c. The affected individuals and communities. The notion of ‘affected individuals and communities’ employed in this thesis is informed by the jurisprudence of the World Bank Inspection Panel. The notion of ‘affected people’ (which in this work is used as a synonym of ‘affected individuals and communities’) is defined in the founding resolution of the Panel. In this resolution ‘affectedness’ is limited strictly to the adverse material harm induced by the interventions.

Nonetheless, considering this provision purely in conceptual terms it appears difficult to find an objective justification as to why material harm should be the sole trigger of accountability. It is true that material harm is easier to observe and to prove; but the issue of restraining coercion cannot be decided only on the basis of how easy it is to acquire evidence. Instead, accountability is meant to mitigate all types of coercion, and protect the kind of goods and principles that affected individuals and communities consider to be necessary to their well-being. Accordingly, the notion of affected individuals and communities in the conceptual framework suggested by this work should be based on the subjective understanding of those who are affected by development operations, and not on some objective test of harm, interest, or others.

To elaborate on these statements further, the cases argued before the Panel indicates at least five types of negative effects that development interventions might produce:

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104 The phrase is from the Panel’s founding resolution (see ‘The World Bank Inspection Panel (IBRD 93-10; IDA 93-6)’ (September 1993)); available online at http://ewebapps.worldbank.org/apps/ip/Pages/Panel-Mandate.aspx.
105 See discussion in s.5.2.2. for more elaborate critique on this issue.
106 The category of ‘affectedness’ is analyzed by R.Kreide, in ‘The Ambivalence of Juridification. On Legitimate Governance in the International Context’, 2 Global Justice: Theory, Practice, Rhetoric (2009) 18. She divides potential interests of affected people into fundamental, expanded and marginal ones; and argues that only the first two should be relevant in the internationalized decision-making processes. It seems to me that the distinction between the three groups is difficult to make, and that therefore this categorisation is not helpful in creating the more universal category of ‘affectedness’.
- **Physical** (e.g. involuntary resettlement of individuals and communities\(^{107}\));
- **Ethnic** (e.g. converting the forest inhabited by indigenous community\(^{108}\));
- **Cultural** (e.g. building an industrial estate in the area traditionally perceived to be the spiritual centre of the surrounding communities\(^{109}\));
- **Economic** (e.g. changing the use of land in a way which strips the people living in the area of their income generating activity\(^{110}\));
- **Public interest-based** (e.g. building an economically viable infrastructure, knowing that it will significantly increase environmental pollution\(^{111}\)).

In reality, but also in theory, the concept of accountability becomes more and more controversial as the circle of affected people expands. Put differently, as we move away from the *direct* and *material* effects of development interventions that the World Bank Inspection Panel is concerned with, the grounds for accountability tend to become increasingly elusive, and mixed with other political processes\(^{112}\). However, at this point I would like to make it as explicit as possible that accountability framework that is fit for the purposes of assessing international development assistance should be capable of acknowledging this reality. In fact, it should go further than that; it should embrace the fact that development projects themselves are not triggered by democratic decision-making processes, but instead are the by-products of globalized political and economic practices. In other words, development projects do tend to create their proper space for legitimacy and deliberation, outside of the ‘normal’ political structures; therefore, beyond a certain point, they do threaten the authority of the state.

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\(^{107}\) An absolute majority of the Panel’s cases deal with involuntary resettlement, some of which are very large scale, see for instance the Panel investigation report in Indian ‘Mumbai Urban Transport Project’ (First request, 2005) (all case reports are available on the Panel’s official website: [http://ewebapps.worldbank.org/apps/ip/Pages/Home.aspx](http://ewebapps.worldbank.org/apps/ip/Pages/Home.aspx))

\(^{108}\) Example is taken from in *PNG Smallholders* case analyzed in the introduction to this work.

\(^{109}\) Example is from *Bujagali* project analyzed in the introduction to this work.

\(^{110}\) For example, Paraguayan/Argentine ‘Reform Project for the Water and Telecommunications Sectors, SEGBA V Power Distribution Project (Yacyretá)’ (2002), where the brick-makers were sharing common clay reservoirs for their brick production and lost their source of income once the area was flooded due to the project.

\(^{111}\) For example, South African ‘Eskom Investment Support Project’ (2010), where the new coal power plan was going to significantly increase country’s GHG.

\(^{112}\) Stewart acknowledges the same problem in his attempt to delineate ‘who is entitled to regard?’. He suggests a scale that ranges from ‘de minimis claims’, to ‘serious harms on discrete groups of individuals’, and concludes that the particular scope of ‘the disregarded’ should be defined on a case by case basis. Although Stewart himself considers his framework to precede any concerns about accountability, conceptually his analysis resembles the parameters of accountability considered in this work (i.e. he considers who, by whom, how and why should be accorded more regard in the global regulatory governance). See Stewart, ‘Remedying Disregard in Global Regulatory Governance’ at 223-227.
This latter claim is contentious, but it explains well the need to envision a substantially
different type of accountability in this area of international cooperation. At the very core of
this alternative framework is the scepticism about the role and the weight of democratic
decision-making processes in the deliberations over development projects. Once this
scepticism is accepted and development interventions are decoupled from democratic
decision-making, the issue of affected people becomes quite an easy one. It instantly becomes
difficult to justify why accountability frameworks should be solely considerate of those
materially affected by development projects. Instead, it leads the analysis towards the
conclusion that all five categories identified above should be treated as equally valid and
placing accountability agents into the category of affected individuals and communities.

What clearly comes out of this analysis of subjects is that accountability in the context of
development financing should be contingent on the facts of each individual project. Each
development intervention creates its proper set of relationships between collectives of donors
and implementing agencies on the one hand, and different groupings of people who are
affected by this intervention on the other. It would therefore be most sensible to treat the
affected people and the power-holders of each development intervention as two collectives
whose powers are meant to be balanced out one against another, in order for them to arrive
at the mutually satisfactory and sustainable development solutions.

2.2.3. Situating the project law (accountability for what and how)

Relationship of accountability contains more elements than just the key parameters outlined
above. Even if we focus on accountability that is triggered by effects rather sources, the power
of decision-makers in development interventions will still be conferred to them via some
source of authority. Accordingly, these sources will contain some standards of accountability
that the power-holders must follow in their exercise of authority. In addition to these
standards, accountability agents should also have access to the mechanisms that allow them to
control and restrain the authoritative behaviour by the power-holders. These two elements of
the accountability relationship are dynamic, and it is the variations in these two parameters
that define whether governance arrangements are actually accountable or not; and why.

113 Cf. Donaldson and Kingsbury who are arguing that the ‘susceptibility to being affected by regulation
of decision is not only practically unwieldy; but normatively questionable’; they base such observation
on the need to distinguish between ‘pre-existing collectivity’, and ‘ex post facto inquiries’ (see
M. Donaldson and B. Kingsbury, ‘From Bilateralism to Publicness in International Law’, in U. Fastenrath et
al., From Bilateralism to Community Interests. Essays in honour of Bruno Simma’ (2011))
Project law in this scheme is the analytical category that helps to group all of the relevant standards and mechanisms of accountability under the same umbrella, and to investigate their functioning in relation to a particular development intervention. The need for such a category can best be explained by looking at the parameters of accountability identified in the previous sections. The framework presented thus far has positioned the relationship of accountability in development financing at the project level. It was argued that accountability is contingent on the situation in each project; that it involves multiple power-holders; and that it therefore cannot be traced back to a single validating source, such as a state constitution or a founding treaty. It follows from such basic features of accountability framework that the standards and, by extension, the mechanisms of accountability must also be contingent on the circumstances of each individual project. Project law makes it possible to conduct such a comprehensive and principled analysis of various types of sources that generally pertain to individual projects (treaties, laws, contracts, guidelines, etc.) and to consider how they link to one another.

In the chapter that follows, I will outline such different categories of rules that are generally relevant in the context of the World Bank interventions. In doing so, I will illustrate that project law is indeed never structured around a single source, and that it is inherently pluralistic. At the very least, project law contains sources that regulate the behaviour of the Bank (i.e. its founding treaties and internal regulations); those that regulate the acts of the borrowing states (i.e. domestic and international law); and the contractual instruments that pertain to all parties to the transactions (i.e. project agreements). These sources also come with their distinct mechanisms of accountability, such as deliberation and authorisation procedures, or internal and external review (which too will be analyzed in the chapters that follow afterwards). Only such comprehensive analysis of project law and related mechanisms will allow me to answer the two remaining questions about accountability relationship – notably for what and how the power-holders in development interventions are currently held to account. This will make it possible to assess whether there is in fact a deficit of accountability in this relationship and why.

2.3. The principles of ‘strong’ accountability

It was already mentioned previously that accountability is a normative category. It represents the pursuit of a balance of power in the relationship between those who hold power, and those who are subjected to it. Accountability pulls the relationship towards more balance, and
enables us to criticise the kind of set-up that does not give sufficient consideration to this matter.

Nonetheless, the assessment of accountability relationship cannot take place in the abstract. It must be structured around some elements of governance that are capable of indicating positive or negative trends in this relationship. In this section, I would therefore like to set up a threshold that indicates a ‘strong’ version of accountability. If put in place, such a model would ensure that the relationship between the collective of power-holders and the group of affected people is a two-way street, and that development interventions do not enable the bold political domination over the lives of these people.

Just as with the concept of accountability itself, this ‘threshold’ cannot be absolute. Instead, it is best expressed in the form of principles of institutional arrangement that should characterise the relationship between the two groups of subjects described in the previous sections. I would like to suggest that these principles can be identified by going back to the defining features of accountability set out in the beginning of this chapter\(^\text{114}\). If unpacked and applied in the context of development financing these general features lead to the four principles of strong accountability outlined below.

(i) Firstly, the defining features of accountability tell us that there should be the standards of behaviour that frame the mandate of the power-holders. These standards should not be entirely contingent on the situation, and should not be dependent on the power-holder alone.

Transmitted into the realm of development practice this feature requires that the rules governing development transactions should be clear and predictable, objective and fair, and able to provide adequate level of protection to affected people against the arbitrary decision-making by the power-holders.

(ii) Secondly, accountability relationship is based on the underlying objectives, which mandate the power-holders to undertake certain activities. These objectives cannot be unilaterally set by the power-holder, and should reflect the needs and interests of accountability agents (since that is what justifies the coerciveness of decision-making that follows from such objectives).

\(^{114}\) See discussion in s.2.1.1.
In the context of development financing this feature requires for the affected people to be able to exercise a level of control on the decision-making by the power-holders; both during project deliberation process and throughout the entire duration of the project.

(iii) Thirdly, based on the core defining feature of accountability, there exists a conceptual distinction between the power-holders and those subjected to their decisions.

For the purpose of assessing accountability in development financing it should therefore not be presumed that affected people are fully represented via the democratic structures of the borrowing state, even if most of them are its citizens. In practical terms this feature requires that affected people are given access to an independent forum of review, which enables them to challenge and influence decision-making by the power-holders.

(iv) Fourthly, since the power-holder acquires its power for the sake of fulfilling certain tasks or responsibilities, those subjected to the subsequent decision-making should be free to dismiss the power-holder from its responsibility, or at least have the possibility to alter it according to changing needs and circumstances.

In the case of development financing this means that if the project becomes too harmful or too costly to create the anticipated benefits then there should be a way of disabling the mandate that causes such activities in the first place. More specifically, this feature requires that accountability mechanisms available to the affected people are capable of bringing about meaningful outcomes, such as serious rethinking, revision, and (in exceptional circumstances) the suspension of development interventions.

As the analysis of relevant rules and procedures in the upcoming three chapters will show, current practices of development financing are quite far from the normative aspirations set above.
Chapter Three

Standards of accountability in context of the World Bank project financing

Introduction

This chapter sets out to examine the rules and regulations that guide the decision-making in the context of development financing, i.e. the standards of accountability that affected people can refer to in order to hold decision-makers to account. In particular this analysis aims to assess whether these standards adhere to the first principle of strong accountability identified in the previous chapter, namely whether they are clear and predictable, objective and fair, also whether they set an adequate level of protection to the affected individuals and communities.

It was explained previously that the standards of accountability are a part of project law. Nonetheless, their exact content in each project depends on the borrower (i.e. its domestic laws and international obligations), the sector and type of the intervention, and also the actual agreement reached between the parties. The chapter therefore gives an overview of sources that could potentially become relevant as project law. It considers the role and significance of the Bank’s founding treaties, its operational policies, and contractual instruments that frame the dealings between the Bank and other parties to the transaction. The latter two sources are given most attention, because of their specific legal status and content, as well as pivotal role that they play within the project law. The reasons for their significance are explained in the overview of general standards of accountability that follow suit. The chapter ends with a critical assessment of these different standards considered together, emphasizing the issues that continue undermining their positive role in the accountability relationship.

3.1. The limited relevance of the World Bank founding treaties

The World Bank, just as any other public international organisation, derives its competence and capacity to act from its founding treaties. However, there is no universal template of how detailed and targeted the constituent documents of international organisation should be. The
governing nature and precision of these founding instruments depend on the mandate that the institution is endowed with, as well as other considerations that appeared relevant during the stage of initial negotiations. This upcoming part of the chapter is meant to demonstrate that in case of the World Bank the content of its founding documents is rather thin, notwithstanding the fact that the Articles do establish the key structural elements that enable these organisations in the first place. Whilst the role of the founding treaties is pivotal in providing the Bank’s institutional structure, it only plays a distant role in setting institution’s operations, as well as accountability for their effects.

When dealing with the Bank’s Articles of Agreement we are in fact talking about a set of founding treaties of five international organisations, all of which belong to the same umbrella of institutions. The widely used term ‘World Bank’ entails that these organisations share closely inter-related objectives and largely overlapping management structure\(^{115}\). Yet at the same time they all have their distinct pathways of arriving at these objectives. Given the focus of this work on development interventions, this research will only be dealing with three out of five of these institutions – notably the International Bank for Reconstruction and Development (IBRD), International Development Association (IDA), and International Finance Corporation (IFC)\(^{116}\). The first two are at the centre of the attention because they can fund development interventions independently. IFC, which only funds development through investment in productive enterprises together with private sector investors is pertinent to this work to an extent that it takes part the operations with the other two. For that reason IFC will not be entirely left aside from the analysis, yet it will not be given extensive separate attention either. Therefore in the context of this work, the reference to ‘the Bank’s Articles of Agreement’ means the focus on the three distinct treaties that govern these three organisations.

All three of these documents are essentially the variations of the same kind of overarching institutional arrangement and its logics\(^{117}\). For the purpose of further analysis the articles in these constituent instruments can be roughly divided into:

\(^{115}\) For the history of the term ‘World Bank’ and the reasons of having several institutions instead of one see E.S.Mason and R.E.Asher, *The World Bank since Bretton Woods* (1973), at 380-419.

\(^{116}\) The other two organisations that belong to the World Bank group – International Centre for Settlement of Investment Disputes (ICSID) and Multilateral Investment Guarantee Agency (MIGA) were both created with a view to ameliorate investment climate, and they do not fund development initiatives directly, but only through support to private investors. This line between providing project funding, and providing other type of support to investors is blurry, but it provides principled enough conceptual ground to exclude MIGA and ICSID from the present analysis.

\(^{117}\) In terms of similarities, it should be noted that all these treaties are relatively short, consisting of 11 Articles in case IBRD and IDA, and 9 in case of IFC; also, the titles of the Articles are also largely the
(i) provisions that establish the key structures of the organisation (membership, subscriptions, capital-related matters, structure of financial resources, organisation and management);

(ii) provisions that position organisation as a subject of public international law (status, immunities, relations with other international organisations);

(iii) provisions that govern the content of operations and the use of resources (purposes, designation of loans, operations and their principles);

(iv) provisions that regulate the change of the founding treaties over time (amendments, interpretation).

The first group of provisions covering the core structures of the organisation establishes the legal ‘hardwire’ of the institution. It deals with such issues as sovereign membership and division of shares, ways of acquiring capital and dealing with variety of world’s currencies, etc. At present these matters had become so embedded in the institutional apparatus of the Bank that their content attracts hardly any inquiry, at least not in legal terms. This group also include the provisions on ‘Organisation and Management’. These articles list the key organs of the institution, as well as their competences. Nonetheless, they only attribute concrete competences to the Board of Governors, i.e. to the largest body within the organization comprised of all member states. Such competences are limited to structural matters such as admission and suspension of members, increase or decrease of capital stock, amendment or interpretation of the Articles, and the like. All other competences ‘The Board of Governors may delegate to Executive Directors’ (the Board), which is what happened in practice throughout the history of the Bank.

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same, with some of the standard conditions repeated with exactly the same kind of wording; see for instance ‘Political Activity Prohibited’ clause (see Art IV s10 IBRD Articles of Agreement; Art V s6 IDA Articles of Agreement; and Art III s9 IFC Articles of Agreement).

118 See Art. II, IV and Art VI in IBRD Articles of Agreement; Art. II, IV, V and VII in IDA Articles of Agreement; also Art II, III and V in IFC Articles of Agreement.

119 This is not to say that discussions about Bank’s core structures are entirely absent. See for instance the relatively recent ‘Voice’ reform through which more voting power was shifted to developing member states, description and relevant documents available on http://go.worldbank.org/8VDV19K6T0. Nonetheless, this and similar discourses are concerned with the distribution of economic and political power within existing structures.

120 See Art.V in IBRD Articles of Agreement; Art.VI in IDA Articles of Agreement and Art.IV in IFC Articles of Agreement.

121 These competences are identical in all three treaties (see Art.V s.2(b) in IBRD Articles of Agreement, Art.VI s.2(b) in IDA Articles of Agreement and Art.IV s2(b) in IFC Articles of Agreement).

122 Ibid.

Because there are so few entrenched competences allocated to the particular bodies of the Bank, it is hard to envision any form of *internal* contestation, occurring based on the Articles of Agreement. A far-reaching discretion of the Board cannot be constrained by a group of members through a collective action in the Board of Governors, mainly because the latter had already delegated most of its powers to the former. Accordingly, such governance structure leaves very little possibility for intra-institutional model of accountability and points towards the need to find alternative ways of keeping institution’s Board and management to account.

The second group of provisions in the Articles positions IBRD, IDA and IFC as *subjects of public international law*. It governs their capacity to enter into the relationship with other entities, and defines their overall legal status. The only clause in this category that is relevant to the present analysis is the one that describes the position of each of these organisations in front of (domestic) judicial processes. I will return to this provision in my analysis of available review procedures.

The third group of provisions, governing the *content* of the Bank’s operations, is probably the most interesting part of the Articles, at least for the purpose of this research. Here, one should remark the importance of the Bank’s purposes. As in case of any other (public international) organisation, they play a necessary role in framing institution’s mandate. The purposes of IBRD are most general of all three. By and large they postulate the broad aim of fostering economic development in its member territories. IDA’s Articles put more specific focus on raising the standards of living in the less-developed parts of the world; and IFC’s objectives centre on the economic development through investment in productive enterprises. The conceptual link between them is the focus on productive purposes, as well as the economic

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124 See Art.VII in IBRD Articles of Agreement; Art.VIII in IDA Articles of Agreement and Art.VI in IFC Articles of Agreement.
125 See Art.VII s.3 in IBRD Articles of Agreement; Art.VIII s.3 in IDA Articles of Agreement; and Art.VI s.3 in IFC Articles of Agreement); for helpful analysis of this clause, and how it fits within general practice of immunities of international organizations see C.F.Amerasinghe, *Principles of Institutional Law of International Organisations* (2005), at 315-329, also 407-416.
126 See the discussion in s.5.2.1.
128 Art.I, IBRD Articles of Agreement.
129 Art.I, IDA Articles of Agreement.
130 Art.I, IFC Articles of Agreement.
means of arriving at such productivity. This kind of ‘economic core’ of the institution had been a subject of repeated criticism over the history of the Bank. As a result, the mandate of the Bank had been increasingly opened up to wider, more socially-oriented and hence more charged interpretations.

This explains why the purposes of the Bank set out in the Articles of Agreement can no longer be understood in a strict textual sense. Instead, their meaning is continuously constructed through institution’s day-to-day operations, as well as ideologies behind them. This radical open-endedness means that it is now difficult to assess the operational qualities of Bank’s interventions against any ‘functional frame’ that its mandate might be expected to provide. In the context of present analysis this means that it is difficult to refer to the institutional purposes as the standards of institutional accountability. It is largely for this reason that one has to look further down into the operational practices and principles of implementation, in order to find the normative elements that are more tangible, and therefore more fit for that purpose.

The articles do not regulate it extensively how the Bank is expected to implement these wide objectives. The treaties set out several principles what the Bank should use its resources for, also what it should not fund; yet again it does so in sketchy terms. For instance, one of the most important clauses that the ‘loans made or guaranteed by the Bank shall, except in special circumstances, be for the purpose of specific projects’ had become more and more flexible in terms of its application, and triggered diverging interpretations over time. The same is true of another pivotal restriction that ‘the Bank and its officers shall not interfere in the political affairs of any member’ (also known as ‘Political Activity Prohibited’ clause), which was loosened with the Bank’s continuous involvement in domestic governance reforms. Over time these provisions had become saturated with more and more meaning, and consequently

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132 Ibid.
133 Ibid.
134 Ibid.
135 The relevant articles are Art.III-IV in IBRB Articles of Agreement; also Art.V in IDA Articles of Agreement; and Art.III in IFC Articles of Agreement.
136 Art.III s.4(vii) IBRD Articles of Agreement.
137 The criticism of structural adjustment lending led Ibrahim Shihata to address this matter explicitly; see Memorandum of the General Counsel issued to Senior Management on May 1, 1984, ‘Project and non-project financing under the IBRD Articles’, reprinted in Shihata, _The World Bank Legal Papers_, at 173-190.
138 Art.IV s.10 in IBRD Articles of Agreement; Art.V s.6 in IDA Articles of Agreement; and Art.III s.9 in IFC Articles of Agreement; for the description and justification of expansive interpretation see Shihata, _The World Bank Legal Papers_, at 219-238.
got so inflated that it is now really difficult to invoke them in concrete terms\textsuperscript{139}. In practice, just as in case of Bank’s purposes, they now appear to be too vague to provide any meaningful standard of accountability.

Finally, the forth group of provisions in the Articles regulating \textit{the formal process of change} defines the possibility of changing these agreements through amendment and/or interpretation\textsuperscript{140}. Because the formal amendment is so difficult to achieve (due to burdensome voting procedures\textsuperscript{141}) the absolute majority of changes in the functioning of the institution had taken place via the second route.

The practice of interpretation in the Bank only indirectly follows the procedure set in the Articles. It is stated in the Articles that ‘any question of interpretation of the provisions of this Agreement [...] shall be submitted to the Executive Directors for their decision’\textsuperscript{142}. However, the last opinion of the Board on the meaning of the Articles had been issued in 1986\textsuperscript{143}. Ever since then there have been no formal decisions of this kind, and all the matters of interpretation had been passed onto the Legal Vice-presidency of the Bank. This top legal official of the Bank issues legal opinions on the contested provisions, and presents them at the meetings of the Board. According to the former General Counsel Ibrahim Shihata, by \textit{not} rejecting such an informal explanation, the Board implicitly approves and executes its prerogative of interpretation\textsuperscript{144}.

Such partial transfer of competence means that most changes in the institution are introduced through the route the consequences of which are not clear in legal terms. The memoranda issued by the General Counsels give an indication of how certain provisions could be understood; however those are adopted without explicit voting or deliberation procedures\textsuperscript{145}.

\begin{footnotesize}
\begin{enumerate}
\item[139] For instance, the term ‘project’ got to be interpreted as a pursuit of any productive objectives, including through policy-making (see Shihata, \textit{The World Bank Legal Papers}, at 173-190); whereas the Bank’s conditionality on borrower’s political economy was interpreted to be in accordance with ‘political activity prohibited’ clause (see Shihata, \textit{ibid.}).
\item[140] Art.VIII-IX in IBRD Articles of Agreement; Art.IX-X in IDA Articles of Agreement; and Art.VII-VIII in IFC Articles of Agreement.
\item[141] All treaties can only be amended by a super majority in the Board of Governors where the voting power of the member states depend on their capital subscriptions (see Art.V s.2(b) in IBRD Articles of Agreement, Art VI s.2(b) in IDA Articles of Agreement and Art.IV s.2(b) in IFC Articles of Agreement).
\item[142] Art.IX(a) IBRD Articles of Agreement.
\item[143] See Shihata, \textit{The World Bank Legal Papers}, at LVIII.
\item[144] Shihata also claims that such situation positions General Counsel’s legal opinions as the source of law, although he does not specify what would be the status of such source; see \textit{ibid.} at LX.
\item[145] Note that the by-laws of the Board do not mention the procedure for dealing with the matters of interpretation (see ‘By-Laws of the International Bank for Reconstruction and Development’ (as amended September 26, 1980); available online at \url{http://go.worldbank.org/3PMBT6T7E0}).
\end{enumerate}
\end{footnotesize}
In such setting it is difficult to tell which parts of the opinion should be treated as an official interpretation, and what merely serves as an informal consultation with a competent legal officer. This gives space for institutional practices that are neither explicitly allowed, nor forbidden by the Articles. They simply take place within the wide discretionary powers created by the founding treaties. As we shall see from the analysis of operational policies, such is the logic of institutional evolution that underlines most of the internal regulations and structures of the Bank.

All in all, this overview of the Articles of Agreement had illustrated that the founding treaties play an anchoring role in setting up the status, as well as the basic structures and principles of the Bank. However, the provisions that could be relevant in guiding the content of interventions are too vague to be invoked as accountability standards. Accordingly, to understand the rules that shape the day-to-day operations of the Bank, we must look at the operational policies of the Bank.

3.2. Operational Policies (OPs)\textsuperscript{146}

3.2.1. Link with the founding treaties

From a legal perspective it appears logical to assume that internal rules governing activities of an international institution emanate directly from its founding treaty. Indeed, the Bank’s website tells us that ‘[operational policies] are short, focused statements that follow from the Bank’s Articles of Agreement ... [and that] establish the parameters for the conduct of operations’. There are legal scholars who suggest similar position. Rigo Sureda for instance, one of the previous General Counsels of the Bank, quotes the above mentioned official statement\textsuperscript{147}, and argues that the Articles of Agreement establish the operational principles, which are then implemented thorough internal regulations (i.e. operational policies)\textsuperscript{148}. Nevertheless, his argument appears not entirely persuasive for several reasons.

Firstly, no internal regulations analogous to the operational policies are noted in the Articles. The sole relevant provision in the Articles establishes that ‘The Board of Governors, and the

\textsuperscript{146} Here, and also in the rest of this work, the term ‘operational policies’ is used as a general category, which includes both operational policies and the Bank’s procedures that are set out in the operational manual. It also includes – unless specified differently – the Access to Information Policy.

\textsuperscript{147} He also does not specifically explain where this statement is coming from, see A.Rigo Sureda, The law applicable to the activities of international development banks (2005) at 82, para 154.

\textsuperscript{148} Ibid at 81, para 151.
Executive Directors to the extent authorized, may adopt such rules and regulations as may be necessary or appropriate to conduct the business of the Bank. Nonetheless, the founding treaties mention such internal regulations of the Bank under the competences of Board of Governors (i.e. the body involving full membership), and not the Board of Directors (i.e. the body of elected representatives). The latter is only meant to acquire such prerogative under the special authorization. There was an attempt to implement this provision through the Bank’s by-laws, which state that ‘The Executive Directors are authorized by the Board of Governors to adopt such rules … as may be necessary or appropriate to conduct the business of the Bank. Any rules and regulations so adopted, and any amendments thereof, shall be subject to review by the Board of Governors at their next annual meeting.’ Nonetheless, this procedure is different from the way in which operational policies are being adopted in practice.

The second source of scepticism is that the textual open-endedness of the Articles is not coincidental, and that instead the choice to leave the constituent documents so fluid was fully intentional. Consider for instance the division of competences between the Board of Governors and the Board of Directors noted earlier. The Articles provide no real guidance on how these bodies are meant to fulfil their institutional objectives, or how they are meant to work together. This suggests that the founding fathers have consciously decided to leave a wide discretionary space for those in charge of the institution, and that the Articles were never meant to frame and guide the day-to-day work of the Bank.

Finally, the counter-argument that goes specifically against Rigo Sureda’s position can be crafted through closer analysis of his ‘operational principles’ that supposedly are implemented through operational policies. Under further scrutiny, his list of principles merely reiterates the Bank’s commitment to market economy (for instance the principle of efficiency and prudence in using financial resources); or Bank’s adherence to basic norms of public international law (for instance prohibition of political conditionality, also requirement to acquire the consent of borrowing member to conduct operations in its territory). All the sections in the Articles he points towards seem to suggest no principled guidance about how

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149 See Art.V s.2(f) of IBRD Articles of Agreement, also Art.VI s.2(h) of IDA Articles of Agreement.
150 See s.15 (‘Rules and Regulations’) in the By-Laws of IBRD.
152 See again Art.V of IBRD Articles of Agreement and Art.VI of IDA Articles of Agreement.
154 Rigo Sureda, The law applicable to development banks at 81, para 151.
the operations of the Bank should be conducted; whereas operational policies govern these activities with considerably more depth and detail.

All in all, neither Rigo Sureda nor the other authors whose reasoning is implicitly structured along the same lines\textsuperscript{155}, seem to have provided convincing enough arguments that there is a genuine derivative link between OPs and the Articles, both conceptually and in practice.\textsuperscript{156} Instead, their elaboration upon the matter comes across as convenient legal rhetoric that adds little to our understanding of these internal regulations.

In that respect this work is attempting to give a different picture from the one portrayed by Rigo Sureda. As a matter of illustrating this different position, we could sketch the Articles of Agreements as a circle, which carves out a certain discretionary space for institution’s activities to take place. Nonetheless, this circle is relatively empty inside. It is in this ‘empty’ space of wide discretionary powers that the operational policies of the Bank had evolved. And they did so in a logic which is different from that of ‘implementing’ the Articles (like for instance the statutory instruments are meant to implement the provisions of the statute). Instead, it mainly took place as a relatively distinct process, the rationale for which will be described next.

\subsection*{3.2.2. Evolution and legal status}

The Operational Manual (Manual) of the Bank is the main reference document that is composed of all the operational policies of the Bank\textsuperscript{157}; with one exception of Access to Information Policy, which is nonetheless relevant to this analysis\textsuperscript{158}. The core safeguard policies of the Bank\textsuperscript{159} are currently undergoing a systemic reform (arguably the most far reaching one since their creation) that should result in the new and updated environmental

\textsuperscript{155} See for instance Mason and Asher, The World Bank since Bretton Woods at 153.
\textsuperscript{156} Some operational policies contain direct references to Articles of Agreement that underline ‘principles of Bank involvement’ (see for instance OP 2.30 ‘Conflict and Development’, or 17.30 ‘Communications with Individual Executive Directors’), however they cover specific operational issues, which are largely irrelevant in the context of this research. These, and all other policies quoted in this chapter can be found on the Bank’s website, see permanent link http://go.worldbank.org/DZDZ9038D0.
\textsuperscript{157} All citations in this work are referring to the version of the Manual as updated in June 2015.
\textsuperscript{158} Although the WB Access to Information policy evolved as a separate piece of internal regulation, in essence its evolution and legal status seems to be mirroring the features of other operational policies. The text of the policy and the basic facts about its evolution are available at http://go.worldbank.org/2I4JROD0I0.
\textsuperscript{159} These are the specific policies within operational policies, dealing with social and environmental protection in investment financing; see next section (s.3.2.3.) for further discussion.
and social framework, to be adopted sometime in 2016\textsuperscript{160}. On the whole, ever since operational policies were first introduced in the mid-1980s they were being continuously updated and transformed, which means that any policy or their annexes can be changed at any time by the initiative of the Bank’s management, which is might be subject to approval by the Board\textsuperscript{161}. At the moment of writing no clear and/or official terms and conditions regulate how the policies come into being\textsuperscript{162}. Traditionally their adoption and modification has been an \textit{ad hoc} process\textsuperscript{163}, but it will be illustrated that increasingly the development of these policies is taking place in a systemic manner.

In the analysis that follows I will show how exactly the policies have acquired their importance over time; and what were the trends in their evolution that contributed to such an enhanced role. This is meant to prepare the grounds for the analysis of their legal status, where I will argue that notwithstanding their uncertain legal origins these policies currently do function as a valid source of law.

\textit{a. The first tendency: from instructive to binding rules.} The ‘story’ of operational policies starts with the early years of the IBRD and the reference documents that its management issued to staff, to guide their dealings with the clients\textsuperscript{164}. Some of these standards were considered important enough to be elaborated with an input from the Board, but many where just issued by the higher levels of management\textsuperscript{165}. The staff of the

\textsuperscript{160} See The World Bank, ‘Review and Update of The World Bank’s Safeguard Policies. Environmental and Social Framework (Proposed Second Draft). Consultation Paper’ (July 1, 2015) (hereinafter – the Second Consultation Paper) \url{http://consultations.worldbank.org/consultation/review-and-update-world-bank-safeguard-policies}. The analysis in this thesis is conducted based on the version of the policies that are valid at the moment of writing and submission, although the most crucial changes envisioned in the new draft will be underlined throughout the text. Also, see the discussion in s.7.3. for the critical overview of changes proposed by this final reform.


\textsuperscript{162} The draft Environmental and Social Framework (hereinafter - WB ESF Second Draft) for the first time in the Bank’s history sets out the clear provision that the policies and their changes will be \textit{adopted by the Board}; see the World Bank Environmental and Social Framework. Second Draft for Consultation (July 1, 2015) ‘Environmental and Social Policy for Investment Project Financing’ para.61; available at \url{http://consultations.worldbank.org/consultation/review-and-update-world-bank-safeguard-policies}.

\textsuperscript{163} See Boisson de Chazournes, ‘Policy Guidance and Compliance’.

\textsuperscript{164} The observations in this, and several forthcoming paragraph are mainly based on D. Kapur \textit{et al.}, \textit{The World Bank. Its First Half Century. Volume 1: History} (1997) at 1161-1216.

\textsuperscript{165} Sureda, \textit{The law applicable to development banks} (2005) at 81-82, para. 153.
Bank was expected to follow them as benchmarks of internal good practices. The earlier standards were detailed and technical, and short on what we would now consider to be the broader policy framework governing the relationship between the Bank and its borrowers. Those were truly the ad hoc instances of operational standard-setting.

The situation changed significantly in the 1980s, when external criticism of the Bank started mounting up, especially following its engagement in several high-profile large-scale projects in Brazil and India. External pressure was put on the Bank to provide more effective safeguards to its operations. It was during this era of project controversies of the 1980s that the first operational standards with an emphasis on public accountability had been adopted by the Board of Directors.

Eventually these social and environmental policies from the 1980s were pronounced to be binding on the Bank’s staff. Later on, following the public criticism that reached its culmination at around 1992, the Board has divided the entire scale of its internal regulatory documents of varied normative grip into two parts: those that are binding on the Bank staff, and those that are not. As a result, this created clear and undisputable standards of acceptable behaviour. Arguably this very commitment to a legalistic binary code of reasoning was one of the most significant moments in developing the Bank’s regulatory framework.

b. The second tendency: from coordinating to regulatory function. The function of the early operational policies described above was to mainstream the best practices of

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166 This is the argument in Boisson de Chazournes, ‘Policy Guidance and Compliance’.

167 The first official history of the Bank that was published nearly fifty years ago does not mention these standards in the context of institutional accountability (see Mason and Asher The World Bank since Bretton Woods (1973)).


169 Currently there exists no official and comprehensive overview of how environmental and social policies in the Bank had come about, and the relevant reviews are scattered through the literature. See for instance M.M.Cernea “The “Ripple Effect” in Social Policy and its Political Content: A Debate on Social Standards in Public and Private Development Projects’, in M.B.Likosky (ed.) Privatising Development: Project Finance Law and Human Rights (2005)(for an overview of origins of policies on involuntary resettlement); also Kingsbury, ‘Operational Policies of International Institutions’ (for the origins of policies on tribal/indigenous people); and Rigo Sureda, The law applicable to development banks at 89 para 173(for the origins of policies on environmental protection).

170 Such shift is emphasized in Rigo Sureda ibid. at 82 para 155.

171 Rigo Sureda, The law applicable to development banks at 82 para 153.
the Bank amongst different operational units. As a matter of efficiency, such management memos had to be concrete, practical, and based on the real-life examples of Bank’s operations. It also had to be unambiguous, and to leave little space for the diverging interpretations. This meant that by the end of the 1980s the breath and complexity of the Bank’s operations was such that it became difficult to manage its volume, let alone square it with the common understanding of a ‘regulatory framework’\(^{172}\). The main challenge, and arguably a considerable achievement in this respect, was to synthesize these dispersed points of reference into a set of binding rules\(^{173}\). Because of the density of the material at hand, this ‘translation’ from empirical best practices to a limited list of norms, proved to be a struggle. Arguably, the legacies of this process challenge the quality of Bank’s operational policies up until the present day.

Generally it should be recognised that ever since their introduction and up until now operational policies has always came about based on the logic of habit and repetition – which resulted in a creation of a norm over a certain period of time. Despite the fact that these policies have been subjected to many reviews and eventually were ‘translated’ into normative language, their formation is based on the organisational practices of the Bank. Arguably, the low threshold of normativity is inherent in this kind of technique of law-making. The standards set by these rules are little likely to be higher than what the institution is already in a habit of doing\(^{174}\).

There also appears to have been many reforms of the policies that resemble the process of codification\(^{175}\), aimed at fostering the unity and coherence of the policies. Despite such

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\(^{172}\) See critical assessment in Rigo Sureda, *The law applicable to development banks* (2005) at 82 para 153: ‘some were policy instruments of a very specific nature, others provided very general guidance… At times, it may have been unclear who had the authority to make exceptions required by particular needs of changing circumstances as policy statements may not have been updated for a long time’.


\(^{174}\) Unless, as the Bank’s current safeguards’ reform illustrates, this threshold is artificially elevated through a strong external pressure from civil society; see the Second Consultation Paper (2015) for an overview of forceful views from civil society (and the conservative response by the Bank’s management).

\(^{175}\) In the last decade there were at least four major reforms of operational policies, many of them lasted for several months or even years (systemic amendments were made in 2007, 2012, 2013 and 2015); it is possible to trace the ‘waves’ of mass revision through archived policies by analysing the so-called archived statements, i.e. the policies that are no longer applicable, see http://go.worldbank.org/9RA8ADGOP0.
efforts, policies still have numerous systemic shortcomings, especially if we compare them with other legal instruments (e.g., domestic regulations).\(^{176}\)

For example, it is difficult to trace the previous amendments of each policy. The Bank provides a list of ‘archived statements’, but the newly adopted policies usually do not state whether they are entirely new, or instead only several individual sections were amended and when. Another systemic issue is that the regulatory sphere of the policies is quite fluid. More specifically, the policies only govern the part of the project that is funded by the Bank, but not by other donors.\(^{177}\) It is however doubtful whether such shift between various set of rules can be principled and non-arbitrary, given the hybrid nature of the capital, and how closely different components of the project are usually interrelated in real life.\(^{178}\)

c. **The third tendency: from internal regulations to externally relevant source.** Up until several decades ago the guidelines of the Bank were not visible to the public. This was not perceived as a lack of transparency – they were just considered to be internal, i.e. something that is of no interest to those outside the institution, as in a case of commercial banks.\(^{179}\) In 1988 the Board had introduced the first relevant changes to the Bank’s Disclosure Policy (currently the Access to Information Policy), following which operational policies were classified as material authorized for publishing.\(^{180}\) From then onwards the algorithm of adoption-and-publication had been employed for both, new policies, as well as their updated versions. That is how the principle of transparency was mainstreamed in the Bank’s rule-making.

\(^{176}\) It seems that the new safeguard policies, if adopted, will introduce a systematic structure of the policies (see WB ESF Second Draft (2015)). However, arguably that will not resolve the issues of application over time; nor the questions about how such policies relate to the rest of the Bank’s policy framework, also other sources in project law (e.g. domestic law of the borrowing state, or the internal regulations of other funders).\(^{177}\) For instance, private contributions to the project are governed by the more flexible IFC standards (see generally OP/BP 4.03 ‘Performance Standards for Private Sector Activities’; also IFC Performance Standards on Environmental and Social Sustainability (January 2012); and IFC’s Policy on Environmental and Social Sustainability (January 2012)).\(^{178}\) Currently the Bank’s policy on private funding is phrased in such a way that the ‘switch’ to IFC performance standards is easily triggered, and little justification is needed (see OP 4.03 ‘Performance Standards for Private Sector Activities’ paras. 1-5).\(^{179}\) On commercial origins of the Bank see Philips, *Reforming the World Bank* (2009) at 3-5; also Mason and Asher, *The World Bank since Bretton Woods* (1973) at 28-32; but cf. Staples, *The Birth of Development* (2006) at 9-12 (who argues that the Bank was inspired by Tennessee Valley Authority in the United States, which was a public institution created to fight the consequences of the Great Depression).\(^{180}\) Timeline in this paragraph is reconstructed from M.M. Cernea, ‘The “Ripple Effect” in Social Policy and its Political Content’ (2005), in M.B. Likosky (ed.) *Privatising Development: Project Finance Law and Human Rights* (2005).
Another feature that has become customary in the adoption of OPs is the extensive consultation with the Bank’s external stakeholders. It is clear that such involvement has enhanced the weight and legitimacy of operational policies. As for the question how meaningful are these consultations – it suffices to assert that the Bank has always kept the driver’s seat in drafting the policies, and that it has never introduced even advisory requirement for the Board to take the suggestions of civil society on board. On the other hand, NGOs are now at least allowed to watch and comment on this process, which is considerably more than they were afforded in the early history of the Bank.

Finally in 1993, following a controversial process triggered by both external and internal pressure, the Bank had established the World Bank Inspection Panel, which is the mechanism for assessing institution’s compliance with its operational policies, and whose procedure will be addressed in the upcoming chapters. For the purpose of understanding the evolution of operational policies it can be argued that the existence of such mechanism has increased the external relevance of Bank’s internal rules. The very principle of specialized review comes across as a move towards the format that is adapted to external scrutiny, and therefore more accessible to those outside the institution.

This brings me to the question about the legal status of operational policies. I have argued in the analysis about their link with the founding treaties that the policies are not exactly implementing the Articles, but that they have evolved at the management level, largely due to an external pressure. Moreover, their format, function and law-making qualities have been changing over time, and none of them seem to have fully settled up to date. The question of their legal status is therefore a truly difficult one to answer, because its object of inquiry is so obscure and in a constant flux.

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181 See Rigo Sureda, *The law applicable to development banks* (2005) at 90 para 177 (about reform of environmental policies in the 1990s and how it was influenced by consultations with civil society). David Hunter has put forward an argument that such practice of consultation means that such procedure has acquired the status of a custom; see D.B.Hunter, ‘International Law and Public Participation in Policy-Making at the International Financial Institutions’ in D.D.Bradlow and D.B.Hunter (eds), *International Financial Institutions and International Law* (2010) 199-238.


184 See chapter 5 in particular; also the discussion in s.7.3.3.
Nonetheless, in the context of the present research problem the question of legal status is pertinent. That is because differently than in case of other categories of rules potentially relevant in the project law, operational policies do not enjoy a full recognition as a legal source. That is why their ‘normative credentials’ to be considered as a binding standard of accountability are also less clear.

Generally the issue of legal status of operational policies belongs to a broader debate about the limits of public international law. In line with this larger disagreement amongst the international legal scholars, it is possible to identify at least two competing positions that frame the debate. While the first (currently prevalent) position would support the claim that the OPs are not the self-standing source of public international law, an alternative position (which challenges the limits of public international law) would argue to the contrary.

The first position is centred on the exclusivity of formal sources established in the Article 38(1) of the Statute of the International Court of Justice (ICJ). The Statute makes no mention of internal regulations of international institutions, or any other source similar to the operational policies. Thus, many scholars consider OPs to be informal sources, also branded as ‘soft law’. These sources at best facilitate the treaty-making processes; however they are not law per se. For those who prefer sticking to such doctrinal limits of public international law the discussion about the legal nature of operational policies does not go further than this assertion.

However, the numeros clausus understanding of Article 38 has been challenged, and scholars have argued that there can be other sources of international law that are not mentioned in this provision. The evolution of the operational policies of the World Bank seems to support this position. Speaking solely about the treaties, customs and principles in the field of development financing does not reveal the full picture of relevant normative framework. The formal sources in this instance (the founding treaties of the Bank in particular) were unable to provide the necessary safeguards to the individuals and communities affected

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185 International legal scholars from the aforementioned GAL and IPA strands had also turned their attention to this matter (see for instance Kingsbury, ‘Operational Policies of International Institutions’; Dann, The Law of Development Cooperation at 187-193).

186 See for instance A.Boyle and C.Chinkin, The Making of International Law (2007) at 210-262; by and large the account in this text sets out the ‘traditional’ position about the limits of public international law, and explains how this formal core links to all other instruments created at the international level.


by development interventions. They proved to be too vague and too limited. The regulatory sphere of these ‘other’ sources, such as operational policies, therefore begins where the traditional state-centric rules cannot reach, mainly due to their problematic law-making processes. The observation that results from looking at these competing positions is that operational policies could be considered as a self-standing source of public international law; and that there are strong arguments for them to be considered as such. Nonetheless, it seems to me that the doctrine of sources, as well as the general debate about the limits of public international law, has little further explanatory value in dealing with the issue addressed in this section. The analytical tools offered by this debate can help us to get a good understanding of legal and political issues at stake, but it can tell us little about the status of the specific source in question.

At this point my proposal is to move away from the theories about the sources of public international law, and instead to focus on the qualities and intentions behind the policies themselves. Arguably the most promising route of understanding their legal status is to assess their format and function. In particular it appears necessary to consider whether the policies have acquired sufficient formal features to be perceived as law, and whether they execute more than just a managerial function. It is also crucial to consider whether the Bank intends for these rules to be mandatory, or are they only meant to act as soft (policy) instruments that contribute to the conclusion of (legal) development financing agreements.

The idea of an evolution is meant to emphasize that the policies have acquired their status as a source of law gradually, rather than through a single decision of a competent authority. The test I propose is therefore based on empirical observation, rather than pure analytical deduction. As much as lawyers are generally resentful to such type of assessment, I think that in case of operational policies no other route can be used for such ascertainment. This is

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189 See the discussion in 7.2. for further argument about why formal sources of international law cannot ensure sufficient level of regulation in this area of international cooperation.

190 This argument is in line with Klabbers’ reasoning about the scope of international legal sources (see Klabbers, ‘Law-Making and Constitutionalism’); and on a more conceptual level it adheres to the theory of law by Lon Fuller, who argued that legal validity depends on internal qualities of the law, such as generality, congruence, clarity, consistency over time, etc. (see L.L. Fuller, The Morality of Law (1969)).

191 The distinction between managerial and legal order is originally introduced by Fuller (ibid.), and adjusted to the context of global governance in Dyzenhaus, ‘Accountability and the Concept of (Global) Administrative Law’.

192 Initially this concern was started by Weil, see P. Weil, ‘Towards Relative Normativity in International Law?’ 77 AJIL (1983) 413; for the evolution of this discussion, and opposing views see contributions in Part II (‘Relative Normativity’) in M. Koskenniemi (ed.), Sources of International Law (2000).
largely due to the ambiguous origins and spontaneous law-making features of the policies outlined above, where it was shown that for many decades the policies had no source-based legitimacy. They also could not have acquired this type of legitimacy more recently, due to the fact that up until present no official law-making procedure of how these policies come is put in place.

On the whole, I would argue that all three evolutionary trends identified in this section point towards the fact that the policies have already acquired a legal status. They currently appear to perform a regulatory function, which largely depends on the format in which the policies are expressed (normative language, abstract rules, relatively clear links amongst the provisions). Moreover, this format is likely to improve significantly with the current reform, which is explicitly aiming to put in place a comprehensive social and environmental framework. The policies are also not just the soft instruments that merely set out good practices. They are binding on the staff of the Bank, and are in turn shaping the behaviour and expectations of other power-holders. Finally, such aspects of their law-making and implementation as transparency, consultation and compliance review show that they have evolved from a source that is merely setting good managerial practices to a source that have procedural and institutional similarities with the law.

Admittedly not all of these characteristics have evolved and have settled completely. For instance, OPs are still not adopted through a well-defined procedure; their temporal application is not always clear, etc. However, on the whole it can be concluded that in their current shape and form operational policies do exhibit the qualities a valid legal source, and therefore create self-standing legal obligations for the Bank and the other power-holders. Accordingly, they can be treated as creating independent standards of accountability that can be referred to by the individuals and communities affected by the World Bank development interventions.

3.3.3. Content and regulatory strategies

Operational policies set out a range of standards that guide the behaviour of the holders in development interventions. For the purpose of this research the most pertinent standards are those that regulate their behaviour towards the affected people. This includes such matters as

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193 See WB ESF Second Draft (2015). This document is better set out than the current policies; and is expressed in more explicitly normative language (although the issue of most appropriate language is still being deliberated upon; see The Second Consultation Paper (2015)).
involuntary resettlement, protection of interests of indigenous and local communities; environmental impact assessments and the like. The table below outlines the main effects of development financing that the policies are dealing with, and where exactly in the Bank’s framework related standards are currently set (see Table 3.1).

<table>
<thead>
<tr>
<th>Contentious issues created within development interventions</th>
<th>The policies that set out relevant standards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Negative implications on a well-being and lifestyles of individuals</td>
<td>4.01 Environmental Assessment; 4.10 Indigenous Peoples; 4.12 Involuntary Resettlement; 4.11 Physical cultural resources</td>
</tr>
<tr>
<td>Social impacts that affect the structure and functioning of local communities (e.g. change of traditions, culture, social and power structures, economies, etc.)</td>
<td>All safeguard policies</td>
</tr>
<tr>
<td>Material and social inequalities between the affected people, which means that development interventions are likely to cause diverging effects to different groups in the same society (e.g. between men and women, urban and rural, land-owners and dwellers, contracted and non-contracted workers and etc.)</td>
<td>4.01 Environmental Assessment; 4.10 Indigenous Peoples; 4.12 Involuntary Resettlement; 4.36 Forests; 8.60 Development Policy Financing (DPF).</td>
</tr>
<tr>
<td>Transformation of governance structures in affected societies, especially with regards to traditional leadership that coexist with the authority of the nation state (e.g. customary use of land, collective ownership, tribal self-governance, etc.)</td>
<td>4.01 Environmental Assessment; 4.10 Indigenous Peoples; 4.11 Physical Cultural Resources; 4.12 Involuntary Resettlement;</td>
</tr>
</tbody>
</table>

Note that the draft WB ESF is intending to add several more substantive issues, such as those related to labour conditions and discrimination; see the discussion in s.7.3.2. This is addressed extensively in the most recent reform, see ibid.

The focus in this thesis is on the Bank’s project financing, whereas admittedly Bank’s policy funding regulated by DPF have nuanced differences in terms of its deliberation of application. However, the distinction between the two financial instruments used by the Bank is so nuanced that it is impossible to delineate and completely exclude policy financing from the field of the current analysis (see the Panel Investigation Report on Democratic Republic of Congo (DRC): ‘Transitional Support for Economic recovery Grant’ (2005) at xv, which explains how DPF is one of the two alternative funding mechanisms invoked by the Bank, and that it is at time used to fund the same type of projects that are traditionally funded under project financing).

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194 Investigation reports prepared by the World Bank Inspection Panel are informative in this respect. At the time of submitting their request the claimants are asked to identify the policy that they think the Bank has failed to comply with, also in what way. Therefore, an overview of Panel’s cases gives a good idea about the issues that tend to be most pressing, and the policies that are crucial in addressing them. The table 3.1. is put together from a comprehensive analysis of such requests for inspection, and Panel’s reports.

195 Note that the draft WB ESF is intending to add several more substantive issues, such as those related to labour conditions and discrimination; see the discussion in s.7.3.2.

196 This is addressed extensively in the most recent reform, see ibid.

197 The focus in this thesis is on the Bank’s project financing, whereas admittedly Bank’s policy funding regulated by DPF have nuanced differences in terms of its deliberation of application. However, the distinction between the two financial instruments used by the Bank is so nuanced that it is impossible to delineate and completely exclude policy financing from the field of the current analysis (see the Panel Investigation Report on Democratic Republic of Congo (DRC): ‘Transitional Support for Economic recovery Grant’ (2005) at xv, which explains how DPF is one of the two alternative funding mechanisms invoked by the Bank, and that it is at time used to fund the same type of projects that are traditionally funded under project financing).
Public interest considerations that go beyond the political and economic preferences of the borrower (e.g. attitude to the benefits of economic development)  

All safeguard policies, also 8.60 DPF

<table>
<thead>
<tr>
<th>Damage to biodiversity and ecosystems</th>
<th>4.04 Natural Habitats; 4.36 Forests; 8.60 DPF.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Environmental degradation in the long run, including its social implications</td>
<td>4.01 Environmental Assessment; 4.04 Natural Habitats; 44.36 Forests.</td>
</tr>
</tbody>
</table>

Operational policies set out a range of regulatory measures about how to address these issues. With regards to some issues, they do put in place relatively strong standards of behaviour; but not with others. Most forceful approach is taken with regards to the natural environment. The policies are relatively unambiguous about the risk of adverse environmental impacts in the areas of natural habitat and forests. There is an explicit commitment to not fund the projects that are likely to produce such negative effects. Similarly, operational policies require for the Bank to avoid acting against relevant international environmental obligations of its borrowers. Nonetheless, it is noteworthy that the scope of such commitment is limited to environmental treaties and agreements, which implicitly excludes other international treaties from having the same effect in related transactions.

Not all issues addressed in the policies are treated in such a principled manner. Most of the social issues that are recognized by the policies leave a lot of discretion for the parties. For instance, policies generally acknowledge the existence of customary forms of governance in the borrowing countries, and acknowledge that such traditional leaders might hold different views about the intervention than the authorities of the borrowing state. However, because the role of customary authorities is a contested area of development financing, the policies are largely ‘tip-toeing’ over the issue, not providing clear guidance about how related tensions should be dealt with. Nonetheless, in this particular case the strategy of operational policies seems to be reasonable. It is filled with caution about interfering in the relationship between

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customary authorities and the state, while at the same time attempting to not leave traditional governance completely out of the picture.

This cautious approach does not seem to be equally well suited to all social issues tackled by the policies. This is the case with most issues of material and social inequalities amongst affected people and the (negative) social changes that development interventions are likely to create. According to all the relevant safeguard policies, the borrower must assess the qualities that make certain social groups more vulnerable to negative effects of the interventions. This appears to be a progressive and much needed specialized standard of behaviour\(^\text{201}\). However, notwithstanding such positive concerns at the outset, the measures that operational policies require from the parties for dealing with these issues are scarce and limited. Absolute majority of social and political conflicts that development projects are likely to initiate are expected to be resolved via consultation mechanisms, designed and applied by the borrower\(^\text{202}\). This strategy is problematic because of its procedural rather than substantive nature, i.e. because the parties are asked to commit to certain processes of decision-making, rather than the effects of their operations\(^\text{203}\).

This latter statement demands a broader overview of the regulatory strategies that the Bank currently employs in its policies. In theory, the Bank only has three strategies to regulate the use of its funding:

(i) it can *forbid* the funding of certain type of activities;
(ii) it can *introduce substantive requirements* that constrain the allocation of funding to certain activities;
(iii) it can *control* the decisions and activities of the borrower by *imposing certain procedural hurdles* that should be followed throughout project deliberation and its implementation.

On the whole, looking at the entirety of the operational policies, it appears that the Bank uses its first prerogative quite scarcely. This is understandable, given that substantial prohibitions


\(^{202}\) Most mechanisms for consultation are set out in the project plans, such as Environmental Management Plan (OP.4.01 ‘Environmental Assessment’. Annex A); Indigenous peoples plan (OP 4.10 ‘Indigenous peoples’. Annex B); and Resettlement Plan (OP 4.12 ‘Involuntary Resettlement’. Annex A); all of which are prepared by the borrower. See the discussion in s.3.3.2. for the analysis about the legal status of these assessments.

\(^{203}\) See the discussion in s.4.2.4, also in s.7.2.2. and s.7.2.3. for the problematic relationship between the two types of measures.
actually limit Bank’s own capacity to find business. The more areas it abstains from, the more likely it is that the borrowers will instead go to other institutions for similar services. It is considerate that the Bank has already banned the assistance to those activities that are manifestly detrimental to the environment\textsuperscript{204}; however it is highly unlikely that it will go along with this strategy much further than that, at least not in the foreseeable future\textsuperscript{205}.

The second strategy too, is used with great caution by the Bank, mainly because of the minefield of state sovereignty that the institution operates in. Any substantial requirements that are not expressed in a format of a treaty, or other source of normativity that is validated by the state consent, creates a controversial space of governance that the Bank is not willing to be swamped in. Therefore even the regulations that currently do fall into this category are often phrased as recommendations, or at best as general preferences that incorporate enough room for exceptions.

The example of this ‘soft’ approach is for instance Bank’s preference of small-scale harvesting of forest areas, instead of large-scale industrial conversion\textsuperscript{206}. A more directive approach that is nonetheless soft is the rule that ‘involuntary resettlement should be avoided where feasible, or minimized exploring all viable alternative project designs\textsuperscript{207}. Despite being framed in relatively strong normative language, this latter clause is still primarily recommendatory rather than imperative on the power-holders. There are only few exceptional instances where substantive rules actually create explicit obligations on the parties. These ‘hard’ regulations are normally applied in specific circumstances dealing with severe negative impacts of development interventions. A good example of this kind of rule is the requirement to only use the certified contractors for building the dams\textsuperscript{208}.

Finally, the third and final strategy at the disposition of the Bank is to use the web of procedures in order to control the activities of all its contracting parties. In terms of its legal and political implications, this strategy is the ‘safe game’ for the Bank. While it is not possible to tell the sovereign borrower or independent business entities what to decide, it is possible to require for certain level of detail of this decision, and even the decision-making process itself –

\textsuperscript{204} OP 4.04 ‘Natural Habitat’ para 4; also OP 4.36 ‘Forests’ para 5; in addition to these two policies the Bank has also committed not to fund production of tobacco, see 4.76 ‘Tobacco’ para 1 (although here too, the policy allows for exceptions ‘for countries that are heavily dependent on tobacco as a source of income (especially for poor farmers and farm workers)’).

\textsuperscript{205} The WB ESF Second Draft introduces some new provisions of this type, see the discussion in s.7.3.1.

\textsuperscript{206} OP 4.36 ‘Forests’, paras.7, 8, 12, 14.

\textsuperscript{207} OP 4.12 ‘Involuntary resettlement’, para.2(a).

\textsuperscript{208} OP 4.37 ‘Safety of Dams’, paras.2, 6.
all of which can drive them to adopt the measures that the Bank considers necessary. Sovereign or not, once the contracting entity has deliberated its proper plan of action and committed to following it, the Bank acquires the administrative authority to demand for proofs of its implementation, and at the same time the implicit authority to demand for results. The use of procedure is therefore the most readily-found regulatory strategy in operational policies. It is used as a master-key to control the planning, implementation, and the effects of development projects.

All in all, the way operational policies are presently phrased, they are best perceived as a procedural lens that the parties are meant to apply while planning and implementing their development activities. If all the parties to the transaction coordinate their interests, they are actually relatively free to do whatever they wish with the issues discovered through this lens. On the other hand when coupled with some ‘soft’ yet substantive recommendations addressed towards the Bank’s staff and borrowers, these procedural rules do create some ‘normative ripples’209. Understood in this way, their content enables the standards of accountability that shape the behaviour of Bank, and also all other parties to its agreements.

This final observation concludes my overview of the operational policies of the Bank. The analysis had hopefully illustrated that we are dealing with a truly complex set of regulations, both in terms of their format and content. There are many uncertainties about the legal status of these policies, also what exact effects they create in concrete development interventions; however, there can be no doubts about how important they have become in this area of international cooperation. They furnish development financing with relatively comprehensive and specialized set of rules, and they establish the standards of behaviour that is binding upon the staff of the Bank and that can be invoked externally. Nonetheless, these standards are fairly loose and short on substance, which is why they can be bent quite easily depending on the will of the contracting parties, and in a way that best suits their shared interests. In practice the largely procedural requirements of the operational policies affect the real-life operations when coupled with more detailed substantive obligations that are put in place through development financing agreements concluded with the Bank.

209 The term is borrowed from J.A. Alvarez, International Organizations as Law-maker (2005).
3.3. Contractual instruments

Development financing agreements, which are the core contractual instruments that govern the relationship amongst all power-holders in this area, did not receive much attention in the academic literature\(^\text{210}\). In practical terms this means that there is fairly little conventional knowledge on this topic, and that the parameters of debate are currently lacking\(^\text{211}\). As a result, the examination of development agreements in this section is based predominantly on the doctrinal overview of individual project agreements concluded by the Bank, and is only at times informed by the existing literature on the matter.

The project agreements for this analysis were selected from the cases investigated by the World Bank Inspection Panel, and their review had to rely on the documentation that the Bank has made publicly accessible\(^\text{212}\). In that respect it is noteworthy that with a very few exceptions\(^\text{213}\) the Bank does not publish online its agreements with private sector enterprises\(^\text{214}\). That is why it is at times challenging to grasp the ‘legal infrastructure’ that guides public-private partnerships of the Bank. The following analysis is therefore an attempt to make the most of the available information and to introduce some analytical structure of talking about these contractual arrangements, with a view of assessing standards of accountability that they put in place.

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211 Even Kevin Davis, who considers the contractual instruments to be the main tools used in development financing (see the discussion in s.6.1.2.), does not offer a framework of analysis for classifying and qualifying the form and content of these agreements (see Davis, ‘Financing Development’ at 175-184).

212 All publicized project agreements are accessible online, in the official page of each individual project. Here is the link to all the cases of Inspection Panel, with links to individual project pages: http://ewebapps.worldbank.org/apps/ip/Pages/Panel_Cases.aspx\(^*\)

213 To my knowledge the only agreements with private entities that were publicized via the Bank's website is from Petroleum Development and Pipeline Project (Chad-Cameroon), see http://www.worldbank.org/projects/P044305/petroleum-development-pipeline-project?lang=en&tab=overview\(^*\)

214 That is because IFC Access to Information Policy applies to all of the Bank’s dealings with private entities (see The World Bank Policy on Access to Information (July 2013), Art.III s.21); and according to Art. C (‘Exceptions’) s.2(a)(i) of this policy, ‘IFC does not disclose...legal documentation...pertaining to IFC’s investments’; see IFC Access to Information Policy (January 2012).
3.3.1. Subjects and their contractual links

It was mentioned in the beginning of this chapter that the Articles contain several broad rules about how the Bank can use its resources. These also cover the subjects that can benefit from the Bank’s funding. In case of IBRD and IDA the key provision on this matter is liberal, stating that ‘the Bank may guarantee, participate in, or make loans to any member or any political subdivision thereof, and any business, industrial and agricultural enterprise in the territories of a member’\(^{215}\). On the whole, especially if we include IFC, but also MIGA mechanisms into the picture, the Bank has pretty much unlimited flexibility to initiate, participate in, and come up with funding schemes\(^{216}\). Hence, although the analysis in this section does not tackle operations conducted exclusively by IFC or MIGA\(^{217}\), it should be borne in mind that the Bank often tends to engage more than one of its institutions to fund different components of the same project. I will now consider the basic structure of the agreements that enable these funding arrangements in legal terms.

Typically, the financing agreement of the Bank will have at least one *funder* and at least one *recipient*\(^{218}\). In many instances there is also an *intermediary* that is either in charge of coordinating the funding, or the implementation of the project (or its part). Further on, both the funder and the recipient can either be directly involved in the operation (i.e. providing the funds, and in charge of their spending); or indirectly contributing to the project, i.e. by providing financial security. All of these subjects can be multiple, i.e. there can be more than one funder, implementing agency or recipient in the same development project.

The table below gives a list of potential type of subjects that can be the parties to the World Bank agreements. It is meant to serve as an illustration of the variety of actors that could have an active role in these interventions, and does not attempt to give an exhaustive list of all relevant subjects. It also gives a rough typology of agreements that are signed in each case (see Table 3.2.).

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\(^{215}\) See Art. III s.4 and Art. V s.1 in IBRD Articles of Agreement; also Art. V s.2(c) and s.5 in IDA Articles of Agreement.

\(^{216}\) See Art. III s.2 in IFC Articles of Agreement: ‘The Corporation may make investments of its funds in such form or forms as it may deem appropriate in the circumstances’; also Art. III in MIGA Convention.

\(^{217}\) It would not be possible to provide any in-depth assessment of these agreements because they are usually not disclosed to the public.

\(^{218}\) Traditionally in the literature on development assistance (also in the Bank’s policies) the two parties are called *lender* and *borrower*, but these terms appear to be misleading and too narrow. Only a part of the Bank’s financial transactions could be considered to be lending operations; the catalogue of financial links is much wider and also include provision of guarantees, grants, direct investment, etc.
Table 3.2. Contractual links between the subjects of development financing

<table>
<thead>
<tr>
<th>Funders</th>
<th>Recipients</th>
<th>Type of agreement between the funders and recipients</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Primary (direct) responsibility</strong></td>
<td>IBRD or IDA; IFC; Other IFIs (e.g., AfDB); National development agencies (e.g., DfID) – directly, or via special trust funds; Private investors; Local or national governments (supplementary funding).</td>
<td>Member state (individual or several in case of cross-border developments); State agencies (e.g., national utility provider); Joint venture companies (e.g., company charged with exploitation of oil and gas); Regional and local authorities; National project fund (under joint governance by several recipients); Private companies</td>
</tr>
<tr>
<td><strong>Intermediaries</strong></td>
<td>IBRD or IDA (if primary funding is coming from other sources); Financial intermediaries that channel the funding from other entities (e.g., commercial banks)</td>
<td>Implementing agencies (normally state agencies, or joint venture companies that are partially owned by the state)</td>
</tr>
<tr>
<td><strong>Providing security</strong></td>
<td>IBRD or IDA (if primary funder is a commercial entity); MIGA (if private funder decides to ensure its political risk); Commercial banks; Other agencies providing political risk insurance</td>
<td>Member state that provides guarantee for projects implemented by other entities in its territory</td>
</tr>
</tbody>
</table>

Notwithstanding these complex links created within individual development transactions, some form of relationship is always established between the Bank, and the member state. If the primary recipient of funding is not the member state – then this state will have to provide a guarantee to the project. If the lender is not the Bank itself – then the Bank will either act as an intermediary that coordinates the funding, or as the entity that provides security to ensure the funding of others (i.e. ensuring the creditworthiness of the state, for the benefits of external funder). In legal terms project agreements only become effective once the guarantee

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219 The Department for International Development, which is a governmental agency in the UK.

220 Note that project agreement can also be concluded between the Bank and other donors and/or investors, in which case the agreement would be between an intermediary and primary funder, and would include no recipient.
agreement between the state and the Bank has been signed and duly authorised. In other words, at least in the funding schemes where IBRD or IDA is involved, the basic link between the two is always preserved; even though this link might not be direct and is instead dispersed through a number of contractual instruments.

In most instances the agreements are signed between the Bank, and one other entity involved in the transaction. The Bank does not propagate signing joint venture agreements that involve many contractors, and it is very unusual to find agreements that contain more than three parties. In other words, the Bank always acts as an intermediary to whom all the parties owe some obligation. This is not to argue that the Bank is primarily responsible for all the activities of its projects; however, in legal terms the Bank tends to be the linking entity that holds all other contractual links together.

The parties to development interactions must always conclude at least one agreement; however, such simplicity is not common. In most cases the same project is governed by a ‘web’ of agreements that regulate different components of operations. By and large, the less direct is the link between the Bank and the member state (i.e. the more entities are involved in funding, implementation and securization of the project), the more agreements will have to be signed between different entities that are taking part in the project.

There are also those interventions that are being executed through a series of consecutive projects, rather than a single and well defined bundle of activities. Usually the most complex large-scale interventions (such as those privatising a whole sector of the economy) are usually divided into sub-projects that follow one another. In legal terms this will be expressed through a number of interrelated yet separate bundles of contractual obligations. Nonetheless, from the perspective of affected people all these various (artificially crafted) projects would manifest themselves as one and the same intervention with specific real-life effects.

Because the Bank is a party to all these agreements, it tends to provide an institutional template to most of the instruments signed in this context. The internal guidelines on this

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221 Note the difference between two terms that are frequently used in development financing: ‘project’ and ‘intervention’. Project is normally a conceptual term used to describe a set of activities, directed towards achieving certain goals. A project is always artificially crafted, i.e. its scope is decided by the authorities in charge of the transaction. ‘Intervention’ on the other hand is a set of real-life operations that are taking place in physical and concrete terms. They can be put in place via several projects, or be a part of a single large-scale project that has several components.
template of contracting are set in Bank’s operational policies\textsuperscript{222} also in \textit{General Conditions for Loans}\textsuperscript{223}. The latter are used as standard clauses of Bank’s contracts (annexed to the agreement), which can nonetheless be changed by the parties during project negotiations\textsuperscript{224}. Overall, the Bank’s contractual instruments are standardised in terms of their layout and some core provisions; however, the scope and detail of the agreements, also the substantive content thereof, inevitably varies from project to project.

\begin{center}
3.3.2. \textit{Substantive content, and the link with the project plans and documents}
\end{center}

Substantive obligations set in development financing agreements are promising instruments in terms of setting project-level accountability relationship in development financing. They are more concrete than the general standards, and they are decidedly binding on all the contracting parties. They also give space for the power-holders to deliberate on the most contentious issues of each intervention, and to agree on the most adequate solutions. Nonetheless, the current design of development financing agreements is such that the substantive standards of accountability are only partially included in the text of the agreements themselves. The present section will explain why the current design of financing agreements tends to compromise their role as standards of accountability within the project law.

In practice contractual accountability standards are set for the first time in the so-called \textit{project documents} that are put together during the project deliberation. These project documents (Project Information Document (PID)\textsuperscript{225} and Project Appraisal Document (PAD)\textsuperscript{226} (alternatively - Program Document (PD)\textsuperscript{227}) also Environmental Impact Assessment (EIA) and others\textsuperscript{228}) are put together after the ‘screening’ of the circumstances relevant to each individual project. They suggest the ways of dividing potential responsibilities between the

\textsuperscript{222} OP 7.00 ‘Lending Operations: Choice of Borrower and Contractual Agreements’; or OP 7.12 ‘Security Arrangements’.
\textsuperscript{223} See IBRD General Conditions for Loans (March 2012); also IDA General Conditions for Credits and Grants (July 2010).
\textsuperscript{224} See s.1.01 of IBRD General Conditions for Loans; also s.1.01 of IDA General Conditions for Credits and Grants.
\textsuperscript{225} Mainly used in Bank’s Investment Project Financing, see BP 10.00 ‘IPF’ para 8.
\textsuperscript{226} \textit{Ibid}. BP 10.00 ‘IPF’ paras.24-25.
\textsuperscript{227} This document is used instead of PID and PAD in Bank’s Development Policy Financing; see OP 8.60 ‘DPF’ para 29.
\textsuperscript{228} The content and deliberation of this, and related assessment reports are regulated by the safeguard policies, i.e. 4.01 ‘Environmental Assessment’ (Annex B); 4.10 ‘Indigenous Peoples’ (Annex A); 4.11 ‘Involuntary Resettlement’ (Annex A).
parties and of mitigating legal, social, economic and environmental risks. These documents are the snapshots of policy-level project-specific arrangements between the parties, during different stages of project negotiations. They result from the project deliberation procedures, and they represent the intention of the parties to act in a certain way; but not yet an explicit commitment on their behalf.

All these analytical documents then provide the policy background to the set of plans that guide each project (such as environmental management plan (EMP), indigenous people’s plan (IPP), and resettlement plan (RP)). These plans are the concrete policy instruments that give a relatively detailed outline of measures to be taken within each project. They are generally elaborated by the recipient and considered to be guiding the activities of the recipient; but changing them require some form of approval from the Bank. These plans, sometimes individually and sometimes under a common heading (such as ‘Operational Manual’ or ‘Environmental and Social Safeguards’) are generally referenced in the text of the agreement. They are the instruments that ‘glue’ the project agreements with their analytical (policy) background (Scheme 3.3.).

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229 See the discussion in s.4.2.1. for further explanation about the role of these documents in deliberation process.
230 Regulated in the same order by 4.01 ‘Environmental Assessment’ (Annex C); 4.10 ‘Indigenous Peoples’ (Annex B); 4.11 Involuntary Resettlement (Annex A).
231 BP 8.60 ‘DPF’ para.25; OP 10.00 ‘IPF’ para.22.
The main text of the agreement on the other hand is usually but a collection of formal clauses\(^\text{232}\). In most cases the substantive provisions that outline the specific commitments of the parties are set in the schedules to the agreement. These substantive provisions then establish recipient’s obligation to follow and implement the aforementioned plans (EMP, RP, IPP, etc.). What this means in legal terms is that agreements themselves formalize only a small part of obligations on behalf of the parties, and rarely tackle the issues that are directly relevant to the affected people (such as means and timeline of resettlement, compensation standards, requirement for local consent and the like)\(^\text{233}\).

\(^{232}\) These clauses usually outline the project that is being executed and over what period of time; the amount of funding allocated; the remedies available to the parties in case of a breach of obligations, etc. Generally project agreements that govern just a part of the project tend to be shorter, only referring to the main agreement (normally between the state and the Bank). Also, guarantee agreements tend to be very short – merely providing the references to the relevant project agreements.

\(^{233}\) More explicit mention of affected communities is commonplace within those projects where they are included in core project objectives, i.e. where they provide the justification for the project. For instance in Paraguay ‘Sustainable Agriculture and Rural Development project’ the objective was ‘to improve the socioeconomic condition of Small-Scale Farmers and Indigenous Communities in Project Area’; hence the agreement outlines principles of cooperation with the small scale farmers and their local communities (see Schedule 1 of Loan Agreement between Paraguay and IBRD (Additional Financing for the Sustainable Agriculture and Rural Development Project) (2013)); [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/LCR/2013/12/20/090224b0821628ed/10/Rendered/PDF/OfficialDocumentOPY00ClosingPackage0.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/LCR/2013/12/20/090224b0821628ed/10/Rendered/PDF/OfficialDocumentOPY00ClosingPackage0.pdf). Similarly, in some projects aimed at
This explicit reference to planning documents in the agreement is significant in legal terms, because it furnishes policy-level accountability standards (that are set in project plans) with a formal status that they would otherwise be lacking. It also helps us to get a better grip of what kind of accountability standards are created by the project agreements.

Probably the most notable flaw of accountability standards being set through project plans is that they are phrased in a policy language, meaning that they create no entitlements to the affected people in a way that normative instruments do. They are technical and analytical instruments that give only a general understanding of how affected people would be treated. The very idea of them being expressed in a form of a ‘plan’ suggests that deviations and changes are possible, and that affected people can neither demand nor be certain of being treated in that particular way.

The issue explained above does not criticise the overall flexibility of project plans, but whether or not these plans are the right instruments to set the standards of behaviour towards affected people. If by definition these planning documents must be flexible and open-ended enough to accommodate the change of circumstances – then surely there should be a different way of ‘registering’ the principled commitment on behalf of the parties towards those affected by their operations. Although both, the agreement and the plans discussed in this section can be changed by subsequent agreement of the parties, the extra level of formality required for expressing and amending the agreement would provide a better entrenched, and therefore more predictable standard of behaviour that affected people can refer to.

Overall, it appears that the core issue of substantive standards in the project-specific rules is created by a form in which they are currently being expressed. The substance and form of project agreements are therefore closely interlinked: phrasing obligations in policy and/or analytical language does provide more flexibility to the power-holders to act within their financial means and possibilities. Yet, it comes at odds with the legal certainty of third interested parties, and consequently – the level of protection accorded to the affected individuals and communities. Arguably, a better balance could be struck between the two, and improving infrastructure, some groups are also the beneficiaries of the project, in which case they are explicitly mentioned by the parties; see for instance Lagos Metropolitan Development and Governance project where the objective of the project was ‘to increase the access to basic services’, (see Project Agreement between IDA and Lagos state(Lagos Metropolitan Development and Governance Project) (2006)); http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/AFR/2010/05/04/8487F9D3ABDB634F852571FE00582627/2_0/Rendered/PDF/PA01Conformed1.pdf). These are the positive yet exceptional cases to the general trend of how standards of behaviour towards affected people are normally being formalized.
more debate could be designated towards finding the optimal level of formality that would be capable of doing both, enabling and at the same time constraining these transactions.

Another issue with project-specific accountability standards being phrased in a policy language is that they generally require specialized mechanisms that are capable to assess and scrutinise their content and application. Put otherwise, institutions of general competence (e.g. domestic courts) are likely to be reluctant to distil concrete obligations from that sort of analytical framework, which is an issue of justiciability that will be discussed in the chapter on review procedure234. Generally plans are neither designed, nor likely, to be treated as sources of normativity. They are designed to be practical and authoritative guides, and are only meant to ‘fill in’ the gaps that are created within the more principled agreement of the parties. It is therefore somewhat troublesome that the normative standards of behaviour within the agreements themselves are so uncommon.

3.3.3. Contractual form and governing law

Differently than in case of operational policies, contractual instruments are unquestionably the sources of law. They create mutual obligations between the parties to the transaction235. Thus, the question of their legal status should be addressed from the different perspective. In practice contractual instruments differ depending on the type of subjects that enter into the agreement, as well as applicable law that governs their entry into force, implementation and execution (which is usually decided by the parties themselves). Together these two elements of legal status determine the mechanisms of accountability, i.e. they either enable or disable the possibility of affected people to invoke project-level accountability standards. Most of the issues related to accountability mechanisms will be considered in the upcoming chapters. The task of this section is to prepare grounds for such upcoming analysis, and to do so by outlining the forms of contractual instruments concluded by the Bank, as well as the issues that arise from institution’s reluctance to adopt clear applicable law provisions.

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234 See s.5.2.1. for the discussion on justiciability, which depends on where and how the standard of behaviour is set (arguing that the agreements can be invoked to assess legality of relevant decision-making, whereas the project documents cannot).

235 The only issue that remains uncertain is to what extent project plans described in the previous section can be considered to be law (see ibid.). This has been identified as one of the unresolved issues in the current debate about safeguards reform, see The World Bank, ‘Indicative List of issues for a Phase Three Consultations’, available at http://consultations.worldbank.org/consultation/review-and-update-world-bank-safeguard-policies.
From the perspective of accountability relationship, the agreement between the Bank and the borrower is the main contractual instruments within the project law. It usually sets the substantive standards of accountability described in the previous section. The decisive factor in determining the precise legal status of this agreement is whether the recipient of funds is (a) a state, or (b) a non-state entity. The key difference between the two is that the latter is incorporated under the rules of domestic law, even though at times it might be under a full ownership by the state (e.g. national oil company). The states on the other hand are legal persons under public international law that make authoritative decisions in their sovereign capacity. Accordingly, in case of the non-state entities the decision to enter into the contract with the Bank would predominantly be governed by their founding statutes, whereas in case of the borrowing states it would be governed by the domestic constitutional law. Below is a brief description of the two main contractual forms that follow from such distinction between the state and non-state borrowers.

a. Agreement between the Bank and the borrowing state is concluded between the two subjects of public international law, and therefore has a status of a treaty. Such status had been confirmed in the early years of the Bank’s functioning, when United Nations insisted on the Bank’s agreements with its member states being registered with the UN treaty registry.

The analysis in the upcoming chapters will illustrate that such treaty status bears both positive and negative effects on the accountability of affected people. The positive features are mostly brought out during the validation procedure, where agreement being regarded as a treaty usually enables the political and judicial mechanisms of contestation. However, the treaty status becomes more problematic once the agreement has been signed and enters into force. At this stage it acquires the specific status as a source of public international law (that often prevails over the domestic law),

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236 The agreement with an implementing agency can also contain some key accountability standards, depending on the role that such agency has in the project (i.e. in some cases it is but an executive body; whereas sometimes it also acts as the primary decision-maker). Either way, this agreement would always have to be linked, and conditioned upon the validity of the contract between the Bank and the member state.

237 Arguably such decision to enter into the agreement is likely to be led by narrower institutional objectives than in those cases where deliberations are undertaken by the official governmental authorities.

238 Rigo Sureda, The law applicable to the activities of international development banks at 113, para 233.

239 See the discussion in s.4.3.
and which consequently can make it difficult to challenge such contractual arrangement in front of the domestic courts\textsuperscript{240}.

\textbf{b. Agreement between the Bank and the non-state entities.} Legal scholars generally agree that the Bank’s agreements with the non-sovereign borrowers and implementing agencies have a legal status of \textit{a contract governed under international law}\textsuperscript{241}. However, there exists no official position by the Bank that either asserts or denies this view, which would also clarify what exactly such legal status entails in practical terms\textsuperscript{242}. Officially the legal status of these agreements remains open-ended, and its precise meaning in practice would depend on the individual court or tribunal that had to address this general issue in specific circumstances\textsuperscript{243}.

Most of the legal uncertainty with this form of agreements appears to be caused by the governing law provision that is employed by the Bank. The relevant clause is set out in its General Conditions for Loans and is expressed through the negative assertion that ultimately avoids choosing an applicable legal system:

‘The rights and obligations of the Bank and the Loan Parties under the Legal Agreements shall be valid and enforceable in accordance with their terms \textit{notwithstanding the law of any state or political subdivision thereof to the contrary}.’ \textsuperscript{244}

This provision had been included into the standard clauses of the Bank’s agreements in 1947, and it ‘remains virtually unchanged since’\textsuperscript{245}. Initially such negative formulation was meant to protect the Bank from its sovereign borrowers invoking their domestic law

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{240} See the discussion in s.5.2.1.
  \item \textsuperscript{241} Broches \textit{‘International Legal Aspects’}; Delaume, \textit{Legal Aspects International Lending}.
  \item \textsuperscript{242} Maniruzzaman makes a distinction between Strict and Moderate Internationalist School. The former would argue that having international law as governing law would elevate the agreements to treaty status; however this view does not seem to be accepted by either the legal practitioners or the majority of academics; see Maniruzzaman, \textit{‘International Development Law as applicable law to economic development agreements: A prognostic view’} at 2-19.
  \item \textsuperscript{243} See Head, \textit{‘Evolution of the Governing Law’} at 223-30; where he favourably evaluates the approach taken by EBRD (European Bank for Reconstruction and Development), because its governing law provision has been drafted with more detail, giving the list of relevant legal sources (which also includes internal regulations of EBRD itself).
  \item \textsuperscript{244} See s.8.01 of IBRD General Conditions for Loans; also analogous provisions at s.7.01 of IDA General Conditions for Credits and Grants; and s.5.01 of Standard Conditions for Grants Made by the World Bank Out of Various Funds (February 2012) \{emphasis added\}. According to Head, this provision \textit{‘leaves the World Bank agreement with a non-member in a legal no-man’s-land’}; see Head, \textit{‘Evolution of the Governing Law’} at 223.
  \item \textsuperscript{245} Rigo Sureda, \textit{The law applicable to the activities of international development banks} at 113, para 233.
\end{itemize}
\end{footnotesize}
to justify non-compliance with contractual obligations. It also permitted the institution to avoid explicit commitment to a particular legal system, including that of international law. Rigo Sureda convincingly argues in his commentary that ‘[multilateral development banks] are pragmatic institutions that avoid taking doctrinal positions’, which seems to be the most plausible explanation as to why this clause has never been updated and made clearer in the decades of Bank’s functioning.

The reason why such conceptual and legal ambiguity is unfavourable from the perspective of affected people is because generally applicable law clauses position the contract in a wider legal realm, and thus limit the freedom of contract exercised by the parties. More specifically, by placing the agreement in the wider legal system the governing law provision enables third party rights, and specifies public interest considerations that can be invoked in order to challenge the validity of such contract. Without the doctrinal clarity about applicable law all such issues as limits of contractual freedom and/or forum for contestation remain unresolved. This in turn enhances the legal uncertainty that affected people are likely to encounter in development interventions. Accordingly, the ‘pragmatism’ of the IFIs that Rigo Sureda was talking about actually comes at odds with accessibility of the accountability standards, and consequently makes it more difficult to keep the power-holders to account.

This last observation brings me to the end of this overview of contractual instruments. Overall, the funding agreements have the potential to provide the tangible and detailed standards of accountability in this context. That is so because differently than in case of all other rules analysed in this chapter they are project-specific, i.e. they set out the concrete measures to be used in development interventions, and their foreseeable real-life effects. However, the analysis of substantive content as well as legal status of these instruments points towards numerous challenges that undermine the role of these standards as landmarks of accountability.

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246 Rigo Sureda explains that this was Bank’s response to the Serbian Loans judgement by Permanent Court of International Justice, which ruled that all debt-related issues should be governed by some municipal law; the current ‘enforceability clause’ of the Bank was therefore introduced by the Bank to derogate from such position in Serbian Loans; see ibid. at 114-115; paras.235-236.
247 Ibid. at 122, para.254.
248 Ibid.
249 See generally Unfair Contract Terms Act 1977 (UK) for a the type of regulations that that limit the freedom of parties within national legal systems. See also the discussion in s.7.1., which underlines the difficulties of identifying such mandatory limits of contractual freedom under the (internationalized) project law.
3.4. General standards of accountability

3.4.1. Relevant standards from domestic and international law

It was noted a few times that the Bank is not the sole entity that furnishes the rules within the project law. The standards of accountability also stem from the surrounding legal systems, i.e. the domestic law of the borrowing state, and the general international law. These general standards of behaviour, which are meant to guide and constrain the decision-making in development financing, can be either binding upon the power-holders, or just indicative of good practice and followed if and when possible. The focus of present analysis is on the binding standards, because at least in theory power-holders in development projects are obliged to behave in accordance with these rules (or at least they would require serious justifications to act to the contrary).

In this section I will outline the main categories of general rules that are relevant to the context of development financing, whilst in the next one I will consider an extent to which they actually apply in this area of international cooperation. These categories of rules do not cover the full breadth of domestic and international law that can potentially become a part of project law. For instance, I leave out of this analysis some pertinent areas of private law (e.g. property rights), rules of taxation, or legal incentives that foster economic cooperation (investment protection or free trade agreements) that might also get activated by the interventions.

Such selectivity of rules is based on the presumption about the most pertinent general standards of accountability from the perspective of affected individuals and communities. This is to say that the full breadth of project law (which covers the rules on property rights, taxation, etc.) deals with the entire range of interests surrounding the transaction (i.e. interests of investors, trading partners, donor countries and the like). Nonetheless, only those rules that are considered in this section would play a decisive role in balancing the accountability relationship between the power-holders and affected individuals and communities.

250 Probably the most relevant non-binding instrument at the international level is ‘Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the context of national food security’ by Food and Agricultural Organisation of the United Nations (2012). There are many other national and international guidelines and standards that are adjusted to specific issues – human rights, housing, construction, agriculture, etc.
a. **Human rights, also other individual and collective rights protected by constitutional and international instruments**. The basic HR standards pertaining to development financing at the international level are expressed through states’ obligations to civil and political rights. For instance, prohibition of torture and inhuman treatment, right to life, right to property, right to a fair trial, or freedoms of expression, association and assembly. Generally social and political rights are protecting the individuals. Nonetheless, to a certain degree they can also be invoked by communities to protect collective goods. In most cases the collective rights are accorded to indigenous peoples, but there have been some development in courts’ jurisprudence to recognise similar entitlements in the context of other traditional communities (which is somewhat easier to proof than indigenous status). Beyond the protection of such readily identifiable local units, HR regime generally does not extend to include the protection of ethnic and national minorities, with only one exception of the Framework Convention at the European level.

In most borrowing states HR standards are also set in the fundamental rights’ provisions in their constitutions. Here the aforementioned social and political rights are often further enhanced through recognition of social and economic rights. For instance, in many

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251 There are eight HR treaties under the UN system, and three main regional HR conventions: American Convention on Human Rights (1969) (ACHR); African Charter on Human and Peoples’ Rights (1981); European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

252 The collective right that is recognised by international HR law is the right to self-determination (see Art.1 of International Covenant on Civil and Political Rights (1966) (ICCPR)), but in practice Human Rights Committee is reluctant to apply this right exclusively, and tends to invoke Art.27 of ICCPR (Right to culture, religion and language) instead (see Ominayak v Canada (1990) and Poma Poma v Peru (2009)). At the regional level Inter-American Court of Human rights has probably the most cases extending individual rights onto indigenous communities, mostly with regards to the right to property (Art.21 of ACHPR, see for instance Mayagna (Sumo) Awas Tingni Community v Nicaragua (2001); Dann v United States (December 2002)); right to life, understood as a right to not be deprived of traditional means of livelihood (Art.4 of ACHPR, see for instance Yokye Axa Indigenous Community v Paraguay (2005); Sawhoyamaxa Indigenous Community v Paraguay (2006)); right to judicial process, understood as a right to access clear and just administrative procedures (Art.7 of ACHPR; see for instance Yokye Axa Indigenous Community v Paraguay).

253 See for instance Saramaka People v Suriname (2007) where community was considered to be ‘traditional’ rather than indigenous, but was nonetheless accorded the same collective rights. See Kingsbury B., ‘Indigenous Peoples’, in Mac Planck Encyclopedia of Public International Law, on the importance of the UN Declaration on the Rights to Indigenous People (2007), which serves as an interpretative tool for the courts, and that way is contributing to the evolution of international HR law towards more collective rights.

254 See The Framework Convention for the Protection of National Minorities (1995). However, this convention is only guiding the policy-making by the member states and cannot be invoked directly by the individuals or communities.

countries there exist the rights to education, social security, housing, also to healthy
environment. The full catalogue of protected rights depends on the borrowing state, i.e.
on the relevant provisions in the constitution, and the international instruments ratified
by the government.

b. **Constitutional standards that regulate division of power within the**
borrowing state are also undoubtedly relevant in this context. Most areas of
constitutional law (operational principles of democracy, separation of powers, access to
natural resources and land, etc.) are ‘switched on’ when projects of development
financing are initiated, approved and implemented. Particularly the relevant rules tend to
be those that distribute the decision-making power between the legislature and the
executive (especially given that development projects are often dominated by the
latter). The provisions that establish the ‘vertical’ distribution of power, i.e. the
comparative ‘weight’ of individual, local and national interests, are also crucial. Every
single project is framed and authorised within these constitutional arrangements, which
are unique to each borrowing state.

c. **Environmental and social standards**, set at both national and international
level, is probably the most controversial area of regulation in development financing. At
the international level social standards are weak, and are mostly found in the area of
labour law. As in case of HR – mostly the relevant provisions in the context of

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256 African Charter on Human and Peoples’ Rights is the only international HR convention that has this
right explicitly mentioned as a separate human right; probably the most relevant case concerning this
province is *The Social and Economic Rights Action Center (CERAC) and the Center for Economic, and*
*Social Rights (CESR) v Nigeria (Ogoniland case)* (2001) by the African Commission on Human and
Peoples’ Rights.

257 See R.Shwaminathan, ‘Regulating Development: Structural Adjustment and the Case of National
Enforcement of Economic and Social Rights’, *37 Columbia Journals of Transnational Law* (1998) 161,
where he argues that the effective implementation of these rights depends on the way that they are
defined and protected through concrete entitlements in domestic legislation. This explains why
ultimately the catalogue of protected rights can tell us little about the scope of protection HR protection
that is actually accorded under the national legislation.

development financing interact with domestic decision-making and how it triggers various
constitutional provisions.

259 An argument by van Putten, *Policing the Banks*, at 24-26; also supported by ‘Parliamentary oversight
of International Loan Agreements and Related Processes. A Global Survey’, by The Inter-Parliamentary
Union (IPU) and the World Bank (2013) (hereinafter – IPU Global Survey) at 8; available at

260 See the discussion in s.4.3. and s.4.4. for more detailed description about how domestic political and
administrative authorities usually divide responsibilities for the authorisation and execution of each
intervention.

261 See the eight ‘Fundamental Conventions’ by International Labour Organisation.
Development interventions are about the treatment of indigenous peoples and traditional minorities. Probably the most comprehensive treatment of social issues at the international level is outlined in the instruments on previously mentioned social, cultural and economic rights. However, these instruments put obligations on the states to take progressive steps towards the implementation of these rights, but do not require for them to commit to a substantive standard of treatment. Otherwise, the approach to social issues fluctuates greatly from country to country, depending on their political economy.

In contrast to the above, international conventions addressing environmental concerns are more widespread and uniformly accepted. Many of them have nearly universal membership, although many contentious issues remain unresolved. Also, it is generally accepted that there exists international customs and general principles of environmental protection, such as the requirement of environmental impact assessment or principle of sustainable development. All these sources create a relatively mature and stringent international regulatory regime of environmental protection. Nonetheless, this regime predominantly creates obligations between states, and only in limited instances is directly accessible to the affected people.

262 See in particular ILO Conventions No.107 (1957) and No.169 (1989); and Art.8(j) of Convention on Biological Diversity (1992) (CBD) (requiring that that States ‘respect, preserve, and maintain indigenous knowledge and encourage the equitable sharing of the benefits arising from the use of such knowledge’).

263 See for instance related criticism in Shwaminathan, ‘Regulating Development’.

264 In the context of development financing the most relevant global environmental agreements are CBD; United Nations Framework Convention on Climate Change (1992); also United Nations Convention to Combat Desertification (1996); World Heritage Convention (1972), amongst others. Most regional agreements would also be relevant, see for instance African Convention on the Conservation of Nature and Natural Resources (2003); ASEAN Agreement on the Conservation of Nature and Natural Resources (1985), amongst others.

265 UN Framework Convention on Climate Change Kyoto protocol (1998) being probably the most controversial international instrument that still lacks support from many powerful states. Accordingly, the Bank’s approach to climate change remains one of the contentious issues in the debate about its operational policies (see the Second Consultation Draft).

266 See Pulp Mills on the River Uruguay (Argentina v Uruguay) (April 2010), which is currently the only case by the ICJ that addressed the issues related to the project funded by the Bank (IFC).

267 See Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (September 1997).

By and large, same as in case of individual and collective rights, social and environmental standards are best defined at the national level. This is also where they tend to have direct effect and incentivise concrete governance practices. Domestic laws on forestry, conservation, land planning and management, social services, social and environmental protection, and many others, depending on the project, all potentially pertain to development interventions.\(^{269}\)

\[ \text{d. The standards of administrative law, mainly the procedural principles such as transparency, due process, review and consultation, are equally relevant; especially if we accept that most development interventions are authorised at the administrative level.}^{270}\] Currently such mandatory and undisputed procedural rules of administrative law seem to only exist at the national level – notwithstanding the fact that GAL scholars mentioned in the introductory chapter argue that they should also apply to decision-making of international institutions.\(^ {271}\) In reality international rules of administrative law are still largely in the flux and remain uncertain, and the delegated authorities only tend to be subjected to them at the national level of the borrowing state.

In sum, probably of the most concrete and explicit general standards of accountability applicable in development interventions are set at the domestic level. International law too, contains some relevant rules, especially in the area of civil and political rights and environmental protection. Nonetheless, in the next section, and also in the rest of this thesis\(^ {272}\) I will argue that general standards of accountability cannot be trusted to ensure the adequate protection to the affected individuals and communities. Partially that is the case because such standards lack the necessary detail, which can only be introduced at the level of specialized and/or project-specific rules. Furthermore, a lot of the issues are caused by the process through which these standards are applied and implemented in practice, and which will be explored in the following.

\(^{269}\) See L.Cotula et al., ‘Legal Frameworks at the Interface between Industrial Agriculture and Ape Conservation’, in H.Rainer et al. (eds.) State of the Apes 2015: Industrial Agriculture and Ape Conservation (2015) for a succinct overview of various laws that get triggered by development projects (with a focus on the agriculture and natural resource management).

\(^{270}\) See Van Putten, Policing the Banks, at 24-26; IPU Global Survey at 8. Also see the discussion in s.5.3.1 and 5.4.1.

\(^{271}\) Note that GAL’s argument is about the emergence of global administrative law, i.e. these scholars claim that certain administrative law principles should be binding; not that they had already been established in the international practice. There seem to be no evidence that their position has changed since, see S.Cassesse, ‘Global administrative law: The state of art’, 13(2) International Journal of Constitutional Law (2015) 465.

\(^{272}\) See in particular s.5.3.1, s.6.3.2 and s.7.1.
3.4.2. The extent to which general standards apply in development financing

On the whole, there are no objective reasons, at least not in legal terms, which could disable the functioning of general legal systems in the context of development financing. Arguably, there is nothing inherent in the essential character of development assistance (e.g. as in case of the state of war) that would exclude it from the regulatory sphere of domestic and international law. In that respect the general answer to the title question of this section would be in the affirmative, i.e. the general standards do, and should apply to these transactions.

Yet, as it was explained in the introductory chapter to this thesis, such general theoretical position seems to be challenged by many practical examples, which show that not all development projects adhere to the standards of environmentally and socially sound behaviour required by domestic and international law. Some of this is caused by the issues of non-compliance or lack of enforcement, which will be addressed in a greater detail in the upcoming chapters. In this section I suggest that at least some of the issues result from the manner in which general standards are expressed, and also they way in which they are interpreted and applied by the competent authorities.

More specifically I would like to argue that such gap between the black letter law and development practice can at least partially be explained if we understand the application of general standards in development financing as a process in which such general rules apply to a certain degree, and not in an ‘on’ or ‘off’ manner. More specifically, these rules are being applied onto the specific circumstances – and it is precisely this move from general to specific that causes most problems in practice. That is so because such transition seems to be under strong influence of economic and political considerations, which in turn can affect the very content and functioning of these standards. Domestic and international standards face similar, yet slightly different challenges in that regard.

a. The issues with an application of domestic law. There are at least three factors that hinder the application of domestic accountability standards in development financing. First of all, the very nature of individual rights, constitutional and administrative rules, also the principles of social and environmental protection, is such that it is conceptually

273 See chapter 5.
difficult to pin down the exact content of conduct required from the power-holders. Such factors as the quality of legal provisions setting these standards, their status in a given legal systems and the methods of implementation become the variables that determine the extent to which these standards are being applied or not in real-life development transactions.

The vagueness of domestic accountability standards can be conquered by specifying their precise scope and meaning in the national laws. This can be done by regulating them at such level of legal and political hierarchy, and also in such a principled manner, that the competent authorities would have relatively little leeway to take contradicting decisions. For instance, the standards of environmental impact assessment in some countries are regulated in the primary laws of environmental protection, and this is done with detail that covers the multiple stages, responsibilities and outcomes of the procedure. In other countries related rules are vague and/or only scarcely regulated through secondary legislation. In the former case the standards provide stronger protection because they are authoritative and concrete, and because they better frame the behaviour of the domestic power-holders. On the other hand, some domestic standards, for instance the fundamental rights’ provisions in states’ constitutions, are deliberately created to be broad and open-ended, in which case their application would depend almost exclusively on the institutions of implementation.

Secondly, because general standards are so broad, their true meaning and real-life effectiveness in most cases is determined by the entities that apply them in practice. These bodies, namely the governmental, statutory or corporate bodies that enter into the agreement with the Bank, normally have a wide discretion to interpret these standards in a way that seems best adjusted to the specific circumstances of the project. The more open-ended is a specific standard and the less clearly its content is defined by the law, the more discretion these institutions have in interpreting it.

Thirdly, the ‘best adjusted’ meaning of a particular standard in practice of development financing is usually the one that requires the least resources for implementation of such standard in practice. That is so because the underlying logic of a loan or a grant is largely

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274 See for instance Indonesian Environmental Protection and Management Law (2009).
based on the idea of scarcity and limitation of resources – and therefore the necessity to utilize them efficiently. Within this logic the borrower should only borrow what is absolutely necessary for the implementation of the project. In a similar vein – the donors and private investors of the project should only be expected to fund the activities that are absolutely necessary, and therefore the least costly.

Indeed, such is the systemic inclination of development financing – to only borrow and provide funding for essential costs of development; and to avoid the so-called ‘negative externalities’\(^{276}\). Unfortunately the fair treatment of affected people (such as for instance the high level of compensation, adequate means of resettlement, viable but more expensive project alternatives) tends to fall precisely under such category of expensive project externalities\(^ {277}\). This is also the main reason to presume that especially the more ‘costly’ standards would be interpreted by the responsible bodies as narrowly as possible in any given circumstances – in order to prevent the costs that can otherwise be avoided by donors and recipients alike.

This is not to say that all relevant decision-making in the area of development financing is guided by such a strict economic rationale. Instead, the argument above is meant to illustrate that in this particular area of international cooperation general standards are particularly vulnerable to the (external) economic considerations. These considerations can alter the meaning of the general standards, potentially to an extent that violates their core and protective nature\(^{278}\).

### b. The issues with an application of international law

In case of public international law, most of the key issues of application seem to be created by the law-making features and the institutional structure of international law itself. It was mentioned in the previous analysis on operational policies that international law is highly state-centric, which means that (i) most obligations of international law are addressed

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\(^{276}\) ‘Externality’ is a notion used by the economists and in the economic analysis to capture the external effects that are not intended by the parties to the transaction. This notion therefore provides and alternative (economic) language of addressing similar issues as this work is concerned with; see J.M. Buchanan and W.C. Stubblebine, ‘Externality’, 29(116) *Economica* (1962) 371.

\(^{277}\) Panel reports show that in preparing the contentious projects the analysis of alternatives normally involves ‘analysis of project externalities’, and their comparative weight with intended benefits of the intervention. See for instance Panel’s ‘Investigation report. South Africa: Eskom Investment Support Project’ (November 2011) at xv.

\(^{278}\) See discussion in s.7.3.1 where I draw the link between such issues of interpretation, and the need to create a possibility of independent review.
towards the states, and not towards all other actors that are active on the international plane; and that (ii) the content of these rules is normally limited to whatever the states can agree upon, and not what is necessarily the most balanced and acceptable standard of behaviour. In the practice of development financing these two qualities of international law result in several major issues that affect the content of relevant standards, also their application.

Firstly, the binding standards set by international law are not as comprehensive as those at the national level. This is notwithstanding the fact that there is an increasingly large and readily available pool of specialized knowledge at the global level that gives us a wealth of insights about what is actually good for the environment, also in terms of sustainable social development. It seems that at the international level countries simply lack consensus about what are the best norms and practices to guide development – which is also why ‘state consent’ remains such an important feature (and safeguard) of law-making at the international level. In the light of such diversity of views the content of binding international standards applicable in development financing is thin, i.e. they only set the ‘minimum common denominator’ of protection accorded to the individuals and communities.

Secondly, because international standards are normally addressed only towards the borrowing state, it remains unclear to what extent these binding rules are meant to guide the decision-making of other parties to these transactions, namely the Bank, other donors, also private investors. In a nutshell, many scholars have pursued the argument that because certain standards are widespread and accepted globally (in particular in the area of natural environment and human rights) – they should guide the decision-making of all actors, such as home states of international corporations, or international institutions like the World Bank. Yet, despite such scholarly attempts to bring this issue to the forefront

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279 This remains the prevalent view with regards human rights obligations (see for instance McInerney-Lankford, ‘International Financial Institutions and Human Rights’).


of law and development discourse, the mainstream position remains focused on the idea that only the states in whose territories development activities take place are bound by the general international law. That is why most of the relevant international law provisions are unlikely to be applied by the Bank, and even less so by the other funders in the transaction.

Thirdly, in specific cases the Bank applies international standards of accountability by its proper choice. Take for instance the aforementioned provision in the operational policies that demands the Bank to abstain from funding such operations that are at a risk of breaching international environmental agreements of the borrower. This sort of cross-referencing between the operational policies and international law requires the Bank to interpret the content of state’s international obligations, and it doing so, to engage with the international law standards. However, it was noted in the analysis in the beginning of this chapter that the World Bank’s mandate is to fund development projects for economic purposes. Thus, any considerations of socially oriented standards are limited by its ‘Political Activity Prohibited’ clause. Both of these elements combined mean that the Bank must distance itself from any contentious interpretation of general international standards, especially if those are likely to create additional financial costs to the transaction.

This in turn shows how much the standards set out in general international law rely on the institutional structures that are put in place for their application and implementation in practice. Also, in case of the World Bank, how susceptible its decisions must be to the economic considerations. It also shows that we should have realistic expectations about the role that the World Bank can have in defining and interpreting the general standards of accountability applicable in development interventions.

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283 This is probably best illustrated in Ruggie’s work on the link between global business activities and human rights; see Guiding Principles on Business and Human Rights. Implementing the UN ‘Protect, Respect and Remedy’ Framework’, UNHR Office of High Commissioner (2011).

284 See the discussion in s.3.1.

285 Art.IV s.10 in IBRD Articles of Agreement; Art.V s.6 in IDA Articles of Agreement; and Art.III s.9 in IFC Articles of Agreement.

286 This observation creates some scepticism about the arguments of human rights approach (see s.2.2.2), where the authors suggest that the Bank should formally express its commitment to international human rights’ obligations. It appears unlikely that (based on the current provisions in its treaties) the Bank could adhere to the progressive interpretation of these rights. Also, see the analysis in s.5.3.1 about the risk of not maintaining the principled enough distinction between legal and economic considerations in authoritative decision-making.
All in all, this overview of general standards of accountability has shown that there exists a range or relevant domestic and international rules that are favourable to the affected people. However, at the domestic level these standards are highly amenable to the (external) economic considerations; whereas at the international level the rules themselves are likely to be less favourable to non-state interests, and if interpreted by the Bank which itself, would inevitably be read with strong economic undertones. All this illustrates that general standards do apply to the decision-making about development projects, but only to a certain degree. This application is limited by the principle of resource efficiency, and due to a wide discretion of responsible authorities, which can tweak and tailor the content of these general provisions depending on the political and economic circumstances.

3.5. Assessing the current accountability standards

This lengthy overview of rules applicable to development financing made a range of comments about the current governing framework. Many of them will become relevant in one way or another in the upcoming chapters. At this point the objective is to pull together the core observations that were put forth in this chapter, and to bring them all back to the central question posed at the introductory passages, namely how the current standards of accountability can be evaluated from the perspective of affected people. It was suggested that the very first principle of strong accountability set out in this work can guide a constructive assessment of this matter. According to this principle the standards that govern development transactions should adhere to the three main criteria: they must be clear and predictable, fair and objective, and should be able to provide an adequate level of protection to the affected individuals and communities. The following overview will summarise the main findings of the present chapter based on these three criteria. The focus will be on the most pressing systemic and conceptual challenges that cannot be readily resolved simply by adjusting the elements of current rules and practices.

Before we move onto such an assessment, the table below sums up the categories of standards that were covered in this chapter – also the extent to which they apply in development financing (Table 3.4). This is meant to aid the reader to better follow the cross-category analysis that follows next.
Table 3.4. Standards of accountability that govern development interventions

<table>
<thead>
<tr>
<th>Category of rules</th>
<th>Type of standard</th>
<th>Scope of application</th>
</tr>
</thead>
<tbody>
<tr>
<td>Founding treaties of the Bank</td>
<td>General</td>
<td>All projects funded by the Bank</td>
</tr>
<tr>
<td>Operational Policies of the Bank</td>
<td>Specialized</td>
<td>All projects funded by IBRD and IDA</td>
</tr>
<tr>
<td>Financing agreements</td>
<td>Project-specific</td>
<td>Specific to individual project</td>
</tr>
<tr>
<td>International rules</td>
<td>General</td>
<td>All projects funded by the Bank, to an extent that the relevant obligations are binding on the borrowing state(^{287})</td>
</tr>
<tr>
<td>Domestic rules</td>
<td>General</td>
<td>All projects within the territory of the borrowing state(^{288})</td>
</tr>
</tbody>
</table>

\(287\) Although it is not certain whether the application of such general rule would remain uninterrupted if project agreement created a specialized rule that challenged or adjusted the general standard.

\(288\) Ibid.

\(a\). **Clarity and predictability.** This first criterion allows me to make an inquiry about whether current standards of accountability are clear enough to be invoked throughout the duration of the project. It also makes it possible to assess whether they furnish affected people with sufficient level of legal stability. Generally this criterion alludes to the systemic coherence of accountability standards – both within each group of applicable rules, and across different categories.

At the more positive end of such assessment, it seems commendable that operational policies are decidedly binding upon the management of the Bank, whilst regulating the most contentious issues of development projects. These internal regulations of the Bank are also being elaborated in a more and more systemic manner, and are moving away from the sporadic standard-setting practices that mark the beginning of their evolution. Especially with the creation of Inspection Panel to ensure their compliance and implementation, these policies had become an undisputed and relatively clear source of reference to the affected individuals and communities.

Nonetheless, the key shortcoming of operational policies that continues undermining their predictability stems from the possibility that these policies might change throughout the duration of the project, in which case it would be unclear which version of the rules are applicable to the transaction and to what extent. Such possibility of change is not just
a theoretical one, given how often the policies had been transformed, deleted or revised since they were merged into a common policy framework several decades ago. Generally it is disconcerting that there exists no clear ‘meta-rules’ explaining how operational policies are adjusted and changed over time, how they link to one another, and how they are sheltered from (or connected with) the ideological climate of the Bank. The lack of such systemic approach can probably best explained by an ‘informal’ nature and evolution of operational policies (i.e. the need for flexibility to tailor institutional practices). However, as the importance of policies grow, and as their regulatory function become more systemic, it becomes reasonable to expect for the Bank to introduce such specific rules, and to frame the functioning of the policies in a more explicit manner.

In addition to the above, probably the most important systemic shortcoming of current standards of accountability is that it is largely not clear (at least not in legal terms) how operational policies, contractual instruments, and general standards link together. In particular it is difficult to ascertain how they interact in case of collisions or overlaps. For instance, it is uncertain if the agreement that is signed in a form of a treaty would prevail over the accountability standards set in domestic laws, in case their provisions end up being contradictory. It is also difficult to ascertain whether or not affected people could continue relying on the protection provided by the constitutional fundamental rights, and is particular to expect for such constitutional protection after the financing agreement had entered into force. In many cases the answers to these questions would fluctuate depending on whether the project is still in the process of deliberation, implementation, or whether it has reached its maturity and completion stages.

On the more conceptual level, there are considerable issues of interpretation. Clearly the question of who gives the meaning to the open-ended clauses in the Articles of Agreements, also to the fundamental principles of democracy, human rights, environmental and social protection, will define the kind of treatment that affected people will receive from the power-holders. Precisely because the circle of interpreters (i.e. the range of authorities who apply them in practice) is so undefined; and because the

289 Historians of the Bank have illustrated that institution’s ‘ideological climate’ tends to shift across the political spectrum, depending on the political powers in US and other major donors; it also seems to be reliant on the personality of the Bank’s president, see Kapur et al., The World Bank. Its First Half Century, ‘Introduction’.

290 This question of an overlap between substantive sources is addressed in more detail in s.5.2.1. and ss.7.2.2-7.3.1.
standards that are being interpreted are so blurry – it is difficult to have a clear view of what the standards of accountability actually are. It is also difficult to understand whether any improvements in these standards are definite, or whether they just fluctuate from one level to another in an arbitrary way, depending on the strategic importance of the project.

All in all, the overview of applicable standards in this chapter has shown that governing legal framework currently lacks clear linkages within, and especially between existing categories of rules. The confusion is largely created by the merger of international and domestic, as well as general, specialized and project-specific rules, which overlap and at the same time differ in terms of their substantive content. That, combined with the fact that the meaning of most standards is largely open to interpretation by a range of power-holders, creates the situation in which even the most informed observer finds it difficult to identify (let alone predict) the exact level of treatment and protection that affected people can expect in this set-up.

b. Objectivity and fairness. This second criterion allows me to make an inquiry about whether the standards of accountability used in development transactions are non-arbitrary, and if they rely on the fair law-making procedures that would appear trustworthy from the perspective of affected individuals and communities. In conceptual terms, this part of assessment is concerned with the origins and also the form of applicable rules.

Probably the biggest concern under this criterion can be raised at the level of project-specific standards. The analysis in this chapter has illustrated that development financing agreements are strongly dominated by the shared interests of the power-holders. The form in which Bank’s agreements are currently expressed leaves relatively little space for the surrounding interests that are also at stake in these transactions. In particular the objectivity of these project-specific rules is hampered by the fact that the relevant standards are usually only included in the policy-level instruments of each individual project, and not into the agreement itself.

The origins of the specialized rules in this context is difficult to characterise in the legal terms, but given that operational policies are being increasingly institutionalised, it becomes possible to perceive them as objective and fair source of law. Nonetheless, despite the positive trend to consult all relevant stakeholders during the revision of these
policies, the Bank maintains the unfettered prerogative to ignore any views expressed during reforms of these policies, notwithstanding their persuasiveness or significance. It is therefore difficult to claim that the Bank has truly ‘democratised’ the law-making of its internal regulations, and that they are currently fully representative of the opinions of all sides to the ideological debate.

The law-making strategies of general international law are predominantly reliant on the state consent, which means that relatively few international rules give due consideration to the interests of sub-state regions, also of the ethnic minorities. If we accept the assertion made in the previous chapter about the separation of subjects in the accountability relationship (and the necessity to stop treating development projects as expressions of democratic governance), then it becomes clear why the rules of international law (that are predominantly made by the governments) cannot be presumed to reflect the views of affected people.

Only the domestic laws are at least in theory elaborated in a way that provides a realistic opportunity for the affected people to question the standard of treatment that is accorded to them, although this can also be problematic in the countries where strong legal system and good governance practices are lacking. Moreover, it has been noted that the effects of national rules are highly uncertain in this context. Their application in development interventions are generally too reliant on the institutions in charge of the project, which often are simultaneously dealing with the implementation of these standards and the most effective use of financial resources.

By and large there are several dangerous inclinations that characterise the structure of accountability standards applicable in the Bank’s development interventions. It can be observed that in this context the international rules tend to prevail over the domestic ones; contractual interests over the surrounding interests of smaller political units; and also in particular with regards to specialized rules – there is a general lack of formality and substantive requirements. If we combine all these trends together – we more or less end up with a picture in which ‘the might is right’, i.e. in which the local concerns are not well

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[^291]: Arguably this is illustrated by the current reform, where despite the repeated criticism by civil society the Bank has decided to leave out of the regulatory sphere such issues as climate change and human rights (to be more precise, the Bank’s team in charge of the new WB ESF felt that the full treatment was unnecessary, and it was enough to deal with specific aspects, such as tracing the level of GHG of its projects, or introducing anti-discrimination provisions). See the Second Consultation Paper (2015).
shielded from the interests of larger and more powerful entities; and in which economic considerations (that by default are central in development interventions) can readily trump social and environmental concerns. Not only that – because the law-making of most standards in development financing is so muddy, affected people genuinely have no systemic means of influencing them, and hence of negotiating the more favourable ‘rules of the game’.

Overall, the fairness of development interventions is an ideological concern that constantly reoccurs in the economic and political criticism of this field of international cooperation\textsuperscript{292}. The current analysis attempted to illustrate that not all fairness concerns in this area are informed by an adherence to a socially-oriented ideology. Instead, development financing is riddled with serious shortcomings of constitutionality and the rule of law, which are generally considered to be the undisputed universal values in all liberal societies across the globe.

c. An adequate level of protection. This third and final criterion allows me to assess the substantive content of rules covered in this chapter. This criterion is probably the most difficult one to employ in the abstract because the ‘adequacy’ of substantive standards very much depends on the activities of the project; and also on the interests and rights that are being affected. Nonetheless, some general observations on this matter are possible to make, with a view of underlining the tendencies, rather than their application on a case-by-case basis.

Generally, I would like to suggest that there exists a fair amount of substantive standards that could be invoked and become effective in this set-up. Domestic law in particular contains a range of relevant regulations that normally provide comprehensive standards of behaviour towards affected people, and so does general international law. Operational policies on the other hand take a more procedural approach and create few substantive obligations that can effectively constrain the behaviour of the power-holders. Nonetheless, the policies contain some important provisions in the field of natural environment, as well as recognition of marginalised and vulnerable groups of people. Most project agreements also contain references to ‘social and environmental framework’ of each individual intervention that must be respected by all the power-

\textsuperscript{292} Good summary of critique provided in K. Marshall, \textit{The World Bank: From Reconstruction to Development to Equity} (2008) at 136-140.
holders in this context – although the latter observation must be followed by a reservation that such commitment is not as principled the rest of the agreement between the parties. Overall, at least some standards of protection apply to all development projects, i.e. there is no ‘vacuum of regulation’ in this area. Arguably, it is the lack of proper adherence to the previous two criteria that makes the application of substantive standards in development financing so problematic.

To try and sum up the findings of all these criteria in a single paragraph, it would be certainly incorrect to claim that the standards of accountability in development financing are non-existent, or that they are flawed in a way that that offers absolutely no possibility of fair and predictable treatment towards the affected people. Indeed, most of the categories of rules considered in this chapter could provide different types of safeguards to affected individuals and communities. Nonetheless, a more systemic understanding of these standards is required in order to understand what would make their functioning more efficient.

In the upcoming chapters of this thesis I hope to illustrate that at least some of the issues identified in the present assessment are driven by the lack of mechanisms and procedures at the disposition of affected people. In other words, there exists an ‘accountability gap’ in terms of implementation and enforcement of these standards. Secondly, in the chapters that follow afterwards I will argue that possibly even more serious issues arise because of the conceptual confusion characterising about the role of law in development financing.

All in all, in the present chapter I have provided a general overview of standards that pertain to project law. I have evaluated them based on the first principle of strong accountability suggested in this work, concluding that generally the current system of the Bank’s financing does not adhere to this principle. In terms of accountability relationship constructed in this work, the analysis thus far has covered the questions who and to whom, also why and for what should be held to account. The next two chapters will focus on the final and most dynamic parameter of accountability relationship, notably how affected people can ensure that decision-makers in development interventions are held accountable.
Chapter Four

Locating the accountability gap: decision-making at the project level

Introduction

The objective of the present chapter is to assess the procedural mechanisms of accountability available to affected people at the level of individual interventions. The idea is to consider the full breadth of procedural safeguards that are meant to ensure that the adherence to the relevant standards of accountability, and then to ask whether or not these mechanisms are accessible to the affected individuals and communities. As in case of the previous chapter, the principle of strong accountability suggested by this thesis is used as a benchmark of assessment. More specifically the chapter is aiming to trace the level of control that affected people have over the decision-making about the individual development projects.

The structure of this chapter follows the stages of the so-called ‘project cycle’ – deliberation, validation and implementation. It starts by mapping out how different categories of rules described in the previous chapter apply onto each stage, and then considers the most common decision-making procedures stage by stage, trying to underline the extent to which those are actually within the reach of affected persons. The chapter concludes that political and administrative mechanisms that are currently in place generally lack coherence amongst different stages, and do not create appropriate power balance between the decision-makers and the affected people. This in return creates an ‘accountability gap’ that unjustifiably deprives affected individuals and communities of control over their own living environment, also of their political, social and cultural choices.

293 In this chapter I focus on the political and administrative mechanisms, whereas the chapter that follows next will deal with formalized (judicial) review procedures.
294 There is no single source that identify these stages – they merely suggest one of the ways of ‘cutting’ the development financing process into identifiable parts.
295 According to the Bank’s website, the ‘project cycle’ is generally broken down into seven stages, which I condensed into three major ones for the sake of convenience and further argument. As explained later on in the text, ‘pre-pipeline’ and ‘evaluation’ stages were left out from the present discussion due to the lack of relevant regulatory framework.
4.1. Overview of rules applicable in the different stages of the project cycle

It is a common practice in law-making to support substantive rules with provisions on implementation and enforcement; and for the latter to be enacted alongside substantive rules, often in the same source. Consider for instance, a generic law on environmental protection. In addition to putting in place the principles and standards of sound environmental behaviour, such law would also create or designate a specific environmental agency that is in charge of environmental protection, and would set out a range of procedures – such as environmental monitoring, audit, impact assessment and the like – that the institution must follow in order to protect environment in the most effective manner.

In a similar vein, all the procedures that are meant to guide and constrain the behaviour of power-holders in development interventions are set in at least one of the categories of rules analysed in a previous chapter. The difference between these rules, and the example of environmental law given above, is that rules governing development transactions come from the multiple sources, and as it was illustrated previously, it is not obvious how different categories of rules link to one another. This means that in order to make sense of the procedures that uphold the implementation of substantive standards in the context of development financing, we need to have a good understanding of how they function together, i.e. how they apply with regards to each individual project.

Generally in development transactions the parties tend to ‘switch’ from general to specialized to project-specific rules – and then back – in each transaction. This means that as the project advances, decision-making by the parties is governed by more and more specialized and increasingly better adjusted rules – and then after the closure of the project it eventually goes back to full reliance on general legal regime (which itself might have been altered during the project, for instance if the intervention was aimed at reforming the governance at the national level). This is how such ‘switch’ looks schematically:
The scheme above is not meant to illustrate how decision-making in development financing should be structured and guided. Instead, it merely attempts to capture the current project governance arrangements, and the rationale of applicable rules under which they usually operate.

Intuitively this sort of move between the levels of different rules seems justifiable. That is because interventions are special events (hence they need specialized rules such as World Bank policies to put them in place\(^\text{296}\)), and they are also unique in terms of arrangements they put in place amongst the parties to the transaction (hence they need project-specific rules that are set by contractual instruments). Yet at the same time, as it will be illustrated in the present and upcoming chapters, this ‘switch’ is one of the main challenges that contribute to ‘accountability gap’ in development financing.

The scheme that follows next illustrates the same idea, but with the reference to the concrete sources of project law analysed in the previous chapter.

\(^{296}\) This underlines the difference between the field of analysis of this work, and the analysis of private sector financing towards developing countries more broadly. The latter is not conducted according to the specialized rules and relies purely on the general domestic and international framework.
It is clear from the above that during *project deliberation* the decisions of each party are generally informed by its ‘proper’ rules (operational policies, domestic law, founding statutes, etc.). However, deliberation stage differs from the stage *before* the project is initiated (later on referred to as ‘ideas’ stage’) because it is primarily governed by the operational policies of the Bank\(^{297}\). This means that solely as a matter of convenience the policies become a sort of specialized ‘procedural code’ that coordinates the behaviour of *all* parties to the transaction, not just the Bank\(^{298}\).

*Project validation* that follows next is the sole moment in the project where the decision whether to engage with the project (from the perspective of the borrower) relies on the constitutional law of the state that is going to host the intervention.

\(^{297}\) Both deliberation and implementation stages are predominantly structured through the so-called ‘framework policies’ (OP/BP 8.60 ‘Development Policy Financing (DPF)’ and OP/BP 10.00 ‘Investment Project Financing (IPF)’). At the moment of writing BP/OP 8.60 ‘DPF’, also OP 10.00 ‘IPF’ were last revised in July 2014; whereas BP 10.00 ‘IPF’ was last revised in July 2015 (20 August 2015). These will be the versions of the two framework policies that will be referenced in the present chapter.

\(^{298}\) IFC performance standards are applied in parallel with the policies, to an extent that an operation is funded or executed by the private entities, see OP/BP 4.03 ‘Performance Standards for Private Sector Activities’.
The core responsibilities of the parties and relevant procedures throughout *project implementation* are predominantly governed by the project agreements (and their policy framework), although in order to resolve the issues that are not addressed by these agreements the parties might have to refer back to the operational policies, of other regulations such as domestic law of the borrower.

*Project completion* (or *closure*) is currently the least regulated stage in the project cycle, which is why it will not be considered separately in the present analysis. There are some specialized rules, stating that the project cannot be completed unless certain social or environmental standards had been complied with; and project-specific agreements might also contain the measures of ‘normalisation’, that is, ways of connecting project output (institutions, infrastructure, etc.) to the general institutional apparatus of the borrower. However on the whole, any issues that arise post-completion should be dealt with under the general rules, and in particular through judicial review procedures, to be considered in the next chapter.

All in all, this section has attempted to underline that the existence of different types of rules brings a great deal of complexity to the accountability mechanisms in development financing. This is largely the case because accountability mechanisms are little likely to be ‘attuned’ across different sources of rules and work well together. The analysis that follows next will unpack this statement, and will illustrate how detached from one another are the available accountability mechanisms depending on the stage of the project cycle in which the decision is made.

### 4.2. Accountability mechanisms during the deliberation stage

All parties to development intervention have a distinct set of reasons to take part in it. Needless to say, the procedural framework that guides these transactions must be capable to accommodate such diversity of agendas, and to create space, time, and scope for the parties to agree on the solutions that are satisfactory to all. It is therefore not surprising that the core concern of the Bank reflected in its operational policies is to ensure communication and

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300 Some projects have special component specifically for that purpose, see Guggenheim, ‘Crises and Contradictions’: at 120-140.

301 Note that most of the analysis in section is based on the procedures currently employed by the Bank; and that some of their elements will change significantly if the new WB ESF draft will be endorsed by the Board. See the discussion in s.7.3.2. for and overview of proposed procedural changes.
commitment amongst parties to the agreement\textsuperscript{302}. With such focus of the policies in mind, the upcoming analysis of the deliberative stage will consist of two parts: it will firstly provide an overview of general ‘division of labour’ between the parties (mainly the Bank, and the borrower); and secondly, it will proceed onto the analysis of accountability mechanisms that are available to the affected people.

4.2.1. Overview of the deliberation process

Following the logic of operational policies, project deliberation process can be divided into several phases – identification, assessment, appraisal, negotiations, and approval\textsuperscript{303}. Note that each project must undergo all of these phases before the agreement is signed by all parties and validated through their internal authorisation procedures. Put otherwise, from a strictly legal (positivist) perspective, project deliberation is but an informal process, which is governed by the internal rules of the Bank, not by the ‘hard’ legal instruments\textsuperscript{304}.

At the outset, each project deliberation process starts with an idea, which itself might emerge from a variety of political and economic forums\textsuperscript{305}. Project ideas do not originate from a single well-defined body. They are ‘out there’, channelled towards the Bank from a variety of sources. What is important from the perspective of present research is that definitive process of project deliberation begins when any such project idea (notwithstanding its origins) starts being treated under the operational policies of the Bank.

The very first point of the project deliberation regulated by the policies is the so-called identification phase, which is when the Bank – in consultation with the borrower and other partners to potential intervention – puts together a project concept note, later on summarized

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{302} This is the logic of so called ‘framework operational policies’ (OP/BP 8.60 ‘DPF’ and OP/BP 10.00 ‘IPF’) that regulate the two main programmes of Bank’s financing – they outline the responsibilities of the Bank, the borrower, and other parties (e.g. financial intermediaries or private entities).
\item \textsuperscript{303} The number of phases depends on the funding program; they are outlined in the framework operational policies (OP/BP 8.60 ‘DPF’ and OP/BP 10.00 ‘IPF’). Note that the present overview of deliberation phases is focused on traditional investment project financing, and that DPF is left out from the analysis.
\item \textsuperscript{304} Some of the projects inevitably fall under the areas of regulation by domestic laws that require environmental and social impact assessment at the national level, as well as other relevant domestic procedures. The policies do not address the issue of related procedural overlaps. However, it seems that in practice the procedures are not duplicated, and the process of deliberation under the Bank’s operational policies subsumes the procedures required under domestic law.
\item \textsuperscript{305} Ideas might be triggered by the Bank’s own Country Assistance Strategy (CAS); but it also might start as an investment offer from a company that is willing to develop a new area of industry in a certain territory.
\end{itemize}
\end{footnotesize}
and disclosed in Project Identification Document (PID). At this stage the Bank decides whether the idea is good enough to initiate project preparation phase, i.e. whether it is worth the while to engage in a rather lengthy, detailed, and often expensive process that is necessary in order to ensure a good quality project for potential development intervention. The Bank therefore tries to ensure that every intervention undergoing project preparation and assessment is economically viable, practically feasible, and fits well with Bank’s development agenda.

Once the idea has been approved by the Bank, deliberation enters an assessment phase. In case of Investment Project Financing this phase requires most of the analytical and empirical work from the Bank and the borrower. During this phase they must run the tests about potential negative environmental impacts, to engage in exact economic and financial calculations, to employ experts that are capable to process and ‘translate’ all the raw data for further steps of deliberation, and also to reach out to those who will be experiencing the negative and the positive consequences of the project. Most assessments also involve an overview of domestic laws and international obligations of the borrower, aiming to identify the tensions and clashes with the project-specific provisions. The ‘division of labour’ in this phase resembles a two-tier system of deliberation where both, the Bank and the borrower provide input to the final interpretation of the law, as well as the understanding of potential (negative) impacts of the project. It would be truly difficult, both conceptually and in practice, to untangle the responsibility of the two parties in this procedure.

The assessment phase is concluded with a number of assessment reports, usually voluminous and heavy on analytical detail, as well as draft plans (EMP, IPP, IRP) – which in their updated form (in later phases) are referenced in the legal agreements between parties. This bulk of analytical information then gets further ‘digested’ and crystallised in the appraisal phase, which is when the Bank comes up with a preliminary decision about whether to fund the project or not. In this phase all the assessments from the previous phase are distilled into a single Project Appraisal Document (PAD) that also forms the basis for negotiations between the parties. The appraisal phase, although relatively well regulated by the policies, is truly analytical and internal, that is, conducted purely by the Bank.

306 Cf. OP/BP 8.60 ‘DPI’ which merely mentions ‘project preparation’ together with identification, and jumps straight to the appraisal and negotiations.
307 Note that the WB ESF Second Draft departs from this approach and shifts most of the responsibilities for assessment to the borrower. Nonetheless, the Bank remains responsible for an oversight of borrower’s assessments, and so seems to me that even under the new draft policies its responsibility in this phase would remain as important as it currently is.
308 Projects classified under category C (low risk) might require no, or very limited assessment, see OP 4.01 ‘Environmental Assessment’ para 8.
In contrast to the above, the next two phases – *negotiations* over specific terms and conditions, and the *approval* of the project – are covered scarcely by the policies. It appears that both of these phases are perceived as points of political exchange that depend on a case-by-case basis. Project negotiations are usually perceived as a crux of the ‘bargaining’ process. However, because of the amount of analytical work that is put in place during project assessment and appraisal, this ‘bargain’ is not so much about *what* (is being funded), as it is about *how much* (everything should cost), also *under what conditions*. Realistically at this point none of the parties would be willing to invest further resources in order to change the core parameters of the project (such as its location, type of intervention, etc.) that on the whole might be causing the most crucial disadvantages to the affected people.

Altogether these five phases bring project deliberation to conclusion (see Table 4.3. below for a summary of the present overview). In the end of this process project objectives and activities are expressed in a form of draft project agreements that are ready for signature by all parties, and which then needs to be validated internally by each party to the transaction.

### Table 4.3. Summary of project deliberation process – responsibilities and documentation

<table>
<thead>
<tr>
<th>Deliberation phase</th>
<th>Identification</th>
<th>Assessment</th>
<th>Appraisal</th>
<th>Negotiation</th>
<th>Approval</th>
</tr>
</thead>
<tbody>
<tr>
<td>Responsible parties</td>
<td>The Bank, in consultation with the borrower and other parties</td>
<td>Preparation and most assessments: the borrower</td>
<td>The Bank</td>
<td>The Bank initiates; All parties take part</td>
<td>The Bank</td>
</tr>
<tr>
<td>Project idea</td>
<td>Oversight of assessment: the Bank</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Documents produced</td>
<td>Concept note PID</td>
<td>Assessment report(s)</td>
<td>Draft PAD</td>
<td>PAD Draft agreements</td>
<td>Legal agreements with annexes (including project plans)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Signature and internal validation by all parties

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309 The ‘bargaining’ issues in development financing had been under scrutiny in the economic analysis for decades, see for instance P. Mosley *et al.*, *Aid and Power. The World Bank and Policy Based Lending* (1991).
4.2.2. Access to information and inclusion of affected people in project deliberation

When it comes to regulation of deliberation process in the policies, consultation and disclosure are the two accountability mechanisms that are mentioned most. They are also the two core procedural devices that would be expected in a deliberative stage of any authoritative decision-making process.

The table below attempts to synthesize the requirements of disclosure and consultation set out in various policies of the Bank, by breaking down the process of deliberation into the five phases described above (Table 4.4.). The core task of this table is to present current disclosure and consultation regime from the perspective of external observer, and to give a systematic overview of where exactly in the deliberative process affected people are expected to, and able to take part.

<table>
<thead>
<tr>
<th>Phase in deliberation</th>
<th>Is there a requirement in the operational policies</th>
<th>Investment Project Financing</th>
<th>Development Policy Financing</th>
</tr>
</thead>
<tbody>
<tr>
<td>Identification</td>
<td>To announce Bank’s intention to consider project idea?</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Assessment</td>
<td>To announce the beginning of project preparation (post-identification)?</td>
<td>Yes, indirectly (by disclosing PID)</td>
<td>Yes, indirectly (by disclosing PID)</td>
</tr>
<tr>
<td></td>
<td>To inform those who will be directly affected by the project through means of direct communication?</td>
<td>Yes, for the groups that are covered by</td>
<td>No</td>
</tr>
</tbody>
</table>

Table 4.4. Disclosure and consultation requirements in operational policies (deliberative stage)

Note that transparency and participation measures are equally important throughout the entire project cycle, and not only during the deliberation; however they are most explicitly regulated (and most effective) in the deliberative stage, which is why the present analysis only explicitly considers these mechanisms in this part of the project.

Another relevant principle that is at times noted by the relevant literature is reason-giving (see B.M. Saper, ‘The IFC’s Compliance Advisor/Ombudsman (CAO): An examination of accountability and effectiveness from a global administrative law perspective’, 44 NYU International Law and Politics (2011-12) 1279, at 1315-17 where he discusses the accountability of IFC in the light of three GAL principles: (1) Information and disclosure, (2) Non-decisional participation, and (3) Reason-giving). It seems to me that the principle of reason giving contributes to the balanced relationship of accountability, but it requires other mechanisms, and does not function independently.
Development policy financing does not contain separate assessment stage; see BP 8.60 ‘DPF’ paras. 1-6.

Ibid.

Project Document in case of DPF (OP 8.60 ‘DPF’ para. 29).

<table>
<thead>
<tr>
<th>Stage</th>
<th>Question</th>
<th>Yes</th>
<th>N/A</th>
</tr>
</thead>
<tbody>
<tr>
<td>Safeguards</td>
<td>To publish project assessment report(s) before appraisal?</td>
<td>Yes</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>To announce that the project has moved from the assessment to the appraisal and negotiation stages?</td>
<td>No</td>
<td>N/A</td>
</tr>
<tr>
<td>Appraisal</td>
<td>To publish the draft of PAD before appraisal?</td>
<td>No, unless borrower consents</td>
<td>No, unless borrower consents</td>
</tr>
<tr>
<td></td>
<td>To publish the draft of PAD after appraisal?</td>
<td>Yes, except for sensitive parts identified by borrower</td>
<td>Yes, except for sensitive parts identified by borrower</td>
</tr>
<tr>
<td>Negotiations</td>
<td>To make it explicit in the appraisal document how the project design was adjusted to incorporate the concerns and suggestions of affected people?</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>To announce the beginning of negotiations?</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Approval</td>
<td>To announce when the Bank will consider the project for approval?</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>To publish the draft of legal agreements before approval?</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>To publish the agreements after they have been approved?</td>
<td>Only the agreements with public entities</td>
<td>Yes</td>
</tr>
<tr>
<td>Consultation</td>
<td>To identify whether there exists a general and wide-spread support for the project idea (both from general public, and amongst potentially affected people)?</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>

---

312 Development policy financing does not contain separate assessment stage; see BP 8.60 ‘DPF’ paras. 1-6.
313 Ibid.
314 Project Document in case of DPF (OP 8.60 ‘DPF’ para. 29).
<table>
<thead>
<tr>
<th>Assessment</th>
<th>To create special opportunities for the affected people to give feedback about project design?</th>
<th>Yes</th>
<th>Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>To invite general public to provide input about the idea and design of the project/policy?</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>To take the views of affected people into the consideration when tailoring project design?</td>
<td>Only in case of indigenous peoples and involuntary resettlement</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>To include affected people in creating the mechanisms for compensation?</td>
<td>Only in case of involuntary resettlement</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>To ensure that there is a broad support for the project before it can be considered for appraisal?</td>
<td>Only in case of indigenous peoples</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>To ensure that project-related benefits are shared with directly affected individuals and communities?</td>
<td>Only in case of commercial development of indigenous peoples’ land, natural resources and knowledge</td>
<td>No</td>
</tr>
<tr>
<td>Appraisal</td>
<td>To consult affected people during project appraisal, on the contentious issues of project design?</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Negotiations</td>
<td>To invite the representatives of affected people to take part in project negotiations?</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Approval</td>
<td>To acquire the consent of affected people before the project can be considered for approval?</td>
<td>Only in case of commercial exploitation of indigenous peoples knowledge and cultural resources</td>
<td>No</td>
</tr>
</tbody>
</table>

315 Especially in projects that involve (a) destruction of natural habitat, (b) effects on indigenous peoples, (c) adverse impacts on physical cultural resources (d) restricted access to natural resources, (e) involuntary resettlement, (f) forest management. In these cases the policies require specially adjusted means to consult with the affected groups, such as for instance ‘culturally appropriate process for consulting with indigenous peoples’; see OP 4.10 ‘Indigenous peoples’ Annex A (Social assessment) para. 2 (c).

316 This is not explicitly stated in the policy, but there is a requirement to consult with ‘key stakeholders in the country’, which in case of DPF would implicitly involve general public (because this funding instrument is only for national level reforms); see OP 8.60 ‘DPF’ para.5.
The first observation that becomes apparent from the table above is that project identification phase is generally kept away from any external scrutiny. This sort of practice does seem to be justifiable to an extent. After all, the parties do require some freedom for their ideas to become tangible and evolve. Yet, it was noted before that at this point the parties tend to make some crucial choices about project idea, such as its locale, intended benefits and negative impacts. Arguably, those are precisely the kind of value judgements that more than anything else define the impacts of the project; including who exactly in the national territory and (or) amongst the general population is likely to be exposed to the negative consequences of such intervention. It is therefore somewhat alarming that no proof of popular support – or at least public and political deliberation process upon the matter – is required for the Bank to issue the ‘stamp of approval’ at its conceptual stage.

The picture changes completely at the phase of assessment. Various groups of potentially affected people must be consulted directly and specifically, also informed about the project. For instance, the Bank even requires the borrower to choose the ‘culturally appropriate’ methodologies that would ensure a dissemination of information to the most vulnerable and detached groups in potentially affected societies. Nonetheless, it is noteworthy that the participatory measures used in the assessment phase are not meant to record the support or consent by the local communities. Instead, operational policies imply repeatedly that consultations in this phase are aimed at collecting information and to mitigate the risks that are associated with the project. Moreover, it is questionable whether the amount of information and detail that needs to be conveyed at this stage leave can leave much space for the ‘meaningful consultation’ that the Bank’s policies are asking for.

The next three steps of project deliberation – appraisal, negotiations and approval – similarly as in the case of identification are generally kept away from the public scrutiny. In the best case scenario affected people could expect to get public access to PAD before project negotiation and approval, which only becomes possible if the borrower issues a special

317 OP 4.10 ‘Indigenous Peoples’ para 10(c).
318 With a notable exception of the projects that involve utilisation of traditional peoples’ cultural knowledge (ibid., para 19); also see the discussion in s.7.3.2. for changes proposed in WB ESF Second Draft.
319 Dann reaches similar conclusion (that Bank’s ‘legal regime’ is risk-driven) in his overview of operational policies; see Dann, Law of Development Cooperation at 380.
320 See WB ESF Second Draft (‘ESS10. Stakeholder Engagement and Information Disclosure’, paras.21-22), which now explicitly defines the term ‘meaningful consultation’.
permission for the Bank to disclose it. Otherwise, the only time after the initial consultation that the public and those potentially affected get to know about the progress of the project, is after it has been appraised, and then (officially) approved by the Bank. Moreover, at least from the perspective of operational policies – there exists no requirements to carry the views of the affected people expressed in project assessment through, onto the next phases of project deliberation. For instance it is not required to notify in the PAD (core negotiation document) whether certain project activities raised dissatisfaction and opposition during the consultation meetings.

The table below summarises the general observations made thus far (see Table 4.3).

<table>
<thead>
<tr>
<th>Identification</th>
<th>Assessment</th>
<th>Appraisal</th>
<th>Negotiations</th>
<th>Approval</th>
</tr>
</thead>
<tbody>
<tr>
<td>No disclosure; no consultation</td>
<td>Major documents disclosed, variety of means and channels for consultation</td>
<td>Disclosure after the appraisal; no consultation</td>
<td>No disclosure; no consultation</td>
<td>Disclosure after the approval; no consultation</td>
</tr>
</tbody>
</table>

What becomes apparent from this table is that all stages of project deliberation between the Bank and the parties are relatively closed off from the public; with a notable exception of project assessment. On the one hand, this appears acceptable: in the end of the day project deliberation should be perceived as single process with several steps on the way, and not all of these steps ought to be open and inclusive. Also, the phase of assessment is the one where project design is still open enough for changes and inclusion of the views that were gathered, and in that sense its timing for consultations does appears to be appropriate.

Ironically though, the table above also shows that assessment is the only phase when no key funding decisions are made by the Bank. This means that the people who would be taking part in the consultations would not know exactly what the parties to the transaction are planning to do; nor exact project design that they are going to experience in real terms– because none of the core decisions about their treatment has yet been made, let alone negotiated or
approved by the Bank. This therefore brings me back to the more general concern about accountability mechanisms used in project deliberation process, and the question whether they actually transfer control over decision-making to the affected people. In the next two sections I would like to recap on the main characteristics of these mechanisms, and to underline why neither the disclosure nor consultation methods currently used by the Bank are sufficient.

4.2.3. Conceptual issues with the Bank’s transparency measures

On the whole, the Bank’s disclosure regime comes across as better attuned to serve the function of accountability mechanism than its participatory approach. The Bank seems to have taken proactive measures in making relevant information available throughout the entire deliberation process – not just during one phase, and not just as a one-off instance. For instance, the policies specifically note that any changes made to PID after it has been published are meant to be included in the publicly accessible version. This means that the Bank staff is meant to keep the documentation up-to-date with real-life developments, and that such exercise ought to be timely, as well as accurate.

Probably the sole yet crucial issue that remains unsatisfactory in Bank’s approach to transparency is that relevant documents in absolute majority of cases are authorised for disclosure after they had been approved. Needless to say, the affected people could only use these documents to scrutinise and influence project design if the documents were published in advance, preferably still in their draft state.

The explanation why the Bank sticks to such type of disclosure is given in its Access to Information Policy. This policy tells us that Bank’s choice to only publish the documents after their approval is meant to ‘preserve the integrity of its deliberative process by facilitating the free and candid exchange of ideas’. At the outset such official justification might appear plausible. Nonetheless, when placed under further scrutiny it does not rest easily with the overarching rationale that characterises Bank’s Access to Information Policy. In particular, this idea of consensus building seems to depart from the general criterion that the Bank has set for

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321 BP 8.60 ‘DPF’ para.2
322 The World Bank Policy on Access to Information (July 2013); the detailed requirements of disclosure analysed thus far where all included in the Operational Manual, alongside other rules about the structure of deliberative stage.
323 Ibid. s16.
itself: to only withhold the type of information that would compromise Bank’s obligation to respect confidentiality.

Here is the objective of the policy:

“[T]o strike the appropriate balance between the need to grant the public maximum access to information in the Bank’s possession, and the Bank’s obligation to respect the confidentiality of its clients, shareholders, employees, and other parties.”

The policy also establishes a clear list of exceptions to the principle of maximisation and free access – that is, certain categories of sensitive information that the Bank chooses to keep away from the public by default. Most categories included in this list of exceptions appear plausible and rather uncontroversial: for instance personal information, information that might endanger the safety of officials and security of some operations, discussions by Bank’s ethics committee and the like. However, it is debatable how the category of ‘deliberative information’ fits in this conceptual framework, and in particular the balancing exercise noted by the aforementioned main policy objective.

More specifically, it is not clear how the obligation to ‘preserve integrity of deliberative process’ follows from ‘obligation to protect confidentiality’. When considered attentively, those appear to be relatively unrelated notions that aim to protect completely different sets of values. The protection of confidentiality on the one hand is about safeguarding concrete interests of particular actors from harm. Deliberation over the development activities on the other hand concerns development of a society as a whole, which is difficult to be portrayed as a confidential matter. To the contrary, the interests that are most likely to be harmed by such project are those of the affected people (who, disturbingly, are often not allowed to follow the process precisely because of the perceived threat to confidentiality).

If we place this idea of ‘integrity of deliberative processes’ under the further scrutiny, it appears that this notion actually gravitates around the pursuit of effectiveness. This

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324 Ibid. s3 (emphasis added)
325 Case-by-case changes to this list are possible, mainly through a specific decision of the Bank, to which there is also an appeal process.
326 Ibid s.7-17.
327 Clearly the sole entities whose interests ought to be protected through confidentiality clause in this set-up are private actors; but the rule currently offers no space to weight of these interests, against the broader interests of the society that will be affected by development intervention.
328 Dann’s analysis contains the explanation why effectiveness might be important in legal sense (see Dann, The Law of Development Cooperation at 284-294); in a nutshell, he argues that public donors owe such duty to their tax payers. Generally the principle had been mainstreamed in the processes of development financing starting with ‘Paris Declaration on Aid Effectiveness’ (2005).
particular value could potentially be threatened by opening up the decision-making process too much, because it might impede the possibility of arriving at mutually satisfactory solutions. Nonetheless, the absolute rule against the timely release of the information probably cannot be justified under the pursuit of effectiveness alone.

All in all, the claim that ‘deliberative freedom’ follows directly from Bank’s ‘obligation to respect confidentiality’ appears to be unfounded, and simply misleading. Understanding this would be the first step to questioning whether the (real) balancing exercise that is relevant in this instance – between the effectiveness of deliberative process, and the accountability towards affected people – had been struck correctly by the Bank in its current disclosure regime.

4.2.4. Conceptual issues with the Bank’s participatory approach

It was already noted previously that affected people are generally only consulted once throughout the entire deliberation process, with a few exceptions of some safeguard policies that require repeated consultation during the assessment phase. From that perspective it is possible to claim that Bank’s participatory strategies fall short of sufficiently systemic approach. Arguably though, even such one-off consultation requirement can be considered as an accountability mechanism of a sort: after all, those in charge of project preparation must listen to, and not just talk at the affected people. In that respect all consultations, even if they only take place once throughout the project, should be taken seriously and not disregarded for their perceived lack of effectiveness.

Clearly however, consultations that require absolutely no follow-up only create a weak form of accountability. That is so because they provide simply no avenues of keeping power-holders to account about whether they listened to affected people or not – at least not in a timely fashion. The Bank itself appears to be in a full acceptance of its weak participatory framework. This is proven by the fact that operational policies treat certain groups of affected people with more attention than others (see the remarks about indigenous peoples and involuntary resettlement in the Table 4.2); and that overall these people fall under a more stringent accountability

329 Notable exception to this rule is the requirement that Indigenous’ peoples communities be given ‘opportunities for consultation at each stage of project preparation and implementation’. Nonetheless, to my knowledge there seems to be no record of including indigenous peoples in the negotiation process.

regime than all the other categories of affected persons identified in the conceptual framework of this work\textsuperscript{331}. This is meant to suggest that the Bank’s refusal to ‘scale up’ the procedural rights already accorded to such specific groups of people does not stand to the objective scrutiny, and that at least no legal reasons can justify its current approach.

In particular, I take issue with the line of reasoning that attempts to justify shortcomings of Bank’s participatory approach under ‘Political Activity Prohibited’ clause in its Articles\textsuperscript{332}. The conventional position of the Bank, used against advocacy initiatives for enhanced participation, seems to suggest that there exists a tension between this clause, and the need to ensure that affected persons support and (or) consent to the project\textsuperscript{333}.

To my understanding, this perceived tension is artificially crafted, and cannot be defended either in theory or in practice. If the Bank’s ‘political activity prohibited’ clause is indeed meant to prevent external intervention into the domestic political affairs of the member state\textsuperscript{334}, then it is difficult to see how it would stand in the way of greater inclusion of affected local people in the project design. More participation would not mean more intrusion by the Bank itself. Also, consultations alone cannot be perceived as Bank’s attempts to ‘import democracy’, where the country is expected to change its political, social or economic structure. Just as in case of any authoritative decision-making, more and stronger participation merely gives a way of ensuring that the project does as little social and cultural, as well as physical harm as possible, and that it is adjusted to all relevant interests in an equitable manner.

Note that the Bank has already introduced similar type of due diligence considerations through its safeguard policies. For instance it is conducting its proper appraisal of project-related facts. It is therefore not clear how stronger accountability mechanisms that give more control to the affected people on a project level are less appropriate than such analytical preventive measures of the Bank.

In a nutshell, it appears to me that the argument about more consultations going against the principle of non-intervention is based on a false dichotomy between popular participation and

\textsuperscript{331} See the discussion in s.2.2.2.  
\textsuperscript{332} Art.IV s.10 in IBRD Articles of Agreement, and Art.V s.6 in IDA Articles of Agreement.  
\textsuperscript{334} Art.IV s.10 in IBRD Articles of Agreement, and Art.V s.6 in IDA Articles of Agreement.
apolitical mandate of the Bank. Participation does not threaten state sovereignty that the Bank’s apolitical mandate is meant to protect. It contributes to the exercise of sovereignty in a productive and justifiable manner. It follows from such critique that in practice the argument about ‘Political Activity Prohibited’ clause standing in a way of enhanced participatory approach is merely a convenient legal rhetoric that prevents the Bank from opening up its operations to more public scrutiny. In reality Bank’s reluctance is based on non-legal (political, economic, strategic) reasons that have little to do with legitimate and objective justifications.

This brings me to the concluding remarks about the deliberative process of the Bank’s interventions. The description of this process has illustrated that each development project tends to initiate a distinct law-making process. Over the years this process had become more and more sophisticated and better structured, and has acquired a distinct format. On the one hand, it produces considerably more detailed and more localised decisions than most international treaty-making processes would do. Yet on the other hand, it bears little resemblance with ‘standard’ decision-making at the domestic level, where the institution in charge of the decision would be expected to engage in an exchange of ideas with all relevant stakeholders in order to find socially and politically most acceptable solutions.

To try and summarise these features in brief, this process can be characterised as largely analytical, but also containing the elements of high-level political negotiations.

(i) Its analytical nature means that most of the decisions about project design are made in a relatively sterile environment controlled by the Bank’s management. These decisions are normally based on hard facts and interpretation of available data. Domestic social dynamic is only one of the factors that must be considered alongside other risks to the successful execution of the project. This analytical character seems to be substituting for a stronger participatory approach, which would otherwise be expected in the domestic decision-making process of similar reach and detail.

(ii) The high-level political negotiations aspect of the process brings to the table the tough bargaining element over specific economic interests of the parties, and in particular over the costs of each transaction. This part of deliberation – due to its resemblance to

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335 Cissé in his analysis of ‘Political Activity Prohibited’ clause recognises that this clause might contribute to the arbitrariness in decision-making; see H. Cissé, ‘Should the Political Prohibition in Charters of International Financial Institutions Be Revisited? The Case of the World Bank’ in H. Cissé et al. (eds.) The World Bank Legal Review. Vol. 3 (2012) 59, at 83.
traditional international law-making practices – tend to justify the exclusion of affected people from the core decisions, under the presumption that they are justly represented by the governmental bodies. The key decisions at this point are being taken under the logic of a compromise, which means that none of the contracting parties is ultimately responsible for the ‘end product’ of negotiation process. In this set-up the borrower can ‘blame’ the Bank, whereas the Bank can point to the needs of private investors and so on and so forth. The ideas and policies are shared, and are never attached to a single power-holder. In such set-up project choices ought to have a mutually acceptable justification – which is likely to be economic, but not necessarily most acceptable from the social perspective.

It is not surprising that in the process with those kinds of characteristics, accountability mechanisms that do exist are fairly toothless; and that they are not meant to hand over any control of decision-making to the affected individuals and communities. These mechanisms appear to be not crafted in order to create space for a dialogue, but instead only include affected people as a reliable source of due diligence. On a more positive side, the requirements of disclosure requirements from this stage do create public access to the output of the process, and therefore enables affected persons to exercise some influence during the validation procedures, also during project implementation.

4.3. Accountability in the validation procedure

4.3.1. Role and function of the project validation procedure

Validation is the only stage of the project cycle where the role of the Bank is meant to be passive. Differently than in case of initial deliberation process and implementation, validation procedures are set entirely by the internal rules of each participating entity; and the Bank takes no charge of whom, how, and in what manner authorises the agreement. According to the operational policies, once the Bank has approved the project, other parties have up until 18 months (12 months in case of DPF) to sign and then authorize the agreement through their internal channels. In practice however draft project agreements tend to give the parties only

336 The Bank only requires ‘satisfactory evidence’ that conditions of effectiveness (i.e. authorization) have been fulfilled; such evidence can be an opinion of ‘counsel acceptable to the Bank’, see ss.9.01-9.02 ‘General Conditions for Loans’ (March 2012).
337 BP 8.60 ‘DPF’ paras.11-12; BP 10.00 ‘IPF’ paras.33-34;
up until 90 days to comply with all such conditions of effectiveness. Extensions to these terms are possible, but not guaranteed. Note that the countdown starts from Bank’s approval of the agreement, meaning that the Bank provides the initial ‘stamp of approval’ that the other parties must then ‘take it or leave it’.

In the context of accountability towards affected people, we are first and foremost dealing with the validation procedures of the borrowing state (or the state that guarantees lending to other entities in its territory). However, the authorization procedures of other entities (implementing agencies, investors) are equally decisive in rendering the agreement effective.

In order to better understand the role and purpose of validation procedure, we should recognize the nuanced theoretical distinction between acceptance of a treaty (under public international law), its validation (under national constitutional law) and implementation (giving it effect within domestic legal system). These are three elements of treaty-making process — and, depending on the country, they might require slightly different actions by the responsible authorities. In practice counties tend to use the same ratification procedure to acknowledge their international obligations and to recognise them under their constitutional law (acceptance and validation), hence in the following analysis the two terms are used interchangeably. The distinction between them merely points towards different consequences of treaty-making, which might become relevant in the area of international state responsibility, or constitutionality review (the latter will be discussed in the upcoming chapter). The third element — of giving the international agreement an effect in domestic legal system — is mandatory in the countries that have dualist approach to international law; that is, those that do not recognise the direct effect of international instruments. The second part of the present section will refer to this procedure as potentially separate device of accountability; but it should be bear in mind that such implementing acts are not required everywhere.

338 Note that authorization requirement is not the only condition that might be required for the agreement to enter into force. There can also be ‘other conditions’, such as adoption of relevant codes of conduct, or establishment of necessary institutions. These other conditions are meant to facilitate project implementation once the agreement enters into force.

339 Since the agreement between non-state entity and the Bank is not a treaty, it does not need to go through the internal ratification processes; however, each such agreement is guaranteed by the state, and this guarantee agreement is also a treaty, which must be ratified. In other words, all projects will contain at least one international agreement that must be authorized through ratification.

340 These are adjusted from analysis in J.H.Jackson, ‘Status of Treaties in Domestic Legal Systems: A Policy Analysis’, 86 AJIL (1992) 310, at 316; he considers in total nine different issues that arise when international agreement enters into domestic system (powers to negotiate, signing, acceptance, validation, implementation, direct applicability, invocability in municipal law, hierarchy with municipal laws, and power to administer a treaty).
In theory validation procedure could be one of the most significant accountability mechanisms available to the affected people. Besides Bank’s own approval mentioned above, it is probably the sole point in the entire project cycle that so clearly requires formal and authoritative decision by a competent institution – as opposed to the other parts of the project where decision-making is more fluid, flexible, normally driven by pragmatic reasons, and shared between several authorities. In addition to that, it is arguably the only stage of the project that is based distinctly on the domestic law – where the authorities are not obliged to take into consideration the array of rules and external standards otherwise applicable in this set-up. Moreover, it was already illustrated in the previous chapter that generally domestic legislation tends to provide the most detailed and stringent standards of protection available to the affected people.

Put otherwise, at least in theory project validation stage could be the ultimate test of accountability, which guarantees that only responsible, equitable and well-balanced development projects are actually executed in practice. Most importantly, such domestic validation procedure could be ‘close enough to home’ for the affected individuals and communities to have a meaningful say in determining its outcomes.

Nonetheless, I would like to argue that project validation procedures in most cases cannot act as viable accountability mechanisms, and that competent institutions are inclined to approve development projects as fait accompli. The significance and potential ‘weight’ of these mechanisms are diminished mainly by political and economic reasons; but also due to certain issues of how the project cycle is structured, and how these procedures fit into an overall flow of development interventions.

To my understanding, it would be naive to claim that political inclination towards more financial resources creates no problems in legal terms. Yet at the same time every governmental decision to enter into financing agreement triggers a whole range of the constitutional rules – those of separation of powers, use of natural resources, protection of individual and collective rights, and the like. At least in theory these rules should contain the ‘thrust’ for external funding within constitutionally acceptable limits. These are also the rules that individuals and communities potentially affected by the intervention will rely upon in order to demand for the kind of treatment and protection that is accorder to them by the constitution.
For us to understand why such rules are not always able to constrain financial decisions, and why economic interests can readily trump them, we should briefly consider the two key areas of constitutional law that get activated when international agreements enter into the domestic legal system. These areas are (i) treaty ratification rules, and in particular who, how, and when normally approves financing agreements; and (ii) the rules on representation and institutional safeguards that can qualify and constrain such standard ratification processes. Looking at these two areas of constitutional rules will help me explain why affected people have little chances to be represented throughout validation procedure and to be protected from potential negative effects of development interventions.

4.3.2. Accountability measures in the treaty ratification process

The parameters of treaty ratification depend almost exclusively on the constitutional structure of each individual state. Nonetheless, certain features of this process tend to be shared by many countries, which is why general observations about reoccurring trends and logic can be made, notwithstanding the important national differences on the matter. The analysis in this section will cover three main parameters of treaty ratification process, focusing on the competent authorities, type of authorisation and timing – all of which determines the role and consequences of such procedure.

a. The authority to authorize development financing agreements. Comparative analysis suggests that in absolute majority of countries around the world treaties are ratified by the highest political power with the state. The key division of competences in this area is between the parliament, and the head of the executive (president, or chief minister).

According to a relatively recent study by the Inter-Parliamentary Union (IPU), in about 59 percent of the countries that were covered by its survey international financing agreements must receive some form of parliamentary approval. This means that in over a half of the

341 The surveys conducted by Inter-Parliamentary Union (IPU) helps getting a general overview of how different countries approach similar issues of representation – and in which areas they converge; available at [http://www.ipu.org/english/surveys.htm](http://www.ipu.org/english/surveys.htm).


countries surveyed the parliaments should either decide to enter into treaty through direct ratification, or to approve the agreements already ratified by the executive.

In the related literature but especially in the commentaries by the civil society\(^{344}\) such requirement of parliamentary approval is considered to be a positive procedural hurdle. That is so because it fosters democratic accountability in the area of state finance, and because it means that development projects ought to be enacted by the most representative, legitimate, and authoritative governing body within the state. In principle this assessment appears to be correct: greater parliamentary involvement in the process is more likely to balance out the variety of interests involved in development transactions, potentially more so than in case of the approval by the executive. Because of its diversity, size and decision-making procedures (secret voting), parliament is less likely to be captured by the powerful interest groups, and to hold an in-depth debate about both, potential benefits and negative effects of the project.

Yet, at this point one needs to make a distinction between the greater parliamentary involvement in the project deliberation and negotiation process as a whole; and the simple requirement to validate the already agreed-upon funding package. It seems to me that the latter does not necessarily bring about as much benefits to the affected people as the former, and in fact comes with its proper shortcomings.

Firstly, it seems that in reality more than a half of the parliaments (64 per cent, according to the IPU study\(^{345}\)) actually do not take part in loan approval processes – despite the legal requirements set in the constitution or primary laws. This means that at least in some countries executive powers are able to by-pass such requirement if they consider this to be necessary; for instance, through the doctrine of ‘executive agreements’\(^{346}\) or through entering into the non-binding agreement at first, and then only presenting smaller elements of the funding package for further approval. Thus, the constitutional requirement alone does not guarantee that the parliament will have a meaningful role in the entire development financing decision-making process.


\(^{345}\) IPU, ‘Parliamentary oversight of International Loan Agreements’ at 9.

Secondly, there is a risk that without the proper and in-depth participation of the parliament in the *entire* contracting process, parliamentary approval becomes just a formality that legitimizes decision-making by the executive, but does not really add much to the acceptance of project activities by wider political circles in the state. The real issue here is that once the agreement had been approved by the parliamentary decision-making body, it becomes considerably more difficult to challenge its implementation at the later date – which is something that might become more and more pertinent as the intervention advances into its later stages (note that all development projects only furnish a *plan* adjusted to particular circumstances, which are inevitably going to change over time).

Finally, and closely related to the previous two points – one must ask whether getting the ‘stamp of approval’ from the parliament provides an adequate way of ensuring public and popular support for the project; or whether such support simply cannot be guaranteed at this point in the project, because all the major decisions had already been made and cannot be changed.

**b. Possibilities of amending the proposed draft.** This brings us onto the question whether the authorizing entity can suggest amendments to the original ‘deal’, or whether it should approve the project ‘as it comes’. Again, the precise answer to this question is generally determined by the legislation of each individual state. The relevant laws would normally set out whether the institution in charge of ratification can make changes or reservations to the international agreement that was signed initially.

In case of parliamentary approval, the aforementioned study by IPU shows that majority of the parliaments could only accept, or reject, the agreement as a full ‘deal’[^347], and no corrections could be made. What this means in practice is that even if the authorizing body decides to fully engage with the agreement, and to examine it in-depth (for instance, by creating an *ad hoc* committee to assess its value and effects), in most instances the outcome of such engagement would still be a ‘yes’ or ‘no’ decision. There would be no shades of grey that would condition of qualify such answer in a way that would make the project better adjusted to the local needs. The alternative of returning the agreement for further amendments – once it has been

[^347]: In less than a third (29 per cent) of countries *that have the requirement of parliamentary approval* legislation explicitly enables parliamentarians to request actual amendments to the loan agreement; *ibid.* at 8.
approved by the Bank and signed by all parties – would require a very serious justification, and also very strong political will on behalf of the borrowing state.

c. **Timing of the authorisation procedure.** This last observation takes us onto the issue about when in the project cycle validation procedure is taking place. To my understanding, we should accept that in most cases project deliberation process described in the previous section (as governed by operational policies of the Bank) absorbs most, if not all, law-making features of each individual project. This means that by the time such project reaches its validation stage, internal authorization is little likely to have any capacity to spark a meaningful political debate. This is not to say that validation procedure would necessarily be of no use. At least in theory it could still act as a threshold that ‘filters through’ really harmful interventions; and it could still have some safeguarding role in the projects that gathered large circle of public interest defenders.

However, in absolute majority of interventions it would be somewhat naïve to expect for a validation procedure to have such a ‘filtering role’. One of the main reasons for that is because in practice development projects often appear to be fairly uncontroversial. They address the pressing needs in the developing countries, and only affect a certain part of national population (e.g. workers in a certain sector) or targeted groups of people (e.g. inhabitants in certain territory). The ‘project details’, about how these people should be treated and what would be the negative effects that they have to endorse, come under larger, more positive, and more flagship-like project objectives. In such a setting the grand objectives of the project are likely to serve as a ‘Trojan horse’ that legitimizes the rest of the project activities; even if those are detrimental to certain ethnic, social or economic groups.

Overall, it seems to me that without additional safeguards in place the national highest authorities would not refuse a funding deal that is beneficial to the country as a whole, even if it could potentially be harmful to smaller political entities.

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348 For instance as in case of South African ‘Eskom Investment Support Project’ that sparked a discussion about the best means of energy production in the country, and which mobilized global civil society to argue against increased GHG emissions.
4.3.3. Safeguards and opportunities of representation

It follows from the analysis thus far that the authorization of development financing agreements falls almost exclusively under the competences of the central governmental authorities – the parliament, or the head of the executive. It therefore seems fair to ask: to what extent can such procedure at all be relevant to the affected people? Can they expect any representation of their interests within such centralized governing bodies, or should they accept that the sacrifice of their interests is necessary for the sake of public good of a larger political unit?

My general argument in this regard is that very few ‘traditional’ measures of representation and protection of interests are accessible to the affected people in the area of development financing. Precisely because funding agreements tend to move through the parliament or the highest executive authorities as a package deal, and because domestic authorization of such deal is only required once and so late in the process, constitutional measures of legal safeguards and representation are largely undermined and cannot be effective. In the next few paragraphs I will explain how precisely these features of validation procedure undermine the effectiveness of traditional measures of representation under domestic constitutional law.

Regarding the measures of representation in the decision-making process by the national authorities, it should be remembered that at least from the perspective of the Bank, validation procedures are simply not meant to have a deliberative function. According to the operational policies, all the deliberation and relevant negotiations had already taken place in the deliberative stage. The validation stage is not meant to change anything – it is only meant to result in a final approval. This takes away the incentives from the parliaments, but also the executive, to have meaningful consultations on the project activities in the domestic political forums, such as discussions in special committees, public hearings, media debates and the like.

Notwithstanding the fact that some consultations have to be conducted during the project deliberation process under the operational policies, the consultation methods used within this process are currently not the same as those within national political arenas. The difference between the two can probably best be described as a difference between a focus group and a round table. The standing of the participants and the purposes of the two mechanisms are conceptually different. The former is conducted to collect information, the latter is normally undertaken to reconcile the variety of interests. In other words, reconciliation does not seem to be the objective of deliberative process by the Bank; nor is it permitted at the validation
stage in the national context. In such set-up the groups potentially affected by the decision are only likely to form an opposition to the project, rather than be treated as a respected side in a balanced debate.

Without such limited avenues to include affected people into the decision-making at the level of central governments, there is still a possibility that some safeguards might be attached to the rules of vertical power distribution within the state. More precisely, it would be fair to expect that in the areas of decision-making reserved by the states (in case of federations), autonomous regions, or local authorities, there might be more chances for the affected people to be heard and included. Generally the governmental units that are smaller and geographically closer to the people are considered to be more representative and better attuned to the local interests.

These authorities are little likely to have any powers within the main project validation procedure\textsuperscript{349}, but they might play some role in the treaty implementation process that follow straight after. In particular such vertical division or power appears relevant in the dualist countries, where implementing legislation is necessary for the international agreements to become part of domestic international law. In some policy areas covered by the project, the authority of enacting such implementing regulations would fall under the competence of the aforementioned sub-state units. Depending on the policy area, one might argue that such regulations could be properly ‘domesticated’, by adjusting international obligations to the context of local people and their needs.

Here however, such possibility of representation would be undermined by the fact that loan agreements tend to be really detailed. They usually entail fully worked out arrangements of governance structures, implementing rules and the like. They do not require, nor leave space, for further implementation arrangements to be introduced through the domestic regulatory acts. Put it otherwise, although constitution might reserve certain policy areas for the discretion of the smaller units of governance, the agreements are generally too detailed to leave any space for them to exercise such discretion.

Moreover, if the project is executed in the exclusive competence of that particular unit (e.g. sanitation system in a certain city), the Bank is likely to sign another project agreement with

\textsuperscript{349} The competence to enter into international agreements is normally reserved by central authorities; but in federal systems such as Germany the Lands ‘can conclude treaties with third states on matters over which they have the power to legislate’; see H.P.Folz, ‘Germany’, in Shelton (ed.), \textit{International Law and Domestic Legal Systems} at 142.
the authority in charge; and then to conclude a supplementary treaty with the central government about providing guarantee to such project. Here too, the consultations with such local borrower would be taking place during the deliberation process required by the Bank, and they are unlikely to resemble the meaningful dialogue with local stakeholders; although arguably more so than in case of fully centralized projects.

Either way, it appears to me that having formal authorization of financing agreements only once, in a package deal, and at the end of the project, leaves very little space for domestic discretion to tailor the content of these agreements. This observation applies to all levels of governance – national, regional, and local. On the one hand this could bring about positive consequences to the affected people. Due to their commitment to the project, the governments must adhere to the standards of treatment set in the agreement even if they are tempted to reduce them in case of budgetary deficit. But then on the other hand, this lack of discretion undermines the capacity of the government to adjust project activities in a way that reflects the demands of the affected people, and which could otherwise be advocated through such means as media campaigns, public protests, local pressure groups, and the like. The development projects inevitably ‘freeze’ certain obligations and take away a lot of flexibility and responsiveness that would otherwise shape governmental decisions. Indeed, this observation applies to both, validation stage, and the implementation stage that will be considered next.

Finally, it is the case with most modern constitutions that popular decision-making is usually constrained through an extensive catalogue of individual and collective rights that are traditionally guarded by the judiciary. The safeguarding function of general courts in the area of development financing will therefore be considered with great detail in the upcoming chapter on review procedure. At this point it is important to underline that according to some constitutions the courts also have a right to intervene prior to ratification of development financing agreement and to put the process of validation on hold. However, the examples of such constitutionality checks are difficult to come by, especially beyond Europe, and the

350 For instance the constitutions of Chad (1996), Chile (1980) and Kazakhstan (1995) amongst many others.
351 Rupp in his paper considers all treaties reviewed by German Constitutional Court in 1977, and concludes that all instances of such review were ruled in favour of ratifying the treaty - because the court is understandably unwilling to intervene in international affairs of the state, see H.G.Rupp, ‘Judicial Review of International Agreements: Federal Republic of Germany’, 25(2) American Journal of Comparative Law (1977) 286.
general analysis of judicial review procedure in this set-up will try and explain why that might be the case\textsuperscript{352}.

All in all in this section I attempted to illustrate that internal validation procedure by the borrowing state can hardly be perceived as a viable accountability mechanism available to the affected people. Partially that is due to the extensive deliberation process that takes place beforehand; and partially because validation is normally concerned with the entire ‘aid package’, and has little possibility to examine its constituent parts. As a result, the project normally travels through validation procedures without changing its form or content; and eventually enters the implementation stage.

4.4. Limited scope of accountability during project implementation

The duration of project implementation stage depends on each individual project, but can last from several months to over a decade\textsuperscript{353}. The cooperation that lasts this long requires a firm legal basis and solid management structure, which is provided by the project-specific rules. To an extent that decisions about implementation stage are not covered by project agreements, they are governed by domestic law of the state in whose territory the project is taking place: it would appear unrealistic for project-specific rules to cover all potential issues that might arise over such an extensive period of time\textsuperscript{354}.

Operational policies of the Bank on the other hand are considerably less pronounced on the issues of implementation than they are on deliberation\textsuperscript{355}; possibly because there is a presumption that the parties would include all the important issues in the project agreements by following the requirements of deliberative stage. Even though with little detail, the policies

\textsuperscript{352} See the discussion in s.5.2.1. and s.5.3.2.
\textsuperscript{353} Project documents often mention the importance of executing the project during the term of the political authority that holds power during project deliberation, which is also why project duration is often tied to the election cycle (normally between 3 and 5 years).
\textsuperscript{354} Note that due to the Bank’s governing law clause the borrower cannot invoke its domestic law to justify non-compliance with its contractual obligations. This means that from the perspective of project implementing agencies, domestic law could not trump project-specific rules; but arguably such clause does not preclude the application of domestic law altogether.
\textsuperscript{355} This has been acknowledged by Bank’s own Independent Evaluation Group (IEG) (see ‘Safeguards and Sustainability Policies in a Changing World’, IEG (2010)); the WB ESF Second Draft addresses this issue by introducing a more flexible risk assessment tool, which would extend throughout all project stages (see the Second Consultation Draft)
do lay out some important principles about the division of implementation-related responsibilities between the Bank, the borrower, and other participating entities. Looking at these few provisions, also at the sample of development financing agreements themselves, it becomes possible to dissect a governance template that is normally put in place to execute the project. This in turn shows what control over the decision-making the affected people might expect to acquire in this stage of the project cycle.

4.4.1. The link between discretion and accountability

The entity that is in charge of project implementation in official terms is the borrower (i.e. not necessarily the state in whose territory the project is taking place). There are at least two types of decision-making units that the borrower must put in place in order to ensure sound and effective implementation: the one in charge of operational matters (project management unit); and the one in charge of removing any hurdles at project’s policy-level (project steering committee, or the like). The former body is normally composed of a small team of administrators with project management experience, which then manages the outsourcing of project activities to external agencies and contractors356. The second type of body, the one in charge of policy-level commitment on behalf of the borrower, is normally made of representatives of different ministries or other political and (or) administrative officials from relevant units of government. The same scheme is replicated at the lower levels of governance, if the project involves several regions or provinces, and if more decentralized structures are needed to ensure the effectiveness of project management. In addition to the above, project execution arrangements usually include a relatively complex scheme about how project operations link with the larger institutional structure of the borrower, as a matter of ensuring internal accountability of these governance units to the borrower.

The crucial feature of all these governance arrangements is that they are all created as ad hoc units, i.e. in absolute majority of cases they only exist and acquire their decision-making powers because of the project agreements, and only during the implementation of the project. In practice this means that their decision-making is first and foremost informed by the project plans and objectives. In the more complex projects these units might be charged with a responsibility to elaborate the so-called ‘annual implementation plans’ which gives them a bit more discretion to plan and act independently; but the scope of such planning exercise is

356 And in some cases these agencies might be fully in charge of implementing certain project component, and have a separate project agreement with a Bank; see s.3.3.1.
nonetheless limited to pre-defined project outline. Underneath it all, the mandate of these governing structures is very narrow and leaves them little space to manoeuvre outside the rationale of the project; i.e. they are charged with project implementation as planned and agreed upon by the parties. Only in exceptional circumstances the policy-level governance units can put forward the suggestions to adjust and restructure the project; which then must be approved by the Bank and other parties to the agreement.

The Bank itself in this stage is charged with ‘implementation support’ \(^{357}\), which is the term that seems to have partially replaced Bank’s previous commitment to ‘project supervision’ \(^{358}\) (and which essentially appears to be the same task, only repackaged under a different title). From a purely legal perspective this role is fluid and rather difficult to pin down. The way this responsibility is set out in contracts with the borrowers, the Bank plays absolutely no direct role in implementing the project. Instead, according to Bank’s policies, its responsibilities are limited to ‘reviewing the monitoring by the Borrower’ \(^{359}\); also looking after the implementation of contentious parts of the project (mainly those covered by safeguard policies); and flagging up the newly occurred risks that are highly likely to impede the implementation – also suggesting possible solutions to the borrower (which, at least in theory, the borrower is not obliged to follow). At least in legal terms those are relatively weak commitments, placing a low hurdle of responsibility on the Bank. This would suggest that Bank’s intimate involvement with projects is mainly caused by its internal institutional practices; more so than its formal legal commitments.

The observation that follows from the description thus far is that entities implementing the project could generally be classified as domestic administrative agencies (with an exception of projects supporting national legislative reforms that require participation by national legislature). Even in those cases where the borrower is not a public entity but for instance has a mixed ownership (e.g. a public-private enterprise, such as national utility provider), it is still an ‘administrative authority’ in a sense that it is administering certain functions of the state, but delegated to it via different legal means (i.e. contract, rather than direct institutional mandate). Without such administrative function, it would be not possible to explain why the state is guaranteeing such transaction, and are engaging the World Bank funding in its capacity as a sovereign. Either way, at least from the legal perspective, the decision-making of these

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\(^{357}\) Note that under operational policies validation stage is considered to be a part of ‘implementation support’; see OP 10.00 ‘IPF’ (July 2014 revision) para. 21 and BP 10.00 ‘IPF’ paras. 32-52.

\(^{358}\) This term is still used in the context of DPF, see BP 8.60 ‘DPF’ para.22.

\(^{359}\) BP 10.00 ‘IPF’ para.40; also BP 8.60, ‘DPF’ paras.22-23.
administrative agencies is distinct from the decision-making of the Bank, since the Bank is only meant to intervene directly when there are serious threats to the implementation of the project. By extension, this means that any authoritative acts adopted by such administrative agencies would have status of domestic administrative decisions.

It seems to me that such domestic administrative nature of implementing decisions has both, positive and negative implications to possible accountability channels available to individuals and communities. On the more positive end, this domestic status means that decisions implementing the project must be in line with any other regulations that are applicable to administrative agencies, such as for instance national administrative law principles and procedures. Among other things, it would mean that these decisions are susceptible to judicial review; although such review would only be symptomatic and potentially could not tackle the source of decision, that is, the agreement itself. Either way, it seems positive that these implementing decisions are ‘free’ from the negative implications of ‘internationalization’; that they are ultimately being taken within the ‘familiar’ state apparatus; and that the agency in charge could be operating relatively close to the affected communities (at least in physical terms). Arguably this is the sole stage of the project cycle where such proximity and full ‘domestication’ of decision-making is present.

On the more problematic side of accountability relationship in this stage, it seems that in order to keep these administrative authorities to account effectively, the relevant mechanisms would necessarily have to be in-built in the project agreements, and only very little external engagement would be possible otherwise. For instance, if project outline requires these authorities to conduct consultation on a certain matter before taking the decision – and leaves sufficient discretionary space to include such external views in their judgment – then these governing units would undoubtedly have to implement such framework, and project execution stage would be (to an extent permitted) open to external input. If however the project objectives and implementation plans are fully worked out from the deliberative stage and they do not include requirements of consultations, public hearings and the like, then it is difficult to envision how and why project implementing units would open up their decision-making to any external scrutiny. From their perspective such exercise of consultation would only generate the suggestions that might require of them to go beyond their limited mandate; nor would

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360 See the discussion in s.5.2.1.
361 Ibid., and also s.7.1.
they be able to respond to any such input, because of the strict budgetary constraints that are present within boundaries of the project.

Arguably this sort of narrow discretionary power is not overly problematic within itself; it is not uncommon for administrative agencies to only stick strictly to their delegated tasks, without taking into account any external opinions. However, the potentially problematic consequences of such discretion stems from the fact that in case of development financing these governing units, strictly speaking, do not belong to the general political system of the state, in a sense that they are not directly subordinate to those authoritative state institutions that otherwise oversee administrative decision-making. So for instance, when a national forestry commission decides to clear certain area of national forest – the ministry of environment (and by extension – the entire executive branch) is ultimately responsible for the consequences of this decision. In principle this means that there always is an institution that can control, and potentially suspend, or override the inappropriate decision by such an administrative agency. However, in case of these ad hoc project agencies – although formally they are a part of the borrower – their sole purpose is to execute the project; and so they are normally not subordinate to single institution with a permanent governance mandate and competences over a certain area of public policy. Instead, the oversight of their activities is left to the Bank, who in this case acts as a surrogate ad hoc supervisor.

This is not to say that the above mentioned forestry commission, which is a part of general administrative apparatus of the state would automatically be more accountable than the governing units of the project. However, it seems to me that the former would be generally more susceptible to political influence beyond the rationale of the project, and that this influence would more easily ‘translate’ into adjusted decision-making. Instead, in case of development financing the agencies in charge have less flexibility, they are less susceptible to domestic political oversight, and they therefore have less possibility to be responsive to their operating environment. Put otherwise, because of their strictly administrative design project governing units are less capable to be accountable to the public, including the affected people. The capacity to be accountable requires for them to have the discretion of decision-making in the first place, that is, no accountability is possible without sufficient discretion. In the context of present research this last observation simply re-emphasizes the crucial role of deliberative stage – it is during this stage that the scope of discretion of administrative agencies is being defined; and it is at this stage that all possible mechanisms of accountability are being either included, or excluded from project design.
The ‘in-built’ mechanisms of accountability (i.e. those that are created through project agreements) are in fact common place with regards to mutual accountability between the parties to the transaction. According to the sample of agreements considered in this study, also following the general principles set out in operational policies\textsuperscript{362}, the borrower is committed to an on-going monitoring and evaluation of the project, which is recorded through a line of periodic reports presented to the Bank. The Bank on the other hand is committed to organizing the field visits and supervisory missions, also providing concrete input on these written reports. Overall, both the agreements and operational policies seem to promote a spirit of cooperation and dialogue between the parties; and there are no objective reasons why the same idea could not be replicated with regards to relationship of accountability towards project affected people\textsuperscript{363}. However, for the moment neither the operational policies, nor the sample of agreements analysed in the present study, requires for these periodic reports to be disclosed or opened up for comments from the public\textsuperscript{364}.

4.4.2. Internal mechanisms of redress

Whilst consultations, disclosures and similar mechanisms of public oversight during implementation stage are fully reliant on the content of the agreements, there exist several internal mechanisms of redress that are available to the affected people, notwithstanding the will of the parties. They are put in place via internal regulations of the Bank. These mechanisms can be divided into: (a) project-level mechanisms, (b) grievance review service and (c) informal operations by the Inspection Panel. There is quite a lot of literature on these review mechanisms, which is why they will only be presented succinctly, as a matter of introducing their key strengths and shortcomings:

\textbf{a. Project-level grievance mechanisms.} According to the operational policies, projects that require involuntary resettlement and/or involve indigenous peoples must create project-

\textsuperscript{362} BP 10.00 ‘IPF’ para.38; also OP 8.60, ‘DPF’ para.16.

\textsuperscript{363} In reality such difference stems from the fact that the Bank holds relatively ‘heavy guns’ that permits to keep borrower to account (i.e. potential economic sanctions, also a possibility of suspending or cancelling the loan); whereas affected people have no effective leverage; see BP 10.00 ‘IPF’ para.28; OP 8.60, ‘DPF’ para.37 (‘Remedies’).

\textsuperscript{364} The only inclusion of affected people within the regime of mutual accountability happens in those instances where project design contains such indicators as ‘satisfaction by project beneficiaries’, which are then included into the monitoring system of the project; in such cases affected people get a chance to provide their input via focus groups created for borrower’s self-evaluation.
level grievance mechanisms. These mechanisms are generally concerned with such matters as distribution of in-kind support from the project and/or compensation rates, and are normally created at the local level, with an inclusion of local representatives. The objective of these mechanisms is normally to deal with intra-community disputes, such as delineation of land for resettlement, or counting the exact share of compensation for the loss of certain assets. These mechanisms tend to be highly limited in terms of their competence and scope of issues they can address, and they also are included in only in a limited group of projects, involving some redistribution of communal wealth. Nonetheless, they do provide an easy, basic-level method of dispute resolution and redress, which therefore can be considered as an accountability mechanism of the sort.

**b. Grievance Redress Service.** In addition to the above, the Bank has a more general scheme of resolving complaints, entitled ‘Grievance Redress Service’ (GRS). This is a relatively new review procedure that mirrors the logic of Inspection Panel, except that it is managed internally, by the staff of the Bank. The time limits of this procedure are considerably shorter than in case of the Panel (10 days for initial registration, as opposed to 21 days of the Panel, also 30 days for proposing solutions, as opposed to 6 months required for Panel investigation); and the procedure only consists of one stage, by the end of which the applicant can either accept the solution proposed by the management, or decline it – in which case the procedure would be considered closed. Application does not initiate suspension or revision to the project: it merely aims to trace the pathways of finding solutions that are feasible at the time of application. Because the mechanism is very recent and no commentary can be provided about its cases, it is difficult to tell whether it will prove to be useful and effective tool of accountability.

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368 Starting April 2014 Panel’s review procedure has been removed from Operational Manual, and is regulated under the ‘Updated Operating Procedures’ (2014).  
369 According to the Bretton Woods Project, procedure has been put in place in April 2015; see [http://www.brettonwoodsproject.org/2015/07/world-bank-fails-to-support-project-critics/](http://www.brettonwoodsproject.org/2015/07/world-bank-fails-to-support-project-critics/).  
370 At the moment of writing the mechanism has received 27 complaints, which is a relatively large number in comparison to the Inspection Panel (which has received 104 cases over several decades of its functioning). Nonetheless, direct comparisons between the two should be avoided, because GRS can also deal with procurement issues, which do not fall under the competences of the Inspection Panel. The case log of GRS is available at:
c. *World Bank Inspection Panel before the complaint has been registered.* The third option of redress available to affected people during project implementation stage is to submit their issue to the World Bank Inspection Panel under its ‘Pilot’ scheme.\(^{371}\) Under this scheme the Panel would not engage in a formal investigation of Bank’s actions, but would try and find mutually satisfactory solutions (between the affected people and the project parties), without officially registering the complaint. Under this scheme the Panel is not acting in its standard capacity, i.e. as a formal review mechanism that checks Bank’s compliance with its proper policies; but instead it engages in a sort of *mediation* exercise.

This is the so-called ‘problem solving function’ that is practiced by most similar review mechanisms in all major MDBs – including the Compliance Advisory Officer (CAO) of IFC.\(^{372}\) Up until recently the Panel did not have this function spelled out in official terms, although in practice was exercising it (mostly in cases where it decided not to register the complaint, and/or not to conduct the investigation). The sole purpose of such problem solving function, similarly as in case of the aforementioned GRS, is to resolve the immediate issues of affected people in a way that is feasible within project limits, and that is acceptable to the parties. On the whole, the Panel does indeed appear to be well placed for such a facilitator’s role – it operates high enough in the organizational ladder of the Bank (at the level of reporting to Board of Directors) for it to suggest meaningful solutions; and it is detached enough from the operational units of the Bank to be considered trustworthy and credible from the perspective of affected people.

Nonetheless, this mediating role of the Panel was also criticized by external observers.\(^{373}\) The main source of critique stems from a possibility that resolving affected people’s issues

\(^{371}\) ‘Piloting a new approach to support early solutions in the Inspection Panel process’, The World Bank (November 2013); available at [http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/PilotingNewApproach.pdf](http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/PilotingNewApproach.pdf). The procedure was created for 3 year ‘pilot’ period, with a view to update it and decide on its evolution after this initial stage. Note that a request to the Inspection Panel can be submitted not only during implementation, but also during the deliberation stage of the project cycle.

\(^{372}\) The Panel too, under certain circumstances used to take this less formal and more action-oriented approach, before it decided present it as an official alternative; see Saper, ‘The IFC’s Compliance Advisor/Ombudsman (CAO)’ at 1296-1306 for an overview of the ‘three functions’ of IFC CAO (ombudsman, compliance and advisory), of which the first two are executed by the Panel.

through informal means can undermine Panel’s capacity to act as *independent* compliance review mechanism. Van Putten have put this point forward with regards to accountability mechanisms of other IFIs (before Panel launched its Pilot procedure)\(^{374}\), arguing that the two functions merged together and conducted by the same body blurs the line between investigation and cooperation, and indirectly pressures the applicants to engage in a less formal option, avoiding open contestation\(^{375}\).

I find these arguments convincing, and overall it seems like the clear separation of the two functions – or better still, having two separate bodies to execute them, would be preferable\(^{376}\). However, in the upcoming chapters I am going to argue that Inspection Panel, even whilst engaging in a formal procedure of review, is *not* an independent review body, at least not from the legal perspective. Hence, to my understanding none of its functions can be fully separate from the interests of the Bank’s management. In other words, the merger of the two functions is already inherent in the nature of initial Panel’s mandate, and is therefore not as problematic as its critics would suggest.

All in all, several general observations emerge from this overview of implementation stage. Firstly, one can observe that in this stage affected people have somewhat more avenues to flag up the issues that are bothering them – at least if we compare these possibilities with the previous two stages. However, these possibilities are strictly confined to the limits of initial project design, and by using those affected people cannot second-guess the rationale of project itself; or its parts. Such prevalence of ‘bounded’ participation and redress is simply indicatory of the very nature of implementation stage – which, more so than any other part of the project cycle is strictly *administrative*, i.e. in this stage the bodies in charge must only follow the roadmap handed to them by the project deliberators, and cannot be amending it on the way. The Bank appears to be the only party in these interventions that continues to be responsible for overseeing how the project fits into a bigger policy picture in which project operations are taking place. Otherwise, borrower’s main task in this stage is to try and keep project activities moving, and aligned as much as possible with the initial plan; also to not deviate from this plan even in the face of changing circumstances. *Some* project parts might be

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\(^{374}\) Van Putten, *Policing the Banks* at 105-162.


\(^{376}\) It is possible that with the adoption of new WB ESF the problem solving function will be conducted by GRS, but for the moment there is no commentary that could explain whether that was the rationale behind the creation of this mechanism, and whether it is indeed going to replace the Pilot procedure by the Panel.
designed to be flexible and open to different approaches; but even then – these approaches are only aimed at achieving specific project indicators.

In a way, such observation about implementation stage simply describes how development financing operates more generally. It (i) creates policy-level commitments on behalf of the borrower; (ii) fixates them through an agreement, and (iii) as a result, these commitments cannot be altered merely because of the changing circumstances. The very nature of development financing is to achieve progress in such solid ‘blocks’ of policy instruments and/or infrastructure developments; hoping that they will bring about positive changes in societies where interventions are taking place. Development of this sort is not incremental: it takes place on a large scale, through systematic and bold steps; and they are meant to bring order to chaotic reality precisely because they are large-scale, systematic and bold. Looking at project implementation from this perspective it can be explained why some issues raised by affected people in this stage cannot be resolved though ‘administrative means’. That is so because they are merely echoing the deeper political disagreements that were not resolved at the deliberation stage – and which end up being ‘cemented’ in the project design without possibility of questioning them.

This brings me to some concluding remarks about accountability mechanisms in different stages of project cycle, and the cross-cutting issues that are present in the evolution of a project as an integral system of decision-making. Even as a matter of very general assessment, one can observe that the three stages considered herein are distinctly different in terms of responsible institutions, procedures of taking decisions, and applicable accountability mechanisms. From the perspective of parties to the transaction these differences are perfectly justifiable; yet from the perspective of external participant affected by such transaction – this sort of diversity can be a source of grave concern. The Bank, the borrower, and the highest institutions of the borrowing state seem to be playing a ‘football’ of responsibilities over the transaction; meaning that in different stages completely different institutions are in charge of it. In that respect the projects do seem a bit like the ‘orphans’ of political systems, in a sense that nobody is fully responsible for how these projects are going to evolve and end up looking when completed.

It is possible to argue that such uncertainty is simply an intrinsic feature of any contracting – and that each project is merely a product of such process of on-going negotiation and deliberation. But this yet again brings me back to the initial argument presented in the beginning of this thesis, which is that such freedom of inventing and adjusting development
solutions should be shared with affected people throughout the entire project, by including them in all decision-making processes and by providing them with a similar level control over this process, as all other parties to the transaction. The mechanisms that have to be ‘cherry picked’ from the different parts of the project governance universe simply do not seem to be coherent, effective and comprehensive enough to put affected people into such a position.

4.5. Locating the gap: assessing control over decision-making at the project level

The underlying observation running throughout this chapter is that accountability mechanisms are inevitably context-specific. The role of consultation, disclosure and redress procedures as accountability mechanisms depends on how they are applied in practice. This practice in the context of the World Bank financing is determined by what can be referred to as the ‘governance template’ of the Bank.

The idea behind this notion of ‘governance template’ is that the Bank’s style of governance depends almost exclusively on its internal regulations and practices, and is maintained through its standardized contracts and drafting techniques. Same as in case of operational policies, such governance template has evolved over many years of Bank’s existence, through trial and error, and eventually ended up framing and dominating the decision-making of all power-holders that are dealing with the Bank. Neither the mode of decision-making itself, nor the accountability mechanisms that are meant to constrain it, are set by the hard legal provisions. A notable exception in this regard are the laws that govern domestic validation procedures, but those too, are largely ‘fitted’ into the financing process through Bank’s internal procedures.

This governance template of the Bank is marked by several characteristics. Firstly, it is heavily reliant on the deliberative stage of the process. Subsequent decisions in both validation and implementation stages tend to ‘free-ride’ almost exclusively on the information, arguments, and principled agreements made at the initial phases. Secondly, the decision-making in all stages tend to be grounded in the professional insights and experts’ analysis, and downplay popular participation as necessary component of development discourse. Thirdly, the entire process – despite being relatively well structured through operational policies – appears to be short of clear checks and balances. There is only one point in the project – the validation of the entire funding deal by the competent national authority – that is clearly marked and identifiable. Fourthly, none of the other potentially decisive ‘check points’ in the project, for instance the funding decisions by the Bank or preliminary agreements by the parties, are
publicly announced or open to external input. This means that even if there are other points of
accountability in the current process, those are not visible to those who would be interested in
using them to scrutinise such authoritative decision-making.

All these characteristics provide an important background to the question of control by the
affected people, and the subsequent balance of power in their relationship with the power-
holders. Overall, it is clear that the mechanisms of accountability do exist. However, they are
weak and sporadic. The difficulty of using these mechanisms in a systemic manner is
undermined by several factors.

Probably most prevalent weaknesses stems from the fact that current governance template is
so focused on the deliberative part of the process. In such set-up both transparency and
participation becomes crucial, from as early on in the process as possible. It is disconcerting
that these two mechanisms currently only help the power-holders to share and acquire
information; but they are not aimed at sharing control over what decisions are being made
and why.

Another issue that stems from such a heavy reliance of project deliberation is that the highest
decision-making authorities during validation stage can only accept or completely dismiss the
entire funding deal, but not deliberate on its parts. Further public reflection at domestic level
is neither encouraged, nor incentivised. The administrative authorities in the implementation
stage are only left with small pockets of discretion to respond to the changing needs, including
those of the affected people.

The Bank alone reserves the prerogative to decide on the necessary changes to the course of
the project, which is why the mechanisms of redress addressed towards the Bank appear to be
relatively effective. However, these mechanisms can only respond to serious harm and
material needs of the affected people, and inspire limited changes that the parties to the
agreement are willing to accept. They do not however have the necessary institutional space
to focus on the essence of the disagreement, which is often ideological and based on the
diverging social interests and needs.

377 See the discussion in s.6.3.2. and s.7.1. for further argument about the deliberative characteristics of
project law.
Such observation about redress mechanisms being reliant on the will of the parties can be expanded and used to explain the overall accountability regime at the project level. In this ‘regime’ the power-holders can decide the extent to which their decision-making would be subjected to external scrutiny. In most instances they have a choice, rather than an obligation to do so. For the moment their choice usually entails keeping the difficult decisions away from the public debate, and avoiding any kind of round table-type of mechanisms. Indeed, there is little space for true reconciliation of national and local opinion about most contentious points of the project. The decision to start intervention is ‘hard’ and usually portrayed as inevitable. However, the idea of governance template points towards the fact that none of these choices are set in stone. More control could be transferred to the general public and affected people if the power-holders were to accept the need for more stringent accountability regime.

The conclusion above begs some kind of justification, notably some explanation about the objective reasons that uphold such an inadequacy of accountability mechanisms in Bank’s development financing. Some of the justifications are more convincing than others, but to my understanding they all fail to provide the satisfactory arguments. Probably the least convincing is the idea that the Bank cannot enhance its accountability mechanisms due to its institutional limitations, and in particular because of its apolitical mandate. This justification appears to be simply misleading. The Bank is already exercising a great deal of influence over borrower’s decisions, and clearly none of the projects are produced by domestic deliberation alone. Hence, the Bank’s operations are already taking place far beyond the ‘usual’ frontline of state sovereignty. There seems to be no objective reasons why the hard line of non-intervention should be drawn precisely to prevent the enhancement of transparency, participation, and generally greater level of local and public control.

Another justification reoccurring in the relevant discourse gravitates around the notion of effectiveness. The idea here seems to be that strong accountability takes time and requires additional resources – and does not necessarily produce the ‘best’ (i.e. most effective) results. This for instance explains the strongly analytical flavour of most decision-making by the Bank – where the in-depth expertise is meant to ‘fill in’ for the risks of not engaging in the negotiations with most vulnerable groups. The same cautiousness is exercised with regards to transparency – where the parties withhold any public announcements until they had fully agreed amongst themselves. On the whole, it seems appropriate to acknowledge that there

\[378\text{ Mandatory mechanisms of judicial review is an exception to this rule; they will be analysed in the next chapter.}\]

\[379\text{ See the discussion in s.7.3.2. about the importance of reconciliation in this context.}\]
might be some tension between pursuit of accountability and effectiveness. Yet on the other hand, the bold inclination towards effectiveness – to the point where the value of popular debate is borderline dismissed – appears alarming. So much so that effectiveness comes across as a convenient, overly general and even parasitic principle used to deprive the affected people from having more control over their political and economic choices.

Finally, the last justification for such low level of control could be associated with a pursuit of national public interest. This notion tends to be employed in a variety of policy areas, and is generally used to justify coercive state measures, such as expropriation, deprivation of certain human rights, expulsion from land, and the like. The subject is problematic and had been criticised for its pervasiveness, but could potentially get activated in this area. In other words, the borrower (alongside the Bank) could argue that the public interest of the larger entity (state, region, or city) overrides the interests of public individuals and smaller political units that might get affected by the funding deal. However, even if such argument was to be made explicit by the parties and accepted by the stakeholders to the transaction, it would only serve as an explanation why affected people cannot expect to persevere on upholding their initial status quo. It still would not explain why affected individuals and communities should be systemically incapacitated and deprived of any meaningful say in decision-making process that threatens their lifestyle, or even their entire social and cultural existence.
Chapter Five

Locating the accountability gap: the role of formal review procedure

Introduction

This chapter focuses on the available review procedures, which enable affected people to challenge the decision-making in development interventions. Such procedure can be singled out from the rest of the accountability mechanisms for its reliance on the reasoning of an intermediary body. This body is charged with resolving a disagreement between (some of) the affected people, and (some of) the power-holders. Because of their formality and the ‘third person perspective’ these mechanisms are stronger than the rest, and they can go deeper into the political and economic disagreements caused by development projects. However, at the same time their functioning is not necessarily grounded in the rationale of cooperation and/or mutual acceptance, which is why they are not always effective, and are not necessarily capable of bringing about the most desired outcomes for the affected people.

The chapter is divided into two major parts: the legal issues concerning the access to such procedure (admissibility); and those that are contributing to its outcomes (merits stage). The two principles used for assessment in this chapter are access to independent review and meaningful outcomes. Overall, this chapter will show that review procedures available in development financing are riddled with systemic shortcomings that are contributing to the ‘accountability gap’ identified in the previous chapters. As a result, affected people have limited and fragmented possibilities to ensure that that the power-holders adhere to a full range of accountability standards applicable in this context.
5.1. An overview of review procedure in the context of development financing

5.1.1. Characteristics and available forums

The principle of review originates from domestic administrative law\textsuperscript{380}. Notwithstanding some important details that distinguish review procedures in different constitutional systems, its main elements flow from general constitutional principles (such as rule of law, separation of powers, and the like), and are therefore shared in most countries around the world. Eventually this principle has ‘travelled’ from the domestic administrative law realm to the international level, and started being used in the context of international institutions. It thus gave birth to such mechanisms as international HR treaty bodies, and the World Bank Inspection Panel\textsuperscript{381}.

The objective of the formal review, the way it is understood in this work, is to decide whether a particular decision was taken in accordance with applicable rules and standards. There are three differences between this sort of review and the redress procedures analysed in the previous chapter. (i) The underlying rationale of redress mechanisms is pragmatic. They are aimed at resolving particular issues of particular groups or individuals. In contrast, the formal review analysed in this chapter is meant to assess the general application of rules. (ii) Formal review is considerably more legalistic and structured, which in return bears effects on the outcome of the dispute. The body in charge must follow certain procedural steps, and cannot deviate from them merely for the sake of pragmatism, as it can do in the case of redress mechanisms. (iii) The remedies that follow from formal review can be more forceful than in the case of informal redress. The body in charge of review does not have to tailor its decision to the will and/or resources of the parties. On the other hand, the outcome of the dispute under formal review procedure can end with the judgement alone (for instance that human rights were violated), without prescribing specific remedies. The latter is uncommon with internal redress mechanisms – at least not in those cases where misconduct of decision-makers had been acknowledged by the Bank.

Understood in a classic sense, review is only available in the context of authoritative decision-making. This means that it can only be used to scrutinize the activities of those bodies that are

\textsuperscript{380} This claim is borrowed from GAL literature; see Kingsbury et al. ‘The Emergence of Global Administrative Law’.

\textsuperscript{381} Fourie traces evolution of judicial oversight in several countries around the globe, and argues that the Panel follows the same path and functions under the same principles; see A.N. Fourie, \textit{The World Bank Inspection Panel and quasi-judicial oversight} (2009) at 2-15.
exercising public powers. If the project is executed by the private entity (even though such execution is guaranteed by the state), the principle of review would only apply to the decisions that are taken by public institutions, but not to the decisions of private actors. This rule of publicness is not absolute: in some countries, if the private body is clearly charged with certain public functions (normally delegated to it by a competent institution), then its decisions can no longer be considered as private, and so it might become subjected to judicial review.

In the area of development financing, there are three potential forums that some of the affected people (depending on the mechanism) could refer to. These forums (hereinafter – ‘review bodies’) are:

(i) The World Bank Inspection Panel (the Panel),
(ii) Domestic courts,
(iii) International and regional HR courts and commissions (HR bodies).

The Panel is the sole non-judicial type of mechanism of all three, which means that it is managed by the Bank, and that it was never created with a view of exercising a judicial function. Nonetheless, it consists of a group of independent experts that do conduct a formal and relatively well structured process of review, and so it can and will be considered alongside the other two (judicial) mechanisms. The other two categories of review bodies identified above are by no means homogeneous, and instead include a range of institutions, yet with some common characteristics. All three of these bodies are covered well in the academic literature, and they will therefore not be described in any great detail here. Nonetheless, for the sake of clarity and convenience, their defining features are underlined in the box below (Box 5.1).

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382 This issue is largely irrelevant to the Inspection Panel, because it can only review decisions of the Bank.
383 See for instance the difference between rules of judicial review under the common law rules in England (where courts can only review decisions by public bodies, see R. v Disciplinary Committee of the Jockey Club ex parte Aga Khan [1993]) and Scotland (where courts can review decisions by all bodies exercising public functions; see Ferguson v Scottish Football Association [1996]).
5.1.2. Stages and elements of review

Because all three types of bodies described above use similar review procedure that emanates from domestic administrative law, the role of such procedure can be examined in general terms. In particular, I think it is valuable to consider these mechanism together, and to question how they all enable (or disable) the possibilities of affected people to challenge the decisions of the power-holders – as opposed to singling out the issues of specific institutions, which is generally favoured in the relevant literature\(^\text{384}\).

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\(^{384}\) Most of the relevant literature tend to focus on either the Panel (see for instance Orakhelashvili, ‘The WB Inspection Panel in Context’; Brown Weiss ‘Bottom Up Accountability’); or the impacts that domestic courts might have on the evolution of the Panel procedure (see for instance Martha, ‘IFIs and Claims of Private Parties’; Thallinger, ‘Piercing Jurisdictional Immunity’).
Review process can be broken down into two main stages: *admissibility* and *merits*. From the perspective of affected people, the former defines their access to such procedure; and the latter – potential outcomes that can be expected from engaging with such process. The structure of both stages determines whether these mechanisms are being used, or not. To my understanding the very fact that there exists a theoretical possibility of review does not mean that this procedure functions as an accountability mechanism. The two can only be equated if the review is actually structured in a way that is both accessible to the affected people, and if it is likely to bring about positive outcomes to the claimants who otherwise must invest significant resources in order to initiate and pursue such claim.

Accordingly, in order to assess the role of review procedures qua accountability mechanisms we must ‘zoom in’ onto both stages, and to consider the factors that tend to limit their application and productivity in real life. It is possible to break down such examination into specific parts, by looking at a set of elements that review bodies must consider when presented with a request to revise the decision (Table 5.2.).

<table>
<thead>
<tr>
<th>Table 5.2. The elements of review procedure</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Admissibility stage</strong></td>
</tr>
<tr>
<td><strong>Decision under scrutiny</strong></td>
</tr>
<tr>
<td>What is the authoritative decision that is being challenged? Is the claimant challenging legal fact (i.e. individual instance of decision-making), or legal act (i.e. a set of rules)? Accordingly, does the review body have jurisdiction to scrutinise such decision?</td>
</tr>
<tr>
<td><strong>Authority that took the decision</strong></td>
</tr>
<tr>
<td>What authority has made the relevant decision? Is this authority subjected to review by that particular review body? Is the authority immune from such review?</td>
</tr>
<tr>
<td><strong>Reason for review</strong></td>
</tr>
<tr>
<td>Is the claim initiated because the relevant decision caused harm? Or is it potentially illegal, i.e. not made in accordance to the rules?</td>
</tr>
<tr>
<td><strong>Standing of the claimant</strong></td>
</tr>
<tr>
<td>Is the person challenging the decision entitled to do so, according to the ‘terms of reference’ (ToR) of that particular review body?</td>
</tr>
<tr>
<td><strong>Timing of the claim</strong></td>
</tr>
<tr>
<td>Was the request for review submitted within acceptable time limits, as set by ToR? Has the decision under scrutiny been taken during the stage of the project cycle that is amenable to review?</td>
</tr>
</tbody>
</table>

385 Review procedure by the Panel is divided into eligibility, registration, and inspection stages. Whilst eligibility is roughly concerned with the issues of admissibility; investigation deals with all the issues that generally pertain to the merits stage. Conceptually registration is an ‘in-between’ stage. It allows the Panel to make a pragmatic decision about whether the potential non-compliance with the policies was great enough to engage in the investigation process.

386 See Verones, ‘Mechanisms for reviewing compliance’. She offers a conceptual framework for grouping the existing review mechanisms, suggesting that a useful way of understanding them would be to assess the correlation between the access (to a particular compliance mechanism), and its outcomes.
### Merits stage

<table>
<thead>
<tr>
<th>Standards for review</th>
<th>What rules and standards the authority that took the decision potentially failed to adhere to? Are these standards procedural, or substantive?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Breach of standard</td>
<td>In what way has the authority failed to adhere to the applicable standards? Did it violate the law, or applied it incorrectly? Or was the decision ultra vires, i.e. not within the competence of that authority?</td>
</tr>
<tr>
<td>Possible outcomes</td>
<td>What sort of judgement is the review body competent to give? Can it mandate the parties to revise their decision and/or recommend quashing it, or can it merely acknowledge the breach?</td>
</tr>
<tr>
<td>Individual remedies</td>
<td>Can it prescribe individual remedies, or can it only issue a general judgement? How can a review body rectify the situation, having identified the breach?</td>
</tr>
</tbody>
</table>

The ToR mentioned in the table above refers to the set of rules that enable the review mechanism in the first place, and which also regulate the process of review, including its potential outcomes. In case of the Panel, its ‘terms of reference’ are decided by the Board and are set by the internal regulations of the Bank. In case of domestic courts – the rules are generally set by either the national legislation, or through judicial reasoning of the highest courts (normally the case in common law countries). The process of HR bodies is normally regulated in the founding treaty that established such body, and/or via protocols adopted by the parties to the convention. The content of review procedures is usually just as complex as the rules that these different types of bodies are meant to scrutinise.

In the next two parts of this chapter I will contrast the procedural requirements of these three types of review bodies. The description of each stage will start with a summary table that outline the key provisions governing the work of all review bodies, and will then move onto the more detailed discussion about the most contentious points of such legal framework. The analysis will attempt to identify the tensions and similarities between the three approaches, and also the accountability gap that becomes apparent when one considers these three procedural devices together.

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5.2. Access to review (admissibility stage)

It would be inaccurate to claim that affected persons’ access to review depends solely on the legal hurdles of the procedure. Probably the most serious obstacles to such mechanism stem from the extra-legal factors, such as resources required to submit the claim (although the procedure itself is usually free, the fees for legal experts can be substantial), geographical remoteness of affected areas (i.e. difficult physical access to courts), the unsatisfactory channels of communication (e.g. lack of internet access, and/or fully functional postal services).

The insufficient knowledge about the rules and/or indeed the very possibility of review can be equally limiting. In case of domestic courts there is an issue of institutional capacity to engage with internationalized decision-making of such scale. All these factors can act as creeping obstacles that hinder the access to review mechanisms. Nonetheless, these factors are not covered by the present research. Instead, the present section is looking at the legal and institutional issues that contribute to the extra-legal problems outlined above.

The table below provides a synthesis of the admissibility requirements in the ToR of review bodies (Table 5.3.). Because judicial bodies are all guided by slightly different rules (depending on the country or specific instrument of HR protection), the observations below are only meant to give a principled overview of relevant models of regulation.

<table>
<thead>
<tr>
<th>Admissibility requirement</th>
<th>Inspection Panel</th>
<th>Domestic courts</th>
<th>HR bodies</th>
</tr>
</thead>
<tbody>
<tr>
<td>What decisions can be reviewed by this body (decision)</td>
<td>All decisions within the projects funded by the IBRD or the IDA, as long as the project is active and on-going.</td>
<td>- All legal acts that create effects in the territory of the recipient state, if they are adopted by an authority that is amenable to judicial review; - All decisions implementing the legal acts mentioned above.</td>
<td>Decisions and acts that might have violated states’ obligations under the relevant HR treaty, if the state accepted jurisdiction of such international body.</td>
</tr>
<tr>
<td>Whose decisions can be reviewed by this body (authority)</td>
<td>The decisions and acts by the Bank (at the level of management and staff, but not the Board of</td>
<td>All authorities of recipient state that are amenable to judicial review (the exact scope defined by the</td>
<td>All authorities whose decisions might have caused HR violations in the state party to the</td>
</tr>
</tbody>
</table>

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388 This is a rough generalisation that does not take into consideration the debate about extraterritorial application of HR treaties (see generally M. Milanovic, Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy (2013)).
The elements of admissibility stage described above can be roughly divided into three groups, notably (i) the issues of jurisdiction, which are mainly determined by the decision and the authority that is being challenged; (ii) the issues of justifying the review, which decide whether a specific person can be considered as ‘affected’ in particular circumstances; and (iii) the issue of timing, which largely relies on the applicable rules, but also the fact that in the early stages of the project cycle the assessment of negative effects (e.g. in case of human rights’ violations) could only be hypothetical and difficult to prove.

5.2.1. Issues of jurisdiction: authorities and decisions susceptible to review

Dealing with a riddle of jurisdiction is a difficult exercise for the review bodies. Of all the bodies, the Panel has probably the easiest task in asserting its jurisdiction over development projects and related decision-making. The entire logic of the Panel’s work is adjusted to the context of development financing; and so its review process is open to the uncertainties in this area. The only two issues that the Panel must establish to assert its jurisdiction is (i) whether certain decision was a part of the development project in question; and (ii) whether the Bank had any control over adverse and material harm caused by such act. The Panel has a relatively lax attitude to the situations where decisions could primarily be allocated to the domestic

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[389] The Panel has noted the difficulties of reviewing the cases where all funding is disbursed in one tranche, as is often done in case of DPF (see for instance DRC ‘Transitional Support for Economic Recovery Grant’ (Investigation Report, August 2007) at xxix-xxvii).
institutions – since it freely accepts my previous observation that in most instances the Bank has the responsibility of the oversight. Overall, it seems that the Panel can overstep, reverse or tailor its competences with relative ease, depending on the needs of the project and its circumstances.

The situation of asserting jurisdiction is more complicated from the perspective of both types of judicial bodies. That is because both of them have strict legal (i.e. binding) limits that dictate the sort of decisions they can review; and the authorities they can scrutinize. These limits are created by the general legal principles (such as rule of law, separation of powers), and also by public international law. Such standards are more rigid than the internal regulations of the Bank, and make the courts more scrupulous about the consequences of asserting their jurisdiction.

Of the two types of judicial bodies, it seems to me that HR bodies have more space to scrutinize the relevant decision of responsible authorities. The process of HR review is triggered by the potential violation of broadly perceived rights; rather than specific features of a particular decision. Hence, as in the case of review by the Panel, HR bodies have more leeway to conduct an overarching review of all relevant decision-making processes. They can identify the cause of violation even in those cases where there was more than one responsible authority, and where it is otherwise difficult to untangle whether the decision has been made by the borrower, or directly initiated by the Bank.

The main obstacle that restricts affected people’s access to review by HR bodies is that their jurisdiction is normally conditioned on the exhaustion of local remedies requirement. Therefore the affected people cannot just submit a claim to these bodies directly. Instead, the complaint must be considered in front of the domestic courts first, which is where most of the conceptual issues of asserting jurisdiction come to fore. Only when the domestic courts dismiss the claim (which might be due to the jurisdictional issues) the affected people can resubmit it to the relevant HR body. Unfortunately in the context of development financing, where the interventions are so strictly confined in time, this two-level system undermines the effectiveness of potential outcomes.

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390 See for instance Honduras ‘Land Administration Project (Investigation Report, June 2007)’ where the Panel decided that the Bank was supposed to oversee the legislative developments that took place as a part of the project activities, and to make sure that affected people were adequately represented in the related processes.

391 Most HR instruments contain a possibility of provisional measures (see for instance s39 of ‘Rules of Court’, European Court of Human Rights (June 2015)). Also, exhaustion of local remedies rule is not absolute – when it would create unjustified delays the HR body can disregard it (see for instance
hierarchy of domestic courts’ and reaches international HR body, the project is likely to be approaching completion. Hence, the measures taken by the HR body could rectify the consequences of a wrongful act, but not prevent it from happening.

The main reason why domestic courts would have most difficulties in jurisdictional matters is because they themselves are the products of (domestic) constitutional legal order. As a result, they (a) only have jurisdiction over the decisions of domestic authorities but not the Bank and not other international parties; and (b) at the domestic level they can only question those authorities that fall under their jurisdiction according to the constitutional model of that particular state. Both of these limitations present distinct challenges to the domestic courts.

a. Functional immunity of the Bank presents probably the main obstacle to the domestic courts’ jurisdiction in terms of questioning the decision-making by the power-holders other than the borrowing state.

In practice Bank’s immunity from judicial processes is not as absolute as in case of most international institutions, at least from the literal reading of its founding treaties\(^{392}\). Here is the relevant clause from the IBRD Articles of Agreements:

> “Actions might be brought against Bank in the court of competent jurisdiction in the territories of a member in which the Bank has an office, 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 or deriving claims from members.”\(^{393}\)

The scholars analysing the Bank’s immunity have argued that this clause actually entails the ‘presumption of absence of immunity’\(^{394}\). According to this position, Bank’s decisions could be challenged in front of the domestic courts, unless proven otherwise. This appears plausible if we were to follow the ordinary meaning of the text in the Articles. Yet, the Bank’s arguments in front of the domestic courts suggest an alternative reading of this clause\(^{395}\). According to such alternative interpretation this ‘reversed immunity’ provision

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393 Art.VII s.3 IBRD Articles of Agreement; Art.VIII s.3 IDA Articles of Agreement; Art.VI s.3 IFC Articles of Agreement (emphasis added).
395 Supported by Rigo Sureda, *The law applicable to development banks* at 45-48. For an overview of the Bank’s counter-arguments in front of domestic courts (mainly in the US and UK) see A.Reinisch and
was included into the Articles to permit the claims of the Bank’s creditors and commercial partners. In other words, it was meant to enable the Bank to participate in financial markets. Thus, this clause does not disable the functional immunity that otherwise shields the Bank from lawsuits in its day-to-day operations. Instead, it merely creates a narrow exception to an otherwise well-established rule of customary international law.

This second position that argues for the preservation of the Bank’s immunity appears to be better grounded, and indeed intuitively more convincing than its alternative. The Bank does operate on the international plane, just as all other organisations that enjoy full functional immunity, and therefore should not be exposed to unlimited challenges through domestic judicial channels. The exercise of its official, treaty-based mandate does require some discretionary space; and it would be difficult to maintain such space in a face of constant vulnerability to domestic review processes.

With such consideration in mind, domestic courts would appear correct to refrain from issuing judgements on decisions where the Bank has a clear and formal ‘share’. For instance they should not scrutinize the agreement to which the Bank had issued its formal approval. Otherwise the courts would risk impeding the immunity of the Bank, and therefore triggering the rules of international state responsibility.

b. The circle of domestic authorities and decisions susceptible to judicial review

presents the second set of jurisdictional obstacles encountered by domestic courts. I have already argued in the previous chapter that most decisions implementing the agreement should be reviewable, because of their domestic administrative status. However, the big

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397 Klabbers calls this freedom from judicial processes a ‘functional necessity’, but admits that it is difficult to identify what discretionary space is necessary for the organisation to exercise its functions; see J. Klabbers, An Introduction to International Organisations Law (2015) at 131-136.

398 Ibid.

399 Reinisch suggests that as a safeguard from such ‘floodgate’ of domestic claims, the jurisdiction by the national courts (to adjudicate of the activities of international institutions) could be enabled by the preliminary ruling of a credible international court, such as the ICJ (he draws this analogy from the EU context); see A. Reinisch, ‘To What Extent Can and Should National Courts ‘Fill the Accountability Gap’? 10(2) International Organisations Law Review (2014) 572.
question that remains open is whether the courts could accept challenges to the decision-making of those bodies that ratified and/or approved the financing agreement itself.\footnote{Note that analysis in this section is focused on the agreements that are concluded in a form of a treaty, because their scrutiny in the context of development financing is arguably most problematic. Moreover, each project approved by the Bank requires at least one treaty with a member state.}

On the whole the answer to the jurisdictional riddle would depend entirely on the constitutional system of the state. The decisive factor would be whether the state constitution enables a ‘weak’ or ‘strong’ model of judicial review.\footnote{US is traditionally perceived to function under the strong model of judicial review (see Art.III s2 of US Constitution (1789)), whereas UK is considered to have the constitutional system with ‘weak’ judicial review (see s2-4 of Human Rights Act (1998)). For a general theoretical distinction between the two models see M.V.Tushnet, ‘Alternative Forms of Judicial Review’, in 101 Michigan Law Review (2003) 2781.} In the latter case domestic courts can question, and in certain countries even suspend the execution of decisions by the highest powers in the state. Whereas in the countries with constitutional model of ‘weak’ judicial review the courts would only be able to review the statutory instruments that implement these agreements.

This issue is further complicated by the different approaches that states have to international law, and in particular whether or not the treaties are given direct effect in that particular legal system. In the countries where agreements must be incorporated into national legal system via domestic legislation (dualist approach) such implementing act could potentially be subjected to the scrutiny by the judicial branch. However, in cases where the treaties enter into the domestic system as soon as they had been ratified (monist approach) – it seems that the court could not challenge, let alone suspend or repeal any part of such agreement. That is so because an agreement has been made on an international plane, and therefore beyond the limits of courts’ jurisdiction, which is created and executed within the national constitutional order.

This dynamic of different constitutional models, i.e. the link between monist-dualist approach, and models of weak-strong judicial review is summarised in the scheme below (Scheme 5.4).
The scheme above presents only a theoretical ‘map’ of factors in the states’ constitution that would restrict domestic courts’ jurisdiction. In reality most countries have somewhat mixed constitutional models. For instance, the doctrine of ‘self-executing treaties’ is one of the factors that can reshuffle the scheme above. The self-executing treaty would not require implementing legislation, but whether it is ‘self-executing’ or not would have to be decided on a case by case basis. Underneath it all, it appears that what enables or disables the domestic judicial review in this context the domestic status of that particular agreement.

There is one further possibility for the courts to review the treaties concluded with the Bank, which does not fit in the scheme above. That is the constitutionality review prior to project validation by the highest authorities, but after the approval by the Bank’s Board of Directors (i.e. during its validation stage). Arguably at that stage the agreement merely has a status of draft rules prepared by the administrative authorities, even if it has already

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402 For a general description of the idea see Bradley, *International Law in U.S. Legal System* (2015) at 75-98.
403 See s.4.3.1. for a description of the validation process, and authorities that tend to take part in ratification.
undergone negotiations and been approved by the Bank. Many state constitutions envision such possibility and permit the highest courts to question the constitutionality of the treaties at their entry into the domestic legal system.

In my analysis of domestic courts’ jurisdiction I have taken a conservative and formalistic route. I have employed the most restrictive interpretation of Bank’s immunity clauses, and I have considered the agreements with the Bank to be excluded from domestic legal order. However, even with such conservative legal interpretation in mind, it seems to me that the courts have a relatively open realm of opportunities to scrutinize the exercise of domestic authority in the context of development financing. More specifically, domestic judicial review is possible when (i) the court can identify exactly which authority has taken the decision or enacted a set of relevant rules (i.e. where the decision is not of a contractual nature, but implemented via unilateral act of state authorities); and (ii) the decision has a status amenable to review procedure. However, no such review would be possible where the decision has been taken collegially with the Bank.

5.2.2. Justification and standing

Because the issue of standing is so closely related to the notion of ‘affected individuals and communities’, it also ties in very closely with the problems I have outlined in the conceptual framework of this work. As I explained in my analysis of the parameters in accountability relationship, the Panel can accept requests from a limited circle of applicants. Its circle of potential applicants is the narrowest one of all review bodies considered in this work. According to its founding resolution, the Panel can only deal with requests from claimants who

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404 Arguably the arguments put forth by ICJ in Qatar v Bahrain (see Judgement of 1 July 1994 (Jurisdiction and Admissibility) paras.21-30) would not apply in this case, because the Bank in its Standard Conditions for loans explicitly states that the agreement only becomes binding and creates rights and obligations after it has been duly authorised by competent authorities (see s. 9.01 of ‘General Conditions for Loans’, The World Bank (March 2012)).

405 To my knowledge there are currently no real-life examples of such constitutionality review that would involve the draft agreements with the Bank. This could at least partially be explained by the potential problems with justiciability of such claims (see s.5.3.1.).

406 See the discussion in s.2.2.2.

407 Note that according to the Panel’s ToR, affected people can be represented by other bodies (see Panel’s founding resolution para.12), which is what at least in theory enables civil society to use Panel’s procedure to initiate the ‘public interest litigation’ of a sort. The Panel so far appears to be resistant to such tendencies; see for instance counterarguments in ‘South Africa: Eskom Investment Support Project’.

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can prove that development projects caused them ‘adverse and material harm’\textsuperscript{408}, and not simply because they were subjected to the decision-making by the Bank\textsuperscript{409}.

Such narrow window of opportunity to activate Panel’s procedure more than anything else emphasizes the crucial role of judicial bodies. Differently than the Panel, the courts are also permitted to question the decisions on the grounds of \textit{illegality}, i.e. to inquire whether the authority in question adhered to the standards set by domestic and international law\textsuperscript{410}.

There is an operational link between the jurisdiction of a particular review body, and the circle of people that can utilize it\textsuperscript{411}. The wider is the jurisdiction, the greater is the number of potential applicants, and the more this number must be limited, in order to preserve the effectiveness and availability of the procedure. That is certainly a relevant consideration in case of the Panel, also HR bodies – where only one such body exists to accommodate the claims from a large number of residents in the borrowing countries. The structure of these two bodies is not as well adjusted as in case of domestic courts. This partially explains why the Panel is only open to a relatively small pool of applicants; whereas domestic courts can be exposed to a much larger number of potential claims.

Nonetheless, it seems to me that this problem of institutional capacity \textit{alone} does not justify the threshold of review being associated with \textit{material} harm. The capacity of the Panel could be adjusted if the flow of the claims was to increase; just as the Bank was capable to adjust its administrative capacity when structural needs for institutional change had occurred in the past\textsuperscript{412}.


\textsuperscript{409} The narrow scope of this requirement can be contrasted with the broad standing rules by EIB Complaints’ Mechanism, where there is no requirement of either material or direct harm, and simple ‘affectedness’ suffice to submit a claim (see EIB Complaints Mechanism Operating Procedures (August 2013) s.5.3), see further analysis in N.Hachez and J.Wouters, ‘A Responsible Lender? The European Investment Bank’s Environmental, Social and Human Rights Accountability’, 49(1) \textit{Common Market Law Review} (2012) 47.

\textsuperscript{410} Note that HR bodies are looking at potential violations of individual rights, i.e. they focus on the negative effects of the decision (although these impacts are not limited to material harm); whereas domestic courts can scrutinise the flaws of authoritative acts \textit{per se}.

\textsuperscript{411} Verones offers five categories of review mechanisms in terms of their access (immediately open, direct, direct with legal condition, indirect and restricted). The distinction is useful in understanding the variety of restrictions that might limit the access to specific mechanisms (see Verones, ‘Mechanisms for reviewing compliance’).

\textsuperscript{412} For instance, when the Bank decided to increase the ‘country ownership’ of its projects it was able to expand its local and regional management structure; see generally Philips, \textit{Reforming the World Bank}.  

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It seems to me that further clarity can be brought to this dilemma if we keep an eye on the distinction between the rules of standing, and the larger matter of reasons for having a review procedure. The latter issue poses the question about why this procedure is needed in the first place, whereas the former is about who should (or should not) be entitled to take advantage of its existence. The two are related, but arguably the justification issue takes priority – and therefore can help us to assess the plausibility of the rules on standing.

An example of review procedure by HR bodies helps me to explain this link between the two. Generally the review procedure by HR bodies enables the states to oversee the functioning of their institutions, and to assess whether they comply with relevant HR obligations. As a result, the procedure is justified by the need to put in place an effective system of HR protection. The ‘exhaustion of local remedies’ requirement, which is a standard criterion used by all HR bodies appears to be a plausible ‘filter’ for limiting the number of potential applicants. This filter applies to all potential HR violations, and does not discriminate against certain groups of claimants. Even with such requirement in place the most important and contentious cases, from all areas of human rights, can potentially be adjudicated upon by the HR bodies.

In case of the Panel, the justification for its review procedure is grounded in the idea of Bank’s commitment to its proper policies. It is meant to help the Board to discipline the staff, and to ensure a more effective implementation of its policy instruments. It is difficult to square this compliance logic with the requirement of adverse material harm. More specifically, it is not clear why only the people who suffered such harm can point towards the instances of non-compliance, and why it cannot be done by all those who were placed well enough to observe the behaviour of the Bank’s staff in that particular project.

Under closer scrutiny, the ‘harm requirement’ by the Bank limits the access to review procedure in a different way than ‘exhaustion of local remedies’ requirement does. Instead of filtering potential cases based on a clear and formal criterion, it dismisses them based on their content. This way of ‘cutting the pie’ appears to be opening the space to an arbitrary judgement about what cases ‘deserve’ to be reviewed, and what not. More precisely, it seems that the Panel can choose admissible cases based on their (lack of) political controversy; possibly with a view to not violate the ‘political activity prohibited’ clause analysed in the previous chapters. Arguably this choice of material rather than formal rules of standing are compromising Panel’s mandate – and are creating unjustifiable obstacles to the access of its review procedure.
5.2.3. Timing

The last group of admissibility issues is about the time limits of the review procedure. This issue is not just technical and does not depend on a single set of rules that the review body must apply. It links back to the previous analysis about the structure of project law, and the division of competence in different stages of project cycle. In particular, the issue of timing brings out the practical difficulties that affected people face in attempting to challenge these interventions, which themselves are triggered by the institutional and legal pluralism that characterizes this field of international cooperation.

The two schemes in the previous chapter (Schemes 4.1 and 4.2.) have shown how the power-holders ‘switch’ from general rules, to specialized, to project-specific, and then back to the general. Such move between different rules is decisive in the context of review procedure, because review bodies can only assess the compliance with certain rules (i.e. their own ToR), but not all of the project law. Scheme below illustrates this link between the applicable rules, and the admissibility for review throughout the project cycle (Scheme 5.5.).

**Scheme 5.5. Accessibility to review throughout the project cycle**

<table>
<thead>
<tr>
<th>Applicable rules</th>
<th>Specialized (mainly)</th>
<th>General</th>
<th>Project-specific (mainly)</th>
<th>General (mainly)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ideas</td>
<td>Deliberation</td>
<td>Validation</td>
<td>Implementation</td>
<td>Completion</td>
</tr>
<tr>
<td>Review bodies that can receive complaints</td>
<td>None</td>
<td>Inspection Panel</td>
<td>Domestic courts</td>
<td>- Inspection Panel - Domestic courts - HR bodies (only after domestic courts)</td>
</tr>
</tbody>
</table>
Overall, this scheme shows that the possibilities for the affected people to access review are fragmented. The early decision-making stage, before the initial idea gets crystallized and approved, simply cannot be subjected to any such procedure. The deliberation process at this stage is not disclosed, and strictly speaking there are no formal decisions that can be challenged. The formal stage of deliberation, which is when the project starts being regulated by the operational policies, can be reviewed solely by the Panel, but none of the judicial bodies. The reverse is true of project validation stage, where the decision-making is governed solely by the domestic law. Project implementation stage is best ‘covered’ in terms of accessible review mechanisms. However, any review by HR bodies in this stage is likely to be significantly delayed because of the aforementioned requirement to exhaust local remedies. With regards to project completion stage, domestic courts, and also HR bodies, would be able to assess the larger implications of the project, yet no review by the Panel would be possible.

Hence, although looking at the scheme above one might get an impression that affected people have some access to review throughout the entire project cycle of the project, such initial impression would be largely false. The scheme above does not mean that affected persons can engage in the ‘forum-shopping’. In reality these review bodies, especially the domestic courts and the Panel, are not interchangeable. Their general role and type of review are completely different from one another, which will become even more apparent in the analysis of the merits stage. Thus, in fact such diversity of review mechanisms means that, from the perspective of the affected person, the possibilities of review can be highly confusing. There is no single forum where affected people could confidently refer to throughout the entire process, in order to challenge the decision-making of all parties.

This brings me to the conclusion of the admissibility requirements. I have argued in this part of the chapter that all the review bodies potentially accessible to the affected people would be able to dismiss their claims without full investigation, and based on a range of formal, but also material grounds. The refusal to deal with a complaint could be justified by the fact that decision was made collegially with an international authority (could be dismissed by domestic courts); also because that review body lacks subject matter jurisdiction to deal with certain type of social harm (e.g. in the case of Panel, and with regards to most of HR bodies). In terms of purely formal grounds, the claim can be inadmissible due to the fact that it was submitted
before official validation (would be dismissed by domestic courts and HR bodies), or after the intervention had already taken place and created negative effects (inadmissible by the Panel). All such cases would slip through the sparse system of justice created by the current admissibility requirements.

5.3. Potential outcomes (merits stage)

The analysis of the admissibility stage had shown that there exist a lot of legal issues that can hamper the access to review procedure. However, it is normally the potential outcomes of the procedure that determine whether anybody attempts to use it in the first place.

Similarly as in case of admissibility, most of the uncertainties in the merits stage are triggered by the internationalised nature of the agreements, as well as multiplicity of applicable standards for review. Here however, the additional difficulties arise because of the content of development interventions. The essential parts of development financing agreements – those that set the accountability standards and regulate the behaviour towards affected people – are based on the complex assessments and problematic assumptions. Evaluating such decisions, and arriving at the correct judgement, presents a problematic set of issues for the review bodies.

The legal problems involved in the merits stage are more numerous within domestic courts than in the case of two international review bodies. That is because the courts are tiptoeing around the difficult issues of separation of powers; also making sure that their judgement does not compromise state’s international obligations. The present section will therefore predominantly focus on domestic courts, but will contrast their problems with more limited, yet considerably clearer stance that the other two international review bodies have on these matters.

In addition to the above it must be noted that there are no real-life examples of cases submitted to either of the two judicial review bodies. This does not necessarily mean that no

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413 Note that the international dispute involving the funding by the Bank was considered by the ICJ [see Pulp Mills on the River Uruguay (Argentina v Uruguay) (April 2010)]; however the argument was between the two countries, whereas the focus in this chapter is on the disputes that involve private parties. See also Budha Ismail Jam et al. v IFC [2015], which was submitted on behalf of the affected
such cases exist in practice, but that they were potentially not ‘registered’ and analysed in the related literature\(^ {414} \). Accordingly, my analysis is limited to the doctrinal issues that are generated by the case law in other areas of law; but it cannot be supported through the case law from international development cooperation. In contrast, at the time of writing the Panel had received over a hundred requests for inspection\(^ {415} \). These cases will not be examined one by one, but I will use Panel’s reasoning in them to make some general observations about its mandate, and the type of judgments that it can deliver.

Same as in the case of admissibility stage, the table below (Table 5.6) synthesizes the core rules that guide this stage of review procedure.

<table>
<thead>
<tr>
<th>Table 5.6. The approach of different review bodies in the merits stage</th>
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<tr>
<td><strong>Inspection Panel</strong></td>
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<tr>
<td><strong>What rules can be applied as a standard for review?</strong></td>
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<tr>
<td><strong>What sort of flaws of decision-making the review body is competent to identify? (Judgment)</strong></td>
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people against the IFC in U.S. Federal court; but which at the time of writing was undergoing admissibility stage (29 December 2015).

\(^ {414} \) In the area of *bilateral* assistance there were claims brought against the sovereign donors in their national courts (for instance Sutradhar v Natural Environment Research Council [2006] in UK); however the issues in these cases are mainly related to sovereign immunity, are based on different legal grounds (laws of donor state), which is why they are largely irrelevant to the field of multilateral assistance, and to the present analysis (see A. di Giovani, ‘Linking the Law and Regulation of Development to the Promotion of Law through Development’).

\(^ {415} \) There were 104 requests registered on 02 January 2016.
What are the possible outcomes of the judgement by this review body?

- Can only recognise non-compliance with the policies, and identify specific errors made by the Bank staff;
  - In practice, the identification of non-compliance triggers the plan by the staff, which amends the project accordingly.
- Could claim that certain acts are illegal and therefore invalid (i.e. quash the decision);
- Could ask to revise certain acts based on the procedural grounds;
- Could not repeal the agreement and (or) its part but could potentially repeal its implementing regulations.
- Can recognise the violation of particular right(s), and normally leaves the state to decide how to rectify the situation.

Is the review body competent to prescribe individual remedies?

No such competence according to the mandate, but in practice the Bank tends to negotiate additional compensation, or otherwise improve the state of affairs of affected people (under its own terms and discretionary judgement)

Competence to prescribe remedies would depend on national constitutional, civil and administrative law rules.

Competences depend on the ToR of that particular HR body:
- Regional HR courts issue binding decisions and are competent to prescribe compensation, or other type of individual remedies
- Normally in case of non-binding decisions (by all other HR bodies) the body issues a suggestion upon the necessary measures that the state should take in order to stop and prevent the violation.

5.3.1. Applicable standards

Both, the Panel and HR courts assess the decisions of the authorities against their own ToR. HR bodies predominantly apply the treaty that created them. Depending on the rights’ catalogue protected by that specific HR treaty and resulting court’s jurisprudence, some decisions or even the entire project might simply be off limits for that particular body. For instance, European Court of Human Rights is unlikely to issue a ruling on the project that might potentially infringe the rights of indigenous peoples; whereas African Human Rights Commission or Inter-American Court of Human rights would. The scope of each regional

416 Only the three HR courts (European, African and Inter-American) can issue binding judgements and prescribe individual remedies. However, of those courts only European Court of Human Rights accept individual petitions; whereas in case of African and Inter-American courts the claims can only be referred to the court via their respective HR commission (which itself can only issue non-binding decisions).

417 See s.3.4.1. for an overview of the relevant articles in HR treaties that are used to protect indigenous rights.
treaty including courts’ previous jurisprudence is therefore decisive in terms of what judgments the courts can issue, and how those relate to the problems in specific interventions. If the review body can assess obligations about social, economic, cultural and collective rights – then it is better placed to address the negative impacts of economic interventions\textsuperscript{418}.

The Panel assesses Bank’s compliance with its own operational policies. In addition to that, the Panel tends to assess how the Bank exercises its oversight function, i.e. its actions in overseeing the application of project-specific rules. Such possibility of assessing the behavior of staff against specific regulations of the project is not clearly spelled out in the resolution that established the Panel, but such seems to be the practice of review. It seems that the Panel treats project agreements as an extension – concrete ToR if you like – of the policies. Importantly so, the Panel applies all the policy documents (project documents and plans) as a part of these agreements – and therefore employs them in its investigation.

Domestic courts are faced with more troublesome task in deciding which standards to apply. They can undoubtedly assess project-related decisions against the general (domestic and international) standards, but their application of specialized and project-specific rules is more problematic. On the whole, it seems not possible for the courts to assess behavior of project authorities against the operational policies of the Bank. As explained previously, these specialized rules are only binding on the staff of the Bank, whereas the courts can only scrutinize the decision-making of domestic authorities. The courts could nonetheless use certain clauses in Bank’s policies as a benchmark (for instance, of due diligence) – to pin down the standards of good practice, and to underline how authorities deviated from them. However, the failure to comply with the policies cannot be assessed by the courts, but only by the Panel.

The application of project-specific rules would appear to be an even a trickier matter for the domestic courts. The question that they should be answering in this regard is whether to assess the authoritative decision-making against the entire agreement between the parties, or only against its formal (legal) part. It seems to me that applying the agreement itself, that is, the main text and its annexes would be possible and unproblematic. Underneath it all – notwithstanding it precise format, the agreement is unquestionably the source of law. However, the main difficulty seems to arise with regards to the aforementioned policy

\textsuperscript{418} Of all existing human rights instruments, only International Covenant on Economic, Social and Cultural rights; Art. 1 of International Covenant on Civil and Political Rights; also African Charter on Human and Peoples Rights cover socio-economic aspects of state policies and related decision-making.
documents. The plans that guide the behavior of the parties, also the project documents and the relevant assessments – all tend to contain the most crucial party commitments about how they are going to treat the affected people. Because these project documents are not, strictly speaking, the sources of law – the courts would potentially have to restrain themselves from applying them.

The case that sheds some light on these issues comes from the recent controversies surrounding the IMF austerity measures in Greece, and the Greek constitutional court’s (Council of State) decisions on the matter. In the case that pertains specifically to this issue, the court was faced with the question whether the Memorandum of Understanding (MoU) that had set out Greece’s austerity plan and that was concluded between the Greek government and the IMF was, amongst other things, undermining country’s budgetary sovereignty. The MoU was formalized as an annex to the act of the Greek Parliament. In this particular case the court has refused to deliver a judgment on the matter, arguing that MoU was a policy document, and that therefore the court did not have the jurisdiction to use it as a standard of assessment. MoU did not ‘constitute an international treaty that transfers powers exercised by the state bodies to an international organization’, argued the court, and therefore could not be scrutinized by the court under its constitutional mandate. The court reserved its right to review the new acts of parliament that would be implementing the political program envisioned in MoU, but it did not find it possible to conclude that the act itself was justiciable.

Emilios Christodoulidis in his assessment of this judgment congratulates the court for this conclusion. He explains that he court had the two options, to either take the formalistic approach, i.e. to disregard MoU and consider black letter law alone; or the functionalist one, i.e. to use MoU in order to interpret the loan agreement and thus accord this policy document

419 Decisions 668/2012 (on constitutionality of law implementing MoU with IMF); 1972/2012 (on constitutionality of new property tax); 1906/2014 (on the constitutionality of privatisation of Water and Sewage Company); 2092/2014 (on constitutionality of salary reductions to army employees); 2307/2014 (on constitutionality of second MoU with IMF). These impacts and court’s reasoning in these cases are explained in more detail in E. Christodoulidis, ‘Crisis and Judgement: Austerity and the Greek Council of State’ (forthcoming); also X. Contiades and I. Tassopoulos, ‘The Impact of the financial crisis on the Greek constitution’, in X. Contiades (ed.), Constitutions in the Global Financial Crisis (2013) 213.
420 Decision 668/2012.
422 Christodoulidis, ‘Crisis and Judgement’.
423 Ibid.
some legal significance. For Christodoulidis, the court’s choice is worth congratulating precisely because it went for formalism, and because it did not take the ‘slippery slope’ of legalizing policy documents for the sake of asserting its own jurisdiction.\footnote{Ibid.}

The issue faced by the Greek constitutional court and the problem of using project documents in assessing the acts of development financing are not completely analogous. At least some project documents – particularly the relevant plans and assessments\footnote{In particular the plans on environmental management, indigenous peoples and involuntary resettlement (see OP.4.01 ‘Environmental Assessment’ Annex B – Content of Environmental Assessment Report for Category A Project’, and Annex C – ‘EMP’; OP/BP 4.02 ‘Environmental Action Plans’; OP 4.10 ‘Indigenous peoples’ Annex A – ‘Social Assessment’ and Annex B – ‘IPP’; OP 4.12 ‘Involuntary Resettlement’ Annex A – ‘Involuntary Resettlement Instruments’.} – are merely the documents that aid the implementation of the agreement. They are not broad policy statements (Christodoulidis makes an analogy between MoU, and the preambles of treaties that foster economic cooperation) that are meant to help interpret and understand the true aspirations of the agreement. Meaning, both project plans and assessments\footnote{Arguably this observation would not apply to analytical project framework (PID, PAD) because those documents would only act as guidelines to implementing obligations set out in legal documents.} could presumably be used by the court not as supporting policy statements, but as an extension of the project agreement, i.e. as the relevant accountability standards per se. If we were to understand them from this perspective, then it would be possible to refute the risks that Christodoulidis associate with expansive interpretation of international financial commitments.

Yet, it seems to me that notwithstanding these differences, the dangers of fusing law and politics are just as alarming in World Bank financing, as it is in IMF lending. If the courts decided to use these policy documents as independent standards of accountability, then they would risk losing the distinction between governments’ obligations by law, and its mere capacity to execute certain policy functions. The difference between the two is that in the latter case there is no ‘hard’ line of minimum obligation, but only the requirement to stick to the agreed policy plan, while having the correct intentions. Hence, while in principle the courts could assess whether a certain act or decision was adopted in accordance to the project to plan or not; such assessment alone would arguably have no legal value. It would potentially eliminate the need for the court to go back to the formal sources, and issue the ‘hard’ judgment about whether certain decision was actually made in accordance to law (that was supposed to inform the policy choices in the first place). It therefore seems to me that domestic courts would be doing their best if they avoided such risk and not used project plans and assessments as standards of accountability per se.
This helps me to underline the core difference between the review procedure conducted by domestic courts, and that initiated through the Panel. Despite the fact that the Panel is conducting a relatively well-structured and thus formalistic analysis of the Bank’s activities, it is critical to highlight that its function is deeply pragmatic. In conducting a review procedure the Panel helps the Bank to maintain the integrity of its projects, and to assess how they fit within the overarching policy choices and aspirations of the Bank. In other words, it acts as an institutional device of the Bank. Domestic courts on the other hand are not – and should not – behave in a way that is instrumental to policy objectives of national governments. Their role instead is to protect the constitutional goods (i.e. individual rights, democracy, rule of law, etc.) from infringements. This conceptual difference between the two procedures is decisive in determining what kind of judgement can follow from engaging with them.

5.3.2. Judgement

When it comes to the findings of the review procedure, both the Panel and HR bodies are meant to fulfill a specific task required by their institutional mandate. The Panel is meant to find out whether the Bank staff acted in accordance with the operational policies (and by extension – with relevant project agreements). International HR bodies have to judge whether or not the acts by the governmental agency implementing the project (also the guaranteeing state, if the agency is a private entity) violated state’s human rights obligation. As long as the Panel and HR bodies can establish their jurisdiction over the particular claim – the judgement would arguably require an assessment whether or not certain actions followed certain rules. Hence, the finding would essentially bring about a ‘yes or no’ type of answer – which is then justified by the reasoning of the body.

The assessment would be considerably more complicated in case of domestic courts’ judgements. The first question that the court in charge of the case would be faced with is whether it can actually intervene in that particular policy area. This issue would arise because of the constitutional separation of powers: the courts must be wary and not venture too far into the policy areas reserved for the exclusive discretion of executive and/or legislative branches.
The observation above shows that the issue of justiciability (referred to in some jurisdictions as ‘political question doctrine’), if recognized by the legal system of the court, is clearly relevant in this set-up. Generally, this doctrine gets activated if the decision of the court is likely to create unwarranted political consequences, bring about heavy economic implications, or where it would initiate redistribution of common goods within the society. International development cooperation as a policy area seems to fall precisely within such blurry and contentious area of separation of powers that tends to trigger ‘political question’ doctrine. In reality most development projects reshuffle the existing order of resource distribution, and they always (by their very nature) create intense economic impacts.

There is simply no clear and explicit judicial practice about what the courts might do when faced with such question. The judgement on this matter would depend on the individual case, and also on the national case law about courts’ deference. In UK for instance there seems to be a tendency within the judiciary to trespass this issue in the cases involving potential HR violations; but the courts generally defer from decisions with heavy redistributive impacts.

On the whole, there can be no certainty about the ability and willingness of the courts to engage with such contentious issues. This observation is valid in all national contexts, notwithstanding the precise scope of justiciability doctrine in different legal systems.

However, even if the court decides that it can judge on the issues covered by the agreement, this still does not answer the question about the type of flaws of decision-making the court is competent to identify. In the cases of simple administrative decisions – such as for instance issuing a license for construction – the judgment would largely follow the same compliance logic as in case of the Panel or HR courts. The court would merely have to examine whether such licensing decision have adhered to the environmental and planning regulations, or not.

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429 For instance political question doctrine is not recognised in Germany (see Folz, ‘Germany’, in International Law and Domestic Legal Systems at 244).
But in such cases as the aforementioned Greek example (dealing with the core provisions of the act implementing the treaty, also the key choices of implementing agencies) the court would inevitably be faced with more difficult question about what exactly is it able to assess. Could it only scrutinize the errors of applying the law, or the interpretation of the relevant facts as well? It is clear that due to the principle of the separation of powers the courts could not second-guess the decisions of political branches. But does this mean that the courts’ powers would only permit them to engage in a formalistic exercise of applying black letter law? Or could they also rule on such matters as the link between the justification and potential negative effects of the particular intervention?

Because there is virtually no relevant case law on these matters, it is simply not possible to give the definitive answers to the questions above. Some inspiration here could be derived from the aforementioned ‘Greek constitutional saga’ in the context of IMF lending, where the court once decided that the decision of highest authorities was unconstitutional433, but only because it related to the particularly sensitive right of free access to water. Some progressive lessons could also be learned from the scholarship and jurisprudence on the EU competition law cases. Here domestic courts can assess the decisions of European Commission, whose decisions are equally complex, and involves similar contentious economic evaluations434. Nonetheless, by and large it is most likely that the more difficult judgments on the sensitive and controversial matters of development projects would have to be predominantly about the application of the law, as opposed to the assessment of economic data and relevant facts435. In other words, it seems unrealistic to expect for the courts to determine whether the authorities designed the project correctly, and in the best possible manner.

This sort of ‘cap’ on the courts’ powers comes in sharp contrast with the review powers of the Panel. An overview of its investigation reports shows that the Panel quite willingly engages with the crucial policy choices of the project, questioning whether they lead to the most appropriate decisions in the given circumstances. As mentioned previously, the Panel is making the link not only between the policies and Bank’s activities – it also scrutinizes the connection between the policies and the project agreement. The latter seems to be perceived by the Panel as a policy tool that helps achieving the objectives of the parties. In other words, the

433 Decision 1906/2014 by Greek Council of State; see Christodoulidis, ‘Crisis and Judgement’.
435 See ibid. on similar dilemmas (and conclusion) in the European competition law cases.
Panel finds it appropriate to assess the *entire logic* of these instruments against the framework of operational policies, and does not just limit itself to the individual fragmented decisions.

Admittedly, such assessment is not arbitrary. It is based on the substantive and procedural standards in the Bank’s policies. Because operational policies are *specialized* rules, they contain at least some standards that are specifically adjusted to guide such assessment about development operations. These specialized standards in the policies can be compared to those in EU competition case law, where over time European courts in their judgments had created a set of tests to verify whether the Commission had exercised its discretion appropriately\(^{436}\). It is precisely because of these specialized standards that in case of EU competition policy the courts are now able to scrutinize Commission’s decisions\(^ {437}\). In the area of development financing there exist no such judicially crafted set of standards, but the operational policies of the Bank at least partially fill in such a gap. Hence the Panel in this case acts like a specialized tribunal, which is expected to have the competence and the capacity to assess the content and the essence of Bank’s operations. Domestic courts on the other hand, because they cannot apply the Bank’s policies, have no such clear point of reference; and they probably should not be expected to have such a specialized knowledge to assess the complex choices of development authorities.

Ultimately these considerations point towards the crucial role of *specialized* rules in the area of development financing. Because this area is so complex and so heavily institutionalized, it would be naïve to expect resolving contentious legal issues through application of general norms. Faced with such complexity the courts would more likely than not admit that they do *not* have the right competences, nor the capacity, to engage with it. And while on the one hand such self-restrain by the courts might appear responsible and driven by correct aspirations, their deference would ultimately create negative impact on the accountability towards affected individuals and communities.

5.3.3. Potential outcomes and remedies

This finally takes me to the core concern of this chapter – the question about the outcomes and remedies that affected people might expect from engaging with such procedure. In line with its ability to assert jurisdiction and second-guess the core policy choices of the parties, the

\(^{436}\) *Ibid.*

\(^{437}\) *Ibid.*
Panel tends to initiate probably the most productive outcomes of all the review bodies analyzed in this set-up. If the Panel decides that certain practices where not in compliance with the policies, then in absolute majority of cases this leads to the revision of project plans, and sometimes even the amendment of project objectives\textsuperscript{438}. Importantly so, it is not the Panel itself that recommends and authorizes such changes, but instead the adjustments are recommended by the staff of the Bank that are in charge of project oversight, which are then authorized by the Board. Hence, the effectiveness of the Panel’s decisions in this case seems to rest precisely on its lack of independence from the Bank, and institution’s choice to enable the systemic remedies that ameliorate the situation of the affected people.

The HR bodies on the other hand seem to be on the different side of the scale in terms of their capacity to produce effective outcomes. As was mentioned before, these bodies might simply state that there was a violation of a certain right – and such judgement alone should be considered as a sufficient remedy. This means that the final resolution of the matter would be left to the state. Moreover, the decisions of most HR bodies are not binding\textsuperscript{439}, i.e. neither the state, nor the Bank is obliged by law to ameliorate the situation\textsuperscript{440}.

The key problem with such outcome is that the follow-up to that sort of judgment would not be triggered \textit{automatically}. Thus, although it is highly possible that related judgment of an international HR court (stating that the World Bank-led intervention had violated human rights) would not pass unnoticed and would \textit{eventually} bring about some positive effects\textsuperscript{441}, such effects would require more time and additional efforts by the claimants than, for example, the judgement by the Panel. It is highly likely that such positive results would be produced when little could be done to rectify the situation, i.e. once the most serious negative effects (clearing

\textsuperscript{438} For instance Panel investigation in ‘DRC: Emergency Economic and Social Reunification Support Project’ lead to the approval of Indigenous Peoples’ Plan, and generally Bank’s commitment to representation of indigenous peoples interests in supporting DRC’s forestry policies; see ‘Progress report to the Board of Executive Directors on the Implementation of the Management’s action plan in response to the Democratic Republic of Congo inspection panel investigation report’ (January 2009), available at \url{http://www.worldbank.org/projects/P081850/drc-emergency-economic-social-reunification-support-project?lang=en&tab=overview}.

\textsuperscript{439} Only the decisions by the three courts (European, African and Inter-American) are binding upon state parties; judgements by all eight treaty bodies, also African and American Commissions, are recommendatory by nature.

\textsuperscript{440} Note that all treaty bodies have developed procedures to monitor whether States parties have implemented their recommendations (so-called follow-up procedures); see \url{http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx}.

\textsuperscript{441} As explained in the analysis of operational policies (see s.3.2.2.) throughout its history the Bank has been known to invest significant time and resources to preserve its good reputation.
of the forest, building a damn on the river, privatizing the sector, etc.) had already taken place\textsuperscript{442}.

In terms of potential outcomes of their procedure, the domestic courts are somewhere in between the two international review bodies. Probably most important feature of their procedure is that domestic courts could issue a ruling about the \textit{validity} of a certain act. If such ruling was in favor of affected people’s concerns, the court could actually quash the decision or the regulatory act that is implementing the agreement. In this respect domestic courts are the only review bodies that do have the power to interrupt the execution of the project (that is, if the decision gets past the admissibility stage; and if they find the claim to be justiciable). Domestic courts could also ask to revise certain decisions, which is likely to happen on procedural grounds (since the non-compliance with substantive standards would render the decision invalid). Domestic courts could also prescribe individual remedies, and order the authorities to pay affected individual or community the compensation and/or damages.

However, despite all these potentially effective outcomes, the domestic courts would \textit{not} have the competence to repeal the agreement itself. That is because, as explained in the analysis of admissibility requirements, the agreements are concluded on the international plane, and so the domestic courts simply do not have the authority to terminate international obligations. In a similar vein, the courts also could not initiate substantive changes to the project design, as in the case of judgments by the Panel.

All in all, this analysis of potential outcomes shows that none of the three review bodies considered in this chapter could suspend or repeal the agreement itself. The contractual obligations between the Bank and the borrower are more or less untouchable. Their rationale and content after validation stage could only be questioned to an extent that is acceptable to the Bank, through its internal review mechanism\textsuperscript{443}. Otherwise the contractual autonomy of international persons cannot be restrained through judicial means – even if it is in tension with some fundamental constitutional freedoms and values. It follows from the analysis of merits’ stage that review mechanisms can only bring about ‘weak’ consequences. They cannot address the \textit{source} of the issue (contractual relationship), but only its measures of its implementation.

\textsuperscript{442} As mentioned previously, interim (or provisional) measures are possible, but they can only be temporary and are not guaranteed.

\textsuperscript{443} The truly substantive reshuffling of project objectives could only be triggered in deliberation stage; and only by the review procedure in front of the Panel.
With this section I conclude this overview of the merits stage, and wrap-up the doctrinal analysis of review procedure in development financing. This chapter had started with an observation that review mechanisms tend to be stronger than the rest of the accountability mechanisms: due to the formal qualities of their procedure, also because of the third person perspective that they can bring into the disagreement between the affected persons and the parties. Nonetheless, the more in-depth analysis has proven that such ‘strength’ comes with practical difficulties. The formalistic nature of the procedure maps out with great difficulty onto the complexity of legal, social and political relationship in this area. Faced with strict formal requirements, judicial bodies often are unable to address the core of the disagreement between the affected people and the parties to the agreement, and instead get stuck at the level of procedural entry requirements. Regarding the third person perspective, the present analysis has demonstrated that whilst departing from the principle of institutional cooperation and into the area of fault-finding, the review mechanisms tend to lose their effectiveness. Overall, it can be observed that the ‘traditional’ model of judicial oversight cannot be readily transplanted in this area\(^\text{444}\). It requires additional adjustments and is often conditioned on the willingness of the parties to be subjected to such review\(^\text{445}\).

### 5.4. Locating the gap: assessing review procedure

The two principles suggested by this work, *access to independent review* and *meaningful outcomes*, are meant to help me assess the available review procedures, and to conclude whether or not they currently function as an accountability mechanism available to the affected people. The key idea behind this assessment is that it is not enough to describe how these mechanisms currently work one by one, or even in relation to one another. To understand their overarching role, we should appraise their institutional qualities, and the systemic impacts that affected people might expect from engaging with them. The review procedure must be applied by an independent body that is capable of holding an objective opinion. Otherwise it is merely free-riding on the credibility of the procedure itself, and only creates an imitation of justice. The focus on the meaningful outcomes is meant to emphasize that such procedure is only truly valuable if it is actually capable to reshuffle the power

\(^{444}\) I am referring here to the model of judicial oversight described by Fourie, see Fourie, *The World Bank Inspection Panel and quasi-judicial oversight*.

\(^{445}\) There are several proposals in the literature about the possibility of enhancing the present effectiveness of the Panel and review procedure in this set-up, see for instance Saper, ‘The IFC’s Compliance Advisor/Ombudsman (CAO)’ at 1325-28 (suggesting to create a specialized tribunal to serve CAO’s appeals’ function).
balance in decision-making, and to uphold the relationship of accountability. Only if and when the review procedure is in line with the two principles outlined above, it could be accepted as a mechanism of strong accountability.

a. Access to independent review. The analysis in this chapter has shown that none of the three review bodies available to affected people ‘ticks both boxes’; i.e., none of them can be considered both sufficiently accessible and independent.

The Inspection Panel can be criticised for not fully adhering to either of the two criteria, but in particular for its lack of independence. On the whole, the Panel is acting as an institutional device that is meant to help the Bank to fulfil its policy objectives. Its rules of standing are based on the material criteria set by the Bank; its time limits for submitting the claim are strictly confined to the period of the Bank’s active involvement in the project. Moreover, all of its decisions must be confirmed by the Directors of the Bank. All of this indicates an institutional dependence that cannot be disregarded as being ‘legal but not factual’\textsuperscript{446}. It is true that the members of the Panel ought to be free from any institutional affiliations with the Bank, which creates some de facto independence\textsuperscript{447}. Also, the Panel assesses compliance without direct subordination to the Bank’s staff and management. However, the fact that all of the Panel’s decisions must go through a ‘filter’ of the Board, even if such filter is relatively open to some negative outcomes, inevitably means that the Panel ought to deliver the judgements that are in principle acceptable to the Bank. Hence, it cannot reason in a way that would ensure truly independent and objective rulings\textsuperscript{448}.

HR bodies on the other hand, are predominantly short on the accessibility criterion. The extensive time needed to initiate their procedure (due to exhaustion of local remedies requirement) is what renders them factually inaccessible in this particular context. Both time and efficiency are absolutely crucial in development financing; whereas by the time affected people had exhausted local remedies, the most detrimental and often irrevocable project activities are likely to have already taken place. Furthermore, it is possible that the most contentious decision-making within the project (those creating negative social, political and

\textsuperscript{446} Fourie, The World Bank Inspection Panel and quasi-judicial oversight at 186-192, 323.
\textsuperscript{447} Ibid.
\textsuperscript{448} See the argument in Fourie uses example of Panel referring to HR as an instance of ‘judicialisation’ (ibid. at 261), and argues that it shows Panel’s inclination to independent reasoning. However since the Panel’s first reference to HR which occurred in 2002 (see Chad, ‘Petroleum Sector Management and Capacity building project’ (Investigation report in Chad request, July 2002)) the Panel only briefly mentioned HR on several occasions and did not fully endorse something like the HR approach.
cultural effects) would not be covered by the limited catalogue of rights protected by these bodies.

Domestic courts too, are potentially compromised both in terms of their independence and their accessibility. In contrast to the Panel, the issue of independence by domestic courts appears to be unproblematic *de jure*; yet *de facto* the courts are vulnerable to a line of influences. Firstly, there are great chances that the courts would decide to defer from ruling the particular claim, driven by their unwillingness to impede the competences of political branches. However, from the perspective of affected person this decision would simply result in the denial of justice – and could not be considered as an *objective* judgement that reconciles the interests of governmental authorities, and those subjected to their decision-making. In other words, by deferring from the judgement the courts would actually be taking the side of the authorities.

On the other hand, even if the courts do decide to engage with the case – they are still likely to be mindful of the redistributive and economic impacts of their judgements. They would therefore probably not be issuing a controversial ruling that goes against the underlying aspirations of the government. Moreover, it was already explained that domestic courts, more so than the other two review bodies, would be faced with a ‘jurisdictional riddle’. Meaning, they would be little likely to accept the claim based on the tricky admissibility criteria – which is why their accessibility in this area is also not guaranteed.

**b. Possibility of meaningful outcomes.** An intelligible assessment of review procedure against this second principle should begin with the clarification about what is meant by the term ‘meaningful’ and why is it being used in this context.

If this notion was equated with an idea of *effectiveness*, then the Panel, notwithstanding its institutional weaknesses, would appear to be the main body that can initiate various positive outcomes. The review procedure by the Panel tends to bring about systemic changes that usually trickle down to all the persons who were negatively affected. It also triggers the necessary adjustments in the project design, which prevents further systemic harm of development interventions, and it does so in a timely manner.

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However, if we instead equate the assessment of meaningful outcomes with the idea of fairness and the objective reconciliation of interests, then the pragmatic style of Panel’s reasoning would not be ‘making the cut’. The outcomes that this procedure can initiate can only go as far as the willingness of the parties, i.e. the Bank, and to an extent – the borrower. The objective ‘third person perspective’ that would be expected to address the core of the disagreement and the discontent by affected people is simply not possible in this case, because of how the review procedure is designed, and because the Bank unilaterally decides how to restore compliance with its operational policies.

Judicial bodies on the other hand, are arguably not in a position to initiate the truly effective outcomes, in particular because they cannot second-guess the rationale of the entire agreement. However, they could potentially issue the judgement that suspends the execution of project operations – which would be a meaningful outcome in a sense that it would indeed give means for the affected people to balance out their power against the parties to the transaction and prevent further negative implications of the project.

Unfortunately, at least in legal terms such suspense could only be temporary, since the international agreement between the Bank and the state would still be active and binding upon everybody involved. None of the courts could order the parties to stop the intervention and (or) go for a potentially better (i.e. less harmful but more expensive) alternative. The role of the two judicial bodies is simply not crafted in a way to enable such meaningful remedies in the context of development financing.

By and large, the conclusion of this chapter largely mirrors what seems to be a relatively uncontroversial knowledge in the literature on development financing – that the access, independence and the impacts of review procedure in this context are problematic. The affected people have some access to justice – but not quite enough to challenge the power of the parties. The contribution that was hopefully made by this analysis concerns the reasons why these problems are so difficult to address, and why they cannot be resolved merely by ‘tweaking’ fragmented elements of review procedure – as some of the analysis tend to insinuate. Instead, the reflection about enhancing accountability through better review mechanisms should be systemic and go back to the very structure of legal framework that governs this area of international cooperation.

With this analysis of formal review procedure I conclude my assessment of project-law accountability relationship. This, and the previous two chapters, covered my second research question, which was concerned with the standards and mechanisms available to the affected people for holding decision-makers to account. On the whole, it was concluded that the ‘accountability gap’ is vast, and that there are many doctrinal issues that deprive affected people of control and institutionalised means of protection. In order to explain such malfunctioning on the more systemic and deeper level, I will now turn my attention to my third and fourth research questions, and will examine the conceptual debate about the role of law in development financing, also possible systemic ‘solutions’ to the accountability deficit.
Chapter Six

Explaining the gap: the conceptual debate about the applicable legal framework

Introduction

The doctrinal analysis in the previous chapters has indicated a number of issues characterising the legal framework of development financing. The current chapter sets out to explore some of the reasons for such systemic malfunctioning. In order to do so, the analysis takes a step back from doctrinal issues, and considers more general scholarly accounts about the role of law in this area of international cooperation. The intention here is to prepare grounds for my normative arguments in chapter seven. This inquiry is therefore concerned with different ways of perceiving the legal framework applicable to development rather than different means of enhancing it.

I have chosen to structure this chapter around the debate between Philipp Dann and Kevin Davis, and their relatively recent and specialized accounts on this matter. The two scholars do not necessarily argue against one another, but they do seem to hold two different perspectives on the role of law in development financing. To my understanding, these accounts diverge and are in tension to one another. Yet, the parties to development transactions seem to justify their choice of governance tools and authoritative behaviour through both sets of arguments simultaneously. Moreover, they fluctuate between them depending on the circumstances. This chapter argues that such conceptual ambiguity in the governing framework can at least partially explain the existence of the ‘accountability gap’. It also argues that conceptual tensions can be best appreciated through the lens of project law, which enhances the explanatory value of both contractual and institutional perspectives considered in this chapter.
6.1. Diverging accounts about the role of law in development financing

Philipp Dann and Kevin Davis are pursuing different intellectual projects, both of which are ambitious in their own way. While Dann is aiming to bring about a certain level of theoretical clarity to the functioning of law in this area of international cooperation, Davis is attempting to delineate the field of development financing as a new field of study, and to set out the parameters for potential research agenda. The methods and the scope of the two scholars are therefore different, and yet sufficiently similar for us to be able to compare them. As argued in the introduction to this thesis, the main similarity is that they analyse institutional and legal practices and processes commonly used in development financing. Then, through inductive reasoning they attempt to tell us the ‘story’ about what sort of legal framework we are dealing with. The present section sets out to grasp – and elaborate upon – the specific account that each of them ends up with.

I will now provide a synopsis of the two accounts one by one, covering (a) an overview of the argument of each author, (b) the link between this account and the issue of accountability towards affected people (c) the justifications behind such perspective and its value for the present research problem, (d) the assumptions that each perspective seems to based upon and the resulting critique. I will conclude this section by contrasting the two views and will show how the normative tensions between them can at least partially explain the existence of the ‘accountability gap’.

6.1.1. Dann’s ‘institutional’ account

a. Overview. Phillip Dann’s perspective on the legal framework governing development cooperation was briefly outlined in the introduction. For Dann, this framework is primarily about the transfer of official development assistance (ODA).

According to him, ‘public actors spending public funds are ultimately faced with different and higher standards of accountability and legitimacy than private actors; because only the public actors have the
authority to unilaterally determine the fate of citizens. The distinction between public and private governance thus plays a crucial role in Dann’s intellectual project.

Dann ties his account to the pre-existing institutional frameworks of public donors and recipients. In practice, because donors are more powerful, they also furnish the key rules in this area. Dann divides what he calls the ‘law of development cooperation’ (i.e. all the relevant rules and regulations of donors and recipients) into ‘constitutional foundations’ and ‘administrative law’. The former is derived predominantly from formal sources of public international law (the Bank’s founding treaties, also other relevant international norms, customs, and principles). He also suggests four ‘constitutional principles’: development, efficiency; and collective and individual autonomy. Of those, the latter two are legal and therefore binding upon all the actors involved.

Regarding ‘administrative law’, Dann spends most time considering the policies of the Bank, and gives only little attention to the agreements, perceiving them as means of ensuring ‘compliance control after signing and during implementation’. Therefore, for Dann, the operational policies of the Bank – although administrative in nature and created unilaterally by the Bank – set out the core procedures that determine the essence of each intervention. Agreements are but the secondary instruments, enabled by an overarching institutional system.

b. The link with the issue of accountability towards affected people. One of Dann’s ‘constitutional principles’ – individual autonomy – points directly to the issue of accountability towards affected persons. Dann uses this principle to evaluate the current framework. He concludes that respect for individual autonomy (i.e. the individual autonomy of affected people) remains one of the key problems in this area. However, because this principle is attached to the limited scope of HR obligations at the international level, it covers a

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452 Ibid. at 18 (emphasis added).
453 Ibid. at 157-208.
454 Ibid. at 215-217.
455 Ibid. at 361-377.
456 Ibid. at 180-195. This is in relation to the World Bank framework; in his monograph he also analyzes German and EU systems, because he is interested in providing a systemic view for multilateral and bilateral aid.
457 Ibid. at 391-394.
458 Ibid. at 495-496.
459 Ibid. at 391-394. In additional to the standard HR treaties, he considers such notions as the ‘right to participate in development’ and ‘free, prior and informed consent’, but ends up concluding that those
considerably more narrow scope of issues than the notion of ‘affected person’ in this work. As argued several times before, international HR norms do not cover a full range of sub-state units, minority groups, cultural and ethnical communities, and the like\textsuperscript{460}. They therefore provide insufficient basis for understanding the disadvantaged position of affected people.

Towards the end of his extensive monograph Dann also allocates a full chapter to accountability. Nonetheless, he approaches the issue by looking at complex web of institutional ties, rather than factual coercion of development interventions. Accordingly, Dann suggests a long list of accountability agents – where those affected are only one of the many groups that the donors and recipients should be accountable to\textsuperscript{461}. Furthermore, Dann only recognises the \textit{retrospective} concept of accountability. For him, accountability gives us an opportunity to grasp the ‘compliance with previously fixed and legitimate standards of review’\textsuperscript{462} – but it does not necessarily aid the assessment of decision-making process itself (i.e. Dann does not accept the idea of \textit{ex-ante} accountability). Hence, for Dann, accountability can be used to assess the responsiveness and viability of the legal and institutional framework; but not the \textit{power balance} between the decision-makers and those subjected to their decisions\textsuperscript{463}.

Notwithstanding the methodological mismatches between the conceptual frameworks constructed in Dann’s analysis and the present work, on the whole Dann’s account exhibits the same kind of concern about the \textit{fairness} and \textit{effects} of development cooperation. The approach with such a distinctly public flavour has a deep inclination towards ‘accountability and legitimacy’\textsuperscript{464}. Dann maintains that these cannot be sacrificed for the sake of competing values, such as his ‘structural principles’ of effectiveness and/or development.

\textbf{c. Justification and explanatory value}. For Dann, development cooperation is a \textit{political} process\textsuperscript{465}. This justifies the need for a strong, \textit{institutionalized} legal framework. Accordingly,
Dann is concerned with colour-coding institutional practices of donors and recipients as being either law, or not law. He interprets these rules and practices through his own framework of analysis, and maps them out in a way that a great deal of them end up being included in the legal realm (for example, operational policies end up being categorized as ‘administrative law’). This is done with an intention to enhance the clarity of institutional responsibilities, but also to highlight the importance of the rule of law (and the lack thereof) in this area of international cooperation.

At the heart of it, Dann’s account is deeply conservative: his ‘law of development cooperation’ is largely a positivist idea, grounded in the state laws and state consent. Dann trusts the intentions and procedures of existing institutions, and is convinced that public international law can be used to scrutinise them. He also trusts the capacity of these institutions to resist economic and political pressure, as long as the ‘rules of the game’ are clear and shared by everybody involved in the process.

This quest for logical coherence and the rule of law is what makes Dann’s approach so well placed to inform the search for normative solutions. Moreover, his choice to focus on public donors and recipients goes well with my focus on IBRD and IDA funding, where the contractual link between the borrowing state and the lending institution is always preserved (as opposed to IFC where only a direct link with an investor is necessary). The present analysis therefore falls directly within Dann’s scope of arguments and is amenable to Dann’s inclination towards public rather than private law reasoning. After all, the focus on public law seems to contain the conceptual space for accountability analysis, whereas private law is mainly meant to ensure the protection of legitimate interests of the parties to the agreement.

d. Critique of underlying assumptions. Dann’s focus on public donors and recipients comes with its flaws and conceptual gaps. Probably the biggest weakness of Dann’s account is that it seems to be based on somewhat simplistic understanding of the link between the globalised markets and the state-centric system of financial cooperation. More specifically, his perspective seems to be based on the assumption that states and intra-governmental organisations like the World Bank have sufficient control over the processes of economic development, and that they are therefore capable to constrain and regulate it accordingly. Not
only that, he thinks that these public entities can ‘program’ ODA transfers in the long run, which is what countries supposedly do in putting together their poverty reduction strategies.\textsuperscript{466}

This is not to say that Dann ignores the issue of resource dependency altogether. As mentioned earlier, he accepts the fact that recipients are heavily reliant on donors’ will – and that therefore the entire legal framework has ‘donors’ bias’.\textsuperscript{467} Either way, public donors are perceived as holding the key to the issue of resource dependency, whereas private actors are somewhat secondary in this. Presumably private entities would only come into the picture through means of delegation or regulation of contracting.\textsuperscript{468} However, they do not challenge or bring about deep transformation into the model of inter-state cooperation. Private actors could thus be excluded from Dann’s ‘law of development cooperation’.

As the upcoming analysis of Davis’ perspective will illustrate, Dann might be too fast in leapfrogging the issue of liberalised markets and just ‘focusing on one important part’\textsuperscript{469} of development financing. It has been argued continuously by the commentators working in this field that the need for resources for development is so great that ODA is neither capable of being, nor should be perceived as, the sole option for acquiring necessary resources.\textsuperscript{470} Public borrowers are in a competitive relationship with one another for a limited stream of resources coming from a limited group of funders. Dipping into private or hybrid sources of funding therefore becomes a ‘decision about public choice’ that readily substitutes for ODA funding\textsuperscript{471}. Choosing private funding in this case is equally political and ‘public’ in terms of authorising institutions and functions; except that the ‘donor’s bias’ here would be skewed towards the interests of private funders.

Overall, Dann seems unwilling to recognise that ODA often only serves a complementary function in development cooperation, and that other types of funding might be utilised to fund the same public choices. Financing mechanisms based on the market therefore transform the

\textsuperscript{466} Ibid. at 303-352.
\textsuperscript{467} Ibid. at 216-218.
\textsuperscript{468} Dann does not mention private actors at all, other than to dismiss them from his framework at the outset. But he accepts that they are present in development cooperation (ibid. at 19-21); and he does talk about development financing as ‘a multi-step and multi-polar process of public contracting’ (see ibid. at 300).
\textsuperscript{469} Ibid. at 21 (emphasis added).
\textsuperscript{470} See, for instance, T.Ehlers, ‘Understanding the challenges for infrastructure finance’, BIS Working Papers, No.454 (August 2014); available at http://www.bis.org/publ/work454.pdf (last accessed on 09 September 2015).
\textsuperscript{471} Dann, ‘Law of Development Cooperation’ at 17.
realm of international development cooperation in a way that renders methodological focus on ‘ODA’ unjustifiable. This choice runs too serious a risk of distorting our view of reality – and it undermines the normative potential of the entire intellectual project. A heavily institutionalized legal framework adjusted to ODA transfers alone might readily end up being too static, too hierarchical and too detached from the needs of the participants in the system. In other words, it risks appearing persuasive in theory, but irrelevant in practice.

6.1.2. Davis’ ‘contractual’ account

a. Overview. Davis’ analysis of development financing is considerably less detailed than Dann’s. Nonetheless, it gives a good idea of a different sort of perspective that one can adopt in order to explain the role of law in this area of international cooperation. For Davis, development financing involves any sort of ‘transfer of foreign capital to development countries’ in order to assist their ‘efforts to reduce poverty and promote development’. In other words, for him the transactions are defined by their purpose and impact rather than the actors taking part in related processes. According to Davis, ‘although scholarly literature typically attempts to isolate and focus on individual methods of financing development, it is often difficult, and even unhelpful, to draw sharp distinctions of this kind’. His essential claim therefore seems to be that in reality public and private capital is so intimately interrelated that the divide makes little sense. Hence, private actors should be considered as equal – and indeed indispensable – participants of this system.

Because of his focus on the purpose and impacts of development financing, Davis sees this entire field of cooperation as being governed through contract. Accordingly, development financing is a contracting process where ‘various forms of regulations... shape the content or interpret, override, or supplement... agreements and determine how they are enforced’. For Davis, operational policies of the Bank are only one of such ‘forms of regulation’. Hence, in contrast to Dann who would take international law and the rules and procedures of the Bank as a point of reference, Davis sees contract as being the basic element of cooperation. It subsumes all other surrounding sources of normativity and becomes a ‘blueprint for

472 Dann’s monograph is nearly 600 pages, whereas Davis has written one article about the matter (see Davis, ‘Financing development’), with a few supporting ideas elsewhere (see for instance K.Davis and H.Hershkoff, ‘Contracting for Procedure’, 53 William and Mary Law Review (2011) 507; also K.Davis, ‘Contracts as Technology’, 88 NYU Law Review (2013) 83).
473 Davis, ‘Financing Development’ at 168.
474 Ibid. at 170.
475 Ibid. at 173.
cooperation', a tool of governance that opens up a range of innovative, *ad hoc* and flexible forms of interaction.

Admittedly, Davis does not perceive contracts as the *sole* tool relevant in this area. He is willing to accept that the focus on governance can also be valuable in understanding the current set-up (in particular he refers to GAL and generally the principles of administrative law)\(^{477}\). However, he also argues that 'viewing financing development exclusively as a form of governance provides limited insights... [as it] tends to obscure the *significance of decentralised uncoordinated interactions* between private actors who define the terms that will govern their interactions for themselves'\(^{478}\). Hence, for Davis, the focus on governance is potentially concealing from scrutiny something that is actually central to the whole endeavour of development: its horizontal and uncoordinated nature.

Not the entire field of development financing' constructed by Davis is relevant to the present analysis. This thesis is only concerned with one specific group of development transactions: those that are authorised by public authorities and funded or facilitated by IBRD and/or IDA. The particularity of these transactions is that they all rely on the Bank’s legal framework, and are never executed without the specific approval of the institutional apparatus of the state. There is at least one public entity at each end of the relationship; and in case of IDA the funding comes exclusively from the states’ budgets. Hence these transactions only constitute a small part of Davis’ field; and in terms of public-private divide, they are ‘as public as it gets’\(^{479}\).

Nonetheless, even such predominantly public transactions often involve substantial funding from private actors. This is almost always the case with the funding of commercially viable projects, such as those aimed at the exploitation of natural resources, industrial agriculture, energy-generating infrastructure, transport and the like. In fact, the majority of development projects *could* be co-funded through market mechanisms; with both donors and recipients usually readily amenable to it. In the light of this inherently mixed nature of capital, Davis’

\(^{476}\) Davis only uses this phrase in his later article (which is not specifically addressed at development financing), but the same idea (in a less developed form) seems to be present in his proposal on development financing. See K.Davis, ‘Contract as Technology’ at 85.

\(^{477}\) *Ibid.* at 177. Note that the IPA approach was only put forward several years after Davis’ paper; he has not deliberately chosen to exclude it from his analysis.

\(^{478}\) *Ibid.* (emphasis added).

\(^{479}\) With a possible exception of state-to-state bilateral assistance, although due to its limited scope bilateral aid rarely is used as the sole source of funding in development interventions.
point about the necessity to transcend the conceptual limits imposed by focusing on the participation of specific actors appears crucial for further analysis.

b. The link with the issue of accountability towards affected people. Due to all the features discussed thus far, Davis’ account leaves very little space for discussion of the issue of accountability towards affected people. He underlines the uncertain status of affected people and questions whether they could be allocated third party rights or not; also whether public policy considerations and abuse of authority could be invoked to question the enforceability of the contract. He seems to imply that the aforementioned administrative law governance frameworks could be used to deal with this issue. However, he acknowledges that ‘characterising a phenomenon as a contract automatically focuses attention on agreements between the parties to the exclusion of other aspects.’ In other words, perceiving the development process in contractual terms implicitly positions the issue of affected people beyond the immediate and core structures of the transactions. Instead, those affected acquire the status of passive, external participants – precisely the opposite of the active subjects that are presumed by a relationship of accountability.

Furthermore (although Davis himself does not talk about this explicitly), the ‘contractual’ account portrays a picture of the world in which different polities and entities around the globe compete over limited financial resources. The key challenge in this setting is to ensure the fairness of the funding deal and the means of finding mutually satisfactory solutions. From this perspective the issues that might arise within each entity or political community are irrelevant, because they are internal to each contracting party. Taking such internal considerations into account might get in the way of concluding the most resource-efficient development deals. Overall, it appears that the ‘contractual’ account has hardly any conceptual space to capture the non-contractual relationships that are formed around each intervention.

c. Justification and explanatory value. Despite its conceptual focus leaving little space for accountability analysis, Davis’ perspective can yield valuable insights. Firstly, as was mentioned previously, Davis defends his account by alluding to decentralised actors and a plurality of legal sources. He thus emphasizes a variety of (public and private) interests that are shaping the

\[\text{Ibid.}\]
\[\text{Ibid. at 177.}\]
\[\text{Davis, ‘Financing Development’ at 178.}\]
terms and conditions of each intervention. This sort of unchartered space of interactions bears close resemblance with the image of the market. Indeed, it makes us wonder to what extent development cooperation does function under the logic of a free market.

This latter idea seems to resonate with the observations made in this work. The doctrinal analysis has demonstrated that specialized and general rules in development financing normally furnish the background to project-specific rules. Instead, the most important variables in each development intervention are decided and set by the agreement itself. Operational policies, for instance, are largely procedural in nature, and therefore contribute fairly little to the substance of the agreement. Moreover, international development cooperation appears to be uncoordinated and fairly unpredictable, despite the loose programming frameworks (such as Country Assistance Strategies) that the Bank and other institutional donors have put in place for each country.

In other words, Davis appears to give a plausible explanation about the structure of the current legal framework and the links amongst the different categories of rules that pertain to this framework. Moreover, Davis tells us why the parties must have a lot of flexibility to agree on the substance of each deal: that is because transactions take place in the competitive environment that dictates its own (market-driven) principles and rules of cooperation.

In the context of the above, probably the greatest explanatory value of Davis’ perspective is that he brings the ‘contracting processes’ of development financing from the ‘high horse’ of institutional practices down to the level of individual transactions. Therefore, unlike Dann, Davis gives us the possibility appreciate the full complexity of each intervention, and not get lost in a web of transnational governance. This in turn points us towards the terms and conditions that really matter: those rules that shape the effects on individuals and communities in each individual case. To put it another way, if we acknowledge the uniqueness of each development interaction, then we must accept that a systemic view alone cannot provide the conceptual tools to deal with accountability deficit. The contractual ‘cell’ is equally

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483 Dann himself admits that CAS procedure has very few substantive limits, and that it leave a lot of discretion for the Bank might choose its funding focus; see Dann, ‘Law of Development Cooperation’ at 317-327.

484 Davis, ‘Financing Development’ at 177.
necessary for us to be able to scrutinise the level of governance in which the most crucial real-life decisions are being made\textsuperscript{485}.

\textbf{d. Critique of underlying assumptions.} There are many troublesome assumptions in Davis’ account that had already been noted. For instance, we ought to be critical of his assumption that competition is a defining factor in development financing and the implication that internal decision-making of each state is somehow secondary in this area of international cooperation. However, and probably most importantly of all, Davis seems to have constructed his account on the assumption that contractual terms \textit{are likely to produce development-friendly results} and that – on the whole – these would be more positive than harmful. In other words, Davis’ account comes in sharp contrast with Dann’s conservatism. It is truly trustful of market forces, and arguably optimistic to the point where it can be considered naive. If Dann appears to be highly cautious about the blind spots and dangers involved in his endeavour, Davis is expressing little prudence about his view. He is oriented towards removing the barriers impeding international development cooperation, rather than the issues that might be caused with an application of such a liberal view.

Another closely related problem with Davis’ perspective is that it is a classic example of ‘immunization ... from political critique’\textsuperscript{486}. Zumbansen talks about this in the context of transnational regulatory governance, observing that many questionable issues end up escaping the processes of political contestation as soon as they are placed at the transnational level\textsuperscript{487}. In a similar vein, Davis seems to be willing to take the entire field of development financing, and place it under the conditions of global markets – away from domestic political processes. In this setting, the ends become more important than the means through which they are achieved. It is also not clear who sets the desired end and on what grounds, nor whose interests these effective and innovative development solutions are meant to serve. In other words, Davis portrays development financing as a largely apolitical process that only has an innocent ‘good Samaritan’s’ role in domestic societal struggles. He does not give any serious thought to the idea that development interventions themselves might be causing social and cultural harm, and that this harm could be reduced if development interventions were better regulated and not so easily enabled through contract.

\textsuperscript{485} Note that in the final section of this chapter I will argue that this ‘cell’ creates more conceptual advantages if it is repackaged and opened up to further scrutiny through project law, see s.6.3.


\textsuperscript{487} In his paper Zumbansen uses an example of lex mercatoria, \textit{ibid.} at 125-138.
In my view, such image of ‘innocent development’, although theoretically dubious, is often used by development practitioners who are pioneering development operations. In this respect the contractual account seems to resonate much better with the prevalent discourses in development financing than the account offered by Philipp Dann. This perspective should therefore be incorporated into the relevant analysis; but it should only be used with full awareness about its weak theoretical underpinnings.

6.1.3. How conceptual tensions between the two accounts contribute to the ‘accountability gap’

It is now time to give more detailed attention to the questions of how the two approaches link to one another, and to the problem analysed in this work. First and foremost I would like to note that the two accounts are both useful in their descriptive capacity. The two scholars apply their distinct set of analytical tools, and end up picking up on different elements of this framework: the crucial role of contractual terms in one case, and the high level of institutionalisation in the other. Both of these observations are valuable and give us important insights about the overall functioning of the phenomenon.

However – and this is the key issue I want to explore further – the co-existence of the two accounts is considerably more problematic if we perceive them in a normative sense. More specifically, if we try to employ the two accounts to generate ideas about how to improve the current governing framework, they end up pointing towards different values and considerations. The two perspectives would therefore lead towards diverging regulatory strategies for enhancing accountability towards affected people.

The table below summarises the divergence between the two accounts (Table 6.1).

| Table 6.1. Diverging perspectives about the role of law in development financing |
|---------------------------------|---------------------------------|---------------------------------|
| Defining feature of the field   | Institutional account           | Contractual account             |
| Participants (public donors and recipients) | Purposes (to foster development) |
| Role of private actors          | Supplementary                    | Primary                          |
| Mode of cooperation             | Coordinated                      | Decentralised and dispersed      |
| Core source of law and obligations | Legal framework of donors and recipients, also public international law | Agreement between funder and recipient |
| Role of law                     | To guide and constrain the political process | To enable better transactions |
As the table illustrates, the underlying logic and aspirations of the two accounts diverge. While Dann would suggest that the legal framework should be *restrictive* and exhibit caution, Davis is eager about the possibilities of fostering development, and would like to see the legal framework as *permissive* as possible. While Dann is suggesting the *formalistic* reading of existing practices in order to enhance clarity, Davis is taking a *pragmatic* stance and would employ the procedures only to an extent that they can create the best outcomes. Accordingly, while Dann would suggest *more control* of existing practices and their on-going evaluation, Davis would prefer liberating the potential of cooperation in this area, and enabling *more laissez-faire* financial dealings for development purposes.

In terms of their normative aspirations, the two accounts tell us different ‘stories’ about the abilities and the role of law in development financing, which is why they can justly be perceived as two different *viewpoints* that reflect opposing considerations. In a normative sense, the two cannot be readily combined into a coherent ‘hybrid’ system. Applied consistently and with full logical clarity, they would require for many competing objectives to be pursued simultaneously, which would be a truly challenging endeavour. It is conceptually impossible to have laws that are both cautious and progressive, or a regulatory regime that is both controlling and laissez faire.

It is true that in practice legal frameworks should be able to accommodate the tension between diverging aspirations. After all, all laws express a political settlement that their deliberators managed to achieve in a certain area. However, this sort of reconciliation is arguably possible if and only if institutions in charge of the issue are willing and strong enough to handle such tensions, such as in the case of domestic parliaments that constantly debate their political choices and consequences that those bring about. However, in case of development financing, where governing institutions such as the Bank are either unable or unwilling to engage in a similar debate about best regulatory practices, the tensions remain unmanaged, and the regulatory regime evolves sporadically. Accordingly, the necessary rules are introduced depending on their feasibility, and not as a result of best rational and/or

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488 The first planned improvement of the Bank’s rules was attempted when operational directives were pulled together in early 1990s (see the discussion in s.3.1. and s.3.2.2.), and again several times since (see s.3.2.2.), but the most recent policy reform seems to be the most comprehensive (see s.7.3. for further debate).
socially most acceptable justification. This leads to loopholes and paradoxes – as has been noted in the doctrinal analysis in the previous chapters. This, in a nutshell, is how the lack of conceptual clarity contributes to the ‘accountability gap’. I will now unpack this statement further, with concrete references to the governing framework of the Bank.

6.2. Conceptual ambiguity in the Bank’s governing framework

In practice, such conceptual confusion puts the institutions capable of influencing the governance of development financing in the spotlight. In the case of the present analysis the competent institution is of course the World Bank. As argued in the chapters thus far, the Bank is already making choices about its ‘template of governance’, and regulates development transactions through its operational policies. The Bank holds most means, the best knowledge and specialized expertise about development. It is charged with bringing together a diverse range of donors and recipients. To put it another way, the World Bank is not just one of the many players floating amongst other market participants in an uncoordinated market of development aid. The responsibility to provide an adequate governing framework for these transactions falls directly under the institutional mandate of the Bank (in contrast to its responsibility for individual interventions, which is shared with other power-holders). However, in order to provide such an adequate framework, the Bank has to make certain regulatory choices, as I briefly explain in the following sections.

6.2.1. The Bank’s regulatory dilemmas

On the whole, it seems to me that the two accounts described above point towards at least three dilemmas with which the Bank is faced. I will explain these dilemmas by describing the type of changes in the governing legal framework that choosing either of the two options would inspire. I will also illustrate why the current position of the Bank – in case of all three dilemmas considered – is an ‘in-between’ one, and how resulting ambiguity undermines the possibility of affected people to demand accountability.

489 Even in case of the current reform, which is meant to be progressive and had been planned with conscious effort, the Bank refers to the ‘balanced response’ and ‘pragmatic solutions’; see the remarks about consultation outcomes in The Second Consultation Paper, para.6.
a. **Control v. liberalisation.** The first dilemma for the Bank is to either control the content of its transactions (in accordance with the institutional perspective), or to allow for this content to be set by the borrower and market forces (in accordance with the contractual perspective). The former would mean improving Bank’s own standards, especially those concerned with substance of interventions. For instance, more emphasis on HR obligations, more substantive provisions in the operational policies and better means of clarifying and enforcing domestic social and environmental laws. The alternative choice – leaving these issues to the borrowers and markets – would mean toning down the importance of the Bank’s own policy objectives and loosening up project regulation, conditionality and supervision. In the case of enhanced control the Bank would be creating a ‘thick’ level of regulatory protection, i.e. a specialized and functional equivalent of safeguards provided by domestic constitutional systems. In the case of deregulation, the Bank would rely more strongly on the domestic regulatory systems, and would enable the affected people to use domestic accountability mechanisms more effectively. Conceptually both options would enable accountability towards affected persons, either based on (specialized) international; or domestic standards of accountability.

The current situation seems to disable both of the two options. The Bank only has soft and procedural regulations. Yet, by censoring which projects are fit for funding and limiting the discretion of domestic authorities during its implementation, the Bank reduces the possibility of political deliberation within the domestic framework of the borrowing state. Hence, from the perspective of affected people, the possibilities of referring to authoritative standards of protection and of using them as leverage against harmful decision-making are undermined at both domestic and international levels.

b. **Institutionalised v. ad hoc accountability mechanisms.** This second dilemma follows directly from the previous one. The first option (more control) would require the Bank to create institutional structures that ensure compliance with its ‘thick’ regulatory framework. In practice this would mean the creation of permanent accountability mechanisms that do not depend on the circumstances of each individual project, for instance the putting in place of an independent review tribunal that could not be circumvented by a decision of the Bank. On the other hand, the second alternative (liberalisation) would require the Bank to update its standard contract clauses and at
least to clarify, but also probably to improve, the position of affected persons in its transactions. For instance, their third party rights could be made explicit and expanded accordingly; or it could become mandatory for the borrower to conclude special benefit-sharing agreements with representatives of the affected communities. Choosing either of the two options would enhance accountability, because it would clarify how exactly affected people are able to protect their interests and resolve their disputes with power-holders.

Again, the current situation seems to reflect only the negative qualities of both accounts. On the one hand, neither the deliberative nor the review mechanisms are fully institutionalized. The jurisdiction of the Panel depends on the type of each individual project (and what role the Bank took upon itself in that project). In a similar vein, not everybody affected has the same opportunities to express their views and challenge decision-making: these rights depend on their social status (indigenous peoples), or gravity of the harm caused. Furthermore, it is only in exceptional circumstances that project agreements provide affected people with specific entitlements and enable their possibility to challenge the decisions of power-holders. In other words, the framework is neither fully institutionalized, nor accessible through ad hoc mechanisms. Altogether this undermines the capacity of affected persons to hold decision-makers to account.

c. Procedures v. outcomes. This last regulatory dilemma is about what justifies the Bank’s choice to fund specific development projects. The Bank should take a clear stance about whether specific projects and their designs are chosen based on the output of the deliberative procedure (institutional account), or simply because of the most effective outcomes, perceived in an objective sense (contractual account). From the first perspective, the Bank should ensure that deliberative procedures are clear, accessible and inclusive. Such procedures would thereby justify project choices by making sure that the decisions taken are those that are socially and politically most acceptable. On the other hand, if the Bank pursues the best possible results, then there must be a clear justification about why such results are objectively better than any of the alternatives.

490 Note that this list is expanding in the Bank’s most recent draft of the policies, see s.7.3. for further details.
491 These are the basic observations that are derived from the communicative theory of contract (see, for instance, B. Lomfeld, ‘Contract as Deliberation’, 76(1) Law and Contemporary Problems (2013) 1) and from general justifications of deliberative democracy (see, for instance, O. Perez, ‘Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law’, 10(2) Indiana Journal of Global Legal Studies (2003) 25).
Moreover, the best potential outcomes should be shielded from political interests by
the funders of the Bank, or any other political considerations unrelated to the quality of
the output. The two options thus point towards different frameworks of assessment that
could be invoked in challenging decision-making by the power-holders.

Here again, the current position of the Bank presents a mid-way scenario that
undermines the possibility of affected people constructing valid arguments against
interventions. The procedures are not sufficiently inclusive to say that they lead to
socially most acceptable solutions. It is a commonplace to invoke the ‘effectiveness’
argument, and claim that more participation would get in the way of arriving at optimal
results. At the same time, the formalism and complexity of the deliberative process is
used to justify the lack of jurisdiction by the domestic courts and prevent affected
people from challenging negative impacts of these transactions. In other words, there is
a lack of a clear point of reference for evaluating project choices. The affected people
can neither refer to the faulty procedure, nor to the negative outcomes. Instead, the
decisions are generally guided by the cost of the available alternatives, which does not
necessarily lead to either the most socially acceptable, or the optimal and most
sustainable solutions.

The objective of this overview of the Bank’s regulatory choices was not to give an exhaustive
list of the measures that the Bank could employ in order to enhance the accountability
towards affected people. Instead, it was meant only to illustrate how an ambivalent
conceptual position leaves affected people disempowered, and deprived of the conceptual
and institutional space to protect their causes and interests.

At this point one could react to such analysis by suggesting that the Bank does not have to
choose a particular one of the two accounts in order to boost accountability towards affected
people. Instead, from the accountability perspective, either of these strategies – i.e. that
pertaining to the institutional or the contractual account – would be preferable to the current
‘gap’. However, accountability is only valuable to the extent that it is able to ensure better
governance of development financing. Uncoordinated accountability measures, on the other
hand, carry a risk of further suppressing the voice of affected people and impeding the overall
effectiveness of development operations.

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492 See s.4.5 for further discussion.
493 Ibid.
For instance, if a participatory regime was introduced at all stages of the deliberative process without ways of assessing its operation, consultations used by competing political powers and interest groups might slow down or jeopardize the funding deal. In a similar vein, the lack of clear terms of reference for review might narrow the discretion of decision-making to the point where it prevents authorities from arriving at satisfactory and sustainable development solutions. In other words, accountability mechanisms ought to be targeted and based on sound justifications. Otherwise, they risk becoming instrumental for other purposes and impeding the interventions that might actually be useful and necessary to improve the well-being of affected societies.

6.2.2. Tendencies in the Bank’s governing framework

The description thus far has shown that in practice the Bank adheres to a mixed set of arguments to justify its governing framework. Neither of the two accounts are invoked fully or consistently. Nonetheless, if one had to identify a tendency in Bank’s outlook on governance, the features of contractual perspective should be recognised as prevalent. This appears to be the case with regards to all dilemmas considered in the present chapter. The Bank seems to favour a more liberal over a strongly regulatory approach. This observation is supported by the institution’s refusal to recognise international human rights’ norms, the procedural nature of its operational policies and its reluctance to introduce more substantive requirements. The Bank appears to be more amenable to the project-specific and ad hoc solutions rather than the institutional model of accountability regime, since all of the core rules that set out social and environmental protection become binding only through the so-called ‘project documents’. Accordingly, the Bank appears to be oriented more towards the outcomes than the process of development cooperation: it currently measures the performance in individual projects through a set of indicators, but does not require the borrower to show how it implemented the views expressed during the consultation process.

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494 Note that all of the observations in this paragraph will need to be amended in one way or another if the Bank’s most recent draft of operational policies were adopted by the Board of Directors. Arguably this new regime would bring the Bank closer to the institutional account (see the discussion in s.7.3. for further details).

495 For changes in the new draft of safeguard policies see s.7.3.1.

496 For changes in the new draft of safeguard policies see s.7.3.2.
Nonetheless, on the whole the analysis of evolution of operational policies in this work has illustrated\textsuperscript{497} that the Bank seems to be shifting towards a more institutionalized approach and away from purely \textit{ad hoc} based reasoning. However, the process is slow and not always intentional. Instead, it seems to be largely evolving as a response to advocacy initiatives by global civil society, whereas borrowing countries and commercial partners seem to be reluctant to accept such tendencies\textsuperscript{498}. That is so because the institutional account points towards clearer and less flexible standards of accountability, which are likely to cause more expensive funding deals\textsuperscript{499}.

Overall, it appears that the contractual mode of governance fits more easily with an underlying ideology of international cooperation in development financing. It is more capable of accommodating the diversity of transactions in this field. It enables more activities, and it is more attractive to market participants because each transaction is treated as unique in terms of its social and environmental standards. Moreover, the liberal approach of channelling funds depends more intimately on demand and supply than on politically contested decisions and institutionalized planning. It therefore seems to be better equipped to enable the flow of capital across borders, and between public and private sectors. In other words, it is easy to see why the Bank would use the contractual approach as a default, and would be resistant to any further institutionalisation.

However, many issues with this contractual outlook have been noted in the critical analysis of Davis’ argument. Underneath it all, this account is based on assumptions that are unjustifiably optimistic, and it tends to accord insufficient attention to the negative implications of development transactions. That is why it appears necessary to explore the possibilities for the Bank to employ the considerations of the institutional perspective. To facilitate such further analysis, in the next section I will explain how the notion of project law suggested in this work helps to restructure the descriptive element of the institutional account, and connects it with the key observations of the contractual point of view.

\textsuperscript{497} See the discussion in s.3.3.3.
\textsuperscript{498} For instance see Consultation Paper at 4-26; also ‘Indicative List of issues for a Phase Three Consultations’, both available online at \url{http://consultations.worldbank.org/consultation/review-and-update-world-bank-safeguard-policies}.
\textsuperscript{499} Cf. Randheria who argues that the Bank is already employing too high standards of accountability that are ‘too expensive’ in comparison to domestic rules; she however provides no evidence for such a general claim (see S.Randeria, ‘The State of Globalization. Legal Plurality, Overlapping Sovereignties and Ambiguous Alliances between Civil Society and the Cunning State in India’, 24(1) \textit{Theory, Culture and Society} (2007)1).
6.3. Project law: the missing link?

I noted in the previous chapters that the term ‘project law’ refers to all sources of normativity pertaining to a particular development intervention. A contractual instrument or a piece of regulation is a part of project law as long as it contributes to the negotiation, conclusion and implementation of specific project objectives. This notion does not contest either of the two positions suggested in this chapter. Instead, it is an organising concept that provides an additional lens of analysis. Through this lens we can view the governing framework of the Bank in a way that accommodates the critical observations of the contractual account, but at the same time allows us to keep in sight the institutional background against which development transactions are taking place. In this section I am going to introduce the origins of this concept and explain how it is able to connect and add to the two accounts analysed above.

6.3.1. Origins of the term and how it is adapted in this work

The term ‘project law’ was coined by Benda-Beckmann about a decade ago\(^{500}\) and has since been used by legal anthropologists analysing the sociology of law in development interventions\(^{501}\). The concept emerged from Benda-Beckmann’s wider analysis of classic legal pluralism\(^{502}\). It was introduced as a normative constellation of donors’ rules, and used to understand how these rules relate to recipient state laws, as well as indigenous systems governing project beneficiaries.

Markus Weilenmann, one of the anthropologists who employed this concept extensively, has unpacked it further and explained and that there are in fact ‘two types of legal schemes’\(^{503}\) that can be understood as project law. The first one describes the design and planning phase

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\(^{502}\) The term ‘classic’ is meant to contrast this strand of literature with new wave of ‘global legal pluralists’ who adopt the ideas of pluralism to the context of global governance; see for this distinction M.Croce and M.Goldoni, ‘A sense of self-suspicion: global legal pluralism and the claim to legal authority’, 8(1) Ethics and Global Politics (2015) 1.

of development interventions. The second one covers its implementation stage, or as he calls it, an ‘institutionalisation’ of project activities, which ‘devises new structures for decision-making and allocation of resources’\textsuperscript{504}. According to Weilenmann, project law can be used to comprehend the space of decision-making within each project, as negotiated and applied by the authorities that take active part in devising this framework.

The fact that this notion originated in the field of legal anthropology seems to add to the epistemic credentials of this idea. That is so because the methodology through which it was initially derived is well grounded in empirical reality. The concept had emerged from observation of the factual set-up of development projects. Such origins of project law explain why it is so well placed to give an accurate descriptive account of legal framework applicable in development financing.

My understanding of project law builds upon these original observations of legal anthropologists; but it also transforms their idea further, as tool of doctrinal analysis. Probably the most important difference (or at least the shift in focus) is that legal anthropologists, when positing the framework of project law, were concerned with the patterns of behaviour of all those actors involved in this set-up. This work on the other hand, employs the idea as a theoretical construct that can help to conceptualize the normative space created within each project. Here the term ‘project law’ is largely emptied of its empirical content, and is instead used to facilitate our theoretical understanding about the formal legal framework that shapes development transactions.

When brought to a level of abstraction, project law should be seen as contingent on the temporal and spatial dimensions of each project, as well as the subjects that it affects. At the same time, these contingent arrangements are nested within larger, more stable institutional and legal structures that enable these arrangements in the first place.

As a theoretical concept, project law attempts to grasp how contractual features and the institutionalization of development financing fit together. In shifting the focus from general system of development financing to individual projects, it places the issue of accountability at the level where most coercive decisions are being made. This adds to Dann’s account, because it brings into the focus of analysis the factual coercion used in development interventions, as well as providing conceptual space to consider the private sources of funding. Secondly, this notion is about authoritative decision-making exercised upon certain subjects. In this respect

\textsuperscript{504} Ibid. at 235.
project law accords affected people central position, beyond the weak ‘third party’ status that Davis’ contractual account would suggest. Arguably project law also provides insights about development financing that the two authors described in this chapter has not yet picked upon, which become apparent if we try and pin down the core characteristics of project law.

The characteristics described in the following section are derived from the observations made by legal anthropologists, combined with the outcomes of doctrinal analysis undertaken in this work.\(^{505}\) The objective of presenting these characteristics on such an abstract level is to come to terms with the complexity of legal relationships formed in the Bank’s operations. The intention is therefore to focus on the logic of the governing framework and its functioning, in order to extract the elements that are unique and therefore crucial from a normative perspective.

### 6.3.2. Core characteristics

**a. Pluralism of legal sources.** I have reiterated several times throughout this work that project law is generated in multiple institutional arenas and composed of a variety of formal legal sources. I have shown that there is no clear hierarchy amongst general, specialized and project-specific rules.\(^{506}\) The extent to which these different categories are applied and implemented depends on the institutional apparatus, and not necessarily on the legal nature of the source that they are derived from. For instance, project-specific rules are likely to be applied thoroughly because each project puts in place a set of ad hoc institutions that are charged exclusively with an implementation of these rules. Yet, the core provisions in state constitutions (for instance those relating to broadly conceived individual rights) are likely to be applied only to a certain degree; notwithstanding their undisputable legal authority that can be contrasted with the authority of the so-called ‘project documents’.

Despite such nuanced differences in legal nature, it should be acknowledged that all categories of rules considered in this work are derived from authoritative sources. Loan and project agreements are concluded by the governments that are acting within their

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\(^{505}\) They are then supplemented with the theoretical arguments by Dann and Davis presented in this chapter, also through the insights provided in general scholarly writings about global legal pluralism and contract law theories mentioned previously in this work (by Croce and Goldoni, Zumbansen, Lomfeld, Orez, etc.)

\(^{506}\) See discussion in s.3.5. for further detail.
constitutional mandate. Operational policies of the Bank are adopted within the framework of the institution’s founding treaties, which are functioning under public international law. None of these sources are truly soft (in a sense of being non-binding), nor informal (in sense of being adopted merely through social and political agreement). However, they belong to different normative orders that cannot be readily aligned and compared against one another. It is difficult to try and argue for any definitive hierarchy amongst them – at least not from the descriptive point of view.

All in all, project law appears to be truly pluralistic, notwithstanding the different levels of democratic and legal credentials that could be attributed to different categories of rules in this area. In many respects this pluralism appears inevitable, because of the indefinite constellations of objectives and relevant sources of funding that get activated in this set-up. The legal framework in this area must be open-ended enough to accommodate a variety of interests and values involved\(^{507}\).

Nonetheless, embracing this pluralistic nature of project law also bears certain risks, mainly related to relativism\(^{508}\). If we went ahead and accepted that funding development requires full freedom of contract, then we risk ending up with a situation with no legal baselines. If terms and conditions of every transaction became contingent solely on the circumstances of that particular transaction, then even the most serious damage to affected people risks being treated as a ‘necessary evil’, and not recognised as grave enough to prevent the intervention from happening. It can become borderline impossible to tell what are in fact the limits of acceptable behaviour, let alone what \textit{standard} of behaviour can limit the decisions by the parties. Everything might become a matter of negotiation, in which affected people are not expected to take part.

Admittedly such traps associated with self-referential decision-making can be conquered. This can be done by adopting the clear and mandatory standards of accountability that constrain authoritative behaviour by \textit{all} power-holders\(^{509}\).

\(^{507}\) Dajani explains how such justification of contractual freedom was first introduced by the courts in New York state (\textit{Lochner v. New York}, 1905), and then eventually got to be accepted on the international plane, see O.M.Dajani, ‘Contractualism in the Law of Treaties’, 34 \textit{Michigan Journal of International Law} (2012)1.

\(^{508}\) Cf. Krisch, who argues that pluralism of legal sources at the global level is generally a positive development, and that it is overall normatively preferable to the hierarchical models of accountability (see N.Krisch, ‘The Pluralism of Global Administrative Law’, 17(1) \textit{EJIL} (2006) 247.

\(^{509}\) See the discussion in s7.2. for a description of related issues that tend to arise in this regard.
b. Justification through deliberation. Since project law is inherently pluralistic, it relies heavily on the process of communication. Parties to the agreement articulate and share their reasons for taking part in the transaction and that way arrive at mutually satisfactory solutions. The very fact that these reasons are put forth, considered and contested – even if they end up being rejected – provides justification for project-specific terms and conditions.

What reasons count as valid in this process and why, and which are the acceptable routes of argumentation and which not, are usually decided at the institutional level, before the negotiations begin. This explains the importance of the Bank’s analytical framework that is used to prepare and negotiate development projects. In this analytical space created by the Bank, all ideas about needs and values behind individual interventions are aligned and weighted against one another. This process legitimises the transaction and leads towards a normative arrangement that is generally considered to be law.\textsuperscript{510}

In the light of the above, the battle over the inclusion of affected people\textsuperscript{511} becomes about the recognition of these people as legitimate participants in the Bank’s deliberative framework. As explained several times before, currently the views of affected persons are treated as relevant \textit{factor} in related negotiations, but they are not yet invited to the table of negotiations\textsuperscript{512}. It would therefore be difficult to claim that affected individuals and communities are treated as equal participants in this process. Thus far the status of ‘affected person’ is in the process of gaining recognition, and it is gradually introducing a new type of \textit{subject} in the Bank’s deliberative process\textsuperscript{513}.

Such a reliance on the deliberative process also comes with certain risks. Probably the greatest risk associated with discursive justification is that it might lead to an arbitrary exercise of power, and in particular domination over those who have less economic and political leverage to negotiate. By definition discursive justification is based on reasons rather than rules. Reasons by and large are more amenable to the subjective interpretation

\begin{footnotesize}
\textsuperscript{510} Lomfeld, ‘Contract as Deliberation’ at 2-10.
\textsuperscript{511} See the discussion in s.4.2.2.
\textsuperscript{512} This trend is changing slowly towards more inclusion, see the discussion in s.7.3.2.
\textsuperscript{513} \textit{Ibid.} See also Dickinson, ‘Public Law Values in a Privatized World’ (who argues that allowing the beneficiaries of public contracting to take part in the contract design is already practiced at the domestic level and should be replicated in the international contracting processes).
\end{footnotesize}
and depend more heavily on the willingness of the powerful parties to accept the reasons of other entities to the transaction.

It is therefore necessary to acknowledge that in order to avoid the risks of arbitrariness and domination, deliberation must be based on certain conditions. Perez argues that our fascination with deliberative practices at transnational level is inspired by our experience with deliberative democracy. However, deliberative democracy requires that all those taking part in the political ‘conversation’ are equal, free and rational. Without these qualities deliberation mocks the values of exchange and communication instead of promoting them.

Here, as in the case of pluralism, the only way of avoiding these related pitfalls is through a sound legal framework, i.e. through the rules about recognition and the reasons that are acceptable in this context. Arguably such a framework, coupled with strong institutions of enforcement, could protect affected people from coercive practices, as well as from a dismissive attitude by the power-holders.

c. Autonomous functioning of implementing institutions. The deliberative process through which project law is created both relies on the decision-making procedures within authoritative institutions while at the same time negating them. This happens because project agreements can only come into being through the structures of already established authorities; but once adopted, these agreements create additional and often competing layer of regulation. In doing so, agreements order social and political relationships that would otherwise be subjected to the general legal regime. On the whole, it should be recognised that existing institutions enable the authority of project law, but in order to do so, they surrender (at least temporarily) some of their authority to the new institutional regime created under each project.

514 See Perez, ‘Normative Creativity and Global Legal Pluralism.
Accordingly, the idea of autonomy in this context should not be equated to ‘self-authorship’\textsuperscript{516}. It does not necessarily point towards a wide discretion of institutional structures that govern the project. Instead, it emphasizes the capacity of project-level governance units to function almost exclusively under the terms and conditions of the project, with little consideration to the surrounding legal framework. These structures are not independent: they generally remain under the supervision by those who negotiated and signed the agreements. However, they are autonomous in a sense that they are often not in a subordinate relationship with the general institutional apparatus of either the borrowing states, or the Bank.

This characteristic of project law cannot be treated merely as an off spring of deliberative qualities. It deserves separate attention because it points towards the existence of functional intermediaries in the development financing process. These intermediaries transform decision-making about specific development issues by removing the need for ongoing and continuous judgement. Instead, they enable an ‘autopilot’ mode of project implementation. Precisely because these intermediaries function under a pre-set mode of decision-making, their accessibility from the external point of view is highly limited. Also, they create a separate ‘cell’ of decision-making within the existing institutional structures. Hence, although from a legal perspective it appears that there is only one and the same entity (the borrower) that continues to be in charge of the transaction, in practice the institutional set-up during project implementation is composed of tight supervisory and contractual ties with all power-holders in the project.

This characteristic of ‘project law’ bears a serious risk of closure. In fact, project law during project implementation appears to be closed \textit{by default} – unless this condition is altered through mandatory rules\textsuperscript{517}. The risk of closure appears unavoidable because the agreement between the parties stabilizes their relationship in a way that it can no longer be responsive to the changing needs outside the transaction. The agreement can also entrench the commitments that are beneficial to the parties, but appear to be exploitative from external point of view. On the other hand the notions of effectiveness and privity of contract provide the reasoning that justifies the closure.

\textsuperscript{516}This is a classic understanding of autonomy under contract theories; see H.Dagan, ‘Autonomy, Pluralism and Contract Law Theory’, 76(2) \textit{Law and Contemporary Problems} (2013)19, at 20.

\textsuperscript{517}New draft framework of the Bank, if adopted, will introduce more of such requirements of openness and inclusion, see discussion in 7.3.2.
In practice all three characteristics of project law can bring both positive and negative consequences to bear on the affected people. Pluralistic rules can boost the standards according to which these people are treated, but at the same time they can lead to relativism and a subsequent lack of protection. The deliberative quality creates space for the views of affected people to be included into project design, but it can also mean that they are being completely excluded from the ‘conversation’ and therefore being dominated. The autonomous functioning of project institutions can mean that sustainable project solutions are sheltered from changing political circumstances, but also that these institutions can be blind and deaf towards complaints about any negative implications of development operations. It is therefore up to the capable and powerful institutions in development financing, such as the World Bank, to become conscious of these features, and to take active measures that help make the most out of these inherent characteristics of project law.

Overall, the analysis in this chapter has shown that the legal framework of development interventions fluctuates between the risks of enabling the arbitrary use of power on the one hand, and that of suppressing the initiative and the possibilities of cooperation on the other. Yet the former issue appears to be much greater and more urgent, which is why the public law framework that informed Philipp Dann’s account appears to be better suited to guide the solutions in this area of international cooperation. The possibility of strengthening the role of public law in project law will therefore be considered in the next and final substantive chapter of this work.
Chapter Seven

Closing the gap? Strengthening the role of public law in project law

Introduction

This final substantive chapter is concerned with possible legal solutions to the issue of the accountability gap. As explained previously, the reason why public law appears to be so well placed to deal with the accountability deficit is because, at least at the national level, its purpose is to control the exercise of political power – often through the systems of accountability that are put in place to restrain responsible authorities. The problem is that neither the rules of public law nor the mechanisms associated with its functioning are readily applicable in the project law setting. Development assistance is always taking place across borders, it involves contingent groupings of power-holders, and the pluralism of legal sources that govern these transactions make an idea of a single public law framework problematic.

The difficulties of ‘transplanting’ public law ideas, values and structures beyond the nation state and onto the global transactions have been recognised by many legal scholars. Arguably some of the most convincing insights about these issues have been offered by the IPA strand described in the introduction to this work. Accordingly, this chapter builds on the suggestions made by Philipp Dann and his colleagues in the IPA project. In doing so, it traces the scope and potential role of public law in the context of development financing, and then explains how a stronger public law framework could reduce the accountability gap within Bank’s interventions.

7.1. Difficulties of locating a public law element in project law

In his account on ‘law of development cooperation’ Philipp Dann argues for an application of the so-called ‘public law approach’\(^{518}\). He does not explicitly say what this approach entails\(^{519}\).

\(^{518}\) Dann, Law of Development Cooperation at 18.

\(^{519}\) The IPA theoretical piece has an overview of their ‘public law approach’, but there it is only introduced as a line of scholarly analysis, rather than an approach that could inform interpretation of
but his idea seems to be that we can understand the entire regulatory framework of development financing as a public law system. This system is composed of public international rules at the top, which are then specified through ‘administrative law of development cooperation’, such as operational policies, and which then result in development financing agreements. The reason for which we can interpret the current framework in this systemic way is because the main actors in this framework are public. Since public law traditionally has a role to constrain public actors, the rules that guide decision-making in development financing can also be understood as belonging to an overarching system of (international) public law.

Yet, the project law paradigm seems to suggest that the link between public law and the entire normative framework of development cooperation might be more nuanced than Philipp Dann would suggest. In the present section I will try to explain why that is the case.

The first clarification that needs to be made in approaching this issue concerns the distinction between normative and descriptive arguments. It is probably fair to say that Dann’s main argument is normative: his claim is that the ‘law of development cooperation’ should be perceived as public law system. This then leads him to select specific sources of law that should be included in this system. Project law on the other hand mainly describes the current status of applicable rules. As a descriptive category project law therefore starts with a larger terrain of relevant sources, and cannot be limited to only those potentially belonging to public law area.

Nonetheless, at this point I would also like to move away from merely a descriptive and explanatory account onto the normative argument about which project law rules belong to public law framework, and which do not. However, this argument presents a different approach than the one taken by Dann. While Dann is concerned with proving an overall necessity to subject development cooperation to a more stringent legal regime, I am concerned with the question about how exactly this legal regime should look, and also how we can justify its existence.

real-life legal arrangements; see von Bogdandy et al., ‘Developing the Publicness of Public International Law’ at 1390-5.

520 Dann, Law of Development Cooperation at 299-301.
521 Ibid. at 377-380.
522 Ibid. at 18.
523 Ibid. at 17.
524 Ibid. at 30-32.
The reason why this separation of public law rules from the rest of the project law appears to be important is because traditionally in domestic systems public law takes priority over all other regulations. This means that in case of a conflict, public law rules prevail. In order to introduce such prioritization in the context of development financing, it seems necessary to capture what makes up the ‘publicness’ of these rules in the first place, and also what justifies their special legal status. This will be the main concern of mine in the upcoming two sections.

Next, as a matter of positioning my argument, it appears necessary to explain how my intention to separate public law rules from the rest of the project law relates back to the debate between Dann and Davis outlined in the previous chapter. Overall, if we accept the key observations that are driving both of these two accounts, then it must be recognised that project law in each intervention consists of two parts:

(i) The *stable* part, i.e. general rules that are set in domestic and international law; also the normative provisions in the operational policies. All categories of rules in this part of project law rely on the authority and enforcement of pre-existing institutions, such as ministries of the borrowing state, the Board of the Bank, and the like. This element is therefore *institutionalised*, which means that its content and desired effects do not depend on the individual transactions\(^\text{525}\).

(ii) The *dynamic* part, i.e. mainly project agreements, but also any other rules that are created for the purpose of the individual project\(^\text{526}\). These rules frame the relationship amongst power-holders, and also between public and private sectors in the context of that particular transaction. The implementation of these rules relies mostly on the institutional structures that are put in place specifically for the purpose of the project. This element of ‘project law’ is distinctly *ad hoc*, i.e. it is created exclusively to fit the individual circumstances of each project.

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\(^{525}\) The full scope of applicable rules would still differ depending on the jurisdiction, sector of intervention, timing of the project and other objective factors; but such potential difference would be envisioned in objective terms.

\(^{526}\) Arguably there can be many other rules that are enacted specifically for the project – but they are not officially the part of the agreement. For instance, the specific agreements required from the borrower (with contractors, or amongst executive agencies), in order for the agreement to become effective.
It was explained in the previous chapter that for the individual transactions to function well both parts of project law are necessary\textsuperscript{527}. On the whole there seem to be at least two reasons for recognising the contractual element separately, and not merely as an instrument implementing the institutionalized part of project law. Firstly, development projects include wider circles of power-holders than just classic state-driven public entities. The dynamic part is therefore necessary to provide a legal space in which mutually satisfactory decisions can be made, because is not as prescriptive as the stable one. Secondly, development financing is usually helping to implement complex social, economic or technological innovations. It would therefore be impossible to predict all the issues that might arise in each transaction. The dynamic part gives an opportunity for decision-makers to agree on the necessary regulations on a case by case basis. This means that interventions can be regulated with sufficient detail, and that contingency of project circumstances does not undermine the relevance and effectiveness of applicable rules.

All this is to note that it is arguably better not to collapse the two parts of project law into one another, but rather to continue seeing them as two different modes of regulation under the same umbrella. The key issue in this sort of ‘joint’ image of project law is therefore to maintain a viable link between the two parts, and to make sure that together they function in a coherent manner.

These general observations are best explained with an example. Take for instance a standard law on environmental protection. Let us say that it requires the government to set permissible levels of deforestation within logging concessions. The entire concession agreement would cover a much wider scope of legal relationship than just levels of deforestation, or even environmental protection broadly perceived. It would deal with such issues as fees, consequences of breach, termination, social commitment, etc. Such agreement would therefore have more functions than just to implement the law on environmental protection. In this example the law is extended to apply onto concession contracts, but it does not subsume the entire content of the contract under its area of regulation. This law therefore creates a link between regulation and contract, which then renders the authorities accountable for their contingent contractual arrangements. The law does not, however, prescribe exactly what authorities ought to agree to in their dealing with concession holders. This is what I mean by saying that the contractual element within project law could be subjected to an accountability

\textsuperscript{527} S.6.2.2.
regime; but that it is more likely to happen if stable rules are explicitly extended to cover contractual arrangements.

All of these remarks finally bring me to the clarification about how public law fits in this set-up. At the domestic level public law rules usually limit the freedom of contract. In other words, they regulate and therefore restrain the realm of social relationships that are otherwise open to the discretion of participating entities and individuals. Public law contracts, for instance, tend to limit the contractual freedom of public authorities, and also other entities that are exercising a public function on their behalf (e.g. national utility providers)\textsuperscript{528}. These public law contracts contain some default mandatory provisions that must be included by the parties due to the specific laws (e.g. clauses fixing the prices of services, or ensuring consumer protection)\textsuperscript{529}. They therefore rely on the same kind of link through which stable rules can affect a more dynamic and contract-based realm of obligations.

This link between domestic public law system and contract bears a close resemblance with the link between stable and dynamic parts of project law. However, the doctrinal analysis of accountability standards and mechanisms in this work has shown that this initial impression of the stable part restraining the dynamic (contractual) element in development financing is largely misleading\textsuperscript{530}. In reality, the stable element of the project law does not always prevail. General and specialised standards are not necessarily treated as mandatory public law rules that cannot be amended or overthrown through the contractual route. Instead, because a financing agreement between the Bank and the state takes the form of a treaty, formally these agreements can amend – for the purpose of that project – the stable part of project law. Not only that, it can also create competing rules.

Operational policies in their current form are particularly flexible in that regard. Both their format and their content are largely susceptible to the will of the power-holders. Furthermore, the more extensive is the involvement of private actors in the transaction, the more flexible are the rules\textsuperscript{531}. In fact, they are explicitly drafted in such a manner so that they can be twisted and moulded to fit the political and financial limitations that might arise in each project\textsuperscript{532}. This

\textsuperscript{528} For a general overview see Davies, \textit{Public Law of Government Contracts} at 32-62.

\textsuperscript{529} \textit{Ibid.}

\textsuperscript{530} See discussion in s.3.5.

\textsuperscript{531} That is because project components involving private actors are conducted in accordance to IFC standards, which are more flexible than the operational policies of the Bank, see OP/BP 4.03 ‘Performance Standards for Private Sector Activities’.

\textsuperscript{532} See discussion in s.3.2.3.
is notwithstanding the fact that their role – especially when it comes to safeguard policies – intuitively resembles the role of the public law.

The role of international law is also tricky in that regard. Although general sources of international law appear to create the pattern of stable rules that are analogous to domestic public law, agreements with the Bank are also concluded in the form of a treaty. In a doctrinal sense this means that such an agreement is just as much a formal source of international law as any other source of international obligations adopted by the borrowing state. For instance, if the Bank and state A conclude a loan agreement that is potentially in tension with A’s obligations under the Convention on Biodiversity (CBD), then under the doctrinal reading of international law it would be difficult to argue that provisions of CBD would necessarily prevail. CBD would not automatically have a higher status than the provisions in the development financing agreement, and further legal argument would be necessary to determine whether the provisions in the agreement could be overruled or not. Under the mainstream understanding of international law both sources are binding due to the state consent; and no state can be demanded to fetter its future consent. All in all, the sources of project law – in particular the stable and dynamic parts – are related in more nuanced ways than public law and contracts at the national level.

Despite all the conceptual difficulties outlined above I do generally agree with Philip Dann that the public law framework should govern and restrain decision-making in development transactions. Yet, it seems to me that more conceptual work needs to be done in order to pin down what exactly can be expected from a domestic public law analogy in this globalized area of cooperation. In other words, we need a clearer and better articulated restatement of what public law actually means in the context of development financing, and what can it do. This in turn requires revisiting the rules and procedures relevant in this set-up, and deciding which of them currently do and should perform the functions of public law. Only once we have clearly identified the rules of the transnational public law framework, will it become possible to see where these rules currently stand in the overall structure of project law, and what solutions they can bring to the issue of the accountability gap.

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533 Such ‘doctrinal reading’ would be in accordance to the standard rules of treaty application, such as Art.30 of the Vienna Convention of the Law of Treaties (1969).
534 These issues are dealt with by the scholars concerned with fragmentation and conflict of norms in international law, see for instance R.Michaels and J.Pawelyn, ‘Conflict of norms, or conflict of laws?: Different techniques in the fragmentation of international law’, 22 Duke Journal of Comparative and International Law (2012) 349.
7.2. Public law beyond the state and its scope in the context of development interventions: building on the IPA approach to global governance

In the previous section I have argued that only a certain element of project law framework can be regarded as public law, and that public law systems understood in a classic sense are only readily identifiable at the domestic level. The meaning of the term itself – public law – on the international plane is fluid, difficult to pin down and yet to be clarified through persuasive legal argument. The question that needs to be addressed for the purposes of present research is therefore the following: under what grounds and based on what criteria would it make sense to categorise transnational rules of development financing as belonging to public law? The IPA project has put forth convincing insights that can help to answer this question, and so the argument in this section will be based on their theoretical approach. Nonetheless, in the second part of this section I depart from some of the IPA’s views, and propose my own interpretation of how the public law framework can be conceptualized and delineated in the context of development interventions.

7.2.1 Theoretical insights of the IPA project

Von Bogdandy, Dann and Goldman, who are the principal authors of the IPA theoretical framework, suggest that public law beyond the state should govern the exercise of international public authority. This authority is defined (a) by its capacity to make decisions about public choices at the international level; and (b) by its competence, which is derived from formal sources of law. The reason why it is important to circle public authorities and delineate them from other actors having political and economic power in the international arena (for instance, transnational corporations) is because these authorities are making

535 von Bogdandy et al., ‘Developing the Publicness of Public International Law’; note that there has been a further elaboration on this project (see A. von Bodgdandy, M.Goldmann, I.Venzke, ‘From Public International to International Public Law: Translating World Public Opinion into International Public Authority’ (September 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2662391 (this, and all other websites in this chapter were last accessed 01 December 2015)). However, this most recent version comes across as elaboration on certain details, whereas the core structure of the theoretical argument is still predominantly set out in the original project.

536 Note that the IPA authors also suggest the idea of ‘functional equivalence’, which defines the instances of exercising the authority that are typically exercised by public authorities; but which at the global level might have been taken on by private, or hybrid entities; see von Bogdandy et al., ‘Developing the Publicness of Public International Law’ at 1383-4.

537 Ibid. at 1384.
unilateral decisions that legitimately affect the limits of individual and collective freedoms. Since traditionally these freedoms could only be limited by domestic government, authoritative decisions that create similar effects at the international level should also be subjected to public law rules and principles.

The IPA scholars share their underlying anxiety about the rising power of institutions at the international level with the GAL project that also sets out to conceptualize the phenomenon of global governance in legal terms. In fact, both of these strands are attempting to rethink the existing system of law at the global level, rather than to put forth suggestions for new doctrinal rules. Both strands are based on the comparative methodology, which means that their theoretical frameworks emerge by aligning different national systems of public (administrative) law, and consequently suggesting what idea of transnational (public) law would work best at the global level538. Hence, they are similar in terms of their aims, scope and methodology. Nonetheless, the differences between the two are also significant. Arguably, they point towards conceptual advantages of the IPA’s framework.

The main difference between the two strands stems from the way in which they conceptualize legal problems characterizing global governance. GAL scholars argue that there exists a common and shared space of decision-making at the global level, in which domestic and international decision-making is intertwined in ways that cannot be separated539. This ‘global administrative space’540 is therefore largely detached from control by the states: its linkages with decision-making at the domestic level are either uncertain, or at least not a part of GAL’s theoretical terrain. Accordingly, GAL is concerned with accountability of ‘global administration’541 – the loose group of actors with varied democratic, constitutional and legal credentials.

Unsurprisingly then, GAL is constructing a thin and largely procedural image of administrative (public) law. In terms of normative solutions, it puts forth a list of basic – although important – administrative principles that are commonly found around the globe542. However, the content of these principles is radically open-ended. Because the universe of ‘global administrators’ is so

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538 Note that both of these projects had been criticized for their Western liberal bias, and that they were ‘modelled’ on the public (administrative) law systems of Global North. GAL is generally considered to be ‘American’ in terms of suggested administrative law model (see Stewart, ‘U.S. Administrative Law: A Model for Global Administrative Law?’); whereas IPA is convincingly inspired by German public law tradition.

539 Kingsbury et al. ‘The Emergence of Global Administrative Law’ at 18-20.

540 Ibid. at 18.

541 Ibid. at 20-23.

542 Ibid. at 37-41.
diverse and because no conscious attempt is made to preserve the link between global administrative law and underlying values of governance or its constitutional ideals, GAL’s principles have very little normative ‘pull’.

In contrast to the above, the public law approach by the IPA scholars has quite a strong focus on the role of states and their institutions. As mentioned previously, this project seems to be inspired by an observation that the states had lost their previous monopoly to legally ‘determine’ and ‘condition’ the fate of their citizens and smaller political entities. At the heart of this framework is a simple idea that the impacts (on individual and collective freedoms) created by an exercise of public authority must be restrained through an authoritative and predictable system of rules – that is, through public law. It is this link between autonomy and authority that needs to be noted, assessed and attuned in the context of global governance. Because the IPA project is so firmly grounded in preoccupations of liberalism, it seems to provide a good justification for the normativity of transnational public law that it advocates.

Despite IPA’s conceptual proposal being highly state-centric and state-driven, their idea of ‘functional equivalence’ helps to bridge some of the gaps that might otherwise undermine the benefits of this strict theoretical model in the messy reality of global governance. In the context of project law, functional equivalence actually becomes the missing ‘piece of the puzzle’ that joins together the state-centric nature of international legal order, and the hybridity of power-holders that take part in development interventions.

In a nutshell, the idea of functional equivalence can be explained through a following list of conditions:
- if decisions by a given entity can unilaterally condition individual freedom or limit collective self-determination,
- if these decisions are legitimate and
- if they help to execute public function that would typically be executed by public institutions,

then the entity that is taking such decisions is exercising public authority.

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543 von Bogdandy et al., ‘Developing the Publicness of Public International Law’ at 1381-85.
544 The two terms are used for different types of authorities; in both cases the focus is not on binding instruments, but on the capacity to ‘unilaterally shape legal and factual situation’; see ibid. at 1381-82.
545 Note that I am using the term here in the same sense as the IPA scholars; it does not refer to the principle of self-determination under public international law; but the more loose and political idea of self-governance and collective autonomy.
The test of functional equivalence is therefore an objective one. It puts an emphasis on the role of authoritative decision-making in a society, rather than the subjective intentions behind it. This means that in circumstances where the entity exercises public function we can disregard the origins of the power-holder, i.e. whether it is public or private. This also diminishes the importance of subjective reasons driving the decisions of a particular decision-maker, i.e. from a public law perspective we no longer care whether the underlying intention of this entity is to acquire profit, or if it actually intends to further public interest. The decision-maker becomes assimilated with its public function, and from a public law perspective its subjective preferences are no longer relevant. On the whole, the idea of functional equivalence can explain why in development interventions the donors, investors, and also private borrowers, can all be considered as exercising public authority, even if they joined the transaction with no such intention. Moreover, it can explain why they should all be subjected to the public law framework.

7.2.2. Using the IPA’s tools to separate transnational public law from other project law rules

The IPA scholars in their theoretical framework give plausible explanations about who should be governed by public law and why, both of which are important issues in development financing. But what do these theoretical reflections tell us about the scope and content of public law rules in development interventions? How can we invoke them to delineate mandatory public law provisions? The IPA’s theoretical framework can only provide us with a general guidance about how to approach these questions, but it cannot give specific answers in this regard. That is so because the theoretical reflections of this strand are about defining public authorities that must be subjected to public law, rather than the rules that would actually apply in each area of international cooperation.

546 In their most recent paper, IPA scholars von Bogdandy, Goldmann and Venzke are insisting on a strict differentiation between private and public actors and do not explicitly explain their decision to stop using the notion of functional equivalence; see von Bogdandy et al., ‘From Public International to International Public Law’ at 22-32).

547 Note that the initial concern of IPA was to establish foundations for a scholarly research project – and not to reconceptualise the entire legal terrain. The emphasis was on the phenomenon that public law scholars should study, rather than limiting them to a particular area of rules. See von Bogdandy et al., ‘Developing the Publicness of Public International Law’ at 1375-1386.

548 In their newest paper on the matter von Bogdandy, Goldmann and Venzke focus on the centrality of freedom and how it can help to ‘reconstruct legal framework of public law at the international level’, but again do not spell out exactly what sources, and what type of rules this framework should include in concrete terms, see von Bogdandy et al., ‘From Public International to International Public Law’ at 23.
Philipp Dann on the other hand engages with the issue directly, and applies the IPA’s theoretical observations into the area of development financing. He implies that the question of identifying public law can be resolved by looking at the origins of legal sources and, in particular, the authority of the institutions that enacted them\(^\text{549}\). He therefore suggests that decisions by official authorities – such as the World Bank operational policies, or the agreements themselves, would also belong to this overarching authoritative system of public law, and that their validity comes from the official mandate of public institutions. Dann then makes a distinction within this system of public law. He differentiates between legal and structural principles, and that way delineates the core of his (public) ‘law of development cooperation’\(^\text{550}\). This core, which is constructed exclusively from the formal sources of international law, cannot be violated by those who are making the decisions about development projects.

Nonetheless, as I have previously argued in my commentary on Dann’s book\(^\text{551}\), this strategy is biased towards international standards, and therefore has low normativity when it comes to the protection of individuals, or sub-state minorities. In other words, his way of delineating mandatory requirements within the public law system points towards a narrow interpretation of what public law could and should do in this context.

In this section I would like to argue that at least in the context of project law, the public law framework extends further than formal sources of international law. Instead, the rules resembling public law provisions can be found within all sources of project law, and they could all potentially perform its function. I would therefore like to put forward two criteria for separating public law from all other sources of normativity in development financing. The first one of these criteria is based on the IPA’s ideas introduced above. The second one deviates from the IPA’s reasoning to a certain degree, but remains amenable to its focus on states and official institutions.

To summarize, such a conceptual exercise of delineating public law rules is concerned with two major qualities of applicable rules: (a) their function; and (b) their effectiveness\(^\text{552}\). The function is defined by the content of rules, whereas the effectiveness depends on the

\(^{549}\) Dann, *The Law of Development Cooperation* at 223.

\(^{550}\) Ibid. at 222-4.


\(^{552}\) This distinction is building on Loughlin’s observations about two functions of the modern state. Loughlin makes a famous distinction between state as *societas* (as a servant of the people) and *universitas* (governors as superiors that carry forward the common undertaking of the society); see M.Louglin, *The Idea of Public Law* (2004) at 13-19.
institutional back-up that these rules should receive with regards to their implementation. In order for the rule to be considered as belonging to the public law framework within project law, it should fulfil both of these criteria.

**a. First criterion: the rule is designated to perform public law function.** As explained previously, in order to identify the range of entities that are exercising international public authority, the IPA suggests using the notion of functional equivalence. It seems to me that this very notion would work equally well as a conceptual tool for delineating the scope of applicable public law provisions within project law. The idea here is to establish the equivalence between functions of *rules* rather than that of *authorities*. This would mean looking for provisions within project law that have the objectives and content similar to those of public law rules domestically.

In order to apply this notion we must firstly agree on the function of domestic public law systems. Under closer examination it appears that the general purpose of public law consists of at least two distinct yet related functions. Firstly, public law *confers* authority to act on behalf of the public interest. Secondly, it *protects* the individual freedom and collective autonomy whilst this authority is being exercised. Power-conferring and power-controlling rules therefore function like two sides of the same coin, which is why they must be applied and interpreted together. On the whole these functions are direct opposites. The tension between them can only be appreciated and resolved through a strong public law framework. Within this framework the two functions balance out one another, and consequently are sustained through a system of checks and balances.

In the domestic context this system of public law is normally set in state constitutions. At the global level and within the context of project law the conferral and control of power tend to happen more ‘organically’ – that is, depending on the willingness of the states to respect the freedoms of their citizens, leadership of international institutions, global ideological climate, international peace and security, and the like. It is impossible to find a single source where all the relevant rules are aligned. It is nonetheless possible to pin

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553 IPA scholars talk about the differences between constitutive and limiting functions, which are roughly representative of the same distinction, see von Bogdandy *et al.*, ‘Developing the Publicness of Public International Law’ at 1380-1.

554 These are also referred to as ‘red light’ and ‘green light’ functions of public law (see generally C.Harlow and R.Rawling, *Law and Administration* (1998)).
down individual power-conferring and power-restraining rules that help to fulfil the public law function beyond the state, which in turn enables the assessment about whether or not the two sides of this function are equally reflected in a legal framework.

This explains at least partially why from a public law perspective international law alone does not suffice to govern development financing. Given how heavily the formal sources of international law are reliant on the sovereignty of states, it can be argued that international law is disproportionately concerned with conferral of power. Put otherwise, it contains insufficient safeguards as to how that power should be exercised. This in turn requires for us to look beyond the formal sources of international law, and to consider what a well-balanced public law framework in this context should entail, and where the necessary rules could stem from.

To my understanding, the test of functional equivalence in development financing therefore points towards necessity to embrace all standards of accountability considered in this work – to an extent that those are performing a public law function in a particular transaction. In practice the rules that create safeguards against the arbitrary exercise of authority are set at the domestic level, and in the context of the Bank’s operations are also asserted through safeguards in operational policies. If we take the idea of transnational public seriously, then domestic standards and operational policies become just as important as formal sources of international law because of their content. This is directly related to the second part of this analysis, concerned with conditions of effectiveness that would enable such a public law framework at the global level.

b. Second criterion: the rule is backed by legitimate coercion of official institutions.

In the beginning of this chapter I have discussed the division between dynamic and stable parts of project law. Indeed, public law is more likely to stem from the latter, because it is better institutionalised and therefore it is more likely to remain the same and be enforced. This same idea has to be revisited here. It is clear that without institutional back-up and stability public law would just be an idea. It would be like software without a device that actually enables its use.

This requirement of effectiveness is therefore what we might call a necessary but insufficient condition of qualifying certain provisions as belonging to a public law framework under project law. Whilst not all rules implemented by authoritative
institutions are public law, all public law rules need an institutional apparatus to sustain their function. In other words, a certain level of legitimate coercion is necessary. Legitimate coercion is what differentiates public law from a set of authoritative aspirations and recommendations.

The emphasis on legitimacy is crucial here. Not every rule that is backed by coercive force is law; nor does it belong to the public law system. So how do we find out which rules are backed by legitimate coercion, and which not? It seems to me that at least in the context of project law the theory of sources alone cannot explain why certain rules are binding on the power-holders. It therefore cannot provide the necessary justification for their coercive power.

Operational policies are the major illustration of why the doctrine of sources does not suffice. As explained in an overview of their evolution, the policies are always formulated by the Bank’s management; and only recently have they started requiring approval by the Board of Directors of the Bank (although even this tendency is not yet expressed through formal procedural requirements). The notion of consent in this scheme of law-making is very thin; because many countries do not even have representatives in the Board, and they had never taken part in the elaboration of the policies. The delegation model of authority can explain why the Board has the authority to adopt the rules that are binding on Bank’s staff, but it does not justify the legitimacy of coerciveness (that result from the application of these policies) towards the citizens of the borrowing state. The link between the law-making of the policies and their effects is simply too distorted to justify any direct application of the policies on the grounds of delegated authority.

A similar argument applies to questions about how domestic public law can affect the activities of the Bank. Because the Bank does not take part in the process of adopting these laws, it would be difficult to see how these laws can legitimately restrain the behaviour of the Bank’s staff and management in the project operations.

I would therefore like to suggest that in the context of global transactions the rules acquire their legitimacy based not on their initial source, but through their later

555 S.3.2.2.
endorsement by official institutions. This endorsement is generally implicit. It is expressed once the power-holders start their deliberations about specific development intervention, and continues throughout the implementation, up until the completion of the project. When any of the parties (including the private actors) decide to join the transaction, they operate under the assumption that the rules governing their authoritative behaviour *internally* will be respected by all other parties. Put otherwise, none of the parties is joining with a view that their internal rules will be disregarded for the sake of a mutually satisfactory agreement. They are all legal persons who must comply with their internal constitutional principles, or otherwise their decisions would be impermissible in the first place.

This is precisely the logic under which all parties currently adhere to the policies of the Bank. They endorse them at the moment when they join the decision-making process, up until when their dealings with the Bank are finished. The only reason why the Bank’s policies are consistently complied with is because the Bank has the political and economic capacity to insist on such compliance; not because the Bank has source-based legitimacy to demand it. Arguably in either legal or conceptual terms there is nothing more than *ad hoc* endorsement that makes the coercive enforcement of the policies legitimate and permissible.

It is common place in international law for the states to adhere to a certain instrument *after* it had entered into force, and without taking part in its actual law-making. The same idea of endorsement of already existing rules is at play in the context of development transactions. Arguably there is also no limit as to what rules can be accepted in that way, i.e. the instrument does not have to be a treaty in order to create an obligation. The binding nature of such a document would depend on the content of the rules, and whether it was intended to create obligation, or simply to give a direction for political cooperation.

There is also no specific reason why the entity accepting the rules in this way would have to be a state. It therefore seems that the same type of endorsement could bind the Bank,

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556 Here I refer to the multilateral treaties that are signed within a limited group of states, which are then opened to ratification by other states; for instance, this happened several times with ‘European’ conventions, which were then endorsed by some countries in Asia, such as European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), or Energy Charter Treaty (1991).
as well as the private funders and borrowers. This notion of *ad hoc* endorsement is still based on consent as a basis for legal obligation. Except that such consent is less formal and more implicit than what is usually required for treaty-making, and it binds not only the states, but also the other parties to the transaction.

Admittedly, this idea of all parties accepting and having to back the implementation of each others’ rules goes against one of the key dogmas of international law – notably, that the domestic law should be irrelevant in determining the scope of *international* obligations. However, it seems to me that in the area of international development cooperation a departure from this general principle would be both permissible and justifiable. It makes little sense in this area to insist on sticking to the model and logic of inter-state cooperation. Whilst in this classic inter-state model the states are willing to sacrifice their proper interests for the sake of mutually beneficial endeavour, development interventions are always addressing the *internal* matters of a borrowing state. This means that development assistance clearly departs from the inter-state logic of cooperation, which is predicated upon the creation of symmetrical obligations between the participating states. Development financing agreements on the other hand are concerned with the behaviour of the borrowing state towards its citizens; and no reciprocal behaviour is required from the entities that are funding such transactions. It therefore resembles the self-disciplining areas of international law, such as human rights or certain areas of international environmental law, rather than those that cover the more conventional areas of inter-state cooperation, such as trade or use of force.

It would therefore appear justifiable in this area of international cooperation to go beyond the strict separation between domestic and international legal orders. That is, it should be accepted that domestic laws of the borrowing state too can create direct *legal* effects within the transaction. In this scheme the Bank should become accountable for compliance with the borrower’s rules and would therefore have to provide institutional back-up for their implementation. In a similar vein, the borrowing state should be held to account for how it follows the Bank’s safeguard policies, and its governing institutions would be responsible for the correct implementation of the policies; at least for the purposes of a given transaction. Applied in this way, the idea of *ad hoc* endorsement

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557 Here I wish to refer to the ‘new generation’ of international environmental law, which is coupled with procedural rights accessible to private persons, such as access to information, public participation and justice under the Aarhus convention (1998).
enables the exchange between different normative orders of project law and links actors into a web of authority with each owing related obligations to each other and the third parties.

This latter observation explains the advantages of \textit{ad hoc} endorsement, and why it fits the area of development cooperation better than the doctrine of sources. In expressing its endorsement the power-holder accepts a set of obligations \textit{for a particular purpose} – and therefore cannot depart from its commitments before the purpose is achieved, or all related activities and effects had been terminated. If, however, we were to stick with the doctrine of sources, and continue arguing that normativity comes merely from a legal nature of an instrument in which the rule is set – then we should accept that the authority that enacted such a rule can amend it at any time.

The focus on the endorsement for a specific purpose, coupled with the function of public law, limits the discretion of decision-makers. They are no longer entirely free to depart from their initial consent; at least not for the duration of the project. That is so because the \textit{ad hoc} acceptance of rules for the purpose of regulating an individual intervention creates legitimate expectations for the specific group of affected people that these rules would continue protecting them until such purpose is achieved. Some changes to the existing rule would still possible (after all, it is a consent-based system of obligation), but those would have to be justified, and they would also have to ensure that affected people are not put in a disproportionately disadvantaged position.

Underneath it all, this suggestion to focus on the function and effectiveness of individual public law rules still brings us back to the state-centric image of (international) public law; where the official institutions are the sole entities holding legitimate means of coercion. However, the main difference between this account of public law based on the two criteria, and the idea of public law based on authority of sources, is that under this account there is no automatic \textit{presumption} that the rules belong to the public law system. Not all rules adopted by competent institutions belong to the public law framework under project law. On the other hand, not all rules that are performing a public law function are authoritative, but only those that are adopted by the competent institutions. Only the rules that are covered by both criteria qualify as public law, and act as a mandatory framework that take priority over all other contractual arrangements between the parties.
Before we move on to the last section in this chapter and look at how this kind of transnational public law might improve the accountability towards affected people, I would like to summarise the key arguments that were set out in the chapter thus far. Up until this point I have argued that project law in every development intervention consists of two types of rules: stable (that exists notwithstanding the project) and dynamic (created specifically for the project). Within both of these categories some rules have a special status of public law. Such status should be accorded to these rules due to their law function, and because they have been endorsed by the power-holders that make decisions in these interventions. These rules together – although they stem from a variety of sources – make up a public law framework within project law. This line of reasoning gives us a conceptual roadmap for identifying the core standards of accountability that are mandatory to the power-holders, and which affected people can refer to in order to hold decision-makers to account.

7.3. Closing the gap? Strengthening the public law framework in project law

In this last section I would like to suggest that strengthening the role of public law in project law could improve the governance of development interventions and reduce the accountability gap. My observations in this section are based on the concept of the public law framework constructed in the previous parts of this chapter. This ‘framework’ is currently scattered and weak, because public law rules that pertain to it originate from all sources of project law. As a result, they are not linked to one another in a way that creates predictable legal consequences. Moreover, these weaknesses are continuously aggravated by the doctrinal and institutional issues identified in this work. For instance, by the lack of overarching institutional structures for review; or the fact that it is difficult to prove whether or not the decision-makers invoked the appropriate interpretation of applicable mandatory standards. In this section I will therefore consider ways of strengthening the public law framework that applies to development interventions. This means that I will look at the possibilities of enhancing its clarity and predictability, but also the procedures and institutional structures of effective implementation.

This emphasis on the mandatory accountability standards and their enforcement inevitably brings back into the picture the regulatory dilemmas faced by the World Bank. I have argued in
the previous chapter that despite the fact that public law rules stem from a range of normative orders that get activated in this set-up, in practice, if and when the Bank takes charge of these matters, it resolves a lot of problems of coordination and institutionalisation\textsuperscript{558}. I have also argued that the Bank has a duty to provide an adequate governance template for its operations\textsuperscript{559}. In other words, amongst all the power-holders that take part in development transactions the Bank is the institution that actually has the power, but also the responsibility to strengthen the public law framework within development interventions.

This draws our attention to the real-life efforts of upgrading the Bank’s safeguards. In fact, the Bank’s most recent reform in this regard is probably the most far-reaching one since the policies had been put together into a common operational framework. This reform is attempting to introduce a broad range of standards and mechanisms that, if adopted, will reshuffle the governance template by the Bank. In light of the above, it seems appropriate for this section to consider how exactly public law rules and principles are reflected in these newly proposed governance standards. This will help me to identify the tendencies about where the Bank’s governance framework is currently heading. In doing so, I will be able to highlight which aspects of the intended reform are coming across as promising solutions, and also which issues tend to be underplayed or are missing from the current discourse.

7.3.1. Enhancing the clarity and coherence of substantive standards

In the previous sections of this chapter I have noted that the public law framework in this area generally lacks systemic coherence. This means that different public law rules within project law might end up competing, or even clashing with one another. Nonetheless, it seems to me that because we are willing to perceive these rules together, under the common framework of public law, it becomes possible to resolve many tensions, overlaps or collisions that arise in this context. Put another way, we can invoke public law tools to explain how these rules should relate to one another, and consequently how to enhance their functioning. This in turn should increase the clarity and predictability of accountability standards.

Indeed, the tools of public law appear to be particularly useful when dealing with pluralism of project law, and especially in addressing the risk of relativism described in the previous

\textsuperscript{558} 5.6.2.2.
\textsuperscript{559} 5.4.5. and 5.6.2.2.
The reference to public law function once again appears to be a good landmark in this respect. If we maintain the position that this function is to protect individual freedom and collective autonomy, then this would appear to be a sufficient reason to claim that amongst different rules coming from different sources of project law the highest standard should always prevail. For instance, if project agreement introduces a lower standard of legal protection than national law – then the national law provisions should prevail, even if the agreement is concluded in the format of a treaty and (at least in some states) might have a higher legal status than national legislation. That is so because from the public law perspective the standard that sets out the highest level of protection is best adjusted to perform public law function.

This principle of always prioritising the highest standard should enhance the clarity of applicable standards, and consequently the chances of holding authorities to account. Under such an interpretation, the power-holders would lose their prerogative to create competing ad hoc standards that are less favourable to those affected by the transaction. They could not choose to shift the level of standards depending on political preferences, financial constrains, or private commercial interests. This would reduce the flexibility of decision-making, but would increase the predictability of the applicable framework by reasserting the legal baselines that cannot be overstepped.

Whilst the rationale of public law can generally be helpful in clarifying the links between various standards, it is less capable of resolving the underlying issue of interpretation that has been noted several times throughout this work. Many public law rules are vague and open-ended, which means that their exact content ultimately depends on those who interpret and apply them in practice. In the context of development financing public law rules are normally interpreted collaterally by the Bank and the borrower, but this interpretation can

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560 S.6.3.2.
561 This claim emphasizes the ‘red light’ function of public law. The aforementioned ‘green light’ function in development interventions is arguably exercised by default, since interventions are only possible if they are authorised by legitimate authorities.
562 See for instance Art. 13.7(2) of the EU-South Korea Free Trade Agreement (2011): “A Party shall not weaken or reduce the environmental or labour protections afforded in its laws to encourage trade or investment, by waiving or otherwise derogating from, or offering to waive or otherwise derogate from, its laws[...].” Including such a clause in the World Bank policies of financing agreements would clarify the official position on these matters.
563 For example s3.4.2.
564 Ibid.
change depending on the views and limitations set out by other parties to the transaction, for example, the investors\textsuperscript{565}.

Given the above, it appears necessary to create a set-up in which the responsibility for such an interpretative stage is clearly spelled out in the relevant public law rules. For instance, the Bank’s policies could introduce a requirement to make an explicit statement about which public law rules are triggered by the transaction, how they are applied, and whether there are any contentious issues that arise in that respect. In practice such requirement would resemble an assessment of the legal framework that is generally required with new legislation introduced at the national level. The point would be to make the exercise of interpretation explicit and exposed to public scrutiny. This would clarify the standards that are used in each transaction; and again would reduce the possibility of power-holders to deviate from them whenever they find it convenient.

This discussion about substantive standards of accountability points towards the limits of normative solutions derived from domestic public law analogy. Arguably the emphasis on public law does not tell us exactly what the content of applicable rules should be, but only how these rules should be applied, and what role they should play. What this means in practice is that public law reasoning alone cannot expand or increase substantive standards of accountability. Instead, it relies completely on the standards that are already set in the existing laws and regulations. As a result, public law provides a framework to assess the legality of decision-making; but it cannot help us to assess whether the decisions are fair, based on equity, or beneficial to the most vulnerable groups and the like.

Dyzenhaus in his analysis of GAL approach gives a telling example about the limits of public law\textsuperscript{566}. In his piece, Dyzenhaus is talking about public law litigation cases under the apartheid regime in South Africa\textsuperscript{567}. He explains that while the public law trials initiated by black urban dwellers allowed them to clarify their entitlements under apartheid laws, it did not help them to carve out more civil liberties, or to fight the overall discriminatory nature of the apartheid regime\textsuperscript{568}. Dyzenhaus’ observation hence appears to be directly relevant in the context of development financing. In this area of international cooperation the main ‘battlefield’ about substantive standards of accountability seems to be in the areas of indigenous peoples’ rights, the level of protection accorded to ethnic minorities, enhancing the voices of the most

\textsuperscript{565} Detailed analysis in s4.2.1.
\textsuperscript{566} Dyzenhaus, ‘Accountability and the Concept of (Global) Administrative Law’.
\textsuperscript{567} Ibid. at 22-23.
\textsuperscript{568} Ibid.
vulnerable groups, etc. However, as the aforementioned South African example illustrates, public law actually does not support either of the two sides in this ‘battle’. The enhanced clarity and predictability of standards do not automatically elevate the level of protection, nor the benefits accorded to the affected people. In order for accountability standards to expand, they need to be adopted and then endorsed by the competent authorities.

The observation above is also meant to underline the more general limits of the legalistic approach, and the realistic role that law can play in closing the accountability gap. Lawyers can interpret, apply and critically assess the applicable rules; but they are not the omnipotent law-makers that set them or bring them into being. Instead, the relevant rules stem from various political forums, such as national parliaments, conference of parties, the board of the Bank, and the like. This in turn marks the importance of various law-making initiatives, such as the most recent review of the World Bank’s safeguards.

In this recently drafted social and environmental framework, the Bank is suggesting the introduction of several new substantive standards, such as prohibition of forced and child labour, several anti-discrimination clauses, and provisions that give more explicit status to unregistered land use rights within project areas. On the whole, these additional standards would enhance the public law framework applicable to the Bank’s transactions. If successful, these changes will strengthen the mandatory standards of accountability, and will therefore give rise to a more stringent accountability regime.

Nonetheless, despite such positive intentions by the Bank expressed in its draft on safeguard policies, it must be noted that the full clarity and predictability of substantive standards in project law depends on the institutions that interpret, apply and enforce them. Ergo, these standards can only be protected from the pervasive logic of resource efficiency if decision-makers are kept under sufficient public scrutiny and institutionalized control. In other words, for public law to control power, the authorities in charge of compliance with public law must have power. This points towards the need for sound procedural mechanisms, employed in a favourable institutional context. Accordingly, the rest of the chapter will consider these two qualities of the current public law framework.

569 See, for instance, the Second Consultation Paper at 4-26; also ‘Indicative List of issues for a Phase Three Consultations’.
571 See ibid. ESS1. Assessment and Management of Environmental and Social Risks and Impacts, para.26.
572 See ibid. ESS5. Land Acquisition, Restrictions on Land Use and Involuntary Resettlement, para.4.
7.3.2. Better procedural control of decision-making

Generally each party that participates in development interventions is guided by its internal decision-making procedures. However, in practice when it comes to negotiations and decision-making involving all parties to the transaction, the overarching rules of cooperation are generally set by the operational policies of the Bank. In that respect there are considerably fewer issues of coordination amongst procedural safeguards of project law than in the case of substantive standards. Nonetheless, the central issue that remains unresolved in this regard concerns the role of validation procedure (of the project as a whole), and how it fits into an overall process of project deliberation.

More specifically, the Bank seems to have an ambiguous position about what this procedure is aiming to achieve, and whether it is only meant to serve as a final formal ‘tick in the box’ by the borrower, or whether it is actually expected to do some political and reconciliatory work at the national level. If it is the latter, then the entire procedure should be moved forward in the deliberation process – in order to make sure that the borrowing state actually has space to engage in relevant discourse domestically; and also to avoid the risk of creating false legitimacy. On the other hand, if the intention is to get nothing but a formal approval from the relevant domestic institutions, then the Bank should take more responsibility for making sufficient opportunities to address social and political disagreements under its operational policies. Before the role of validation procedure is clarified, the deliberation process remains somewhat disjointed and difficult to assess as a single and coherent process of public decision-making.

The issue of validation aside, the procedural safeguards by the Bank appear to play a central role in addressing the issue of the accountability gap. This is because the process of deliberation regulated by these policies is in fact determining the content of each intervention, both before and during the project. The decisions in project law are therefore mostly justified through reasons rather than rules and, strictly speaking, are only indirectly guided by substantive standards. Accordingly, sound procedural mechanisms are crucial, because they provide tangible measures against arbitrariness and excessive use of public power, even in the absence of fully developed substantive rules.

573 5.4.3.2.
Public law contains a wealth of legal tools to enhance the soundness of procedures. These tools can help assess the existing procedures, and they can inspire ways of improving them. More specifically, public law procedures in domestic systems generally follow from a line of procedural principles, such as transparency, participation, reason-giving and review. All of these principles were advocated by GAL scholars, as means of ameliorating the governance of global administrators. However, public law principles can be applied in varying degrees, and procedural values behind them are not simply triggered in an ‘on or off’ manner. Whilst the minimum level of application is widely practised and relatively easy to achieve, the ‘thicker’ notion of these principles is more difficult to advocate, especially under the thin normativity of GAL approach.

The analysis in this work has illustrated that within the current policies of the Bank the required level of transparency, participation and review is relatively low. Accordingly, it would be difficult to argue that the procedural requirements currently employed by the Bank have given much procedural control to the affected people. It would also be difficult to claim that these principles currently shield the affected people from arbitrariness in the same way as public law is expected to do at the national level.

The newly drafted safeguards of the Bank are more promising in that regard. They include a line of procedural requirements that reflect a thicker notion of public law principles. For instance, the new draft introduces the requirement of grievance mechanisms in all of the Bank’s projects. This expands the application of a principle of review and creates new reciprocal channels between the affected persons and the power-holders. The draft also introduces more detailed requirements of disclosure, including during project implementation. On the other hand, the new requirements reaffirm the notion of deliberative freedom set in the institution’s Access to Information Policy, which is aimed at fostering retrospective transparency, but considerably limits the disclosure during the decision-making process. Probably the most far-reaching changes are suggested under the principle of participation. The new draft defines the term ‘meaningful consultation’, and sets the requirement of Free Prior and Informed Consent (FPIC), giving the affected indigenous

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574 Kingsbury et al. ‘The Emergence of Global Administrative Law’ at 37-41.
575 See analysis in s.4.2.3 and 4.2.4.
578 Ibid. ‘Overview of WB ESF’, para.9.
communities a possibility to veto development interventions in certain exceptional circumstances.

On a more conceptual level, an important shift that the new draft standards are attempting to make is that they finally spell out the notion of ‘affected party’, and its procedural implications. This is a commendable move from a public law perspective – because such draft provision acknowledges the underlying structure of accountability in development financing in which the borrower and the Bank are not just accountable to each other, but to the external actors who have a stake in their decision-making. This goes back to the issue of recognition mentioned in the previous chapters – notably, the observation that the Bank’s policies generally determine whose reasons count in the overall deliberation process. The status of ‘affected person’ is therefore necessary to bring the values and interests of affected individuals and communities onto the table of negotiations. Accordingly, the new standards, if adopted, will officially recognise such additional public dimensions of development interventions and will consequently make the entire procedural framework of the Bank better aligned with the functions and principles of public law.

On the whole, these trends in the Bank’s policy reform appear promising, and in the long term should increase the openness and reduce the arbitrariness of decision-making in development financing. It is nonetheless difficult to believe that these upgraded requirements will ensure an adequate level of procedural control in the hands of affected people. This is because conceptually, but also in practice, procedural mechanisms and control are closely interrelated – but the latter do not necessarily follow from the former. It is possible to have a situation in which the procedures reflect all the public law principles outlined above, but the decision-making process still rests predominantly within the hands of the power-holders.

The difference between inclusiveness and control is particularly acute in cases where the relationship between the decision-makers and the persons subjected to their decisions is not amicable in the first place; i.e. where the interests of the two are likely to contradict each other, rather than overlap. This is precisely the kind of authoritative relationship that often characterizes development financing. Because the circle of decision-makers is wider than just the legitimate government of the borrowing state, and the group of affected persons is normally more limited than its entire population, we can no longer presume that decision-

582 5.6.2.1.
makers are acting in the best interests of these affected subjects. Affected people are not only the potential beneficiaries, but also the potential victims of these interventions.

In such a setting, the shift from procedural mechanisms to control can only be made by creating legal leverages that actually empower the affected people to influence relevant decision-making. Arguably, current policies of the Bank contain no such leverages. None of the current procedures analyzed in this work (consultation, disclosure, authorization and redress) gives the possibility to affected people to assert their stance in project negotiations. The parties have full discretion to decide on the outcomes of the consultation process; and ‘no action’ does not seem to be a likely alternative. The new draft introduces one such measure; notably the aforementioned requirement of FPIC. It appears to be the sole legal mechanism that could be used in a way that would make the parties to revise their strategic choices in the project.

However, this possibility remains an exception rather than a rule in the Bank’s line-up of procedural clauses. In reality, while the requirements of consultation are increasing in terms of scope and intensity, they still permit the power-holders to take decisions that are the most resource-efficient and beneficial in commercial terms. The policies remain silent about the need for political reconciliation, or the necessity to resolve social conflicts that development interventions are likely to create. This brings us back to the issues concerning validation procedure – and the observation that, currently, deliberation process about development transactions contains no clear checkpoint that would permit such reconciliation at the national level.

The strong focus on procedural safeguards can therefore distract public attention from deeper disagreements created by development financing. It can also reduce the capacity of affected people to claim the arbitrariness and insufficient concern for their interests and values. That is because the issue might have been identified in the consultation procedures, but not addressed or resolved due to insufficient leverage in the hands of affected people to negotiate better conditions. In other words, showing that the power-holders have complied with relatively easy administrative requirements can be a cover for the real substantive unfairness of the decision itself and the exclusion of affected people from any control over it.

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583 See discussion throughout chapter 4;
7.3.3. The need for institutional checks and balances

The previous two sub-sections both ended on a cautious note. They hinted several times that there is no overarching institutional structure that can ensure the correct application, implementation, and enforcement of substantive and procedural safeguards under project law. As explained previously, the World Bank can resolve many problems of coordination and potentially some issues of enforcement – but it cannot guarantee that all standards will be applied consistently and in the way that they were originally intended. For instance, the Bank cannot guarantee that the borrower employs and interprets correctly the fundamental rights provisions in the national constitution. Indeed, in the context of development interventions even a competent and capable institution like the World Bank does not have full control over what other parties do, and why. Also, none of the parties can fully control the forces and logic of the market, which, as argued in the previous chapter, normally bears strong influence on the direction, the specific content and the impacts of these transactions.

In the absence of such an omnipotent and positive decision-making authority under project law we are left with a notion of institutional checks and balances. This idea of balance (rather than authority) relies on the possibility to limit decision-making, rather than actively direct it one way or another. This means that the parties to the transaction cannot tell one another how to behave; but it is possible to devise a system in which they are discouraged from behaving in a manner that is unacceptable to at least one of the remaining parties, or the affected people. Accordingly, at the global level the mechanisms of active enforcement are replaced by a system of prevention, and reflexive mechanisms that allow decision-making to evolve and correct itself584.

This sort of preventive system of institutional checks and balances is crucial in development financing. That is because development interventions create a dangerous terrain of decision-making, with an extreme scale of possible outcomes. On the one hand they can have an explosive effect on the balance between stability and change in the particular society; and yet at the same time they can trigger much needed adjustments and create better living conditions to vast numbers of people. Either way, making decisions in such transactions involves extremely complex economic, social, environmental and political judgements. This

584 Both Palombella and Dyzenhaus in their separate analyses arrive at the similar conclusion that ‘publicness’ of law at the global level can function without global polity; mainly because the mechanisms of reciprocity that characterize legal institutions are likely to inspire necessary adjustments; see Dyzenhaus, ‘Accountability and the Concept of (Global) Administrative Law’ and G.Palombella, ‘The (re-)Constitution of the Public in a Global Arena’, in C.Mac Amhlaigh et al. (eds.), After Public Law (2013) 286, at 293-96.
complexity requires some professional input and the best templates of governance. However, enabling more knowledge to inform the decision-making process does not eliminate the social and political dilemmas within societies affected by these changes. The affected people therefore should be given the means to challenge decision-making in these interventions. In other words, they should be able to push an ‘alert button’ when they become aware that intervention is causing harm or negative consequences that are outweighing its benefits.

In most public law systems this troubleshooting task is performed by judicial review procedures. To be more precise, the correct application of public law rules usually depends on the possibility to remedy the deficient decision; whereas the best remedial action is generally triggered by an independent review body. Hence, without review procedure, the notion of checks and balances becomes difficult to conceive.

Earlier in this thesis I argued that none of the review bodies currently available in development financing can fulfil such a task of independent review; one capable of bringing about meaningful and timely remedies. The point I am trying to underline in this section is that such a lack of independent review creates bigger issues than just the lack of a forum to deal with individual complaints. Instead, it signifies the lack of institutional balance that otherwise upholds the functioning of the public law framework in each project. The possibility of timely remedial action serves an exclusive role of prevention and control, which then creates a viable link between the power-holders and those subjected to their decisions. In other words, it fosters accountability at all levels and stages of decision-making. On a more general level, it fuels a system of public law, by making it change, and ultimately better serve its function.

This institutional balance cannot be created merely by upgrading the procedure of the Panel, or putting in place mandatory grievance mechanisms, as suggested by the draft policies of the Bank. That is because none of these specialized bodies under the auspices of the Bank or

585 There is a lot of literature on the role of courts in international law, and how they contribute to the rule of law; see generally K.Wellens, ‘Fragmentation of international law and establishing an accountability regime for international organisations: the role of the judiciary in closing the gap’, 25 Michigan Journal of International Law (2003-4) 1159; also Dyzenhaus, ‘The Rule of (Administrative) Law in International Law’.

586 S.5.4.

587 Cf. Stewart who argues that ‘administrative law lite’ without strong and legalistic review procedure is actually possible at the global level, and that it can be substituted through other, more informal redress mechanisms, if applied alongside other procedural values, such as non-decisional participation, transparency and reason-giving (see Stewart, ‘Remedying Disregard in Global Regulatory Governance’; and Stewart ‘U.S. administrative law: a model for global administrative law?’).
within the boundaries of individual projects are able to assess the legality of decision-making, which is precisely the requirement of a well-functioning and healthy public law system.

Judicial review bodies on the other hand could, in theory, fill such an institutional gap. However, in the current system their jurisdiction would be paralyzed by complex admissibility criteria and limitations of justiciability. Because of such limited jurisdiction, they would also be unable to mandate power-holders to cancel, suspend, or even mandate the revision of their operations. The institutional inadequacy of review procedures therefore undermines the possibilities of strong accountability. This is true even if substantive and procedural standards of the Bank appear to be heading in the right direction and are generally more adjusted to fulfil public law functions in this area of international cooperation.

Hence, whilst the new framework suggested by the Bank offers better standards and procedural mechanisms of accountability, it pays insufficient attention to the institutional end of the matter. As a result, the entire framework risks ending up being misbalanced, with numerous duties and responsibilities of decision-makers on the one hand and no coercive power to enforce them on the other. In the long run this is likely to lead to a situation where none of the applicable rules are fully respected; and therefore they merely represent the policy-level aspirations, rather than clear and enforceable public law provisions.

Overall, it appears that in the current legal framework it would be possible to design a system of ad hoc dispute settlement – or even a permanent tribunal – that would adhere to all the necessary requirements of judicial review. It would have the competence to deal with related tensions that arise in development transactions, and it could be made independent and readily accessible. It could also have the jurisdiction to assess the application of all the standards under project law; with a possibility to prescribe timely remedies. Nonetheless, such mechanisms could only be set up with the consent of power-holders, since institutionalisation of strong accountability is inconceivable without their initial commitment.

The position of the Bank and the borrowing states towards the Inspection Panel is telling in this respect. Before the Panel procedure had been established and became accepted by the Bank, the institution was unwilling to accept any allegations of non-compliance; only the internal report commissioned by the Bank inspired some change. This particular mechanism

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588 See discussion in s.5.2.1. and 5.3.1.
589 The two famous triggers for this development were the so-called (external) Morse-Berger report (see Morse and Berger, ‘Sardar Sarovar’), and (internal) Wapenhans report that followed en suit; see ‘The
had therefore been established under the Bank’s own initiative – and arguably this is the main reason why this procedure is currently bringing about some productive outcomes. At the other end of the scale, the recurring problem exemplified in the Panel cases points towards the borrowing states’ reluctance to accept the authority and findings of this mechanism. They often prefer to resist and/or ignore the Panel’s recommendations, rather than to be bound by any external authority. In the case of deeper disagreements states tend to switch to a different source of funding, which might bring about some penalties and cause higher interest rates, but are less demanding and therefore ‘cheaper’ for them to implement.

All these issues occur because, for the moment, international development cooperation continues to be firmly grounded in the institutional and ideological structure of public international law, which is why its regulation is continuously held back by the (lack of) voluntarism of power-holders. It is indeed somewhat of a paradox that this voluntarism is ultimately built on the same pursuit of freedom and self-determination as public law – but it nonetheless leads to completely different outcomes, frameworks, and structures of assessment. The way out of this voluntaristic trap should, however, not be based on advocating the non-compliance with or disregard to international law. Instead, the point of pressure would have to be on the authoritative institutions – both domestic and international – to accept the responsibilities and self-restraint that come with a consent-based system of obligation and governance.

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See for instance Randeria who is describing India’s reluctance to accept the Panel’s findings in several projects investigated by the Panel (Randeria, ‘The State of Globalization’); also China’s decision to refuse the Bank’s funding after the Panel’s investigation in the Western China Poverty Reduction Project (1999) (see Centre for International Environmental Law, ‘Campaign Update’ (2000), available at [http://www.ciel.org/project-update/western-china-poverty-reduction-project/](http://www.ciel.org/project-update/western-china-poverty-reduction-project/)).
Chapter Eight

Concluding remarks

This work has put forth many critical observations and suggestions, ranging from nuanced details of the applicable legal framework to the arguments about the necessity for systemic change. Given such diversity, the best way of restating and aligning the major conclusions of this thesis seems to be by returning to the two cases that were described in the introduction – Bujagali and PNG Smallholders. These projects will help me to illustrate how the complexity of development financing fits into the theoretical framework suggested by this work, and to emphasize the main claims advanced by this thesis. Each section in this concluding chapter roughly corresponds with one of the four research questions that provoked and guided this research.

8.1. The need for project-level accountability

One of the central premises of this work is that development projects are executed under a unique mode of governance. The most important conceptual move that I suggest is to accept that these projects do not, strictly speaking, belong to domestic decision-making processes, but that they instead carve out their own space of political deliberation and contestation. This space is related to a certain territory, stretches over a defined period of time, and involves a unique set of decision-makers who are exercising their power on a specific group of people affected by such decisions.

For instance, in the case of the Bujagali project, the power-holders were the IFIs that funded the intervention, the government of Uganda, the private investors, and the national power supplier. At the other end of the scale, the community directly affected by such decisions was one of the 55 ethnic minorities in the country\footnote{Information from compliance review report by Independence Review Panel of African Development Bank (AfDB); available at \url{http://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/30740990-EN-BUJAGALI-FINAL-REPORT-17-06-08.PDF}.}. The project also indirectly affected the future electricity consumers to be serviced by the new power plant, which essentially meant the entire population of Uganda.
In the case of PNG Smallholders, the power-holders were the borrowing government and the Bank, as well as the national body in charge of the palm oil industry. The affected people were the smallholders of palm oil plantations, and the communities living and working in the areas where the palm oil plantations are situated. In both cases, the people who were governed and the power-holders who were making the relevant decisions could not be equated to the citizenry and the state. The constellations of time, space and authority were all project-specific and unique, and should therefore be treated that way.

The contingency of governance structures creates the need for project-level accountability, where different groups of affected people and the power-holders are placed at the two different ends of the authoritative relationship. The crucial aspect of such an accountability framework is that the two categories do not collapse into one another through the ideas of democracy or the self-governance of the nation state. Instead, in these transactions there needs to be a clear distinction between those who govern, and those who are being governed – because that is the only way of delineating the political realm in which the specific discourse about development is taking place.

As the project dealing with Uganda’s need for energy supply has illustrated, this realm can shift depending on the territory in which the project is executed (in Bujagali – depending on the venue of the power plant). However, beyond a certain point in project deliberation it normally becomes possible to locate and ascertain the contours of this unique political space with relatively great precision592.

In both Bujagali and PNG Smallholders, the accountability relationship involved more than one category of people who were governed. This somewhat complicates the idea of a clear set of ‘power-holders’ on the one hand, and the specific group of ‘affected people’ on the other. This issue, however, should not be perceived as impeding the possibility of project-level accountability altogether. Instead, it should be treated as an inevitable characteristic of development projects.

For instance, the fact that the entire Ugandan population of future electricity consumers and one of the 55 ethnic communities exposed to the direct effects of such an intervention might

592 The newest draft of operational policies is truly progressive in that regard, because it considers the possibility of involving third parties to decide who these affected parties and project stakeholders would be; see WB ESF Second Draft, ‘WB Environmental and Social Policy for Investment Project Financing’, para.33.
hold different views about the same project is not overly problematic in objective terms. Diverging views can be reconciled, and mutually satisfactory solutions can be negotiated. The important question is who gets to sit at the round table of negotiations; and whose views count in the process of decision-making. The project-level accountability framework should ensure that the views of minorities, sub-state groups, and all those holding legitimate interests in a specific intervention are not automatically disregarded for the sake of the interests of a larger political entity and, even more so, for the sake of the interests of the private investors.

All of these observations point towards the core justification about why the alternative framework of accountability is needed in this area of international cooperation. In this thesis I portray the accountability relationship as a substitute of the democratic governance that is otherwise lacking in this context. This accountability relationship is triggered by exposure to unilateral and authoritative coercion, as a means of empowering those who are governed, and of giving them a way to control the decision-making by the relevant power-holders. Perceived in this way, accountability is meant to create the balance of power. Law is one of the means that pulls towards the correct balance in such a relationship. The ultimate balance of power in development transactions should neither be blocking development initiatives and positive changes, nor enabling arbitrary and harmful reforms that are simply masked under compelling development objectives.

8.2. The accountability gap

The doctrinal overview conducted in this work has shown that the accountability relationship in the current governing framework of the Bank generally fails to adhere to the principles of strong accountability. Here are some of the key observations that demonstrate the existence of such an 'accountability gap'.

(a) Accountability standards in development financing are highly unpredictable in terms of their scope and application in concrete development interventions. This is partially due to the format and the content of applicable rules, but also because project-specific rules can readily overrun the general standards set by domestic and international law. As a result, the standards of accountability are unclear, lack objectivity, and do not always create the adequate level of protection to the affected people.
(b) The affected people have no realistic opportunities to exercise control over decision-making at the project level. This observation applies to all stages of the project cycle. Even the internal authorisation procedures (that are supposed to be conducted following the treaty ratification process outlined in the state constitutions and primary laws) do not enable viable channels of political and administrative control.

(c) If and when the decision-making fails to adhere to the standards of accountability, affected individuals and communities have only limited access to an independent review procedure. Only a narrow group of people, who can prove that they will, or already have, suffered adverse and material harm can challenge the Bank’s decision-making in front of the Panel. Although the Panel is not independent, it provides the sole route through which these people can question the core aspects of the project design.

(d) Finally, the attempts to contest the authoritative decision-making can at best lead to partial solutions that are, in principle, acceptable to the power-holders. None of the review procedures can inspire the remedial action that would penetrate to the heart of the political disagreement between the power-holders and the affected people.

Altogether, the findings of this research show that although the system of development financing creates an appearance of legitimacy and justified coercion, it is almost completely detached from any input, control or contestation by the people who are governed under such interventions.

8.3. The risks of project law

I have argued throughout this work that all development projects are governed by their proper system of project law, which consists of all the sources of normativity relevant to an individual project. Project law includes all the standards of accountability, but also all other rules that enable and guide the transaction. I have also asserted that project law always consists of stable and dynamic parts, and that the latter always comes about through contractual instruments.
As a result of such dual structure, project law has at least three main characteristics, which come with their distinct risks. Firstly, project law is only partially institutionalized. Instead, a great deal of its content is elaborated *ad hoc*, through a distinct deliberation process that is unique to each intervention. Such an open-ended governing framework arguably gives a lot of space for discretionary judgement, but also runs a high risk of arbitrariness. Secondly, having such a strong contractual element in project law means that development interventions are only vaguely guided by external, stable and predictable norms that can readily be used as a point of reference for accountability. This makes the judgements in development interventions highly susceptible relativism. Thirdly, largely due to the former two characteristics, project law functions autonomously (i.e. through its own institutions) and without direct subordination to the administrative apparatus of the borrowing state. Therefore, it is, by default, closed from external input, unless there are mandatory rules that order the power-holders to act otherwise.

The *Bujagali* and *PNG Smallholders* help me to bring to life such theoretical observations about the accountability gap and the risks within project law. In the case of *Bujagali* the affected local community was supposed to be protected by a range of specialized rules, all coming from the multiple IFIs that were funding the intervention. Yet, in reality, none of these sources were able to prevent the transaction, nor to draw the legal baseline of acceptable behaviour that the affected people could rely upon. Moreover, neither the affected ethnic minority, nor the civil society organisations concerned with a public interest of future electricity consumers were able to have a meaningful say in project deliberation procedures and/or negotiations. No space was created for political disagreement to be voiced out and resolved. All these issues point towards the deliberative and pluralistic features of project law and show how, if not regulated properly, they can silence the voices of affected people.

Furthermore, none of the affected groups in *Bujagali* could challenge a strong technical and economic rationale of the deal. Neither the domestic judicial review process, nor the numerous hearings in front of review bodies by IFIs could mandate the power-holders to revise their decisions. Due to such a lack of possibilities for review, project law in *Bujagali* legitimized arbitrary decisions, and it was immune to the constant flow of negative feedback from the affected people and civil society. All the risks of project law outlined above (relativism,

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593 The agreement between the government and the investor was, in fact, scrutinized in front of the domestic courts; and at the end of these proceedings the court concluded that the contract framing the relationship between should be made public. However, the domestic case never covered the substantive dispute between the citizens and the governmental bodies and/or the investor; see I.Makumbi, ‘Public Access to Government-Private Sector Contracts: The Case of the Bujagali Project Power Purchase Agreement’, Uganda Wildlife Society, Access to Information Series (January 2003).
arbitrariness and closure) were triggered in this case. The standards and mechanisms of accountability proved to be not sufficiently *institutionalized* to counter-balance the inclination of the power-holders to prompt such risks when pressured by the global market conditions.

In the PNG Smallholders case the issues were similar, notwithstanding the fact that the project was aimed almost exclusively at national public sector reform, and involved fewer external actors able to exercise influence on the borrowing government. Here too although the negative effects of the palm oil production were well known and were supposed to be prevented by the Bank’s policies and national laws, it proved impossible to control the decision-making by the power-holders and to ensure that the industry did not expand and create further detrimental effects. The project design had ‘slipped through’ all possible review procedures, and there were no legal baselines that could stop the intervention from taking place.

In this project, as in Bujagali, the values associated with economic development were prioritized over all other interests, despite some detrimental effects to the affected society and its environment. Stronger accountability mechanisms in PNG Smallholders might not have stopped the government from continuous expansion of palm oil production. Arguably, however, it could at least have enabled more insightful and rigid political judgement, and could have created more space for the self-determination of smallholders and other affected communities living in the palm oil-producing areas.

8.4. The limited ‘solutions’ based on the public law framework

Adequate standards and mechanisms of accountability are so difficult to devise in this area of international cooperation because the contractual element of project law comes with a genuine regulatory tension. On the one hand it requires sufficient freedom for the parties to make the most beneficial and sustainable decisions about development. On the other hand this freedom needs to be restrained, in order to avoid the aforementioned risks of arbitrariness, relativism and closure.

In domestic public contracting such tension between public interest considerations and freedom of contracting parties is usually managed through the public law framework. It sets
the mandatory provisions that cannot be overstepped through contractual arrangements. In
the context of development financing, this limiting function of public law is performed by a
range of unrelated provisions, scattered throughout the various sources of project law. This
often undermines the clarity, predictability and enforcement of these mandatory standards,
and thus upholds the accountability deficit in these transactions.

My suggestion is that despite their dispersed nature, all these rules performing this public law
function should be perceived as belonging to the same public law framework. That would
enable us to adopt a systemic outlook about the shortcomings, as well as the possibilities of
improving this framework.

Above all, such a systemic outlook would help to resolve the tensions and collisions that might
arise between the various standards of the project law. For instance, perceived as a part of the
same public law framework, an agreement between the government of PNG and IDA could not
override the existing laws on environmental and social protection. The clauses of the
agreement could only prevail in those instances where it created higher standards. That is
because the standards of protection endorsed by the parties would be performing a public law
function and thus creating legitimate expectations for the affected people. Similarly, the
agreement between Uganda and public funders in Bujagali could not create rules that are in
tension with the African Convention of Human and Peoples’ Rights, even though, formally,
both instruments are expressed in the form of a treaty and currently there is no formal
clarification about which one of the two should prevail.

Nonetheless, fostering the clarity and predictability of mandatory standards would require
more than just the creation of better rules and procedures of implementation. As well as this,
public law framework in development financing cannot be conceived without public control
over the decision-making and, in particular, without the possibility of meaningful remedial
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Chad: Petroleum Development and Pipeline Project, Management of the Petroleum Economy Project, and Petroleum Sector Management Capacity Building Project (March 2001)

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Kazakhstan: South-West Roads: Western Europe-Western China International Transit Corridor - CAREC-1b & 6b (July 2010)

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Kazakhstan:

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