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International Trade and Economic Law

International Financial Institutions and Sustainable Development

Lawmaking and Accountability

Johanna Aleria P. Lorenzo



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INTERNATIONAL FINANCIAL INSTITUTIONS AND SUSTAINABLE DEVELOPMENT

Merging theoretical and practice-oriented elements, this book introduces researchers, teachers, and students in international sustainable development law to the international financial institutions' (IFIs') safeguard policies. It also scrutinizes the case law of independent accountability mechanisms that interpret those policies and afford recourse to individuals and communities adversely affected by development projects. The book's focus on the procedural and substantive features of IFIs' safeguard systems contributes to a more concrete understanding of these organizations' participation in the international lawmaking process on sustainable development. It puts IFIs in the spotlight and provides an international legal critique of their activities to match their notoriety in popular discourse and to enhance their accountability to those they harm. By approaching international (economic) law and sustainable development through the lens of environmental, social, and economic issues arising in development projects primarily in the Global South, the book presents a needed counterbalance to existing literature on the topic.

JOHANNA ALERIA P. LORENZO is Assistant Professor in Public International Law at the University of Amsterdam. Her perspective on international law's interaction with development, sustainability, and global economic governance is informed by her upbringing, education, and professional experience in Asia, the United States, and Europe. Johanna received the Ambrose Gherini Prize, the highest prize awarded in the field of international law by Yale Law School, for her doctoral dissertation on which this book is based.

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ACKNOWLEDGMENTS

Ring the bells that still can ring
Forget your perfect offering
There is a crack, a crack in everything
That's how the light gets in.

—Leonard Cohen

This book almost did not see the light of day, because no matter how many times I have read or been told that perfection is the enemy of the good, it took a while to overcome the instinct to strive for that "perfect" offering. In the end, what prevailed are the eagerness to reach out to the world and share a bit of perspective, to continue learning, and to simply give thanks for those possibilities. The present work, much like the dissertation from which it originated, is the outcome of several persons' efforts and contributions that certainly deserve to be thanked and celebrated.

It is fitting that in the course of editing this book's manuscript, I constantly heard one of the earliest pieces of advice I received from my doctoral supervisor, Daniel Esty: to be concise and direct in writing. I must admit that it is a lesson I am still working on. But truly, I am grateful to Dan, whose expertise on sustainable development and global governance has enabled me to more carefully consider how my ideas can impact real-world concerns. His encouraging optimism about my project and my future prospects, in general, has spurred me to continue despite some episodes of doubt and disillusionment. Indeed, I am enthusiastic about what our "Remaking Trade for a Sustainable Future" project has been doing and will continue to do. It has also been a deeply enriching experience to craft my arguments under the insightful guidance of the leading scholar of the New Haven School of International Law, Michael Reisman, whose succinct but profound comments have broadened my approach to tackling some of the legal and policy issues I have sought to address here. I am likewise greatly indebted to Susan Rose-Ackerman,

who meticulously went over my chapters, asked probing questions from a political economy perspective to sharpen my proposals, and generously shared her firsthand knowledge about the World Bank. My gratitude to these mentors cannot be fully expressed in words, and I can only strive to pay forward their wisdom, patience, and kindness now that it has become my turn to teach and counsel students. My research tasks, especially when I was working remotely, have been made easier by the friendship and competent assistance of the staff at the Lillian Goldman Law Library.

Earlier drafts of this monograph benefited from remarks, inquiries, and suggestions of people I encountered over several years, particularly during conferences organized by the McGill Faculty of Law, the *Cambridge International Law Journal*, and the Birmingham Law School. While working on the dissertation, I also had the opportunity of being a Grotius Research Scholar, which fostered my interaction with academics from various parts of the world researching on diverse issues in international and comparative law, and with some members of the faculty at the University of Michigan Law School. I specifically thank Kristina Daugirdas, who graciously commented on my project based on her international environmental law and international organizations law scholarship.

As the reader can glean, turning that doctoral work into what is now at hand (or on screen) took longer than planned. The delay was somewhat fortuitous, though, since it enabled me to discuss and refine the book proposal with Ingo Venzke, whose writings on interpretation and international lawmaking I had only been citing before I met him in person. Now after moving to yet another continent, I have the privilege of working with him and other wonderful colleagues at the Amsterdam Law School and the Amsterdam Center for International Law.

My thanksgiving would, of course, be incomplete without mentioning the endless support and love of my family and friends and their incredible belief in me. Despite being oceans away from my home country when I was doing the JSD, I never felt lonely because my relatives in Toronto warmly welcomed me into their homes during Christmas and summer breaks. Having another human being with whom to share the simple joys, the deep fears, and the grand aspirations is essential in seeing this endeavor through to the end, so I consider myself blessed to have the steadfast companionship of my partner, Kathy, whose understanding and affection I treasure. All told, for whoever I am today and however this work has turned out, I have my parents, Emerson and Delia, to thank. They have created in me a strong desire to serve and think of others,

especially those vulnerable and in need, and raised me in a faith that values human flourishing and protection of people and the environment. This book is thus only the beginning of a life's work intent on discovering ways to address sustainable development concerns through the use of international (economic) law and institutions – a personal academic agenda that I am currently pursuing and that hopefully aligns with the purposes that the Heavenly Father has planned for me.

Introduction

Situating (Sustainable) Development and Non-State Actors in International Law

When the World Bank supports a project in a developing country, it is not simply providing money. It also makes international law. It decides how environmental, social, and economic sustainability can be achieved in development projects. Individuals and communities, as well as borrowing States, affected by projects such as a dam construction likewise participate in this decisionmaking process and thus assume a lawmaking role. Explaining who this international lawmaking process involves, how it transpires, and what its implications are – for the essentially contested concept of sustainable development and the international legal accountability of international financial institutions (IFIs) like the World Bank – are the main tasks of this book. These pages tell the tale of two characters – sustainable development and the World Bank – and their contribution to the ongoing formation of *international sustainable development law*.[1] What makes them interesting characters is that, despite their outsized part in the public imagination and discourse, they are rather outsiders to the international legal order. Their position in international law is marginal at best and often disputed.

When it started, this project sought to solve this puzzle and understand the dissonant attitudes toward these two. In investigating where and how they fit, if at all, within international law, it became apparent that not only do they individually have a place within such order, but, more crucially, their alliance – which is plausible though not a given – has empowered them to even reshape that order. The findings and claims presented here ultimately center on the lawmaking dimension of the

[1] As used throughout the book, the term refers to a distinguishable area standing at the "intersection between international economic law, international environmental law and international social law aiming toward development that can last." Marie-Claire Cordonier Segger and Ashfaq Khalfan, *Sustainable Development Law: Principles, Practices, and Prospects* (Oxford University Press 2004) 46–47.

relationship between IFIs and sustainable development and what it means for calling international institutions to account for the exercise of their powers and legal mandates.

The approach taken to the questions motivating this work can be better understood by momentarily ignoring the word "sustainable" and focusing on "development." The notion of development, especially its dynamic and not always desirable link to international law, is an appropriate starting point for the following account, since it is the primary mandate of the institutions featured in this book. Moreover, as "'sustainable development' law is the new face of [international development law (IDL)],"[2] a digression into an abridged history of *international development law*[3] is needed.

From lived experiences in and resulting resistance from the Global South, development's connections with international law and organizations are palpable, if not inevitable.[4] International financial and economic institutions are indeed ubiquitous, tangible links between law and development today. But development has not originally[5] been of international concern.[6] States' economic affairs – employment rate, financial stability, poverty reduction – used to be matters of domestic jurisdiction and beyond the realm of international law. International organizations (IOs) "concerned with one or more aspects of economic and social development" only started proliferating after the Second World War.[7] Since then, certain principles have materialized to regulate the pursuit of "development," ambiguously defined as the term may be.

[2] Emmanuelle Tourme-Jouannet, "How to Depart from the Existing Dire Condition of Development" in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012) 399.

[3] See Koen de Feyter, "Contracting for Human Development: International Law and Development Revisited" (2002) 10 Asia Pacific Law Review 49; Edward Kwakwa, "Emerging International Development Law and Traditional International Law – Congruence or Cleavage?" (1987) 17 Georgia Journal of International & Comparative Law 431.

[4] See Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press 2003).

[5] Mindful of international law's dark origins and the "development" ambitions that drove colonialism and still drive imperialism, I ask a bit of the reader's indulgence as such discussion comes later in this chapter.

[6] Kerry Rittich, "Theorizing International Law and Development" in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016).

[7] Florentino P Feliciano, "Some International Law Aspects of International Economic Development" (1974) 4 Philippine Yearbook of International Law 49, 50–51.

In the sixties, when decolonization was nearing its formal end, "a species of public international law"[8] called *international law of development*[9] or *droit international du développement*[10] emerged. According to Peter Slinn, the French term – more accurately translated as "international law *for* development" – conveys "the idea of a dynamic, teleological process" and a policy, goal-oriented approach to international law, whereas the neutral English translation (international law *of* development) obscures the debate between the Francophone proponents and the adherents to "the classic perception of international law as a set of neutral, value-free rules."[11]

There have been different answers to the questions of whether and how international law regulates the quest[12] for development and the relationship[13] between and among those concerned with this pursuit. Some view international law optimistically and advocate for the use of "legal tools for reversing inequality and establishing a new international economic order (NIEO), or at least, social justice."[14] Others stress the sinister origins of international law itself, problematizing the relationship between development thought and practice and the "civilizing" mission

[8] James CN Paul, "The United Nations and the Creation of an International Law of Development" (1995) 36 Harvard International Law Journal 307, 310.

[9] See Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia University Press 1964) 176–81; Oscar Schachter, "The Evolving International Law of Development" (1976) 15 Columbia Journal of Transnational Law 1; Francis G Snyder and Peter Slinn, *International Law of Development: Comparative Perspectives* (Professional Books 1987); FV García Amador, *The Emerging International Law of Development: A New Dimension of International Economic Law* (Oceana 1990).

[10] See Alain Pellet, *Le Droit International Du Développement* (2nd edn, 1987); Michel Virally, "Vers un droit international du développement" (1965) 11 Annuaire français de droit international 3.

[11] Peter Slinn, "Differing Approaches to the Relationship between International Law and Development" in Francis G Snyder and Peter Slinn (eds), *International Law of Development: Comparative Perspectives* (Professional Books 1987) 27–28.

[12] See Qerim Qerimi, *Development in International Law: A Policy-Oriented Inquiry* (Martinus Nijhoff 2012); Margot E Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford University Press 2008); Christine Chinkin, "The United Nations Decade for the Elimination of Poverty: What Role for International Law?" (2001) 54 Current Legal Problems 553; Henry J Steiner, "Social Rights and Economic Development: Converging Discourses?" (1998) 4 Buffalo Human Rights Law Review 25.

[13] See Philipp Dann, *The Law of Development Cooperation: A Comparative Analysis of the World Bank, the EU and Germany* (Cambridge University Press 2013); Philipp Dann and Michael Riegner, "Foreign Aid Agreements" in *Max Planck Encyclopedia of Public International Law* (2014).

[14] de Feyter (n 3) 50.

that rationalized colonialism.[15] Challenges against international development law additionally arise because individuals, purportedly the ultimate beneficiaries of development, have no legal standing to express their rights and claims before many international tribunals and fora.[16] Strands of this critique subsist, pertinently regarding the (human) right to development.[17] We will return to this exclusion and non-recognition of human beings in international law below.

Underlying international sustainable development law, as this book portrays, is the imperative for international law – having been "a stimulating factor in making the poor peoples of the world conscious of their rights, in creating new public expectations and in making them rebellious against present inequalities" – to likewise become "a stimulating and a creative factor in bridging the gap between the poor and rich," lest national and international turbulence ensue.[18] The monograph adopts and substantiates Emmanuelle Jouannet's claim that sustainable development is "the culmination and the synthesis of all the earlier changes bound up in a critical version that seeks to satisfy the economic and social purposes of development, along with the concern for the environment and for future generations."[19] It thus also advances, taking a policy-oriented approach, a similar normative project embedded in "international law *for* development."

APPROACHING THE MATERIALS AND WHY

To present a more nuanced understanding of the interrelationships among international law, sustainable development, and non-State actors, the book studies the IFIs' operational policies and procedures. Apart from the set of "soft law" instruments – United Nations General

[15] See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2007); Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011); James Thuo Gathii and Ntina Tzouvala, "Racial Capitalism and International Economic Law: Introduction" (2022) 25 Journal of International Economic Law 199.

[16] Philip Allott, "The Law of Development and the Development of Law" in Francis G Snyder and Peter Slinn (eds), *International Law of Development: Comparative Perspectives* (Professional Books 1987) 70–71, 81.

[17] See Emmanuelle Tourme-Jouannet, *What Is a Fair International Society? International Law between Development and Recognition* (Hart 2013) 47.

[18] Willem Dirk Verwey, *Economic Development, Peace, and International Law* (Van Gorcum 1972) 283.

[19] Tourme-Jouannet (n 17) 53.

Assembly (UNGA) resolutions, declarations, expert/committee reports – typically examined when studying the relationship between international law and sustainable development, the book links these arguably non-binding texts with materials (i) governing the IFIs' activities and (ii) generated and used by these international economic organizations.

Because IFIs are creatures of treaties (international agreements), their normative orders remain properly within the realm of international law.[20] As used in the book, "internal" law[21] includes not only IFIs' constituent documents (Charters, Articles of Agreement, etc.) but also the safeguard policies and other operational procedures they issue. The qualifier "internal" is employed insofar as they are only *directly* binding on the institutions. They are nevertheless of interest to international law because of their impact on the behavior – potentially even the obligations and rights – of States and non-State actors that interact with these IFIs.

While considerable critical accounts of the harms to people and environment caused by IFIs exist, there remains limited treatment of their functions and operations from an international law perspective. Indeed, for the greater part of their more than half-century existence, IFIs have been largely excluded from international legal studies, despite their importance for multilateral cooperation and achieving complex global objectives such as sustainable development. This exclusion parallels how rarely "development" is discussed in legal terms, although it is central to various IOs' mandates.[22]

To partly correct these omissions, the safeguard systems – "an important body of normative practice [that is] surprisingly neglected in the theory of international law"[23] – are treated here as international legal

[20] See generally Kirsten Schmalenbach, "International Organizations or Institutions, General Aspects" in *Max Planck Encyclopedia of Public International Law* (2020) paras 55–76 <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e499>.

[21] The use of the term "internal law" loosely follows its conception as the set of rules or legal system that governs the IO's internal organization and functioning. See Chittharanjan Felix Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge University Press 2005) 272–73.

[22] See Duncan French, "'From Seoul With Love' – The Continuing Relevance of the 1986 Seoul ILA Declaration on Progressive Development of Principles of Public International Law Relating to A New International Economic Order" (2008) 55 Netherlands International Law Review 3, 17.

[23] Benedict Kingsbury, "Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples" in Guy S Goodwin-Gill and Stefan Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford University Press 1999) 323.

materials. The safeguard system,[24] which each of the major multilateral development banks (MDBs) and other IFIs now have, takes center stage in this monograph. A safeguard system has two components: (i) a set of environmental and social policies ("safeguard policies") aimed at operationalizing the concept of sustainable development by, for example, requiring an environmental impact assessment (EIA); and (ii) an independent accountability mechanism (IAM) that interprets those policies in the course of investigating complaints submitted by project-affected people, who claim to be harmed by an MDB's alleged violations of its safeguard policies.

This methodological choice is key to the book's approach – pragmatic and doctrinal engagement combined with critical distancing – and arguments that follow the thrust of international law *for* development scholarship. The approach recognizes the arguable necessity for "institutional pragmatism"[25] in the international development context whilst insisting that IFIs *qua* IOs have legal personality[26] who thus bear rights and duties under international law. It concomitantly rejects the specious position that IFIs' violation of their own rules and policies, especially those concerning human rights and environmental protection, cannot trigger accountability or responsibility under international law.

The IFIs' constituent instruments, policies, procedures, and practices relating to development projects, including the reports of their respective IAMs, are textually and contextually analyzed here. The context wherein the safeguard policies apply is one wherein the individual is affected by international law, which, in turn, is affected, used, and shaped by the individual herself. Reasons for concentrating on IFIs' safeguard policies and independent accountability mechanisms are thus twofold. First is to stress that there already are policies and mechanisms, albeit still imperfect and at their nascent phase, by which the concept of sustainable development is sought to be operationalized. Second, viewing the IFIs'

[24] For the "systemic" treatment of the policies and the accountability mechanisms, see Harvey Himberg, *Comparative Review of Multilateral Development Bank Safeguard Systems* 1 (2015) <https://consultations.worldbank.org/content/dam/sites/consultations/doc/migration/mdb_safeguard_comparison_main_report_and_annexes_may_2015.pdf>.

[25] Daniel D Bradlow and Andria Naudé Fourie, "The Operational Policies of the World Bank and the International Finance Corporation: Creating Law-Making and Law-Governed Institutions?" (2013) 10 International Organizations Law Review 3, 8.

[26] *Reparation for Injuries suffered in the Service of the United Nations,* advisory opinion [1949] ICJ Rep 174, 179.

safeguard policies as part of international law prompts a greater sense of obligation on the part of IFIs to cooperate with borrowing States and project-affected individuals in the pursuit of sustainable development. Concomitantly, portraying IFIs as lawmakers is meant to subject them and their outputs to the "normative strictures and consequences that normally come hand in hand with being part of international law . . . [such as] systemic relation to other rules of international law including basic human rights and *jus cogens*."[27]

The safeguard systems deserve closer examination not only for their valuable contribution in filling lacunae in international law on sustainable development but also for their potential impact on altering the traditional State-centric view of international law, which needs to adapt to and address contemporary challenges, including those posed by the complex interdependence among economies, human societies, and the natural environment.

These unorthodox objects of inquiry also contribute to the book's uniqueness. They allow readers to explore how the law of IFIs – as part of international financial law, which is itself an understudied branch of international economic law – treats environmental and social issues and to thereby appreciate the similarities and differences in approaches with international trade and investment law. Further, the practice and case law of IAMs could fascinate, alarm, or both those who are interested in ensuring and enforcing the IFIs' responsibility for internationally wrongful conduct.

An international legal perspective is used here to (i) examine how IFIs have been undertaking reforms to shift toward a sustainable development orientation and (ii) demonstrate that IFIs are not only becoming participants in the international lawmaking process concerning sustainable development but also facilitating the participation of other non-State actors in such process. Significantly, the last point implies that the creation of international sustainable development law involves not only States, as traditional subjects and makers of international law, but also non-State actors, who invoke, clarify, elaborate, and operationalize the arguably vague and ambiguous concept of sustainable development. This perspective allows one to better appreciate how the international community's expectations, generated in part through various international

[27] Joost Pauwelyn, "Informal International Lawmaking: Framing the Concept and Research Questions" in Joost Pauwelyn, Ramses Wessel, and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press 2012) 16–17.

"soft" law instruments, can be shaped, enhanced, reinforced, and made concrete through the work of IOs.

The book analyzes the IFIs' evolving environmental and social policies and the case law of different IAMs through a functional approach to lawmaking and the view of international law as a communicative process among relevant actors. The communications model of international lawmaking[28] is adopted, and the functional term "prescription" is used, in lieu of "law" or "rules" – to include in the scope of study the arrangements or relationships between and among a wider range of international actors: not only States but also IOs, individuals, nongovernmental organizations (NGOs), and other members of the international community.

Viewing international law as process, which is further discussed below, "entails harder work in identifying sources and applying norms, as nothing is mechanistic and context is always important."[29] It is thus particularly salient to this book's treatment of international instruments like IOs' outputs and UNGA resolutions as legally meaningful, although they are not formal sources of international law. Such treatment also hinges on the normative vision accompanying the notion of "international community": that international law must serve the interests of not only States but individuals as well.[30]

Since the book delves into the inner workings of MDBs and their IAMs, it presents a portrait taken with a telephoto (*contra* wide-angle) lens showing only a select group of States, IOs, and populations. The issues and hurdles in implementing sustainable development – identified by examining specific development projects, the IFIs' safeguard policies that apply to them, and the accountability mechanisms' operations – might be peculiar to the Global South, where IFI-supported development projects are implemented. Yet this focus crucially allows the spotlight to be shone on the asymmetric relationships – between IFIs and borrowing States, between project-affected people and IFIs, and even between government officials and local communities within a particular

[28] W Michael Reisman, "International Lawmaking: A Process of Communication: The Harold D. Lasswell Memorial Lecture" (1981) 75 Proceedings of the Annual Meeting (American Society of International Law) 101.

[29] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1995) 8.

[30] See Benedict Kingsbury and Megan Donaldson, "From Bilateralism to Publicness in International Law" in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011) 79.

country – that also shape the international lawmaking process on sustainable development. The ostensible limitation, therefore, is necessary and constitutes the distinctive contribution of my work. The book's deliberately narrow focus is ultimately its strength, as it counteracts existing approaches that usually overlook these unequal interactions and their international legal implications.

The developing world is purposefully centered, because it highlights the vision of IFIs *qua* IOs constituted within the post–World War II international law framework, whose "primary goal is not limited to international peace and security, but extends to actions to eliminate poverty and facilitate development."[31] Concentrating on peoples in developing countries provides readers a glimpse of this vision. The scope of this study thus responds to the necessity for a better appreciation of the special challenges confronting the developing world and the demand for international law to take those particularities into account.

Some aspects of the book's findings are nevertheless generalizable. For instance, the posited link between the procedural and substantive principles defining sustainable development – as demonstrated by how public participation enhances the integration of environmental and social concerns into development projects – could conceivably apply to many economic activities undertaken in similar contexts. Fitting contemporary examples are financing and construction activities under the Belt and Road Initiative (BRI), the European Union's Global Gateway, and other transnational infrastructure projects.

WHAT THE BOOK OFFERS

Using as focal point the uncertainty of sustainable development's status in international law, the book proposes one way of understanding and analyzing the debatable legislative role of IFIs. The organizational and policy reforms IFIs undertook since the eighties to become more responsive to environmental and social concerns surrounding their economic activities have created avenues for them and other non-State actors to engage in a deliberative process with States regarding how sustainability can be defined and operationalized in the context of development projects.

[31] Mahnoush H Arsanjani, "Review of International Organizations as Law-Makers by José E. Alvarez" (2006) 100 The American Journal of International Law 733, 741.

The monograph is an in-depth study, from an international-law-as-process perspective, of the different IFIs' sustainability policies and the accountability mechanisms' functions – as they operate in select problematic, (un)sustainable development projects. It seeks to provide a means for researchers, and possibly development practitioners, to not lose sight of the forest for the trees: an accessible text to the IFIs' operational policies and procedures and the case law of their independent accountability mechanisms, viewed and examined contextually in the broader international legal order that they shape and form part of. It offers students and teachers of international sustainable development law an analytical framework to understand the operations of IFIs and the relatively unfamiliar quasi-judicial bodies, the IAMs. Put differently, the book delves into the IFIs' "internal" law to demonstrate that while international law does govern or discipline these IOs, the latter also participate in making international law. Accordingly, the core argument and certain premises dovetail with the contention that the safeguard systems shape the IFIs' international legal obligations and "influence the normative development of international law ... in areas that are particularly under-developed with respect to specific cases or factual situations."[32]

Taking this argument a step further, the book specifies that it is to the emerging area of "international sustainable development law" - that the IFIs, IAMs, and other non-State actors – through the safeguard systems – make their normative contribution. Despite the growth of the international (economic)[33] law and sustainability

[32] Bradlow and Naudé Fourie (n 25) 6–7. See also Daniel D Bradlow, "International Law and the Operations of the International Financial Institutions" in Daniel D Bradlow and David B Hunter (eds), *International Financial Institutions and International Law* (Kluwer Law International 2010).

[33] Friedl Weiss, Erik MG Denters, and Paul JIM de Waart (eds), *International Economic Law with a Human Face* (Martinus Nijhoff 1998); Marie-Claire Cordonier Segger and Markus W Gehring (eds), *Sustainable Development in World Trade Law* (Kluwer Law International 2005); Christina Voigt, *Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law* (Brill/Nijhoff 2009); Marie-Claire Cordonier Segger and others (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2011); Emily Barrett Lydgate, "Sustainable Development in the WTO: From Mutual Supportiveness to Balancing" (2012) 11 World Trade Review 621; Wolfgang Alschner and Elisabeth Tuerk, "The Role of International Investment Agreements in Fostering Sustainable Development" in Freya Baetens (ed), *Investment Law within International Law: Integrationist Perspectives* (Cambridge University Press 2013); Diane A Desierto, "Deciding International Investment Agreement Applicability: The Development Argument in Investment" in

literature[34] in recent decades, very little has been written about how sustainable development is understood and acquires legal significance within international development finance, an area largely regulated by "soft" law. Some answers might have already been offered regarding "What's trade or investment law got to do with sustainability?,"[35] but it is only more recently that the question of whether or how the relationship takes shape in other branches of international economic law has been asked. Works within the third branch, international financial

Freya Baetens (ed), *Investment Law within International Law: Integrationist Perspectives* (Cambridge University Press 2013); Stephan W Schill, Christian J Tams, and Rainer Hofmann, "International Investment Law and Development: Friends or Foes?" in *International Investment Law and Development* (Edward Elgar 2015); Mitsuo Matsushita and Thomas J Schoenbaum, *Emerging Issues in Sustainable Development: International Trade Law and Policy Relating to Natural Resources, Energy, and the Environment* (Springer 2016); Celine Tan and Julio Faundez, *Natural Resources and Sustainable Development: International Economic Law Perspectives* (Edward Elgar 2017); Anna Aseeva, "(Un)Sustainable Development(s) in International Economic Law: A Quest for Sustainability" (2018) 10 Sustainability 4022; Andrea K Bjorklund, "Sustainable Development and International Investment Law" in *Research Handbook on Environment and Investment Law* (Edward Elgar 2019).

[34] Alan E Boyle and David Freestone, *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 1999); Nico J Schrijver and Friedl Weiss (eds), *International Law and Sustainable Development: Principles and Practice* (Martinus Nijhoff 2004); Dire Tladi, *Sustainable Development in International Law: An Analysis of Key Enviro-Economic Instruments* (Pretoria University Law Press 2007); Nico J Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status* (Martinus Nijhoff 2008); Marie-Claire Cordonier Segger and Judge CG Weeramantry (eds), *Sustainable Development Principles in the Decisions of International Courts and Tribunals: 1992–2012* (Taylor & Francis 2017); Marie-Claire Cordonier Segger, "Sustainable Development in International Law" in Hans Christian Bugge and Christina Voigt (eds), *Sustainable Development in International and National Law: What Did the Brundtland Report Do to Legal Thinking and Legal Development, and Where Can We Go from Here?* (Europa Law 2008); Virginie Barral, "Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm" (2012) 23 European Journal of International Law 377; Rakhyun E Kim, "The Nexus between International Law and the Sustainable Development Goals" (2016) 25 Review of European, Comparative & International Environmental Law 15; Sumudu Atapattu, "From Our Common Future to Sustainable Development Goals: Evolution of Sustainable Development under International Law" (2018) 36 Wisconsin International Law Journal 215; Jonas Ebbesson and Ellen Hey (eds), *The Cambridge Handbook of the Sustainable Development Goals and International Law*, vol 1 (Cambridge University Press 2022); Ilias Bantekas and Francesco Seatzu (eds), *The UN Sustainable Development Goals: A Commentary* (Oxford University Press 2023).

[35] See, e.g., Marie-Claire Cordonier Segger, *Crafting Trade and Investment Accords for Sustainable Development: Athena's Treaties* (Oxford University Press 2021).

law[36] – analyzing whether and how ecological, human rights, inequalities, and other social concerns are integrated into development projects – remain scarce. The monograph aims to fill that gap by scrutinizing the IFIs' engagement with the concept and emphasizing the jurisgenerative processes[37] such engagement triggers.

Benedict Kingsbury's[38] lament – that the legal aspects of IOs' operational policies are inadequately examined, despite their evident importance to maintaining and evolving norms of wider application, is pertinent here. More than two decades later, international law scholarship on IFIs' rules or "internal" law has relatively increased. Several articles have described and critiqued IFIs' standard-setting role and exercise of international public authority in various policy areas.[39] Some of these publications have specifically examined the safeguard

[36] Daniel D Bradlow and Claudio Grossman, "Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF" (1995) 17 Human Rights Quarterly 411; Gerhard Loibl, "The World Bank Group and Sustainable Development" in Friedl Weiss, Erik MG Denters, and Paul de Waart (eds), *International Economic Law With a Human Face* (Martinus Nijhoff 1998); Charles E Di Leva, "International Environmental Law, the World Bank, and International Financial Institutions" in Daniel D Bradlow and David B Hunter (eds), *International Financial Institutions and International Law* (Kluwer Law International 2010); David Freestone (ed), *The World Bank and Sustainable Development: Legal Essays* (Martinus Nijhoff 2012); Johanna Aleria P Lorenzo, "International Law-Making in the Field of Sustainable Development and an Emerging Droit Commun among International Financial Institutions" (2018) 7 Cambridge International Law Journal 327; Adebola Adeyemi, "Changing the Face of Sustainable Development in Developing Countries: The Role of the International Finance Corporation" (2014) 16 Environmental Law Review 91; Kevin P Gallagher and Fei Yuan, "Standardizing Sustainable Development: A Comparison of Development Banks in the Americas" (2017) 26 The Journal of Environment & Development 243; Ariel Meyerstein, "Transnational Private Financial Regulation and Sustainable Development: An Empirical Assessment of the Implementation of the Equator Principles" (2012) 45 New York University Journal of International Law and Politics 487; Ben Clift and Te-Anne Robles, "The IMF, Tackling Inequality, and Post-Neoliberal 'Reglobalization': The Paradoxes of Political Legitimation within Economistic Parameters" (2021) 18 Globalizations 39; Kristalina Georgieva and Rhoda Weeks-Brown, "The IMF's Evolving Role Within a Constant Mandate" (2023) 26 Journal of International Economic Law 17.

[37] See generally Robert Cover, "The Supreme Court, 1982 Term – Foreword: Nomos and Narrative" (1983) 97 Harvard Law Review 1; Paul Schiff Berman, "A Pluralist Approach to International Law" (2007) 32 Yale Journal of International Law 301; Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press 2012).

[38] Kingsbury (n 23) 339.

[39] See Bradlow and Naudé Fourie (n 25); Matthias Goldmann, "Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority" (2008) 9 German Law Journal 1865.

policies and their relationship with, and/or contribution to, international law.[40] Most pertinently, the existence of a "law of development cooperation" – built from, among others, the World Bank's operational policies and procedures – has been posited.[41] While the examined materials overlap, this book differs from Philipp Dann's work in terms of the approaches to such materials, the research questions posed, and the overall purpose of the study. To some extent, this monograph – by showing how seemingly "soft" law instruments that predominate international financial law can harden global sustainability commitments – takes up Dann's invitation to explore other items in the research agenda from the inchoate field of the law of development cooperation.

Like Philipp Dann and Michael Riegner, the book considers the World Bank's formulation of safeguards as "multilateral lawmaking projects" setting a "globally diffused normative [standard] for socially and environmentally sound development."[42] Although their narrative unpacks the normative assumptions and justification for international institutions' legislative functions and broadly sketches the techniques employed to make the safeguards legally binding on borrowing States, it lacks particular consideration of the actual texts and the ways that they are interpreted and implemented by various relevant actors. In contrast, a more comprehensive analysis – even including the International Finance Corporation's (IFC) Performance Standards and the Compliance Advisory Ombudsman (CAO) – is provided by Daniel Bradlow and Andria Naudé Fourie to support their argument that IFIs' operational policies, together with the IAMs' functions, are turning them into

[40] Giedre Jokubauskaite, "The Legal Nature of the World Bank Safeguards" (2018) 51 Verfassung in Recht und Übersee 78; Dimitri Van Den Meerssche, "Accountability in International Organisations: Reviewing the World Bank's Environmental and Social Framework" in Elena Sciso (ed), *Accountability, Transparency and Democracy in the Functioning of Bretton Woods Institutions* (Springer International 2017); Michael Riegner, "Governance Indicators in the Law of Development Finance: A Legal Analysis of the World Bank's 'Country Policy and Institutional Assessment'" (2016) 19 Journal of International Economic Law 1; Michael Riegner, "The Equator Principles on Sustainable Finance Assessed from a Critical Development and Third World Perspective" (2014) 5 Transnational Legal Theory 489; Melanne Andromecca Civic, "Prospects for the Respect and Promotion of Internationally Recognized Sustainable Development Practices: A Case Study of the World Bank Environmental Guidelines and Procedures" (1998) 9 Fordham Environmental Law Review 231.

[41] Dann, *The Law of Development Cooperation* (n 13).

[42] Philipp Dann and Michael Riegner, "The World Bank's Environmental and Social Safeguards and the Evolution of Global Order" (2019) 32 Leiden Journal of International Law 537, 538, 547.

law-making and law-governed institutions. Included in these authors' premises, which the book adopts, is a focus on the IAMs' role as interpreters of the safeguards.[43] In contrast to their work, however, the present one devotes considerable space to detail their substantive content, mindful that the safeguards remain quite unfamiliar to many readers and scholars. Further, sharing the attention and importance, albeit not the research method, that Dimitri Van Den Meerssche affords the Bank's lawyers,[44] the present work likewise underscores the vital role of interpretation in enabling IFIs, as well as IAMs, to become participants in the international lawmaking process concerning sustainable development.

The book also corroborates Giedre Jokubauskaite's assessment – that the World Bank's environmental and social policies "captures a practice-oriented standard of authoritative behaviour set by international legal obligations"[45] – and expands it in two ways. First, the book delves into and exposes the interaction between political commitments and international "soft law" instruments concerning the vague concept of sustainable development, on the one hand, and the IFIs' policies, on the other. It also concretely depicts how particular safeguards operate in specific development projects. Second, the book examines how independent accountability mechanisms, as part of the safeguard system, further clarify environmental and social sustainability in development projects. Instead of treating such "intra-institutional law-making" as an alternative[46] to traditional inter-State rulemaking, however, the present work views the international lawmaking *process* holistically, such that IFIs and other non-State actors are among the participants, together with States.

Separately, the literature on accountability mechanisms has taken two main forms: one focuses on the structural features, the rules governing their proceedings, and their variations across different mechanisms;[47]

[43] Bradlow and Naudé Fourie (n 25) 41–45.

[44] Dimitri Van Den Meerssche, *The World Bank's Lawyers: The Life of International Law as Institutional Practice* (Oxford University Press 2022).

[45] Giedre Jokubauskaite, "The World Bank Environmental and Social Framework in a Wider Realm of Public International Law" (2019) 32 Leiden Journal of International Law 457, 458.

[46] Ibid. 458–59.

[47] See, e.g., Makane Moïse Mbengue and Stéphanie de Moerloose, "Multilateral Development Banks and Sustainable Development: On Emulation, Fragmentation and a Common Law of Sustainable Development" (2017) 10 Law and Development Review

another tackles the jurisprudence but only on an individual basis or through select case studies from one IAM.[48] Theoretical and comprehensive empirical treatments of cases investigated by the Inspection Panel also exist.[49]

Yet, thus far, most authors have dealt with the environmental and social policies in isolation from the accountability mechanisms. The notable exceptions[50] who inspired the present work have holistically examined the safeguards and the IAMS, but they are limited by their formats (book chapter, journal article), whereas the jurisgenerative potential of the safeguard system as a whole deserves a book treatment due to its fairly unfamiliar components and various nuances. No work has yet to comprehensively study the safeguard systems, in their entirety and across different IFIs, from an international law perspective. It is such a task that the monograph undertakes.

389; Richard E Bissell and Suresh Nanwani, "Multilateral Development Bank Accountability Mechanisms: Development and Challenges" (2009) 6 Manchester Journal of International Economic Law 2; Daniel D Bradlow, "Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions" (2005) 36 Georgetown Journal of International Law 403; Enrique R Carrasco, Wesley Carrington, and HeeJin Lee, "Governance and Accountability: The Regional Development Banks" (2009) 27 Boston University International Law Journal 1; Karel Wellens, *Remedies against International Organisations* (Cambridge University Press 2002).

[48] See, e.g., Sabine Schlemmer-Schulte, "The Inspection Panel's Case Law" in Gudmundur S Alfredsson and Rolf Ring (eds), *The Inspection Panel of the World Bank: A Different Complaints Procedure* (Martinus Nijhoff 2001); Jonathan A Fox, "The World Bank Inspection Panel: Lessons from the First Five Years" (2000) 6 Global Governance 279; Mariarita Circi, "The World Bank Inspection Panel: The Indian Mumbai Urban Transport Project Case" in Sabino Cassese and others (eds), *Global Administrative Law: Cases, Materials, Issues* (Second, 2008); Jalia Kangave, "Investigating the Failure of Resettlement and Rehabilitation in Development Projects: A Critical Analysis of the World Bank's Policy on Involuntary Resettlement Using Lessons from Uganda's Bujagali Hydroelectric Project" (2012) 45 University of British Columbia Law Review 327.

[49] See, e.g., Andria Naudé Fourie, *World Bank Accountability: In Theory and in Practice* (Eleven International 2016); Andria Naudé Fourie, *The World Bank Inspection Panel Casebook* (Eleven International 2014); Kristen Lewis, "Citizen-Driven Accountability for Sustainable Development: Giving Affected People A Greater Voice – 20 Years On" (Independent Accountability Mechanisms Network 2012) <https://inspectionpanel.org/sites/inspectionpanel.org/files/publications/CitizenDrivenAccountability.pdf>.

[50] David Freestone, "The Environmental and Social Safeguard Policies of the World Bank and the Evolving Role of the Inspection Panel" in David Freestone (ed), *The World Bank and Sustainable Development: Legal Essays* (Martinus Nijhoff 2012); Bradlow and Naudé Fourie (n 25); Dann and Riegner (n 42).

TERMINOLOGY AND USAGE

Referring to the World Bank and its regional counterparts as "international financial institutions" (and only occasionally as "multilateral development banks") is a deliberate terminological choice involving three considerations that are central to this book's approach and claims. First, the term IFIs maintains and highlights two characteristics of the World Bank and its peers, namely, that of being creations of international law that have treaties as their founding documents and that of being entities primarily rooted in and concerned with economics. Second, underscoring that IFIs are IOs more clearly signals how the monograph builds on the IOs as lawmakers thesis and the literature on global administrative law and international public authority. In the same vein, identifying these entities as institutions more closely situates this work within international institutional law and particularly associates it with the research agenda on institutional law and development governance that Philipp Dann posited.[51] Third, the term MDBs runs the risk of glossing over the fact that "development," as well as "sustainable development," is an essentially contested concept. In contrast, "IFIs" is a relatively neutral or less loaded term. Nevertheless, "MDBs" is used mainly for demonstrating how the ambiguity of the word "development" has allowed an evolutionary treaty interpretation of the World Bank's Articles of Agreement. The comparative analysis in Chapter 6 also uses MDBs more frequently, for consistency with the actual names of these entities.

The remainder of this introductory chapter expounds the research question – *how do IFIs accord legal significance to an essentially contested concept like sustainable development and with what implications for these IOs' accountability under international law* – and the ways that the book's approach and response deviate from existing literature touching on this inquiry.

I.1 Sustainable Development: What's International Law Got to Do with It?

Denying sustainable development a place in the international legal system, a standard argument goes: the pursuit of sustainability is not regulated by international law, because it merely involves broad political

[51] Philipp Dann, "Institutional Law and Development Governance: An Introduction" (2019) 12 Law and Development Review 537.

commitments that are unenforceable and, at best, considered soft law. These critical or skeptical views consist of two strands that are often intertwined but can be analytically distinguished. The first refers to the vagueness of the concept, that is, the lack of sufficient normative guidance that supposedly prevents it from becoming legally meaningful.[52] The second cites the absence of a binding multilateral treaty or any other formal source of international law that defines sustainable development and lays down the rights and obligations associated with the concept.[53]

The first is a question of content, the second of pedigree. Both can be analyzed as problems concerning the *international lawmaking process*.

I.1.1 Finding Content

The widely cited and established meaning of sustainable development comes from the Brundtland Commission Report: development that "meets the needs of the present without compromising the ability of future generations to meet their own needs."[54] In the landmark *Gabčíkovo-Nagymaros Case*, the International Court of Justice (ICJ) sheds some light regarding its content and characterization: "This need to reconcile economic development with protection of the environment

[52] See, e.g., Günther Handl, "Sustainable Development: General Rules versus Specific Obligations" in Winfried Lang (ed), *Sustainable Development and International Law* (Graham & Trotman/M Nijhoff 1995); Vaughan Lowe, "Sustainable Development and Unsustainable Arguments" in Alan E Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 1999) 34; Michael Redclift, "The Meaning of Sustainable Development" (1992) 23 Geoforum 395; Sharachchandra M Lélé, "Sustainable Development: A Critical Review" (1991) 19 World Development 607; Michael McCloskey, "The Emperor Has No Clothes: The Conundrum of Sustainable Development" (1999) 9 Duke Environmental Law and Policy Forum 153; Thomas M Parris and Robert W Kates, "Characterizing and Measuring Sustainable Development" (2003) 28 Annual Review of Environment and Resources 559; Michael Redclift, "Sustainable Development (1987–2005): An Oxymoron Comes of Age" (2005) 13 Sustainable Development 212.

[53] See, e.g., Lowe (n 52); William M Lafferty, "The Politics of Sustainable Development: Global Norms for National Implementation" (1996) 5 Environmental Politics 185; Alhaji BM Marong, "From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development" (2003) 16 Georgetown International Environmental Law Review 21.

[54] World Commission on Environment and Development, *Our Common Future* (Oxford University Press 1987) 8.

is aptly expressed in the concept of sustainable development."[55] The Court's statement recognizes a tension between environmental protection and economic development and crucially affirms that sustainable development – albeit legally classified as neither a right nor an obligation but a "concept" – is an injunction to resolve such tension. These descriptions provide some clarity but arguably little normative guidance.

What existing definitions of sustainable development lack, it seems, is a clearly determined way to reconcile the conflicting goals. The legal academic critique about conceptual vagueness and deficient normativity parallels policy objections: without a proper definition of sustainable development, different people having different interests will reach different understandings and implement it differently. Hence, the concept or policy objective would not truly change behavior, especially as it could be co-opted by powerful actors to serve only their own interests. These criticisms, however, could be put in perspective and analyzed through the notion of an essentially contested concept, which is a concept whose "proper use [] inevitably involves endless [and unresolvable] disputes about [its] proper uses on the part of their users," since the dispute is "sustained by perfectly respectable arguments and evidence."[56] As Gallie explained, "to use an essentially contested concept means to use it against other uses and to recognize that one's own use of it has to be maintained against these other uses."[57]

Applying this analytical framework to sustainable development, Stephen Connelly underscored the need "to acknowledge the intellectual legitimacy of alternative interpretations . . . to appreciate how and why they can be strongly held and defended," concluding that it remains possible to pursue development trajectories "as though [a conception of sustainability] exists as the ideal for which we strive, always in competition with conceptions that are comprehensible but, from our perspective, undesirable."[58] Sustainable development is neither a useless nor defective concept, Michael Jacobs further argued, because the fact that it allows contestation or "political struggle over the direction of social and economic development" is not a problem that needs correction but a feature

[55] *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7, 78, para 140.

[56] WB Gallie, "Essentially Contested Concepts" (1955) 56 Proceedings of the Aristotelian Society 167, 169.

[57] Ibid. 172.

[58] Steve Connelly, "Mapping Sustainable Development as a Contested Concept" (2007) 12 Local Environment 259, 262, 275.

that can push national governments and other relevant actors to learn and reappraise their policies.[59] Using a Jungian analytical psychology perspective, Alison Peck similarly maintained:

> What is necessary for sustainable development to be transformative is not that opposites will be eliminated, nor that they will be "harmonized" in the sense of ceasing to be opposites. . .. Economics, environment, and equity will all have their dogs in the fight. . .. As long as the fight is conscious – as long as we agree that "sustainable development" is our goal – Jung suggests that transformation will occur. *Is* occurring.[60]

It is therefore just as important to understand how disputing parties formed their positions regarding sustainability. Indeed, despite sustainable development's purported conceptual vagueness, IFIs managed to concretize and implement norms that steer economic activities in development projects toward environmental and social sustainability. Drawing from ideas about institutional learning[61] and epistemic communities,[62] the book posits that given the predominant professional (and thereby cultural)[63] background of IFI officials and staff, these IOs' understanding and operationalization of sustainable development largely derive from economic thought.[64] This section thus highlights discussions in economics and political philosophy,[65] to explain how IFIs translated the principles or core ideas underlying sustainable development into legal and operational terms. Specifically, the so-called Capability Approach[66]

[59] Michael Jacobs, "Sustainable Development as a Contested Concept" in Andrew Dobson (ed), *Fairness and Futurity: Essays on Environmental Sustainability and Social Justice* (Oxford University Press 1999) 26, 29.

[60] Alison Peck, "Sustainable Development and the Reconciliation of Opposites" (2012) 57 Saint Louis University Law Journal 151, 177–78. (Italics in the original)

[61] See generally Martha Finnemore, "Norms, Culture, and World Politics: Insights from Sociology's Institutionalism" (1996) 50 International Organization 325; Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52 International Organization 887.

[62] See generally Peter M Haas, *Epistemic Communities, Constructivism, and International Environmental Politics* (Routledge 2015).

[63] Galit A Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (Stanford University Press 2012).

[64] Rittich (n 6) 827–28.

[65] Martha Craven Nussbaum, *Creating Capabilities: The Human Development Approach* (Belknap Press of Harvard University Press 2011); Martha Nussbaum, "Capabilities as Fundamental Entitlements: Sen and Social Justice" (2003) 9 Feminist Economics 33.

[66] See Ingrid Robeyns, "Capability Approach" in Jan Peil and Irene van Staveren (eds), *Handbook of Economics and Ethics* (Edward Elgar 2009).

has been influential in their determination of factors that qualify development as sustainable.

Individuals have traditionally been marginalized, if not entirely excluded, both in the international lawmaking[67] process and in the development decisionmaking process.[68] Such omission subsequently led to demands for the two disciplines – international law and economics – to make the individual the focus of analysis and to make the processes inclusive and participatory. Emphasis on the agency of human beings and the changing concern within economics from growth to development are synthesized in Amartya Sen's revolutionary capability approach, which rejects a purely quantitative conception (measured in gross domestic product, GDP) of "development" and instead embraces a holistic and multidimensional process.[69] Under this approach, "Development, well-being and justice are regarded in a comprehensive and integrated manner, and much attention is paid to the links between ... the economic, social, political and cultural dimensions of life."[70] Additionally, development is a "process of expanding the real freedoms [capabilities] that people enjoy," with freedom being not only "the primary ends of development" but "also among its principal means."[71]

Central to the approach is an understanding of so-called functionings and capabilities that together constitute a person's well-being.[72] It involves treating economic growth as a means to expand capabilities,

[67] Akin to the *international law as process* perspective discussed below, some scholars use the term "law-making" (instead of simply "law") to describe their project, since their focus or objective is precisely "to find out whether the normative processes under review can somehow lead to 'law.'" See Joost Pauwelyn, Ramses A Wessel, and Jan Wouters, "Informal International Law as Presumptive Law: Exploring New Modes of Law-Making" in Rain Liivoja and Jarna Petman (eds), *International Law-making: Essays in Honour of Jan Klabbers* (Routledge 2014) 81.

[68] See Daniel D Bradlow, "Development Decision-Making and the Content of International Development Law" (2004) 27 Boston College International and Comparative Law Review 195. ("Development decision-making" is defined as "the way in which individuals, groups, and institutions decide to adopt and then implement policies, programs, and projects that affect the evolution of their own and/or other's social and physical environments.").

[69] Amartya Sen, *Development as Freedom* (Knopf Doubleday 1999); Amartya Sen, "The Ends and Means of Sustainability" (2013) 14 Journal of Human Development and Capabilities 6; Sudhir Anand and Amartya Sen, "Human Development and Economic Sustainability" (2000) 28 World Development 2029.

[70] Robeyns (n 66) 41.

[71] Sen, *Development as Freedom* (n 69) 3, 10.

[72] David A Crocker and Ingrid Robeyns, "Capability and Agency" in Christopher W Morris (ed), *Amartya Sen* (Cambridge University Press 2010) 63.

rather than purely an end itself.[73] As Sen explained, "Having greater freedom to do the things one has reason to value is (1) significant in itself for the person's overall freedom, and (2) important in fostering the person's opportunity to have valuable outcomes."[74] As another author succinctly put it, "development properly construed is about strengthening all of these freedoms"[75] from different sorts of deprivation.

Also important for the capability approach is the concept of agency, which underscores the procedure by which decisions about well-being are made or enacted and suggests that individuals and groups should decide for themselves what functionings and capabilities are valuable.[76] To Sen, the "agent" is "someone who acts and brings about change, and whose achievements can be judged in terms of her own values and objectives."[77] He thus commends democratic processes, arguing that "our conceptualization of economic needs depends crucially on open public debates and discussions, the guaranteeing of which requires insistence on basic political liberty and civil rights."[78] Put differently, public discussion and reasoning on the selection of capabilities lead to greater understanding of the value and specific role of such capabilities.[79]

A capability-centered approach to sustainability means "see[ing] human beings not merely as creatures who have needs but primarily as people whose freedoms really matter."[80] To solve the quandary of unsustainability, Sen explains, "we need a vision of mankind not as patients whose interests have to be looked after, but as agents who can do effective things – both individually and jointly."[81] From this perspective, freedom "operates through values as well as institutions" not only to specify the ends of sustainable development but also to identify the means for achieving such objective.[82] The capability approach to sustainable development can accordingly be gleaned from the core idea of the

[73] Sen, *Development as Freedom* (n 69) 14–15; Sakiko Fukudu-Parr, "The Human Development Paradigm: Operationalizing Sen's Ideas on Capabilities" (2003) 9 Feminist Economics 301, 304–5.
[74] Sen, *Development as Freedom* (n 69) 18.
[75] Robert McDonald, "Sustainable Development as Freedom" (2006) 13 International Journal of Sustainable Development & World Ecology 445, 446.
[76] Crocker and Robeyns (n 72) 61, 75.
[77] Sen, *Development as Freedom* (n 69) 19.
[78] Ibid. 148.
[79] Robeyns (n 66) 43.
[80] Sen, "The Ends and Means of Sustainability" (n 69) 11–12.
[81] Ibid. 7.
[82] Ibid. 18.

1972 Stockholm Declaration on the Human Environment[83] that human beings are "both creature[s] and moulder[s] of [their] environment" and that the natural and man-made aspects of the environment "are essential to [human] well-being and to the enjoyment of basic human rights – even the right to life itself."[84]

As will be seen from the World Bank's experience recounted in Chapter 2, IFIs' economic expertise–derived authority underwent changes in parallel with the discipline itself. But it was not simply a matter of adopting ideas from development economics, it also became imperative for them – as IFIs delved further "deeply into the social, economic and political life of countries and away from core macroeconomic competencies"[85] – to make organizational and processual changes that balance technocracy with democratic accountability.[86]

I.1.2 Moving beyond Pedigree

If one were to cite the 2030 Agenda containing the Sustainable Development Goals (SDGs) as legal basis for requiring States to develop in a sustainable manner, a too-facile response would likely be that a "mere" UNGA resolution is not a source of international law,[87] does not create binding or legally enforceable rights and obligations,[88] and is, at best, "soft" law.

Scholars arguing that sustainable development has normative force posit that it is a general principle of international law, a customary norm, and/or an interpretive tool. Their argument is succinctly and aptly summarized as follows:

> In considering evidence to support the existence of a principle of customary international law on sustainable development, there is clearly a great deal of general state practice committing to sustainable development, and

[83] Report of the U.N. Conference on the Human Environment, U.N. Doc. A/CONF.48/14 and Corr.1, chap. I [hereinafter, the "Stockholm Declaration"].

[84] Stockholm Declaration, Preamble, para 1.

[85] Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (Oxford University Press 2011) 52–53 (citation omitted).

[86] See Daniel C Esty, "Good Governance at the Supranational Scale: Globalizing Administrative Law" (2006) 115 Yale Law Journal 1490, 1520.

[87] Statute of the International Court of Justice, June 26, 1945, T.S. No. 993 [I.C.J. Statute at 25], art. 38(1).

[88] See generally James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press 2012) 42; Carl-August Fleischhauer and Bruno Simma, "Ch.IV The General Assembly, Functions and Powers, Article 13" in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press 2012) 550.

> there appears to be a certain weight of *opinio juris* which supports the proposal that states do this because they feel bound by some form of international commitment to sustainable development. If it were a principle of international law (recognized in treaty and emerging as customary), it seems most likely that the norm would be mainly related to the integration of environment and socio-economic development: that States shall take environmental protection into account in the development process and *vice versa* (as stated in the *Iron Rhine Railway* arbitration). A slightly more optimistic view would be that States are, building on this commitment to integration of environment, social and economic priorities in the development process, also beginning to recognize a right of States to promote sustainable development, implying a related duty not to interfere duly with each others' efforts to do so (as implied in the *Uruguay River Pulp Mills* case).[89]

Even admitting *arguendo* that the 2030 Agenda is "soft" law, the possibility of its hardening into customary international law or assisting in the progressive development of the law[90] should not be readily dismissed. UNGA Resolutions have normative value despite being nonbinding. According to the ICJ, they "can in certain circumstances, provide evidence [regarding] the existence of a rule or the emergence of an *opinio juris*."[91]

Notably, the formation of law from nonbinding international instruments[92] has been particularly relevant to the development of international environmental law[93] and international economic law.[94]

[89] Cordonier Segger (n 34) 141.

[90] See generally Crawford (n 88) 42; Mark Weston Janis, *International Law* (6th edn, Aspen 2012) 55; Stephen M Schwebel, "The Effect of Resolutions of the U.N. General Assembly on Customary International Law" (1979) 73 Proceedings of the Annual Meeting (American Society of International Law) 301; Eduardo Jiménez de Aréchaga, "International Law in the Past Third of a Century" (1978) 159 Recueil des cours de l'Académie de droit international de La Haye = Collected courses of the Hague Academy of International Law 1, 34; Volker Röben, "International Law, Development through International Organizations, Policies and Practice" in *Max Planck Encyclopedia of Public International Law* (2010) paras 33–35.

[91] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 254–55, para 70.

[92] Janis (n 90) 55.

[93] Pierre-Marie Dupuy and Jorge E Viñuales, *International Environmental Law* (Cambridge University Press 2015) 34–35; Jürgen Friedrich, *International Environmental "Soft Law"* (Springer Berlin Heidelberg 2013) 247; Pierre-Marie Dupuy, "Formation of Customary International Law and General Principles" in Daniel Bodansky, Jutta Brunnée, and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (1st edn, Oxford University Press 2008).

[94] Ignaz Seidl-Hohenveldern, "International Economic 'Soft Law'" (1979) 163 Collected Courses of the Hague Academy of International Law; Sergei A Voitovich, "Normative Acts of the International Economic Organizations in International Law-Making" (1990) 24 Journal of World Trade 21, 31.

Defending the legal relevance of international "soft" law or "quasi-regulation," Elihu Lauterpacht argued that the international community should not be deprived of "the use of a device that contributes to orderly behavior and development within a given field."[95] In their conceptualization of informal international lawmaking, Joost Pauwelyn and his colleagues also differentiated "being law" from having "legal effect": a norm can change behavior or determine a tribunal's decision "independently of whether it is law or merely has legal effect based, for example, on grounds of acquiescence, estoppel, or legitimate expectations."[96] Studies under this project illustrate how "expertise-based legitimacy" could be reconciled with a "more inclusive understanding of international legal norms."[97]

Labeling declarations, resolutions, IOs' reports, and other non-treaty instruments as "soft" law, and the resulting conclusion that these texts are legally insignificant, are thus unhelpful.[98] Regardless of their form[99] or technical designation, these international instruments nevertheless affect the behavior of both States and non-States in their interactions with one another, meaning, among States and between States and non-State actors.[100] Breaking free from the formality of Article 38, Alan Boyle and Christine Chinkin asserted that norms can emerge from "post-conference interactions between non-governmental interpretative communities' [international organizations] and state agencies."[101] Likewise for Jutta Brunnée and Stephen Toope, norms acquire fidelity and become suitable for legal reasoning not due to their pedigree but through adherence to Lon Fuller's conditions of legality and shared understandings of such norms.[102]

[95] Elihu Lauterpacht, "Are International Organizations Doing Their Job? International Legislation" (1996) 90 American Society of International Law Proceedings 593, 595.

[96] Joost Pauwelyn, Ramses A Wessel, and Jan Wouters, "Informal International Lawmaking: An Assessment and Template to Keep It Both Effective and Accountable" in Joost Pauwelyn, Ramses Wessel, and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press 2012) 527–28.

[97] Pauwelyn, Wessel, and Wouters (n 67) 89–90.

[98] See Benedict Kingsbury and Lorenzo Casini, "Global Administrative Law Dimensions of International Organizations Law" (2009) 6 International Organizations Law Review 319, 351.

[99] See Richard Collins, "Mapping the Terrain of Institutional 'Lawmaking': Form and Function in International Law" in Elaine Fahey (ed), *The Actors of Postnational Rule-making: Contemporary Challenges of European and International Law* (Routledge 2016).

[100] Kingsbury and Casini (n 98) 349.

[101] Alan E Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007) 83.

[102] Jutta Brunnée and Stephen J Toope, "Interactional International Law: An Introduction" (2011) 3 International Theory 307, 315–16.

The IFIs' lawmaking role thus challenges and prompts re-thinking the doctrine of sources. It also creates the need "for a more fully formed international administrative law."[103] The book contributes to both endeavors, viewing international law as a process and tracing the journey of IFIs, other non-State actors, and sustainable development – as "co-travelers" – through the international legal system.

I.2 Non-State Actor Participation and Alternative Views of International Law

The importance of human agency and individual participation in the development decisionmaking process parallels the growing recognition of non-State actors' crucial role in the international lawmaking process.[104] The role of IFIs and their safeguard systems in international sustainable development lawmaking draws upon the complementarity of these trends.

The characteristics that purportedly negate the legal meaning and status of sustainable development are only problematic under a positivist and formalist international law. An inquiry into the relationship between international law and sustainable development would be more productive and insightful if one were to remove the blinders that limit to certain actors or outputs what can be observed and legally analyzed. The international lawmaking process for a complex, multidimensional, and interdisciplinary concept such as sustainable development compels a deviation from the traditionally State-centric, sovereignty-based perspective.

[103] Kingsbury (n 23) 323.

[104] See generally Anthea Roberts and Sandesh Sivakumaran, "Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law" (2012) 37 Yale Journal of International Law 107; Julian Arato, "Corporations as Lawmakers" (2015) 56 Harvard International Law Journal 229; Janet K Levit, "Bottom-up International Lawmaking: Reflections on the New Haven School of International Law" (2007) 32 Yale Journal of International Law 393; Kal Raustiala, "The 'Participatory Revolution' in International Environmental Law" (1997) 21 Harvard Environmental Law Review 537, 555; George (Rock) Pring and Susan Y Noé, "The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development" in Donald N Zillman, Alastair R Lucas, and George W (Rock) Pring (eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press 2002) 52.

I.2.1 Process

In describing international law as "world social process," founders of the New Haven School explained that "process" signified interaction and "social" referred to living beings who are the active participants in such interaction.[105] Viewing international law as a process entails "reject[ing] the notion of law merely as the impartial application of rules" and embracing, rather than eschewing, policy considerations, especially where the rules are not overwhelmingly clear.[106]

In addition to being closely associated with policy-oriented jurisprudence, the New Haven School distinctly understands international law as an authoritative decisionmaking process wherein "reference to [rules: past decisions and current norms] is of great importance, but in which the concept of community policy also plays its part."[107] Policy-orientedness means that law is "a product of and an instrument in society [that] must promote preferred ends of a society"[108] and implies that international legal rules "are intended to reflect the needs of international policy arguments and vice versa."[109] Simply put, under the New Haven School approach to international law, there is no necessary divide or conflict between law and policy.

This position, in turn, has critical implications for who are considered subjects and makers of international law. Indeed, this approach prefers the term "participants,"[110] as it embodies "an all-inclusive, non-discriminatory concept containing such diverse [entities] as individuals, states and social groupings" that provides scholars with "a conceptual technique for mapping relevant social processes."[111]

[105] Myres S McDougal and Harold D Lasswell, "The Identification and Appraisal of Diverse Systems of Public Order" (1959) 53 American Journal of International Law 1, 7–8.

[106] Rosalyn Higgins, "Policy Considerations and the International Judicial Process" (1968) 17 The International and Comparative Law Quarterly 58, 58–59.

[107] Ibid. 83.

[108] Eisuke Suzuki, "The New Haven School of International Law: An Invitation to A Policy-Oriented Jurisprudence" (1974) 1 Yale Journal of International Law 1, 5.

[109] Harold Hongju Koh, "Is There a 'New' New Haven School of International Law?" (2007) 32 Yale Journal of International Law 559, 563.

[110] Myres S McDougal, Harold D Lasswell, and W Michael Reisman, "The World Constitutive Process of Authoritative Decision" (1967) 19 Journal of Legal Education 253, 262.

[111] Math Noortmann, "Understanding Non-State Actors in the Contemporary World Society: Transcending the International, Mainstreaming the Transnational, or Bringing the Participants Back In?" in Math Noortmann and Cedric Ryngaert (eds), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (Ashgate 2010)

The process view additionally conveys the existence and importance of continuity and incremental changes.[112] It implies that international law results from a dynamic and deliberative interaction, which can be both purposeful and unintentional, with good practice possibly, eventually becoming considered a legal obligation over time.[113] Law thus materializes when IOs, States, and affected peoples make, challenge, defend, and elaborate claims and arguments "in the context of [a] diffuse normative process," which "offers a promising new channel for the development of international law in areas where incremental agreement on practice is ahead of state consensus on principle."[114] Benedict Kingsbury likewise explained that when IOs make policies to accomplish global objectives, they are not merely creating internal rules but "are participating in an international normative process."[115] More generally, it is possible to produce norms from "international incidents" – as Michael Reisman[116] calls events involving a series of argumentation or communication between one actor performing some action and justifying it and other actors responding to such action and justification.[117]

Concomitant to the process view is a *functional approach to lawmaking*. As identified here, functional lawmaking occurs in "any communication between elites and politically relevant groups which shapes wide expectations about appropriate future behavior."[118] The international lawmaking process described in this monograph involves States and non-State actors interacting and communicating in the context of the IFIs' operational activities, that is, funding development projects. The account employs the New Haven School framework, which breaks down

162–63. See also Janne Nijman, "Non-State Actors and the International Rule of Law: Revisiting the 'Realist Theory' of International Legal Personality," in Math Noortmann and Cedric Ryngaert (eds), *Non-State Actors Dynamics in International Law: From Law-Takers to Law-Makers* (Ashgate 2010) 91–124.

[112] Higgins, "Policy Considerations and the International Judicial Process" (n 106) 59.

[113] Ian Johnstone, "Law-Making by International Organizations: Perspectives from IL/IR Theory" in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2012) 283.

[114] Ian Johnstone, "Law-Making through the Operational Activities of International Organizations" (2008) 40 George Washington International Law Review 87, 121–22.

[115] Kingsbury (n 23) 342.

[116] W Michael Reisman, "International Incidents: Introduction to a New Genre in the Study of International Law" (1984) 10 Yale Journal of International Law 1, 3. Emphasis added.

[117] See also Johnstone, "Law-Making through the Operational Activities" (n 114) 88.

[118] Reisman (n 28) 107.

"decision" into seven functions: gathering intelligence, promoting preferences, prescribing authoritative policy or lawmaking, applying prescriptions, invoking or making provisional characterizations of deviations from prescriptions, terminating prescriptions, and appraising the aggregate performance of a community's decision processes in terms of community goals.

The process view thus dispels the notion that international law can only be found and embodied in treaties, customs, and general principles. Such insight informs the examination of IFIs' "internal" law to explain how they operationalize and accord legal significance to the arguably ambiguous and contentious concept of sustainable development.

I.2.2 Pluralist

The study of international law through a legal pluralist lens, Paul Schiff Berman explained, begins with Robert Cover's idea that "law does not reside solely in the coercive commands of a sovereign power" and is instead "constantly constructed through the contest among various norm-generating communities" that are not limited to nation-states.[119] This view, closely related to the New Haven School approach discussed above, shifts the focus of international legal scholars "to the variety of normative assertions, the impact of such assertions on legal consciousness, and the way these norms are deployed by actors both within and without governmental bureaucracies."[120]

Significantly, the capability approach also aligns with the New Haven School's treatment of individuals as participants in the international lawmaking process: "When we focus on individual human beings who constitute groups and communities, it becomes evident that [they] have their own demands, identifications and expectations. They act on their own behalf or act collectively to maximise values through institutions affecting resources."[121] Scholars have made arguments for inclusivity in the transnational prescriptive process as far back as the seventies, stressing how "expectations about policies, authority, and control are created by both official and non-official cooperative behavior' and the preference

[119] Berman (n 37) 302.
[120] Ibid. 303.
[121] Eisuke Suzuki, "Non-State Actors in International Law in Policy Perspective" in Math Noortmann, August Reinisch, and Cedric Ryngaert (eds), *Non-State Actors in International Law* (Hart 2015) 35.

for constantly accommodating "the interests and behavior of all participants who are affected by the prescriptions being created."[122]

In some sense, therefore, the book reiterates and extends this call, by transposing it to the resolution of sustainability concerns arising in IFI-supported development projects. Parenthetically, although this project does not cover the matter of aid effectiveness, its proposition – an attempt to expand the importance of grassroots or community involvement in development projects – is derived from the monitoring role of local communities (vis-à-vis the borrowing country itself) that Susan Rose-Ackerman considers significant in limiting corruption in the use of foreign aid.[123]

The pluralist approach debunks the proposition that States hold exclusive authority to make international law and are the sole legitimate units of analysis in international legal scholarship. In the areas of international economic law, international environmental law, and international human rights law – at the intersection[124] of which areas international sustainable development law can emerge and be discovered – the principle of public participation is extant and essential in varying degrees and forms. As will be elaborated and reiterated throughout, public participation[125] is significant in implementing the principle of integration,[126] which lies at the core of sustainable development. Consequently, an understanding of the interrelationships among the economic, environmental, and social dimensions of development requires inputs from various actors, whose interests in and knowledge

[122] Myres S McDougal and W Michael Reisman, "The Prescribing Function in World Constitutive Process: How International Law Is Made" (1979) 6 Yale Studies in World Public Order 249, 274.

[123] See Susan Rose-Ackerman, "Governance and Corruption" in Bjørn Lomborg (ed), *Global Crises, Global Solutions* (Cambridge University Press 2004) 321–22.

[124] See Bradlow, "Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions" (n 47) 410; Ole Kristian Fauchald, "Hardening the Legal Softness of the World Bank through an Inspection Panel?" (2013) 58 Scandinavian Studies in Law 101, 107–8.

[125] Lewis (n 49).

[126] Schrijver (n 34) 203–4; Marie-Claire Cordonier Segger and Markus Gehring, "The Principle of Integration for Sustainable Development in European Policy and Jurisprudence" in Marie-Claire Cordonier Segger and Judge CG Weeramantry (eds), *Sustainable Development Principles in the Decisions of International Courts and Tribunals: 1992–2012* (Taylor & Francis 2017); Dire Tladi, "Sustainable Development, Integration and International Law and Policy: Sombre Reflections on World Bank Efforts" (2004) 29 South African Yearbook of International Law 164, 166.

of these three dimensions have to be taken into account in the authoritative decisionmaking process.

I.3 International Organizations as Lawmakers

This book develops the idea that instead of displacing traditional sources, IFIs' (sustainability) rules concretize and build upon them. Long before "globalization" and "sustainable development" became buzzwords or phenomena influencing changes in international law, the IOs' lawmaking role had been explored from different angles. International organizations engage in "law-making by subterfuge"[127] or "law-making through the back door, if not quite by stealth."[128] Their policies form part of a normative process and their operations (practices and programmatic work such as humanitarian action and development assistance) often pertain to "widely acknowledged but not well-specified norms"[129] that sometimes generate friction, thereby compelling affected governments to react and initiate a discourse (action and reaction) and engage in legal argumentation, which, in turn, can cause soft law to harden.[130] Interactive processes in the international community are legally relevant when they "were solidified in growing expectations of legitimate authority."[131] In most new fields of international law, only continuous organization can "implement the objectives and policies of co-operation,"[132] and issues in these fields require the "invention of tools to organize the world economy and communications network."[133]

Some IOs' lawmaking role manifests through the involvement of judicial or quasi-judicial bodies. In this book, MDBs' independent accountability mechanisms resemble the "global community of courts" that Anne-Marie Slaughter depicts as being constituted by judges, who see each other as "fellow professionals in an endeavor that transcends national borders" and are "fac[ing] common substantive and institutional problems … learn[ing] from one another's experience and

[127] José E Alvarez, *International Organizations as Law-Makers* (Oxford University Press 2006) 217.
[128] Johnstone, "Law-Making by IOs" (n 113) 275.
[129] Kingsbury (n 23) 340.
[130] See Fauchald (n 124) 107.
[131] Alvarez, *IOs as Law-Makers* (n 127) 52.
[132] Friedmann (n 9) 294.
[133] Brigitte Stern, "What, Exactly, Is the Job of International Institutions?" (1996) 90 American Society of International Law Proceedings 585, 591.

reasoning ... and cooperat[ing] directly to resolve specific disputes."[134] Transjudicial deliberation[135] or transnational judicial dialogue explains how domestic courts, through informal networks, "interact[] with and engag[e] each other in a rich and complex dialogue on a wide range of issues" that enable them to "collectively engage in the co-constitutive process of creating and shaping international legal norms," thereby promoting cross-fertilization resulting to global jurisprudence.[136]

In studying the mechanisms' "dockets," specifically the significance of cases arising from co-financed projects to the creation of international sustainable development law, this book also takes a "common law approach" to international lawmaking. Under this approach, law is "develop[ed] through the resolution of specific problems brought forward through actual disputes"[137] and "jurisprudence is not 'soft law' so much as it is a hardwired component of legal analysis."[138] The approach presupposes that (i) adjudicators' rationality impels them to draw lessons from past experiences and (ii) actors interacting with adjudicators expect such learning process and references to precedent to occur.[139] More broadly, the common law approach could unsettle the notion that international law is simply a body of rules organized under principles and axioms and instead re-channel the energy and attention of the international community to tackling and resolving the progressively transnational nature of contemporary economic, social, environmental, and resource problems.[140]

This approach is useful because of common law's flexibility, elasticity, and infinite resourcefulness, "in devising the ways and means of effectuating principles" of justice and equity.[141] Proceeding from the premise

[134] Anne-Marie Slaughter, "A Global Community of Courts" (2003) 44 Harvard International Law Journal 191, 193.

[135] See Anne-Marie Slaughter, "A Typology of Transjudicial Communication" (1994) 29 University of Richmond Law Review 99, 102.

[136] Melissa A Waters, "Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law" (2004) 93 Georgetown Law Journal 487, 490 (citation omitted).

[137] Frederic G Sourgens, "Law's Laboratory: Developing International Law on Investment Protection as Common Law" (2013) 34 Northwestern Journal of International Law & Business 181, 226 (citations omitted).

[138] Ibid. 186.

[139] See McDougal and Reisman (n 122) 264.

[140] See Sourgens (n 137) 247.

[141] John CH Wu, "The Common-Law Approach to International Law" (1959) 5 The Catholic Lawyer 295, 302.

that "the common law regards man as having the dignity of being made in the image of his Maker," John Wu presents an approach to international law (alternative to judicial positivism, which focuses on State consent) that considers sovereignty "as ethical in foundation, pluralistic in distribution, relative to the purpose of the common good, and circumscribed within the limits of law and reason."[142]

The due regard that the common-law approach gives to human dignity is a feature that accountability mechanisms seem to strive for, although neither consistently nor successfully, in handling project-affected people's complaints. This proposition means taking into account the multidimensional goals and interests of the intended project beneficiaries. It also means valuing the agency of project-affected people in making decisions relating to their development, such that their participation in the relevant processes cannot be so easily disregarded or overridden by technicalities and overly pragmatic considerations.

As these statements illustrate, other scholars have posited the lawmaking function of international institutions.[143] But few have closely examined the idea in relation to IFIs.[144] Moreover, an account about the legal techniques, mechanisms, and procedures they employ remains limited.[145] Hence, whilst building on the IOs as lawmakers thesis, the book is distinguishable on three aspects.

First, the book yields the hopefully reassuring finding that IFIs have also empowered, albeit circuitously and still imperfectly, other non-State actors such as individuals and local communities, to participate in the international lawmaking process concerning sustainable development.

[142] Ibid. 296, 298.

[143] See, e.g., Jan Wouters and Philip De Man, "International Organizations as Law-Makers" in Jan Klabbers and Åsa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011); Ramses A Wessel, "Informal International Law-Making as a New Form of World Legislation?" (2011) 8 International Organizations Law Review 253, 254; Nigel D White, "Separate but Connected: Inter-Governmental Organizations and International Law Forum on International Institutional Law" (2008) 5 International Organizations Law Review 175, 181.

[144] Susan Block-Lieb and Terence C Halliday, *Global Lawmakers: International Organizations in the Crafting of World Markets* (Cambridge University Press 2017); Chris Brummer, *Soft Law and the Global Financial System: Rule Making in the 21st Century* (Cambridge University Press 2011); Kristen Boon, "'Open for Business': International Financial Institutions, Postconflict Economic Reform, and Rule of Law" (2006) 100 Proceedings of the ASIL Annual Meeting 142.

[145] Andria Naudé Fourie, "The World Bank Inspection Panel's Normative Potential: A Critical Assessment, and Restatement" (2012) 59 Netherlands International Law Review 199, 200–201.

Second, the thesis is expounded here specifically in relation to international sustainable development law, that is, the contribution of IFIs' safeguard systems to this nascent field and practice. Third, the rare publications substantiating the IFIs' lawmaking function often stop short of scrutinizing the implications[146] of such function for these IOs' international legal accountability. The book urges greater thinking and more serious debates not only about the potential responsibility of IFIs for noncompliance with their legal mandates and for harms caused to peoples and the environment in many developing countries but also regarding the relationship of their accountability mechanisms to the law of international responsibility.

The book shows that the purposes of IFIs today are no longer limited to facilitating cooperation, managing compliance, or even providing resources. Rather, they can now also inform and prescribe the content of norms applicable to various entities acting at the transnational level and, possibly supplementing the law governing the relations among States and non-State actors.

STRUCTURE OF THE BOOK

The book is divided into two parts and consists of nine chapters, including this introduction and the Conclusion. Part I includes Chapters 1–4, each of which describes the book's two main characters – sustainable development and the World Bank exemplifying IFIs – and narrates how their paths meet. Chapter 1 ("Sustainability's Journey: Snapshots from Stockholm, Rio, Copenhagen, The Hague, Johannesburg, and New York") maps the international community's varied and evolving understandings of sustainable development, drawing particular attention to how these understandings overlap with and echo themes from early attempts to reform international economic law, that is, the legal rules governing the global economic order and the contemporary efforts to codify the human right to development. Chapter 2 ("Detour to Bretton Woods: Re-Constructing the International Bank for Sustainable Development") runs parallel to the immediately preceding chapter by tracing the changing definitions of development, as implemented by one of the pillar organizations of international financial law, that is, the

[146] A notable exception is Sinclair's cautious attitude about the promises *and* perils of IO reform. Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press 2017).

World Bank, whose mandate and functions have likewise been evolving. It employs the New Haven approach to international law and treaty interpretation to expound how development has come to be understood in the Bank's operations as involving not only economic growth but also environmental, governance, and human rights concerns, despite the "political activity prohibition" in its constituent instrument.

The last two chapters in Part I explains the main characters' respective features that establish their initially uncertain connection. Chapter 3 ("Public Participation and Integration: Procedural and Substantive Principles of Sustainable Development") identifies the distinct but intertwined principles of sustainable development that particularly found resonance in the IFIs. It discusses the posited link between the two, with public participation serving as the procedural component of sustainable development, which in substance requires the integration of environmental, social, and economic concerns. Chapter 4 ("Safeguard Systems: Legal Institutional Framework for Sustainability of Development Projects") elaborates how the World Bank translated the sustainable development principles, analyzed in Chapter 3, into its operational policies and procedures. It details the contents of select safeguard policies – environmental assessment, involuntary resettlement, indigenous peoples – and their interpretation by the Inspection Panel.

Part II, comprising Chapters 5–7, presents the book's core argument that *IFIs are international lawmakers in the field of sustainable development who can thus be held legally accountable*. The first prong of the thesis – IFIs' contribution to international sustainable development lawmaking – has two components, which Chapters 5 and 6 respectively elaborate. Chapter 5 ("IFIs as Lawmakers I: Hardening International 'Soft' Law on Sustainable Development and Externalizing 'Internal' Law on Development Finance") uses examples of "un-sustainable development projects" in various developing countries to show how the safeguard systems work (and not) in ensuring the environmental, social, and economic sustainability of IFIs' operations and the projects they support. Chapter 6 ("IFIs as Lawmakers II: Harmonizing and Communicating toward a *Droit Commun* on Sustainable Development") uses the coordination and cooperation among MDBs and among IAMs to demonstrate how they learn from one another's approach to sustainability and engage in actions that reinforce the authoritativeness of their collective understanding of sustainable development.

Rounding up Part II is Chapter 7 ("Institutional Lawmaking and International Legal Accountability"), which is a vital continuation of

the narrative about the interrelationship among international law, IFIs, and sustainable development. A demand for accountability motivated the initial encounter; it is also accountability – more broadly construed – that should underpin the IFIs' international lawmaking role vis-à-vis sustainable development. To expound the second prong of the book's claim, this penultimate chapter sketches a complementary relationship between independent accountability mechanisms and the International Law Commission (ILC) draft Articles on the Responsibility of International Organizations (ARIO), with a view to upholding the right to remedy in the development finance context. It then pleads that, given the IFIs' critical roles as creatures, creators, and catalysts of international law – especially regarding sustainable development – international legal scholars should begin taking them seriously and further scrutinizing their "internal" rules and operations.

The Conclusion ("A Place for Accountable Non-State Actor Participation in International Sustainable Development Lawmaking") synthesizes the book's findings and presents the reimagined view of IFIs not only as funders of development projects but also as lawmakers and enablers of non-State actor participation in the international lawmaking process concerning sustainable development. As each of the chapters will demonstrate, sustainable development can derive meaning and normative force within the international legal order through the work of IFIs and their interaction with other non-State actors and with States from the Global South. This lawmaking role urges further scrutiny to ensure IFIs' accountable exercise of power and performance of their legal mandates and creativity to genuinely uphold the right to remedy of project-affected people.

1

Sustainability's Journey

Snapshots from Stockholm, Rio, Copenhagen, The Hague, Johannesburg, and New York

No universally binding multilateral treaty at present unambiguously defines sustainable development, whether as a concept or an objective. Few clearly regulate its pursuit and specifically provide the legal obligations concomitant to it. Although States arguably still do not (yet) have a legal obligation to develop sustainably, there exists a growing consensus that they and other relevant actors should at least undertake and promote processes conducive to sustainability of planet, society, and economy.[1] This consensus can be inferred from the international instruments – of varying degrees of normativity and precision – surveyed in this chapter that refer to sustainable development, elaborate on its components and implications, and affect the behavior of both States and non-State actors. Such survey is accompanied by a sketch of judicial and arbitral decisions that further expound the meaning and international legal significance of sustainable development (Section 1.2). Lastly, Section 1.3 discusses codification works and long-standing demands that additionally converge and should have a bearing on the international community's understanding of sustainable development. Taken together, the intercity and intercontinental journey of sustainability traced here supplies one premise of the book's argument, namely, that the supposedly lacking content and normative force of sustainable development can partly be found in multiple "soft" law materials spanning at least five decades.

Scholars' perspectives about the legal status of sustainable development can be analyzed on a spectrum of softness (i.e., global policy

[1] See Alan Boyle and David Freestone, "Introduction" in Alan E Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 2001) 17; Boyle and Chinkin (Introduction n 101) 224–25; Barral (Introduction n 34).

without legal value) and hardness (i.e., a binding legal norm).[2] Some authors skeptically view sustainable development to be no more than an expectation or hope, an aspirational goal, a moral obligation, or at best a political commitment.[3] Those who characterize sustainable development as "soft" law – that is, "a normative statement supported by a political or other commitment and, thus, something more than policy even though it is not legally binding"[4] – lie somewhere in the middle of the spectrum.

On the other hand, there are "optimists,"[5] who ascribe "hard" law status to sustainable development, characterizing it as "a principle of international law (recognized in treaty and emerging as customary)" requiring States (i) to "take environmental protection into account in the development process and *vice versa*" (integration principle) and/or (ii) "to recognize a right of States to promote sustainable development, implying a duty not to interfere duly with each others' efforts to do so."[6] Christina Voigt, for instance, deems sustainable development as a principle of law requiring a holistic approach to dispute resolution and whose "normative force aims at the *integration of various norms and respective interests* while ensuring the functioning of essential natural processes."[7] Functionally speaking, sustainable development, as a principle, structures legal argument and "operates to widen the issues in dispute, such that a question concerning

[2] See Winfried Lang, "From Environmental Protection to Sustainable Development: Challenges for International Law" in Winfried Lang (ed), *Sustainable Development and International Law* (Graham & Trotman/M Nijhoff 1995); Daniel Barstow Magraw and Lisa D Hawke, "Sustainable Development" in Daniel Bodansky, Jutta Brunnée, and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2008).

[3] See generally McCloskey (Introduction n 52); Marong (Introduction n 53); Lafferty (Introduction n 53).

[4] Magraw and Hawke (n 2) 624.

[5] See generally Cordonier Segger (Introduction n 34) 137–38; Voigt, *Sustainable Development As a Principle of International Law* (Introduction n 33) 161; Sumudu Atapattu, "Sustainable Development, Myth or Reality: A Survey of Sustainable Development under International Law and Sri Lankan Law" (2002) 14 Georgetown International Environmental Law Review 265; Schrijver (Introduction n 34); Barral (Introduction n 34).

[6] Cordonier Segger (Introduction n 34) 141.

[7] Voigt, *Sustainable Development As a Principle of International Law* (Introduction n 33) 170–71; Christina Voigt, "The Principle of Sustainable Development: Integration and Ecological Integrity" in Christina Voigt (ed), *Rule of Law for Nature: New Dimensions and Ideas in Environmental Law* (Cambridge University Press 2013).

a state's right to develop . . . cannot be discussed independently of environmental concerns."[8]

For optimistic scholars, there are so-called sustainable development treaties, which propagate the procedural phenomenon of allowing non-State actors to attend and participate in international conferences, on the premise that "sustainable development derives a significant amount of its normative power from its negotiated, incremental acceptance among States, as well as a wide variety of other actors and interest groups," and the requisite deliberative process should involve "the international community as a whole [and regulate] the conduct of both its legislators and civil society."[9] In a similar vein, what Marie-Claire Cordonier Segger labels "Athena's Treaties" are international trade and investment agreements that result from "reasoned negotiations based on scholarship, on law and sustainability expertise" and "integrate environmental and social considerations," such as climate change, biodiversity protection, human rights, and equity.[10]

Taking a more nuanced view but disagreeing that it is a principle of international law, Vaughan Lowe instead characterizes sustainable development "as an element of the process of judicial reasoning . . . a meta-principle, acting upon other rules and principles – a legal concept exercising a kind of interstitial normativity, pushing and pulling the boundaries of true primary norms when they threaten to overlap or conflict with each other."[11] As shown below, the operation of such interstitial norms could be especially observed in cases where sustainable development is analyzed as a treaty objective.

Yet another perspective is James Crawford's: considering sustainable development as "a way of thinking about law and its relationship to policy."[12] It partly links with an economist's view of sustainable development as "both an analytical theory and a 'normative' or ethical framework":

> Sustainable development is both a way of looking at the world, with a focus on the interlinkages of economic, social, and environmental change,

[8] James Crawford, "Responsibility, Fraternity, and Sustainability in International Law" (2015) 52 Canadian Yearbook of International Law / Annuaire canadien de droit international 1, 28.
[9] Cordonier Segger and Khalfan (Introduction n 1) 50.
[10] Cordonier Segger (Introduction n 35) 1, 4.
[11] Lowe (Introduction n 52) 31.
[12] Crawford (Introduction n 154) 28.

> and a way of describing our shared aspirations for a decent life, combining economic development, social inclusion, and environmental sustainability. . .. Our new era will soon be described by new global goals, the Sustainable Development Goals (SDGs).[13]

Built on the success and momentum of the Millennium Development Goals (MDGs),[14] the SDGs are more expansive and ambitious in terms of covered areas and of the participants/stakeholders. As pertinent to the World Bank and this book, "A core feature of the SDGs is their strong focus on means of implementation – the mobilization of financial resources – capacity-building and technology, as well as data and institutions."[15]

1.1 Ideation and Conversations

Sustainable development as a global policy debuted at the 1972 United Nations Conference on the Human Environment (UNCHE)[16] in Stockholm – although the concept had then yet to assume its present name of "sustainable development."[17] The Stockholm Conference was crucial in affirming at the international level "the interrelationship between development and the exploitation of natural resources, on the one hand, and the need for limits on the exploitation of such resources in order to protect the environment, on the other."[18] It also stimulated other ideas, policies, and rules within and beyond the UN system that

[13] Jeffrey D Sachs, *The Age of Sustainable Development* (Columbia University Press 2015) xiii.

[14] G.A. Res. 55/2, United Nations Millennium Declaration (September 18, 2000) [hereinafter, the "Millennium Declaration"].

[15] Ibid.

[16] G.A. Res. 2994 (XXVII), United Nations Conference on the Human Environment (December 15, 1972).

[17] See, e.g., Schrijver (Introduction n 34); Michael Decleris, *The Law of Sustainable Development: General Principles* (Office for Official Publications of the European Communities 2000); Ulrich Beyerlin, "The Concept of Sustainable Development" in Rüdiger Wolfrum (ed), *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?* (Springer 1996); Boyle and Freestone (Introduction n 147); Cordonier Segger (Introduction n 34); Philippe Sands, "Environmental Protection in the Twenty-First Century: Sustainable Development and International Law" in Richard L Revesz, Philippe Sands and Richard B Stewart (eds), *Environmental Law, the Economy and Sustainable Development* (Cambridge University Press 2000); Edith Brown Weiss, "The Evolution of International Environmental Law" (2011) 54 Japanese Yearbook of International Law 1.

[18] Philippe Sands, "International Law in the Field of Sustainable Development" (1995) 65 British Yearbook of International Law 303, 309–10.

eventually influenced landmark outputs such as the Rio Declaration.[19] Remarkably, the World Bank participated in the UNCHE,[20] as several principles in the Stockholm Declaration refer to "taking into account the circumstances and particular requirements of developing countries"[21] and remedying connections between environmental deficiencies and underdevelopment "through the transfer of substantial quantities of financial and technological assistance as a supplement to [developing countries'] domestic effort."[22] Significantly, this latter injunction concerning resources redistribution persists and is currently embodied in one of the fundamental but deeply contested principles in climate change law, namely, common but differentiated responsibilities.

The Brundtland Commission's definition of sustainable development is the oft-quoted one that has gained nearly universal acceptance today, in spite, or because, of its generic and ambiguous formulation. This definition in *Our Common Future*, the report of the World Commission on Environment and Development ("Brundtland Report"),[23] is anthropocentric.[24] Humanity is identified as the subject or actor, the one that "has the ability to make development sustainable – to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs."[25]

Significantly, the two succeeding sentences, which receive less attention in many accounts, do acknowledge ecological and social boundaries, albeit not absolute ones:

> The concept of sustainable development does imply limits – not absolute limits but limitations imposed by the present state of technology and

[19] See Barral (Introduction n 34) 379–80; David Hunter, James Salzman, and Durwood Zaelke, *International Environmental Law and Policy* (5th ed., Foundation Press 2015) 141.

[20] See Chapter 3.

[21] Stockholm Declaration, Principle 12.

[22] Ibid. Principle 9.

[23] G.A. Res. 42/187, Report of the World Commission on Environment and Development (December 11, 1987).

[24] See Edith Brown Weiss, "Rule of Law for Nature in a Kaleidoscopic World" in Christina Voigt (ed), *Rule of Law for Nature: New Dimensions and Ideas in Environmental Law* (Cambridge University Press 2013); Beyerlin (Introduction n 163) 105–6; Virginie Barral, "National Sovereignty over Natural Resources: Environmental Challenges and Sustainable Development" in Elisa Morgera and Kati Kulovesi (eds), *Research Handbook on International Law and Natural Resources* (Edward Elgar 2016) 5–7; McCloskey (Introduction n 52) 154–55.

[25] World Commission on Environment and Development (Introduction n 54) 8.

> social organization on environmental resources and by the ability of the biosphere to absorb the effects of human activities. But technology and social organization can both be managed and improved to make way for a new era of economic growth.[26]

This excerpt could support critical observations that sustainable development does not constitute a genuine paradigm shift, because its primary objective, if not obsession, remains economic growth while the constraints thereto, including Earth's ability to absorb the impacts of human activities, are only of secondary importance – things to be modified and overcome.[27] Simply put, the concept seemingly remains fixed in the economic sphere. Interesting as the debate on sustainable development's philosophical underpinnings might be, it is beyond this book's scope. However, as expounded in the succeeding chapters, the IFIs' initial approach to sustainability predictably leaned toward economics, but such "bias" has not barred them from subsequently reaching a relatively multidisciplinary and integrated perspective that accommodates non-economic concerns.

Apart from characterizing sustainable development as a *concept*, the Brundtland Commission also described it as a dynamic *process*:

> [S]ustainable development is *not a fixed state of harmony, but rather a process of change* in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are made consistent with future as well as present needs. We do not pretend that the process is easy or straightforward. Painful choices have to be made. Thus, in the final analysis, *sustainable development must rest on political will*.[28]

Such characterization is vital to this monograph for two reasons. First, it aligns with the view of international lawmaking and of development decisionmaking as processes. Second, it stresses the value of political will, which also underscores the need for public participation.

The concept and terminology of sustainable development gained acceptance among States and earned its place in international law and policy during the 1992 UN Conference on Environment and Development (UNCED), also known as the Earth Summit, in Rio de Janeiro. Similar to the Brundtland conception, the Rio Declaration reflects the anthropocentric character of sustainable development:

[26] Ibid.
[27] See generally McCloskey (Introduction n 52).
[28] World Commission on Environment and Development (Introduction n 54) 9.

"Human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life."[29]

The UNCED's importance can be appreciated from the fact that it generated four of the most important conventions and instruments for international environmental law, including the UN Framework Convention on Climate Change (UNFCCC).[30] Indeed, it took several decades for human society to undergo a "profound change in the way [it] views the relationship between economic activity and the natural environment," and it was in Rio that sustainable development first received imprimatur from the world's governments, who adopted sustainable development as the development paradigm and made it "the underlying theme of the five instruments" adopted by a total of 172 countries represented by heads of State or other national leaders at that time.[31] Accordingly, the Rio Declaration, which used strong legal language despite its non-binding form, and its formulation of sustainable development "became the unavoidable paradigm of environment/development relations."[32] Based on the Rio Declaration principles that "reflect a global consensus and political commitment at the highest level on development and environment cooperation,"[33] Agenda 21 laid down concrete action points – for the implementation primarily by States, but with support and contribution from international, regional, and subregional organizations as well as NGOs and other non-State actors.[34]

Attention and emphasis on the (third) *social* aspect[35] of sustainable development came a little later and was first[36] explicitly recognized in the

[29] Rio Declaration, Principle 1.

[30] Brown Weiss, "The Evolution of International Environmental Law" (Introduction n 163) 10–11.

[31] Magraw and Hawke (n 2) 614–16; Alexandre S Timoshenko, "From Stockholm to Rio: The Institutionalization of Sustainable Development" in Winfried Lang (ed), *Sustainable Development and International Law* (Graham & Trotman/M Nijhoff 1995) 152.

[32] Barral (Introduction n 34) 379.

[33] Agenda 21, chap. 1 (Preamble), para 1.3

[34] Sands, "International Law in the Field of Sustainable Development" (n 18) 324. ("Agenda 21 . . . 'reflects a global consensus and political commitment at the highest level' towards the implementation of national strategies, plans, policies and processes, to be supported and supplemented by international co-operation.").

[35] See Ximena Fuentes, "International Law-Making in the Field of Sustainable Development: The Unequal Competition Between Development and the Environment" (2002) 2 International Environmental Agreements 109, 111–12.

[36] See Sumudu A Atapattu, *Emerging Principles of International Environmental Law* (Transnational 2006) 93.

1995 Copenhagen Declaration on Social Development.[37] This Declaration introduced the conception of sustainable development as having three dimensions: "Economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development, which is the framework for our efforts to achieve a higher quality of life for all people."[38] The Declaration additionally contained States' commitments to "reinforce . . . the means and capacities for people to participate in the formulation and implementation of social and economic policies" and "support, particularly through technical and financial cooperation, the efforts of developing countries to achieve rapid, broadly based sustainable development."[39] By recognizing that sustainable development requires "empowering the poor to utilize environmental resources sustainably"[40] and that social development and social justice necessitate sustained economic growth, the Copenhagen Declaration resonates with Amartya Sen's capability approach discussed in the Introduction.

The 2002 Johannesburg Declaration on Sustainable Development[41] upheld the three "interdependent and mutually reinforcing pillars of sustainable development – economic development, social development and environmental protection" and States' collective responsibility to advance and strengthen them "at the local, national, regional and global levels."[42] Apart from enumerating several challenges to meeting the "objectives of and essential requirements for sustainable development," including "managing the natural resource base for economic and social development,"[43] States signing the Johannesburg Declaration recognized sustainability's requirement for "broad-based participation in policy formulation, decisionmaking and implementation at all levels."[44] The contents and normative implications of the concept can be gleaned from such statements regarding what sustainable development requires.

[37] Report of the World Summit for Social Development, Copenhagen Declaration on Social Development, U.N. Doc. A/CONF.166/9, chap. I, annex I (March 14, 1995) [hereinafter, "Copenhagen Declaration"].
[38] Copenhagen Declaration, para 6.
[39] Ibid. para 21, Commitment 1(c) and (l).
[40] Ibid. para 6.
[41] Report of the World Summit on Sustainable Development, Johannesburg Declaration on Sustainable Development, U.N. Doc. A/CONF.199/20, chap. I, Res. 1 annex (Sept. 4, 2002) [hereinafter, "Johannesburg Declaration"].
[42] Ibid. para 5
[43] Ibid. para 11 *et seq.*
[44] Ibid. para 26.

Poverty eradication, as States declared (two decades after the relationship between environmental concerns and development was introduced at the Earth Summit), is foremost and indispensable among such requirements.[45] Further, "a just balance among the economic, social and environmental needs of present and future generations" necessitates harmonization with nature.[46] These pronouncements were made on the occasion of sustainability's return to Rio in 2012 for the UN Conference on Sustainable Development. In the outcome document entitled *The future we want*, States buttressed the three-dimensional conceptualization of sustainable development by reaffirming their commitments contained not only in the 1992 Rio instruments but also in "the outcomes of all major United Nations conferences and summits in the economic, social and environmental fields."[47]

Further, the list includes the UN-sponsored international conferences on financing for development held in Monterrey (2002) and Doha (2008).[48] Likewise, echoing the IFIs' emphasis on engaging project-affected people, NGOs, and other stakeholders, the States considered "broad public participation and access to information" essential to promoting sustainability.[49] Lastly, in describing the idea of "green economy" and tagging it as an important tool to achieve sustainability, the outcome document also detailed what the contents of the concept are (apart from eradicating poverty): "Sustained economic growth, enhancing social inclusion, improving human welfare and creating opportunities for employment and decent work for all, while maintaining the healthy functioning of the Earth's ecosystems."[50]

Notwithstanding the foregoing affirmations, there presently remains substantial skepticism regarding the existence of international sustainable development law. Again, views about international instruments mentioning sustainable development, such as the Rio Declaration, range from

[45] G.A. Res. 66/288 Annex, "The future we want" (July 27, 2012), para 2 [hereinafter, "The future we want"].
[46] The "future we want," para 39
[47] "The future we want," para 16
[48] See Report of the International Conference on Financing for Development, Monterrey, Mexico, March 18–22, 2002 (A/CONF.198/11, chapter 1, resolution 1, annex); Doha Declaration on Financing for Development: outcome document of the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus, November 29– December 2, 2008 (A/CONF.212/L.1/Rev.1).
[49] "The future we want," paras 42–55
[50] Ibid. paras 56–58

treating the Declaration as "part of an ongoing process of codification and development of international environmental law" to its "marking a transition from international environmental law and international economic law to an international law of sustainable development."[51]

Coexisting with such skeptical views is the assertion that, after the foregoing series of conferences and declarations, the international community has entered a new era – what Sachs calls the "Age of Sustainable Development," wherein "global society is interconnected as never before" and technological advances, coupled with expansion in knowledge and improvement in business practices, have presented "new opportunities and also new risks."[52]

The International Law Association's (ILA) New Delhi Declaration[53] responded to the call under Rio Declaration Principle 27 for international cooperation to further develop *international law in the field of sustainable development*. It embodies years of intensive study by legal experts who sought "to integrate [international economic law; international human rights law; and international law in the field of development] in order to make international law more effective in the pursuance of sustainable development."[54] It is a synthesis and recapitulation of the sustainability-related actions that States undertook, and should undertake, to implement their sustainability commitments made during the UNCED, and arguably, also during the 1972 UNCHE in Stockholm.[55] Through this Declaration, the ILA also exemplified the role of legal academics and practitioners as "intermediaries between activists and states" by offering reasonable "interpretations of the instruments that they advocate should be adopted in states' policy and practice."[56]

1.2 Conflicts and Adjudication

The concept of sustainable development did not stay within conference rooms but has also entered judicial halls.[57] Its legal status has yet to be

[51] Boyle and Freestone (Introduction n 147) 2–3.
[52] Sachs (Introduction n 159) xiii.
[53] ILA, "New Delhi Declaration of Principles of International Law Relating to Sustainable Development," Resolution 3/2002 (April 6, 2002).
[54] Nico Schrijver, "ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development" (2002) 49 Netherlands International Law Review 299, 299.
[55] Cordonier Segger (Introduction n 34) 166.
[56] Boyle and Chinkin (Introduction n 101) 82.
[57] For a more comprehensive treatment and specific analyses of cases citing the Rio Declaration, see Cordonier Segger and Weeramantry (Introduction n 34).

definitively clarified and resolved by an international court or tribunal. The ICJ has nevertheless hinted at the integrative requirement of sustainable development and characterized the latter as a concept.[58] One of the crucial and novel features of the *Gabčíkovo-Nagymaros Case* is the judicial imposition of an obligation for the disputing States, who were parties to an economic partnership treaty, to "together . . . look afresh at the effects on the environment of the operation of the [subject] power plant," which injunction was followed by the Court's statement that the Parties themselves are tasked "to [negotiate and] find an agreed solution that takes account of the [subject treaty's objectives], which must be *pursued in a joint and integrated way*, as well as of the norms of international environmental law and the principles of the law of international watercourses."[59] Otherwise stated, although the States agreed to integrate economic and environmental goals in their treaty, it is not for the ICJ to determine what such "appropriate" integration entails.

Ensuing commentary on the *Gabčíkovo-Nagymaros Case* stressed that the majority judgment left undecided the juridical status of sustainable development and its classification as a binding norm or standard.[60] It is not entirely clear whether resolving this point was at all important for the Court's overall reasoning and conclusion. However, what seemed to spark controversy – academic, if not necessarily judicial – is Judge Weeramantry's Separate Opinion, in which he considered sustainable development as "more than a mere concept, but as a principle with normative value, which is crucial to the determination of this case."[61] To show "wide and general recognition of the concept," Judge Weeramantry cited, among others, "multilateral treaties [specifically from the 1992 Earth Summit], international declarations; the foundation documents of international organizations; the practices of international financial institutions."[62]

Further elaborating the concept of sustainable development is the *Iron Rhine Railway Case*.[63] The arbitral award notably cited the Stockholm

[58] See Case Concerning Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment, 1997 I.C.J. Rep. 7, 78, para 140 (September 25).
[59] Ibid. at 78, para 141 (emphasis added).
[60] Lowe (Introduction n 52) 20.
[61] Case Concerning the Gabčikovo-Nagymaros Project (Hungary v. Slovakia), Judgment, 1997 I.C.J. Rep. 7, 88 (Sept. 25) (separate opinion by Weeramantry, J.).
[62] Ibid. at 93–94.
[63] In the Arbitration Regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belgium v. Netherlands), 27 R.I.A.A. 35 (Perm. Ct. Arb. 2005).

and Rio Declarations to support the conclusion that "both international and [European Community] law require the integration of appropriate environmental measures in the design and implementation of economic development activities,"[64] and, regardless of the status of the emerging principles within international environmental law that refer to "prevention and of sustainable development, and protection for future generations," these notions should still be considered in the interpretation of treaties and the adjudication of disputes.[65] The tribunal's pronouncement that "environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts" is enlightening, although it was followed by a questionable statement that the duty to prevent or mitigate significant harm arising from development-related activity "has not become a principle of general international law."[66]

In the more recent *Pulp Mills Case*, the ICJ referred to sustainable development as an *objective*, whose essence is the "interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection."[67] The Court additionally considered the case as "highlight[ing] the importance of the need to ensure environmental protection of shared natural resources while allowing for sustainable economic development."[68] This case can be read as granting sustainable development the character of an objective – which is true for some existing treaties, including trade agreements, - that thereby provides context for interpretation and for ascertaining the consistency of State conduct with international legal obligations.[69]

Indeed, sustainable development, as an objective of the World Trade Organization (WTO) Agreement, operated to enable the Appellate Body in *United States–Shrimp* to evolutively interpret an economic treaty[70] provision (drafted in 1947), "in the light of contemporary concerns of the community of nations about the protection and conservation of the

[64] Ibid. at 66, para 59.
[65] Ibid. at 66–67, paras 58, 60.
[66] Ibid. 66–67, para 59.
[67] *Pulp Mills on the River Uruguay* (Argentina v. Uruguay) (Judgment) [2010] ICJ Rep 14, 74–75, para 177.
[68] *Pulp Mills on the River Uruguay* (Argentina v. Uruguay) (Order, Provisional Measures) [2006] ICJ Rep 113, 133, para 80.
[69] Barral (Introduction n 34) 387.
[70] General Agreement on Tariffs and Trade (GATT), article XX(g).

environment."[71] Strangely, the decision – declaring WTO-inconsistent a domestic measure aimed at protecting sea turtles – seems to indicate that sustainability-oriented regulations targeting the production process and "act[ing] as unilateral trade measures, will be controversial in a WTO context."[72] Beyond the WTO, States have been entering into free trade agreements (FTA) containing labor and environment provisions, as well as so-called Trade and Sustainable Development (TSD) chapters, which the European Union (EU) now regularly includes in its FTAs.[73] A similar trend of drafting sustainable development and/or its underlying principles into the objectives, if not the substantive provisions, of international investment agreements can be discerned.[74] Congruently, arbitration tribunals have increasingly, albeit not consistently, been addressing sustainable development concerns in investment disputes.[75]

1.3 Fellow Travelers from Other Eras

Sustainable development is of course not the first concept to introduce changes in development thinking and demand reformation of the rules governing international trade, finance, and investment. Prior to its emergence as a global policy objective, other ideas and movements have made similar or related pressures for restructuring and transformation. Two of those – the right to development and the New International Economic Order (NIEO) – are outlined here. Before proceeding, two clarifications are in order. First, while interesting links also exist between the NIEO and the (human) right to development, this section only examines the

[71] United States – Import Prohibition of certain Shrimp and Shrimp Products, WT/DS58/AB/R, para 129 (1998).

[72] Lydgate (Introduction n 33) 637.

[73] See Geraldo Vidigal and Kathleen Claussen, *The Sustainability Revolution in International Trade Agreements* (Oxford University Press 2024).

[74] See Bjorklund (Introduction n 33); Vid Prislan and Ruben Zandvliet, "Mainstreaming Sustainable Development into International Investment Agreements: What Role for Labor Provisions?" in Stephan W Schill, Christian J Tams, and Rainer Hofmann (eds), *International Investment Law and Development: Bridging the Gap* (Edward Elgar 2015); Alschner and Tuerk (Introduction n 33); Diane A Desierto, "Development as an International Right: Investment in the New Trade-Based IIAs" (2012) 3 Trade, Law and Development 296.

[75] See Desierto, "Deciding International Investment Agreement Applicability" (Introduction n 33); Chester Brown, "Bringing Sustainable Development Issues before Investment Treaty Tribunals" in Marie-Claire Cordonier Segger, Markus W Gehring, and Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (Wolters Kluwer Law & Business (Kluwer Law International) 2011).

relationship between sustainable development and each of these two. Second, what follows is but a preliminary exploration of a relationship deserving of closer and more comprehensive analysis.

1.3.1 Right to Development

It is remarkable that very few studies about sustainable development,[76] especially in international law, discuss how elements of the right to development overlap with several sustainability concerns. For instance, peoples' "right to full sovereignty over all their natural wealth and resources" is included in the right to self-determination, which the right to development implies.[77] The statement by the World Conference on Human Rights clearly references the Brundtland conception of sustainable development: "The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations."[78]

Likewise salient here, one important intersection between sustainable development and the right to development is their common emphasis on individual empowerment and public participation.[79] The UN General Assembly has recognized that achieving the right to development requires mainstreaming core principles, such as "equity, non-discrimination, *transparency, accountability, participation and international cooperation,* including effective partnerships for development," in the "policies and operational activities of the United Nations ... as well as in the policies and strategies of the international financial and

[76] But see Nigel Dower, "Sustainability and the Right to Development" in Robin Attfield and Barry Wilkins (eds), *International Justice and the Third World* (Routledge 1992); Imme Scholz, "Reflecting on the Right to Development from the Perspective of Global Environmental Change and the 2030 Agenda for Sustainable Development" in Markus Kaltenborn, Markus Krajewski, and Heike Kuhn (eds), *Sustainable Development Goals and Human Rights* (Springer International 2020).

[77] G.A. Res. 41/128, Declaration on the Right to Development (December 4, 1986), Article 1 (2) [hereinafter, "RTD Declaration"].

[78] World Conference on Human Rights, Vienna Declaration and Programme of Action, A/CONF.157/23 (July 12, 1993). Endorsed by the General Assembly in G.A. Res. 48/121, World Conference on Human Rights (December 20, 1993).

[79] See RTD Declaration, Art. 1(1): "The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized." See also Art. 2(1): "The human person is the central subject of development and should be the active participant and beneficiary of the right to development."

multilateral trading systems."[80] This shared emphasis informs the book's use of the capability approach to sustainable development as part of its interpretive lens.

Moreover, the conceptualization of sustainable development as a process aligns with the view that the "right to development," as a human right, is the "right to a particular process of development" that is expected to improve peoples' well-being, which "include[s] the expansion of opportunities and capabilities to enjoy those opportunities, captured in the indicators of social and human development, which in turn expand substantive freedoms."[81]

Worth monitoring in this respect, therefore, is the ongoing codification of the right to development. Under the Draft Convention on the Right to Development (Draft RTD Convention), sustainability is a "dimension of development."[82] Sustainable development's "primary end" and "principal means" is the RTD, and such right "cannot be realized if development is not sustainable."[83] The Commentary explained that the RTD "gives proper shape, colour and texture" to sustainable development "by purposely stressing [the latter's] right and duty aspects."[84]

The Draft RTD Convention treats sustainable development as a general principle.[85] Article 3(e) reiterates the sixth preambular paragraph concerning the following symbiotic relationship:[86] "Development cannot be sustainable if its realization undermines the right to development, and the right to development cannot be realized if development is unsustainable." One can glean from this statement that sustainable development means respecting, protecting, and fulfilling the human right to development.

Importantly, the Draft has one entire provision dedicated to such "dominant global imperative."[87] In Article 22 entitled "Sustainable

[80] G.A. Res. 67/171, The right to development, para 12(e) (Mar. 22, 2013) (emphasis added). See also para 18: "*Reaffirms* the primary responsibility of States to create national and international conditions favourable to the realization of the right to development, as well as their commitment to cooperate with each other to that end."

[81] Arjun K Sengupta, "Conceptualizing the Right to Development for the Twenty-First Century" in United Nations and United Nations Office of the High Commissioner for Human Rights (eds), *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (UN 2013) 69.

[82] Commentary on draft preambular paragraph six, para 1.

[83] Preamble, para 6

[84] Commentary to preambular paragraph six, para 2.

[85] Draft RTD Convention, art 3(e)

[86] Commentary to art 3, para 9

[87] Commentary to preambular paragraph six, para 1.

development," States have three individual and joint undertakings ("to ensure that"): (a) international and national laws, policies, and practices pursue and contribute to realizing sustainable development; (b) decisions and actions do not compromise the future generations' ability to realize their RTD; and (c) laws, policies, and practices aimed at realizing sustainable development are formulated, adopted, and implemented consistently with the draft treaty provisions. It appears that States Parties to the RTD Convention should construe and implement the concept of sustainable development based on "the 2030 Agenda, through its consensually adopted 17 SDGs and 169 targets" as the resolution contains "a common understanding on what [sustainable development] entails in the present context."[88]

Regarding the objects of the current study, IFIs' safeguard policies, together with "the setting of targets such as MDGs [now SDGs], improvements in development funding and clarification of the objectives of such developmental assistance," are arguably ways to mainstream RTD's realization and operationalization.[89]

1.3.2 New International Economic Order

Current policy statements and discussions about sustainable development bear some resemblance to the NIEO demands in the seventies. To recognize this resemblance – "intuitive and foundational to a fairer and successful international system" – and express broad support for their common propositions is to advance Duncan French's conclusion that the NIEO's "ideal and underlying aims, particularly those with sustainability implications, remain urgent today."[90] Indeed, progress in achieving NIEO objectives "is a prerequisite for the long-term achievement of sustainable development."[91] This point is true, given that the international community's present understanding of sustainable development includes reducing inequalities among countries – indeed one of two main concerns under SDG 10 – which is likewise among the Third World countries' demands under the NIEO documents.

Briefly, the NIEO is the Global South's clarion call for structurally reforming the unjust international trade, investment, and financial

[88] Commentary to art 22, para 1
[89] French (Introduction n 22) 25.
[90] Ibid. 21, 5.
[91] Ibid. 27.

systems – and the international law supporting them – that render their newly obtained political and legal independence illusory. Its key objectives include eliminating South-North inequalities:

> There is a close interrelationship between the prosperity of the developed countries and the growth and development of the developing countries. . .. International co-operation for development is the shared goal and common duty of all countries. *Thus the political, economic and social well-being of present and future generations depends more than ever on co-operation between all members of the international community on the basis of sovereign equality* and the removal of the disequilibrium that exists between them.[92]

This excerpt aligns with the sustainable development principle of equity, in both intergenerational and intragenerational senses. The former links the welfare of present and future generations, the latter of developed and developing countries. Likewise, contemporary commitments to global partnerships for sustainable development echoes NIEO's emphasis on international cooperation for development.

Remarkably, in 1974 "sustainable development" had yet to be coined or become a catchphrase. Yet, the NIEO Declaration – while being primarily aimed at remedying existing injustices and enhancing developing countries' participation in international economic decisionmaking[93] – did express, albeit rather peripherally, some concern for ecological issues. For example, among the principles on which the called-for NIEO should be founded are "the adoption of special measures in favour of the least developed, land-locked and island developing countries as well as those developing countries most seriously affected by economic crises and natural calamities" and "the need for all States to put an end to the waste of natural resources, including food products."[94] Among the specified action points is to avoid "damaging or deteriorating natural resources . . . especially those derived from the sea, by preventing pollution and taking steps to protect and reconstitute those resources."[95] Read in today's context, the first principle evokes the special and differential treatment

[92] G.A. Res. 3201 (S-VI), Declaration on the Establishment of a New International Economic Order (May 1, 1974), para 3. [hereinafter, "NIEO Declaration"] (emphasis added). See also G.A. Res. 3281 (XXIX), Charter of Economic Rights and Duties of States (December 12, 1974), Art. 30. [hereinafter, "CERDS"]

[93] See, e.g., CERDS, Art. 10.

[94] NIEO Declaration, para 4 (c) and (q).

[95] G.A. Res. 3202 (S-VI), Programme of Action on the Establishment of a New International Economic Order (May 1, 1974) sec. I, para 2(d).

(SDT) principle in international trade law and the principle of common but differentiated responsibilities (CBDR) in international climate law. It additionally bears to highlight that implementing the SDT principle is one of the targets under SDG 10, which pertains to the reduction of inter- and intra-State inequalities.

Significantly, as it was recounting the major international economic and policy challenges facing the world in 2014 (when the 2030 Agenda and the SDGs were being drafted), the UN pronounced that sustainable development "has become the global guiding principle and operational standard."[96] It likewise acknowledged that calls made in NIEO outcome documents remain highly relevant today. Hence, the Addis Ababa Action Agenda (AAAA),[97] the 2030 Agenda for Sustainable Development, and the Paris Agreement – three of the recent UN-led milestones – carry forward several still-unmet NIEO objectives and proposals.[98] The UN Secretary-General highlighted that provisions in the Paris Agreement on adaptation, financial assistance and technology transfer from developed to developing countries, and capacity-building are "in agreement with the [NIEO], which also emphasized those issues."[99]

Most relevant here are States' reaffirmation of the Rio Principles and re-commitment to broadening and strengthening developing countries' participation "in international economic decisionmaking and

[96] Report of the Secretary-General, "Updated overview of the major international economic and policy challenges for equitable and inclusive sustained economic growth and sustainable development, and of the role of the United Nations in addressing these issues in the light of the New International Economic Order," U.N. Doc. A/69/203 (July 28, 2014), para 66. [hereinafter, "2014 NIEO Report"]

[97] G.A. Res. 69/313, Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda) (July 27, 2015) [hereinafter, "Addis Ababa Agenda"]. The outcome document repeats the formulaic statement on "achiev[ing] sustainable development in its three dimensions through promoting inclusive economic growth, protecting the environment, and promoting social inclusion" (para 1).

[98] Report of the Secretary-General, "Updated overview of the major international economic and policy challenges for equitable and inclusive sustained economic growth and sustainable development, and of the role of the United Nations in addressing these issues in the light of the New International Economic Order," U.N. Doc. A/71/168 (July 20, 2016), para 31. [hereinafter, "2016 NIEO Report"]

[99] Ibid. paras 62–63, 67. See also NIEO Declaration, para 1 and 4(p). The latter states: "Giving to the developing countries access to the achievements of modern science and technology, and promoting the transfer of technology and the creation of indigenous technology for the benefit of developing countries in forms and in accordance with procedures which are suited to their economies."

norm-setting and global economic governance."[100] In the same AAAA outcome document, they named MDBs to lead "the establishment of a global infrastructure forum" that will enable developing countries "to identify and address infrastructure and capacity gaps" – stressing that investment in sustainable and resilient infrastructure is essential to achieving many of the SDGs.[101] Lastly, echoing calls for a NIEO, States endorsed parts of the WTO Doha Development Agenda concerning "enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity-building programmes."[102]

In a fairly comprehensive 1995 study, James Paul identified "sources and principles of the international law of development [] that has been generated by the U.N. system."[103] His enumeration of the content of this body of law – derived from the UN Charter and the major human rights treaties, as well as several resolutions, declarations, outcome documents of international conferences, issuances of international organizations, and other international instruments[104] – strikingly reflects most of the contemporary commitments and aspirations relating to sustainable development. It is thus worth quoting in full:

1. *Development must be people-centered,* i.e., designed to promote human dignity, capacities, security, and welfare above all . . .;
2. *Development must be participatory,* and the process of development must . . . enable and empower people, especially those most affected, to participate effectively at all relevant stages in governmental and intergovernmental development processes (notably in projects and programs which foreseeably impact identifiable groups);

[100] Addis Ababa Agenda (n 97) paras 5, 106.
[101] AAAA, para 14. See also para 75.
[102] AAAA para 83.
[103] Paul (Introduction n 8) 307.
[104] See 2030 Agenda, para 10: "The new Agenda is guided by the purposes and principles of the Charter of the United Nations, including full respect for international law. It is grounded in the Universal Declaration of Human Rights, international human rights treaties, the Millennium Declaration and the 2005 World Summit Outcome. It is informed by other instruments such as the Declaration on the Right to Development." Para 11 continues, "We reaffirm the outcomes of all major United Nations conferences and summits which have laid a solid foundation for sustainable development and have helped to shape the new Agenda. These include the Rio Declaration on Environment and Development, the World Summit on Sustainable Development . . . and the United Nations Conference on Sustainable Development."

3. *Development must protect and promote,* all of the interrelated, indivisible human rights now established by the major international instruments;
4. *Development must work to eliminate all forms of discrimination against women and cultural, ethnic or other groups*;
5. *Development must be concerned with the protection and rehabilitation of environments, and it must be environmentally sustainable*;
6. *Development must respect and protect cultures and cultural diversity*;
7. *Development must promote democratic systems of governance,* particularly with respect to the processes of development;
8. *Development must promote a rule of law designed to secure the above principles.*[105]

The congruence between these international development law (IDL) prescriptions and the emerging international sustainable development law is remarkable. Consider the following statements, goals, and targets in the 2030 Agenda for Sustainable Development:

1. On behalf of the peoples we serve, we have adopted a historic decision on a comprehensive, far-reaching and *people-centered* set of universal and transformative Goals and targets. . .. We are committed to achieving sustainable development in its three dimensions – economic, social and environmental – in a balanced and integrated manner.[106]
2. Support and strengthen the participation of local communities in improving water and sanitation management.[107]
3. We reaffirm the importance of the Universal Declaration of Human Rights, as well as other international instruments relating to human rights and international law. We emphasize the responsibilities of all States, in conformity with the Charter of the United Nations, to respect, protect and promote human rights and fundamental freedoms for all, without distinction of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability or other status.[108]
4. All people, irrespective of sex, age, race or ethnicity, and persons with disabilities, migrants, indigenous peoples, children and youth, especially those in vulnerable situations, should have access to life-long

[105] Paul (Introduction n 8) 319–25 (citations omitted).
[106] 2030 Agenda, para 2 (emphasis added). See also para 4.
[107] 2030 Agenda, Goal 6, para 6.b. See also Goal 16, para 16.7.
[108] 2030 Agenda, para 19.

learning opportunities that help them to acquire the knowledge and skills needed to exploit opportunities and to participate fully in society.[109]

5. We acknowledge that the United Nations Framework Convention on Climate Change is the primary international, intergovernmental forum for negotiating the global response to climate change. We are determined to address decisively the threat posed by climate change and environmental degradation.[110]
6. We pledge to foster intercultural understanding, tolerance, mutual respect, and an ethic of global citizenship and shared responsibility. We acknowledge the natural and cultural diversity of the world and recognize that all cultures and civilizations can contribute to, and are crucial enablers of, sustainable development.[111]
7. We envisage a world in which every country enjoys sustained, inclusive and sustainable economic growth and decent work for all. A world ... in which democracy, good governance and the rule of law, as well as an enabling environment at the national and international levels, are essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger.[112]
8. The new Agenda recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions. Factors which give rise to violence, insecurity and injustice, such as inequality, corruption, poor governance and illicit financial and arms flows, are addressed in the Agenda.[113]

The breadth of the foregoing commitments relating to sustainable development signifies that States and the international community have now expanded their understanding of development and the range of actors involved in its pursuit. The concept of development changed once attention had shifted to protecting its human beneficiaries: it became a

[109] 2030 Agenda, para 25. See also 2030 Agenda, Goal 5, para 5.1.
[110] 2030 Agenda, para 31. See also para 33.
[111] 2030 Agenda, para 36.
[112] 2030 Agenda, para 9.
[113] 2030 Agenda, para 35.

multidimensional concept that "can no longer be confined to the economic relationships between States."[114]

In sum, international sustainable development law updates IDL by more explicitly stating that development has three dimensions – economic, environmental, social – whose factual interdependence have to be integrated through legal means, both procedurally and substantively.

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The questionable legal status of sustainable development stems in part from its being mostly contained in outcome documents (resolutions, declarations, reports) of international conferences and bodies commissioned by such conferences or by IOs like the UN. As this chapter has shown, however, notwithstanding its purported vagueness, sustainable development has become a matter of international public policy that has also some relevance in treaty negotiations and international dispute settlement. Moreover, despite their informality, these fora and instruments have helped clarify and particularize the content of sustainable development, including its emphasis on the principles of integration and public participation. What these two principles mean and how their elaboration contributes to the international lawmaking process on sustainable development are explained in greater detail in Chapter 3.

From the "travelogue" presented here, the concept of sustainable development appears to unsettle prevailing understandings of and practices related to development, because it innovatively and progressively posits, among others, that development is not solely the domain of economists and cannot be confined to purely economic growth concerns. As will become clearer in Chapter 2, it is likewise this challenge of dealing with development as a holistic and multidimensional process that compelled, and made it possible for, IFIs to incorporate environmental and social issues within their mandates and thereby participate in the international lawmaking process on sustainable development.

[114] See de Feyter (Introduction n 3) 54.

2

Detour to Bretton Woods

Reconstructing the International Bank for Sustainable Development

The World Bank of today whose avowed mission is to "end extreme poverty within a generation and boost shared prosperity"[1] – and more recently, to "end poverty on a livable planet"[2] – would likely be unrecognizable to the Bretton Woods Conference participants who created the International Bank for Reconstruction and Development (IBRD)[3] and the International Monetary Fund (IMF). None of them could have imagined that IFIs would be involved in climate change action. The Bank is certainly among the IOs that has pursued sweeping innovations and whose activities have undergone substantial transformation through the years.[4] Yet apart from three amendments (the last one taking effect in 2012), which are mainly procedural in character, the text of the 1944 IBRD Articles of Agreement – its "constitution" – remains essentially the same.

These changes triggered the "mission creep"[5] critique, namely, that the World Bank is not authorized and competent to address ecological,

[1] The World Bank website <http://www.worldbank.org/en/about>.

[2] See World Bank Group, *The Development, Climate, and Nature Crisis: Solutions to End Poverty on a Livable Planet: Insights from World Bank Country Climate and Development Reports covering 42 economies* (2023).

[3] The terms "IBRD"; "Bank"; and "World Bank" are used interchangeably. The convention in the literature, however, is to collectively refer to the IBRD and the International Development Association (IDA) as the World Bank. The so-called World Bank *Group*, in turn, consists of five discrete IOs, namely, the IBRD, the IDA, the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment Disputes (ICSID).

[4] See Ibrahim FI Shihata, *The World Bank in a Changing World: Selected Essays and Lectures*, vol II (Martinus Nijhoff 1995) 1.

[5] See generally Jessica Einhorn, "The World Bank's Mission Creep" (2001) 80 Foreign Affairs 22; Celine Tan, "Mandating Rights and Limiting Mission Creep: Holding the World Bank and the International Monetary Fund Accountable for Human Rights Violations" (2008) 2 Human Rights & International Legal Discourse 79; Bradlow and

governance, and human rights issues. Otherwise stated, being an IFI or international *economic* organization, the Bank cannot and should not be involved in social and environmental policymaking. The critique has two intertwined but analytically distinguishable strands. The first – an ultra vires argument – objects to any sort of expansion that involves encroaching on member States' sovereignty beyond what is provided in the Bank's mandate, that is, the Articles of Agreement. Andrew Guzman ominously named this phenomenon of IOs becoming too independent and sometimes more powerful than their creators as the "Frankenstein Problem."[6] The second – a competence argument – raises concerns about the Bank's expertise to perform the functions it is appropriating. Representative is Jessica Einhorn's view that the Bank embraced "an unachievable vision instead of an operational mission," such that it has taken on "challenges that lie far beyond any institution's operational capabilities."[7] Extending the argument, such incompetence to address unfamiliar challenges beyond its mandate, in turn, causes Bank operations to become harmful to people and environment.

The World Bank's conventionally one-dimensional understanding of development *qua* economic growth does clash with the integrative thrust of sustainable development, which encompasses three dimensions (economic, social, environmental), as detailed in Chapter 1. Problematizing such contrast as a treaty interpretation issue and using as objects of inquiry the IBRD Articles of Agreement, General Counsels' legal opinions, and Bank practice, this chapter posits that the Bank's puzzling evolution "from a mere economic development agency to an international organization with a broader mandate" is due to the power of treaty interpretation.[8] Specifically, it demonstrates how the Bank has been applying a teleological-evolutionary interpretation of specific provision in the Articles to legally justify its involvement in sustainable development and "non-economic" matters. It thus supplements the observation that issues relating to "environmental protection, indigenous

Grossman (Introduction n 36); Anne O Krueger, "Whither the World Bank and the IMF?" (1998) 36 Journal of Economic Literature 1983, 2009–10.

[6] Andrew Guzman, "International Organizations and the Frankenstein Problem" (2013) 24 European Journal of International Law 999.

[7] Einhorn (n 5).

[8] Maria Rosaria Mauro, "The Protection of Non-Economic Values and the Evolution of International Economic Organizations: The Case of the World Bank" in Roberto Virzo and Ivan Ingravallo (eds), *Evolutions in the Law of International Organizations* (Brill Nijhoff 2015) 252.

peoples, involuntary resettlement, governance, corruption, public participation, the role of women in development, and poverty reduction . . . can have a bearing on the central objectives prescribed for all of the [MDBs] in their charters."[9] What follows is a legal-historical account of how an IFI like the World Bank came to be involved in sustainability concerns, particularly in the Global South, despite the "political prohibition" clause in its constituent instrument.

2.1 From Reconstruction to Development

Contrary to critical accounts, becoming a sustainable development agency conforms with the World Bank's legal mandate, although some parts of its present-day work were unforeseen at its inception. Before expounding the argument, it is worth exploring how much the organization has in fact changed over time.

2.1.1 Short Institutional History

Interaction between the IBRD and some of its original beneficiaries, that is, the mostly (developed) European countries devastated by World War II, was remarkably brief, having been overtaken by the United States' Marshall Plan.[10] To avoid irrelevance, the World Bank had to expand its business from the war-torn States to the decolonizing ones in the fifties and sixties, thereby shifting (perhaps prematurely) the focus of its lending and investment – from reconstruction to development.[11] The shift importantly entailed offering non-commercial or concessional loans to newly independent poor countries and assuming a poverty reduction mandate;[12] hence, the International Development Association's (IDA)

[9] John W Head, *The Future of the Global Economic Organizations: An Evaluation of Criticisms Leveled at the IMF, the Multilateral Development Banks, and the WTO* (Transnational 2005) 124–25.

[10] Krueger (n 5) 1987.

[11] Edward S Mason and Robert E Asher, *The World Bank since Bretton Woods: The Origins, Policies, Operations, and Impact of the International Bank for Reconstruction and Development and the Other Members of the World Bank Group: The International Finance Corporation, the International Development Association [and] the International Centre for Settlement of Investment Disputes* (Brookings Institution Press 2010) 72–87; Sinclair (Introduction n 146) 201–35.

[12] John W Head, "Law and Policy in International Financial Institutions: The Changing Role of Law in the IFIs" (2008) 17 Kansas Journal of Law & Public Policy 194, 198.

creation.[13] As the focus moved to "addressing developmental questions from a planning perspective" and "new procedures were introduced to study developing countries," one author aptly observed, "the Bank for Reconstruction of Western Europe had gradually *transformed itself* into the World Bank as a development bank."[14]

The postwar architects were not entirely oblivious that the IOs they were creating would necessarily or inevitably have social and political impacts. Such consciousness can be gleaned from the contemporaneous attempt to create the International Trade Organization (ITO),[15] a third institution to complete the envisioned three-pillar structure of the international economic order.[16] Reading the Havana Charter,[17] the stillborn ITO is "a remarkable organization that pioneered the idea of an integrated trade and employment" whose story offers "an unparalleled case study of a short period in history when free trade, labour standards and human development were friends and not historical antagonists."[18] Such

[13] International Development Association website <https://ida.worldbank.org/en/about/history>. IDA Articles of Agreement (effective September 24, 1960).

[14] Dann, *The Law of Development Cooperation* (Introduction n 13) 43 (emphasis added).

[15] In a way, the ITO is the indirect predecessor of the World Trade Organization (WTO), considering that the agreement establishing the latter incorporates and significantly draws from the General Agreement on Tariffs and Trade (GATT), which served as a placeholder (for nearly half a century) following the stillbirth of the ITO. See generally Clair Wilcox, *A Charter for World Trade* (Macmillan Company 1949); Craig VanGrasstek, *The History and Future of the World Trade Organization* (World Trade Organization 2013) 39–80; Daniel Drache, *The Short But Amazingly Significant Life of the International Trade Organization (ITO) Free Trade and Full Employment: Friends or Foes Forever?* (1997); William Diebold Jr, "The End of the I.T.O." (1952) 16 Essays in International Finance 1; Richard Toye, "Developing Multilateralism: The Havana Charter and the Fight for the International Trade Organization, 1947–1948" (2003) 25 The International History Review 282.

[16] See generally Gerald M Meier, "The Bretton Woods Agreement – Twenty-Five Years After" (1970) 23 Stanford Law Review 235; Robert Hockett, "Three (Potential) Pillars of Transnational Economic Justice: The Bretton Woods Institutions as Guarantors of Global Equal Treatment and Market Completion" (2005) 36 Metaphilosophy 93; Jan Wouters and Dominic Coppens, "International Economic Policy-Making: Exploring the Legal Linkages between the World Trade Organization and the Bretton Woods Institutions" (2006) 3 International Organizations Law Review 267; Robert C Hockett, "Bretton Woods 1.0: An Essay in Constructive Retrieval" (2013) 16 New York University Journal of Legislation and Public Policy 401; Douglas W Arner and Ross P Buckley, "Redesigning the Architecture of the Global Financial System" (2010) 11 Melbourne Journal of International Law 185, 188–93.

[17] Havana Charter for an International Trade Organization (March 24, 1948) UN Doc E/CONF.2/78.

[18] Drache (n 15) 2, 26.

interdependence among economic, political, and social pursuits is also the theme of the World Bank's evolution, which, to further complicate the situation, is occurring at a time of significant ecological changes and challenges.

The World Bank's introduction to the "Third World" – the decolonized States (also referred to as the developing[19] and least-developed or middle- and low-income countries) – was rough almost at the outset. The Bank seemed ill-equipped to perform the developmental aspect of its mandate[20] – a criticism persisting to this day – because only the reconstruction part had been carefully studied and deliberated.[21] One commentator noted that in the postwar period, "the maintenance of peace and security had priority over the promotion of economic welfare."[22] The developing countries' plight was hardly considered, as the discussions "focused on promoting currency stability, devising a system of international payments, and organizing the economic reconstruction of Europe."[23] Indeed, invitations to the Bretton Woods Conference expressly stated that it was "for the purpose of formulating definite proposals for an International Monetary Fund and possibly a Bank for Reconstruction and Development."[24]

Moreover, the Bank's knowledge and experience did not fit the solutions needed for the former colonies' economic and social development

[19] But see Neil Fantom, Tariq Khokhar, and Edie Purdie, "The 2016 Edition of World Development Indicators Is out: Three Features You Won't Want to Miss" (*The Data Blog*, April 15, 2016) <http://blogs.worldbank.org/opendata/2016-edition-world-development-indicators-out-three-features-you-won-t-want-miss>; Matthew Lynn, "Why the Title of 'Developing Country' No Longer Exists" *The Telegraph* (May 23, 2016) <http://www.telegraph.co.uk/business/2016/05/23/why-the-title-of-developing-country-no-longer-exists/>; Tim Fernholz, "The World Bank Is Eliminating the Term 'Developing Country' from Its Data Vocabulary" (*Quartz*) <https://qz.com/685626/the-world-bank-is-eliminating-the-term-developing-country-from-its-data-vocabulary/>.

[20] But see Eric Helleiner, *Forgotten Foundations of Bretton Woods: International Development and the Making of the Postwar Order* (Cornell University Press 2014).

[21] Mason and Asher (n 11) 12, 28.

[22] Ignaz Seidl-Hohenveldern, "The International Economic Order" in Christian Tomuschat (ed), *The United Nations at Age Fifty: A Legal Perspective* (Martinus Nijhoff 1995) 215.

[23] Sandra Blanco and Enrique Carrasco, "Pursuing the Good Life: The Meaning of Development as It Relates to the World Bank and the IMF" (1999) 9 Transnational Law and Contemporary Problems 67, 71.

[24] International Monetary Fund, *The International Monetary Fund 1945–1965: Twenty Years of International Monetary Cooperation*, vol I: Chronicle (International Monetary Fund) 79 <https://www.elibrary.imf.org/display/book/9781451955255/9781451955255.xml>.

problems.[25] The incompatibility between the IFI's specialization and the Global South's distinct and diverse political, economic, social, and cultural institutions and contexts became most manifest – and deeply felt by people residing in those countries – through the badly conceived and implemented development projects.[26] The most disastrous and adverse impacts revolved around indigenous peoples' rights violations, forced/involuntary resettlement, and environmental degradation.[27]

By the late eighties to early nineties, the Bank had gradually but still only partially recognized that the developing world's problems constitute a distinct interrelationship among economic, political, and sociocultural factors. Hence, its then president, James Wolfensohn, introduced the Comprehensive Development Framework (CDF), which "radically" called for a development agenda directed and owned by the borrowing country; stronger partnerships among governments, donors, civil society, the private sector, and other development stakeholders in implementing the country strategy; and emphasis on the interdependence of all elements (social, structural, human, governance, environmental, economic, and financial) of

[25] See generally Lawrence A Brown, "Reflections on Third World Development: Ground Level Reality, Exogenous Forces, and Conventional Paradigms" (1988) 64 Economic Geography 255.

[26] See, e.g., Kevin Danaher (ed), *50 Years Is Enough: The Case against the World Bank and the International Monetary Fund* (South End Press 1994); Walden F Bello, David Kinley, and Elaine Elinson, *Development Debacle: The World Bank in the Philippines* (Institute for Food and Development Policy 1982); M Rodwan Abouharb and David L Cingranelli, "The Human Rights Effects of World Bank Structural Adjustment, 1981–2000" (2006) 50 International Studies Quarterly 233; Kevin JA Thomas, "Development Projects and Involuntary Population Displacement: The World Bank's Attempt to Correct Past Failures" (2002) 21 Population Research and Policy Review 339; John Walsh, "World Bank Pressed on Environmental Reforms" (1986) 234 Science 813.

[27] See generally David Freestone, "The World Bank and Sustainable Development" in David Freestone (ed), *The World Bank and Sustainable Development: Legal Essays* (Martinus Nijhoff 2012); Andrew Gray, "Development Policy, Development Protest: The World Bank, Indigenous Peoples, and NGOs" in Jonathan A Fox and L David Brown (eds), *The Struggle for Accountability: The World Bank, NGOs, and Grassroots Movements* (MIT Press 1998); Loibl (Introduction n 36); Robert Wade, "The World Bank and the Environment" in Morten Boas and Desmond McNeill (eds), *Global Institutions and Development: Framing the World?* (Routledge 2004); David Hunter, "Using the World Bank Inspection Panel to Defend the Interests of Project-Affected People" (2003) 4 Chicago Journal of International Law 201; Bradford Morse and Thomas R Berger, "Sardar Sarovar: Report of the Independent Review" (International Environmental Law Research Centre 1992).

development.[28] Highlighting that this new approach to development entails a change in mindset (both within the Bank and within developing countries themselves), former World Bank Chief Economist Joseph Stiglitz stated that the CDF "contrasts with the dominant paradigm of the past half-century, which focused more narrowly on certain economic, or even more narrowly, allocative issues."[29]

The technical background and self-image of the Bank impact how it understands and applies a concept such as sustainable development, which is vague and ambiguous and has a multidisciplinary quality. For a substantial part of its existence, and up until it reached its fiftieth anniversary, the World Bank has quite insistently portrayed itself as an international economic organization with a neutral (read: *a*political) character.[30] This apolitical characterization notwithstanding, the Bank has not been completely unaffected by changes and new ideas both in the global policy arena[31] and in scholarship,[32] more specifically the economics discipline.[33] Indeed, its openness to, and adoption of, sustainable

[28] James D Wolfensohn, *The Comprehensive Development Framework* (2000), available <https://documents1.worldbank.org/curated/en/208631583185352783/pdf/The-comprehensive-development-framework.pdf>.

[29] Joseph E Stiglitz, "Participation and Development: Perspectives from the Comprehensive Development Paradigm" (2002) 6 Review of Development Economics 163, 164.

[30] See Sandra Blanco, "The 1960s and 1970s: The World Bank Attacks Poverty; Developing Countries Attack the IMF" (1999) 9 Transnational Law and Contemporary Problems 109, 109; John Ciorciari, "The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement" (2000) 33 Cornell International Law Journal 331, 362.

[31] See Michel Chossudovsky, *The Globalisation of Poverty: Impacts of IMF and World Bank Reforms* (Zed Books; TWN 1997); Frances Stewart, *Adjustment and Poverty: Options and Choices* (Routledge 1995); Lewis (Introduction n 49) 4–5.

[32] See Karla Hoff and Joseph E Stiglitz, "Modern Economic Theory and Development" in Gerald M Meier and Joseph E Stiglitz (eds), *Frontiers of Development Economics: The Future in Perspective* (World Bank; Oxford University Press 2001) http://elibrary.worldbank.org/content/book/9780195215922; Merilee S Grindle, "In Quest of the Political: The Political Economy of Development Policymaking" in Gerald M Meier and Joseph E Stiglitz (eds), *Frontiers of Development Economics: The Future in Perspective* (World Bank; Oxford University Press 2001) <http://elibrary.worldbank.org/content/book/9780195215922>.

[33] See Galit A Sarfaty, "Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank" (2009) 103 American Journal of International Law 647; Michael Gavin and Dani Rodrik, "The World Bank in Historical Perspective" (1995) 85 The American Economic Review 329, 332–33.

development closely followed the way that the notion gradually infiltrated the "growth addicted"[34] economics profession.

2.1.2 A Survey of Bank Documents

In the years leading up to the 1992 Rio Conference, there had been subtle yet crucial shifts in the World Bank's language such that it had begun using the adjective "sustainable" to qualify "economic growth." Illustrative is the Bank's 1989 study, *Sub-Saharan Africa: From Crisis to Sustainable Growth*, which described the prescribed growth strategy as "sustainable," meaning, "sound environmental policies [should] protect the productive capacity of Africa's natural resources."[35] In another report whose title explicitly mentions "sustainable development," the Bank referred to "green growth," tautologically defined as "economic growth that is environmentally sustainable" and "growth that is . . . efficient in its use of natural resources, clean in that it minimizes pollution and environmental impacts, and resilient in that it accounts for natural hazards and the role of environmental management and natural capital in preventing physical disasters."[36]

Parenthetically, the European Bank for Reconstruction and Development (EBRD) was established in this period. As the first regional development bank to expressly mention "sustainable development" in its constituent instrument[37] and to dispense with the political activity prohibition, the EBRD was deemed to represent a "third generation in the evolution of the MDBs" and to manifest the "trend towards using the MDBs as instruments of global policy [regulation]."[38]

During this initial transition, the environmental dimension appears to have gained slightly more attention than the social.[39] It did not take too

[34] Magraw and Hawke (Chapter 1 n 2) 621.
[35] The World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth* 4 (1989).
[36] The World Bank, *Inclusive Green Growth: The Pathway to Sustainable Development* (2012) 30.
[37] Agreement Establishing the European Bank for Reconstruction and Development (entered into force March 28, 1991), Art. 2(1)(vii). This provision enumerates the EBRD's functions, including "to promote in the full range of its activities environmentally sound and sustainable development."
[38] Head (n 12) 198–99. See also Sands, "International Law in the Field of Sustainable Development" (Chapter 1 n 18) 311.
[39] See generally Timothy A Wise, "Economics of Sustainability: The Social Dimension (Overview Essay)" in Jonathan Harris and others (eds), *A Survey of Sustainable Development: Social And Economic Dimensions* (Island Press 2013) 47.

long though for the Bank to also embrace the notion of social and/or human development. In this regard, poverty alleviation (eradication) is a topic that the Bank claimed as part of its mandated involvement in sustainable development. The CDF portrayed the connection thus:

> Achieving faster, sustainable development for poverty reduction – the goal towards which CDF aims to contribute – recognizes that poverty has multiple facets, of which income or wealth are only an element: others include physical security, environmental sustainability, and the ability of poor people to confront their future with confidence. This goal also recognizes that the CDF is about societal transformation.[40]

The Framework assumes, according to former World Bank General Counsel Ibrahim Shihata, that "poverty alleviation and sustainable development are built on two intrinsically linked pillars: sound macroeconomics and finances on the one hand and a sound structural and social framework on the other."[41] Consequently, there should be "more emphasis on the structural and social aspects of development by the Bank, not only because this is part of the Bank's original task (as opposed to the tasks of its sister institution, the IMF), but also the aspect of development that contributes the most to making development sustainable in the long run."[42]

The formulation of the *human development* paradigm[43] resulted from the distinct but combined efforts of economists – the "basic needs" approach[44] of Mahbub ul Haq and Paul Streeten and Amartya Sen's "capability approach"[45] – to shift the focus of development discourse "from incomes to outcomes and from per capita income growth to improved quality-of-life outcomes."[46] Once the United Nations Development Programme (UNDP) adopted the Human Development Index (HDI),[47] the World Bank likewise acknowledged the occurring

[40] The World Bank, *Comprehensive Development Framework: Report on Country Experience – CDF Proposal Questions and Answers* (2011) 16 <http://documents.worldbank.org/curated/en/259631468333563307/pdf/633900WP0Compr00Box0361515B0PUBLIC0.pdf>.

[41] Ibrahim FI Shihata, "The Dynamic Evolution of International Organizations: The Case of the World Bank" (2000) 2 Journal of the History of International Law 217, 239.

[42] Ibid.

[43] See generally Tadashi Hirai, *The Creation of the Human Development Approach* (Palgrave Macmillan 2017) 1–20; Fukudu-Parr (Introduction n 73).

[44] Paul P Streeten, "Basic Needs: Premises and Promises" (1979) 1 Journal of Policy Modeling 136.

[45] Discussed in the Introduction.

[46] Wise (n 39) 48.

[47] UNDP, *About Human Development* <https://hdr.undp.org/about-hdro>.

evolution of approaches to development and affirmed that growth and development are correlated but not identical:

> Economists have traditionally considered an increase in per capita income to be a good proxy for other attributes of development. But *the weakness of income growth as an indicator is that it may mask the real changes in welfare for large parts of the poor population.* Improvements in meeting the basic needs for food, education, health care, equality of opportunity, civil liberties, and environmental protection are not captured by statistics on income growth.[48]

The human development approach was later rebalanced by integrating an environmental dimension. The HDI – "a summary measure of average achievement in key dimensions of human development: a long and healthy life, being knowledgeable and a decent standard of living"[49] – was reimagined and recalculated, resulting to the Human Sustainable Development Index (HSDI).[50]

The foregoing illustrates the World Bank's reluctant, if not initially unsympathetic, stance toward sustainable development. This changing attitude, Susan Park explained, results from norm contestation by environmental groups and broader inter-State negotiations that indicated how the international community intended to tackle the environmental problems relating to economic growth and thereby compelled the Bank to modify its own conception and approach.[51] Günther Handl attributed the Bank's contentious involvement in "social and 'sustainable' development, as against 'economic development'" to the "persistent differences among [shareholding countries] over the specific role of the [Bank]" – with some countries continuing to view the Bank primarily as a financial institution that makes decisions on purely financial and economic

[48] The World Bank, *World Development Report 1991: The Challenge of Development* 31 (1991) (emphasis added) [hereinafter, WDR 1991].

[49] UNDP, *Human Development Index (HDI)* <https://hdr.undp.org/data-center/human-development-index#/indicies/HDI>.

[50] Chuluun Toftokh and Owen Gaffney, "2010 Human Sustainable Development Index) (*Our World*), November 5, 2010 <https://ourworld.unu.edu/en/the-2010-human-sustainable-development-index>. See also Helen Clark, "Achieving Sustainable Human Development," Opening Speech at Fifth Ministerial Forum for Development, May 29, 2012 <https://www.undp.org/content/undp/en/home/presscenter/speeches/2012/05/29/helen-clark-achieving-sustainable-human-development-.html>.

[51] Susan Park, "The World Bank, Dams and the Meaning of Sustainable Development in Use" (2009) 5 Journal of International Law and International Relations 93, 100–101.

grounds, while others "advocated a much stronger human resources and sustainable development orientation."[52]

This friction aside, the World Bank has now undoubtedly staked its position concerning sustainable development. In fact, it was heavily involved[53] in several projects and programs relating to the MDGs, the SDGs' precursor. A common theme among contemporary international policy and legal instruments, especially the post-Rio ones, highlights IFIs' "pivotal role . . . in the sustainable development process" and the need for them to alter the "traditional perception of their functions and purposes" and come up with "innovative financial mechanisms" to implement sustainable development.[54] Today, the World Bank and other MDBs explicitly support – at least in principle and rhetoric – the global pursuit of sustainable development, declaring that they will:

> individually and collectively bring in emerging and existing . . . partner institutions and, together, contribute to the success of the 2030 Agenda, helping countries to leverage [the MDBs' and the IMF's] financing and knowledge [] to address their most pressing development challenges and . . . contribute to achieving the transformative outcomes that the SDGs entail.[55]

Further, in a recent UNFCCC Conference of Parties (COP), they stated:

> In October 2023, we confirmed our commitment to enhance our approach that is largely focused on our joint reporting of climate finance commitments to also tracking and reporting climate outcomes. This will enable us to better track results for climate and development priorities – for both mitigation and adaptation. To this end, at COP28 we agree to develop a common approach for reporting climate results and impact, and we will continue our close collaboration to harmonize and improve our methodologies for climate indicators.[56]

[52] Günther Handl, "The Legal Mandate of Multilateral Development Banks as Agents of Change Toward Sustainable Development" (1998) 92 The American Journal of International Law 642, 646 (citations omitted).

[53] The Bank used to have a dedicated page for the MDGs <http://www5.worldbank.org/mdgs/> containing this claim: "The World Bank is committed to helping achieve the MDGs because, simply put, these goals are our goals."

[54] Handl (n 52) 655–56.

[55] *Statement by the Multilateral Development Banks: Delivering on the 2030 Agenda* (October 9, 2016) <http://www.worldbank.org/en/news/press-release/2016/10/09/delivering-on-the-2030-agenda-statement>.

[56] *COP28 Multilateral Development Banks (MDB) Joint Statement* (December 3, 2023) <https://www.ifc.org/en/statements/2023/cop28-mdb-joint-statement>.

These statements show that the Bank has moved with the international community toward the current moment wherein it is intuitive and legitimate to turn to MDBs for "financing sustainable development and providing know-how" and encourage them "to establish a process to examine their own role, scale and functioning to enable them to adapt and be fully responsive to the sustainable development agenda."[57] How the Bank achieved this transition, from an international law perspective, is portrayed in Section 2.2.

2.2 From Development to Sustainable Development

Even as they are treaty creations themselves, IOs can develop international law through their own interpretation of their constituent instruments.[58] To emphasize, these charters are international agreements delineating IOs' competence and authority.[59] In the *Use of Nuclear Weapons* advisory opinion, citing its earlier *Certain Expenses* advisory opinion, the ICJ noted specific interpretive problems posed by constituent instruments, because not only do they establish rules among States they also create an entity tasked with realizing common goals whose very nature and practice, as well as "the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions," deserve special attention during

[57] Addis Ababa Action Agenda (Chapter 1 n 96) para 70. See also U.N. Secretary-General, *Updated overview of the major international economic and policy challenges for equitable and inclusive sustained economic growth and sustainable development, and of the role of the United Nations in addressing these issues in the light of the New International Economic Order*, para 57, U.N. Doc. A/71/168 (July 20, 2016).

[58] See Rosalyn Higgins, "The United Nations and Law-Making: The Political Organs" in Rosalyn Higgins (ed), *Themes and Theories: Selected Essays, Speeches and Writings in International Law* (Oxford University Press 2009) 68–70; Alvarez, *IOs as Law-Makers* (Introduction n 127) 65–108; Ervin P Hexner, "Interpretation by Public International Organizations of Their Basic Instruments" (1959) 53 American Journal of International Law 341, 343; Joseph Gold, *Interpretation: The IMF and International Law* (Kluwer Law International 1996); Daniel Costelloe and Malgosia Fitzmaurice, "Lawmaking by Treaty: Conclusion of Treaties and Evolution of Treaty Regimes in Practice" in Catherine Brölmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar 2016).

[59] See Schmalenbach (Introduction n 20) para 62; Edward Gordon, "The World Court and the Interpretation of Constitutive Treaties" (1965) 59 American Journal of International Law 794, 797.

interpretation.[60] Although supplemental approaches may be needed, these factors nevertheless do not preclude charters from being interpreted like other treaties.[61]

Treaty interpretation, specifically teleological/purposive and evolutionary approaches, enabled the World Bank to involve itself in sustainability issues. Exercise of such power explains this IFI's ensuing policies and practice – regarding environment, governance, and human rights – that contribute to the formation of international sustainable development law.

2.2.1 Interpretation of Constituent Instruments

No hierarchy exists among the various elements of interpretation enumerated in article 31 of the Vienna Convention on the Law of Treaties (VCLT).[62] Use of the singular form, "rule," signals that all four paragraphs constitute one general rule rather than discrete rules. According to the International Law Commission (ILC) the so-called crucible approach entails a single combined operation wherein all the various elements (text's ordinary meaning; context; subsequent agreement or practice; relevant rules of international law; specially intended meaning) "would be thrown into the crucible, and their interaction would give the legally relevant interpretation."[63] For treaties creating IOs, the same general rule applies, except when the constituent instrument itself provides for the applicability of specific relevant rules of the organization.[64] Given the "creative ambiguity"[65] deliberately used in drafting the Articles

[60] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, 74–75, para 19.

[61] See Catherine Brölmann, "Specialized Rules of Treaty Interpretation: International Organizations" in Duncan B Hollis (ed), *The Oxford Guide to Treaties, Second Edition* (Oxford University Press 2020).

[62] See Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill 2009) 435–36; Richard K Gardiner, *Treaty Interpretation* (Oxford University Press 2015) 161–62, 222; Mark E Villiger, "The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The 'Crucible' Intended by the International Law Commission" in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011) 114.

[63] ILC Report 1966, *YILC* (1966), U.N. Doc. A/CN.4/191, vol. II, at 219–20, paras 8–9.

[64] VCLT, art. 5.

[65] Robert Hockett, "From Macro to Micro to 'Mission-Creep': Defending the IMF's Emerging Concern with the Infrastructural Prerequisites to Global Financial Stability" (2002) 41 Columbia Journal of Transnational Law 153, 177–78.

of Agreement of the Bretton Woods institutions, applying VCLT article 31 would involve contextual, teleological, and dynamic considerations.

Contextualization and elaboration are necessary since "the frailties of language and other communication"[66] sometimes result in parties being unable to fully express their shared expectations in the treaty text, thereby making it necessary to remedy those inevitable gaps and ambiguities "by a disciplined recourse to community prescriptions designed to regulate activities of the particular kind embodied in the agreement or, in the absence of such prescriptions, to the more fundamental, authoritatively postulated policies of the larger community."[67] The teleological or purposive approach, which can support IOs' assumption of additional functions that respond to new needs and demands,[68] is reflected in article 31(1)'s reference to "object and purpose." Closely related to this approach are the implied powers doctrine and the principle of effectiveness, both of which tend to amplify IOs' powers.[69]

Evolutionary interpretation, although not explicitly mentioned in the VCLT, is possible when "a treaty term is capable of evolving ... so that allowance is made for [] developments in international law ... [and] account is taken of the meaning acquired by the treaty terms when the treaty is applied."[70] When a generic term is used and the treaty has been entered into for a very long time and/or is of a continuing duration, it can be presumed that parties intended an evolutionary interpretation.[71] As the ICJ held, "the presumption necessarily arises that [a generic word's] meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time."[72]

But such intention does not predetermine how the terms shall evolve. Evolution of treaty provisions may occur "in ways the drafters cannot

[66] Myres S McDougal, Harold D Lasswell, and James C Miller, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure* (Martinus Nijhoff 1994) xxvii.

[67] Ibid. xxxi–xxxii.

[68] José E Alvarez, "Limits of Change by Way of Subsequent Agreements and Practice" in Georg Nolte (ed), *Treaties and Subsequent Practice*, Oxford University Press 2013) 128.

[69] Gardiner (n 62) 211; Röben (Introduction n 90) para 40.

[70] Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford University Press 2014) 59.

[71] *Dispute Regarding Navigational and Related Rights* (Costa Rica v. Nicaragua) (Judgment) [2009] ICJ Rep 213, 242–43, paras 65–66.

[72] *Aegean Sea Continental Shelf* (Greece v. Turkey) (Judgment) [1978] ICJ Rep 3, 32, para 77.

control and could not predict."[73] Evolutionary interpretation is relevant to any or all of the following: (i) a change in the meaning and usage of a term "so as to include new activities, scientific advances, [and] technological advancements"; (ii) a treaty bears "constitutional characteristics," meaning, it gives powers to an IO but needs elaboration to have precise effect; and (iii) emergence of new fields of law or later treaties and other developments elsewhere in the legal system.[74] Interestingly, Virginie Barral offers a related analysis, which is premised on sustainable development being an intrinsically evolutive proposition and whose inclusion in a treaty "necessarily opens that agreement up to its potential evolutive interpretation."[75]

Linking the teleological and evolutionary approaches is the dynamism required to respect the object and purpose of a treaty establishing "longer lasting and solid relations" among parties.[76] The IO's object and purpose remains the central determinant of the evolutionary (dynamic) interpretation of constituent treaties, and "within the framework of the teleological approach, considerations of effectiveness in achieving the stated purpose, as well as principle of speciality, play an important role."[77] A teleological-evolutionary approach is justified when interpreting treaties as constitutions, because the "purposes and functions [sought by States in creating IOs] cannot be achieved by the creation of simple norms of conduct ... [and instead require] the permanent operation of [discrete, often independent] entities."[78] Dynamic and purposive interpretation therefore do not disregard State consent. It remains "based upon the objective establishment of the intention of the parties" and "the evolution involved in [such] interpretation of treaties should be understood as evolution intended [by the parties]."[79] As Pierre-Marie Dupuy opined, the evolutionary approach requires the interpreter "to ensure that a new reading is undertaken in such a way as to reflect the common

[73] Sondre Torp Helmersen, "Evolutive Treaty Interpretation: Legality, Semantics and Distinctions" (2013) 6 European Journal of Legal Studies 161, 172.
[74] Gardiner (n 62) 468.
[75] Barral (Introduction n 34) 394–95.
[76] Bjorge (n 70) 118–19.
[77] Stefanie von Killinger, *The World Bank's Non-Political Mandate* (2003) 74.
[78] Tetsuo Sato, *Evolving Constitutions of the International Organizations: A Critical Analysis of the Interpretative Framework of the Constituent Instrument of International Organizations* (Martinus Nijhoff 1996) 230.
[79] Bjorge (n 70) 188.

desire of the parties as if they had renegotiated the same agreement taking into account the circumstances that have since evolved."[80]

Closely related to evolutionary interpretation is the New Haven Approach, under which the aim of treaty interpretation is to ascertain the treaty parties' contemporary shared expectations that are complemented, and in some instances, supplanted, by the international community's expectations and demands.[81] Its premise is that a treaty's main objective "is to project a common policy with the respect of future distribution of values," hence, interpretation should "discern the shared expectations of the parties, which may be adjusted by the interpreter to the goals of public order, including human dignity."[82] The New Haven Approach is thus supportive of Michel Virally's conception of international development law (*droit international du développement*)[83] that "sought to rewrite the principles of public international law [in order to] benefit developing countries... [and] to reinterpret [international principles, institutions and rules] toward the overall goal of fostering development and a more just world order."[84]

2.2.2 *The Bank's Constitution*

The IBRD Articles not only established rules regulating States' economic relations in the decades following World War II but also created an IO to monitor and facilitate such relations. The Articles' lawmaking character implies that "the Bank had been expected 'at all times to adapt itself to the changing needs of the world, if only to ensure its continued relevance.'"[85] Moreover, certain terms in the World Bank's charter meet the ICJ's abovementioned conditions for evolutionary interpretation. The

[80] Pierre-Marie Dupuy, "Evolutionary Interpretation of Treaties: Between Memory and Prophecy" in Enzo Cannizzaro (ed), *The Law of Treaties beyond the Vienna Convention* (Oxford University Press 2011) 126.

[81] McDougal, Lasswell, and Miller (n 66) xvi–xix; Richard A Falk, "On Treaty Interpretation and the New Haven Approach: Achievements and Prospects" (1967) 8 Virginia Journal of International Law 323, 338, 352.

[82] Malgosia Fitzmaurice, "Dynamic (Evolutive) Interpretation of Treaties: Part II" (2009) 22 Hague Yearbook of International Law 3, 26–29 *citing* McDougal, Lasswell, and Miller (n 66) 40–41, 90.

[83] Discussed in the Introduction.

[84] Dann, *The Law of Development Cooperation* (Introduction n 13) 5.

[85] Andrés Rigo Sureda, "The World Bank and Institutional Innovation" (1999) 31 Studies in Transnational Legal Policy 11, 12 (citations omitted).

words "development," "political," and "economic" are generic ones that are broad enough to be variably construed under changing contexts.

The transformation sketched in Section 2.2.1 is mostly attributable to the Articles' interpretation, rather than their amendment via the cumbersome procedure under *Article VIII*.[86] The amendment route has hardly been taken, presumably because of the weighted voting entailed by such important decisions: proposals need acceptance by a supermajority, that is, three-fifths of the members having 85 percent of the total voting power, and can be subject to the United States' (holding 15.51 percent)[87] veto. Curiously, as elaborated below, the World Bank's evolving mandate has also relied sparingly on official/formal interpretation.[88] It is nevertheless valuable to understand where such authority lies.

2.2.2.1 Authority to Interpret

Under *Article IX: Interpretation*, any interpretive question regarding the IBRD Articles is resolved, not by a third party, but internally ("auto-interpretation"). The Executive Directors' initial interpretation[89] can only be appealed to the Board of Governors whose decision is final.[90] These designated interpreters are remarkably the same organs formulating the Bank's policies and overseeing the acts of Management and staff.[91] The deliberate choice to empower the policymaking organs to interpret their own charters[92] can be ascribed to two factors: the supposedly technical and complex nature of the subject matter of IFIs'

[86] Shihata, *The World Bank in a Changing World* (n 4) 1.

[87] International Bank for Reconstruction and Development Subscriptions and Voting Power of Member Countries (data as of February 9, 2024) <https://thedocs.worldbank.org/en/doc/a16374a6cee037e274c5e932bf9f88c6-0330032021/original/IBRDCountryVotingTable.pdf>.

[88] See Shihata, "The Dynamic Evolution of International Organizations" (n 41) 224. [*Dynamic Evolution*].

[89] IBRD Articles of Agreement, Art. IX(a).

[90] IBRD Articles of Agreement, Art. IX(b).

[91] IBRD Articles, art. V, sec. 2(a) ("All the powers of the Bank shall be vested in the Board of Governors."); art. V, sec. 2(f) ("The Board of Governors, and the 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."); art. V, sec. 4(a) ("The Executive Directors shall be responsible for the conduct of the general provisions of the Bank, and for this purpose, shall exercise all the powers delegated to them by the Board of Governors.")

[92] See Hockett (n 65) 178.

operations[93] and the drafters' desire to create "a constitutional framework which would not preclude the adjustment of policies to changing political and economic circumstances."[94] The merging of functions suggests the importance for interpretation to respond "to the needs of the institution and its members as a whole" by "combin[ing] strictly sound legal analysis with considerations related to the business exigencies of the organization, where the efficiency of the institution in achieving its purposes and its continued relevance to the needs of its members are important factors to be taken into account."[95]

Similarly, Robert Hockett argued the necessity of a teleological approach to interpreting the IMF's Articles of Agreement, the provisions of which are, like the IBRD's, couched in "creatively ambiguous" language, especially with respect to the statement of purposes.[96] Such argument is to refute the mission creep complaint against the Fund. Drafters of both Articles of Agreement – consisting of economists and lawyers – were mindful of possible future changes within the international order to which the Bretton Woods institutions would have to adapt. They were open to the possibility of constitutional development but, given the foreseen need to constantly consult with technocrats, that is, financial and economic experts, they saw fit to retain the interpretive powers within the organizations.[97]

For Antony Anghie, however, it is problematic that "an essentially legal question is decided by a non-legal body which appears to be under no obligation to decide the matter according to legal considerations."[98] This legitimate concern against auto-interpretation could be partly assuaged, as actual practice reveals that in matters of interpretation, the Executive Directors have extensively relied on the advice of the Bank's lawyers. Indeed, in lieu of formal interpretations, whenever provisions of the Articles needed to be clarified, the General Counsel is consulted and requested to issue a legal opinion, which, although not itself an

[93] Killinger (n 77) 53; Sato (n 78) 233; Ralph Zacklin, *The Amendment of the Constitutive Instruments of the United Nations and Specialized Agencies* (Martinus Nijhoff 2005) 175.
[94] Hexner (n 58) 344.
[95] Shihata, "The Dynamic Evolution of International Organizations" (n 41) 222–23. [*Dynamic Evolution*]
[96] Hockett (n 65) 177–78.
[97] Zacklin (n 93) 176.
[98] Antony Anghie, "Time Present and Time Past: Globalization, International Financial Institutions, and the Third World" (2000) 32 New York University Journal of International Law and Politics 243, 270.

authoritative interpretation of the Articles, triggers subsequent practice in the Bank, once it is endorsed or concurred with by the Executive Directors.[99] Such subsequent practice could inform the Articles' interpretation.

For purposes of VCLT article 31(3)(b), three forms of conduct may be relevant, per the ILC: (i) subsequent practice of the constituent instruments' parties, (ii) practice of an IO's organs, and (iii) a combination of the IO organs' practice and the treaty parties' subsequent practice.[100] The ICJ's *Israeli Wall* advisory opinion[101] has likewise been read as recognizing that even statements by the United Nations' Legal Counsel are covered by the reference to "organ practice" for purposes of treaty interpretation, "indicat[ing] that organizational practice might not need to reflect state practice even indirectly."[102] Previously, however, construing "subsequent practice" under VCLT article 31(3)(b)[103] as the practice of the IO and/or its organs has been controversial, because up until the 1962 *Certain Expenses* advisory opinion, the provision has been understood as referring only to the subsequent conduct of States parties themselves.[104]

The General Counsel's acknowledged interpretive power is particularly important to the World Bank.[105] Andrés Rigo Sureda, former Bank Counsel, recounted that at the beginning of mid-1980s until the turn of the millennium, the General Counsel has given more opinions than in all the Bank's prior years, not simply because the institution "has faced more legal issues, but also because of Shihata's proactive approach to using law as an instrument of change [that thereby resulted in the enhancement of]

[99] Shihata, "The Dynamic Evolution of International Organizations" (n 41) 225. [*Dynamic Evolution*].

[100] Int'l Law Comm'n, Rep. on the Work of Its Seventieth Session, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries*, UN Doc A/73/10 (2018), 85–90, paras 26–42.

[101] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136.

[102] Julian Arato, "Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations" (2013) 38 Yale Journal of International Law 289, 326.

[103] "3. There shall be taken into account, together with the context:

xxx

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

[104] *Certain Expenses of the United Nations* (Advisory Opinion) [1962] ICJ Rep 151. See Arato (n 102) 319–20.

[105] See generally Meerssche (Introduction n 44).

the role of law in policy-making and in the overall framework of the Bank."[106]

Realizing that legal opinions become practically accepted interpretations of the Articles, and as such, could be deemed a source of the Bank's law,[107] if not international law, Shihata depicted a meticulous and thoughtful process for preparing those opinions:

> The General Counsel's clarifications of the meaning and implications of the Articles have carefully studied the *travaux préparatoires* in an attempt to identify the intended meaning. But they have accorded *greater attention to the ultimate objective of the Articles and the overall mandate of the Bank*. There was no attempt to adhere to a subjective (intentionist) interpretation. Interpretations have rather served the purposes of the Bank as an international institution concerned with the reconstruction and development of its members: a financier of investment for productive purposes, and a facilitator of international investment and trade. They have enabled the Bank to *address many areas related to the economic development of its borrowing countries that were not deemed to be so related at the time the Articles of Agreement were drafted.*[108]

This excerpt encapsulates the contextual, purposive, and evolutionary elements used in the Bank's interpretive approach.

2.2.2.2 Object and Purpose: "Development"

Reading the Articles of Agreement, considering the limited use of the amendment procedure, and reviewing its organizational history, one should wonder whether the current scope of the World Bank's activities deviates from its "original" purposes. Have member States authorized the Bank to perform such tasks as financing projects/programs geared toward poverty reduction,[109] human rights promotion,[110] environmental

[106] Rigo Sureda (n 85) 12 (citation omitted).

[107] Shihata, "The Dynamic Evolution of International Organizations" (n 41) 225. [*Dynamic Evolution*].

[108] Ibid. (emphasis added).

[109] See Christopher L Gilbert and David Vines, "The World Bank: An Overview of Some Major Issues" in Christopher L Gilbert and David Vines (eds), *The World Bank: Structure and Policies* (Cambridge University Press 2006) 18.

[110] See generally Ibrahim FI Shihata, "The World Bank and Human Rights: An Analysis of the Legal Issues and a Record of Achievements" (1988) 17 Denver Journal of International Law & Policy 39; Ciorciari (n 30); Sigrun Skogly, *Human Rights Obligations of the World Bank and the IMF* (Cavendish 2001); Mac Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (Hart 2003); Adam McBeth, *International Economic Actors and*

protection,[111] and legal or judicial reform?[112] More pointedly, are the Bank's present sustainable development–focused operations ultra vires, inconsistent with the principle of speciality or of implied powers under international organizations law?[113]

To pursue this line of inquiry, the first two paragraphs of *Article I: Purposes* deserve close attention. These paragraphs mention (i) assistance in the reconstruction and development of members' territories and (ii) promotion of private foreign investment. They capture the States' major concerns and immediate objectives during the Bretton Woods Conference, which sought to establish an orderly and stable international monetary and financial system. Observing that the language of this provision is deliberately couched such that its ends and means are integrated,[114] Shihata recasted the Bank's mandate:

(i) The Bank's first role is that of a *facilitator and promoter* of investment of capital, especially private foreign investment, for reconstruction and productive purposes in member countries. This role includes (a) facilitation of reconstruction and reconversion of productive facilities to peace time needs, (b) transition and restoration of the economies of "post war countries" (which, under textual and teleological interpretations, should apply to all post-conflict situations, not only to the originally intended participants in World War II, (c) encouragement of the development of productive facilities and resources in less developed countries, and (d) encouragement of international investment for the purpose of growth of balanced trade and the equilibrium of balances of payments.

Human Rights (Routledge 2009); Sanae Fujita, *The World Bank, Asian Development Bank and Human Rights* (Edward Elgar 2013).

[111] See Ibrahim FI Shihata, "The World Bank and the Environment: A Legal Perspective" (1992) 16 Maryland Journal of International Law 1. [hereinafter, *WB and Environment*].

[112] See Daniel D Bradlow, "The Reform of the Governance of the IFIs: A Critical Assessment" in Hassane Cissé, Daniel D Bradlow, and Benedict Kingsbury (eds), *The World Bank Legal Review: International Financial Institutions and Global Legal Governance* (World Bank 2011) 39.

[113] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, 78–79, para 25; *Reparation for the Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 180; Niels M Blokker, "International Organizations or Institutions, Implied Powers" in *Max Planck Encyclopedia of Public International Law* (2021) <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e467?prd=EPIL>.

[114] Shihata, "The Dynamic Evolution of International Organizations" (n 41) 228–29. [*Dynamic Evolution*].

Through such facilitation, promotion and encouragement, the Bank plays its role in the reconstruction of war-affected member countries and the development of the less developed ones.

(ii) The second role of the Bank stated in the Article is that of a *financier*, i.e. a guarantor of/or a participant in "loans and other investments" made by *private foreign* investors and a direct lender of funds to finance or facilitate productive purposes on suitable conditions "when private capital is not available on reasonable terms."[115]

Within this "means-ends" framework, the Bank is expected to undertake activities that will realize the development of its member countries. Rather than expressly defining "development," however, the World Bank sought to identify and draw – rather circuitously – the conceptual contours of this term, through the economic-political dichotomy supposedly underlying the "political activity" prohibition, which is discussed below. For this book's purposes, therefore, eliciting the Bank's understanding of development and sustainable development entails a legal analysis of such prohibition. The analysis proceeds from the ICJ's statement that the concept of "well-being and development" is not static, but by definition, evolutionary.[116]

2.2.2.3 Political Activity Prohibition: "Economic" v. "Political"?

The World Bank's apolitical character and the assumed imperative to limit its concerns to economic considerations find legal bases in Article IV, Section 10; Article III, Section 5(b); and Article V, Section 5(c). These provisions form the core of the "political activity prohibition" and concomitant objections against including "non-economic" matters in the Bank's evolving mandate.[117] These same provisions nonetheless supported Shihata's opinion that the Bank can take into account a government's deteriorating political stability, as a "relevant economic consideration," because the security of a State's people and territories

[115] Ibid. 230.

[116] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, 31, para 53.

[117] See generally Hassane Cissé, "Should the Political Prohibition in Charters of International Financial Institutions Be Revisited? The Case of the World Bank" in Hassane Cissé, Daniel D Bradlow, and Benedict Kingsbury (eds), *The World Bank Legal Review: International Financial Institutions and Global Legal Governance*, vol 3 (World Bank 2011).

and its prospective creditworthiness are at stake.[118] As discussed in Chapter 5, the World Bank Inspection Panel adopted a similar reasoning to justify its jurisdiction over one case when it called attention to a host country's human rights situation, which affected the proper implementation of the development project and the Bank's environmental and social policies.

To recall, the Bretton Woods drafters prohibited political interference to enable the Bank "to gain and maintain Wall Street credibility" and "to assure the banking community ... that the Bank [as guarantor and facilitator of international private investment] would [be running] on sound investment principles."[119] The prohibition also addressed Keynes' concern about Bank decisions being strictly based on economic considerations, including a borrowing country's ability to pay back loans.[120]

With these important but not controlling intentions in mind, and despite his initial skepticism regarding the Bank's involvement in borrowing countries' democratization and political reform,[121] Shihata appears to have eventually relaxed his interpretation of the political activity prohibition. In a memorandum, the General Counsel initially looked at the ordinary meaning of the word "political" but simultaneously included a qualifier to select from among the several dictionary meanings the one that would be relevant to the IBRD Articles:

> Since these Articles recognize the relevance of economic considerations but exclude political ones, they must assume an established distinction between the two. The more relevant meaning of the excluded political factors should therefore be found in what the Oxford Dictionary defines as "belonging to or taking a side in politics or in connection with the party system of government; in a bad sense, partisan; factions" as well as "the political principles, convictions, opinions or sympathies of a person or party." *This [prohibition]... should exclude, for the purposes of the Bank's Articles, such typical economic and technical issues as the "management of*

[118] Ibrahim FI Shihata, "The World Bank and 'Governance' Issues in Its Borrowing Members" in *The World Bank in a Changing World: Selected Essays*, vol 1 (1991) 75–76. [hereinafter, *WB and Governance*].

[119] Ronald Janse, "(Why) Was the World Bank Supposed to Be a Nonpolitical Organization? An Interpretation of the Original Meaning and Rationale of Article 4 (10) of the Articles of Agreement of the International Bank for Reconstruction and Development, 1941–1948" (2014) 16 Journal of the History of International Law 113, 140; Mason and Asher (n 11) 125–38.

[120] Ciorciari (n 30) 369.

[121] See Shihata, "The Dynamic Evolution of International Organizations" (n 41) 243. [*Dynamic Evolution*].

money or the finances" or more generally the efficient management of the country's resources.[122]

Simply put, a country's management of its resources is not a political matter; hence, it falls within the Bank's mandate. While economic considerations were casually assumed to be distinct from political ones, there is nothing in the memorandum suggesting that the two are incompatible or mutually exclusive.

Similarly, finding that the provisions do not necessitate the construction of "an artificial separation between 'economic' and 'political' factors," one commentator concluded that they cannot prevent the Bank from "considering a nation's violation of internationally recognized human rights in its lending and credit decisions."[123] Parenthetically, given its Relationship Agreement[124] with the UN, and the fact that international obligations of the Bank's member States under the Charter take precedence over other treaty obligations,[125] the Bank is plausibly bound to "pay due accord to factors which are basically political in nature" and even abide by Security Council decisions.

Underlying the political-economic dichotomy is a tension between States' sovereignty to decide their own policies and development trajectories, on the one hand, and the necessity for the World Bank to keep abreast of "new insights in the mechanisms of development" that shrink members' "political" space, on the other.[126] Alternatively, the dynamics can be better depicted as lying on a spectrum, such that one issue can theoretically have different ratios or degrees of "economic-ness" and "political-ness." This conceptualization would make it easier to rationalize the Bank's economics-oriented prescriptions that simultaneously have some political color due to their being connected to the way that a borrowing State would implement certain policies – especially with respect to resources management. Not only would this alternative acknowledge the "inseparability of the economic and political spheres,"[127] it would also respond to the necessity for "a consistent and

[122] Shihata, "The World Bank and 'Governance' Issues in Its Borrowing Members" (n 116) 70. Citations omitted. Emphasis added. [*WB and Governance*].
[123] Ciorciari (n 30) 369 (citation omitted).
[124] Agreement between the United Nations and the International Bank for Reconstruction and Development, November 15, 1947, 16 U.NT.S. 346.
[125] UN Charter, art 103.
[126] Killinger (n 77) 41.
[127] Ibid. 90–91.

thoughtful interpretation of the political prohibition ... and a better understanding of the relationship between human rights, [environmental protection,] governance and development."[128]

Amplifying the last point, the next section examines the Bank's attitude toward three crucial sustainability-related areas that it has included into its operations in varying degrees, despite the fact that "no one in 1944 might have thought specifically of a role for the Bank in ... human development or the environment."[129] Consistent with the overall argument of this chapter, particular attention is drawn throughout the discussion to the teleological and evolutionary aspects of the World Bank's interpretive approach to its constituent instrument.

2.3 Evolution by Interpretation

Environment The increasing relevance of the environment to the World Bank's work and the corresponding expansion of its activities are broadly due to two factors: (i) lessons from Bank-financed projects that showed how *both* economic growth (especially via untrammeled industrialization) and poverty can harm the environment and (ii) the Bank's increased capacity and expertise, as "the premier development finance institution," to advise and to share knowledge and technical assistance with "countries in the preparation of [their own] environmental action plans and strategies."[130] Various multidisciplinary research, including those undertaken by the World Bank Group, have additionally identified significant and complex correlations between poverty and environmental degradation.[131]

Whether the Bank has authority to handle environment-related concerns has been resolved by assessing how such concerns could affect a borrowing country's economy or the Bank's financial integrity. The term

[128] Bradlow and Grossman (Introduction n 36) 43–44.

[129] Shihata, "The Dynamic Evolution of International Organizations" (n 41) 231. [*Dynamic Evolution*].

[130] Shihata, "The World Bank and the Environment: A Legal Perspective" (n 111) 40.

[131] See, e.g., Robin Broad, "The Poor and the Environment: Friends or Foes?" (1994) 22 World Development 811; Anders Ekbom and Jan Bojö, "Poverty and Environment: Evidence of Links and Integration into the Country Assistance Strategy Process" (The World Bank, Africa Region, Environment Group, 1999) Discussion Paper No. 4 <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.203.3709&rep=rep1&type=pdf>; Arild Angelsen, "The Poverty – Environment Thesis: Was Brundtland Wrong?" (1997) 24 Forum for Development Studies 135.

"economic" in Article IV, Section 10 has been interpreted to encompass environmental protection issues, insofar as a failure to anticipate and mitigate adverse ecological impacts could delay or even halt development projects, thereby resulting to inefficiency and loss of resources. This interpretation apparently derives from the Brandt Commission report's injunction that MDBs should "assist in carrying out environmental assessments to ensure that an ecological perspective would be incorporated into development planning."[132] Sustainable development, Shihata asserted, "cannot be really achieved at the expense of the environment."[133] The Brundtland Commission relatedly stated, "Economy is not just about the production of wealth, and ecology is not just about the protection of nature; they are both equally relevant for improving the lot of humankind."[134]

The Bank's initial views and policies toward environmental protection were described in the then Bank President's address to the 1972 Stockholm Conference.[135] Robert McNamara acknowledged the "dilemma of development versus growth" and affirmed that continued economic growth is interlocked with environmental protection.[136] The conclusions of that conference are relevant to the findings of the Brandt Commission,[137] which "indicated that protection of the environment could no longer be seen as an obstacle to development but rather as an essential aspect of it."[138] Ever since the Stockholm Conference,

[132] Independent Commission on International Development Issues, *North-South: A Program for Survival* (1980) *cited in* Shihata, "The World Bank and the Environment: A Legal Perspective" (n 111).

[133] Shihata, "The World Bank and the Environment: A Legal Perspective" (n 111) 40. [*WB and Environment*].

[134] World Commission on Environment and Development (Introduction n 54) 37–38.

[135] See Bruce Rich, "World Bank/IMF: 50 Years Is Enough" in Kevin Danaher (ed), *50 Years Is Enough: The Case against the World Bank and the International Monetary Fund* (South End Press 1994) 9.

[136] Robert S. McNamara, Address to the United Nations Conference on the Human Environment, Stockholm, Sweden (June 8, 1972) <http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2011/11/24/000333038_20111124075644/Rendered/PDF/557860WP0Box360y0Robert0S.0McNamara.pdf>.

[137] The commission's official name is "Independent Commission on International Development Issues," and through its report, development policy "became an issue of global and foreign policy relevance," and development came to be seen as "a key part of international politics, and one in which money and political energy must be invested." See Interview with Sigmar Gabriel, "Today's International Agenda" (September 13, 2017) <https://www.deutschland.de/en/topic/politics/todays-international-agenda>.

[138] Shihata, "The World Bank and the Environment: A Legal Perspective" (n 111) 2.

"international economic and financial organizations [have been] faced with the practical aspects of integrating environment and development" and MDBs have repeatedly been "called upon to integrate environmental and social considerations into their loan-making processes."[139]

Quite similarly to ordinary financial institutions, the Bank sought to address development-related environmental problems – unsustainable natural resources use, failure to provide sufficient public access to information, stifling of local community participation in project development[140] – through legal instruments with conditionalities that bind borrowing countries to, for instance, conduct environmental impact assessments and/or undertake certain mitigation measures. Compliance with requirements under the environmental and social policies becomes a matter of legal obligation for a State, when it executes with the World Bank Group a "loan agreement" (IBRD) or a "development credit agreement" (IDA) that is often complemented by "project agreements."[141] These agreements specify the respective rights and obligations of the Bank and of the borrower. These obligations include the Bank's duty "to carry out the project with due diligence" and give due regard to environmental and ecological factors when the execution of the project is likely to have an impact on the environment.[142] Incorporating the safeguard policies into the loan or grant agreements is therefore a way for IFI "internal" law to be externalized – meaning, to create State duties – and enter the international legal order.[143]

By the nineties, the further "greening" of the Bank could be gleaned from the substantial increase in environmental professionals on staff and

[139] Sands, "International Law in the Field of Sustainable Development" (n 38) 311.

[140] See Todd Roessler, "The World Bank's Lending Policy and Environmental Standards" (2000) 26 North Carolina Journal of International Law and Commercial Regulation 105, 106–7, 124. See also Development Committee, *Environment, Growth, and Development,* Pamphlet No. 14 (August 1987) <http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2000/04/05/000178830_98101901582496/Rendered/PDF/multi_page.pdf>.

[141] Ibrahim FI Shihata, "The World Bank and the Environment – A Legal Perspective" in Ibrahim FI Shihata, Franziska Tschofen, and Antonio R Parra (eds), *The World Bank in a Changing World: Selected Essays*, vol I (Martinus Nijhoff 1991) 148.

[142] Ibid. 148–49.

[143] Laurence Boisson de Chazournes, "Policy Guidance and Compliance: The World Bank Operational Standards" in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press 2003) 281–303, 282.

its being the sole IFI with a dedicated environmental unit.[144] Moreover, the Bank's engagement with the environment extended beyond its own projects, as it participated in "multilateral efforts to mobilize resources for the protection of the global environment and to ensure efficient utilization of such resources."[145] One such multilateral financing mechanism is the Global Environment Facility (GEF), which was launched in 1991 pursuant to a resolution by the IBRD Executive Directors,[146] and subsequently restructured to its present form as "a family of funds [whose] grants, blended financing, and policy support help developing countries address their biggest environmental priorities and adhere to international environmental conventions."[147] The GEF serves as a financial mechanism for various multilateral environmental agreements (MEAs), including the UNFCCC,[148] the Convention on Biological Diversity (CBD),[149] and the Stockholm Convention.[150]

Their voluntarily assumed roles under MEAs give MDBs like the World Bank a "position of special responsibility," Handl argued, and they are "deemed not merely authorized but legally required to pursue these objectives [environmental protection and social development] actively in their various lending operations in developing member countries."[151] This argument, which is not undisputed, corroborates the oft-repeated calls – recently reiterated in the 2030 Agenda – for the creation of an *enabling international economic environment* to complement

[144] Di Leva (Introduction n 36) 345; Park, "The World Bank, Dams and the Meaning of Sustainable Development in Use" (n 51) 108.

[145] Di Leva (Introduction n 36) 373–84; Shihata, "The World Bank and the Environment: A Legal Perspective" (n 111) 28–37. [*WB and Environment*].

[146] Resolution 91-5 of the Executive Directors of the IBRD (March 14, 1991).

[147] "Who We Are," Global Environment Facility website <https://www.thegef.org/who-we-are>.

[148] United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107.

[149] Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 69.

[150] 2001 Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, 2256 U.N.T.S. 119.

[151] Handl (n 52) 663–64. But see Duncan French, *International Law and Policy of Sustainable Development* (Manchester University Press 2005) 194 (refutes that MDBs' position of special responsibility suffices to establish their affirmative international legal duty to promote sustainable development, in the absence of State practice and *opinio juris*).

national sustainable development efforts and, especially, to assist developing countries in those efforts.[152]

Governance Justifications for the World Bank's inclusion of "governance" in its work are expounded in a legal opinion prepared by Shihata.[153] Mindful of the political prohibition clause, and aware of the tendency for governance issues to magnify the overlap between politics and economics, the General Counsel posited a conceptual distinction among different dimensions and issues of governance:

> One key to determining the aspects of "governance" which are relevant to the Bank's work and consistent with its mandate is to be found in a definition given to this term in contemporary English which sums up what is mostly intended by those who use it in the Bank. This is the meaning of "good order," not in the sense of maintaining the *status quo* by the force of the state (law and order) but in the sense of having a system, based on abstract *rules* which are actually applied and on functioning *institutions* which ensure the appropriate application of such rules. This system of rules and institutions is reflected in the concept of "the rule of law," generally known in different legal systems and often expressed in the familiar phrase of a "government of laws and not of men."[154]

Shihata thus distinguished the term "politics," as understood when used in conjunction with partisanship, and the term "political" (as in "political economy") in the sense of "belonging to the state or body of citizens; its government and policy."[155] The legal opinion explained that the Bank is only prohibited from interfering with its member countries' partisan politics, or being "influenced by a member's political ideology or character or form of government."[156] Accordingly, the Bank can be involved in

[152] See 2030 Agenda, para 63. See also G.A. Res. S/19-2, Programme for the Further Implementation of Agenda 21, para 25 (September 19, 1997). ("A mutually supportive balance between the international and the national environment is needed in the pursuit of sustainable development. . .. The gap between developed and developing countries points to the continued need for a dynamic and enabling international economic environment supportive of international cooperation, particularly in the fields of finance, technology transfer, debt and trade, if the momentum for global progress towards sustainable development is to be maintained and increased.")

[153] An edited/modified version of the December 21, 1990, Memorandum appears as Ibrahim FI Shihata, "The World Bank and 'Governance' Issues in Its Borrowing Members" in *The World Bank in a Changing World: Selected Essays* 53–96 (1991).

[154] Shihata, "The World Bank and 'Governance' Issues in Its Borrowing Members" (n 118) 84–85 (citations omitted).

[155] Ibid. 69–70. [*WB and Governance*].

[156] Rigo Sureda (n 85) 15.

"governance," which is essentially "the manner in which a community is managed and directed, including the making and administration of policy in matters of political control as well as in such economic issues as may be relevant to the management of the community's resources."[157]

The Bank views governance not only as an end but also a means "of correcting [development-related] problems that impede economic progress" and "of improving aid effectiveness and contributing to economic performance."[158] Consistent with this neoliberal understanding, the Bank's activities have been focused on "the *degree* and *quality* of the state's intervention in running the economy" and on other means to enhance the country's investment prospects.[159] Accordingly, similar to the inclusion of environmental protection above, the Bank conditioned its loans to the borrowing countries' implementation of "institutional changes in macroeconomic and financial management, sectoral restructuring and policy reforms, enhancement of public sector efficiency and constraints in public sector management."[160] The emphasis on the rule of law is intimately connected to the importance that the Bank accords to stability and predictability of the business environment within a State, as well as to the necessity of social discipline for a successful economic reform.[161]

Good governance encapsulates various factors calculated in determining the so-called cost of doing business, which the World Bank has been monitoring and reporting on since 2003 but has recently discontinued due to data irregularities.[162] To recall, the CDF presents a "holistic approach to the structural, social and human aspects of development" and includes in the structural aspect the existence of a good and clean government.[163] Expounding the Bank's holistic approach to development

[157] Shihata, "The World Bank and 'Governance' Issues in Its Borrowing Members" (n 118) 79–80.

[158] Nicholas H Moller, "The World Bank: Human Rights, Democracy and Governance" (1997) 15 Netherlands Quarterly of Human Rights 21, 27–28.

[159] Shihata, "The World Bank and 'Governance' Issues in Its Borrowing Members" (n 118) 87. [*WB and Governance*].

[160] Ibid. 59 (citation omitted). [*WB and Governance*].

[161] Ibid. 85.

[162] See World Bank, *Doing Business Archive* <https://archive.doingbusiness.org/en/doingbusiness>; World Bank, *Business Ready (B-READY)* <https://www.worldbank.org/en/businessready>.

[163] James D Wolfensohn, *A Proposal for a Comprehensive Development Framework: A Discussion Draft*, January 21, 1999 <https://documents1.worldbank.org/curated/en/208631583185352783/pdf/The-comprehensive-development-framework.pdf>.

and its overall commitment to long-term capacity-building,[164] Wolfensohn is the first president to expressly acknowledge the relevance of corruption in the Bank's operations and mandate. He considered corruption as "the single most corrosive aspect of development and must be fought systematically at all levels."[165] Susan Rose-Ackerman explained that the Bank is not precluded from addressing corruption, although it is a political issue, because the Bank is as much a political animal as it is a development institution, being "a coalition of most of the countries of the world."[166]

Former General Counsel Roberto Dañino elaborated the Bank's role in pursuing the interrelated objectives of good governance, human rights, and sustainable development:

> Another dimension of the evolving mandate of the Bank is embodied in the world community's commitment to realizing the Millennium Development Goals (MDGs). . .. All eight MDGs involve more than one human right. One concept that the Bank has taken a leading role in developing is governance. *Governance itself has a strong human rights content;* indeed, this is an area in which our research has found a rich set of connections in charting the work of the Bank to key international human rights provisions. Governance incorporates *transparency, accountability, and a predictable legal framework*. . .. All of these principles are *clearly linked to the rule of law and its inherent notions of fairness and social justice.* But the rule of law must also be supported by a number of other indispensable factors such as public participation, a free press, and a voice for civil society. These factors also relate to important provisions of a number of international human rights instruments, particularly those of the International Covenant on Civil and Political Rights.[167]

Ana Palacio, Dañino's successor, pushed the envelope further by classifying human rights as issues of governance and positing that governance can be rooted in international human rights law:

> The concept of *governance* is widely acknowledged to be *indispensable to sustainable development*. That focus would be significantly strengthened by anchoring it in the international human rights framework. *Human*

[164] Heather Marquette, "The World Bank's Fight against Corruption" (2006) 13 Brown Journal of World Affairs 27, 31.

[165] Ibid.

[166] Susan Rose-Ackerman, "The Role of the World Bank in Controlling Corruption" (1997) 29 Law and Policy in International Business 94, 94.

[167] Roberto Dañino, "The Legal Aspects of the World Bank's Work on Human Rights" (2007) 41 The International Lawyer 21, 24 (emphasis added).

> *rights offer a clear conceptual and legal framework for connecting the supply and demand sides of governance in terms of its basic correlative notion of rights and duties*. Acknowledging the relevance of human rights to the Bank and integrating human rights into its work is an important element in our efforts to step up the Bank's promotion of good governance and its global fight against corruption. Indeed, in substantive terms, *these areas share common legal principles*.[168]

Indeed, the value of recognizing governance concerns should be appreciated in light of the fact that among the reasons behind the disastrous consequences of some Bank projects in the developing world is the lack of understanding about the human and societal concerns, as well as the broader sociopolitical and cultural context, in these countries within which the projects were being implemented. Despite these partial recognitions, human rights, in itself (i.e., as a concern distinct from governance), remained latent or obscure in the Bank's practice and interpretation of its mandate.

Human Rights Compared to the two other areas, the World Bank's engagement with human rights issues has been more fraught. As the Bank frames it, the issue is whether human rights, particularly civil and political rights are "non-economic" considerations within the meaning of the Articles. Human rights, per Shihata, necessarily have a political component insofar as it refers to the relationship between the State and the individual.[169] Yet, he concurrently reasoned, "a guarantee of human rights protection ... is central to the development process."[170] Such ambiguity and vacillation unfortunately still characterize the Bank's position today.

More categorically, albeit not written in his official capacity as General Counsel, Dañino maintained that "human rights are at the very core of the World Bank's mandate":

[168] Ana Palacio, *The Way Forward: Human Rights and the World Bank,* 8(2) Development Outreach 35, 36–37 (October 2006) <https://documents1.worldbank.org/curated/en/129071468313761602/pdf/406330REPLACEMENT.pdf> (emphasis added).

[169] See Shihata, "The World Bank and Human Rights: An Analysis of the Legal Issues and a Record of Achievements" (n 110) 39; Ciorciari (n 30) 335–36. [hereinafter, *WB and Human Rights*].

[170] Ibrahim FI Shihata, "Human Rights, Development, and International Financial Institutions Conference on Human Rights, Public Finance, and the Development Process" (1992) 8 American University Journal of International Law and Policy 27, 28. Citation omitted. [*Human Rights and IFIs*].

> Social equity, at the heart of my conception of poverty alleviation [which has by now become a key element of the Bank's mission], includes fighting inequality, giving the poor and marginalized a voice (i.e., empowerment), freeing the poor from hunger and fear, and providing access to justice. *Social equity has, therefore, an obvious human rights content.* In our interpretation of the Articles, we must therefore maintain a focus on the purposes of Article I and the overall mission of the Bank.[171]

Referring to studies correlating substantial violations of civil and political rights and slower economic growth, Dañino positively rejected a stark distinction "between economic, social, and cultural rights on the one hand, and civil and political rights on the other" and thereby concluded that the World Bank "can and should take into account human rights because, given the way international law has evolved with respect to concepts of sovereignty and interference, the Bank would not run afoul of the political prohibitions of the Articles by taking human rights into account."[172] Moreover, experience and research have shown that a government's treatment of its citizens impacts the country's investment climate[173] and, as such, can properly be within the Bank's mandate to consider and address.

Interestingly, Dañino also wrote a "note" entitled *Legal Opinion on Human Rights and the Work of the World Bank*, which concluded, "The Articles of Agreement permit, and in some cases require, the Bank to recognize the human rights dimensions of its development policies and activities, since it is now evident that human rights are an intrinsic part of the Bank's mission."[174] In the same breath, though, he reiterated the Bank's current position that it only assists member States in implementing their (not the IFI's) human rights obligations under international law.

Interpreted in a teleological and evolutionary manner, the IBRD Articles provide legal bases for the Bank's involvement in human rights–related activities and its consideration of human rights concerns in appraising and implementing projects:

[171] Dañino (n 168) 22. This 2007 article echoes Dañino's arguments in the 2006 "note/legal opinion" that was not submitted for consideration of the Board of Executive Directors

[172] Ibid. 23–24 (citation omitted).

[173] Victoria E Marmorstein, "World Bank Power to Consider Human Rights Factors in Loan Decisions" (1978) 13 Journal of International Law and Economics 113, 124, 135.

[174] Cited in Palacio (n 169) 36.

> *We need to interpret [legal] limits dynamically, in a contemporary context, yet in a way that is consistent with the purposes of the Bank, ever mindful that these limits do exist.* We must work within the legal framework . . . to tackle the challenges presented by human rights issues as they evolve. There are also institutional limits, for the Bank is a specialized financial agency. . .. The Bank also has finite capacity and limited resources. For now at least, I believe the Bank should embrace the centrality of human rights in its work instead of being divided by the issue of whether to adopt a rights-based approach to development.[175]

The "rights-based approach to development," Mauro asserted, "and the general awareness of the necessary interdependence between economic welfare and the effective recognition of human rights now prevent a restrictive interpretation of the Bank's mandate."[176] Initiatives in poverty alleviation, the environment, and the status of women are thus permissible under the Articles if "economic" is teleologically interpreted.[177] Otherwise stated, human rights issues can lie outside the constitutional prohibition against involvement in political activity, since people's economic welfare often depends also on their exercise of certain civil and political rights.

Evolving international legal norms should provide additional context to the IBRD Articles' interpretation.[178] There is no necessary conflict between the political activity prohibition and universal human rights standards, Erich Vogt argued, because the prohibition "has to be interpreted within the development of the human rights doctrine and the principle of sustainable development."[179] As participants in the international lawmaking process, the IFIs should pay attention to sustainable development concerns, "not *despite* their constituent instruments but, rather . . . *because* of them."[180]

Significantly, while IFIs are not parties to human rights treaties, these agreements provide "solid and compelling legal foundation[s] for the consideration of human rights in development," because they embody the "states' consent in their voluntarily undertaken legal commitments" and thus provide the IFIs with legitimacy and protection

[175] Dañino (n 168) 24–25.
[176] Mauro (n 8) 270–71.
[177] Moller (n 158) 25–26.
[178] Handl (n 52) 657.
[179] Erich Vogt, "Establishing a Rights-Based Approach to International Development" (2015) 45 Environmental Policy and Law 180, 182–83.
[180] Handl (n 52) 665 (italics in the original).

against charges of political interference,[181] to the extent that the IFIs' development work would facilitate States' compliance with their own legal commitments.[182] In furthering the relationship between development and human rights, "the critical dimension of obligations" cannot be neglected because "the accountability they bring defines their 'value-added' for development."[183]

The perceived border between the economic and the political is therefore blurring, if not vanishing. The World Bank, as well as States and scholars, now recognizes that several "non-economic" factors – environment, governance, human rights – affect the development process. As this chapter showed, there is likewise no legal impediment for the Bank to include these concerns in its operations. If anything, a teleological-evolutionary interpretation of the IBRD Articles of Agreement suggests that sustainable development properly falls within the Bank's legal mandate. One could even argue that the World Bank is obligated under its constituent instrument to implement sustainable development and to support member States in their pursuit thereof.

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Critical remarks against the World Bank's environmental track record and genuine concerns about the adverse effects of its operations, especially the project-affected people's hardships, are certainly not trivial. Nonetheless, the evolution of the Bank's mandate to "include new areas such as the environment, sustainable development, governance, democracy, cultural development, post-conflict reconstruction, programmes to combat corruption and, of course, human rights, issues"[184] has, by and large, been a boon rather than a bane. Such expanded mandate has encouraged the Bank to strive to make itself more transparent and accountable – that is, conform to the same good

[181] See Thomas Buergenthal, "The World Bank and Human Rights" in Edith Brown Weiss, Andres Rigo Sureda, and Laurence Boisson de Chazournes (eds), *The World Bank, International Financial Institutions, and the Development of International Law (A Symposium Held in Honor of Dr. Ibrahim F.I. Shihata)* (1999) 100.

[182] Siobhán McInerney-Lankford, "International Financial Institutions and Human Rights: Select Perspectives on Legal Obligations" in Daniel D Bradlow and David B Hunter (eds), *International Financial Institutions and International Law* (Kluwer Law International 2010) 263.

[183] Ibid. 284.

[184] Mauro (n 8) 260.

governance framework that it espouses to the borrower countries – through mechanisms and organs that observe and embody the principles of Global Administrative Law (GAL).[185] Chapter 4 elaborates on this change, as manifested in the formulation of environmental and social policies and the establishment of the Inspection Panel.

In Chapter 3, the concept of sustainable development is dissected and analyzed, to elaborate which of its principles the IFIs adopt and operationalize. This discussion is essential in expounding these IOs' participation in the lawmaking process on sustainable development.

[185] See generally Benedict Kingsbury, Nico Krisch, and Richard Stewart, "The Emergence of Global Administrative Law" (2005) 68 Law and Contemporary Problems 15; Richard B Stewart, "The Normative Dimensions and Performance of Global Administrative Law" (2015) 13 International Journal of Constitutional Law 499; Benedict Kingsbury and Megan Donaldson, "Global Administrative Law" *Max Planck Encyclopedia of Public International Law* (2011); Esty (Introduction n 86); Daniel Bodansky, "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?" (1999) 93 The American Journal of International Law 596.

3

Public Participation and Integration

Procedural and Substantive Principles of Sustainable Development

Sustainable development is a complex multidimensional endeavor that encompasses normatively charged and politically contentious aims concerning the environment, society, and economy. As a concept, it has become "the shorthand term for [the refinement of] a systems-oriented policy approach,"[1] geared toward managing interdependence on various levels and simultaneously addressing sometimes conflicting needs. Although sustainable development is not inherently a concept in law, several principles of varying legal status have emerged to grapple with the conflicts that it seeks to balance. Significantly, these conflicts could occur among different priorities – economic growth, social welfare, human rights, and environmental protection (principle of integration) – espoused by diverse actors: developing/poor and developed/rich countries (principle of intragenerational equity) and present and future generations (principle of intergenerational equity).

This chapter outlines how public participation, as a procedural[2] principle of sustainable development, facilitates achievement of the substantive principle of integrating economic, environmental, and social goals. A clearer understanding of the relationship between these two principles is crucial to the entire book's account of the IFIs' operations and their role in international sustainable development lawmaking.

[1] Daniel C Esty, "Free Trade and Environmental Protection" in Regina S Axelrod and Stacy D VanDeveer (eds), *The Global Environment: Institutions, Law, and Policy* (4th edn, Sage 2015) 345.

[2] This characterization does not preclude the principle from also having a substantive aspect, as participation can be linked to several human rights. See International Law Association (ILA), "New Delhi Declaration of Principles of International Law Relating to Sustainable Development" (2002) 2 International Environmental Agreements: Politics, Law and Economics 211, 215, para 5.2.: "Public participation in the context of sustainable development requires effective protection of the human right to hold and express opinions and to seek, receive and impart ideas."

In turn, such an account hopefully lends additional insights about the principle of intragenerational equity and drive future research regarding its relevance to development projects that purportedly contribute to the reduction of inequalities within and between States. Using the IFIs' operational policies and procedures to contextually understand the content of sustainable development draws inspiration from the idea "that substantive law has at first the look of being gradually secreted in the interstices of procedure."[3] Part of what this chapter aims to do, in other words, is to probe the presumed dichotomy but close connection between procedural and substantive rights.

The more abstract discussion here is deliberate and somewhat inevitable. It is essential to explaining what it is that IFIs are clarifying and elaborating through the safeguard systems. It also illustrates the problem or frustration about the vagueness and unenforceability of sustainable development more generally.

3.1 Sustainable Development Principles

Sustainable development, as the Brundtland Commission stresses, "require[s] a change in attitudes and objectives and in institutional arrangements at every level."[4] As Chapter 4 expounds, IFIs pursue, or support the pursuit of, such change by implementing the principles of integration and of public participation.

3.1.1 Integration

As used in this chapter and throughout the book, integration generally means the mainstreaming of environmental and social concerns into the global trade, investment, and finance regimes. Rio Declaration Principle 4[5] expresses the principle of integration.[6] It assertively, albeit quite

[3] Henry Sumner Maine, *Dissertations on Early Law and Custom* (J Murray 1891) 389. See also Jeremy Waldron, "The Rule of Law and the Importance of Procedure" (2011) 50 Nomos 3. See also Brigitte Stern, "Commentary on Substantive and Procedural Questions" (2008) 7 The Law and Practice of International Courts and Tribunals 301.

[4] World Commission on Environment and Development (Introduction n 54) 62.

[5] "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."

[6] See Virginie Barral and Pierre-Marie Dupuy, "Principle 4: Sustainable Development through Integration" in Jorge E Viñuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press 2015) 177.

broadly, requires the development process – in particular, the actors engaging in such process – to take into account the effects of their activities on the natural environment. The provision does not specify how environmental protection is supposed to be integrated with development, except that such integration is necessary to achieve sustainable development.

By incorporating environmental considerations and objectives that used to be peripheral to international economic relations, this principle, Philippe Sands claims, is "the most important long-term contribution which UNCED [United Nations Conference on Environment and Development] will make to international affairs."[7] Most relevant here is its potential interpretation "as permitting, and perhaps even requiring, the attachment of environmental conditionalities to all development lending by States and by the [MDBs]."[8]

In the light of conferences, summits, and further studies following the 1992 Earth Summit, sustainable development has come to be conceptualized as additionally requiring the incorporation and consideration of a third pillar, namely, the social or human dimension. Accordingly, the principle of integration, as presently understood and expressed in Principle 7 of the New Delhi Declaration,[9] "reflects the interdependence of social, economic, financial, environmental and human rights aspects or principles and rules of international law relating to sustainable development." The interdependent goals comprising sustainable development that include environmental protection and distributive equity require "integrated policy assessment" and "widely participatory governance structures."[10]

Significantly, public participation is itself a notion with an integrative (inclusive) aspect that is indispensable to realizing the objectives of protecting human rights and the environment and of promoting development.[11] It encourages actors to more fully disclose their interests and attitudes, to combine various methods or solutions, and to be receptive to

[7] Sands, "International Law in the Field of Sustainable Development" (Chapter 1 n 18) 324.
[8] Ibid.
[9] International Law Association (ILA) (n 2). Transmitted to the UN General Assembly as an annex to *Letter dated 6 August 2002 from the Permanent Representative of Bangladesh to the United Nations and the Chargé d'affaires a.i. of the Permanent Mission of the Netherlands to the United Nations addressed to the Secretary-General of the United Nations*, U.N. Doc. A/57/329 (August 31, 2002).
[10] Douglas Kysar, "Sustainable Development and Private Global Governance" (2005) 83 Texas Law Review 2109, 2145–46.
[11] Laurence Boisson de Chazournes, "Public Participation in Decision-Making: The World Bank Inspection Panel" (1999) 31 Studies in Transnational Legal Policy 84, 85.

values transformation, thereby helping expound and contextualize the normative content of sustainable development.[12] Otherwise stated, implementing the principle of integration, which lies at the core of sustainable development, requires the complementary implementation of the principle of public participation.

3.1.2 Public Participation

Rio Declaration Principle 10 contains the interrelated elements of the principle of public participation, namely, access to information (availability), meaningful participation of all concerned persons at the relevant level, and access to justice (judicial and administrative proceedings).[13] These elements are couched as rights in one treaty, the Convention on Access to Information, Public Participation in Decisionmaking and Access to Justice in Environmental Matters.[14] Better known as the Aarhus Convention, it is the most important application of the sustainability principle of public participation and the first internationally binding mechanism for access to information and public participation in environmental matters.[15] It grants the public a number of environment-related rights, which parties to the Convention must make effective by requiring public authorities to undertake certain actions or to put in place certain arrangements that would allow individuals and their associations to exercise the specified rights. The original or primary rationale for granting these rights is that public input is crucial in

[12] James Meadowcroft, "Participation and Sustainable Development: Modes of Citizen, Community and Organisational Involvement" in William M Lafferty (ed), *Governance for Sustainable Development: The Challenge of Adapting Form to Function* (Edward Elgar 2004) 165–66.

[13] See Sands, "International Law in the Field of Sustainable Development" (Chapter 1 n 18) 359; Priscilla Schwarz, "Sustainable Development in International Law" (2005) 5 Non-State Actors and International Law 127, 144; Daniel Barstow Magraw and Niranjani Manel Amerasinghe, "Transparency and Participation in Investor-State Arbitration" (2009) 15 ILSA Journal of International and Comparative Law 337, 348. (Although Rio Declaration Principle 10 textually pertains to environmental decisionmaking on a national level, Agenda 21 emphasizes the need for access to information on an international level to achieve sustainable development. Also, the 2002 Johannesburg Plan of Implementation extends the participation requirement to all decisionmaking with respect to sustainable development, and not limited to environmental decisionmaking.)

[14] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("Aarhus Convention"), 2161 UNTS 447; 38 ILM 517 (1999).

[15] Magraw and Amerasinghe (n 13) 349.

assessing the probable impact of certain projects on the environment and finding measures to eliminate or mitigate such impact.[16] The Convention's premise is that environmental decisionmaking can be enhanced through inputs from various sources. This idea is then elevated to international law by establishing rights that empower the public and concomitantly imposing on States procedural or process-oriented obligations. Significantly, the Aarhus Convention now also has a counterpart in Latin America and the Caribbean through the Escazú Agreement, which entered into force in April 2021.[17]

Public participation has thus come to be understood within environmental law and the emerging international sustainable development law as concerning "universal rights related to expression and association."[18] The principle recognizes certain non-State actors as direct beneficiaries of developmental and environmental activities who are accordingly entitled to contribute to policy elaboration, implementation, and compliance monitoring.[19] Given the uncertainty surrounding some aspects of sustainable development and the often far-reaching impacts of actions oriented toward its achievement, the decisionmaking process becomes less about a technical, entirely objective determination, and a more value-laden one, that should reflect the attitudes of a particular community toward risk and their degree of aversion to it. Some of the inevitable tradeoffs entailed in making sustainable development–consistent decisions must be aligned with the distinct priorities of the people impacted by such decisions.

For analogous reasons, the notion of "meaningful consultation" is prominent in the development finance context. It is interspersed, defined, and elaborated in the IFIs' safeguard policies and the IAMs' jurisprudence. The centrality of the meaningful consultation requirement is highlighted by the fact that all three of the safeguard policies discussed in Chapter 4 – Environmental assessment, Indigenous peoples, Involuntary resettlement – have information disclosure and public consultation requirements that arguably enhance the implementation of the

[16] Neil AF Popović, "The Right to Participate in Decisions That Affect the Environment" (1993) 10 Pace Environmental Law Review 683, 699.

[17] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, ("Escazú Agreement"), March 4, 2018 <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-18&chapter=27&clang=_en>.

[18] Cordonier Segger (Introduction n 34) 172.

[19] Boisson de Chazournes, "Public Participation in Decision-Making" (n 11) 86–87.

development project in particular and the pursuit of sustainable development in general. It most importantly manifests in the obligations of Bank Management to (i) evaluate whether adequate consultations have been undertaken by the project sponsor or the implementing agency and (ii) explain in its appraisal report "the steps the Bank has taken to appraise the adequacy of the consultations, and . . . why [it has] concluded that the Bank's policies on the issue have been complied with, and that the interests of all [potentially affected] parties have been respected."[20] Significantly, the World Bank Environmental and Social Framework (ESF)[21] devotes a separate environmental and social standard (ESS) to Stakeholder Engagement and Information Disclosure.

Public participation therefore matters to sustainable development, because the different and potentially conflicting perspectives of States, international organizations, communities, and individuals about the "appropriate" balancing and integration of economic, environmental, and social priorities make it necessary for decisions to be reached through a transparent, inclusive, and participatory process, wherein all stakeholders are given the opportunity to present and reason out – but also to modify – their respective positions.

The principle of public participation is likewise recognized as a pillar of rational and legitimate administrative decisionmaking. More relevantly, the study of global administrative law (GAL)[22] frames the demands against international institutions – for transparency, consultation, participation, and reasoned decisions – in terms of accountability.[23] It proceeds from the idea that "some normative demands and

[20] African Development Bank (AfDB) Independent Review Panel, Bujagali Hydropower and Interconnection Projects, Compliance Review Report, June 20, 2008.

[21] The Framework, which was approved by the Board of Executive Directors in August 2016, consists of (i) the Bank's Vision for Sustainable Development; (ii) the Environmental and Social Policy for Investment Project Financing; (iii) the ten (10) Environmental and Social Standards, which set out requirements that apply to Borrowers; and (iv) Bank Directive on Addressing Risks and Impacts on Disadvantaged or Vulnerable Individuals or Groups. The World Bank, "Environmental and Social Framework" <https://www.worldbank.org/en/projects-operations/environmental-and-social-framework>.

[22] Kingsbury, Krisch, and Stewart (Chapter 2 n 186); Nico Krisch and Benedict Kingsbury, "Introduction: Global Governance and Global Administrative Law in the International Legal Order" (2006) 17 European Journal of International Law 1; Benedict Kingsbury, "The Concept of 'Law' in Global Administrative Law" (2009) 20 European Journal of International Law 23.

[23] See Richard B Stewart, "Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness" (2014) 108 American Journal of

procedural principles [derived from administrative law in domestic settings] are sufficiently common across diverse [IOs and transnational arrangements or groupings] to suggest that a unified field may be discernable."[24] The GAL literature esteems rulemaking transparency, correction and return to legality via compliance review, and promotion of accountability.[25] As an analytical framework based on studies of existing IO practices, which generally receive inadequate attention within international law scholarship, GAL aids in rethinking the field of international institutional law by suggesting ways to view and resolve contemporary problems arising from the proliferation and diversification of IOs.[26]

A key requisite for IOs' effective and legitimate exercise of public authority[27] in the global administrative space is public participation. Notably, the World Bank ESF itself resulted from an amendment process that the IFI endeavored to make more transparent and inclusive by systematically soliciting comments from the public.[28] Scholars, civil society organizations, and national governments have, in fact, participated (physically or online) in the Bank-organized consultations and used those opportunities to criticize and suggest various revisions, many of which pertain to environmental/ecological, human rights, and social welfare concerns.[29]

International Law 211; Kingsbury and Casini (Introduction n 98) 320; Benedict Kingsbury and Stephan W Schill, "Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality" in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford Universisty Press 2010).

[24] Kingsbury and Casini (Introduction n 98) 333.

[25] Ibid.

[26] Ibid. 332.

[27] See generally Armin von Bogdandy, Philipp Dann, and Matthias Goldmann, "Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities" in Armin von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions* (Springer Berlin Heidelberg 2010); Armin von Bogdandy, "General Principles of International Public Authority: Sketching a Research Field" in Armin von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer Science & Business Media 2010); Matthias Goldmann, "Foreword to the Special Issue on the Exercise of International Public Authority" (2016) 7 Goettingen Journal of International Law 3.

[28] The World Bank, *The World Bank's Safeguard Policies: Proposed Review and Update (Approach Paper)*, October 10, 2012 <https://consultations.worldbank.org/content/dam/sites/consultations/doc/migration/safeguardsreviewapproachpaper.pdf>.

[29] See The World Bank, "Review and Update of the World Bank Safeguard Policies" <https://consultations.worldbank.org/en/consultations/detail/review-and-update-world-

Public participation has therefore come to be recognized as both a principle of sustainable development and of (global) administrative law. The former takes a substance-oriented justification, given its concern with the quality and content of decisions, while the latter has a process-based rationale, as it seeks to enhance the democratic legitimacy of those decisions and the accountability of the decisionmakers. That sustainable development and global administrative law have this principle in common indicates a connection between the challenge of integrating the economic, environmental, and social dimensions of sustainable development and the "problem of disregard"[30] that GAL principles aim to remedy.

Put differently, public participation, transparency, and accountability often work together not only to improve the efficacy and legitimacy of global governance and the accuracy and efficiency of international dispute settlement processes but to also operationalize and advance sustainable development on a multilateral level. In this respect, the book takes the argument – that a commitment to sustainable development requires good governance – a step further by merging the sustainability and the administrative law perspectives.

In reality, of course, the process-based and substance-oriented rationales work in tandem and are often intertwined. The value of making an analytical distinction, however, hinges on making recommendations for reform more acceptable, to the extent that one set of justifications could resonate more strongly in a particular institution or audience than in another. As a practical strategy, in advocating for greater participation by third parties or non-State actors in decisionmaking on public concerns, the framing of proposals matters. One may need to emphasize the type of rationale that would likely be more convincing to the addressee.

Although there is no guarantee that public participation will necessarily lead to sustainable development or to the incorporation of noneconomic concerns in international economic disputes,[31] it can facilitate the "pedagogic cultivation and exchange of environmental

bank-safeguard-policies> (hereinafter, "WB Safeguards Review Consultation"). The comments and submissions of the Consultation/Review participants are publicly available through this dedicated page in the Bank's official website.

[30] Stewart, "Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness" (n 23).

[31] Kirsten Mikadze, "Uninvited Guests: NGOs, Amicus Curiae Briefs, and the Environment in Investor-State Dispute Settlement" (2016) 12 Journal of International Law and International Relations 35.

[and social] values,"[32] which are arguably important especially in regimes primarily intended to protect private interests.[33] A similar caveat applies regarding the consultation requirements imposed by IFIs in development projects as well as to the efforts in making their own operations more inclusive and participatory: while these procedures would not automatically or necessarily result in sustainable development, they arguably at least steer the IFIs' and borrowing States' processes toward that direction.

3.2 Procedure and Substance of Sustainability

International actors' commitment to balance economic, environmental, and social priorities consists of procedural and substantive obligations. These obligations, according to Marie-Claire Cordonier Segger, vary depending on "the economic relationship of the parties, the prevailing social and ecological conditions, the treaty instrument itself, and even each area of law and policy that is disciplined."[34] Proceeding from this premise, the book establishes a link between procedure and substance to support the argument that IFIs contribute to the creation of international sustainable development law, not through any of the formal sources of international law (i.e., treaties, custom, general principles) but through their safeguard systems that operationalize the principles underlying sustainable development.

One of this book's objectives is to extract the substance or meaning of sustainable development from the primarily procedural measures applied by IFIs in development projects. Examining procedure with the concomitant aim of deriving its substantive implications heeds the advice from Oscar Schachter, one of the early thinkers in international law of development, that the "concern with substantive principles and broad policy should not obscure the significance of procedural issues in the area of development," including those relating to the IFIs' internal operations,

[32] Benjamin J Richardson and Jona Razzaque, "Public Participation in Environmental Decision-Making" in Benjamin J Richardson and Stepan Wood (eds), *Environmental Law for Sustainability: A Reader* (Bloomsbury 2006) 172.

[33] See Valentina S Vadi, "Environmental Impact Assessment in Investment Disputes: Method, Governance and Jurisprudence" (2010) 30 Polish Yearbook of International Law 169, 186.

[34] Marie-Claire Cordonier Segger, "Innovative Legal Solutions for Investment Law and Sustainable Development Challenges" in Yulia Levashova, Tineke Elisabeth Lambooy, and Ige Dekker (eds), *Bridging the Gap between International Investment Law and the Environment* (Eleven International 2016) 25.

since "institutional arrangements concerned with multinational resource-sharing problems may benefit from similar measures to improve the rationality and fairness of the collective decisions."[35]

Attention to procedure is justified in the highly complex case of sustainable development, given the lack of agreement on a single definition of the concept and the fact that States have instead opted to focus "on developing greater global consensus on *how* to achieve it, signing and ratifying international treaties where necessary, leading to the emergence of the international law on sustainable development."[36] Exemplifying this notion are innovative sustainable development provisions in international trade and investment agreements that require environmental or sustainability impact assessments, information exchange, and capacity building are procedural in character.[37] The vagueness and essentially contested character of the concept of sustainable development would be better addressed through a procedural, participatory, and deliberative process that allows all affected parties to debate the objectives of and criteria for development, as well as the strategies suitable to the peoples' conditions and development needs. Moreover, the multidimensionality of sustainable development and the concomitant complexity of its operationalization make it necessary to stress the importance of procedure in reaching substantive outcomes.

More generally, this proposition aligns with the concept of "procedural rationality," as developed by Herbert Simon, who assumes a decision-making process that occurs in a world of scarce and incomplete or imperfect information, and argues that substantive rationality would be futile in the absence of procedural means that rationally organize the public's concerns and that force actors to also take into account the indirection effects of certain courses of action.[38] In proposing "procedural meta-norms" to serve as checks and balances for informal international lawmaking, Joost Pauwelyn and his colleagues also cite Simon to support their claim about the universal support that procedural rules could obtain.[39]

[35] Schachter (Introduction n 9) 13–15.
[36] Cordonier Segger (n 34) 6 (emphasis added).
[37] See Cordonier Segger (n 34) 19–23; Cordonier Segger (Introduction n 35) 248–63.
[38] Herbert A Simon, "Rationality as Process and as Product of Thought" (1978) 68 The American Economic Review 1, 13.
[39] Pauwelyn, Wessel, and Wouters (Introduction n 96) 532.

Under international environmental law, procedure can relate to substance in two ways: first, compliance with procedural rules can be an observable indicator of compliance with substantive duties; second, procedural obligations can be a means by which desired substantive outcomes are pursued.[40] As illustrated in Chapter 4, in relation to what I refer to as "un-sustainable" development projects, procedural and substantive duties contained in the environmental assessment requirement are in a close functional relationship. By identifying ecological risks and preventing or minimizing potential damage, procedures facilitate fulfillment of the substantive obligation to respect and protect the environment while undertaking economic activities.

The environmental and social assessment requirement – existing in a number of domestic legislation, treaties, and all of the examined IFIs' safeguard policies – illustrates well the procedure-substance dynamic, in that it is a technique to enable integrated decisionmaking, that is, to reach a decision that takes into account the environmental, economic, and social impacts of a contemplated activity or project, for the purpose of avoiding or mitigating any detrimental effects.

The connection between procedure and substance when conducting environmental assessments can likewise be framed in terms of likelihood and bounded discretion. The exploration and consideration of a greater number of options increase the opportunities to simultaneously further multiple goals, hence, "procedural integration also makes it more likely that substantive goals will be achieved."[41] Otherwise stated, prescribing procedures to compel decisionmakers to take into account all possible perspectives and alternatives regarding a particular project increases the probability that none of the economic, environmental, and social substantive goals underlying such project would be disregarded.[42] More

[40] See Mari Koyano, "The Significance of Procedural Obligations in International Environmental Law: Sovereignty and International Co-operation The Contribution of International Environmental Law to International Law: Past Achievement and Future Expectation" (2011) 54 Japanese Yearbook of International Law 97.

[41] John C Dernbach, "Sustainable Development as a Framework for National Governance" (1998) 49 Case Western Reserve Law Review 1, 52–53, 56.

[42] See Calvert Cliffs' Coordinating Comm. v. US Atomic Energy Commission, 449 F.2d 1109, 1114 (D.C. Cir. 1971). (The statutory procedural requirements ensure that agency decisionmakers take into proper account "all possible approaches to a particular project . . . which would alter the environmental impact and the cost-benefit analysis. Only in that fashion is it likely that the most intelligent, optimally beneficial decision will ultimately be made.").

crucially, these procedures help ensure that foreseeable harms to people and the environment are minimized, if not entirely avoided, through measures that align with the preferences, practices, and values of those directly affected.

Significantly, consistent with the Rio Declaration's emphasis on procedural techniques, most domestic environmental assessment legislation also require another key procedure that is meant to achieve a substantive goal: public participation is required to inform and to solicit input from persons who stand to be affected by the activity.[43]

For example, the National Environmental Policy Act (NEPA),[44] the US law requiring the conduct of environmental assessment for federal projects, provides that before major federal actions affecting the quality of the human environment are undertaken, a statement shall be made detailing, among others, the environmental impact of the action, any unavoidable adverse environmental effects, and alternatives to the proposed action.[45] NEPA also provides that such detailed statement and the comments of relevant agencies, which are authorized to develop and enforce environmental standards, shall be made available to the public.[46] Publication of the environmental impact statement (EIS) serves interrelated purposes: it assures the public that the agency has considered environmental factors in its decisionmaking process and, more importantly, it enables affected people and communities to participate by serving as "a springboard for public comment."[47] With regard to the consideration of alternatives, "what is required is information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned."[48] The range of alternatives that must be considered and the extent to which the agency must discuss them are governed by a "rule of reason."[49]

Significantly, in one of the early NEPA cases, the DC Circuit Court of Appeals held that instead of establishing environmental protection as an

[43] See Nicholas Robinson, "International Trends in Environmental Impact Assessment" (1992) 19 Boston College Environmental Affairs Law Review 591, 594; Cordonier Segger (Introduction n 35) 99.
[44] 42 U.S.C. §§ 4321–47 (1970).
[45] NEPA, Sec. 102(C) (42 U.S.C. § 4332).
[46] Ibid.
[47] Robertson v. Methow Valley Citizens, 490 U.S. 332, 349 (1989).
[48] Natural Resources Defense Council v. Morton, 458 F.2d 827, 836 (D.C. Cir. 1972).
[49] Sierra Club v. Watkins, 808 F. Supp. 852, 871 (D.D.C. 1991).

exclusive goal,[50] the statute simply demands "a reordering of priorities, so that environmental costs and benefits will assume their proper place along with other considerations," and the procedural provisions, which establish a strict standard of compliance, "are designed to see that all federal agencies do in fact exercise the substantive discretion given them" by ensuring that "presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations."[51] The US Supreme Court likewise held that the sweeping substantive policy goals in NEPA Section 101 are "realized through a set of 'action-forcing' procedures that require that agencies take a 'hard look' at environmental consequences."[52] However, while "these procedures are almost certain to affect the agency's substantive decision . . . NEPA itself does not mandate particular results, but simply prescribes the necessary process."[53] Nevertheless, some studies show that the early identification of environmental impacts during project preparation does in fact assist in anticipating certain damages and in preventing or mitigating them.[54]

Relatedly, the European Court of Human Rights (ECtHR) held that, because EIAs represent a process "where substantive environmental obligations meet (and merge with) individual rights of information, participation, and access to justice," any legitimate EIA should uphold the participatory rights of the concerned public throughout the decision-making process, lest the right to private life and/or the right to life are violated.[55] The ECtHR also found a relation between the right to private

[50] In contrast, among the stated reasons of the European Union's Environmental Impact Assessment (EIA) Directive (2011/92/EU) for requiring the assessment of a project's effects on the environment are "to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life."

[51] Calvert Cliffs' Coordinating Committee v. U.S. Atomic Energy Commission, 449 F.2d 1109, 1112–13 (D.C. Cir. 1971).

[52] Robertson v. Methow Valley Citizens, 490 U.S. 332, 350 (1989).

[53] Ibid.

[54] See, e.g., Robinson (n 46) 594; Wolfgang Wende, "Evaluation of the Effectiveness and Quality of Environmental Impact Assessment in the Federal Republic of Germany" (2002) 20 Impact Assessment and Project Appraisal 93; Matthew Cashmore, Alan Bond, and Dick Cobb, "The Role and Functioning of Environmental Assessment: Theoretical Reflections upon an Empirical Investigation of Causation" (2008) 88 Journal of Environmental Management 1233.

[55] See Riccardo Pavoni, "Environmental Rights, Sustainable Development, and Investor-State Case Law: A Critical Appraisal" in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann,

life and the access to procedural safeguards, such as public consultation, in the context of the authorization of resource extraction activity.[56]

Investment arbitration tribunals have likewise reached comparable conclusions and are thereby "contributing to the emergence of a global jurisprudence which have assessed the legitimacy and propriety of EIA in the light of the transparency and public participation criteria," although they do not expressly cite the parallel jurisprudence of human rights courts and the ICJ.[57] As this book demonstrates, the IFIs' independent accountability mechanisms are similarly beginning to better appreciate and flesh out the contribution of impact assessments to the realization of environmental and social protection.

In international investment law, environmental impact assessments have been found to be "highly material to the outcome of the decision making process," thereby affirming the connection between substance and procedure.[58] Indeed, this book agrees with and corroborates the powerful conclusion of Alan Boyle and David Freestone that although there does not *yet* exist an explicit obligation (of result) under international law for development to be sustainable, what are emerging from treaty and customary law are requirements to engage in conduct and procedures facilitating sustainable development.[59]

Although the "proceduralization" of international environmental law is problematic to some,[60] because turning to procedure merely postpones a decision on the States' substantive rights and duties, this view underestimates the value of communication, especially constant and continuous interaction, in influencing attitudes and shaping behavior. It also ignores the growing trend of enabling non-State actors to express their views and participate, albeit in a limited capacity, in international dispute settlement within trade and investment law through procedures, such as acceptance of *amicus curiae* briefs.[61]

and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 546.

[56] Ibid. 549–50.

[57] Vadi (n 33) 202.

[58] Ibid. 171.

[59] Boyle and Freestone (Chapter 1 n 1) 17.

[60] See, e.g., Martti Koskenniemi, "Peaceful Settlement of Environmental Disputes" (1991) 60 Nordic Journal of International Law 73, 84–85.

[61] See Philippe Sands, "Turtles and Torturers: The Transformation of International Law" (2001) 33 New York University Journal of International Law and Policy 527, 543.

Indeed, the idea of accomplishing substantive obligations through procedural requirements has previously been explored and pursued in other areas of international economic law. The WTO Appellate Body, for instance, proceduralized the substantive nondiscrimination (i.e., most-favored-nation and national treatment) obligations by requiring WTO Members to engage in prior consultation and good faith negotiation with States whose economic interests are affected by their measures, with a view to achieving multilateral consensus.[62] Similarly, the creation of the International Centre for Settlement of Investment Disputes (ICSID) as part of the World Bank Group – at a time of uncertainty regarding the contents of international investment law – followed the "programmatic formula 'procedure before substance'": the law was expected to develop and eventually mediate the persistent disagreement about substantive issues (e.g., meaning of expropriation or fair and equitable treatment, determination of due compensation) through the process of adjudication.[63]

The ICJ itself has thus far focused on the procedural aspects of international environmental obligations, as shown in the *Pulp Mills* case, where it recognized a functional link between procedural obligations (e.g., notification, consultation, and negotiation), on the one hand, and the fulfillment of substantive obligations such as conservation of a shared resource, on the other.[64] According to the Court, the obligation to inform facilitates cooperation between treaty parties that is necessary in fulfilling the customary obligation for a State "to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State."[65] The ICJ also recognized the importance of procedural duties to inform and notify in protecting a shared resource through close and continuous inter-State cooperation.[66] Arguably, this ruling can be

[62] See Armin von Bogdandy, "Legitimacy of International Economic Governance: Interpretative Approaches to WTO Law and the Prospects of Its Proceduralization" in Stefan Griller (ed), *International Economic Governance and Non-economic Concerns: New Challenges for the International Legal Order* (Springer Vienna 2002) 128–29.

[63] Armin von Bogdandy and Ingo Venzke, "On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority" (2013) 26 Leiden Journal of International Law 49, 70–71.

[64] *Pulp Mills on the River Uruguay* (Argentina v. Uruguay) (Judgment) [2010] ICJ Rep 14, 51, para 81 (hereinafter, "Pulp Mills Judgment").

[65] Ibid. 55–56, paras 101–2.

[66] Ibid. 51, para 81.

attributed to the specific circumstances, that is, facts and applicable law, of this dispute between Argentina and Uruguay.[67] It nonetheless acknowledged that some general links do exist between substance and procedure.

International cooperation, which often involves reconciling substantive differences among States' interests and objectives, has indeed been obtained through procedural frameworks such as reporting and monitoring mechanisms. A procedural approach to substantive institutional reform is at once "a lawyerly response to the complex realities [especially at the international level]" and a pragmatic one that prudently considers existing "concrete differences in politics [and] resources."[68]

Moreover, proceduralization could facilitate substantiation through experimentation of solutions and continuous reasoned exchanges among all stakeholders.[69] With regard to the value of repeated conversations, Alison Peck's interesting perspective based on the Jungian solution to the ego/shadow opposition is worth reiterating: "What is necessary for sustainable development to be transformative is not that opposites will be eliminated, nor that they will be 'harmonized' in the sense of ceasing to be opposites," rather, "the process is the solution," meaning, these opposites should simply be allowed to engage in "open conflict and open collaboration" and constant dialogue.[70]

This monograph concentrates on the procedural aspects of sustainable development to arrive at a firmer grasp of the substance of the concept and its normative implications. The position that "a practical procedure is worth a thousand pious pronouncements of principle"[71] is thus adopted here. After all, more concrete and cooperative means of addressing political and economic issues underlying most environmental and

[67] See Jutta Brunnée, "Procedure and Substance in International Environmental Law: Confused at a Higher Level?" (2016) 5 ESIL Reflection <https://esil-sedi.eu/post_name-123/>.

[68] Chi Carmody, Frank J Garcia, and John Linarelli, "Conclusion: An Agenda for Research and ch and Action" in Chi Carmody, Frank J Garcia, and John Linarelli (eds), *Global Justice and International Economic Law: Opportunities and Prospects* (Cambridge University Press 2012) 291.

[69] See Joanne Scott, "Integrating Environmental Concerns into International Economic Law" in Stefan Griller (ed), *International Economic Governance and Non-Economic Concerns: New Challenges for the International Legal Order* (Springer Vienna 2002) 379.

[70] Peck (Introduction n 60) 177–78.

[71] Barry Barton, "Underlying Concepts and Theoretical Issues in Public Participation in Resources Development" in Donald N Zillman, Alastair R Lucas, and George W (Rock) Pring (eds), *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (Oxford University Press 2002) 103–4 (citations omitted).

social problems are necessary, albeit often not sufficient, steps toward sustainable development.

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Through the foregoing conceptual and theoretical discussions, this chapter sought to expound one of the book's claims: that implementing the principle of integration, which forms the substantive core of sustainable development, entails participatory procedures. Otherwise stated, public participation serves as the procedural means to implement the principle of integration. As shown above, a primarily procedural approach to sustainable development rests on sound and established legal theory, as well as on the jurisprudence and literature in international environmental law, international human rights law, and international economic law, recognizing how procedures and processes can promote and lead to substantive outcomes.

A further refinement of this point stems from the administrative law insight that meaningful public participation requires transparency, which, in turn, is key to accountability and legitimacy of actors and decisions, especially at the international level. Good governance is accordingly also crucial to sustainable development. In other words, public participation, transparency, and accountability often work together not only to improve the IFIs' efficacy and legitimacy but also to operationalize the multidimensional and normatively charged goals constituting sustainable development.

4

Safeguard Systems

Legal Institutional Framework for Sustainability of Development Projects

The procedure–substance connection discussed in Chapter 3 is essential to understanding how IFIs conceptualize and implement sustainable development through their safeguard systems. This explanation is, in turn, valuable in appreciating the participation of IFIs and other non-State actors in the international lawmaking process on sustainable development.

At the core of the World Bank's evolving mandate and contribution to international law and the sustainable development agenda are: (i) its formulation of operational policies and procedures addressing the environmental and social aspects of development projects and (ii) the establishment of an independent accountability mechanism that investigates complaints from individuals or communities allegedly harmed by the Bank's noncompliance with its own policies. The policies and the mechanism together form a "safeguard system," which is key to how the Bank and other IFIs give legal and practical effect to various principles constituting sustainable development, particularly the principles of integration and public participation that were discussed in Chapter 3. The safeguard system regulates the distribution of expected actions and decisionmaking authority among the IFIs, borrowing States, and non-State actors affected by development projects. Significantly, prior to the formation of the World Bank's safeguard system, it "was a 'lawless institution,' insofar as it was insulated from any legal responsibilities to people directly affected by its actions."[1]

This chapter examines the texts of the World Bank's environmental and social policies ("safeguard policies" or "safeguards"). It also provides a detailed description of the Inspection Panel's functions, explaining

[1] Jonathan Fox, "Introduction: Framing the Inspection Panel" in Dana Clark, Jonathan Fox, and Kay Treakle (eds), *Demanding accountability: civil-society claims and the World Bank Inspection Panel* (Rowman & Littlefield 2003) xix.

especially the way it interprets and applies the safeguards. Using the analytical framework set out in the Introduction, this chapter demonstrates the book's distinctive treatment of these policies and the accountability mechanisms' reports as international legal materials.

4.1 Environmental and Social Policies

Guided by the vision of moving beyond a "do no harm" approach toward a "maximize development gains" strategy, the World Bank safeguard policies translate global aspirations and commitments – of both the Bank and its Borrowers – regarding environmental and social sustainability by, among others, ensuring that project-affected individuals or communities are not prejudiced and "particular consideration [is given] to Indigenous Peoples, minority groups, and those disadvantaged or vulnerable, especially where adverse impacts may arise or development benefits are to be shared."[2] The formulation of the safeguard policies is a noteworthy and welcome progress, because these policies "mark important new ground in international law, and offer an avenue to advance the integration of economic, social and environmental policy dimensions in support of sustainable development, a basic goal of the international agenda for many years."[3] This section analyzes these policies and identifies specific aspects that translate the concept of sustainable development into operational terms.

The safeguard system's first component consists of a set of environmental and social policies, which the World Bank previously labeled "operational policies and procedures (OPPs)."[4] As safeguards, OPPs elaborate the processes and procedures deemed necessary to make development sustainable. How these instruments perform this role is best illustrated through the intertwined manifestation of the principles of integration and public participation (discussed in Chapter 3) in the safeguard policies concerning (a) environmental assessment, (b) indigenous peoples, and (c) involuntary resettlement. While the succeeding discussion heavily focuses on the World Bank and the Inspection

[2] The World Bank, "A Vision for Sustainable Development" in *The World Bank Environmental and Social Framework* (2017), paras 5 and 6.

[3] Edith Brown Weiss and others, *International Law for the Environment* (West Academic 2016) 1176.

[4] Throughout the book, the terms "standards" and "policies" are used interchangeably to account for the variance among the MDBs.

Panel, it bears emphasizing that all the major MDBs have predominantly similar safeguard policies and accountability mechanisms.[5]

The OPPs' evolution and the concomitant emergence of a safeguard system parallel the evolution and expansion of the World Bank's mandate (discussed in Chapter 2). Hence, the incorporation into the Bank's operations of noneconomic concerns, such as environmental protection and the rights of indigenous peoples and persons displaced by development projects, had similarly been gradual and incremental.

In 2018, the World Bank transformed the OPPs into the Environmental and Social Framework (ESF), which has three components: (i) the World Bank's Vision for Sustainable Development, (ii) the World Bank Environmental and Social Policy for Investment Project Financing, and (iii) ten Borrower Requirements or Environmental and Social Standards (ESS). The OPPs, that is, the "older" safeguard policies, are also examined in detail here, since they continue to apply to existing projects, so "the two systems will run in parallel for an estimated seven years"[6] or until 2025. The ESF's overall purpose is to translate the Bank's aspirations regarding environmental and social sustainability "into practical, project-level applications within the context of the Bank's mandate."[7] In line with this mandate, the Bank envisions moving beyond "do no harm" toward maximization of development gains. The ESF forms the cornerstone of the World Bank's work on ending extreme poverty and promoting shared prosperity. These "corporate goals" are underpinned by the sustainability commitments to "secur[e] the long-term future of the planet, its people and its resources, ensur[e] social inclusion, and limit[] the economic burdens on future generations."[8]

Apart from directing the behavior of IFI management and staff, most of the safeguard policies contain requirements[9] that a borrowing State or a private entity should fulfill. These policies are incorporated and stipulated as conditions in the loan and credit agreements that are enforceable under international law through the law of treaties.[10] One crucial change resulting from the latest revision process is a clearer delineation of duties

[5] I discuss the similarities and differences among the IFIs' safeguard systems in Chapter 6.
[6] The World Bank, "Environmental and Social Policies" <http://www.worldbank.org/en/projects-operations/environmental-and-social-policies>.
[7] The World Bank, "A Vision for Sustainable Development" (n 2) para 9.
[8] Ibid. para 1.
[9] See Alvarez, *IOs as Law-Makers* (Introduction n 127) 235–36.
[10] See Boisson de Chazournes, "Policy Guidance and Compliance" (Chapter 2 n 143) 290, 299.

between the World Bank and the borrowing State. In general, the requirements enumerated in each of the ten ESS are to be fulfilled by the Borrower, while the Bank imposes upon itself the performance of environmental and social due diligence responsibilities. Most relevant here is this specification:

> The Bank's due diligence responsibilities will include, as appropriate: (a) reviewing the information provided by the Borrower relating to the environmental and social risks and impacts of the project, and requesting additional and relevant information where there are gaps that prevent the Bank from completing its due diligence; and (b) providing guidance to assist the Borrower in developing appropriate measures consistent with the mitigation hierarchy to address environmental and social risks and impacts in accordance with the ESSs. The Borrower is responsible for ensuring that all relevant information is provided to the Bank so that the Bank can fulfil its responsibility to undertake environmental and social due diligence in accordance with this Policy.[11]

This division of labor is material for determining the jurisdiction or scope of investigation of independent accountability mechanisms. The Inspection Panel, for example, is only mandated to determine the existence of harm arising from noncompliance by Bank management and staff with the OPPs.

4.1.1 Environmental Assessment

Environmental assessments "are now a well-established international and domestic legal method for States to integrate environmental concerns into development and decision-making and to make better-informed decisions."[12] The United Nations Environment Programme (UNEP) defines "environmental impact assessment" (EIA) as "an examination, analysis and assessment of planned activities with a view to ensuring environmentally sound and sustainable development."[13] Definitions in the Espoo Convention[14] and the Rio

[11] World Bank Environmental and Social Policy for Investment Project Financing (hereinafter, "WB Environmental and Social Policy"), para 32.

[12] Vadi (Chapter 3 n 33) 178 (citations omitted).

[13] UNEP, *Goals and Principles of Environmental Impact Assessment,* January 16, 1987 <https://www.elaw.org/system/files/unep.EIA_.guidelines.and_.principles.pdf>.

[14] Espoo Convention, Art. I (vi): "'Environmental impact assessment' means a national procedure for evaluating the likely impact of an activity on the environment."

Declaration[15] are almost similar, with the former having a broader scope, insofar as it does not qualify the gravity of the adverse environmental impact that would trigger the conduct of an assessment.[16]

Because there is no single definition of EIA under international law, the specific requirements and practices differ depending on the provisions of the international instrument or domestic legislation and, in some cases, the interpretation thereof by courts or quasi-judicial bodies. In the development finance context, the World Bank operationalizes sustainable development by enumerating the components of the prescribed environmental assessment. It begins by defining "environmental and social assessment" (ESA) as a process of analyzing and planning to ensure the identification, avoidance, minimization, reduction, or mitigation of environmental and social impacts of a development project.[17]

As has previously been the case under the OPPs,[18] it is the borrowing State's duty to conduct the ESA, conforming to this prescription:

> The assessment will evaluate the project's potential environmental and social risks and impacts in its area of influence; examine project alternatives; identify ways of improving project selection, siting, planning, design, and implementation in order to apply the mitigation hierarchy for adverse environmental and social impacts and seek opportunities to enhance the positive impacts of the project. The environmental and social assessment will include stakeholder engagement as an integral part of the assessment, in accordance with ESS 10.[19]

The "intent and spirit"[20] of the World Bank's Environmental Assessment (EA) Policy, the Inspection Panel noted, compel the actor required to conduct the EA to "give[] *integrated consideration* to the

[15] Principle 17: "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority."

[16] UNEP, *Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach* (2004) <https://wedocs.unep.org/bitstream/handle/20.500.11822/8753/Environmental_impact_assessment.pdf?sequence=3&amp%3BisAllowed>.

[17] ESS1 ("Assessment and Management of Environmental and Social Risks and Impacts"), Annex 1, para 1.

[18] ESS1, para 1; OP 4.01, para 4.

[19] ESS1, para 24. See also Operational Policy (OP) 4.01, para 2.

[20] World Bank Inspection Panel, *Mumbai Urban Transport Project*, Investigation Report, December 21, 2005, para 640 (hereinafter, "WBIP Mumbai Urban Transport Investigation Report").

natural and social aspects of the Project."[21] The policy's emphasis on considering natural and social conditions in an integrated manner manifests how the assessment is intended to advance sustainable development. Indeed, one author lauded the considerable detail in the Bank's OP 4.01 that "provid[ed] practical and needed information for EA preparers and reviewers" although it "did not state the goals of sustainable development quite as elegantly or succinctly."[22]

The relationship between IFIs' safeguards, particularly regarding environmental assessment, and the objective of sustainable development is aptly expressed in the following disquisition by the EBRD Independent Recourse Mechanism:

> 12. [O]ne of the compliance issues to be addressed is whether any EBRD actions in respect of the Project violates the objective of sustainable development and/or the related principle of inter-generational equity. *The main difficulty in examining compliance with the concept of sustainability is that it is usually expressed in general terms* as a compromise between protection of the natural environment and the requirements of economic development.
>
> 13. *The requirements of sustainable development are often considered by means of an environmental impact assessment* ("EIA"), and this is the approach taken under the EBRD Environmental Policy. . .. [A]ny determination as to whether a Bank action or failure to act in respect of the Project amounts to a violation of the objective of sustainable development, is necessarily bound up with, and dependent upon, an *examination of the adequacy of the EIA* carried out.[23]

The stakeholder engagement and information disclosure requirements are also for the Borrower to execute, by providing stakeholders with adequate information about the project throughout its life cycle and engaging with them in a way that suits their interests and properly takes into account the project's potential environmental and social risks and impacts.[24]

A noteworthy addition in the ESF is a specification of the project-related environmental and social risks and impacts that "the Bank will take into account in its due diligence":

[21] Ibid. para 638 (emphasis added). See also OP 4.01, para 3.
[22] Civic (Introduction n 40) 249 (citations omitted).
[23] EBRD Vlorë Thermal Compliance Review Report (emphasis added).
[24] ESS1, para 51. See also ESS10.

> (a) Environmental risks and impacts, including: (i) those identified in the World Bank Group Environmental, Health, and Safety Guidelines (EHSGs); (ii) those related to community safety (including dam safety and safe use of pesticides); (iii) those related to climate change and other transboundary or global risks and impacts; (iv) any material threat to the protection, conservation, maintenance and restoration of natural habitats and biodiversity; and (v) those related to ecosystem services and the use of living natural resources, such as fisheries and forests; and
>
> (b) Social risks and impacts, including: (i) threats to human security through the escalation of personal, communal or interstate conflict, crime or violence; (ii) risks that project impacts fall disproportionately on individuals or groups who, because of their particular circumstances, may be disadvantaged or vulnerable; (iii) any prejudice or discrimination toward individuals or groups in providing access to development resources and project benefits, particularly in the case of those who may be disadvantaged or vulnerable . . . (vi) impacts on the health, safety and well-being of workers and project-affected communities; and (vii) risks to cultural heritage.[25]

Another new important provision now explicitly includes in the assessment the evaluation of "climate change mitigation, adaptation and resilience issues, and impacts on threatened or depleted migratory species and their habitats" and further expands the scope to "potentially significant project-related transboundary and global risks and impacts, such as . . . emissions of short- and long-lived climate pollutants."[26]

In lieu of the prior classification of projects into Category A ("likely to have significant adverse environmental impacts that are sensitive, diverse, or unprecedented")[27] or Category B, under the new ESF, "the Bank will classify all projects . . . into one of four classifications: *High Risk, Substantial Risk, Moderate Risk* or *Low Risk*." The new classification scheme considers "relevant issues, such as the type, location, sensitivity, and scale of the project; the nature and magnitude of the potential environmental and social risks and impacts," as well as the Borrower's capacity and commitment to manage such risks and impacts in accordance with the ESSs.[28] The classification of a project as High Risk or Substantial Risk obliges the borrowing State to hire independent

[25] WB Environmental and Social Policy, para 4.
[26] ESS1, para 35.
[27] OP 4.01, para 8(a).
[28] WB Environmental and Social Policy, para 20.

specialists who will conduct the ESA.[29] Additionally, "the Borrower may be required to engage one or more internationally recognized experts" for projects classified as High Risk "or contentious, or that involve serious multidimensional environmental or social risks or impacts."[30] However, the ESF does not define any threshold for classifying projects as "contentious" or for qualifying risks or impacts as "serious." Such definitions are necessary, given that project classification determines the administrative, financial, and legal burdens that a borrowing State would have to bear.

Apart from project classification, the proper and timely identification of the affected population during the planning phase is essential, because it determines the next steps to be taken – for example, whether to apply a particular environmental and social standard and to prepare the appropriate development plan. Ultimately, such an early decision point spells the difference between protection and disregard of a vulnerable group. In the Inspection Panel's words, "a safeguard postponed is a safeguard denied, because by failing to identify beforehand the affected population, the Bank policies requiring consultation and participation of that population could not be properly followed."[31] The Panel has repeatedly held that consultation with the local population, particularly the project-affected people, during the design and preparation phases is critical in considering alternatives and in carefully looking for ways to prevent or mitigate the potential social and/or environmental harms associated with a project.

The Bank elaborates and further endorses the principle of integration by now clearly and expressly requiring an assessment of both environmental *and* social dimensions of a development project. Its new ESF directs the conduct of an environmental and social assessment with the purpose in mind that it "will consider, *in an integrated way,* all relevant, direct, indirect and cumulative environmental and social risks and impacts of the project."[32] This statement aligns with the general consensus that the conduct of environmental and/or social impact assessment is a concrete implementation of the principle of integration. Procedures such as the ESA operationalize sustainable development, by requiring actions that ensure that environmental and social concerns are taken into

[29] ESS1, para 25.
[30] ESS1, para 33.
[31] World Bank Inspection Panel, *Cambodia: Forest Concession Management and Control Pilot Project*, Investigation Report, March 30, 2006, para 212.
[32] ESS1-Annex 1, para 3 (emphasis added).

account together with the economic and/or financial aspects of the development project, which is designed, implemented, and monitored by the borrowing State, as the primary actor, but with substantial involvement by non-State stakeholders. Further, the consultative components of these impact assessments concretize another sustainable development principle, namely, the principle of public participation.

The positive aspects of public participation are also mentioned in an earlier iteration of ESS1, wherein the borrowing State is expected to fully take into account the views of affected groups and local nongovernmental organizations (NGOs) in project design, implementation, and in particular in the preparation of EAs, because public consultation serves to elucidate "both the nature and extent of any social or environmental impact and the acceptability of proposed mitigatory measures, particularly to affected groups."[33] Significantly, under the ESF, Borrowers are expected to give greater attention to "identify[ing] those project-affected parties (individuals or groups) who . . . may be disadvantaged or vulnerable' due to their age or their separation from family or community"[34] and to further identify individuals or groups, whose concerns and priorities "may require different, or separate, forms of engagement."[35] This formulation has expanded the potential bases of vulnerability, which was previously limited to select groups, namely, involuntarily displaced persons or communities and indigenous peoples.

In sum, environmental and social assessment links integration and public participation, thereby fostering sustainable development outcomes in IFI-supported projects in two mutually reinforcing ways: (i) requiring identification, consideration, and management of the environmental and social impacts of a development project and (ii) ensuring a community's involvement, understanding, and opinion of such undertaking.

4.1.2 Indigenous Peoples

The former World Bank policy on indigenous peoples[36] is quite atypical, because it expressly mentions "human rights" and "sustainable development" in one sentence, and thus implicitly rejects the anachronistic conception of the Bank as a purely international *economic* organization.

[33] Operational Directive (OD) 4.01, para 19.
[34] ESS10 ("Stakeholder Engagement and Information Disclosure"), para 11.
[35] ESS10, para 11.
[36] WB OP 4.10, para 1.

The existence of a separate and particular policy or standard concerning indigenous peoples is believed to "contribute[] to poverty reduction and sustainable development by ensuring that [Bank-supported projects] enhance opportunities for [distinct social and cultural groups] to participate in, and benefit from, the development process in ways that do not threaten their unique cultural identities and well-being."[37] Taking note of previous pronouncements by the Inspection Panel, the World Bank specified in detail the scope of application of ESS7, such that the latter expressly recognizes that the terminologies used to refer to "indigenous peoples" differ according to national context and therefore applies "whenever Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities . . . are present in, or have collective attachment to a proposed project area, *as determined during the environmental and social assessment*."[38] The Indigenous Peoples Standard further clarifies that it will apply regardless of (i) whether the impacts on indigenous peoples are positive or negative, (ii) the significance of such impacts, and (ii) whether there are "discernible economic, political or social vulnerabilities."[39]

Like other safeguards, ESS7 tasks the Borrower to "assess the nature and degree of the expected direct and indirect economic, social, cultural (including cultural heritage), and environmental impacts on [indigenous peoples] who are present in, or have collective attachment to, the project area."[40] It is also for the borrowing State to craft a culturally appropriate consultation strategy and to determine how these affected groups will participate in project design and implementation.[41] Determining the existence of broad community support under the Indigenous Peoples Policy is more difficult when a comprehensive and appropriate disclosure of information about the project is absent.[42]

In recognition of the special circumstances of groups qualifying as indigenous peoples, including their particular vulnerability to lose their

[37] ESS7 ("Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities"), para 2. [hereinafter, "Indigenous Peoples Standard"]
[38] ESS7, paras 6 and 7 (emphasis added).
[39] ESS7, para 7.
[40] ESS7, para 12.
[41] ESS7, para 12.
[42] Inspection Panel, *Indigenous Peoples*, Emerging Lessons Series No. 2 (October 2016) <http://documents.worldbank.org/curated/en/447361478156710826/pdf/109710-REVISED-PUBLIC-IP-lessons-text-10-31-16web-links.pdf>, 9 (hereinafter, "Inspection Panel, Emerging Lessons: Indigenous Peoples").

land and access to natural and cultural resources, the Borrower is expected under ESS7 to fulfil additional requirements – that is, on top of those under ESS1 (ESA) and ESS10 (Stakeholder Engagement). Foremost of these requirements is obtaining the affected indigenous peoples' free, prior and informed consent (FPIC) when the project will:

(a) have adverse impacts on land and natural resources subject to traditional ownership or under customary use or occupation;
(b) cause relocation of [indigenous peoples] from land and natural resources subject to traditional ownership or under customary use or occupation; or
(c) have significant impacts on [indigenous peoples'] cultural heritage that is material to the identity and/or cultural, ceremonial, or spiritual aspects of the affected [indigenous peoples'] lives.[43]

While disclaiming the existence of a universally accepted legal definition of FPIC, it is important that the World Bank unequivocally avows not to continue supporting the project in the absence of the indigenous peoples' FPIC, or at least those aspects of the project for which such consent cannot be ascertained.[44] ESS7 could be viewed as an improvement to OP4.10, since the revision has accorded a more central place for FPIC and provided further specification about its application. In the ESF context, FPIC "builds on and expands the process of meaningful consultation [which is required for other project-affected people] ... and will be established through good faith negotiation between the Borrower and affected [indigenous peoples]."[45]

The interrelated requirements of consultation and of preparing development plans are, according to the Inspection Panel, intended to adequately identify the indigenous peoples' "'felt' need," including long-term projects "such as literacy and numeracy classes, maternal and child health, and self help groups" rather than marginal activities in the project area that lack depth and connection.[46] Following this finding, the Panel urged Bank Management to ensure that the project proponent, a private entity, "take[s] steps to continue to improve relations with local civil

[43] ESS7, para 24.
[44] WB Environmental and Social Policy, para 55. See also ESS7, para 27.
[45] ESS7, para 25(b).
[46] World Bank Inspection Panel, *India Coal Sector Environmental and Social Mitigation Project*, Investigation Report, November 25, 2002, para 348 (hereinafter, "WBIP India Coal Sector Investigation Report").

society groups ... and to maintain and strengthen a participatory, bottom-up approach to preventing and ameliorating the environmental and social impacts of their mines on affected peoples, especially the most vulnerable, including the tribals."[47]

In the particular context of projects affecting indigenous peoples and their rights to natural, economic, and cultural resources, activities implementing the sustainable development principle of public participation include direct consultation to identify local preferences, incorporating indigenous knowledge into project approaches, and "appropriate early use of experienced specialists."[48] When FPIC is required, the Borrower is enjoined to engage independent specialists to help identify project risks and impacts.[49]

In evaluating its experiences with the Indigenous Peoples policy, the Inspection Panel mentioned some challenges in implementing the participation requirements:

> Panel investigations have found particular instances of non-compliance with the policy with respect to: (i) consulting with individuals or segments of the community who are not the legitimate representatives chosen by the indigenous community; (ii) not providing information to Indigenous Peoples in a culturally appropriate manner, form, and language, thereby reducing their opportunities to influence project design and implementation; and (iii) assuming that an agreement to discuss the project and an early interest in it constitutes broad community support.[50]

Still, community participation, the Panel stressed, is the "first and fundamental" prerequisite for a successful indigenous peoples plan, and the safeguard policy intends for the preparation of such document "to be driven by the people."[51] In another case, the Panel elaborated that, in order for the Bank to adequately assist the borrowing State, especially in strengthening local legislation, there should be a proper assessment of the legal framework and potential vulnerabilities and issues of importance to indigenous peoples, and the results of such assessment is embodied in an

[47] Ibid. para 349.
[48] OD 4.20, para 8 (italics in the original). See also World Bank Inspection Panel, *Democratic Republic of Congo: Transitional Support for Economic Recovery and Emergency Economic and Social Reunification Support,* Investigation Report, August 31, 2007, para 219 (hereinafter, "WBIP Congo Transitional Support Investigation Report").
[49] ESS7, para 24.
[50] Emerging Lessons: Indigenous Peoples, at 8.
[51] WBIP India Coal Sector Investigation Report (n 45) para 327.

indigenous peoples development plan.[52] Remarkably, a department of the World Bank found that even though "Informed Participation" is difficult, costly, and time-consuming, it "is a basic premise of [the indigenous peoples policy], the very essence of its requirements," and in cases where it has been undertaken it has resulted in positive effects for indigenous peoples.[53]

As expounded in Chapter 5, several IFIs are likewise beginning to require, albeit still to a limited extent, FPIC, in accordance with international law – mainly embodied in the ILO Convention No. 169[54] and the United Nations Declaration on the Rights of Indigenous Peoples[55] (UN DRIP).

4.1.3 *Involuntary Resettlement*

Further illustrating the relationship between the safeguards and international sustainable development law, a number of requirements under the IFIs' involuntary resettlement policies are geared toward fulfilling the SDGs, specifically Goals 6 ("Ensure availability and sustainable management of water and sanitation for all"), 7 ("Ensure access to affordable, reliable, sustainable and modern energy for all"), 9 ("Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation"), and 11 ("Make cities and human settlements inclusive, safe, resilient and sustainable"). This connection reinforces the normative potential and international legal significance of the safeguards, inasmuch as they address activities that are the subject of States' multilateral political commitments. Regrettably, although these requirements likewise concern certain human rights, such obligations are not recognized or stated explicitly as such in the safeguard policies.

What characterizes "involuntary resettlement" is the absence of a right to refuse land acquisition or land use restrictions on the part of the

[52] WBIP Congo Transitional Support Investigation Report (n 47) paras 244, 261.

[53] World Bank Operations Evaluation Department, *Implementation of Operational Directive 4.20 on Indigenous Peoples: An Evaluation of Results* (2003) <http://documents.worldbank.org/curated/en/692341468761684285/pdf/257541OD04–20.pdf>, para 4.12.

[54] International Labour Organization, *C169 – Indigenous and Tribal Peoples Convention,* June 27, 1989.

[55] GA Res 61/295, United Nations Declaration on the Rights of Indigenous Peoples (September 13, 2007).

displaced persons or communities.[56] The World Bank ESF begins with a clear expression of policy that involuntary resettlement should be avoided in development projects, since experience and research have shown "that physical and economic displacement, if unmitigated, may give rise to severe economic, social and environmental risks," such as dismantling of local production systems, weakening of community institutions and social networks, and loss of cultural identity.[57]

As is also the case with the ESA and the Indigenous Peoples Standards, the borrowing State is the one that prepares a resettlement plan or a resettlement policy framework to address the economic, environmental, and social impacts resulting from project-related land acquisition or land use restriction.[58] The Involuntary Resettlement Standard requires continuous disclosure of relevant information to, and meaningful participation of, displaced persons and their communities, as well as the host communities receiving them, regarding the planning, implementation, and monitoring of alternative project designs, resettlement options, compensation process, and livelihood restoration activities.[59] The consultation must be a dialogue, a "two-way conversation," wherein project-affected people are not only informed of resettlement options but also given a voice and an opportunity to "actively participate in the discussion and selection of such options."[60] Thus, the requisite consultation with involuntarily resettled persons and the host/receiving communities has a rationale similar to that of consulting indigenous peoples.

The Inspection Panel stressed the direct correlation between meaningful consultation and community participation, on the one hand, and the success of an involuntary resettlement plan, on the other. Success in this case is measured against the plan's suitability and responsiveness to the unique needs of the displaced individuals and/or communities.[61] Interpreting the African Development Bank's (AfDB) involuntary

[56] ESS5 ("Land Acquisition, Restrictions on Land Use and Involuntary Resettlement"), para 1.
[57] Ibid. para 2.
[58] See ESS5-Annex 1, in relation to ESS5, para 21.
[59] ESS5, para 17.
[60] Inspection Panel, *Involuntary Resettlement,* Emerging Lessons Series No. 1 (April 2016) <http://documents.worldbank.org/curated/en/521101467989568006/pdf/105660-NWP-Box394887B-PUBLIC-PUBDATE-4-12-16.pdf>, 8 (hereinafter, "Inspection Panel, Emerging Lessons: Involuntary Resettlement")
[61] Ibid. 8.

resettlement policy, the relevant accountability mechanism[62] likewise emphasized the connection between the timeliness of compensation and the requirement to treat displaced persons equitably: "The long period of uncertainty which the resettlers have had to endure ... and the harm that this has caused some of them does not comply with the equitable treatment required [by the involuntary resettlement policy]."[63] It then explained that, meaningfully consulting the project-affected people about their preferred compensation (amount and method) and the schedule of their resettlement could have tempered the offending uncertainty and thereby contributed to a more equitable treatment.[64]

The World Bank's former policy provides that if resettlement cannot be avoided, the related activities "should be conceived and executed as sustainable development programs, providing sufficient investment resources to enable the persons displaced by the project to share in project benefits."[65] Heeding this injunction, the Inspection Panel has occasionally expanded its focus by looking not only at the objective of preventing or minimizing harm to a vulnerable population but also at the Bank policy goal of ensuring that said population "receive social and economic benefits that are culturally appropriate and gender and intergenerationally inclusive."[66] The sharing of benefits with project-affected persons is consistent with this monograph's view that the pursuit of sustainable development not only involves avoiding or minimizing adverse impacts on any of the three pillars, but entails satisfying, within ecological limits, the multidimensional needs of human beings as well.

As the foregoing shows, the safeguard policies are more than just a set of instructions from an international organization to its managers and staff. Rather, these environmental and social policies include a considerable number of key obligations imposed on the borrowing State. Moreover, the World Bank now presents its policies as standards – a semantic shift that is not without implications for the other IFIs, the borrowers, and even private financial institutions. Accordingly, contrary to skeptical arguments, these norms and standards are part of

[62] The AfDB's Independent Review Mechanism (IRM) is administered by the Compliance Review and Mediation Unit. See <https://www.afdb.org/en/independent-review-mechanism-irm>.

[63] AfDB IRM, *Compliance Review Report on the Bujagali Hydropower and Interconnection Projects* (June 20, 2008), at 25, 27.

[64] Ibid. 27.

[65] OP 4.12, para 2.

[66] OP 4.10, para 1

international law and do not exclusively belong to the internal law of an international organization. The environmental and social standards shape the behavior not only of IFIs' management and staff but also of States, albeit only those in the Global South, particularly in these States' interaction with IOs.

4.2 Independent Accountability Mechanisms

The so-called independent accountability mechanisms, which exist in almost all MDBs – and even a number of national or bilateral development finance institutions (DFIs) – are labeled as such, because in the functions they perform, an actor is called upon to answer for or explain to another actor an alleged harm that occurred in the context of an IFI-supported development project. In the different proceedings conducted by IAMs, there exists a "respondent," namely, the bank management/staff, who is made to account for the acts or omissions that are claimed to have caused harm to individuals or communities, that is, the complainant(s).

Independent accountability mechanisms generally perform two theoretically distinct but practically intertwined functions, namely, determining and ensuring compliance by IFIs with their safeguard policies and assisting management and project-affected people in reaching solutions to the latter's concerns or grievances. In performing these functions, IAMs interpret, clarify, and elaborate those policies, thereby producing a case law that offers insights into "broad emerging trends, issues, and systemic concerns in development as well as pitfalls and risks inherent in the design and implementation of development projects and programs."[67] Additionally, some of them perform, expressly or indirectly, advisory functions, which can better frame the complaints of project-affected people in sustainability terms. Finally, the inclusive deliberation and participation stimulated by these mechanisms enhance the IFIs' accountability and legitimacy.

As forums that deal with on-the-ground manifestations of the sometimes conflicting or inconsistent demands posed by the three dimensions of sustainable development, IAMs complement the IFIs' safeguard policies by providing further guidance on how to balance such conflicts and integrate economic, environmental, and social concerns in

[67] Lewis (Introduction n 49) 11.

development projects. Because these mechanisms were deliberately created, in part, to remedy the lack of representation and participation of the very people impacted by the IFIs' conduct, one of their noteworthy features is the explicit standing (*locus standi*) given to non-State actors who are adversely affected or under threat of being adversely affected by IFI-funded projects.

Amidst a widespread public perception that IOs, in general, and the World Bank, particularly, are remote, callous, and impermeable entities that cause considerable harms to many voiceless and powerless people in the developing world, the Inspection Panel was established in 1993. The World Bank Inspection Panel is hailed as a pioneering mechanism for holding accountable a creature of international law that has, in the past, obstinately invoked its immunity to ward off any attempts to scrutinize its actions or even simply to engage in a dialogue with the people harmed by development projects.[68]

The Inspection Panel's establishment was contemporaneous with the increasing international recognition of the concept of public participation, as manifested, among others, during the 1992 Rio Conference. The Panel is the first one outside of the European Community (Union) system to empower individuals and communities to challenge a multilateral development bank's activities before an international forum.[69] It is an institutional reflection of the reality that "governments' actions, including their actions within IOs, are likely to reflect the growing influence of non-State actors."[70] The Panel's mandate reflects the complementary nature of the twin motivations for creating IAMs in general, namely, to enable IFIs to acknowledge and rectify their failures under their own "internal" rules and to allow project-affected people to be heard, inasmuch as they "are the ultimate intended beneficiaries of the [IFIs'] development assistance."[71] It is because the investigations are

[68] Dana Clark and David Hunter, "The World Bank Inspection Panel: Amplifying Citizen Voices for Sustainable Development" in Gudmundur S Alfredsson and Rolf Ring (eds), *The Inspection Panel of the World Bank: A Different Complaints Procedure* (Martinus Nijhoff 2001) 170.

[69] Sands, "International Law in the Field of Sustainable Development" (Chapter 1 n 18) 359.

[70] Ibrahim FI Shihata, *The World Bank Inspection Panel: In Practice* (Oxford University Press 2000) 265.

[71] Sabine Schlemmer-Schulte, "The World Bank's Experience with Its Inspection Panel" (1998) 28 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 353, 387–88.

triggered "from below" by people's complaints that IAMs are described as "citizen-driven"[72] or "community-led."[73]

The origins and "growing pains" – for example, the uncooperative stance of Bank Management toward the Panel and unwelcoming reactions from borrowing States – of the Inspection Panel are detailed in other works[74] and already briefly discussed in Chapter 2, relative to the World Bank's evolving mandate. Notably, during the late eighties, several of the Bank's safeguard policies were already in place, including the Environmental Policy (Operational Directive [OD] 4.01).[75] However, before the Panel's establishment, there had been no formal and independent means to review whether the staff and Management were in fact implementing and complying with such policies in the context[76] of actual development projects.[77] For almost thirty years, the Inspection Panel served as the sole IAM for the IBRD and the IDA.

Most accountability mechanisms' jurisdictions generally do not extend to the borrowing State or any other entity involved in a project. They are only concerned with the conduct of the IFI. Other mechanisms'

[72] Lewis (Introduction n 49).

[73] Peter L Lallas, "International Investment Activities: Giving Affected People Greater Voice and Rights of Recourse" in Junji Nakagawa (ed), *Transparency in International Trade and Investment Dispute Settlement* (Routledge 2013) 188.

[74] See, e.g., Robert Wade, "Greening the Bank: The Struggle over the Environment, 1970–1995" in Devesh Kapur, John Prior Lewis, and Richard Charles Webb (eds), *The World Bank: Its First Half Century* (Brookings Institution 1997) 726–34; Jonathan A Fox, "The World Bank Inspection Panel and the Limits of Accountability" in Jonathan Pincus and Jeffrey Alan Winters (eds), *Reinventing the World Bank* (Cornell University Press 2002); Dana Clark, "Understanding the World Bank Inspection Panel" in Dana Clark, Jonathan Fox, and Kay Treakle (eds), *Demanding Accountability: Civil-Society Claims and the World Bank Inspection Panel* (Rowman & Littlefield 2003); Kay Treakle, Jonathan Fox, and Dana Clark, "Lessons Learned" in Dana Clark, Jonathan Fox, and Kay Treakle (eds), *Demanding Accountability: Civil-Society Claims and the World Bank Inspection Panel* (Rowman & Littlefield 2003); Alvaro Umana, "Some Lessons from the Inspection Panel's Experience" in Gudmundur S Alfredsson and Rolf Ring (eds), *The Inspection Panel of the World Bank: A Different Complaints Procedure* (Martinus Nijhoff 2001).

[75] Interestingly, the Inter-American Development Bank (IDB) is recorded to be the first MDB to adopt an environmental policy in 1979, followed by the Asian Development Bank (ADB), which introduced environmental assessment into its operations in the same year. See Mbengue and de Moerloose (Introduction n 47) 397–98.

[76] See generally David Hunter, "Contextual Accountability, the World Bank Inspection Panel, and the Transformation of International Law in Edith Brown Weiss' 'Kaleidoscopic World'" (2020) 32 Georgetown Environmental Law Review 439.

[77] Boisson de Chazournes, "Public Participation in Decision-Making" (Chapter 3 n 11) 90–91.

functions, however, include problem-solving[78] or consultation,[79] which could involve the borrowing States or the private sector sponsors as parties. The World Bank has recently followed this trend by establishing in 2020 the Accountability Mechanism that now offers an option to mediate between the Borrower and the project-affected people. This change is part of the larger World Bank Safeguards Reform, prior to which the Inspection Panel served as the sole accountability mechanism at the Bank. Presently, the Inspection Panel is one of two mechanisms available to project-affected people, the other one being the Dispute Resolution Service.[80]

Changes to the Panel's mandate and operating procedures are minimal.[81] It continues to have the jurisdiction to receive and investigate complaints wherein individuals and communities allege that their "rights and interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures" and "that such failure has had, or threatens to have, a material adverse effect."[82] Additionally, its investigation remains limited to the conduct of Bank management and staff. Hence, the Panel report can only discuss "those material adverse effects, alleged in the request, that have totally or partially resulted from serious Bank failure of compliance with its policies or procedures."[83] The Inspection Panel's authority to comment on the Management Report and Recommendation is likewise still restricted to submitting its view, for the consideration of the Executive Directors, on "the adequacy of consultations with affected parties in the preparation of the management action plan."[84]

Although it is a body independent and distinct from the World Bank, the Inspection Panel possesses only recommendatory and persuasive powers, which it exercises vis-à-vis the Bank's decisionmakers. The results of Panel investigations, including any findings of noncompliance

[78] See ADB Special Project Facilitator <https://www.adb.org/who-we-are/accountability-mechanism/problem-solving-function>.
[79] See IDB Independent Consultation and Investigation Mechanism <https://mici.iadb.org/en/what-mici>.
[80] Resolution No. IBRD 2020-0005 and Resolution No. IDA 2020-0004 (September 8, 2020) (hereinafter, "Accountability Mechanism Resolution").
[81] World Bank, Accountability Mechanism Resolution (2020), para 6.
[82] World Bank, Inspection Panel Resolution (2020), para 13
[83] Ibid. para 38.
[84] Ibid. para 42.

with the safeguard policies, do not directly lead to remedies in favor of the project-affected people and to modifications in the project design or implementation. Rather, it is the Board of Executive Directors, through the Management, that could effect such changes. Independent accountability mechanisms determine neither the legal consequences, that is, liabilities, resulting from the IFI's alleged violation, nor the wisdom of the environmental and social policies. Nevertheless, some IAMs can recommend, but still not legally require, specific and appropriate remedial actions that IFI management could take to remedy the harms caused to project-affected people.[85] At best, therefore, accountability mechanisms' findings could improve the "decision-making process within the [IFI] during the various stages of the preparation and implementation of a project."[86]

4.2.1 Compliance Review

Compliance review is a fact-finding[87] exercise aimed at investigating allegations of noncompliance with safeguard policies that caused, or potentially causes, harm to project-affected people.[88] The Inspection Panel's primary task is to ascertain the existence of harm allegedly suffered by complainants and establish a causal link between such harm and the World Bank's act or omission that constituted a violation of the pertinent safeguard policy. Its powers and functions are defined in a series of resolutions[89] and "clarifications"[90] by the Board of Executive Directors. These documents constitute the legal bases for the Inspection

[85] This point will be elaborated in Chapter 6.

[86] Boisson de Chazournes, "Public Participation in Decision-Making" (Chapter 3 n 11) 92.

[87] See ADB, *Accountability Mechanism Policy 2012*, 22, para 114; ADB, *Review of the Inspection Function: Establishment of A New Accountability Mechanism*, 23, para 99 (May 2003). (The Compliance Review Panel is the ADB Accountability Mechanism's fact-finding body tasked "to investigate alleged violations by ADB of its operational policies and procedures in any ADB-assisted project that directly, materially, and adversely affects local people in the course of the formulation, processing, or implementation of the ADB-assisted project" and to recommend to the Board remedial changes in the scope or implementation of the project.)

[88] See IDB, *Policy of the Independent Consultation and Investigation Mechanism* (December 2015), 16, para 37.

[89] Resolution No. IBRD 93-10 and Resolution No. IDA 93-6 (1993), as amended by Resolution IBRD 2020-0004 and Resolution No. IDA 2020-0003 (September 8, 2020) (hereinafter, "Inspection Panel Resolution").

[90] Review of the Resolution Establishing the Inspection Panel: 1996 Clarification of Certain Aspects of the Resolution (October 17, 1996); 1999 Conclusions of the Board's Second Review of the Inspection Panel (April 20, 1999).

Panel to receive and investigate complaints from individuals (or NGOs, as representatives) who have supposedly been harmed by a development project financed by the World Bank due to the latter's noncompliance with its own safeguard policies. Specifically, the request for inspection must demonstrate that an affected party's

> rights and interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank (including situations where the Bank is alleged to have failed in its follow-up on the borrower's obligations under loan agreements with respect to such policies and procedures) provided in all cases that such failure has had, or threatens to have, a material adverse effect.[91]

During the Eligibility Phase, the Panel – using information presented in the request for inspection, the Management response, and other documentary evidence – determines whether to recommend an investigation to the Board of Executive Directors. Although it is the latter that authorizes investigations, it cannot adjudicate on the merits of the complaint/request by project-affected people. The Board can only check whether certain technical eligibility criteria[92] – for example, number of complainants and their presence in the borrowing State's territory; assertion of the Bank's serious violation of its safeguard policies; absence of

[91] Inspection Panel Resolution, para 13.

[92] (a) The affected party consists of any two or more persons (the "requester") with common interests or concerns and who are in the borrower's territory.
(b) The request asserts in substance that a serious violation by the Bank of its operational policies and procedures has or is likely to have a material adverse effect on the requester.
(c) The request asserts that its subject matter has been brought to Management's attention and that, in the requester's view, Management has failed to respond adequately demonstrating that it has followed or is taking steps to follow the Bank's policies and procedures.
(d) The matter is not related to procurement.
(e) For projects approved by the Executive Directors before the date of this Resolution, the related loan has not been closed or substantially disbursed or for projects approved by the Executive Directors on or after the date of this Resolution fifteen months have not yet passed from the date the related loan has been closed.
(f) The Panel has not previously made a recommendation on the subject matter or, if it has, that the request does assert that there is new evidence or circumstances not known at the time of the prior request.

previous Panel investigation or recommendation; prior referral of the subject matter to Bank Management – have been met.[93]

Complainants are not required to cite specific IFI policies and procedures alleged to have been violated.[94] Moreover, IAMs do not generally prescribe a specific format for the complaint, but some provide a sample/model complaint letter[95] to guide potential complainants. The EBRD Project Complaint Mechanism (PCM), for instance, has a brochure, available in physical and electronic formats, that contains a relatively easy to follow checklist for filing a complaint. The Compliance Advisor Ombudsman (CAO) for the World Bank Group's private sector-oriented arms, International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA), additionally makes itself available for potential complainants to contact for clarification before submitting a complaint.[96]

The investigation or compliance review reports, particularly of the World Bank Inspection Panel, follow a general pattern: they enumerate the applicable and/or invoked safeguard policies; present the complainants' and the Management's respective views; set out the relevant facts, including those gathered from site visits; ascertain compliance; and make recommendations, as necessary, to resolve or rectify any safeguards violation. Interestingly, in some reports, the Panel appears to be performing an advisory function (despite the absence of a clear mandate from the Bank) by adding "a final chapter in which it discusses 'systemic issues' related to the Bank's compliance with [safeguard policies] in light of its conclusions in the case at hand."[97]

Such advisory function is indeed aligned with the generally inward-looking character of compliance review. The purpose of investigating alleged noncompliance with safeguard policies is to improve an IFI's

[93] Inspection Panel Resolution, para 29.

[94] ADB, *Review of the Inspection Function: Establishment of A New Accountability Mechanism*, 26, para 108 (May 2003).

[95] See CAO Operational Guidelines (2013), 10; AfDB Independent Recourse Mechanism (IRM), "Sample Request Format" <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/Sample_Request_Format__CRMU.pdf>; EBRD Project Complaint Mechanism (PCM), "Sample complaint form" <https://www.ebrd.com/documents/occo/pcm-complaint-form.doc>; EBRD, "PCM user guide" <https://www.ebrd.com/documents/comms-and-bis/pdf-pcm-user-guide.pdf>; IDB Independent Consultation and Investigation Mechanism (MICI), "Model Complaint Letter" <http://www.iadb.org/document.cfm?id=40295905>.

[96] CAO Operational Guidelines (2013), 12

[97] Fauchald (Introduction n 124) 122 (citation omitted).

environmental and social performance.[98] The final outcome of a Panel proceeding is Management action to bring the development project into conformity with the World Bank's safeguard policies.

After receiving the investigation report, Management will produce its own report and recommendation that "*shall* include a management action plan, comprising actions that Management proposes for addressing Panel findings of non-compliance."[99] The management action plan is a document agreed upon by the Management and the borrowing State. Its purpose is to address the harm caused by the Bank's noncompliance. To emphasize, however, it lies in Management's discretion how to correct any failures identified by the Panel. The Executive Directors can task the Inspection Panel, in some cases, to monitor and verify whether and how Management is implementing the plan.[100] As discussed later in the book, this feature is one area where reforms in IAMs are needed, to ensure greater accountability for IFIs' acting inconsistently with their due diligence duty or their sustainable development mandate more broadly.

To recall, the World Bank's (and other IFIs') sustainability mandate is treaty-based, meaning, it derives from its constituent instrument. However, it is not the Articles of Agreement that is the applicable law in Inspection Panel proceedings. Instead, the Panel interprets and applies the OPPs or ESS, which the Bank promulgated to implement its sustainable development mandate. In performing compliance review, most accountability mechanisms can only use the IFI's own environmental and social policies as bases for their investigations and possible recommendations. But some accountability mechanisms can consider other IFIs' policies and procedures, "to the extent that [Asian Development Bank] ADB's policies and procedures have explicit reference" to the former.[101] The Asian Infrastructure Investment Bank (AIIB) likewise expresses openness to use other IFIs' safeguard policies in co-financed projects and to rely on its co-financiers' mechanisms for determining compliance with operational policies, "provided that the Bank is satisfied that they are consistent with the Bank's Articles of Agreement and materially consistent with the [Environmental and Social Policy] and [Environmental and Social Standards], and that appropriate monitoring

[98] See CAO Operational Guidelines (2013), 5.
[99] Inspection Panel Resolution, paras 40 and 41 (emphasis added).
[100] Ibid. para 51 in relation to para 42.
[101] ADB, *Accountability Mechanism Policy 2012*, 30, para 149 [hereinafter, "ADB AM Policy"].

procedures are in place."[102] AIIB also seems willing to cooperate with, and rely on, other IFIs regarding the review of the adequacy of a borrowing country's safeguard systems.[103]

Besides the safeguard policies, IAMs often cannot refer to any other "applicable law" like human rights or environmental treaties. Exceptionally, taking advantage of its wide discretion to advise based on diverse sources, including norms concerning human rights and environmental protection, "CAO has made reference to international norms [and standards] as models for IFC/MIGA to emulate."[104] Other accountability mechanisms likewise endeavor to fill the deficiencies in their IFIs' safeguards by referring to treaties and international instruments.[105] Even the World Bank Inspection Panel has indicated an apparent willingness to broadly interpret the safeguard policies "in light of treaties [that] . . . have implicitly been identified as relevant context for the [safeguards]."[106]

By citing international law and intentionally linking it to the IFIs' environmental and social policies, the mechanisms are enhancing the normativity of the latter, by drawing from the authoritativeness and legitimacy of those documents that have received the express consent of States or the clear endorsement of the international community. At the same time, such linkage potentially enriches, refines, and fills some of the gaps in the still-growing international law on sustainable development.

4.2.2 Dispute Resolution

To "empower project-affected people . . . rather than just letting them be recipients of the [investigation] results,"[107] the Asian Development Bank

[102] AIIB Environmental and Social Policy and Standards, para 10.
[103] Ibid. para 53.
[104] Benjamin M Saper, "The International Finance Corporation's Compliance Advisor/Ombudsman (CAO): An Examination of Accountability and Effectiveness from a Global Administrative Law Perspective" (2012) 44 New York University Journal of International Law and Politics 1279, 1306–7 (citations omitted).
[105] See, e.g., IDB, *Policy of the Independent Consultation and Investigation Mechanism*, 19, para 45 (The MICI, for instance, implicitly performs an advisory function by including in its Compliance Review report "the factual and technical basis for a decision by the Board on preventative or corrective action in connection with the Bank-Financed Operation under investigation.").
[106] Fauchald (Introduction n 124) 124. Referring to the *Honduras: Land Administration Project* case.
[107] ADB AM Policy, para 13.

(ADB) pioneered[108] the problem-solving function – performed by the Special Project Facilitator (SPF) – to complement the inspection function of its accountability mechanism. The SPF is mandated to "engage with all relevant parties, including the complainants, the borrower, the ADB Board member representing the country concerned, Management, and staff to gain a thorough understanding of the issues to be examined."[109] Concretely, it has handled a grievance about inadequate compensation to owners whose shops were removed due to an ADB-supported road improvement project. Its first step was to organize several meetings with complainants, borrowing country officials, and the ADB operations department to discuss possible solutions. The SPF also helped complainants put together the requisite documentation to have their properties evaluated. The borrower's transport ministry then paid the compensation, and SPF even "visited to confirm the payment and the satisfaction of the complainants."[110] Although use of the problem-solving function remains limited due to several factors, such as borrowing countries' continued assertions of State sovereignty, the ADB Accountability Mechanism's bifurcated model has improved the ability of the Bank to address the project-affected people's grievances.[111]

Inspired by the ADB, and further improving upon the Inspection Panel, the CAO was established in 1999 to serve as the independent accountability mechanism for the IFC and the MIGA. One of CAO's distinctive features is having three discrete functions, which are indicated by its very name: compliance review/audit, dispute resolution or problem solving (ombudsman), and advice-giving. These functions assist "in building a credible and responsive structure to ensure that projects are environmentally and socially sound and enhance IFC's and MIGA's contribution to sustainable development."[112]

[108] See Susan Park, "Assessing Accountability in Practice: The Asian Development Bank's Accountability Mechanism" (2015) 6 Global Policy 455, 457; Suresh Nanwani, "Directions in Reshaping Accountability Mechanisms in Multilateral Development Banks and Other Organizations" (2014) 5 Global Policy 242, 243.

[109] ADB AM Policy, para 128(iii).

[110] ADB OSPF, "Accountability: OSPF Problem-Solving Primer" (2012) <https://www.adb.org/sites/default/files/publication/29979/ospf-problem-solving-primer.pdf>.

[111] See generally Park, "Assessing Accountability in Practice" (n 113); Susan Park, "Institutional Isomorphism and the Asian Development Bank's Accountability Mechanism: Something Old, Something New; Something Borrowed, Something Blue?" (2014) 27 The Pacific Review 217.

[112] Office of the Compliance Advisory Ombudsman (CAO) Terms of Reference <https://www.cao-ombudsman.org/sites/default/files/downloads/CAOTOR2013.pdf>.

The CAO's Ombudsman or Dispute Resolution role mirrors the other accountability mechanisms' problem-solving function, which the ADB introduced to complement the inspection function of its earlier accountability mechanism.[113] This role is intended to address the grievances of project-affected people[114] and "improv[e] environmental and social outcomes on the ground,"[115] without focusing on the question of compliance by the IFI with its policies and procedures.[116]

Among the justifications[117] for having two separate but complementary phases is the recognition that "project-affected people are more interested in having their complaints addressed first rather than focusing on the establishment of ADB's accountability."[118] This shift or expansion of orientation aligns with the argument for a capability approach to sustainability in development projects. Relatedly, the ADB declares that an effective accountability mechanism "is fundamental to equitable and sustainable development."[119] The AfDB also fittingly describes its

[113] See ADB AM Policy, para 13 ("In addition to addressing their concerns, development agencies should empower project-affected people to participate in the problem solving process, rather than just letting them be recipients of the inspection results. Following ADB, most international financial institutions have instituted problem solving in their own accountability mechanisms.").

[114] See CAO Operational Guidelines (2013), 14. (Project-affected people can decide to terminate a dispute resolution process anytime, whether upon their own will or with advice from CAO itself "that resolution of the case is unlikely to be possible through a dispute resolution process or that it would be an inefficient use of resources." When such decision is made, the case is transferred to Compliance for appraisal.)

[115] CAO Operational Guidelines (2013), 4, 18.

[116] See IDB, *Policy of the Independent Consultation and Investigation Mechanism* (December 2015), 13–14, paras 24–26 ("The Consultation Phase is an optional and voluntary feature that project-affected people can invoke 'to address the issues . . . related to Harm caused by the failure of the Bank to comply with one or more of its Relevant Operational Policies in the context of a Bank-Financed Operation.'"]; ADB, *Review of the Inspection Function: Establishment of A New Accountability Mechanism*, 16, 18, paras 64, 71; ADB *Accountability Mechanism Policy 2012*, 24, para 126 (In performing the problem-solving or consultation function, the Special Project Facilitator assists parties in "finding ways to address the problem of the project-affected people in ADB-assisted projects" rather than identifying and allocating blame.).

[117] See ADB, *Review of the Inspection Function: Establishment of A New Accountability Mechanism*, 14, paras 57–58 (May 2003) <https://www.adb.org/sites/default/files/institutional-document/32108/adb-accountability-mechanism.pdf> (detailed enumeration of the accountability mechanism's rationale and the principles guiding its establishment and operation).

[118] Ibid. 11, para 39.

[119] ADB, *Accountability Mechanism Policy 2012*, 1, para 1 <https://www.adb.org/sites/default/files/institutional-document/328211/accountability-mechanism-policy-2012.pdf>.

accountability mechanism's purpose by referring to its role in ensuring compliance with the bank's "policies and procedures related to sustainability."[120]

As mentioned, an important change resulting from the establishment of the World Bank Accountability Mechanism is the introduction of a Dispute Resolution Service (DRS), whose role and functions are performed prior to the Investigation Proper. Specifically, if the requesters and the Borrower – the "Parties" in the voluntary and independent problem-solving proceeding – agree to avail of this process, the Inspection Panel's authorized investigation (compliance review) shall be suspended until the dispute resolution process is completed.[121] Both the Inspection Panel Resolution and the Accountability Mechanism Resolution make clear that "the Panel will have no role in dispute resolution and will not opine on policy compliance in dispute resolution or the outcome of the dispute resolution process." While these functions are separate and distinct from each other, they have the same jurisdiction *ratione materiae*, meaning, the scope of the dispute resolution process "is limited to project-related issues raised in the Request for Inspection and identified as the issues to be investigated in the Inspection Panel's report to the Executive Directors recommending investigation."[122]

One major amendment effected by the new Accountability Mechanism is that Inspection Panel proceedings could be temporarily suspended, should the project-affected people and the borrowing State mutually agree to pursue dispute resolution.[123] Moreover, a possible outcome of the dispute resolution is preventing the Panel from taking further action on the request for investigation if "the Parties have reached agreement and signed a Dispute Resolution Agreement," since the case shall then already be considered closed.[124]

Offering the option to pursue dispute resolution can be seen to align with the shift from "operational policies and procedures" to "Borrower requirements". This shift, however, detracts or at least diffuses attention away from the accountability and responsibility of the MDB as financier. Recalling the asymmetries among the Bank, the borrower, and the

[120] AfDB IRM Operating Rules, para 3.
[121] Inspection Panel Resolution, paras 30–33.
[122] Accountability Mechanism Resolution, para 12(d), in relation to Inspection Panel Resolution, paras 22–25.
[123] Ibid. paras 30–33 (e. Referral to Dispute Resolution).
[124] Ibid. para 33(b).

project-affected people, this "solution" is problematic, as it creates the unjust and objectionable possibility that Parties could "lawfully waive – by agreement – violations of Bank policies and procedures, regardless of the legal consequences of the material adverse effects of these violations on the Requesters."[125]

As the Accountability Mechanism has only been operational for less than five years (as of March 2024), there is no adequate practice yet to evaluate how the availability of the dispute resolution process has affected (i) the Panel's conduct of its compliance review function, which is critical in holding the Bank accountable and, more crucially, (ii) the overall environmental and social sustainability of development projects.

For now, it bears reiterating that the Inspection Panel's work focuses on "whether there is a serious Bank failure to observe its operational policies and procedures with respect to project design, appraisal and/or implementation" and its report to the Executive Directors discusses "material adverse effects, alleged in the [project-affected people's] request, that have totally or partially resulted from serious Bank failure of compliance with its [safeguards]."[126] An alleged material adverse effect that the Panel finds to be not totally or partially caused by Bank failure might fall within the jurisdiction of the DRS (e.g., if it can be attributed to the borrowing State), and "the Panel's report will [] state [such fact] without entering into analysis of the material adverse effect itself or its causes."[127]

4.2.3 Advice-Giving

In contrast to the Resolution and Clarifications establishing the World Bank Inspection Panel and governing its operations, the Board Resolutions creating the AfDB Independent Recourse Mechanism (IRM) expressly provide for the performance of an advisory function, which is triggered when the President and/or the Boards "feel that projects, programs, policies and procedures of the Bank Group can benefit from the accumulated experience of the IRM and support efforts

[125] Diane Desierto and others, "The 'New' World Bank Accountability Mechanism: Observations from the ND Reparations Design and Compliance Lab" (*EJIL: Talk!*, November 11, 2020) <https://www.ejiltalk.org/the-new-world-bank-accountability-mechanism/>.
[126] Inspection Panel Resolution, para 38.
[127] Ibid.

of staff and Management to strengthen the social and environmental impact of the projects funded by the Bank Group."[128] The advisory function is meant "to provide independent opinions on systemic issues, and technical advice on projects and programs of the Bank Group."[129] Advice-giving is also part of CAO's mandate.[130]

The IAMs' advisory role has great potential for pushing further the IFIs' sustainability orientation and commitments, not only by recommending systemic improvements to IFIs' safeguard policies and harmonizing efforts across these institutions but also by aligning such efforts with the broader agenda of the international community.

Further, formally and expressly vesting accountability mechanisms with advisory functions – as opposed to its being contingent on, and incidental to, the investigation or inspection of an actual complaint filed by a project-affected people – can be advantageous, because it would be easier to initiate the process from within the IFI and can occur under circumstances that might be more conducive to thinking in the long term and from a broader perspective, since there is no pressure from an actual case and set of issues that the mechanism is expected to resolve. Additionally, a less tense or contentious interaction between the mechanism and the IFI staff and management could foster a more deliberative and collaborative approach to the formulation and enhancement of projects, programs, policies, and procedures.

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Analyzing the relationship between international law and sustainable development – given the essentially contested character of the latter and the "softness" of international instruments endorsing such concept – compels some rethinking of the very notion of international law and revisiting alternative conceptions thereof. This analysis likewise entails paying attention to IOs that have development-related mandates. The World Bank and other IFIs are prime examples. Through requirements under their "internal" law, IOs can shape the behavior of States and other relevant actors in the international legal order. Moreover, the IFIs' financial and technical resources, not to mention the authoritativeness of their decisions, are vital, arguably indispensable, to putting sustainable

[128] *Boards Resolution on Establishment of IRM*, Resolution B/BD/2015/03 – F/BD/2015/02, January 28, 2015, para 17.
[129] Ibid.
[130] CAO Operational Guidelines (2013), 29.

development into practice, especially in the Global South where there is greater reliance on MDBs. In this regard, a study of the emerging international sustainable development law would benefit from probing the internal law of these international economic organizations engaged in development work. Such is the task undertaken in this chapter and continued throughout the book.

To describe the World Bank's environmental and social policies and the Inspection Panel's jurisprudence as "sustainability-oriented" signifies their embodiment of the principles underlying sustainable development, as expressed in various international instruments. By providing specificity to the concept of sustainable development, this portion of the IFIs' internal law thereby addresses the vagueness problem that purportedly prevents the concept from acquiring normative force.

Chapter 5 explains the first of two ways that IFIs are deemed lawmakers in the field of sustainable development, using examples of "unsustainable development projects" in different developing countries to illustrate how the safeguard systems work (or not) in ensuring the economic, environmental, and social sustainability of the IFIs' operations and the development projects they support.

5

IFIs as Lawmakers I

Hardening International "Soft" Law on Sustainable Development and Externalizing "Internal" Law on Development Finance

The World Bank and other IFIs are often portrayed as violators of international law, given the social and environmental harms associated with their operations, particularly in the Global South. Whilst the critique is not entirely inaccurate, this chapter slightly changes the perspective and presents the first prong of the book's central proposition that IFIs are lawmakers in the field of sustainable development. It focuses on how IFIs formulate policies, procedures, and mechanisms that not only govern their interactions with those they affect but also elaborate and concretize international "soft" law instruments prompting the integration of economic, social, and environmental concerns. Together with the IAMs and project-affected people, IFIs engage in lawmaking by "interpreting and applying international law in areas that are particularly under-developed with respect to specific cases or factual situations."[1] Put differently, IFIs and IAMs particularize borrowing States' sustainability commitments and enable project-affected people to contribute their own interpretation of those commitments. It is through the safeguard systems that this particularization and enablement occur.

The safeguard systems' normativity lies in their influence on the conduct and expectations of both State and non-State actors in the context of development projects. Focusing on behavioral impact mirrors the legal importance accorded to many international environmental norms that modify behavior, despite their apparent nonbinding character.[2] It also extends the insight that since international lawmaking is a

[1] Bradlow and Naudé Fourie (Introduction n 25) 7.

[2] See Hunter, Salzman and Zaelke (Chapter 1 n 19) 355–56; Daniel Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press 2010) 86–87; Ellen Hey, "International Institutions" in Daniel Bodansky, Jutta Brunnée, and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press

communicative process, "it is the audience . . . that endows the prescriber with the authority that renders his communications prescription."[3]

Although the safeguard policies' international legal significance remains disputable, some authors concede that these policies reflect, are inspired by, or bear a close relationship with established international legal principles and standards. José Alvarez, for instance, was initially unconvinced of their normative force, describing safeguards as simply "intended to be used by Bank staff for approving loans or for guiding the development of projects [and] were not directed at changing either the general rules applicable to states or even members of the Bank."[4] Later, however, Alvarez affirmed that "some of the matters covered by the Bank's [operational policies] . . . overlap with those considered by the UN General Assembly and other UN specialized agencies" and thus safeguard policies can become ways "to 'harden' a dense network of otherwise 'soft law' norms or treaties whose terms are vague or that have drawn few parties."[5]

Indeed, some safeguard policies contain quite more detailed guidance than the treaty provisions or customary obligations they refer to. Independent accountability mechanisms further enhance this specificity. Similar to judicial and quasi-judicial processes that specify what international agreements and instruments require,[6] safeguard systems regulate, albeit indirectly, State and non-State actions (and attitudes) by detailing broad or ambiguous principles.

Generally, the World Bank's safeguard policies "reflect concerns related to the promotion of sustainable development as expressed in many other fora" and constitute the Bank's means for achieving such objective.[7] By linking its policies to international law standards, the Bank facilitates "their mutually reinforcing contribution to the promotion of sustainable development and the rule of law."[8] The issuance and

2008) 757; Jacqueline Peel, "Environmental Protection in the Twenty-First Century: The Role of International Law" in Regina S Axelrod, Stacy D VanDeveer, and David Leonard Downie (eds), *The Global Environment: Institutions, Law and Policy* (Third, 2011).

[3] Reisman (Introduction n 28) 110.

[4] Alvarez, *IOs as Law-Makers* (Introduction n 127) 236.

[5] Ibid. 237.

[6] See generally von Bogdandy and Venzke (Chapter 3 n 63) 55–56; Sabine Schlemmer-Schulte, "The World Bank Inspection Panel: A Record of the First International Accountability Mechanism and Its Role for Human Rights" (1999) 6 Human Rights Brief 1.

[7] Boisson de Chazournes, "Policy Guidance and Compliance" (Chapter 2 n 143) 297.

[8] Ibid.

implementation of safeguard policies "necessarily results in [IFIs] becoming actively engaged in the creation of the international law applicable to ... the rights of indigenous peoples; international human rights law and development; the relationship between international organizations, states, and non-state actors; and the environment," since several norms in these topics are couched in broad and open-ended language.[9] As Daniel Bradlow asserted, "As the IFIs implement and interpret their policies they will be both applying and shaping the applicable international law."[10]

However, the procedures and mechanisms through which this lawmaking occurs, and the relevant actors involved, remain understudied. This chapter fills such a gap by delving not only into the content of the safeguard policies and their connection to existing international legal instruments but also into their role, within a system, as the "normative text"[11] that gets interpreted and applied by quasi-judicial bodies, international civil servants, States, and individuals. In this reframing, what shapes the demands and expectations of relevant actors in the development finance context is the aggregate effect of the components – the environmental and social policies and the IAM – comprising the safeguard system. Through the safeguard systems, IFIs, together with borrowing States and the latter's population, implement the principle of public participation – expressed in the meaningful consultation requirement – and the principle of integration, thereby contributing to international sustainable development law.

5.1 Functional International Lawmaking in Development Finance

Treating IFIs' policies and procedures as international law attracts skepticism, in part because they are found in an IO's "internal" law. The Bank

[9] Daniel D Bradlow and David B Hunter, "Conclusion: The Future of International Law and International Financial Institutions" in Daniel D Bradlow and David B Hunter (eds), *International Financial Institutions and International Law* (Kluwer Law International 2010) 394–95. See also Myres S McDougal, Harold D Lasswell, and W Michael Reisman, "The World Constitutive Process of Authoritative Decision" (1967) 19 Journal of Legal Education 253; Rosalyn Higgins, "The United Nations and Law-Making: The Political Organs" in Rosalyn Higgins (ed), *Themes and Theories: Selected Essays, Speeches and Writings in International Law* (Oxford University Press 2009) 61–72.

[10] Bradlow, "International Law and the Operations of the International Financial Institutions" (Introduction n 32) 26.

[11] Bradlow and Naudé Fourie (Introduction n 25) 5, 17; Naudé Fourie, *World Bank Accountability* (Introduction n 49) 192–93.

itself, as well as a few scholars, maintains this position.[12] This limited view dismisses too readily the policies' normative value due to their form and their origin. Its chief flaw is a failure to recognize two facts. First, safeguard policies do contain and impose explicit sustainability-related requirements on borrowing States. Second, these policies are incorporated in the legally binding loan or grant agreements between the States and the IFIs. Noncompliance with such "internal" rules triggers legal (and financial)[13] consequences. Moreover, even granting that State consent defines international lawmaking, it can be argued that member countries of the World Bank *qua* IO did agree – following provisions in the Articles of Agreement – to the creation of the safeguard systems.

Rejecting the characterization of the environmental and social policies as merely internal law, this chapter contends that these policies properly belong to the realm of international law. They specifically discipline the myriad activities entailed by development projects – which should support economic growth, social progress, and environmental protection – and are thus vital to a clearer understanding and more concrete application of the concept of sustainable development.

To use the New Haven School's terminology, the IFIs and the IAMs perform *intelligence* functions by lending greater precision to – providing further information – the actions necessary to integrate the environmental, social, and economic dimensions of sustainability implicated in development projects. Some cases brought before the IAMs provide opportunities to identify a sustainable development–related problem, wherein different participants – Bank management, project-affected people, and the mechanism itself – advocate for a prescriptive response, with each thereby performing a *promotion* function.

Functional lawmaking in this context takes place when the integration and public participation principles are implemented together in two distinct but intimately linked moments. The configuration and interaction of participants vary in each. In the first scenario, a borrowing State's project-related decisions are influenced by the Bank, as the financier of the project. This influence is exercised through the environmental and social policies and made legally binding by the loan or grant

[12] The World Bank, *Making Sustainable Commitments: An Environment Strategy for the World Bank* 19 (2001); Shihata, *The World Bank Inspection Panel: In Practice* (Chapter 4 n 70) 234; Schlemmer-Schulte (n 6) 5.

[13] See José E Alvarez, "Governing the World: International Organizations as Lawmakers" (2007) 31 Suffolk Transnational Law Review 591, 604.

agreement. The second scenario involves the IFI *qua* IO as the decision-making authority, which interacts not only with the borrowing country, but also with individuals adversely affected by the financed development project. Parenthetically, the World Bank's recurring revision of its safeguard policies can likewise be considered as part of its implementation of the public participation principle and, concomitantly, international sustainable development lawmaking. Aspects of public participation are present in this exercise, insofar as the Bank has been making efforts to solicit comments on its proposed draft policies from different stakeholders, including academics, civil society organizations, and private sector representatives.

5.1.1 IFIs: Elaboration and Clarification of International Norms

Though still reluctant to acknowledge that certain international legal norms apply to its operations, the World Bank, as previous chapters demonstrated, has increasingly incorporated "non-economic" concerns – typically addressed in international human rights law and international environmental law – in its mandate. The connection between the IFIs' safeguards and the principles or standards set and agreed upon at the international level is crucial to this book's argument. This linkage, especially when direct and deliberate, enriches international sustainable development law by clarifying and elaborating broad sustainability norms and concepts.

The IFIs' operational policies, including the safeguards, do not expressly claim to lay down global standards. They nevertheless derive from international legal principles, and often identify and expound best practices.[14] For example, the World Bank policy about benefit-sharing in favor of indigenous peoples contextualizes and fleshes out some treaty provisions. States parties to the Convention on Biological Diversity (CBD) "recogniz[e] the close and traditional dependence of many indigenous [] communities . . . on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices."[15] They thus agreed to "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles . . . and encourage the equitable sharing of the benefits arising from the utilization of such

[14] See Naudé Fourie, *World Bank Accountability* (Introduction n 49) 163.
[15] CBD 12th preambular paragraph

knowledge, innovations and practices."[16] But the CBD does not say more about how this obligation should be fulfilled.

In contrast, ESS 7 lays down a procedure wherein the borrowing State and the affected indigenous peoples identify not only harm mitigation measures but also "opportunities for culturally appropriate and sustainable development benefits" that take into account the indigenous peoples' "institutions, rules and customs" and "their level of interaction with mainstream society."[17] The succeeding paragraphs further illustrate the IFIs' elaborative and clarificatory functions in the international lawmaking process concerning sustainable development.

5.1.1.1 Free, Prior, and Informed Consent

The Free, Prior, and Informed Consent (FPIC) principle is enshrined in International Labour Organization (ILO) Convention No. 169[18] and the United Nations Declaration on the Rights of Indigenous Peoples (UN DRIP).[19] Not unlike the concept of sustainable development, its legal character has been challenged on the bases of its pedigree and content.[20] This book does not address issues concerning the principle's legal status. Rather, it assumes from these debates that there remains controversy, not least, about the meaning of FPIC. It is on such premise, and the need for any legal definition to be context-specific[21], that the safeguard policies are argued as providing elaboration and clarification to international norms.

Under the UN DRIP and the ILO Convention No. 169, FPIC is required for development projects affecting indigenous peoples. James Anaya notes the absence of "one specific formula for carrying out consultations with indigenous peoples that applies to all countries in all circumstances."[22] Nevertheless, according to the Special Rapporteur on

[16] CBD art 8(j).
[17] ESS 7, paras 20–21.
[18] International Labour Organization, *C169 – Indigenous and Tribal Peoples Convention*, June 27, 1989.
[19] G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (September 13, 2007).
[20] See Hans Morten Haugen, "The Right to Veto or Emphasising Adequate Decision-Making Processes? Clarifying the Scope of the Free, Prior and Informed Consent (FPIC) Requirement" (2016) 34 Netherlands Quarterly of Human Rights 250, 261.
[21] See Carla F Fredericks, "Operationalizing Free, Prior, and Informed Consent" (2016) 80 Albany Law Review 429, 440.
[22] James Anaya (Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people), *Promotion and Protection of All Human Rights, Civil,*

the situation of human rights and fundamental freedoms of indigenous peoples, States' duty to consult entails the following:

> In cases involving natural resource exploitation or development projects affecting indigenous lands, in order for the indigenous peoples concerned to make free and informed decisions about the project under consideration, it is necessary that they are provided with full and objective information about all aspects of the project that will affect them, including the impact of the project on their lives and environment. In this connection, it is essential for the State to carry out environmental and social impact studies so that the full expected consequences of the project can be known. *These studies must be presented to the indigenous groups concerned at the early stages of the consultation, allowing them time to understand the results of the impact studies and to present their observations and receive information addressing any concerns.* Further, a consensus-driven consultation process in such contexts should not only address measures to mitigate or compensate for adverse impacts of the project, but also explore and arrive at *means for equitable benefit-sharing* in a spirit of true partnership.[23]

The Special Rapporteur's elaboration of this duty is reproduced, albeit only partially, by the IFIs' meaningful consultation or Free, Prior, and Informed *Consultation* (FPICon) requirements. Like most of its peers, the ADB, whilst recognizing the relevance of the UN DRIP in Asia and the Pacific,[24] only requires "meaningful *consultation*" instead of FPIC. To its credit, it adopts a consistent definition of meaningful consultation across its three safeguards. Moreover, the bank carves out special circumstances wherein the consent of affected indigenous peoples would be required.[25] Consent is defined as "a collective expression by the affected Indigenous Peoples communities, through individuals and/or their

Political, Economic, Social and Cultural Rights, including the Right to Development, para 37, U.N. Doc. A/HRC/12/34 (July 15, 2009).

[23] Ibid. para 53 (emphasis added).

[24] ADB SPS Appendix 3 (*Safeguard Requirements 3: Indigenous Peoples*), para 1.

[25] Ibid., para 30: "Indigenous Peoples may be particularly vulnerable when project activities include (i) commercial development of the cultural resources and knowledge of Indigenous Peoples; (ii) physical displacement from traditional or customary lands; and (iii) commercial development of natural resources within customary lands under use that would impact the livelihoods or the cultural, ceremonial, or spiritual uses that define the identity and community of Indigenous Peoples. *In deciding whether to proceed with a project involving such project activities, the borrower/client will seek the consent of affected Indigenous Peoples communities.*" (emphasis added).

recognized representatives, of broad community support for the project activities listed in [the preceding paragraph]."[26]

Also in lieu of FPIC, the IFC generally requires[27] its clients to engage with indigenous peoples in a process called Informed Consultation and Participation, which is

> a more in-depth exchange of views and information, and an organized and iterative consultation, leading to the client's incorporating into their decision-making process the views of the [indigenous peoples] on matters that affect them directly, such as the proposed mitigation measures, the sharing of development benefits and opportunities, and implementation issues.[28]

The IFC does mention FPIC in the Performance Standards and describes it as an expansion of the process of Informed Consultation and Participation that "will be established through good faith negotiation between the client and the Affected Communities of Indigenous Peoples."[29] Under this expanded process – an exception to the general rule – clients are required to obtain the indigenous peoples' FPIC only under limited circumstances:

(i) If the client proposes to locate a project on, or commercially develop natural resources on lands traditionally owned by, or under the customary use of, Indigenous Peoples, and adverse impacts can be expected;
(ii) If indigenous peoples will be relocated from lands and natural resources subject to traditional ownership or under customary use;
(iii) Where a project may significantly impact on critical cultural heritage that is essential to the identity and/or cultural, ceremonial, or spiritual aspects of indigenous peoples lives; or
(iv) Where a project proposes to use the cultural heritage including knowledge, innovations, or practices of indigenous peoples for commercial purposes.[30]

[26] ADB SPS Appendix 3 (*Safeguard Requirements 3: Indigenous Peoples*), para 31. This provision clarifies that "broad community support may exist even if some individuals or groups object to the project activities."
[27] IFC, *Performance Standards on Environmental and Social Sustainability,* January 1, 2012 [hereinafter, "IFC Performance Standards"], Performance Standard 1, para 32.
[28] Ibid. para 31.
[29] IFC Performance Standards, Performance Standard 7, para 12.
[30] IFC Performance Standards, Performance Standard 1, para 31, in relation to Performance Standard 7, paras 13–17.

Under any of these situations, the client must engage external experts to help identify the project risks and impacts.[31] Similar to ADB's caveat, however, the IFC states, "FPIC does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree."[32]

Like ADB and IFC, the World Bank makes an exception for projects involving commercial development of the cultural resources and knowledge of indigenous peoples, such that these projects are "conditional upon [indigenous peoples'] *prior agreement* to such development."[33] The current ESS 7 expounds the Bank's OP 4.10 by enumerating the types of development projects wherein FPIC is mandatory.[34] These cases are essentially the same as those listed above in the IFC Performance Standards.

Upon review, if the Bank cannot ascertain the existence of such consent, it does not proceed further with those project aspects for which FPIC is lacking.[35] The general rule for World Bank projects, however, still relies on a procedure that includes "stakeholder analysis and engagement planning, disclosure of information, and meaningful consultation, in a culturally appropriate and gender and inter-generationally inclusive manner"[36] – but does not necessarily require consent or agreement.

Without using the actual wording of international legal instruments, the Inter-American Development Bank (IDB) likewise appears to have a requirement that upholds indigenous peoples' right to FPIC:

> For cases of particularly significant potential adverse impacts that carry a high degree of risk to the physical, territorial or cultural integrity of the affected indigenous peoples or groups, the Bank will further require and verify that the project proponent demonstrate that it has, through a good faith negotiation process, *obtained agreements regarding the operation and measures to address the adverse impacts as necessary to support, in the Bank's judgment, the sociocultural viability of the operation.*[37]

The AIIB's approach is also worth considering. Although it follows most IFIs in generally requiring only FPICon, it allows for the possibility

[31] IFC Performance Standards, Performance Standard 7, para 11.
[32] Ibid. para 12. See also WB ESS 7, para 26 in relation to para 25(d).
[33] WB OP 4.10, para 19 (emphasis added).
[34] ESS 7, para 24.
[35] WB Environmental and Social Policy, para 55.
[36] ESS 7, para 23.
[37] IDB Operational Policy on Indigenous Peoples, IV. Policy Directives, para 7(c) (emphasis added) <https://www.iadb.org/document.cfm?id=2032081>.

of requiring the client to obtain FPIC on two conditions. First, the laws of the country where the project is located requires FPIC. Second, "'in [the AIIB's] view, such application is consistent with the requirements of FPICon as set out [in its Environmental and Social Policy]."[38]

From the survey above, two points emerge. First, the IFIs' FPICon requirement still falls short of the FPIC principle and of certain domestic practice, because it disregards the reality that indigenous peoples "need to be in a position to decide how to utilize their lands and resources" to freely pursue their development.[39] Requiring consultation but not consent also overlooks the internationally protected human right to self-determination.[40] For Fergus MacKay, special attention should be devoted to the use and meaning of FPICon, because "the efficacy of the protections set forth in the [safeguard] turn on its interpretation and use in practice."[41] He found deficient the then draft OP 4.10, since the World Bank's definition omitted the informed participation component, which creates "a substantially higher standard than consultation and requires active involvement in decision-making."[42] All told, the fact that FPIC is the exception rather than the rule under the IFIs' safeguard policies is rightfully criticized[43] for not aligning with international norms and, more relevantly to this book, for not ensuring the environmental and social sustainability of development projects involving indigenous peoples.

Notwithstanding these shortcomings – and this is the second point – the IFIs' safeguards give shape and texture, albeit imperfectly, to the somewhat amorphous FPIC principle. The policies provide more concrete and actionable guidance to implement States' international legal obligation to include indigenous peoples in decisionmaking. Without comprehensively appraising the relationship between FPIC and FPICon, the modest point here is that the IFIs' safeguard policies help operationalize an international principle of supposedly questionable legal character and vague content, by

[38] AIIB Environmental and Social Policy and Standards, para 61, in relation to para 60.
[39] Stefania Errico, "World Bank and Indigenous Peoples: The Operational Policy on Indigenous Peoples (OP 4.10) between Indigenous Peoples Rights to Traditional Lands and to Free, Prior, and Informed Consent" (2006) 13 International Journal on Minority and Group Rights 367, 382.
[40] Ibid. 385.
[41] Fergus MacKay, "The Draft World Bank Operational Policy 4.10 on Indigenous Peoples: Progress or More of the Same" (2005) 22 Arizona Journal of International and Comparative Law 65, 70–71.
[42] Ibid. 83.
[43] See Mbengue and de Moerloose (Introduction n 47) 405–7.

providing specificity as to who needs to do what, when, and how in a given development project affecting indigenous peoples.

5.1.1.2 Environmental Assessment as Integration Tool

Another international standard that IFI safeguards elaborate is the conduct of environmental impact assessment. To recall, OP 4.01 requires the EA to consider "in an integrated way" "the natural environment ... human health and safety; social aspects (involuntary resettlement, indigenous peoples, and physical and cultural resources); and transboundary and global environmental aspects."[44] The World Bank's new ESF likewise affirms, "The environmental and social assessment is the primary means of ensuring projects are environmentally and socially sound and sustainable."[45]

These statements express the sustainable development principle of integration and echo the Rio Declaration. Further, as can be seen from how the EA safeguard works, the principle of public participation is likewise concretized. Bolstering this observation is an explanation by Shihata, as former General Counsel, that the Bank's requirements for borrowing States to consult project-affected people (and civil society) and to take their views into account "play a major role in operationalizing [the participation principle in Principle 10 of the Rio Declaration] and making it a legal obligation with respect to Bank-financed projects in a wide range of developing and transition countries."[46] Parenthetically, the journey of the EA norm – from the statute of one State (the United States) to the IOs' operational policies to the private financial institutions' voluntary codes of conduct and the domestic legislation of other States – depicts the "interaction-interpretation-internalization" dynamic and the blurring of the public and private law divide under the "transnational legal process" posited by Harold Koh.[47]

The safeguards compel States and non-State actors to take into account the environmental and social implications of economic activities (an implementation of the integration principle), by involving all affected

[44] OP 4.01, para 3.

[45] World Bank ESF, ESS1-Annex 1, para 1.

[46] Ibrahim FI Shihata, "The World Bank's Contribution to The Progressive Development of International Environmental Law" in Ibrahim FI Shihata (ed), *The World Bank in a Changing World*, vol III (Martinus Nijhoff 2000) 493.

[47] See generally Harold Koh, "Transnational Legal Process" (1996) 75 Nebraska Law Review 181; Harold Koh, "Why Do Nations Obey International Law?" (1997) 106 Yale Law Journal 2599.

parties (an implementation of the public participation principle). As the World Bank ESF states, the ESS will, among others: "Support Borrowers in achieving good international practice relating to environmental and social sustainability" and "assist Borrowers in fulfilling their national and international environmental and social obligations."[48] The AIIB echoes this view, stating, "the application of the [Environment and Social Policy] and [Environmental and Social Standards] ... will support Clients in achieving good international practice relating to environmental and social sustainability; assist Clients in fulfilling their national and international obligations relating to environmental and social risks and impacts ... and enhance sustainable development outcomes of Projects through ongoing stakeholder engagement."[49]

Further, the safeguards, and particularly IFIs' compliance therewith, can be considered as indirectly enforcing international law, as most EA policies provide that the IFI will not support or finance a project that would cause a borrowing State to contravene its international legal obligations.[50] For instance, the IDB "will not finance projects ... that would contravene [Environmental and Social Policy Framework (ESPF)] standards, national laws, or country obligations under relevant international treaties, conventions, and agreements."[51] The EBRD similarly commits to withhold financing for noncompliant (i.e., not environmentally and socially sustainable) projects.[52] Notably, it bases its commitment to "ensur[e] that projects are structured to meet EU environmental principles, practices and substantive standards [comprised in EU regulations and directives]" on EBRD's being a signatory to the European Principles for the Environment (EPE).[53] On the other hand, the EBRD expressly relies on "the International Bill of Human Rights and the eight core conventions of the International Labour Organization" for guidance

[48] WB ESF Overview, para 4.

[49] AIIB ESF, *Annex: Environmental and Social Policy and Environmental and Social Standards*, para 4 [hereafter, "AIIB Environmental and Social Policy and Standards"].

[50] See ADB Safeguard Policy Statement, para 47; IDB Environment and Safeguards Compliance Policy, para 4.15; ADB Safeguard Requirements 2: Involuntary Resettlement, para 15; ADB Safeguard Requirements 3: Indigenous Peoples, para 13.

[51] IDB ESPF, Policy Statement, para 1.6. See also ADB Safeguard Policy Statement (SPS), para 47; AfDB Integrated Safeguards Policy Statement (ISPS), "Commitments and responsibilities"; AIIB Environmental and Social Policy (ESP), para 85; EBRD ESP, para 2.3; EBRD ESP, para 2.3.

[52] EBRD ESP, Section III, para 2.3.

[53] EBRD ESP, Section III, para 2.2, in relation to footnotes 2 and 3.

with its commitment to respect human rights.[54] Albeit lacking an express institutional commitment to international human rights or environmental law, the ADB also makes it a policy not to finance projects that "do not comply with its safeguard policy statement ... [or] with the host country's social and environmental laws and regulations, including those laws implementing host country's obligations under international law."[55]

Other safeguards make express references to particular international instruments and agreements, signifying that "the procedures and standards contained therein are to inform any determination as to the adequacy of the [IFIs'] actions in respect of information disclosure and public consultation."[56] For instance, the EBRD's Performance Requirement on "Information Disclosure and Stakeholder Engagement" explicitly states that it "is guided by the spirit, principles and ultimate goals on public disclosure and stakeholder engagement comprised in the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters."[57] Similarly, IFC clients are required to comply with national law, "including those laws implementing host country obligations under international law."[58] Moreover, the IFC's Performance Standards on "Biodiversity Conservation and Sustainable Management of Living Natural Resources" and on "Cultural Heritage" have been guided by the Convention on Biological Diversity.[59]

Quite interestingly though, a State has once attempted to invoke its supposed compliance with the ADB's safeguard policies as a defense against a communication alleging human rights violations brought before the UN Human Rights Committee. Sri Lanka argued that the complained of project could not have received funding from the IFI if the latter considered that the development project would violate human and

[54] EBRD ESP, Section III, para 2.4, in relation to footnote 4.
[55] ADB SPS, para 47
[56] EBRD Vlorë Thermal Compliance Review Report, para 69. (The international agreements referred to are the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ["Aarhus Convention"] and the UNECE Convention on Environmental Impact Assessment in a Transboundary Context ["Espoo Convention"].)
[57] EBRD Performance Requirement 10 – Information Disclosure and Stakeholder Engagement, footnote 1.
[58] IFC Performance Standards, Overview, para 5.
[59] IFC Performance Standards, Performance Standard 6, para 1.

environmental rights.[60] Although the argument failed, it can be inferred from such justification that borrowing countries comply (or at least attempt to) with loan/grant conditionalities, which include compliance with certain safeguard policies imposed by IFIs, in the belief that they are fulfilling some international legal obligation that is not exclusively of an economic character.

This book accordingly conceives of the IFIs' roles as involving not only the elaboration or clarification of the concept of sustainable development but the administration thereof as well. By facilitating interactions among borrowing States, IFIs, and project-affected persons and communities, the safeguard systems broaden participation in the process of justification and argumentation about economic, environmental, and social norms posited at the international level. The IFIs become administrators[61] or indirect enforcers of international sustainable development law when they wield and leverage their financial capacity to shape the actions and decisions of borrowing States.

5.1.2 *Accountability Mechanisms: Interpretation and Application of Safeguard Policies*

The creation of IAMs forms part of the IFIs' transformation from purely international economic organizations into development agencies.[62] Independent accountability mechanisms constitute a specific kind of epistemic community called "interpretive communities." An epistemic community is "a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area" who infuse international public policy with consensual knowledge, since they are "usually self-recruited around some paradigm linking lore to some aspect of a problematique [a given set of interdependent problems, places, acts, and policies]."[63] Interpretive communities, apart from offering knowledge

[60] See Ms. Susila Malani Dahanayake and 41 other Sri Lankan citizens v. Sri Lanka, Communication No. 1331/2004, U.N. Doc. CCPR/C/87/D/1331/2004 (2006), paras 4.3, 6.3.

[61] See Alvarez, *IOs as Law-Makers* (Introduction n 127) 262.

[62] See de Feyter (Introduction n 3) 53–55.

[63] Peter M Haas, "Introduction: Epistemic Communities and International Policy Coordination" (1992) 46 International Organization 1, 3; Peter M Haas and Ernst B Haas, "Learning to Learn: Improving International Governance" (1995) 1 Global Governance 255, 257, 260.

and policy advice, also pass judgment.[64] Passing judgment entails norm-application to specific cases that fosters normative development, also called "interstitial lawmaking" or "structuration."[65]

As interpretive communities, IAMs can make safeguard policies even more specific, thereby contributing to the policies' normative development and participating in the international lawmaking process on sustainable development. Independent accountability mechanisms are "vehicles for transmitting new norms [concerning environmental and social protection] and promoting their internalization [by IFIs and, to a lesser extent, the borrowing states]."[66]

They also belong to a broader shift in international law, namely, the proliferation of international courts and tribunals that "judicializes" international relations and causes "States [to] lose a degree of control in the 'making' of international law, since the line between interpretation and legislation can often be a hard one to draw."[67] Lawmaking does often intertwine with interpretation,[68] especially in the work of international judges[69] and IOs.[70] The entanglement of these actions partly explains the power of interpretive communities. The blurred distinctions enable "even relatively low-level World Bank or IMF officials, while engaged in attaching particular conditions to loan commitments" to enforce international soft law and simultaneously expand the IFIs' mandates.[71] The potential amplification of this power through the emergence of a *droit commun* among IAMs is explored in Chapter 6.

The World Bank Inspection Panel treats safeguard policies "as the guiding norm[s] for [its] analysis" of the requests for

[64] Johnstone, *The Power of Deliberation* (Introduction n 85) 35, 41.

[65] Friedrich Kratochwil and John Gerard Ruggie, "International Organization: A State of the Art on an Art of the State" (1986) 40 International Organization 753, 770; Johnstone, *The Power of Deliberation* (Introduction n 85) 49.

[66] Johnstone, *The Power of Deliberation* (Introduction n 85) 45.

[67] Sands, "Turtles and Torturers: The Transformation of International Law" (Chapter 3 n 63) 543, 555.

[68] See Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press 2012) 214.

[69] See Higgins, "Policy Considerations and the International Judicial Process" (Introduction n 106) 68.

[70] See Alvarez, "Governing the World" (n 13) 596; Krzysztof Skubiszewski, "Forms of Participation of International Organizations in the Lawmaking Processes" (1964) 18 International Organization 790, 796; Sandesh Sivakumaran, "Beyond States and Non-State Actors: The Role of State-Empowered Entities in the Making and Shaping of International Law" (2017) 55 Columbia Journal of Transnational Law 343, 359–60.

[71] Alvarez, *IOs as Law-Makers* (Introduction n 127) 600.

investigation.[72] Indeed, when undertaking compliance review,[73] IAMs necessarily interpret the applicable IFI policies and procedures,[74] because "like all rules with normative content, operational policies contain concepts and phrases that are (often deliberately) vague, and which only gain precision through interpretation and implementation in relation to a particular case or set of circumstances."[75] Further, in performing quasi-judicial[76] functions, IAMs constrain and/or compel, albeit indirectly, the developing States to be mindful of the environmental, social, and human rights implications of the development projects being implemented within their territories.

Significantly, compliance review involves more than just fact-finding. Instead, it involves reasoned interpretation of IFIs' environmental and social policies that leads to a clearer and more elaborate understanding of sustainability requirements. This interpretive function – illustrated in Section 5.2 and the case studies of co-financed projects in Chapter 6 – qualifies the IAMs as participants in the international lawmaking process on sustainable development.

5.1.3 *Project-Affected People: Invocation and Enforcement of Rights*

Invocation, as one of the discrete "decision functions" under the functional approach to lawmaking,[77] occurs when individuals or communities submit a complaint alleging harms to them or to the environment due to an IFI's noncompliance with its safeguards. If a project-affected people's request is deemed eligible, the ensuing investigation is an opportunity not only to scrutinize the actions of bank management

[72] WBIP, Uganda: Private Power Generation (Bujagali) Project, Investigation Report, para 118 (August 29, 2008) [hereinafter, "WBIP Uganda Private Power Investigation Report"].

[73] See Wei-Chung Lin, "Implementing Environmental Treaty Obligations in Project Finance Activities through an Accountability Mechanism: An Analysis of the World Bank Inspection Panel" (2016) 5 Cambridge Journal of International and Comparative Law 238, 265–66.

[74] Fauchald (Introduction n 124) 116.

[75] Bradlow and Naudé Fourie (Introduction n 25) 51–52.

[76] See generally Andria Naudé Fourie, *The World Bank Inspection Panel and Quasi-Judicial Oversight: In Search of the 'Judicial Spirit' in Public International Law* (Eleven International 2009); Daniel D Bradlow and Andria Naudé Fourie, "Independent Accountability Mechanisms at Regional Development Banks" in Thomas Hale and David Held (eds), *Handbook of Transnational Governance: Institutions and Innovations* (Polity Press 2011).

[77] See Suzuki (Introduction n 121) 51.

and staff but also to essentially challenge the IFI's (and tangentially, the borrowing State's) interpretation and application of the concept of sustainable development. Where there are findings of noncompliance, the IFI's policymaking body directs management to make the necessary modifications to the project. The submission of complaints to IAMs thus creates an opportunity to clarify, and possibly re-define, the meaning of and requirements for sustainable development, as laid down by the IFIs in their environmental and social policies.

To the extent that project-affected people, as well as concerned NGOs, can shape the decisions of IFIs and IAMs, international sustainable development law is arguably created not out of State interests and actions alone. It instead arises from the complex and continuous interaction among various non-State actors. Indeed, by involving those very persons whose interests and rights are at stake, the accountability mechanisms address the imperative to focus on human beings as the intended beneficiaries of development efforts.

Rosalyn Higgins, one of the intellectual pioneers of the international law as process view, underscores that the international community's contemporary problems – "human rights, environmental matters, globalised trade" – reveal the "permeability of State frontiers" and the limitations of States' capacity to address these problems, thereby impelling greater involvement in the international legal process of individuals and other non-State actors, being the entities directly affected by these problems.[78] When the IFIs adopted their safeguard policies and established the IAMs, they created an opportunity for other non-State actors to uphold their rights and interests, thereby also helping determine what constitutes a commitment to sustainability and what "greening"[79] entails.

By giving project-affected people legal standing to seek recourse from IFIs, additional entities become included as participants in a process that previously fell within the exclusive remit of States. In this way, the international lawmaking process becomes more inclusive, as individuals and other members of civil society are empowered to trigger or invoke the interpretative function of the accountability mechanisms. Thus, the IFIs' participation in the international lawmaking process importantly

[78] Rosalyn Higgins, "International Law in a Changing International System" (1999) 58 Cambridge Law Journal 78, 84.

[79] See Susan Park, "The World Bank Group: Championing Sustainable Development Norms?" (2007) 13 Global Governance: A Review of Multilateralism and International Organizations 535, 538–39.

includes enabling other non-State actors to also participate in development decisionmaking at the international level.

The project-affected people's Requests for Investigation, the Management Response, and the Panel's Reports reveal some of the tensions among the economic, environmental, and social concerns surrounding a development project. Section 5.2 discusses how project-affected people used the safeguard policies to raise and legally frame their concerns and how these tensions were addressed in the context of Inspection Panel proceedings.

5.2 (Un)Sustainable Development Projects

How sustainability is understood and operationalized within international financial law, specifically the law of IFIs, can be discerned from the instances of noncompliance with specific safeguard policies. Section 5.1 detailed each relevant actor's functions in the development finance context and how they participate in the decisionmaking process. In turn, this section further demonstrates the theory of international sustainable development lawmaking as communicative process through cases examined by the World Bank Inspection Panel. The cases expose the adverse consequences of disregarding the social and environmental dimensions of development when pursuing investment activities with mainly economic objectives. They help identify features of "un-sustainable development" by determining "what counts as an acceptable environmental assessment, reasonable access to project information, and appropriate grassroots participation."[80] For this purpose, the contents of select Panel reports are closely scrutinized to show how findings of noncompliance with IFI-formulated environmental and social policies tease out the dimensions of sustainable development and the principles underlying such concept. To clarify, although the Inspection Panel's entire docket has been examined, the present study is not a casebook or compilation of summaries of all the cases.[81] Only landmark and/or representative cases are discussed to illustrate how IAMs address sustainable development concerns in practice.

[80] Jonathan A Fox and L David Brown, "Assessing the Impact of NGO Advocacy Campaigns on the World Bank Projects and Policies" in Jonathan A Fox and L David Brown (eds), *The Struggle for Accountability: The World Bank, NGOs, and Grassroots Movements* (MIT Press 1998) 531–32.

[81] See Naudé Fourie, *The World Bank Inspection Panel Casebook* (Introduction n 49).

Since it began operations and as of December 2023, the Inspection Panel has received a total of 165 complaints (Requests for Investigation), 121 of which were registered, that is, passed the Eligibility Phase (73.33 percent).[82] Among these registered cases, 50 proceeded to investigation (41.32 percent). For every five received requests, four alleged noncompliance with the Environmental Assessment policy (OP 4.01).[83] Another oft-invoked issue concerns Consultation/Disclosure (66.67 percent or 110 Requests). Involuntary Resettlement (OP 4.12) constitutes 53.33 percent or 88 Requests, while 48 complaints about Indigenous Peoples (OP 4.10) represent 29.09 percent of the Panel's docket. According to the World Bank Independent Evaluation Group (IEG), in many of the cases with noncompliant consultation and disclosure requirements, "the deficiency was the absence or inadequacy of any description of consultations conducted during project preparation, or missing EAs and Integrated Safeguards Data Sheet in the Bank's internal document database."[84]

One illustration of the safeguard system's contribution to international sustainable development law concerns the elaboration of States' broad duty to "facilitate and encourage public awareness and participation" under the Rio Declaration. To recall, Principle 10 provides:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have *appropriate access to information* concerning the environment that is held by public authorities . . . and the *opportunity to participate in decision-making processes.* States shall facilitate and encourage public awareness and participation by *making information widely available.* Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[85]

The IFIs' policies and the IAMs' interpretation thereof identify the factors in determining compliance with this requirement: (i) inclusion of the relevant stakeholders, (ii) timeliness, and (iii) linguistic and cultural appropriateness.

Cases about "meaningful consultation" brought before IAMs present an opportunity to analyze in greater detail what constitutes "appropriate

[82] All figures obtained from the World Bank Inspection Panel website <https://www.inspectionpanel.org/panel-cases/data>.
[83] More accurately: 135 out of 165, or 81.82 percent.
[84] World Bank Independent Evaluation Group, *Safeguards and Sustainability Policies in a Changing World: An Independent Evaluation of World Bank Group Experience* 20 (2010)
[85] Emphasis added.

access to information" and what steps a borrowing country should take to "mak[e] information widely available." As Chapter 4 discussed, the requirement to meaningfully consult project-affected people is common to all three safeguards studied in the book. As the Inspection Panel highlighted, "The provision of full information to Project affected people, and meaningful consultation with them to enable their informed participation with respect to decisions that stand to affect them, are mainstays of the Bank safeguard policies."[86] Likewise, in a case brought before both the World Bank Inspection Panel and the AfDB Independent Review Panel, the latter observed, "The fact that consultation is discussed in so many different Bank policies underscores the importance of meaningful consultation to the Bank."[87]

In interpreting "meaningful consultation" under OD 4.01, the predecessor of OP 4.01 (Environmental Assessment Policy), the Inspection Panel explained that taking into account the views of the affected people and local NGOs during preparation of an EA is intended for stakeholders to "understand both the nature and extent of any social or environmental impact and the acceptability of proposed mitigatory measures, particularly to affected groups."[88] It recalled that OD 4.01 expressly provided that consultations on social issues may be linked to the EA consultations and "should pay particular attention to those issues most likely to affect the people being consulted."[89] This earlier version of the policy expounded the significance of consultation, describing it as "a valuable way to improve decision making, to obtain feedback on the environmental assessment process and draft report, and to increase community cooperation in implementing the recommendations of the environmental assessment."[90]

The Inspection Panel further explained that "fully informed and participatory consultation" is necessary to achieve the Involuntary Resettlement Policy's envisioned "form of negotiated compensation" occurring in the context of considerable power imbalance between the

[86] WBIP Honduras Land Administration Investigation Report, para 132.
[87] African Development Bank (AfDB) Independent Review Panel, Bujagali Hydropower and Interconnection Projects, Compliance Review Report, 37 (June 20, 2008). [hereinafter, "AfDB Bujagali Hydropower Compliance Review Report"].
[88] World Bank Inspection Panel, Colombia: Cartagena Water Supply, Sewerage and Environmental Management Project, Investigation Report, para 230 (June 24, 2005). [hereinafter, "WBIP Colombia Water Supply Investigation Report"].
[89] Ibid. citing OD 4.01, para 21.
[90] OD 4.01, para 19.

State and the citizens.[91] The presence of security forces during consultations is incompatible with the Bank's policy requirements, since "full and informed consultation is impossible if those consulted perceive that they could be penalized for expressing their opposition to, or honest opinions about, a Bank financed project."[92] In this case, involving a petroleum development and pipeline project, the Panel took an exceptional opportunity to investigate whether issues of good governance and human rights within a country (Cameroon) "were such as to impede the implementation of [a development project] in a manner compatible with the Bank's policies"[93] and affirmed that the far-from-ideal situation required reinforced monitoring by the Bank.[94]

The Panel's clarificatory function and teleological interpretation of the safeguards additionally manifests through its insistence on timeliness in initiating the EA and/or conducting the public consultations. In its view, these procedures ensure that (i) the borrowing country takes into account the environmental and social effects when it decides on particular aspects of a development project and (ii) the potential harms are mitigated, if not prevented.[95] Consultations should be held as early as possible to actually enable the project-affected people's inputs to matter and be taken into account, as well as to allow for the possibility of transforming those inputs into choices or options.[96]

In the *Albania–Vlora* case (further discussed in Chapter 6), the Inspection Panel stressed the rationale for requiring the borrower to timely disclose project-related information: "To enable project-affected populations and local NGOs to express their perceptions and locally informed knowledge about the risks and concerns that the project may cause to them."[97] In a succinct but effective manner, this statement

[91] World Bank Inspection Panel, Ghana: Second Urban Environmental Sanitation Project, Investigation Report, para 290 (March 13, 2009).

[92] World Bank Inspection Panel, Cameroon: Petroleum Development and Pipeline Project and Petroleum Environment Capacity Enhancement, Investigation Report, ¶135 (May 2, 2003). [hereinafter, "WBIP Cameroon Petroleum Investigation Report"].

[93] WBIP Cameroon Petroleum Investigation Report, para 215.

[94] WBIP Cameroon Petroleum Investigation Report, para 217.

[95] See, e.g., WBIP, Bangladesh: Jamuna Bridge Project, Report and Recommendation to the Executive Directors of the International Development Association ("Eligibility Report"), para 47 (November 26, 1996).

[96] WBIP Mumbai Urban Transport Investigation Report, para 368.

[97] World Bank Inspection Panel, Albania: Power Sector Generation and Restructuring Project, Investigation Report, para 319 (August 7, 2009). [hereinafter, "WBIP Albania Power Sector Investigation Report"].

illustrates how public participation is intended to gather information about social and/or environmental issues regarding a development project and, consequently, to assist in reaching a decision that integrates economic, social, and environmental concerns, consistent with the concept of sustainable development.

Moreover, according to the Panel, the requirement for environmental assessments to be closely integrated with project economic, social, and technical analyses is for purposes of "ensur[ing] that environmental considerations are given proper weight in project selection, siting, and design decisions."[98] Consequently, it was rightly alarmed when "there has been inadequate consideration of the relationships between the compliance with [the] Bank's safeguard policies, project design and quality, and among the applicable policies":[99]

> The EA and resettlement/compensation processes are *intimately linked in the real world, and by the terms of the two policies.* For instance, the determination of the size and location of the future buffer zone is closely linked to the potential harm of the future landfill. At the same time, the determination of this size and location directly affects the number of people to be evicted as well as the cost of compensation.[100]

The consultation requirement crucially reveals the interrelation among environmental and social policies. Indeed, the effectiveness of environmental assessments in fulfilling the goal of integrating environmental issues into development planning is influenced by public participation requirements.[101] In this regard, the Inspection Panel identified a link between public participation and integration by underscoring how the EAs' determination of impacts and choices[102] improves the decisions' sustainability orientation:

[98] World Bank Inspection Panel, Argentina: Santa Fe Road Infrastructure Project (Third Request), Investigation Report, para 51 (July 2, 2009).

[99] World Bank Inspection Panel, Ghana: Second Urban Environment Sanitation Project, Investigation Report, para 188 (March 13, 2009). [hereinafter, "WBIP Ghana Urban Environment Investigation Report"].

[100] WBIP Ghana Urban Environment Investigation Report, para 185 (citation omitted) (emphasis added).

[101] See generally Pring and Noé (Introduction n 104) 38; Richardson and Razzaque (Chapter 3 n 32) 179.

[102] See Asian Development Bank, Compliance Review Panel/Office of the Compliance Review Panel, Office of the Special Project Facilitator, Independent Evaluation Department, and Sustainable Development and Climate Change Department, *2016 Learning Report on the Implementation of the Accountability Mechanism Policy*, 13–14, para 48, p 17, para 59, September 2016 <https://www.adb.org/documents/2016-learn

> The Panel has reviewed the environmental assessments and finds that they are very inadequate. They do not comply with the requirements of OD 4.01. The range of environmental matters addressed is limited; *affected parties were not consulted*; and no mitigation measures are suggested. As discussed later, no alternative resettlement sites were considered. The safeguard envisioned to be in place through OD 4.01 has therefore failed.[103]

> *If there is no alternative, there can be no choice*. This basic principle was recognized in environmental assessment more than three decades ago. The purpose of environmental assessment is to improve decisions by making appropriate choices. It follows that careful comparison of realistic alternatives is an important feature of environmental assessments. Without systematic consideration of realistic alternatives, any environmental assessment is seriously flawed.[104]

The principle of integration has also been discussed in the context of elucidating the EA's contribution to the success of an involuntary resettlement.[105] The Panel reasoned that the "intent and spirit"[106] of the Environmental Assessment Policy "requires that the EA gives *integrated consideration* to the natural and social aspects of the Project."[107] Conversely, "an EA that does not consider ambient environmental and social conditions when identifying sites for resettlement fails to meet the requirements of the Bank's OP 4.01."[108]

Further, the Panel obliquely discussed the principle of integration and its relation to sustainable development thus:

> The Panel recognizes Management's effort to comply with the Bank's applicable policy requirements. In this spirit, and in order *to ensure the sustainability of the benefits of the Pipeline Project* and effectively monitor its risks, the Bank should *consider within its larger dialogue framework* with the country, an effective incentive to help *integrate important sectors,*

ing-report-implementation-accountability-mechanism-policy>. (Generally, meaningful consultation includes "improved information sharing, regular involvement, and communication with project beneficiaries.")

[103] WBIP Yacyretá Hydroelectric Investigation Report, para 116 (emphasis added). See also WBIP Mumbai Urban Transport Investigation Report, para 368.

[104] WBIP Yacyretá Hydroelectric Investigation Report, para118. Citing US National Environmental Policy Act (NEPA) and the Espoo Convention. See also WBIP Colombia Water Supply Investigation Report, para 60.

[105] WBIP Mumbai Urban Transport Investigation Report, paras 638–40

[106] Ibid. para 640.

[107] Ibid. para 638 (emphasis added).

[108] Ibid. para 636.

> *such as environment and public health*, in a local monitoring team for the Pipeline Project.[109]

Apart from situations where the applicable safeguard policy explicitly references "sustainable development," Panel reports use the term to capture the sometimes competing environmental, social, and economic concerns surrounding a development project. For example, the Panel rationalized its perspective and approach toward a private sector–driven hydroelectric power plant project, which allegedly violated the Involuntary Resettlement policy, with an awareness that development projects often have multiple dimensions:

> At the outset, the Panel wishes to reiterate that it considers *energy a crucial factor in Uganda's development*. The findings of this Report, and the discussion below, do not dispute this fact. Rather, they highlight what might itself be noted as the first systemic point to be raised in this Report, i.e., that energy production requires considerable care in order to *ensure that social, economic and environmental aspects are properly considered, in line with Bank policy*, to adhere to sound development practices and avoid situations where costs, including social and environmental costs, outweigh the benefits expected from what are usually sizable investments.[110]

Although this excerpt does not explicitly mention "sustainable development," the Panel report's summary does:

> In closing, the Panel would like to emphasize that energy is a crucial factor in Uganda's development. As this investigation shows, *generating energy for development in a way that is economically efficient, socially equitable and environmentally sustainable is hugely complex and one of the major sustainable development challenges of today.*
>
> The results of the Panel's investigation illuminate some of these complexities in the Bujagali Project, which may also be relevant to other similar projects. These include addressing legacy issues from preceding projects, difficulties in achieving transparency on economic and other impacts in public-private partnership projects, incorporating climate change issues into project design, and issues regarding the application of Bank policy on natural habitats to sacred groves and sacred places.[111]

In the same case, the Inspection Panel's analysis of project-related problems provided specificity to the safeguard's injunction to

[109] WBIP Cameroon Petroleum Investigation Report, para 233 (emphasis added).
[110] WBIP Uganda Private Power Investigation Report, para 620 (emphasis added).
[111] WBIP Uganda Private Power Investigation Report, Executive Summary, xv (emphasis added).

envisage and execute resettlement activities as sustainable development programs:

> **Lack of focus on displaced persons** The Panel notes that the CDAP [Community Development Action Plan], though [an] important demonstration of the Sponsor's corporate social responsibility, is not necessarily related to benefit sharing for displaced persons as required by the objectives of OP/BP 4.12. While the programs offered by the CDAP are directly available to the displaced people (micro-credit, agricultural extension, small business support, etc.), eligibility criteria do not indicate preference to displaced persons.
>
> **Lack of Program Specificity:** The problem identified by the first Inspection Panel Report over five years ago persists. The Panel finds that *in the area of sustainable development* and benefit sharing, the CDAP focuses almost entirely on short-term exercises; its targets are poorly laid out; and it makes no significant or systematic effort to ensure that resources are directed to institution building or social fundamentals rather than only short-term construction projects.[112]

The Inspection Panel found Bank Management to be noncompliant with OP 4.12 due to the absence of items in the proposed assistance measures that specifically address the needs of vulnerable tenants/sharecroppers or of children, and because the "measures do not address the question of sustainability beyond the limited Project support."[113]

The Panel's reasoning in other reports has similarly included references to the "letter and intent" of safeguard policies regarding the definition of "project area"[114] that, in turn, is crucial in defining who the "project-affected people" are. It has occasionally connected the lack of an adequate census and baseline assessment of the project site's socioeconomic situation, on the one hand, with the resulting noncompliance with a safeguard's policy objectives to afford compensation to populations adversely affected by a development project, on the other.[115]

Finding that the social dimension was barely considered in an environmental assessment, the Panel enumerated examples of factors that should have been studied as part of the assessment.[116] In another case, the Panel emphasized the importance of socioeconomic surveys that "should

[112] Ibid. paras 528–29 (emphasis in the original) (italics added).
[113] Ibid. para 503.
[114] World Bank Inspection Panel, The Qinghai Project – A Component of the China: Western Poverty Reduction Project, Investigation Report, para 81 (April 28, 2000).
[115] WBIP Uganda Private Power Investigation Report, Executive Summary, at xliii–xliv
[116] WBIP Albania Power Sector Investigation Report, para 142.

include, *inter alia,* standard household characteristics, the magnitude of the displacement, and information on the full resource base of the affected population."[117]

Likewise, in particular, projects affecting indigenous peoples and their rights to natural and economic resources, activities implementing the principle of public participation include direct consultation to identify local preferences, incorporating indigenous knowledge into project approaches, and "appropriate early use of experienced specialists."[118] The World Bank's Operations Evaluation Department found that despite Informed Participation being difficult, costly, and time-consuming, it "is a basic premise of [the indigenous peoples policy], the very essence of its requirements," and in cases where it has been undertaken it has resulted in positive effects for indigenous peoples.[119] The Inspection Panel corroborated that community participation is the "first and fundamental" prerequisite for a successful indigenous peoples plan, and the safeguard policy intends for the preparation of such document "to be driven by the people."[120]

5.3 Participation, Integration, Sustainability: Redux

Based on the safeguard systems' design, the development decisionmaking process follows an "expertocratic model,"[121] where participation is valued for the information it provides to the principal decisionmaker. The discussion thus far has shown that individuals and local communities, alongside the IFIs and the IAMs, are involved in the international lawmaking process on sustainable development. Such involvement is

[117] WBIP Yacyretá Hydroelectric Investigation Report, para 226.

[118] OD 4.20, para 8 (italics in the original). See also World Bank Inspection Panel, Democratic Republic of Congo: Transitional Support for Economic Recovery and Emergency Economic and Social Reunification Support, Investigation Report, para 219 (August 31, 2007). [hereinafter, "WBIP Congo Transitional Support Investigation Report"].

[119] World Bank, *Implementation of Operational Directive 4.20 on Indigenous Peoples: An Evaluation of Results*, 41, para 4.12 (April 10, 2003) <http://documents.worldbank.org/curated/en/692341468761684285/pdf/257541OD04–20.pdf>.

[120] World Bank Inspection Panel, India: Coal Sector Environmental and Social Mitigation Project, Investigation Report, para 327 (November 25, 2002) [hereinafter, "WBIP India Coal Sector Investigation Report"].

[121] See Jim Rossi, "Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking" (1997) 92 Northwestern University Law Review 173, 207.

facilitated by the meaningful consultation requirement that IFIs uniformly include in their safeguard policies. Uniformity in promoting public participation derives not only from the policies' textual similarities but also (as will be shown in Chapter 6) from the IAMs' converging interpretations of the safeguards.

Insofar as "debates about sustainable development are increasingly dominated by questions of how to secure values such as participation, representation, accountability and legitimacy in transnational governance arrangements,"[122] the restatements, elaboration, and clarification afforded by safeguard systems are valuable. They bolster the argument that integration of the economic, environmental, and social dimensions of development is made more possible and effective under conditions of openness, inclusion, and deliberation. The deliberation contemplated in this respect entails dialogue, discourse, and communicative reason, such that "participants . . . are not enjoined merely to respect the viewpoints of others: they are required to engage these viewpoints, to take them as a starting point in shaping dialogue and [possibly] moving towards consensus."[123] Other indicators of due consideration is the openness or willingness of all participants to change their minds or modify their views in the light of information – both "objective" knowledge and value-laden perspectives – presented by their co-participants.[124]

Ultimately, in determining whether a decision is consistent with sustainable development, the fundamental issue is less about which dimension is prioritized or whose position prevails. Rather, it is whether all relevant actors representing various economic, environmental, and social concerns had an opportunity to choose and to be heard about their choices. Otherwise stated, it bears asking whether these relevant actors have been treated as free agents. This proposition dovetails with Lawrence Solum's "participatory legitimacy thesis": "Procedural justice is the route to reconciliation with substantive error. Adjudicative procedures create legal norms and, like other norm-creating procedures, requires rights of participation to establish legitimacy."[125]

[122] Karin Bäckstrand, "Democratizing Global Environmental Governance? Stakeholder Democracy after the World Summit on Sustainable Development" (2006) 12 European Journal of International Relations 467, 468.

[123] Rossi (n 121) 205 (citations omitted).

[124] See Lawrence Solum, "Procedural Justice" (2004) 78 Southern California Law Review 181, 292–93.

[125] Ibid. 190.

Significantly, this approach to sustainability also fits with the interactional international law framework, wherein "the fundamental commitment is to enable participants to pursue their own ends while being guided by law," since "the requirements of legality are largely procedural in orientation."[126] The IFIs' (self-interested) pursuit of legitimacy through accountability-promoting procedures simultaneously makes "a substantive contribution to the engagement of the individual as a participant in international law."[127] Hence, Laurence Boisson de Chazournes aptly portrayed the decision to establish the Inspection Panel as "a progressive step in the development of both the law of international organizations and [human rights law]."[128]

Projecting farther ahead, the World Bank's and other IFIs' adoption of the human development approach should foster recognition of their international human rights obligations, or at least the adoption of a common human rights policy (via a stand-alone safeguard policy) in the future.[129] This proposition follows Arjun Sengupta's view that "the right to development builds upon the notion of human development and can be described as the right to human development, which in turn is defined as a development process that expands substantial freedoms and thereby realizes all human rights."[130] Compelling the IFIs to move toward this direction can start with convincing their decisionmakers that economic growth, which remains among the institution's chief concern, actually serves as both an objective and a means of the right to development: "It is an objective because it results in higher per capita consumption and higher living standards; it is instrumental [constitutive] in that it allows for the fulfilment of other development objectives and human rights."[131]

Notwithstanding their limitations, the existence of accountability mechanisms and the IFIs' increasing efforts to consult and involve the public in the formulation of their internal law are arguably consistent with the SDGs, specifically the target under Goal 10 ("Reduce inequality

[126] Brunnée and Toope (Introduction n 102) 316.
[127] Duncan French and Richard Kirkham, "Complaint and Grievance Mechanisms in International Law: One Piece of the Accountability Jigsaw?" (2009) 7 New Zealand Yearbook of International Law 179, 204.
[128] Boisson de Chazournes, "Public Participation in Decision-Making" (Chapter 3 n 11) 94; Clark (Chapter 4 n 74) 19.
[129] See generally Vogt (Chapter 2 n 180) 181.
[130] Sengupta (Chapter 1 n 81) 71.
[131] Ibid.

within and among countries") that provides, "Ensure enhanced representation and voice for developing countries in decisionmaking in global international economic and financial institutions in order to deliver more effective, credible, accountable and legitimate institutions."[132] Moreover, despite all their current imperfections, the safeguard systems have enabled individuals and communities – whose place within the international legal order remains contested – to assert their voices, interests, and rights in a manner that contributes to a decisionmaking process that impacts how sustainable development is conceptualized and applied.

The IFIs' role as makers of international sustainable development law is complemented by a growing shared awareness among IAMs that they are not only part of the IFIs' safeguard systems but are also participants themselves in the international sustainable development lawmaking process. Chapter 6 accordingly focuses on this trend.

[132] Target 10.6. See also Target 16.6 under Goal 16: "Develop effective, accountable and transparent institutions at all levels."

6

IFIs as Lawmakers II

Harmonizing and Coordinating toward a *Droit Commun* on Sustainable Development

By demonstrating how the safeguard systems harden sustainability commitments in international legal instruments and extend the application of these norms beyond the organization, Chapter 5 expounded the first prong of the book's claim about IFIs' role in making international sustainable development law. This chapter amplifies such claim by discussing a distinct but closely related set of circumstances wherein this international lawmaking transpires. It delves deeper into the workings of IAMs, underscoring how their collaboration additionally clarifies and elaborates the concept of sustainable development that the increasingly similar environmental and social policies endorse. International sustainable development law, as presented here, is formed through the diffusion of sustainability-oriented norms and practices among a particular group of IOs and related organs who interact with one another and with States and individuals.

Understood through these interactions that safeguard systems regulate, international lawmaking occurs in an interlinked manner. First, IFIs and IAMs prescribe to their peers organizational structures, policies, and procedures about environmental and social issues arising in development project finance. Second, their converging prescriptions reinforce borrowing States' understanding of and/or compliance with international obligations concerning (development) finance, human rights, and the environment. This convergence further enhances project-affected people's participation in the development decisionmaking process.

To illustrate this lawmaking process, the chapter compares select safeguard policies across the major MDBs and the IFC. It then discusses the similarities and differences among these IFIs' IAMs, particularly in their interpretation of safeguards in co-financed projects, thereby updating and expanding the earlier work of Richard Bissell and Suresh Nanwani.[1]

[1] Bissell and Nanwani (Introduction n 47).

Framing this comparative analyses, Section 6.1 briefly introduces theories positing the formation of a *droit commun* or common law within development finance.

6.1 Standard-Setting and Emerging *Droit Commun* on Sustainable Development

The respective harmonization efforts among IFIs and among IAMs form what some scholars[2] call a *droit commun* within development finance. As defined, *droit commun* is "a process through which various organizations develop and implement similar standards, rules, or procedures."[3] Philipp Dann refers to "*ius commune* of development cooperation" in a nearly similar sense, describing development cooperation and its law as a "heterarchical system" comprising actors from national, regional, and international levels who learn from one another, bring about diffusion and cross-fertilization of norms and practices, and collectively create a visibly coherent body of instruments and procedures.[4] Crucial to the emergence of this *droit commun* are, as this chapter demonstrates, the communication and learning that occur among IFIs and accountability mechanisms.

Because of its longer history and somewhat more extensive knowledge, the World Bank has become a standard-setter among IFIs. In the field of sustainable development, its formulation of the safeguard policies and establishment of the Inspection Panel exemplify this standard-setting role.[5] To address development project–induced displacement especially of

[2] See Laurence Boisson de Chazournes, "Partnerships, Emulation, and Coordination: Toward the Emergence of a Droit Commun in the Field of Development Finance" in Hassane Cissé, Daniel D Bradlow, and Benedict Kingsbury (eds), *The World Bank Legal Review: International Financial Institutions and Global Legal Governance*, vol 3 (World Bank 2012); Dann, *The Law of Development Cooperation* (Introduction n 13) 29, 192; Philippe Sands, "International Law-Making and Regulation" in *Principles of International Environmental Law* (Cambridge University Press 2003) 142.

[3] Boisson de Chazournes, "Partnerships, Emulation, and Coordination" (n 2) 174.

[4] Philipp Dann, "The Global Administrative Law of Development Cooperation" in Sabino Cassese (ed), *Research Handbook on Global Administrative Law* (Edward Elgar 2016) 419; Dann, *The Law of Development Cooperation* (Introduction n 13).

[5] See Boisson de Chazournes, "Partnerships, Emulation, and Coordination" (n 2) 174; Sabine Schlemmer-Schulte, "Sustainable Development Priorities in World Bank Inspection Panel Decisions" in Marie-Claire Cordonier Segger and Judge CG Weeramantry (eds), *Sustainable Development Principles in the Decisions of International Courts and Tribunals: 1992–2012* (Taylor & Francis 2017) 740; Daniel D Bradlow and Megan S Chapman, "Public Participation and the Private Sector: The Role of Multilateral Development Banks in the Evolution of International Legal Standards" (2011) 4 Erasmus

indigenous populations, one author advocated that no other institution but the Bank "should be the global actor to provide a solution to this problem because it has various transnational resources and a great amount of experience due to its funding of hundreds of development projects over several decades."[6] Likewise, in one project co-financed by the World Bank, the European Investment Bank (EIB), and some bilateral DFIs, the donors agreed to apply the World Bank's involuntary resettlement policy "because of its better operationalized standards and . . . field presence and upstream activities."[7] The complications from this project in Kenya are briefly recounted below.

Interestingly, as the subsequent discussion shows, the teacher has now also become the student. The World Bank based its 2018 Environmental and Social Framework not only on inputs from extensive public consultations but also on an independent study[8] of the improvements and innovations that other MDBs have adopted for their safeguard policies over the years. The learning process among IFIs has thus come full circle, with the World Bank also deriving lessons from its "younger" peers.

Similar dynamics could be observed among IAMs. Most existing mechanisms were modeled after or inspired by the World Bank Inspection Panel, which was established in 1993. The IDB, for instance, took the World Bank's lead and established in 1994 its Independent Investigation Mechanism to increase its transparency, accountability, and effectiveness.[9] More than a decade later (in 2010), this body was replaced by the current Independent Consultation and Investigation Mechanism (MICI), which the Board considered an enhancement that "reflected current practice in independent accountability mechanisms and public input."[10] Most IAMs have also since improved upon the Panel's template by adding functions that better respond to the needs of project-affected people.

Law Review 91, 92; Alvarez, *IOs as Law-Makers* (Introduction n 127); Gallagher and Yuan (Introduction n 36).

[6] Ali VanCleef, "Hydropower Development and Involuntary Displacement: Toward a Global Solution" (2016) 23 Indiana Journal of Global Legal Studies 349, 352.

[7] Jeanette Schade, "EU Accountability for the Due Diligence Failures of the European Investment Bank: Climate Finance and Involuntary Resettlement in Olkaria, Kenya" (2017) 8 Journal of Human Rights and the Environment 72, 78–79 (citations omitted).

[8] See generally Harvey Himberg, *Comparative Review of Multilateral Development Bank Safeguard Systems* 1 (2015).

[9] IDB, *Policy of the Independent Consultation and Investigation Mechanism* (December 2015), 5, para 2 <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=40792853>.

[10] Ibid. para 3

Like the World Bank, the ADB exemplifies how an institution alternates between being a follower and a standard-setter. In reviewing and updating its environmental and social policies, ADB surveyed other IFIs' safeguards and took into account the demand for donor harmonization.[11] The establishment of its Inspection Function in 1995 likewise shows ADB following the World Bank, which had then just created the Inspection Panel. In 2003, the ADB in turn laid down some standards for other MDBs to emulate, that is, the bifurcated/dual-function model and the empowerment of complainants to comment on draft compliance review reports.

Relative newcomers like the AfDB, EBRD, and AIIB also draw lessons from the combined past experiences of the earlier-generation MDBs. Acknowledging the importance of effective implementation of environmental and social management plans, the AIIB cites "the collective experience of the [MDBs] and bilateral development organizations in assisting their clients to manage environmental and social risks and impacts."[12]

The present study focuses on harmonization of the safeguard systems, not only through the actions of IFIs that formulate the policies but also through the IAMs' efforts to cooperate during investigations of co-financed projects.

6.2 Safeguards Harmonization and Cooperation among Accountability Mechanisms

A common law on sustainable development would derive from the aggregate practices and interaction not only among IFIs and accountability mechanisms but also between them and their borrowers as well as the people and communities affected by development projects. Auspiciously, IFIs are becoming more receptive to international law and to taking a role in global pursuits, including climate change action:

> At a time of increasing debt levels and strained government budgets, when more development finance is urgently needed, we, Heads of Multilateral Development Banks (MDBs), recognize the collective role we need to play in response to the global challenges and the efforts that

[11] ADB Safeguard Policy Statement, paras 10–11. As of January 2024, ADB is in the process of adopting a revised Environmental and Social Framework that considerably mirrors the World Bank's.

[12] AIIB ESF, para 11.

> will put us on track towards achieving the SDGs. To this end, we are committed to strengthen our collaboration and individual actions for greater impact. We will also continue to explore ways to expand our lending capacity. . . . MDBs, working in collaboration with other development partners, can offer substantial leverage, deep knowledge and expertise, and an unparalleled proximity to governments and those most in need.[13]

Indeed, the MDBs have, in the last five years (at least), been issuing joint statements on the occasion of the annual climate change Conference of Parties (COP). They have also agreed upon several methodological principles to align their operations with the Paris Agreement.[14]

The effectiveness, if not the legitimacy, of the embryonic but growing participation of IFIs and other non-State actors in the international lawmaking process on sustainable development partly depend on the coherence of the safeguard policies and the predictability in their interpretation and implementation. Parenthetically, this largely positive view of safeguards harmonization and establishing greater links with international law does not discount apprehensions about having a sole institution, or group of like-minded institutions, unilaterally set "universal" standards.

6.2.1 Convergence of Safeguard Policies

The convergence among safeguard policies regarding environmental assessment, involuntary resettlement, and indigenous peoples is one way to demonstrate the IFIs' collective contribution to international sustainable development law. As mentioned, these topics represent the "non-economic" concerns that are to be integrated into the law of IFIs (and international economic law more generally) in order to form international sustainable development law.

Many MDBs have been taking their counterparts' safeguards as templates for formulating and/or revising their own environmental and social policies. A comparative analysis of the safeguard policies reveals that, at the very least, the seeds of an orientation toward the

[13] Statement of the Heads of Multilateral Development Banks Group: Strengthening Our Collaboration for Greater Impact, October 13, 2023 <https://www.worldbank.org/en/news/statement/2023/10/13/statement-of-the-heads-of-multilateral-development-banks-group-strengthening-our-collaboration-for-greater-impact>. The Statement was signed by the following MDBs: AfDB, ADB, AIIB, Council of Europe Development Bank, EBRD, EIB, IDB, Islamic Development Bank, NDB, WBG.

[14] See European Bank for Reconstruction and Development, "The EBRD and the Paris Agreement" <https://www.ebrd.com/ebrd-paris-agreement>.

multidimensional concept of sustainable development have been, and continue to be, planted in these institutions' operational frameworks. There is considerable similarity in the wording, the topics covered, and, in most instances, the requirements set by the safeguard policies. As argued elsewhere, although certain requirements vary – for example, frequency and timing of consultations and criteria for identifying indigenous peoples – "the general procedures and overall intent to adequately consider the environmental and social impact of development projects are fairly uniform across the IFIs."[15]

Remarkably, the "learners" now also include other non-State actors such as private financial institutions. The latter appear to be similarly receptive to adopting environmental and social policies,[16] as shown by their voluntary formulation of the Equator Principles, which considerably mirror the IFC's environmental and social policies ("Performance Standards").

The Performance Standards guide IFC-supported private sector projects in "identify[ing] risks and impacts, and are designed to help avoid, mitigate, and manage risks and impacts as a way of doing business in a sustainable way, including stakeholder engagement and disclosure obligations."[17] Compliance requires "borrowers to field a closely coordinated, inter-disciplinary team of environmental, social and legal specialists" who are experienced in "conducting assessments, identifying and analyzing applicable standards and laws, formulating action plans, establishing monitoring and reporting programmes and designing management systems."[18] Together with the Access to Information Policy, they constitute the IFC's Sustainability Framework. They reflect and implement the multidimensional nature of sustainable development as broadly understood and espoused by the international community.

The Equator Principles illustrate the ability of IOs with vast resources to set standards, "which could put more pressure on both governments and corporations to take steps toward ... implementation [of international soft law]."[19] They set a benchmark or minimum standard for due diligence, constituting a framework for private financiers to "identify,

[15] Lorenzo (Introduction n 36) 338.
[16] See William Thomas and Clifford Chancer, "Equator Principles II: The Need to Be Sustainable" (2006) 25 International Financial Law Review 62, 65.
[17] IFC Performance Standards, Overview, para 1.
[18] Thomas and Chancer (n 15) 63–64.
[19] Fredericks (Chapter 5 n 21) 463.

assess and manage environmental and social risks" in projects.[20] If one were to consider the far-reaching capacity of transnational businesses to set standards and form best practices in their respective industries – owing to their wealth and the power associated with it – the Principles themselves have considerable potential to propagate and embed a sustainability orientation in the private sector, which has an important role in funding the sustainable development agenda.

The IFC's CAO has taken note of such widening influence beyond the Corporation's own portfolio. It thus advised IFC to update its Performance Standards in the light of the growing emphasis on the private sector's human rights responsibilities, as expressed in the work of the United Nations Special Representative on Business and Human Rights, John Ruggie.[21] As financiers and advisers, the Equator Principles Financial Institutions have themselves cited the UN Guiding Principles on Business and Human Rights (UNGPs)[22] and recognized their "responsibility to respect Human Rights in line with the [UNGPs] by carrying out human rights due diligence."[23]

6.2.1.1 Environmental Assessment

Predating the 1992 Rio Declaration, the World Bank's EA Policy (OP 4.01) facilitated the inclusion in said Declaration of the principle[24] regarding EIA.[25] It contained the typical definition enumerating factors that an EA should consider "in an integrated way": "The natural environment (air, water, land); human health and safety; social aspects (involuntary resettlement, indigenous peoples and physical cultural resources);

[20] Equator Principles, Preamble (EP 4, July 2020) <https://equator-principles.com/app/uploads/The-Equator-Principles_EP4_July2020.pdf>.

[21] Office of the Compliance Advisor/Ombudsman, Advisory Note: Review of IFC's Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information (2010) 8.

[22] Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework,* Human Rights Council, Principle 31, U.N. Doc. A/HRC/17/31 (March 21, 2011).

[23] Equator Principles (n 20), Preamble.

[24] Principle 17: "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority."

[25] See Shihata, "The World Bank's Contribution to The Progressive Development of International Environmental Law" (Chapter 5 n 46) 491–93; Boisson de Chazournes, "Policy Guidance and Compliance" (Chapter 2 n 143) 299.

and transboundary and global environmental aspects."[26] Most MDBs followed suit: an EA is presently required prior to and/or while undertaking IFI-supported development projects, especially those that could harm living species or the natural environment.[27] Some MDBs additionally mention gender,[28] governance capacity,[29] and other non-environmental issues, for consideration.

In one case, finding that an EA inadequately addressed the social dimension, the World Bank Inspection Panel assumed a gap-filling role and enumerated examples of social factors that should have been considered: "Composition of the Project area population, its livelihood and income sources; Formation of attitudes towards the project; Interest group activity; Change in size or structure of local government; Planning and zoning activity; Industrial diversification; Economic inequities; Employment equity; Changing occupational opportunities; Sense of place; Cherished features."[30]

Together with the MDB's risk- and impact-based project classification, it is the EA that determines whether and how the other safeguards are applied. Borrowers conduct the assessment,[31] while MDBs perform the project risk and impact classification.[32] Borrowing States can request financial and/or technical assistance (e.g., training; capacity-building) from MDBs to conduct the EA.[33] For the World Bank's environmental and social risk classification – that is, High Risk, Substantial Risk, Moderate Risk, or Low Risk – it "take[s] into account relevant issues, such as the type, location, sensitivity, and scale of the project; the nature

[26] WB OP 4.01, para 3.

[27] ADB Safeguard Requirements (SR) 1 (Environment); AfDB Operational safeguard (OS) 1 (Environmental and social assessment); AIIB ESS1 (Environmental and Social Assessment and Management); IDB Environmental and Social Performance Standard (ESPS) 1 (Assessment and Management of Environmental and Social Risks and Impacts); EBRD Performance Requirement (PR) 1 (Assessment and Management of Environmental and Social Risks and Impacts).

[28] ADB SPS, para 2; ADB SR1, para 5.

[29] IDB Environment and Safeguards Compliance Policy (January 2006), para 4.18

[30] WBIP Albania Power Sector Investigation Report, para 142.

[31] WB ESS1, para 23; ADB SR1, para 1; AfDB OS1, "Project level"; AIIB ESS1, para 3; EBRD PR1, para 2; IDB, ESPS1, para 5.

[32] ADB SPS, para 49; AIIB ESP, Section V, paras 16–17; EBRD ESP, Section III, para 4; IDB PS, para 3.13; WB ES Policy, paras 20–21. For AfDB, its OS1 provides for a shared "responsibility of appropriate categorisation" between the Bank and its borrowers.

[33] ADB SPS, Section VI, para 76; AfDB Integrated Safeguards Policy Statement (ISPS), "Support to clients and countries"; AIIB Environmental and Social Framework (ESF), paras 8.12 and 15; IDB ESP, paras 3.14–3.15.

and magnitude of the potential environmental and social risks and impacts; and the capacity and commitment of the Borrower (including any other entity responsible for the implementation of the project) to manage the environmental and social risks and impacts in a manner consistent with the ESSs."[34] Other MDBs use essentially similar factors to classify projects.[35]

6.2.1.2 Involuntary Resettlement

The involuntary resettlement safeguards uniformly provide three vital requirements for the borrowing State: (i) preparing a resettlement[36] and/or livelihood restoration plan,[37] (ii) paying compensation or providing other forms of resettlement assistance, and (iii) meaningful consultation with project-affected people. Although not couched as such across the IFIs, these requirements correspond to human rights, especially of involuntarily resettled individuals. Exceptionally, the EBRD Performance Requirement (PR), citing the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), provides that its application "is consistent with the universal respect for, and observance of, human rights and freedoms, specifically the right to private property, the right to adequate housing and to the continuous improvement of living conditions."[38]

All MDBs generally agree that involuntary resettlement produces undesirable consequences – for example, long-term hardship and impoverishment, other adverse socioeconomic impacts, and environmental damage – for both the displaced persons and their host/receiving communities and should thus be avoided as much as possible.[39] Following this consensus, most safeguard policies convey a hierarchy of preferred outcomes that bank management and staff, working with the borrowing State, should implement, through the following actions: (1) avoid or minimize physical displacement; (2) if avoidance is not possible, ensure equitable treatment of displaced persons; and (3) where feasible, enable

[34] WB ES Policy, para 20.
[35] ADB SPS, para 50; AIIB ESP, paras 16.2 and 17; EBRD ESP, para 4.1; IDB PS, para 3.16.
[36] ADB SR2, paras 17–18; AfDB OS2, "Resettlement planning"; AIIB ESS2, paras 11–15; EBRD PR 5, para 55; IDB ESPS5, para 19; WB ESS5, para 26.
[37] ADB SR2, para 21; AIIB ESS2, para 20; EBRD PR5, para 61; IDB ESPS5, para 25; WB ESS5, para 33.
[38] EBRD PR5, para 2.
[39] ADB SR2, para 1; AfDB Operational safeguard 2; EBRD PR5, para 3; IDB ESPS5, para 2; WB ESS5, para 2. See also IFC Performance Standards, Performance Standard 5, para 2.

the displaced to share in the benefits of the project requiring their resettlement.[40] The AfDB additionally requires the borrower to "consider[] feasible alternative project designs ... to avoid or minimise physical or economic displacement, while balancing environmental, social, and financial costs and benefits."[41] Its disapproval of involuntary resettlement intensifies when consequences are particularly severe, such that it obliges[42] the borrower to "consider either downsizing the project to reduce resettlement or finding other alternatives that can reasonably replace the project."[43]

This order of preference aligns with Principles 6 and 7 of the UN ECOSOC's Guiding Principles on Internal Displacement,[44] which portray relocations as exceptional situations ("last resort") that must be justified by a compelling and overriding public interest and accompanied by measures to minimize adverse effects. One study stressed the relevance of prior environmental assessments to this requirement and concluded that procedural norms are critical to safeguarding against infringement of the substantive rights of involuntarily resettled persons.[45]

The MDBs uniformly prescribe that involuntary[46] resettlement[47] should be "conceived and executed as sustainable development programs," and displaced persons and communities should be empowered to share in the project benefits.[48] Using sustainable development as a

[40] See IDB Policy on Involuntary Resettlement, OP 7-10 (1998) <https://issuu.com/idb_publications/docs/_en_31018>.

[41] AfDB Operational safeguard 2 – Involuntary resettlement: land acquisition, population displacement and compensation, para 12.

[42] The safeguard interestingly uses the word "shall" in this situation.

[43] AfDB Operational safeguard 2 – Involuntary resettlement: land acquisition, population displacement and compensation, para 12.

[44] UN Econ. & Soc. Council [ECOSOC], Comm'n on Hum. Rts., Guiding Principles on Internal Displacement, UN Doc. E/CN.4 /1998/53/Add.2 (February 11, 1998).

[45] Wolfgang Obergassel and others, "Human Rights and the Clean Development Mechanism: Lessons Learned from Three Case Studies" (2017) 8 Journal of Human Rights and the Environment 51, 54.

[46] IFC Performance Standard 5, para 1 considers resettlement to be involuntary "when affected persons or communities do not have the right to refuse land acquisition or restrictions on land use that result in physical or economic displacement."

[47] As a starting point for determining whether a resettlement action plan complies with the requirements under this policy, the World Bank Inspection Panel defined resettlement as "a process, not a threshold defined by the moving of people or acquisition of land." See WBIP Uganda Private Power Investigation Report, para 453.

[48] See, e.g., WB OP 4.12, para 2(b), AIIB Environmental and Social Policy and Standards, para 30.

standard ("ensuring that people are better off than they were before the project took their lands") signifies an objective that requires recognizing the multifaceted risks – joblessness, homelessness, marginalization, food insecurity, loss of common lands and resources, increased health risks, social disarticulation – of relocation and sufficiently planning for their amelioration.[49] The determination of whether benefit-sharing in a proposed project is fair and equitable should be made through the meaningful participation of project-affected people, who should be provided with adequate information to enable them to evaluate supposed benefits vis-à-vis the potential economic, social, cultural, and environmental risks. For the World Bank, EBRD, and IDB, the required consultation and participation under the involuntary resettlement policy are conducted through the process described in the separate safeguard policy for stakeholder engagement.[50]

6.2.1.3 Indigenous Peoples

The World Bank's former indigenous peoples policy is said to contribute "to [its] mission of poverty reduction and sustainable development by ensuring that the development process fully respects the dignity, human rights, economies, and cultures of Indigenous Peoples."[51] The current ESS similarly seeks to ensure that Bank-supported projects "enhance opportunities for [indigenous peoples] to participate in, and benefit from, the development process in ways that do not threaten their unique cultural identities and well-being."[52] In its statement of policy objectives, ADB also expressly mentions fostering respect for indigenous peoples' human rights.[53]

The ADB's policy is among the few that cites international legal obligations, stating that requirements for assessing potential social impacts and risks can also be based on the host country's obligations under international law.[54] Even more remarkably, the IDB's policy enumerates a few treaties, as applicable and relevant to each country and as

[49] VanCleef (n 6) 371 (citations omitted).
[50] WB ESS5, para 17; EBRD PR5, para 37; IDB, ESPS5, para 10.
[51] OP 4.10, para 1.
[52] ESS 7, para 2.
[53] Asian Development Bank (ADB), Safeguard Policy Statement, Appendix 3 (*Safeguard Requirements 3: Indigenous Peoples*), para 3. See also para 9 (when policy is "triggered"). [hereinafter, "ADB SPS"].
[54] ADB SPS Appendix 3 (*Safeguard Requirements 3: Indigenous Peoples*), para 13.

sources of indigenous peoples' rights.[55] It is not clear, however, whether the interpretation, application, and effectiveness of the safeguard policies are impacted by such references to international human rights obligations.[56] Interestingly, the AfDB is the only IFI examined here that does not have an indigenous peoples safeguard policy. It nonetheless considers the vulnerability of indigenous peoples in the context of its ESA policy, which requires the borrowing State to implement "appropriate differentiated measures so that unavoidable adverse impacts do not fall disproportionately on these vulnerable groups, and so that they are not disadvantaged in sharing development benefits and opportunities."[57]

Similar to the involuntary resettlement policies, borrowing States are required to (i) "assess the nature and degree of the expected direct and indirect economic, social, cultural (including cultural heritage), and environmental impacts on" indigenous peoples; (ii) engage the latter in meaningful consultation and ensure their informed participation in project design and implementation, or obtain FPIC in certain circumstances; and (iii) prepare, in consultation with the affected indigenous peoples, a time-bound indigenous peoples (development) plan which specifies protective or mitigating measures whose scope and scale are proportionate to the project's potential risks and impacts.[58]

6.2.1.4 Consultation and Information Disclosure

The requirement of conducting meaningful consultation is reiterated several times throughout most MDBs' safeguard policies. It becomes even more salient in situations where risks and harms are more concentrated on specially vulnerable groups of persons, such as indigenous peoples and involuntarily displaced persons. Meaningful consultation is intended to "enable[] the incorporation of all relevant views of affected people and other stakeholders into decision making, such as project design,

[55] IDB *Operational Policy on Indigenous Peoples*, I. Definitions, para 2 (The enumeration includes the UDHR, International Covenant on Civil and Political Rights [ICCPR], ICESCR, the American Convention on Human Rights, ILO Convention 107 & 169, the CBD, and Agenda 21. It also mentions "the corresponding international jurisprudence of the Inter-American Court of Human Rights or similar bodies whose jurisdiction has been accepted by the relevant country.").

[56] It is beyond the scope of the monograph to study this question.

[57] AfDB OS1, "Vulnerability and community impacts." See also AfDB ISPS, Box 2 ("Vulnerable groups and indigenous peoples").

[58] WB ESS7, paras 12–13. See also ADB SR3, paras 16–19; AIIB ESS3, paras 5 and 19; EBRD PR7, paras 17 and 25; IDB ESPS7, paras 17–18.

mitigation measures, the sharing of development benefits and opportunities, and implementation issues."[59]

Consultation conducted at project conception is highly effective in preventing conflict; hence, this point is a potential area for harmonization among IFIs, especially since "one of the cross-cutting issues [encountered by] most accountability mechanisms is the need for adequate or meaningful consultations with local people as essential prerequisite to equitable and effective development process."[60] Indeed, engagement with project-affected people is among the most contentious points that IAMs have had to repeatedly clarify and elaborate, since meaningful participation in the project design, monitoring, and implementation is a major component of environmental assessment and the other two safeguard policies examined.

The ADB's[61] clear and straightforward version appears most conducive to compliance as it details the timing, steps, and manner of the process:

> Meaningful consultation is a process that (i) begins early in the project preparation stage and is carried out on an ongoing basis throughout the project cycle; (ii) provides timely disclosure of relevant and adequate information that is understandable and readily accessible to affected people; (iii) is undertaken in an atmosphere free of intimidation or coercion; (iv) is gender inclusive and responsive, and tailored to the needs of disadvantaged and vulnerable groups.[62]

The IFC adopts an almost identical enumeration of the requisites for *effective consultation*, except that Performance Standard 1 adds that there

[59] ADB SPS, para 54.

[60] Michelo Hansungule, *Review of the IRM, findings and recommendations, Final Review Report*, September 26, 2009 <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/Fianl%20IRM%20Review%20Report%20Prof.%20Hansungule%20-%2026%20September%202009.pdf>.

[61] Copied almost verbatim by AIIB ESF, para 13: "The Bank believes that transparency and meaningful consultation is essential for the design and implementation of a Project and works closely with its Clients to achieve this objective. Meaningful consultation is a process that begins early and is ongoing throughout the Project. It is inclusive, accessible, timely and undertaken in an open manner. It conveys adequate information that is understandable and readily accessible to stakeholders in a culturally appropriate manner and in turn, enables the consideration of stakeholders' views as part of decision-making. Stakeholder engagement is conducted in a manner commensurate with the risks to, and impacts on, those affected by the Project."

[62] ADB SPS, para 54.

should be adequate documented evidence of the consultation.[63] This similarity is remarkable, because it indicates the possible emergence of best practices, which the IFIs can flesh out through, among others, encouraging their staff to talk to and learn from one another.

Additionally, the MDBs emphasize the importance of information disclosure in enabling people to participate in a meaningful way in various activities throughout the project cycle. As mentioned, all the involuntary resettlement safeguards include a provision requiring the borrower to adequately disseminate information to the persons who would be consulted. The policies differ, however, in the specificity of information to be provided and the timing of dissemination. To illustrate this dissimilarity, the World Bank's safeguard gives the impression that information dissemination can be done after a resettlement instrument has already been drafted by the borrower,[64] while the AfDB counterpart gives more detailed guidance, including the requirement to disseminate relevant information at an earlier stage.[65] As will be seen in the cases below, these details are often crucial in determining whether or not the consultation requirement has been complied with.

The defining elements of meaningful participation and its rationale are substantially the same for all MDBs, though the phrasing and arrangement of requirements slightly vary. These framing or presentation differences could affect the staff's and borrowers' understanding and application of the requirement. It is with respect to this ambiguity that IAMs' interpretation and clarification of the safeguards are useful.

Regarding the question of how early the project-affected people and other stakeholders should be engaged, the Aarhus Convention Compliance Committee (ACCC) instructs that consultations should be done at the stage when the public's input can still modify decisions, such as those regarding the location of an installation and the kinds of mitigation measures to be employed.[66] The AfDB Compliance Review and Mediation Unit (CRMU)[67] adds, "A section in the project appraisal report [should] detail[] the steps the Bank has taken to appraise the

[63] IFC Performance Standards, Performance Standard 1 – Assessment and Management of Environmental and Social Risks and Impacts, para 30.
[64] See WB OP 4.12, para 22.
[65] See AfDB *Operational safeguard 2 – Involuntary resettlement: land acquisition, population displacement and compensation*, para 15.
[66] ACCC Albania – Vlora Compliance Report, para 79.
[67] The CRMU is the focal unit of the Bank's Independent Review Mechanism. See AfDB, *The independent review mechanism, Operating Rules and Procedures* (January 2015), 5.

adequacy of the consultations, and explain[] why they have concluded that the Bank's policies on this issue have been complied with, and that the interests of all parties who could be affected by the project have been respected."[68]

In the *Albania–Vlora* case, the ACCC inferred that the concurrent involvement in a development project by two IFIs (World Bank and EBRD), which both impose environmental and social safeguards, "has probably stimulated a gradual increase in the application of the public participation and consultation procedures to the decision-making process by national authorities."[69] Interestingly, both IFIs contributed to the review process of Compliance Committee by way of written exchanges/communication and comments on the draft report. The Committee acknowledged that such inputs were "very useful in establishing many of the facts related" to the case.[70]

As the growing convergence across safeguards shows, necessity and repeated interaction can stimulate cooperative and coordinative behavior among entities engaged in similar activities and facing common challenges.[71] This behavior is evident not only among the IFIs themselves but also among IAMs, which are studied next.

6.2.2 Coordination among Independent Accountability Mechanisms

The case law of IAMs (not only of a single mechanism) is still largely untapped by legal scholars, even though such cases contain rich information about the grounded ways that a naked pursuit of economic growth could concretely conflict with environmental protection and social concerns, including upholding human rights. More importantly for this monograph, they capture practices and discourses triggered by the safeguard policies that aim to address such conflict.

6.2.2.1 Mandate and Procedures for Cooperation

Provisions in IAMs' mandates and procedures that permit, if not encourage, cooperation with peers foster the formation of a *droit commun*. They

[68] AfDB Bujagali Hydropower Compliance Review Report, 37.

[69] Report of the Compliance Committee on its Sixteenth Meeting, *Findings and Recommendations with regard to Compliance by Albania*, para 90(b), ECE/MP.PP/C.1/2007/4/Add.1 (July 31, 2007). [hereinafter, "ACCC Albania – Vlora Compliance Report"].

[70] Ibid. para 90(a).

[71] Boisson de Chazournes, "Partnerships, Emulation, and Coordination" (n 2) 174.

promote structured communication and interaction among these entities that have shared clientele, functions, and objectives. For example, CAO's Terms of Reference allow collaboration with other accountability mechanisms "to ensure that the complaint is handled in a manner that is fair and efficient."[72] The Terms of Reference specifically instruct CAO to inform the World Bank Inspection Panel in the event that a complaint concerns allegations directed to the institutions covered by the latter.[73]

Most of the other IAMs' operating procedures similarly enjoin collaboration. Concerned with "avoid[ing] duplication of efforts and/or disruption or disturbance to common parties," the EBRD Project Complaint Mechanism (PCM) can consider the possibility of "establishing a written cooperation agreement with the accountability mechanism of co-financing institution(s)."[74] Indeed, the PCM Rules of Procedure even deem a complaint ineligible if its subject matter "has been dealt with by the accountability mechanism of any co-financing institution and the PCM Officer is satisfied that the complaint was adequately considered by such accountability mechanism."[75] The ADB emphasizes that its Accountability Mechanism remains available in co-financing operations,[76] while IDB provides for possible collaboration (sharing of information and technical expertise; joint site visits) between its IAM and the others "to improve the Mechanism's cost-effectiveness and avoid duplication of efforts for the Parties involved."[77]

As the cases below illustrate, learning opportunities and efficiency gains can result from synchronously investigating complaints about co-financed projects.

6.2.2.2 Co-financed (Un)Sustainable Development Projects

As examined elsewhere, cooperation and coordination among IAMs, particularly in relation to co-financed projects, have merits and challenges.[78] Building upon that earlier work, this sub-section delves into select cases' specific facts, the safeguards violations that prompted them, and the similarities and differences among the mechanisms' analyses.

[72] CAO Operational Guidelines (2013), 4.
[73] Ibid. 13.
[74] Project Complaint Mechanism (PCM) Rules of Procedure (2014), para 23.
[75] Ibid. para 28.
[76] ADB, *Accountability Mechanism Policy 2012*, 39, para 207.
[77] IDB, *Policy of the Independent Consultation and Investigation Mechanism*, 24, para 68.
[78] See Lorenzo (Introduction n 36).

Argentina/Paraguay – Yacyretá The overall costs of the Yacyretá hydroelectric project were originally estimated at USD 2.1 billion, but as of 2012, the project was still ten years behind schedule and this amount had ballooned more than five times.[79] Significantly, since 1979, when the first loans were approved to fund the dam construction itself, the World Bank (IBRD and IDA) and the IDB have provided – belatedly, the complainants argued[80] – additional loans precisely for the involuntary resettlement activities arising from the project.

At least two complaints have been submitted to each of the two co-financiers' IAMs within a ten-year period, further illustrating the complexity of this immense and protracted project.[81] The IDB's accountability mechanism stressed how "the structural problems and the socio-environmental problems outlined by the first panel continue to exist" while others such as the public participation component have subsequently worsened.[82] It concluded, "The Bank administration was seriously deficient in fulfilling its supervisory role [as over] the past nine years, [it] watched the project fail to fulfill its social and environmental objectives."[83]

The first set of cases (submitted in 1996, decided in 1997) arose from complaints filed by Sobrevivencia, an NGO representing Paraguayan project-affected people, to both the World Bank Inspection Panel (WBIP) and the Independent Investigative Mechanism (IIM).[84] The

[79] Itzchak E Kornfeld, "Adiós to Paradise: The Yacyretá Dam and the Destruction of Environmental and Human Rights" (2012) 7 Florida A&M University Law Review 181, 201, 203.

[80] Report and Recommendation of the Inspection Panel, Request for Inspection – Argentina/Paraguay Yacyretá Hydroelectric Project (December 24, 1996), Annex I (September 12, 1996) [hereinafter, "Sobrevivencia Complaint"] <https://documents1.worldbank.org/curated/en/832261468740399783/820140748_200404145113841/additional/28468.pdf>, para 24: "Rather than financing a resettlement component or integrating the resettlement program into the design and preparation of the project, the Banks have instead treated resettlement as separate from the civil works aspect of the Project and have placed primary responsibility for financing resettlement on the government of Argentina."

[81] See Kornfeld (n 79) 205.

[82] Inter-American Development Bank (IDB) Independent Investigation Mechanism, Yacyretá Hydroelectric Project, Final Report of the Panel, 11 (February 27, 2004). [hereinafter, "IDB Yacyretá Hydroelectric Final Report"]

[83] Ibid. 6–7.

[84] Predecessor of the current Independent Consultation and Investigation Mechanism (MICI)

"dual claim" alleged that the two Banks' violations of their respective "policies on resettlement, environmental assessment, indigenous peoples, and wildlands" and their failure "to adequately supervise or monitor" the borrowers seriously impacted the people's health, economic well-being, and standards of living.[85] The IDB's Board authorized the IIM to cooperate with the World Bank Inspection Panel to avoid duplication.[86] The accountability mechanisms hence conducted parallel investigations, which have never been done before then.

After what appears to be a comprehensive but rather informal investigation, the Inspection Panel issued the "Review of Present Project Problems and Assessment of Action Plans,"[87] addressing two complaints – one submitted by Sobrevivencia and another by a group of citizens from Argentina. The Review deviated from the Panel's procedures as it was not preceded by a formal investigation authorized by the World Bank Executive Directors. Instead of approving the recommendation to pursue such an investigation,[88] the Directors requested the Panel "to undertake a review of the existing problems of the Yacyretá Hydroelectric Project in the areas of environment and resettlement and provide an assessment of the adequacy of the Action Plans as agreed between the Bank [Management] and the two countries."[89] Form and technicalities aside, the WBIP found the Bank's inadequate attention to, and financing for, the project's environmental and social aspects, and reproachfully stated:

> Imbalance in execution between civil/electro-mechanical works on the one hand and resettlement and environmental measures on the other has been one of the fundamental problems of the Yacyretá Project. *This imbalance has been exacerbated by the usual Bank practice of financing*

[85] Sobrevivencia Complaint (n 80) paras 2–5.

[86] See Kornfeld (n 79) 205; Richard E Bissell, "Recent Practice of the Inspection Panel of the World Bank" (1997) 91 The American Journal of International Law 741, 743.

[87] Inspection Panel, *Review of Problems and Assessment of Actions Plans – Argentina/Paraguay: Yacyretá Hydroelectric Project*, September 16 1997 [hereinafter, "IPN, Review of Problems"] <https://documents1.worldbank.org/curated/en/275821468740716631/pdf/29064.pdf>.

[88] Report and Recommendation of the Inspection Panel, Request for Inspection – Argentina/Paraguay Yacyretá Hydroelectric Project (December 24, 1996) [hereinafter, "IPN, 1996 Report and Recommendation"], para 43: "Based on the foregoing the Panel recommends that the Executive Directors authorize an investigation into the violations of Bank policies and procedures alleged in the Request."

[89] IPN, Review of Problems (n 87) para 1.

> *the former while leaving the latter for counterpart funding.* The Panel believes that this practice should be reconsidered.[90]

> Institutional strengthening of executing agencies in the areas of resettlement and environmental protection continues to be an issue that needs to be addressed by the Bank.[91]

In the second set of cases (submitted in 2002, decided in 2004), the investigation conducted by the IIM included discussions with Inspection Panel staff since the same NGO,[92] filed essentially the same complaint with the WBIP.[93] It appears that the accountability mechanisms' coordination and cooperation were less formal and explicit, compared to the arrangements between the WBIP and the AfDB CRMU in the *Uganda – Bujagali* case, discussed below. It is difficult to ascertain from the reports whether joint site visits had similarly been conducted here, and if so, whether such arrangement produced mutual benefit.

Nevertheless, the accountability mechanisms' factual observations and ultimate conclusions in this case bear considerable resemblance. The IDB IIM held:

> Overriding all these concerns, the Panel concludes that the Bank administration was seriously deficient in fulfilling its supervisory role. In the past nine years, the Bank administration should have been aware of the lack of effective participation of the affected population in planning new actions, and the lack of an effective mechanism for conflict resolution. The Panel concludes that the administration was unaware of the true situation in the field because its personnel did not spend enough time in the project area to comprehend the magnitude of the project's failure on social issues.[94]

The WBIP similarly reported:

> After reviewing the evidence presented by the Requesters, Management's Response and the Panel's independent observations, the Panel finds that supervision of resettlement by the Bank is inadequate in two important respects: a failure to ensure sound technical quality in the design, construction, and implementation of resettlement programs, and inadequate consultation with affected people.[95]

[90] Ibid. Executive Summary, 4 (emphasis added).
[91] IPN, Review of Problems (n 87) para 34.
[92] Federación de Asociaciones y Organizaciones de Afectados por Yacyretá de Itapúa y Misiones (FEDAYIM).
[93] IDB Yacyretá Hydroelectric Final Report, 13.
[94] IDB Yacyretá Hydroelectric Final Report, 39.
[95] WBIP Yacyretá Hydroelectric Investigation Report, para 381.

Both mechanisms emphasized that the grievances – exclusion of particular persons (e.g., the economically displaced) from the project-affected list; inappropriate, insufficient, or delayed compensation; unsatisfactory living conditions at the relocation site, including unemployment, contaminated wells, constant flooding, and concomitant health problems – are attributable to the MDBs' continuous failure to supervise the project implementer[96] and ensure that the latter engaged with the project-affected people in designing and executing the project, especially the socioeconomic programs forming part of the resettlement plans.[97]

Uganda – Bujagali Complaints regarding the Uganda Private Power Generation Project were submitted almost simultaneously to the WBIP and the African Development Bank Compliance Review and Mediation Unit (AfDB CRMU). The requesters in both cases were the Ugandan National Association of Professional Environmentalists (NAPE), other local NGOs, and individuals. They alleged, among others, that their resettlement had not been executed as "a development project allowing them to share in the project benefits"[98] and "their standards of living, income earning capacity and production levels" did not improve, contrary to World Bank and AfDB safeguards.[99] They additionally raised these overlapping concerns:

> WB: hydrological risks and climate change; environmental assessment; cumulative impact assessment and terrestrial and aquatic fauna; the proposed Kalagala Falls offset; economic analysis, options, and affordability assessment; information disclosure, transparency and openness regarding the Project; dam safety; indigenous peoples; cultural and spiritual issues; compensation, resettlement and consultations.[100]

[96] A semi-autonomous, bi-national entity created pursuant to a treaty between Argentina and Paraguay for the Yacyretá Hydroelectric Dam.

[97] For IDB, these findings constitute violations of its policies on Involuntary Resettlement (OP-710) and on Environmental Impact (OP-703). Correspondingly, they violated the following World Bank safeguards: Environmental Assessment (OD 4.01), Involuntary Resettlement (OD 4.30), Project Supervision (OD/OP/BP 13.05), Monitoring and Evaluation (OD 10.70).

[98] AfDB Bujagali Hydropower Compliance Review Report, 24.

[99] Ibid.

[100] WBIP Uganda Private Power Investigation Report, para 8.

> AFDB: projects' assessment of hydrology; dam safety; social and environmental issues; information disclosure; reliability of data used; economic analysis; comprehensive options assessment; affordability.[101]

The Bujagali project's magnitude indicates the multidimensionality of its potential effects, which the Inspection Panel duly observed:

> The Project requires 238 ha of land take to construct project facilities and thus will cause the involuntary resettlement of affected people living in and around this site. The flooding for the reservoir will also cause the loss of white water rafting opportunities over 2.5 km from the Bujagali Falls to Dumbbell Island.[102]

The predominantly cooperative behavior between the accountability mechanisms and their respective IFIs, as well as the two bodies' substantially similar findings and analyses, is noteworthy.

After discussing the relationship between the safeguards and the World Bank's poverty reduction mandate and highlighting the importance of the involuntary resettlement policy, the Inspection Panel affirmed that the World Bank's policy (OP 4.12) contained standards that are "almost identical" to those laid down in the AfDB's Involuntary Resettlement (IR) Policy.[103] The WBIP likewise cross-referenced the AfDB's IR Policy about the disclosure and consultation required for a resettlement action plan.[104] Regarding the appropriate compensation that should be "made prior to [the affected people's] move or before taking of land and related assets," the WBIP cited both OP 4.12 and paragraph 3.3 (e) of the AfDB's IR Policy.[105]

Concerning the claim about OP 4.10's applicability because the Basoga inhabitants should have been classified as indigenous peoples, the WBIP upheld Management's position that the Basoga inhabitants are not marginalized, vulnerable, and incapable of participating in and benefiting from development. Hence, it ruled that OP 4.10 was not applicable to the case, since "although the Basoga people meet some of the criteria necessary to be regarded as indigenous people in the context of Bank-financed projects pursuant to OP 4.10, they are a large and influential group with political, social and economic standing in Uganda's society."[106] Such

[101] AfDB Bujagali Hydropower Compliance Review Report, 20.
[102] WBIP Uganda Private Power Investigation Report, para 98.
[103] WBIP Uganda Private Power Investigation Report, para 434, footnote 423.
[104] WBIP Uganda Private Power Investigation Report, para 457, footnote 454.
[105] WBIP Uganda Private Power Investigation Report, para 467, footnote 475.
[106] WBIP Uganda Private Power Investigation Report, para 535.

clarification of the meaning of "indigenous peoples" – by introducing the need to consider a group's "political, social and economic standing" – illustrates the crucial interpretive role played by IAMs.

Interestingly, the influence of this role is not limited to the IFI that an IAM investigated. In this case, AfDB Management cited the WBIP's first report in 2001 to dispute the classification of the Basoga as indigenous peoples. The 2001 report also rejected the view that the Basoga were indigenous peoples requiring special attention mandated by the World Bank's policy.[107]

The AfDB CRMU likewise had to fill an important legal lacuna in resolving this issue, because the AfDB did not have an express and dedicated policy concerning indigenous peoples. It had to optimize its interpretive power and strategically use it to tackle the notion of "vulnerability," and provide guidance regarding the treatment of the alleged indigenous peoples:

> While the Bank does not have a policy dealing explicitly with indigenous people, it does refer in some of its policies to "disadvantaged groups" who should receive special attention in Bank-funded projects. For example, this concern is stipulated in Paragraph 3.3(c) of the *Resettlement Policy* which states that "particular attention should be paid to the needs of disadvantaged groups" which include ethnic and religious minorities.
>
> The Basoga as a group do not qualify as a disadvantaged group in regard to the [projects]. They are one of the largest ethnic groups in Uganda. They are not subject to any particular discrimination and have a traditional governmental structure that is recognized by the [Government of Uganda]. Consequently, the Panel concludes that the Bank Management and staff complied with their obligations under applicable Bank policies by treating the Basoga as neither indigenous people nor a disadvantaged group.[108]

The AfDB CRMU then proceeded to apply the enumerated standards and ultimately reached the same conclusion as the WBIP: the Basoga are neither a disadvantaged group nor indigenous peoples, since they constitute one of the largest ethnic groups in the country, are not subject to any particular discrimination, and have a traditional government structure that the Ugandan national government recognizes.[109]

[107] AfDB Bujagali Hydropower Compliance Review Report, 28.
[108] Ibid.
[109] Ibid. Accordingly, the CRMU held that it was proper for Bank management and staff not to apply the indigenous peoples policy.

Beyond the resolution of the foregoing cases, the safeguard systems served other valuable purposes. An in-depth empirical study concerning a component of this massive hydropower project – funded through the Kyoto Protocol's Clean Development Mechanism (CDM) – found that interviewees viewed the MDBs and the grievance mechanisms they formed, especially the World Bank Inspection Panel, "as the most reliable reference for hearing complaints and righting failures [including those relating to human rights]."[110] Clear procedural norms, the researchers concluded, help address human rights violations associated with development projects:

> The presence of international lenders seems to have been highly important in settl[ing] the multiple claims of infringements of human rights, which ... included the right to housing, the right to food, the right to health and the right to property. *While the recommendations by non-judicial grievance mechanisms of multilateral [development] banks are non-obligatory, they create pressure on the implementers to alleviate identified grievances of project-affected people.*[111]

The central role that the IFIs' safeguard systems played in this CDM project supports the feasibility of a sustainability-oriented *droit commun* being derived from the MDBs' operations. It also suggests how the application or influence of such common law could reach even beyond projects co-financed by MDBs.

The CDM is particularly in need of a clear understanding of sustainable development, Christina Voigt argued, and ensuring its integrity "demands strong safeguards."[112] Briefly, the CDM has the twin goals of achieving sustainable development and reducing emissions.[113] Some CDM projects involve similar activities and industries – energy, agriculture, mining – as IFI-supported development projects. But the CDM has no accountability mechanism.[114] Moreover, it lacks clear criteria for

[110] Obergassel and others (n 45) 65.
[111] Ibid. 66 (emphasis added).
[112] Christina Voigt, "Is the Clean Development Mechanism Sustainable – Some Critical Aspects" (2007) 8 Sustainable Development Law & Policy 15, 19.
[113] Kyoto Protocol to the United Nations Framework Convention on Climate Change, December 10, 1997, UN Doc FCCC/CP/1997/7/Add.1, 37 I.L.M. 22 (1998), Art. 12(2).
[114] Marcos Orellana, "Climate Change, Sustainable Development and the Clean Development Mechanism" in United Nations and United Nations Office of the High Commissioner for Human Rights (eds), *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (UN 2013) 330–31.

defining sustainable development. This deficiency poses the risk of a race-to-the-bottom, since the definition could vary according to the priorities of host States, which have discretionary authority about whether or not a project helps achieve sustainable development.[115]

Reverting to the Bujagali project, given their concurrence of jurisdiction, the WBIP and the AfDB CRMU signed a memorandum of understanding (MOU) to coordinate their tasks. The two mechanisms, together with a team of specialist consultants, jointly visited Uganda.[116] From the Inspection Panel's perspective, this arrangement proved successful, with potential for further use in the future:

> This collaboration between the [Inspection] Panel and the CRMU worked to the mutual benefit of both parties. Each Panel focused its compliance review on its own policies and procedures and each Panel has made its own independent judgments about the compliance of its Management and staff with its own policies and procedures. Accordingly, while there may be common elements and language in the respective reports, the findings in this report are based on the independent judgment of the Panel and exclusively on the World Bank's Operational Policies and Procedures.[117]

Harmonization and cooperation, however, can also impair independence, actual or perceived. The AfDB CRMU expressed concern about this potential negative side effect, describing the mere reliance on another IFI's policies as tantamount to unduly delegating to another organization "the responsibility to decide how the [AfDB] should deal with such a complex issue as the treatment of important cultural resources in its borrowing member countries."[118]

In grappling with the tension between independence and collaboration, the AfDB CRMU pointed to some instances wherein an IFI refers to a specific policy of another IFI and considers it as either directly applicable or as basis for developing its counterpart policy. Those references, the CRMU stressed, should be construed restrictively and contextually, meaning, they should not be read as a wholesale "commitment to follow another [IFI's] decisions regarding its own policies" and the

[115] Damilola S Olawuyi, "Towards a Transparent and Accountable Clean Development Mechanism: Legal and Institutional Imperatives" (2012) 2 Nordic Environmental Law Journal 33; Karen Holm Olsen, "The Clean Development Mechanism's Contribution to Sustainable Development: A Review of the Literature" (2007) 84 Climatic Change 59, 62.

[116] AfDB Bujagali Hydropower Compliance Review Report, 21.

[117] WBIP Uganda Private Power Investigation Report, para 29.

[118] AfDB Bujagali Hydropower Compliance Review Report, 30–31.

referring IFI "must [still] decide for itself what standards to apply in dealing with [an] issue and how they will be interpreted." The CRMU reiterated this concern at the end of its Bujagali report where it made recommendations regarding AfDB's operational systems, based on interviews with Bank staff who appeared to have been overly reliant on their co-financiers, especially the World Bank, for supervision and due diligence:

> As the operations of the [AfDB] are governed by this Bank's own policies, the Panel recommends that the Bank take appropriate action to ensure that the Bank staff have an adequate knowledge of the Bank's policies and how they are applied in its operations, including co-financed operations.[119]

A similar case of blind reliance on, if not improper delegation of duties (specifically regarding due diligence) to, another MDB occurred in a Kenya-based project. The multilateral and bilateral DFIs co-financing the project agreed to apply the World Bank's OP 4.10 due to its supposedly more stringent safeguards concerning indigenous peoples. For EIB, one of the co-financiers, this agreement entailed adopting the World Bank's interpretation and practice of OP 4.10 that exclude a certain indigenous peoples (the Maasai), who would have otherwise been protected under the EIB's own safeguard policy.[120]

Other IFIs and IAMs would thus do well to adopt a cautious attitude when working on co-financed projects. The exercise of due diligence, including the proper application of safeguard policies on a case-by-case basis, remains the discrete responsibility of each MDB's management and staff. Likewise, despite the growing similarities in the texts of the safeguards, IAMs' interpretative function remains limited to the policies of their respective MDBs.

Albania – Vlora In the Vlora thermal power plant project, substantially similar requests for inspection were submitted to the WBIP and the EBRD Independent Recourse Mechanism (EBRD IRM). The latter directed the attention of management and staff to the sources from which they could obtain guidance on implementing the EBRD's safeguard policies. Where EBRD policy is silent or lacking in detail, and national environmental law and EU environmental standards also do not exist or

[119] Ibid. 68.
[120] See Schade (n 7) 86–87.

are inapplicable, "the EBRD shall identify other sources of good international practice, including relevant World Bank Group guidelines . . . and require compliance with the selected standards."[121] This guidance is remarkable for two reasons. First, it reinforces the practice of considering the World Bank as the standard-setter among IFIs. Second, the breadth of sources mentioned – to fill any lacuna in EBRD policy – pushes harmonization and cross-referencing of sustainability standards to extend beyond the MDBs and the IAMs.

This possibility was explored in this case, as a complaint was also filed with the Aarhus Convention Compliance Committee concerning Albania's alleged treaty violations.[122] Significantly, requirements under the World Bank's EA policy are largely similar to the public consultation and disclosure requirements under the Aarhus Convention.[123] Given such substantive resemblance, the Inspection Panel considered the Committee's conclusions relevant to its inquiry about the World Bank's compliance with its safeguard policy. The Panel's disquisition is worth quoting in full:

> 330. In accordance with OP 4.01, it is necessary that an EA takes into account, *inter alia,* the country's obligations pertaining to project activities under relevant international environmental treaties and agreements.
>
> 331. The Aarhus Committee concluded that *Albania failed to comply with the requirements for public participation* set out in paragraphs 3, 4 and 8 of article 6 of the Aarhus Convention.
>
> 332. Based on the foregoing, the Panel finds that *Management did not ensure that the Project preparation activities complied* with the consultation and public participation requirements of the Aarhus Convention. This does not comply with OP 4.01.[124]

World Bank Management, the Panel held, "failed to ensure adequate notification to the project affected people and NGOs and to secure

[121] EBRD Vlorë Thermal Compliance Review Report, para 27 (citation omitted).

[122] Among the main allegations is Albania's violation of Art. 6.2 of the Convention that provides for the State's provision of information to the public concerned, "early in an environmental decision-making procedure, and in an adequate, timely and effective manner." Communication to the Aarhus Convention Compliance Committee dated April 27, 2005, ACCC/C/2005/12 <https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2005-12/Communication/communication.pdf>. See also Aarhus Convention Compliance Committee, DATASHEET <https://www.unece.org/env/pp/compliance/Compliancecommittee/12TableAlbania.html>.

[123] WBIP Albania Power Sector Investigation Report, para 323.

[124] Ibid. paras 330–32 (emphasis added).

their participation in consultation meetings as required under OP 4.01."[125] The Panel employed the same reasoning as above while also emphasizing that it "verified in its own investigation the facts examined by the Aarhus Committee" – to arrive at the conclusion similar to that of the Committee regarding the "inadequacy of the notifications, disclosure of information, and public participation during Project preparation."[126]

The tension between independence and collaboration in co-financed development projects thus arose again. The EBRD IRM echoed the AfDB CRMU's words of caution about excessive reliance on the supervision and judgment exercised by another MDB's management and staff:

> 79. In the case of a project, co-financed by a number of international financial institutions, with lenders becoming involved at different stages in the project's planning and each institution employing broadly comparable safeguard policies and procedures, it becomes necessary to consider the extent to which EBRD, may rely on the adequacy of the public consultation measures overseen by another institution prior to its participation in the project.
>
> 80. It is useful to note that the Environmental Policy anticipates inter-institutional cooperation and expressly provides that "The EBRD will work with other international financial institutions, the [EU], bilateral donors, UN agencies and other organisations in promoting a coordinated approach to effective environmental interventions." *Central to this issue is the degree to which the EBRD should take active steps to determine whether measures overseen by another institution were adequate for the purposes of compliance with the EBRD policies.*[127]

Significantly, the Compliance Review Report concluded with several recommended changes to EBRD's operational policies and procedures, including some that relate to the accountability mechanisms' handling of simultaneous investigations for co-financed projects. It broached the possibility of granting "an express power to delegate assessment of a Project to another IFI" and "establishing a formal mechanism to ensure effective inter-institutional communication in co-financed projects on matters related to environmental and social safeguards."[128]

A curious point about the Vlora project cases is that, despite affirmations about substantial similarities between the two IFIs' safeguard policies and the IAMs' apparent willingness to cooperate, somewhat

[125] Ibid.
[126] Ibid. para 352.
[127] EBRD Vlorë Thermal Compliance Review Report (emphasis added).
[128] Ibid. para 119.

different findings and recommendations were given regarding the IFIs' noncompliance with their respective safeguards.

The WBIP held that the delayed implementation of the public participation requirement rendered the impact assessment inadequate and noncompliant with the EA policy. It also held that Management violated the requirement for the EA to include analyses of site and technological alternatives and of "a large array of social issues and potential economic risks to the area population."[129] In contrast, the Compliance Review Expert found that the EBRD's failure – to ensure that the project sponsor gave project-affected people the opportunity to express views on the location of the project – constituted a material violation of the Environmental Policy. However, such violation did not "warrant[] any remedial changes in the scope or implementation of the Project."[130] Instead, what was needed are "remedial changes to the Bank's practices and procedures so as to avoid a recurrence of such or similar violations in the future."[131]

In sum, IAMs are generally confined to interpreting their IFIs' own safeguards. There are nevertheless some occasions wherein an accountability mechanism needs to consider in its interpretation either a co-financier's policy or the interpretation thereof by another IAM. It is thus important to track developments in the texts of these safeguard policies. Despite ongoing harmonization among the environmental and social policies, there remains considerable discretion for each IAM to interpret those policies and arrive at divergent conclusions regarding the same project. Evaluating the merits of either trend is beyond this chapter's scope.

6.2.2.3 Shared Principles

To recall, the IAMs' posited contribution to the international lawmaking process concerning sustainable development involves elaborating and clarifying the vague concepts and principles in international soft law materials. Predictability and consistency in the interpretation of safeguard policies would enhance such participation. The foregoing cases show that IAMs often devoted considerable attention to how the findings of their counterparts match or contradict their own. In some instances, they made cooperation concrete and formal through the signing of a memorandum of agreement.

[129] WBIP Albania Power Sector Investigation Report, Executive Summary, xiv–xv.
[130] EBRD Vlorë Thermal Compliance Review Report, para 94.
[131] Ibid.

Beyond the mechanisms' performance of compliance review, a collaborative spirit can also manifest and be promoted through participation in regular meetings where they deliberate on standards and best practices for their common use and by jointly conducting capacity-building workshops in countries with whom they usually transact.[132] The accountability mechanisms have an existing association (in the loose sense) – resembling an epistemic community – that can initiate and facilitate a more deliberative and guided harmonization process. The Independent Accountability Mechanisms Network (IAMnet) "is a virtual network of dedicated practitioners who contribute to the regular exchange of ideas and assist with institutional capacity building in accountability and compliance as components of corporate governance."[133] Membership of this network is diverse and not limited to the mechanisms studied here. It includes the Independent Redress Mechanism of the Green Climate Fund (GCF), the Office of Examiner for Environmental Guidelines of the Japan Bank for International Cooperation (JBIC), and the Social and Environmental Compliance Review and Stakeholder Response Mechanism of the United Nations Development Programme (UNDP).

In 2013, the network held its 10th Annual Meeting, during which the members agreed upon the basic criteria for participation in IAMnet. These criteria include: "(i) citizen-driven complaint and response mechanism; (ii) operates at the international level; (iii) for a public institution which finances or supports development-related activities; (iv) operationally independent; and (v) considers social and environmental impacts/concerns."[134] Brainstorming about the "ideal accountability mechanism," the network's proposed[135] characteristics include accessibility, credibility,

[132] See EBRD Project Complaint Mechanism Annual Report 2016, *Report of the Project Complaint Officer*, 3. (The Project Complaint Officer narrates the increased level of collaboration with other independent accountability mechanisms, as manifested by, among others, its hosting a joint capacity-building workshop with CAO and the EIB Complaints Mechanism "to improve our ability to engage in local problem-solving initiatives.")

[133] IAMnet website <https://accountability.worldbank.org/en/iamnet>.

[134] "Basic criteria for participation in the IAM network," 10th Annual Meeting of IAMs, Washington, DC, September 2013 <https://thedocs.worldbank.org/en/doc/3043c724b44d475060e19be691c1a0ae-0490092016/original/IAMnet-Criteria-for-Participation-and-Principles-for-Cooperation-september-2016-ENGLISH.pdf>.

[135] Bissell and Nanwani (Introduction n 47) 44 (citing the *Fourth Meeting of Principals of Independent Accountability Mechanisms in International Financial Institutions* held in June 2007 at the EBRD's London office).

efficiency, effectiveness, independence, objectivity, and professionalism. Notably, the last characteristic echoes Slaughter's theory that one contributing factor to the emergence of a "global community of courts" is the judges' view of each other as "fellow professionals in an endeavor that transcends national borders."[136]

The ability to make independent judgments is valuable to the overall proper functioning of the IAMs and the safeguard systems as a whole. Conversely, glaring inconsistencies can threaten their legitimacy and even inhibit the formation of a *droit commun*. It is thus important for IAMs to agree upon certain principles for interpreting the safeguard policies and for gathering and appreciating facts to support their interpretations. In September 2016, IAMnet adopted the *Criteria for participation and principles for cooperation* based on the idea of citizen-driven accountability.[137] This document resulted from the belief of a core group of IAMs that "it is in their common interest to further advance their efforts at cooperation" and, through cooperation, "explore the possibilities of greater harmonization."[138] These principles would help manage and stabilize the demands and expectations, not only of project-affected people who are interested in submitting complaints but also of the IFI management and staff whose conduct could be scrutinized by the accountability mechanisms.

6.3 Implications of *Droit Commun* in Development Finance

The existence of a common law of sustainable development among IFIs remains disputable.[139] Some authors nevertheless admit that MDB safeguards are converging "toward a general definition of sustainable development" and covering several similar policy areas.[140] It appears that their skepticism stems, not so much from the lack of commonalities among IFIs' environmental and social policies, but more from the observation that some policies do not match the sustainability-oriented demands and

[136] Slaughter (Introduction n 134) 193.

[137] "The Independent Accountability Mechanisms Network: Criteria for participation and principles for cooperation," September 2016 <https://thedocs.worldbank.org/en/doc/3043c724b44d475060e19be691c1a0ae-0490092016/original/IAMnet-Criteria-for-Participation-and-Principles-for-Cooperation-september-2016-ENGLISH.pdf>.

[138] Ibid. 4.

[139] Mbengue and de Moerloose (Introduction n 47) 392; Gallagher and Yuan (Introduction n 36) 244, 258.

[140] Mbengue and de Moerloose (Introduction n 47) 404–5 (citations omitted).

expectations of the international community and the fact that MDBs specify different requirements for some policy areas. This criticism, however, is not irremediable, especially as IFIs recurrently update and revise their safeguard policies, and the accountability mechanisms continue to handle complaints requiring the clarification and elaboration of these policies. Indeed, a recent study found "little evidence for strong differences [among] World Bank, IFC and regional MDBs: procedural requirements are comparatively detailed in all analyzed frameworks."[141]

The formation of common law described in this chapter is spontaneous and undirected in certain aspects, while deliberate and purposive in others. The interrelated phenomena of emulation, coordination, and cooperation among MDBs and IAMs indicate the emergence of a *droit commun* in the area of development finance. As MDBs more frequently finance the same or related projects, the probability of project-affected people submitting requests to more than one accountability mechanism increases.[142] In turn, the increasing number of co-financed projects encourages both IFIs and accountability mechanisms to coordinate and cooperate with their peers. It thus also offers greater opportunities to harmonize and foster the emergence of a *droit commun*.

This chapter demonstrated how IFIs and accountability mechanisms do look to one another for possible improvements to their policies, procedures, and practices – often with the more experienced institutions serving as models for the newer ones. It is reasonable to infer that such trend is occurring, because all parties involved consider harmonization beneficial. Benefits arising from harmonization include enhancement of development impacts, reduction of transaction costs, collaborative behavior, and avoidance of confusion among claimants.[143]

Harmonization of safeguard policies also benefits IFIs, borrowing States, project-affected people, and IAMs in several ways. The benefits accruing to IFIs (and donors in general) and their borrowers are intertwined. The Paris Declaration on Aid Effectiveness (2005) and the Accra

[141] Jochen von Bernstorff and Philipp Dann, "Reforming the World Bank's Safeguards: A Comparative Legal Analysis" (German Federal Ministry for Economic Cooperation and Development (BMZ) 2013) 19 <https://consultations.worldbank.org/Data/hub/files/worldbankssafeguardsacomparativelegalanalysis.pdf>.

[142] Richard E Bissell, "Learning Processes in International Accountability Mechanisms" (2005) 10 The Innovation Journal: The Public Sector Innovation Journal 1, 6.

[143] Nanwani (Chapter 4 n 108) 249.

Agenda for Action (2008)[144] are formal expressions – not only by IFIs and other DFIs but also by States' representatives – of a common desire to have uniform standards and practices among donors and partner/receiving/host countries to improve the development impact of aid or loans. The Paris Declaration endorses harmonization of IFI policies and "highlights the need to … implement common arrangements, increase complementarity, and strengthen incentives for collaborative behavior … to increase the effectiveness of aid programs,"[145] because harmonization is a way to eliminate duplicative missions and initiatives.[146] Pursuant to these goals, representatives of various MDBs, bilateral agencies, and export credit agencies meet biannually, forming the Multilateral Financial Institutions' Working Group on Environmental and Social Standards (MFI-WGESS), "to discuss trends and emerging issues related to environmental and social policies … [and] to collaborate on some areas of mutual benefits and interest."[147]

Moreover, according to signatories (heads of multilateral and bilateral development institutions and representatives of the IMF, other IFIs, and aid recipient countries) to the Rome Declaration on Harmonisation (2003), development effectiveness hinges on borrowing/recipient country ownership or leadership, which means "ensuring that development assistance is delivered in accordance with partner country priorities, including poverty reduction strategies."[148] Notably, some IFIs have recognized that encouraging country ownership might also entail building or improving the capacity of borrowers to formulate and implement their own safeguard systems.[149] At a minimum, harmonized safeguards would

[144] Organisation for Economic Co-operation and Development (OECD), The Paris Declaration on Aid Effectiveness and the Accra Agenda for Action (2005/2008) <https://www.oecd.org/dac/effectiveness/34428351.pdf>.

[145] Boisson de Chazournes, "Partnerships, Emulation, and Coordination" (n 2) 183.

[146] Ibid.

[147] AfDB, "Multilateral financial institutions convene in Abidjan for working group on environmental and social standards," October 7, 2015 <https://www.afdb.org/en/news-and-events/multilateral-financial-institutions-convene-in-abidjan-for-working-group-on-environmental-and-social-standards-14786/>.

[148] OECD, Rome Declaration on Harmonization (2003) <http://web.undp.org/execbrd/pdf/Rome%20Declaration%20on%20harmonization.pdf>.

[149] The Asian Development Bank (ADB) has various efforts – sanctioned by its 2009 Safeguard Policy Statement (SPS) – to promote and strengthen country safeguard systems, including technical assistance (TA) amounting to $45.337 million as of May 2, 2018. ADB defines "country safeguard systems" as "the policies, practices, legal frameworks and institutions that a country puts in place to avoid, minimize or mitigate potentially adverse environmental and social impacts of development activities." See

ideally encourage borrowing countries to own the development project and take the lead in implementing the actions needed to achieve the project objectives. Such ownership, in turn, enhances the impact of the donors'/lenders' resources on the particular development concern that the project seeks to address.

It does not appear, however, that the MDBs and the IAMs intend for their safeguards harmonization efforts to have an external effect. Harmonization could nonetheless influence the behavior of actors interacting with them. For instance, homogenizing the safeguard policies and, effectively, the loan or grant requirements, across the major MDBs would restrict the choices available to borrowers and deter them from selecting a financier based on the permissiveness of its environmental and social standards.

Conversely, for borrowers often requiring several financiers for one project, harmonized safeguards can mean that they need only be familiar with and meet one IFI's environmental and social policies to ensure that the project is consistent with the objective of sustainable development. Thus, harmonization helps minimize the efforts and costs that borrowers would spend to satisfy the requirements (conditions) for their multiple loans or grants.

From the project-affected people's perspective, if safeguard policies were harmonized, there would be less need to draft several versions of complaints to be submitted to the co-financiers' different accountability mechanisms.[150]

To the extent that greater uniformity is established among the normative texts on which IAMs base their findings, harmonization facilitates and further rationalizes coordination and cooperation. A common reference point shapes the dialogue among adjudicators about certain norms and helps substantiate such norms.[151] Certainly, even with the creation of

ADB, "Country Safeguard Systems" <https://www.adb.org/who-we-are/safeguards/country-safeguards-systems>. See also World Bank, OP 4.00 – Piloting the Use of Borrower Systems to Address Environmental and Social Safeguard Issues in Bank-Supported Projects, paras 3 and 5 ("The Bank may explore with the borrower [and, as appropriate, third-parties] the feasibility of arrangements to strengthen ownership and country capacity to implement specific operational principles."].

[150] These complaints usually contain the same or similar alleged violations anyway.

[151] See Melissa A Waters, "The Future of Transnational Judicial Dialogue" (2010) 104 American Society of International Law Proceedings 465, 466. ("International legal norms ... provide courts with common reference points around which to shape a dialogue. At the same time, that dialogue fleshes out and gives content to these norms.")

a common language, the accountability mechanisms might still arrive at contrasting conclusions if they adopt different interpretive techniques. However, this scenario is not necessarily undesirable, because the benefits notwithstanding, some space should be left for experimentation and specialization, especially given the varying, sometimes region-specific, needs of the MDBs' clients. There is value in encouraging IFIs to make the safeguard policies more responsive to context and to possible changes in the state of knowledge about the interrelationship among people, planet, and prosperity.

It is important that IAMs have purposefully formed networks and organized forums to discuss and address common challenges. As Boisson de Chazournes pointed out, the IAMs engage in "similar types of business activities . . . and thus face similar challenges, such as the promotion of sustainable development."[152] By providing recurrent occasions to share experiences and insights about the common challenges they face, the network's meetings have been enabling the mechanisms to learn from one another (including the others' mistakes) and, in some instances, to avoid or minimize the costs of experimenting with solutions. Further, by acting jointly and collectively, the IAMs could enhance their credibility and persuasive powers relative to the IFI management and staff, thereby encouraging greater compliance with the safeguard policies.

Given their contributions to international sustainable development law, IAMs and IFIs should indeed expand, deepen, and regularize their interaction, which should be built upon the sense that they are part of the same community – specifically a "global community of law"[153] – engaged in a common enterprise. This enterprise consists of the formulation and implementation of policies and procedures aimed at integrating the economic, environmental, and social dimensions of development. Collective and collaborative action among these nontraditional lawmakers reinforces the knowledge on which their performance of intelligence functions is based. Put differently, the authoritativeness and legitimacy of the norms they espouse are bolstered by their combined expertise and credibility.

Significantly, special rapporteurs or mandate holders within the UN human rights system raised alarm over the perceived downgrading of the Bank's standards (in its new Environmental and Social Framework) due to competitive pressures brought about by newer development banks,

[152] Boisson de Chazournes, "Partnerships, Emulation, and Coordination" (n 2) 174.
[153] See Waters (Introduction n 136) 498–99.

specifically the AIIB. Philip Alston, the former Special Rapporteur for Extreme Poverty and Human Rights, remarked, "The risk of a race to the bottom is real and would be disastrous for sustainable development."[154] The Special Rapporteur also said that the World Bank itself has led the race to the bottom rather than the two newcomers, which have so far been simply replicating the World Bank's very low standards.[155]

The race to the bottom is definitely a threat to be mindful of and to avert. But the assumption underlying this threat – that IFIs are lowering their sustainability standards due to the borrowing States' preference to minimize project costs – trivializes a more complex reality. Many States have now begun internalizing sustainable development principles and thus would not necessarily consider more stringent safeguards as unwarranted expenses.[156] Indeed, this internalization process is worth further exploring as a means to address the race-to-the-bottom challenge: country safeguard systems can be used in lieu of, or to augment, the IFIs' environmental and social policies, when it is shown that the former is more sustainability-oriented than the latter.[157]

It is possible that States, with their exposure to a wider range of internal and external pressures, could be quicker and more receptive to adopting higher environmental and social standards. This scenario removes or diminishes the supposed motivation of IFIs to decrease transaction costs and speed up the process by relaxing safeguards. It also bears noting that the IFIs themselves have learned that less stringent standards often do not translate to lower costs, and the formulation of safeguard policies was precisely a result of such realization.[158]

[154] United Nations Office of the High Commissioner for Human Rights (OHCHR), "World Bank should recognize importance of human rights in new environmental and social policies," December 17, 2014 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15429&LangID=E>. See also Letter dated December 12, 2014, to the World Bank president from the United Nations Human Rights Council special procedures mandate-holders concerning the (then) draft Environmental and Social Framework, which was released for consultation on July 30, 2014 <https://www.ohchr.org/Documents/Issues/EPoverty/WorldBank.pdf>.

[155] Sam Jones, "Senior UN official castigates World Bank over its approach to human rights," *Guardian*, October 22, 2015 <https://www.theguardian.com/global-development/2015/oct/22/world-bank-human-rights-un-special-rapporteur-philip-alston>.

[156] Lorenzo (Introduction n 36) 329.

[157] But see Vinod Thomas and David de Ferranti, "Time to bolster safeguards, not dilute them," *Financial Times*, September 23, 2015 <https://www.ft.com/content/a4302a45-3c94-3ea4-96d1-7a9b0c07c523>.

[158] Lorenzo (Introduction n 36) 349–50.

Paying greater attention to the IFIs' safeguard systems, analyzing them in legal terms, and scrutinizing their contribution to and compatibility with existing environmental and social norms, including human rights obligations, would be useful in counteracting the possible downward harmonization. Additionally, this shift in perspective could enrich the international legal discourse on the responsibility and accountability of international organizations, whose mandates are evolving to assist in the search for multilateral solutions to enduring as well as contemporary global problems like poverty, inequality, and climate change. The next chapter elaborates this point by scrutinizing the relationship between the IAMs and the international law of responsibility, as well as the implications of such relationship for the right to remedy of project-affected people.

7

Institutional Lawmaking and International Legal Accountability

Finding Remedies for (Un)Sustainable Development Projects*

Given their roles as creatures and creators of international law – especially in the field of sustainable development – IFIs are IOs whose conduct needs closer legal scrutiny. Despite having been in existence for more than a half-century and the expansion of their functions within that period, IFIs have been largely excluded from legal critique and the harms resulting from their conduct left unremedied. The World Bank Inspection Panel's creation in 1993 thus marked the birth of accountability as an international legal concept, David Hunter argued, because it "disrupted the normal channels of accountability in international law."[1] Yet, three decades later, there is still limited understanding about the extent and quality of this disruption. The Inspection Panel, its iterations in other IFIs, and the implications of their operations remain a niche and esoteric topic in international legal scholarship.

International lawyers generally seem to have paid little attention to the notion of accountability, especially as applied to IOs.[2] While States are interested in controlling and ensuring IOs' performance of their functions in accordance with international law,[3] they have instead turned to

* A modified version of this chapter appears as Johanna Aleria P Lorenzo, "Accountability of Multilateral Development Banks and the Law of International Responsibility" (2024) 73 International & Comparative Law Quarterly 209.

[1] Hunter (Chapter 4 n 76) 440.

[2] The International Law Association final report of its study on the accountability of international organizations was published in 2004. The International Law Commission finalized the Articles on the Responsibility of States for Internationally Wrongful Acts and the Draft Articles on the Responsibility of International Organizations in 2001 and 2011, respectively.

[3] See generally Mahnoush H Arsanjani, "Claims against International Organizations: Quis Custodiet Ipsos Custodes?" (1981) 7 The Yale Journal of World Public Order 131; Eisuke Suzuki and Suresh Nanwani, "Responsibility of International Organizations: The

the concept of responsibility. This focus contributed to the neglect of accountability and a hazy understanding of its relationship with responsibility, particularly in the development finance context.

Indeed, the question of whether and how the IAMs relate to the international responsibility regime remains open. This uncertainty – coupled with the false premise that such mechanisms are the only legally feasible means of regulating IFIs' behavior given their immunities – has turned IAMs into a subterfuge for not scrutinizing the responsibility of IFIs *qua* IOs under international law. It has additionally allowed the persistence of two imprecise and somewhat contradictory claims: first, the principles and rules governing accountability mechanisms are *lex specialis* that preclude application of the general international law of responsibility; second, IFIs bear no international legal obligations regarding environmental and human rights protection, since IAMs and the safeguard policies are not part of international law (or the latter constitute "soft law," at best).

Aiming to refute these claims, this chapter provides a detailed analysis of how the ILC Draft Articles on the Responsibility of International Organizations (ARIO) can complement, or apply residually to, the IFI accountability framework. It additionally sketches areas (some requiring further research) for reforming IAMs to augment their remedial function. Remedy in the development finance context finds bases in the banks' sustainable development and "do no harm" mandates.

As the Office of the High Commissioner for Human Rights (OHCHR) posits, doing no harm does not only mean prevention, rather it also logically requires remedying any harms done.[4] To introduce remedy in the development finance context, it is necessary to "transcend the punitive assumptions and associations with remedy and approach the issue from the standpoint of contingency planning."[5] In this regard, the chapter contributes to the much-needed clarification that wrongful conduct is not always and necessarily a prerequisite for remedies and that remedies may instead be based on or justified by the

Accountability Mechanisms of Multilateral Development Banks" (2005) 27 Michigan Journal of International Law 177; Bradlow, "International Law and the Operations of the International Financial Institutions" (Introduction n 32).

[4] United Nations Office of the High Commissioner for Human Rights, "Remedy in Development Finance: Guidance and Practice" (2022) 14.

[5] Ibid. 10.

occurrence of harm, which can result from lawful but risky or hazardous activities.[6]

Contextualizing some questions addressed here is the observation that despite the growth of noncompliance mechanisms, "the nature and content of the accountability principles and their relationship with the law of responsibility remains ill developed, in particular where it concerns principles relevant to situations of shared responsibility."[7] At the outset, it bears emphasizing that accountability and responsibility are not mutually exclusive alternatives. There is merit, however, in exploring the accountability mechanisms' potential to overcome some of the conceptual and practical difficulties – for example, identifying an IO's international obligation – involved in establishing institutional responsibility.[8] While disagreeing with their conclusions that ARIO and the Inspection Panel are separate paths that will unlikely meet, this chapter adopts Baimu and Panou's approach of ascertaining "the added value [per Simma and Pulkowski] that general international law could bring to the panel,"[9] meaning, the circumstances in which reliance on general international law "is expedient to serve the purposes of the special regime."[10]

International legal responsibility is understood here as "a particular form of legal accountability, focused upon the legal consequences of breaches of international law that are attributable to an international actor."[11] This chapter likewise adopts Jutta Brunnée's definition of international legal accountability as involving "the *legal* justification of an

[6] See Julio Barboza, *The Environment, Risk and Liability in International Law* (Brill Nijhoff 2011) 22, 27.

[7] André Nollkaemper and Dov Jacobs, "Shared Responsibility in International Law: A Conceptual Framework" (2013) 34 Michigan Journal of International Law 359, 407.

[8] See generally David M Ong, "Shared Responsibility or Institutional Accountability? Continuing Conceptual and Enforcement Issues for Grievance Mechanisms of Public and Private International Finance Institutions" in Richard Barnes and Ronán Long (eds), *Frontiers in International Environmental Law: Oceans and Climate Challenges Essays in Honour of David Freestone* (Brill Nijhoff 2021).

[9] Evarist Baimu and Aristeidis Panou, "Responsibility of International Organizations and the World Bank Inspection Panel: Parallel Tracks Unlikely to Converge?" in Hassane Cissé, Daniel D Bradlow, and Benedict Kingsbury (eds), *The World Bank Legal Review: International Financial Institutions and Global Legal Governance*, vol 3 (World Bank 2012) 149.

[10] Ibid. 171.

[11] Jutta Brunnée, "International Legal Accountability through the Lens of the Law of State Responsibility" (2005) 36 Netherlands Yearbook of International Law 21, 22 (citation omitted).

international actor's performance *vis-à-vis* others, the assessment or judgment of that performance against *international legal* standards, and the possible imposition of consequences if that actor fails to live up to applicable *legal* standards."[12] Hence, international legal accountability is a notion broader than international legal responsibility. It is broad enough to encompass the accountability model employed within the law of IFIs. Conversely, the ILC responsibility regime does not subsume the IFI accountability model. It is not the goal of this chapter to make the latter fit within the former. Instead, the comparative analysis serves to identify insights that can be drawn to enhance the remedies afforded by the IFIs' safeguard systems, particularly the IAMs.

The responsibility regime embodied in ARIO is conceptualized here as *responsibility as liability*, which contrasts with *responsibility as answerability* that frames the accountability model used in, and arguably more appropriate to, the IFIs' legal order.[13] According to James Crawford and Jeremy Watkins, a person deemed responsible in the "responsibility as answerability" sense is "called to account for their conduct and made to respond to any moral or legal charges that are put," without need of adjudicating on whether the relevant conduct constitutes a wrong.[14] The "responsibility as liability" model, on the other hand, conveys "the idea that a person has violated their obligations and become liable to some negative response such as punishment, censure, or enforced compensation."[15] This notion is to be differentiated from the legal meaning of "liability," which at present is predominantly associated with a no-fault regime, as used in some treaties and by the ILC in its other works.[16] The Crawford and Watkins framework is useful in viewing the ARIO-IAM connection along a spectrum, where answerability and liability serve different purposes and operate at different stages of a legal controversy.[17]

[12] Ibid. 24 (italics in the original).

[13] This analytical framework draws mainly from James Crawford and Jeremy Watkins, "International Responsibility" in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010); Brunnée, "International Legal Accountability through the Lens of the Law of State Responsibility" (n 11).

[14] Crawford and Watkins (n 13) 283.

[15] Ibid. 284.

[16] It is also to be distinguished from the ILA Committee's second level of accountability for "tortious liability for injurious consequences arising out of acts or omissions not involving a breach of any rule of international and/or institutional law."

[17] Crawford and Watkins (n 13) 284.

This link reinforces the "liberating effect" of the concept of accountability that could help international lawyers become more attuned to contemporary realities and enable them to think more broadly about the entities (beyond States) to whom account should be rendered.[18] It is important to look beyond the traditional notion of responsibility and see "complementary relationships between [] various modalities" of accountability, according to Curtin and Nollkaemper, given the accountability gaps "result[ing] from shifts in power and that create the risk of abuses of power."[19] This expansion is additionally imperative, because there are activities and relationships at the global level that are creating damages and losses that a State-centric international law cannot meaningfully address. The case of harms arising from MDB-supported projects and the concomitant demands for redress by affected non-State actors demonstrate the urgent need for the international legal system to expand its concepts and mechanisms for controlling power.

Revisiting some enduring questions and examining the relationship between the IAMs and the ARIO are also timely, given recent reforms in the World Bank's environmental and social standards and the establishment of its Dispute Resolution Service, which touches upon the borrowing State's conduct and now complements the Inspection Panel. These changes are analyzed in the context of long-standing demands for stricter legal regulation of IFIs' activities concerning development projects in the Global South that have caused harms to people and the environment. Such harms raise issues not only about IFI responsibility for breaches of international human rights law or international environmental law but also and more fundamentally about their obligation to provide remedies for adverse outcomes resulting from the performance of their sustainability-oriented legal mandates.

7.1 Accountability of International Financial Institutions

Consistent with its conceptualization as "responsibility as answerability', the IFIs' accountability framework focuses on justifying conduct toward an injured party but not on determining the wrongfulness of such conduct and imposing penalties. Under Brunnée's concept of

[18] Deirdre Curtin and André Nollkaemper, "Conceptualizing Accountability in International and European Law" (2005) 36 Netherlands Yearbook of International Law 3, 9.
[19] Ibid. 14.

international legal accountability[20], IAMs satisfy two of its three elements: (i) an IFI's (international actor) legal justification of its performance vis-à-vis project-affected people (others) and (ii) an evaluation of such performance against the IFI's environmental and social policies (international legal standards). To emphasize, normative standards against which conduct is evaluated are not limited to formal sources like treaty or custom. Further, in this conception, sanctions are possible but not indispensable.

Accountability is relational, meaning, the actor ("accounter") who is being called to account for her conduct is doing so by responding *to* another actor ("account-holder").[21] Indeed, the relationship between accounter and account-holder is central to the IFIs' accountability regime. Accountability is also subjective, meaning, the impact of the actor's conduct on a certain group of persons is examined. In contrast, under the ILC responsibility regime, which is objective, the effects of an international actor's act or omission need not be ascertained, at least at the outset. Accountability is triggered by an adverse impact, material or otherwise, experienced by the account-holder that is claimed to result from the accounter's conduct. Simply put, determining the existence of accountability is done with reference to a recipient or addressee of the account, answer, or explanation.

In the International Law Association (ILA) study on the accountability of international organizations, accountability takes different, non-mutually exclusive *forms* – legal, political, administrative, financial – and consists of three interrelated and mutually supportive *levels*, that is, "internal and external scrutiny and monitoring," "tortious liability for injurious consequences arising out of acts or omissions not involving a breach of any rule of international and/or institutional law," and "responsibility arising out of acts or omissions which do constitute a

[20] Brunnée, "International Legal Accountability through the Lens of the Law of State Responsibility" (n 11) 24.

[21] See Christiane Ahlborn, "Remedies against International Organizations – A Relational Account of International Responsibility" in Dan Sarooshi (ed), *Remedies and Responsibility for the Actions of International Organizations /Mesures de réparation et responsabilité à raison des actes des organisations internationales* (Brill Nijhoff 2014); Stewart, "Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness" (Chapter 3 n 23); Ruth W Grant and Robert O Keohane, "Accountability and Abuses of Power in World Politics" (2005) 99 The American Political Science Review 29.

breach."[22] To clarify, this chapter's focus on international legal accountability is not intended to discount other types of accountability, especially the political.

A crucial but lacking consideration in both the ILC's and the IFIs' models is the role of power and its distribution. Attention to power is what, according to the ILA and some authors,[23] imbues the concept and practice of accountability with an extralegal or nonlegal dimension. Indeed, the scholarship on accountability straddles academic disciplines: law, political science, public administration, and philosophy among others. One author, for instance, defines accountability "as a moral or institutional relation in which one agent . . . is accorded entitlements to question, direct, sanction or constrain the actions of another – particularly where these actions involve the exercise of public power or authority within a governance system."[24] The ILA aptly highlights that "power entails accountability, that is the duty to account for its exercise" and accountability, "as a matter of principle . . . is linked to the authority and power of an IO."[25] Thus, better aligned with the premise of the ILA's study is the terminology used by Ruth Grant and Robert Keohane, who refer to the actor being called to account as the "power-wielder."[26] Here, the IFI is the power-wielder. The account-holders are the multiple actors – member States, project-affected people, NGOs – to whom the IFI responds.

The subjective and relational dimensions of accountability present advantages and challenges. It is advantageous because it shines light on both the power-wielders and the account-holders, thereby drawing due attention to the harm suffered by the latter that triggered the need for accounting. The IAMs' focus on harm or injury is vital, especially in the context of IFI-supported development projects, because it serves to

[22] ILA, "International Law Association Berlin Conference (2004) Accountability of International Organisations" (2004) 1 International Organizations Law Review 221, 226.

[23] See, e.g., Ige F Dekker, "Making Sense of Accountability in International Institutional Law: An Analysis of the Final Report of the ILA Committee on Accountability of International Organizations from a Conceptual Legal Perspective" (2005) 36 Netherlands Yearbook of International Law 83; Mark Bovens, "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13 European Law Journal 447; Kate Macdonald and May Miller-Dawkins, "Accountability in Public International Development Finance" (2015) 6 Global Policy 429.

[24] Kate Macdonald, "The Meaning and Purposes of Transnational Accountability" (2015) 73 Australian Journal of Public Administration 426, 428.

[25] ILA (n 22) 225.

[26] Grant and Keohane (n 21) 30–31.

temper the asymmetric relationship between an IO and individuals or communities who suffer tangible and material adverse effects that the traditional State-centric international law would fail to consider. Richard Stewart portrays this situation as a problem of disregard: "Overall, the present structures and practices of global regulatory governance often generate unjustified disregard of and consequent harm to the interests and concerns of weaker groups."[27] In the case of the World Bank and other MDBs, the disastrous development projects, which triggered the establishment of the Inspection Panel, were symptomatic of the failure to consider and integrate into the project design and implementation the environmental impacts and the rights and interests of individuals and local communities.

7.1.1 Reframing IAMs' Role within the Safeguard Systems

The IAMs are labeled as such, since in the functions they perform – compliance review and dispute resolution – an actor is called upon to answer or explain to another actor for an alleged harm that occurred in the course of a development project. In these proceedings, there exists a "respondent," which is typically the bank management/staff, who is made to account for the acts or omissions that are claimed to have caused harm to individuals or communities, that is, the complainant(s). One of the IAMs' most remarkable features is the fact that their proceedings are triggered by non-State actors, who have suffered harm or are under threat thereof due to an IFI-supported development project.

7.1.1.1 Rationale for Establishment

From an institutional standpoint, the rationale for establishing the pioneer accountability mechanism, namely the World Bank Inspection Panel, is twofold: to ensure the economic efficiency and cost-effectiveness of Bank-funded projects; and to prevent or mitigate these projects' adverse impacts on people and the environment. The first reason is a matter of internal accountability, in the sense that member States, as creators and shareholders of the World Bank, are calling upon the latter to account for the use of their money in relation to the disastrous projects. Member States, especially the majority shareholders in the IFIs such as the United

[27] Stewart, "Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness" (Chapter 3 n 23) 211 (citation omitted).

States,[28] endorsed the Panel's establishment to respond to the growing demands in the eighties and nineties from various NGOs for MDBs to take responsibility for the harms to people and the environment that occur in connection to development (typically infrastructure) projects.

The second rationale, which this chapter concentrates on, concerns external accountability, wherein the demand for answers/justification is coming from project-affected people, who do not have a contractual relationship or any legal tie with the Bank. Indeed, the IAMs' configuration is unorthodox and arguably state-of-the-art, as it formally recognizes a relationship – material and legally relevant, albeit noncontractual – between an IO and the individuals affected by the former's actions and decisions.[29]

Significantly, the establishment of IAMs is intimately connected with the MDBs' sustainable development mandates. The AfDB fittingly describes the purpose of its Independent Recourse Mechanism (IRM)[30] in this way:

> The IRM provides people adversely affected by an Operation financed by the Bank with an independent mechanism through which they can seek redress and *hold the Bank to account to ensure that it complies with its own policies and procedures related to sustainability.*[31]

This statement corroborates the book's claim that, through their interpretive functions, accountability mechanisms help clarify, elaborate, and operationalize the concept of sustainable development, which lies at the core of the IFIs' legal mandates under their constituent instruments.

7.1.1.2 Functions of IAMs

All IFIs, except the World Bank (at least prior to 2020), have IAMs that serve dual functions: compliance review and dispute resolution, which is also referred to as problem-solving in some mechanisms. These two, as well as the advice-giving function, have been expounded in Chapter 4.

[28] See Kristina Daugirdas, "Congress Underestimated: The Case of the World Bank" (2013) 107 American Journal of International Law 517, 552–53.

[29] See Park, "Assessing Accountability in Practice" (Chapter 4 n 108) 464.

[30] Successor of the CRMU.

[31] AfDB, The Independent Recourse Mechanism – Operating Rules and Procedures January 2015 (Updated June 2021), para 3 (emphasis added). [hereinafter, "AfDB IRM Operating Rules"]

The problem-solving function is outcome-driven and does not focus on identifying and allocating blame.[32] It is flexible and encompasses various procedures, such as mediation, conciliation, consultative dialogue, information sharing, and fact-finding. In any of these dispute resolution methods, the objective is to address the grievances of project-affected people[33] and "improv[e] environmental and social outcomes on the ground,"[34] without focusing on the question of the IFI's compliance with its policies and procedures.[35]

Notably, the flexibility and consensus-oriented character of the dispute resolution function could be vicious as it is virtuous, since the process usually involves "difficult compromises about what can be achieved and may result in significant harms being left unaddressed" – a situation that the OHCHR rightly criticizes due to the inalienable nature of human rights.[36] These characteristics obscure the unequal bargaining strengths – a function of "technical, legal, financial, or fiscal resources and capacities"[37] – of the parties to the dispute resolution process. In this respect, a provision in the AfDB Independent Recourse Mechanism Operating Rules and Procedures is noteworthy: "The Problem-Solving exercise shall be particularly sensitive to the existence of power asymmetries between the negotiating parties, particularly concerning the availability of information needed and the capacity of the parties to participate effectively in these processes."[38]

[32] ADB, Accountability Mechanism Policy, para 126.

[33] See CAO Operational Guidelines (2013), 14. (Project-affected people can decide to terminate a dispute resolution process anytime, whether upon their own will or with advice from CAO itself "that resolution of the case is unlikely to be possible through a dispute resolution process or that it would be an inefficient use of resources." When such decision is made, the case is transferred to Compliance for appraisal.)

[34] Ibid. 4, 18.

[35] See IDB, Policy of the Independent Consultation and Investigation Mechanism (December 2015), 13–14, paras 24–26. (The Consultation Phase is an optional and voluntary feature that project-affected people can invoke "to address the issues . . . related to Harm caused by the failure of the Bank to comply with one or more of its Relevant Operational Policies in the context of a Bank-Financed Operation."); ADB, Review of the Inspection Function: Establishment of A New Accountability Mechanism, 16, 18, paras 64, 71; ADB Accountability Mechanism Policy 2012, 24, para 126. (In performing the problem-solving or consultation function, the Special Project Facilitator assists parties in "finding ways to address the problem of the project-affected people in ADB-assisted projects" rather than identifying and allocating blame.)

[36] United Nations Office of the High Commissioner for Human Rights (n 4) 60.

[37] Desierto and others (Chapter 4 n 125).

[38] AfDB IRM Operating Rules, para 48.

In comparison, the compliance review or investigation reports follow a general pattern: they enumerate the applicable and/or invoked safeguard policies; present the complainants' and the Management's respective views; set out the relevant facts, including those gathered from site visits; ascertain compliance; and make recommendations, as necessary and if so authorized, to resolve or rectify any violation of the environmental and social policies. Despite the original impetus for the IAMs' creation in general, namely, to respond to the demands by project-affected people and the international community for IFIs' accountability for environmental and social harms, the compliance review function likewise tends to be inward-looking in practice. For instance, the CAO's objective in investigating alleged noncompliance with IFC/MIGA policies is to "improv[e] IFC/MIGA environmental and social performance."[39] The orientation toward the organization's internal workings can be gleaned from the manner by which CAO handles a compliance appraisal, which includes "discussions with IFC/MIGA team working with the specific project and other stakeholders to understand which criteria IFC/MIGA used to assure itself/themselves of the performance of the project."[40]

7.1.2 Identifying the Normative Standards

The emergence of accountability as an institutional priority was contemporaneous to the IFIs' incremental recognition of sustainable development as part of their operations, if not *the* core of their legal mandates as international organizations. Otherwise stated, substantive changes to these IOs' "internal" law serve as important context for the IAMs' creation. It is difficult, if not impossible, to understand the purpose and functions of these bodies without also comprehending the contents of the safeguard policies they interpret and apply. These policies are vital to the question of what IFIs are being held accountable for when the accountability mechanisms' functions are triggered.

[39] CAO Operational Guidelines (2013), 5.

[40] Ibid. 22–23. ("The compliance investigation criteria include IFC/MIGA policies, Performance Standards, guidelines, procedures, and requirements whose violation might lead to adverse environmental and/or social outcomes. Compliance investigation may have their origin, or arise, from environmental and social assessments or plans, host country legal and regulatory requirements [including international legal obligations], and the environmental, social, health, or safety provisions of the World Bank Group, IFC/MIGA, or other conditions for IFC/MIGA involvement in a project.")

To recall, the standards and rules against which the conduct of World Bank management and staff are evaluated during compliance review are expressed in the safeguard policies. Simply put, the norms applied by the Bank and interpreted by the Panel – implicitly for the protection of people and the environment – are these policies. While safeguards are considered internal law or the rules of the organization that legally bind only the Bank and its agents, they also prescribe certain actions to the borrower. These requirements constitute binding international obligations through the loan/grant agreement, which incorporates the safeguards by reference, between the borrowing State and the IFI.

7.1.2.1 Do No Harm

A "do no harm" principle informs IFIs' support of development projects. For instance, the IDB considers itself implementing the principle by establishing "clear provisions for effectively managing project-related environmental and social risks and impacts, and whenever feasible, facilitating the enhancement of social and environmental sustainability beyond the mitigation of adverse risks and impacts."[41] The World Bank likewise seeks, through the ESF, to translate its aspirations regarding environmental and social sustainability "into practical, project-level applications within the context of the Bank's mandate."[42] Somewhat ominously, however, the Bank envisions moving beyond "do no harm" toward maximizing development gains.

IFIs construe and implement "do no harm" as a due diligence obligation – consistent with how some tribunals[43] and scholars[44] interpret the harm prevention rule. Their duty of prevention covers harms to both

[41] IDB, ESPF para 1.4.

[42] The World Bank Environmental and Social Framework (2017), A Vision for Sustainable Development, para 9.

[43] *Trail Smelter Arbitration* (US v. Canada) [1938 and 1941] 3 RIAA 1905; *Corfu Channel Case* (UK v. Albania) (Merits) [1949] ICJ Rep 4; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7; *Pulp Mills on the River Uruguay* (Argentina v. Uruguay) (Judgment) [2010] ICJ Rep 14.

[44] See, e.g., Jacqueline Peel, "Unpacking the Elements of a State Responsibility Claim for Transboundary Pollution" in *Transboundary Pollution* (Edward Elgar 2015); Catherine Redgwell, "Transboundary Pollution: Principles, Policy and Practice" in *Transboundary Pollution* (Edward Elgar 2015); Kerryn Anne Brent, "The Certain Activities Case: What Implications for the No-Harm Rule" (2017) 20 Asia Pacific Journal of Environmental Law 28; Jorge E Viñuales, "Due Diligence in International Environmental Law: A Fine-Grained Cartography" in Heike Krieger, Anne Peters, and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (Oxford University Press 2020).

people and environment. This coverage contrasts with the harm prevention rule in international environmental law and is closer to the older *Trail Smelter* "no harm" rule that focused on State responsibility for transboundary harm.[45] But it aligns with the ILC's definition of harm as one "caused to persons, property or the environment" in relation to hazardous activities.[46]

The harm prevention rule and IFIs' own interpretation thereof leave room to argue that these IOs have at least an obligation to respect human rights. Apart from the IFIs' declaration of their "do no harm" and due diligence commitments, harm prevention is a customary rule that binds IOs as subjects of international law. Significantly too, IFIs are enjoined under the ICESCR to pay greater attention to protecting human rights in their financing activities, including the policies they prescribe or require as condition for funding.[47] Moreover, as the World Bank is a UN specialized agency (pursuant to a Relationship Agreement between these IOs), it is bound by the UN Charter, including its human rights–related provisions. In this regard, the Bank's obligation to respect the Charter involves undertaking due diligence.

It is therefore suspect how the World Bank views its relationship with international law and how it implements its sustainable development mandate:

> The World Bank's activities support the realization of human rights expressed in the Universal Declaration of Human Rights. Through the projects it finances, and in a manner consistent with its Articles of Agreement, the World Bank seeks to avoid adverse impacts and will continue to *support its member countries as they strive to progressively achieve their human rights commitments*.[48]

This statement represents the long-standing official position of the World Bank, as well as other IFIs, that it does not bear international human rights obligations but simply acts in an assistive or supportive

[45] Jutta Brunnée, "Harm Prevention" in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press) 272; Tim Stephens, *International Courts and Environmental Protection* (Cambridge University Press 2009) 135.

[46] Draft Prevention Articles, art 2(b).

[47] See, e.g., Committee on Economic, Social and Cultural Rights (CESCR), General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12) (August 11, 2000), para 64; CESCR General Comment No 12: The Right to Adequate Food (Art. 11) (May 12, 1999), para 41.

[48] Ibid. para 3 (emphasis added).

capacity vis-à-vis the borrowing States, which are the ones legally bound to respect, protect, and fulfill the human rights implicated in development projects.[49] Several reports and recommendations by other IOs and treaty bodies[50], as well as academic commentaries,[51] have already refuted such claim convincingly. This issue is not the main concern here, but it serves as critical background for evaluating the delineation and distribution of prescribed tasks between Bank management/staff and the borrowing State.

7.1.2.2 Due Diligence

Although the State arguably bears the primary international legal obligations toward environmental and human rights protection during development projects, the IFI *qua* IO cannot absolve itself of its customary duty under international law to take diligent steps to prevent harm – especially knowing from years of experience about the risks posed by certain development projects like dam construction. One study succinctly explains that due diligence operationalizes "do no harm," and as applied to potential human rights infringements, IOs "have the ex ante duty to identify and mitigate potential human rights risks exacerbated by their operations, as well as the ongoing duty to monitor and mitigate newly emerging human rights violations."[52]

[49] See generally Bradlow and Grossman (Introduction n 36); Adam McBeth, "A Right by Any Other Name: The Evasive Engagement of International Financial Institutions with Human Rights" (2009) 40 George Washington International Law Review 1101; Antonio Morelli, "International Financial Institutions and Their Human Rights Silent Agenda: A Forward-Looking View on the 'Protect, Respect and Remedy' Model in Development Finance" (2020) 36 American University International Law Review.

[50] See, e.g., Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) (August 11, 2000), para 64; CESCR General Comment No. 12: The Right to Adequate Food (Art. 11) (May 12, 1999), para 41.

[51] See, e.g., Dañino (Chapter 2 n 168); Margot E Salomon, "International Economic Governance and Human Rights Accountability" [2007] LSE Law, Society and Economy Working Papers No. 9/2007 <http://eprints.lse.ac.uk/24622/1/WPS09-2007Salomon.pdf>; Ashfaq Khalfan, "Development Cooperation and Extraterritorial Obligations" in Anna FS Russell and Malcolm Langford (eds), *The Human Right to Water: Theory, Practice and Prospects* (Cambridge University Press 2017); Juan Pablo Bohoslavsky, "Complicity of International Financial Institutions in Violation of Human Rights in the Context of Economic Reforms" (2020) 52 Columbia Human Rights Law Review 203.

[52] Ellen Campbell and others, "Due Diligence Obligations of International Organizations under International Law" (2018) 50 New York University Journal of International Law and Politics 541, 584.

Rather than a free-standing obligation, due diligence qualifies behavior and describes the duty of care "needed when a risk has to be controlled . . . to prevent harm and damage done to another actor or to a public interest."[53] The ILC explains that the preventive obligation is one of due diligence, rather than a guarantee of total prevention, such that a State must exert "best possible efforts to minimize the risk" or undertake "all necessary measures to prevent significant transboundary harm."[54] From an international project finance perspective, due diligence is a set of practices and methods aimed at identifying and assessing risks. As Diane Desierto expounds, "The scope of the risk assessment is necessarily extensive as to subject-matter, multidimensional as to tools and methods used for risk analysis, interrelated in the approach to identifying individual and collective environmental and social risks, and continuing as part of the Bank Management's project oversight."[55] Based on the IFIs' formulation, "do no harm" is the underlying substantive obligation that the procedural duty of due diligence operationalizes.

As early as 2009, ADB has recognized its duty under the safeguard policies to "help borrowers/clients meet [policy] requirements during project processing and implementation through capacity-building programs, *ensure due diligence* and review, and provide monitoring and supervision."[56] The World Bank now also explicitly acknowledges its own duty of due diligence, "proportionate to the nature and potential significance of the environmental and social risks and impacts related to the project," in order to implement the Environment and Social Policy.[57] An entire sub-section in the Policy details mandatory requirements for Bank management/staff in carrying out the environmental and social due diligence, which is intended to "assist the Bank in deciding whether to provide support for the proposed project and, if so, the way in which environmental and social risks and impacts will be addressed in the

[53] Anne Peters, Heike Krieger, and Leonhard Kreuzer, "Due Diligence in the International Legal Order: Dissecting the Leitmotif of Current Accountability Debates" in Heike Krieger, Anne Peters, and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (Oxford University Press 2020) 2.

[54] ILC Commentary to Draft Prevention Articles art 3.

[55] Diane A Desierto, "Due Diligence in World Bank Project Financing" in Heike Krieger, Anne Peters, and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (Oxford University Press 2020) 339.

[56] ADB, Safeguard Policy Statement (2009), para 16 (emphasis added). See also ADB, Operations Manual (2013).

[57] The World Bank Environmental and Social Framework (2017), World Bank Environmental and Social Policy for Investment Project Financing, paras 3 and 4.

assessment, development and implementation of the project."[58] Most relevant here is this specification:

> 32. The Bank's due diligence responsibilities will include, as appropriate: (a) reviewing the information provided by the Borrower relating to the environmental and social risks and impacts of the project, and requesting additional and relevant information where there are gaps that prevent the Bank from completing its due diligence; and (b) providing guidance to assist the Borrower in developing appropriate measures consistent with the mitigation hierarchy to address environmental and social risks and impacts in accordance with the ESSs. The Borrower is responsible for ensuring that all relevant information is provided to the Bank so that the Bank can fulfil its responsibility to undertake environmental and social due diligence in accordance with this Policy.

The ILC encourages States and IOs to make such clear delineations and expressly allocate their respective competences and responsibilities when they undertake joint projects or operations. Accordingly, one can construe the apportionment of tasks between the Bank and the borrowing State as heeding the ILC's advice. Illustrative are the provisions concerning the formulation of an Environmental and Social Commitment Plan (ESCP), which is part of the legal agreement between the Bank and the Borrower that lays down "the material measures and actions required for the project to meet the [environmental and social standards] over a specified timeframe."[59] The implementation of measures and actions specified in the ESCP is the Borrower's obligation, while the Bank undertakes to monitor the environmental and social performance of the project in accordance with this Plan.

Whether such distribution of duties aligns with the concerned actors' power and capabilities to prevent and to remedy the resulting harms is a question that deserves greater scrutiny but is beyond the scope of this chapter. Intuitively, although the State does indeed bear the primary legal duty to pursue development that does not violate its obligations relating to environmental and human rights protection, the IFI *qua* IO cannot absolve itself of its customary duty under international law to take diligent steps to (i) prevent significant transboundary harm and (ii) not cause such harm. Given the wealth and power disparities between MDBs and many borrowing States, it is a reasonable and legitimate expectation

[58] Ibid. para 30.
[59] The World Bank Environmental and Social Framework (2017), World Bank Environmental and Social Policy for Investment Project Financing, para 46.

that the former would be more capable of ensuring that the development projects do not cause environmental and social harms and of providing remedies, should harms occur.

7.1.2.3 Right to Remedy

Remedy is highly important in the development finance context for several reasons, foremost of which are IFIs' legal mandates to pursue sustainable development and "do no harm" and the necessity to meet "evolving social expectations and relevant normative developments."[60] Among such developments are the elaboration of the right to remedy into procedural (effective access) and substantive components, its crystallization as a customary rule, and the implication that IOs are legally bound to go beyond the first level of accountability.[61] As the OHCHR explains, "remedy is the functional corollary of the 'do no harm' mandates of DFIs, going to the heart of their missions,"[62] and IAMs aid DFIs in performing such missions by "support[ing] the voice, empowerment and participation rights of people directly affected by projects [and] bringing inputs, knowledge and feedback loops that may not otherwise be available, to the benefit of equity and sustainability."[63] However, as one commentator critically notes, "the IAMs' general lack of consequential authority is a major shortcoming of the IFI accountability systems."[64] A notable exception is the AfDB IRM, which is expressly authorized to recommend, upon finding noncompliance, "that redress be provided to those harmed, which may include financial and/or non-financial considerations."[65] Whether other IFIs would follow the AfDB's example is uncertain, though one might find hope in the cooperative behavior among MDBs described in Chapter 6.

IAMs' contributions to the overall improvement of project performance and, possibly, to decreasing the likelihood of future environmental and social harms in development projects, should not be ignored. It nonetheless bears emphasis that they still fail to adequately and appropriately satisfy the project-affected people's right to remedy, especially concrete reparation.[66] This deficiency could be attributed to the fact

[60] United Nations Office of the High Commissioner for Human Rights (n 4) 14.
[61] Wellens (Introduction n 47) 17–18.
[62] United Nations Office of the High Commissioner for Human Rights (n 4) 14.
[63] Ibid. 59 (citation omitted).
[64] Hunter (Chapter 4 n 76) 459.
[65] AfDB IRM Operating Rules, para 67.
[66] United Nations Office of the High Commissioner for Human Rights (n 4) 61–62.

that, except in a few existing accountability mechanisms, the involvement of project-affected people does not go further than initiating a complaint. Complainants are excluded from subsequent processes and are not even given an opportunity to provide inputs to the management action plan, which is meant to correct the project failures or violations that have caused social or environmental harm.

Additionally, the considerable discretion of the IFI – mainly the Management and, to a lesser extent, the Board of Executive Directors – regarding the appropriate actions upon a finding of noncompliance is problematic. As one scholar observed, enabling the Bank to exercise greater discretion and professional judgment exacerbates the glaring gaps in the standards, "most notably the lack of a clear commitment to ensure Bank projects do not contribute to violations of human rights."[67] Further, the lack of clear legal commitment to environmental and human rights protection can be problematic, because treating remedial action as discretionary rather than mandatory undermines at least one of the original rationales for creating accountability mechanisms, that is, responding to demands for redress of harms to people and the environment.

An examination of the management action plans formulated by different MDBs after a compliance review shows that the actions are corrective but not reparative. Put differently, the outcome of establishing harm-causing noncompliant behavior is not to wipe out the adverse consequences to project-affected people. Instead, the actions usually taken by IFI management are forward-looking and geared toward improving project implementation in subsequent phases. Nevertheless, this procedure is consistent with the ILA's recommended rules and practices about reporting and evaluation, specifically that reports "should not only contain a genuine account of action or inaction but also explanations for the course of conduct" and past operations should not perfunctorily be used "as a model for future operational activities."[68]

7.2 Responsibility of International Organizations

Given the interest in ensuring that IOs perform their functions in accordance with States' instructions or, more broadly, with international law, ARIO attempts to codify and progressively develop rules that would

[67] Hunter (Chapter 4 n 76) 458.
[68] ILA (n 22) 235.

prevent IOs from becoming Frankenstein's monster[69] that inflict harm on people and the environment. Its text and principles derive from the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA). The ILC acknowledges, however, that IOs, as international actors, have idiosyncrasies that distinguish them from States. The difficulties in drafting the secondary rules stem in large part from "the limited availability of pertinent practice," the unavailability or inadequate use of third-party dispute settlement procedures that cover IOs, and the "great diversity among [them]."[70]

In contrast to the IFIs' accountability model, ARIO is objective and nonrelational. These features mean that determining the existence of international responsibility requires looking only at an international actor and its conduct, without regard to the effect of the latter or to any relationship of said actor to another entity, international or otherwise. At the crux of the law of international responsibility is an internationally wrongful act, meaning, the breach by an actor of its international obligation. In the ILC's formulation, the internationally wrongful conduct, which entails international responsibility, arises when two elements are present: (i) the act or omission is attributable to an actor, either a State or an IO; and (ii) it constitutes a breach of an international obligation of that actor.[71] As further discussed below, the notions of "injury" and an "injured State" become relevant only at a later phase, namely, in invoking responsibility and implementing the legal consequences of an internationally wrongful act.

To reiterate, the ILC model is conceptualized here as "responsibility as liability" (*contra* "responsibility as answerability"), given its focus on identifying the violation of a legal obligation and specifying the implications of such violation for the responsible actor. In the words of Crawford and Watkins, the principles behind this conceptualization "shape the judicial response to international lawbreaking and the legal obligations which responsible parties thereby acquire."[72] This emphasis can be observed from the overall structure of the ILC Articles, with the part that deals with the Content of the International Responsibility and Part Two immediately following the part that tackles The Internationally Wrongful Act itself.

[69] Guzman (Chapter 2 n 6).
[70] ILC Commentary to ARIO, General commentary.
[71] ARIO art 4; ARSIWA art 2.
[72] Crawford and Watkins (n 13) 284.

7.2.1 Rationale and Scope of the Articles

The legal consequences of an internationally wrongful act serve at least two purposes: (i) maintaining or restoring the rule of law in the interest of the international community as a whole ("legality function"); and (ii) making whole the parties injured by the breach of an obligation ("remedial function").[73] These functions and the provisions that operationalize them do not inherently clash, but they sometimes stand in tension, to the detriment of affording full reparation to injured parties.[74] For instance, the choice to restrict compensation to "financially assessable damage" is intended to ensure that the Articles do not punish the responsible State, instead only compelling it to uphold or restore the international rule of law through other specified remedies. This solution, however, could be inadequate for an injured party, who might additionally be interested in imposing punitive damages to deter future violations. The standard of "financially assessable damage" also poses difficulties in establishing non-pecuniary environmental harms, such as air or marine pollution and loss of biodiversity. In at least one case, however, the ICJ has affirmed the compensability of environmental damage and laid down a methodology to valuate such damage.[75]

Also crucial for the present analysis is the fact that, apart from a handful of provisions that could be interpreted as contemplating non-State actor participation, the Articles concentrate on established subjects of international law, namely, States and IOs. Despite the "communitarian turn" in the international responsibility regime,[76] the international community, as the Articles appear to construe it, excludes individuals and other non-State actors. The latter's conduct only becomes legally relevant if it is attributable to a State or an IO.[77] Conversely, responsibility for human rights violations and breach of other treaties, wherein the ultimate rights-bearers are individuals, can only be invoked and implemented by States and IOs.[78]

[73] Dinah Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility" (2002) 96 American Journal of International Law 833, 838.
[74] Ibid. 836–37.
[75] See *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua) (Judgment) (Compensation owed by the Republic of Nicaragua to the Republic of Costa Rica) [2018] ICJ Rep 166.
[76] See Ahlborn (n 21) 526–27.
[77] ARIO, Part One, Chapter II; ARSIWA, Part One, Chapter II.
[78] ARIO, Part Four; ARSIWA, Part Three.

7.2.2 Salient Provisions for IFIs

Judging from comments submitted to the Commission by the World Bank and other IFIs, there are provisions that are particularly salient to this group of international economic organizations. Using these provisions, the relationship between ARIO and IAMs can be analyzed along three issue-areas: (i) *lex specialis* character of IO rules, (ii) IO rules' legal nature (international versus internal), and (iii) interaction between State and IO responsibility.

7.2.2.1 Lex specialis

For the World Bank, like many IOs, Article 64 on *Lex specialis* is ARIO's key provision.[79] Apart from strongly encouraging the ILC to express more clearly the "centrality of *lex specialis* and the residual character" of ARIO, it insists that the internal law of the organization should prevail over all international obligations, save for *jus cogens* norms.[80] A related provision is Article 32 ARIO, which precludes an IO's invocation of its rules to justify noncompliance with obligations in Part Three, that is, the legal consequences of international responsibility including, among others, the reparation provisions. Significantly, while an IO and its member States may agree on special rules concerning remedies, such agreement binds only them and cannot affect the rights or interests of third parties, including individuals injured by the IO's activities.[81]

Application of the *lex specialis* principle contemplates two possible relationships: one wherein the general standard and the specific rule point in the same direction, but with the latter elaborating the former; and another wherein the two have "no express hierarchical relationship, and provide incompatible direction" about tackling the same set of facts.[82] As applied here, the issue rests on two questions. Does the legal framework governing IAMs cover all topics that ARIO addresses, such that the former can displace the latter? Is there a normative conflict between the regimes?

[79] Kristen E Boon, "The Role of Lex Specialis in the Articles on the Responsibility of International Organizations" in Maurizio Ragazzi (ed), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Brill Nijhoff 2013) 136.

[80] Comments and observations received from international organizations, A/CN.4/637 and Add.1, February14 and 17, 2011 [hereinafter, "IO Comments and observations"], 169–70.

[81] See ILC Commentary to ARIO art 32.

[82] Report of the Study Group of the International Law Commission, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law," A/CN.4/L.682 (2006), paras 56–57.

Focusing on the first question, Baimu and Panou answer in the affirmative, highlighting the peculiarity of MDBs and the greater specificity of their rules.[83] They fail, however, to satisfy "thresholds of specificity and genuine inconsistency"[84] by, for instance, explaining how either the safeguard policies *qua* applicable rules before IAMs or the latter's procedures elaborate ARIO provisions. In contrast, Palchetti disagrees that IFIs' accountability system constitutes *lex specialis*, arguing that the two regimes are complements rather than competitors, with ARIO providing external control and IAMs operating "'from within' by imposing procedural limitations on the way in which the organization exercises its functions."[85]

The comparative analysis below yields a similar conclusion, showing that the law of international responsibility and the IFI accountability framework serve the same broad objective but address different accountholders and circumstances. IAMs address harms caused by IFIs' noncompliance with safeguard policies but do not adjudicate on the legality of such noncompliance. ARIO tackles IFIs' breach of international obligations and the legal consequences thereof but only considers injury to States as a secondary matter. Although not covering the same legal issues, the ARIO and IAMs address the same set of facts and are not conflicting in their direction and operation. Therefore, IAMs cannot entirely replace ARIO (and vice versa). The two can apply simultaneously and complementarily to better control IFIs' power and afford remedies to injured parties, including project-affected people.

7.2.2.2 "Rules of the Organization"

Whether IO rules[86] are internal or international law is addressed, albeit inconclusively, in the second paragraph of Article 10 ARIO, stating that the breach of an international obligation by an IO "may arise . . . under the rules of the organization." Whether IFIs' safeguard policies create international obligations links to whether noncompliance with them, as determined by IAMs, amounts to international responsibility. The ILC

[83] Baimu and Panou (n 9) 170–71.

[84] Boon (n 79) 138, 141.

[85] Paolo Palchetti, "The Law of Responsibility of International Organizations: General Rules, Special Regimes or Alternative Mechanisms of Accountability?" (2015) X Anuário Brasileiro de Direito Internacional 72, 87.

[86] See generally Christiane Ahlborn, "The Rules of International Organizations and the Law of International Responsibility" (2011) 8 International Organizations Law Review 397; Kingsbury (Introduction n 23).

itself does not claim to have a definitive answer.[87] It nonetheless points out that not all breaches of obligations under the rules of the organization are necessarily breaches of obligations under international law.[88]

The "institutional theory of law" admits such possibility and the plurality of legal phenomena, given the shift of this school of thought's inquiry from how the legal system legitimizes legal norms to how certain results of human activity and social reality "can obtain legal validity as elements of the legal system."[89] As Dekker aptly posited, although "principles, inducements and purposes" may not amount to legal obligations, they are "institutional legal realities" that create "different expectations and different patterns of legitimization of conduct," and therefore IOs can be held accountable for noncompliance with "a legally valid – but not necessarily also legally binding – rule of international law."[90] This proposition, however, remains theoretical and is not (yet) widely accepted in practice.

The World Bank's view on this matter is worth quoting in full:

> Precisely because the World Bank agrees with the Commission in its cautious approach to [the controversial question about the legal nature of IO rules], it thinks that the clarification provided in the commentary would be better reflected by the deletion of paragraph 2 from draft article 9. In fact, paragraph 1 already states that a breach is a breach regardless of the origin and character of an obligation binding an international organization, thus clearly implying that this origin may also be in the rules of the organization. On the contrary, *retaining paragraph 2 may wrongly lead to the unsubstantiated conclusion (expressly denied in the Commission's commentary) that the breach of any rule of the organization is necessarily a breach of an international obligation*.[91]

This statement reflects the oft-criticized position of almost all IFIs that they are not bound by obligations under international human rights law and international environmental law.[92] It contradicts their acts of

[87] ILC Commentary to ARIO art 10.
[88] Ibid.
[89] Dekker (n 23) 107.
[90] Ibid. 108, 111.
[91] IO Comments and observations (n 80) 153 (emphasis added).
[92] Skogly (Chapter 2 n 110); Ibrahim FI Shihata, "The World Bank and Human Rights" in *The World Bank in a Changing World: Selected Essays*, vol 1 (1991); Shihata, "The World Bank and the Environment – A Legal Perspective" (Chapter 2 n 141); Daniel D Bradlow, "The World Bank, the IMF, and Human Rights" (1996) 6 Transnational Law & Contemporary Problems 47; Alix Gowlland Gualtieri, "The Environmental Accountability of the World Bank to Non-State Actors: Insights from the Inspection Panel" (2002) 72 British Yearbook of International Law 213.

formulating environmental and social policies and creating IAMs. Since some safeguard policies overlap with treaty or customary rules, it is possible for an IAM's findings of noncompliance to also implicate an IFI's breach of international law.[93]

Concomitant with the formal recognition of a relationship between the IFI and a group of non-State actors should be the equally substantive move to consider the safeguard policies – the "rules of the organization" – as legally relevant for purposes of holding the IO accountable for development project–related harms that arguably also constitute human rights violations and/or environmental law breaches. Moreover, since international lawmaking is a communicative process among relevant actors, IFIs *qua* IOs are considered participants in such process, and their environmental and social policies create international law.

These issues emphasize the outstanding need to further develop the primary rules, specifically concerning harm prevention and due diligence, applicable to IFIs when they assist States and fund development projects. Clarifying and elaborating the primary rules that bind IOs are critical not only in "enhanc[ing] the predictability of international organisations' action towards the different entities of their constituencies" but also "provid[ing] the necessary preconditions for any serious attempt at remedial action against them."[94]

7.2.2.3 Responsibility of Multiple Actors

Other provisions likely applicable to IFIs are those on aid or assistance (Article 14 ARIO) and direction and control (Article 15 ARIO). Regarding the former, the World Bank enjoins the ILC to reiterate, for clarity and emphasis, its commentary to Article 16 ARSIWA in the commentary to the ARIO that "organizations providing financial assistance do not, as a rule, assume the risk that assistance will be used to carry out an international wrong."[95] Such an interpretation is critical, the Bank claims, to alleviate the "dangerous chilling effect [that Article 14 ARIO may create] for any [IFI] providing economic assistance to eligible borrowers and recipients."[96] Relatedly, the Bank seeks clarification about the knowledge

[93] Alexander Orakhelashvili, "The World Bank Inspection Panel in Context: Institutional Aspects of the Accountability of International Organizations" (2005) 2 International Organizations Law Review 57, 85–86.
[94] Wellens (Introduction n 47) 27.
[95] IO Comments and observations (n 80) 155.
[96] Ibid.

threshold for these two provisions and pushes for setting it to actual, rather than presumed, knowledge. It details the distinction between "oversight" and "direction and control," arguing that in an agreement between the IFI and the borrowing State, "direction and control for the implementation of a project or programme activities are never really ceded, because the responsibility for implementation remains with the borrower or recipient, while the [IFI] engages at most in the exercise of oversight."[97]

The ILC seems to encourage States and IOs to clearly delineate and expressly allocate their respective competences and responsibilities when they undertake joint projects or operations. Discussing the model contribution agreement between the UN and the States contributing military contingents for peacekeeping operations, the Commission notes, however, that such agreement only binds the international actors parties thereto and "could . . . not [deprive] a third party of any right that this party may have towards the State or organisation that is responsible under the general rules."[98] Some authors suggest that ex ante clarification and apportionment of responsibilities could be particularly useful in managing litigation, at least among States.[99]

From this section, one would justifiably get the impression that ARIO does not provide a conclusive response to the question about the relationship between IAMs and the law of international responsibility. The objective here, however, is precisely to show that the generally open-ended language of the Articles gives room for creative legal arguments to thrive.

7.3 Accountability Mechanisms and the Articles: Convergence and Divergence

International legal accountability encompasses responsibility in both senses, namely, answerability and liability. The rules governing IAMs and the law of international responsibility could accordingly bear similarities whilst retaining distinctions. As shown below, the two regimes do have points of convergence and divergence. It is not this chapter's aim to reconcile these models, especially because such task would involve a far more complex exercise of revisiting fundamental doctrines of international law such as legal personality, fleshing out the implications of non-State actor participation in the international legal order, and

[97] Ibid. 156.
[98] ILC Commentary to ARIO art 7, para (3).
[99] Nollkaemper and Jacobs (n 7) 394.

including individuals as part of the legal conception of the international community.[100] This section instead takes on the more modest tasks of specifying the ways that these two regimes meet and split and of examining their implications for remedying harms to people and the environment that arise from IFI-supported development projects.

The comparative analysis uses as reference points the questions that Edith Brown Weiss[101] associates with accountability (i) for what types of conduct is an account due, (ii) to whom the accounter must give account, (iii) what consequences follow from being held accountable or responsible, and (iv) whether and how institutional learning takes place.

7.3.1 Noncompliance/Breach

Both the IFI accountability model and the international responsibility regime involve identifying a conduct that does not conform to a given standard, that is, a violation of an obligation. In the accountability mechanism's case, the standards are the IFI's policies, whereas the ILC Articles concern an international obligation based on treaty, custom, or general principle. Ascertaining a failure to follow the safeguard policies is usually the first prong of IAMs' analysis, the second (discussed below) being the causal relation between such failure and the alleged harm/s. Breach of international obligation suffices to establish responsibility, except when the primary rule includes damage or harm among the elements of an internationally wrongful act.[102]

7.3.2 Harm or Damage

As mentioned, breach is one of the two essential elements of international responsibility. Injury is generally assumed from the breach and is relevant only at a later phase, namely, in specifying and delimiting the legal consequences of international responsibility. Hence, in both ARSIWA and ARIO, injury is discussed in the part entitled "Content of the International Responsibility" that is separate from the part concerning "The Internationally Wrongful Act." More specifically, injury is described in the provision defining the consequence or obligation of

[100] See Brunnée, "International Legal Accountability through the Lens of the Law of State Responsibility" (n 11) 23–24; Hunter (Chapter 4 n 78) 465.

[101] Edith Brown Weiss, *Establishing Norms in a Kaleidoscopic World* (Brill 2019) 338.

[102] ILC Commentary to ARSIWA art 2, para (9). See also ILC Commentary to ARIO art 4, para (3).

reparation: "Injury includes any damage, whether material or moral, caused by the internationally wrongful act of an international organization."[103] Likewise, the notion of an "injured State" figures into the ILC regime for purposes of implementing international responsibility and of identifying which actor can do what (e.g., invocation, non-recognition, countermeasures) in response to the internationally wrongful act.

In contrast, under the responsibility as answerability model, IAMs focus their inquiry not only on the IFIs' noncompliance with safeguards but also on its material adverse effects. The fact-finding exercise IAMs undertake largely involves determining the cause(s) of harms that project-affected people allegedly suffered or will probably suffer. More particularly, an IAM determines whether such harms are the result of a failure by management/staff to comply with the IFI's safeguard policies. The causation analysis does not include a determination or judgment that the noncompliance constitutes a legal wrong – a feature that clearly distinguishes the accountability mechanism's tasks from those of a court/tribunal applying the ILC Articles.

It nonetheless bears highlighting that the Management Response essentially reads like a defense. This document is the power-wielder's rendering of account, submitted following the request for investigation. It typically includes a rebuttal of the IAM's factual findings of causality, such that management's explanation or justification would often consist of stating that its supervision of the stakeholder consultation conducted by the borrowing State was adequate and in accordance with the relevant IFI policy and procedure, or that it exercised due diligence in ensuring that the borrower undertook the proper environmental assessment.[104] In other words, while an IAM stops short of determining whether the IFI

[103] ARIO art 31, para 2.

[104] See, e.g., World Bank Inspection Panel Resolution (2020), para 20:

> In its initial response to the request for inspection, Management will provide evidence that:
>
> (a) it has complied with the relevant Bank operational policies and procedures; or that
> (b) there are serious failures attributable exclusively to its own actions or omissions in complying, but that it intends to comply with the relevant policies and procedures; or that
> (c) the serious failures that may exist are exclusively attributable to the borrower or to other factors external to the Bank; or that
> (d) the serious failures that may exist are attributable both to the Bank's non-compliance with the relevant operational policies and procedures and to the borrower or other external factors.

engaged in legally wrongful conduct, the management/staff is still required under the rules of the organization to answer the project-affected people's complaint and to justify its conduct based on what the safeguard policies provide.

It could also happen that the causality analysis is not disputed, in which case, the Management Action Plan indicates concrete steps to correct the noncompliant conduct. These corrective measures would consist of, for instance, telling the borrower to conduct another or a supplemental EA or to hold another consultation session that includes those groups who were previously denied an opportunity to participate.

7.3.3 Standing/Invocation

The fact-finding mandate of IAMs and the attendant requirement for IFI management to respond to the compliance review report fittingly demonstrate the axiom of speaking truth to power and highlight how power-wielders can be compelled to respond and justify their conduct.[105] For persons bringing a case before IAMs, harm is an eligibility requirement. Harm gives individuals legal standing to trigger the mechanism's exercise of its jurisdiction, which entails the scrutiny of the IFI's conduct vis-à-vis its policies and procedures. Indeed, IAMs are among the first international fora where individuals can directly submit complaints. Prior to their establishment, the project-affected people's capability to call upon the MDB *qua* IO to explain its decisions and actions was not recognized. It is the departure from such status quo – giving project-affected people the legal standing to initiate transnational, quasi-judicial processes – that accordingly makes these mechanisms innovative and valuable in remedying the disregard of non-State actors in the international legal system. Through these mechanisms, IFIs *qua* IOs become answerable to the project-affected people, who are non-State actors that have no formal relationship with the IFIs and generally limited (if at all) international legal personality.

In contrast, ARIO does not allow non-State actors like individuals to invoke and protect their rights. It does, however, clarify that the chapter pertaining to invocation of responsibility "is without prejudice to the entitlement that a person or entity other than a State or an international organization may have to invoke the international responsibility of an

[105] See Brown Weiss, *Establishing Norms in a Kaleidoscopic World* (n 101) 363.

international organization."[106] The Commission, again reverting to the primary-secondary rule distinction, explains that the relevant primary rule will have to "determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account."[107] Hence, in a human rights treaty breach, for example, while it is undisputed that the rights-bearers are the natural persons themselves, under the ARIO, the injured party who can invoke responsibility would presumably be limited to the State of nationality[108] of those natural persons whose rights were violated or any other State or IO who is a party to such treaty and the norm involved is of an *erga omnes* character.[109] The ILC nonetheless acknowledges that a primary obligation, such as a human rights treaty or a bilateral investment treaty, that accords rights to non-State actors may itself provide for a procedure that entitles the latter to invoke the responsibility on their own account.[110]

7.3.4 Remedies/Consequences

The ILA's study categorizes and differentiates the types of remedies per level of accountability, and the "identity of potential claimants, their locus standi and the remedies" available to them will also vary depending on the kind of conduct (e.g., institutional acts/decisions, operational activities) undertaken by an IO.[111] Remedies may assume a "positive, injunctive, corrective or compensatory nature," and ultimately, the potential outcome of remedial action against IOs is contingent on "the identity of the party seeking redress, the kind of accountability involved, and the forum before which the remedial action has been brought."[112]

The contributions IAMs have made to overall improvement of IFIs' performance of their sustainability mandates and, possibly, to decreasing the likelihood of environmental and social harms in development projects, should not be overlooked. But the OHCHR's observation

[106] ARIO, art 50. See also ARSIWA, art 33(2).
[107] ILC Commentary to ARSIWA art 33, para (4).
[108] ILC, Draft Articles on Diplomatic Protection, arts 3 and 4.
[109] ARIO art 49; ARSIWA, art 48.
[110] ILC Commentary to ARSIWA art 33, para (4).
[111] ILA (n 22) 268.
[112] Ibid. 269–70. The Committee has notably alluded to the possibility that outcomes of remedial action at the first level of accountability "may indeed provide the necessary background material or evidence for instituting legal action" to obtain legal remedies at the subsequent levels.

unfortunately rings true and merits emphasis: these mechanisms still fail to adequately and appropriately fulfil the project-affected people's need and right to remedy, especially concrete reparation.[113] Corroborating this observation, a group of researchers, scholars, and practitioners emphasize that the reform of the World Bank's Accountability Mechanism failed to "clearly articulate or elaborate on the possibility of reparations for the harmful consequences of conduct of either the borrower State (or entity) and/or the Bank Management as the lender."[114] Nollkaemper and Jacobs similarly observe that noncompliance mechanisms are treated by States and IOs as "instruments to secure control of public power, to limit abuses of power, and to further the rule of law," but not as means to grant redress and reparation for people harmed by the noncompliant or *ultra vires* behavior.[115]

To echo these critical remarks, it bears highlighting that, although it is the project-affected people who trigger Inspection Panel proceedings – that is, they are given the voice to call out the possible errors of Bank management/staff – the Panel reports are addressed to the Board of Executive Directors.[116] Likewise, although the complainants could have access to it, the Management's Response containing its explanation and/or proposed action plan is directed to the Board. Project-affected people are thus excluded from the processes and are not even given an opportunity, except in a few of the existing IAMs, to provide inputs to the management action plan, which is meant to remedy the project failures or violations that have caused harm to them and the environment.

Considering that the subject matter of the proceedings involves, if not revolves around, the harm or threat thereof suffered by the project-affected people, these features are irregular. It seems only logical and fair to expect that the explanation is owed to them as much as – if not more than – to the Board. That this legitimate expectation is left unfulfilled makes the accountability obtained through the Inspection Panel and similar mechanisms indirect and incomplete. In this regard, IAMs do not substantially deviate from the traditional framework, per Brown Weiss' portrayal, wherein IOs remain directly "accountable to the Governments that established and that fund them" and are merely "accountable at least indirectly to those that are affected by what they

[113] United Nations Office of the High Commissioner for Human Rights (n 4) 61–62.
[114] Desierto and others (Chapter 4 n 125).
[115] Nollkaemper and Jacobs (n 7) 406–7.
[116] In other MDBs, the accountability mechanisms report directly to the Bank President.

do, be they affected peoples or communities, the private sector, or non-governmental bodies."[117]

Further, the consequences of an IAM's finding of noncompliant behavior differ considerably from the legal consequences of an internationally wrongful act. The first difference concerns cessation and non-repetition. In the responsibility as answerability regime, because no legal wrong is determined to have been committed, the accounter – the IFI – is not legally obliged to cease its conduct, even when the accountability mechanism finds that a noncompliant behavior caused injury to project-affected people. Neither is there an obligation to offer assurances and guarantees of non-repetition.

The AfDB IRM, however, presents a noteworthy deviation, as the resolution creating it attempts to be more specific about what Management is required to do after a finding of noncompliance: Management shall "identify any changes to AfDB practices, policies, guidance or systems to bring the Bank into compliance and/or avoid recurrence of similar situations."[118] Generally, however, it is discretionary on the IFI management's part to stop the harmful activity, to perform an omitted action that would have prevented the harm, or to commit to ensuring that noncompliance will not recur in the future.

In contrast, due to its rule-of-law-restoration philosophy, the ILC Articles provide that the obligations to cease the wrongful conduct and to offer assurances and guarantees of non-repetition accrue almost automatically, that is, without need of invocation by an injured party.[119] Again, due to the international responsibility regime's State-centric orientation, individuals and other non-State actors are not entitled to the remedies enumerated in the ILC Articles. Rather, the entities who can claim reparation are limited to States and IOs. While reference to other "beneficiaries of the obligation breached" in ARIO art 49(4)(b) and in ARSIWA art 48(2)(b) "provides a means of protecting the community or

[117] Brown Weiss, *Establishing Norms in a Kaleidoscopic World* (n 101) 356.

[118] African Development Bank, The Independent Recourse Mechanism – Operating Rules and Procedures January 2015 (Updated June 2021), para 69:

"If IRM finds the Bank to be non-compliant, Management shall:

(b) Include in the Management Action Plan clear time-bound actions for returning the Bank to compliance and achieving remedy for affected populations.

(c) Identify any changes to AfDB practices, policies, guidance or systems to bring the Bank into compliance and/or avoid recurrence of similar situations."

[119] ARSIWA, arts 30, 42, 48, and related Commentary; ARIO, arts 30, 43, 49, and related Commentary

collective interest at stake,"[120] the practice of States and IOs regarding this provision remains limited.

On balance, however, when a responsible State or IO stops its internationally wrongful conduct, the individuals or other non-State actors injured by such conduct arguably benefit indirectly from the cessation. In the *LaGrand* Case,[121] for example, the assurances and guarantees of non-repetition were given by the responsible State (United States of America) to the State of nationality (Germany), but the ultimate beneficiaries of such action are arguably the other citizens of the injured State.

Despite this possibility, the responsibility as liability model generally appears to be inappropriate for redressing the harms experienced by project-affected people in the context of development finance. It is highly unlikely that the borrowing State would espouse their claims, considering that those harms would typically also be caused by the State's own acts or omissions. On an even more pragmatic level, a borrowing State might not be willing to risk the cancellation of the loan/grant and the cessation of the development project, especially if it believes that the latter would bear economic gains for the country.

Turning to the responsibility as answerability model does not favor the project-affected people either. The prime reason lies in the aforementioned broad discretion that the IFI – mainly the Management and, to a lesser extent, the Board of Executive Directors – has concerning the appropriate actions upon a finding of noncompliance with its own operational policies and procedures.[122] An examination of management action plans formulated by different MDBs after a compliance review shows that the actions are corrective but not reparative. Put differently, the outcome of a finding of harm-causing noncompliant behavior is not to wipe out the adverse consequences to the project-affected people. Instead, the actions usually taken by IFI management are future-oriented

[120] ILC Commentary to ARSIWA art 48, para (12).

[121] *LaGrand Case* (Germany v. United States) (Judgment) (Jurisdiction, Admissibility, Merits) [2001] ICJ Rep 466.

[122] See, e.g., World Bank Inspection Panel Resolution (2020), para 41:

> "The Management Report and Recommendation shall include a management action plan, comprising actions that Management proposes for addressing Panel's finding of non-compliance and for which it seeks the Executive Directors' approval. Management shall consult with the affected parties during the preparation of the management action plan and shall communicate to the Panel the nature and outcomes of consultations with affected parties. Management shall also confirm to the Executive Directors that it has reached agreement with the borrower with respect to those actions in the management action plan that require the borrower's collaboration to implement."

and aimed at improving project implementation in subsequent phases. Hence, IAMs' compliance review functions primarily serve supervisory or managerial purposes.

Again, a notable exception is the AfDB IRM, which is expressly authorized, in case of a finding of noncompliance, to recommend "that redress be provided to those harmed, which may include financial and/or non-financial considerations."[123] Notably, such procedure aligns with the ILA Committee's recommended rules and practices about reporting and evaluation, specifically that reports "should not only contain a genuine account of action or inaction but also explanations for the course of conduct" and past operations should not perfunctorily be used "as a model for future operational activities."[124]

The overall practice regrettably remains that, despite the laudable attention and importance accorded by the IFIs' accountability model to harm and to the project-affected people's rights and interests, it ironically limits the consequences, particularly the remedies available to injured parties, that follow from a finding of harm and noncompliance. Indeed, the most unsatisfactory feature of the responsibility as answerability model is its remedial feature, or lack thereof. None of the existing IAMs can oblige the IFI to provide reparation, in any of its forms (restitution, compensation, satisfaction), to project-affected people. Accordingly, as with the ILC responsibility regime, harm or injury to non-State actors is only, if at all, indirectly repaired and remedied. As one commentator bluntly puts it, "The [independent accountability mechanisms'] general lack of consequential authority is a major shortcoming of the IFI accountability systems."[125]

7.3.5 Opportunity to Learn

The ILA Committee's conception of remedy, as "an acceptable outcome arrived at through a procedure instigated by an aggrieved party," encompasses other kinds of redress such as "prospective changes of policy or practice by the IO."[126] Under this study, IAMs operate at the first level of

[123] African Development Bank, The Independent Recourse Mechanism – Operating Rules and Procedures January 2015 (Updated June 2021), para 67.
[124] ILA (n 22) 235.
[125] Hunter (Chapter 4 n 78) 459.
[126] ILA Final Report, "Part Four: Remedies Against International Organizations."

accountability, which entails forms of internal and external scrutiny that could result in modifications of an IO's conduct, but without regard to potential and subsequent liability and/or responsibility, which are the second and third levels, respectively. While the responsibility as answerability regime does not require offering guarantees and assurances of non-repetition, the expectation is that being held accountable would become a learning opportunity.

Some studies affirm that IAMs have indeed "help[ed] stimulate institutional learning at the [IFI], both enhancing its development effectiveness and . . . improving its policies and procedures."[127] The insights that accountability mechanisms gain from applying the safeguard policies in the context of their problem-solving or compliance review activities can be, and have been, valuable to IFIs when conducting safeguards reviews.[128] According to the ADB, its "Staff, Management, and the Board increasingly see the Accountability Mechanism as a tool for ADB to respond positively to public scrutiny . . . [and] helps ADB to learn lessons and improve its project quality."[129] The Board Resolutions creating the AfDB IRM expressly authorize the performance of an advisory function,[130] which enables the mechanism "to provide independent opinions on systemic issues, and technical advice on projects and programs of the Bank Group."[131]

Likewise, part of CAO's advisory work is to "advanc[e] the boundaries of environmentally and/or socially responsible behavior on the part of IFC/MIGA by advising on emerging, strategic, or systemic issues or trends or processes."[132] CAO is also envisioned to advance the same behavior "in the private sector, civil society, and academia through lessons derived from CAO cases."[133] It is noteworthy that in recent reports, the World Bank Inspection Panel appears to also be performing an advice-giving function (despite the absence of a clear and express mandate) by adding "a final chapter in which it discusses 'systemic issues'

[127] Bradlow and Naudé Fourie, "Independent Accountability Mechanisms at Regional Development Banks" (Chapter 5 n 76) 126.
[128] Nanwani (Chapter 4 n 108) 248.
[129] ADB, Accountability Mechanism (2012), para 42.
[130] AfDB, Board Resolutions on Establishment of IRM, Resolution B/BD/2015/03 – F/BD/2015/02, January 28, 2015, para 17.
[131] Ibid.
[132] CAO Operational Guidelines (2013), 29.
[133] Ibid.

related to the Bank's compliance with [safeguard policies] in light of its conclusions in the case at hand."[134]

7.4 Summing Up

The foregoing comparative analysis reveals that the ILC responsibility regime is not necessarily better and more stringent than the IFI accountability model. Indeed, in some aspects, such as the identity of accountholders, the rules governing IAMs have a broader and more progressive scope. At the same time, both share deficiencies concerning the role and implications of harm. Rather than attempting to fit one model within the other, this chapter set out to fill the gaps in one model with some components from the other. Most crucially, the currently lacking remedial function of IAMs could be addressed by drawing from the consequences of international responsibility identified by the ILC. This route can be pursued without need for the IFI accountability model to change its underlying logic that IAMs are not intended to establish the international wrongfulness of an IFI's conduct. The proposed adaptation instead hinges on the right to remedy of project-affected people that, to some extent, is already recognized in the responsibility as answerability framework.

At the end of the day, even the staunchest defenders of the virtues of IFIs and IAMs have to concede that these mechanisms "still fall short of ensuring that justice prevails in every instance of a breach of international environmental obligations and/or standards" due to continuing contestations and uncertainties about the international legal obligations of IOs in general.[135] These contestations and uncertainties include the fair distribution of obligations between IFIs and States. The position – that the IFIs' powers are so limited that "broad-based concepts such as international responsibility" are considered "additional constraints" that might inadvertently limit these institutions' capacity to discharge their mandates[136] – should be fiercely rejected for lacking any basis in reality. Given IFIs' vast resources, especially vis-à-vis the developing countries that borrow from them, clarifying and elaborating their duty of due diligence is crucial in fulfilling IFIs' legal mandates toward sustainable development and realizing their commitments to "do no harm."

[134] Fauchald (Introduction n 124) 122 (citation omitted).
[135] See Ong (n 8) 138.
[136] Baimu and Panou (n 9) 151.

Conclusion

A Place for Accountable Non-State Actor Participation in International Sustainable Development Lawmaking

This book is a tale of two characters – the World Bank, an IFI and non-State actor, and sustainable development, an essentially contested concept – who are, on first impression, irrelevant or insignificant to international law. It narrates what happened when these two "outsiders" crossed paths, focusing on how their merger allowed them to fit within and potentially even shape the international economic legal order. Apart from showing that the World Bank and its peers are lawmakers in the field of sustainable development, the book also highlights how other non-State actors like individuals are being empowered as participants in this international lawmaking process. It additionally sketches a framework to analyze IFIs' legal accountability, based on the insight that the right to remedy and a concomitant obligation exist where harms occur, even in the performance of lawful but risky activities – as is the case with financing development projects and, more broadly, wielding the power of international lawmaking.

The relationship between international law and sustainable development, and the IFIs' role in such relationship, were scrutinized along three dimensions: the IFIs' authority to elaborate and contextualize the vague concept of sustainable development, the normative significance of the policies and mechanisms they used for such contextualization and for performance of their (sustainable) development mandates, and the international legal accountability concomitant to those mandates. From these analyses, the book argued that IFIs are lawmakers on sustainable development who can thus be held legally accountable for harms to people and the environment resulting from the exercise of such power. It thus provided a needed international *legal* narrative and critique of IFIs' activities to match their prominence (or notoriety) in popular consciousness and to reinforce their accountability to those they affect.

The argument that these IOs do more than just provide money for development projects could be novel or trite, depending on where and how one observes and experiences their decisions and activities.

For States and peoples in the Global South, IFIs' prescriptions and operations almost unquestionably bear the force of law – impacting their conduct and expectations about a wide range of socio-political affairs, including the relationship among economic growth, social and human well-being, and environmental protection. The lived realities of individuals and communities adversely affected by IFI-supported development projects, as well as the economic coercion potentially felt by borrowing countries when they request assistance, deserve clearer articulation and understanding in legal terms – to ensure that the law-creating institutions are also law-governed. Hence, this monograph.

The primary aim here is to contribute a more nuanced understanding of the international lawmaking process on sustainable development – which understanding is particularly salient to Global South borrower States and the peoples living there. This contribution, it is hoped, would give shape to IFIs' perceptible contribution to global economic lawmaking and thereby encourage deeper legal debates on policies governing their activities that bear massive economic, environmental, and social impacts, especially in the developing world. To this end, the book scrutinized the procedures, accountability mechanisms, and situations through which IFIs, as well as other non-State actors, participate in such international lawmaking process.

The central argument proceeded in three steps. First, the safeguard (environmental and social) policies and their interpretation in the jurisprudence of independent accountability mechanisms were distinctively treated as international legal materials, following the international law-as-communicative-process theory. In this regard, the book also touched upon the broader literature concerning the place of soft law and non-State actors in international law. The selected materials clarify, operationalize, and elaborate the essentially contested concept of sustainable development, specifically the underlying principles of integration and public participation that are predominantly expressed in non-legally binding international instruments. Through the safeguard system, especially the means for activating accountability mechanisms' functions, project-affected people likewise substantiate the meaning of sustainability and communicate their expectations about the rights and duties (of both IFIs and borrowing States) embedded in the concept. Put differently, participatory procedures found in IFIs' "internal" law facilitate the integration of environmental and social concerns with economic priorities driving many development projects.

Second, IFI and non-State actor participation in international sustainable development lawmaking is reinforced by (i) the increasing similarities in safeguard policies' approaches and prescriptions regarding economic, social, and environmental sustainability and (ii) the learning, cooperation, and "transjudicial communication" among IAMs, particularly in the context of co-financed development projects.

Third, international legal accountability follows from the IFIs' "do no harm" obligation, due diligence duty, and the lawmaking role they assumed upon adopting and implementing the concept of sustainable development as part of their mandates as IOs. Otherwise stated, the IFIs' very participation in international sustainable development lawmaking – that is, the formulation of safeguard policies and the establishment of IAMs – provides a legal means to hold them accountable, if not internationally responsible, for harms to people and environment arising from development projects. The form that international legal accountability has taken in development finance befits the context wherein the persons directly (and often adversely) affected by an IO's decisions are not the States transacting with them but the human beings and the natural environment within those countries. It nonetheless bears stressing that the existing IFI accountability framework still has serious deficiencies, especially regarding the right to remedy.

The "IFIs as lawmakers on sustainable development" proposition has myriad aspects that would be interesting for international legal scholars. While interest and research about how international economic law interacts with sustainable development have grown, the attention has so far mostly focused on the trade and investment regimes. Among the present work's objectives is thus to include international financial law, particularly the law of IFIs, and the law of development cooperation in the analysis.

For this purpose, the book detailed how teleological and evolutionary treaty interpretation facilitated the incorporation of "non-economic" concerns in the development finance context. It additionally analyzed the changes to the IFIs' operational policies and procedures resulting from such incorporation. This analysis built upon and expanded the "international organizations as lawmakers" idea, by adapting it to a group of functionally similar IOs, rather than only a single institution. Closer attention was devoted to the World Bank and the Inspection Panel, given their pioneering and standard-setting roles, but the participation of the regional/multilateral development banks and their accountability mechanisms was also crucial to the overall analysis.

Parenthetically, the book's claims could also attract the attention of academics from related disciplines, in which MDBs are examined, like development studies, economics, and international relations. Professionals – working in, with, or for the Global South and the IFIs themselves – could likewise benefit from reading a contextualization of their practice as part of the international lawmaking process on sustainable development.

Like many projects, the present one inescapably had to leave certain questions for future research that are now outlined by strands. For a few of these inquiries, an interdisciplinary approach can be valuable. The first general thread relates to a potential conceptualization of environmental, social, and economic sustainability arising from the thematic overlaps between the NIEO proposals and the right to development. Given the ongoing codification of the latter, this exploration is particularly timely. It is worth investigating, for instance, how such conceptualization, arguably rooted in assertions of State sovereignty and of legally binding human rights obligations, might contest (or surprisingly support) the IFIs' understanding of and prescriptions regarding sustainable development, as detailed in this book.

The second strand, which could but not necessarily intertwine with the first, explores whether and how some insights drawn from the operation of the safeguards systems, particularly the IAMs, in the development finance context are transposable or adaptable to climate finance. Given the subsisting issues of accounting and accountability in the latter, it would be important and interesting to know, among others, how accountability is understood and implemented in mechanisms such as the Global Environment Facility (GEF) and the Global Climate Fund (GCF), and what the implications are for people affected by, e.g., clean-energy projects, especially their right to remedy.

The third strand – possibly the thickest and most extensive – entails reinterpreting the distinct but overlapping concepts of accountability, responsibility, and liability under international law, and revisiting their application to development project finance, which is an area where IFIs are no longer the sole sources of funding. As suggested here, activities in this context could be predominantly lawful but have proven to be hazardous or posing significant risks of harm to people and the environment. One could ask, therefore, whether and how these activities can be maintained whilst ensuring that harms are remedied and repaired, if not prevented.

The last thread additionally involves rethinking the doctrine of sources of international law, in the light of this book's findings (and of others that came before), arguing that the creation of international law does not and should not exclusively remain the prerogative of States, not least because they are not the only ones affected by these far-reaching decisions. In this respect, the book grouped IFIs and project-affected people as non-State actors who are participating in international sustainable development lawmaking. There is, however, room to further problematize the fact that, within this broad classification, mutuality of interests is not a given, as power and the ability to influence the decisions remain unequally distributed.

For now, the modest conclusion stands that, even in the absence of treaties, custom, and general principles, guidance on important matters – such as the way that environmental and social concerns are integrated into economic activities – are being provided through the interactions of actors other than States. Extolling the merits of non-State actor participation in the international lawmaking process is not a case for the complete exclusion and/or irrelevance of States (which certainly remain the classic and dominant international lawmakers) in conceptualizing and implementing sustainable development. The argument is simply that the IFIs' internal law can enrich the international lawmaking process, by contributing to the clarification, elaboration, and operationalization of an essentially contested concept such as sustainable development. Importantly, IFIs also enable individuals and other non-State actors to participate in the international lawmaking process concerning sustainability. It is for this purpose that the safeguard policies and the IAMs' functions, specifically their interpretation and application of the policies, were thoroughly studied in the book.

A failure to properly understand the link between international (economic) law and sustainable development – and particularly, to reimagine the roles and responsibilities of IFIs and other non-State actors – creates missed opportunities for the international legal system to offer responses to some of the most persistent and pressing global issues, such as poverty, inequalities, and environmental degradation. As the book has shown, IOs, perhaps more so IFIs, are crucial to crafting these responses not only because the international community has entrusted them with pertinent legal mandates, but more importantly because their own structures and rules have contributed to the problem and thus the ones in need of reform. The safeguard systems thus deserve closer examination not only

for their valuable contribution in filling lacunae in international sustainable development law but also for their potential impact on altering the traditional State-centric view of international law, which needs to adapt to and address contemporary challenges, including those posed by the complex interdependence among economies, human societies, and the natural environment.

As stated at the beginning, this work intended to reveal and better understand the process underlying the IFIs' participation in international lawmaking, particularly the emergent international sustainable development law. The hope is that it will initiate further inquiries and discussions not only about the issues identified above but also regarding the relationship between international law and sustainable development, the place of international (economic) organizations and other non-State actors in such relationship, and the legal consequences of harms inflicted on the environment, on peoples and societies, and on economies, especially in the developing world.

Despite their sustainability-oriented legal mandates and, paradoxically, the harms their decisions often pose to people and the environment, IFIs have largely flown under the radar of international law. Yet, as demonstrated here, they exercise functions that carry both material and legal implications for the pursuit of sustainable development. The decades-long exclusion from international legal studies thus needs to be corrected. Now is the opportune moment to begin such correction, especially given the far-reaching and still growing impacts, both good and bad, of these IOs on the legal system regulating the international economic order, as well as on the lives of human beings and this planet.

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