SCHOOL OF ADVANCED STUDY
UNIVERSITY OF LONDON

THE ACCOUNTABILITY OF INTERNATIONAL FINANCIAL INSTITUTIONS IN LIGHT OF SUSTAINABLE DEVELOPMENT GOAL 16:

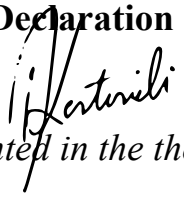
THE ROLE OF MDBS' INDEPENDENT ACCOUNTABILITY MECHANISMS IN PROMOTING SUSTAINABLE DEVELOPMENT

Aikaterini-Angeliki Akestoridi

Doctoral Thesis

Institute of Advanced Legal Studies
School of Advanced Study
University of London

Declaration



The work presented in the thesis is my own.

Abstract

This piece of research sets out to demonstrate the reasons why Multilateral Development Banks can be held accountable for sustainable development and to define the scope of their accountability. It does so by studying the role of the World Bank Group (WBG) in the implementation of Agenda 2030 for sustainable development and the Sustainable Development Goals, promulgated by the United Nations. First, the thesis constructs the substantive and procedural contours of sustainable development from the viewpoint of policy and qualifies its legal relevance as a guiding norm for decision-making and dispute resolution, in order to bring the WBG under its normative ambit. It draws on positivist legal theory and reflects on the policy approach to international lawmaking, in order to explain the normativity of sustainable development in international law and in the WBG's regulatory framework for the administration of development. The thesis then contends that there is an obligation on the WBG to promote sustainable development and the SDGs that is justified on policy and legal grounds: 1) due to the WBG's institutional role in international development in its capacity as UN specialized agency. In the context of Agenda 2030, which is political and not legally binding in nature, this pledge is manifested in the WBG's voluntary duty of good economic governance under SDG16.6; 2) because the WBG has mainstreamed sustainable development into its internal law in two ways: (i) by advancing the teleological approach to interpretation of its Articles of Agreement to include the international community's expectations and fundamental policies for an optimum world order, which now resonate in sustainable development and the SDGs; and (ii) through the IBRD/IFC safeguards system; the environmental and social safeguards, set authoritative standards for the WBG's staff and borrowers with regards to social and environmental protection as prescribed by relevant international law instruments and delineate the rights and interests of project-affected people (PAP). Furthermore, their interpretation, application and enforcement by the Inspection Panel and Compliance Advisor Ombudsman promulgate them as a distinct legal body of common standards, rules and procedures for sustainable development. The WBG has thus become addressee of existing and emerging norms of the international law on sustainable development, which it advances through its own standards, exercising its power and authority in development governance. Nonetheless, the case can be made that it has taken on an affirmative legal duty to promote environmental and human rights objectives that bear directly upon sustainable development.

To whom is this duty owed and what does it actually entail? Acknowledging the WBG's internal and external stakeholders competing interests and conflicting expectations about

accountability, the thesis answers the question by recourse to the people-centred character of Agenda 2030 and to the procedural aspect of sustainable development's definition. According to the latter, the integration of socioeconomic and environmental objectives relies on participatory, transparent and reasoned decision-making process, which is subject to review through accountability procedures that uphold due process. Relative to this, the IP/CAO practice becomes the primary source for evidence to substantiate the assertion that the WBG holds the obligation to employ in its policy formulations and decision-making the integration of diverse rules and interests in the socioeconomic and environmental fields. The IBRD/IFC are therefore accountable to PAP for the impact their decision-making faults have on PAP's wellbeing. By giving PAP access to recourse, AMs hold the WBG directly answerable to them for upholding equitable participation and transparency, which are fundamental aspects of the procedural facet of the right to development; hence of the procedural dimension of sustainable development. That said, the safeguards' harmonization with hard and soft law on sustainable development would enhance their authoritativeness as sources of the WBG's legal obligation for sustainable development and strengthen the credibility of the AMs. With States and MDBs prescribing to the same rules and principles, development interventions would indeed be predicated on a coherent law on sustainable development. For this to happen, such improvement is contingent upon the WBG's will to be subject to more stringent regulatory and accountability frameworks.

TABLE OF CONTENTS

PART I

CHAPTER 1

INTRODUCTION AND METHODOLOGY

The notion of development has been much debated. Different meanings have been attached to it over time depending on the specific historical and political circumstances in an international context. Under their direct influence, diverse views about what aspects determine its content and which is the best way for development to occur gave rise to 'a theory and practice' of international development. Contrary to what the use of the singular may imply, theorisation on development never led to one uniform strategy. Quite the opposite, disparate trends became the "mainstream" approach during the course of time.[1] Yet, in all cases propositions on development strategies were the outcome of a normative and analytical judgement based on moral values and beliefs about the preferable state of social organisation; and to be more accurate, of a globally shared belief that a said state of the world is more desirable for all human beings as members of the global community.[2] Development, therefore, is a normative concept and as such it has been the cut and thrust of discussions taking place at the principal institutional organ for the government of international affairs, the United Nations (UN).

International development numbers the third pillar of the UN, the other two being peace and security and human rights. It has its roots in the Preamble and Article 1(3) of its Charter, which describe the promotion of social progress and 'solving international problems of an economic, social, cultural or humanitarian character' among its purposes. Chapter IX of the Charter mentions in more detail core areas of action under this purpose and it follows from its provisions that its realization depends on a complex institutional mechanism, comprising of various other UN organs and specialized agencies. Notably, these were: the Economic and Social Council (ECOSOC) which was mandated with a coordinating role, the United Nations Development Program (UNDP); the World Health Organization (WHO); the International

[1] D.Seers, 'The Meaning of Development' in D.Lehmann (ed), *Development Theory: Four Critical Studies* (Routledge 2010); W.Sachs, *The Development Dictionary: A guide to Knowledge as Power* (Zed Books 2010); R.Gordon, J.Sylvester, 'Deconstructing Development' (2004) 22 Wis Int'l L J 1; K.Willis. *Theories and Practices of Development* (Routledge 2005); N.Piterse, *Development Theory: Deconstructions/Reconstructions* (2nd edn, Sage 2010)

[2] R.Hanlin, W.Brown, 'Contesting Development in Theory and Practice' in *International development in a Changing World* (The Open University, 2013) <https://www.open.edu/openlearn/ocw/pluginfile.php/321851/mod_resource/content/2/td223_openlearn_chapter2.pdf> accessed 19 April 2020.

Labor Organization (ILO) and the Food Agricultural Organization (FAO); UNESCO, the UN's Educational, Scientific and Cultural Organization and UNICEF, the UN's Children's Fund. A complementary role was saved for the International Financial Institutions (IFIs) of the World Bank (WB) and the International Monetary Fund (IMF). Notwithstanding the autonomy of their mandates, they were integrated into the UN system by virtue of Art.57 under the same Chapter of the Charter. Under the supervisory authority of the General Assembly, the institutions would promote development with 'a view to the creation of conditions of stability and wellbeing, which are paramount for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'.[3] The pursuance of development was thus interrelated with the Organization's other purposes. It aspired to provide a vision as counterweight to the post-World War II reality of many industrialized countries with destroyed economies and their populations' in social and economic hardship but also address the new world order following the liberation of former colonies and the creation of new States, for which development was primarily associated with the attainment of agency as equal sovereign entities. In this context, development was common ground for the North and South. Of course, as an endeavour it was far from being 'apolitical' and not prone to the power dynamics between the developed and developing countries. Nonetheless, the vision for the liberation of people through long-term economic and social structural transformation had strong impetus and paved the way for the UN to announce that the decades to come would be the 'era of international development'.

The first phase of the global development framework targeted predominantly the ex-colonies in order to help them align their welfare standards with industrialized nations.[4] Following the successful implementation of industrialization practices in the North, development theory and practice were driven by economic considerations. Development became synonymous to economic growth, which presided as the dominant pattern for development agendas until the 1980s. What differed in the course of the years were the applicable theories on how to generate growth best. In principle, the growth stages of Western nations served as the blueprint for the modernisation of developing countries. Attention was drawn to their structural impediments that were associated with their productive structure. Aiming at the diversification of their economies from subsistence agriculture to export-oriented and serviced economies, developing countries laid emphasis on building an economically strong state since the latter would be the provider of welfare goods.

[3] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119, Art.55.
[4] UNGA Res 1710 (19 December 1961)

The assumption was that increased state wealth would lead to improved social welfare and to this end the international community assisted with the injection of capital, technology and expertise. Unfortunately, the growth of the South stalled after two conjunctions: the 1970s oil crisis that caused a great recession globally and the expansion of neoliberalism, which ran against nation-state development in favor of a free market economy. Against this background, decision-making for development was transferred to the IFIs that, for their founding purpose, could provide technical and financial support to developing countries.[5] The IMF and the WB took the lead in development strategies promoting an international economic order through the imposition of standard reform packages that prescribed macroeconomic adjustment, trade liberalization and privatization. Eventually, the vision for the liberalization of people was replaced by the liberalization of economies and global economic integration. The nucleus of development and international cooperation was a liberalized international economic interaction with purported benefits (including social welfare) for all countries.

The failing impact of this approach on the generation of state wealth for these countries and the elimination of social disparities brought to the forefront the issue of fair distribution of the benefits of development in a two-fold way; first, as a demand for institutional and structural changes in international economic relations and second, as a claim for increased attention to the improvement of individual wellbeing through social goals.[6] Conceptually a narrative for the human dimension of development emerged under the suasion of the capabilities theory that emphasized the central role of human beings both as beneficiaries and active participants in the development process. The theory advocated for the advancement of human wellbeing as the end of development policies through the exercise of individuals' freedom based on their opportunities to do and be what they have reason to value.[7] Accordingly, human wellbeing comprised not only of quantitative elements, i.e. material goods, but qualitative parameters too such as increased life expectancy, education, personal security, community participation and the safeguard of human rights, to name a few. More importantly, the quest for its realisation constituted a universal claim of individuals, founded on the internationally accepted values of human dignity, equity and justice. Within this framework, development turned from a simple idea of advancement to a concept of normative value and its pursuance was linked back to the ideals of the UN Charter. It

[5] G.Koehler, 'Seven Decades of "Development", and now What?' (2015) 27 J.Int.Dev. 733; UN GA Res 2626 (XXV) (24 October 1970).
[6] UNGA Res 35/36 (5 December 1980), Art.17.
[7] A.Sen, *Development as Freedom* (OUP 1999).

simultaneously resulted in human rights acquiring prominence in development parlance, leading to the declaration of development as a right.[8] Effectively, development was defined as a 'comprehensive, economic, social, cultural and political process, which aims at the constant improvement of the wellbeing of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom'.[9] In practice, the theory translated broadly into policies that aimed at improved and accessible to all national and international economic and financial environments, the eradication of poverty and measures to generate domestic growth that meets social needs. Throughout this period the market remained the structural framework within which specific development measures would be implemented but the creation of social safety nets was supposed to temper its negative dynamics.[10] At the beginning of the new Millennium, development policy was defined by a set of eight desirable outcomes, time-bound and assessed by measurable targets – the Millennium Development Goals (MDGs) that the UN Secretary General presented to the GA.[11]

Theoretically and politically, the current discourse on international development unfolds around the concept of sustainable development. The concept derives by and large from the report issued by the World Commission on Environment and Development in 1987, which defined sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs' but builds on a number of preceding UN summits and studies that focused on growth's detrimental impact on development and the environment. The Commission therefore took into account the international community's declaration that people have a fundamental right to equality and adequate conditions of life in an environment of quality that permits a life of dignity and wellbeing and formed its definition on the basis of the human development hypothesis, applied in an intra-and intergenerational context. That said, the comprehensive notion of sustainable human wellbeing constitutes the objective of development whose achievement is contingent on an enabling economic, social and environmental framework. Since then, sustainable development has been embedded in international development discourse as a process that is grounded on those three interdependent, equal and mutually reinforcing pillars as they are referred to.[12]

[8] UNGA Res A/RES/41/128 (4 December 1986).
[9] Id., Preamble, para 2.
[10] UNGA Res 45/199 (21 December 1990).
[11] Section 2.2.1.2(b); 3.1.1(b).
[12] Section 2.2.1.3.

In this context, The United Nations adopted unanimously by virtue of UN General Assembly Resolution A/Res/70/1 in September 2015 *Agenda 2030 for Sustainable Development* as the international community's most comprehensive action plan for development until the year 2030. A predominant feature of the agenda is the Sustainable Development Goals (SDGs), a set of 17 targets and 169 indicators that are universally applicable to all countries without prejudice to the development particularities and capabilities of each country. The SDGs capture poverty in its multidimensional form in line with the human development paradigm and pay more attention to issues that had remained outside the development scope such as peaceful societies, good governance and the rule of law. Consequently, not only the idea that development is purely relevant to the Third World is abandoned but it is also being admitted that the challenges in the areas of economic prosperity, the planet, peace, security and justice are common to humanity and addressing them is an objective of global nature. In this third phase, development theory and practice call for inclusiveness and universality; it requires a normative assessment of the international rules and policies in the economic, social and environmental fields in accordance with the UN Charter's values and a re-evaluation of the responsibilities that derive therefrom for States as well as for an expanding network of actors in development governance.

It follows from the foregoing that development planning is largely a matter of policy given that it relates to real life problems. Moreover, it has been drawn at a high political level. In light of this, a legitimate question to raise is the following: Is there a role for international law to play in addressing development concerns? Further, is it an effective conduit for global governance in sustainable development? What legal instruments are needed to bring about its integrated outcomes? Can goal-setting, which as a system of governance is conceptually different from the system of law, be combined with or even incorporated into the latter? Finally, how do the decisions and practices of major institutional international actors in development affect the evolution of law in the field?

Neither politics nor policy is applied in the absence of the regulatory framework of law. By implication, international law doesn't operate in a vacuum; its reality lies in its use by a variety of actors in order to provide solutions on matters that affect the viability of the international community. Therefore, a 'balanced and comprehensive state of international law in the field of sustainable development' is overriding.[13] The occasion of the adoption of the

[13] N,Schrijver, *The Evolution of Sustainable Development in International Law* (Hague Academy of International Law, 2008), 378; UN Conference on Environment and Development, *Rio Declaration on Environment and Development* (12 August 1992) UN Doc. A/CONF.151/26 (Vol. I) (*Rio Declaration*),

SDGs resulted in the proliferation of academic writings that discuss legal aspects of sustainable development. Of particular interest is the relevance of sustainable development in international law, and particularly the concept's status in international law, since it has found resonance in a number of instruments of economic, human rights and environmental law alongside the development of a set of principles of international law relating to sustainable development.[14] In parallel, but to a lesser degree, the nexus between the SDGs and international law has been studied apropos the clear statement in the UN Resolution that Agenda 2030 and the SDGs have a bearing on international law.[15]

Research Question and Methodology

In light of the above, this piece of research aspires to advance the studies of the SDGs, examining the role of IFIs in the new development framework. How are the IFIs accountable in promoting sustainable development and the SDGs? Further, do they have a legal obligation to promote them? These two questions form the core of this study.

IFIs are major sources of financial and technical support and play a pivotal role in the realization of the sustainable development Agenda and the SDGs by aligning international economic decision-making and global economic governance with the normative ramifications of the concept. This link has been established gradually through a series of Financing for Development Conferences (FFD) that has taken place in parallel to the processes whereby the content of development policy was finalized. The third international FFD conference in Addis Ababa served catalytically the contextualization of the role of finance in development due to its inextricable ties with Agenda 2030. Development finance is henceforth associated with the purpose of sustainable development in a holistic, comprehensive and integrated way through the mainstreaming of sustainable development criteria in specific financing strategies, investment decisions and budget allocations in order for projects to acquire a people-centered and inclusive character, delivering on the concept's three dimensions.

Principle 27; UN Conference on Environment and Development, *Agenda 21* (12 August 1992) UN Doc. A/CONF.151/26, Section IV, Ch 39.

[14] G.Atkinson et al (eds), *Handbook of Sustainable Development* (2nd ed.) (Edward Elgar, 2014); F.Dodds et al (eds), *From Rio+20 to a New Development Agenda: building a Bridge to a Sustainable Future* (Routledge 2014); R.Ramlogan, *Sustainable Development: towards a Judicial Interpretation* (Martinus Nijhoff 2011); H.Bugge et al, *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 Publishing 2008); M. Segger et al, *Sustainable Development Law: Principles, Practices, and Prospects* (OUP 2004); N.Schrijver et al, *International Law and Sustainable Development – Principles and Practice* (Martinus Nijhoff 2004).

[15] C.Díaz Barrado et al, *Sustainable Development Goals: Goal 16 – Peace, Justice and strong Institutions* (Thomson Reuters ARANZADI 2018); D.French et al, *Sustainable Development Goals – Law, Theory and Implementation* (Edward Elgar 2018); S.Brown, *Sustainable development Goals and UN Goal setting* (Routledge, 2017); N.Kanie et al, *Governing through Goals: Sustainable Development Goals as Governance Innovation*, (MIT Press 2017).

Consequently, all actors in the field of finance are required to heed in their activities and operations the normative standards of sustainable development and translate them into practical outcomes. Having said that, multilateral development banks (MDBs) have embraced sustainable development in response to the international community's expectations for global applicability of the international public policy of sustainable development. They have done so by expanding their functions pursuant to their constituent documents, which have been interpreted to include the normative benchmarks of sustainable development. In that capacity, MDBs' contribution to the realization of sustainable development is critical not only because they facilitate its practical implementation but also because they strengthen its function as a norm.

A number of more specific SDGs Targets may engage IFIs, however in the thesis their role in sustainable development is looked at from the perspective of SDG 16.6, which calls for the establishment of strong and accountable institutions at all levels. The said Goal permeates the entire agenda imposing an obligation for good, effective and equitable governance, therefore economic governance as well. Hence, it is deemed to reflect and reveal better than any of the other Goals issues that relate to MDB's institutional role, namely their legal status, structure and functioning as international actors that are important from the standpoint of international law too. I, thus, focus on the accountability of IFIs for promoting sustainable development. MDBs have established international accountability mechanisms (IAMs or AMs) in order to offer individuals and groups access to address grievances caused by their projects and seek redress. Specifically, I study the World Bank Inspection Panel and the Compliance Advisor Ombudsman of the International Finance Corporation for two reasons: a) because the WBG's AMs are the model AMs for other MDBs and b) the two AMs give the opportunity to study cases that arise from public and private sector project-finance respectively, allowing the study on the assimilation of sustainable development and the SDGs by IFIs to be more comprehensive in scope and evidence. Assessing the IAMs' "jurisprudence", I aim to identify the nature of the claims from a sustainable development perspective and enquire if and how sustainable development and the SDGs have been incorporated into the Bank's operations. How the WBG interprets sustainable development and through what legal instruments are questions that lie at the core of the study given that the way they have been invoked and applied in the decisions of the AMs contributes to the coherent development of international law in the field.

To prove that the WBG is an international actor accountable for promoting sustainable development due to its institutional role in development governance and the integration into

its mandate and operational policies (i.e. internal law) of the normative and practical tenets of sustainable development as formed by international law instruments, the research is based on primary sources, secondary sources and case studies. Primary sources consist of hard and soft international law instruments: treaties, declarations and resolutions by States/IOs; seminal case-law of international tribunals related to sustainable development; and the WBG's policies, i.e. the environmental and social safeguards. Scholarly work about international lawmaking and the doctrine of sources, the law on IOs, international development and literature on development governance comprise the secondary sources. Arguments are then drawn from two streams of thinking: a) international policy on sustainable development, as it is framed by Agenda 2030 and b) sustainable development from the viewpoint of international law. As such, the thesis gives due account to the debate regarding the effectiveness of goals in development governance and the status of sustainable development in policy and international law, and stresses their importance and binding force for MDBs.

My question – on what grounds are MDBs accountable in promoting sustainable development and if they have a legal obligation to promote it – asks in essence what the law governing MDB's operations *should* be in terms of its ability to bring about good policy outcomes. Consequently, my research question is to a great extent normative. On this premise, the thesis aspires to offer a possible normative reading of international development institutions' role in shaping development practice. Unavoidably, however, this task invites engagement with the law of international development and notably, the governing law of the institutions that organise the financing of projects, namely the process and criteria that determine the distribution of funds. Attention thus turns to the institutional structure of development agencies and to the substantive and procedural rules for the administration of international cooperation between MDBs and recipient countries through financing development. Crucial considerations in this institutional turn to development governance are: (a) MDBs operating in the international order as an actor themselves that (b) exercise own power and authority in international development by partaking in the formation of policies and setting their own authoritative standards, hence behavioural standards for borrowers and affecting the life and liberties of individuals by delineating the rights of project-affected people (PAP). Relatedly, the WBG is conceptualised according to the 'Public Power' paradigm. In this context questions about the limits of the Bank's power and accountability are guiding.

Against this background, the responsibility of the WBG to pursue sustainable development is not only informed by the normative connotations of the notion but it is also based on law.

Both are largely shaped by the WBG itself (its constitutional instrument and internal law) and a wider network of stakeholders involving formal institutions (e.g. States, Courts, IOs) and other actors (civil society, epistemic communities etc.) who influence decision-making in deliberations and negotiations at various international fora. This duality of development presents some challenges: (i) that the legal positive foundations of sustainable development do not conform to traditional lawmaking. Rather, they are formed by discursive policy-making processes among diverse group of actors; (ii) the WBG's secondary rules upon which the transfer of funds is based are not classified among the transitional sources of international law either. It follows, that establishing the accountability of the WBG requires that the normativity of sustainable development in international law and in the WBG's regulatory framework for the administration of development be explained first. To this end the New Haven School (NHS) of thought is preferred, for it connects policy with law and treats international law as a process of authoritative decision-making that takes place within a decentralised international legal order. The second strength of this theory lies in its commitment to values such as equality, justice and fairness that characterise the optimum world order and translate, under policy-oriented jurisprudence, into public order goals such as as wellbeing and human dignity. These elements are common to the pluralist understanding of sustainable development and its nature as a paramount interest of the global order. Significantly, the NHS' policy-oriented jurisprudence permits an evolutive-teleological interpretation of the Bank's Articles of Agreement under Art.31 VCLT since treaties are viewed as instruments for the realisation of the optimum world order and it allows consideration of the expectations and demands of the international community in order to legitimise the pursuance of sustainable human wellbeing and dignity under the Bank's mission.

While the abovementioned theoretical approach elucidates the normative framework within which the WBG operates, it does not explain how its positive legal duty to pursue socioeconomic and environmental standards is framed, nor its legitimacy.

In examining the safeguards relationship with international development law, the thesis endorses the global administrative law approach. Development is understood to have a procedural dimension as well and the process of organising financial transfers is procedural and administrative, including: country planning; budgeting; the appraisal of a development project; its implementation and the control of intervention. The safeguards set the procedural rules and substantive standards for this process. In this respect, the Bank is viewed as administrator of global development governance since it sets its own norms and regulates its

field of activity. To be legitimate the application of normative standards for regulatory decision-making, namely transparency, participation and review are paramount to this process. The safeguards' interpretation, implementation and enforcement by the WBG in its decision-making on project-finance give effect to these standards and render the WBG accountable to its internal and external stakeholders such PAP. The practice of the IBRD/IFC AMs serves as the primary source for scrutinising the WBG's decision-making in relation to its impact on project-affected people. In turn, the two case studies referred to herein concretise the practical implementation of the safeguards and permit indicative conclusions about the interpretation and application of the principle of sustainable development by the WBG and the type and degree of accountability it holds for promoting sustainable development. Thereafter, the safeguards are qualified under the sub-field of the law of development cooperation and finance. Nevertheless, a comprehensive account of their legal nature is given through a constructivist perspective on international lawmaking. Legal constructivism contends that international law is made through the interactions of a variety of actors and emphasises their practice in the promulgation of legal norms that ultimately affords them criteria of legality of law. Broad stakeholder participation in the promulgation of the safeguards and the role of AMs have bestowed them with the level of generality, publicness, clarity and coherence that validate their normativity and enable them to function as an autonomous source of the international law on sustainable development. Therefore, this take on IL explains the WBG's role as lawmaking institution.

Employing these theoretical frameworks the WBG's responsibility and accountability in development are embedded in a positive constructivist (and progressivist) approach to the law of international development.

Thesis Outline

The thesis is divided into two parts: Part I adopts a conceptual perspective to unravel the meanings attributed to the notion of 'development' and 'sustainable development' and define the latter. It approaches the issue from the standpoint of global values. Thus, Chapter 2 explores the mainstream theories of development, which have their roots in economic thinking, and the pluralist viewpoints that reflect an ethical reasoning for development based on moral values. It becomes evident in the analysis that the preferred definition of development stems from the pluralist theories because they provide a normative justification for addressing developmental issues in a comprehensive way. Moreover, values are also

relevant to law, in particular international law, which in being a regulatory framework for the conduct of States, IOs etc., functions also as a system of values and norms. In this regard, the chapter navigates through the various UN Summits and Conferences on development to identify the values that define the organisation of the international community and can thus form an "objective" normative foundation for sustainable development. These are: universality, equity and justice. Reasoning on the normativity of these values and the holistic concept of human development, sustainable development is defined as 'an integrated economic, social, cultural, political and environmental process, which aims at the constant improvement of the wellbeing of the entire population and of all individuals in present and future generation on the basis of their active, free and meaningful participation in development and the fair distribution of benefits resulting therefrom, including the sustainable use of resources and the protection of the environment on which nature and human life as well as social and economic development depend'.[16] The suggested wording reflects the concept's normative end (human wellbeing) and how it translates into concrete practical outcomes, serving as a clear signpost for determining sustainable development's normative proposition in policy and how the interconnection between relevant issues is captured. It benefits also the legal analysis because it provides a benchmark for establishing the intersections among legal rules in the economic, social and environmental fields.

How sustainable development finds application in international policy is the next point to look at in Chapter 3. The SDGs are the subject matter of the analysis. Before anything else, the role of Goals as instruments for development policy and governance is discussed. Such commentary is considered necessary in order to highlight the differences from rule-making as a system of governance. Next to explore are the nature of Agenda 2030 and whether and how the theoretical and practical tenets of sustainable development described earlier have been integrated into it. While it seems to capture both the normative and practical elements of the concept, the SDGs are also the outcome of a politically agreed document; hence sustainable development constitutes in the context of policy a political goal/objective, which nevertheless has the normative and moral connotations inherent in the notion of sustainable development very strongly embedded into it. That being so, the succeeding question is if a political agreement, and in fact voluntary-based, can instate an obligation for the international community to realize the commitments therein and of what kind. Agenda 2030 does not prescribe specific binding obligations for each stakeholder. Rather, it addresses the obligation to respond to the SDGs and the imperative of sustainable development from a political-

[16] Section 2.2.1.3.b(iii).

institutional and ethical perspective. By this it is meant that the 'response-ability' to the Agenda is understood from the perspective of stakeholders forming a political-institutional collective and having a general obligation to respond to the SDGs and Agenda 2030 conjointly. That's why stakeholders bear only political-moral accountability for not rising up to their commitments.

In practice, the collective dimension of the obligation to respond to the SDGs and the general quest for sustainable development is depicted in Agenda 2030 as a duty of cooperation and good governance. Against this background, the MDBs come under the Agenda for being an inextricable sustainability factor for development governance. Given that the discussion about sustainable development develops so far in the area of policy, the chapter is concerned with the input of MDBs to the collective capacity of institutions in the pursuit of sustainable development by examining the role reserved for them in the SDGs Agenda. Apropos, though, the general *problématique* about the permissibility of MDBs to have other than economic objectives is briefly noted. It is shown that MDBs have definitely incorporated environmental and social policy objectives in their mandates, supporting and encouraging projects that aim at sustainable and people-centered outcomes. To this end, their social-environmental safeguards and AMs are the instruments that facilitate the mainstreaming of sustainable development and the SDGs into their specialized mandates.

Having examined sustainable development in policy, the narrative continues by connecting development with law in section 3.3. Establishing first the law-development nexus through a description of the law and development movement, the chapter discusses the status of sustainable development in international law. The matter is approached from the viewpoint of positivist legal thinking and classical theory of international lawmaking, examining thus if sustainable development meets the criteria of a binding rule of international law. Within this framework, seminal judgments of the International Court of Justice (ICJ are invoked alongside the content of treaties referring to sustainable development and scholarly opinions on the topic. It is opined that sustainable development cannot be deemed a self-standing rule of law. It is nevertheless a legally relevant principle with a particular kind of normativity: it functions as a 'guiding/directing norm' for dispute resolution and decision-making in various contexts where the necessity to regulate and decide upon sustainability issues arises. Such a conclusion stems from the reasoning that insisting on the ascertainment of law in its traditional sources doesn't match the reality of current international lawmaking, which has become part of communicative practices by different networks of international actors in various forums, nor the purpose international law serves; namely the pursuit of

common values and the establishment of a cooperative framework for the achievement of common goals of the international community.[17] Thus, multiple forms and explanations of normativity should be accepted if international law is to be an effective canal for global development. On this account, the qualification of the foundation documents of sustainable development in law is looked at to conclude that non-binding legal instruments (soft law) have a normative impact on hard law.

Finally, the legal relevance of the SDGs is equally dealt with. Applying *mutatis mutandis* the reasoning about the legal effects of non-binding instruments, the view adopted here is that the goals have normative implications for law. In fact, attention is drawn to a dual relationship between the Goals and international law: the Goals should be implemented in light of current legislative frameworks. On the other hand, the SDGs reflect existing international obligations and may contribute to the further development of international law by establishing certain standards for stakeholders' conduct and decision-making, creating in turn the legitimate expectation that actors will commit to and observe the agreed in good faith, and will streamline their conduct (understood broadly to include decision-making) in consistence with sustainable development's economic, social and environmental objectives. Along these lines, they clarify the meaning of already established legal frameworks in the various fields of international law or shape the content and pave the way for the formulation of new norms that may comprise a more consolidated perspective on international law matters that cannot be found at the moment. Accordingly, there seems no reason to deny the Goals' transformative dynamic in policy and law alike by acknowledging their contribution to the progressive development of 'hard' law on sustainable development and the latter's consolidation.

In light of this, Part II is developed with the inquiry for a coherent system of international law on sustainable development (ISDL) at the background, informed by the view of a pluralist international order (in terms of the norms and interests of the international community and participating actors) and legal constructivism which contends that international law is made through the interaction of various actors and their practices. Within this framework, coherence of ISDL is determined by inclusiveness, which extends to the international actors that are bestowed with the authority to engage in legal decision-making and to the normative basis of the legal framework; in other words, it should comprise of all relevant normative standards that are paramount for the creation of a corpus of international

[17] I. Venzke, 'Contemporary Theories and International Lawmaking' in C.Brölmann, Y.Radl (eds.), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar 2016)

legal principles and instruments which regulate sustainability issues lying at the intersection of international economic, social and environmental legislation. Therefore, MDBs are perceived in this section as legal subjects having law-making capacity, which they exercise, *inter alia,* through their IAMs.

Chapter 4, thus, gives an overview of the WBG and discusses its classification in international law as IO with specialized function. Engagement with this point is necessary for understanding the WBG's autonomy and exercise of power in development, which is illustrated further by the way the WBG interprets its charter and positions itself in relation to the bindingness of general international law upon it. In turn, the chapter defends the incorporation of sustainable development in the Bank's mandate by application of treaty-interpretation rules in light of the international community's expectations about public order goals like sustainable development. On the same account, the chapter explains how human rights and environmental legal standards are applicable to the Bank but notices the discrepancy between the applicability and operationalization of international law in the rules of the organisation. Accordingly, the focus turns to the safeguards' legal nature and content. The newest versions of the WB's and the IFC's environmental and social safeguards are assessed in section 4.2. Regarding the IBRD these are compiled in the 'Environmental and Social Framework', adopted in 2016 and effective since October 2018 for all new projects. Instead, the previous 'Safeguard policies' will be applied to existing ones. Their parallel running allows their comparison, in order to detect the Bank's understanding of sustainable development and any advances vis-à-vis the notion's substantive and procedural aspects. With respect to the IFC, the standards examined are those described in its 2012 'Sustainability Framework.' The purpose is to test the normativity of sustainable development against the reality of the WBG's practice by exploring the extent to which the safeguards' normative content corresponds to the notion's core aspects as defined earlier. It is argued that while they constitute rules of the global administrative law for development, they are vectors for the integration of sustainable development in the WBG's decision-making, hence shape the substantive content of its legal duty to promote sustainable development.

Section 4.3 then asks how this duty can be enforced. It discusses the notion of accountability in international law, its ambit for the WBG and its correlation with the notion of responsibility. On the occasion, the Draft Articles on the Responsibility of International Organizations are engaged. A number of specific issues arise here that distinguish the responsibility regime of IOs from State responsibility and relate to MDBs' separate legal personality in international law, their specialized function and the disagreement about the

rules of the organization being international law. Secondly, the analysis puts the spotlight on the WBG's IAMs with a brief reference to the rationale and objectives behind them in light of its mandate, internal and external concerns of effectiveness/efficiency and legitimacy. The comparison between the WB's Inspection Panel (WBIP) and the IFC's Advisory Ombudsman (IFCAO) aims at a thorough understanding of their function. It becomes evident that IAMs are part of the complex legal and institutional particularities of the WBG, trying to balance the WBG's institutional and public accountability. They thus operate at the crossroads of administrative and quasi-judicial oversight instituted by people harmed by Bank-financed projects. The case studies illustrate the AMs' role in the interpretation and enforcement of the safeguards and clarify the content of WBG's accountability in sustainable development. Two questions inform the analysis: if the sub-principles of sustainable development are reflected in the IP/CAO's reports and if the SDGs are used to shape the requests and clarify safeguards' content. While both are only implicit in the IP/CAO reports, the latter contribute to their 'hardening' in international law as they interpret and enforce the IBRD/IFC safeguards. Moreover, they promulgate the safeguards as a body of development finance law and promote their systematic application. The WBG seems to exercise less arbitrarily public authority in development governance and to apply uniformly their policy standards across development projects. IAMs thus become catalysts for the rule of law, justice and good governance in development, promoting sustainable development and the SDGs.

In view of the aforementioned, Chapter 5 answers conclusively the question how accountable the WBG is for sustainable development and the SDGs, and what exactly for. It is submitted that the narrative within which one understands the WBG's accountability in the context of development and therefore the criteria one uses to assess it generate different responses. There are competing conceptions and expectations of accountability due to the competing interests of the WBG's internal and external stakeholders. Importantly, how one understands sustainable development also influences the answer. From my perspective, the end goal of sustainable human wellbeing, manifested in practice through the integration of socioeconomic and environmental dimensions of development, relies on a participatory and transparent process whereby stakeholders' decisions about development interventions are reasoned and subject to review through accountability procedures that uphold due process. Moreover, insofar as sustainable development is a guiding norm for decision-making adjudication and deliberations in development, stakeholders' accountability relates to the procedural dimension of the concept of sustainable development. By extension, the WBG is

accountable towards project-affected people for employing in its decision-making the integration of sustainable development's three dimensions and facilitating their equitable participation in it and transparency. The safeguards' substantive and procedural aspects and people's access to recourse through the IP/CAO proceedings facilitate these objectives as per SDG16.6.

Could the accountability process before the AMs be improved and the WBG be held to account on a firmer legal basis? I answer in the affirmative. However, this presupposes the safeguards' harmonization with hard and soft law on sustainable development, ergo the human rights, environmental and climate change obligations of member states. With the latter and the WBG prescribing to the same rules and principles, development interventions would indeed be predicated on a coherent common law on sustainable development. Until this is done, accountability in development finance will remain a sustainability challenge.

CHAPTER 2
UNRAVELING THE NOTION OF DEVELOPMENT

2.1. THE HISTORICAL AND POLITICAL BACKGROUND TO THE TALKS ON DEVELOPMENT

2.1.1 The internationalization and institutionalization of development under the United Nations as a means for peaceful and friendly relations among Nations

'Development' as a notion is not novel. The word has a long presence in the vocabulary of natural sciences, describing the process whereby living beings grow into their natural, complete and full-fledged form or even to a more perfect form.[18] As social sciences gained footing into the intellectual environment, the term lent its meaning to the social sphere to denote over the centuries the transformation of societies into more advanced organisational structures driven by an industrialised mode of production, political reformation, the intellectual dominants of the Enlightenment that called for the construction of a new world based on individuals' self-directed thought and action,[19] and the modernisation of life, which started to evolve around urban planning and the accumulation of capital, ensured largely by commerce[20]. Ultimately, this definition became the embedded logic that began to form the contemporary understanding of the world, which moved towards a complex synthesis that would foster the conditions for people to escape poverty and climb the welfare ladder.

Development, thus, encompassed connotations of advancement, a favorable change to a variety of aspects of human conditions that had to be mainstreamed in policies in order for the promising positive outcomes to be realized for societies and the peoples. Political mobilization to this end was intense in Europe and *'development as advancement'* received a programmatic contour as States moved to the era of industrialization.[21] Not only that, but the conviction that this was the way forward had such potency that underlined the rationale behind colonization and the economic practices effectuated by the Europeans in their colonies. The said historical period was symbolic to the exploitation of resources of the non-European world and a significant profitmaking for the conquerors. Yet, the validation of such an attitude was that the active interference in the economic affairs of the countries under occupancy constituted part of a "civilizing devoir" that was believed to have long-term

[18] G.Esteva, 'Development' in W.Sachs (ed.), (n1), 13.
[19] W.Bristow, 'Enlightenment', *The Stanford Encyclopedia of Philosophy* (Summer, 2011) <https://plato.stanford.edu/entries/enlightenment/#toc> accessed 21 August 2017.
[20] G.Esteva, (n.18).
[21] Id.

beneficial effects for the whole world regarding nations' levels of affluence. In light of this, the presumption was that the colonies lacked the technical capacity or willingness to harness their natural assets in a resourceful way and join up with the rest of the world that was progressing. The Europeans, therefore, perceived their intervention a necessity for triggering the modernization of those states, although in practice their stance led to the net transfer of wealth from the colonized to them and left the former suffering the economic, political and moral damages of the atrocities that took place. Notwithstanding the ethical matters concerning the colonizers' behavior, the argument in light of a "colonial" articulation of advancement was that those nations could only be developed under their influence if the world were to move forward and upward altogether.[22]

Clearly, a distinction was drawn between a part of the world that had progressed (the 'North') and another that had not – or could not independently – (the 'South') that maintained its relevance in the agenda of international relations until the aftermath of the Second World War when the words 'developed' and 'underdeveloped' became popularized and were used to portray this contrast in a post-war context of course.[23] President Truman in his inaugural address at the Capitol on January 20, 1949 stated:

> […] We must embark on a bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of *underdeveloped*[24] areas. More than half the people of the world are living in conditions approaching misery. Their food is inadequate. They are victims of disease. Their economic life is primitive and stagnant. Their poverty is a handicap and a threat both to them and to more prosperous areas[25] […]

Admittedly, the War had a devastating impact on societies, leaving in its wake fragmented states and human suffering which justified the prioritization of the problem of poverty and material deprivation. But it also brought the international community in front of a radical realignment of the world order that unavoidably shaped the North-South divide in different terms. Post-1945, anticolonial dispositions and national liberation movements across Africa and Asia expanded, resulting in the creation of new nation-states and the abandonment of the hierarchical subordination of the colonies to the controlling metropolises.[26] Absent the colony-colonizer relationship, questions arose about the future of the newly independent

[22] I.Wallerstein, 'After Developmentalism and Globalization, What?' (2005) 83(3) Social Forces 263.
[23] G.Esteva (n.18). The author stresses that the terms were introduced earlier than President Truman's speech by Wilfred Benson, a former member of the ILO's Secretariat, in his written piece of work titled 'The Economic Advancement of Underdeveloped Areas'.
[24] Emphasis added.
[25] 'Truman's Inaugural Speech' (*Harry S. Truman Library and Museum,* 20 January 1949) <https://www.trumanlibrary.org/whistlestop/50yr_archive/inagural20jan1949.htm> accessed 21 August 2017.
[26] Gilbert Rist, *The History of Development* (Academic Foundation 2009), Ch.4, 73.

states and their role in the world as equal sovereigns. The question was not a technical one. Rather it was framed as an issue of *peace* and *prosperity* relevant to the entire world, as demonstrated in Truman's speech, attaching for the first time a universal character to the endeavors of States for advancement.

Within the framework of the new status quo in international politics, there was a semantic element inherent to the notion of development that both the North and the South embraced, each from their own perspective and as a reflection of their own interests. For the new countries, development was linked to their making as new nation-states and their acquisition of substance in the global stage as independent entities, able to exercise control over their affairs. It was a matter of economic and political self-determination and was bestowed a national character which hereafter became the only source from which any policy derived legitimacy.[27] The presumption now was that the South should (and had) the potential to develop themselves as well.[28] Hence, development signaled a dual-purpose process: first, the attainment of 'agency' in the new world order and subsequently, the structural transformation of the state in more progressive terms as far as the economy and the organization of society is concerned.

For the North, development was a matter of domestic affairs that primarily signified economic and social progress, yet at the same time it strongly remained an idea that transcended national borders. Put in a post-war context, though, it constituted the foundational basis for the harmonious coexistence of states rather than the instrumental tool for the progress of the politically powerful countries at the expense of the less influential as the old imperialism had shown. Truman seemed to have embraced this vision when he referred to peoples' *own*[29] efforts to achieve self-government, civil and political freedoms, abundance of material goods and a satisfying life after the war.[30] To the extent that Truman acknowledged the existence of country ownership as a constituent of the change the nations were undergoing, indeed he – representing the North – shared the South's view that development was an 'internal self-generated phenomenon'[31] that all states equivalently

[27] Self-determination of peoples has two aspects: 'an internal, which is peoples' right to pursue freely their economic, social and cultural development without outside interference and an external, namely that all people have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject people to alien subjugation, domination and exploitation': Committee on Elimination of Racial Discrimination (CERD), 'General Recommendation No XXI(21)' (8 March 1996) UN Doc. A/51/18, Annex VIII at 125, para 4.
[28] I.Wallerstein (n 22).
[29] Emphasis added.
[30] H.S.Truman (n 25).
[31] G.Rist (n.26), 74.

should experience. Nevertheless, development became furthermore emblematic of the *global strategy* the world should embark on to remedy the misfortune that a part of the planet was suffering, as evidenced by his urge for assistance to those nations. For if a just settlement of international differences and fair deal were to be effectuated for the underdeveloped areas, the barriers to those nations in benefiting from the scientific advances and industrialized progress of the Western Hemisphere should be lifted through a constructive program, inclusive of all countries. In this sense, development for the North, translated into a *common aim* for humanity with robust ramifications regarding nations' interdependence for the preservation of a free, peaceful and democratic world.[32] At least, this was the pledge.

In practice, the internationalization of development was far from an 'apolitical' agenda. The leading role reserved for the United States and its allies, although presented as stemming merely from their recorded success in the management of knowledge and material resources, hence bearing no political nuance of domination, definitely served their interests. At a first glance, developing states were seen as a promising space for the expansion of the economic activities of the developed states. The US had already gone into partnership with Europe on a large-scale economic program, the purpose of which was to invigorate democracy in the continent and its general recovery after the war.[33] Along the same lines, the improvement of the socioeconomic position of the emerging states would ultimately increase their peoples' spending power, leading to a boost in commercial production, international trade and investments. Yet, this guided self-interest was infused with an ideological underpinning too, namely the fight against communism and the economic system it introduced that reached its peak during the years of the Cold War. By supporting developing countries' aspiration for political stability and favorable economic conditions, the Western block had the ability to bring them under its power of influence.[34] Development assistance then was proclaimed as a means of diplomacy, aiming at the determination of power relations between the US and the Soviet Union apropos their competition for geopolitical dominance.[35]

---

[32] Id.

[33] Implying the Marshall Program; See, Harry S. Truman (n.25) and Act of April 3, 1948, European Recovery Act [Marshall Plan], Enrolled Acts and Resolutions of Congress 1789-1996; General Records of the United States Government; Record Group 11; National Archives. Citation taken from <https://www.ourdocuments.gov/doc.php?flash=false&doc=82> accessed 7 November 2019. At the same time, the movement for the establishment of the EU had started: 'The history of the European Union' <https://europa.eu/european-union/about-eu/history/1946-1959/1947_en> accessed 7 November 2019.

[34] D.Kingsbury, 'Introduction' in J.MacKay, et al (eds.), *International Development: Issues and Challenges* (3rd edn, Palgrave McMillan 2016), 2.

[35] D.Williams, 'The History of International Development Aid' in Manuela Moschella and Catherine Weaver (eds.), *Handbook of Global Economic Governance – Players, Powers and Paradigms* (Routledge 2014), 233.

Politics intermingled strongly in the formation of the post-war development initiative, so that it is not arbitrary to argue that the latter constituted an expression of US hegemony and more general, a systemic issue of East-West political confrontation. From this viewpoint, the long-established tendency of the North to take advantage of peripheral nations, just like in the colonial epoch, was not obsolete at all; it was just manifested differently.[36] Nonetheless, the international stimulus attributed to it was certainly robust. Indeed, the internationalization of development gave impetus to its systematization in international policy, i.e. to the creation of the institutional structures at the international level that would mainstream in their operation the quest for qualitative improvement of the lives of the world's poor.[37] Centre to the so-called institutionalization of development was the contribution of the United Nations (UN), mandated since its foundation in 1945 with the promotion of international cooperation and the maintenance of international order. Drawing upon the Preamble of its Charter, the organization proclaimed that among its legitimate aims were to 'foster social progress, better standards of life in larger freedom and to employ the international machinery for the promotion of the economic and social advancement of the people'.[38] In response to this, a series of specialized agencies were established, the policies and activities of which were brought under the aegis of the UN's General Assembly and the Economic and Social Council (ECOSOC) that was assigned coordinating responsibilities.[39] In its primitive stage, the international machinery comprised of an 'Expanded Program of Technical Assistance' that focused on institutional capacity building of underdeveloped countries through training of managerial personnel and an ECOSOC 'Standard Technical Assistance Committee' that examined the details of the projects.[40] However, as necessity for project-funding bolstered, the engagement of the economic institutions, namely the World Bank (WB)[41] and the International Monetary Fund (IMF[42]) – already operating since 1945 – was imperative. The

[36] Authors talk about anti-colonial imperialism. See, G.Rist (n.26), 75.
[37] D.Kingsbury (n.34).
[38] UN Charter (n.3), Preamble.
[39] Id., Arts. 56-63.
[40] D.Williams (n.35).
[41] The International Bank for Reconstruction and Development (IBRD) was the first affiliate of the World Bank Group to be established. In its initial role it was tasked to raise capital for the reconstruction of Europe and Japan after the War. Yet, its activities were expanded after the foundation of the International Finance Corporation (IFC) in 1956 and the International Development Association (IDA) in 1960, which lent money to poor countries at better than the market terms, WBG <http://www.worldbank.org> accessed 21 August 2017.
[42] The IMF aimed at promoting monetary stability, International Monetary Fund, 'The Fund's Mandate – An Overview' (22 January 2010) <http://www.imf.org/external/np/pp/eng/2010/012210a.pdf> accessed 21 August 2017. Initially, its mandate did not include development and lending was subsidiary part of its role, but the increased cooperation with the WB in poverty reduction strategies for low-income countries gave to its operations a developmental aspect. B.Thirkell-White, 'Ambitious Goals, limited Tools? The IMF and Poverty

latter were complemented by a Special Fund[43] that collected voluntary country contributions for those projects until its successor, the United Nations Development Program, took over.[44]

With the institutional framework in place, it was crystallized in international public opinion that development, as a scheme to balance out the conditions for prosperity between the North and the South, depended on concerted efforts and required a methodological approach. Interestingly enough, the dominant states and their understanding of what development actually means by and large prescribed the content of the development strategy. In fact, the above analysis demonstrates that the idea of development has always been associated with considerations the European states held about what is 'good' and 'right' for humankind. Development for Western civilization has been identified with a process of historical societal shift in a country's domestic order, namely the transition from an agriculture-based (or traditional) to an industrial-based (or modern) society that consequentially brought changes to peoples' social stratification. Over the time and due to historical and political parameters this idea of development penetrated national borders, being either associated with the "Europeanization" of the world during colonization or linked to post-World War II aspirations for a united and peaceful planet. Despite the contextual differences, development for the North represented constantly a material and moral good for the entire world and was given a very specific connotation that remained intact: development was a process of social transformation premised predominantly upon economic advancement through the utilization of material and non-material resources (science and technology), labor, trade and any other profit-making method. By defining development in such terms, economic progress was elevated to a substantive element of the development policy on which the international mechanism would focus and promote to the underdeveloped world against the background of a common vision of human mankind free from war and coercion. To put it differently, the qualities of freedom, justice and peace were secondary in nature in the process of development and the latter was conceived in the same traditional way, being primarily a matter of economic growth, as it will be discussed in the next section.

Reduction' in K.Nadakavukaren Schefer (ed.), *Poverty and International Economic Law: Duties to the Poor* (CUP 2013).

[43] UNGA Res 1240 (XIII) (14 October 1958).

[44] Consolidation of the Special Fund and the Expanded Program on Technical Assistance in a United Nations Development Program, UNGA Res 2029 (XX) (22 November 1965) UN Doc A/RES/2029.

2.2. From an Idea of advancement to a normative Concept of Development

2.2.1. Between Mainstream and Pluralist Views of Development

2.2.1.1. Development as Economic Growth:

a. Developmentalism and the building of a strong State as the Provider of Social Goods

The fact that economics swept onto centre-stage with regards to development endeavours in the regions that were left behind did not merely follow from the practical implementation of the abovementioned long-standing understanding of development that the international community upheld; it also reflected the spirit of the times when the world's prosperity was associated with wealth accumulation and the creation of a steady environment that would foster the sustenance of economic growth and citizens' welfare. On the domestic front, this was achieved through the enhanced role assumed by national governments in the economy. The positive European experience attests to this. The post-war years were a period of rapid economic recovery for Europe, characterized by high productivity rates and welfare innovations that were largely owed to the leading role afforded to the state both as an entrepreneur and a guarantor of welfare. In this dual capacity, the state aimed at the creation of such domestic circumstances that attracted investments, encouraged technology transfer and triggered the active participation of all stakeholders in business, including labor, in order for the countries to restore their peoples' confidence in them and reach a stage of abundance of goods and mass-consumption[45].

Internationally, the return of normal economic health in the world was pursued through the encouragement of transplanetary connectivity, which embodied the transformation of the spatial organization of social relations and transactions – assessed in terms of their extensity, intensity, velocity and impact – therefore the reduction of barriers to human activity.[46] Globalization, as this trend was named, signified a shift in patterns of knowledge, production and governance, and was enveloped in a movement towards increasing levels of interdependence and integration of people. At its core were political, cultural and economic dimensions, but the latter prevailed mightily. Indeed, the landscape of the post-war

[45] N.Crafts, 'Fifty Years of Economic Growth in Western Europe: No Longer Catching-Up but Falling Behind?' (2003) Stanford Institute for Economic Policy Research, Discussion Paper No.03-21 <http://www-siepr.stanford.edu/papers/pdf/03-21.pdf> accessed 21 August 2017.
[46] D.Held, et al (eds), *Global Transformations: Politics, Economics and Culture* (Stanford University Press 1999), 16.

international economic order pushed towards cross-border exchange of goods, services and capital. These three pillars formed the basis for the global organization of production and an open trading system without tariffs and fixed currency exchange rates.[47] The IMF and the WB were key actors in ensuring the stability of this new setting. As a consequence, states internationally were expected to open their markets to one another. The marketplace, thereof, constituted the backbone for the integration of the world, which was first and foremost economic but would eventually contribute to the world's turnaround to political stability and assured peace.[48]

The general frame being so, the development of the South was benchmarked on the one hand against the 'Golden Epoch' of growth for Europe and globalization on the other. That said, the only option for developing countries to break through the cycle of underdevelopment and catch-up with the rest of the world was to imitate the growth pattern of the developed countries that appeared as the blueprint for modernization.[49] To succeed in the latter the development process involved agricultural intensification that raised productivity at levels beyond the demands for internal consumption, and infrastructure for better exploitation of the physical environment until the foundations were set for exports and for the manufacturing industry to become the primary sector of the economy. The next step would be the expansion of businesses, large-scale investment in social infrastructure (e.g. in education and the health sector) and the acquisition of individual income, which could be disposed for the consumption of high-value consumer goods. In light of this vision, developmentalism gained footing in political economy as the policy that could diversify the economic structures in the developing states according to the aforementioned standards and would trigger growth that would bestow benefits on the people, allowing them to secure at least the essentials for living so that the inequality gap with the North started to close. Similarly to the tactic applied in Europe, the state was supposed to be the main coordinator in order for the development process to correspond to country needs and for the latter to become self-governing in light of the dual-purpose that development for developing countries entailed – that is the obtainment of agency as nations along with financial autonomy and social

[47] D.W. Drezner, 'International Economic Order' in William A. Darity Jr., *International Encyclopaedia of the Social Sciences* (2nd edn, McMillan Reference 2008), 92.
[48] K.Dadkah, *The Evolution of Macroeconomic Theory and Policy* (Springer 2009), 29.
[49] The Modernization Theory was presented by Walter Rostow as the five stages of economic growth, which he illustrates in a language of metaphors: a) the traditional society, b) the preconditions for take-off, c) the take-off, d) the drive to maturity and e) the age of high mass-consumption; Walter Rostow, *The Stages of Growth: A Non-Communist Manifesto* (CUP 1960) as cited in G.Rist (n.26), 93.

progress.[50] In this respect, the involvement of the West was minimized to providing relevant technical and advisory support (aid) to them through the international institutional mechanism in accordance with the post-war universal connotation of development.[51]

Yet, the case was not as simple. While developing countries were trying to pursue their professed industrialization within their territories through state-directed plans, the dynamics for economic integration at the international level maintained the prosperity gap between the former and the industrialized countries. What mobilized the economy internationally was the openness of the market, which the developing countries lacked because the keystone of developmentalism was to foster economic progress through a forceful internal market rather than economic extroversion.[52] This directly contradicted the international economic order and precluded developing states from bridging the growth gap between them and the industrialized countries. The situation turned even more to their detriment amidst the global economic crisis that sprung in the 1970s from the increase in oil prices that affected the North and the South alike, albeit not equally. Persistently high inflation, combined with great unemployment rates and stagnant demand were the dominant traits in the economy of countries of the North. Alongside, countries of the South suffered disequilibrium in their balance of payments given that their export value declined dramatically whereas the cost of imports was set higher for them due to the doldrums the economy had entered worldwide.[53] For the North, which had already achieved its industrialization and could present a surplus in capital, an effective response to the crisis was in sight. By contrast, the South fared poorly. The scarcity in liquid assets resulted in excessive borrowing from the developed states, which transformed into a serious debt crisis as industrialization in these countries slowed down, their currencies were depreciated and interest rates rose, making debt service impossible.[54] This crack in the international economy paved the way for a polemic against developmentalism an ultimately dysfunctional system for development. The national identity embedded in it was now considered mere protectionism, which trapped states in economic

[50] To the extent, thus, that Developmentalism signifies a national program of action for development, it is a term that can be used to describe the policy for economic advancement applied by developed countries too. See, I.Wallerstein (n.22).
[51] Id.
[52] E.S.Reinert, The Other Canon Foundation, Norway and Tallinn University of Technology 'Developmentalism' (2010) Working Papers in Technology Government and Economic Dynamics No.34 <http://technologygovernance.eu/files/main/2012032710251212.pdf> accessed 7 October 2021.
[53] I.Wallerstein (n.22), 1264.
[54] Id.

policies that eventually neither gave them a competitive advantage in the markets nor proved to have equipped them with effective mechanisms to deal with the crisis that had emerged.[55]

b. Institutional and Structural Changes in International Economic Relations: Neoliberalism and the leading Role of IFIs in Development Strategies

The conjuncture of the economic crisis served as a fruitful opportunity to challenge the effectiveness of developmentalism and search for a replacement model that would be more responsive to potential economic distortions for developing countries but would also redefine their economic relationships with the industrialized nations in general so that they would stop being at the periphery of the global political and economic order. The South's demand was summarized in proposals for an amendment of the international economic order's rules, which they presented at the UN's Sixth Special Session in 1974. The Declaration and Program of Action of the New International Economic Order (NIEO[56]) envisaged to wave the conditions for economic progress of double standards and offer developing countries significant opportunities to improve economically. The suggested changes ranged from enhanced control over natural resources to equal partnership in international commerce and the ability to determine their development on the account of their needs. Notably, provision was made for the amount of official development assistance from developed countries, which was set at the specific target of 0.7% of their Gross National Product (GNP) and an international food program was also established[57]. Developing countries, thus, aspired to set the path for their national economic performance within a fairer and more egalitarian international economy.

Unfortunately, the South's vision for equitable development conflicted with the expansion of neoliberalism in the North, which attacked developmentalism as the presiding development model and embraced equity, yet in a varied manner. Neoliberalism was promoted as the ideological corrective against the concept of 'nation' upon which developmentalism was premised.[58] According to the new stream of thinking, the state's leading role in the economy should be transposed to private corporations, which should enjoy extensive freedom in business, while supply and demand among producers and consumers

[55] Id.
[56]UNGA Res 3201 (1 May 1974) UN DOC A/RES/S-6/3201. Nico J. Schrijver, (n13), 47
[57] Charter of Economic Rights and Duties of States, UNGA Res 3281 (XXIX) (12 December 1974).
[58] S.George, 'A Short History of Neoliberalism: Twenty Years of Elite Economics and Emerging Opportunities for Structural Change' (Conference on Economic Sovereignty in a Globalising World, Bangkok, 24-26 March 1999) <http://www.globalexchange.org/resources/econ101/neoliberalismhist> accessed 2 May 2017.

would operate unreservedly. To this end, a re-regulation of the developing countries' domestic economy was introduced during the 1980s by the IMF and the WB, through structural adjustment programs encouraging the privatization of state enterprises, diversifying trade practices through export-oriented facilities and restructuring the state in general, not only in terms of its interference in the economy (e.g. by regulating competition to control monopolies), but also as a guarantor of a safety net for its people with regards to health, education and social security entitlements.[59] The new framework, thus, provided the market arena with a flexibility that in the view of the developed states appeared to offer equal prospects, and was open to whoever would like to enter and was willing to compete. That said, profit-making and economic growth was predominantly directed by the maximum utilization of the opportunities the current system offered and it depended on stakeholders' individual effort to benefit from the market's new capabilities.[60] The proposition was that liberalization in financial transactions would catalyze national borders that proved to be a barrier to the progress of the South and a limitation on northern countries, which sought for continuous growth rates. Undeniably, a change to the structure of the global economy was introduced but little resemblance did it bear to the structural change that developing countries had recommended. On the contrary, 'neoliberal globalization' became henceforth the driver of the growth model that both the North and the South should follow as if there were no alternative for maximum prosperity, liberty and peace to the whole of humankind.[61]

Undoubtedly, development and economic growth were one and the same irrespective of the changeover from developmentalism to neoliberalism. The two economic policies share a common ground to the extent that both associate development with fiscal returns and assume that an end to hardship will stem from the economy's growth as a natural consequence. However, there is a stark contrast between them: national developmentalism was empowered by the intention to support developing countries' undertakings towards economic self-determination with the further aim for them to improve the conditions (social and political) that affected their peoples' lives, whereas neoliberalism propagated growth having put on the

[59] J.Aart Scholte, 'The Sources of Neoliberal Globalisation' (2005) UN Research Institute for Social Development, Overarching Concerns Program Paper No.8, 7 <https://www.files.ethz.ch/isn/102686/8.pdf> accessed 7 October 2021. The structural adjustment programs constitute the core of the 'Washington Consensus', A.Eide, 'Human Rights-Based Development in the Age of Economic Globalization: Background and Prospects' in Bard A. Andreassen, S.P. Marks (eds), *Development as a Human Right: Legal, Political and Economic Dimensions* (Harvard University Press 2006), 231.

[60] G.Monbiot, 'Neoliberalism - the Ideology at the Root of all our Problems' *The Guardian* (London, 15 April 2016) <https://bookshop.theguardian.com/catalog/product/view/id/381048/?utm_source=editoriallink&utm_medium=merch&utm_campaign=article> accessed 2 May 2017.

[61] J.Scholte (n.59).

sidelines the question of who the beneficiaries should be. Even more, the existence of the already huge gap between the developed and developing countries in terms of state organization and financial situation was silenced, rendering the question of how the latter would manage to grapple a share of this growth unaddressed. Growth was advocated for its own sake or, to articulate differently, as an autonomous variable to the development equation, defined purely by the interests of private capital and uninhibited market forces. The advancement of people's lives would necessarily follow, however an incidental character was attached to it. In the ambit of these dissimilarities, one may reasonably argue that development seemed to have been placed on diametrically opposed ends. During the years of national developmentalism, when development plans where by and large structuralist in nature (i.e. aimed at lifting a country's structural barriers to development) it can be said that growth had a redistributive connotation. On the contrary, nothing at the beginning of the global integration era indicated the presence of an interest in the outcomes of growth to reach out to the various societal layers and lift people out of poverty.

In light of the above, it is hardly an overstatement to argue that there was an endemic controversy in the efforts of the international community to foster the advancement of developing countries through economic growth and the purpose of such growth according to the UN Charter's aspirations for social progress. Economic growth should have been an interim objective of the development process; a milestone towards the ultimate, long-term goal of social transformation. Yet, the framework within which development was pursued constituted by far an inappropriate hub for social considerations to align the relations between growth as the means of the development process and social change as the desideratum of the latter. Even the slightest possibility to realize this through developmentalism was negated after the forceful imposition of neoliberalism that by principle treats economics in isolation from dimensions of social relations.[62] When the crippling effects of structural adjustment overshadowed the optimism of economic growth, major attention was drawn to the inequality, poverty, marginalization and exclusion of developing states and their people that challenged the dominant view of development as economic growth and triggered a serious debate on an alternative international development strategy.

[62] Id.

2.2.1.2. Development as a Comprehensive Economic, Social, Cultural and Political Process:

a. Framing a New Paradigm of Development Thinking: 'Basic Needs' and the 'Capability' Theory as the foundations of the Human Development Hypothesis

To be precise, the quest for a unified approach to development whereby social aspects would be directly addressed did not emerge suddenly in the 1980s as a result of the detrimental effects of the neoliberal structural adjustment programs. Its origins are traced back in the early theoretical insights that had emerged in the cycle of a UN discourse about the aims of development and the nature of the development process. In a 1962 report of the ECOSOC setting out proposals for action at the outset of the development decades,[63] it was illustrated that development and economic growth are not synonymous. *'Development is growth plus change; change, in turn, is social and cultural as well as economic, and quantitative as well as qualitative'.*[64] As a direct corollary, pure economic quantifiers cannot lead to an improved quality of people's lives without balancing the social dimension of development. The Declaration on Social Progress and Development was the first UN official endorsement of an integrated approach to development that should be founded on respect for the dignity and value of the human person and shall ensure the promotion of human rights and social justice.[65] In this regard, development planning should provide for employment, equitable distribution of income, access to free compulsory education, health protection and housing, the establishment of social security schemes and the equality of opportunity for economic progress for nations and individuals alike. The objective was the harmonious balance between material progress and the intellectual, spiritual and moral advancement of humanity.[66]

The Declaration signaled the early signs of a turnover regarding the goals of development and set the foundations for a normative justification of international development strategies.

[63] UNGA Res 1710 (n.4), para 1 designating the decade 1960-70 as the UN's development decade 'in which States and their people will intensify their efforts to mobilise and sustain support for the measures required on the part of both development and developing countries to accelerate progress towards self-sustaining growth of the economy of the individual nations and their social advancement so as to attain in each under-developed country a substantial increase in the rate of growth'. UN development decades are four, until the year 2000 and comprise all together the first development era. After that, with the adoption of MDGs and currently the SDGs we have entered the second development era, G.Koehler (n.5).
[64] The United Nations Development Decade: Proposals for Action, Report of the Secretary General (E/3613), United Nations Publication No. 62. II.B. 2, New York 1962, 2.
[65] UNGA Res 2542 (XXIV) (11 September 1969).
[66] Id., Part I, Articles 1-13.

In its present form, the blend of economic and social factors of development was positioned as a matter of social fairness that suggests the just allocation of goods in a society, exemplified by the distribution of wealth and the availability of equal opportunities for individual activity. Social justice is, then, defined as distributive justice, which bears upon the moral imperative that all individuals in a society have obligations towards one another and everyone is entitled to the improvement of their human conditions so that they live a life of dignity and fulfill their human potential.[67] That said, there is a correlative duty imposed on a society's institutions to eliminate the glaring social inequalities and foster the fair distribution of burdens and benefits. Transposing the theory of social justice into the international arena, development initiatives capture the responsibility of the international community to redress the bases of inequality and pursue the policies that will allow for a trickle-down effect of economic growth along with social progress.[68]

Following the footprints of the Declaration the concept of human wellbeing marked its presence in the vocabulary of international development, without being clearly defined though.[69] At the moment it was solely projected as the ultimate purpose of global development strategy due to the acknowledgment of the interdependence of economic and social advancement. In this vacuum, the 'basic needs' approach that grew out of the Conference on Employment, Income Distribution and Social Progress appeared to offer a considerable viewpoint as to what could inform the meaning of wellbeing.[70] 'Basic needs' comprise of objectively identified 'primary goods' which are fundamental for the accomplishment of individuals' life plans and their effective involvement in the economic, political and social life.[71] As such, they include the essentials for survival, namely adequate food, shelter, clothing and basic services such as sanitation, safe drinking water, health and educational facilities and means of transport. Hence, they constitute the social minimum that ensures conditions of dignified living. Yet, there is also a strong impulse for the empowerment of individuals that is implicated by this theory: the satisfaction of an absolute level of basic needs has firstly a universal application in that it attaches to individuals of all nations, and secondly it does not merely constitute an end in itself but forms the steppingstone for the complete physical, mental and social development of individuals and

[67] K.Thomson, 'A Universal Social Minimum as a Foundation for Citizenship', (2007) 38(3) IDS Bulletin, 58.
[68] Id.
[69] UNGA Res 2626 (n.5), Preamble para 7.
[70] Special Report of the International Labour Organisation (ILO) to the ECOSOC on the Implementation of the Program of Action adopted by the World Employment Conference (Geneva, 1-17 June 1976) (ILO 1977) <http://staging.ilo.org/public/libdoc/ilo/1977/77B09_1480_engl.pdf > accessed 17 September 2017.
[71] K.Thomson (n.67), 57.

their participation in a society. Through this prism a basic-needs development strategy seems promising to fulfill the full range of desirable non-material development attributes.[72] Once again though, the potential of the theory was defeated in practice absent a consensus among development practitioners on the precise way in which the relationship between growth, production and productivity should be re-arranged to produce outcomes for the poor and prioritize their needs. This was invigorated by the fear that growth rates would be hindered for the sake of the current welfare of a specific target group, the poor.[73] As a result basic needs were viewed as a trade-off for growth and the concept was wiped out with the surge of structural adjustment.

Nevertheless, the basic-needs approach to development had managed to spread the seeds for a reorientation of development strategies by diverting the attention of the international community from developing things, i.e. states, to developing man. Consequently, there was a shift in the intellectual approach to international development vis-à-vis the role of individuals in the development process. It could be argued, however, that the basic-needs approach touched upon the matter only subtly given that it emphasized at first instance the *provision* of goods and services. In this way it treated individuals as beneficiaries of the former's availability whereas the aspired active participation in the sociopolitical stage would occur after the attainment of this minimum level of wellbeing. Furthermore, it did not provide an explanation as to how individuals can lift their lives above the minimum subsistence level and form the livelihood they value their own. Yet, the latter should be the quintessential of any development process. Indeed, Amartya Sen contends that the nucleus of development is the enhanced freedom of individuals to choose and lead the life they esteem.[74] In essence, what development policies should aim at is the quality of individuals' life, which is not determined only by the acquisition of goods and services but by the expansion of opportunities that advance the capabilities of people and transform them into valuable achievements for them.[75] Unlike basic-needs, the capability approach brings the individual to the forefront of the development process through the strengthening of human agency that originates in the exercise of judgment by the individual when evaluating the merit his/her

[72] Overseas Development Council and ILO International Labour Office, *Employment, Growth and Basic Needs: A One-World Problem – The International "basic-needs strategy" against chronic poverty* (Praeger Publishers 1977).
[73] P. P.Streeten, 'Basic Needs: Premises and Promises', (1979) I Journal of Policy Modelling 136, 139.
[74] A.Sen (n.7) For a brief explanation of his theory, C.Ruggeri Laderchi, et al, 'Does it Matter that we do not Agree on the Definition of Poverty? A Comparison of Four Approaches' (2003) 31(3) Oxford Development Studies 243, 253.
[75] S.Marks, 'The Human Rights Framework for Development: Seven Approaches' in A.Sengupta, et al (eds), Reflections on the Right to Development (SAGE Publications 2005).

choices have for his/her life. Therefore, development strategies should not be assessed against a flat level of acquisition of material resources by everyone, despite them remaining instrumental, since different people in different societies hold distinctive perspectives about their importance and the best practice to use them. To put it differently, heterogeneity should be taken into account in the development process as part of individuals' freedom to reflect on the meaning of 'good life' for themselves.[76]

The capability approach has ramifications for the concept of wellbeing too. By giving due regard to the criterion of personal satisfaction from the development process, the diversity in human inspirations and the quality of development outcomes, the theory reveals the multidimensional nature of wellbeing and sheds light to subjective considerations of the concept. Through the lens of the latter, monetary indicators of income or consumption envision very narrowly human wellbeing, which encompasses the recognition that everyone in the world aspires to live well irrespective of age, culture, religion, political affiliation and geographical space. Wellbeing, thus, also refers to the degree that an individual feels happy and prosperous that does not hinge on the availability of commodities as the basic-needs approach would envisage but is founded on the increased participation of the individual in the development process in order to achieve one's potential.[77]

b. Mainstreaming Human Development in the Agendas of the UN and IFIs

Under the influence of the theoretical reflections on the purpose of development, an ethos for a human-based development surfaced that reoriented and revitalized the function of the international development mechanism as well. A milestone towards this direction was the 1986 UN Declaration on the Right to Development.[78] In its Preamble (§13) and Art.2(1) the Declaration recognizes the human person as the central subject of development and that development policy should make the human being the main participant and beneficiary of development. Therefore, the premise that people are at the core of development is

[76] J. Waage, et al, 'The Millennium Development Goals: a cross-sectoral analysis and principles for goal setting after 2015' (2010) 376 *The Lancet* 991, 1009. Heterogeneity is an expression of human agency in development that the capability approach argues for. It was absent from the basic needs approach, which seems to position all individuals into the same and flattened condition by emphasizing their entitlement to an absolute minimum of goods which is the same for all.

[77] M.MacGillivray, Matthew Clarke (eds.), *Understanding Human Wellbeing* (UN UP 2006), 3-5. On the relationship between capabilities and wellbeing, A.Sen, 'Capability and well-being', 30-53 in M.Nussbaum, A.Sen (eds) *The Quality of Life* (OUP 1993), 36 who says that the functionings relevant for well-being vary from elementary (e.g. escaping mortality, adequate nourishment etc.) to complex ones such as being happy, achieving self-respect, taking part in the life of the community etc. Still, in this approach wellbeing as a policy goal should be measured by objective standards.

[78] UNGA A/RES/41/128 (n.8)

unquestionable. Furthermore, development aimed at the constant improvement of human wellbeing on the basis of individuals' active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.[79] Quite obviously, the articulated objective is in keeping with the capability theory that views development through the lens of individuals' freedoms to realize what they value. Moreover development was pronounced a pluralistic *process,* one that comprehensively includes economic, social, cultural and political dimensions.[80] In turn, the economic aspect of development is only but one element. Indeed, the Declaration expands the range of obstacles to development and to the complete fulfillment of human beings and peoples to incorporate structural impediments like threats to international peace and security and the denial of civil, political, economic, social and cultural *rights*. Especially in relation to the latter, the Declaration states that in order to promote development, equal attention and consideration should be given to the implementation, promotion and protection of all human rights due to their indivisible and interdependent nature.[81] Consequently, wellbeing is inextricably associated with human rights. By extension, the design and implementation of development policies by States, whether it is the result of individual or collective action, is linked to their obligations under human rights treaties. The Declaration goes a step even further imposing on States an explicit duty to cooperate with each other in ensuring development that furthers the rights of people.[82] Human rights, thus, add an important qualitative dimension to the realization of human wellbeing since enlarging individuals' choices and enhancing their freedoms is accomplished through the simultaneous realization of human rights. Ultimately, development itself is understood as a human right. After all, the Declaration on the *right to development* suggests so.[83]

[79] Id., Preamble para. 2 and Art.2(3).
[80] Id., Preamble para.2
[81] Id., Preamble para. 5, 8-11, Art. 3-4, 6, 7.
[82] Id. Art.3(3), 6, 7.
[83] Id., Preamble para.16 and Art.1. On the right to development: J. Donnelly, 'In search of the Unicorn: The Jurisprudence and Politics of the Right to Development' (1985) 15 California Western International Law Journal 473; M. Bedjaoui, 'The Right to Development' in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (Martinus Nijhoff 1991); W.Mansell, J.Scott, 'Why bother about a Right to Development' (1994) 21(2) Journal of Law and Society 171; S. Marks, 'The Human Right to Development: between Rhetoric and Reality' (2004) 17 Harvard Human Rights Journal 137; M. E.Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (OUP 2007); M.Assefa Tadeg, 'Reflections on the right to development: Challenges and Prospects' (2010) 10(2) African Human Rights Law Journal 325; In the context of sustainable development the RTD should be fulfilled "equitably" in order to meet developmental & environmental needs of present and future generations. Also the current special Rapporteur on the RTD stated that the RtD is a guiding standard when measuring progress in the implementation of the policy framework for SD, Report of the Special Rapporteur on the Right to Development, A/HRC/36/49 (2 August 2017).

Later, the publication of the WB's first World Development Report emphasized the importance of a two-part strategy for development, namely the implementation of macroeconomic adjustment so that the least developed countries are able to accede to the new economic order, complemented though with social policies that would improve living standards.[84] On a parallel course, the idea that people must be at the center of development emerged in clear language in the UN's inaugural Human Development Report. In a robust tone it was articulated that the purpose of development is to offer people options in life that are not limited to the acquisition of material things but capture a wider spectrum that encompasses increased life expectancy, education, a decent standard of living, political stability and freedom, personal security, community participation, productivity, involvement in social and cultural affairs and the safeguarding of human rights.[85] It became therefore recognizable that development as a process goes beyond the attainment of income. It is one that aims at advancing people's capabilities and enlarging peoples' choices so that objectives like the afore-mentioned are realized. In this respect, growth, defined as a country's gross domestic product (GDP), gains substance only when it is managed in the interest of people. It is rather the *means* than the *end* of development.[86] For high income and quantitative production of commodities little matter if 'human development'[87] is not effectuated and people cannot lead flourishing lives.

Clearly, the conceptualization of development as 'human development' brought a paradigm-shift in development thinking and shaped the contemporary development discourse. Having as a roadmap the human development hypothesis, development strategies are now given content by reference to a broad spectrum of problems that in a series of UN summits during the 1990s[88] have been recognized as the causes of underdevelopment and

---

[84] WBG, *World Development Report 1990 – Poverty* (OUP 1990); <https://openknowledge.worldbank.org/bitstream/handle/10986/5973/WDR%201990%20-%20English.pdf?sequence=5> accessed 19 May 2017.

[85] UNDP, *Human Development Report 1990* (OUP 1990), 9-10.

[86] For the distinction between means and ends as key to the human development approach that differentiates it from the wealth-based approach to development, S.Anand, A.Sen, 'Sustainable Human Development: concepts and priorities' (1994) UNDP Human Development Report Office Occasional Papers, 10-16, 42 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2294664> accessed 20 September 2017.

[87] Id. Progress was measured by the Human Development Index (HDI), a composite index according to which countries' progress in three core dimensions is assessed: a) a long and healthy life determined by life expectancy at birth, b) education, taking into account adult literacy rate and enrolment ratio for primary to tertiary education, and c) decent standard of living, measured by GDP per capita in US$ purchasing power parity (PPP), <http://hdr.undp.org/en/content/human-development-index-hdi> accessed 17 September 2017.

[88] The most important: a) UNICEF's 'Children's Summit' in New York in 1990, b) the World Summit for Social Development in Copenhagen and the UN Forth World Conference in Beijing (both in 1995) and c) the UN Conference on the Environment and Development (infra 2.2.1.3). Exhaustive reference to these summits, D.Hulme, 'The Millennium Development Goals (MDGs): a Short History of the World's Biggest Promise' (2009) Brooks World Poverty Institute Working Paper 100.

poverty, a situation of sustained or chronic deprivation of the resources, capabilities, choices, security and power for the enjoyment of an adequate standard of living and other political, socioeconomic and cultural entitlements.[89] Attention is more vigorously drawn on income disparity, (un)employment, infant and maternal mortality, access to inclusive primary education, the decrease of malnutrition and the sufficiency of clean water, the environment, social integration and gender equality in the light of discussions about reproductive health and women's empowerment. The necessity for a multi-sectoral approach to development was embedded in the respective Declarations, confirming the mounting commitment of governments for an improved global policy agenda on development. For their part, the IFIs seemed to have endorsed the modified approach to development as well, by implementing in developing countries 'adjustment programs with a human face' that would not only be concerned with the macroeconomic policies but with human growth too.[90] In fact, the WB's programs were framed in terms of poverty-reduction policies that were designed to provide for primary education, basic health care, nutrition and sanitation. On a similar path, the IMF strived to take poverty into account alongside its traditional role as the promoter of macroeconomic stability by setting for developing states the execution of a poverty reduction strategy as a prerequisite for lending and debt relief.[91]

Human-centered thinking was for the first time present in the agenda of both UN bodies and the IFIs, serving as a remedy to a second intrinsic controversy of the international mechanism for development that concerned the cooperation among those institutions. As already mentioned, the institutionalization of development took place under the auspices of the UN; hence it was validated by the principles of human dignity, equality, democracy, peace and mutual responsibility as enshrined in the UN Charter. By implication, all its specialized agencies involved in the facilitation of development would uphold these values and incorporate them in the development initiatives they pursued. Yet, the institutionalization of development ran in parallel with the operation of the WB and IMF, which had a different philosophy but nonetheless came aboard the development mechanism. Therefore, the

[89] CESCR, 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights' (10 May 2001) E/C.12/2001/10, para 8 <http://www2.ohchr.org/english/bodies/cescr/docs/statements/E.C.12.2001.10Poverty-2001.pdf> accessed 17 September 2017.

[90] R.Jolly, 'Adjustment with a Human Face', in R.Jolly (ed.) *Milestones and Turning Points in Development Thinking* (Palgrave McMillan 2012).

[91] For the WB: Mark S. Ellis, 'The World Bank; Fighting Poverty – ideology versus accountability in K.Nadakavukaren Schefer (n.42). For the IMF, Ben Thirkell-White, (n.42) in *idem*. It should be noted that the changes the IFIs made were far less than those required by the concept of human development as both authors indicate.

international apparatus for development comprised of two distinct forums that performed under their own system of values. This constituted its weakness since different values formulated unalike perspectives regarding the best development practices. The preoccupation with growth during most of the development decades is exemplary: the leading role of the IFIs had set the UN principles aside, correspondingly drifting away the Organisation's call for an approach to development that was informed by them. As a result, a demarcation line was drawn between the development strategies that were applied on the ground and the type of development the UN envisioned which annulled a collaborative and methodological tactic towards development assistance. Human development managed to close the gap between the international development mechanism's two affiliates, being the common normative theory to underline their work and therefore modify their institutional mandates. Whether this harmonization was portrayed to the absolute degree in practice is open to discussion, but at least the founding principles of the UN were brought again to the foreground while the economic institutions could not ignore the thrust of a human-focused development.

The incorporation of the UN principles and human development in international institutions' public policies was crystalized in light of the adoption of the Millennium Declaration,[92] which set out clearly the values that should govern international relations and linked them to key objectives in the broad areas of peace and security, development and poverty eradication, the environment, human rights, democracy and good governance in order to translate them into actions. Hence freedom, equality, solidarity, tolerance, respect for nature and shared responsibility became the standards for the establishment of a more coherent international program of action aiming at spreading the benefits of globalization to all peoples by tackling the world's inequalities and responding to the development needs of the marginalized parts of the world, the eight Millennium Development Goals.[93] Being a list of specific priorities, the goals declare – not unquestionably, as will be shown later – the will of states to advance global welfare through a policy tailored towards the issues that humanity faired poorer, and to do so collectively through the coordination of countries' and international organizations' actions and the evaluation of their policies on the basis of certain criteria, procedures and indicators. More importantly however, the Millennium Declaration was the product of a globally shared belief about the socially preferable state of the world that countries, the UN, its agencies and the IFIs should endeavor to realize,[94] which was

[92] UNGA Res A/RES/55/2 (8 September 2000).
[93] *United Nations Statistics Division*, 'Official List of MDGs and Indicators for Monitoring Progress 2008' <http://unstats.un.org/unsd/mdg/Host.aspx?Content=Indicators/OfficialList.htm> accessed 4 March 2016.
[94] Millennium Declaration (n.92), para 30.

formulated from the perspective of the life of all human beings, not only as individuals but also as members of an international community who share common interests. The proposed kind of development was declared therefore as a value judgment about the optimum way to realize the third purpose of the UN, namely to solve international problems of an economic, social, cultural and humanitarian nature through international cooperation, and stemmed from a decision-making process based on the declaration's stated principles. In that respect development was not simply about meeting targets; it bore upon value-based norms, gaining thus normativity as a concept and being translated into a global value itself that in turn has the potential to permeate the international order as a fundamental principle.[95]

To conclude, human development has set the foundations for a comprehensive approach towards development practice. Placing the human person on the center stage of development talks, it suggests that development strategies should aim at creating the environment in which people can develop to their fullest potential. Analogously, underdevelopment cannot be defined by reference to the lack of material necessities and the absence of economic growth alone. Individuals' deprivation of the freedom, the power and the choice (the capability) to lead a life they value is also part of the equation. Within this framework, development is converted from a general idea of advancement into a concrete concept with explicit dimensions: an economic, but also the social, cultural and political facets of life, all of which are fundamental to a continued improvement of people's wellbeing. As a result, it denotes a collective process of change that targets states, aspiring to tackle specific pathogeneses within their domestic order, but focuses on individuals and communities as the beneficiaries and active participants in the process towards achieving a prosperous life. To repeat the DRtD's definition, development is 'a comprehensive, economic, social, cultural and political process aiming at the constant improvement of the wellbeing of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom'. To this end, the principles of human dignity, equality and solidarity among nations are of paramount importance for the determination of international development objectives, which in turn can promote social justice, peace and democracy in line with the post-World War II aspirations for a united and harmonious planet.

[95] O.Spijkers, The United Nations, the Evolution of Global Values and International Law (DPhil thesis, Intersentia 2011); Open Access Leiden University Repository <https://openaccess.leidenuniv.nl/handle/1887/17926> accessed 8 November 2019.

2.2.1.3.The Concept of Sustainable Development:

a. The Conceptualization of the Notion and its Consolidation in the Institutions for International Development

The concept of sustainable development takes the discussion about development a step further by bringing to the foreground a third dimension: the relationship of humans with the natural environment as a constituent element of the world system within which development is pursued. The heavy economic exploitation of natural resources upon which the postwar vision of development for growth maximization had much been grounded, had raised concerns about the detrimental impact of development practices on the environment[96] and the ability of nature to replenish its reserves in such a pace that continuous and unlimited economic progress would be feasible in the long-run.[97] The matter found resonance at the international level as early as 1949 when the UN Scientific Conference on Conservation and Utilization of Resources took place.[98] The conference had rather an informative character and its scope was limited to outlining the world resource situation, in particular the adequacy of minerals, flora and fauna, forests and fuels, to discuss the role of technology in the development of new techniques for resource-substitution and explore ways for developed and developing nations to cooperate on a strategy for a 'wise use' of the natural capital so that the needs of the growing population of earth are covered and higher living standards are ensured.[99] Nevertheless, the Conference underscored for the first time the environment's role in development, which became the additional parameter to be considered when trying to identify the nature of development.

In the years to come the need for societies to develop without exceeding the earth's carrying capacity became more pronounced, generating a number of UN summits and consultations among development institutions that took place alongside those that laid the

[96] E.g. UNDP, Human Development Reports <http://hdr.undp.org/ > accessed 18 November 2017.
[97] Sustainable development as a term is first documented in *Lexikon der Nachhaltigkeit* <https://www.nachhaltigkeit.info/artikel/definitionen_1382.htm> accessed 18 November 2017; Similarly D.Ricardo admits that economic growth will be hindered due to the scarcity of natural resources and points to the necessity for effective conservations measures if human survival is to be ensured: D. Ricardo, *The Principles of Political Economy and Taxation* (Dent 1965) cited by M.C Gordonier Segger, 'Sustainable Development in International Law' in H.C.Bugge, C.Voigt (n.14), 93.
[98] ECOSOC, 'Conservation and Utilization of Resources', Resolution 32(IV) (28 March 1947), UN Publication Sales No.47.1.14, 5
[99] UN, Yearbook of the UN 1948-49, Department of Public Information, UN Publications Sales No. 1950.I.II, 481-82 <https://read.un-ilibrary.org/united-nations/yearbook-of-the-united-nations-1948-49_e4eb38e2-en#page493> accessed 18 November 2017; UNSCCUR, Conference proceedings (17 August-6 September 1949) UN Doc. E/CONF.7/7.

basis for the consideration of social aspects in the development process. In 1962, the UN General Assembly adopted a Resolution on Economic Development and Conservation of Nature, [100] acknowledging the instrumental role of natural resources for economic development and simultaneously highlighting the necessity for protection measures to ensure their long-term availability. However, it was not until a decade later that concerns about the limits to growth were supported by tangible proof, when the Club of Rome empirically studied the applied development pattern and tested its determinants, namely accelerating industrialization, population growth, excessive food production, pollution generation and depletion of resources, against viability. In its homonymous report the Club warned the international community that unless conditions of environmental and economic sustainability were introduced, the basic material needs of each individual on earth could not be satisfied, let alone the opportunity afforded to them to develop to their fullest potential.[101]

Yet, the exhortation for global development equilibrium was not harmoniously welcomed by the nations. It definitely reflected the concerns of developed countries, which started to think about the negatives of the 'extraction, production, consumption' model they had been following,[102] but was treated with skepticism by developing countries in light of fears that a global environmental agenda will become an impediment to their development potential.[103] The conflicting views converged at the UN Conference on the Human Environment in 1972,[104] where the environment question was addressed in correlation to the social and economic development of developing and developed countries alike. In the Stockholm Declaration,[105] the participating countries, acknowledging that the environment gives people physical sustenance and affords them the opportunity to progress at the social, economic and scientific level, agreed on 26 Principles relating to the cautious and rational management of natural resources (Principles 2-5 and 13-14) and the necessity to reconcile the needs of development for each country with the need to protect and improve the environment (Principles 6-12). More precisely, Principle 11 clearly stipulated that environmental policies shall not hamper the development prospects of developing countries nor shall they obstruct the attainment of better living standards for all. Rather, it was affirmed that all states enjoy

[100] UNGA Res 1831 (XVII) (18 December 1962).
[101] D.H.Meadows, et al, *The Limits to Growth: A Report for the Club of Rome's Project on the Predicament of Mankind* (Universe Books 1972), 24.
[102] UNGA Resolution 2398 (XXIII) (3 December 1968).
[103] Developing countries' concerns were addressed at the meeting of a panel of Experts on Development and the Environment at Founex, Switzerland in June 1971, see *Development and Environment: Report and Working Papers of a Panel of Experts Convened by the Secretary General of the UN Conference on the Human Environment* as cited by N.Schrijver (n.13), 43.
[104] (16 June 1972), UN Doc A/Conf48/14/Rev.1, United Nations Publication, Sales No. E.73.II.A.14
[105] Id.

the sovereign right to exploit their own resources pursuant to the environmental policies they set themselves (Principle 21) given the prevailing system of values in each country. That way, countries would not bear unwarranted social and economic costs from the application of environmental standards that did not correspond to their circumstances (Principle 23). Even more so, states committed to avoid their activities having transboundary effects on the environment of other states and agreed that the matter of environmental quality would be dealt with in a spirit of cooperation and on the basis of equality among states (Principle 24).[106] Evidently, the Conference and the Declaration per se managed to align environmental matters with development concerns and to convince the international community that the necessity for environmentally sound natural resource exploitation did not assume that development activities should be halted.

The human impact on the environment became subsequently the central theme of the World Conservation Strategy, a report prepared by the International Union for the Conservation of Nature (IUCN) with inputs from UNDP, the Food and Agriculture Organisation (FAO), the UN Educational, Scientific and Cultural Organisation (UNESCO) and the World Wildlife Fund (WWF).[107] The report focused predominantly on environmental degradation in terms of destruction of ecosystems, extinction of genetic diversity and overexploitation of living resources and juxtaposed it with development issues such as the increasing demand for resources on behalf of affluent countries but also poverty and social deprivation of poor nations, which adopt destructive environmental practices in order to deal with their precariousness. Demonstrating that there is a reciprocal cause-and-effect relationship between development and the earth's ecological imbalances, the report stressed that the management of the human use of the biosphere (conservation) is paramount to the attainment of a maximum sustainable yield for satisfying the needs of present generations and ensuring that those in the future will also be able to fulfill their aspirations.[108] By implication, development should incorporate the 'application of human, financial, living and non-living resources *and* the modification of the biosphere'[109] in such a way that optimum productivity for the greatest number of people and for the longest time is delivered.[110]

---

[106] For an analysis, L. B.Sohn, 'The Stockholm Declaration on the Human Environment', (1973) 14(3) Harvard Law Journal 423.
[107] IUCN, *World Conservation Strategy: Living Resource Conservation for Sustainable Development,* Gland, Switzerland (IUCN 1980).
[108] Id., Introduction: living resource conservation, para 4
[109] Id., para 3.
[110] *World Charter for Nature*, UNGA Res 37/7 (28 October 1982) UN Doc A/Res/37/7.

Environmental ethics, thus, permeated development efforts and became the complement to a new strategy that aimed at sustainable living.[111] Responding to the opening call for a reorientation of development activities, the World Commission on the Environment and Development (WCED or Brundtland Commission) that was established by UN GA Resolution A/38/161 (*Process of Preparation of the Environmental Perspective to the Year 2000 and Beyond*) was specifically mandated to formulate proposals for policies that would take account of the interrelationships between people, resources, the environment and development.[112] In re-examining the critical environment and development issues, the Commission found that focusing on ecological concerns as a priority policy objective in isolation from the interlocking crises and institutional fragmentation that occur among nations in the social and economic field would be of little avail. Physical, or ecological, sustainability is intertwined with the challenges posed by uneven economic growth and the unbalanced distribution of its benefits and costs among rich and poor countries, inappropriate technology that puts the resource base at risk and the lack of informed decision-making that merges environment, economics and human needs in development planning.[113]

For the Commission, therefore, a satisfactory solution to the environment inquiry was associated with a simultaneous solution to institutional questions relating to the viability of societies. In the words of the Commission 'the objective of development is the satisfaction of everyone's human needs and legitimate aspirations for an improved quality of life. A world in which poverty and inequity are endemic will always be prone to ecological and other crises', hence it is vital that a comprehensive development path is put forward in order for this set of problems to be dealt with in an integrated and mutually reinforcing way.[114] On the basis of this reasoning, the Commission advocated for *sustainable development,* which is *development that meets the needs of the present without compromising the ability of future generations to meet their own needs.*[115] Addressing the matter in this way, the Commission places the problem in the global context and makes it relevant to rich and poor countries. It acknowledges that 'needs', in particular those of the world's poor, constitute the cornerstone of development practices and that at the same time development should be environmentally

[111] Id., Section 20: Towards Sustainable Development. See also, IUCN, UNEP, WWF, *Caring for the Earth: a Strategy for Sustainable Living* (Routledge 2013) (reprint) in which the same organisations suggested a new organisational structure to address issues of development and conservation and defined (sustainable) development as 'improving the quality of human life while living within the carrying capacity of supporting ecosystems'.
[112] WCED, *Our Common Future* (OUP 1987).
[113] Id., Chapter 2: Towards Sustainable Development.
[114] Id., para.4.
[115] Id., Section IV, paras 1-2, Section I.

sound so that those needs are met in perpetuity. In this respect, the Commission reinstates the centrality of human beings in the development process and grounds its proposition on an anthropocentric approach, signifying that the objective of sustainable development goes beyond preventing environmental damage. Environmental protection is of course inherent to the concept but the claim extends to bringing about socioeconomic change and equitable opportunities for an improved quality of life for all.[116] In practical terms, this translated into changes in the international policies of each nation that would restore the asymmetries between developing and industrialized countries, taking into account the material and non-economic variables of human needs, namely education, health, clean air, water and protection of natural beauty.[117] It would furthermore require reformed domestic organizational setups that give effect to democratic governance and citizen participation in politics and institutions as a means for individuals to take a stand directly on the factors that affect the quality of their lives.[118] That said, the Commission pointed towards a wider spectrum of wellbeing that includes the freedom to achieve dignity and respect of the person through active involvement in society's organizational system in addition to the enjoyment of material and non-material goods, therefore embracing the concept of human development as one that informs the content of sustainable development.[119] Furthermore, it distilled into the latter an obligation of collective social responsibility[120] to ensure the just allocation and utilization of resources among human members since everyone is entitled to the necessities of life and the essential infrastructure for social organization.[121] On this account, the ability to promote the common interests should be the product of economic and social justice within and amongst nations and of the integration of environmental concerns in development strategies.[122]

The content of the Brundtland report was reaffirmed at the UN Conference on Environment and Development that followed five years later.[123] Reaffirming that human beings are at the center of concerns for sustainable development and that they are entitled to a

[116] That sustainable and environmentally sound development, though linked, are different was clearly expressed in UNGA Res 42/187, 'Report of the World Commission on Environment and Development' (11 December 1987) UN Doc A/RES/42/187, which adopted the Commission's conclusions, para 3:'[…] Recognizing, in view of the global character of major environmental problems, the common interest of all countries to pursue policies aimed at sustainable and environmentally sound development […]'
[117] WCED (n.112), Chapter 2, para 39.
[118] Id., Chapter I, para 28; Conclusions para 81.
[119] J.Robinson, 'Squaring the Circle? Some thoughts on the Idea of Sustainable Development' (2004) 48 Ecological Economics 369, 372-373.
[120] Id.
[121] O.Schachter, *Sharing the World's* Resources (Bangalore: Allied Press 1977), 11-12 cited by R.Ramlogan (n.14), 235
[122] WCED (n.112), para26. The Commission refers hereby to the principles of intergenerational and intragenerational equity.
[123]General Information <http://www.un.org/geninfo/bp/enviro.html> accessed 19 May 2017.

healthy and productive life in harmony with nature, the adopted Declaration[124] and Agenda 21,[125] the action plan on environment and development issues, provide specific principles and recommendations for the economic and other activities of States in order for sustainable development to appeal in practice. Human development remained at the core of this revived form of development (Principle 1) as did the right to development that must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations (Principle 3). Therefore, States were prompted once again to 'co-operate in the essential task of eradicating poverty in order to decrease the disparities in living standards and better meet the needs of the majority of the people of the world' (Principle 5). Other normative and procedural aspects, though, complemented the concept of sustainable development. For example, the right of each state to exploit its resources depending on its development needs (Principle 2), the introduction of impact assessments and public participation in the decision-making process (Principles 10 and 17), States' cooperation to promote a supportive and open international economic system leading to economic growth and sustainable development in all countries (Principle 12) and the establishment of partnerships for the fulfilment of the Declaration's principles and the progression of policy and regulation in the field sustainable development (Principle 27). All in all, a linkage between poverty eradication, economic efficiency and environmental management was created.[126] As of that point development efforts were premised on this tripartite basis, which became the cornerstone for a re-design of the institutional mechanism for development to include a holistic conceptualization of wellbeing and a more coherent formulation of processes and outcomes.

The latter was the result of the 2002 World Summit for Sustainable Development (WSSD) in Johannesburg as it presented the first specific and time-bound targets that emphasized the practical side of the Brundtland's definition of sustainable development. These were exemplified in the Johannesburg Plan of Implementation (JPOI), a 'blueprint' for implementation of the Rio Declaration and Agenda 21. The JPOI elaborated in its substantive chapters, among others, on the issue of poverty eradication (e.g. halve by 2015 the proportion of people who live on less than 1$/day, suffer from hunger and lack access to safe drinking

[124] Rio Declaration on Environment and Development (12 August 1992) UN Doc. A/CONF.151/26 (Vol. I) [Rio Declaration].
[125] Agenda 21 (12 August 1992) UN Doc. A/CONF.151/26 (Vol. I, Annex II).
[126] This conclusion derives from a read of Agenda 21' Ved P. Nanda, 'The Journey from the Millennium Development Goals to the Sustainable Development Goals' (2016) 44(3) Denver Journal of International Law and Policy 389, 392.

water and sanitation)[127] and a number of actions were proposed to defeat the causes of ill health and their impact on development, especially for the most vulnerable groups of society (women, children, disabled)[128]. Priority was also given to matters such as the suspension of the adverse effects of chemicals on human health and the environment[129], the protection of ecosystems[130] and biodiversity[131], and energy production and efficiency.[132] Reference to environmental protection and development concerns in a document that sets priorities for action in the field of development, cannot but attest to the fact that these issues were not considered as being merely interrelated. They were the subjects of a global consensus that economic, social and environmental issues constituted components and overarching objectives of (sustainable) development and should be dealt with in a balanced manner.[133] To this end, the JPOI took a step forward to cure the observed fragmentation in the institutional architecture for development. It linked up all the relevant bodies and organisations in the development sector at the international, regional/sub-regional and national level, making the ECOSOC the focal point for supervision of the UN's inter-agency activities in the framework of sustainable development and for the promotion of their collaboration with affiliated institutions such as the IFIs and the World Trade Organisation (WTO). At the same time the mandates of each UN body were defined more clearly, being tailored to address on-the-ground challenges in the three development sectors through particular mechanisms, specific operation measures and detailed review processes.[134]Aiming for coherence of implementation and partnerships among institutions, the JPOI managed to organize the work of all global policy institutions around the three mutually reinforcing pillars of sustainable development.

Attention to the praxis of sustainable development continued to be high on the international community's agenda. Ten years after the WSSD, at a new UN Conference for sustainable development held again in Rio,[135] the world leaders issued a political outcome document that contained clear and practical measures for implementing sustainable development. In the 'Future we want',[136] governments and civil society declared their

[127] Report on the World Summit on Sustainable Development, Johannesburg, South Africa (26 August-2 September 2002) UN/CONF.199/20 and annexes that include Johannesburg Declaration on Sustainable development and the JPOI; for this point see specifically, section II 'Poverty Eradication' at 7(a), 8, 25, 26.
[128] Id., section VI 'Health and Sustainable Development'.
[129] Id., section III 'Sustainable Consumption and Production' at 23
[130] Id. at 30(d), 31, 32(c).
[131] Id. at 44
[132] Id., section II at 9, section III at 15 & 20, Section IV at 25, 38 and 44.
[133] Id., Preamble at 2.
[134] M.C Cordonier Segger (n.97), 107-113.
[135] UN Conference for Sustainable Development, *Report of the Conference on Sustainable Development* <http://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.216/16&Lang=E> accessed 19 March 2017.
[136] UNGA Res 66/288, *The Future we* want (11 September 2012) UN Doc. A/RES/66/288.

determination to realize their commitments in the social, economic and environmental fields undertaken in all preceding UN summits and conferences and bridge the gaps in promoting inclusive economic growth, social development and environmental protection that would benefit all people.[137] They decided on the thematic areas of the WSSD and JPOI and others such as food security, cities and clean oceans, agreed on the importance of a strategy to finance projects in these areas[138] and established a high-level political forum[139] for follow-up and review of progress.

In light of the above, sustainable development carries within it the seeds of reform in domestic and international programming for development. In fact, it is meant to serve as a guiding principle for the UN, governments and private institutions, organizations and enterprises when establishing their policies or development projects.[140] However, to accept sustainable development as a *principle* indicates that the concept is understood by development stakeholders as a functional characteristic of the institutional system in the field of international development that reflects the system's purpose and operates also as an evaluative standard for conditioning and assessing stakeholders' conduct. That is to say that sustainable development is understood further as a principle with normative force. However, an effective orientation and regulation of subjects' conduct by a normative principle, presupposes that the latter is clearly defined in content and scope. Surprisingly, despite the endorsement of sustainable development in international development discourse, there is no agreement on a single definition or on the concept's normativity. Quite the opposite, even the Brundtland's definition which popularised the term has been criticised as vague and inexact.[141] Not only that, but the interchangeable use of the term 'sustainability' creates further confusion because again it is not clear if the term is a mere tautology or denotes something else. Providing thus a clear definition of sustainable development and defining the kind of normativity it enjoys is important if concrete conclusions are to be drawn as to how exactly, being a principle, it binds stakeholders' decision-making and whether it generates responsibility for them to conform to and promote sustainable development from an international law point of view, which is the ultimate focus of the thesis.

---

[137] Id. at 5 and 6.
[138] Sustainable Development Knowledge Platform <https://sustainabledevelopment.un.org/rio20> accessed 19 March 2018.
[139] High-level Political Forum on Sustainable Development <https://sustainabledevelopment.un.org/index.php?menu=1556> accessed 19 March 2018.
[140] UNGA Res 42/187 (n.116), par.2.
[141] W.M.Adams, 'The Future of Sustainability: Rethinking Environment and Development in the Twenty-First Century', Report of the IUCN Renowned Thinkers Meeting 29-31 January 2006 (IUCN 2006) <https://portals.iucn.org/library/node/12635> accessed 19 March 2018.

b. In Search of a Definition of Sustainable Development:

i. The three-pillar Typology of Sustainable Development

To be sure, the genesis of sustainable development as a concept stems from the acknowledgment that there are limits on traditional forms of economic development. By and large these are biophysical, hence why at the early stages the discussion concentrated mainly on finding ways to use resources at a rate that does not have a negative impact on real incomes for present and future generations but also does not reduce the diversity of ecosystems and their reproductive capacity.[142] The presumption was that economic growth was achievable without depletion of the environment. Sustainable development could be defined according to this assumption as a process of economic advancement for every generation through ecologically viable methods that would maintain and improve the asset base in order for everyone to live equally well as they enjoyed similar income levels and benefited from access to goods and services.[143] With the introduction of the Brundtland commission's expansive understanding of sustainable development, the precise determination of the concept was premised not solely on the question of how to manage the economy and the environment, but on the question of wellbeing for present and future generations to which environmental concerns were included as well. A possible way to incorporate this thinking into a definition of sustainable development would be to determine the latter as a process that 'leads to higher wellbeing for all and to a positive or at least neutral effect on the overall state of resources for the future'[144] or, in a more analytical way, as an 'open and participatory process of environmental, social, economic, cultural and political change that can be achieved through protecting and enhancing ecosystems, transforming the direction of investments and the orientation of technology, and redesigning institutions to ensure current and future potential to meet the needs and aspirations of communities'[145]. The latter definition is more precise and reflects in the most accurate way the commission's background study to sustainable development. Yet, the commission's chosen wording for the definition of the concept was much different and rather more inexact, despite its success to draw attention to the connections between the economy and the environment on the one hand and humans on the other. Indeed, the commission may have pointed towards the human dimensions of the

[142] P.S.Elder, 'Sustainability' (1991) 36 McGill Law Journal 831.
[143] R.Repetto (ed.), *The Global Possible: Resources, Development and the New Century*, World Resources Institute Book (Yale University Press 1985), 10; 'good life' is defined in terms of access to goods and services.
[144] Tom Kuhlman, John Farrington, 'What is Sustainability' (2010) 2 Sustainability 3436, 3442.
[145] G.Gallopin, *Impoverishment and Sustainable Development* (ISSD 1996) <https://www.iisd.org/system/files/publications/impoverishment_and_sd.pdf> accessed 7 October 2021.

problem, i.e. the social constraints to traditional forms of economic development, but left open to interpretation crucial elements such as how needs and wellbeing should be outlined, how a balance between each generations' needs would be achieved and what are the institutional changes that ought to take place so that development is not halted.

Nevertheless, on the premise of the Brundtland definition it was embedded in the international development discourse that the concept has an environmental, economic and social dimension.[146] It is this understanding that constitutes the core idea of the presiding three-pillar model of sustainable development. Simply put, the model synthesises competing interests between generations in the social, economic and environmental sphere and sets the balanced fulfilment of all three as an objective so that human wellbeing is maintained.[147] In this schematic approach the three pillars are deemed equivalent and development decisions by all actors in the field should allow for their integration. Sustainable development is defined therefore as a process of economic and social progress that takes place in the framework of environmental protection and aims at maintaining human wellbeing or as the UN specifies, it is 'a multidimensional undertaking to achieve a higher quality of life for all people that encompasses economic, social and environmental components which are interdependent and mutually reinforcing'[148]

Plausibly the current definition provides with a necessary clarity, not least because there is a consensus that a good living standard depends on the intrinsic links among economic, social and environmental wellbeing. These three mutually interacting dimensions are deemed hierarchically equal and the assumption is that they should be satisfied at the same time and to the same degree.[149] On the face of it, such thinking suggests a holistic approach to development and can only be welcomed as positive because it enunciates the human-centred nature of it. I believe though that the three-pillar model ignores an important fact: the differences amongst the pillars both as far as their determinative features and their

[146] World Summit on Social Development (14 March 1995) UN Doc A/CONF.166/9: 'Equitable social development that recognises empowering the poor to utilise environmental resources sustainably is a necessary foundation for sustainable development. We also recognise that broad-based economic growth in the context of sustainable development is necessary to sustain social development and social justice'.

[147] A.Chandani, 'Distributive Justice and Sustainability as a viable Foundation for the Future Climate Regime' (2007) 2 Carbon and Climate Law Review 152, 159-160.

[148] *UN Agenda for Development* (1997) UNGA Res A/RES/51/240 at 1. The three-pillar model forms the basis of other generally accepted definitions in international organisations. E.g. Commission of the European Communities, *A sustainable Europe for a better world: a European Union Strategy for Sustainable Development*, Communication from the Commission (Commission's proposal to the Gothenburg European Council), COM(2001) 264 final <http://europa.eu.int/eur-lex/en/com/cnc/2001/com2001_0264en01.pdf> accessed 16 June 2018.

[149] M.Lehtonen, 'The environmental-social Interface of Sustainable Development: Capabilities, Social Capital, Institutions' (2004) 49 Ecological Economics 199, 201, who criticises the three-pillar conception and says that the three dimensions are not qualitatively equal.

functionality are concerned. The objectives of the economic pillar are mainly driven by profitability whereas the societal pillar attaches importance to themes such as education, health, housing, employment and democratic governance.[150] On the other hand, the environmental pillar can be considered as an independent variable; it hosts human activity and circumscribes it depending on the level and diversity of its resources but also suffers the former's negative repercussions. Truly, according to a system analysis socioeconomic progression happens mostly to the detriment of natural systems and some times economic progress does not advance social causes either.[151] There is thus a dynamic tension amongst the pillars because they perform on a diverse logic that does not really accentuate their potential links and renders their integration weak. For integration is substantiated when the relevance of each pillar for the whole agenda is taken into account, thinking how they can individually contribute to a means-ends continuum whereby each one of them becomes, accordingly, the fulfilled prerequisite for the accomplishment of the other and all together create the enabling context for the achievement of the optimum goal, human wellbeing in harmony with the environment.[152]

Therefore, the focus should be on creating synergies between the dimensions that requires a specific balancing exercise to manage the quantity and quality of accomplishment of the economic, social and environmental pillar respectively in order to meet people's needs. By implication, at times some of the three dimensions shall be prioritized over the others and not all of them can be satisfied equally. The three-pillar model doesn't acknowledge this qualitative distinction among the dimensions nor does it offer guidance on how to resolve the inconsistency that occurs with the pillars being treated as hierarchically equal.[153] Actually, critics contend that it even permits tradeoffs since the demarcation of the pillars separates social from economic aspects, which are two sides of the same coin, and risks diminishing the importance of the environmental parameter.[154] That makes the model resemble more to an *omnium gatherum* of distinguished systems that function independently rather then being aligned with a holistic approach to development. Be that as it may, the political criticism suggesting the probable perpetuation of 'economism' and 'productivism' that characterize the

[150] On the difficulty on defining the social pillar and how to differentiate from the economic, *idem*; S.Torjman, 'The Social Dimension of Sustainable Development' (Caledon Institute of Social Policy 2000).
[151] V.Spaiser, et al, 'The Sustainable Development Oxymoron: Quantifying and Modelling the Incompatibility of Sustainable Development Goals', (2016) 24(6) *International Journal of Sustainable Development & World Ecology* 457.
[152] International Council for Science and International Social Science Council, *Review of the Sustainable Development Goals: The Science Perspective* (2015), 8.
[153] M.Lehtonen, (n.149) 201.
[154] T.Kuhlman et. al, (n.144), 3439.

dominant development model is not absurd.[155] Based on this conceptual critique, alternative models have been proposed where the pillars have been substituted with concentric or interlocking circles[156] in order to depict better the interfaces between the three dimensions of development and show that their dynamics should be balanced and integrated.

ii. Integrating the three dimensions of Sustainable Development by recourse to fundamental moral values of the International Community

The metaphors all these models use have the power to popularize the concept, representing also a guiding pole in relation to which policies can be oriented since they define the boundaries of the concept. Yet, being typologies of sustainable development they are restrictive in analyzing the concept because they do not capture the political, moral or philosophical positions, which also play into the conflation of the three dimensions and practically dictate what should be done to achieve sustainable development.[157] Models are technocratic fixes and do not offer an understanding about how various underlying values may result in a differentiation to the definition of sustainable development. As a result, sustainable development renders being an all-encompassing term that is used to cover divergent ideas about the relationship of the three dimensions whereby various stakeholders can legitimize their goals. In other words, even staying within the spectrum of the economic, social and environmental framework, differing 'conceptions of the concept' are to be expected and any solution to the development-environment question can be considered as falling within the meaning of sustainable development. These are not merely 'semantic disputations' but a reflection of substantive political, philosophical and moral arguments on the links between development, the environment and humans and how these links should be put into practice that reveal how contested sustainable development can be as a concept.[158] That makes sustainable development 'a problem-driven concept, rooted in different sets of

[155] M.Lehtonen, (n.149), 201. Also J.Robinson, (n.119) 375-377 who stresses that the argument finds expression in the anti-globalisation movement and constitutes a criticism against the Western model of development, i.e. industrialisation and neoliberalism, and the political characteristics of western culture.
[156] W.M. Adams, (n.141), 2.
[157] S.Connelly, 'Mapping Sustainable Development As a Contested Concept' (2007) 12(3) *Local Environment* 259, 262.
[158] Id.,262, 269. However, G.Houghton, D.Counsell, *Regions, Spatial Strategies and Sustainable Development* (Routledge 2004), 72-73 claim that 'rather than focus on searching for a definite meaning of 'sustainable development' it is necessary to recognise the multiplicity of sustainabilities and to analyse the ways in which these are shaped and mobilised in political discourse' (cited in id.) Similarly, J.Robinson (n.119), 374 who doesn't consider the lack of definitional precision as a problem and argues that the concept may actually benefit from a constructive ambiguity since definitions will emerge from implementation rather than being imposed from the outset and effectiveness in policy can be better achieved.

values and moral judgments, rather than a scientific/technical hypothesis'.[159] Therefore stating that sustainable development is the integration of economic, social and environmental dimensions does not suffice. The content of the concept may be defined but given that the definitional question involves also the issue of combining and lifting the conflict amongst them, its scope isn't.

In line with this thinking it can be said that a definition of sustainable development is two-fold: it involves a substantive aspect, which refers to the consolidation (rather than balance) of the economic, social and environmental dimensions and a procedural facet too, which refers to the process whereby the substantive aspect is accomplished. Determinants of the procedural aspect are moral values because they justify the choices made each time for the integration of sustainable development's three components. The procedural aspect thus is the moral reasoning underpinning sustainable development's substantive element. The whole concept therefore rests on an ethical foundation, becoming essentially a moral or ethical pronouncement as to what should be done and how in the effort to address simultaneously the economic, social and environmental challenges to development.[160] Accordingly, a comprehensive and precise definition of sustainable development depends significantly on an agreement on those values that inform the ideological background to the notion. For if the values and what they prescribe for stakeholders' actions in the field of development are clear, then the matter of conflicting conceptions of sustainable development will be settled as well since the integration of the concept's three components will be defined by normative boundaries.

Identifying those values is itself a challenging task because normally moral values represent subjective individual preferences.[161] Nevertheless, there are fundamental objective values that not only enjoy wide acceptance by the international community but have been the steppingstone for the postwar organization of States around the three UN pillars of peace and security, human rights and development. Naturally, they can constitute the unifying denominator on which the substantive part of sustainable development can be realized. The authoritative source for identifying those values would be the Universal Declaration of Human Rights (UDHR) – Articles 1and 2 in conjunction with Article 25(1), the UN Charter, especially Articles 1 and 2 that specify the principles underlining the pursuance of the

[159] S.Cohen, et al, 'Climate Change and Sustainable Development: towards dialogue (1998) 8(4) *Global Environmental Change* 341, 362-363.
[160] E.Holden, et al, 'The Imperatives of Sustainable Development' (2017) 25 Sustainable Development 213, 215; JPOI (n.127)para 6 states that ethics are important for sustainable development.
[161] H.Daly, *Ecological Economics and Sustainable Development, Selected Essays of Herman Daly* (Elgar 2007), 239 et seq.

Organization's purposes, but also the outcome documents of the constituent UN summits from which sustainable development emerged. From the combinational reading of all, it can be concluded that there are two sets of values that are central to the acts of the international community: equity and justice, and universality. Whereas in the Charter these values are referred to in relation to the generic solution to economic, social and cultural problems, they are linked to more specific program areas in the documents of the specialized summits. For example, equity is referred to in Agenda 21 regarding income distribution, education, energy and rural development.[162] In both instances though, the process towards the settlement of these matters is informed by a moral value. However, the most elaborate mention of these values is found in the Johannesburg Declaration on Sustainable Development and the resolution of the UN Conference on Sustainable Development. In their respective preambles it is clearly stated that people are at the center of sustainable development and the international community, cognizant of the need for human dignity, will strive for a world that is just, equitable and inclusive.[163]

To see how these values find resonance in the so-called substantive aspect of sustainable development, the Brundtland commission's canonical definition is particularly useful. By stating that sustainable development is development that meets the needs of the present generation without compromising those of the future, the commission expresses a two-fold belief: a) that the interests of all individuals within the same generation should be served and b) the interests of future generations should receive equal attention and should be moreover integrated in social and economic policies because everyone should be allowed to lead worthwhile lives. This belief involves the assertion that humans share the same life claims irrespective of gender, religious denominations, ethnic identity, class, region and of course generation. Life claims are universal. By implication, sustainable development, which enunciates an entitlement to human wellbeing, is a universal claim too prescribing that human progress respects also environmental limits so that the general capacity to create wellbeing is preserved. Universality can be therefore said to be the first moral value upon which sustainable development is founded.[164]

The second moral is indeed justice and in particular distributive justice because the claim for fulfillment of each generation's needs implies in essence a claim of fair and just relations between individuals and the institutions of their societies with regards to the economic and social arrangements that affect generations' prospects to human wellbeing. An equal

[162] Agenda 21, (n.125). paras 9.11, 18.76, 36.5(a)
[163] Johannesburg Declaration (n.127), Preamble para 2, para 26; The Future we want (n.136) paras.6, 7, 8.
[164] A.Sen & S.Anand (n.86), 3-6.

opportunity to wellbeing seems then to be contingent on the one hand upon a good institutional setup that creates the conditions for a fair system of social cooperation over time among citizens and from one generation to the other. On the other hand, it depends also on the availability and actually the fair distribution of the necessary means such as income and wealth that enable people to exercise their freedoms and pursue their own goals within the given social structures.[165] The former concerns institutions that form the basic structure of a functioning society and are important for social cooperation. Hence, the framework for the exercise of civil and political liberties under the rule of law, including freedom of conscience, speech, association and participation as exemplified by effective citizen involvement in democratic processes and decision-making and by the institutions' capacity to deliver on the outcomes of participation constitute this category.[166] These liberties should be accorded to everyone because individuals are fundamentally equal. Thus, fairness in the processes of social cooperation through which individuals aim to lead decent lives resides in an equality-based thesis whereby everyone has the same rights and everyone's liberties are valued equitably under a society's organizational system.[167] Likewise, the equality baseline applies to the distribution of all goods in a society that are useful and necessary for individuals to fulfill as free humans their societal roles. Such goods include income, wealth and the opportunities for personal activity (for instance, to undertake positions of authority and responsibility), which should be distributed in a way that is to everyone's advantage. That is not to say that everyone gets the same share. Different circumstances such as personal abilities and talents will influence the outcome of the distribution. However, the latter should happen under conditions of fair equality of opportunity, namely that everyone should have a fair chance to attain these goods under society's basic institutions, so that even the least privileged in a society improve their status of wellbeing. The objective is substantive equality

[165] G E.Henderson, 'Rawls and Sustainable Development' (2011-12) 7(1) McGill International Journal of Sustainable Development Law and Policy 1. The analysis here draws on Rawls's theory of justice because it can address the intergenerational aspect of sustainable development in the best way and also shows how the realisation of development relies on the existence of a functioning and just institutional order, which has been highlighted during the UN summits on development. Also, I find that this part of his theory is in harmony with the human development paradigm because it does not promote a utilitarian approach to wellbeing that suggests that generations in the future are as well off as current in terms of capital, natural and human-produced [a utilitarian approach would require to spread happiness/utility to the greatest degree and to the maximum of people, implying thus the necessity of maximisation of wealth indefinitely]. Rather, Rawls emphasises the institutional aspect of development, the establishment and maintenance of just institutions, which does not necessarily hinge upon economic growth. Consequently, he provides an alternative to the growth model of development and creates the circumstances for the realisation of human wellbeing understood as enlarging peoples choices to pursue there own conception of good life. Finally, sustainability can be conceptualised as a normative endpoint, which I explain in the next paragraphs.

[166] WCED (n.112), 65.

[167] Rawls's Theory of justice, first principle: *"Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all"*

among different groups and individuals that is served at most when structural inequalities are removed and the means to achieve wellbeing are distributed justly and fairly.[168] Sustainable development enunciates the above characteristics being a call to share the capacity for wellbeing among contemporaries and between present and future generations. Justice in the institutional processes that allow everyone to exercise their rights and in the distribution of material goods and opportunities is therefore instrumental for determining the substantive element of the concept in an intra-generational and inter-generational context.

The next thing to study is what the values of universality, equity and justice dictate for the process whereby the three dimensions of sustainable development are to be reconciled. It was already mentioned that by acknowledging an ethical foundation of sustainable development, we accept that the notion represents a moral value system that like any system of values that sets standards for human behavior, it governs development stakeholders' conduct. Indeed, it can be inferred that on the basis of universality and justice with equity the realization of generations' claim to wellbeing unfolds around three organizing dimensions[169]: (i) satisfying human needs in line with the human-development theory, (ii) ensuring social equity and (iii) respecting environmental limits. The three are truly even in importance and enjoy a normative status stemming from their direct appeal to the normativity that universality and justice have as moral values. Consequently, they constitute an objective moral threshold for the integration of socioeconomic and environmental aspects of development. Stakeholders' conduct therefore takes place in a framework of choices that is determined by "ethical objectivism", meaning that the process of giving effect to sustainable development's substantive part is not prescribed by their own evaluation about how to achieve it but is

[168] Rawls's second principle of justice which should satisfy two conditions: socioeconomic inequalities are permissible if a) they are attached to offices and positions open to all under conditions of fair equality of opportunity (fair equality of opportunity principle) and b) are to the greatest benefit of the least-advantaged members of society (the difference principle) <https://plato.stanford.edu/entries/rawls/#TwoGuiIdeJusFai>

[169] K.Murphy, 'The Social Pillar of Sustainable Development: A Literature Review and Framework for Policy Analysis' (2014) 15(1) The ITB Journal 29, 35. The author proposes four organising dimensions: equity, awareness for sustainability, participation and social cohesion in his effort to determine the social pillar of sustainable development. A number of more specific policy objectives derive from these broad classifications, such as providing for basic material needs, access to welfare services, engaged governance etc. (33-34). Even though the classifications are different and referred to as social policy concepts, they correspond to what universality and justice advocate for, although the author doesn't mention them. Hence they should not be narrowly determined as characteristics of the social pillar of sustainable development only but they pertain to the whole concept. Furthermore, they can be considered normative standards instead of policy concepts given that policies should uphold these dimensions when determining the more specific objectives. In fact, it is through these normative standards that a synthesis of policy objectives is facilitated and sustainable development's inter-pillar links are realized.

bound by the three specific objectives of needs, equity and environmental limits that cannot be trespassed. In fact, they pose categorical constraints on them.[170]

Ultimately, universality, justice and equity regulate stakeholders' actions primarily by imposing normative imperatives that set the evaluative space within which development policies and projects should be designed.[171] Having said that, these moral imperatives do not give effect to a specific sustainable policy or outcome. Their observance actually operationalizes the ethical responsibility to sustainability. While sustainability has been defined as an obligation to protect and enhance the wellbeing of generations by disseminating and preserving a specific kind of capital, whether simply in the form of environmental resources or as a total stock of natural, physical and human capital (including renewable and non-renewable resources, infrastructure, knowledge, technological capacity etc.),[172] it is better if it is addressed from a normative perspective. Indeed, sustainability is an exemplification of a commitment to equity (intra- and intergenerational) that is inherent to the morals of social justice and universality and characterizes the relationship between individuals within the same generation and with the next ones. Hence, it should be construed as a general duty to afford individuals within and between generations the entitlement of access to the same opportunity to fulfill their legitimate aspirations for a better life in dignity[173] and functions as the principled basis on which the outcome of stakeholders' projects is assessed. Sustainability is therefore the normative endpoint of the observance of the three moral imperatives in development projects that stakeholders should aim at and differs from sustainable development, which is the process whereby to achieve it.

This understanding of sustainability assimilates the human development approach in the most optimal way too. First of all, it brings about the qualitative dimension of the development process because it practically reaffirms that the purpose of development is to

---

[170] E.Holden et al. (n.160)

[171] Id, 214. Policies will satisfy the substantive element of sustainable development so long as they are not in conflict with the normative constraints.

[172] SAnand, A.Sen (n.86), 27-28; A.Chandani (n.147), 160 who discusses sustainability purely from an environmental perspective and mentions strong (current generations should leave to future ones the same environmental resources it has inherited) and weak sustainability (due to distributive justice between generations, each one should pass onto the next an equivalent or better total stock of overall resources). As she argues though, the preferred option would be a position situated between these two renditions, ensuring that we leave to future generations the same opportunities we currently enjoy.

[173] Id; UNDP, *Human Development Report 1994* (OUP 1994), 13: 'Human development and sustainability are thus essential components of the same ethic of universalism of life claims. There is no tension between the two concepts, for they are a part of the same overall design. In such a conceptual framework, sustainability is, in a very broad sense, a matter of distributional equity-of sharing development opportunities between present and future generations. There would, however, be something distinctly odd if we were deeply concerned for the wellbeing of future-as yet unborn-generations while ignoring the plight of the poor today. The ethic of universalism clearly demands both intragenerational equity and intergenerational equity'.

create the enabling environment in which all people can expand their capabilities. The end of development is human wellbeing that is accomplished by reserving for everyone the ability to achieve basic functionings such as to lead a healthy live, be educated, well-nourished etc., and more complex such as political/public participation in the community, and reserving the freedom to choose and make use of these functionings according to what they have reason to value. The universal claim for a decent life rests therefore in the values of individual freedom that reserves for humans an active role in the process. Indeed, human agency is the cornerstone of human development.[174]

Secondly, sustainability encompasses a temporal parameter due to the equal attention that needs to be paid to the lives of people between periods of time. Hence the said purpose of development should be maintained if opportunities for a worthwhile life are to be made available.[175] In this respect, one can read an obligation to apply the qualitative dimension of development to the level of society in order to maintain its "capabilities" to address individuals' universal claim to a dignified life. The latter is not simply a matter of individual effort but it is realized also through institutions whose structures need to be adjusted as necessary. Human development's rationale is instrumental in this case because it sets human wellbeing as the operational value of these institutions too, pointing to the fact that the human dimension of development has a collective outlook in addition to the individual. Thereafter, the mechanisms of domestic and global governance and the markets would have to take note of all the important characteristics of human living, of opportunities and situations of deprivation and tackle systemic challenges that would otherwise be left unaddressed. Human wellbeing becomes the *desideratum* of a collective process of change at the national and international level that endows multiple stakeholders (governments, local communities, international organizations, non-governmental institutions etc.) with the responsibility to act in partnership in order to provide the key services that generate opportunities for wellbeing within the evaluative space of needs, equity and environmental limits described above.

[174] A.Sen, 'Capability and well-being' (n.77).
[175] UNDP 1994 (n.173), 13: 'The purpose of development is to create an environment in which all people can expand their capabilities, and opportunities can be enlarged for both present and future generations'.

iii. Reasoning on the Normativity of values and the holistic Concept of Sustainable Human Development

How does recourse to the aforementioned values and human development alters the understanding of sustainable development? First and foremost, such understanding builds on the same evaluative conception of development that was introduced by the human development approach and underlined ever since the definition of development, that being development that is predicated on the enhancement of human freedoms and capabilities and which is now applied at present and in the future. On this basis, Sen's stipulation that sustainable development is 'development that prompts the capabilities of present people without compromising the capabilities of future generations'[176] looks particularly appealing because it points to the human dimension of development and makes explicit what was only implied in the Brundtland definition despite the commission's reference to humans' legitimate aspirations for an improved quality of life. It is true that such a definition is also abstract but reflects in the best way that sustainable development purports to a wider net of results in the economic, social and environmental field that are integrally connected with the enhancement of human capabilities, mainstreaming in the international development discourse the perspective of *sustainable human development*. Just like human development professed development outcomes beyond the economic outputs of growth, so too sustainable human development embodies a development process that 'seeks to expand choices for all people while protecting the natural systems on which all life depends, eliminating poverty, promoting human dignity and rights, and providing equitable opportunities for all through good governance [and just institutions]'.[177] The human dimension of development becomes the evaluative standard against which the integration of the three pillars of sustainable development should be measured, removing furthermore the uncertainty about the optimal way to effectuate it and balance the interests and rights between generations. As mentioned earlier in the section, how the consolidation/integration of sustainable development's three pillars should take place is part of the procedural facet of the definition, which actually reflects an ideology of aspired political, social and economic changes in a society. By establishing the link between sustainable development and the endorsed-by-consensus by the international community normative standards of human development, universality, equity and justice, each of the three pillars that comprise the substantive aspect of sustainable

[176] A.Sen, 'The Ends and Means of Sustainability' (2013) 14(1) Journal of Human Development and Capabilities: a Multidisciplinary Journal for People-Centred Development 6, 11.
[177] M.C.Cordonier Segger, A.Khalfan (eds), *Sustainable Development Law* (OUP 2011), 4.

development is juxtaposed with the normative claim to a worthwhile life and its key non-negotiable components of needs, social equity and environmental limits which can be thought of as three normative pillars. The concept therefore becomes normatively prescriptive and in fact the discussion about having multiple conceptions of it gains less importance since the integration of the economic, social and environmental elements portrays a specific normative assessment of the changes that have to take place in order to build societies in which all needs are met and opportunities are made available and preserved for the future.

Having said that, the qualification of sustainable development as a value of the international community in the same way the concept of development was considered appears a justifiable correlation. Sustainable development's foundation on moral values with normative ramifications makes the notion an action-oriented normative concept that enunciates the international community's shared perception of the preferable world and directs its decision-making processes in the field. The only point of difference lies in the fact that it is an integrating concept and has therefore advanced the value of development to an even more comprehensive notion. In fact, the evolution of the content of development reveals two things about global values: a) they are relative as concepts; they only suggest favorable, not ideal, conditions for the state of the world; and b) the discourse on them is enduring, bringing changes to their features over time except for one element: the source of their content continues to be found in the common interests of all human beings.[178] This is all the more evident in the case of the value of development, for which a global consensus on its meaning, as it has thus far been indicated, lies at the intersection of political compromises and philosophical debates about a global ethic.

With that in mind, what is an appropriate definition of sustainable development? Sustainable development could be defined as *a comprehensive and integrated economic, social, cultural, political and environmental process, which aims at the constant improvement of the wellbeing of the entire population and of all individuals in present and future generations on the basis of their active, free and meaningful participation in development and the fair distribution of benefits resulting therefrom, including the sustainable use of natural resources of the earth and the protection of the environment on which nature and human life as well as social and economic development depend.*[179] Again,

[178] O.Spijkers, (n.95), Chapter II, 15-16

[179] ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development (2 April 2002), (2002) 2 Politics, Law & Economics 211, 212: 'The objective of sustainable development involves a comprehensive and integrated approach to economic, social and political processes, which aims at the sustainable use of natural resources of the Earth and the protection of the environment on which nature and human life as well as social and economic development depend and which seeks to realize the right of all human

one could contend for a different formulation, hence the proposed one is not put forward as authoritative. However, I believe it possesses certain strengths in order to be considered as a working definition because it depicts sustainable development's normative end and how it translates into concrete outcomes. Specifically, the definition sets definitely human wellbeing as the ultimate objective of the development process and refers to all aspects of development that constitute its organic elements. It is well consolidated therefore that the process of development has a human dimension, which is multifaceted and requires a holistic approach in order to be implemented. More importantly, the characteristics of the human development approach, namely individual freedom, agency and participation but also fairness and justice feature more prominently, making explicit the role of human development as the means and the end of the development process. In other words one can find in the said definition both the three pillars of the substantive aspect of sustainable development and the core attributes of its procedural aspect, giving thus a comprehensive statement of the exact meaning of the concept.

A definition in which all the composites of the value of sustainable development, practical and normative, are found is particularly important when examining sustainable development's normative proposition in policy and its bindingness in law for states and institutions because the interplay of the substantive and procedural elements of sustainable development is more evident and functions thus as a clear signpost for the establishment of the intersections among the legal rules and policies arising in the economic, social and environmental field per se and the duties – responsibilities that derive therefrom for states and institutions that are all the more so assigned with a responsibility to implement those obligations in this framework. How the value of sustainable development fares in policy and what the potential of law is in expressing its content in the language of legal norms will constitute the themes of the next chapters in an effort to prove that sustainable development has gained ground as a principle of the international order.

---

beings to an adequate living standard on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom, with due regard to the needs and interests of future generations'. The ILA refers to the *right* of adequate standard of living, shedding light to the relevance of the concept in law.

2.3 IN CONCLUSION

The chapter discussed the notion of development. It demonstrated how the notion evolved into a normative concept and a value of the international community around which the institutional machinery for international assistance and inter-organizational cooperation was established.

The main approaches to development can be classified in three broad categories. First, the welfare approach that dominated the first decades after the War until the end of 1980s. In sum, the hypothesis during the described period of time was that the welfare of societies would be accomplished through increased income and economic growth despite the changing theoretical approach to how this would be achieved. The wealth of a state was the indication for its development status. The second category emerged from a people-centered development approach; hence, between the 1990s and the new Millennium the UN bodies and the IFIs designed development strategies on the common acceptance that development encompassed a comprehensive economic but also social, cultural and political process aiming at the constant improvement of the wellbeing of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom. It was a process infused by the values of human dignity, universality, equity, justice and fairness, resonating in the UN Charter and human rights. In practice, the direct correlation between the objectives of development and human rights led to the DRtD and the Millennium Declaration. Both were deemed to serve as the "cradle" for a rights-based approach to development that has remained a constant force in the continuous talks about development, although success records when it comes to on-the-ground implementation are uneven.

Finally, the nucleus of the third approach to development is the notion of sustainability. When first conceptualized, it was mainly understood from an environmental perspective However, over the course of the development debate, it was informed by the human development hypothesis and the latter's associated values to denote a general duty to afford individuals within and between generations the entitlement of access to the same opportunity to fulfill their legitimate aspirations for a better life in dignity. Consequently, the notion reaffirms the purpose of the development process in creating an enabling environment for people to improve their wellbeing and maintaining it through time so that the needs of current and future generations are met. In that respect, development also conveys something about the capacity of economic, political, social and environmental systems that provide the circumstances for that wellbeing at the domestic and international level. How to achieve

sustainable (human) development that integrates the aforementioned pillars and realises the right of individuals for an improved standard of living with due regard to their agency constitutes the very essence of the current discourse. It is a task that requires a normative assessment of the changes that need to take place in the international rules and policies arising in the economic, social and environmental fields and a re-evaluation of the responsibilities that derive therefrom for States as well as for an expanding network of actors in development governance.

CHAPTER 3
FROM THE THEORY TO THE PRACTICE OF INTERNATIONAL DEVELOPMENT

3.1. SUSTAINABLE DEVELOPMENT IN POLICY

3.1.1.International Development Policy through Goal-setting

a. Global Goals as Tools of Development Policy and Governance

Against the background of the multiple UN summits about sustainable development and the optimal way to integrate its three dimensions, it was recognised that implementation and mainstreaming of sustainable development in the UN's development agenda could be pursued more effectively with the development of goals.[180] As such, structuring development policies around goals did not constitute a novelty at all. On the contrary, it is recorded as a usual practice of the international community. Goals have been featuring sporadically in conference declarations during the course of all preceding development decades.[181] It is true though that the MDGs constitute the most successful example for the additional reason that their making was carried out in a systematic way compared to the scattered approach to goal-setting taken until then. Given the importance the international community ascribes to goals for development agendas it is worth looking briefly into their nature as instruments for cooperation in policy as well as the processes that lead up to them since this will reveal, on the one hand, the attributes for which goals are deemed effective for international development strategies and on the other, it will contribute to a better understanding of the manner in which they define concepts – in this case, the concept of sustainable development – and influence development stakeholders' decision-making and behaviour in the same context.

Development agendas that are presented in the UN declarations frame the global social situation in the language of norms and values. Recall the earlier comment about (sustainable) development being an action-oriented normative concept that represents the international community's understanding of the preferred circumstances for human wellbeing based on globally acceptable moral values. Within that framework, the challenges in development and the necessary actions in order to address them are couched in ethical principles that by definition prescribe what ought to be done in the abstract. Consequently, the content of UN resolutions is given in a descriptive manner, outlining the multifaceted concept of

[180] *The Future we* want (n. 136), 245-246.
[181] R.Jolly, 'Global Development Goals: the United Nations Experience' (2004) 5(1) Journal of Human Development 69.

development and the international community's steps to achieve it in qualitative terms. Notwithstanding the dynamic that recourse to fundamental universal values has for coiling development stakeholders around a common purpose, little does it help on-the-ground implementation of such declaratory programmes of action for development that require concrete deliverables. For the latter to be successful two things are of paramount importance: first, a clear understanding on behalf of policy makers and other actors of what the declarations prescribe from the viewpoint of practice. In other words, what the global policy priorities are. Once these are communicated successfully to stakeholders, the second need is to align their action with those priorities. Such task presupposes the designation of specific outcomes with which the actions will be juxtaposed. Furthermore, given the global nature of development agendas, the juxtaposition should be based on universally applicable standards that function also as evaluative measures for assessing stakeholders' performance.[182]

Goals as policy tools have certain advantages that may serve both of these purposes. They comprise of numeric indicators that, it is claimed, are objective criteria for setting standards and allowing comparisons of progress in the prescribed policy field. Indeed, the ability of indicators to capture in numerical form complex phenomena, therefore presenting them in a simpler way, builds on the assumption that numbers convey always a clear, self-explanatory, and universal meaning. That is because indicators are perceived to emerge from readily applied scientific knowledge. The analytical techniques of experts used to produce and promulgate them tend to lend them scientific authority, validation, credibility and legitimacy, which increase the wider the scientific support for indicators and, ultimately, their public endorsement become through their adoption by public/private networks of actors and institutions. These factors create the appearance of objective (impartial) science that standardises information and makes it easier to draw comparisons. By implication, broad development objectives described in the declarations can be turned into tangible targets that are presented in a simplified manner and become more convincing as achievable results.[183] Due to their specificity, goals and targets are moreover more comprehensible by stakeholders and can be used as an advocacy tool to popularise the content of the agenda they reflect, mobilise action and advance a consensus about the means of implementation since it becomes easier to reach an agreement on budgets, resource allocation and the responsibilities each

[182] UNGA, 'Road map towards the implementation of the United Nations Millennium Declaration, Report of the Secretary-General' (6 September 2001) UN Doc A/56/326 Annex at 3 [*Road map*]: 'To help focus national and international priority-setting, goals and targets should be limited in number, be stable over time and communicate clearly to a broad audience'.

[183] S.Fukuda-Parr, 'Global Goals as a Policy Tool: Intended and Unintended Consequences' (2014) 15(2-3) Journal of Human Development and Capabilities 118, 119-121.

stakeholder has to undertake.[184] Through simplification and specification, goals have the potential to trigger systematic action on development, creating thus a narrative of development planning attached to concrete results and commitments from all involved actors.

Well-defined goals have an additional value. Serving as the common denominator of stakeholders' behavior they establish a regulatory framework for benchmarking stakeholders' efficiency and effectiveness towards the realization of their common development aims. At the framework's core lie periodic review processes, whereby development actors' decision-making and practices are scrutinized with the purpose to draw conclusions about country-level and international trends of progress (or not) in the development field and to perform an accountability-check regarding stakeholders' activities and the derived results.[185] Ultimately, these processes have a reformative effect in the way international development matters are managed, for they create an integrated system of rules that structure the behavior of actors vis-à-vis the collective development problems.[186] In light of the described managerial consequence, goals constitute a useful governance mechanism for realizing the international community's vision for development because by regulating the relations among development actors on the basis of their policies, they reinforce the international community's values and influence the way institutions function and exercise their power in the pursuit of such normative ends as (sustainable) development.[187]

Yet, one ought also to be alert to the more profound implications the use of goals has for the exercise and distribution of power in development governance. The elaboration of a measurement system for development objectives is highly challenging. Measurement in general is not a purely scientific and technical exercise; the methods and instruments employed test in practice 'norms, values and power structures that underline ideas of what is being measured, why and by whom'.[188] Indicators that are used as evaluative standards have implicitly embedded in them a normative judgment regarding what lies at the core of the social phenomenon they depict and what the process is to bring about targeted solutions in order to reach the optimum, often ideal, state of society. As K.Davis et al explain, indicators

[184] J.C.Dernbach, 'Targets, Timetables and Effective Implementing Mechanisms: Necessary Building Blocks for Sustainable Development' (2002) 27 William and Mary Environmental Law & Policy Review 79, 99: 'Goals become the basis around which budgets are developed and implemented; personnel are hired and allocated; programs are created, modified, or harmonised; and rewards and punishments are meted out'.
[185] *Road map*, (n.182) Annex at 4; A.B.Zampetti, 'Entrenching Sustainable Human Development in the Design of the Global Agenda after 2015' (2015) 43(3) *Denver Journal of International Law & Policy* 277, 282-284.
[186] G. M.Hodgson, 'On defining institutions: rules versus equilibria' (2015) 11(3) *Journal of Institutional Economics* 497.
[187] A.B.Zampetti (n.185).
[188] László Pintér, Marcel Kok, Dora Almassy, 'Measuring Progress in Achieving the Sustainable Development Goals' in Norichika Kanie, Frank Biermann (eds), *Governing through Goals: Sustainable Development Goals as Governance Innovation* (MIT Press 2017) 100.

are ‘markers of larger policy ideas. They may measure “success” directly along this axis, or they may measure what, from the standpoint of the theory or policy idea, are pathologies or problems to overcome. More frequently they address simply some measurable elements within a wider scenario envisaged by the theory or policy idea’.[189] It is thus this implicit ideology that prompts the selection of a said indicator over another and more generally the collection, organisation and classification of information into indicators. Eventually indicators are shaped by the identity, motivations, knowledge and experience of those who create them.[190] On the other hand, the identity and interests of the various audiences to which indicators appeal are equally influential in the way indicators are interpreted and used.[191] Often the focus turns to the indicator itself, a practice that conceals a comprehensive consideration of the qualities it measures, its underpinning assumptions, the sources of the data collection and sometimes the original purpose for its compilation. Consequently, indicators may be easily re-framed and transposed to conceptually different contexts in order to lend authority to decision-making.[192] As they acquire new meanings and find new applications, they become authoritative in their own right shaping thereafter actors’ conduct and instructing policy reforms as autonomous normative tools. Against this background, the objectivity of indicators and the determining effect of measurement on achieving normatively-laden policy commitments should not be taken at face value; they depend on whether their conceptual foundation matches the theoretical claims of the latter and on the degree of robustness the data collection process presents.

Considerations such the above are very relevant in the context of international development and have spearheaded the argumentation of more moderate voices regarding the advantageous attributes of goals as tools of governance for development issues.[193] Appraisal of the success of goals and indicators in driving policy interventions as well as account of

[189] K.Davis et al, ‘Introduction: Global Governance by Indicators’ in Kevin E.Davis, Angelina Fisher, Benedict Kingsbury and Sally Engle Merry (eds), *Governance by Indicators: Global Power through Quantification and Rankings* (OUP 2012) 9-10.

[190] Terence C.Halliday, ‘Legal Yardsticks: International Financial Institutions as Diagnosticians and Designers of the Laws of Nations’ in K.E.Davis et al (eds) supra, who remarks that ‘the use of indicators for law reforms are embedded within the politics of IFIs, reflect epistemological and status struggles among competing professions and competition among IFIs in their struggles for centrality or survival’, 215-216.

[191] Wendy Nelson Espeland and Michael Sauder, ‘The Dynamism of Indicators’ discussing educational rankings in K.E.Davis et al (n 189) 86-87, 96-100;

[192] W.Nelson et al supra, 92-95; Katharina Pistor, ‘Re-Construction of Private Indicators for Public Purposes’ in K.E.Davis et al (n 189) explaining how indicators produced to capture the investment climate in a country and assess risks for foreign investors were used by the World Bank for greater policy reforms during the Washington Consensus.

[193] Sumayyah Abdul Aziz et al, ‘A Critical Analysis of Development Indices’ (2015) 1(1) Australian Journal of Sustainable Business and Society, stating that development indices are criticised for poor data, incorrect choice of indicators, consider few dimensions of the concept of development and specify development frameworks poorly.

their overall effectiveness are given in the following section that discusses the MDGs agenda, which is considered the "archetype" for achieving development through goals.

b. The example of the Millennium Development Goals and a Critique of Goals' Overall Effectiveness for Planning and Governing Development Affairs

The MDGs were destined to echo the international community's noble call for the creation of a global environment in which the human person is situated at the center of concerns for social and economic progress.[194] The Millennium Declaration epitomized the UN's Development Agenda,[195] mapping out concisely the wide-ranging commitments of the international community to address conditions of adversity at the country, regional and individual level in order to increase capacity for all to contribute to the spread and growth of human well-being in all its dimensions. This quest had a constitutional nuance as the Declaration reinvigorated the UN's ethical framework set out in the Charter, reaffirming in addition to the already-mentioned founding UN values, the relevance of core human rights and their principles to development. On this footing, the Declaration's objectives carried a strong normative underpinning and while this was bold enough to remind governments and all parts of the UN system, including the IFIs, of their mutual responsibilities for inducing the human ends of development policies, there was still need to consolidate these objectives into a practically implementable construction and to communicate them lucidly to a broader audience.[196]

The MDGs agenda served the latter purpose by introducing clear, concise and time-bound goals that were linked to specific numerical targets and indicators, hence they were actionable and measurable. Rightly, to describe, for example, eradication of extreme poverty and hunger in terms of halving between 1990 and 2015 the proportion of people whose income is less than $1/day (MDG1 Target 1) and who suffer from hunger (MDG1 Target 2) or to say that during the same period of time the under-five child mortality rate should be reduced by two-thirds (MDG4 Target 5) and that the proportion of people without sustainable access to safe drinking water and basic sanitation should be halved by 2015 (MDG7 Target10) instead of referring broadly to reducing child mortality rates and ensuring

[194] K.A.Annan, 'We the Peoples', The Role of the United Nations in the 21st Century' (2000) UN Department of Public Information <http://www.un.org/en/events/pastevents/pdfs/We_The_Peoples.pdf> accessed 4 March 2016.
[195] UN DESA, *The United Nations Development Agenda: Development for All – Goals, commitments and strategies agreed at the UN world conferences and summits since 1990*, UN publication Sales No. E. 07.1.17 2007.
[196] *Road Map* (n.182), Annex §3

environmental sustainability respectively, highlights the priorities in each category of development challenges and speaks to on-the ground implementation.[197]

Indeed, exemplifying the problem of multidimensional poverty, i.e. its material (e.g. lack of income, food and sanitation, health diseases and environmental sustainability) and non-material elements (such as gender inequalities, social inclusion, just economic and financing system etc.) in terms of real situational problems drew attention to these matters and raised awareness about the broader picture in development. Political leaders used the MDGs as a medium to demonstrate leadership and advocate for social reforms domestically; countries applying to IFIs like the IMF included and transposed the MDGs as national targets in their national planning framework for development, the so-called Poverty Reduction Strategy Papers (PRSPs);[198] private sector businesses and civil society groups adopted eradication of poverty as their common cause with the latter using the MDGs also as a means to pursue criticism on stakeholders for not delivering on budget and institutional reforms that promoted the Goals.[199] Most importantly, the fact that the Goals were considered a dynamic scheme that was embedded in the mandates of different actors is evidenced in the broad coalitions and capacity building of key national and international constituencies that evolved under the aegis of the UN Millennium Campaign[200] and the UN Millennium Project,[201] which were exclusively commissioned to support the implementation of the MDGs. These specialized mechanisms opened the floor for concerted consultations among a great network of development practitioners, over the course of which governmental policy-makers, representatives of international financial institutions, UN agencies and to an extent the private sector provided an action plan that embodied practical investment strategies to achieve the MDGs and an operational outline to monitor progress.[202] The MDGs movement became, thus, institutionalized and development planning was reshaped too. Certainly, the conversion of global goals into sensible outcomes for individuals and the launch of a core package of

---

[197] ibid.

[198] S.Fukuda-Parr, 'Are the MDGs Priority in Development Strategies and aid Programs? Only few are!', International Poverty Centre Working Paper No.48 (UNDP 2008), who nevertheless criticizes this practice.

[199] R.Manning, 'Using Indicators to Encourage Development-Lessons from the Millennium Development Goals' (2009) Danish Institute for International Studies Report 2009:01 <https://www.oecd.org/site/progresskorea/44117550.pdf> accessed 17 March 2016.

[200] *United Nations Millennium Campaign* <http://www.millenniumcampaign.org/> accessed id.

[201] *United Nations Millennium Project* <http://www.unmillenniumproject.org/> accessed id.

[202] ibid. Also *Road Map* (n.182), Annex §4. Cooperation on development was established further in the 'Monterrey Consensus': *UN Report of the International Conference on Financing for Development, Monterrey-Mexico, 18-22 March 2002*, A/CONF.197/11, UN Publications Sales No. E.02.II.A.7 and *Monterrey Consensus of the International Conference on Financing for Development – Final Texts and Agreements Adopted at the Conference on Financing for Development, Monterrey-Mexico, 18-22 March 2002*, UN Publications, New York 2003; DESA, *Financing for Development* <http://www.un.org/esa/ffd/overview/monterrey-conference.html> accessed 19 May 2017.

wide-ranging interventions to accomplish them contributed to the setup of an intensively coordinated and results-oriented model for international development, which until then the international community lacked.[203] The newfangled 'institutional apparatus'[204] featured now concrete outputs and informed decision-making by countries and supervisory bodies, favoring at the same time political accountability and social feedback. Consequently, it constituted a robust operational platform at the service of the MDGs and UN's Development Agenda in general.

The MDGs inaugurated, therefore, a shift in global development, becoming the stepping-stone for a development policy that rests on systematic and versatile international cooperation to boost global transformation and uses evaluation standards to measure its efficiency in triggering societal change. Therefore, they clearly functioned as performance standards for international and national bodies being the universal benchmark against which progress on development was assessed. Their governance and advocacy effects were also obvious because they tailored the design and execution of development policies towards issues that really mattered, redefining also the purpose and mission of development stakeholders, which in turn streamlined their operations in light of mutual aims. The positive outcomes demonstrated in the final Millennium Development Report[205] prove in fact the Goals' contribution 'to free men, women and children from the abject and dehumanizing conditions of extreme poverty'.[206] Indicatively, global poverty declined since the proportion of people living in extreme poverty had been reduced by more than fifty percent since 1990;[207] the

[203] C.Dunning, M.Elgin-Cossart, 'Can the SDGs Really 'Leave No One Behind'?' (*Centre for Global Development*, 7 January 2015) <http://www.cgdev.org/blog/can-sdgs-really-leave-no-one-behind> accessed 21 March 2016.

[204] P.Alston, 'Ships passing in the Night: the Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals', (2005) 27(3) Human Rights Quarterly 755.

[205] DESA, The Millennium Development Goals Report 2015 <http://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20(July%201).pdf> MDGs Report 2015) accessed 19 May 2017; X.Li, 'Soft Law-making on Development: The Millennium Development Goals and Post-2015 Development Agenda' (2013) 10(3) Manchester Journal of International Economic Law 362, 372-375.

[206] *Millennium Declaration* (n.92).

[207] MDGs Report 2015 (n 205) 15. However, Pogge expresses his scepticism about the ambition of MDG1: firstly, the goal's reference to reducing the 'proportion' of population of people experiencing hunger and living in extreme poverty is less ambitious than halving the 'number' of people in this situation, as expressed in the declaration of the World Food Summit in 1996, considering also the estimated population growth for the years 2000-2015; secondly, the reference year of 1990 means greater population growth, thus less reduction to the actual number of the poor to achieve the 50% reduction in the proportion of the population living in extreme poverty; thirdly, the WB's problematic method in producing poverty data (e.g. the low benchmark of $1/day for the poverty line, the conversion of this amount into other currencies using PPP conversion factors). He also notes that extreme poverty could have been eliminated before 2015 at a cost barely felt by developed countries and discusses how the problem is augmented by the severe (and rising) inequalities between developed and developing states which is reinforced through, inter alia, the advantageous to the former of the global economic and institutional order. T.Pogge, 'The First United Nations Millennium Development Goal: a Cause for Celebration?' (2004) 5(3) Journal of Human Development 377.

number of out-of school children in primary education fell by almost half since 2010; similarly, the gender gap in youth literacy had been narrowed,[208] an indication that gender equality and women's empowerment drew considerable attention within the MDGs framework. Corroborative to this are other achievements such as the increase in the percentage of women being active in the labor market and politically represented in parliaments[209] and the improvement in women's access to reproductive and maternal health care. However, this was not an unqualified success.[210] It was acknowledged that the goal's breadth and ambitions had not been matched and success in the future required renewed efforts to mobilize financial flows, enhance the integration of developing countries in the multilateral trading system and build their capacity to harness the benefits of technology.[211]

The MDGs had in reality mixed records in the areas they covered.[212] As their uneven results toned-down their success, it was inevitable that the goals' capability to shape development policies through the abovementioned positive attributes would be questioned. The question may have been probed by the fact that the goals themselves were not met, but the inquiry was more profound since the 'MDGs were not just numerical targets that had to be hit; they enshrined [or were supposed to] principles based on human rights, equity and justice'[213] and were underscored by the normative framework of the Millennium Declaration. Their fragmented outcomes, therefore, cast doubt over their instrumentality in effectuating the Declaration's scope. At the core of the criticism sits the proposition that the reason for their piecemeal upshots lies in their making, which was a process dominated by the fermentation of ideas about development, state politics and the objectives of different development organizations in an open-ended process of formatting global public policy. Over the long haul, the idea of human development was blended with a managerial tactic to form a strategy that captured a spectrum of the multi-dimensional problem of poverty but widely offered the probability of tangible results, whereby the world's leaders could maintain a political advantage, aid organizations could regain their purpose and civil society could be comforted by the reporting on progress towards a kind of development that aspired to dissolve the uneven spread of prosperity in the world.[214] The interaction of these parameters,

[208] MDGs Report 2015 (n 206) 5 & 27.
[209] ibid, 28-31.
[210] ibid., 15 & 26, 31, 43 (indicatively).
[211] ibid, 68.
[212] ibid., 15, 26, 31, 43, 64, 66, 68.
[213] K.Watkins, *The Millennium Development Goals: Three Proposals for renewing the Vision and Reshaping the Future* (UNESCO 2008), 5
[214] D.Hulme, 'MDGs: a Short History' (n 88) 43-48. On the managerial tactic, A.Binnendijk, 'Results-based Management in the Development Cooperation Agencies: A Review of Experience' (2001) DAC Working Party

while being the motive force for a consensus on the MDGs' content, caused simultaneously fragmentation in their formulation that challenged the goals' success at three different tiers: a) their conceptualization and execution, b) country ownership and c) equity and the neglect of human rights.[215]

The problems at the level of conceptualization and execution have a cause and effect relation and are strongly associated with the extent to which the theories of human development and results-based management (as the strategy to improve agencies' performance was termed)[216] infused the thinking behind the MDGs. 'Human development' provided development talks with a robust context that brought to the forefront the multi-dimensional nature of poverty eradication and called for a holistic approach to the matter. In that respect the goals were interdependent and interrelated, creating synergies among the competent national and international development bodies in order to deliver programs that would not only lead to the individual implementation of the goals but would simultaneously boost standards across all development sectors. By way of example, reducing income poverty would allow access to education for more children and encourage daily attendance and learning achievements. Besides, it would improve nutrition and people's ability to pay for health care, not to mention the benefits for women's health and wellbeing, which would enable them further to establish their status in the society and participate in its political and economic life.[217] These mutually reinforcing links among development goals were the fundamental part of development strategies that had their foundational basis on human development and as such were supposed to pursue not just the means but also the objective of a spirited development vision through an integrated method.[218]

However, results-based management had a much more direct impact on the making of the goals and triumphed over its ideational counterpart. Its 'common-sense nature and linearity'[219] were the tenets that in effect specified the goals and narrowed down the scope of the development agenda to quantifiable proposals that were built around targets and indicators. Based on this premise, an aspired-to-be inclusive action plan for development was converted into a minimalist or incomplete agenda that didn't capture the breadth of the objectives enclosed in the Millennium Declaration nor did it empower the nexuses between

---

on Aid Evaluation, 3-4 <https://www.oecd.org/development/evaluation/dcdndep/31950852.pdf> accessed 18 March 2016.

[215] J.Waage et al., (n.76) 996-1007.

[216] A.Binnebdijk Annette, *Results-based Management in the Development Cooperation Agencies* (n 214).

[217] Jeff Waage et al (n.76) 1000.

[218] David Hulme, 'Governing Global Poverty: Global Ambivalence and the Millennium Development Goals' in Clapp, J & Wilkinson R. (eds.), *Global Governance, Poverty and Inequality* (Routledge 2010) 135-161.

[219] ibid.

aims in the same or different development field.[220] For all the value that can be found in measuring and monitoring performance through indicators, the focus on the latter undermines the complexity of the targets themselves and the quantitative nature of the development progress overall, not least since – as the word implies – they are meant to be indicative of progress and not divert efforts towards their fulfillment in their own right. It arises then that in the structure of such a results-oriented system the execution of the goals is overly reliant on the precision, accuracy and relevance of the targets and indicators and becomes susceptible to their weaknesses: quite often data, based on which indicators are defined, are either not available or of poor quality. In turn, indicators cannot be measured systematically causing complications at the target level, mainly due to the targets' vagueness and lack of implementation mechanisms. Ultimately, this leads to a very narrow understanding of a respective goal, thus to non-inclusive and small-scale policies that give piecemeal solutions.[221]

Questions around the ownership of the goals emanate from the ex-post evaluation of their actual impact on national development strategies and donors' practices in their effort to substantiate their promise for partnership. Regarding the former, the crux of the matter lies primarily in the relevance MDG priorities and targets found in the PRSPs and therefore, their perception as national targets. One would logically expect that given the universal political consensus on the Goals, PRSPs would include the whole spectrum of the MDGs and reflect an individual country's strong commitment to their implementation. Contrary to these expectations, not only were the Goals picked upon selectively by policymakers but a discrepancy concerning the degree of implementation was also noted, even among those goals that constituted priority areas.[222] The misapprehension that the MDGs, which were targets set at the global level, should be transposed effectively into domestic jurisdictions unchanged and successfully bring about the desired outcomes on the global scale provides an explanation. However, without taking into consideration local circumstances and the differences of technical and financial potentiality among countries, the goals were stripped of country-specific pragmatism.[223] As a consequence, there was a mismatch with the particular

[220] ibid.
[221] Jeff Waage et al (n.76) 997.
[222] Sakiko Fukuda-Parr, 'Are the MDGs Priority' (n 198).
[223] J.Vandemoortele, 'The MDGs: 'M' for Misunderstood?' (*WIDERAngle*, 2007) <https://www.wider.unu.edu/publication/mdgs-'m'-misunderstood> accessed 19 May 2017: '[…]the global MDG targets must be tailored to make them context-sensitive—which is essential for generating a sense of national ownership. Global targets are meant to encourage countries to strive for accelerated progress. Their applicability, however, can only be tested and judged against what is realistically achievable under country-

development situation of countries and preoccupation with the goals was either downgraded to a typical mention in the reporting process of monitoring progress on the MDGs or the goals were instrumentalised by countries to attract donor resources for governmental aims that were simply easier to achieve,[224] a tactic that casts doubts as to whether the MDGs were translated from 'consensus objectives' to 'planning targets' that would actually encourage development in line with national priorities.[225]

The problem of ownership by the international community is directly linked to the process that led to the formulation of the MDGs described briefly. The involvement of so many organizations in the identification of the goals and targets, while desirable and positive, crafted a complex institutional structure that comprised of UN agencies, funds, multilateral and bilateral donor organizations[226] each of which asserted competence either on the whole of a goal or on its specific targets. Compartmentalization of key responsibilities was an unavoidable consequence of this complexity and rendered the coordination of activities difficult, in particular because of ambiguity as to which of them should take leadership in the implementation of the respective goal.[227] Thus being the situation, the accomplishment of the MDGs was constrained by the absence of a clear action plan with defined duties and obligations for every actor. Lack of leadership resulted essentially in lack of accountability[228] of the institutions charged with the realization of the MDG agenda and weakened also the relationships with civil society organizations and other public and private entities that agreed to work together on the goals and the development process in general.[229] Against this background, the international community's ambition to bolster global partnership in the identified key sectors for development pursuant to MDG8 was threatened by fragmentation

---

specific circumstances. To be meaningful, national targets require adaptation; not a mindless adoption of global targets[…]'.

[224] For example, targets concerned with the empowerment of the most vulnerable groups such as gender violence or women's empowerment and political representation were neglected. S.Fukuda-Parr, 'Reducing Inequality – the Missing MDG: A Content Review of PRSPs and bilateral Donor Policy Statements' (2010) 41(1) Institute of Development Studies Bulletin 26.

[225] Sakiko Fukuda-Parr, 'Are the MDGs Priority' (n.198), Section 2.2 'The Instrumentality of the MDGs', 3. The author distinguishes between three functional uses of global goals: as consensus objectives, monitoring benchmarks and as planning targets.

[226] For a list of the UN's Fund, Programs and specialised agencies (UN) <http://www.un.org/en/sections/about-un/funds-programmes-specialized-agencies-and-others/ > accessed 19 May 2017; for indicative list of bilateral donors see *Canadian Trade Commissioner Service* <http://tradecommissioner.gc.ca/development-developpement/bilateral-agencies-organismes-bilateraux.aspx?lang=eng > accessed same date.

[227] Example of MDG4 &5 (Reduce child mortality & improve maternal health), mentioned in Jeff Waage et al (n.76) 1002-1003.

[228] OHCHR, 'Who will be accountable? Human Rights and the Post-2015 Development Agenda' (2013) HR/PUB/13/1 <https://www.ohchr.org/Documents/Publications/WhoWillBeAccountable.pdf> accessed 19 May 2017; V.Ginneken, 'Social protection, the Millennium Development Goals and Human Rights' (2011) 42(6) Institute of Development Studies Bulletin 111.

[229] UNGA Res A/RES/60/215, 'Towards Global Partnerships' (29 March 2006) 3, point 2 &3.

as policy coherence was hindered by the ad hoc nature of the cooperation between stakeholders and their focus mostly on short-term issues rather than the promotion of systemic change.[230]

The challenge to the MDGs' success at the fourth tier, equity, is a corollary to the problems at the level of conceptualization, which led to a very narrow understanding of the goals and delinked them from the core objectives of the Millennium Declaration and the UN's development agenda. What comprised the essence of the latter were human development and a wider share of the benefits of economic globalization between and within countries. Although the ideology of neoliberalism remained untangled,[231] the content and character of the agenda was permeated by the values of human freedom, dignity, solidarity and tolerance. A concern for equity and equality of all persons was also present.[232] In the context of development, equity finds application in three areas: a) equal life chances, b) equal concern for people's needs and c) meritocracy in order to 'level the playing field' for everyone.[233] Equality, on the other hand, is concerned with the distribution of goods or outcomes, requiring that people receive equal amounts.[234] It aims to promote fairness so long as everyone starts from the same place and is offered the same aid.[235] However, both concepts have built-in the notion of universality, which presupposes that the benefits of a policy reach out to all people, not just particular groups or a proportion of certain groups. The wellbeing of a society as a whole should be maximized. This element was absent in the

---

[230] Global partnership for development in MDG8 included targets on aid, trade, debt relief and improved access to essential medicines and new technologies. After the Monterrey Consensus (n.202), States incorporated resource mobilisation, global governance and policy coherence: UN, *Johannesburg Declaration on Sustainable Development and Plan of Implementation of the World Summit on Sustainable Development: The Final Text of Agreements Negotiated by Governments at the World Summit on Sustainable Development, 26 August-4 September 2002*, Johannesburg, South Africa, United Nations Department of Public Information, 2003. Also UN System Task Team on the Post-2015 UN Development Agenda, 'A Renewed Global Partnership for Development – Frequently Asked Questions' <http://www.un.org/en/development/desa/policy/untaskteam_undf/faqs.pdf > accessed 19 May 2017.

[231] See, Saith's criticism that the Monterrey Consensus embedded MDGs' implementation within the mainstream neoliberal strategic and policy framework, Ashwani Saith, 'From Universal Values to Millennium Development Goals: Lost in Translation' (2006) 37(6) Development and Change 1167, 1170; Margot E.Salomon, 'Poverty, Privilege and International Law: The Millennium Development Goals and the Guise of Humanitarianism' (2008) German Yearbook of International Law 30, 46-47: MDGs do not challenge the neoliberal means to reduce poverty through alternative models and leave structural causes of poverty such as the international trade and investment system unaddressed.

[232] Jose Antonio Ocampo, *The United Nations Development Agenda: Development for all,* UN Department of Economic and Social Affairs (UN Publications 2007) iii.

[233] H.Jones, 'Equity in Development – Why it is important and how to achieve it' (2009) ODI Working Paper No.311, 3-7 <https://cdn.odi.org/media/documents/4577.pdf>. Equity stems from the idea of 'moral equality, namely the principle that people in a society should be treated as equals because they share a common humanity or human dignity. It is a normative concept and is concerned with equality, fairness and social justice'.)

[234] ibid, 9.

[235] Carolyn Solomon-Pryce, 'Is Equity the same as Equality?' (*LSE Equity, Diversity and Inclusion Taskforce*, 9 December 2015) <http://blogs.lse.ac.uk/equityDiversityInclusion/2015/12/is-equity-the-same-as-equality/> accessed 19 May 2017.

formulation of the MDGs given that the targets were framed in a way that optimized the living conditions for some, by and large in poor countries, rather than ameliorating the gap between wealthy and poor people within and between countries.[236] Hence, they were not relevant to rich countries, which supported the process through finance and technology transfer. But their implementation in developing countries was problematic too. The goals' minimalistic approach – the focus was on the attainment of *minimum* levels of economic and social goods for the respective target groups – did not redress unfair social constructions beyond the line of minimum adequacy. That meant that hardship would be sustained, albeit at lower levels and one could plausibly argue that it could also be deemed acceptable[237] since 'basic needs' as an absolute minimum of goods would be enjoyed. However, equity is concerned with relative distribution in society of things that are not only 'needed' for people but constitute a prerequisite for their full participation in society.[238] As the MDGs were constructed, concentrating on improving poverty levels on average and to a minimum standard, they did not take account of the particularities of certain groups (such as the worst off amongst the poor) nor did they give everyone the means to become agents of their own development.[239] Reducing inequity was the MDGs' 'missing target'.[240]

The exclusion of equity and equality from the agenda stressed yet another dimension of the MDGs' critique that validated even more the argument that the Goals moved away from the spirit of the Millennium Declaration and the human development approach: the neglect of

[236] Jeff Waage et al (n.76) 1005-1007; A.Saith (n 231) 1184-86 also highlights the lack of reference to redistribution of income and assets (such as land), the concealment of the relationship between economies in the North and the South and how the MDGs were not global at all but directed to Third World countries.
[237] A.Saith (n 231), 1196 '[M]eeting the MDGs […] is to be a parallel process, comfortable and compatible with stabilizing the ongoing and unmoderated processes of neoliberal globalization. Indeed, the poor are increasingly viewed as the last unconquered market, and making poverty reduction profitable is an emerging dictum in the design and practice of public-private partnerships for sustainable pro-poor development'.
[238] H.Jones (n.233) 6 incl. ftn 6.
[239] The MDGs framework was critiqued for not taking a pro-poor approach, J.Vandemoortele, 'The MDGs and Pro-Poor Policies: Related but not synonymous', (2004) UNDP International Poverty Centre Working Paper No.3 <https://www.researchgate.net/publication/5129024_THE_MDGs_AND_PRO-POOR_POLICIESRELATED_BUT_NOT_SYNONYMOUS> accessed 20 May 2017 and for their disguise of humanitarianism, M.E.Salomon, 'Poverty, Privilege and International Law' (n 230) 57-64. Leaving the rules of the international economic order intact continues to favor policies that are not to the common benefit of all countries but in fact advance the interests of the powerful states, thus undermining the sincerity of partnerships for development under the aspiration MDG 8 and violating the socioeconomic human rights of the poor given states' obligation to avoid policies that adversely impact the rights of people outside their territory and to contribute to the realization of these rights through their duty to cooperate as members of the international community. As the author remarks, the MDGs were an annex to the economic project of neoliberalism (71-72); M.Fehling, et al, 'Limitations of the Millennium Development goals: a literature Review' (2013) 8(10) Global Public Health 1109, section 2 (incl.citations).
[240] Sakiko Fukuda-Parr, 'Reducing Inequality' (n.224).

human rights.[241] The MDGs' relationship with human rights has not been clear-cut. The most optimistic view sees the MDGs initiative as 'reflecting a human rights agenda'[242] and 'the strategies to realize human rights and the MDGs as reinforcing and complementing each other'.[243] However, a mere statement on the mutually reinforcing relationship between the MDGs and human rights does not necessarily presuppose that human rights norms and processes permeated the MDGs initiative in substance. Indeed the human rights criticism against the MDGs suggest that the goals aimed at realizing aspects of what would correspond to the social and economic rights of people but they did not clearly match the states' commitments under the relevant international human rights treaties, let alone that they excluded civil and political rights.[244] Human rights strengthen the moral and legal force behind universality, equity and justice and provide a benchmark of clearly defined entitlements, duties and responsibilities that should be integrated into plans, policies and processes of development as well, if real standards of achievement were to be attained; they encompass a commitment for comprehensive solutions given the indivisibility and interdependence of civil, political and socioeconomic rights and are complemented by well-developed mechanisms that ensure the respect, protection and fulfillment of rights and provide for remedies in cases of violations.[245]

That being the case, the MDGs sought to improve the environment for people to better their living standards but did not posit a normative basis for this. By contrast, human rights, which also seek to create the circumstances for people to develop to their fullest potential, do so by 'offering a value system, a legal framework and monitoring mechanisms'.[246] A rights-based approach to the MDGs would necessitate a transformation of the national and international institutions and practices that force people into a cycle of deprivation so that human dignity is ensured and equal opportunities are promoted for all.[247] In this context also,

---

[241] UN System Task Team on the Post-2015 UN Development Agenda, 'Review of the Contributions of the MDG Agenda to foster development: Lessons for the Post-2015 UN development Agenda' (2012) Discussion Note, 12 <https://sustainabledevelopment.un.org/content/documents/843taskteam.pdf> accessed 19 May 2017.

[242] UNDP, *Human Development Report 2003,* 29 <http://hdr.undp.org/sites/default/files/reports/264/hdr_2003_en_complete.pdf > accessed 21 May 2017.

[243] OHCHR, 'Report to ECOSOC' (2002) U.N. Doc. E/2002/68, 'Mutually reinforcing goals', 3 <http://www.un.org/documents/ecosoc/docs/2002/e2002-68.pdf>

[244] E.g. the goal on education focused on primary education instead of capturing the full spectrum of the right to education under Art.13 ICESCR. Such approach is even contrary to human rights; UN System Task Team (n.238); HRC, Consolidation of Findings of the High-level Task Force on the Implementation of the Right to Development (25 March 2010) UN Doc. A/HRC/15/WG.2/TF/2/Add.1, paras 65–66.

[245] Ellen Dorsey et al, 'Falling Short of our Goals: Transforming the Millennium Development Goals into Millennium Development Rights' (2010) 28(4) Netherlands Quarterly of Human Rights 516.

[246] OHCHR Report (n 241) 4.

[247] S. P.Marks, 'The Human Rights Framework to Development: Seven Approaches', 23-60 in B.Mushumi, et al (eds.), *Reflections on the Right to Development* (Sage 2005).

participation of the most vulnerable communities in designing and implementing development strategies that was missing from the MDGs does not merely constitute a technocratic component to the success of development projects by simply denoting the necessity for consultative mechanisms and community inputs in bringing about development outputs. Rather, it becomes a normative principle, which acquires specificity by being juxtaposed to objectives and fixed standards set in international human rights treaties such as the right to political participation or freedom of expression and association.[248] Similarly, accountability for the realization of the MDGs, seen from a rights-based perspective, would be applied as a principle of international law. As such, national human rights institutiosn and international human rights monitoring bodies could contribute to the realization of MDGs when reviewing states compliance with human rights treaties as part of an overall system of monitorin, holding them answerable for fulfilling their pledges to the poor.[249] All things considered, one can infer that a rights language would give a forceful impetus to the MDGs, converting the socioeconomic issues they address into rights with a clearly defined scope and content that raise specific commitments on behalf of states which should be fulfilled at least to a minimum core.[250] Unfortunately, as much as the human rights dogma underlined UN proclamations about the purpose of development, it faded away during deliberations on the MDGs. As a result, the two paradigms pointed to different directions in terms of strategy and design, despite their shared concern to advance the dignity, wellbeing and freedom of individuals in general. The potential to supplement each other fruitfully and facilitate in practical ways their shared concern was real, but could only be realized though their integration.[251] Nevertheless, such a synergy was not contemplated.

[248] Other rights would be the right to information and assembly as enshrined in the UDHR and the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171, the rule of law and good governance, P.Alston (n.204), 782, 811. A.Saith (n 231) 1187 mentions the silence of the MDGs on the democratisation of decision-making at international organisations and the fact that the voices of the poor in such process is not heard.

[249] Alston (n 204) 813 onwards.

[250] CESCR, 'General Comment No. 3' (14 December 1990) UN Doc E/1991/23, para 10.

[251] UNDP, *Human Development Report 2000*, 19 <http://hdr.undp.org/sites/default/files/reports/261/hdr_2000_en.pdf> accessed 19 May 2017. Alston (n 204) offers a critical analysis on the MDGs/human-rights divide, arguing that the lip service paid to one another was reciprocal since reference to the MDGs within the human rights system was also not systematic (761) and 'the human rights community has itself shown a significant degree of obstinacy when it comes to making the necessary outreach to endure that its own agenda is effectively promoted within the context of the international community's development agenda', 827.

On the basis of the MDGs' drawbacks it can plausibly be argued that goals have a dual effect as tools in development policy.[252] In stark comparison to their use in describing a social objective with simplicity and introducing a regulatory order for stakeholders, the flip side is the reductionism of abstract concepts and values such as the concept of development and the foundational values of the UN respectively in their conversion into a concrete universal message. In the hypostatization of the latter they disentangle the concept of development as a comprehensive *process* of economic, social, cultural and political nature from its embedded theoretical framework and the goals become norms in their own right. Consequently, the notion of development is re-conceptualized based on what constitutes the content of the goals, acquiring thus a more constricted meaning. In the MDGs' case, development was identified with poverty eradication, and even then, in the one-sided understanding as material deprivation. Human development, let alone a human rights lens to development were sidelined. De-contextualizing goals from their normative frame distorts moreover development priorities at the national level for the reason that development strategies are manipulated by data availability and measurability whereas important development challenges are put on the margins. The ramifications of the goals' downsides are of paramount consideration on the international stage too because they affect the nature of development actors' obligations and their individual accountability. In the absence of a robust theoretic framework, their actions are untied from norm-creating values, which renders the correlation between them and the derived duties loose. Hence, their legitimacy as governing institutions may be questioned since they are provided with a leeway to circumscribe their responsibility for their conduct in relation to development issues. This matter will be looked into in the context of the SDGs agenda where the normative impact of sustainable development on stakeholders' obligations under the Agenda will be examined. Due to the focus of the thesis on IFIs, particular interest will be shown in how they have assimilated sustainable development's normativity in their role to finance Agenda 2030. Previously, we must look at whether the theoretical and practical tenets of sustainable development (in the way they have been defined herein) have been included in the agenda, examining as well whether the risk of the described negative consequences of goals is still present.

[252] S.Fukuda-Parr, 'Global Goals as a Policy Tool' (n.183). About common pitfalls of goal setting at the international level, O.R.Young, 'Conceptualisation: Goal setting as a Strategy for Earth System Governance' in N.Kanie et al, (n.15), 35.

3.1.2. Agenda 2030: The Sustainable Development Goals

a. The normative and practical elements of Sustainable Development in the Agenda

With the experience of the MDGs in mind, a goal-setting process was launched at the Rio Conference in 2012. The specific mandate to form the new set of goals was assigned to an Open Working Group (OWG) under the auspices of the UN Secretary-General and in open consultation with governments, civil society, the scientific community, representatives from the business sector and the UN system in general.[253] The new goals would be action-oriented, concise, limited in number but global in nature and universally applicable to all countries without prejudice to the development particularities and capabilities of each country. In terms of content, they would reflect the conclusions of preceding summits, predominantly Agenda 21, the JPOI and the Rio Principles, addressing the three-dimensional nature of development and the interlinkages of its three pillars.[254] Hence, the new scheme of goals appeared to be more comprehensive and responsive to the new development challenges that had been identified meanwhile. In addition, its content was largely influenced by broader topics such as the connection between development and peaceful societies, good governance, human rights, the rule of law over which several studies on the post-2015 development agenda deliberated.[255] Of course, the principles of equity, equality, non-discrimination and inclusion continued to be highlighted as a key prerequisite for what would be again a people-centred development agenda[256] in accordance with the UN Charter, the UDHR and other human rights treaties that seemed to be the direct source of the goals legitimacy.[257] Hence, the goals were organised around the rudiments of human dignity, economic prosperity, the planet, peace, security and justice. Global partnership would again play a catalytic role for the realisation of the goals, being extended to clusters among the UN system, national public and

---

[253] *The Future we want,* (n.136) paras 248-249; Report of Secretary-General, 'A life of dignity for all: accelerating progress towards the Millennium Development Goals and advancing the UN development Agenda beyond 2015' (26th July 2013) UN Doc A/68/202, 37(b)-(g).

[254] *The Future we want,* (n.136), paras 246-247.

[255] *A life of dignity for all (*n.220); Sustainable Development Solution Networks, 'An Action Agenda for Sustainable Development: Report for the UN Secretary-General' (June 2013) <https://unstats.un.org/unsd/broaderprogress/pdf/130613-SDSN-An-Action-Agenda-for-Sustainable-Development-FINAL.pdf>; High Level Panel on Eminent Persons on a Post-2015 Development Agenda, 'A New Global Partnership: Eradicate Poverty and Transform Economies through Sustainable Development' (May 2013) <https://sustainabledevelopment.un.org/content/documents/8932013-05%20-%20HLP%20Report%20-%20A%20New%20Global%20Partnership.pdf>; E.Solheim, 'Development Cooperation Report 2013: Ending Poverty' (2013) <http://www.oecd-ilibrary.org/docserver/download/4313111e.pdf?expires=1521481533&id=id&accname=guest&checksum=4DADD8F66F295E40D12A3344AA8A953C> all accessed 19 March 2018.

[256] UN Secretary-General, 'The Road to Dignity by 2030: Ending Poverty, Transforming All Lives and Protecting the Planet' (4 December 2014) UN Doc A/69/700;*The Future we want* (n.136) para 8.

[257] *The Future we want* (n.136) paras 5-9.

private entities and civil society and facilitated through the mobilisation of a wide range of resources from financial to knowledge and technical expertise in order to stimulate innovation and capacity-building for the implementation of the agenda.

The OWG's proposal comprised of seventeen SDGs and 169 targets,[258] which would be 'further elaborated through indicators focused on measurable outcomes'.[259] The list was finalised and incorporated into 'Agenda 2030 for Sustainable Development', adopted by the UN in September 2015 by virtue of GA Resolution A/Res/70/1.[260] They read in thematic titles:[261] i) No Poverty (SDG1), ii) Zero Hunger (SDG2), iii) Good Health and Wellbeing (SDG3), iv) Quality Education (SDG4), v) Gender Equality (SDG5), vi) Clean Water and Sanitation (SDG6), vii) Affordable and Clean Energy (SDG7), viii) Decent Work and Economic Growth (SDG8), ix) Industry Innovation and Infrastructure (SDG9), x) Reduced Inequalities (SDG10), xi) Sustainable Cities and Communities (SDG11), xii) Responsible consumption and Production (SDG12), xiii) Climate Action (SDG13), xiv) Life below Water (SDG14), xv) Life on Land (SDG15), xvi) Peace, Justice and strong Institutions (SDG16), xvii) Partnerships for the Goals (SDG17).

A first read of the goals even by title confirms the bold character of this new action plan for the people and the planet. Not only do the SDGs address issues that the MDGs did not touch on but also even those that are repeated portray a more spherical approach. An obvious example is SDG1, whereby all forms of deprivation and exclusion from the economic and other resources that contribute to an improved living standard are promoted, wherever they occur.[262] By the same token, SDG5 calls for an end in all forms of discrimination and exploitation against women/girls (incl. trafficking, child marriage and female genital mutilation) – concerns that MDG3-target did not explicitly consider.[263] SDG3 sets more precise targets for reducing maternal and child mortality and tackles health issues expansively (e.g. family planning, universal health coverage, support of research for medicines and vaccines for diseases)[264] compared to MDGs4-6. Last but not least, SDG4 includes secondary and tertiary education and lifelong learning in contrast to MDG2 on universal primary education only whereas environmental issues extend in three goals

[258] OWG Proposal for Sustainable Development Goals <https://sustainabledevelopment.un.org/content/documents/1579SDGs%20Proposal.pdf> accessed 19 March 2018; Report of the Open Working Group of the General Assembly on Sustainable Development Goals (12 August 2014) UN Doc. A/68/970 (OWG Report).
[259] OWG Report, para18.
[260] UNGA Res 70/1 (25 September 2015) UN Doc A/Res/70/1 (*Agenda 2030*)
[261] ibid.
[262] ibid, SDG1 all Targets.
[263] ibid., SDG 5, Targets 5.1 – 5.3.
[264] ibid, SDG 3, Targets 3.1-3.2, 3.7, 3.8, 3.9b.

(SDG13-15) compared to their epigrammatic inclusion in MDG7. In other parts the text of the UN Resolution elaborates on the significance of institutional and security aspects: democracy, good governance and the rule of law are deemed essential for creating the enabling environment at the national and international levels that permits the full realisation of human potential and contributes to shared prosperity.[265] As it is affirmed 'sustainable development cannot be realised without peace and security and peace and security will be at risk without sustainable development'.[266] Hence, the Resolution endorses the multifaceted nature of sustainable development adopted at the major international conferences and summits. In this way, the SDGs pledge to complete the MDGs unfinished business and more: they seek to remedy the frustration with the reductionism of the MDGs and to reflect universality, a quality feature that differentiates them from the MDGs which were goals designed by development policy officials for developing countries. The SDGs are concerned with the global wellbeing and capture its multidimensional nature thanks to the participatory and transparent process that preceded their adoption.[267]. The pledge to 'leave no one behind'[268] captures this fundamental in the best possible way. Whereas the intention to remedy the MDGs' non-universal impact on the most marginalised and disadvantaged groups is mostly recognisable in this exhortation, the latter is elevated as a 'fundamental guiding principle for the SDGs implementation' in whole since it is placed in the preamble (§2). Therefore, the pledge finds expression not solely in the components of certain SDGs that address specifically 'the furthest behind'[269] but becomes relevant for the realization of the aims established by every goal. In that respect it is taken into account in the making of informed policy choices and for the impact assessment of development interventions at all levels[270] as a norm against which the coherency of the agenda is tested in substance and in the execution phase.[271] Furthermore, it is not arbitrary to read into the said call the intent for equality and an account for social justice for the beneficiaries of the agenda without discrimination. In turn, this means addressing the underlying causes of inequality be they geography-, ethnicity-, gender related or structural.[272] For instance, the targets that tackle

[265] ibid, paras 8-9, 17.
[266] ibid., Preamble under 'People', para 35.
[267] ibid, para 6; Ved P. Nanda (n.126), 406.
[268] ibid., para 4.
[269] ibid, e.g. targets 2.3, 8.5, 8.8
[270] ibid, para 74.
[271] G.Long, 'Underpinning Commitments of the Sustainable Development Goals: indivisibility, universality, leaving no one behind' in D.French et al (n.15). The author also provides an excellent critical appreciation of the exhortation in light of the ambiguities and contradictions within the SDGs agenda, 110-115.
[272] N.Kabeer, 'Can the MDGs provide a pathway to social justice? The Challenge of intersecting inequalities' (2010) IDS, MDG Achievement Fund

work related entitlements such as labor rights and wage policies aimed at greater equality, relative poverty and the gender gap or those directed to increasing developing countries' representation in global institutions and reregulating financial markets are indicative examples aimed at fulfilling the promulgation that through the goals the international community seeks to ensure human beings can fulfill their potential in dignity and equality, with justice and absent discrimination.[273]

Furthermore, the wide spectrum of issues covered by the goals is provenly of concern and relevance to all countries, albeit to varying degrees. It is difficult to deny social and economic disparities within developed and developing states and their perpetuation onto future generations if not adequately addressed. Hence the so-called 'zero-based' targets aimed at 'eliminating' socioeconomic gaps (e.g. target 5.2 'eliminate violence against women') or 'ensuring for all' entitlements of economic or social nature (e.g. target 4.2 'ensure that all girls and boys have access to quality early childhood development') are directly applicable to all countries. In fact, they are the 'epitome of universality; since the same goal applies to everyone, they set one benchmark for all and look past potential bases for discrimination'.[274] Yet even for those that seek to phase out discrepancies by proportional reductions there is ground for implementation everywhere (e.g. target 3.4 referring to the promotion of mental health and well-being is relevant in developed economies too). Likewise concerted action should be taken against the drastic effects of climate change on biodiversity and the environment that should be protected as global natural commons. All in all, the SDGs reflect the understanding of development as a continuum that interconnects rather than dichotomizes countries between developed and developing by capturing issues that involve the entire world and requesting that 'all countries change with a sense of the global common good'.[275] Consequently, they are indeed universal because their scope extends to all, guiding or constraining state and non-state actors in their actions apropos explicated deliverables and

---

<http://www.mdgfund.org/sites/default/files/MDGs_and_Inequalities_Final_Report.pdf> accessed 7 October 2021.

[273] However, H.Weber, 'Politics of "Leaving No One Behind": Contesting the 2030 Sustainable Development Goals Agenda' (2017) 14(3*)* Globalisations 399 who argues that the explicit commitment to 'leave no one behind' is a discourse that is strategically deployed to justify the implementation of a highly problematic political project as the framework of global development which reflects contesting policies that can be highly exclusionary and unjust, 409. See also below about the non-transformative nature of some SDGs.

[274] G.Long, 'The Idea of Universality in the Sustainable Development Goals' (2015) 29(2) Ethics & International Affairs 203, 213.

[275] *Road to Dignity by 2030* (n.256); UNEP, OHCHR, 'Universality in the Post-2015 Sustainable Development Agenda' (2015), para 3 <https://www.ohchr.org/Documents/Issues/MDGs/Post2015/OHCHR_UNEP.pdf> accessed 20 May 2017.

commitments that should be met and upheld for everyone pursuant to the people-centered character of the agenda.[276]

Nonetheless, universality should not be confused with unvaried application of the agenda. The SDGs framework is accepted by all countries and applicable to all, taking into account different country realities, capacities, development state and respective national priorities.[277] As a result, the scope of the goals is adjusted to country specific circumstances. Accordingly, states are given certain leeway to design and implement their policies for poverty eradication and sustainable development. At first glance state-level differentiation is justified by the unalike levels of development of each country and does not contradict the SDGs' universality of application. On the contrary, it denotes that the SDGs are not a 'one-size-fits-all' framework. Problems arise if state discretion results in piecemeal solutions, an opportunistic selectivity regarding what will be prioritized and a lesser degree of accomplishment that undermines the universality of the goals' content and accelerated progress towards them at the global level. An understanding of national differentiation in this manner misinterprets its validity and purpose in the agenda. For what is put forward with this proviso is not a differentiation at the target level but an account for a qualification of the extent of responsibilities that each country bears for the realization of the agenda as whole, the content (i.e. targets) and application of which remain universal. States have *common* responsibility to uphold the global goals but nevertheless *differentiated* due to historical reasons and differing resource bases.[278] That does not alter the applicability of the content of the agenda. Rather it links the universality of the goals application with a demand for just burden sharing; and the latter is expressed through a modified assignment of responsibility.[279] It is true that the SDGs do not allocate duties explicitly but fairness in the application of the agenda can lead to 'win-win' cooperation and mutual benefits in the framework of the revitalized global partnership to which states commit for the implementation of the agenda in a spirit of global solidarity.[280]

The SDGs therefore are indeed wider in scope and are ambitious in guiding development efforts post-2015 for sustainable improvements in human wellbeing. From their listing it is apparent that they capture the practical elements of sustainable development, i.e. its economic, social and environmental pillars, the consolidation of which corresponds to the

[276] G.Long, 'The Idea of Universality' (n.274).
[277] *Agenda 2030* (n.260) at 5.
[278] A.Leong, 'The pursuit of universality' (2015) 11(1) Mother Pelican <http://www.pelicanweb.org/solisustv11n01page4.html> accessed 25 May 2017.
[279] G.Long, (n.247), *Agenda 2030* (n.244) para 12. For the principle of 'Common but differentiated Responsibilities', Rio Declaration (n.127), Principle 7; Ch.Stone, 'Common but Differentiated Responsibilities in International Law' (2004) 98(2) American Journal of International Law 276.
[280] *Agenda 2030* (n.260) paras 18,39. For critique, G.Long, 'Underpinning Commitments' (n.271), 104.

concept's substantive aspect. The text of the UN Resolution itself backs this observation when it mentions explicitly in the preamble that the goals are integrated and indivisible and balance the three dimensions of sustainable development.[281] The same is repeated in the second introductory paragraph of the incorporated declaration as the international community's commitment to achieving sustainable development in its three dimensions.[282] Furthermore, the aim of the new agenda is elaborated in the subsequent paragraphs where the interplay between the three pillars is better elucidated. Point 13 of the Declaration is representative with the characteristic wording that 'sustainable development recognizes that eradicating poverty in all its forms and dimensions, combating inequality within and among countries, preserving the planet, creating sustained, inclusive and sustainable economic growth and fostering social inclusion are linked to each other and are interdependent'.[283]

Yet, the document should be taken into account as a whole in order to discern the constituent elements of the pillars in their entirety. Scepticism has overshadowed the Goals' dynamic. The reasons are more profound than their complexity and the difficulty to communicate such wide-ranging commitments to stakeholders or the public in general.[284] The critique contends that the SDGs represent nothing less than a 'development as usual' model.[285] That is, the acclaimed change they aim for is not grounded on a radical restructuring of the world economic system and its wealth-extracting mechanisms that have constantly been blamed for perpetuating global poverty and inequality.[286] In fact, the power relationships between countries in crafting the world's poor-rich divide are sustained. The main argument in support of this thesis lies in the prevalence of economic growth within the SDGs framework as the tool to eradicate poverty. SDG8 speaks clearly about the promotion of economic growth in terms of GDP and the invigoration of national financial institutions to expand access to financial services for all. Strikingly, the desired growth rate for least developed countries is 7 percent GDP/year. However, the relationship between growth and poverty reduction is contradictory.[287] Data by the WB show global growth has been increasing year after year reaching 3 percent GDP in 2017 with growth in emerging markets

[281] *Agenda 2030* (n.60), para. 3.
[282] ibid, para 2.
[283] ibid, para 13.
[284] Jaakko Kuosmanen, 'SDGs – A Beacon of Light or another Stumble in Global Governance?' (Oxford Human Rights Hub, 26 September 2015) <http://ohrh.law.ox.ac.uk/ sustainable-development-goals-a-beacon-of-light-or-another-stumble-in-global-governance/> accessed 19 March 2018.
[285] ibid.
[286] IngaT.Winkler, Margaret Satterthwaite,'Leaving no one behind? Persistent inequalities in the SDGs' (2017) 13 The International Journal of Human Rights 1073.
[287] For a critique, F.Seatzu, K.Akestoridi, 'SDG8: Promote Sustained, Inclusive and Sustainable Economic Growth, Full and Productive Employment and Decent Work for All' in I.Bantekas, F.Seatzu, K.Akestoridi (eds), *Oxford Commentary on the Sustainable Development Goals* (OUP forthcoming).

and developing economies scaling up to 4.3 percent.[288] Yet, only a fraction of the wealth generated benefits the poor. Hickel reports that between 1999-2008, only 5 percent of income generated by global GDP growth was received by the poorest 60 percent. At such ratio, it will take more than 200 years to eliminate poverty whereas the economy will have grown by 175 times.[289] Hickel also criticizes SDG8 for lying at opposition with the environmental sustainability objectives of the SDGs; 'even growth at 3% makes it impossible to reduce resource use and carbon emissions enough to stay within the 2°C warming limits'.[290] How, thus, can one make the case that growth should be 'sustained', as SDG8 proclaims? Kallis asserts that instead of aiming for economic growth, the SDGs should aim at building upon advances in the field of 'sustainable degrowth' which acknowledges the limits of the earth's systems to cope with continued growth, the inability of technological efficiency to meet growing demands, and the need to 'down-shift' sustainably to reduce society's emissions and related use of resources.[291] The qualifications to growth – inclusive, sustainable – although seemingly progressive, do not change the fact that growth is a precondition for development. In that respect, (the human right to) decent work and full employment (SDG 8's second theme) are conditioned upon economic growth, which is inadequate and misleading given that other social elements determine the value of work.[292]

The same inferences can be drawn when looking at the inequality goal.[293] SDG 10 aspires to reduce inequality among and between countries. But, according to Alston, questions of wealth redistribution and of an international economic system that produces structural disadvantage are masked. By way of example, development stakeholders' efforts are orientated towards raising the income growth of the bottom 40 percent of the population

[288] The World Bank Group, Statistical Appendix in Global Economic Prospects: Broad-based Up- turn but for How Long?, Washington D.C. (January 2018), 233 <http://www.worldbank.org/en/ publication/global-economic-prospects#data> accessed 19 March 2018

[289] J.Hickel, 'The problem with saving the world' *Jacobin Magazine* (2015) <https://jacobin.com/2015/08/global-poverty-climate-change-sdgs/> accessed 10 June 2022; UNGA, 'The Parlous State of Poverty Eradication: Report of the special Rapporteur on extreme Poverty and Human Rights' (19 November 2020) UN Doc A/HRC/44/40, paras 65-66.

[290] J.Hickel, 'The contradiction of the sustainable development goals: Growth versus ecology on a finite planet' (2019) 27 Sustainable Development, pp. 873 ff.

[291] G. Kallis, J. Hickel, 'Is Green Growth Possible?' (2019) 25 New Political Economy 469. See also World Bank Group, *Poverty and Shared Prosperity 2016: Taking On Inequality* (The World Bank 2016) 2, claiming that: '...slower growth may be offset with and even overcome by greater redistribution and narrowing of inequality'.

[292] D. F. Frey and G. MacNaughton, 'Full Employment and Decent Work in the Post 2015 Development Agenda' in Noha Shawki (ed), *International Norms, Normative Change, and the UN Sustainable Development Goals* (Lexington Books 2016) 185–201, 195–6; Diane F. Frey, 'Economic growth, full employment and decent work: the means and ends in SDG 8' (2017) 21(8) The International Journal of Human Rights 1164, 1165.

[293] For a full account of SDG10, Joanna Aleria Lorenzo, 'SDG10: Reduce inequalities among and between states' in I.Bantekas et al (eds) (n 287).

without considering that attention should be diverted to the rich.[294] Analogously, targets 10.4 and 1.3 that put on the table social protection schemes as a means to reduce poverty and achieve greater equality are on the one hand vague and on the other, purport to rectify injustices through ameliorative technical policy interventions that address the needy individual or household.[295] Of course, fundamental social security benefits in the form of social protection floors provided by national social protection systems contribute to the betterment of people's wellbeing but they still satisfy the required minimum for subsistence. On this footing, policies do not radically address socio-economic injustice. The mitigating solutions they offer sustain the neoliberal model of growth instead of provoking radical alternatives to the commodification of social goods. They furthermore confine the efforts to reduce inequality to the domestic realm while marginalizing the fact that states are subordinate to the power structures of the global financial, economic and institutional order.[296] Clearly, a reading of SDGs 1.3 and 10.4 as a human right to social security, cross-fertilised with the commitment to equality of opportunity in its national and international exhortations (as a claim and duty to international cooperation) under the DRtD that in principle advocates for a transformative reform of international economic governance would not only lead to better redistributive but potentially allow for predistributive policies, changing the terms that generate and sustain suffering. The SDGs don't seem to take this bold step.[297]

Last but not least, the targets on trade are pursued under the regulatory framework of the WTO despite the declaration to endorse a universal, open and non-discriminatory multilateral trading system (SDG17.10). That means that orthodox positions on trade liberalization, including free trade agreements between individual governments and some countries, the removal of tariffs for imported goods, deregulation of the economy and the concentration of trading power to multinational corporations maintain prominence, affording developing countries no latitude in regulating their national economies according to their development needs. Therefore, developing countries are caught in a cycle of unfair competition that reduces state revenue and dismantles the societal net by giving rise to unemployment and

[294] SDG10.1; UNGA, 'The Parlous State of Poverty Eradication' (n 289) paras 41-42.
[295] This is referred as 'methodological individualism', see J.Linarelli et al (n 297) 253.
[296] How much policy space is there for the least powerful sovereign states, at least, (SDG17.15) when everything should be done 'consistent with relevant international rules and commitments' (Agenda 2030, paras 21, 63); ibid 260.
[297] On social protection in the SDGs and a critical discussion about human rights' potential to bring about transformative solutions, J.Linarelli et al, *The Misery of International Law* (OUP 2018) 226-270. UNGA, 'The parlous State of Poverty' (n 289) paras 72-74.

lower income, hence deepening the impoverishment of their people.[298] The same is to be said about the pressure inflicted on the poor countries because of their unsustainable debt stock. Target 17.4 captures the problem providing for debt financing, debt relief and restructuring. Yet, all three options constitute ways to manage existing debt and make its repayment viable; they do not lead to debt cancellation, which remains developing countries' request, especially for illegitimate debts.[299] Consequently, large amounts of domestic finances are diverted away from public spending on national economies and the welfare state since lenders' demands acquire priority. Surprisingly, developing countries pay over $1.4b/day in debt service and return over 400% in repayments compared to the sums of ODA they receive.[300] Had this money been put into strengthening the development capacity of states, they would definitely be a step forward in realizing their people's needs.

b. Ramifications for the SDGs' Legitimacy and Influence on Stakeholders' Conduct

When conditions like the above-indicated exist, it is hard to say unquestionably that the SDGs conform to the normative standards of sustainable development absolutely; hence that they project their 'full moral force and appeal',[301] especially with regards to equity and the realization of human rights. It may be that Agenda 2030 embraces the values of human dignity, universality, equity and justice by reference to the UN Charter, the UDHR, the Millennium Declaration, the DRtD, human rights treaties and the various UN conferences' outcome documents which constitute the main body of instruments that have already mapped

[298] Share the World's Resources, '10 Policies to Finance the Global Sharing Economy' in Financing the Global Sharing Economy, London October 2012, 158 <https://www.sharing.org/information-centre/reports/financing-global-sharing-economy> accessed 19 March 2018

[299] Share the World's Resources, 'Beyond the Sustainable Development Goals: Uncovering the truth about global poverty and demanding the universal realisation of Article 25' (29 September 2015) <https://www.sharing.org/information-centre/reports/beyond-sustainable-development-goals- uncovering-truth-about-global> accessed 19 March 2018.

[300] ibid.

[301] T.Pogge, M.Sengupta, 'The Sustainable Development Goals as Drafted: Nice Idea, Poor Execution' (2015) 24 Washington International Law Journal 571, 572. 576-577 (for human rights criticism), 580-584 (for inequality). About human rights in the SDGs; K.Donald, 'Winning a place for human rights in the new sustainable development agenda' (*Open Democracy*, 24 September 2015) <https://www.opendemocracy.net/openglobalrights/kate-donald/winning-place-for-human-rights-in-new-sustainable-development-agenda> accessed 19 March 2018, but 'Human Rights and Sustainable Development' (*Harvard University Press Blog*, 2 October 2015), in which it is stated that the SDGs lack a robust human rights framework <http://harvardpress.typepad.com/hup_publicity/2015/10/human-rights-and-sustainable-development-goals.html> accessed id; I. T.Winkler, C.Williams, 'The Sustainable Development Goals and Human Rights: A Critical Early Review' (2017) 21(8) The Interantional Journal of Human Rights 1023. S.Bernstein also talks about the goals normative contestation, 'The UN and the Governance of Sustainable Development Goals', 213, 216 in N.Kanie et al (n.15); A.Underdal, R. E.Kim, 'The Sustainable Development Goals and Multilateral Agreements', 253 in N.Kanie et al, (n.15) who identify a 'normative anarchy' in the SDGs, mentioning that only a few goals cut across all domains of development policy.

out normative claims in the context of development. Yet to what extent states conform to them as common higher-order principles that determine their actions in their relations to one another and as members of the international community in the framework of the SDGs' implementation is dubious. If it were the case, these values would have become 'the standards that define how rules and policies are to be made, interpreted and applied';[302] thus, international policy and rule-making would unfold around them. Rules and policies underlined by higher-order principles are coherent and enjoy enhanced legitimacy since international actors view them as stipulations with normative underpinning that ought to be observed or followed due to their moral validation and wide acceptance

However, behind the proclamations of the SDGs lie political compromises that may undermine the transformative character the agenda is claimed to have.[303] The highly participatory deliberations and final negotiation of the goals to which they owe their broad scope permitted at the same time the entry of diverse and conflicting interests of various groups – UN agencies, NGOs and civil society, businesses, and crucially international state politics. All influenced the design of the agenda, 'creating the conditions for "progressive" deadlock', as Langford puts it.[304] The trade-offs in the afore-mentioned goals of inequality or growth, for instance, are a good illustration of the admittance of certain stakeholders' proposals and showcase the conflict between developed and developing countries. Principles of universality, equity and justice, which constitute the normative origins of a distributive development model, co-exist with the higher-order principles of the international economic order – sometimes they even take second place. Still, although compromised, Agenda 2030 moves away from the MDGs' 'humanitarian cosmopolitanism' and while not made explicit or being properly addressed, it becomes apparent that the success of sustainable development rests in institutional reforms domestically and by and large at the international level. As such, the Agenda demonstrates that holistic development outcomes cannot/ought not be marginal in the norms, guidelines and regulations at the international level that comprise each one of the economic, social and environmental policy fields separately and from which certain actions by development stakeholders derive. A new approach to the processes that formulate the sectorial rules and principles under the rubrics of economy, social policy and the environment is necessitated in that those should be strengthened, harmonised and become more coherent in order to govern the intersections between the economic, social and environmental regimes

[302] T.Franck, *The Power of Legitimacy among Nations* (OUP 1990), 16 cited in A.Zampetti (n.185), 289.
[303] M.Langford, 'Lost in Transformation? The Politics of the Sustainable Development Goals' (2016) 30(2) Ethics & International Affairs 167, 168.
[304] ibid, 171.

and channel them towards sustainable outcomes.[305] Indeed, the SDGs offer the framework for cross-sectoral development planning that enjoys the support of all stakeholders involved in their making, despite their ideological differences. Insofar as institutional actors can relate to the SDGs' normative prescriptions and their pursued objectives can be grounded therein, the SDGs possess a particular discursive and institutional strength. Thanks to that, the goals can be validated as governance and advocacy tools, and gain legitimacy in setting global priorities. In turn, they enjoy 'a considerable compliance pool'. Notwithstanding the fermentation of conflicting norms, the process of SDGs' making, considered an exercise of global participatory democracy,[306] has led to a normative consensus on development that content-wise builds upon the previous intergovernmental summits from which the concept of sustainable development emerged. Truly, the understanding of sustainable development as translated in the SDGs may not be as transformative as Agenda 2030 declares. There is an understanding about the procedural and substantive elements of development in the light of 'progressive-pragmatism', i.e. the achievement of sustainable human wellbeing without straying too far from the status quo. But it is currently the best framework for development currently in place that purports to be comprehensive and legitimate. Subsequently, the degree of compliance with Agenda 2030 on behalf of international actors is augmented not solely on the grounds of a moral obligation (as one could argue about the MDGs) but because what it prescribes is normatively justified, giving rise to shared understandings of preferred courses of actions among actors and creating the expectation of commitment to them.[307] To conclude, Agenda 2030 has the potential of an instrument for advocacy, evaluation and social mobilization that is not disengaged from normativity (and could trigger consensus on the concept of sustainable development as well). On this presumption the discussion about how stakeholders' obligations are shaped under Agenda 2030 and what is the nature of sustainable development as a goal will continue below.

[305] M-C.C.Segger, A.Khalfan (eds), (n.177), 5.
[306] M.Langford, (n 303)
[307] T.Franck (n 302) 289-294.

3.1.3. Stakeholder Obligations and Accountability under Agenda 2030

3.1.3.1. The SDGs political and aspirational Character, a non-prescriptive collective Obligation to Respond and a High-Level Political Forum as the Agenda's Accountability Mechanism

By adopting the SDGs the international community aimed at establishing priorities with the intent that the goals set the ground for a comprehensive and broader agenda for sustainability and commitment for meaningful action in the long run. In that respect the SDGs purport to capture the interconnections between development-related issues and to inaugurate an integrative and systemic approach to global problems.[308] For such an ambitious proposition one would expect that clearly defined obligations for stakeholders would be a constituent element of Agenda 2030. Whereas the Agenda includes means of implementation, it is descriptive of stakeholders' contribution to deliver on them and lays more emphasis on the requirement that the UN system, governments, civil society and private sector businesses join their forces to mobilize support and resources at the national and regional level. Hence, the goals are considered more as global aspirations[309] that, nevertheless, acquire consensus over a common purpose and draw support through formal institutions for their enforcement. Their institutionalization though is not accompanied by a strong compliance mechanism, whereby actors' behavior could be assessed on the basis of explicated duties under each goal that failure to achieve them would induce actors to conformity and impose sanctions.[310] As a matter of fact the SDGs' follow-up and review mechanism, although systematic and taking place at the subnational, national, regional and global levels, is predicated only on benchmarks for progress (the global indicator framework) and evaluations are to be voluntary, state-led (undertaken by developed and developing countries alike), but also involve multiple stakeholders, including UN entities.[311]

The lack of prescriptive obligations and a robust compliance mechanism in the agenda, even though it may be seen as a hindrance to its effectiveness, is intrinsic to the defining features of goal setting as the driver for policy. Goals seek to steer behavior towards an objective and in this regard, there are certain actors assigned to work towards the goals' attainment but their actions have been formulated after procedures that aimed at generating enthusiasm, support and stimulus for the delineated outcomes; not to articulate specific rules

[308] N.Kanie et al, (n.15),12.
[309] *Agenda 2030* (n.260) para 55
[310] N.Kanie et al. (n.15), 18.
[311] *Agenda 2030* (n.260) paras 75-84.

of conduct. The latter would fall within the scope of a process that would aim at generating response to Agenda 2030 by making it the centerpiece of regulatory arrangements where rules (laws, regulations etc.) would be the source of duties for implementation and compliance. Indeed, this is an intrinsic difference between goal setting and rule making, although both prompt individual or collective behavior towards desired outcomes.[312] Due to the distinct method employed by goals to spur action, Agenda 2030 could not enshrine obligations in the sense the term would be understood in the context of a set of rules. Correspondingly, success in the implementation of the agenda becomes a task even more demanding because it is dependent on maintaining actors' dedication to it and keeping its content appealing to their programmatic strategies and mandates so that they embrace the goals as their mission and be positively situated to the establishment of partnerships that would push the goals' fulfillment[313].

In addition to goals' inherent disconnection to rules, the fact that the SDGs were the outcome of a high-level political process of negotiations and debates among head of states, economic actors and civil society should not be overlooked. Development issues are complex and most of the times politically sensitive, and like most summits leading up to the SDGs concluded with outcome documents expressing stakeholders' intentions through statements of political character, Agenda 2030 constitutes the political device by which the international community declares certain aspirations and not legally binding obligations. It is a political declaration of intent.[314] Subsequently, the SDGs are political aspirations that shall be attained basically through stakeholders' voluntary political pledges. In this sense Agenda 2030 and the Goals per se may be politically binding, even morally binding given the embedded normative values, and therefore the expectations of compliance with the norms they contain may be high, yet non-compliance will most likely, if at all, generate political consequences only since there is no direct bearing on law and its enforcement mechanisms.[315] It is not then accidental that Agenda 2030 coordinates the aforementioned review on progress in implementing the SDGs through the High-level Political Forum (HLPF), which as its name testifies, is an intergovernmental body vested with high-level political leadership that 'will

[312] O.R.Young, (n.252), 31-34.
[313] ibid, 40.
[314] O.Dörr, 'Declaration', *Max Planck Encyclopedia of Public International Law* (2015) <http://opil.ouplaw.com> accessed 21 June 2019 [MPEPIL].
[315] Dinah Shelton, 'International Law and 'Relative Normativity'', 166 in Malcom D.Evans (dd.) *International Law*, (3rd edn, OUP 2010).

guide the UN system on sustainable development and hold it accountable'.[316] More specifically, its mandate is directed towards fostering the integration of the SDGs and their mainstreaming into the UN system and outside of it through collaborative relationships with the respective bodies that are lead institutions in individual domains covered by the SDGs.[317] In doing so the Forum draws legitimacy under the auspices of the UNGA, a political organ, and the ECOSOC, which is again the dominant political platform for policy coherence across the UN, the IMF and the WBG. Consequently, the HLPF serves its role as coordinator of the international policy for sustainable development being bound by the rules of procedure of the two organs.[318] It thus maintains the intergovernmental nature of discussions in its meetings, which result in concise negotiated political or ministerial declarations to be submitted for consideration to the GA or to be included in the ECOSOC's report to the GA respectively. These elements highlight the fact that the HLPF despite its 'formal authority lacks legally binding decision-making powers or enforcement capability'.[319]

What the above suggest is that trying to define obligations in Agenda 2030 by the same criteria a legal source would delineate obligations and justify their allocation is not applicable in the politics of international development. It should not be inferred that obligations do not exist. The concept of goals presupposes that certain agents by virtue of their role in the institutional apparatus of international development have a duty to undertake specific tasks to fulfill them, in other words they have an obligation to respond to the "prescripts" of the goals. This is evident in Agenda 2030. Yet, the generator of these obligations is a political agreement that encompasses political and moral commitments. Accordingly, the obligations, penetrating the political and moral purview, are political-institutional and ethical in nature.[320] In this regard, obligations are rather aspirational since they are formed in phrases such as 'spare no effort to', 'strive to', 'work towards to' and the like. Moreover, they derive from the connectedness between actors as formulators of social structures who constitute

[316]Secretary General, 'Remarks at Inaugural Meeting of the High-Level Political Forum on Sustainable Development' (24 September 2013) <https://www.un.org/sg/en/content/sg/statement/2013-09-24/secretary-generals-remarks-inaugural-meeting-high-level-political> accessed 21 June 2019. The HLPF though is not explicitly an implementing body of the SDGs in the sense of having own resources and independent authority to directly support the goals. It depends on political action and resource mobilisation actors and institutions of the international development system.

[317] E.g.UN subsidiary bodies, inter-agency coordinating mechanisms for development-related program delivery and implementations such as the UN Development Group, IFIs, WTO, Funds such as the Global Environment Facility etc. These would act as "intermediaries". For analysis on the HLPF', S.Bernstein (n.301), 220 et seq.

[318] UNGA, 'Format and organisation aspects of the high-level political forum on sustainable development' (23 August 2013) UN Doc A/RES/67/290, paras 3, 6(d), 7(g), 14 et seq.

[319] S.Bernstein (n.301), 222.

[320] M.Bexell, K.Jönsson, 'Responsibility and the United Nations' Sustainable Development Goals' (2017) 44(1) Forum for Development Studies 13, 20-23.

simultaneously the members of a political public collective.[321] For this reason obligations are linked to stakeholders' capacity to address the issues raised by the goals at a collective level and are not specified for them as individual entities as much; the structural problems and inequalities the goals address demand greater capacities which stakeholders are likely to obtain through collective action,[322] hence also the emphasis on a revitalized global partnership for the implementation of the agenda right from the beginning of the declaration.

In light of this, who is exactly obligated to do what, for what goal and on what grounds is blurry but this is not incompatible with the political-institutional realm where the ability to remedy development challenges through the goals is assigned primarily to collectives. Therefore the commitment to perform the necessary actions for their promotion pertains to the group as a whole,[323] although the individual commitment of each agent exists by virtue of the agent's membership to the political-institutional collective, its specific relation to it and its mandate. What one could infer from Agenda 2030 specifically is that all actors should execute specific undertakings to bring about a state of affairs (sustainable development) that as a community of states and organizations they deem desirable. Put differently, it is required that stakeholders as a group be able to do something; to produce a change in the world.[324] Thereafter, they are also accountable for effectuating this change and should also take responsibility for making sure that results come about actually.[325] Indeed, the predominant address in the first person plural 'we' throughout the declaration's text is a reinstatement of States' political agreement in the UNGA and an explicit acknowledgment of the political-institutional responsibility to realize the Goals. Stakeholders are committed and obligated to perform the necessary actions in order to remedy the structural injustices described in the agenda and prevent their reoccurrence in the future through sustainability as a normative end. Such commitment bears upon a pluralistic framework of actors and on membership in a political community in which members owe to one another and ought to provide for each others needs in light of the things they value.[326] But it is essentially prospective, creating expectations and being a reason for action that will promote the aimed outcome. As a result,

[321] C.Neuhäuser, 'Structural Injustice and the distribution of Forward-Looking Responsibility' (2014) 38 Midwest Studies in Philosophy 232, 239.
[322] Understood in material, institutional and knowledge terms, M.Bexell et al. (n.320), 20. This is also in line with the principle of 'common but differentiated' responsibilities for the agenda.
[323] Id., 17.
[324] M.Smiley, 'Future-Looking Collective Responsibility: a preliminary analysis' (2014) 38 Midwest Studies in Philosophy 1.
[325] M.Bexell et al., (n.320), 17 who refer to it as the 'capacity principle': the ability to bring remedy to deprivations entails the obligation to do so.
[326] M.Smiley (n.324). In political theory this would reflect 'the principle of connectedness', according to which obligations should be allocated on the basis of closeness, so that people with special ties of different kinds have more obligations toward each other: M.Bexell et al., (n.324) 17

obligations that arise from it are task-oriented and forward-looking since they constitute actions with a projection to the future, they are motivational and justified by the collective capacity to remedy the injustices described in Agenda 2030, yet not-binding. Rather they externalize the declared intention and promise of stakeholders to act according to the imperative of sustainable development with which they are morally and politically charged.[327]

To the extent thus that policy texts express the interests and ambitions of their addressees and subject demand for action to political and moral tenets, there is no strict legal understanding of obligations in Agenda 2030. By implication, sustainable development in this context can be considered a political goal/objective, which is also phrased in moral terms and is pursued through a coordinated, collective apparatus that can answer the practical questions that arise from efforts to realize it. Sustainable development is a collective goal. It is explainable therefore that obligations are not prescribed for each actor individually in Agenda 2030 but are summarized into a general obligation to respond by suitable means and propose solutions to the challenges set forth. For the same reason it is not possible to conclude on stakeholders' legal responsibility for not rising up to their (non-binding) commitments and those affected should be content to politically-based peer accountability of stakeholders.[328]

With the above in mind, the section that follows will first elucidate the collective dimension of the general obligation to respond to the SDGs and the mandate of Agenda 2030 from the political-institutional point of view, and then look into the 'role-responsibility' of IFIs to foster sustainable development since their policies are an inextricable factor of institutions' collective capacity.

[327] In law this would amount to obligation of means as opposed to obligations of result; infra section 3.2.2.2.
[328] M.Bexell et al. (n.324) 23 et seq, where the authors highlight that even in the framework of peer reviewed accountability those affected have indirect means for holding decision-makers accountable since in the international setting of sustainable development governance, effective enforcement and vertical accountability are absent; S.McInerney-Lankford, Hans-Otto Sano, 'Human Rights and the Post-2015 Sustainable Development Goals: Reflections on Challenges and Opportunities' (2016) 7 The World Bank Legal Review 167, 179.

3.1.3.2. The collective dimension of Stakeholders' Obligation to Respond in the context of a voluntarist non-legally binding agreement:
a. International Cooperation through 'Global Partnerships'

The collective dimension of the obligation to respond to the SDGs and the general quest for sustainable development is illustrated in *Transforming our World* with reference to the revitalized global partnership that will facilitate an intensive global engagement in support of implementation of all Goals, bringing together governments, the private sector, civil society, the UN system and other actors (§39). By and large, such partnership is predicated on the exchange of experiences, improved coordination, and better and focused support of the UN development system, the IFIs, regional organizations and other stakeholders in accordance with their specific mandates (§65). More importantly, the goals need first to be diffused and integrated into global institutions and their practices through the harmonization of their specific mandates in order thereafter to allow the establishment of a broad coalition around a common cause that will enhance their collective performance. That is to say that the realization of the SDGs depends on institutional and policy coordination and coherence in the domains of trade, finance, technology, official development assistance and the mechanisms of decision-making and norm-creating in those and other issue-specific areas (e.g. water management and sanitation, sustainable consumption etc.) with the purpose to build collective capacity for targeted and effective development intervention with lasting results.

Evidently, the objectives of the SDGs and sustainable development are not inseparable from 'systemic issues.' These are transverse to the whole agenda and constitute the cornerstone for operative solutions to public policy problems. Since the collective facet of the obligation to respond to the SDGs challenge translates into the establishment of integrated planning frameworks across those pillars, the question arises through what canals will it be achieved. A read through *Transforming our world* blatantly subjects the collective pursuit of global development to international cooperation and good, effective and equitable global governance on behalf of stakeholders. Both are essential to the global partnership for development, transforming thus the collective obligation to respond to the imperative of sustainable development into an obligation to cooperate and manage well the human, natural, economic and financial resources at the international level for an enabling environment for development.

International cooperation has traditionally been considered a fundamental condition for resolving meaningfully the problems of the international community.[329] Proclaimed firstly in Article 1(3) of the UN Charter as the organization's main purpose, it has also acquired specific relevance in finding solutions to the impediments to the promotion of socio-economic progress pursuant to Art.56 UN Charter.[330] Art.22 and 28 UDHR in more 'revolutionary' terms entitle everyone to a social and economic order in which the rights and freedoms set forth in the Declaration can be realized. To the same direction point a number of UNGA resolutions that announce international cooperation for development as a shared goal and common duty of all states,[331] and declarations[332] the most seminal of which are the 1969 Declaration on Social Progress and Development and the DRtD. The former states that the objectives embodied in social progress and development aim at 'meeting the needs common to all humanity'[333] and calls for national and international action to continuously improve the living standards of all members of the society through the mobilization of international resources and a fairer and remunerative trading system.[334] The latter sets international cooperation for development in a firmer tone. In fact, international cooperation is described as an obligation of states to formulate international policies for development collectively, drawing its authority from the abovementioned UN Charter provisions.[335] Although the declaration lacks binding nature, its moral and normative injunction to the international community for collaboration on the economic, social and political fronts in order to ensure 'the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom'[336] is beyond doubt.

---

[329] Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, UNGA Res 2526 (XXV) (24 October 1970): 'States have the duty to cooperate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international cooperation free from discrimination based on such differences'.

[330] UN Charter, (n.3) Art.56 'All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Art. 55'.

[331] Charter of Economic Rights and Duties of States (n.57), Art.17.

[332] Others are: Declaration on the use of Scientific and Technological Progress in the Interests of Peace and for the benefit of Mankind, UNGA Res 3384 (XXX) (10 November 1975), art.1: 'All states shall promote international cooperation to ensure that the results of scientific and technological developments are used in the interests of strengthening international peace and security, freedom and independence of states, and also for the purpose of the economic and social development of peoples and the realization of human rights and freedoms in accordance with the Charter of the United Nations'.

[333] (n.65), preamble para 12.

[334] Id. Pt II Objectives, preamble para15, Pt III Means and Methods; Art.23.

[335] DRtD, (n.8), Art. 3(3), 4.

[336] Id., Preamble para 2, Art 2(3).

Indeed, the potency of international cooperation for the promotion of development goals is all the more evidenced in the content of the majority of UN declarations ever since. Characteristically, the Vienna Declaration and Program of Action stressed that 'the international community should promote an effective international cooperation for the realization of the right to development and the elimination of obstacles to development by prioritizing the immediate alleviation of extreme poverty and catering for the environmental and developmental needs of present and future generations.[337] In the same spirit, the Declaration and program of Action adopted at the World Summit for Social Development in 1995 emphasized the centrality of collective commitment and efforts of the international community for cooperation in order to fulfill its pledges with regard to the distribution of the benefits of globalization and the mitigation of its negative repercussions, associating economic growth with objectives of social development.[338] Yet, international cooperation was established as the indispensable means for developmental policies more in the aftermath of the Millennium Declaration when a more coherent approach to international cooperation is noted both at the conceptual and operational level. By that time international development had become a global objective and the burdens for its accomplishment were meant to be shared and distributed in accordance with the principles of equity, social justice, shared responsibility and international solidarity.[339] Hence, the adoption of the MDGs triggered the systematic institutionalization of international collaboration through multilateral channels (e.g. development banks), international programs (e.g. UN Development Program) and bilateral agreements between states around key aims such as a fair and equitable multilateral trading and financial system, increased development assistance in the form of technical or economic support from one state to another, debt relief, increase of private-sector finance and

[337] Vienna Declaration and Programme of Action, UNGA Res 48/121 (20 Dec 1993), Pt I, Art.10, 11, 14
[338] Copenhagen Declaration and Programme of Action (n.146), indicatively Art. 13, 14, 20, 26(c), 25.
[339] Millennium Declaration (n.92), Pt I Values and Principles, Art.6, Solidarity, shared responsibility. The draft declaration on the right to international solidarity in its Preamble invokes the UN Charter, regional and international human rights treaties and UN conferences as sources of the right and *reaffirms its link with international cooperation.* It also takes into account the global commitment to solidarity specifically for sustainable development (para 10) and invokes Agenda 2030 where solidarity is the "building block" of the Global Partnership (para.17). It defines the right to international solidarity as 'a human right by which individuals and peoples are entitled[…]to participate meaningfully in, contribute to and enjoy a social and international order in which all human rights and fundamental freedoms can be fully realised. It is grounded in the codification and progressive development of freedoms and entitlements contained in international human rights treaties reflecting civil and political rights, economic, social and cultural rights, the right to development and international labour standards, and complemented by other responsibilities arising from voluntary commitments undertaken in the relevant fields at the bilateral, multilateral, regional and international levels. Its realisation becomes a primary duty of states; (Art.4), OHCHR, Report of the UN Independent Expert on Human Rights and International Solidarity, UN Doc A/HRC/35/35, Annex.

investment etc.[340] UN Member states imagined hereafter development strategies for the implementation of development goals and actions agreed upon, mainstreaming to these ends their 'universal aspirations for cooperation, development and peace'.[341]

Notwithstanding international cooperation as a stated objective of, and pathway to development, its exact content and precisely how it shapes the relationships between development actors has not been a straightforward issue.[342] By and large, the reason why the parameters of international cooperation have not been clearly drawn lies in the negation by developed states that it constitutes more than a moral obligation to assist the development process whether in material terms or otherwise.[343] The public pronouncements of financial pledges in the framework of donor conferences that are not considered binding until the funds reach the recipient show lucidly that this kind of state promises does not resemble other unilateral declarations of states capable of creating legal obligations, and remain voluntary contributions with less legal significance.[344] Such practice reveals the unwillingness of governments to recognize a legal entitlement to development assistance (as resource transfer) and to international cooperation more broadly. On the other hand, international cooperation as a term has never been defined by an international treaty or a resolution of an international organisation.[345] However, several instruments contribute to asserting the specifics of international cooperation as a duty in law and policy. Fundamentally, the CESCR affirms it as such, being particularly incumbent upon states in a position to assist others, when elaborating on States Parties' obligations under Art.2(1) of the covenant in their efforts to realize economic, social and cultural rights.[346] The Committee refers to the furnishing of technical and economic assistance as the means of international action for the achievement of

[340] Millennium Declaration, (n.92), Pt III Development and Poverty Eradication, Art.13, 15.
[341] Id., Pt VIII Strengthening the UN, Art.32 and World Summit Outcome, UNGA Res A/RES/60/1 (16 September 2005), para.38 emphasising the need for the UN to play a fundamental role in the promotion of international cooperation for development and the coherence, coordination and implementation of development goals and actions agreed upon by the international community.
[342] N.Cooper, D.French, 'SDG17: partnerships for the Goals-cooperation within the context of a voluntarist framework' 271, 272 in D.French et al, (n.15).
[343] Report of Open-ended Working Group on the Right to Development (20 March 2001) E/CN.4/2001/26 Annex III, Comments submitted by Japan, para 46, 48 denying that there exists a consensus to a duty of international cooperation for the realisation of the right to development; Report of Open-ended Working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights (10 February 2005) UN Doc E/CN4/2005/52, para 76 'The representatives of the UK, the Czech Republic, Canada, France and Portugal believed that international cooperation and assistance was an important moral obligation but not a legal entitlement, and did not interpret the Covenant to impose a legal obligation to provide development assistance or give a legal title to receive such aid'.
[344] I.Bantekas, 'The Right to Development, Poverty and other Related Rights', 562 in I.Bantekas, L.Oette (eds.), *Human Rights Law and Practice* (2nd edn, CUP 2016); Victor Rodríguez Cadeño, María Isabel Torres Cazorla, 'Unilateral Acts of States in International Law, *MPEIL* (2019) <http://opil.ouplaw.com> accessed 24 June 2019.
[345] R.Wolfrum, 'International Law of Cooperation' *MPEIL* (2019) <http://opil.ouplaw.com> para 12 accessed 25 June 2019.
[346] CESCR, 'General Comment No.3' (14 December 1990) UN Doc E/1991/23 para 14.

the recognized rights but international cooperation is understood broadly to include an enabling environment for fulfilling obligations of global character under the UN Charter, notably those 'conducive to the universal fulfillment of socioeconomic rights, including in matters relating to bilateral and multilateral trade, investment, taxation, finance, environmental protection and development cooperation'.[347] Obligations in this respect include the development of international rules in the aforementioned fields, the review of international agreements and standards, and measures taken in policies States perform through IOs, not to mention that they extend to the latter too.[348] By implication, the capacity of states to facilitate cooperation is not limited to their financial resources but extends to technological capacities (e.g. IP ownership), human and natural resources, even the capacity to influence international decision-making processes on pertinent issues.[349] Besides, the constant political commitments towards international cooperation that find expression in the so-called 'global partnerships for development'[350] are not devoid of value for outlining obligations of international cooperation and establishing a plausible claim against governments of developed countries as a group to assist and give effect to development. MDG8 focused on the processes and steps to be taken at an international level to realize the MDGs and create an international environment conducive to poverty alleviation.[351] Pursuant to these aims, international cooperation was informed by strategies for productive work for the youth in developing countries, the expansion of availability of new technologies in the areas of communication and information in collaboration with the private sector, and of

[347] Olivier De Schutter et al, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of economic, Social and Cultural Rights (2012) 34 Human Rights Quarterly 1084, 1101-1104; 1145-1159 (Principles 8, 29-35)

[348] ibid, Principles 15, 29. CESCR, 'General Comment 2' (2 February 1990) UN Doc E/1990/23, paras 8-9; CESCR, General Comment 14' (11 August 2000) UN Doc E/C.12/2000/4 para 39; ibid, 'General Comment 15' (20 January 2003) UN Doc E/c.12/2002/11, para 36. M.E.Salomon 'Deprivation, Causation and the Law of International Cooperation' in M.Langford et al (eds), *Global Justice, State Duties: The Extraterritorial Scope of economic, Social and Cultural Rights in International Law* (CUP 2013) about the basis upon which duties of international cooperation may be assigned and disaggregated, explaining also how interstate communications under the optional protocol to the ICESCR may enforce the duty of international cooperation; A.Khalfan, 'Division of Responsibility amongst States', especially 310-312 on states obligations as members of IOs and W.Vandenhole, W.Benedek, 'Extraterritorial Human Rights Obligations and the North-South Divide', who illustrate with cases their conceptual framework of extraterritorial obligations (especially with the obligation to fulfil) in international development cooperation in M.Langford et al (eds) id.

[349] International assistance can also take other forms, ibid Principle 33.

[350] P.Glasbergen, et al (eds), *Partnerships, Governance and Sustainable Development–reflections on theory and practice* (Edward Elgar 2007), 2 define partnerships as 'self-organising and coordinating alliances or – in a more strict definition – collaborative arrangements in which actors from two or more spheres of society (state, market and civil society) are involved in a non-hierarchical process through which these actors strive for a sustainability goal'.

[351] MDG8 targets <https://www.un.org/millenniumgoals/global.shtml> accessed 4 September 2018. P.Alston (n.204), 778: 'repeated formal commitments provides a strong argument that such obligation has crystallised into customary international law'.

course by the reform of the international economic, trading and financing architecture to ensure a positive contribution to poverty reduction and the creation of new international mechanisms to meet the specific requirements of developing countries. All these exhortations rely on the international community's implicit agreement for practices of best effort to promote development for all and have the undertaking of conduct in the specialized field of each actor as their primary element on the basis of a moral account at the very least.

The same pattern is followed now by SDG17 on 'Strengthening the means of Implementation and Revitalizing the Global Partnership for Sustainable Development'. The Goal is larger in scope and ambition compared to MDG8 as evidenced by the description of the themes it covers, capturing thus the entire spectrum of structural aspects of international cooperation and accountability and being applicable to all stakeholders. Of course most of the issues under SDG17 constitute the content of previous Goals too; targets SDG10.5 ('improve the regulation and monitoring of global financial markets and institutions and strengthen the implementation of such regulations') and SDG10.6 ('ensure enhanced representation and voice for developing countries in decision-making in global international economic and financial institutions in order to deliver more effective, credible, accountable and legitimate institutions') are good examples, pointing to the fact that SDG17 could be considered to have more of an instrumental role, namely to link various modes of cooperation, already identified and permeating the whole agenda, with the ideal of partnership and collective capacity for the Goals and sustainable development broadly speaking through synergy. Nevertheless, a critical perspective on the goal brings to the fore the innate voluntarism of Agenda 2030 which attaches to partnerships as well and jeopardises their effective attainment. Goal 17 promotes partnerships between States, public-private compacts and highlights collaboration with civil society and other non-governmental actors such as businesses (an element that diversifies partnerships) but does not concretise how these partnerships ought to be set up. N.Cooper and D.French contend that systemic tensions are apparent in SDG 17. Importantly, they point to a mismatch between the targets of SDG17 and the purpose that partnerships ought to fulfil, i.e. structured global change for sustainable development. This is due to the disjunction between partnerships and international cooperation as concepts. Whereas the latter generates from the value of international solidarity that suggests 'the convergence of interests, purposes and actions between and among people, individuals, states and their international organisations […] in order to achieve common goals', the former often promotes a managerial response to the general ethical idea of sustainable development that

fails to reflect the complexity and multifaceted nature of the SDGs.[352] The Goal then appears weak normatively and despite the moral ambition evidenced in the language of Agenda 2030 the Means of Implementation targets are geared toward shaping conditions in developing countries rather than being attentive to underlying social structures, power relations and governance arrangements.[353] A good illustration of this can be found in the role of business as development partner. To what extent people are empowered by the mobilization of private capital for the implementation of the SDGs or the latter provide an enabling environment for businesses' interests alone is a fundamental question to ask against the background of increased FDI, privatization and little efforts to promote domestic revenue mobilization.[354] International cooperation may seem to be intensified and institutionalized with the prompt of a revitalized global partnership but there are reasons to believe that it is/will be contested.[355]

b. Good Governance for Multi-Level Action Framework for Sustainable Development:

i. Defining Governance and aligning it with the normative and practical tenets of Sustainable Development

Having ascertained the fields of international cooperation and the multiplicity of actors involved, the next point to raise is how to sustain such cooperation and guarantee sustainable outcomes. For it is extremely important for collective problem-solving on development to engage stakeholders – from the public and private sector to civil society – effectively and ensure successful multilateral negotiations on creating or reforming the conditions under which common affairs are administered. To engineer new levels of cooperation among states, key sectors of societies and people, the interests of all should be respected and the integrity of the global environmental and developmental system should be protected. What this, in turn, presupposes is 'a just balance between converging and diverging interests of developed and developing states, which must be foundational to the functioning of a sustainable international community more generally'.[356] From the viewpoint of practice, this means that the various elements of sustainable development should be integrated at the international level in all identified areas of international cooperation and specifically the mechanisms,

[352] N.Cooper et al (n.342), 275-289
[353] A.Kloke-Lesch, 'The Untapped Functions of International Cooperation in the Age of Sustainable Development' in S.Chatuvedi et al (eds) *The Palgrave Handbook of Development Cooperation for Achieving the 2030 Agenda* (Palgrave Macmillan 2021).
[354] UNGA, 'The Parlous State of Poverty' (n 289) paras 48-49.
[355] S.Chatuvedi et al (eds) ibid.
[356] D.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) LV Netherlands International Law Review 23 cited in N.Cooper et al. (n.342) 292.

processes and institutions through which the human, natural, economic and financial resources are managed – in other words the governance of resources for development and of stakeholders' relationships, as they exercise their power in that respect for equitable and sustainable development.

As with international cooperation, the concept of governance has various contours.[357] Different disciplines are dominated by references to 'governance', which has resulted in the conceptual adaptation of the term in line with the norms and principles that structure the subject matters of each discipline. In particular in the international system, which on the one hand lacks an overarching political authority to regulate the interdependent relations of states and on the other, witnesses the proliferation of actors (beyond formal institutions) participating in the decision-making in an ever expanding field of common affairs, hence the unavoidable emergence of new dynamic forms of co-ordination and co-operation, the term is used in a dual sense: 'as a general frame of reference that is meant to comprise the different forms and modes of decision-making; and as a description of the new modes of heterarchical decision-making' that takes place in the midst of formal international organization and informal network-like cooperation in all domains of common affairs with the purpose to provide solutions to global problems, set common standards and rules, delimit each actor's competencies and expertise, and find the mechanisms to attribute responsibility to state and non-state actors in light of their involvement and participation in the management of global affairs.[358] With the variety of tools employed to manage collective affairs and the diversity of actors in mind, it could be argued that governance refers in general terms to collective problem-solving arrangements and may be defined more specifically as the complex of formal and informal institutions (laws, norms, policies), mechanisms, relationships and processes between and among states, markets, citizens and organizations –both inter- and non-governmental– through which collective interests on the global plane are articulated, duties, obligations and privileges are established and differences are mediated.[359]

Amongst the many matters comprising the net of global affairs to which a system of governance is applicable, international development has been the field where governance has

[357] Karl-Heinz Ladeur, 'Theory of Governance' *MPEPIL* (2015) <http://opil.ouplaw.com> accessed 18 June 2019.
[358] ibid. paras 11-18
[359] T.G. Weiss,R.Thakur, *The UN and Global Governance: An Idea and Its Prospects* (Indiana UP 2006), 6-7; *Our Global Neighbourhood: Report of the Commission on Global Governance* (OUP 1995), Chapter 1, 2: 'Governance is the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest'.

attained readily acceptance as a fundamental element for the pursuit of poverty reduction and the elimination of disparities among all peoples. Naturally, when development was equated with economic growth, governance was linked to economic development only. Being more relevant to developing countries, it was the means to higher and eventually sustained rates of economic growth that advanced societies enjoyed having built domestically effective, adaptable, stable and rules-based institutions, which boosted their social capital and the competitiveness of their industries.[360] As a result governance was set as a precondition for lending and aid towards developing countries by international development institutions. In fact, their experts developed indicators of governance upon which development finance was conditioned, adopting a technocratic approach to the operationalization of governance in the development process.[361] Yet, governance is embraced as a key policy and strategic thrust all the more so in the framework of pluralistic understandings of development that highlight the multifaceted nature of development objectives and ground their achievement to a strong society at the domestic as well as international level. If development aims at an improved human wellbeing for the present and future generations centered on individuals' participation in an integrated development process and the fair distribution of its beneficial outcomes, governance becomes germane to the pursuit of the comprehensive goal of sustainability through structuring cooperatively the inter-relationships and decision-making of stakeholders each one of whom represents different segments of society – governments, the market, key international developmental institutions, civil society and citizens as well.

Given the relevance of governance to the multiple objectives of sustainable development, the realization of a wide range of desired outcomes is encompassed in the concept of governance as well. In part there is an overlap between the objectives of sustainable development and those of governance in so far as the latter is thought of as the medium to achieve the former. Consequently, sound governance for sustainable development (or development governance)[362] is aligned to the challenges of global sustainability. Thus, it is concerned with the harmonization and integration of the economic, social and environmental pillars of development with the purpose to promote people's human wellbeing by forging a productive synergy between the state, civil society, the people and global development

[360] M.Chibba, 'Governance and Development, The current Role of Theory, Policy and Practice' (2009) 10(2) World Economics 79. The author discusses three main economic schools of thought on the role of governance in development.
[361] WBG, Worldwide Governance Indicators (WGI) <https://info.worldbank.org/governance/wgi/#home> accessed 5 September 2018, focusing on the quality dimension of governance (see further in section) for an enabling environment for development domestically.
[362] A.Shafiqul Huque, H.Zafarullah (eds.), *International Development Governance* (online edn, Routledge 2017), 3-50.

regimes. By implication, the normative tenets of sustainable development should influence the process of governance too. Therefore, governance has a bearing on the human dimension of development and the values of universality, equity and justice that will serve as guiding principles for the effective management of development affairs in order to bring about system changes in line with the normative standards of sustainable human development.

It stems from the above that governance has inherent practical and normative composites akin to sustainable development. The first refer to the integration and reform of socioeconomic and environmental policies and programs for sustainable development, and comprise of several stages and methods:[363] the identification of issues and the setting of a commonly decided agenda with specific goals following negotiation amongst involved actors; the execution of the agreed plan for development through well-defined functions for stakeholders, specified rules in laws or other agreements, collective and collaborative decision-making and capacity-building for long-term outcomes; finally, the monitoring of stakeholders' compliance with the requirements of the project and the evaluation of their performance against certain standards. But for all these phases to yield results regarding the integration of sustainable development's pillars, the quality of governance plays a defining role. This qualitative feature of governance is served only through the incorporation and systematization of normative ends that impose standards on the process and the substantive content of decision-making of states, international organisations, the private sector and civil society. Premised on higher-order norms the operationalization of governance is thus encompassed with legitimacy and is tailored towards effectiveness and the distribution of development outcomes in light of the quest to 'leave no one behind'.

ii. Good Governance as a stand-alone Goal in Agenda 2030 (SDG16)

The normative dimension of governance is recognized as a core element of human wellbeing in *Agenda 2030* by reference to *good governance*. 'Democracy, good governance and the rule of law as well as an enabling environment at 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'. Good governance remains an open-ended notion.[364] However, the democratization of public

[363] F.Biermann, et al, 'Global Goal Setting for Improving National Governance' in N. Kanie et al., (n.15), 75; R.Kemp et al, 'Governance for Sustainable Development: moving from theory to practice' (2005) 8(1-2) International Journal Sustainable Development 12, 17.
[364] E.B.Weiss, A.Sornarajah, 'Good Governance' *MPEPIL* (2015) <http://opil.ouplaw.com> accessed 25 June 2019; on different indicators to measure good governance, F.Biermann et al. supra.

institutions, the absence of corruption, an effective legal and justice system, the observation of human rights norms, openness and transparency in agreements that affect peoples, the latter's (especially the poor's and most vulnerable groups') inclusion and active engagement in the process through participation and finally, the accountability of stakeholders for their decisions and actions are hallmarks of good governance that ought to constitute the base for attaining developmental goals.[365] By implication, the management and distribution of human, social and environmental capital depends on strong and accessible institutional frameworks that create the conditions for the benefits of socioeconomic and environmental progress to be sustained. Good development governance has therefore an expanded scope: it is concerned with the positive settlement of sustainability issues but it is mostly about providing the political and institutional context at the national and international level in order to consolidate sustainable development initiatives and ensure coherent, effective and efficient stakeholder action.

Good development governance transcends the whole SDGs action plan, yet SDG16 is considered to be the overriding stand-alone goal on governance since it mentions cumulatively the key elements of good governance that give substance to its institutional dimension. The relevant targets include specifically, the promotion of the rule of law at the national and international levels and the safeguard of equal access to justice for all (16.3); the reduction of corruption (16.5); the development of effective, accountable and transparent institutions at all levels (16.6) and the inclusive, participatory and representative decision-making at all levels (16.7); the strengthening of development countries' participation in institutions of global governance (16.8); public access to information as well as the protection of fundamental freedoms in accordance with national legislation and international agreements (16.10). Emphasis on a strong institutional basis provides a structured way for transforming the divergent preferences and interests of interdependent stakeholders into sustainability-oriented development policies and makes more apparent the connection between good and effective-equitable governance, elements of which are more evident in the goals that explicate poverty, human development and environmental matters. By way of example, participation of local communities gives leeway to improved water and sanitation management that is a target of SDG6; enhanced representation of developing countries in the decision making processes of IFIs makes the latter more credible and legitimate for designing economic and fiscal policies in line with sustainable development outcomes (SDG10.6); access to information leads to awareness for sustainable consumption patterns and lifestyles

[365] E.B Weiss et al., supra.

in harmony with nature (SDG12). Correspondingly, closing the inequality gap within and among countries depends largely on legal reforms and successful enforcement of laws as SDG10.3 'ensure equal opportunity and reduce inequalities of outcome, including by eliminating discriminatory laws, policies and practices and promoting appropriate legislation, policies and action in this regard' indicates.[366]

Good governance has thus a synergetic interaction with the content of other goals and their accomplishment. It clothes with legitimacy the development interventions put forward by all actors in society because it prompts the latter to adopt multi-level action frameworks for each SDG. This it to say that interventions should be for instance i) regulatory (e.g. employ and combine a body of legal instruments at the national and international level; for instance, link the Rio human and environmental principles with human rights and the principles applicable to development aid), ii) economic (financing arrangements between public and private sectors or from development banks), iii) technical (infrastructure relevant to the aims of each goal), iv) management-oriented (corporate social responsibility through environmental and human rights impact assessments) and v) compliance- and accountability-oriented through reporting and monitoring measures.[367] By extension, the obligation of stakeholders to cooperate internationally is reinforced. Moreover, peoples' agency and empowerment are given effect because good governance makes a condition of participation in the process of development. The normative nuance of good governance has therefore crosscutting ramifications for the building of human capacities in order for peoples to pursue their personal development as well as for the building of the collective capacities of institutional partnerships for the realization of the SDGs and sustainable development. Especially with regard to the latter, it facilitates integration of policies vertically, from the global to the local level, and horizontally so that strategies within one development domain and among others are not incompatible. As an immediate consequence the 'silo effect' that has been characterizing development sectors and institutional arrangements for development[368] can be reversed, while sustainable development and the SDGs are being 'owned' by the domestic and international bodies that work on development interventions. Ultimately, development as a global value with an inherent claim to universality, equity and justice acquires practical relevance.

[366] Also SDG5(c) 'adopt and strengthen sound policies and *enforceable legislation* for the promotion of gender equality and the empowerment of all women and girls at all levels'.
[367] J.Gupta, M.Nilsson, 'Toward a Multilevel Action Framework for Sustainable Development Goals' in N.Kanie et al. (n.15) 275-294, 285.
[368] ibid.

With the above in mind, the next section will look into the input of IFIs to the collective capacity of institutions in the pursuit of sustainable development by examining the role reserved for them in the SDGs Agenda. How they have adopted, interpreted and, in fact, the extent to which they have mainstreamed the SDGs and sustainable development into their specialized mandate as institutions of economic governance are the main points that the thesis will consider onwards in order to answer the more specific questions relating to IFIs' accountability, and potential legal responsibility, to promote sustainable development.

3.1.4. IFIs as an inextricable Sustainability Factor of Development Governance

3.1.4.1. From the Monterrey Consensus to the Addis Ababa Action Agenda:

i. Aligning Development Finance with Sustainable Human Development, Agenda 2030 and an Integrated Review Mechanism of Financing-for-Development Outcomes

An enabling international environment that provides the policy space necessary to implement operative sustainable development strategies will have to be underpinned by a compact of commitments in relation to an effective sustainable development financing strategy as well as on strengthened and enhanced global economic governance.[369] The magnitude of the SDGs' scope gave new impetus to the talks about the mobilization of resources, which went beyond the challenge of filling financing gaps. Actually, the availability of resources globally had increased: large amounts of investable resources were available in advanced and emerging economies, while global savings were ample and liquidity at high levels, despite the international financial system's volatility in the meantime (e.g. due to the financial crisis) and the stalemate to the resource flow it caused.[370] Nonetheless, the allocation of resources adequately to address global needs remained the biggest challenge. Against this backdrop, attention turned to the design and implementation of an integrated, strategic finance architecture based on good policies and credible institutions with the aim to maximize synergies across financing streams, taking into account the interplay between various sources of finance (public and private, international and domestic)

[369] Report of the Intergovernmental Committee of Experts on Sustainable Development Financing (5 August 2014) A/69/315, para 39 [ICESD Report]

[370] WBG, Financing For Development Post-2015 (October 2013) <https://thedocs.worldbank.org/en/doc/932281485530446820-0270022017/original/Financingfordevelopmentpub101113web.pdf>, 23; Development Committee, 'From Billions to Trillions: Transforming Development Finance Post-2015 Financing For Development: Multilateral Development Finance', 2 <https://siteresources.worldbank.org/DEVCOMMINT/Documentation/23659446/DC2015-0002(E)FinancingforDevelopment.pdf> accessed 2 Oct 2018.

so that financing flows are matched with appropriate needs and uses.[371] Most importantly, the ambition was to associate the new financing framework with the purpose of sustainable development; hence, new precepts for financing included the mainstreaming of sustainable development criteria in specific financing strategies, investment decisions and budget allocations in order for projects to acquire a people-centered and inclusive character, delivering on its three dimensions. To this end, elements of good governance, in particular transparency, accountability and participation of all stakeholders, become pertinent to the financing framework since they enhance the effectiveness and legitimacy of the financing operations. By necessity, the "modus operandi" and decision-making processes of the institutions that pursue such policies are updated to include more democratic and representative characteristics, triggering thus the assimilation of good governance in the internal structure of these institutions too. In turn, development cooperation seems more likely to succeed in that matter.[372]

To be fair, the grounds for a new international approach to development finance had been set at the first International Conference on Financing for Development that took place in 2002 in Monterrey in the aftermath of the MD and the MDGs.[373] Under the aegis of the UN, the conference was an open platform for deliberations, inviting to all institutional development stakeholders, from the WTO to the IFIs and the OECD to their regional and national counterparts, namely Central Banks, Finance and Trade Ministers. Non-institutional stakeholders, i.e. the private sector and civil society joined also for the first time. Its universal participation declared already the shift in the conceptualization of the role of finance for development. As discussions centered on financing sources (domestic and foreign investments, trade, taxes, foreign remittances, debt etc.) and their impact on development, the existing development policies that had been put forward by each participating agency separately as well as the processes whereby they were decided were scrutinized for their consistency and interrelationships amongst them, and their connectedness to the goals of eradicating poverty, achieving sustained economic growth and promoting sustainable development.[374] Accordingly, the departure from the idea that financing policies raised merely "technical" issues (e.g. how to raise resources, increase productivity, reduce capital flight etc.) was noticeable. The conference's multi-institutional appeal revealed the compartmentalization of the institutional architecture for finance and the necessity to

[371] ICESD Report (n.369), paras 39-40, 45
[372] ibid.
[373] (n.202)
[374] A.Caliari, 'Guest Editorial: The Monterrey Consensus, 14 Years Later' (2016) 59 Development 5.

establish a new system of shared global rules anchored on a framework of mutual obligations and accountability between stakeholders.

The Monterrey Consensus substantiated this call, being a global agreement for a new partnership between developed and developing countries that sought to build an alliance for development for all, premised on countries' shared responsibilities in the key areas of trade, aid, debt relief and institution building, and a renewed commitment on the part of the international community as a whole (global institutions included) to support development efforts.[375] The turning point, however, was the explicit linkage of development finance cooperation to the UN Charter and the values of the Millennium Declaration. Stakeholders resolved to promote national and economic systems based on the principles of justice, equity, democracy, participation, transparency, accountability and inclusion, therefore bringing into financing operations their normativity which is fundamental for human-centered development.[376] On this account, finance policies are not considered extraneous to the purposes of development. The emergent realization is that their endpoints converge and since the former provide the tools to realize development strategies, they become a substantial means of implementation for the latter. Moreover, the said convergence seems to extend also to the processes that lead to their formulations, which although distinct, they emanate from the same normative underpinning. Eventually, there existed the conceptual framework for the interconnection of finance and development in a holistic, comprehensive and integrated way although strong criticism maintains that such connection legitimized the power of capital by saving for its owners a partner role in development, recasting neoliberalism through emphasis on poverty elimination, inclusion and partnerships.[377]

Notwithstanding the landmark agreement in Monterrey, it took another international conference seven years later in Doha to solidify its objectives into more concrete commitments. The same axes framed the content of the Doha Declaration:[378] (i) domestic resource mobilization, (ii) mobilization of international resources for development, (iii) international trade as an engine for development, (iv) the expansion of international financial and technical cooperation for development, (v) debt sustainability and (vi) the review of

[375] I.Haque, R.Burdescu, 'Monterrey Consensus on Financing For Development: Response Sought from International Economic Law' (2004) 27 International and Comparative Law Review 219, 221 incl. footnote 7.
[376] Monterrey Consensus (n.202) para.9.
[377] A. Caliari (n.374), 6; S.Soederberg, 'Recasting Neoliberal Dominance in the Global South? A Critique of the Monterrey Consensus' (2005) 30(3) Alternatives: Global, Local, Political 325.
[378] 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 (29 Nov-2 Dec 2008) UN Doc A/CONF.212/L/1/Rev.1 <https://www.un.org/esa/ffd/wp-content/uploads/2014/09/Doha_Declaration_FFD.pdf>.

global economic governance arrangements. Emerging issues such as climate change, food and energy crises were also looked at. A read through the Declaration documents the normative developments around financing for development. The introductory paragraphs reiterate the international community's resolve to address the challenges of financing for development in a spirit of global partnership and solidarity and cite freedom, peace and security, respect for all human rights, including the right to development, the rule of law, gender equality and an overall commitment to just and democratic societies for development as important elements of financing policies at the domestic and international levels.[379]

More direct reference is also made to human development, which is mentioned as a key priority of development that should be promoted by finance.[380] A number of individual provisions elucidate the interconnections between the former (or aspects of it) and finance. For example, the attainment of growth as a result of macroeconomic policies is associated with poverty eradication, at least with its economic dimension, aiming at income distribution, full employment and the elimination of imbalances that affect especially the poor.[381] The same can be said about tax reforms that should make tax systems more pro-poor.[382] Development goals are linked to the effective provision of ODA that is considered a catalyst for removing constraints to equitable growth, social institutional infrastructure (e.g. health and education) and the preservation of the environment.[383] Equally, the participatory elements of development and the recognition that it is a universal claim that rests, however, on countries' different capacities and priorities for its realization, feature more strongly in the Declaration. For instance, it is stated that parliaments, citizens and civil society have an active part in the shaping of the national policies of development countries while in debt renegotiations, debtors should be fully involved and their national strategies that are linked to attaining internationally agreed development goals should be taken into account.[384] On the same footing, the Declaration outlines the particular role of IFIs in supporting favorable environments for development. On the one hand, they are called to mobilize and transfer

[379] ibid paras 1-2. It is interesting to note though that in the rest of the text no further mention to human rights made neither a human-rights language is used to link finance with development. Had it been so, then in the examples mentioned in the text growth would have been associated with the right to work and the right to an adequate standard of living; ODA with the right to health and education.
[380] ibid para 12 and 80.
[381] ibid para 15.
[382] ibid para 16. Contrariwise, A.Ruckert, 'Towards an Inclusive Neoliberal Regime of Development: From the Washington Consensus to the Post-Washington Consensus' (2006) 39(1) Labour, Capital and Society 36 who speaks about how the post-Washington Consensus pursued an agenda of 'inclusive neoliberalism', i.e. policies that do not deviate from neoliberalism yet are somehow progressive. By including the poor and underprivileged neoliberalism is further embedded in the global economic order.
[383] ibid ,para 41.
[384] ibid, paras 46,63.

resources in a manner that promotes economic growth, poverty eradication and sustainable development worldwide. On the other, they are meant to enhance policy coherence for development by functioning as a forum for the exchange of information on best practices and coordinating working relationships with other regional and bilateral development institutions in order to tackle practical issues across the development landscape.[385] Strikingly, the fact that policies should be formulated consistently with the objectives of sustainable development, including development goals, is not simply rhetoric. There are discernible efforts to implement the promulgation in practice.[386]

However, the financing of development strategies and programs was catalytically contextualized in the Addis Ababa Action Agenda (AAAA).[387] The AAAA constitutes the new global framework for financing development that aligns all financial flows and policies with economic, social and environmental priorities, ensuring simultaneously that financing itself is sustainable. It embodies a hundred concrete measures that draw upon all sources of finance, technology, innovation, trade and debt, which states pledge to implement individually and collectively in order to deliver sustainable development for all. Whereas one could think of the AAAA as yet another document that repeats political commitments of the past, the fact that its adoption coincided with Agenda 2030 lends to it particular weight. There is a strong political connection between the two documents and the cross-references to each other ascertain the entwined nature of their content. As stated in clear tone in Agenda 2030, the AAAA constitutes an integral part of it and helps to contextualize its means-of-implementation targets.[388] Respectively, State representatives declared in the AAAA to put forward an equally ambitious, comprehensive and transformative approach to the means of implementation of the post-2015 development agenda, combining them and integrating into them the economic, social and environmental dimensions of sustainable development with the ultimate aim being to give effect to the synergies between the SDGs so that the implementation of one contributes to the progress of others.[389] Therefore Agenda 2030, the SDGs and the AAAA should be read comprehensively.

With the two documents being intimately linked, sustainable development constitutes the normative threshold which financing policies ought to respect. Consequently, all actors in the field of finance are required to heed in their activities and operations the concept's normative

[385] ibid, paras 55, 69, 73, 77.
[386] ibid, para 70.
[387] UNGA Res 69/313 (27 July 2015).
[388] *Agenda 2030* (n.260) paras 40,62.
[389] *AAAA* paras 2, 11 and 19.

standards and translate them into practical outcomes.[390] Financing operations are thus embedded in a normative context and several points in the AAAA text reflect that. Before anything else, the pledge to promote a global economic system in which no country or person is left behind indicates that universality is a fundamental value of development finance too. Indicatively, this is illustrated in the promotion of appropriate, affordable and stable access to credit to small and medium-sized enterprises[391] or in rendering financial inclusion a policy objective in financial regulation, lifting barriers to commercial banking and other services for specific population groups, especially women, but also States which face challenges accessing international credit due to the structural characteristics of their economies.[392] Other elements of a sustainable development process that enable the effective, efficient and transparent mobilization and use of resources include peace, security and freedom, and fundamentally, the rule of law and good governance,[393] though the concept of the rule of law has been deemed a 'western' ideological apparatus to sustain the current 'predatory' capitalist system of global production. As such, like the notion of development that is presented as the solution to global poverty and inequality but remains a political and economic intervention, the rule of law is underpinned by the intention of domination of the powerful on their weakest counterparts within the framework of global governance.[394] To the contrary, a proper understanding of the rule of law for sustainable development invites a substantive and procedural conception of it that fosters the fair and equitable distribution of resources (economic, social and environmental).[395]

Yet, the most critical element that proves that sustainable development is taken into account as a guiding norm in addressing practical issues arising from the implementation of development policies such as finance is the endorsement of the principles of the Rio Declaration.[396] Remarkably, there is no reference to the WSSD that expounded the concept of sustainable development. It could be argued though that this gap is bridged by Agenda 2030, which mentions all UN conferences and summits that have laid a solid foundation for sustainable development. Still, to the extent that the Rio Declaration advances a statement of

[390] ibid, paras 12-18 about AAAA's objectives, which can be clearly matched to specific SDGs, confirming the fact that they share common ends.
[391] ibid para 16
[392] ibid, paras 39, 43, 46; more examples of an inclusive financing framework, paras 72, 76, 81, 98 etc.
[393] ibid, para 5. How these values feed into finance is explained in individual paragraphs, e.g. para 20 (rule of law), 37 and 103 (economic governance) and 67 (peace-building financing gap).
[394] U.Mattei, 'Emergency-based Predatory Capitalism: The Rule of Law, Alternative Dispute Resolution, and Development' in D.Fassin, M.Pnadolfi (eds) *Contemporary States of Emergency: The Politics of Military and Humanitarian Interventions* (Zone Books 2010).
[395] See section 3.2.1 herein discussing how law has functioned as a 'technology' of development governance depending on the changing model of development over the time.
[396] AAAA para 5.

purpose and the Principles establish 'good practice standards' on substantive aspects of development, like the eradication of poverty, the decrease of disparities in living standards, environmental protection etc., and on procedural aspects, like duties of cooperation, exchange of information and participation, they instill into development finance the purposefulness of sustainable human development outcomes.

Forceful impetus is given, moreover, to the aforementioned purpose by the invocation of human rights and the agreed development cooperation effectiveness principles that stakeholders should adhere to so that multi-stakeholder partnerships lead to sound policies for a sustainable, equitable, inclusive and prosperous future for all. As far as the former are concerned, their relevance to finance is sharper in the AAAA than in the outcome documents of the previous development finance conferences. It is first stated in a general tone at the beginning of the document as the commitment to respect all human rights[397] but the provisions that follow indicate that in the formulation and implementation of financial policies, the full realization of human rights is taken into consideration, including the need to promote and protect them effectively in accordance with international human rights law. To be precise, the fulfillment of human rights is mentioned in relation to the specific categories of people such as women, migrants and children as amongst the vulnerable groups requiring special attention.[398] Furthermore, there is no distinction with regard to the activities either of the business sector, which should comply with international standards such as the Guiding Principles on Business and Human Rights, ILO labor standards and the CRC, or development banks, which should establish social and environmental safeguards systems, including on human rights.[399] Therefore, the human rights of all people should be protected in the economic sphere as well.[400]

For their part, the principles for effective development cooperation facilitate sustainable and inclusive development as they forge a new global development partnership that embraces

[397] ibid.
[398] ibid, paras 6, 111-112.
[399] ibid, paras 37, 75.
[400] OHCHR emphasized that the objective of financing development should be the equitable distribution of resources so that all persons have their most basic needs met and human rights are made a reality for all and outlined a number of obligations and responsibilities that the AAAA should reflect in that respect; OHCHR, 'Key Messages on Financing for Development and Human Rights', <*https://www.ohchr.org/Documents/Issues/Development/KeyMessageHRFinancingDevelopment.pdf*> accessed 2 September 2018. On the same note, civil society expressed skepticism about the new financing framework for Agenda 2030, stating that although the AAAA promulgates the realignment of financial flows with public goals, the agenda does not tackle the structural injustices in the current economic system and that development finance is not people-centered:, 'Third FFD Failing to Finance Development–Civil Society Response to the AAAA on Financing for Development', (*Global Policy Watch,* 16 July 2015*)* <https://www.globalpolicywatch.org/blog/2015/07/16/civil-society-response-agenda-financing-development/> accessed 2 September 2018.

countries' diversity and recognizes the distinct roles that all stakeholders in cooperation can play to support development. The four principles, namely ownership of development priorities by developing countries, the focus on a sustainable impact as the driving force behind investments and efforts in development policy-making, inclusiveness, transparency and accountability in development partnerships, comprise the Busan Partnership Agreement (BPA), which was finalized during the Fourth High Level Forum on Aid Effectiveness after receiving the support of more than 160 countries, the civil society and the private sector alike.[401] The BPA builds on the preceding Paris Declaration on Aid Effectiveness[402] and the Accra Agenda for Action[403] that based development efforts on workable aid policies, but directs the focus from efficiency of aid to efficiency of development which requires a wider net of means and institutional arrangements to bear results. Accordingly, the BPA principles have an institutional nuance attached to them since they serve such broader outcome. Their endorsement, thus, in the AAAA consolidates the alignment of finance with them, given that finance is a crucial field of development cooperation.[404] In light of this, the AAAA's strong emphasis on accountability checks on development actors, be they governments, corporations, development finance institutions or philanthropic foundations, both in relation to their individual financing packages and as global partners, completes the frame for the consolidation of sustainable development in finance. The AAAA provides for an integrated review, through a follow-up process that discusses and reviews financing-for-development outcomes together with the means of implementation of the post-2015 development agenda, which will then feed into the overall follow-up assessment regarding the implementation of the post-2015 agenda.[405] Through this development, the AAAA furthers the interrelationship with Agenda 2030 because the ensuing body of commitments is taken as a compact. Additionally, it strengthens to a great extent the FFD process itself since the latter is elevated to a forum where rules of finance are fermented with principles of sustainable development and human rights.[406] Thereby, substantive and implementation goals of Agenda 2030 are predicated on a shared normative belief that provides a principled-based network for

[401] Busan Partnership for Effective Development Cooperation, Fourth High-Level Forum on Aid Effectiveness (29 Nov- 1 Dec 2011) <https://www.oecd.org/dac/effectiveness/49650173.pdf> accessed 16 October 2019.
[402] OECD, *Paris Declaration on Aid Effectiveness* (OECD 2005) <http://dx.doi.org/10.1787/9789264098084-en> read online 15 October 2019.
[403] OECD, *Accra Agenda For Action* (OECD 2008) <http://dx.doi.org/10.1787/9789264098107-en> read online 15 October 2019.
[404] *AAAA* para 58, where the effectiveness principles are mentioned verbatim.
[405] *AAAA* paras. 25, 30, 42, 48 (accountability of individual stakeholders) and 125-134 (accountability with respect to global partnership and the follow-up process)
[406] A. Caliari (n.374) 7.

collaborative action and for development objectives to be dealt with in an interrelated and indivisible manner, creating indeed the enabling environment for sustainable development.

ii. Multilateral Development Banks' Support for the SDGs and Integration of Sustainable Development in their Activities and Policies – Towards Good Economic Governance

In this context, multilateral development banks (MDBs) are prompted to update and develop their policies in support of the post-2015 development agenda, including the SDGs. The AAAA encourages them to examine their own role, scale and functioning so that they adapt and are fully responsive to the sustainable development agenda.[407] The exhortation follows previously stated proclamations in international fora that sustainable development must be an integral part of the mandates of international organizations. The WCED stressed that the latter must be made responsible and accountable for ensuring that their policies, programs and budgets encourage and support activities that are economically and ecologically sustainable in the shorter and longer terms.[408] Likewise, MDBs' undertaking to make sustainable development their policy objective has been expressly recognized at Rio,[409] in the Copenhagen Declaration on Social Development[410] and in the Program for Further Implementation of Agenda 21 which encouraged them 'to strengthen their commitments to support investment in developing countries in a manner that jointly promoted economic growth, social development and environmental protection'.[411] A clear expectation by the international community is, thus, articulated that MDBs are to pursue sustainable development in their ordinary activities apropos the universally endorsed shift in the development paradigm.

At first sight, the embodiment of sustainable development in the MDBs' mandate is challenging on the practical side since the multifaceted nature of the concept should be translated into specific, measurable and credible operational actions. By definition, this is not an easy task for any development actor given that the concept comprises of a matrix of goals

[407] Id. para 70.
[408] WCED (n.112) para 312.
[409] Agenda 21 (n.125), preamble para 1.3; UNGA Res 41/197 establishing the Commission on Sustainable Development, which calls the WB and other financial and development institutions to report to the Commission regarding their implementation of Agenda 21 (para 23).
[410] Copenhagen Declaration (n.146), Commitment 2 para (h): 'multilateral development banks should support policies and programs for the attainment, in a sustained manner, of the specific efforts of developing countries and all countries in need relating to people-centred sustainable development and to meeting basic needs for all'.
[411] Program for Further Implementation of Agenda 21, UNGA Res S-19/2, Annex 28 June 28 1997, (1997) 36 ILM 1639, para 81.

with socioeconomic, environmental and institutional inferences and its operational implications have been outlined descriptively in the UN conferences and Agenda 2030.[412] Consequently, the challenge is not unique to MDBs in this regard. Yet, when MDBs' status as international organizations (IOs) and more precisely as IFIs, is taken into account, the assimilation of sustainable development raises a more profound challenge for them – the challenge of redefining their role in shaping community interests and of the relevance of their functionalist purpose. IOs have been founded with the purpose to promote the global common good, the community interest, setting the stage for various forms of organized inter-state cooperation and the performance of tasks that individual states alone could not manage.[413] They do so in a dual capacity, as platforms for discussion or as instrumental entities that are supposed to act upon the specific reason that, being an issue of community interest, prompted their establishment. In this role, though, international organizations have the power to set agendas; they formulate how the community interest should be understood and which matters merit being considered issues of interest for the community; they take decisions and construct a framework for the regulation of those matters.[414]

However, community interests are hardly isolated from the more specific interests, political or of other kind, of the actors that construct them, reflecting, thus, a specific project that the latter wish to put forward. IOs are no exception to that. They have their own ideology behind their establishment and operational mandate, which they wish to propel as still timely through their role described above.[415] Therefore, whereas they work to safeguard the community interest, they do so from their particular standpoint and advocate for a type of community-interest that will simultaneously legitimize their existence. IFIs' traditional view of community interest is one that rests in economic values and gives the leading role in development to the markets instead of States. The Washington Consensus streamlined this vision as the policy prescription that would reduce inequalities among countries and contribute to world prosperity. The same belief, i.e. that the market will produce efficient and equitable development outcomes, remained current even in the post-Washington Consensus, despite the noted shift in the means to achieve development and the reconsideration of

[412] G.Handl, 'The Legal Mandate of Multilateral Development Banks as Agents for Change toward Sustainable Development' (1998) 92 American Journal of International Law 642, 644-645.
[413] J.Klabbers, 'What Role for International Organisations in the Promotion of Community Interests? Reflections on the Ideology of Functionalism', 86 in E.Benvenisti, G.Nolte (eds), *Community Interests Across International Law* (OUP 2018).
[414] ibid, 92, 94, incl. footnote 32.
[415] ibid; infra section 3.1 about the making of the MDGs.

development goals.[416] In direct contrast to that lays the "ideology" behind sustainable development because it encapsulates a pluralistic vision of development. Moreover, it was largely framed outside the IFIs' ambit and its realization as a community interest – if one puts forward the argument that it is such – falls within the mandate of several organizations at the same time. As an immediate consequence, the coordination of these institutes is a matter that needs to be settled and alongside this, the ideological competition that exists among them.[417]

In such across-the-board process of global policy shift, MDBs see their functional existence being under threat. Two reasons contribute to this: first, the concept of sustainable development has changed the determinants of good economic development. The latter now encompasses non-economic parameters as well. The expansion, thus, of sustainable development criteria into MDBs' financing and banking operations amounts to admittance that the needs of borrowing countries are multidimensional and to acceptance of the ineffectiveness and inefficiency of economic programs so far. By implication, the need to reconstruct their identity and define their role in the changing environment seems mandatory. Second, their "re-establishment" is perceived a change imposed on them to a great degree from the outside, which implies a restriction in their autonomy to decide what matters are relevant to their function.[418] So, instead of setting the agenda themselves, they are asked to adjust to an international public policy that ostensibly runs against their constituent documents, which in their majority stress only economic efficiency as relevant to their lending activities and exclude political or other non-economic influences[419] – and, as already mentioned herein, the concept of sustainable development is made up of such non-economic aspects.

Nonetheless, MDBs cannot remain static in this changing international landscape. The process of development is not treated in a purely technical way but incorporates qualitative attributes that create an enabling environment for it. That said, what constitutes legitimate criteria for Banks' financing operations differs from the past. Project-finance that gives due regard to economic factors alone is doomed to fail because financing programs are not implemented in isolation from social, environmental and institutional aspects. These are directly related to the effectiveness and efficiency of economic programs since they can either hamper or lead to their success. Given the intrinsic economic ramifications, factoring

[416] E.Krogstad, 'The Post-Washington Consensus: Brand New Agenda or Old Wine in a New Bottle?' (2007) 50(2) *Challenge* 67.
[417] J.Klabbers (n.413) 96.
[418] G.Handl (n.412) 646.
[419] IBRD, Articles of Agreement, Article III, Section 5(b); Article IV, Section 10. There is no political prohibition clause in the EBRD's Articles of Agreement; infra section 4.1.1 and R.Danino (n 661).

non-economic determinants of development into development-finance projects as conditionalities does not alter the functional specialization of MDBs neither do the latter act *ipso facto* in excess of their articles of agreement by taking on a political role and interfering with a country's domestic or international political affairs. It is true that non-economic aspects of development, in particular human rights, corruption, governance and participation, have political connotations for countries. However, there is scope for their incorporation into the financial operations of MDBs based at the very least on an objective economic rationale and on their relevance to MDBs' main activity, namely the pursuit of economic growth.[420] Besides, in light of the normative ramifications of sustainable development the political prohibition clause can be considered to have adapted to what the concept prescribes. A constructive and teleological interpretation of its meaning, upholding the rule of law and the equitable treatment of member states seems then permissible, if not imperative, in order for MDBs to keep up with the evolving understanding of development that brings more areas of action under their function or recognizes multiple aspects of their function. Multilateral institutions 'by the nature of their mandates must be able to respond to the changing needs of their member States', therefore interpreting MDBs' constituent documents as 'living instruments' should not be considered an exercise at the expense of their manifest function. It should rather be seen as serving the institutions' business and as increasing their credibility and legitimacy in a changing environment. On this account, the political prohibition remains relevant inasmuch as it is understood narrowly as non-involvement in partisan politics.[421]

IFIs are thus called to take up a role as agents of change toward sustainable development although the latter is not included in their charters (with the exception of the European Bank

[420] H.Cisse, 'Should the Political Prohibition in Charters of International Financial Institutions be revisited?' (2012) 3 World Bank Legal Review, 59, who gives an overview of the Bank's practice regarding issues that trigger the political prohibition provision.

[421] Id., 84-86 et seq. The political prohibition is a shield for MDBs against pressures from borrowing states, other donors and even NGOs but also for the IFIs' own credibility towards lenders. Yet, politics may be present in the internal organisation of IFIs, passing on to their rules of conduct and thereafter to their acts within the framework of those rules. In addition, development itself is not an apolitical concept. In that vein, it is important to draw a line between permissive and non-permissive conduct, especially if one takes into account that the collective action it probes require solutions in a global governance framework that involves the increasingly dense and politically significant exercise of power (beyond the state). The expansion of MDBs mandate known as 'mission creep', has been regarded ultra vires activity. Yet, Head finds the 'mission creep' argument unpersuasive because the MDB charters provide for self-interpretation and their provisions are themselves broad enough to allow for such. Furthermore, he points to the fact that MDBs should be regarded nowadays as instruments of global policy regulation while still executing their development banking functions due to the evolution of world affairs that require more policy regulation. Yet, he also agrees that interpretation of MDBs charters is subject to limitations either as a matter of the institution's policy not to be viewed by third parties as willing to stretch its powers when an opportunity arises, hence to safeguard its reputation, or as a matter of law (e.g. respect of the rule of law, customary international law of treaty interpretation according to which a treaty shall be interpreted in good faith in accordance with Art.31 VCLT); John W.Head, 'Law and Policy in International Financial Institutions: The Changing Role of Law in the IMF and the Multilateral Development Banks (2007) 17 Kansas Journal Law and Public Policy 194, 198-210.

for Reconstruction and Development). Indeed, MDBs have geared their strategies towards the integration of environmental, social and economic aspects of development as evidenced by their strategic frameworks. For example, the Asian Development Bank's agenda until the year 2020 focuses on inclusive economic growth, environmentally sustainable growth and regional integration;[422] the Inter-American Development Bank has updated its institutional strategy for the decade 2010-2020 to include gender equality, climate change and sustainability, especially in the Latin American and the Caribbean regions;[423] the integration of development outcomes is the predominant concern of the African Development Bank, which shall mainstream in its 2014-2023 Strategy economic inclusiveness and sustainable development.[424] Likewise, the World Bank Group has endorsed the eradication of poverty and the promotion of shared prosperity as own goals and sustains the view that they can only be achieved through 'environmental, social and fiscal sustainability'.[425] The Bank, moreover, admits 'the three pillars of sustainable development – economic growth, environmental stewardship and social inclusion – carry across all sectors of development'.[426]

Further to these individual statements of recognition of sustainable development as compatible with their purposes, MDBs have also acknowledged their role in advancing sustainable development in joint statements such as in the discussion note prepared in the wake of the Addis Ababa FFD Conference.[427] MDBs declared, 'they are financial institutions committed to eradicate poverty and inequality and they have come together to explore and confirm what they can do, within their respective institutional mandated, to support the achievement of the post-2015 SDGs'. They proposed their preliminary vision for cooperation amongst them with respect to their individual and shared responsibilities to assist country

[422] ADB, Strategy 2020–The Long-term Strategic Framework of the Asian Development Bank 2008-2020, 1 <https://www.adb.org/sites/default/files/institutional-document/32121/strategy2020-print.pdf> accessed 4 March 2017

[423] IADB, Update to Institutional Strategy 2010-2020, Partnering with Latin America and the Caribbean to Improve Lives (March 2015), 1 <https://publications.iadb.org/publications/english/document/Update-to-the-Institutional-Strategy-2010-2020.pdf> accessed id.

[424] AfDB, Regional Integration Policy and Strategy 2014-2023. Integrating Africa: Creating the Next Global Market (2015), 11 <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/Regional_Integration_Stategy_RIPoS_-2014-2023_-Approved_-__Rev_1__-_11_2014.pdf> accessed id.

[425] WBG, The WBG Goals: End Extreme Poverty and Promote Shared Prosperity, 7 <https://www.worldbank.org/content/dam/Worldbank/document/WB-goals2013.pdf> accessed id.

[426] WB, *Bonds for Sustainable Development–Investor Newsletter* (April 2015), 1 <http://pubdocs.worldbank.org/en/770351529080670295/WB-Sustainable-Development-Bonds-Newsletter-2015-v-13-FINAL-interactive.pdf> accessed 4 November 2018; WBG, *The Sustainable Development Agenda and the WBG: Closing the SDGs Financing Gap* (2019 update–non-official publication), 16 explaining how the Bank's institutional vision until 2030 is connected to the SDGs agenda and its global practices match the 17 SDGs almost one-to-one <http://pubdocs.worldbank.org/en/259801562965232326/2030Agenda-2019-final-web.pdf> id.

[427] *From Billions to Trillions*, (n.370).

clients in financing the implementation of the Goals and translate them into country level targets, policies and programs. In a follow-up document, MDBs elaborated on the specifics of their methods to ensure efficient and effective financing solutions that would rise to the SDGs challenge. In that effort, they announced that they would use their business models to scale up financial resources, technical assistance and policy advice to enhance the total contribution they can make to global development and the specific needs of each country, partner or investor.[428] Last but not least, MDBs concern with the operation of sustainable development in their field of expertise is demonstrated through their knowledge-sharing practice whereby they disseminate publications on sustainable development issues and communicate their activities on this front.[429] Nonetheless, the most substantial development that shows precisely *how* sustainable development is incorporated in the functions of MDBs and is actually implemented in their projects is the adoption of environmental and social safeguards and the accountability mechanisms. The former are substantive instruments and determine borrowers' eligibility for lending and subsequently their compliance with those standards for the duration of the financed project. The latter, being procedural, 'interpret and apply the safeguards, contributing to their consolidation and thereafter the transplantation of sustainable development as understood in the safeguards in the MDBs' activities where it influences and regulates behaviors'.[430]

The significance of substantive and procedural instruments is not just practical in the sense that they facilitate on-the-ground implementation of sustainable development projects. They reflect MDBs' normative understanding of the concept. A couple of key ramifications derive from this: first, MDBs' adaptation to the new context of development seems to be driven by the normative precepts of sustainable development and not merely from outside pressure, which makes a consensus on the overriding normative effects of sustainable development seem more plausible. Second, MDBs themselves seem to accept and diffuse through their

[428] *From Billions to Trillions: MDB Contributions to Financing For Development* (7 July 2015*),* 2 <http://documents.worldbank.org/curated/en/602761467999349576/From-billions-to-trillions-MDB-contributions-to-financing-for-development> accessed 4 March 2017. Already for the first three years of the SDGs period, the planned financial support from MDBs was over $400 billion.

[429] E.g. The WBG, World Development Reports <https://www.worldbank.org/en/publication/wdr/wdr-archive>; WBG, *World Development Report 2003: Sustainable Development in a Dynamic World–Transforming Institutions, Growth and Quality of Life* (OUP 2003); Indicatively, S.Nazal, '5 ways CSOs can help advance the SDGs' (*ADB Blog*, Sep 2018) <https://blogs.adb.org/blog/5-ways-csos-can-help-advance-sdgs>; Alessandra Heinemann, 'Why I'm optimistic we can achieve SDG1–ending poverty in all its forms, everywhere' (*ADB Blog,* Aug 2019) <https://blogs.adb.org/blog/why-i-m-optimistic-we-can-achieve-sdg-1-ending-poverty-all-its-forms-everywhere> accessed both 4 Nov 2019.

[430] M. M.Mbengue, S. de Moerloose, 'Multilateral Development Banks and Sustainable Development: On Emulation, Fragmentation and a Common law of Sustainable Development' (2017) 10(2) Law and Development Review 389, 395-397.

own practice and mechanisms sustainable development as a norm in development policy, with its substantive and procedural aspects as outlined in the previous chapter. They become active promoters of sustainable development and a sustainability factor of development governance since they influence the way power is exercised and decisions are taken in the field on the basis of a values-based concept and also the design and structuring of institutions. Mainstreaming sustainable development into their internal and external practices they transform into fairer, more responsible and solidarity-based institutions. Yet, there might be a caveat to the robustness of these implications which derives from the fact that the stated transformation in MDBs' policy is prompted in the context of a politically endorsed agreement that both the AAAA and the SDGs Agenda are. It could be contended that MDBs' deference to sustainable development is due to no more than a political or moral duty. For sure, the aforementioned documents suggest so. However, if sustainable development is presented as a function and purpose of MDBs and is developed through their practice as a legitimate end, does this mean that their operational policies and accountability mechanisms are only good politics? Or do MDBs also have a legal responsibility to do so? Answering the question assumes the examination of MDBs operational policies and accountability mechanisms as legal instruments and of the status of sustainable development in law. For the core elements of sustainable development as well as the issues raised in the SDGs Agenda are not only matters of interest in policy or politics; there is definitely an interplay between law and policy since it is unlikely for the latter to be effectuated in a legal lacuna and law's role as a goal-implementing mechanism can be instrumental in the realization of sustainable development. The evaluation of sustainable development from a legal perspective will be the theme of the following section. The legal aspects of MDBs' operational policies and their accountability mechanisms will be constitute the core of my analysis in part II.

3.1.5. IN CONCLUSION

This section showed that the concept of (sustainable) development finds application in international development policy through Goals. Apropos, the advantages and disadvantages of goals as governance tools for development were explained before discussing the SDGs in detail. It was shown that the SDGs have a firmer normative foundation in human rights and the values of human dignity, equity and justice; hence, in principle, they are safeguarded from being mere technocratic fixes. Yet, goals are not rules of conduct for actors similar to rules of law. Furthermore, there is also no robust compliance mechanism that can impose sanctions on non-compliant actors. Indeed, Agenda 2030 does not prescribe specific binding obligations for each stakeholder. Rather, the 'response-ability' to the Agenda is understood from the perspective of stakeholders' forming a political-institutional collective and having a general obligation to respond to the Agenda 2030 jointly. The reason for this, besides goals' inherent disconnection to law, is the overtly political context within which the SDGs arose. Sustainable development can be considered a political objective, which is also phrased in moral terms and is pursued through a coordinated, collective apparatus. Accordingly, stakeholders bear only political accountability for not rising up to their commitments.

In practice, this collective obligation is depicted in Agenda 2030 as a duty of cooperation and good governance. International cooperation has been embedded in international development as the means and also a duty to realize its purposes, despite disagreement regarding the binding nature of this duty. Likewise, good, effective and equitable governance is aligned with the practical and normative composites of sustainable development. Its emphasis on strong institutions provides a structured way for transforming the divergent preferences and interests of interdependent stakeholders into sustainability-oriented development policies.

IFIs are major sources of financial and technical support and play a pivotal role in the realization of sustainable development by aligning international economic decision-making and global economic governance with the normative ramifications of the concept. The third international conference in Addis Ababa served catalytically the contextualization of the role of development finance in Agenda 2030. The cross-references to each other ascertain the entwined nature of their content. Development finance is therefore associated with the purpose of sustainable development through the mainstreaming of sustainable development criteria in specific financing strategies.

MDBs have embraced sustainable development by expanding their functions pursuant to their constituent documents, which have been interpreted to include the normative

benchmarks of sustainable development. In that capacity, MDBs' contribution to the realization of sustainable development is critical not only because they facilitate implementation but also because they strengthen its function as a norm. The question remaining open is whether sustainable development is only a political or moral goal given that it has been concluded in the framework of political agreements. Is what sustainable development represents merely a matter of politics or policy? By implication, is MDBs' endorsement of sustainable development simply a political and economic opportunity? Fundamentally, how strong can actors' compliance with Agenda 2030 and the SDGs be in such a framework where voluntary commitments prevail, even though the Agenda's legitimacy is robust? Could goal-setting be strengthened by rules in the effort to pursue sustainable development? It is true that neither politics nor policy is applied in the absence of the regulatory framework of law, and law is one of the tools for policy implementation. Sustainable development should thus be examined from a legal standpoint too, which will allow comprehensive conclusions about its normative effects on regulating stakeholders' conduct.

3.2. LAW AND SUSTAINABLE DEVELOPMENT

3.2.1. The Law and Development Movement

a. The Instrumentality of Law for Domestic and International Development in the 'Development as Growth Era'

The relationship between law and development has followed the changes of the model of development over time and originates in assistance activities of developed nations to Third world countries. In essence, it emerged as a by-product of development assistance. The different rationales behind development policy initiatives, the actual design of development projects and the allocation of funds for this purpose by development agencies generated different trends in the way law could assist economic and social progress in developing countries. In the period when development was identified with economic growth, we can distinguish two phases for the function of law in the economy: the first was shaped by the modernization theory and the interventionist role of the state in managing the economy towards industrialization and free market.[431] Law was essential to economic development

[431] R.Sarkar, *International Development Law* (OUP 2009), 36. For a good overview of the law and development movement, B.Ngoc Son, 'Law and Development Theory: A Dialogical Engagement (2019) 51 George Washington International Law Review 65. For a general theory of law and development, Yong-Shik Lee, 'General Theory of Law and Development' (2017) 50 Cornell International Law Journal 415.

because it possessed formal, rational and logical characteristics that created the steady, predictable system necessary to the functioning of a free market capitalist system and was instrumental to growth.[432] Law-making in developing countries aimed, thus, at modernizing the regulation of key traditional economic sectors and simultaneously shaping state institutions, so that developing states emulated the liberal-democratic societies of the West, which protected individual liberties, democracy and the rule of law in tandem with wealth and economic production. Law was clearly a tool to achieve development in those countries through regulatory reform and the creation of a legal culture according to the western archetype of the liberal, democratic, modern state.[433]

The second phase was influenced in the first-half by the rising critique of modernization by dependency theorists. Proceeding from their main argument that developing countries are trapped in perpetual dependency relations with advanced societies due to the system of world capitalism, these theorists brought the study of the international economy at the center of the law and development discourse, although law per se had a reduced status in their narrative compared to economics.[434] Yet, insofar as they advocated the redress of structural deficiencies of the international economy that augmented inequality and colonial-type relationships between developing and developed states, they provided fertile ground for the NIEO agenda to shape the legal dimension of economic development policy at the international level. Through the changes the agenda introduced, it aspired to balance the relationship between law and development by criteria of redistribution, inclusiveness and in

[432] B. Z.Tamahana, 'The lessons of Law-and Development Studies' (1995) 89 American Journal of International Law 470, 473: 'Law is essential to the economic development because it provides the elements necessary to the functioning of a market system. These elements include a universal rule uniformly applied, which generated predictability and allows planning; a regime of contract law that secures future expectation; and property law to protect the fruits of labor. In theory, law assists political development by serving as the backbone for the liberal-democratic state. Law is the means through which the government achieves its purposes, and it serves to restrain arbitrary or oppressive government action'.

[433] D. M.Trubek, M.Galanter call this type of legal reform in the frame of modernisation theory 'legal liberalism', a movement originating in the US. The movement's basic assumptions can be summarised as follows: the state is the primary agent of social control and change, and will use law as a purposive instrument to transform society but will also be constrained itself by it. Hence, legal rules are considered instruments of social change because they bring about changes that change behaviour. Such presumption justifies the instrumentality of legal rules for the achievement of development goals and generated a strong belief that investing in the improvement of legal systems would yield high developmental payoffs. Nonetheless, this law and development movement is criticised by them as highly ideological in nature because it was used to smuggle in to developing societies the political, cultural and moral values of the West. It was furthermore ethnocentric because it ignored that development countries lacked political pluralism and the legal foundation whatsoever to internalise legal rules. Legal development assistance meant to impose western political and social organisation as a universal model, dismissing the cultural and historical diversity of developing states. These characteristics led to the failure of legal liberalism to promote development in those countries: D.M.Truber, M.Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' (1974) Wisconsin Law Review 1062.

[434] R.Sarkar (n.431).

the long run, effectiveness. Leaving aside the little success this movement had, the most critical contribution of this phase has been the changing perception of law exclusively as a means for domestic economic regulation and development (national development law) and the prominence of the need for legal rules governing key development parameters and the relations of states in this field to be international too. As of this point, the international outlook of the law on development was emphasized, setting the ground for the emergence of the international law on development.[435]

The law and development movement continued to evolve in the direction of internationalization during the second-half of the 'development as growth' era, when the proliferation of the neoliberal ideology about development and globalization were its main characteristics. The shift in economic policy towards open markets required the legal-institutional conditions of market economic relations to be framed appropriately. At the international level this meant a new legal framework for trade, investments and transnational commercial transactions by private entities, international finance and stability in monetary policies for currency markets that would be applied universally.[436] National economies would have to adjust respectively to these goals; therefore international regulation needed an enabling domestic setting as a counterpart. In developing countries the policy prescriptions of the Washington Consensus aimed to assist in this process. Law once more was a purposive instrument directed in its international dimension mostly to regulate economic law issues relevant to global integration. At the national level, the aim was to create the conditions for the international economic rules to be operational in countries' domestic economic order. Consequently, the nature of legal reforms was the concomitant of the international demand for market efficiency.

A third phase for the 'law and development' discourse has been entered in the light of the more holistic understandings of development that caused development thinking to be revisited altogether. Indeed, under the rubric of sustainable human development, a comprehensive development framework is the new exemplar for development policies. With the expansion of human capabilities of present and future generations being the ultimate aim of development, predicated on the principles of universality, equity and justice, it emphasizes the interrelationship and interdependence of all aspects of development and suggests that strategies address economic, social and environmental objectives, public participation, the

[435] S.Newton, 'The Dialectics of Law and Development', 182 et seq. in D.Trubek, Alvaro Santos (eds.), *The New Law and Economic Development-A critical Appraisal* (CUP 2006).
[436] D.Kennedy,'The "Rule of Law", Political Choices, and Development Common Sense', 95, 131 in D.Trubek and A.Santos (eds.) supra.

protection and realization of socioeconomic entitlements and civil liberties as human rights, good governance, country-ownership, increased cooperation and coordination among all actors of development and effective and accountable institutions at the national and international level. These elements have brought law to the forefront not merely as a tool of development but as an objective itself.[437]

b. Law as a Tool for and Objective of Sustainable Development:

i. The Pursuit of 'The Rule of Law' and its Relevance to Sustainable Development's three Dimensions

Legal reforms in the context of current development trends are put forward emphatically as the pursuit of the 'rule of law' (RoL) in the countries where they are applied. While an unequivocal definition of the rule of law is not discernible, it could be said that the term refers with certainty to a system of rules and institutions consisting of predictable, enforceable and efficient laws that guide the behavior of their subjects.[438] This formal, procedural understanding of the RoL focuses simply on the efficaciousness of a legal system in providing an optimal institutional structure for social and economic relations and governmental action irrespective of the content of these rules and whether they incorporate and promote axiological values such as fairness, justice, democracy, distributive equality, constitutionalism and the like that would pass on a judgment about the law as good or bad, fair or not.[439] In contrast lies a substantive conception of RoL to which not only the formality but also the normative dimensions of the RoL are important. Under this conceptualization, the RoL is informed by the aforementioned values and reflects specific rights that correspond to them.[440] In other words, the quality of RoL as an institutional arrangement matters as well.

---

[437] D.Trubek, A.Santos, 'Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice', 6 et seq. in idem (n.435).

[438] A.Santos, 'The World Bank's Uses of the "Rule of Law" Promise in Economic Development', 253 in D.Trubek,A.Santos (eds.) (n.435).

[439] T.Ringer, 'Development, Reform and the Rule of Law: Some Prescriptions for a Common Understanding of the Rule of Law and its Place in Development Theory and Practice' (2007) 10 Yale Human Rights and Development Law Journal 178. The author explains and critically discusses the distinction between "thin", i.e. procedural/formal/instrumental conception and "thick", i.e. substantive conception of the RoL that is not autonomous vis-à-vis political morality.

[440] UN Secretary-General, 'The Rule of Law and Transitional justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General' (Aug. 23, 2004) UN Doc S/2004/616* defines the rule of law as 'A principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated laws, which are also consistent with human rights norms and standards. It requires measures to endure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of law, the separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency'. This is a broad understanding of the rule of law, corresponding to a "thick" conceptualization.

For (sustainable) development, which is in the view adopted herein a normatively driven initiative, the RoL cannot but be expressed in normative terms.[441] Yet, its procedural value is also a prerequisite consistent with the procedural dimension of sustainable development. Thus, a combination of the two categorical conceptions of the RoL coheres more with the goals of sustainable development. The relationship between the RoL and development is demonstrated in the following excerpt from a 2002 World Bank report:

'The rule of law is essential to equitable economic development and sustainable poverty reduction. Weak legal and judicial systems undermine the fight against poverty on many fronts: they divert investment to markets with more predictable rule-based environments, deprive important sectors of the use of productive assets, and mute the voice of citizens in the decision-making process. Vulnerable individuals, including women and children, are unprotected from violence and other forms of abuse that exacerbate inequalities. Ineffectual enforcement of laws engenders environmental degradation, corruption, money laundering, and other problems that burden people and economies around the world.'[442]

Elsewhere it was noted that:

'The Bank has promoted adherence to the rule of law as a fundamental element of economic development and poverty reduction, given that the absence of well-functioning law and justice institutions and the presence of corruption are oft-cited constraints to economic growth and to the sustainability of development efforts. A well-functioning legal and judicial system is critical not only as an end in itself, but also as a means of facilitating the achievement of other development objectives[…]'.[443]

In the above formulations, both an institutional and substantive view of the RoL is noticeable. The RoL's inherent value as a process for the formulation and application of rules is acknowledged. In parallel, the appreciation that an appropriate legal system, properly run and enforced, should be linked with the creation of an environment conducive to economic, social and environmental aspects of development requires the substance of the rules to be aligned with these purposes. The Bank exemplifies this by reference to the necessity to fight corruption that impinges on transparency, accountability and democratic governance, the creation of economic rules that enhance business activities, the fight against poverty which presumes a legal system that promotes and protects human rights, access to justice, participation and the enhancement of people's capabilities for equitable and sustainable development. These are just some illustrations of the RoL's function in the process of

[441] T.Ringer, (n.439), 196.
[442] WBG Annual Report (2002), 77 <http://documents.worldbank.org/curated/en/379051468163155729/pdf/multi0page.pdf> accessed 23 October 2019.
[443] WBG Legal Vice Presidency, *Initiative in Justice Reform 2009*, 2 <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/JRInitiativestext2009.pdf> accessed 23 October 2019.

development, showcasing that stable, transparent legal regimes and due process guarantees promote economic development; access to justice and equality of opportunity for individuals' participation further development's social pillar while RoL that provides for the fair and sustainable management of natural resources, protects the environment.[444] It becomes quite clear how the RoL is relevant to all three dimensions of development and why its promotion is furthermore instrumental and intrinsic to it.[445]

ii. The Contours of an International Law for Sustainable Development: institutional and normative comprehensiveness

This third (and ongoing) phase of development law is characterized then by expanded content in degree and in kind due to the expansion of the notion of development. As a direct corollary, the purpose of development law has been altered from seeking to close the gap between the developed and developing world on the basis of economic considerations to satisfying a wide range of interconnected goals that admittedly are in the interest of humankind. Consequently, although it remains true that development decision-making resides with sovereign states and they bear predominantly the responsibility for allocating resources and assessing the environmental and human impact of projects within their jurisdiction or control, sustainable development necessitates engagement with questions of how best to distribute and make use of natural, economic and political resources as the basis for stable, secure and just societies at a global level. It represents an overarching collective interest of the international community, which pledges to have human beings, as individuals, groups or through the state of their nationality under its direct concern.[446] By implication, questions like the aforementioned trespass the domestic domain and become relevant to a wider net of stakeholders because more entities have an established interest in, and/or are affected by, the outcome of development. It is, thus, required that issues evolving from the accommodation of economic development, social justice and environmental protection be decided upon cooperatively on the basis of shared international values. It follows that legal

[444] I.Kahn, 'How can the Rule of Law Advance Sustainable Development in a Troubled and Turbulent World' (2017) 13 McGill Journal of Sustainable Development 211, 212

[445] A. Santos (n.438). However, Tor Krever, 'The Legal Turn in Later Development Theory: The Rule of Law and the World Bank's Development Model' (2011) 52 Harvard International Law Journal 287, traces the RoL discourse in the WB back to the criticism against neoliberal development and demonstrates that the organisation adopts a narrow definition of the RoL which continues being a market-facilitating view of law and it is misleading that it promotes sustainable development. He implies that the Bank's shift in understanding of the RoL from institutional to substantive and from a means to an end of development has allowed the WB to justify various law reform projects and its involvement in them. This hodgepodge, as he calls it, articulation of the rule of law is actually reflected in this excerpt.

[446] W.Friedmann, 'The Relevance of International Law to the Processes of Economic and Social Development' (1966) 60 American Society of International Law Proceedings 8, 10.

development as well should be exerted by mutually agreed commitments and institutional practices for joint and integrated solutions to the global challenges of sustainable development.

Against this backdrop the international dimension of development law is looked at afresh because development is viewed as a mutually beneficial endeavor for all countries as well as private (individuals, local/international NGOs, corporations, cooperatives) and institutional actors (MDBs and bilateral aid agencies) in a globalized world. Given that and the multiplicity of development objectives, the areas of interaction among development stakeholders have widened, instituting thereafter deeper and more complex legal relationships between them on the international level. An international institutional framework that ensures the legitimacy of the development process for all stakeholders is therefore instrumental.[447] Put differently, the RoL should be advanced, implemented and maintained on a worldwide basis for sustainable development.[448] In practice, such a task amounts to the making of clearly articulated substantive and procedural principles that define the process of development on an international level; the creation of an international legal framework, comprising of contextual norms on various subjects of environmental, economic and social concern, that reconcile any conflict between existing legal norms in each of those fields separately and address their intersections;[449] it entails also strengthened implementation bodies (dispute settlement mechanisms, quasi-judicial bodies etc.) that refine rules of enforcement in order to safeguard development interests, make the development process more accessible and equitably participatory and hold stakeholders accountable.[450]

All things considered, the international law on development is not simply a matter of globalized legal norms and standards in subject-matter areas that have an international development impact. For sure, the internationalization of ever more issues with

[447] R.Sarkar (n.431), 85.
[448] UNGA Res 67/1 (24 September 2012) ('Declaration on the Rule of Law'), para 7: 'the rule of law and development are strongly interrelated and mutually reinforcing, that the advancement of the rule of law at the national and *international* levels is essential for sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms, including the right to development, all of which in turn reinforce the rule of law...'
[449] R.Sarkar (n.431), 111 defines a contextual legal norm as one 'which on its face provides identical treatment to all States affected by it but the application of which requires (or at least permits) consideration of characteristics that may vary from country to country. The application of a contextual norm thus typically involves balancing multiple interest and characteristics'.
[450] I.L.Head, 'The contribution of International Law to Development' (1987) 25 Canadian Yearbook of International Law 29; M.de Serpa Soares, 'Room for Growth: The Contribution of International Law to Development' (2015) 14 Chinese Journal of International Law 1; M-C.Segger, A.Khalfan (n.177) Introduction (1-12), Ch.4 (51-91); J.Gu, 'International Development Law' *Oxford Bibliographies* (last review 2 November 2017) <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0121.xml> accessed 23 October 2019.

developmental ramifications and the economic and environmental interdependence of States have made it impossible for stakeholders' activities to be exempt from international regulation. Yet, the advent of 'international law in the field of sustainable development' (Rio Principle 27) is quintessentially a question of a legal regime that must streamline into a coherent approach the various threads of development, provide for the constructive engagement of each stakeholder in the process and delineate their duties and rights based on collective, binding international principles and instruments that reflect the content and normative ramifications of sustainable development. 'International Sustainable Development Law' (ISDL), thus, would ideally dilute the traditional frontiers between the conventional disciplines of international economic, environmental and social law and purport to introduce an evolutive interpretation of recognized principles and rules in those fields[451] or even introduce new procedural and substantive obligations that would facilitate a balance between intersecting systems of international law.[452]

As expected, sustainable development itself is the guiding concept for crystalizing this new body of law. Hence, the next section examines sustainable development as a legal concept in order to present its influence in the evolution of the international law on development.

[451] P.Sands, 'International Law in the Field od Sustainable Development' (1994) 65 British Yearbook of International Law 303, 379 defines international law in sustainable development as 'a broad umbrella accommodating the specialised fields of international law which aim to promote economic development, environmental protection and respect for civil and political rights'; it is not an independent and free-standing body of principles and rules as it draws on principles and rules from traditional approaches to the international legal order. Hence, it is evolutionary rather than revolutionary law. For a comprehensive summary of these specialised fields of PIL see M-C. Segger and A. Khalfan (n.177), 51-91. M.E.Salomon, 'From NIEO to Now and the Unfinishable Story of Economic Justice' (2013) 62(1) International and Comparative Law Quarterly 31, 47-50, evaluating whether 'international development law' exists as an autonomous body of law regulating the relations among sovereign but economically unequal states, replies negative and argues instead that what makes it valuable is the fact that existing legal regimes (in trade, investment, finance, human rights, the environment) were cross-fertilised with the values (principles) of equity, justice, international cooperation, and the idea of common interests. Thus it showed how development objectives are common to all these subfields of international law, hence they cannot be used or theorised in isolation. To be fair and realistic, I do not see how sustainable development law may evolve differently. Hence, what I mention in the text is rather aspirational. See also my position on SDL in 'Concluding Remarks' of part I of the thesis.

[452] M-C.Segger and A.Khalfan (n.177), 50

3.2.2. The Status of Sustainable Development in International Law

3.2.2.1. Sustainable Development Principles as the Foundation for Sustainable Development Law

The Rio Declaration has been authoritatively influential in laying the foundations for law-making on sustainable development. It was the first document to set fundamental principles of sustainable development both of substantive and procedural nature, distilling in this way the most important aspects of it.[453] The former include the sustainable utilization of natural resources, the integration of environmental protection and economic development, the right to development and equity in its inter- and intra-generational form regarding the allocation of resources (Principles 3-8). The procedural features comprise of public participation in decision-making processes, individuals' right to information and access to judicial and administrative remedies and the execution of environmental impact assessments by competent national authorities prior to deciding on proposed activities that are likely to have a significant adverse impact on the environment (Principles 10-17.). Procedural aspects apply also horizontally, between States, in light of their duty to notify, consult, cooperate and assist one another in situations where their activities have significant trans-boundary effects (Principles 18-19).

While the principles as such may not be all new in international law, their systematization in one document as components of sustainable development has ramifications for the legitimacy of the concept in international law. On the one hand, the declaration signifies States' consensus on the necessity to have universally accepted principles in framing the law (and policy) of sustainable development. On the other, the mandatory language in which most of the principles are framed (note the imperative command "shall" in most of them), suggests that they were intended to operate as norm-creating principles.[454] Secondly, the interdependent and indivisible connection that the Declaration drew between development and other areas belonging to the corpus of international law, indicatively warfare and peace, the rights of indigenous people and women, denotes –although tacitly– the need to create a system of international law relating to sustainable development with codified core substantive

[453] P.Schwarz, 'Sustainable Development in International Law' (2005) 5(1) Non-State Actors and International Law 127, 129 (incl.footnotes 15,16): 'UNCED and the Rio Declaration gave the principle of sustainable development 'credible international standing' and anointed it formally for legal use within the corpus of international environmental law'.

[454] A.Boyle, D.Freestone, *International Law and Sustainable Development* (OUP 1999), 2-5.

and procedural legal norms in order to strengthen the intertwined nature of different legal regimes and promote the implementation of the concept of sustainable development.[455]

Since Rio, sustainable development received wide endorsement among all society sectors and informed the content (as a whole or just aspects of it) of many treaties on the environment, trade and investment by becoming either their objective or part of their purpose. Likewise international declarations, corporate charters, national governments' policies and the operations of international organizations (IOs) formally accepted sustainable development as a goal.[456] This recognition of the concept made more urgent the need for a comprehensive international law perspective on the integration of sustainable development objectives that would give due consideration simultaneously to the activities of States, intergovernmental organizations, industrial concerns, non-governmental organizations and individuals as participants in such multilateral development framework. Having the Rio principles as reference, the first step towards a framework of international law in sustainable development was the elucidation of principles relating to sustainable development. Initiatives to this direction were put forward by the UN while academic scholars have expressed their own views on the matter too.[457] All the same, the work undertaken by the International Law

[455] Agenda 21 (n.125),Ch39.I: there is a 'need to clarify and strengthen the relationship between existing international instruments or agreements in the field of environment and relevant social and economic agreements, taking into account the special needs of developing countries'. The same need was acknowledged again in the Report of the WSSD (n.127), para 148(e), where states mandated the UN Commission on SD to consider the legal developments in the field of sustainable development being attentive to the role of intergovernmental bodies in promoting the implementation of Agenda 21 as far as the international legal instruments and mechanisms is concerned.

[456] D.Hunter, et al, *International Environmental Law and Policy* (5th edn, Foundation Press 2015), 169; national reports to Commission on Sustainable Development <https://sustainabledevelopment.un.org/intergovernmental/csd19>;Trade/investment agreements, e.g. *EU-Singapore Free Trade* (Preamble, Art.12.4, 12.10, 12.11, 12.14, 12.15) *and Investment Protection Agreements* (Preamble), OJEU I.294/3 (14.11.2019); *USA-Chile Free Trade Agreement* (USA-Chile) (adopted 6 June 2003, entered into force 1 January 2004), preamble <https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text>; *North American Free Trade Agreement (NAFTA) (*Canada-USA-Mexico) (adopted 17 December 1992, entered into force 1 January 1994), (1993) 32 ILM 289 and 32 *ILM* 605, to be replaced by *United States-Mexico-Canada Agreement (USMCA)* (signed 30 November 2018, not yet in force) <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> accessed all 15 December 2019; UN Framework Convention on Climate Change, (4 June 1992, into force 21 March 1994), 1771 UNTS 107, Art.3; UN Convention on Biological Diversity (5 June 1992, into force 29 December 1993), 1760 UNTS 79, Arts.1, 8, 10; more in P.Sands (n.395).

[457] Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development, Geneva, Switzerland, 26-28 September 1995 <https://digitallibrary.un.org/record/212979/?ln=en>; A.Boyle, D.Freestone (n.454), 8-16 recognise sustainable utilisation, integration of environment and development, the right to development, and intra- and intergenerational equity as the elements that determine the content of sustainable development and consider environmental impact assessment and participation as procedural elements of implementation; P.Sands, et al (eds.), *Principles of International Environmental Law* (4th edn, CUP 2018), 219 [cited in S.Atapattu, 'From Our Common Future to Sustainable Development Goals: Evolution of Sustainable Development under International Law' (2019) 36 Winsconsin International Law Journal 215, 240] identify four legal elements of sustainable development: a) intergenerational equity, b) sustainable use of natural resources, c) intragenerational equity and d) the principle of integration.

Association's (ILA) Committee on Legal Aspects of Sustainable Development is deemed to have the most significant impact on the firm embodiment of sustainable development in law.

In its final report, the ILA pronounces sustainable development 'an established objective of the international community and a concept with some degree of normative status in international law'.[458] Although the Committee did not give more details on this, it did provide a thorough legal justification for the recognition of general and specific international law principles for sustainable development and their current status in law. It built its argumentation on the evolution of public international law, which was triggered by changes in international economic relations since the NIEO era, the consensus on international development policies set during the UN summits in the 1990s up to the Millennium Agenda and, naturally, the work produced by the forums that laid the bedrock for sustainable development. Thus, the ILA identifies the sources of these principles in the *lex lata* rules for economic development, human rights and environmental protection and enriches them with late concepts in law such as good governance. In this view, the Committee aims at distinguishing the core dimensions of sustainable development and contributing to a balanced and comprehensive framework of international law in the field. The contours of the legal dimension of sustainable development, were finally consolidated in the following seven principles announced in the New Delhi Declaration:[459] a) the duty of States to ensure sustainable use of natural resources, b) the principle of intra- and intergenerational equity and the duty to cooperate for the eradication of poverty, c) the principle of States' common but differentiated responsibilities, d) the precautionary approach to human health, natural resources and ecosystems, e) public participation and access to information and justice, f) good governance and g) the principle of integration and interrelationship to human rights and social, economic and environmental objectives.

Despite these developments, there is no uniformity in views on whether sustainable development in itself is a self-standing legal rule principle or. Uncertainties remain also as to whether 'the said principles relating to sustainable development are sufficiently substantive to

[458] Committee on Legal Aspects of Sustainable Development, 'Searching for the Contours of International Law in the Field of Sustainable Development', International Law Association, Final Conference Report (New Delhi, April 2002), 5.

[459] *ILA New Delhi Declaration* (n.179). A.B.M.Marong, 'From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development' (2003) 16 Georgetown International Environmental Law Review 21, 60-64 argues that from the specific principles of sustainable development mentioned in the ILA's report sovereignty over natural resources, intra- and intergenerational equity and common but differentiated responsibility define the substance of sustainable development whereas the precautionary principle, public participation in decision-making and environmental impact assessment are those that dictate how legal regimes and decision-making procedures could contribute to the realisation of sustainable development.

be capable of establishing the basis for an international cause of action'.[460] That said, opinions about the role of sustainable development in international law fluctuate between bindingness or not and are divided between two opposites: the thesis that sustainable development constitutes customary international law and the claim that it is merely a policy goal included in international treaties but with no normative value whatsoever. What holds true?

3.2.2.2. Classifying Sustainable Development in the Sources of International Law: Arguments from International Jurisprudence and Academic Theory

Acceptance of the former (customary rule) requires certainty about the normativity of the concept and evidence of the two elements based on which a norm is classified as custom in international law: state practice and *opinio juris.*[461] Concluding on these in an affirmative way, gives a positive answer to the question if there is a general legal obligation to develop sustainably that is binding on states and constrains their conduct. For the proponents of the thesis, the proliferation of soft and hard law instruments, even programs of action and national legislations, in which sustainable development is referred to constitutes proof of states' *opinio juris* on the binding nature of sustainable development insofar as formulations of the concept are expressed in a similar way and framed as legal rules.[462] The fact that there is no uniformity in the way the concept is articulated does not suffice to deny the consistency and coherence in the proclamation of the concept as a binding objective of States' conduct. The latter has been endorsed as such by the international community and states adopt 'constantly and generally' national development strategies and implement international development projects aiming at sustainable development. Conduct, aimed towards that end and in conformity with the abundance of endorsed legal acts, irrespective of the particular way it is outlined, can still form valid precedence for the existence of a general practice of States. Hence, sustainable development as an objective constitutes a norm of customary law, albeit very general and abstract.[463]

---

[460] A.Boyle, D.Freestone (n.454), 7,18; M-C.Segger,A.Khalfan (n.177), 96.

[461] Article 38(1)(b) ICJ Statute. The elements that form customary international law have been articulated in the *Asylum Case* (Columbia v. Peru), 1950 ICJ 266, 276-77 and in *North Sea Continental Shelf* (Fed.Rep. of Germany v. Denmark; Fed.Rep. of Germany v. Netherlands) 1969 ICJ 3.

[462] D.Luff, 'An Overview of International Law of Sustainable Development and a Confrontation between WTO Rules and Sustainable Development' (1996) 29 Belgium Review of International Law 90, 94-97.

[463] V.Barral, 'Sustainable development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) 23(2) European Journal of International Law 377, 388. It is important to note though that the author argues in favour of sustainable development as custom in light of the question: is there an obligation to implement measures aimed at achieving or to promote sustainable development (p.386)? Her argumentation is,

Truly, the continuous invocation of sustainable development in declarations and treaties demonstrates that the concept enjoys universal acceptance and that the international community commits strongly to its realization but, according to Lowe, this is not enough to uphold the view that states accept the concept as law *ipso facto.*[464] The negation of the proposition is furthermore unrelated to the assertion that sustainable development is rather a 'soft law' principle, hence of lower normative status, due to the fact that it is found mostly in soft law documents which because of their non-binding nature create a weaker degree of expectation of state compliance. Quite the opposite, the single difference between hard and soft law rules lies in the process of their making and the consequences they bear if breached, not in the normativity of the rules.[465] For a notion to acquire normativity and form the basis of a general rule of law its norm-creating character should be agreed foremost. This task precedes even the search for state practice and *opinio juris* and involves the identification of such characteristics that give to the notion clarity in meaning and scope. Pursuant to Lowe, sustainable development does not possess these qualities unquestionably, even if one resorts to its individual substantive components since their normative status in international law presents some challenges too.[466] For instance, intergenerational equity has become part of international law as a principle that underlines environmental treaties but there is no clear-cut position as to the justiciability and enforceability of future generations' rights since only occasionally have future generations been granted *locus standi* and even then one may argue that intergenerational equity does not actually generate rights but only imposes an enforceable duty on states to account for the interests of future generations in the framework of the exercise of existing rights under international law.[467]Hence, intergenerational equity's

---

furthermore, embedded in the opinion that sust.development is an obligation of means that presupposes a variety of ways it can be fulfilled; hence, a general practice of states can still be identified even if it is expressed in different types of effort. This variability in sustainable development's nature is exerted by its purposive fulfilment and necessity for effective implementation as an objective.

[464] V.Lowe, 'Sustainable Development and Unsustainable Arguments' in A.Boyle, D.Freestone (eds.) (n.454), 24.

[465] Id., 30. More on hard and soft law below.

[466] Id. 24ff.; *North Sea Continental Shelf*, para 72 "It would be in the first place necessary that the provision concerned should […] be of fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law." According to one reading of the ICJ's judgement, this has been regarded a third requirement for custom.

[467] *Minors Oposa v. Secretary of the Department of Environment and Natural Resource*s (1994) 33 *ILM* 173, although V.Lowe (n.464), 27 comments that the representative character of plaintiffs' actions was a performance of their obligation to ensure the protection of the right to a sound environment for future generations, not the right of a future generation per se. The ICJ refrained to discuss the legal status of intergenerational equity in the *Nuclear Weapons in Armed Conflict*, Advisory Opinion [1996] ICJ Rep.226, though it acknowledged the catastrophic implications from the use of nuclear weapons for future generations. Yet, in his separate opinion Judge Weeramantry held: '[…]This Court[…]must in its jurisprudence pay due recognition to the rights of future generations[…](they) have passed the stage when they were merely an embryonic right struggling for recognition. They have woven themselves into international law through major

contribution can be at most the guidance in balancing the interests between generations in development processes and outcomes.[468] When the underlying elements of sustainable development present normative weakness and are largely exemplified on a case-by-case basis, it becomes more difficult to ascribe to the concept of sustainable development both a clear meaning and the identifiable normativity that is a prerequisite for its establishment as a generalized norm of customary international law. Sustainable development lacks a norm-creating character[469] at least for creating a primary customary rule of actor conduct, prescribing that states should develop sustainably or constraining their conduct.

Corroborative to this are also judicial decisions in which sustainable development has not been invoked as a rule of customary law but as facilitator of the reconciliation of conflicting norms relating to the environment and socio-economic development. In the landmark *Gabcikovo – Nagymaros Case* the ICJ stated:

> […]mankind has, for economic and other reasons, constantly interfered with nature…Owing to the scientific insights and to a growing awareness to the risks for mankind–for present and future generations–of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when states contemplate new activities but also when continuing with activities begun in the past. This need to *reconcile* economic development with protection of the environment is aptly expressed in the *concept* of sustainable development. For the purposes of the present case, this means that the parties together should look afresh at the effects on the environment of the operation of the Gabcikovo power plant[…]'[470]

The Court recognized the significance of sustainable development in settling the dispute but the wording does not suggest that it understood sustainable development as a binding legal norm. It referred to it as a concept of decisive force in its reasoning. This only indicates that the Court acknowledged that sustainable development enjoys some kind of normativity but not that of a primary legal norm. The separate opinion of Judge Weeramantry sheds more light as to the normative role of sustainable development in international law. Because it is

---

treaties, juristic opinion and general principles of law recognised by civilised nations' (at 888). The Judge in a firmer tone pronounced intergenerational equity an important and rapidly developing principle of international law in his dissenting opinion in the *Case Concerning Nuclear Tests (New Zealand and Australia v. France)* (1974) ICJ Rep.457, 341-342. Analogously in the *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)* [1993] ICJ Rep.38, 211-279. *Certain Phosphate Lands in Nauru (Nauru v. Australia)* [1993] ICJ Rep. 322. E.B.Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (Transnational Publishers Inc. 1989) argues in favour of generational rights in international law [conclusion derived from reading the book review by Gordon A.Christenson (1990) 1(1) Yearbook of International Environmental Law 392]

[468] A.Boyle,D.Freestone (n.454), 14. The same problems arise with respect to intra-generational equity. Id.,15. V.Lowe (n.464), 29. For cases about intragenerational equity, R.Ramlogan, (n.14), 242-245

[469] V.Lowe, (n.464), 30.

[470] [1997] ICJ Rep.7, para.140.

widely accepted by the international community due to its adoption in multilateral treaties, foundation documents of IOs, the practice of IFIs and planning documents, it has become part of modern international law for this reason as

'[…]A principle with normative value[471] […]There is always need to weigh considerations of development against environmental considerations as their underlying juristic bases, the right to development and the right to environmental protection are important principles of current international law[…]The law necessarily contains within itself the principle of reconciliation. That principle is the principle of sustainable development'.[472]

Whereas Judge Weeramantry attributed to the norm of sustainable development customary nature by finding evidence of *opinio juris* in the abundance of issued documents (treaties etc.) whereby the international community affirmed support of the concept, and state practice dating back to the practices of ancient civilizations,[473] it is more plausible to argue that sustainable development functions akin to an interpretative principle when there is necessity to define the relationship and the application of primary norms, in this case the right to development and environmental protection; as per Lowe, it is an 'interstitial' or 'modifying norm' that acts upon other substantive primary legal rules which conflict or overlap, seeking to establish their relationship and content. It does not regulate actors' conduct because it lacks prescriptive character but it is nevertheless a legal concept that gains its normativity within the judicial process, functioning as a rule for decision-making and reasoning. Therefore, as a norm of this kind, it does not depend on state practice and *opinio juris* to assert its normativity nor should the latter be sought in them in the first place.[474]

The normative role of sustainable development in balancing competing interests that derive from rules in international economic law, human rights and environmental law, therefore leading to the resolution of disputes in a holistic manner, has been repeated in WTO disputes and Arbitral Awards as well. By illustration, in the *Shrimp-Turtle*[475] case, sustainable development was characterized again as a concept emphasizing the integration of economic and social development and environmental protection. Similarly, the Permanent Court of Arbitration referred to sustainable development in the *Iron Rhine* case stating that the dictum in the *Gabcikovo-Nagymaros* applies equally in the current case. However, in the

[471] Id, Separate opinion of Vice-President Weeramantry, paras.85, 95.
[472] Id., para. 87
[473] Id., paras. 92, 101, 103, 105.
[474] V.Lowe (n.464), 31, 33-35.
[475] *United States-Import prohibition of certain Shrimp and Shrimp Products* (20 Sept 1999) WT/DS58/AV/R (Appelate Body Report), WT/DS58/R (Panel Report), para 129. For analysis of the case, E.B.Bonanomi, *Sustainable Development in International Law Making and Trade–International Food Governance and Trade in* Agriculture (Edward Elgar 2015), 111-114. For more examples, 115-117.

framework of reconciliation of environmental law and the law on development, the tribunal conferred a duty to prevent, or at least mitigate, the harm caused by development to the environment and elevated it to a principle of general international law.[476]

The analysis suggests that sustainable development has been primarily invoked as a norm that influences the outcome of litigation and in that respect it has been mostly considered as a normative goal against which the practice of states in development will be measured and evaluated. It does not regulate states' conduct directly by way of imposing constrains on them. Rather, judicial disputes are dealt with holistically.

Notwithstanding the value of this view, other scholars do not easily accept that sustainable development is only an adjudicative/procedural norm. Its codification in international law documents and the extent by which it has been negotiated by state and non-state actors suggest that its influence in international law goes beyond its procedural relevance. In several documents the pursuance of sustainable development has been articulated as the international community's commitment to *promote*[477], *achieve*[478], and *contribute to*[479] sustainable

[476] *Iron Rhine Arbitration, Belgium v Netherlands, Award*, ICGJ 373 (PCA 2005), 24th May 2005, Permanent Court of Arbitration [PCA], para 59: 'Today, both international and EC law require the integration of appropriate environmental measures in the design and implementation of economic development activities. Principle 4 of the Rio Declaration on Environment and Development, adopted in 1992 (31 ILM 874, 877), which reflects this trend, provides that 'environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'. Importantly, these emerging principles now integrate environmental protection into the development process. Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm (para 222). *This duty, in the opinion of the Tribunal, has now become a principle of general international law.* This principle applies not only in autonomous activities but also in activities undertaken in implementation of specific treaties between the Parties. *The Tribunal would recall the observation of the International Court of Justice in the Gabčíkovo-Nagymaros case* that '[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development'….in that context the Court further clarified that 'new norms have to be taken into consideration, and[…]new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past' *(Ibid.). In the view of the Tribunal this dictum applies equally to the Iron Rhine railway'***.** V.Barral, (n.463), 387 refers to is as customary int.law. The validity of this comment is questioned given that general principles of international law as a source of international law stand as a category of their own, conceptually distinct from customary and conventional law and should not be subsumed under the latter [Judge Trindade in Pulp Mills Case, paras 17-20, 26-27, 33, 52 (below n.427)]

[477] JPOI (n.127) para 163 'all countries should promote sustainable development at the national level'; Biodiversity Convention, (n.400), Art. 8(e): 'Promote environmentally sound and sustainable development'; UNFCCC (n.400), Art.3(4) 'parties have the right to promote sustainable development' and in the preamble 'recognising that all countries…need access to resources to achieve sustainable development…'; Kyoto Protocol to the UNFFCC (1998) 37 ILM 22, Art.2(1): 'Each Party included in Annex I, in achieving its quantified emission limitation and reduction commitments under Article 3, in order to promote sustainable development, shall…'

[478] JPOI (n127), para 3 'to achieve the wide shared goals of sustainable development'; Agenda 2030 (n.227), para2: 'We are committed to achieving sustainable development'; Partnership agreement 2000/483/EC between the members of the African, Caribbean and Pacific Group of States, and the European Community and its Member States, signed in Cotonou on 23 June 2000 (OJ L 317, 15.12.2000, 3-353), Preamble.

development, which implies that states and other stakeholders should take positive steps, including the adoption of specific measures and balanced decision-making in policies, towards sustainable development, which in turn qualifies as an objective for the international community. This is particularly evident in several trade treaties. To be sure, sustainable development constitutes a specific objective for the WTO since the conclusion of its 1994 foundational agreement[480] but also for individual countries entering into regional agreements that clearly recognize the promotion of sustainable development as an objective.[481] Additionally, the ICJ has referred to sustainable development as an objective in the *Pulp Mills* case, which was brought before the Court after Argentina filed an Application against Uruguay concerning alleged breaches by the latter of obligations incumbent upon it under the Statute of the River Uruguay, signed by the two States on 26 February 1975 for the purpose of establishing the joint machinery necessary for the optimum and rational utilization of that part of the river which constitutes their joint boundary. In examining the alleged breach of the applicable article of the Statute, i.e. Art.27, the Court stated that 'reconciling the varied interests of riparian States in a transboundary context and especially in the use of a shared natural resource [is] consistent with the objective of sustainable development and concluded that the provision at stake embodied the interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development'.[482] However, the Court fell short of contemplating on the exact legal status of sustainable development, let alone of discussing its relevance to the resolution of the dispute as custom or as a general principle of international law like Judge Trindade opined.[483]

Relative to this, there are scholars submitting that sustainable development forms part of the 'object and purpose; of treaties in light of which they should be interpreted.[484] In that framework, even if the wording of the provisions does not include absolute language regarding state conduct it cannot be concluded that it does not prescribe some kind of conduct. The suggestion to 'promote' or 'achieve' sustainable development requires that

---

[479] UNGA, Elaboration of An International Convention to Combat Desertification in Countries experiencing Serious Drought and/or Desertification, Particularly in Africa – Final Text of the Convention (12 September 1994) A/AC.241/27, Art.2(1) 'with a view to contributing to sustainable development.

[480] Agreement Establishing the World Trade Organization (1994) 33 ILM 1125.

[481] Trade treaties examples (n.456); Free Trade Agreement between Canada and Costa Rica (Canada-Costa Rica) (adopted 23 April 2001, into force 1 Nov 2002), *La Gaceta of Costa Rica,* No.127 (3 Jul 2002).

[482] Pulp Mills on the River Uruguay, Argentina v Uruguay, [2006] ICJ Rep 113, para 177.

[483] Id, Separate Opinion of Judge Cançado Trindade, paras 132-139 (Sustainable development should be applied as such by virtue of the evolution of international environmental law through the enunciation of general legal principles)

[484] Vienna Convention on the Law of Treaties (22 May 1969), 1155 UNTS 331, Art.31(1) and (2).

states deploy their best efforts and mobilize all possible means to achieve it. The emphasis thus is laid on the endeavors of actors, which are bound by an obligation to facilitate sustainable development. This has been termed as 'obligation of conduct' or 'obligation of means' (or 'best efforts obligations') and is opposed to 'obligation of result', which equates to guaranteeing the outcome prescribed by the obligation.[485] It is furthermore compatible with the standpoint that (sustainable) development from a human rights perspective is a right to a process that demands from stakeholders to put in place suitable policies at the national and international level conducive to its realization.[486] This is very important since the progressive realization of all individual rights captured by sustainable development under obligations of conduct means that collective responsibility and accountability can still be assumed by States if breached, irrespective of the likelihood of achieving the result. Consequently, there may not be an established absolute legal obligation to develop sustainably, but an obligation to promote sustainable development exists.

However, one may still argue that it is a relative obligation, first because it binds only the parties to a convention and secondly, because it boils down to taking appropriate or reasonable measures to conform to it and depends on varied circumstances affecting stakeholders' capability towards its fulfillment (e.g. state's development status, time).[487] Still, the relativity of the obligation does not mean it is also vague. The Rio and the ILA principles can serve as core assessment criteria/standards of conduct for stakeholders. Indeed, some treaties contain provisions on concrete measures that correspond to constitutive elements of sustainable development. For instance, in the context of the Desertification Convention Art.2(2) states that sustainable development entails 'long-term integrated strategies that focus on improved productivity of land and the rehabilitation, conservation and sustainable management of land and water resources'. Comparably, the FCCC refers to appropriate measures for climate protection that State-parties should take in light of the principle of common but differentiated responsibilities.[488] Lastly, in their submissions, parties to a dispute before the ICJ and the Court itself have elaborated on these measures. To use *Pulp Mills* as an example, Argentina referred to the principles of precaution; equitable, reasonable and non-injurious use of international watercourses and the need to carry out environmental impact

[485] ILC Report (51st Session 1999), UN Doc A/54/10; ILC 'Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries', ILC Yearbook [2001], ii, pt.2 at 153; *Gabcikovo-Nagymaros* (n.470) para.132.
[486] Obligations of conduct in the context of the RtD, Margot E. Salomon (n.83), 132ff.
[487] V.Barral, (n.463), 391-392.
[488] *UNFCCC* (n.400); Art.2(1)(a) Kyoto Protocol (n.421): 'contracting parties shall implement measures[…]such as the enhancement of energy efficiency, the promotion of sustainable forms of agriculture or the use of new and renewable forms of energy'.

assessments whereas the judgment mentioned that 'the obligation to take positive steps to avoid changes in the ecological balance consists in the adoption of a regulatory framework or administrative measures[…]and the obligation of the parties to coordinate their adoption and enforcement'.[489] Obligations of conduct therefore do not lack normativity and can function as perfect primary legal rules that regulate conduct of legal subjects. That makes sustainable development not just a policy goal in treaties but a rule that is addressed to stakeholders, capable of generating obligations.

Notably, no court has declared sustainable development as a primary rule of law even in treaty context. Apart from the fact that sustainable development acquires contextual meaning, being interpreted according to the treaty's content, the treaties do not actually include coherent provisions on sustainable development but mostly references to it. Against this background, sustainable development's interpretative potential for decision-making comes again to the foreground.[490] In fact, the ICJ in the *Pulp Mills* case engaged in a hermeneutical exercise, using the concept of sustainable development in order to reinterpret and update the content of the 1975 treaty signed between the parties. Yet the Court did not invoke the Articles on treaty interpretation of the Vienna Convention on the Law of Treaties (Art. 31), especially Art.31(3)(c) that refers to 'any relevant *rules* of international law applicable in the relations between the parties.' Hence, despite that the Court read the respective treaty in light of its purpose and contemporary concerns, it did not do this on the account that sustainable development is a primary rule of law and recognized no deriving legal consequences.[491]

The lack of agreement on sustainable development's status as a self-standing rule of international law has been unavoidably reflected in litigated cases before other regional and domestic judicial or quasi-judicial bodies. Most cases have been argued on the basis of a breach of one of sustainable development's components or substantive economic, social and cultural rights related to specific dimensions of sustainable development (e.g. environment and social protection (human rights) or environment and economic development) that give

[489] *Pulp Mills,* (n.482), paras 25, 185-187.
[490] V.Barral (n.463), 393 et seq., who states though that 'The objective of sustainable development *as a primary rule of law* may be referred to by the judge in the interpretation of other customary or conventional rules.'
[491] *Pulp Mills,* (n.482), para 75: 'The Court notes that the object and purpose of the 1975 Statute is for Parties to achieve "the optimum and rational utilization of the River Uruguay" by means of the "joint machinery" for cooperation, which consists of both CARU and the procedural provisions contained in Art.7-12 of the Statute[…]such use should allow for sustainable development which takes account of "the need to safeguard the continued conservation of the river environment and the rights of economic development of the riparian States. (Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, ICJ Reps. 2006, p.133, para.80)'. It is, however, true that in this case sustainable development was not included in the Statute per se but it was invoked as an external concept to re-interpret its content.

effect to its components[492] which are linked to well-embedded constitutional entitlements or rights in human rights conventions that seem to give effect on them by being their substantive legal basis.[493] That is not to say that sustainable development principles lack normative value, however their substantiation as justiciable standards is still evolving with only some of them qualifying as established rules of international law.[494] For sure when invoked they aim at resolving a development challenge in an integrated manner. Yet, their invocation has not led to the declaration of a coherent binding legal obligation to develop sustainably or even as an obligation to promote sustainable development. What is then the exact normative relevance of sustainable development in law?

3.2.2.3. Can Classical Legal Theory and Positivism adequately explain Sustainable Development's Normativity?

i. International Lawmaking as a Discursive Process between International Stakeholders and the Insertion of New Forms and Standards of Normativity for Actor Conduct and Decision-Making

In answering the question, I observe that the legal normativity of sustainable development has been sought so far from the standpoint of classical legal theory whereby legal normativity is directly associated with making law and inevitably with the bindingness of a rule of law. A concept is bestowed the characterisation of a legal rule by the criteria of a) existence of well-articulated obligations - rights that affect actor conduct and b) the applicability of justiciable standards for review. If these concrete parameters of 'fundamental law-creating character' are met, then legal normativity is granted and the rule is vested with bindingness since the prevailing assumption is that legal normativity presupposes also legal bindingness or results always in the latter.[495] To the extent that legal normativity comes in the form of binding rules of law, recourse to the formal sources of international law and legal positivism for the purposes of ascertaining the legal nature of sustainable development seems plausible. According to Art. 38 ICJ Statute, international law is ascertained when legal standards or statements are codified in treaties, if they have evolved to custom or are accepted as general

[492] M-C.Segger,A.Khalfan (n.177), 175ff, especially section on ESCRs p.201ff. IACHR, Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, doc. 10 rev. 1 (24 April 1997), chapter VIII;. Bulankulama and Others v. Secretary, Ministry of Industrial Development and Others (Eppawela Case) (2000) 3 Sri LR 243 (2 June 2000). More cases in R.Ramlogan (n.14).
[493] The legal basis for sustainable development principles will vary according to the issues raised in a case. For instance, the obligation to execute environmental impact assessments (EIAs) seem to be grounded on customary rules of international environmental law as explained by Segger,Khalfan (n.177).
[494] M.Segger,A.Khalfan (n.177), 95-171 for analysis of their legal status.
[495] E.Bonanomi (n.475), 135.

principles of law. Anything else that doesn't fit this formality is deemed non-law. A crucial element of the mainstream sources doctrine is the central role afforded to States. Legal rules emerge and are validated from their actions that reveal, explicitly or implicitly, their consent and intent to undertake certain obligations that derive from them.[496] The making of international law is traditionally viewed as a function fundamentally reserved for sovereign and equal states. It is from this premise that the search for the normativity of sustainable development as a primary rule of law departed in the cases that were analysed. The legitimacy of sustainable development has been sought in the conduct of sovereign states and in their consensus that legally relevant statements are regarded as law in so far as this consensus is strictly expressed in the sources of international law. Sustainable development didn't meet those standards. Whereas it is true that the concept is found in conventions or that some of its constitutive principles constitute customary law, the origins of the concept are mostly identified in other types of documents that do not fit the categorical classification of Art.38 ICJ; Declarations such as the Rio and Agenda 2030, let alone the Brundtland report or the WCED report do not correspond to the traditional conception of what constitutes international law. Moreover, sustainable development's evolutive nature[497] in combination with its characterisation sometimes as 'umbrella concept' due to the embodiment of substantive and procedural elements from diverse areas of international law have not allowed it to qualify as a binding rule of international law in the classical sense.

Having said that, the focus on the state-centric strand of international lawmaking in the analysis of sustainable development's legal relevance does not fit the current reality of international law, which witnesses the proliferation and diversification of international actors, exercising authority in the making of international law through various communicative practices.[498] States have become a component of broader institutional networks involving

[496] *SS Lotus (France v Turkey)* [1927] PCIJ Series A No 10 <https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_10/30_Lotus_Arret.pdf > accessed 29 January 2020, 18: 'International law governs relations between independent states. The rules binding upon them therefore emanate from their own free will.' C.Sweetser, 'Humanity as Alpha and Omega of International Law, Four Replies to Anne Peters' (2009) 20 European Journal of International Law 545, 550. W.G.Wegner, 'State Consent as Foundational Myth' in C.Brölmann et al, (n.17).

[497] *Our Common Future* (n.12) at 15: 'sustainable development is a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development; and institutional change are all in harmony and enhance both current and future potential to meet human need and aspirations'; at 30: 'sustainable development is not a fixed state of harmony, but rather a process of change.'

[498] I.Venzke, (n.17). In particular the New Haven School of International Law argues that international lawmaking involves formal institutions (States, Courts, IOs), which have formally the competence to make decisions and other actors who don't but influence decisions significantly and may arise in various modes of social interaction. Hence, international law is not merely about rules but a process of authoritative decisions (p.74). I find this school of thought more appropriate to explain international lawmaking and legal normativity

intergovernmental organisations, epistemic communities, civil society and private sector entities, which form new partnerships for cooperation and interaction in response to the pressing need for prompt reaction to issues of global concern. In this context international actors operate on the 'continuum between strictly political and strictly legal statements', which are advanced through various forums that host consultations, negotiations and policy-making processes on global affairs.[499] By implication, the making of international law is legitimised through an institutional regime that consists of multilayer interactive processes among States, and between them and non-state actors who influence the development of international norms and decision-making in the pursuit of the common interests of humanity. In light of this, the multiplication of forms and explanations of normativity should be considered, rendering it incorrect to depend the classification and bindingness of a norm as legal on the formalism of lawmaking.[500] International law should be viewed as 'a normative system, harnessed to the achievement of the international community's universal values and common objectives that constitute its foundation'.[501] Consequently, it should be normatively inclusive, incorporating in its fabric expressions about the regulation of international affairs that may not match the usual form of legal statements but can be legally persuasive due to their content and their authority, given that they have been pronounced by actors who have the power to decide on these matters and choose this way to demonstrate their intent to be compelled by them.

The process leading up to the genesis of sustainable development depicts the aforementioned fermentation between institutional actors and the insertion of new standards of decision-making at the international level. The concept has emerged from a discursive process since 1972 that led progressively to an agreement on its three pillars, to its acceptance as an objective of the international community and the specification of certain priority areas for action in the form of global goals or as demonstrated by the conclusion of new and the refinement of existing treaties that address sustainability matters, to the introduction of principles of international law relating to sustainable development and finally, to the invocation of sustainable development by adjudicative bodies in the settlement of

---

in sustainable development. Jean d'Aspremont, 'Subjects and Actors in International Lawmaking: the paradigmatic divides in the cognition of international norm-generating processes' in C.Brölmann id.

[499] MC.Segger,A.Khalfan (n.177) 48-50; M M.T.A.Brus, 'Soft Law in Public International Law: a pragmatic or principled choice? Comparing the Sustainable Development Goals and the Paris Agreement' (22 March 2017), 7 <https://ssrn.com/abstract=2945942> accessed 20 January 2020; M-C.C.Segger, 'The Role of International Forums in the Advancement of Sustainable Development' (2009) 10 Sustainable Development Law and Policy 4.

[500] A.Marong (n.459), 54.

[501] R.Higgins, *Problems and Process: International Law and How We use It,* Clarendon Press, Oxford 1994, 2-3.

disputes where developmental and environmental interests conflict.[502] Without question, sustainable development has had an impact on the well-embedded fields of environmental law and the law on international development but the consensus of its legal relevance was built by the adoption of instruments "extra-law." Actually, it was shaped through policy-making processes where law found its place in the form of normative provisions contained in the body of non-binding texts, the so-called 'soft law' instruments.

Definitions of 'soft law' in the literature abound, although they all unfold around the axis of the mandatory or non-mandatory force of their prescriptions.[503] In general though, a range of instruments can be classified as such, 'from treaties that include some rather abstract provisions without stipulating a direct obligation, to non-binding or voluntary resolutions, political declarations, codes of conduct, guidelines and reports formulated and accepted by international and regional organizations, to statements prepared by individuals in a non-governmental capacity but which purport to lay down international principle'. [504] Benchmarked against legal bindingness, it has therefore been stated that 'soft law' are instruments of normative nature with no legally binding force, which purport to establish rules of conduct or determine principles applicable to the international community and are applied through voluntary acceptance since the *pacta sunt servanta* principle is non-applicable. In this regard, soft law norms intend to guide discourse and deliberation, influencing indirectly behavior in the international sphere or regulate in the absence of law. There is thus high probability that they will develop into binding rules. That's why they are regarded as unripe law or law that is being constructed.[505]

Without question, sustainable development has primarily developed through 'soft law' given that the 1972 Stockholm Declaration, the Rio Declaration and Agenda 21, the 2002 JD and JPOI and Agenda 2030 that were endorsed by the respective UNGA Resolutions are the outcome of international conferences and summits instead of a process of formal lawmaking. Still, the Declarations were carefully negotiated, debated and drafted occasionally in a legal language. They were universally endorsed as an effective formula to set the grounds for an internationally agreed regulatory framework and policy strategy on sustainable development. In this regard, the statements made therein intended to establish certain standards for state practice and decision-making, creating in turn the legitimate expectation that actors will

[502] MC.Segger 'International forums' (n.443), 6.
[503] F.Augusto C.Castañeda, 'A Call for Rethinking the Sources of International Law: Soft Law and the Other Side of the Coin' (2013) XIII *Anuario Mexicano de Derecho Internacional* 355, 376 et seq.
[504] C.M.Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38(4) The International and Comparative Law Quarterly 850, 851.
[505] A.Marong (n.459), 52 incl. footnote 138.

commit to and observe the agreed in good faith, and streamline their conduct (understood broadly to include decision-making) in consistence with sustainable development's objectives.[506] Having said that, the documents unavoidably influenced the interpretation and application of existing rules of international law in the respective field by the articulation of specific principles relating to sustainable development. On these grounds, their legal effects are not negligible.

ii. Sustainable Development as a 'Guiding Norm' or 'Directing Principle' for Development Decision-Making by all Legal Subjects in diverse International Forums

With the above in mind, the normativity of sustainable development ought to be examined through the prism of lawmaking by State and non-State actors alike and with consideration of all instruments in which legally relevant statements can be found. Based on the foregoing, sustainable development cannot be classified as a rule [of law] in itself. It has not been accepted that it formulates specific standards of actor conduct and that it regulates the latter directly because it lacks prescriptive function, i.e. it does not dictate certain course of action.[507] Instead, the process from which sustainable development stemmed and the way it has been used by courts indicates that it directs decision-making and the application of legal rules; it sets general standards for reasoning since it is invoked and brought into practical use whenever stakeholders are called to realize developmental and environmental objectives where none should be at the detriment of the other. On this account, sustainable development may have failed the legal test of 'obligation' but not that of a 'guiding norm' or 'directing principle' in the context of practical reasoning.[508] I am thus more inclined to endorse Lowe's opinion about sustainable development as an interstitial norm. However, I would see fit the transposition of this guiding norm to any regime that aims to regulate development in a holistic manner, from judicial decision-making to administrative procedures, to deliberative processes in treaty negotiations and policy-making forums where law also comes to play often.[509] Extending the applicability of the principle of sustainable development to all kind of decision-making is appropriately compatible with the spirit of the UN Declarations, especially Agenda 2030, which reveal the international community's legitimate expectations that stakeholders conduct their affairs according to the objectives of sustainable development

[506] F.Augusto (n.503), 369
[507] A.Marong (n.459), esp.56-58;
[508] A.Marong (n.459), 44; P.Schwarz (n.453), 139-141.
[509] Id. Lowe (n.464), 33, 35 also makes this point saying that modifying concepts are not directed to judges and can be used in the same way by states as they negotiate on ways of reconciling conflicting principles.

and subject successful pursuit to partnerships. Also from a legal point of view, sustainable development as a guiding principle brings under its normative ambit the entirety of international community members who, due to the expanded matrix of processes for the making of international law, are all the more subject to evolving international law and public policy for the attainment of common objectives and goals. Accordingly, the guiding principle of sustainable development is directly applicable to the administrative and quasi-judicial context of the WBG's AMs. Thereafter, even if the affirmative duty to promote sustainable development by virtue of a specific obligation of conduct is contested, international actors' accountability and responsibility for sustainable development may still arise given that principles entail a varied degree of legal bindingness.

3.2.3. The Nexus between the SDGs and International Law and the Implications for the Development of the International Law on Sustainable Development

In the same way the legal normativity of sustainable development was questioned, the status of the SDGs in law has attracted controversy as a direct corollary. The argument against their legal normativity arises from the process of their making. The SDGs were borne through the political route in the international community's efforts to inspire and mobilize its members to cooperate for a sustainable world. They build upon the political rhetoric for an inclusive international society and the prevalence of the shared benefit as the underlying assumption in the way international affairs are conducted. In the very words of the Declaration: 'the SDGs and targets are integrated, global in nature and universally applicable, yet defined as aspirational, with each government setting its own national targets guided by the global level of ambition but taking into account national circumstances and deciding itself how these would be incorporated into national planning processes, policies and strategies'.[510] By reason of this tone of inspiration and ambition, the goals' purpose is not to prescribe obligations for and regulate the conduct of development stakeholders. This becomes more evident when one looks at individual goals that are not written with high specificity, making it difficult to discern clearly their aim. Indicative is SDG9, which seems to bring together a wide variety of issues, infrastructure, industrialization and innovation. Besides the fact that only four of its targets are time bound (targets 9.2, 9.4, 9.5 and 9.c), none of the targets is couched in precision that allows the addressees to understand the meaning of value judgments such as 'resilient infrastructure' and 'inclusive industrialization' and to define

[510] *Agenda 2030* (n.260), paras 5,7, 21

clearly the obligations that derive from them. It would also appear that even the more specified targets such as those on poverty eradication are not worded in a language that denotes legal prescriptions for States or other actors. Thus, insofar as the targets cannot be converted into a normative duty to take certain individual action, they encompass purely an exhortation towards international actors to respond ambitiously to the global aspiration.[511] Another element that strengthens this line of reasoning is the weak and political nature of the SDGs' accountability mechanism. Hence, what was mentioned earlier about stakeholders' obligations under Agenda 2030, namely that they could be framed as a collective "voluntary duty" (note the oxymoron) to respond cooperatively to the imperative of sustainable development as overarching communal interest they have pledged to serve, is at the core of the reasoning that opposes the legal nature of the Goals.

On the other hand, the Declaration does not cease to reiterate the relevance of international law to the SDGs. Agenda 2030 is guided and informed by a number of international law instruments: the UN Charter, the UDHR, the Millennium Declaration, the DRtD and other human rights conventions. Furthermore, the landmark soft-law documents that have laid the solid foundation for sustainable development and compose the body of international environmental law are cited as the key sources of the Agenda. Beyond the named legal instruments, however, the Agenda is to be implemented in a manner that is consistent with the rights and obligations of States under international law in general.[512] It appears therefore that there is full respect for international law and seemingly the intention to join goals and the law together for maximum compliance with the Agenda. Within this framework, the goals can be seen to represent to a great extent existing international commitments and can be assigned to corresponding legal frameworks.[513] For some it is easier to identify the international agreements in which they are embedded. To name a few, the environmental goals (climate change and biodiversity) or the goals on education, gender equality, decent work, water and sanitation reflect clearly the substance and underlying norms of environmental and human rights law respectively. It follows that the Goals can be read as norms further defining the rights and obligations that States assume in international agreements and even extend them to other actors.[514] In this capacity, they could also serve as

[511] D.French, 'The Global Goals: Formalism Foregone, Contested Legality and Re-Imaginings of International Law', 151-178 in Z.Yihdego, et al (eds.) *Ethiopian Yearbook of International Law 2016* <http://eprints.lincoln.ac.uk/id/eprint/25934/> accessed 20 January 2020.
[512] *Agenda 2030* (n.260), para 10-11, 19.
[513] R.E.Kim, 'The Nexus between International Law and the Sustainable Development Goals' (2016) 25(1) Review of European Community and International Environmental Law 15, 16.
[514] M.Brus (n.499), 11.

a 'coordinating and synthesizing framework for existing legal obligations functioning also as a remedy to the fragmentation of international law'[515]' Undoubtedly, the SDGs have not been inserted into a normative vacuum nor have they emerged without law existing at the background. A nexus between the SDGs and international law exists.

The interplay between law and the SDGs turns the spotlight to the normative status of Agenda 2030 once more. As noted UNGA resolutions adopt recommendations and not decisions that create legal effects in international law per se. However, they do contain soft law norms with normative credence for the interpretation and application of the law. How and why Agenda 2030 can be regarded a soft law instrument was already discussed. By implication, the case that the SDGs are endowed with the same status can be made plausibly. They do not create binding obligations, yet their observance is not entirely optional either given their universal acceptance and legitimacy. Consequently, the Goals may contribute to the development of the legal discipline when attached to the norms of respective legal fields.[516] Supporting views of such cross-fertilization between the SDGs as soft law norms and international law can already be found in discussions about the international law framework for governing the use and conservation of water crossing international boundaries and how it interacts with the duty to manage water resources in a way that satisfies individuals' entitlement to safe drinking water and sanitation from a human rights angle. The relevant international conventions may be interpreted in this case in the light of SDG6 whose targets may give rise to subsequent practice that affects the application of the treaties. More generally, SDG6 may infuse the practice of this area of law with the theory and practice of human rights as well as new perspectives to water management stemming from the environmental dimension of sustainable development such as the ecosystems approach.[517] An analogous potential could be evidenced regarding other aspects of the Agenda belonging to the environmental cluster, i.e. air pollution, climate change, oceans conservation and protection of terrestrial ecosystems. Their targets can be directly linked to specific international law provisions, although not all legal instruments are mentioned. Still, the interrelationship between the goals and the law can be discerned, being thus an indication that the SDGs may not only reinforce current international law but also contribute to the

[515] R.Kim (n.513), 16-17.
[516] W.Scholtz, M.Barnard, 'The Environment and the Sustainable Development Goals: 'We are on a road to nowhere'' in D.French et al. (n.15), 227.
[517] Id.; O.McIntyre, 'International Water Law and SDG6: mutually reinforcing paradigms' in id.

integration of the different international agreements within the cluster in those instances where their targets overlap.[518]

A final example arises from the "peace-building" goal, SDG16. Agenda 2030 takes quite a reformative step in the sector of peace and security by drawing a direct link with development and elevating the issue of poverty, inequality and violent extremism to structural causes of crises and conflicts. It sheds light to the human security dimension of development and affirms that resilient and inclusive societies are the counterbalance to fragility that threatens peace. Building on the threads of human security (with human rights at the core of the notion), resilience and inclusiveness, it has been argued that Goal 16 pictures the peace-building and conflict-transformation architecture as a cooperative construction between the State, external actors and civil society, aiming to tackle the risks to peace from a people-centered and bottom-up standpoint; that means in line with the SDGs' quest to 'leave no one behind', in a way that promotes the freedoms and capabilities of individuals and particular groups in the society and taking into account local political realities. Inasmuch as peace- and state-building strategies are viewed from the prism of the new consensus under Agenda 2030 on universality and sustainability, it is proposed that SDG16 introduces a revitalized (not limited to the independence of states) understanding of self-determination in state-building, which moves away from state-centric designs, echoes the diversity of actors involved in the process and incorporates constructively human rights, the commitment for inclusive and just institutions and the consensus on positive obligations of States' responsibility to protect. Within this framework, Agenda 2030 and SDG16 introduce a roadmap to a new normative conceptualization of the rules and principles governing peace-making after conflict, namely towards a 'holistic responsibility to build' and a universal right to peace as the cornerstones of the international law of transition.[519]

It arises that the SDGs do have normative consequences for the progressive development of international law by clarifying the meaning of already established legal frameworks in the various fields of international law or by shaping the content and paving the way for the formulation of new norms that may comprise a more consolidated perspective on international law matters that cannot be found at the moment. However, in supporting this position through examples it could be suggested that the soft law nature applies to some goals only, i.e. to those that refer explicitly or implicitly to matching conventions or customary rules of international law. Such an argument holds true and indeed undermines the normative

[518] W.Scholtz, M.Barnard (n.516).
[519] U.Werther-Pietsch, 'The impact of SDGs on International Law-A nucleus of a Right to Peace?' (2018) 47(1) OZP-Austrian Journal of Political Science 17.

force of Agenda 2030. It is proposed that a teleological interpretation and implementation of the Agenda may fill this gap other Goals may create. This task would require taking into account Agenda 2030 in whole, as an integrated framework that is effectuated by the linkages between the Goals through their Targets. By extension, such integration would apply to the legal frameworks that govern the Goals by mainstreaming dimensions that so far have not been anchored in law. The principles of sustainable development may find useful application in this manner, being the signposts for this assimilation. Hence, all goals will obtain a normative underpinning and new entries for the development of the economic, social and environmental legal regimes will be created. As a wider consequence, the principle of sustainable development will be crystallized in international law, giving firmer answers to the question on the role of law to development. A final remark should be allowed: the fact that the Goals fall outside the ambit of classical lawmaking in international law and are not formulated in an unequivocal legal form and content does not lessen their legal weight. They are legitimate because they mirror the shared values and interests of the members of the international community, who have the authority to decide on their making and accept them as appropriate. Ergo, the intent to regulate, even in the absence of well-embedded law, is present. Accordingly, there seems no reason to deny their potential not only in policy but in law as well, recognizing their impact on the progressive development of 'hard' law on sustainable development.[520]

[520] M.Brus (n. 499).

3.2.4. IN CONCLUSION

This part centered on the status of sustainable development and the SDGs in international law against the background of the discussion on the role of law in international development. It was argued that the shaping of development law has followed the evolution of the development debate. Law has been both instrumental and intrinsic to development. Sustainable development requires an international institutional and legislative framework that ensures the legitimacy of the development process in whole; therefore development of the international law of sustainable development is fundamental.

Hence the chapter's second part aimed at clarifying the concept's legal status. The analysis emanated from classical legal theory and the positivist approach to international law but considered also the policy approach to international lawmaking and the effects of soft law in establishing certain standards for state-practice and decision-making and on the interpretation and application of the law. Against this background, sustainable development was categorized a 'guiding principle' that can be transposed effectively to judicial, administrative and deliberative processes where development-related matters should be dealt with holistically. Such an approach to the principle of sustainable development is particularly significant from a legal standpoint since all international actors are brought under its normative ambit and may bear accountability for global sustainable governance.

Finally, the legal relevance of the SDGs was equally discussed. Opposing views of any legal normativity of the Goals rest within the latter's political nature and the absence of regulative character. Even though, the view adopted here is that the goals have normative implications for law. In fact, there is a dual relationship between the Goals and international law: the SDGs reflect existing international obligations and may contribute to the further development of international law by clarifying the meaning of already established legal frameworks in the various fields of international law or by shaping the content and paving the way for the formulation of new norms that may comprise a more consolidated perspective on international law matters that cannot be found at the moment. Accordingly, there seems no reason to deny their transformative potential not only in policy but in law too, recognizing their impact on the consolidation of the principle of sustainable development in law and on the progressive development of 'hard' law in the field.

CONCLUDING REMARKS

LAW ON SUSTAINABLE DEVELOPMENT AGAINST THE BACKDROP OF LEGAL CONSTRUCTIVISM AND A PLURALISTIC INTERNATIONAL ORDER

Concluding the first part of the thesis, I recapitulate on the value-based norm of sustainable development and draw some final remarks on the nature of international law as a conduit for its promotion.

The principal assertion is that development is a contested notion. It acquires different meanings according to the respective theories of development that have been promoted over time depending on the historical and social context within which they arose. Yet, what constitutes common ground in the discourse of development is that attempts to define the latter's content and practical outcomes are based on a normative judgment about the most preferable way to remedy economic, social, cultural and environmental challenges.[521] Such normative judgment draws upon commonly accepted moral values that inform the purpose of development and justify certain interventions of a practical scale. Those values, which have been identified to be human dignity, equity and distributive justice, have been the thrust of the political debates on development between the North and South under the aegis of the UN. Indeed, the Organization by virtue of its consultative capacity and the promotion of international dialogue on matters of global interest is the hub for the fermentation of various viewpoints on morality that have shaped community values, and for the latter's promotion and consolidation in global affairs.[522] In fact, those values are arrayed in the Organization's Charter and determine its purposes, principles and policies. They are furthermore translated into law by means of Treaties, Resolutions, Declarations etc., concluded between States or adopted by the UNGA or other Commissions and subsidiary entities respectively. Hence, international law is transformed from law that facilitates the coexistence of independent sovereign states into a value-based legal order.[523]

With the aforementioned into account, social progress and development constitute a value-driven purpose of the UN. Their exact meaning and scope originate in the numerous Declarations on development and programs of action that have been issued throughout the development decades. Unquestionably, the texts of these documents interpret the content of Art.55 UN Charter. They also elaborate on the global values that should guide this mission by

[521] R.Hanlin et al. (n.2) 20.
[522] O.Spijkers, (n.95) 5.
[523] Id., 6;

being directly applicable to development, namely freedom, equality, solidarity, equity, social justice, shared responsibility, cooperation, respect for nature and sustainability in the way it has been defined here – a normative endpoint that combines the qualitative features of the human development paradigm with the temporal dimension. Yet, when the impact of these declarations on the formation of the international law on development is examined, one can sense that it is rather weak or not always equally forceful.[524] The strength of those documents is that they have been concluded after inclusive deliberations at the UN level to the extent that the views of all States have been represented. Such inclusiveness gives to their content the authority and legitimacy necessary to become the compliance pull for stakeholders and a source to establish their responsibility for implementation. It is also true that they reinforce the content of established law in the sub-areas of development (economic, social, environmental) and facilitate, furthermore, the integration of these regimes through principles such as the Rio and the ILA principles. Still, the overall set of international legal instruments that may address development issues comprehensively is difficult to be deemed effective.

International law on (sustainable) development is not solid. The fragmentation[525] that characterizes international law in general is one of the reasons for this – the regulatory frameworks that have dealt with development matters have been developed independent from one another and are run by different fundamental principles and rules. Importantly, many of these have been created from institutions other than the UN principal organs, which may or may or may not have (in)formal relationships with them. By and large, this is the case of, international economic law. Its aspects have been the product of the WTO, the IFIs regarding fiscal stability and the finance of development projects while foreign direct investment is subject to a system of bilateral investment treaties that is monitored by the International Centre for the Settlement of Investment Disputes.[526] The second cause is linked to one of the parameters that make development a contested matter, i.e. the interplay of power dynamics between institutional actors; it is the fact that most of the lawmaking in the field has taken place at a high political level (e.g. all the conferences) and as evidenced by practice the endpoint of this process is not the codification of rules and principles in a legal document after confirmation of State practice and *opinio juris*, rather an agreement that puts together commonly agreed principles of law and describes a future course of action on development issues (e.g. the JPOI or even the SDGs). In this regard, what is stated in these documents

[524] Id., Ch.V.
[525] ILC, Report on the Work of Its Fifty-seventh Session (2May-3 June, 11 July-5 August 2005) UN Doc. A/60/10, para. 439,
[526] O.Spijkers, (n.95) 252

remains sometimes just a political declaration and States do not follow-up with practice. Other times proclaimed norms develop into law, the Rio Principles being the most prominent example.[527] Consequently, much of the law on development remains in a prolonged status of progressive development. Last but not least, there is the expanding network of legal subjects as stakeholders. In addition to States and IOs (including IFIs, MDBs, bilateral donor organizations), civil society, the scientific community, multinational corporations, commercial banks and individuals are all considered actors in the development process.[528] Consequently, the regulatory regime for sustainable development will not be – and as shown, it actually is not – shaped by States alone. Naturally, sustainable development becomes a multifaceted governance challenge, to which law is one of its facets.

In light of this, a coherent system of law on sustainable development should address the new organizational model of the international community and the growing interconnection between its legal subjects. Coherence and integration constitute the very essence of sustainable development and extend to procedural and substantive aspects. By implication, they apply to the normative basis of this new legal framework that will shape its substantive content. Hence, the pertinent areas of law ought to be treated in normatively coherent way. The inherent tension in this exercise is obvious given the different underlying logics per regime. This is how the value-based grounds of international law gain significance, providing a good structure for mitigating the risk of fragmentation that international law poses. For if the principles of the sectorial regimes are aligned with them, they will also be with each other since they will bear on common denominators. At the very minimum, the expected effect ought to be that provisions won't contradict each other nor undermine each one's effectiveness in relation to the objectives they aim at realizing.

Nonetheless, the said outcome will not occur unless all types of norms, legal standards and principles where these values find expression are taken into account.[529] A normatively comprehensive law on sustainable development builds on a wide canvas of sources that is created as an immediate result of the diverse institutional scene and multi-level governance in development.[530] Against this background, soft law instruments and voluntary standards appear to gain a constructive role in the creation of an international normative framework for sustainable development together with binding international law according to Art.38 ICJ

[527] N.J. Schrijver (n.13), 383-385.
[528] Id.,379.
[529] E.Bonanomi (n.475), 137-140.
[530] J.Vivekanandan, 'Multilevel Governance: Toward a New Paradigm for Sustainable Development', (31 January 2009) <http://regardssurlaterre.com/en/multilevel-governance-toward-new-paradigm-sustainable-development> accessed 30 January 2020.

Statute. There is even more scope for this assertion, if one studies international law from the perspective of community interests that signify 'a consensus whereby respect for certain fundamental values is not to be left to the free disposition of states individually or inter se'[531] but is framed by non-state actors on the account that they are equally legitimate subjects of international law. Insofar thus that an argument in favor of a global community and the existence of common interests of an entire society can be made, international law is not simply inter-state law. International sustainable development law will reflect that.[532]

Sustainable development is a community interest; hence sustainable development law should encompass all relevant (in type and content) legal standards that are fundamental in order to arrive to optimal practical and legal solutions that will realize the objectives of sustainable development. This kind of inclusiveness may seem to 'blur the normativity threshold'[533] of international law norms. For sure, it contradicts the axiom that the only authoritative processes of lawmaking are those of Art.38 ICJ Statute. On the other hand, it is indicative of the changing features of international law where actors deliberately opt for means other than formal legal instruments in order to regulate conduct and declare expected behavior apropos pressing global problems. The concepts of the 'community of states as a whole' and 'common interests of humanity' allow a great margin for the incorporation of public policy and values as the basis for the determination of rules;[534] 'soft law norms are able to reunite the international community around shared values',[535] not to mention their further incorporation into the international legal system through the work of supervisory bodies that oversee their implementation in an analogous mode to the mechanisms monitoring treaty implementation. That is not to say that these legal standards shouldn't be weighed and balanced in relation to each other within the current "informal" hierarchical structure of international law norms. Quite the opposite; they should find their place in the ISDL. Justification for this assertion originates also in Agenda 21 (Ch.39) whereby

[531] B Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 Recueil des Cours de l'Academie de Droit International 233

[532] M.Brus (n.499) who refers briefly to 'Global Law' as an emerging system of international laws in the common interest, inherent to which is a policy-oriented approach to lawmaking. Briefly on 'Global Law', G.Z.Capaldo, 'What is Global Law?' (*OUPblog,* 10 August 2015) <https://blog.oup.com/2015/08/what-is-global-law-jurisprudence/> accessed 30 January 2020.

[533] P.Weil, 'Towards Relative Normativity in International Law?' (1983) 77 American Journal of International Law 413 cited in D.Shelton, 'Normative Hierarchy in International Law' (2006) 100 American Journal of International Law 291, 322.

[534] D.Shelton supra, 292, 323.

[535] F.Sindico, 'Soft Law and the Elusive Quest for Sustainable Global Governance' (2006) 19 Leiden Journal of International Law 829, 835. Examples of supervisory bodies resembling Treaty-monitoring mechanisms are the Commission on Sustainable Development that monitored implementation of Agenda 21 and the HLPF.

international standards of varied normativity are given regard in light of the progressive development and codification of international law concerning sustainable development.

As a result, relative normativity may be idiosyncratic of ISDl since it is par excellence 'a complex regime with variations in forms of instruments, means and standards of measurement that interact intensively with the common purpose of regulating behavior and decision-making within a rule-of-law framework'.[536] With this observation in mind I arrive at a final thought regarding the nature of SDL, namely that in its present form it remains a 'methodological legal framework' in the sense that its principles and integrated objectives aim to guide the application of economic, environmental and social laws and provide a structured basis for systemic interpretation and balanced decision making for international actors in development.[537] This is a direct consequence of the fact that sustainable development is not a rule in international law in its own right but a guiding principle that demands the integration of all three priorities in the outcome of decision-making and deliberating processes. The same conclusion could be drawn also when considering sustainable development as an umbrella principle, given that the normative effect of its sub-principles is clearer in resolving disputes and guiding policy or law than in generating or conferring unequivocal rights and obligations. Despite its *sui generis* nature as a principle, sustainable development is incumbent on the respective legal subject who is called to address the conflict between environmental and developmental matters.

Part II looks into the latter point by examining the role and practice of IFIs in shaping sustainable development law through their IAMs. The exemplar taken is the WB and the purported aim is to demonstrate how, if at all, soft law standards are taken into account in the decision-making process of complaints brought before the Bank in relation to financed projects. In the same vein it will be enquired if and how the principle of sustainable development is invoked and applied. It is on these grounds that the accountability of IFIs, as legal subjects of international law, to promote SDGs' implementation and sustainable development will be established.

---

[536] D.Shelton (n.533), 320.

[537] Bonanomi considers sustainable development a 'methodical norm' for legal implementation and judicial review, analysed in three duties: to include all relevant standards that can be detected in the relevant streams of law, to weight them, and to balance and reconcile them for optimal solutions. In this way she constructs a framework for informed decision-making where the sub-principles of sustainable development feed in, being assembled around the three duties. This is a normative way to utilise the legal principles relating to sustainable development. In my view, it is a model whereby a coherent basis of international sustainable development law may be created, highlighting coherence from primarily from a procedural point of view that will then lead to substantive coherence – to the creation of 'a group of congruent norms, a corpus of international legal principles and treaties, which address areas of intersection between international economic, environmental and social law', as M.C.Segger, A.Khalfan observe (n.177), 46.

PART II

CHAPTER 4

MDBs AS AGENTS ACCOUNTABLE FOR SUSTAINABLE DEVELOPMENT

4.1. PRESENTATION OF MDBS: THE EXAMPLAR OF THE WORLD BANK GROUP

MDBs are international institutions, which raise financial resources on a multilateral front with the purpose to provide financial assistance to States for projects in the public or private sector that foster economic and social development.[538] In this regard, they are classified among the IFIs, namely the intergovernmental organizations that are founded by States for a public purpose and engage in financial transactions of commercial nature (despite the organizations' public character). Hence, MDBs are comprised of and governed by States on the basis of an international agreement – the MDBs' constituent instruments or Articles of Agreement (AoA), to which all Member States are parties.[539] Membership is therefore saved only for States. Due to the dual nature of IFIs (public purpose of their operation and market-based transactions), MDBs' organizational structure resembles the corporate model. Consequently, member States are shareholders of the Banks and their voting rights depend on the number of their shares and contribution to the Banks' capital stock. Furthermore, MDBs' governance is executed by the chief officer; a Board of Governors, which is a plenary organ in which all the powers relating to the functioning of the MDBs are vested; and the Board of Directors, an executive organ upon which the Board of Governors delegates certain powers. Representatives of Member States (MS) sit on these organs, whether being elected by Members or being appointed by those with the greatest number of shares.[540]

MDBs fulfill their purpose of providing financial assistance to States through different lending facilities under concessional and non-concessional terms. The former are below market-based loans and grants, given to low-income countries. The latter come in the form of market-based loans, equity investments and loan guarantees, which are available for middle-income countries, some creditworthy low-income countries and the private sector in developing countries (middle- and low-income countries). As the fields of MDBs' activity evolved over the years, other means of aid have been used such as technical assistance and

[538] L.A.Crippa, 'Multilateral Development Banks and Human Rights Responsibility' (2010) 25 Am.U.Int'l L.Rev. 531, 533-536.
[539] D.Bradlow, 'International Law and the Operations of the International financial Institutions', 1 in D.Bardlow, D.B.Hunter, *International Financial Institutions and International Law* (Kluwer Law 2010).
[540] M.Ragazzi, 'Financial Institutions, International' MPEPIL (last updated October 2017), paras 13-16 <http://opil.ouplaw.com> accessed 18 June 2019.

advisory services. Yet, lending remains their primary activity. Irrespective of their type, loans are granted either for investment projects (infrastructure: roads, power plants, irrigation systems, dams and projects with a social impact, e.g. building of hospitals and schools) or policy reforms. The structural adjustment programs were a typical example of policy-based lending by the WBG.[541]

Apart from the WB there are also regional MDBs.[542] While all MDBs share more or less the same features regarding structure, membership and the products they offer to their Member States, differences in their mandates may persist. Consequently their functional purposes and responsibilities may vary. Having said that, the WBG is the exemplar for all other MDBs on matters relating to governance and legal issues that arise from their function in the international sphere, especially in relation to the applicability of international law to them and how this shapes the legal obligations deriving from project-financing: with which international law standards should MDBs' funding activities comply? Is their obligation to adhere to international law confined only to the evaluation of projects and the content of the financial agreement with the borrower or does it extend to the stage of project implementation? If so, what obligations do MDBs bear towards the beneficiaries of development projects, namely individuals with whom they have no contractual agreement but who might be adversely affected by the execution of the funded project? These questions raise the issue of MDBs' accountability and responsibility in (sustainable) development and of their role as international legal actors in formulating the regime of SDL through their operations.[543]

With the above in mind, the following sections elaborate on the accountability of MDBs in light of SDG16 by looking at the operations of two entities of the WBG,[544] the IBRD and the IFC. They are mandated to lend the public and private sector respectively and are introduced immediately below.

---

[541] R.M.Nelson, 'Multilateral Development Banks: Overview and Issues for Congress' (11 February 2020) Congressional Research Service Report R41170, 1-11 <https://crsreports.congress.gov/product/pdf/R/R41170> accessed 1 September 2020.

[542] EBRD<www.ebrd.org>; AfDB <www.afdb.org>; IADB <www.iadb.org>; ADB www.asdb.org. Islamic Development Bank <www.isdb.org>; EIB <www.eib.org>; AIIB <www.aiib.org>. Sub-regional MDBs also exist: the Caribbean Development Bank <https://www.caribank.org/>, the Central American Bank for Economic Integration <https://www.bcie.org/>, the East and the West African Development Banks <https://eadb.org/>; <https://www.boad.org/>.Also, J. Head (n 421), 198 talks about 'three generations' of MDBs.

[543] D.Bradlow (n 539), 2-3.

[544] The other three are: the International Development Association (IDA), the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes (ICSID) <https://www.worldbank.org/en/about> accessed 3 September 2020. The IBRD and the IDA, the fund for the poorest countries, comprise the WB. Only the IBRD will be discussed.

4.1.1 An overview of the World Bank Group and its Mission

a. The International Bank for Reconstruction and Development (IBRD)

The IBRD is a cooperative inter-governmental institution, which enjoys universal membership since it is owned by 189 Member States. Art. 1 AoA[545] defines the Bank's purposes as follows: i) to assist in the reconstruction and development of MS by facilitating the investment of capital for productive purposes, ii) to promote private foreign investment by means of guarantees or participations in loans and other investments made by private investors, iii) to promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment, iv) to arrange the loans made or guaranteed by it in relation to international loans through other channels so that the more useful and urgent projects are dealt with first and v) to conduct its operations with due regard to the effect of international investment on business conditions in MSs' territories. The Bank makes available its resources and facilities exclusively to its members intending to take on reconstruction or development *projects*.[546] Within this framework, policy-based lending seems to be employed in special circumstances only [Art.III, Section 4(vii)]. Yet, as the Bank has undertaken the mission to end extreme poverty, increase shared prosperity and to promote sustainable development, the interrelationship among institutional impediments and the socioeconomic advancement of countries has become more prominent. Consequently, policy-based lending with a strong developmental impact[547] has gained ground among the IBRD's operations as a complement to investment project financing and the program-for-results financing, which are also more tailored to promote the Bank's endorsed goals.[548] The IBRD lends to governments of MS or

---

[545] IBRD, Articles of Agreement (as amended effective June 27, 2012) <http://pubdocs.worldbank.org/en/722361541184234501/IBRDArticlesOfAgreement-English.pdf> (last updated November 3, 2018) accessed 4 September 2020.

[546] Id., Art. III, Section1 and Section 4(vii).

[547] Development Policy Financing helps borrowers achieve sustainable poverty reduction through a program of policy and institutional actions: e.g. strengthen public financial management, improve investment climate, diversify their economy etc. It is different to the structural adjustment programs of the 1980s as it is aimed towards medium-term institutional reforms <https://ieg.worldbankgroup.org/topic/development-policy-financing-dpf> (accessed 4 September 2020); WB, Policy and Procedure Framework: Development Policy Financing (issued 2 August 2 2017, entered into force 13 July 2017) <https://ppfdocuments.azureedge.net/b98d432b-7471-441b-9f39-36b7c380bd05.pdf> accessed 4 September 2020.

[548] WB, *Policy and Procedure Framework: Investment Project Financing* (issued 30 September 2018, entered into force 1 October 2018) <https://ppfdocuments.azureedge.net/796071c4-6875-4b6f-b9ba-5eeeb8de20a4.pdf>. For general information <https://www.worldbank.org/en/projects-operations/products-and-services#IPF>; *Policy and Procedure Framework: Program-for-Results Financing* (issued 10 November 2017, entered into force same date) <https://ppfdocuments.azureedge.net/f9e36a3b-72e0-4edb-9fdc-96bf555c7208.pdf> and for updated information <https://www.worldbank.org/en/programs/program-for-results-

any business, industrial and agricultural enterprise subject to the loan being guaranteed by the MS in whose territories the project is located. The specific terms of lending are thus stipulated in the lending agreement with the borrower and in the case that the latter is a private entity a guarantee agreement with the sovereign state defines the terms of the guarantee.[549]

Art.II provides for the organizational structure of the Bank. Section 1 sets sovereigns' membership to the IMF as precondition for joining the Bank. Upon joining, members subscribe to shares of the capital stock of the Bank. Sections 3–10 regulate matters regarding the shares, from issue price to method and time of payment to their disposal by members. Unlike other organizations, the number of shares each member holds determines not only the amount of contribution to the organization's capital but also its voting power. One vote is allocated for each share of stock held and is added to the basic votes of each member. Together they determine the member's voting influence (Art.V, Section 3). The Bank is governed by the Board of Governors, which delegates to the Executive Directors the authority to exercise most of its powers alongside their responsibility for the conduct of the general operations of the Bank. The Chairman of the Executive Directors is the President of the Bank, who conducts the ordinary business of the Bank under the former's direction and is also Chief of the operating staff.[550]

The IBRD facilitates its loan operations through the funds it raises from its members' subscriptions and, by and large, through the Bank's own borrowing from the capital markets usually by issuing bonds.[551] Remarkably, sustainable development and the SDGs have been mainstreamed in the IBRD's own Funding Program and the organization aims to promote both by engaging investors into the Bank's development mandate through the issuance of Sustainable Development Bonds (SDBs) and Green Bonds (GrBs).[552] SDBs advance all SDGs since they are issued to support a variety of sustainable development sectors and the

---

financing#1>. Since 2017 the Multiphase Programmatic Approach allows clients to divide large and complex projects financed either through IPF or PfRF into smaller linked phases with intermediate targets, *Multiphase Programmatic Approach* (Operations Policy and country services, 18 July 2017) <http://documents1.worldbank.org/curated/en/203081501525641125/pdf/MPA-07192017.pdf>. All accessed 4 September 2020.

[549] AoA (n.545), Art.IV that specifies the Bank's Operations.

[550] Id., Art.V, Section 2, 4 & 5. There is also an Advisory Council selected by the Board of Governors and comprising of consultants from banking, commerce, the industry, labor and the agricultural sector (Section 6) and the Loan Committee (Section 7), which reports on the conditions on which the Bank may guarantee or give loans.

[551] Governmental contributions are less that the amount raised through financial markets since only 20 per cent of membership subscription is paid, AoA (n.545) Art.II, Section 5 and 7.

[552] WBG, 'IBRD Funding Program' <https://treasury.worldbank.org/en/about/unit/treasury/ibrd> accessed 4 September 2020.

proceeds are used to bring about holistically positive economic, social, environmental and governance outcomes to Bank-funded projects. Indeed, the 2019 WB SDB Impact Report,[553] the first since the issuance of SDBs, demonstrates the IBRD's vigorous engagement in bond issuance to secure the necessary financing for tackling the world's most enduring development challenges. For the FY18-19 bonds focused[554] mainly on SDGs 3, 5, 6, 11, 12, 13 and 14 but the concluded projects that were financed by their proceeds had a wider impact. By way of example, in Brazil more than 4 million people benefited from social safety net programs (SDG Target 1.3); the annual energy efficiency in China was improved by 3,330,267MWh (SDG Target 7.3) and greenhouse gas emissions in China, Indonesia and Mexico were reduced annually by 1,705,913 tCO_2 eq. (SDG Target 9.4); access to technical, vocational training and higher education (SDG Targets 4.3-4.4) was improved in El Salvador and the Philippines by having 35,693 teachers certified while SDG Targets 8.5 and 8.10 were promoted in India and Turkey after almost 2,500 medium and small enterprises benefited from financial services.[555] Therefore, SDBs have a multiplier effect as projects cause ampler outputs that relate to themes covered in other SDGs.

Against this background, it can be argued that the WB is an organization, which has integrated the SDGs into its own corporate goals to eradicate poverty and ensure shared prosperity in a sustainable manner, becoming thus a 'premier institution in development'. By channeling funding through multilateral partnerships, the Bank serves policies that advance the shared development aims of the international community, adopting a 'forward look' towards its operations and business model in order for it to meet clients' needs and reinforce its relevance in the 2030 development agenda.[556]

b. The International Finance Corporation (IFC)

The IFC is a sister organization of the IBRD and member of the WBG. As a separate and distinct entity in terms of organization and funds,[557] the IFC furthers economic development by encouraging the growth of productive private enterprises in member states, particularly

[553] WB, 'Bonds for Sustainable Development: Impact Report 2019' (May 2020) <http://pubdocs.worldbank.org/en/138051589440217749/World-Bank-Sustainable-Development-Bond-Impact-Report-2019.pdf> accessed 4 September 2020.
[554] Id., 12-15.
[555] Id., 22-23; 24-25.
[556] Development Committee, ' Forward Look: a Vision for the WBG in 2030' (20 September 2016), paras 1, 7-8 <http://pubdocs.worldbank.org/en/545241485963738230/DC2016-0008.pdf> accessed 4 September 2020.
[557] IFC, AoA (as amended through 16 April 2020), Art.IV, Section 6 <https://www.ifc.org/wps/wcm/connect/d057dbd5-4b02-40f8-8065-9e6315c5a9aa/2020-IFC-AoA-English.pdf?MOD=AJPERES&CVID=n7H2n-h> accessed 4 September 2020.

developing countries. The corporation: i) assists in financing the establishment, improvement and expansion of productive private enterprises by investing in association with private investors; ii) brings together investment opportunities, domestic and foreign private capital, and experienced management; iii) seeks to stimulate and create conditions conducive to the flow of private capital into productive investment in member countries.[558]

The organization of the IFC builds strongly on that of the IBRD. Members of the Bank are members of the IFC as well.[559] Each MS subscribes to a certain number of stock shares based on the country's economic power, which determine also the member's voting power.[560] All the powers of the Corporation are vested in the Board of Governors, which comprises of the Governors and Alternate Governors that are appointed to the IBRD's Board of Governors. Analogously, the Board of Directors is composed *ex officio* of the Executive (and Alternate Executive) Directors of the IBRD and the President of the Bank is the Chairman of the Board. The President of the IFC is appointed by the Board of Directors on the recommendation of the WB President. While management staff is shared by the IBRD and the IFC, the President, officers and staff of the latter owe their duty in discharge of their office entirely to the Corporation. Similarly, the two institutions are not liable for the acts or obligations of one another.[561]

Like the IBRD, raising capital through bond issuances in international capital markets enables the IFC's financing operations. Sustainable development could only be the pillar of the organization's mechanism for its own funding as well. Stringent environmental, social and governance standards regulate the bonds' issuance in general. However, part of the Corporation's loan portfolio is funded through specific Green (GPBs) and Social Program Bonds (SPBs). GPBs include bond instruments whereby proceeds target, *inter alia,* climate change mitigation and adaptation, land use and natural resource conservation, terrestrial and aquatic biodiversity preservation, pollution prevention and control, sustainable water- and waste management projects.[562] Respectively, SPBs aim to alleviate within the broader population or special categories (e.g. people below the poverty line, people with disabilities, migrants, minorities etc.) issues such as access to affordable housing, basic infrastructure and services (i.e. sanitation, transport, healthcare facilities, educational institutions etc.), food

[558] Id., Art.I and III.
[559] Id., Art.II, Section 1; Art.V, especially Section 3.
[560] Id, Section 3; Art.IV, Section 3
[561] Id., Art.IV, Sections 2, 4, 5, 6.
[562] International Capital Market Association (ICMA), 'Green Bond Principles: Voluntary Process Guidelines for Issuing Green Bonds' (June 2018) <https://www.icmagroup.org/assets/documents/Regulatory/Green-Bonds/Green-Bonds-Principles-June-2018-270520.pdf> accessed 5 September 2020.

security and socioeconomic empowerment (e.g. equitable participation in market and financial resources).[563] The issuance of both types of bonds has transparency, disclosure and reporting at its core since issuers are required to account for the use of the bond's proceeds, the strategy for project implementation and the intended impact of the funded project. Within this context, the SDGs are used to evaluate the financing objectives of a given GPB/SPB. Bond issuers are required to include in the reporting their methodology for alignment with the SDGs and explain the latter's specific relevance to their project, reporting if possible on the respective SDG indicators but also on the adverse impact that realization of their targeted SDGs may have on others.[564] The bonds, therefore, become blatantly a channel for SDG investments[565] and enhance the IFC's strategic alignment with the SDGs. Emanating from its AoA, SDGs 1 and 10 are integral to the IFC's mandate. Moreover, the IFC brings about developmental impacts within and across sectors by emphasizing employment creation, environmental and social sustainability, climate change adaptation in projects on infrastructure, agriculture, health, education, and financial inclusion, and by partnering with investors to mobilize resources. Its operations, thus, already translate into a number of SDGs: 2, 3, 4, 5, 6, 7, 8, 9, 12, 13 and 17.[566] With the IFC having a corporate line of sight to the SDGs, it furthers systemic impact investment[567] that purports to deliver positive project outcomes and changes to the markets in order for them to enable sustainable development impacts.

[563] ICMA, 'Social Bond Principles: Voluntary Process Guidelines for Issuing Social Bonds' (June 2020) <https://www.icmagroup.org/assets/documents/Regulatory/Green-Bonds/June-2020/Social-Bond-PrinciplesJune-2020-090620.pdf> accessed 5 September 2020.

[564] ICMA, 'Green, Social and Sustainability Bonds: a High-Level Mapping to the SDGs' (June 2020) <https://www.icmagroup.org/assets/documents/Regulatory/Green-Bonds/June-2020/Mapping-SDGs-to-Green-Social-and-Sustainability-Bonds-2020-June-2020-090620.pdf> accessed 5 September 2020.

[565] Social and Green Bonds <https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new/investor+relations/ir-products/socialbonds> and <https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new/investor+relations/ir-products/grnbond-overvw>. Impact Reports <https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new/investor+relations/ir-info/impact+reports> all accessed 5 September 2020.

[566] IFC, 'IFC's Contribution to the SDGs' (March 2018) <https://www.ifc.org/wps/wcm/connect/1433afde-d252-42f2-bbd9-839e30a69947/201803_IFCs-contribution-to-the-SDGs_v1.pdf?MOD=AJPERES&CVID=m9zP1Y-> accessed 5 September 2020.

[567] Impact Investment for the SDGs is enhanced by the robust reporting mechanism the IFC applies to monitor and evaluate its operations, the Anticipated Impact Measurement and Monitoring (AIMM) system for market-creation effects and the Harmonised Indicators for Private Sector Operations (HIPSO) that comprises sector-level outcome indicators Id., 2 et seq; IFC, 'Impact Investing at IFC' <https://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Development+Impact/Principles/> accessed 5 September 2020.

4.2. MDBs AS SUBJECTS OF INTERNATIONAL LAW

4.2.1. The IBRD and IFC as International Organizations with a Specialized Function:

To be sure MDBs are organizations through which states act collectively on the basis of the mandated purposes for the pursuit of public international interests. Consequently, MDBs act on the international plane forming relations with their members and other IOs. Within this context, they are endowed with certain capacities and implied competencies, which they exercise at the international and domestic level for the fulfillment of these purposes. As in the sphere of law such capacities are linked to the possession of legal personality, MDBs' juridical status should be settled. The matter has two dimensions since it involves MDBs' international legal status and their status in the territory of MS.

To confer upon an entity legal personality assumes that the entity holds certain rights and bears specific duties. In international law, international legal personality had been traditionally associated with statehood. Accordingly, it was an attribute that was afforded only to sovereign states.[568] Yet, 'the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community(…)[T]he progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States'.[569] Truly, IOs[570] have been the medium for systemizing states' international relations and their cooperation in practically every field of common interest par excellence. Their conduct, thus, comes within the purview of international law, as they are subjects of law as well.[571]

In examining the sources of international legal personality for the UN, the 'supreme type of IO', in the *Reparation for Injuries*[572] the ICJ looked at its Charter. Absent an explicit

---

[568] A.Broches, *International Legal Aspects of the Operations of the World Bank* (The Hague Academy of International Law, 1959), 319

[569] 'Reparation of Injuries Suffered in the Service of the United Nations', Advisory Opinion, 1949 ICJ Rep.174, 178.

[570] Definition in VCLT (n.484), Art.2(1)(i); Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (adopted 21 March 1986, not in force), UN Doc A/CONF.129/15, Art.2(1)(i); ILC, 'Draft Articles on the Responsibility of International Organisations (DARIOS)', (2011) II (Part Two) Yearbook of the International Law Commission, Art.2(a).

[571] Ch.Walter, 'Subjects of International Law', MPEPIL <http://opil.ouplaw.com> accessed 18 June 2019; Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, (1980) ICJ 73, para 37 (p.89-90): [I]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties […]'

[572] 'Reparation of Injuries' (n 569)

provision granting international legal personality to the Organization, the Court examined the functions and powers ascribed to it by its founding MS: the existence of organs and their tasks, its power to decide and to conclude treaties with other organizations and its members, the enjoyment of privileges and immunities. The Court opined that the Organization 'occupies a position in certain respects in detachment from its Members'[573] and asserted further that '[It] was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. [I]t could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged'.[574]

It arises then that IOs do posses international rights and duties. However, as opposed to states, these 'depend upon their purposes and functions, as specified or implied in their constituent documents and developed in practice'.[575] It is on this ground that IOs are deemed 'juridical international persons', featuring a derivative international personality whereas states are 'natural' legal persons.[576] Nonetheless, this functional specialization of IOs in relation to their competencies and scope of activity in international law does not deprive them of inherent features that the possession of international legal personality generally entails. These are: the capacity to possess separate rights and obligations at the international level from their members; to conclude treaties valid under international law; to bring claims and institute proceedings before competent international forums in defense of their rights and in reparation for damages suffered, but also bear responsibility for misconduct and wrongful acts. A distinct element of IOs' legal personality concerns the regulation of their legal capacity to act within the territory of MS in order to perform their functions effectively.[577]

How do these features of IOs' personality find expression in MDBs? With regards to their legal personality in domestic jurisdictions, the IBRD's and the IFC's AoA are similar,

[573] Id., 179.
[574] Id.
[575] Id., 180
[576] Id., 179: '[T]he Court has come to the conclusion that the Organization is an international person. That is not the same things as saying that it is a State or that its legal personality and rights and duties are the same as those of a State. Still less is it as saying that it is a 'super-State'…It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State[…]'; L.A.Crippa (n 482), 536; A.Broches, (n.568), 322.
[577] Reparations of Injuries (n 569), 179 -181; D.Akande, 'International Organisations' in Malcolm D. Evans (ed.), *International Law* (5th edn, OUP 2018), 257-258. Still, possession of international legal personality of any IOs does not indicate that all IOs have the same capacities, rights and duties (p.256)

stipulating that they 'possess full juridical personality and, in particular, the capacity to contract, to acquire and dispose of immovable and movable property and to institute legal proceedings'.[578] Subsequent provisions regulate their privileges as far as their property and assets, and the immunities of their staff are concerned.[579] Clearly these rights are accorded to the IBRD/IFC in the territories of each member, which is obliged to take necessary action to make these provisions effective in its domestic jurisdiction.[580] The legal status of the IBRD/IFC. at the municipal level is settled, thereafter, explicitly by their constituent instruments. By contrast, their international juridical status derives from their AoA implicitly. That the IBRD/IFC are distinct entities from their members is evident throughout their founding treaties given that their provisions either address directly the IBRD/ IFC (e.g. Art. I, *The Bank/IFC* shall be guided in all its decisions by the purposes set forth in their AoA) or delineate the entitlements and obligations of the IBRD/IFC vis-à-vis its members and vice versa. For instance, the two institutions prescribe the conditions of membership and subscription to their capital stock, they are self-directed in how they manage their capital and resources, staff owes its duty to no other authority than the IBRD/IFC and members shall respect the international character of this duty. Above all, in order for the IBRD/IFC to execute their business operations, they enter into financial agreements, whereby certain rights and duties are stipulated for each party with States and private businesses as separate entities. Yet, beyond their relationship with clients but always with the aim to fulfill their purposes, the organizations have also concluded agreements that determine their relationship and cooperation with other IOs. The most blatant example is the relationship agreement with the UN. Art.1(2) states '[T]he Bank is a specialized agency established by agreement among its member Governments and having wide international responsibilities, as defined in its Articles of Agreement, in economic and related fields within the meaning of Art.57 of the Charter of the UN. By reason of the nature of its international responsibilities and the terms of its AoA, the Bank is, and is required to function as, an independent international organization'.[581] The Article applies *verbatim* to the IFC since its relationship with the UN is governed by the IBRD's Agreement.[582] As the ICJ has conferred '[I]t is difficult to see how

[578] IBRD, AoA (n.545), Art.VII, Section 2; IFC, AoA (n.501), Art.VI, Section 2.
[579] IBRD, Id. Sections 4-9; IFC, Id. Sections 3-9. On Immunities also, Convention on the Privileges and Immunities of the Specialised Agencies (adopted 21 November 1947, entered into force 2 December 1948), (1949) 33 UNTS 261
[580] IBRD AoA (n 545), Art. VII, Section 10; IFC AoA (n 501), Art.VI, Section 10.
[581] Agreement between the United Nations and the International Bank for Reconstruction and Development (adopted 16 August 1947, entered into force 15 November 1947) (1948) 16 UNTS 346.
[582] United Nations and International Bank for Reconstruction and Development (acting for and on behalf of the International Finance Corporation: Agreement on Relationship between the United Nations and the International

such agreements could operate except upon the international plane and as between parties possessing [separate] international personality'.[583]

Constituent instruments of IOs are, thus, 'multilateral treaties of a particular type; they create new subjects of law endowed with a certain *autonomy*, to which the parties entrust the task of realizing common goals'.[584] On this account, they are conventional and institutional alike. In their latter capacity, they establish general rules of conduct for IOs and bestow on them authority and powers, the scope and extent of which are delineated by the principle of speciality.[585] However, even in this stringent operative framework, it is accepted that IOs have the power to exercise their functions to their full extent, in so far as their statutes do not impose restrictions upon this prerogative.[586] In other words, IOs are deemed to have also powers that are conferred upon them not by express statements in the charters but by implication, as being essential to the performance of their duties.[587] Such 'implied powers' are a manifestation of IOs' autonomy and exercise of authority in the field they operate, albeit moderated by the fact that they ought to be necessary to their function and consistent with their charter provisions.[588] Nonetheless, the justification for them is pragmatic, and generates from the requisite that IOs' functions meet the ever-changing needs of international life and adapt to the evolving international system.

Without exception, the aforementioned desideratum is relevant for the IBRD, bringing again to the forefront the discussion about the Bank's reconceptualization of its mission in development. The matter was touched upon in the previous chapter, where a defense for the evolvement of the Bank's mission was provided from a policy-based perspective, i.e. the

---

Finance Corporation (adopted 19 December 1956, entered into force 20 February 1957) (1957) 265 UNTS 312, Art.1. The IFC has authorized the IBRD to act for and on behalf of it in entering into formal arrangements with the UN and other public international organizations having specialized responsibilities in related fields [IFC AoA (n 501), Art. IV, Section 7].

[583] Reparation of Injuries (n 569), 179.

[584] Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 ICJ 66, para 19.

[585] Id., para 25: 'International organisations are subjects of international law which do not, unlike States, possess a general competence [They] are governed by the "principle of speciality", that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them'.

[586] 'Jurisdiction of the European Commission of the Danube', Advisory Opinion, PCIJ, Series B No 14, 64: 'As the European Commission is…an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose, but it has the power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it'.

[587] Competence of the International Labour Organization to regulate, incidentally, the personal work of the employer', Advisory Opinion, PCIJ, Series B No 13, 18; 'Reparation of Injuries' (n 569), 182-183; 'Legality of the Use of Nuclear Weapons' (n 584) para 25, explaining that inferred powers are required due to the necessity of international life.

[588] J.Head, 'Suspension of Debtor Countries' Voting Rights in the IMF: An Assessment of the Third Amendment to the IMF Charter' (1993) 33 Virginia Journal of International Law 591, 607-611 for the doctrine of implied powers.

facilitation of Agenda 2030. However, it is appropriate to return to this critique and provide a complementary argument in favor of the evolutive nature of the Bank's mandate, this time from a purely legal viewpoint.

4.2.1.1 The Ramifications of Legal Personality for the Determination of the IBRD's Mandate

The question to be asked from this standpoint is the following: Is the Bank's expansion and evolution of activities and policies beyond what is expressly authorized by its AoA wrong as a matter of law, in particular international law and the law of the organization as framed by its AoA?

The wording of the question in this way involves the consideration of the Bank's AoA as legal instruments. Furthermore, the determination of the Bank's powers (the explicit and, all the more, the implied) necessitates elaboration of the Articles' meaning in the appropriate way for formal legal documents.

Under international law, the Bank's AoA are not only deemed treaties but constitutions as well.[589] A direct ramification of the latter characteristic is that their provisions have a special status in the hierarchy of applicable rules to the Bank. They are not ordinary norms of conduct but create the framework for the long-term operation of the Bank as a permanent organizational entity, notwithstanding that the conditions and rationale underlying them may change.[590] In this regard, the Bank's charter is quite broad in its clauses. Indeed the purposes of the Bank are laid down in generic terms, while the terms 'development, 'political' and 'economic' around which the 'mission creep' criticism unfolds are not specified. The Bank's charter 'incorporates a good deal of "creative ambiguity" in order to provide for future contingencies and secure agreement'.[591] As a matter of fact, the gradual connection of financing with the multidimensional purposes of development and the normative underpinning of sustainable development that was advanced through the FFD conferences, particularly the AAAA, is an indicative example of how the connotations of the terms have been understood and endorsed by the Bank itself. Besides, it verifies the continuous commitment of MS to the organisation's mandate not only as an institution for their

[589] J.D'Aspremont, 'The Law of International Organisations and the Art of Reconciliation: From Dichotomies to Dialectics, (2014) 11(2) Int'l Org.L.Rev. 428, 435.
[590] I.Shihata, 'The dynamic Evolution of International Organizations: The Case of the World Bank' (2002) 2 J Hist Int'l L 217; J.Klabbers, *An Introduction to International Institutional Law* (2nd edn, CUP, 2009), 74-76.
[591] R.Hockett, 'From Macro to Micro to 'Mission Creep': Defending the IMF's Emerging Concern with the Infrastructural Prerequisites to Global Financial Stability' (2002) 41 Colum.J.Transnat'l L 153, 177-178. J.Klabbers supra, 58 discussing the matter in relation to the doctrine of implied powers.

reconstruction but for *development* too, hence their approval of the Bank's active engagement in the developmental agendas as framed during the decades.[592] Therefore, the necessity for adaptation of the AoA to the changing demands of the international community was already foreseen by its drafters. The rationale behind the constitutional character of the AoA and the use of generic terms in their wording dictate that their meaning evolves dynamically, according to the tenor of the law in force at any given time in order to allow for social and political developments in the application of the treaty and account for the practice of state parties to the treaty and the organs of the IO.[593] On these grounds, the expansion of the Bank's mandate is, in the first place, permissible.

Having said that, such adaptation ought to be made through credible legal methods that conform to the Articles' constitutional nature as well as their conventional character. The acceptable means are two: a) amendment and b) interpretation. Indeed, the IBRD's and the IFC's AoA provide for both in Articles VIII-IX and VII-VIII respectively. A read through the provisions reveals how rigorous the amendment process is since approval by the Board of Governors and a special majority or, on certain occasions, unanimity is required for the amendments to go through. In practice, members of the Bank/IFC have resorted to the amendment procedure sparingly.[594] By contrast, the institutions' provisions have been subject to interpretation more often. According to the AoA, questions of interpretation are dealt by the Bank itself. Self-interpretation is exercised by the Executive Directors and, in case of disagreement with their decision by a MS the matter is referred to the Board of Governors, whose decision shall be final. The same rules apply to the IFC. Oddly, the two interpretative bodies are the same that draw the institutions' policies. Furthermore, no international tribunal neither the ICJ have jurisdiction over matters of interpretation. Shihata, former Senior Vice President of the WB, commenting on why the policymaking organs of the Bank interpret the AoA explains that 'the interpretation function, while it should always be subject to a correct legal approach, is also meant to be responsive to the needs of the institution and its members as a whole. It should therefore combine strictly sound legal analysis with considerations related to the business exigencies of the organization, where the efficiency of the institutions

[592] I.Shihata (n 590), 225.
[593] M.Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties', Part I (2008) 21 Hague YB Int'l Law 101, 117-118. ILC, Report on the Work of Seventieth Session, UN Doc A/73/10, Ch IV, 65 para 6 referring specifically to 'wellbeing' and 'development' as generic notions which cannot have a static meaning; *Legal Consequences for States of the Continued Presence of South Africa in Namibia,* Advisory Opinion, 1971 ICJ Reports 16, para 53.
[594] I.Shihata (n 590), 224-225.

in achieving its purposes and its continued relevance to the needs of its members are important factors to be taken into account'.[595]

What is made clear from the excerpt is that the interpretation of the AoA of MDBs is complex because it is necessary to ensure the effectiveness of the institutions, given the often-technical nature of the matters they deal with, and simultaneously, it should comply with legal standards of treaty interpretation. However, the fact that interpretation is performed by the very organs that design and approve the Bank's policy challenges the legality of this function. The issue touches upon two axes: the organs' interpretative power itself and the interpretative method. Considering the former, Hockett observed that the authorization of IFIs to auto-interpret their AoA raised 'a nearly irrebuttable presumption in favor of formal legality of IFI action'[596] notwithstanding that the Board members in interpreting the IFI's AoA perform an inherently legal task without being a legal body. Although objectionable at first glance, given that subjectivity may interfere in the construction of the AoA and lead to interpretative outcomes that move away from the will of the founding states, the Articles themselves set the limits to the interpretative exercise by providing that the purposes of the Bank shall guide all its decisions. The interpretation of the charter is not excluded from this "guiding principle" since it enunciates an element of decision-making when determining the true intention of the provisions' drafters, namely the intent of MS who created the institution. In addition, the Executive Board's interpreting function is restrained by the will of its member states. It is the latter that give to it the authority to interpret the AoA and those that have the power to object to its interpretation. At the very least then, the Board's decisions do not escape the political review of the Bank's members. Thereafter, any action of the Bank under the issued interpretative guidance should be regarded legitimate and constitutionally correct.

From the standpoint of practice, the consultation of the Legal Counsel, although an informal process of interpretation since the AoA do not provide for it, is a safeguard of both legality and effectiveness. First, the Counsel has a distinct role within the institution and has the competence to advise on interpretation. Even though his view is not authoritative, request by the Executive Board of the legal opinion of the Bank's General Counsel denotes the 'acceptance by the Bank's executive organs of the role of law in framing the Bank's policy and the respect to the rule of law within the institution'.[597] All the more so, the Board's agreement with or endorsement of the Counsel's opinion renders it a source of the Bank's

[595] Id., 222.
[596] R.Hockett (n 591), 180.
[597] I.Shihata (n 590), 225.

law and develops the practice of the institution.[598] Second, a legally correct analysis of matters without neglecting the institutional responsibility of the executive organs to promote the Bank's interests/business and to serve the needs of its members can be discerned in his/her legal opinion through the application of the general rules of treaty interpretation to the Bank's AoA in light of their status as an international treaty,[599] which the Counsel is bound to follow. This addresses the second axis of the legality challenge on the basis of the interpretative method employed, in light of the risk that interpretation could be merely driven by policy expediency on behalf of the Directors.

Art.31 VCLT constitutes the legal compass for the inference of the relevant interpretation for the AoA. It considers cumulatively as means for interpretation good faith, the text of the treaty with its ordinary meaning in the context within which its terms were adopted and are currently used, the object and purpose of the treaty, subsequent agreements and practice regarding the interpretation and application of the treaty, relevant rules of international law and any special meaning attributed to a term by the parties. No hierarchy amongst them was intended. Rather, the Article provides an equal footing to a textual as well as a purposive/teleological interpretation of treaties. Thereafter, Art.31 provisions shall be taken into account as a whole and be combined into a single interpretative operation.[600] Against this background, the principles of speciality and effectiveness, and the doctrine of implied powers that are central to IOs' function find a legitimizing basis for being considered in the interpretation of the Bank's AoA since they are linked to the object and purpose of the organization and its fulfillment.[601] 'Every treaty, and each of its provisions, must be taken to

[598] I.Shihata (n 590), 225; J.A.P.Lorenzo, 'Development versus Sustainable Development: (Reconstructing the International Bank for Sustainable Development' (2018) 51 Vand.J.Transnat'l L. 399, 445-446; ILC, Report on Seventieth Session (n 537), Ch IV, 93-106 regarding 'subsequent practice', we can distinguish between the subsequent practice of the parties to constituent instruments, the practice of the organs of an IO and the combination of organ practice of IOs and subsequent practice of parties. Subsequent practice is a means of interpretation of IOs' constituent instruments.

[599] VCLT (n.484), Art.5: 'The present Convention applies to any treaty which is the constituent instrument of an international organisation and to an treaty adopted within an international organization without prejudice to any relevant rules of the organization'; '*Legality of Use of Nuclear Weapons'* (n.584), para 19: '[T]he constituent instruments of international organization are multilateral treaties, to which the well-established rules of treaty interpretation apply'.

[600] ILC, Report on the Work of its Eighteenth Session (1996) UN Doc A/CN.4/191, 219-220, paras 8, 9, 11.

[601] M.Fitzmaurice (n 593), 115-116. On the relation of implied powers with the purpose of an organization's purpose, I.Shihata (n 590), 224 (footnote 27) comments that the doctrine of implied powers is part of customary law of IOs and applies to both the IBRD and the IFC. In fact the latter provides explicitly for the doctrine in Art.III, Section 6(v): 'The Corporation shall have the power to exercise such other powers incidental to its business as shall be necessary or desirable in furtherance of its purposes'. J.Klabbers *Introduction* (n 590), 59 (incl. footnote 32) notes that the doctrine is not a means/rule of interpretation itself but it justifies a particular interpretative method, the teleological. Interesting is the differentiation he makes between two versions of the doctrine: one that flows from the express provisions of a treaty and furthers the fullest effect of the treaty and a second, wider version, whereby the doctrine resides in the treaty's object and purpose (59-64). The first version

have been intended to achieve some end';[602] 'to have a definite force and effect'.[603] 'An interpretation, which would make the text ineffective to achieve the object is, prima facie, suspect'.[604] Texts should be interpreted so as 'to have the *fullest* value and effect consistent with their wording and with other parts of the text'.[605] The principles of effectiveness, attributed and implied powers advance this purpose and consequently the teleological approach to the AoA.

Relatively, I would agree with Lorenzo[606] that the legitimate expectations of the international community for the realization of the common interests and shared values of humanity feed, equally, in the hermeneutical task under Art.31 for the ascertainment of the object and purpose of a treaty. Art.31 does not provide for this and on the face of it, the proposition might be at odds with the contextual interpretation, as defined in Art.31(2), because it looks for evidence regarding the intention of the parties to a treaty in extraneous sources, beyond the treaty's text or any agreement/instrument made between all or some of the parties in relation to the conclusion of the treaty.[607] Nevertheless, the argument is tenable from the perspective that international law currently purports to realize the common interests of humanity together with (and through) universal values among which, human dignity, equity, justice and fairness.[608] As an immediate ramification, what constitutes the optimum international order, which public goals and normative values should be furthered is shaped and influenced by the expectations and demands of the larger international community. By extension, international agreements on a subject matter should be seen as the outcome of

---

seems to be interrelated with the effectiveness principle, yet both versions are founded on the teleological interpretation of a treaty.

[602] M.Fitzmaurice, id., citing H.Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989, Part III' (1991) 62 BYIL 44.

[603] Id.,citing Sir G.Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Grotius Publications Ltd, 1986), 49.

[604] Id., citing H.Thirlway (n 602).

[605] Id., citing G.Fitzmaurice (n 603).

[606] J.P.Lorenzo (n 598), 462 et seq.

[607] M.Fitzmaurice (n 593), 114 referring to Engelen, who argued that the teleological interpretation that gives effect to the object and purpose of a treaty should be derived from the text.

[608] Infra Section 3.2.2.3 and CONCLUDING REMARKS (PART 1). As in those sections, I build my arguments on the New Haven School's (NHS) approach to international law here too. The NHS espouses the view that the international legal order should promote the welfare and dignity of a human community through response to and realisation of dominant value predispositions. (The latter characterise the optimum world order and translate into public order goals such as human wellbeing, dignity etc.) To this end, the NHS does not adhere to classical legal theory of international law but incorporates policy into lawmaking. It treats international law not only as a body of rules but as a process of authoritative decision-making that takes place within a decentralised international legal order both in terms of power variable and valued ends. It is this characteristic that shifts attention to the communication functions of international law. Hence, interpretation of treaties in order to be persuasive and authoritative should take into account the value diversities or convergencies and to weigh perceived interests of the community: R.A.Falk, 'On Treaty Interpretation and the New Haven Approach: Achievements and Prospects', (1968) 8 VA.J.Int'l L. 323, 326-327.

actors' communicative functions that take place in different contexts. Whereas their normative weight may vary (i.e. hard v. soft law), they should be regarded holistically since they are aimed at projecting a 'common policy with respect to the future distribution of normative values and the materialization of public order goals',[609] prescribing certain standards for stakeholders' conduct and principles for decision-making in the field they regulate. Against this backdrop, treaty interpretation should be integrative, namely the shared intentions of the parties to a treaty should be discerned by reference to the larger contextual framework within which the commitments it embodies are engaged, and must be reconciled with the preeminent community norms and goals.[610] It should constitute a systematic inquiry into the context; 'a careful inventory and assessment of the values being sought in the agreement and their relation to any superseding interests of the larger community as expressed in its more fundamental policies'.[611] By implication, the base for the teleological interpretation of a treaty is constructed more widely, allowing for the purpose of the treaty to be updated pursuant to parties' 'contemporary expectations concerning problems of the type being discussed'.[612] This kind of interpretation 'gives effect to the continuing consensus of the parties',[613] which is particularly necessary to be reasserted or re-established when new developments and standards have emerged that influence the entire regulatory system in which the treaty is being applied. More importantly, when the 'purpose of the treaty is to create longer, lasting and solid relations between the parties [like in the case of the constituent treaties of IOs], it is hardly compatible with that purpose to eliminate new developments in the process of treaty interpretation'.[614]

The said interpretative approach fits perfectly with the regulatory framework for sustainable development, which has been shaped by the interaction among states, IOs, MDBs, civil society, the epistemic community, businesses etc., and the imperative nature of sustainable development as the new public order objective. Undoubtedly, sustainable development constitutes the primary goal of the international community. Its wide endorsement in treaties, declarations and programs of action, its consideration in judicial

[609] M.Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties', Part II (2009) 22 Hague YB Int'l Law 3, 27
[610] R.Falk (n 608), 337-339, especially because interpretation should respond to the quest for realising a world public order of human dignity (340).
[611] M.S.McDougal, et al, *The Interpretation of International Agreements and World Public Order: Principles of Concept and Procedure* (Yale Univ. Press, 1967), xxxi as cited in J.Lorenzo (n 598), 465. M Fitzmaurice, 'Dynamic Interpretation', Part II (n 581), 27.
[612] R.Falk (n 608), 352; M Fitzmaurice (2009) (n.609).
[613] Another way to put it is to identify the shared expectations of the parties as reinforced (or altered) by taking account of overriding general community policies', R.Falk, 348 citing McDougal, *Interpretation*, 100; M Fitzmaurice (2009) id
[614] M.Fitzmaurice, Part I (n 593), 117.

decision-making, the SDGs and the instigation of a revitalized global partnership to achieve its objective attest to this. The goal's multidimensional nature and normative underpinning set beyond question that the notion of development is construed broadly. This cluster of interdependent facets of development reflects the international community's collective expectation and demand that individual actors redefine their role in development and the correspondent regulatory frameworks be revisited in order to uphold the legitimate concerns for human dignity and wellbeing. States of course bear the predominant responsibility to fulfill these aims, but the pursuit of sustainable development relies largely on an enabling institutional environment. MDBs are inextricable facilitators of sustainability through their resources, technical expertise and knowledge. Nowhere is this most clearly stated than in Agenda 2030 itself, whereby MS accorded to IFIs central role in the new development framework. By entrusting them with this institutional role, MS conferred explicitly upon them their shared commitment to the normative connotations of sustainable development and the designed implementing policy. To the extent thus that sustainable development constitutes a paramount interest of the global order and the WB is among the global policy regulating agencies, the intentions of the drafters' AoA cannot but be interpreted in the light of the evolving circumstances. The Bank's functions and purposes should echo the international community's values as manifested in the principles and practical objectives of sustainable development.

All things considered, Art.31 seems to constitute the legal tool for materializing Shihata's remark regarding the flexibility and responsiveness of interpretation to the Bank's 'operation in actual practice and in the light of the tendencies in the life of the organization'[615] because the dynamic interpretation that it sustains can accommodate the intention of the signatory MS, respecting the charter's text but also embracing the evolutive reading that serves the institution's purposes in the context of contemporary legitimate expectations and demands of the international community as well. The interpretation of the Bank's AoA grounded on the application of Art. 31 VLCT supports their construction in an evolutive-teleological manner, justifying legally the expansion of its mandate. The Bank's organs are not only authorized by the charter itself to interpret it but they have been acting lawfully under the AoA when conferring upon the Bank the competence to take on non-economic considerations (poverty alleviation, environmental protection, human rights, governance etc.). Such widening of the

[615] *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, 1955 ICJ Reports 67, Separate Opinion of Judge Lauterpacht, 106 who highlighted that proper interpretation of a constitutional instrument must take into account the formal letter of the original instrument but also the (evolving) circumstances that condition the practice of an organization.

Bank's operational scope is neither an ultra vires action, running against the political prohibition clause of its constituent instrument, nor wrong as a matter of policy. On the contrary, it is backed by the consent and approval of MS, as manifested in various fora. Therefore, even the objection that reading in the Bank's charter emergent purposes makes it more independent an organization than its MS wished cannot be sustained. Moreover, the determination of the Bank's own powers fits and reinforces the Bank's role in the international order as an autonomous organizational entity, geared towards the functional and policy needs of the international society. The interpretation of its Charter by its own organs constitutes an expression of the IBRD's legal personality and of the inherent capacity to develop its own practice in relation to the rights and duties it possesses or to participate in the creation of such rights and duties, always in harmony with its purposes and functions. Ultimately, the criticism that is raised by opponents of the evolution of the Bank's mandate whatsoever and by those who do not agree with the direction in which this expansion is headed is rebutted.

4.2.2. International Law applicable to IOs – A General Overview

Subordination of IOs to international law derives from their status as subjects of international law. Though this is a truism, controversy surrounds arguments about whether and to what extent international law binds international organisations such as the MDBs.[616] The controversy resonates in the dialectical opposition between contractualist and constitutionalist approaches to the law of IOs as a result of the dual nature of their constituent instruments.[617] On the one hand, IOs' dependence on the contracting parties, as a corollary of the conventional character of their AoA, and on the other, their autonomy, deriving from the institutional tenor of their AoA, finds IOs fluctuating between two parallel legal orders: an internal, namely the IOs' own legal order that is founded on their constitution, and the international legal order. IOs are perceived to have an open-closed structure that affects their identity, functioning and relations with other subjects of international law, especially their member states since sometimes IOs are regarded entities that exercise independent authority in the public sphere as they interact with other subjects of international law and other times,

[616] J.Klabbers, 'The Paradox of International Institutional Law' (2008) 5 International Organisations Law Review 151, 165, who points that there is no plausible theory of obligations to clarify which international law binds IOs and why, despite the ICJ's claim in WHO-Egypt that IOs are subjects of IL, hence the latter applies to them without qualifications.

[617] J.d'Aspremont, 'The Law of International Organisations and the Art of Reconciliation' (2014) 11 Int'l Org L Rev 428.

vehicles through which states act pursuant to the regulatory framework enacted by the organisations' constituent instrument.[618] Accordingly, IOs' norm-creating capacity is not confined to rules regulating their internal functioning but may have external effects, such as agreements concluded with a state or another IO, recommendations, declarations as well as those deriving from the organisations' practice. On such occasions, there is a dynamic interplay between the internal and external law of an IO. The question that arises then is if the former is permeable to the latter and its system of rules, namely international law (IL), and by extension what is the legal nature of the so-called 'rules of the organisation'.

On the premise of the ICJ's dictum in its *WHO-Egypt* Advisory Opinion,[619] a number of scholars aver that IOs are bound by general international law, i.e. general principles and custom.[620] At the same time, others challenge the ICJ's claim as inappropriate for drawing any conclusions about IOs' obligations under IL since the Court merely refers to obligations *incumbent upon* them without getting more specific about the rules from which those arise.[621] Moreover, the diversity of subjects of international law let alone the diversity of IOs with regards to their power and specific functions, do not create a uniform framework of rights and obligations under international law. Rather, the proliferation of international actors exercising authority in the making of international law and global governance have "stretched" the classical theory of the sources of IL, and soft law, despite its benefits, cannot be useful in defining rights and obligations from the traditional standpoint of IL theory. Klabbers,[622] analyzing the ICJ's opinion, concludes that only a subset of IL rules is applicable to IOs, primarily those that regulate the making, application and enforcement of IL since without them the system of IL would not exist. It is in this sense, he contends, that the ICJ captured the meaning of 'general rules of IL' and did not equate it with customary IL.[623]

---

[618] C.Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart Publishing 2007), 32, 60

[619] Supra (n.

[620] E.Benvenisti, *The Law of Global Governance* (2014), 99: 'As an international person, an IO is subject to general international law. Therefore IOS are subject to customary international law and general principles of law'.

[621] K.Daugirdas, 'How and why International Law Binds International Organisations' (2016) 57(2) Harvard International Law Journal 325, 333.

[622] J.Klabbers, 'Sources of International Organisations' Law: Reflections on Accountability', 995-997,998 in J.d'Aspremont, S.Besson (eds) *The Oxford Handbook of the Sources of International Law* (OUP 2017)

[623] Id., 999-1000. These secondary rules would be those on state responsibility or those on treaty law (e.g. the making, application and termination of treaties, which was actually the subject matter of the *WHO-Egypt*) However, the recent work of the ILC on identification of custom acknowledges that 'in certain cases, the practice of IOs also contribute to the formation, or expression, of rules of customary IL. ILC, 'Identification of Customary International law – Statement of the Chairman of the Drafting Committee' (7 August 2014), 9 <https://legal.un.org/ilc/sessions/66/pdfs/english/dc_chairman_statement_identification_of_custom.pdf> accessed 16 June 2021.

Equally, there is a debate about the potential of treaties to bind IOs without their consent, which is guaranteed for states and IOs in Art.34 VCLT and VCLT between States and IOs. Emanating from the proposition that IOs are vehicles for states and that the VCLTIOs is not in force, some commentators suggest that IOs, even absent their consent, are bound by their MSs' obligations because the latter do not cease to exist with the creation of the organization nor can states exploit IOs by giving them the power to contract out of their obligations. Furthermore, the fact that IOs are not, but exceptionally, parties to multilateral treaties is because of the default rule that treaties are open only to states. Ultimately, IOs' constitutional roots are in international law, hence they cannot claim superiority over it.[624]

It is submitted that the question of IOs' obligations under IL should be answered in a way that conforms to their distinctiveness and identity. It should not rest in the absoluteness of the dichotomy between constitutionalism and contractualism since neither can explain on its own the functioning of IOs and their interaction with states in their vertical or horizontal relationships with them; and, though the distinction between member and non-member states gains some significance in this context, IOs' autonomy both as a formal legal and practical matter and their dependence on states given that they designed them do not necessarily affect the issue of IL rules' bindingness on IOs in a contradictory way.[625]

Reasoning the bindingness of IOs' by IL on the assumption that contracting states should not be able to evade their international obligations when establishing IOs, the latter cannot escape *jus cogens*. The supremacy of these norms due to their peremptory and non-derogable nature creates higher-order obligations for states, which cannot bypass them by entering into a treaty that violates such norms.[626] By implication, the treaty by virtue of which an IO is established cannot conflict with *jus cogens* norms. The ILC is explicit on this point when

---

[624] H.Schermers, N.Blokker, *International Institutional Law* (5th edn, Brill 2011), 996 §1574; Example of different views about states' treaty obligations binding IOs: critique to the IMF by CESCR, 'General Comment 12' (1999) UN Doc E/C.12/1999/5, stating that the Fund and the WB 'should pay greater attention to the protection of the right to food in their lending policies and credit arrangements and in international measures to deal with the debt crisis'. Similarly, P.Alston, 'The International Monetary Fund and the Right to Food' (1987) 30 Howard Law Journal 473, 479-480; S.I.Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (Cavendish 2001), 136 also mentions the legal relationship of the IMF to the UN Charter, from which 'a negative and neutral obligation not to violate and to respect [human rights]' derives for the IMF. Opposing, F.Gianviti, 'Economic, Social and Cultural Human Rights and the International Monetary Fund' 113, 115;121-122 in P.Alston (ed) *Non-State Actors and Human Rights* (OUP 2005). J.Klabbers, 'The Paradox' (n.560), 166 who says that a plausible theory of obligation under the law of IOs is lacking, therefore the question about which norms bind IOs is answered sometimes based on what is morally desirable; 'organisations are bound by certain norms of international law because the opposite would be undesirable, perhaps even unthinkable'. This is particularly the case for human rights, which are deemed universal (fundamental global values) and from the standpoint of constitutionalism they ought not be trespassed by subjects of IL. However, Skogly (supra), 76-79; 84-90; 120-125 supports the customary law status of socioeconomic rights.

[625] K.Daugirdas (n 621), esp.330 ff.

[626] VCLT (n.484), Art.53, Art.64.

stating that 'peremptory norms apply to IOs as well as to States[…]it can hardly be maintained that States can avoid compliance with peremptory norms by creating an organisation'.[627] Therefore, *jus cogens* bind IOs to prevent states from using them as the channel to circumvent their international obligations, although IOs' obligation to uphold them without their consent could also follow from the very nature of these rules.[628] By contrast, the same cannot be said with regards to custom and general principles of law. States can lawfully derogate from general international law by entering into treaties that modify or elaborate such rules on a subject matter, if *lex specialis* would reflect better particular circumstances and thus regulate the relationships between them more effectively.[629] The use of this possibility is not invalidated in the event of the conclusion of an IO's founding treaty by contracting MS. The presumption is that MS will not intend something inconsistent with generally recognized principles of IL unless express provisions of the IO's constituent treaty diverge from provisions of general international law.[630] Consequently, general international law does not bind IOs categorically, at least in their relations with MS. The general rule in the VCLT that a treaty cannot create obligations or rights for a third State without its consent is relevant here.[631] Hence, departure from general international law by virtue of an express statement by MS of an IO cannot be invoked against third parties.

Finally, it is not that obvious that MS' treaty obligations are transferred to the IOs they establish. For instance, if all parties to a treaty conclude the treaty establishing the IO, the latter may be considered *lex specialis* vis-à-vis an earlier treaty regulating overlapping issues. But not all MS of an IO may be parties to the same existing treaties at the time of the organisation's foundation or those concluded afterwards.[632] Therefore, IOs could not be

---

[627] Commentary on Draft convention on the Law of Treaties Between States and International Organisations and Between International Organisations (1982) 2 Y.B. Int'l L.Comm'n 56, art.53 cmt.2, UN Doc A/CN.4/SER.A/1982/Add.I.

[628] Ch.Tomsuchat, *Ensuring the Survival of Mankind on the Eve of a New Century*, (1999) 62 Recuel Des Cours 23, 135-136: IOs are bound by 'ordinary norms' (of customary international law) from which they cannot alter by agreement, unlike states, and jus cogens; M.Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc A/CN.4/L.682, 346: 'since UN Member States cannot draw up valid agreements in dissonance with *jus cogens*, they must also be unable to vest an IO with the power to go against peremptory norms'. J.Klabbers, 'Sources' (n 622), 1001 gives an additional explanation why IOs are bound by *jus cogens*, which resonates in the constitutionalisation of IL. A constitution of the international community would contain fundamental global values, reflects in jus cogens, erga omnes obligations etc., which IOs must respect.

[629] *North Sea Continental Shelf* (n.461) 43, 72: 'rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties'; M.Koskenniemi (supra), 60 (about the effectiveness of special rules) and 79: 'that treaty rules enjoy priority over custom is merely an incident of the fact that most of general international law is *jus dispositivum* so that parties are entitled to derogate from it by establishing specific rights or obligations to govern their behaviour'.

[630] Jennings, Watts cited in M.Koskenniemi (n.628), 37.

[631] VCLT (n.484), Art.34.

[632] Gianviti's argumentation (n.624), 119.

automatically bound by treaties to which a portion of their MS is party. One comes to the same conclusion in the case when some states-parties to a treaty join others in the establishment of an IO with a similar to the former's mandate. The relationships between state parties to both treaties and those to only one may be conflicting on the basis of the two equal in status treaties and, though the former may bear responsibility towards the latter that arises from the incompatibility of their obligations under the two regimes,[633] none of the treaties is void absent the legal prerequisite that the subsequent treaty (in this case the IO's treaty) ought to incorporate pre-existing obligations of contracting parties. Nonetheless, it is usual practice that IOs adopt policies and standards reflecting states obligations under treaty regimes that intersect with the organisation's mandate.[634] It is also true that treaty-monitoring bodies, especially on human rights, have delivered opinions in favor of states' retaining their responsibility for breach of treaty obligations in their interactions with IOs, urging, for instance the IMF, wealthier states to ensure that policy-making by the Fund conforms to states' obligations under the human rights treaty and less developed to take into account their obligations when negotiating loans so that the agreement does not undermine human rights.[635] In such cases nothing would preclude the simultaneous responsibility of both the state and the IO pursuant to the Articles on States' and IOs' Responsibility.[636] Consequently, there is no ground to support the view that IOs are automatically bound by states' treaty obligations because otherwise states will evade them.

Examining the issue from the viewpoint that IOs act on the international stage as States' peers, the principle of speciality, and the doctrine of implied powers and IOs' practice, balance IOs' autonomy, as co-equal subjects of IL with states,[637] and their immunities[638] with

[633] VCLT (n.484) Art.30(4) and (5). G.Fitzmaurice, 'Third Report on the Law of Treaties' (1958) UN Doc A/CN.4/115 in (1958) 2 Y.B. Int'l L.Comm'n 20, 41-44, UN Doc A/CN.4/SER/A/1958/Add.1; the rapporteur expresses his scepticism about the invalidity of treaties when they conflict. Also, Humphrey Waldock, 'Third Report on the Law of Treaties' (1964) UN Doc A/CN.4/167 in 2 Y.B Int'l Comm'n 44, para 34, UN Doc A/CN.4/SER/A/1964/Add.1.

[634] E.g. the Operational Policies of the WB explained in this chapter.

[635] CESCR, Concluding Observations (Belgium) (1 December 2000) UN Doc E/C.122/1/Add.54, para 31; id, Concluding Observations (Italy) (23 May 2000) UN Doc E/C.12/A/Add.43, para 20.

[636] DARIOS (2011) (n.570), Art.3, para 6 and commentary in PART FIVE 'Responsibility of a state in connection with the conduct of an IO', para 2: 'Not all the questions that may affect the responsibility of a State in connection with the act of an international organisation are examined in the present draft articles […] Thus, if an issue arises as to whether certain conduct is to be attributed to a State or to an international organisation or to both, the present articles will provide criteria for ascertaining whether conduct is to be attributed to the international organisation, while the articles on state responsibility for internationally wrongful acts will regulate attribution od conduct to the State'.

[637] Reparation of Injuries (n.569), 177-78 where the Court submits that 'international claims can only exist between two political entities, equal in law, similar in form, and both direct subjects of international law',implying therefore a level playing field between the UN and states.

[638] UN Convention on the Privileges and Immunities of the UN (1946) 1 UNTS 15; UN Convention on Privileges and Immunities of Specialised Agencies (n.579).

the powers they exercise in practice, being global policy regulators. As a result, IOs' acts or omissions are embedded into the rules of international law, which induce legal consequences for them. On this account, IOs share certain rights and obligations by virtue of being members of the international community irrespective of their consent. In analogy to states, which acknowledge reciprocal obligations as a 'concomitant of membership in the international community – a structured, continuing association of interacting parties governed by law'[639] – IOs cannot act in a way that ignores international law and undermines the international legal order. Thus, IOs are definitely bound by peremptory norms of IL and by general IL as a default matter. It is with respect to custom and general principles that the interpretative approaches to IOs' statutes and the principle of functional specialization become relevant. While the latter suggests that only the subset of IL rules that matches the IOs' mandates binds them, the former extends them beyond the charter provisions. By aligning the explicit and implicit powers conferred to IOs with the respective legal frameworks, IOs' international obligations emerge from a wider net of international rules. Of course, the rule that MS may modify through the IOs' charter the general IL applicable between them but not against non-member states still exists.

IOs' own position on the matter corroborates this. Apropos the DARIOS, the content of the primary rules that give rise to responsibility indeed preoccupied IOs. In their comments and observations to the ILC, IOs signalize the imperative character of *jus cogens* accepting that an act in accordance with their charter provisions will be wrongful if it conflicts with peremptory norms.[640] However, with respect to 'ordinary norms of IL', charter provisions and internal rules override as *lex specialis* as between the organization or its agents and MS. By implication, conflicting views about the characterization of an act as wrongful or not in relation to general international law is resolved by the application of the special rule as opposed to the general. The WB has characteristically stated: '[…]as the internal law of the organization is, as a rule, the most significant component (when not the whole) of *lex specialis*, will not a special rule prevail over all international obligations other than those deriving from *jus cogens*? We cannot think of any dispositive (as opposed to peremptory) norm that would constitute an exception, precisely because, on any matter that is not

[639] K.Daugirdas (n 621), 358 (incl. footnote 181,182 citing Thomas M.Franck, *The Power of Legitimacy Among Nations* (1990), 197).

[640] ILC, 'Responsibility of International Organisations: comments and Observations Received from Governments and International Organisations' (12 May 2005) UN Doc A/CN.4/556, para 40, in which the IMF considers that an act by an IO that is consistent with its charter can only be wrongful if it is contrary to some higher order obligations '[W]e can accept this only in cases involving breaches of peremptory norms of international law, but we find no support for such a proposition with regard to ordinary norms of international law'; ILC id. (14 February 2011) UN Doc A/CN.4/637, para 40 where the OECD expresses the same view.

governed by a peremptory norm, a general obligation is qualified and superseded by special law, this being the very purpose of special law'.[641] The formulation of the issue this way indicates that IOs do not reject *a priori* the application of general international law. Rather, the latter stands at the background and is applicable in IOs' relationships with non-member and in relation to their interaction with MS to the extent that IOs' charters do not provide for anything different.[642]

The principle of speciality constitutes also the right basis to answer the question about the categorical application of States' treaty obligations to the functioning of an IO. IOs are invested with powers for the promotion of specific common interests that states entrust to them. This limits the competencies they have as international actors compared to states. By extension, being unequivocally bound by the entirety of substantive treaty obligations which might sometimes expand and others delimit their authorities would undermine their specialized function, let alone contravene the rules and procedures set by the IO's charter regarding amendment of their mandate and authorities. After all, the enjoyment of a level playing field by states and IOs alike requires as a minimum the consent of IOs for them to be bound by treaty provisions to which they have not been parties from the outset or have not acceded. IOs' themselves, taking into account their charter and functional specialization, emphasise their own practice with respect to the application of treaties. Persisting in the view that they are bound by treaties only if they have consented, IOs nevertheless do not hesitate to apply treaty rules which they regard customary. For instance, the VCLT is applied in the legal interpretation of the WB's AoA.[643] This is indicative of the WB's interpretative practice whereby it conforms to treaty provisions and considers them binding upon it.

To conclude, IOs cannot be exempted from the international legal system. In fact, they shape it as well since many sub-fields of international law pertain to their regulatory powers. That said, IOs operate against the background of existing rules, which bind them to the extent that they can be adapted to their legal nature and status.[644] Even so, like states, IOs may contract around general norms of IL by virtue of their mandate while the principle of consent

[641] ILC, id. (14 February 2011), para 41; similar comment by the IMF in ILC, id. (1 May 2007) UN Doc A/CN.4/582, para 5 and ILC, id. UN Doc A/CN.4/556, para 47-48: It should also be recognized that the rules of an organization are *lex specialis* as between the organization and its members and agents and among its members. It is therefore not possible to suggest…that in some cases (other than involving obligations of a peremptory nature) general international obligations might prevail over the rules of an organization. Such a suggestion ignores the international agreements between the organization's members regarding the exclusive application of the laws governing their relations and it suggests that *lex generalis* prevails over *lex specialis*.
[642] K.Daugirdas (n 621), 366-368, 377-379
[643] Id., 368-372, 374-377 (incl.footnotes 293, 294).
[644] A.Reinisch, 'Sources of International Organisations' Law: Why Custom and General Principles are Crucial' in J.d'Aspremont, S.Besson (eds) (n 622), who emphasises the importance of settling the matter of sources of law binding on IOs for establishing their responsibility/accountability.

is paramount in determining their international obligations deriving from treaties. How is this position is exemplified in the context of the IBRD's and IFC's function and what does it mean for the content and legal nature of the 'rules of IOs'? This question will be answered in the next section, which turns the spotlight on international law and MDBs' operations.

4.2.2.1 International Law applicable to the MDBs

It follows from the foregoing analysis that the WB and the IFC are bound by their constitutions, international agreements to which they are parties, customary and general principles of international law.[645] However, how compliance with international norms is substantiated in their operations reveals the complexity of having a set of binding obligations that captures comprehensively the multidimensional relationships that the WB and the IFC develop in the context of their operations. IFIs operations serve simultaneously a public purpose and bear the characteristics of commercial transactions. In this context, the issue of MDBs' compliance with their international obligations arises many times, depending on the addressees of their agreements and the respective stage of the latters' execution. For instance, how is MDBs' responsibility defined in relation to the evaluation and implementation of funded projects and policies, and critically towards project-affected people, who do not have a contractual relationship with them?[646] These scenarios bring to the foreground MDBs as passive recipients of rights and duties and as active actors in the formation of international law binding on them, both roles being a consequence of MDBs' dual capacity as vehicles for states to act collectively for the pursuit of international interests and autonomous actors in the international legal system.

The IBRD's/IFC's operations traditionally raise questions of applicability with regards to human rights norms, environmental protection and international economic law. Pursuant to the foregoing position that IOs are not in principle more or less bound by general international law compared to states unless their charters specify differently and they have consented to be bound by treaties, the status the norms in the above-mentioned sub-fields of law enjoy becomes crucial. Equally, how the IBRD/IFC themselves understand their nature

[645] ILC, 'First Report on Responsibility of International Organisations, Special Rapporteur G.Gaja UN Doc A/CN.4/532, paras 15-16. Exceptional example, openly accepting IL's bindingness on MDBs is the AIIB, 'The Role of Law at AIIB', para 2.1 <https://www.aiib.org/en/about-aiib/who-we-are/role-of-law/index.html> accessed 19 June 2021: 'Accordingly, AIIB is both constituted and governed by public international law, the sources of which according to Article 38 of the Statute of the International Court of Justice include applicable international conventions, customary international law, general principles of law and subsidiary means for the determination of rules of law'.

[646] D.Bradlow. (n 539), 2.

as mandatory or default is also important. By way of example, the undertaking of environmental impact assessments (EIAs) and the obligation to prevent transboundary environmental harms have been declared by the ICJ a requirement under customary international environmental law in the light also of Principles 21 and 2 of the Stockholm and Rio Declaration respectively.[647] The WB, and other MDBs, has incorporated these principles in its Operational Policies (OP 4.01 and OP 7.5 on international waterways) and its recently adopted Environmental and Social Framework (WB ESF),[648] which sets out mandatory requirements for the Bank and borrowers to ensure that funded projects are environmentally and socially sustainable. Analogously the IFC Performance Standards (IFC PS 1) lay out in detail the standards the impact assessments should meet. Having such OP in place for the evaluation and implementation of projects and the possibility to hold the IBRD and IFC accountable for non-compliance through their grievance mechanisms suggests that the institutions uphold the respective legal requirements because they deem them mandatory, hence legally binding on them. By contrast, the debated status of the precautionary principle as custom[649] has affected the Bank, which does not have a specific OP that requires its application or exemplifies what it entails. In the WB's new ESF, the precautionary approach is only mentioned once in relation to Environmental Social Standard 6 (ESS) on Biodiversity Conservation and Sustainable Management of Living Natural Resources.[650] While the principle is linked to the obligation of EIAs, thus it could be argued that it is generally applicable to all kinds of environmental risks, its invocation only for the elimination or avoidance of threats to biodiversity gives ground to the opinion that the Bank conforms with the principle by 'best practice' motives, rendering compliance with it an operational choice.[651] Comparable observations can be made in relation to human rights standards in the absence of an explicit safeguard policy addressing human rights or the total of positive and negative obligations that states would normally possess. This is explainable because, only

[647] *Pulp Mills* (n 482), para. 204; *Legality of the Threat of Nuclear Weapons* (n 584), para 29; *Gabčikovo Nagymaros* (n 470) para 53; A.Rieu-Clarke, 'The Duty to take appropriate measures to prevent significant transboundary harm and private companies: insights form transboundary hydropower projects' (2020) 20 Int Environ Agreements 667, 669-671. That the 'no-harm' rule has customary status and imposes procedural obligations is also discussed by K.A.Brent, 'The Certain Activities Case: What Implications for the no-harm Rule?' (2017) (20) Asia Pacific Journal of Environmental Law 28; M.Tignino, C.Brethaut 'The Role of International Case Law in Implementing the Obligation not to cause significant Harm' (2020) (20) Int Environ Agreements 631.

[648] OP 4.01 is replaced by the Bank's Environmental and Social Policy for Investment Project Financing of the new framework.

[649] Mary Stevens, 'The Precautionary Principle in the International Arena' (2002) 2 Int'l & Comp.Envtl.L.13

[650] WB, 'World Bank Environmental and Social Framework' (2016) <https://documents1.worldbank.org/curated/en/383011492423734099/pdf/The-World-Bank-Environmental-and-Social-Framework.pdf> accessed 19 June 2021.

[651] D.Bradlow (n 539), 21.

human rights violations that are directly relevant to the project and its monitoring may be encoded in their OPs as indicated by the explicit reference to the human rights of indigenous people and the more tacit to gender and development issues and involuntary resettlement. Not to forget also is the contestation over human rights considerations in the IBRD's activity, which explains the absence of direct reference to them more broadly.

However, the position that some environmental and human rights obligations are deemed legally binding for the IBRD and IFC whereas others not does not stand unreservedly in light of the Bank's expanded mandate. The problematique pertains to the relational character the provisions on the political prohibition clause as *lex specialis* to the international rules regulating environmental and social issues as general law. The first observation to be made is that the political prohibition articles are not directly comparable to any environmental and human rights rule in treaties or general international law. For a special rule to apply, it must deal with the same subject matter as the general provision. In the case of the IBRD and the IFC, their AoA are neutral in the sense that the objectives enshrined therein do not automatically raise questions of conflict or compliance with the normative core of these rules. Rather environmental and human rights concerns are brought under their purview indirectly through the interpretation of their AoA. Even so, 'no rule, treaty or custom, however special its subject-matter or limited the number of states concerned by it, applies in a vacuum. Its normative environment includes[…]not only whatever general law there may be on that very topic, but also principles that determine the relevant legal subjects, their basic rights and duties, and the forms through which those rights and duties may be supplemented, modified or extinguished'.[652] Thereafter, the IBRD's/IFC's charters should be (and, as shown so far, are) interpreted in light of the environment in which they are applied, including what is their object and purpose.

The second observation concerns the very interpretation of the IFIs' charters in light of the view that states' treaty obligations do not automatically bind IOs. Accepting, of course, the justification offered by proponents of this opinion that *ipso facto* bindingness contravenes the amendment procedures of IOs' charters, it does not reflect current practice. While it has been suggested that IFIs' charters should be amended to incorporate key provisions of several core treaties,[653] amendment procedures are not preferred. Instead, IFIs may expand their mandates through intrepretation. The practice of the WB is illustrative. Thus, although the charter is *lex specialis* and imposes legal limits on the extent and nature of international legal obligations

[652] M.Koskenniemi, 'Fragmentation' (n.628), para 116, 120.
[653] J.Head (n 421), 214.

the Bank may undertake, it has been interpreted in such way that does not undermine the legal framework set by it, hence the specificity of the Bank's function, neither the international legal order within which the Bank operates. By implication, the Bank has adhered to legal principles and standards and has assumed obligations that derive from treaties between states while itself it is not party to any of these. Thus, through the evolutive-teleological interpretation of Art.IV Section 10 AoA, environmental normative benchmarks that do not yet enjoy the status of custom have been applied not as treaty law per se, because indeed this is difficult to align with the principle of consent, but as legal standards of general applicability.[654] In line with the endorsed view here that international lawmaking emerges from communicative practices among diverse international stakeholders, multilateral environmental treaties address concerns that are fundamental to the international community and have been negotiated rigorously by various international actors in international fora; hence, their content enjoys wide support, creating expectations of general compliance since such agreements are the product of the international community's consensus around the policy put forward and the normative authority of the respective norms On this basis, such treaties have the power to generate rights and obligations for third parties, whether states or IOs.[655] Ultimately, IFIs as members of the international community are subject not only to *jus cogens* norms and general international law but also to the 'normative reach of those agreements that have been adopted precisely to lay down principles and standards of global applicability'.[656]

The Bank's practice is corroborative. The 1984 Operational Manual Statement addressed the connection between projects in the economic sector and environmental implications and laid down eight principles whereby the Bank would be guided in order to manage the environmental aspects of funded projects. Principle (e) stipulates clearly that the Bank will not finance projects that contravene any international environmental agreement to which the member country concerned is a party' whereas the rest denote the institution's commitment to the 'no harm' principle, to cater for displacement of vulnerable groups and to respect the finite capacities of natural resources.[657] At the very least, such formal endorsement of environmental objectives is akin a limited legal obligation to uphold relevant environmental standards. Other Bank initiatives such as its participation in the Global Environment Facility

[654] G.Handl (n 412), 660.
[655] Id., 661
[656] Id.
[657] I.Shihata, 'The World Bank and the Environment: A Legal Perspective' (1992) 16 Md J Int'l L & Trade 1, 5-6 citing the OMS in footnote 15.

that mobilises funds to assist countries in meeting their obligations under the Montreal Protocol and other environmental agreements confirms its commitment to foster states' obligations under key environmental accords and its undertaking of an obligation to streamline financing according to the legal criteria in those agreements.[658] Thus, though not directly obligated, the WB and IFC can hardly disregard the 'normative datum'[659] of such norms.

By the same token, human rights lie at the very core of the WB's/IFC's mandate. As early as 1988, Shihata confirmed the WBG's/IFC's leading role in the promotion of the right to economic development and a broad range of human rights associated therewith, noting in particular that under their relationship agreement with the UN the organization ought to take into account the obligations assumed by its members. Furthermore, he stressed that such role of the Bank should not be confused with the latter's stance regarding its non-interference in the political affairs of its members.[660] Later, Danino stated that the 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'.[661] The shift from infrastructure lending to poverty alleviation and human development through social equity has a human rights content and suggests that a rights-based approach to development does not trespass the Bank's institutional limits as financial institution. Nonetheless, Danino stressed that the 'Bank's role is a collaborative one in the implementation of its MSs' human rights obligations and complementary to that of UN partners entrusted with the job of globally respecting, protecting and fulfilling human rights'.[662] Therefore, the Bank is not an enforcer of rights.[663]

---

[658] Id., 29; also Handl (n 412), 652-653.
[659] G.Handl (n 412), 661.
[660] I.Shihata, 'The World Bank and Human rights: An Analysis of the Legal Issues and the Record Achievements' (1988) 17 Denv.J.Int'l L.& Pol'y 39. The human rights he enumerates are: the right to development; the right to be free from poverty, encompassing the right to adequate standard of living, to education, nutrition and health; the rights of vulnerable population groups such as women and refugees. He also admits the indivisibility of human rights and that civil and political liberties are basic to human development and happiness too. Therefore, the Bank should be concerned with the broader effect of its loans upon the wellbeing of beneficiaries (p.65).
[661] R.Danino, 'The Legal aspects of the World Bank's Work on Human Rights' (2007) 41(1) The Int'l Lawyer 21, 23-24.
[662] Id., 25.
[663] Shihata also makes the same point (n 604) citing Reisman, 47: 'there is a limit to 'institutional elasticity, i.e. the extent to which institutions created and still used for other purposes can be 'stretched' in order to get them to perform human rights functions […]'; also, D.Bradlow, 'Should the IFIs play a Role in the Implementation and Enforcement of International Humanitarian Law' (2002) 50 U Kan L Rev 695, 714-716 and 726-729, distinguishes between the enforcement and implementation role of the Bank with respect to international obligations arising from humanitarian law apropos the Bank's activities in conflict and post-conflict situations.

Truly, the auxiliary role of IFIs and non-state actors in the promotion of human rights as opposed to states as primary duty-bearers has been stressed by human rights monitoring bodies on various occasions.[664] In particular with respect to the WB, there is agreement that it is subject to human rights[665] but opinions about the nature and scope of its obligations are indeed divided. Some theorists contend that the Bank should be rights-compliant whereas others bestow upon it a normative role in the realization of rights.[666] The former is facilitated by the integration of human rights in the development of the Bank's OPs, which purport to ensure that the design and implementation of funded projects conform to the Bank's human rights obligations and 'do not undermine the ability of other subjects of international law to act in conformity with their own legal obligations'. The second facilitator is the deployment of the internal redress mechanism when the OPs are breached, i.e. the Bank's independent accountability mechanism. Through these two means the Bank reinstates its position that it takes human rights into account but considers states the duty bearers.[667]

On the other hand, the Bank's normative role presupposes that through the OPs it undertakes more positive obligations towards the promotion of rights. Such approach envisions the institution as a *de facto* policy maker who 'uses its financial leverage to reshape the domestic political landscape of borrowing countries and compel them to comply with

---

An enforcement role of the WB would be exercised by using loan conditionalities to enforce IHL whereas as an enabler of international obligations, the Bank would use its capacity for technical assistance and data collection about the country circumstances to inform the competent specialised international bodies who are mandated to deal with specific violations of IHL ('[…] as subject of IL, the Bank has an obligation to help promote greater compliance with IL and not to collude with other subjects of IL in avoiding their international legal obligations' 716). Distinction endorsed by J.Head (n.421), 213 who distinguishes further between an enforcement role of IFIs regarding core obligations in treaties on economic relations and an implementation role in relation to treaty obligations on human rights and environmental protection.

[664] CESCR, 'General comment No.2 (Art.22)' (2 February 1990) UN Doc E/1990/23, para 6; UN Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex 1, para 11: '[…]States bear the principal obligation for applying human rights in order to ensure respect for the rights enshrined in binding treaties and general principles of international public law. This does not absolve other parties, including international financial and other institutions or organisations…of all responsibility'; also para 71-72 referring to the role of the international community, including IOs; CESCR, 'General comment No.24' (10 August 2017) Un Doc E/C.12/GC/24; 'General Comment No.23' (7 April 2006) UN Doc E/C.12/GC/23; UNHCHR, 'Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights; (20 May 2003) UN Doc E/CN.4/sub.2/2003/12; UN HRC, Guiding Principles on Business and Human Rights: Implementing the UN 'Protect, Respect and Remedy Framework' (21 march 2011) UN Doc A/HRC/17/31 (corporate responsibility to respect HR)

[665] D.Bradlow, C.Grossman, 'Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF' (1995) 17(3) Human Rights Quarterly 411; J.D.Ciorciari,'The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretative Analysis of the IBRD and IDA Articles of Agreement' (2000) 33 Cornell International Law Journal 331; A.McBeth, 'Breaching the Vacuum: A Consideration of the Role of International Human Rights Law in the Operations of the International Financial Institutions' (2006) 10(4) International Journal of Human Rights 385.

[666] C.Tan, 'Mandating Rights and Limiting Mission Creep: Holding The World Bank and the International Monetary Fund Accountable for Human Rights Violations' (2008) 2 Hum Rts & Int;l Legal Discourse 79, 83-85.

[667] Id., 88-90.

their human rights obligations either by withholding or suspending financing from them or by increasing the conditionalities into the financing agreements with borrowing states'.[668] While the Bank's capacity as policy regulator cannot be overlooked, Ana Palacio, WBG Senior Vice President and general Counsel, has stated that the WB's role is a facilitative one in helping its members to realize their human rights obligations.[669] Interpreting the Bank's AoA in accordance with 'the demand and values of our times' to include the explicit consideration of human rights, would *allow and not mandate* action on the part of the Bank in relation to human rights'. Besides, I would disagree with linking the Bank's normative role to the status of rights-enforcer. The Bank exercises a normative role even by being rights-compliant because the obligation to respect human rights, i.e. to refrain from acting in infringing ways, to adopt and apply OPs that reflect those standards, reinforces the normative authority of human rights norms and protects the beneficiaries of its operations against human rights abuses. Whether such protection is adequate and effective is a different discussion. The fact that the OPs discuss human rights indirectly and that the Bank's operations are not subject to external scrutiny, restricts the direct enforceability of human rights against its operations.[670] Nevertheless, in this supportive role to MS in fulfilling their human rights obligations it is important that the Bank acknowledges them as 'the subject of binding legal obligations' that are intrinsic to development.[671] The Bank may not be a party to human rights treaties, however their MS have legally committed themselves under Art.55 and 56 UN Charter to promote and respect human rights; hence, 'human rights treaties prove a solid and compelling legal foundation for the consideration of rights in development' and shield IFIs from 'charges of political interference since such consideration would be delimited by states' consent in their voluntarily undertaken legal commitments'.[672]

---

[668] Id., 90-91, 104-106. In p.106 the author criticises the normative role of the Bank and IMF '[P]olicing human rights norms onto the shoulders of the IMF and WB not only ascribes them a role that the have neither the competence nor the constitutional authority to undertake, but also neglects the BWIs' own complicity in human rights violations in member states, as well as their collusion in facilitating projects and policies which violate such norms on behalf of other more politically and economically powerful members and the corporations they represent'.

[669] A.Palacio, 'The Way Forward: Human Rights and the World Bank', (2006) 8(2) Development Outreach 35, 36 (permissive ; allowing but not mandating human rights); I.Shihata, 'Human Rights, Development and International Financial Institutions' (1992) 8 Am.U. J. Int'l L. & Pol'y 27. G.A.Sarfaty, 'The World Bank and the Internalisation of Indigenous Rights Norms' (2005) 114 Yale Law Journal 1791, argues that the bank is an enforcer of rights in borrowing countries through the OPs, which are internalised in the national law of borrowers through the loan agreements as conditionality. In such way the Bank exercises legal authority over countries.

[670] C.Tan (n 666), 87.

[671] S.McInerney-Lankford, 'International Financial Institutions and Human Rights: Select Perspectives on Legal Obligations' in D.Bradlow, D.Hunter (n.539), 250-252.

[672] Id., 263.

All things considered, the fact that human rights and environmental considerations are pertinent to the IBRD's and IFC's internal policies is indicative of the latter's understanding and acceptance of relevant obligations under international law whether their source is in treaties or general international law. Certainly, the IFC's and IBRD's obligation to refrain from harming the environment and impeding on rights through the projects they fund is a negative one. Yet, when the environmental and human rights duties are brought together with economic concerns under the rubric of sustainable development, the IBRD and the IFC 'occupy a position of special responsibility'[673] due to their institutional role in development, which they avowed anew in light of Agenda 2030 and the AAAA by re-examining their functioning 'in order to adapt and be fully responsive to the sustainable development agenda'.[674] As such, the principle of speciality and their charters do not exclude them from upholding environmental and human rights norms; rather, it is due to this principle and the interpretation of their AoA as *lex specialis* in the light of the environment in which they are applied, that not only do not set aside general rules on the environment and human rights but have raised the IBRD and IFC to 'addressees of existing and emerging norms of international law on sustainable development', including the principle of integration. Accordingly, it can be plausibly argued that they even undertake an affirmative legal duty to take reasonable steps to promote environmental and human rights objectives given that they bear directly on sustainable development.[675]

Even so, the legal regime regarding the applicability of international law to IFIs is fragmented and, although normatively speaking their own substantive rights and obligations can be construed, the applicability of international legal principles in various areas of international law is subject to the IFIs' own authority. The examples of the OPs mentioned above demonstrate the IBRD's and IFC's autonomy to decide not only with which international legal principles they will comply but also how they will operationalize them. The evaluation, thus, of the IBRD's/IFC's compliance with international law hinges upon the oxymoron between the applicability and operationalization of international law in their practice. This interplay between international law as external benchmark for determining the rights and duties of the IBRD and IFC and its incorporation into their internal regulatory framework raises the question about the legal nature of the 'rules of the organisation' (RoO) and crucially, whether the operational policies can be classified among the sources of international law and therefore trigger the IFIs' responsibility if breached, or constitute

[673] Handl (n 412), 664.
[674] AAAA para 70.
[675] Handl (n 412), 663-664.

sources of their internal law only. After all, the comparison of the OPs' legal status with that of corresponding provisions in IL already existing is more appropriate than comparing their AoA with IL since OPs cover the same substantive issues, although not to their entirety. Besides, IFIs' immunity from domestic courts or other forum becomes another obstacle to holding them fully legally accountable.

In the next paragraphs I will give a preliminary account to the nature of the OPs as part of the rules of the organisation. Comprehensive conclusions will be drawn at the end of this section.

'Rules of organisation'

The DARIOS constitute the core source for identifying the content of the RoO. Art.2 stipulates that such rules comprise, in particular, the constituent instruments, decisions, resolutions and other acts of the IO such as recommendations, declarations, guidelines, directives or standards that have been adopted in accordance with those instruments and established practice of the organization.[676] According to the ILC, agreements concluded by the organization with third parties and judicial or arbitral decisions binding the organization comprise the RoO as well. Interestingly, not all the rules pertaining to the IO enjoy equal status.[677] There is a hierarchy amongst them. At any rate, the internal rules of an IO cannot be sharply distinguished from international law unlike States' domestic law.

Yet, the ILC does not take a clear-cut view on whether the RoO are international law.[678] In fact, there are articles in the DARIOS that invoke them as internal law while others indicate their international nature.[679] Commenting on the characterization of an act by an IO as internationally wrongful, the ILC seems to accept that constituent instruments are governed by international law whereas for other RoO the Committee is not categorical – they *may* be part of international law.[680] From the preceding discussion on IOs' constituent instruments it became evident that their treaty-character subjects them to international law. By contrast, the nature of secondary rules is indeed controversial due to their diversity and because emanating from the IO's constituent treaty they have been equally considered a manifestation of its international and constitutional character. Therefore some scholars have argued that they are

[676] C.Ahlborn, 'The Rules of International Organisations and the Law of International Responsibility' (2011) 8 Int'l Org l Rev 397, 418.
[677] DARIOS 2011, 51 paras (16) and (19).
[678] Id., 64 para (7).
[679] DARIOS, RoO as internal law: Art.6(2), 32(1), 40; as international: Art.10(2), 22, 32(2), 52, 64 (RoO may constitute special rules of international law allowing for derogations from the DARIOS).
[680] Id. commentary, 54 paras (2), (3); also p.63, para (4) '[…]obligations arising from the constituent instruments or binding acts that are based on those instruments are indeed international obligations […]'

part of international law and others that they are not.[681] In-between there are those who speak about the external effects of binding internal rules when the latter grant rights and obligations to others.[682]

In the effort to identify the nature of the IBRD's/IFC's OPs it is necessary to consider their instrumentality for the institutions' function first. Internal policies, which include Operational Policies (OPs), Bank Procedures (BPs) and Good Practices (GPs) – for the IBRD, and the Policy on Environmental and Social Sustainability (ESS) for the IFC, aim to enable the two institutions to carry out their mandates in the countries they operate. In this respect, they purport primarily to guide staff in their activities as they exemplify the institutions' policy. In other words, these standards are the medium whereby the institutions' mandates are put into practical effect. As a result, they are premised on the IBRD's and IFC's AoAs, whose constitutional nature confers upon their organs the power to issue such secondary law that elaborates on the organisations' competencies and ensures their functioning. While the issuance of such internal legal acts bears on the AoAs as the primary source of rights and duties of the organisations, the latter do not detail the procedure of secondary lawmaking. Indeed, IBRD OPPs were not the outcome of a systemic legislative process; rather they emerged in response to problems spotted ad hoc in the course of Bank projects and the Bank's own governance and compliance crisis in the 1990s.[683] Nevertheless, the binding nature of the OPs/BPs and the standards set in the IFC's Framework have become the normative and procedural benchmarks for evaluating the IFIs' "conduct", aka decision-making in the preparation, appraisal and implementation of projects. Undoubtedly, these acts that are produced under the authority of the IFIs' charters and result from the own will of the organisations have internal legal effects and constitute a source of the internal legal order of the two organisations. According to one view, the fact that the IBRD and IFC are treaty-based organisations does not automatically give the resulting acts the same character so that they can be deemed part of international law.[684] Corroborative to the internal nature of the OS is the fact that these acts are 'enforced through bureaucratic hierarchy, performance

[681] Schermer, Blokker (n.624), 755 §1196 citing Bernhardt: […]'the prevailing opinion that the internal law of international organisations is a new branch of and forms part of international law has strong arguments in its favor. The basis of the internal law is the constituent treaty of each organization; the enactment and binding force of the internal law derive from this treaty as interpreted in conformity with the practice of the organization concerned'; Eisuke Suzuki, 'Responsibility of IFIs under International Law' in D.Bradlow et al (n.539), 78 mentioning Special Rapporteur Giorgio Gaja, who commenting on the previous draft of the ARIOS stated that the law internal to an IO is part of international law (footnotes 86, 87); DARIOS commentary, 63 para (5) with citations; C.Ahlborn, (n.676), 418-419.
[682] Schermer, Blokker (n.624), 756 §1200, 1206-1215.
[683] P.Dann, M.Riegner, 'The World Bank's Environmental and Social Safeguards and the Evolution of Global Order' (2019) 32 Leiden Journal of International Law 537, 538-541
[684] C.Ahlborn (n 676), 417, 420-421.

assessments of staff',[685] audits during project preparation and implementation, disciplinary proceedings as well as internal review mechanisms such as the Bank's Operations Evaluation Department (OED), the WBIP and the IFCAO.[686] Against this background, OS regulate the administration of the institutions and their normative effects are those of internal administrative law.[687] Their external impact on international law is thought to be limited, let alone for them to be considered a source of international obligation of the IBRD/IFC. Shihata's statement is illustrative on the latter point: 'a violation by the Bank of its policy, even if established by the Panel is not necessarily a violation of applicable law that entails liability for ensuing damages' neither can Panel findings be used in judicial proceedings as conclusive evidence against the Bank.[688] The contradiction with Art.10(2) DARIOS, which suggests that obligations created by the OPs are subject to international law, is clear.

That being so, it would be misleading to argue that the impact of OS concerns only the internal administration of the IBRD and IFC, for this would ignore the organisations' role in the institutionalization of development and in the administration of the consequent multi-level (in essence global) cooperation among international institutions, national governments, civil society and private entities for the realization of development as a community interest. As Agenda 2030 indicates, the governance of development affairs has set aside the classical separation of the international and domestic realms and regulatory functions are performed by the aforementioned stakeholders through various formations that are transnational and global[689] such as transnational network cooperations, intergovernmental-private schemes and predominantly development agencies, which have been specifically created with the purpose to promote development. In this context of multilayered and heterarchical interaction, it is all the more imperative that development policies and the substantive and procedural norms operationalizing them adhere to standards of transparency, participation, reasoned decision-making and effective review. Such attributes ensure the accountability of stakeholders and the legality of development governance.[690]

Against this backdrop, the IBRD and IFC are global regulators/administrators of development. They lead the process of organizing the transfer of funds and knowledge for

[685] P.Dann, M.Riegner (n 683), 542.
[686] L. 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* (OUP 2000), 291-292.
[687] J. E.Alvarez, 'Governing the World: International Organisations as Lawmakers' (2008) 31 Suffolk Transnat'l L.Rev 591, 593.
[688] I.Shihata, *The World Bank Inspection Panel: In Practice* (World Bank 2001) 234
[689] B.Kingsbury, et al, 'The Emergence of Global Administrative Law' (2005) 68 Law & Contemp Probs 15, 20-23.
[690] Id., 17, 29, 55, 61.

development activities; hence in setting the rules of cooperation with their clients, delineating powers and assigning responsibilities.[691] Consequently, the ramifications of their mandatory OS are much broader when assessed against the standards mentioned above and principles of development cooperation:[692] (i) the autonomy of states in designing and executing a project as an expression of their sovereignty, self-determination and ownership of their development; (ii) the protection of the individual as the beneficiary of development, which encompasses safeguarding human rights and providing for their participation in the development process through the rights to be informed, consulted, and to have access to effective redress and remedy; (iii) the efficiency and coherence of development interventions and (iv) sustainable development as a principle directing development decision-making.

For sure, the formalization, application and enforcement of OPs may not further all four principles equally or even adequately. Foremost, OPs affirm the autonomy of development agencies in structuring the provision of financial and technical assistance to their clients, which conversely restricts the latter's freedom to implement development interventions according to their domestic laws. On the other hand, Bank/IFC staff is constrained in allocating resources unjustifiably since only interventions that comply with OS will be selected, approved and supervised. Furthermore, clients are aware of the prerequisites they need to fulfill before receiving assistance by the IBRD/IFC since the documents containing the OS are public and accessible. In this respect, OPs serve as clear norms on environmental and social aspects that taken into account ensure sustainability and individual rights in the design of a project.[693] Therefore, OS function as conditionality for the suitability and selection of the intervention to be financed. IBRD and IFC internal standards compel primarily staff but are indirectly binding on potential recipients of assistance, who theoretically maintain some discretion not to accept the funding after all. Even so, the existence of these standards sets benchmarks for transparency, due diligence and informed decision-making on both the IBRD/IFC and clients at the negotiating phase of financing a project. Yet, the signing of the loan agreement is the turning point in determining the scope and nature of obligations of compliance with OS during the implementation of projects since OPs become legally binding through their incorporation in the loan agreements. OPs become

[691] P.Dann, 'The Global Administrative Law of Development Cooperation' in S.Cassese (ed), *Research Handbook on Global Administrative Law* (Edward Elgar, 2016), 415-416 speaks about the administrative law of development cooperation and finance.
[692] P.Dann, *The Law of Development Cooperation: A Comparative Analysis of the World Bank, the EU and Germany* (CUP 2013), 219-298.
[693] P.Dann, 'GAL of Development Cooperation' (n.635), 428-432; B.Kingsbury, 'Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples' in G.S.Goodwin-Gill, S.Talmon (ed.) *The Reality of International Law* (OUP 1999), 338.

conditions for evaluating the performance of clients. At this stage, compliance with them is a legal requirement for the recipient and if absent the loan is cancelled. What differs is the regime under which the agreement is enforced against clients depending on whether the financier is the IBRD or the IFC. In case of the former, international treaty law applies since loan agreements between the IBRD and states are international agreements whereas in the latter, contract law applies.[694]

What the above suggests is that OPs are normative instruments that acquire a specific external dimension and have legal effects: while executing the institutional mandate of the IBRD/IFC, they shape the international law of development cooperation and finance which is also administrative. From this standpoint, OPs constitute procedural rules and substantive standards of the law of global (development) governance or, otherwise stated, the global administrative law for development.[695] However, they also diffuse their normativity into the international law of sustainable development more broadly. The making, interpretation and enforcement of OPs (being legal terms in the loan agreements and subject to review by the WBIP and the IFCAO) play an important role in the cross-fertilization of IFIs' internal law with international law, rendering MDBs lawmaking institutions. The next sections will make this remark more explicit.

[694] S.de Moerloose, *World Bank Environmental and Social Conditionality as vector of Sustainable Development* (DPhil thesis, University of Geneva 2019), 47-52 paras 60-64 <http://archive-ouverte.unige.ch/unige:121456> accessed 15 June 2021.
[695] Id.

4.2.3. The MDBs' Operations Policies (OPs) as Internal Law and their Relation to International Law: A Reflection of existing standards?

4.2.3.1. Environmental and Social Safeguards as Vectors for the Implementation of Sustainable Development in MDBs:

i. The IBRD's Safeguard Policies until 2016

Environmental and social safeguards (ESS) contain normative prescriptions designed to apply to investment project financing with the aim to restrain or minimize the adverse effects on people and the environment caused by financed projects. As such, ESS are a subcategory[696] of the OPs, which generally cover all functional areas of the IBRD's lending operation and regulate the entire project cycle.[697] ESS are laid out in the Operations Manual and are two-fold since each OP is complemented by the corresponding BP. Therefore, substantive objectives and standards are accompanied by the respective procedural rule. ESS comprise seven environmental policies. By contrast, social issues are underrepresented given that there exist only two explicit policies, OP/BP 4.10 on Indigenous Peoples and OP/BP 4.12 on Involuntary Resettlement. However, environmental assessment 'acts as a *de facto* procedural "umbrella" policy' for the identification of more social issues.[698] That said, EA together with the Indigenous Peoples and Involuntary Resettlement policies have been the main gateway for integrating non-economic considerations into development. Indeed, they count for the majority of complaints by project-affected people before the WBIP.[699] Their content underscores the multifaceted nature of development and the realization of sustainable human wellbeing as the end goal. For this reason they merit detailed presentation.

a. Environmental Assessment

EA is the responsibility of the borrower following the environmental screening of the proposed project by Bank staff.[700] The extent and type of EA are contingent on the classification of the project into one of four categories (A, B, C, FI) depending on its type,

[696] R.E.Bissell, S.Nanwani, 'Multilateral Development Bank Accountability Mechanisms: Development and Challenges' (2009) 6 Manchester Journal of International Economic Law 2, 25.
[697] D.Bradlow, A. Naude Fourie, 'The Operational Policies of the World Bank and the International Finance Corporation' (2014) 10 Int'l Org. L Rev 3, 17.
[698] H.Himberg, 'Comparative Review of Multilateral Development Bank Safeguard Systems' (May 2015), vii <https://consultations.worldbank.org/sites/default/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/related/mdb_safeguard_comparison_main_report_and_annexes_may_2015.pdf> accessed 20 June 2021.
[699] D.Bradlow,A.Fourie (n 697), 20.
[700] BP 4.01 <https://ppfdocuments.azureedge.net/1578.pdf> accessed 20 June 2021.

location, sensitivity, scale and the nature and magnitude of its potential environmental impacts.[701] By implication, a range of different instruments is used to satisfy the Bank's EA conditions. The most prominent is the Environmental Impact Assessment (EIA), which is used to identify and assess the potential environmental impacts of a project, to evaluate alternative and design appropriate mitigation, management and monitoring measures throughout project implementation.[702] Positive impacts of the project should also be enhanced; hence they are part of the EA, which is thereafter understood broadly and considers natural and social aspects in an integrated manner.

EA takes into account risks associated with the three elements of the natural environment (air, water, land) that can be transboundary and global such as climate change (without detailed description as to what to address), ozone-depleting substances, pollution of international waters and adverse impacts on biodiversity. To this end, the OPs on forests,[703] natural habitats[704] and pest management[705] also inform the content of the assessment in light of the Bank's affirmation that natural resource management is essential for sustainable development. Admitting the economic value for reducing poverty and the ecological functions of natural habitats and forests, the Bank urges borrowers to take a precautionary approach and integrate conservation and preservation effectively into their economic development while paying due regard to the rights and welfare of people dependent upon natural resources. In the same vein, pest management should be handled through biological and environmental control methods instead of the utilization of chemicals.

Social risks are mainly defined by reference to the OPs on involuntary resettlement, indigenous peoples and physical cultural resources[706] with the addition of human health and safety.[707] However, critics point to the inadequacy of health and safety evaluation in this context because pertinent issues are addressed only in connection with environmental impacts and are treated as a consequence thereof.[708] The different approach to social issues is evident also from the lack of reference to country obligations under international human rights agreements or domestic laws on social matters as opposed to the statement that EA should

[701] OP 4.01, paras 2, 4, 8 <https://ppfdocuments.azureedge.net/1565.pdf> accessed id.
[702] OP 4.01, Annex A, para 2 <https://ppfdocuments.azureedge.net/3901.pdf> accessed id.
[703] OP 4.36 <https://ppfdocuments.azureedge.net/1574.pdf> accessed id
[704] OP 4.04 <https://ppfdocuments.azureedge.net/1567.pdf> accessed id.
[705] OP 4.09 <https://ppfdocuments.azureedge.net/1637.pdf> accessed id.
[706] OP4.11 <https://ppfdocuments.azureedge.net/1571.pdf> accessed id. Paras 1-2 echo the definition of cultural heritage of the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered in force 17 December 1975) 1037 UNTS 151.
[707] OP 4.01, para 3.
[708] J.von Bernstorff, P.Dann, Reforming the World Bank's Safeguards: a comparative Analysis (GIZ, 2013) 13<https://consultations.worldbank.org/sites/default/files/consultation-template/review-and-update-world-bank-safeguard-policies/submissions/worldbankssafeguardsacomparativelegalanalysis.pdf> accessed id.

consider country obligations pertaining to project activities under relevant international environmental treaties otherwise the Bank will not finance projects that contravene them.[709] A defining feature of EA is the public consultation with project-affected groups and local NGOs and their associated right to be adequately and appropriately informed for the consultations to be meaningful. Such provision enables individuals' participation in the decision-making process for structuring the project and agreeing on its financing.[710]

b. Indigenous People

The policy on indigenous people is an exemplar of good development governance by IFIs due to the direct link drawn with the Bank's developmental mandate and the normative underpinning of the holistic concept of sustainable human development. Paragraph one sets out the purpose of the policy: 'to contribute to the Bank's 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 […] and that they receive social and economic benefits that are culturally appropriate and gender and intergenerationally inclusive'.[711] Justification for the special consideration of indigenous communities and the necessity to avoid, mitigate or compensate for a project's adverse effects on their wellbeing lies in the vulnerability and marginalization they suffer compared to dominant population groups as a result of their distinct social and cultural identity. Still, indigenous groups are only descriptively identified based on characteristics such as their self-identification and recognition thereof as a distinct group; their collective attachment to geographically distinct habitats or ancestral territories and to the natural resources; their political, socioeconomic and cultural organisation according to their customs and their language. Consequently, the term encompasses, but is not limited to, 'indigenous ethnic minorities', 'aboriginals', 'hill tribes', 'minority nationalities', 'scheduled tribes' or 'tribal groups'.[712] The lack of a clear definition of indigenous people may, however, possess particular strength in overcoming the resistance of some governments to officially recognize this group and thus uphold the substance of the policy. At the same time, it could be argued that its application is weakened because the OP's association with the legal framework pertaining to indigenous people is only implicit.[713] Truly the OP does not repeat the prohibition to finance projects that violate obligations of the

[709] OP 4.01, para 3; OP 4.36 para 6.
[710] OP 4.01, paras 14-18; OP 4.04, para 10.
[711] OP 4.10 <https://ppfdocuments.azureedge.net/1570.pdf> accessed 20 June 2021.
[712] Id., paras 2-4.
[713] B.Kingsbury (n 693); G.Sarfaty (n 669), 1801-1809 referring to the political and legal challenges in the implementation of the OP, due also to the lack of definition.

borrower vis-à-vis indigenous people despite the acknowledgement that their rights are being safeguarded under international and domestic law.[714] That being so, the reflection of international standards for the protection of indigenous people is discernible in OP as evidenced by its general content and especially the borrower's and the Bank's obligation to hold free, prior and informed consultation[715] with them when conducting the social assessment for the project and at all stages of its execution.

c. Involuntary Resettlement

Involuntary resettlement as a corollary of development projects burdens both the affected people and the receiving community. Displacement of the former results in their impoverishment given that they are deprived of fundamental means for securing the necessities of live such as access to income and other economic sources, shelter, land or their productive skills which they cannot apply to the environment where they relocate. In turn, the hosting societies face the disruption of their socio-economic organisation and of the physical environment in the areas where displaced persons relocate.[716] The policy thus aims at mitigating the side effects of project-afflicted resettlement by compensating or assisting displaced population in restoring their living standards to pre-displacement levels. Notably, resettlement should be 'conceived and executed as sustainable development programs'[717], indicating that resettlement plans/policy frameworks should address the own needs and development challenges of this group holistically and in relation to the implemented project so that the benefits are shared. This quest is realized by the prerequisite that 'displaced persons and their communities, and any host communities receiving them, are provided timely and relevant information, are consulted on resettlement options and offered opportunities to participate in planning, implementing and monitoring resettlement'.[718] Meaningful consultation is thus a core element of this safeguard policy in all circumstances and especially for vulnerable groups, including indigenous people and ethnic minorities.[719]

---

[714] OP 4.10, para 2. International law on indigenous peoples: UN Declaration on the Rights of Indigenous Peoples (2 October 2007) UN Doc A/RES/61/295; ILO Indigenous and Tribal Peoples Convention (No.169) (1989) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169> accessed 20 June 2021, ICCPR and ICESCR.

[715] Defined as 'consultation that occurs freely and voluntarily, without external manipulation, interference, or coercion, for which the parties consulted have prior access to information on the intent and scope of the proposed project in a culturally appropriate manners, form and language', BP 4.10, para 2 <https://ppfdocuments.azureedge.net/1582.pdf> accessed 20 June 2021.

[716] OP 4.12, paras 1,3 <https://ppfdocuments.azureedge.net/1572.pdf> accessed idem.

[717] Id., para 2(b).

[718] Id., para 13(a).

[719] Id., para 8-9.

To conclude, OPs set clear prescriptions for environmental and social aspects in the form of procedural requirements (i.e. impact assessments and public consultations) that should be adhered to during project-planning and throughout project implementation. As a minimum, they reflect the Bank's 'do no harm' code regarding people and the environment in its support to sustainable poverty reduction.[720] Through the safeguards the Bank aims to fulfill the objectives of investment projects as stated in OP 10, namely to promote poverty reduction and sustainable development through broad-based economic growth, social and environmental sustainability and the improvement of the public and private sectors.[721] To a good extent each OP individually serves the said purpose given that all capture the essence that sustainable development is multidimensional. Furthermore, this is strengthened by their reference to one another (e.g. OP on EA to OP on biodiversity and indigenous peoples). Such interconnection and eventually integration is the cornerstone of sustainable development. However, OP 10 does not function as an overarching policy statement, defining roles, responsibilities, general commitments and objectives with regards to environmental and social aspects, from which the safeguards flow and come under its normative purview.[722] With a general commitment in place, there would be greater thematic coverage in the safeguards and more substantive protection for individual rights. For instance, poverty and gender assessments, which facilitate the Bank's general country assessments, would be more systematically linked to the safeguards and concretized to apply at the specific project. By extension, the safeguards would be the means to address socioeconomic rights such as the core labor standards or even civil rights, which fall outside the safeguards' scope. Such course of action would remedy the fragmentation between the three individual regimes that comprise development policy and embed their integration.

ii. The New 'Environmental and Social Framework'

The new policies seem to remedy these omissions, allowing for the harmonization of the environmental, social and economic dimensions of sustainable development and its further assimilation in the Bank's mandate. The Environmental and Social Framework (ESF)[723],

[720] J.Bernstorff, P.Dann (n 708) 13.
[721] <https://ppfdocuments.azureedge.net/796071c4-6875-4b6f-b9ba-5eeeb8de20a4.pdf> accessed 21 June 2021.
[722] J.Bernstorff, P.Dann (n.708) 10-11; H.Himberg (n.698), vii-viii
[723] WB ESF (2016) <https://thedocs.worldbank.org/en/doc/837721522762050108-0290022018/original/ESFFramework.pdf>. The ESF will run in parallel with the OPs for seven years. For the background to the adoption of the ESF, see: Independent Evaluation Group, 'Safeguards and Sustainability Policies in a Changing World: an Independent Evaluation of WBG Experience' (2010)

effective as of October 2018, is more integrative in structure and content alike. It comprises of three parts: a non-binding 'Vision Statement' (VS), an 'Environmental and Social Policy (ESP) that sets out the requirements applicable to the Bank and ten Environmental and Social Standards (ESS) that delineate borrowers' obligations. The VS is aspirational and reinstates the Bank's commitment to ending extreme poverty and promoting shared prosperity. Environmental sustainability and social development and inclusion are central to it. By numbering concrete environmental and social problems such as climate change, the depletion of natural resources, access to education, health, social protection, work and financial resources; by reference to the principles of intergenerational equity, equality, non-discrimination, empowerment-participation and importantly the realization of human rights as enshrined in the UDHR, and by relating development outcomes to the collaboration with all relevant stakeholders,[724] the ESF bears connection to the four Ps in Agenda 2030: People, Planet, Prosperity and Partnerships. On this basis, the ESF moves from a simply 'do no harm' target to 'doing good', achieving positive development outcomes.[725]

At first glance, the ESP and the ESSs attest to this. The IBRD bears a broad environmental and social 'due diligence' obligation in deciding whether to support financially the proposed project. In general, the aim is for the IBRD to assess the borrower's capacity and commitment to develop the project in accordance with the ESSs.[726] For this purpose, it shall review the documents and information provided by the borrower relating to the environmental and social risks and impacts of the project and shall assist the borrower in developing appropriate measures and tools compliant with the ESS that will mitigate the them.[727] Of particular importance is the Bank's emphasis on information disclosure, meaningful consultation and informed participation of stakeholders. The IBRD expressly states that its due diligence will cover these dimensions and that the outcome of consultations will inform deliberations as to whether to finance the project. Notably, the Bank will have the right to participate in consultation activities in order to form own view about the project's impacts on communities and evaluate the borrower's response in practice.[728] The Bank thus

<https://openknowledge.worldbank.org/handle/10986/2571> accessed 21 June 2021; WB consultations on draft and revised proposed ESF in three phases <https://consultations.worldbank.org/consultation/review-and-update-world-bank-safeguard-policies> accessed id.

[724] ESF, 2.

[725] WB, 'The World Bank's Safeguard Policies–Proposed Review and Update, Approach Paper (2012), para 8: 'The Bank expects this review and update process to result in the next generation of safeguard policies that can help the Bank support measurable development outcomes or 'doing good', in addition to maintaining the 'do no harm' principles of the current safeguard policies'

[726] ESF, paras 30-31.

[727] Id., paras 32-33.

[728] Id., paras 49-55.

is intensely involved in the preparation of the project and has enhanced responsibilities. Supervision of project implementation, however, does not fall outside the Bank's scope of obligations. The Bank requires stakeholders' participation throughout the project cycle and the establishment of grievance mechanisms for the resolution of complaints brought by affected groups. Crucially, all material measures and actions required in order for ESSs standards to be upheld are incorporated into the Environmental and Social Commitment Plan (ESCP), which forms part of the legal agreement with the borrower and constitutes the basis for monitoring the borrower's performance.[729]

Equally under the new ESF the borrower's responsibility is enhanced since a fundamental change introduced is the use of borrower (country) systems, i.e. borrower's ES Framework, provided that it leads to 'materially consistent' protection of the environment and people.[730] Increasing borrowers' role by allowing the application of their policy, legal and institutional framework is believed to increase the ownership of development activities and to conflict less with state sovereignty. By extension, the financial aid that is offered is used more effectively, leading to better development outcomes.[731] The expanded thematic coverage of ESSs is instrumental to this end. Their objectives, scope of application and content specifics are now explicated. ESS1 lays out procedural requirements for environmental *and* social impact assessment. The majority of environmental concerns are included: climate change and transboundary and global risks; protection and conservation of biodiversity and natural habitats; the benefits from ecosystems, from food and water to climate regulation and protection from natural hazards to nutrient cycling, primary production and cultural services such as recreation sites; the use of living natural resources (forests, fisheries) and community safety related to dams and use of pesticides.[732] Social risks extend to threats to human security from inter-state conflict and crimes; repercussions from involuntary taking of land or contestations over land/natural resources use (e.g. food insecurity, tenure rights etc.); cultural heritage; health, safety and wellbeing of workers and project-affected people, and discrimination in accessing development resources and project benefits. In this context, 'disadvantaged or vulnerable groups' that are disproportionately affected are taken into

[729] ESF, paras 3, 46-48 paras 56-63; ESS1-Annex 2, paras1-14.
[730] Id., paras 23-24.
[731] Paris Declaration on Aid Effectiveness (n.346), 3; Accra Agenda for Action (n.403), 15; Busan Partnership (n 401), 3.
[732] ESS1, para 28(a).

particular consideration and special provision is made so that they are enabled to participate in the consultations.[733]

Each of these matters is analytically addressed in the remaining standards, which guide the ESA. ESSs are then interlinked. ESSs5-8 address involuntary resettlement, biodiversity, indigenous people and cultural heritage just as the pre-existing OPs. They have been updated though to regulate the issues more comprehensively. For example, ESS5 highlights women's perspective during community engagement and the issue of displaced peoples' integration with host populations.[734] Analogously, indigenous communities are more empowered given that meaningful consultations do not suffice in certain circumstances and their free prior and informed *consent* is sought.[735] Respectively, stakeholder information and participation (ESS10) is elevated to a separate standard. Underpinning the entire project cycle, this safeguard is fundamental for good development governance because it fosters transparency and accountability.[736] From the new additions, ESS2 safeguards labor and working conditions. Employment is a driver of economic growth and together they constitute key components of poverty reduction. On this basis, it should be accessible to all and decent. ESS2 aims at ensuring the ILO's core labor standards[737] – freedom of association and effective recognition of the right to collective bargaining, freedom from forced and compulsory labor, the abolition of child labor, and non-discrimination in employment – for project workers, although ILO conventions are not invoked. ESS3 on resource efficiency, pollution prevention and management aims to promote the sustainable use of resources, including energy, water and raw materials, mitigate atmospheric and climate pollutants, minimize/avoid the generation of (non-)hazardous waste and the risks from pesticide use. It thus takes a more holistic approach to aspects of environmental sustainability that have an intra- and intergenerational impact.[738] Finally, ESS4 addresses health and safety risks in the context of infrastructure (including dams), traffic and road-safety, exposure to hazardous material and disease.[739]

[733] Id, para 28(b), incl.footnote 28; Bank Directive, 'Addressing Risks and Impacts on Disadvantages or Vulnerable Individuals or Groups' (27 March 2021) binding on staff regarding Bank's dude diligence obligation for this group of people, hence subject to WBIP consideration <https://ppfdocuments.azureedge.net/9598117e-421d-406f-b065-d3dfc89c2d78.pdf> accessed 22 June 2021.
[734] ESS5, paras 17,23.
[735] ESS7, 79-80 paras 24-28.
[736] ESS10, 98-101.
[737] ILO, Declaration on Fundamental Principles and Rights at Work (18 June 1998); ESS2, 31-36.
[738] ESS3, 39-43.
[739] ESS4, 45-50.

iii. The IFC's 2012 'Sustainability Framework'

Conceptually the IFC Sustainability Framework (SF) bears great resemblance to the IBRD's new ESF. To be accurate, it served as the exemplar for the IBRD's safeguards reform. The Policy on Environmental and Social Sustainability (PESS) links the successful realization of the IFC's mandate to the objectives and principles of its SF. 'Central to the IFC's development mission are its efforts to carry out investment and advisory activities with the intent to 'do no harm' to people and the environment and to achieve positive development outcomes'.[740] In this respect, the IFC acknowledges the importance of a balanced approach to development, which the institution aspires to achieve by tackling substantive and procedural aspects of the development process. Remarkably, the IFC emphasizes climate-related impacts that impede economic and social wellbeing but also the environment. It recognizes business' responsibility to respect human rights, independently of states' duty to respect, protect and fulfill them, and stresses the need to address adverse human rights impacts and have mechanisms to remedy promptly various project-related grievances. Another noteworthy element is the mention to gender-related risks from business activities and to unintended gender differentiated impacts, which aim to remedy women's underrepresentation in development. Last but not least, information disclosure by clients and the IFC as well as informed consultation and participation (IPC) of affected groups, which in the case of Indigenous communities is raised to free prior informed consent (FPIC) are both substantial for good governance and sustainability performance.[741] The 'Access to Information Policy' regulates information sharing with the public as a means to promote these ends.[742] Like the IBRD, the IFC holds a 'due diligence' duty with respect to environmental and social parameters of its business activity, whose key components are similar to those of the IBRD.[743] Thus, IFC involvement in project appraisal is as intense as the Bank's.

The eight Performance Standards (PS) are directed towards clients and guide them on how to identify, mitigate and manage risks and impacts of project-level activities that obscure

---

[740] IFC (2012) <https://www.ifc.org/wps/wcm/connect/7141585d-c6fa-490b-a812-2ba87245115b/SP_English_2012.pdf?MOD=AJPERES&CVID=kiIrw0g> accessed 23 June 2021.

[741] Id, paras 10-13, 15, 30 (IPC should lead to broad community support for the business activity by affected people), PS1, paras 30-32, 36 on external communications indicates also integration of the general public in the project; PS7 2, 11-17. However, the granting of more expanded rights to those suffering 'significant adverse effects' has been characterised as narrowing the scope of consultation compared to the Bank's consultation with 'potentially affected people', von Bernstorff et al (n 708), 21

[742] <https://www.ifc.org/wps/wcm/connect/6810c62b-2a5d-47f2-97ba-06193bba4e42/AIP_English_2012.pdf?MOD=AJPERES&CVID=kiIXyKw> accessed 24 June 2021.

[743] Id, para 28 (reviewing documentation by clients, conducting site inspections etc.) Developed further in the Environmental and Social Review Procedures Manual <https://www.ifc.org/wps/wcm/connect/6f3c3893-c196-43b4-aa16-f0b4c82c326e/ESRP_Oct2016.pdf?MOD=AJPERES&CVID=lRwoQFr> accessed id.

sustainable development.[744] They are structured in a similar fashion, stipulating objectives, their scope of application and individual requirements, and include: ESIA (PS1), Labor and Working Conditions (PS2), Resource Efficiency and Pollution Prevention (PS3), Community Health, Safety and Security (PS4), Land Acquisition and Involuntary Resettlement (PS5), Biodiversity Conservation and Sustainable Management of Living Natural Resources (PS6), Indigenous Peoples (PS7) and Cultural Heritage (PS8). Decisive from a sustainable development perspective is that the PS are read together and cross-referenced, especially when cross-cutting topics such as gender and human rights are relevant to more than one PS.[745] In terms of their relationship to national and international law on the subject matters they encompass, the PS seem to be mutually reinforcing since clients must comply with host countries' obligations.[746] Reference to the ILO conventions codifying fundamental workers' rights in PS2 is illustrative of the normative interaction between IFIs secondary law and international law.[747] The same can be said about the health and safety of personnel and the safeguarding of property (PS4) that should be carried out in line with relevant human rights principles; PS6, which is guided by the Convention on Biological Diversity and PS8, which aims to protect cultural heritage consistent with the Convention Concerning the Protection of the World Cultural and Natural Heritage.[748]

Comparable with the IBRD's new ESF, IFC clients' responsibility to meet the requirements of the PS in order to be financed is primary. The IFC does not conduct its own screening of projects but relies heavily on client's self-evaluations and capacity of their plans and systems. Such difference is explainable by the fact that the IFC's engagement in a project may take place after the activity has been conceived and started.[749] However, even during the implementation phase of the project, the IFC's systematic monitoring of client's compliance with agreed environmental and social actions depends on the latter's reporting despite that other measures such as site visits, information disclosure, third party supervision and grievance mechanisms are employed.[750] Thereafter, client-ownership is ensured both in terms of project design and implementation-supervision.

---

[744] <https://www.ifc.org/wps/wcm/connect/c02c2e86-e6cd-4b55-95a2-b3395d204279/IFC_Performance_Standards.pdf?MOD=AJPERES&CVID=kTjHBzk>; Guidance Notes <https://www.ifc.org/wps/wcm/connect/9fc3aaef-14c3-4489-acf1-a1c43d7f86ec/GN_English_2012_Full-Document_updated_June-14-2021.pdf?MOD=AJPERES&CVID=nF3GZYM> accessed id.
[745] Id., para 4; PS1 para 3; PESS, para 12.
[746] PS, para 5.
[747] PS2, paras 1-2.
[748] PS4, para 2, PS6, para 1, PS8, para 1.
[749] PESS, para 27.
[750] von Bernstorff et al (n.708), 25-29.

4.2.3.2. Testing the normativity of sustainable development against the reality of the IFIs' practice – The correspondence of the ESSs' normative content to the notion's core aspects and the SDGs

Hardly anyone would disagree that environmental and social parameters intertwine with the economic aspect of development activities in the IBRD/IFC safeguards. There is thus a preliminary consensus that the three pillars of sustainable development are incorporated into the design and implementation of projects, as declared by the WB.[751] Central to the pursuit of sustainable development is the principle of integration, which all actors exercising public authority in various sectors of society with a development output should implement.[752] The issue-specific policies comprise a cohesive framework that concretizes this principle in the context of financing development. Their application and enforcement furthermore substantiates the principle of good governance, which calls for responsible investments as a prerequisite for the fair distribution of wealth and the benefits of development among countries and communities. To this end, transparent decision-making, due process procedures, and respect for fundamental principles of sustainable development, as enshrined in the Rio Declaration, and participatory rights are important.[753] Indeed, EIAs correspond to Principle 17; other environmental safeguards (e.g. ESS6) are premised on the precautionary approach to the environment (Principle 15); Intra- and intergenerational equity (Principle 3) are discerned in IFC PS3 and 8, ESS3 and ESS8; the safeguards on Indigenous Peoples reflect Principle 22 whereas women's participation in development that is realized through a number of safeguards (ESS1, 2, 5, 8; PS1, 2, 5, 6, 7) conforms to Principle 20. Finally, the consultations with stakeholders and affected people enforce Rio Principle 10.

An important step forward is the consideration of human rights in socioeconomic and environmental objectives, to which the IBRD/IFC make an explicit commitment. Whereas with respect to the IBRD this commitment is only included in the non-binding VS and therefore does not prescribe the performance of human rights due diligence on behalf of the Bank,[754] it nevertheless endorses the Bank's obligation to respect human rights and not to finance projects that infringe upon them. What's more, if the VS functions akin to the

[751] WB, 'Sustainable Development: Overview-Context': 'The three pillars of sustainable development carry across all sectors of development'<http://www.worldbank.org/en/topic/sustainabledevelopment/overview> accessed 20 June 2021.
[752] ILA New Delhi Declaration (n.179), paras 7.1-7.2.
[753] Id., paras 6.1-6.3.
[754] UNDP's human rights standards are more rigorous, Social and Environmental Standards (updated January 2021) <https://www.undp.org/publications/undp-social-and-environmental-standards> accessed 27 June 2021.

preamble of conventions, the IBRD's obligations under the ESF could potentially be read and interpreted in the light of human rights law. Besides, the UDHR and other human rights principles such as non-discrimination that the Bank invokes are the stepping-stone for a rights-based approach to the financing and execution of development projects.[755] Yet, HRC Special procedures mandate-holders have stressed that the ESS are not compliant with human rights law because they do not reflect the full spectrum of relevant instruments nor adhere to their articulated standards.[756] Another point of contention is the lenience of the ESF towards the use of borrower's system. Not all countries have legal systems that protect individuals (and the environment) according to international standards. Subjecting their protection under Bank safeguards to domestic law and accountability mechanisms, ''dilutes' the safeguards' regulatory power'.[757] The Bank should thus be more stringent in reasoning about CSs' 'material consistency with ESS, conduct a scrupulous and timely assessment of CS and not compromise its due diligence and the level of project oversight.[758] The same should apply to the IFC.

Notwithstanding these conditions, the IBRD ESF and the IFC SF note the relevance of human rights to development financing and development objectives. This element brings the two frameworks close to the AAAA. As section 3.1.4.1 showed the AAAA entrenched financing in the normative standards of sustainable development and the SDGs as public goals that draw legitimacy from human rights. It cannot be contended unequivocally that the AAAA or Agenda 2030 influenced the IBRD ESF given the absence of reference to it in the VS but it has been proven so far that the international effort to promote and institutionalize sustainable development has not left the IFIs passive addressees of deliberations. Elsewhere the WBG has reinstated that a new approach to development finance has been instigated

[755] P.Dann, M.Riegner (n 683), 555-557.

[756] Letter to President of the WBG (12 December 2014) <https://www.ohchr.org/Documents/Issues/EPoverty/WorldBank.pdf>; OHCHR, 'UN Expert urges WB to amend its Constitution to Effectively Advance Human Rights' (14 September 2017) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22064&LangID=E> accessed 27 June 2021. The non-explicit incorporation of human rights in the mandate and ESF/SFs of the WBG is a missed opportunity, especially since Agenda 2030 and the SDGs are premised on international human rights law.

[757] M.Igoe, 'The World Bank Chief defends New Safeguards' (*Devex*, 5 August 2016) <https://www.devex.com/news/world-bank-chief-defends-new-safeguards-88545> accessed 27 June 2021; C.Passoni, et al, 'Empowering the Inspection Panel: The Impact of the World Bank's New Environmental and Social Safeguards' (2017) 49(3) NYU J Int'l L & Pol 921, 933. The authors also argue that the ESF gives the Bank wide discretion in fulfilling its responsibilities towards borrowers. Examples given are the looser timeframes in which the borrower must fulfil certain prerequisites ('in a manner and timeframe acceptable to the Bank'–ESF, 4 para 7, 6 para 16) and the language used to describe Bank obligations, e.g. 'to require' instead of 'to ensure' the borrower undertakes certain tasks, 930-931; 934-935.

[758] P.Dann et al (n.683), 554, the author warns about the downsides of UBCS and views it as a 'legal institutionalisation of inequality'; 558.

through the AAAA, Agenda 2030 and the SDGs.[759] The safeguards then are substantive instruments for the integration of sustainable development in MDBs and, as such, cover the vast majority of policy concerns. By title only the ESS and PS are pertinent to a number of SDGs: SDG3 (3.9/3.d on health), SDG5.5 and 5.a (women's effective participation, equal rights to economic resources and access to land ownership), SDG6 (water management), SDG7 (energy use), SDG8 (inclusive and sustainable economic growth and decent work); SDG9 (resilient infrastructure and inclusive/sustainable industrialization), SDG11 (human settlements), SDG12 (sustainable consumption and production through, *inter alia*, sustainable use of natural resources and sound management of chemicals; SDG 12.2, 12.3), SDG13-15 (climate change, biodiversity) and SDG16.6 since the safeguards are also driven by motives to improve the effectiveness of development through transparency and participation and constitute the theoretical basis for claims against which IFIs may be held accountable. Such correspondence corroborates the correspondence of the SDGs with the WBG's twin goals to end poverty and build shared prosperity in a sustainable way.

Ultimately, the new IBRD ESF/IFC SF converge towards a more harmonized regulatory regime and common understanding of sustainable development. Differences in scope and wording exist. It is furthermore true that the density of this convergence with international legal regimes in human rights and the environment may not be unqualified when the safeguards systems and individual standards are compared to relevant stipulations in international legal documents. The IFC framework seems to have faired better. However, neither the IBRD nor the IFC state explicitly that the interpretation and implementation of the safeguards ought to be guided by the interpretation and application of corresponding norms in international law. Although such cross-fertilization need not be precluded, the IFIs have exercised their autonomy in setting and enforcing these standards.[760] All the same, the fact that international environmental and human rights norms can be read into the safeguards and the latter's content can be juxtaposed with specific SDGs enables a principled positive contribution to the realization of development objectives by the IFIs and borrowers that is consistent with the Safeguards systems' outcome-oriented aim. Consequently, the ESS and

[759] WBG, 'The WBG's Twin Goals, the SDGs and the 2030 Development Agenda <https://www.worldbank.org/en/programs/sdgs-2030-agenda> accessed 29 June 2021.

[760] P.Dann et al (n 683), 558. However, B.Morse, T.Berger, *Sardar Sarovar: Report of the Independent review* (Ottawa, 1992) in considering impacts of the project on indigenous people implied the WB policies ought to be applied in the context of wider international law to which they pertain, as referred to in T.Berger, 'The World Bank's Independent review of India's Sardar Sarovar Projects' (1993) 9(1) American University International Law Review 33; IFC, 'International Bill of Human Rights and IFC Sustainability Framework', 1 mentioning the assessment of IFC Policy and PSs in light of human rights but stating IFC's decision not to create a separate standard on human rights <https://documents1.worldbank.org/curated/en/470681480669101836/pdf/110689-IBHR-and-IFC-Policies-PS-DRAFT.pdf> accessed 21 September 2021.

PS may tend to 'shape a distinct legal body of common standards, rules and procedures for the promotion of sustainable development'[761] but are in practice guided by and reinforce existing international law in the IFIs' operations. Broader ramifications regarding the interaction of the IBRD's/IFC's secondary law with the international legal order emerge, as explained below.

4.2.3.3. The OPs as a source of ISDL

The interplay of IFIs' secondary law with international law is two-fold. First, IFIs influence the operational practice, thus the consolidation and further development of norms relating to sustainable development. Insofar as the IFC/IBRD safeguards have been influenced by treaties, custom and soft law of sustainable development or explicitly refer to country obligations deriving from them, they embody best practices for attaining the objectives connoted in the concept of sustainable development and promote respect for and compliance with the relevant norms that correspond to the fields covered by the safeguards. Conversely, the IFIs' safeguards may give rise to new international practice by states that may acquire customary status.[762] This is exactly what happened with the inclusion of EIA, as a national instrument, in the Rio Declaration. More generally, the IFIs' internal law determines the interplay between international and domestic law of clients since environmental and social conditionality is the vector through which the principle of sustainable development is transposed in national legal frameworks.[763] In addition, the normativity of WBG safeguards became the standard according to which other MDBs reformed their safeguards while the IFC SF was the model for the Equator principles that apply to the banking sector internationally. Both IFIs have diffused social and environmental norms of sustainable development horizontally at the international level through their practice since the safeguards have served as "precedent" for other international actors in relation to their international obligations in the field.[764] Hence, the IBRD/IFC are global norm-setters; not only do they interact with existing norms and reconfigure them for the purposes of development projects but through their sustainability frameworks they may instigate the

[761] de Chazournes, 'Partnerships, Emulation, and Coordination: Toward the Emergence of a *Droit Commun* in the Field of Development Finance' (2013) 3 World Bank Legal Review 174, 178.
[762] de Chazournes, 'Policy Guidance and Compliance: The World Bank Operational Standards', 297, 300-301 in D.Shelton (ed) *Commitment and Compliance* (n.686).
[763] P.Dann, M.Riegner (n 683), 542; de Moerloose (n 694), 134.
[764] Id., 546 et seq; Susan Park,'The World Bank Group: Championing sustainable Development Norms' (2007) 13 Global Governance 535; Mbengue et al (n.430).

genesis of new norms or their reinterpretation.[765] Consequently, they shape international law but also enforce it.

Associated with this observation is the second aspect of the interplay that is concerned with the possibility to classify the safeguards as international law. The question links back to the argument that the international law on sustainable development is better understood through a constructivist approach to law. Through this lens, legally relevant norms open up to the normative instruments produced by actors other than states and via mechanisms that differ from those whereby treaty and custom traditionally emerge but are not less authoritative. Criteria for the validity of such norms are their content, their intent and their emergence from a legitimate process, determined further by the authority of stakeholders participating in the making of the norms, it being a public deliberation among stakeholders and often chosen alternative to formal lawmaking routes. Generally, the normative effects of such norms tend to be explained by recourse to soft law, which according to the prevailing view is not proper international law. Perhaps it is time to acknowledge 'new forms of legislation and new vehicles' for them that engage state and non-state actors instead of rejecting their legal bindigness.[766]

Thus, from the dominant doctrinal aspect the safeguards may be viewed as 'a soft 'lex specialis'' [767] applicable to their relationship with MS because they 'create normative expectations and pave the way for the consolidation of patterns of behavior, which may lead to the emergence of principles and rules and their recognition as *lex lata* under international law'.[768] Indeed, the safeguards create legal effects through the implementation of the loan agreement between the IFI and the borrower. While they regulate the negotiation of the finance agreement, they do not create general legal obligations for states in the way treaties or customs do.[769] However, it would be an omission not to recognize the wider impact of the ESF/FS beyond giving rise to state practice and custom. This would ignore that the safeguards are essentially authoritative in setting behavioral standards for IFIs' staff, borrowers and private partners with regards to social and environmental protection that are shaped by existing international legal obligations.[770] Moreover, they are scrutinised by the AMs. In examining the complaints and passing judgment about IFIs' acts/omissions, AMs

[765] G.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.
[766] J.Alvarez (n.687) 594, 596, 603-604, 606-607.
[767] D.Bradlow (n.539), 26.
[768] de Chazournes 'Policy Guidance' (n.706), 301.
[769] G.Jokubauskaite (n.765), 457.
[770] Id. 458.

interpret the applicable to project finance social and environmental norms apropos the standards laid out in their OPs and elaborate on their relationship with international principles and the concept of sustainable development.[771] The entire safeguard system (ESS/PS plus AMs) becomes a mechanism that implements sustainable development. Ergo, 'when adopting, applying and supervising their policies and procedures IFIs do more than making rules for themselves: they are participating in an international normative process'.[772] At basic level, the safeguards demonstrate a shared social understanding about the practice of sustainable development. But broad stakeholder participation in their making/promulgation and the role of AMs have bestowed them with the level of generality, publicness, clarity and coherence that validate their normativity and generate commitment of compliance by stakeholders that is reciprocal, namely it relates to the IFIs (governing bodies and staff) and to the addressees of the ESS/ESF (borrowers and project-affected people). The AMs play a center role in preventing that the ESS/ESF's normativity is unidirectional, i.e. simply the exercise of authority by the WBG towards borrowers. Ultimately, the safeguards adhere to some criteria of legality of law. As such, they potentially have the functional capacity of an autonomous source of obligations in development finance and the international law on sustainable development more broadly;[773] they denote the substantive content of the WBG's legal duty to promote sustainable development, they delineate the rights and interests of project-affected people and substantiate what an obligation to cooperate between development stakeholders would entail in the context of Agenda 2030.[774]

How is this legal duty of the WBG enforced in order for the SDGs to be transformed into material outcomes for the people and the planet? The discussion will turn to the second element of the safeguards system, the IAMs, since they are the institutional avenue for scrutinizing the WBG's environmental and social project failures.

---

[771] J.Lorenzo, 'International Lawmaking in the Field of Sustainable Development' (2018) 7(2) Cambridge International Law Journal 327, 333.

[772] B.Kingsbury, 'Operational Policies' (n.693), 342

[773] G.Jokubauskaite, 'The Legal Nature of the World Bank's Safeguard' (2018) 1 Verfassung und Recht in Übersee, Law and Politics in Africa, Asia, Latin America 78; B.Kinsbury supra speaks about expanded understanding of custom or general principles, 339; B.Kingsbury, LCasini, 'Global Administrative Dimensions of International Organisations' (2009) 6 Int'l Org L Rev 319, 353-354 who present a positivist theory for determining the legal character of such norms. Viewing law as a social practice, they contend that the set of authoritative sources and their application may be determined by the recognition practice of the key actors in the specific community of expertise on the subject matter and normative regime involved. In such case there is a rule of recognition by a narrower set of specialised actors instead of wide acceptance by states. Weight is given to the processes whereby the norm was produced for "outsiders" to evaluate it as law. This is when principles of GAL come to play.

[774] J.Lorenzo, (n.771), 353; de Chazournes, 'Partnerships' (n.761), 186: form part of an emerging *corpus juris* that is compatible with GAL lens, granting legitimacy to decision-making and implementation of projects.

4.3. THE ACCOUNTABILITY AND LEGITIMACY OF THE IBRD AND THE IFC AS INTERNATIONAL DEVELOPMENT AGENCIES

4.3.1. The Accountability – Responsibility Regime for MDBs

4.3.1.1. Understanding Accountability in the Context of MDBs

When a legal duty incumbent upon an international actor is breached as a result of the infringement of an international norm regulating the actor's conduct, the mechanism for assessing the actor's performance is triggered, leading to the determination of the breach and the characterization of the misconduct as an internationally wrongful act. In turn, legal consequences are attributed to the actor such as the reparation of damages in the form of compensation to the victim for the harm suffered. These elements describe the responsibility regime for internationally wrongful acts committed by states, which is 'the paradigm form of responsibility on the international plane'.[775] Indeed, the centrality of the rules of state responsibility to the institution of international responsibility, i.e. the normative system of rules and principles that obliges an actor with own decision-making power in its area of competence to answer to the international community for its failure to adhere to its assigned obligations,[776] is wedded to the understanding of international law as inter-state law. In this context, states are the main actors upon which rights and duties are bestowed on the basis of positive rules of international law, hence those who could also breach them, cause injury to their peers and be subjected to the control and sanctioning powers of a designated body (e.g. the UN or the ICJ) to whom the state ought to answer. However, on the assumption that international law addresses community interests and emerges from the cumulative interaction and participation of multiple actors that shape expectations about appropriate behavior, states are not the only ones that are called upon to be accountable for their conduct. Besides, legal norms are not confined to those with formal legal status. Other norms that enjoy legitimacy and have compliance pull obligate and give rights to actors. These traits of the international legal order broaden the source of legal standards against which an actor's behavior is assessed and draw attention to other regimes that serve the imperative of answerability for the expanded range of international actors.

Whether one continues to perceive international law through the traditional standpoint or ascribes to contemporary processes of international lawmaking, one grapples with the notions

[775] J.Crawford,S.Olleson, 'The Nature and forms of International Responsibility' in M.D.Evans (ed) *International Law* (OUP 2003), 446.
[776] V.Roeben, 'Responsibility in International Law' (2012) 16 Max Planck Yearbook of United Nations Law 99.

of accountability and responsibility – the quintessence of the idea that international actor's conduct should comply with specific standards and in case of failure to do so, there should be reverberations. Though often invoked, accountability has not been clearly defined. Instead, a cluster of conceptualizations is put forward in international law doctrine that is associated with the exercise of power in the public space. For example, accountability encompasses the idea that a state, a governing authority, needs to report to the people and take them into account or, generally put, an international actor's 'duty to account for the exercise of public power'.[777] Because the circumstances surrounding the conduct of international actors and the function those actors perform on the international terrain vary, including political, administrative, financial or legal competences, accountability is a multifaceted phenomenon.[778] Still, at its core the notion embodies 'the justification of an actor's performance vis-à-vis others, the assessment or judgment of that performance against certain standards, and the possible imposition of consequences if the actor fails to live up to applicable standards'.[779] This political notion of accountability has been transposed in the international legal order. Thus, accountability denotes the 'need to attribute certain activities under international law to actors as a precondition for responsibility'.[780] Having said this, responsibility, which is often juxtaposed with accountability and has also been used with many connotations,[781] is narrower, referring to the legal consequences of non-compliance with international law by the actor. Responsibility could then be classified as legal accountability.

As with states, the responsibility of IOs has been dealt with by the ILC in the DARIOS. The DARIOS provide for the legal accountability of IOs in an analogous manner to that of

[777] ILA, 'Accountability of International Organisations', Final Report (Berlin Conference, 2004), 5. Preceding conferences on the topic were held in London (2000) and New Delhi (2002). For the reports <https://www.ila-hq.org/index.php/committees> (accessed 18 June 2021).
[778] Id.
[779] L.Brunnée, 'International Legal Accountability through the Lens of the Law of State Responsibility' (2006) XXXXVI Netherlands YIL 3 (incl. citation in footnote 1); Kristen E.Boon, 'New Approaches to the Accountability of IOs' (2019) 16 IO Law Rev 1, 5 (footnote 18) citing Grant, Keohane defining accountability in the same terms: 'accountability implies that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of theses standards, and to impose sanctions if they determine that these responsibilities have not been met. Other classifications include human rights accountability, gender accountability, managerial and political, institutional accountability etc. depending on the user employing the word, S.Nanwani, 'Holding MDBs to Account: Gateways and Barriers' (2008) 10 International Community Law Review 199, 201-204. He understands the notion as the responsibility of an MDB for the action or inaction taken, by being answerable for the taken decision, by ensuring a participatory process was carried out in the decision-making, and by giving reasons for the outcome.
[780] G.Hafner, 'Accountability of IOs' (2003) 97 Proceedings of the Annual Meeting (American Society of International Law) 236, 237.
[781] V.Roeben (n 776) 102-105.

states when obligations imposed on IOs under international law are breached.[782] Therefore, the attribution of a wrongful act to the organization is the additional condition for responsibility. However, the diversity in structure and function of IOs, their restricted powers compared to states, the unsettled status of their internal rules under international law and their interaction with member and non-member states, present complexities for attribution (e.g. whether responsibility can be established for a breach of an internal rule, the extent MS have joint responsibility, the distinction between state and IO responsibility etc.). By implication, it might be difficult to conclude to general principles applying equally to all IOs with such variety in the specific situations of each IO.[783] Notwithstanding this, the DARIOS limit also the addressees of legal accountability by focusing on the responsibility of IOs towards states. Yet, IOs' answerability to the public extends to third parties, including other IOs and especially those in non-contractual relationship with IOs affected by the latters' exercise of public power. In addition, not to be forgotten are the institutional relations between the IO and its organs, which also give grounds for 'response-ability' of the staff/organ for its performance within the institution. This variety of legal relationships of an IO calls for a wider spectrum of accountability that extends to third party claims (external accountability) and covers the institutionalized by the IOs' constituent instrument internal accountability too. This broad normative understanding of accountability is important considering the fact that organizational immunity constitutes a hurdle to holding IOs that exercise public authority and may violate individuals' rights through their acts responsible.[784]

---

[782] DARIOS (2011) commentary, 48(5).

[783] ILC, Comments and Observations from IO (Feb. 14, 2011) (n.584),, at 37–41; id, (Feb. 17, 2011), at 34–35.

[784] See recent case *Jam v IFC* 139 S.Ct. 759 (2019) <https://www.supremecourt.gov/opinions/18pdf/17-1011_mkhn.pdf> accessed 20 August 2021; The case concerns a suit for negligence, nuisance, trespass and breach of contract filed by fishers and farmers in Gujarat, India in relation to the Tata Mundra Power Plant financed by the IFC. Petitioners claimed that pollution damaged their property, destructed the environment, threatened their health and caused loss of their livelihood. Notably, the US Supreme Court discussed the scope of IOs' immunity under domestic law (IOs Immunity Act) and not under the IFC's charter (i.e. IL). The SC stated that the IFC enjoyed restrictive immunity under the IOIA, however the decision does not open the floodgates for excessive litigation against IOs/IFIs before domestic courts. The decision comes with caveats: D.Desierto, 'SCOTUS Decision in Jam et al v IFC Denies Absolute Immunity to IFC…with Caveats' (*EJIL:Talk!* 28 February 2019) <https://www.ejiltalk.org/scotus-decision-in-jam-et-al-v-international-finance-corporation-ifc-denies-absolute-immunity-to-ifc-with-caveats/> accessed 20 August 2021; S.Dias, 'Jam v IFC before the D.C. District Court: Forget the Floodgates, there won't even be a Trickle' (*EJIL:Talk!* 1 April 2020)<https://www.ejiltalk.org/jam-v-ifc-before-the-d-c-district-court-forget-the-floodgates-there-wont-even-be-a-trickle/> accessed id; N.Perkins, S.Pei, *Jam v IFC* (2019) 23(3) ASIL Insights; F.L.Bordin, 'To what immunities are International Organisations entitled under general International Law? Thoughts on *Jam v IFC* and the 'default rules' of IO immunity' (2020) 72 QIL (Zoom-in) 5; Y.Okada, 'The immunity of International Organisations before and after *Jam v IFC*: is the functional necessity rationale still relevant?' (2020) 72 QIL (Zoom-in) 29. K.Daugirdas, 'IOs Accountability Symposium: Reputation and Accountability' (*OpinioJuris*, 15 October 2019) <http://opiniojuris.org/2019/10/15/international-organizations-symposium-reputation-and-accountability/> accessed id, examining if and how reputation can be a disciplinarian for holding IOs accountable given the dearth of legal mechanisms to this end. The ILC currently studies the related but narrower

In light of the above, the ILA's initiative to capture the accountability of IOs in the broadest normative sense is an encouraging step towards remedying the elusiveness of IOs accountability. In keeping with the more extensive political notion of accountability associated with the exercise of legal, political, administrative or financial power, 'the constituency entitled to raise the accountability of IOs consist of all component entities of the international community provided their interests or rights have been affected by acts of IOs'.[785] Addressees of accountability then range from IOs' staff to other IOs to private parties (legal and natural persons) and accountability unfolds around three levels: the first refers to the extent to which IOs in the fulfillment of their functions pursuant to their constituent instruments are subject to forms of internal and external scrutiny and monitoring, irrespective of legal responsibility and liability; on the second and third level, the tortious liability and international legal responsibility respectively are engaged.[786] In this framework, the primary rules imposing obligations on IOs include general rules of international law, internal rules and soft law standards. Remarkably, good governance principles find application in this context, enriching the substantive norms for assessing IOs' institutional and operational activities on the first level of accountability.[787] Thereafter transparency in decision-making and the implementation of the decisions, substantial degree of participation in the decision-making process, access to information to all potentially affected by the IOs' decisions and appropriate mechanisms for oversight, reporting and evaluation of policies and projects, become the yardsticks for accountability, although as principles they might not originate in the classical sources of international legal rules applicable to IOs. After all, the diversity of forms of accountability rules out any requirement that only legal interests may trigger it.[788] By extension, the procedures instigated by an aggrieved party in order to undertake remedial action against an IO and the kind of remedies per se may range from binding and informal (non-binding) assessment mechanisms, and legal and non-legal remedies. However, the three levels of accountability should be seen as interrelated and mutually supportive, factoring into the accountability regime for IOs four general features –participation, transparency, evaluation and complaints-redress. In this way, IOs become answerable to internal and

topic of IOs' disputes with states and other IOs, 68th Session (2016) A/71/1, Annex A 'The settlements of international disputes to which IO are parties' <legal.un.org> accessed id.

[785] ILA 2004 (n.777), 5.

[786] Id.

[787] G.Hafner (n.780) 239-240. ILA's Recommended Rules and Practices cover primary and secondary rules of accountability, ILA 2004 (n.777), 6-7 although they should not be understood as having a specific legal status.

[788] ILA id., 6; 8-17. Good governance is complemented by other principles such as good faith, due diligence, constitutionality and institutional balance, supervision and control, reasoned decisions, procedural regularity, objectivity and impartiality. For the other two levels, id., 18 et sec; Ved P.Nanda, 'Accountability of IOs: Some Observations' (2005) 33(3) Denv J IL & Pol 379, 387-389.

external stakeholders. Their use of power is restrained and tailored towards effectiveness and appropriateness while there is the element of control over IOs in terms of the imposition of some kind of sanction in the event of poor decision-making and misuse of power.[789] Conclusively, the mutual reinforcing relationship between accountability and good and effective governance is established.[790] Accountability controls and legitimizes actors' exercise of public authority by determining the standards and process whereby IOs answer for their acts and allowing them eventually to reaffirm themselves as lawful, suitable and respect-worthy for the purpose they were established.[791] Whether the accountability mechanisms withstand the effectiveness and proportionality test in practice is a question that should be answered by assessing the accessibility of accountability mechanisms to affected parties as well as the adequacy and effectiveness of remedies vis-à-vis the party seeking redress, the kind of accountability involved and the forum before which the remedial action has been brought.

In the context of international development, it is all the more important that procedural safeguards exist for assessing stakeholders' performance in relation to the objectives of sustainable development. MDBs, having shaped the international policy on development and setting authoritative benchmarks in project implementation for themselves and borrowers through their safeguards and providing resources, are not absolved from this scrutiny. Effective governance for sustainable development demands that institutions at all levels are inclusive, transparent, effective and accountable (SDG16.6-16.7). Moreover, conceiving the process of sustainable development as participatory and cooperative as per Rio Principle 10, accountability among stakeholders should be mutual. On this basis, the IBRD and IFC are responsible for their own conduct, as decision-makers and executors of programs and projects, to states and individuals, whom development projects should benefit. Given the absence of an international adjudicatory body with jurisdiction over MDBs and with immunity shielding them from domestic proceedings, the practice of international

[789] S.Burall,C.Neligan, 'The Accountability of International Organisations' (2004) Global Public Policy Institute, Research Paper Series No.2, 7-8 <https://www.gppi.net/media/Burall_Neligan_2005_Accountability.pdf>

[790] W.E.Holder, 'Can International Organisations be Controlled? Accountability and Responsibility' (2003) 97 ASIL Proceedings 231, 232-233 who states that accountability can be added to governance and transparency is an extension of accountability. Notably, when referring to governance he emphasises the internal power structures defined by the hierarchical relationship of the IO's organs, and the way decisions are taken. Yet, he understands accountability as having an internal dimension reflecting the structure of the IO and external towards stakeholders not directly related to the IO.

[791] These elements are indicators of legal, moral and sociological legitimacy as per R.H.Fallon (Jr.), 'legitimacy and the Constitution' (2004-5) 118 Harvard Law Review 1787 cited by A.Fourie, *The World Bank Inspection Panel and Quasi-Judicial Oversight: In Search of the 'Judicial Spirit' in Public International* Law (Eleven International Publishing 2009), 14-15.

accountability for IFIs is grounded in 'soft law processes'[792] such as the WBIP and the IFCAO. Both forums aim at satisfying the direct accountability of the institutions precisely to individuals, who do not have a legal relationship with the IBRD/IFC but are harmed, by improving the institutions' administrative efficiency and operational effectiveness. As such, they add a 'downward system of accountability'[793] to that existing within these organisations according to their institutional hierarchy. Obviously, the WBIP/IFCAO are classified under the aforementioned first level of accountability. Yet, while performing this compliance control they fill in the accountability lacuna left by the IOs' international responsibility regime developed by the ILC. Therefore, the internal accountability that is primarily served by the MDBs' accountability mechanisms is interlinked to the external. The WBIP/IFCAO constitute an alternative forum for claimants, who lack direct ius standi under international law, and counterbalance the ramifications of immunity. Further, their decisions establish a kind of precedence about the rights of project-affected people as delineated by formal international law instruments. Certainly, the legal interests of individuals that are engaged are not ascertained on the grounds of formal legal norms – the safeguards are not conceived as such; neither are the WBIP/IFCAO courts of law nor do they adjudicate the rights and obligations between IFI and private individuals. However, they 'draw attention to the existence of international obligations incumbent upon MDBs and to the degree to which these obligations are reflected in the institutions' policies in the first place'.[794] Therefore, a constructivist and interactional approach to IL-making and implementation would view the safeguards as those international legal standards providing for the legal justification of MDBs' acts towards borrowers and individuals, which the assessment before the AMs has the ability to force. It may thus be possible to construe a more flexible (softer) understanding of international legal accountability in contemporary international practice that is not affixed to positive legal rules and pertains to the expanded net of international actors.[795]

[792] L.Bruneé (n.779), 30.
[793] I.Shihata, *WBIP* (n.688), 239. Other AMs include the Administrative Tribunal that examines staff complaints, or allegations by persons claiming through them, that the Bank has violated staff's terms of appointment or employment contract; the Internal Auditing Department that oversees the operational, financial, administrative etc. management systems, ensuring their effectiveness and compliance with internal regulations; the Independent Evaluations Group that assess operational programs' contribution to development effectiveness and the Integrity Vice Presidency for the investigation of corruption within the Bank or in relation to its projects. Disputes with borrowers are resolved through negotiation and upon failure through arbitration.
[794] G.Handl (n.412)
[795] L.Bruneé (n.779). 6-7.

4.3.2. International Accountability Mechanisms (IAMs) of MDBs

4.3.2.1. The WB's Inspection Panel (WBIP) and the IFC's Advisory Ombudsman (IFCAO): Two mechanisms, two Mandates?

i. The Rationale and Objectives of the Mechanisms

The establishment of AMs was triggered by internal and external factors that questioned the IBRD's mode of doing business and performance.[796] On the one hand, there were concerns coming from Management that staff aimed at getting approved as many loans as possible while paying less attention to borrowers' commitment to the project objectives and its execution. On the other hand, there was growing criticism by civil society, shared by influential political entities in MS with the largest contributions to the Bank's capital (fundamentally the US) in relation to the lack of transparency in Bank's decision-making and the proven negative impacts on people and the environment of several financed projects, which were illustratively labeled 'development disasters'.[797] The most known is the Sardar Sarovar Dam and Canals project on the Narmada river, involving the resettlement of 120,000 people, the inundation of more than 200 villages, including farmlands and monuments such as temples and pilgrimage sites, and environmental damage. On a parallel track, the gradual emphasis on wellbeing, human rights and individuals' active, free and meaningful participation in development pointed towards more rigorous processes for the design and implementation of development projects. Unquestionably, the Rio Summit pushed the momentum for change in various ways. Firstly, by formally recognizing the right to development and conceding that the effective access to judicial and administrative proceedings (to redress and remedy) is constituent of participatory development alongside transparency and access to information. Secondly, by calling for environmental and social safeguards in projects and thirdly by recognizing the vulnerability of specific groups such as women, the youth and indigenous communities and giving them voice in the deliberations as 'Major Groups'.[798] These parameters taken together set the groundwork for IFIs to rethink their responsibilities within their operative framework.

---

[796] I.Shihata *WBIP* (n.688), 1-8.

[797] WBG, *The Inspection Panel at 25 Years: Accountability of the World Bank Group* (2018), 14 <https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/publications/25th%20Anniversary%20Book-PDF%20Version.pdf> accessed 24 August 2021.

[798] K.Lewis, Citizen-Driven Accountability for Sustainable Development: Giving Affected People a Greater Voice–20 Years On (June 2012), 5-6 <https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/publications/CitizenDrivenAccountability.pdf> accessed 25 August 2021.

In response to this situation, two independent investigations were requested by the Presidency of the WB. The first, led by B.Morse retired administrator of the UNDP, reviewed the Narmada project[799] and the second, the Portfolio Management Task force coordinated by W.Wapenhan, examined the Bank's performance of its portfolio.[800] The investigators arrived to a common observation, namely that Bank projects were failing because the institution was not adhering to its own policies and the 'approval culture' exacerbated this trend. As a result, the Bank's action plan outlined several measures to improve its practice that related to participation in the design and implementation of projects by affected people, borrowers' project ownership and better monitoring of the Bank's performance.[801] The Bank turned its attention to the adequacy of existing methods for ensuring quality control and compliance with Bank's AoA during project preparation, supervision and evaluation. A new round of discussions opened and several proposals for a suitable organ with the authority to examine complaints regarding violations of WB policies were put on the table.[802] Eventually, it was decided that 'the most effective arrangement would be the establishment of an independent in-house Inspection Panel'.[803]

The Resolution establishing the IP was signed in September 1993[804] and was appraised for shifting the legal perspective of individuals' rights in international law because it gave project-affected people the possibility to bypass their governments and seek independent review of their rights. Citizen-driven accountability was groundbreaking in the context of IFIs and IOs more broadly. Development projects were not decided by government officials and IFIs' technocrats. People and communities could now partake in the Bank's decision-making and co-identify the aims of a development project, which was a significant change for international development cooperation.[805] The inspection function of the Panel was emulated

[799] Memorandum Reporting on the Morse Commission and Environmental Defence Fund Press (19 June 1992) <https://timeline.worldbank.org/themes/timeline/pdfjs/web/viewer.html?file=%20%20%20%20%20%20%20%20%20%20%20%20//timeline.worldbank.org/sites/timeline/files/timeline/archival-pdfs/event65_SardorSarovar_4_1662724.pdf>. Project archives <https://timeline.worldbank.org/event/1911> accessed 24 Aug 2021

[800] WBG, Effective implementation: key to development impact (Wapenhans Report) <http://documents.worldbank.org/curated/en/596521467145356248/Effective-implementation-key-to-development-impact-Wapenhans-Report> accessed 23 August 2021.

[801] WBG, Portfolio Management: Next Steps A Program of Actions (22 July 1993) <https://documents1.worldbank.org/curated/en/177411468178127024/pdf/multi-page.pdf> accessed 24 August 2021.

[802] Id., para 60;.I.Shihata *WBIP* (n 688), 16-21

[803] I.Shihata *WBIP* supra, 25.

[804] Resolution No.IBRD 93-10, Resolution No.IDA 93-6 in *The IP at 25 Years* (n.741), Appendix 1. 94-97.

[805] K.Lewis (n.798), 7.

by other MDBs and of course affiliates of the WBG: the institution of Ombudsman was adopted by the IFC in 1999.[806]

The creation of the inspection system within the IFIs essentially weighs the interests of affected parties in project design and implementation, and shields MDBs even from the minor (because of immunity) possibility of being held liable by an external body in case of allegations of harm by private parties. As a matter of fact, by providing a forum to discuss remedies towards affected parties, MDBs defend their immunity and legitimacy, dissolving claims that they are law-less institutions.[807] Providing for transparency and accountability, facilitating better access to information, participation in project design/implementation and the investigations of claims, MDB's inspection system balances then the conflicting dynamics between its internal and external stakeholders. The fact that the inspection mechanisms are independent, yet 'in-house' is indicative of this counterbalancing exercise. The protection of individuals' rights puts on the mantle of IBRD/IFC administrative efficacy and credibility.[808] It could thus be said that policy reasons prompted mostly the development of the AMs. However, an argument can be made for the legal reasoning behind alternative dispute-settlement mechanisms by IOs. In doing so, IOs may be fulfilling a treaty obligation such as that under Art.IX, Section 31 of the Convention on the Privileges and Immunities of Specialized Agencies.[809] The IBRD's administrative tribunal is such example.[810] Equally, the right to remedy may be seen as a general principle of law and as a basic human rights standard of customary law that applies to IOs in their dealings with states and non-state parties.[811] As mentioned in previous sections, custom binds in principle IOs. Besides

[806] Compliance Advisor Ombudsman <http://www.cao-ombudsman.org/howwework/NewCAOPolicy.htm> accessed 24 Aug 2021. The CAO is the accountability mechanism for MIGA as well. The IFC resisted the establishment of AM but the loan to Endesa (Spanish electric utility) for the construction of a hydroelectric dam on the Upper BioBio River in Chile that violated WB Safeguard policies on involuntary resettlement of indigenous people made the WB Board reconsider the value of an AM for the IFC/MIGA, CIEL, 'Independent Review Confirms IFC Covered Up social and Environmental Impacts from Chilean Dam Project' <https://www.ciel.org/wp-content/uploads/2015/05/prbio2.pdf> accessed 28 August 2021;De Chazournes (n.761), 179 et seq. names it institutional emulation.

[807] Indeed arguments in favour of restricting IOs' immunities are grounded on the absence of alternative forums to settle dispute with non-contracting parties; K.Daugirdas et al, 'Breaking the Silence: Why IOs should acknowledge Customary International Law' (2020) 3 AIIB Yearbook of International Law: The Role of International Administrative Law at International Organisations 54, 56 citations n.8, 103; D.Hunter, 'Using the WBIP to Defend the Interests of Project-Affected People' (2003) 4 Chicago Journal of International Law 201, 203-204.

[808] I.Shitata (n.688), 235-236, 240.

[809] (n.579)

[810] ILC, Responsibility of International Organisations: Comments and Observations from IOs (25 June 2004) A/CN.4.545, 34, 36 (IMF, OAS mentioning the Administrative Tribunals as adjudicating forums consistent with IL due process standards) <https://legal.un.org/ilc/documentation/english/a_cn4_545.pdf> accessed 25 Aug 2021.

[811] ILA 2004 (n.777), 33. On customary law of the right to remedy: D.Shelton, *Remedies in International Human Rights Law* (3rd edn, OUP 2015), 238; International Commission of Jurists (2018) The right to a remedy

customary law on human rights cannot be changed to the disadvantage of beneficiaries. Thereafter, the obligation to afford effective remedies may not be circumscribed to such degree that the protection of individual rights becomes dead letter. That would amount to denial of justice. In contrast, it should be exemplified to match the specific characteristics and operating context of the IO to which it applies.[812] Hence, the creation of the IP/CAO could be seen as the IBRD's/IFC's attestation to the customary obligation to provide effective remedies. Of course, the WBG has not expressly agreed on this – while there is a growing practice[813] of having AMs, it is not obvious that it is undertaken with a sense of legal obligation. To be sure, the acknowledgment of this obligation would place upon IOs the burden to accept the bindingness of other customary law obligations, especially human rights, which does not come to terms with how IOs position themselves in international law.[814] Fundamentally, it would embed the process before AMs on the elements of effective remedies as defined by human rights law. The AMs would therefore be the institutional apparatus for the promotion of rights-based development by MDBs.

In reality, WBG's AMs have developed outside the realm of human rights. Notwithstanding this, and to the extent that accountability is delivered through effective redress and remedies, AMs' adequacy is assessed against the relevant standards of the right to an effective remedy. Procedural as well as substantive dimensions comprise the said right:[815] access to justice, i.e. access to a competent forum with the power to hear complaints, and substantive redress, referring to the result of the proceedings and the type or quantum of relief afforded. It was noted earlier that what constitutes procedurally and substantively an effective remedy is determined by the level of accountability, the claimant's identity, the right at stake and the severity of the violation.[816] However, a set of minimum requirements has been identified: the competent authority[817] should be independent and impartial;[818]

---

and Reparation for Gross Human Rights Violations: Practitioner's Guide No.2, 19 <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf>

[812] K.Daugirdas et al (n.807), 74.

[813] AMs of other MDBs; Ombudsperson as focal point for the de-listing of individuals from the UNSC sanctions regime in relation to Al-Qaida and ISIL <https://www.un.org/securitycouncil/ombudsperson> accessed 25 August 2021.

[814] K.Daugirdas et al (n.807), 80-81.

[815] D.Shelton, *Remedies* (n.811), 58.

[816] ILA 2004 (n.777), 35; 37: 'the procedural aspects of remedial action vary amongst the different categories of potential claimants'.

[817] Competent tribunal (Art.8, 10 UDHR); Art.2(3)(b) ICCPR refers to a competent judicial, administrative or legislative authority. Hence, judicial remedies may be often the norm but remedial processes may take various forms; HRC, General Comment No 31 (26 May 2004) CCPR/C/21/Rev.1/Add.13, para 15.

[818] ICommJur (n 811), 16, 52; D.Shelton, *Remedies* (n.811) 96: 'access to justice means the right to seek remedy before a tribunal constituted by law and which is independent and impartial in the application of the law'.

accessible;[819] process claims promptly, guaranteeing due process rights, and have a mechanism to enforce its decision.[820] Accordingly, the actual remedy may encompass restitution, restoration of the claimant to the previous condition before the wrongdoing, and as substitute compensation. Occasionally, rehabilitation or satisfaction (e.g. public apology, expression of regret, guarantee of non-repetition) may be appropriate.[821]

In addressing the question of what makes the WBIP/IFCAO effective, the above criteria of effective remedies are mentioned by most commentators, albeit in different combination. In his report, Lewis states that citizen-driven accountability rests upon the principles of independence, impartiality, transparency, integrity and professionalism, accessibility and responsiveness.[822] Nanwani mentions transparency, participation, independence, credibility and effectiveness as the five essential criteria of an adequate AM by MDBs,[823] while in his earlier joint work with Suzuki, they outline the principles upon which the viability and effectiveness of AMs rest as follows: (i) accountability, redress and development effectiveness, which constitute the substantive principles defining the interests of MDBs' internal and external stakeholders; (ii) transparency, due process, economy and efficiency, and realism, as the procedural principles that enhance stakeholders' consensus on the substantive ones.[824] The ILA adds the procedural requirement to consider the substance of a complaint with all necessary care and to give a reasoned reply and associates it with accessibility to AMs.[825] With respect to potential outcomes of remedial action at the first level of accountability, the ILA concludes that they can be positive, injunctive, corrective or compensatory in nature.[826] What is missing from all is the element of enforcement. The remedies' non-legal character explains this, that's why the effectiveness of remedy outcomes also turns on the mandate and function of the AM, which will be looked at below. I find Nanwani's and Suzuki's approach to be analytically more appropriate because it distinguishes between the procedural and substantive dimensions of the right to effective

[819] Stakeholder groups who wish to use them should know about them and provided assistance to access them when they cannot, IntCommJur (n.755), 71; D.Shelton (n.755) 98.
[820] IntcommJur (n 811), 66; D.Shelton (n 811), 102 who links the speedy process of claims with the remedy's effectiveness; Art.6(1) ECHR: '[…] everyone is entitled to fair and public hearing within a reasonable time […]'; regarding enforcement, IntCommJur,, 81 which links the judicial power's inability to carry out its judgment to the ineffectiveness of the remedy; ILA 2004 (n.721), 33 '2.remedies should be adequate, effective and, in the case of legal remedies, enforceable'.
[821] D.Shelton (n 811), 19, 33-34, 205-232, 298, 307, 384, 394-397 (indicatively); HRC, General Comment No31 (n.761) para 16 (reparations can involve rehabilitation and satisfaction).
[822] K.Lewis (n.798), 9-10.
[823] S.Nanwani (n.779), 223.
[824] E.Suzuki, S.Nanwani, 'Responsibility of International Organisations: The Accountability Mechanisms of Multilateral Development Banks' (2005) 27 Michigan Journal of International Law 177, 205-206.
[825] ILA 2004 (n 777) 37.
[826] Id., 35.

remedy. Furthermore, the principles mentioned by Lewis can be classified under their configuration (e.g. independence, impartiality under due process) while responsiveness can be matched to the ILA's requisite. Hence, the classifications are complementary and taken as a whole, they point to what an effective remedy tailored to the attributes of the MDBs looks like.

ii. A Comparison of their Structure and Function

THE WBIP

The governing framework of the Panel has undergone several reviews[827] since 1993 with the most recent being in 2020, following a three-year external and highly participatory evaluation of the Panel's function against the background of the Bank's new ESF.[828] Under the new framework, the IP is one of the constituents of the new 'WB Accountability Mechanism'[829], the second being the Dispute Resolution Service (DRS). Having a similar structure to the 1993 founding Resolution, the updated counterpart regulates the structure, powers and process before the Panel.[830] A number of elements are meant to ensure the independence of the Panel and the integrity and professionalism of its three members: members are selected on the basis of their ability to deal thoroughly and fairly with the requests brought to them, their integrity and independence from Bank's Management, and their exposure to development issues and to living conditions in developing countries. They

---

[827] Review of the Resolution Establishing the IP-Clarification of certain Aspects of the Resolution (17 October 1996) <https://www.inspectionpanel.org/sites/ip-ms8.extcc.com/files/documents/ReviewResolution1966.pdf>; Clarification of the Board's second review of the IP (20 April 1999) <https://www.inspectionpanel.org/sites/ip-ms8.extcc.com/files/documents/ClarificationSecondReview.pdf>; Updated Operating Procedures of the IP (2014, with Annex 2 'Enhancing Consultation with Requesters and Tracking Action Plans' added in February 2016) <https://www.inspectionpanel.org/about-us/panel-mandate-and-procedures>.

[828] D.Bradlow, External Review of the Inspection Panel's Toolkit (14 May 2018) <https://documents1.worldbank.org/curated/en/562131583764988998/pdf/External-Review-of-the-Inspection-Panel-s-Toolkit.pdf> studying five issues: a) an assessment of the costs and benefits of including dispute resolution, monitoring and advisory services in the IPN's toolkit; b) the time-limit on eligibility for filing requests for compliance reviews with the IPN; c) extending IPN eligibility to activities funded by bank executed trust funds (BETFs); d) if differences between the various IAMs result in any gaps in accountability in co-financed projects; e) communications with requesters regarding the findings of IPN investigations; WB, Report and Recommendations on the Inspection Panel's Toolkit Review (Board Report) (5 March 2020) <https://documents1.worldbank.org/curated/en/972351583772786218/pdf/Report-and-Recommendations-on-the-Inspection-Panel-s-Toolkit-Review.pdf>; WB, 'Conclusion of the Inspection Panel toolkit Review; (Factsheet, 9 March 2020), para 4: inputs given by client countries, IP requesters, civil society and academics <https://www.worldbank.org/en/news/factsheet/2020/03/06/conclusion-of-the-inspection-panel-toolkit-review> all accessed 28 August 2021.

[829] Resolution No.IBRD 2020-0005/No.IDA 2020-0004 (8 September 2020) <https://thedocs.worldbank.org/en/doc/619761599763139929-0330022020/original/AccountabilityMechanismResolution.pdf> accessed 28 August 2021 *[WBAM Res]*

[830] Resolution No.IBRD 2020-0004/No.IDA 2020-0003 (8 September 2020) <https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/documents/InspectionPanelResolution.pdf> accessed id *[IP Res 2020]*

cannot have worked in any capacity for the Bank for the two years prior to their appointment and can only be removed from office 'for cause' by decision of the Executive Directors; they shall be disqualified from participation in hearing and investigation of any request related to a matter in which they have a personal interest or had significant involvement in any capacity.[831]

The process before the IP is instigated by requests for inspection presented by an affected party in the territory of the borrower. Notably, the Panel hears collective complains. Upon receiving the request, the Panel now should inform promptly the AM secretary and the Bank Management in addition to the Executive Director and the Bank's President.[832] The admissibility of the complaint depends on demonstration that the party's rights or interests have been or a likely to be directly affected by an action or omission of the Bank as a result of its failure to follow its OPPs with respect to the design, appraisal and/or implementation of the financed project (including its failure to follow-up on the borrower's obligations under a loan agreement with respect to such OPPs). Critical in either case is for the Bank's failure to have, or threaten to have, a material adverse effect on the party.[833] Hence the violation of Bank's OPP should be of serious character and not manifestly outside the Panel's mandate.[834] Interestingly, despite harm being a fundamental admissibility and substantive requirement for holding the Bank accountable, no criteria are given by the resolution determining the materiality of the adverse effect or the seriousness of the violation. The Panel exercises its own judgment in this respect.[835] For the technical eligibility of the request to be decided, the Panel should also satisfy itself that the request has been dealt with by Bank Management and the latter failed to demonstrate that is has followed Bank's OPPs. To this end, Management shall provide the Panel evidence that is has complied or intends to comply with relevant OPPs within 21 days of notification of the request for inspection.[836] Within an equal period of time after the Management's response, the Panel shall determine whether the eligibility criteria are finally met.[837] Apparently, the Management's response weighs considerably for the admissibility decision, although other documentary evidence is taken into account. Critiquing this procedural element on a due process account, requesters are in an unfavorable

[831] Id., paras 3-12.
[832] Id, para 18; *WBAM Res*, para 7(c).
[833] Id, para 13.
[834] Id., para 14, 15.
[835] I.Shihata, *WBIP* (n.688), 50; 2014 Operating Procedures, para 12(a); *IP Res 2020*, para 39 which mentions the assessment of harm based on the 'without-project situation'.
[836] *IP Res 2020*, paras 19-21.
[837] Id., para 25-26 (country visit possible as part of the eligibility determination phase); 2014 Operating Procedures, paras 32-40 referring to all the technical eligibility criteria. Currently, complaints can be lodged up to 15 months after the closing date of the loan, credit or grant.

position. To the extent that evidence assessment now takes place at the preliminary stage of admissibility, requesters should have had access to this and have the possibility to respond (equality of arms). The IP resolution, however, does not make such provision.[838] Having then decided on eligibility, the Panel makes recommendation to the Executive Directors to authorize an investigation.[839]

At this point, the WB's accountability framework differs from the past when compliance review was the sole procedure available to claimants. Following the authorization of an investigation the requesters and the borrower are offered the opportunity for dispute resolution. If they agree to it, the Panel's compliance process is held in abeyance until the dispute resolution concludes (12-18 months maximum), in which case only when the parties have not reached agreement does the Panel commence investigation.[840] The DRS offers an alternative avenue to resolve issues with the Bank in the context of IP requests. It is voluntary and independent from Management and the IP, which has no role in the dispute resolution – it does not opine on policy compliance or on the outcome of the dispute resolution process.[841] The dispute resolution may take the form of mediation or include consultative dialogue, information sharing, joint fact-finding, conciliation and other means.[842] However, the scope of the DR is confined to the identified issues as determined by the IP in the context of is recommendation to the Executive Board for investigation.[843]

Given the novelty of the DSR, its efficacy and effectiveness is meant to be tested. Nevertheless, some preliminary concerns have been raised. First, requesters might have to overcome legal, financial and technical obstacles to their meaningful participation in the process compared to the borrower. The WBAM Resolution does not mention the provision of any kind of assistance to them (something resembling legal aid). Equally, the selection criteria of who will provide the DRS (the qualities of that organ/individual) is not described.

---

[838] D.Desierto et al, 'The 'New' World Bank Accountability Mechanism: Observations from the ND Reparations Design and Compliance Lab' (*EJILTalk*, 11 November 2020) <https://www.ejiltalk.org/the-new-world-bank-accountability-mechanism/> accessed 28 August 2021.

[839] *IP Res 2020*, paras 28-29.

[840] Id., paras 30-33; *WBAM Res*, para 11; para 12(g) on the duration of dispute resolution; para 13(a) on its conclusion. Predecessor of the DRS could be considered the 'early solutions approach' as described in the 2014 Operational Manual, about which N.Bugalski, 'The Demise of Accountability at the World Bank?' (2016) 31(1) Am.U.Int'l L.Rev. 1, 41-44 notes that it was characterised by power imbalance, which could easily lead to the manipulation and abuse of the process by management. Consequently, on a substantive level it functioned as an avenue for the WB to avoid adherence to its safeguards and extinguish attendant entitlements of project-affected people. On process level, it didn't ensure fairness. Ultimately it was not a rights-based approach to achieving effective remedies.

[841] *IP Res 2020*, para 32; likewise, the role of the AM Secretary with respect to the IP is limited and information disclosed in dispute resolution is not used in compliance investigation *WBAM Res*, paras 8, 14; 12(e) management can have the status of observer.

[842] *WBAM Res*, para 12(c). It is unclear if arbitration could also be used as alternative dispute method.

[843] Id., para 12(d).

Although the parties agree on the method of DR and the exact details of the process, it seems like the borrower may have leverage in shaping it. Moreover, the flexibility of the mechanism itself, which is dictated by the selection pool of resolution methods and by extension their different attributes, does not embed the DR on a consistent rules-based system that can ensure the predictability of the process and outcome uniformly. Indicative of the process's uncertainty is the lack of prescriptive rules about the fact-finding that should take place in the course of the DR. What documents shall be consulted, how and to what extent may requesters have access to them is not determined. Bearing in mind these things, it may be that the DRS might discriminate between parties, being less accessible to requesters and favoring the borrower country. Besides, if an agreement is reached the IP's investigation is annulled. Practically speaking, by having the Panel issue a memorandum closing the case, its role is circumscribed to accepting the DR's outcome. Does the latter address satisfactorily the compliance violations that the IP would? The DR cannot substitute the Panel's compliance review. At the same time, it should be ensured that an investigation is not foreclosed in the event that some requesters may feel that their concerns were not addressed in the DR. The impression given is that through the possibility of the DRS, the IBRD may avoid scrutiny for its non-compliance with the ESSs lawfully. Firstly, Bank management is only an observer in the process. Secondly, while the scope of dispute is limited to issues raised in the request for inspection, it is unlikely that these would be discussed on the material grounds of the ESS.[844] Thirdly, how holistic would the solution be raises also some questions since the ESS standards won't be taken into account. Fourthly, the nature and binding scope of the parties' DR agreement is not specified in the WBAM Resolution. Thus, it cannot be assessed if the agreed actions remedy the adverse material effects as a result of the Bank's non-compliance with the OPPs/ESSs.[845]

For these reasons the IP's role may be enhanced, not to mention that it has gained complainants trust due to its long-standing presence. The IP process is regulated in paras 33-53 IP Res (2020). The process is not time-bound and IP members conduct their fact-finding mission through various modes, including visits to the borrowing country in order to gather

[844] D.Bradlow (n 828), paras 49-50: 'The primary purpose of dispute resolution is to try and resolve the problems that the requesters are facing. The dispute resolution process may or may not identify instances of non-compliance in the course of resolving the dispute. In other words, findings on compliance can result from the dispute resolution process but it is not a primary objective… The issue of whether the harm suffered by the requesters has been caused by non-compliance with the MDB's operational policies and procedures is a secondary consideration. This means that, although the IAM cannot accept the parties reaching an outcome that directly contradicts the bank's operational policies and procedures, the resolution to the dispute need not be fully consistent with every detail of the applicable policies and procedures, as long as it is acceptable to the parties to the dispute'.

[845] D.Desierto et al (n 838).

information through consultations with affected people. However, the new ESF may potentially challenge the role of the IP considering the less prescriptive nature of the Bank's obligations and the separation of Bank and Borrower responsibilities, with the latter's being now predominant. A suggested way out is for the IP to continue to assess the Bank's compliance by applying the reasonableness standard of care and taking an object-and-purpose approach, whereby compliance is assessed taking into consideration the facts and circumstances of the particular case in order to determine if the purported goal of the provisions are met.[846] Moreover, the Bank may continue to be linked to borrowers' ESSs through its duty to consult affected communities and facilitate their participation in forming project guidelines; the binding ESCP in the development of which the Bank contributed and its obligation to assess and review the borrower's project documentation in the course of its environmental and social due diligence assessments; the Bank's implementation support and monitoring duties by virtue of which it oversees the project in its entirety until completed (e.g. the Bank review regularly borrower's compliance with the ES requirements of the ESCP). Therefore, even if an action is conducted by the borrower, the Bank may be still held accountable if it fell under the Bank's supervisory duty.[847]

Upon conclusion of its investigation, the Panel conducts its report and submits it to the Executive Directors and the President. Requesters have now the possibility to read the full report at the Bank's nearest country office prior to its discussion by the Board while being bound by a confidentiality agreement regarding its content.[848] Within two weeks from the consideration of the report, the IP informs publicly the requesters about the outcome of the investigation and action take in this respect. Actions are determined by Management, which submits its own report and recommendations. It includes a management action plan (MAP) that has been shaped after consultations with affected parties and agreement with the borrower. Monitoring responsibility of the action plan lies with Management unless the Board instructs the IP to verify its implementation in complex and serious cases.[849] Interestingly, requesters seem to be excluded from the monitoring. Unlike MAP monitoring, compliance with the DR agreement does not seem to be institutionally monitored by either

[846] C.Passoni et al (n.757) 'Empowering the IP', 941-950.
[847] Id., 950-957.
[848] *IP Res 2020,* para 45-46 (no possibility to make copies or reproduce its content by other means); BP: IP Process (5 March 2021), para 10 <https://ppfdocuments.azureedge.net/38eff62b-68ed-4af5-b884-e5cf3f26f5fd.pdf> accessed 28 August 2021.
[849] *IP Res 2020*, (i); D.Bradlow (n 828), paras 74 et seq. discussion about arguments for and against AMs monitoring MAP.

the IP or Management. A final concern relates to the reparations for the harm caused to requesters since neither the IP Resolution nor the WBAM resolution elaborate on this.

All in all, the WBAM possesses strengths and weaknesses that in the long-term might jeopardize the system's effectiveness, efficacy, legality and legitimacy. Its success depends on whether it will address the real concerns of project-affected people through the investigations and DR.[850]

IFCAO

Just like the WBIP, the IFCAO has its own regulatory framework. It comprises the CAO's Terms of Reference (TOR)[851] that articulate its mandate and the Operational Guidelines (OG),[852] which set forth how the CAO executes its functions, aiming in this way to provide a predictable process for complainants before the CAO. Since the CAO's establishment, both documents have been periodically reviewed in response to recommendations from external assessments of its effectiveness. In 2019 the CAO's role and effectiveness were assessed again in the framework of the IFC's Environmental and Social Accountability evaluation that was requested by the Committee of Development Effectiveness (CODE) on behalf of the IFC's Board.[853] The content of the review was shaped by questions about IFC's and its clients' E&S performance and concerns about CAO compliance cases that intensified in the light of the investigation of the *Tata Mundra* power plant project in India and *Jam v IFC*.[854] The risk of litigation against the IFC turned the spotlight to the efficacy of the IFC's sustainability framework and the CAO's attentiveness in conducting its compliance investigations and concluding on its findings, which at times had led to divergent interpretation of the IFC's SF requirements and clients' PS and at others, to failure to hold the IFC fully accountable. The IFC's inadequate follow-up of compliance and the insufficiency of remedies were also points that challenged the CAO's success.[855] Consequently, the

[850] D.Desierto et al (n 838)

[851] CAO, TOR (2013) <http://www.cao-ombudsman.org/about/whoweare/documents/CAOTOR2013.pdf> accessed 28 August 2021; previous TOR (1998) <http://www.cao-ombudsman.org/about/whoweare/documents/TOR_CAO.pdf>

[852] CAO OG (2013) <http://www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines2013_ENGLISH.pdf>. Previous <http://www.cao-ombudsman.org/howwework/2012OperationalGuidelinesUpdate.htm>.

[853] WB, Brief (12 August 2020) <https://www.worldbank.org/en/about/leadership/brief/external-review-of-ifc-miga-es-accountability>

[854] (n.728).

[855] External review paras 14-19 <https://thedocs.worldbank.org/en/doc/578881597160949764-0330022020/original/ExternalReviewofIFCMIGAESAccountabilitydisclosure.pdf> Further on how litigation shifted attention to the substantive effectiveness and procedural legitimacy of the IFC's commitment to its SF and the CAO's administration of complaint resolution process, paras 131-152; para 191 about dissatisfaction in obtaining remedial action.

external assessment addressed the aptness of the OGs against the requirements of the CAO's mandate and TOR; IFC's responsiveness to concerns regarding adverse E&S impacts of the business activities of their clients; CAO's impact on communities, clients and governments and on the IFC's operations, policies and risk profile. In that respect, the governance structure of the CAO was revised in order to be better aligned with its function. It was furthermore examined how the IFC responds to CAO processes and whether it was necessary to establish grievance mechanisms through which project-affected people may raise concerns directly with IFC management.[856] The results of the review were included in the new IFC/MIGA Independent Accountability Mechanism (CAO) Policy, effective from 1st July 2021.[857]

From the outset, CAO's structure differed significantly from the IP's. The CAO's main function was dispute resolution due to its professed advantages, namely that it is consensus-based, more flexible and less publicly visible. Correspondingly, compliance was limited. The CAO had also a formally recognized advisory role, which the IP acquired now after the recent reforms.[858] Nevertheless, the expansion of IFC's project portfolio has increased the caseload for CAO's compliance function.[859] Under the new policy, CAO's functions are complementary and contribute to delivering on its mandate.[860] DR helps resolve issues relating to the social and environmental impacts of projects through a neutral, collaborative, problem-solving approach and purports to improved outcomes on the ground. The compliance function possesses the same characteristics as the respective IP process. It reviews IFC compliance with the ESP in relation to actual or reasonably likely to occur material adverse environmental or social effects on people or the environment that result directly or indirectly from a project, and recommends remedial actions to address non-compliance and harm appropriately. Finally, the advisory support to the IFC and its Board aims at improving the institution's systemic performance on sustainability and reducing the risk of harm.[861]

Eight principles guide the CAO's performance:[862]

---

[856] WB Brief (n.797).
[857] IFC/MIGA IAM (CAO) Policy (28 June 2021) <https://documents1.worldbank.org/curated/en/889191625065397617/pdf/IFC-MIGA-Independent-Accountability-Mechanism-CAO-Policy.pdf> *[CAO 2021]*
[858] External review (n 855) para 104.
[859] Id. 193-196.
[860] *CAO 2021* (n.801) para 7: 'to facilitate the resolution of complaints from project-affected people in a fair, objective and constructive manner; to enhance projects' social and environmental outcomes and foster public accountability and learning that will enhance IFC's environmental and social performance and reduce the risk of harm to people and the environment'.
[861] Id., para 8; iv for definition of harm.
[862] Id., para 10.

(i) *Independence and impartiality*, which are ensured firstly by the CAO Director General's direct reporting to the IFC Board – a major change from the previous regime when reporting was to the WB President and became problematic as the IFC undertook more compliance reviews.[863] Secondly, DG candidates are external to the WBG or at least two years should have elapsed since the end of their service. The DG should be a person of impeccable integrity and credibility, with sound judgment and knowledge in a variety of fields (e.g. socioeconomic, environmental and legal disciplines, dispute resolution practices, compliance investigations, business and financial products and understanding of civil society). Thirdly, the DG's selection process is conducted by an independent, transparent and participatory (involving stakeholders from diverse regional, sectoral and cultural backgrounds) selection committee;[864]

(ii) *Transparency,* which is warranted by keeping complainants informed about processes and the progress of their complaint, ensuring that IFC provides full and timely access to project-related information and CAO discloses its findings and outcomes subject to the IFC's Access to Information Policy;[865]

(iii) *Accessibility*, which is a fundamental prerequisite for effective remedy. The CAO engages proactively in raising awareness for its role and mandate. In the context of its Outreach and Communication policy, it disseminates information about its work and engages with project-affected people upon request. Additionally, the CAO makes reports and communication materials available to local languages and it publishes them in culturally appropriate means. Last but not least, upon request it provides guidance on how to lodge a complaint. In these ways, the AM aims to lift local constraints that prohibit people from accessing its service.[866]

(iv)-(vi) *Responsiveness, Fairness and equitability,* and *Predictability* are directly linked to the process before the CAO. They are meant to make CAO procedures clear and consistent with the types of available outcomes and to ensure that stakeholders have access to information, advice and expertise that enables them to participate meaningfully and be heard, facilitating thus a level playing field between parties. Importantly, they drive the CAO procedures towards delivering timely and fair solutions to the parties' claims. Therefore, they can guarantee due process and the effectiveness of substantive remedy consistent with the international principles of business and human rights, as they apply to the IFC's SF, and good

[863] Id., para 12, 23-24; External Review (n 855) paras 153-166.
[864] *CAO 2021*, paras 14-17.
[865] Id., para 25-29.
[866] Id, paras 160-168; 35.

practice standards [(*principle (vii)*], including businesses' respect to human rights.[867] Reference to human rights is unique to the CAO, compared to the IP that does not make such correlation, and bolsters the legitimacy of its mandate.

(viii) *Continuous learning*, which fosters systemic improvements of IFC's performance in social and environmental matters and in reducing harmful repercussions in development.

As with all AMs, their adequacy and effectiveness (especially from a human rights perspective) is judged in practice. In principle, the latest CAO reform has addressed impediments to the efficiency of its process. Considering for example accessibility, the CAO is intended to be accessible to *any individual or group*, or their authorized representative, who believes they are or may be harmed by a project.[868] Therefore, individual and collective complaints can be lodged. Eligibility is accorded to a complaint if it relates to an active project; if the issues raised fall within the CAO's mandate and the complainant is or may be affected by the harm described in the complaint.[869] Even so, criteria appear to be less stringent compared to the IP's. An obvious difference is that complainants need not demonstrate ex ante a causal link between harm and a specific E&S policy, allowing the claim to proceed to assessment on the basis of the described E&S issues.[870] Time frames at all stages of CAO process have also been shortened (e.g. eligibility screening up to 15 working days) in response to complaints that investigation reports were issued after the business relationship between the IFC and client had terminated which made it difficult to address non-compliance and correct harm.[871]

After enlisting an eligible complaint to the registry,[872] the CAO should conclude a preliminary assessment of the complaint within 90 days. Without expressing judgment on its merits, the CAO purports to gain better understanding of the substantive claims, identify the stakeholders relevant to the complaint and determine whether the parties seek to initiate DR

---

[867] Id, paras 5, 10(g)*;* Guiding Principles on Business and Human Rights: Implementing the UN 'Protect, Respect and Remedy' Framework (2011) <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf>; D.Bradlow, A.Fourie, 'Multilateral Development Banks and Management of Human Rights Impacts', 319 in S.Deva, D.Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar 2020) saying that the UNGP can become indirectly implicated in the work of MDBs, although themselves claim that they are not directly applicable to them.

[868] Id., para 30; former OG 2.1.2

[869] Id., para 37. Additional criteria exist for specific projects (para 41) and exclusions also apply (para 42). Complaints before a project has been approved are ineligible and referred to the Board or Management (paras 42(c), 47-48). Exceptionally, a complaint may be submitted up to 15 months after the IFC's exit from the project (para 49). External review (n 855) paras 214-218.

[870] Id. 34(b); External Review (n 855) paras 208-209.

[871] External review, paras 197-199.

[872] Enlisting serves publicity and transparency, although there is not a full disclosure of the complaint at this stage; Id, para 228.

or compliance review. As the assessment process is flexible, the CAO may conduct various activities to this end, including liaising with the complainant and the client and visiting the project site. Parties may also engage directly with each other in an effort to resolve the issues without the direct involvement of the CAO but with the constructive support of IFC if parties consent to it. Undertaking this role, the IFC does not become formally a party to the complaint and its role is mainly advisory to its client while also checking its E&S performance. Upon completion of the assessment the complaint report is drafted by the CAO, which parties may review and comment before its publication. The case is then directed either to DR, if parties have so agreed, or the compliance function in the opposite case.[873]

CAO's DR resembles the IP's since the latter was designed according to the former. The process is voluntary and is conducted in a non-judicial, non-adversarial manner with the aim that parties find mutually satisfactory solution to the problems raised in the complaint and during assessment. DR proceeds through mediation,[874] facilitation and information sharing, joint fact-finding, dialogue and negotiation.[875] Unlike the IBRD, the IFC may be invited to participate in the DR, a possibility that is considered on a case-by-case basis. This may raise concerns as to the neutrality of the CAO forum since IFC's advisory again role to the client may seem to favor the latter. However, CAO and IFC have agreed that in principle IFC's participation is appropriate insofar as it maintains lines of communication between parties and CAO in the process.[876] The agreement produced by DR may result in full or partial resolution when parties have agreed on some of the complaint issues or have agreed on everything but failed to implement the agreement. In all cases, the CAO monitors the implementation of the agreement by IFC Management and when partial or no agreement exist, s/he transfers the complaint to compliance provided complainants have consented explicitly to this.[877]

Accordingly, the compliance function is analogous to the IP's. The suitability of the SF is not assessed neither is client's compliance with PS. Yet, in making findings about harm and whether it is related to IFC's non-compliance with the SF, the CAO assesses IFC's review and supervision of its E&S requirements at project-level and considers project-related E&S performance.[878] The process is divided into three steps: (i) appraisal, which determines if the complaint will be investigated in its merits, (ii) the actual investigation and (iii)

[873] *CAO 2021* (n.801), paras 52-61; External review (n 855), 232-236.
[874] *CAO 2021*, para 73 role and attributes of mediator.
[875] Id. para 65.
[876] External review (n 855) para 252.
[877] *CAO 2021*, paras 62-75.
[878] Id., para 77

monitoring.[879] Upon transfer of the complaint to compliance, Management and Client may respond in writing, outlining respectively the steps taken (or those intended) to facilitate compliance with relevant policies/E&S requirements and to address the caused harm. The CAO compiles then his report after reviewing relevant documentation and having concluded that there are preliminary indications of harm and of IFC's non-compliance with E&S policies, which are interlinked.[880] The appraisal decision should be reasoned and may either instruct investigation indicating its scope, or the merger with another open case, the deferral under specific circumstances to allow the IFC, Client and Complainant to resolve the issue directly, or the case's closure.[881] An appraisal report is compiled by the CAO and circulated for information to the Board, President, Management, Client and the Complainant. At this stage, the complainant gains full knowledge of the Management's/Client's response,[882] something that might be criticized for contravening complainant's procedural rights and safeguarding the IFC/Client from reputational risk.

In the actual phase of the investigation, the CAO obtains and evaluates evidence systematically and objectively. The terms of reference, which are publicly disclosed, define the investigation's scope.[883] The process is non-adversarial. As such, in undertaking analyses and drawing conclusions, the CAO considers evidence from document review, interviews, observations of activities and conditions, reports and any other appropriate means that can constitute a reasonable basis for his compliance findings.[884] The latter are incorporated in a reasoned draft report, which includes also recommendations for the IFC to consider for the remediation of non-compliance and the related harm.[885] IFC Management and the Complainant have the opportunity to review the facts and comment on the report before it is finalized by the CAO. A different treatment of Complainants may also be discerned here since their right to be informed might be restricted to the minimum of being provided a table of findings for factual review and comment whereas the CAO shares the entire report with Management.[886] The final report is then compiled and submitted to Management and may be shared with the Complainant and Client in order to provide them with content for the consultation with Management when preparing the Management Report and Action Plan (MAP). The very submission of MAP to the IFC Board and its content is identical to the IP's

[879] Id., para 78.
[880] Id., paras 79-95.
[881] Id., para 93-103.
[882] Id, para 106.
[883] Id, para 118-119.
[884] Id, paras 115-117.
[885] Id, para 120.
[886] Id., para 122, 124-125.

MAP; it comprises time-bound remedial actions that haven been agreed in consultation with the complainant and the client. After the MAP's approval by the Board, the investigation report and the MAP are published on the CAO's website.[887] Still, the compliance process is not completed until the CAO verifies the MAP's effective implementation. CAO monitoring is another element that distinguishes this mechanism from the IP and strengthens the effectiveness of remedial actions. That said, the fact that compliance may be closed while not all substantive commitments in the MAP have been effectively fulfilled and absent reasonable expectation that action will be taken, puts into question the IFC's perception as an accountable institution that implements the BHR framework to 'protect, respect and remedy' human rights violations, as the institution itself proclaims.

Indeed, whether CAO non-compliance findings lead to remedial actions was strongly discussed during the external review since evidence pointed to the opposite. Indicatively, as of FY2019, half of the projects for which the CAO compliance monitoring process was closed remained in substantial non-compliance status.[888] A central reason for this is the discrepancy in the compliance process, namely that it determines if the IFI has exercised its due diligence for the application of the ES OPs but corrective actions ought to be taken by the borrower/client, which are not under scrutiny. By extension, remediation of complainants' rights is caught in the disagreement between the IFI and the borrower/client as to at whose expense will corrective actions be taken.[889] In the IFC's case, the WB Board may have an important contribution in assuring the adequacy and responsiveness of the MAP in relation to the non-compliance and afflicted harm before its approval. Similarly, the consultation with stakeholders before designing the MAP is also an advantage.[890] However, the Review Team has taken a bolder step in addressing IFC's responsibility for remedy, implementing by analogy the BHR remedial framework to the IFIs context. The Team distinguishes between the IFC's direct contribution to harm and its mere linkage to the harm caused by the client. Instances of non-compliance would fall under the former and the IFC would have to contribute directly to remedy together with its client, whereas a linkage to harm that does not involve an act or omission by the IFC would only require that it uses its leverage over its client to promote remediation. IFC's responsibility to contribute to remedial action will be applicable to both compliance and DR. In practice, such contribution would translate to financial remediation, regarding which the Review Team proposed the establishment of a

[887] Id., para 130-138.
[888] External Review (n 855) para 311.
[889] Id, para 314.
[890] Id., paras 319-321.

funding mechanism (liability insurance fund), or the provision of technical advice when the client has the capacity and resources to undertake corrective action.[891]

To conclude, the IFCAO's function presents both advantages and challenges. Due to its resemblance with the IP the benefits and limitations are common. Overall, the fact that most often than not a claim is firstly attempted to be solved through problem-solving prior to a compliance investigation prolongs the process before the CAO. Although timeframes are now being curtailed, complainants face a barrier to accessing redress given the lengthy procedures and the resources they need to spend to partake in them. Moreover, DR and compliance review each have its own limitations.[892] Good problem solving relies on a process which parties feel they own and is tailored to achieving meaningful outcomes. While some flexibility is understandable, power imbalances need to be addressed. The IFC's involvement in the process might reserve some bias. Conversely, the possibility of complainants to comment on draft assessment and compliance reports enhances project-affected people's participation. Additionally, monitoring the implementation of the agreement is paramount. The CAO's monitoring role of both the DR and compliance review outcomes is definitely an asset compared to the IP that only verifies implementation of the MAP in specific cases.[893] Given that a right without a remedy is not such in practice, the degree to which complainants have been satisfied or at least fairly compensated for harm is critical. Nonetheless, the IFCAO policy does not elaborate on remediation and reparation of harm, and given that it is not authorized to enforce corrective actions, remediation relies on Management's response and actions (in compliance). When the latter are not adequate, the accountability, credibility and effectiveness of the CAO, and by extension of the IFC, weaken.

iii. The WBIP and the IFCAO as Quasi-Judicial Bodies

The overview above suggests that typically the elements that determine the effectiveness of a remedy, as identified in the previous section, are discernible in the framework that

[891] Id, paras 324-339; V.Ramachandran, 'Fishermen, SCOTUS and the IFC: Litigating Development' (*CGD blog*, 5 November 2018) <https://www.cgdev.org/blog/fishermen-scotus-and-ifc-litigating-development> accessed 28 August 2021, also mentions the existence of a funding mechanism by the IFC for the purposes of addressing victims' claims. K.Lewis (n.798), 12: other remedies may be the redesign or cancellation of the project, if early on the project; changes in project implementation, mitigating measures to address harm and strengthened supervision.

[892] K.Lewis (n.798), 24-29.

[893] Id., 15 referring to the IFC's Management Action Tracking Record regarding implementation of CAO compliance findings by the IFC and the Monitoring and Evaluation tool for feedback by stakeholders in the process which improves CAO's overall effectiveness.

shapes the structure and operation of the WBIP and the IFCAO. In particular, the latter also explicitly bases its function on principles of effectiveness that govern any redress mechanism. Both the IP Resolution and the CAO Policy provide for the impartiality of the AMs, the integrity and professionalism of their members while changes to their procedures have been made with the concern of prompt processing of claims, the consideration of complaints with care and the issuance of reasoned replies, transparency and responsiveness at the background. Improvements to the participation of complainants have also taken effect, although "equality of arms" is not always ensured, affecting thus also the accessibility of the IAMs. Against the backdrop of this mixed picture of the IP's and CAO's function, and notably in relation to their compliance function, the two AM's have been subject to the criticism of not securing these elements in reality. Usually their independence from their Executive Boards and Management is the first point of reproach against the Panel and CAO of not fulfilling all the criteria of effective remedies. The prerequisite of the Executive Board's authorization of an investigation by the IP, the occasional respective process of IFC Board review of the CAO's decision to investigate, and the fact that Boards and Management have the final decision-making powers with respect to approval of investigation reports and the MAPs have often been the point of contestation.[894] The second recurrent criticism focuses on the review mandate of the two AMs, which is considered too narrow since assessment is made only against their own policies and excludes international legal standards.[895] The spearhead assuredly remains the Panel's and CAO's non-formal role in the development and enforcement of remedial actions which rest in the Management's capacity.[896] These points are valid of course, all the more so since the underlying standard of comparison for the effectiveness of the two AMs are judicial bodies. As de Chazournes has clarified however, IFIs' AMs are not judicial mechanisms; contrary to domestic or international courts and tribunals that enforce liability of wrongdoers or confer upon subjects of IL responsibility for

[894] D.Bradlow, 'Brief of Amicus Curiae in Support of Plaintiffs-Appellants, *Jam v IFC*, DC Cir No 16-7051' (7 August 2016), 17-18, 22-23: '[IFC] is accessible to all qualifying stakeholders and its is reasonably fair, although the complainant is not necessarily given an opportunity to respond to the evidence and arguments presented by the IFC's management. It is not clearly impartial because the IFC's Board and senior management retain final decision-making powers. Moreover, it is not independent because the CAO is appointed by and reports to the senior management of the IFC. In addition, it does not necessarily provide complainants with a meaningful remedy because its findings and recommendations are non-binding' (note: the brief was written before the recent changes to the IFC. Thus reporting to the management is not the case now whereas the factual review gives an opportunity to complainants to respond indirectly to management's arguments. The process, however, is still non-adversarial).

[895] B.Kingsbury, 'Operational Policies' (n.693), 330-331 stating that the panel had not invoked IL standards, except for OPs and project documents regarding the indigenous peoples, although international standards can be invoked as part of the norms and practice that may guide the Panel's recommendations.

[896] D.Bradlow, 'Private Complainants and International Organisations: A comparative study of the Independent Inspection Mechanisms in IFIs' (2005) 36 Georgetown Journal of International Law 403, 419.

violations of IL, the IP/CAO simply identify IBRD's/IFC's malpractice without determining the consequences of a violation of the safeguards and forward their findings to the institutions' respective bodies without again their reports being binding on them.[897] There is thus a fundamental difference in the way AMs are conceptualized and operate. They are independent investigatory bodies[898] but framing their function in legal terms is confronted with reluctance. The Panel and the CAO are in the first place accountability mechanisms.[899] They 'trigger the responsibility of the WBG's administration with respect to member states by utilizing the requests for inspection by private parties to this end'.[900]

That being said, a closer look at the *de facto* exercise of their compliance competencies reveals that the IP and the CAO may have more things in common with classical judicial bodies while they maintain their nature as internal governance tools. Indeed, A.Fourie[901] has tested the IP's function against three core dimensions of judicial oversight, as conceptualized by her Judicial Oversight Model: its *nature, effects/outcomes* and *dynamics*. Each of these dimensions has its own defining characteristics. Thus, judicial independence and judicialisation (the expansion of judicial influence and power) lie at the core of the nature of judicial oversight; effects are distinguished between constitutional dispute resolution, human rights protection (remedies) and the legitimization of political institutions; dynamics refer to the interplay between the first two elements and the relationship between courts and political institutions.[902] In examining the Panel's/CAO's function, the first thing to note is the resemblance of their mandate with that of courts. Just like the judiciary conducts a 'review process into the exercise of public power by the legislative, executive and administrative bodies of a particular constitutional system against the normative standards of the constitution or other 'higher order law' such as human rights law'[903], the IP/CAO through their compliance function do the same; they 'monitor compliance with a body of norms, settle

[897] de Chazournes, 'Public participation in decision-making: the World Bank Inspection Panel', 92 in E.B.Weiss, et al (eds.), *The World Bank, international financial institutions, and the development of international law: a symposium held in honor of Ibrahim F.I. Shihata*, March 22, 1999 (American Society of International Law 1999)
[898] Id.
[899] S.Schlemmer-Schulte, 'Sustainable Development Priorities in the World Bank Inspection Panel decisions', 742-743 in M.C.Cordonier-Segger, C.G.Weeramantry (eds) *Sustainable Development Principles in the Decisions of International Courts and Tribunals* 1992-2012 (Routledge 2017).
[900] S.Battini, International Organisations and Private Subjects: A Move Toward A Global Administrative Law? (2005) IILJ Working Paper 2005/3, 28 <https://iilj.org/wp-content/uploads/2016/08/Battini-International-Organizations-and-Private-Subjects-2005-3.pdf> accessed 30 August 2021. The author opines that the lack of remedies, 'the possible consequence of a judgment enforcing the requester's violated rights' is the defining characteristic for the IP not being a court of law; Bissell, Nanwani (n.696), 39.
[901] A.Fourie (n.791).
[902] Id., 34-35 ff 57.
[903] Definition of judicial oversight, id. 11-12.

disputes regarding those norms or make determinations on the basis of investigations of one form or another, however they are not empowered to make final, binding decisions on questions of international law'.[904] Nonetheless, what the IP/CAO do is essentially a judicial task. On this account they have also been described as quasi-judicial bodies, even though their quasi-judicial oversight is camouflaged by the terminology used in their establishing resolutions.[905]

To demonstrate that the AMs of IFIs possess the nature, effects and dynamics of judicial oversight, Fourie employs specific mechanisms/sub-criteria under each of the abovementioned dimensions of judicial oversight. To begin with, she notes that the Panel has ascertained its institutional *independence* first by safeguarding the *integrity of the process* before it. The requirement that its decisions shall be reached by consensus and only when this is not feasible defer to majority-minority voting,[906] has served as a "statutory" safeguard of the Panel's credibility since to date consensus has been preferred. Moreover, the IP has asserted itself over the Management's questioning of its authority to determine the eligibility of complaints, its interpretation of the OPs and the facts of a case, even its "jurisdiction," a practice that was observed particularly in the early years of the Panel's function.[907] Through

[904] M.Tignino, 'Quasi-judicial Bodies' in C.Brölmann et al (n 468), 242. A.Fourie (n.791) says that quasi-judicial oversight is performed by non-judicial bodies and their decisions may or may not be legally binding.
[905] M.Tignino supra, 256-246; G.Gualtieri, 'The Environmental Accountability of the World Bank to Non-State Actors: Insights from the Inspection Panel' (2001) British Yearbook of International Law 213, at 252-253: '[...] NGOs and external commentators, as well as some sections of Bank staff, have leaned towards the 'judicialization' of the Panel. The Resolution indeed grants the Panel quasi-judicial functions during the eligibility and investigation phases [...]. While the Inspection Panel should remain a flexible and pragmatic dispute resolution mechanism, strengthening its quasi-judicial functions has the potential to give the mechanism greater teeth'; A.Fourie (n.791), 323 citing K.Nathan, 'The World Bank Inspection Panel: Court or Quango? (1995) 12 Journal of International Arbitration 135,147; n.14 where the author states that the IP has not explicitly accepted such characterization.
[906] *IP Res (2020)* para 54.
[907] Indicatively, *Rodonia Natural Resources Management Project* (Brazil, 1995), IP Report (17 August 1995), para 4: 'At this stage the Panel must satisfy itself that Management has dealt with the subject matter of the Request (Resolution paragraph 13). The subject matter of a Management response is restricted by the Resolution to 'evidence that it has complied or intends to comply with the Bank's relevant policies and procedures' (Para18)**.** The Panel found that Management's "response" did not deal with the subject matter of the Request. Management addressed the eligibility criteria of the Request, and set forth its own "judgment" concluding that the Request was not eligible' <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/4-Eligibility%20Report%20%28English%29.pdf>; *Tanzania – Power VI Project* (1995), Management Response (18 July 1995), para 2: '[i]t is the view of IDA's Management that: a) the Request doe not meet all the eligibility requirements set forth in Res No.IDA93-6 and b) one of the allegations in the Request is not admissible under the resolution…For *your information*, attached hereto is an annex commenting on the specific alleged violations by the Management of IDA's Policies and procedures' <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/3-Management%20Response%20%28English%29.pdf>; *Jute Sector Adjustment Credit* (Bangladesh 1996), IP Report (14 March 1997), Box 1, 4 paras 1-3 '[I]f Management's allegation [that complaints regarding delays in implementation are outside the Panel's jurisdiction because they involve actions of the borrower and not the IDA] were accepted, the panel would lack jurisdiction in all cases where delays in the execution of a project as caused harm to third parties…Management cannot disclaim responsibility for adverse effects of Bank/IDA-financed projects simply because it is not the executor of activities included

these ways, the Panel has managed to build its credibility when executing its mandate. The formal acknowledgement of the *quality of its fact-finding and investigation reports* corroborates this. By way of example, in *Yacyretá*, Management expressed its appreciation for the thorough presentation of the Panel's findings and found its recommendations constructive.[908] Above all though, *landmark cases* of the IP that have revealed cases of serious Bank non-compliance that caused serious harm to the environment and people have set the cornerstone for the Panel's integrity. To use *Yacyretá* again as an example, the IP overtly said that is strived to be independent and fair towards stakeholders by recognising the Bank's efforts to implement the long-lasting project but also giving full account to non-compliance instances for complainants. Thus, the Panel found the Bank to be in breach of, *inter alia*, then OD 4.01 because the EIAs conducted by the borrower did not meet the directive's requirements and Management had not provided for the preparation of these EIAs. Besides, Management had failed to appreciate comprehensively problems regarding the project's implementation and did not take in time the necessary remedial actions. Interestingly, the IP was instructed by the Board to review the MAP and monitor its implementation, despite the lack of such provision by the Panel's revised framework of 1999.[909] Similarly, the *Integrated Coastal Zone Management and Clean-Up Project*[910] in Albania revealed that the project was not designed or supervised well, critical communications from Management to the Board were in error and Bank fact-finding efforts had omitted core information. Complainants alleged that project implementation had led to 'displacement of families, human rights violations, inhumane actions including, violence by the police, and a complete lack of information and transparency regarding any projects or future plans for the area'. Furthermore, they argued, the destruction of their village was due to the Bank's failure to 'take into consideration legal rights as we as the wellbeing of the

---

therein'<https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/6-Eligibility%20Report%20%28English%29.pdf>. Additionally, A.Fourie mentions the IP's reaction to Management's undue political interference with its process as an additional criterion of IP's independence (e.g. Bank's intimidation of requesters not to file their complaint), 209-211.

[908] *Paraguay/Argentina Reform Project for the Water and Telecommunication sectors, SEGBA V Power Distribution Project (Yacyretá) (2002)*, Management Report and Recommendation to IP Report (6 April 2004), para 3 <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/26-Management%20Report%20and%20Recommendation%20%28English%29.pdf>

[909] The Panel received two requests for this project. The first time (1996) the Board authorised a limited review. For the crucial statements regarding Bank's non-compliance in the 2002 review, see *Yacyretá* supra, IP Report (24 February 2004), xii et seq., paras 273, 286, 294; xvxiii <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/26-Investigation%20Report%20%28English%29.pdf>

[910] Two requests were filed: Case-47 (30 July 2007), Case-48 (13 August 2007)

community'. [911] Management denied any direct or indirect connection between the demolitions and the project when the IP process was initiated and stated that the government had agreed to a demolition moratorium in the coastal area covered by the project until safeguards for affected people were in place.[912] The Panel's investigation was a declaration of its quality and credibility since it resulted in a Bank-wide review of more than 1,500 projects in its portfolio involving land-use planning projects and to policy clarifications regarding the application of safeguards to such projects.[913]

Turning to *judicialisation*, the IP/CAO have ascertained their quasi-judicial nature by *extending the boundaries of their mandate* either through procedural innovations or by expressing judgment about the causes of project non-compliance, concern for future compliance and subtly criticizing borrowers.[914] Their *interpretative techniques*, leading to normative developments in development finance law and the law of sustainable development, are an additional avenue. By analogy to courts' practice, IAMs expand their "judicial discretion" and limit managerial discretion. The ultimate purpose is the efficacy and efficiency of the process before them.

For instance, IP's deference of investigation to allow for further interaction of Management with complainants in order to address the latters' concerns was a procedural innovation before problem-solving became part of the WBAM's mandate. When determining the eligibility of the request regarding the *Mine Closure and Social Mitigation Project,* requesters, the Bank, national, local and project authorities agreed on a formal action plan that would alleviate the complaints raised in the request for inspection. Complainants thus asked the Panel not to initiate a recommendation regarding their request for inspection for a period of six months. The Panel accommodated their request, noting however that requesters would still have recourse to the Panel later if they considered there were serious violations of Bank Policies and procedures causing them material adverse effect.[915] Moving on to more recent years of the IP's operation, the handling of the complaint regarding the *Kenya*

[911] Id, IP Report, para 17 and 19-22<https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/47-Investigation%20Report%20%28English%29.pdf>
[912] Id, para 24.
[913] *IP at 25* (n.741), 55, 57 referring also to the reaction of then WB President Zoellick in press release: '[…] the Banks record with this project is appalling. We take very seriously the concerns raised by the IP and we are moving promptly to strengthen oversight, improve procedures and help families who had their buildings demolished. The Bank cannot let this happen again'
[914] For these aspects, A.Fourie (n.791), 215-222. I will focus on procedural innovation and interpretation since these are more relevant to my argument that IAMs are international lawmakers.
[915] IP Recommendation (29 September 2006), paras 1-3 <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/39-Inspection%20Panel%20Recommendation%20%28English%29.pdf>; A.Fourie (n.791), 224 highlighting that in this way the Panel offered claimants the opportunity to resubmit their request upon the same facts.

Electricity Expansion Project,[916] a co-financed project with the European Investment Bank and other donor agencies, has also been a novelty due to the cooperation of the IP with the EIB's AM for the purposes of the compliance review. The Memorandum of Understanding that set out the terms of their cooperation, including information sharing and joint field visits, was the procedural tool for an integrated investigation, which would minimize the risks of uncoordinated jurisdiction such as overlaps in activities. As such, it institutes a 'managerial approach' to the undertaking of the compliance function, offering procedural facilitation.[917]

Beyond their authority to introduce rules of procedure, the IP/CAO have contributed to the *clarification of safeguard policies* and *the delineation of IBRD/IFC (and of borrowers) obligations* in the context of development finance law and with regards to substantive international law more generally. They have done so through *interpretation*. In this respect, the IP/CAO relationship with IBRD/IFC management can be described as conflicting because an expansive interpretation of terms either in the establishing resolution of the AMs or in the OPs has restricted management's discretion in the application of IBRD/IFC policies.[918] As Shihata has stated, the latter are not meant to be '"marching orders" for a specific operation but general operational codes that are written to apply in different situations'.[919] Taking a pragmatic approach to development, the policies entrust management with a 'margin of appreciation', which it has used by exercising its own professional judgment in order to adjust the policies to the specific project conditions. Yet, often that discretion is overly broad because of management's very narrow understanding of OPs, rendering them also inapplicable to projects and affecting the scope of investigations. Thus, in *Argentina Special Structural Adjustment Loan* the IP opined that 'a strict interpretation of the OP on Disclosure of Operational Information could justify Management's actions in this case, but a more open dialogue with the representatives of potential requesters could have avoided the need for a

[916] Request received 26 October 2014 <https://inspectionpanel.org/panel-cases/electricity-expansion-project> The EIB's AM had received a separate compliance request.
[917] M.M.Mbengue, de Moerloose, 'A Managerial Approach for the Coherent Development of Sustainable Development Law: The Kenya Electricity Expansion Project before the World Bank and the European Investment Bank' 92018) 17(2) Revista Jurídica Piélagus 83, 90 ff identifying also substantive ramifications for the coherent development of international law, especially SD, and redress for complainants.
[918] The IP has blamed Management for being too legalistic or narrow in the application of OPs and the Panel's resolution. Conversely, the Panel has been accused for not allowing any flexibility in the application of OPs, as if they were legally binding rules. E.g. *China Western Poverty Reduction Project (18 June 1999)*, Management Report and Recommendation (13 June 2000), para 20 <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/16-Management%20Report%20and%20Recommendation%20%28English%29.pdf>; D.Bradlow, A.Fourie (n.867) 8 (incl. footnotes 16-18 for more cases); 46-48.
[919] I.Shihata, *WBIP* (n.688), 43

request for inspection'.[920] Accordingly, the CAO declared that IFC PSs were applicable in the *Wilmar Group's* plantation operations in Indonesia, contrary to IFC's argument that its investment related to the Delta-Wilmar and did not trigger issues of biodiversity, involuntary resettlement, indigenous people etc., hence the IFC lacked formal legal leverage to implement any of the requirements in the PSs.[921] On several other instances, the definition of 'environment', 'project', 'affected party' have been perceived differently from the AMs and IBRD/CAO.[922]

By and large, the discrepancy regarding the conceptualization of terms can be explained by a shift from textual interpretation towards *teleological-purposive interpretative methods* in light of the policies' spirit and the IFIs' overall objectives. The CAO stressed the importance of promoting the underlying principles and purposes of the OPs in the abovementioned *Wilmar* case. In its appraisal report, CAO found 'the procedures for assessing supply chain issues relevant to IFC investments unclear and a possible failure in addressing social and environmental outcomes as part of the review process, which might lead to outcomes contrary to the desired effect of the policy provisions'.[923] It then concluded that the IFC had not acknowledged the wider implications of its investment impact, which was 'inconsistent with its asserted role, mandate and commitment to sustainable development'.[924] On its part, the IP analyzing OD 4.00 and 4.30 referred to their 'substance and spirit' and stated that the active participation of affected people is essential for them to be effectively applied.[925] As a

---

[920] (26 July (1999), Eligibility Report, para 27 <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/17-Eligibility%20Report%20%28English%29.pdf>.

[921] *Indonesia/Wilmar Group-01/West Kalimantan* (1 July 2007), CAO Appraisal Report, paras 14-15 <http://www.cao-ombudsman.org/cases/document-links/documents/CAO_Appraisal_Report_C_I_R6_Y08_F096_ENGLISH.pdf>.

[922] A.Fourie (n.791), 232-241;D.Bradlow, A.Fourie (n.867), 32-33.

[923] *Wilmar* (n 921), para 18; CAO OGs (n 832) para 3.3.3.

[924] Id, Audit report (19 June 2009), paras 2.2.12, 3.2.2-3.2.3 <http://www.cao-ombudsman.org/cases/document-links/documents/CAO_Audit_Report_C_I_R6_Y08_F096_ENG.pdf>; *Peru Agrokasa-01/Ica (2 June 2009)*, CAO Audit Report (22 February 2011), para 4.1.1: 'In pursuing the Agrokasa III investment, IFC would have supported the actions of an existing client—and therefore its own financial interests—in protecting its access to water through an intra-aquifer water transfer and other activities. By pursuing this investment before an adequate EA was prepared and reviewed, IFC would have proceeded without taking into account potential negative long-term and wide-ranging development impacts on other more vulnerable users: impacts that could cause economic displacement, impoverishment, and loss of access to potable water. *The CAO concludes that this course of action is inconsistent with and in violation of commitments made within IFC's Policy on Environmental and Social Sustainability and its role as a development institution*'.

[925] *Bangladesh Jamuna Multipurpose Bridge* (23 August 1996), IP Report and Recommendation (26 November 1996), para 47 <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/8-Eligibility%20Report%20%28English%29.pdf>; *Cameroon Petroleum Development and Pipeline Project, and Petroleum Environment Capacity Enhancement Project* (25 September 2002), IP Report para 22: '[…] the purpose of OD 4.01, para 12 regarding the strengthening of environmental capabilities to adequately assess construction impacts during the implementation and monitoring phases of the project has not been achieved'

matter of fact, informed participation and consultation of affected parties has been raised before the Panel multiple times, providing it with the opportunity to clarify its normative content, thereby strengthening the enforcement potential of the relevant OPs. The Panel has thus concluded that mere information sessions are not equivalent to consultations nor are the latter meaningful when requesters fear oppression if they express openly their opinion about a project.[926] Most importantly, the IP/CAO have used their competency to 'sharpen the IBRD's/IFC's OPs' teeth'[927] in conformity with international legal standards. They have therefore contributed to the *policies' normative development* but have also shaped the international practice of IOs and states alike. In interpreting and applying the norms for which they are custodians (i.e. the OPs), AMs have considered relevant international law and have admitted, albeit allusively, the cross-fertilization between IFIs' compliance with internal and international standards. The *Chad Pipeline* investigation is very representative of the WB's human rights obligations. Although human rights considerations did not fall under the IP's mandate, the Panel linked human rights violations and good governance to the 'unobstructed implementation of the project in a manner compatible with the Bank's policies'. It then affirmed that 'human rights are implicitly embedded in various policies of the Bank', hence its decision to examine possible violations in the context of the project was 'within the boundaries of its jurisdiction'.[928] In another case, the Panel considered the borrower's lack of compliance with the Aarhus Convention as verification of non-compliance with internal policies.[929] Comparably, the CAO has acknowledged that IFC requirements should meet international good business practices, highlighting occasions when IFC Guidelines have fallen below those standards.[930] A final remark may be endorsed; by

---

<https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/27-Investigation%20Report%20%28English%29.pdf>.

[926] E.g. *China Western Poverty Reduction* (n.862), para 116; *India Eco-development Project* (2 April 1998), Request para 4(b)(ii), (iv) <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/11-Request%20for%20Inspection%20%28English%29.pdf> and Eligibility Report, para (iv), 40-42 <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/11-Eligibility%20Report%20%28English%29.pdf>

[927] S.Schulte (n.899), 740, 745.

[928] (22 March 2001), IP Report (17 July 2002), para 34-35 <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/22-Investigation%20Report%20%28English%29.pdf>; IP Chairperson address to Board, para 8 as cited in D.Bradlow, A.Fourie (n.811), 55. Also, *Honduras Land Administration* (3 January 2006), Request para 3: '[T]he policies have been designed and are frequently reviewed so that the Bank, in executing its projects, respects the international rules and standards designed to safeguard the rights of indigenous peoples, as stipulated in international agreements[…]'

[929] *Albania Power Sector Generation and Restructuring Project (IDA Credit No.3872-ALB)*, Investigation Report (2009) cited in M.Tignino (n.904), 259.

[930] *Tullow Oil/Kosmos Energy/Jubilee FPSO Ghana* (19 August 2010), Appraisal Report (20 May 2011), 9-10 <http://www.cao-ombudsman.org/cases/document-links/documents/CAO_Appraisal_Report_C-I-R4-Y11-F137.pdf>

employing the teleological interpretative method and borrowing from international law instruments, AMs have not only taken a progressive approach in interpreting the IBRD/IFC operational standards but have also shaped, what Fourie calls, a *compliance doctrine*.[931] In assessing the IBRD's/IFC's decision-making for a project, the AMs have proceeded on two steps: they identify whether the formal requirements of the OPs are met and then appraise whether IFIs' decisions reflect substantive quality. For IFIs' compliance to be granted both procedural and substantive elements need to be met. The *China Western Poverty Reduction* Project makes this explicit:

'[I]n appraising compliance, Management had an obligation to satisfy itself not only that *the process and procedures mandated by the policies had been followed*, but also that the work under review met *professionally acceptable standards of quality*. In other words, both *process and quality were essential components of compliance'*.[932]

For the final element of the comparison between AMs and judicial bodies, we should look afresh into the formers' mandate vis-à-vis each of its addressees, namely their Boards, staff and project-affected people. How has the nature of the IP/CAO, as described so far, influenced the *outcome* of the compliance review? Does the latter lead indeed to the resolution of disputes in project finance, the protection of beneficiaries of development projects and the legitimization of the WBG as a development institution just like a court resolves disputes between parties, offers remedies and legitimizes the authority of governmental institutions within a constitutional order?

Undoubtedly, the IP/CAO's limited jurisdiction, lack of binding decision-making authority and the dependence on management for the implementation of recommendations may be perceived as their weakness for meeting those ends.[933] Thus, if dispute resolution is understood in the strict legal sense, the IP/CAO do not fulfill that aim. Nevertheless, their fact-finding is tailored towards addressing the issues raised in the complaint and exercise their own judgment on its merits. Both features attest to a *de facto resolution of disputes* of Complainants v. Management and an "audit" of the latter's relationship with the Board.[934] As

[931] A.Fourie (n.791), 244-251.
[932] *China Western* (n.862), IP Report, para 12, 38-39: '[…] A senior staff put it clearly when he told the Panel that the Management has a duty to ensure that our minimum standards are adhered to, and it has a duty to ensure that the quality of the project meets the standard the Bank expects. Both process and quality were essential components of compliance'; paras 44-45 <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/16-Investigation%20Report%20%28English%29.pdf>
[933] D.French,R.Kirkham, 'Complaint and Grievance Mechanisms in International Law: One Piece of the Accountability Jigsaw?' (2009) 7 New Zealand Yearbook of International Law 179, 205.
[934] A.Fourie (n.791) 258-259.

far as the protection of project beneficiaries are concerned, the IP/CAO have given new formal rights to individuals, not new material rights; they have provided recourse but not redress.[935] It is uncontested that by recourse private parties exercise administrative rights (access to information, participation and judicial review of the legitimacy of administrative decisions.[936] Yet again, the development, enforcement and effectiveness of (legal) remedies have been outside their scope in the first place. Because of this, a more realistic assessment of remedial effectiveness in the context of IFIs' AMs should be sought. Attention should shift to the IP/CAO's influence through their investigation reports on the design and quality of MAPs pursuant to the severity of a project's adverse material effects. In a way, Management's response to investigations amounts to *de facto remedies* for project-affected people, especially when these result in changes to borrower's implementation of projects as well as to the revision of IBRD/IFC policies. Interestingly, the IBRD has taken direct remedial action in the *Albania Coastal Zone Management* by financing through own resources the cost of legal aid for involuntary resettled people to claim compensation.[937]

Conclusively, AMs' investigations affect IFIs' behavior in their capacity as institutions for *good development governance*. Every investigation is a check on IFIs' adherence to good governance in the manner defined by the ILA (as a principle of SD and primary norm of accountability) given that the latter find expression in the majority of OPs. Non-compliance erodes the legitimacy of financing operations and the respective development intervention. AMs' scrutiny corrects this error.[938] By the same token, AMs promote certainty in the context of international development because like an arbiter they promulgate the OPs as a body of development finance law, aligning them to an extent with international law and promoting their systematic application and interpretation. These are significant tasks in the administration of international law. AMs thus become catalysts for the promotion of the *rule of law and justice* in the international development context.[939]

In the light of the foregoing, the IP/CAO are hybrids. They are in part an instrument of judicial review but also a mechanism of accountability. By extension, it is before them where internal and external accountability meets. In the ultimate section of the thesis, I will look at if and how the IP and CAO live up to their role in light of their specific commitments to promote accountability for sustainable development and the SDGs.

---

[935] Id., 273; Schulte (n.899), 742.
[936] Battini (n 900)28-29.
[937] A.Fourie (n.791), 274-276; Schulte (n.843), 744.
[938] D.French, R.Kirkham (n.933), 184, 203.
[939] M.Tignino (n.904), 261 referring to quasi-judicial bodies as procedural and substantive lawmakers; A.Fourie (n.791) 276-280; infra section 3.2.1(b)(ii).

4.4. IBRD AND IFC KEY PLAYERS IN THE DEVELOPMENT OF INTERNATIONAL SUSTAINABLE DEVELOPMENT LAW: INTERPRETATION AND IMPLEMENTATION OF OPS AND THE FACT-FINDING WORK OF IAMS

For the purpose of examining the IBRD and IFC's accountability for sustainable development and the SDGs, the cutting year for the collection of evidence is 2015, when the international community adopted Agenda 2030. Thus, the selection period for the two case studies below is 2015-2019 because complaints filed in the last two years are either at the registration stage or investigation is still open. That said, for many of the requests within this period the IP did not recommend investigation or found complaints ineligible. The multiplicity of development outcomes and severity of harms addressed in the complaints were an additional criterion for their selection because such cases constituted an opportunity to demonstrate the quasi-judicial nature of the IP's/CAO's function as well as the interdependence of development issues as prioritized in the SDGs and how the IBRD/IFC eventually can promote them by complying with their own OPs. It should also be noted, that IBRD complaints were decided based on the previous regime of ESS and IP operating procedures. The same applies to the IFC, although transitional arrangements to its new Policy for ongoing CAO cases have been agreed upon between the IFC and CAO.[940] While this is a limitation, because the newest ESF/ESS are not examined, the cases can still be analyzed through the lens of the SDGs and SD principles, permitting us to draw relevant conclusions.

4.4.1. The WBIP Requests

Case Study:

High Priority Roads Reopening and Maintenance (2nd Additional Financing) (P153836), DRC[941]

The Request for Inspection, registered by the Panel on 13th September 2017, alleges harm suffered by complainants during the course of the High-Priority Roads Reopening and Maintenance project ('Pro-Routes') in the DRC and specifically the Bukavu-Goma road. The protracted conflict in the country, especially in the provincial areas, has contributed to distress, crumbling state institutions and poverty. The development of the transport sector

[940] IFC/MIGA IAM (CAO) Policy–Transitional Arrangements <http://www.cao-ombudsman.org/howwework/documents/CAOPolicy-TransitionalArrangements.pdf>

[941] Case documents: <https://inspectionpanel.org/panel-cases/high-priority-roads-reopening-and-maintenance-2nd-additional-financing-p153836> accessed 30 August 2021.

was key development priority for the government in its effort to stimulate growth, contribute to poverty reduction and provide basic connectivity within the country, where only a fraction of its provinces were connected by road to the capital whereas a large part of the country's territory remained totally inaccessible. The Project was financed initially by a Bank-administered, multi-donor trust fund in 2008 and received twice additional financing, the last being in 2016 to which the Request relates.

Being an infrastructure project, its development objective is to 're-establish lasting road access between provincial capitals, districts and territories in the project implementation area in a way that is sustainable for the natural environment' (SDG9, SDG10.2, SDG11.2, 11.a). The parent project was classified under environmental category A and triggered the safeguards on EA (OP4.01), Natural Habitats (OP4.04), Forests (OP4.36), Physical Cultural Resources (OP4.11), Indigenous People (OP4.10) and Involuntary Resettlement (OP4.12). Accordingly an Environmental and Social Management Framework (ESMF), an Indigenous Peoples Planning Framework (IPPF) and Resettlement Policy Framework (RPF) were submitted already for the parent project and were updated for the second financing with the submission of a new ESIA, IPP and Resettlement Action Plan (RAP).[942]

The complainants (two community members in the project) alleged violations of very serious nature regarding property loss and livelihoods, use of violence against the community, including gender-based violence, and seizure of indigenous communities' resources. The Panel, though, identified the violations as follows:

Livelihood impacts: loss of income due to the occupation of a quarry by the Congolese armed forces, which the Contractor employed to provide security. Construction materials were forcibly taken following torture, assault, battery and physical violence. Moreover, crops were destroyed without complainants being compensated (SDG2, 2.3). Consequently, workers of the quarry were condemned to impoverishment with implications not only for their survival (SDG1) but also for their children's access to education since without income they could not pay school fees (SDG4). Other community members' crops and medicinal herbs were destroyed by the construction works, again without any compensation given. Negative effects for people's health (SDG3) may also be discerned.

Violence: requesters alleged human rights violations, including violence against the community and sexual violence against women, and violation of international humanitarian law (SDG5, SDG16.1, 16.2, 16.a, SDG1.b).

[942] IP Report, paras 1-9.

Labor issues: child labor because young boys were employed as daily laborers, dehumanizing work conditions (verbal and physical abuse of workers) and labor exploitation since the Contractor confiscated a portion of workers' salaries (SDG8.5, 8.6, 8.7, 8.8)

Violation of Indigenous People's rights: due to the forced seizure of their resources, using armed and uniformed military personnel and the destruction of cultural resources (e.g. graves desecrated by project activities) (SDG1.4, SDG11.4)

Retaliation of Requesters by local authorities such as the closure of the quarry (SDG16).

In light of the above, the Panel also assessed compliance with OP4.20 (Gender and Development) and OP10 on investment project financing.[943] The IP's investigation was conducted on the one hand by extensive examination of Bank documents, interviews with staff and the employment of consultants on social and environmental safeguard issues, investigative techniques for gender-based violence, environmental and resettlement experts; on the other, by fact-finding visits on the project site that included also interviews with affected people. Investigation started first with an assessment of the project preparation in response to Requesters' questioning of the quality of project documents that were not detailed. Furthermore, complainants argued that they were sidelined during that phase (ILA Principle 5: principle of public participation and access to information and justice; Rio Principle 10). The Panel noted that the project was prepared and implemented in a constrained timeframe. Therefore preparation proceeded without seriously reviewing whether adequate implementation mechanisms were in place, if there were any capacity constrains and what level of risk the project entailed since it was implemented in riskier parts of the country. The project proceeded based on 'framework documents' of the parent project, which were updated to reflect the new road construction. However, the IP found this approach unjustified since the location and impacts of the project were known.[944] Moreover, there were no 'special considerations'[945] for the deferral of the preparation of safeguard documents to project implementation phase. Consequently, provision should have been made for safeguard documents to be compiled timely and be adequately detailed after consultation with locals. Instead, the lack of site-specific safeguard documents during the preparation of the project left the communities without information about the road and related safeguard protections, including assessments and mitigation measures to address environmental and social risks.[946]

[943] Id., para 37-38. OP4.10 was not assessed because the Panel concluded that grievances described as pertaining to indigenous were rather livelihood issues applying to all local populations.
[944] Id, para 54; Management's justification was that the security situation prevented assessment on project site, MR, 5 footnote 1.
[945] OP10.0, paras 12,53.
[946] IP Report, para 56.

Looking in more detail into capacity constraints, the IP confirmed a very complex institutional arrangement whose dysfunction was exacerbated by actors' lack of clearly defined roles and competence, especially regarding safeguards oversight. Consequently, the assessment of project risks was weak. The project entailed political and governance risks due to the volatile, post-conflict situation in the DRC and the continuous action of armed groups. Additionally, the large number of vulnerable populations, the environmental richness of the area including tropical forests and natural resources raised the importance of mitigation measures to manage the adverse effects on people and the environment. *The IP found Management's design and preparation of the Project in non-compliance with OP10.00 and OP4.01*.[947]

The Panel elaborated on the issue of meaningful consultation with PAP, their participation in the design and implementation of RAP and their recourse to affordable and accessible grievance procedures (GM) for dispute arising from resettlement.[948] *The Panel's findings revealed Management's non-compliance with OP4.01§14 and OP4.12*.[949] Whether the subject of consultation was the project's EA or resettlement matters, stakeholder engagement was weak. There was no indication that PAPs were provided with relevant and culturally appropriate (incl. in their own language) information prior to the consultations. Besides, the consultations that Management claimed to have taken place between 2015-2017 were more information meetings rather than meaningful discussions of specific issues (e.g. rights pertaining to resettlement, compensation) and there was no clear evidence that its was PAP who appeared in the sessions.[950] The situation was not remedied during project implementation either, preventing locals from influencing project decision-making and benefitting from new employment opportunities that the construction of the road presented for some. Moreover, communication with the Constructor was obstructed due to language barriers or resistance from military personnel employed to secure the site.[951] Finally, GMs were only established after the filing of the Request but were not accessible, transparent and effective.[952]

The Panel then continued with the substantive claims of harm. The investigation into the taking of quarry materials and loss of agricultural crops and medicinal plants relates to the

[947] Id., paras 57-70, 76.
[948] Id, paras 82-87.
[949] Id, paras 115-116.
[950] Id, para 91, 96. Safeguard documents were not disclosed to PAP nor were they available in the field.
[951] Id, paras 98-101.
[952] Id, paras 104-105, 108-113 (e.g. imprecise registration of claims, no training of staff, confidentiality of complainants not guaranteed, no indication if compensation was paid).

fundamental developmental issue about the sustainable use of natural resources and states' sovereign right to manage them pursuant to their own environmental and developmental policies and in a rational, sustainable and safe way so as to contribute to the development of their peoples (ILA Principle 1). Contrary to this principle of development, the Panel found that once locals were expelled from their quarry, they were forced to sign extraction agreements without being informed about the quantities and quality of materials taken. Sadly, a specific environmental and social management program with a rehabilitation plan for the quarries was missing and became available only after the quarries were exploited.[953] Furthermore, sand mining methods over the years became unsustainable due to the use of heavy machinery, which exploited the resources very quickly, leading to the closure of the mine.[954] The IP noted that the exploitation of quarries in the specific project context constituted involuntary resettlement in the form of economic displacement (OP4.12).[955]It furthermore led to the acquisition of land from locals and loss of socioeconomic assets ranging from shortages to the production of goods (food) to agricultural income resources to impacts on property (homes, commercial structures that obstructed the road construction).[956] PAP were thus entitled to compensation, however where it was given it did not meet the standards of OP4.12. *The IBRD was found yet again non-compliant with OP4.01, 4.12*.[957]

Community Health and Safety was the second ground of the complaint under which the Panel brought the issue of violence by the military and the related human rights violations. From a developmental perspective, the matter engages ILA Principle 4 on the precautionary approach to human health, natural resources and ecosystems. Of course, the human rights problématique in the development context becomes prominent again. The Panel noted that the absence of a Bank policy on security arrangements presented a policy gap that may have contributed to the harm. It thus resorted to IFC's 'Use of Security Forces Handbook in order to frame the discussion about the use of force by the borrower and its contractors, just like courts expand the sources of legal reasoning by reference to relevant jurisprudence of other tribunals. The Panel did not elaborate on borrower's and contractor's human rights obligations, although it implied that providing security and respecting human rights can be

[953] Id, para 131, 137, 144; 162-163: the Quarry Restoration Plan received later included measures in line with good practice, however described in general terms (e.g. reforestation with suitable species, drainage channels, reshaping of slopes).
[954] Id, para 132.
[955] Id, para 153. 157.
[956] Id, paras 165-170.
[957] Id, paras 173-176.

consistent; hence, security forces' response should be proportional to the threat.[958] Despite the absence of an OP on security forces, Management took the allegations of excessive use of force very seriously and took several actions to address the issue: it requested the Government to address cases of abuse through legal measures and the Contractor to revise its internal rules and code of conduct prohibiting violence, and train military personnel accordingly; it also worked closely with DRC authorities and UN peacekeeping mission in the country to improve the selection of military personnel assigned to the protection of worksites and to train them in humanitarian law.[959] Management updated the ESIA accordingly to highlight the risks of physical and sexual violence perpetrated by military forces and to stress the necessity for the prevention, mitigation and punishment of cases of abuse.[960]

Two more issues with a negative health impact on project beneficiaries were identified. Firstly, workers' accidents, pollution and dust from the construction site, and road accidents which prevented some of the injured people to work and secondly, the disruption of access to drinking water (SDG6) for long periods of time since the ESIA had failed to identify the risk of breakage of water pipes and therefore the Contractor had taken no mitigation measures. Pipe ruptures affected at least a population of 2,000 who had to travel 2,5km to access safe drinking water. Due to the distance, people often used river water of poor quality. As a result, waterborne diseases were transmitted among the population. Subsequent repairs took place but were of poor quality.[961] Against this background *management was held into account for failing to identify risks regarding the use of force by military personnel and not engaging with the Contractor in an adequate and timely manner; for not adequately identifying and mitigating the impacts of water pipe rupture, storm water and lack of road safety, and for its weak supervision, which did not identify harm to communities (non-compliance OP4.01 and 10.00)*.

The third account of the Request, child labor and mistreatment of workers, related to Occupational Health and Safety and Working Conditions (SDG8). The Bank stated that it takes child labor issues very seriously and has a clear position to help reduce harmful child labor through its ongoing poverty reduction efforts. In exercising its due diligence it supported the Borrower's efforts to review the Contractor's labor registry and interview

[958] Id, para 186.
[959] Id, para 201-205; MR (27 November 2017), para 6.
[960] IP Report, para 205-206.
[961] Id, paras 208-221, 225 (additional problem with health impacts was the lack of infrastructure to drain storm water; standing water nurtured mosquito-borne diseases)

community members, including children, in order to identify child labor incidents. It also conducted unannounced checks on worksites with a qualified expert on the matter, but could not confirm any child labor case. In contrast, instances of non-compliant labor and occupational safety conditions were observed (wage withholding, physical/verbal abuse against project workers).[962] Still, since project GM were not fully set up, Management became aware of these issues after a mission trip to the site. It then requested that the Contractor's safeguard specialist and supervision engineer be used as reliable and confidential ombudspersons for any labor issue.[963]

The Panel's investigation shed light to the abovementioned issues. The Panel could not substantiate child labor allegations but discovered that underage boys and girls supplied food and beverages to the Contractor's employees and several were dismissed from school due to repeated absences from class. School dropouts apropos the short-term income opportunities the construction offered subjected children to long-term impoverishment risks (SDG1, 4). The IP determined that this situation was not in the Contractor's direct control, however the company and supervising authorities ought to have engaged with local authorities to sensitize teaches, children and their families about the repercussions of their dropouts.[964] The working conditions and occupational health risks were substantiated. Workers initially lacked formal contracts and received reduced salaries because the conversion to local currency was not done according to the official exchange rate. While these issues were reportedly rectified, workers' average working time (70h/week) exceeded the legal working week in DRC (45 hours). Workers reported for work at 7am and were only allowed to leave after 5.30pm with less than 30 minutes break 7 days/week and without overtime being paid to them.[965] Furthermore, national workers were discriminated by the Contractor, as they had to seek accommodation themselves and pay for it at their own cost whereas the Contractor rented houses for foreign workers. Others lived in temporary camps on worksites in tents, without access to latrines, kitchens and other basic facilities. During working hours, workers were not provided access to safe drinking water. Sanitary conditions were also poor while workers suffered harsh treatment whenever they took a break to search for toilet, food or water. Often they were beaten up by foreign workers when they made mistakes and were dismissed without compensation. Finally, the safety on site was fragile since workers were not provided with protective equipment (helmets, protective boots etc.). Health risks due to waste and

[962] MR (10 October 2017), paras 45-46; 55
[963] Id, 26.
[964] IP Report, para 238.
[965] Id., para 235.

toxic products were also noted and occupational accidents were frequent (SDG12.4). Workers were uninsured and often had to take the burden of paying for medical care. Since Management started to follow up to ensure that the contractor complies its contractual provisions only after the Request was filed, the Panel found it *had failed to adequately monitor or provide implementation support to safeguard workers health and safety, hence it had not complied with OP4.01, 10.00 and the Bank's Health and Safety Guidelines.*[966]

The final issue the Panel discussed was gender-based violence, which the Bank has taken very seriously into account over the years of its project-financing operations. Corroborative to this is the Bank's rigorous regulative framework on the topic and its dedicated effort to highlight the importance of the matter in general and more specific OPs. OP4.01 on EA that requires human health and social aspects of the project to be considered in an integrated manner is expounded by the interim Guidance Note on Assessing Social Impact and Risks. The latter requires special attention to be paid to vulnerable or disadvantaged groups who could experience adverse impacts from a project more severely than others. On this ground, gender differentiated impacts should be examined and assessment should propose measures to ensure that one gender is not disadvantaged over the other.[967] Complementary, the Bank's Policy on Gender and Development (OP4.20) requires that it assesses the gender dimensions of development within and across sector and in relation to the Country's Partnership Framework. Where gender-responsive interventions have been signaled a priority, as in the DRC, the Bank shall ensure that the design of the project is aligned with them. Notably, the Bank has also issued guidelines about managing the risks of adverse impacts on communities from labor influx, including GBV, and has developed a robust risk assessment methodology to identify and mitigate such incidents in projects. Thus, ESIA/ESMP should be informed by the above elements.[968]

Against this backdrop, the Panel discussed in detail the situation of women and girls in the DRC. Its findings about gender inequality and conflict-related sexual violence were alarming. Women encountered systemic sexual violence in a context of impunity and weak governance. Girls' school dropout rates due to early marriage or early pregnancies were high; they were engaged in agricultural and informal labor, as a result of which they were excluded from social and legal protection; they were victims of domestic violence and of abuse from non-state armed groups without access to supporting services for GBV victims (SDG5, 8).[969] The

[966] Id, paras 239-246, 249, 254-255.
[967] WBG, Interim Guidance Note for Assessing Social Impact and Risks under OP/PB4.01, February 2012, 2.
[968] IP Report, paras 261-267.
[969] Id. paras 268-270.

IP took also the opportunity to address to DRC's constitutional and human rights obligations under the international treaties preventing gender discrimination and violence against women. It referred to findings of the CEDAW Committee, noting women lacked effective access to justice in DRC due to delays in judicial reform, the high costs of legal proceedings and the prevalence of corruption. Women were also unaware of the laws and feared retaliation and stigmatization if they reported sexual violence. The widespread distrust of the legal system led them also to prefer out-of-court settlements with the perpetrator or his family.[970]

The Panel was meticulous in verifying requesters' allegations relating to the project. In fact, its investigation was indicative of the Panel's quasi-judicial nature not only because of the methodical way its fact-finding tasks were designed and performed but because the entire proceeding was premised on definitions of GBV offences identified in international documents and on international good practices for the documentation of sexual violence as a crime or violation of international law.[971] The IP made it explicit that it did not seek to satisfy a legal burden of proof as this was outside its mandate. However, it did establish a uniform mechanism for gathering and assessing the validity of evidence it collected, instituting thus a holistic compliance review approach with regards to OP4.20.[972] Eventually, the IP observed a wide range of GBV types related to the project for which perpetrators were mostly foreign workers. Sexual harassment, sexual exploitation and abuse, even rape, were practiced against female workers in the camps under the threat of getting fired. Some cases amounted to modern slavery, although the Panel did not characterize them as such.[973] The same offenses were verified regarding women of the community more general (along the under-construction Bukavu-Goma road). By way of example, women were forced to provide sex work in nearby restaurants, bars and hotels while others were attracted by the payment of small amounts of cash, the provision of food or promises of long-term relationships and marriage (survival sex). Minors were also victims of rape. Naturally, the obvious consequences of GBV varied from health issues (sexually transmitted infections) to psychological traumas, which women could not heal effectively because they could not afford appropriate health services.[974]

As with all previous allegations, the Panel found the initial ESMF inappropriate because it did not take properly into account women's and girls' situation in DRC, hence potential risks

[970] Id, para 271.
[971] Id, para 272, 273-276, 278-288; *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict* (March 2017) <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/06/report/international-protocol-on-the-documentation-and-investigation-of-sexual-violence-in-conflict/International_Protocol_2017_2nd_Edition.pdf> accessed 15 September 2021.
[972] IP Report, para 277.
[973] Id, paras 294-308.
[974] Id, paras 310-326.

to them were either not underscored at all or mitigation measures were very subtly addressed. In contrast, the updated ESIA in 2017 was more comprehensive. Measures to address violence against women included education and information sessions with the community on the issue and about available actions to the victims (legal and medical/psychological support); the establishment of a Code of conduct by the Contractor and a grievance mechanism for victims.[975] Yet, as the Panel observed most of these measures were not implemented and prior to the Request, Management's supervision relied on poorly compiled, and often misleading, reports by the borrower's supervisory bodies.[976] After the Request, Management became indeed more active about remedial actions in cooperation with the borrower in order to address the project-related GBV cases and build the country's institutional capacity to respond more effectively to such issues.[977] While the Panel acknowledged Management's efforts, it opined that all issues would have been properly addressed if the project had commenced with a proper risk assessment/mitigation plan and the community was consulted and involved at the appraisal stage. *Management was therefore not compliant with OP4.01 and 10.00 for not properly assessing gender-based violence, considering the endemic GBV in the DRC and the project area more specifically and for failing to supervise the implementation of mitigating measures or propose redress measures to remedy harm caused by the project*[978].

Responding to the IP's findings, Management submitted its Action Plan in consultation with PAP and in agreement with the DRC.[979] The Bank offered a package support to GBV victims, tailored to their specific needs and in line with best practices and international standards. It also followed-up with the Borrower on the progress of internal investigations by the contractor and the initiation of disciplinary actions against perpetrators as per the Code of conduct. Furthermore, it supported the expansion of the Bank-financed 'Regional Great Lakes Emergency GBV Project' that would support victims after the project was completed. Yet, the Bank proceeded to changes of its policy on GBV on systemic and portfolio level. Indicative, is the issue of a 'Good Practice Guidance Note' for staff on 'Addressing Sexual Exploitation and Abuse and Sexual Harassment (SEA/SH) in Investment Project Financing involving Major Civil Works'. GBV screening now takes place on all new operations under

[975] Id, paras 343-348.
[976] Id, paras 349-355.
[977] MR (20 October 2017), paras 40-44, 59; MR (27 November 2017), 1&3.
[978] IP Report, paras 364-365.
[979] MRR (10 August 2018) <https://inspectionpanel.org/sites/inspectionpanel.org/files/cases/documents/120-Management%20Report%20and%20Recommendation%28English%29-10%20August%202018.pdf> accessed 18 September 2021.

the new ESF.[980] In addition, the Bank tailored its efforts to strengthening the capacity of national institutions, contractors, supervision engineers and GBV service providers. Finally, it enhanced the monitoring and reporting mechanisms for project implementation.

Commentary: The IP's investigation offers insights related to risks of harm associated with infrastructure projects in countries suffering fragility, conflict and violence. If one were to classify the case study under a general theme, one could bring it under the umbrella of 'sustainable development in post-conflict countries'. Pursuing sustainable development strategies in such context is particularly challenging due to the country's scarcity of financial resources and the lack of appropriate institutional structures. Road infrastructure in the DRC is critical for the country's economic growth, poverty reduction and the elimination of inequality between population groups within it. These broad development objectives, which reflect SDGs1, 8, 9 and 10 respectively, are meant to be achieved through a number of individual outcomes that the existence of infrastructure facilitates such as the increase of the country's agricultural output, the improvement of trade competitiveness and the socioeconomic inclusion of isolated communities in the DRC. These objectives are framed in SDG Targets 9.1, 9.2, 10.2, 11.2, 11.a, 17.11 but have a positive effect on other targets such as SDG1.1, 1.2, 1.4, 2.1, 2.3, 2.a, 8.5. At the same time, the implementation of the project had adverse impacts on some of the very same targets and others, as the allegations demonstrated. Thus, the destruction of crops jeopardized food sufficiency (2.1) and agricultural productivity (2.3); productive employment and decent work were challenged by the occupational health and safety risks and the appalling working conditions (SDGs 8.5-8.8) of workers, whereas discriminatory practices between national and foreign employees were also noted; women and girls were particularly affected by discrimination as they suffered violence, sexual exploitation, their work was undervalued and their sexual and reproductive health were at risk (SDGs 5.1, 5.2, 5.4, 5.6); lack of access to safe drinking water and sanitation (SDG 6.1, 6.2), and water resource management (SDG6.5) resulted in water-borne diseases (SDG3.3) while health risks due to toxic products and pollution (SDG3.9, 12.4) were also observed. School dropout rates of young boys and girls hindered them from education opportunities (SDG4.1, 4.5). Local communities' inadequate engagement in the design and

[980] Third Progress Report (18 January 2021), para 10 <https://inspectionpanel.org/sites/inspectionpanel.org/files/cases/documents/120-Third%20Management%20Progress%20Report-January%2018%2C%202021_0.pdf>; Good Practice Note <https://thedocs.worldbank.org/en/doc/741681582580194727-0290022020/original/ESFGoodPracticeNoteonGBVinMajorCivilWorksv2.pdf> accessed 18 September 2021.

implementation of the project were contrary to SDG16.7 since they were not consulted nor had effective GM to address complaints, whereas the exercise of military use of force against workers and community members were indicative of the DRC's weak governance institutions and their capacity to prevent and reduce violence (SDG16.1, 16.10, 16.a).

Considering the above, it becomes evident how a single infrastructure project has a broader development impact and how interrelated and independent individual development outcomes are. Simultaneously, it is clear that scant risk assessment at project appraisal and design may jeopardize its own success because mitigation measures fall short of adequately protecting the beneficiaries of the project. While the borrower has responsibility of project implementation, the Bank was held accountable for not complying with its OPs on EAs, involuntary resettlement, Project financing, the EHS Guidelines, and for inadequate supervision of project implementation. By concluding so, the IP ensured that the safeguards embodied in Bank Policies are adhered to and that corrective measures are initiated in case of non-compliance. The Panel affirmed that projects with a potential growth impact should not proceed at the expense of the environment and people's rights, who are the ultimate beneficiaries. This is the crux of the sustainable development process whose three dimensions are mutually reinforcing and the case demonstrated exactly this point, i.e. that economic, social and environmental aspects are always present in a project and should be integrated.

The Panel thus afforded Requesters their formal rights to access project information, participate in decision-making about its implementation and bring under judicial review the legitimacy of Management's administrative decisions about the project. But is also restated indirectly their substantive rights as prescribed by the SDGs and provisions in human rights treaties (e.g. the International Bill of Rights, CEDAW, Convention on the protection of the Rights of the Child). It is true that the complaints were not framed in the language of the SDGs, neither the IP referred to them since they are not embedded in the text of the OPs. Complainants, however, invoked human rights and dignity as the basis of their complaint without referring to specific provisions. In turn, the IP discussed the country's human rights obligations but it did not decide that the latter should play a role in the Bank's compliance assessment with the OPs like it stated in *Chad Pipeline*. However, the cross-fertilization of OPs with international law was manifested in the way the IP conducted the investigation about GBV and the interpretation of OP4.20. The same can be said about consultation because the IP repeated the approach it had taken in complaints of the past. Additionally, the OP4.01 (EAs) mentions country obligations under international law in any case. This consistency in the interpretation of policies corroborates the earlier observation that the Panel

has created a 'compliance doctrine' over the years, which supports the systematic application and interpretation of the OPs.

Ramifications for the development of SD law exist too. The Panel's interpretation demonstrated that the OPs echo Principles of SD as codified in the Rio and the ILA New Delhi declarations. Again, there is no explicit appeal to them, yet the substantive and procedural aspects of the OPs and the mere access of complainants to the IP engage the Principles of Integration (*ILA 7, Rio 3-4*), the precautionary approach to development (*ILA 4, Rio 15*), the sustainable use of natural resources (*ILA 1, Rio 17*), public participation and access to information and justice (*ILA 5, Rio 10*), and good governance (ILA). The Panel thus contributes to the 'hardening' SD principles through strengthening the binding force of Bank policies. Of course, a direct engagement with these principles would have had a greater impact on the development of ISDL. Likewise, with respect to remedial actions one could insist on the criticism that since they are not legal remedies, they are not effective. Yet, as explained, Management corrective measures amount to de facto remedies. This was also the case in this complaint given that the Panel's findings resulted in changes in the Borrower's implementation of the project and the revision of Bank's policy on GBV.

In the light of the foregoing and recalling Nanwani's and Suzuki's substantive and procedural principles of IAMs' effectiveness, it should be acknowledged that the IP promotes development effectiveness, accountability and redress through transparency, due process and in the framework of realism. By extension, the Bank should be granted the role of the promoter of sustainable development and the law.

4.4.2. IFCAO Requests

Case Study:

Albania/Enso Albania-01/Lengarica[981]

This CAO compliance investigation report was issued in response to a complaint submitted by the Organic Agriculture Association on behalf of two residents of the Permet district in the Gjirokaster prefecture in Albania, where a hydropower plant on the river Lengarica would be constructed. The project was partially funded by the IFC since it had approved equity financing in the project-investing company Enso Hydro Energji Sh Pk (Enso Albania). The investment represented up to 20% equity in Enso Albania. Complainants argued that the project violated IFC's AoA, Policies and Standards. It was also contrary to the

[981] Documents accessed: <http://www.cao-ombudsman.org/cases/case_detail.aspx?id=240>.

Albanian environmental legislation and had irreparable and irreversible negative impacts on the environment and the local population. Specifically they alleged:[982]

- The Hydropower plant was constructed inside the Bredhi i Hotovës National Park, a protected area under national law. The Lëngarica Canyon had also been classified as protected area of first category. Therefore, every kind of construction was prohibited, while seasonal activities that did not impinge on the ecological integrity of the ecosystem (e.g. collection of medical herbs, secondary products of forests) were allowed only with environmental permit. IFC was thus non-compliant with applicable national legislation as related (a) the project's location in a designate protected area; (b) adverse impacts on natural monuments which enjoyed first level of protection under national law and (c) the environmental permitting process.
- Because the river water would be deviated and shifted into tubes for more than 7km of tunnels and pipes, the ecological system would be endangered. Additionally, tourism-based livelihoods would be adversely impacted, particularly water activities and natural landscapes with touristic and cultural appeal.
- IFC had failed to adhere to its own E&S Policies and Standards.[983] Specifically, it had not exercised its due diligence in relation to PS 6 whose objective is the protection and conservation of biodiversity. The project would lead to significant conversion or degradation of the natural habitats in the protected area, which hosted also 'critical habitats'.[984] Decisively, the IFC was accused of not verifying that the client applied with PS6 requirements regarding legally protected areas.[985]
- Finally, complainants regarded stakeholder engagement inadequate and noted that information was not properly disclosed as per the IFC's disclosure of information policy.

[982] Complaint (June 2015).
[983] The project was approved in the context of ESPF and PS 2006 <https://www.ifc.org/wps/wcm/connect/f12fa7cb-267e-442b-ab9d-58f371b9198a/SustainabilityPolicy.pdf?MOD=AJPERES&CVID=kpI-B8K> and <https://www.ifc.org/wps/wcm/connect/3f3419f4-6043-4984-a42a-36f3cfaf38fd/IFC%2BPerformance%2BStandards.pdf?MOD=AJPERES&CVID=jkC.Eka&id=1322803957411> accessed 18 September 2021. The CAO analysed IFC performance against this framework, CAO IR, 12 <http://www.cao-ombudsman.org/cases/document-links/documents/ENG_CAOComplianceInvestigationReport_ensoAlbania-01_06252018.pdf>.However, complainants cited the 2012 ESPF/PS in their complaint, which is more robust. Hence, the requirements of ESPF/PS are more stringent now than the 2006 as there are some differences in the wording of their provisions.
[984] Both as defined in PS6 2006, paras 8-10; compare with PS6 (2012), paras 13-19.
[985] Id, para 11: project planning in line with the management plan for the national park, holding prior consultation with local communities and other stakeholders in the area and having in place additional program with conservation aims. PS6 (2012), para 20 has additional criteria: client has to demonstrate that the proposed development is legally permitted.

For all these reasons, complainants alleged that IFC failed to apply international standards of environmental protection and sustainable development, relevant domestic laws, contrary to its own ESPF and PSs. Consequently, the IFC contravened the 'do no harm' principle and the responsibility of business to respect human rights of populations in areas they operate, namely to avoid infringing upon their rights and to address adverse human rights impacts linked with their operations.[986]

For the purposes of the investigation the CAO went on a mission in Albania in autumn 2016 and held discussions with complainants, the client and other stakeholders. It also engaged with the IFC, reviewed relevant documentation and sought input of an external biodiversity expert. Given that IFC's oversight responsibility is already engaged in the pre-investment phase, the CAO scrutinized IFC's supervision from the period prior to making in the investment and throughout implementation. Prior to investment, the IFC reviews the project's E&S risks and impacts and agrees with the client on mitigation measures, consistent with the project's nature, scale and level of risks. The client's commitment and capacity to manage the risks weighs significantly given the central principles that the IFC shall refrain from financing business activities that cannot be expected to meet the PS over a reasonable timeframe.[987] Reviewing the clients ESIA, the IFC classified the investment under Category B, meaning that the adverse ES impacts were expected to be limited, site-specific, largely reversible and readily addressed through mitigation measures. Nevertheless, an assessment of the biodiversity value of the river system, environmental flow monitoring and an analysis of impacts on hot springs, ancient bridges and the Lengarica canyon were requested by the IFC board. Accordingly, an ESAP was compiled with actions at client- and project level, leading to the investment's approval. Thereafter, the IFC supervised its investment through the company's reporting and periodical site visits.[988] CAO's compliance analysis revealed the following:

Impacts on endangered species and natural/critical habitats (SDG 15/15.1/15.5/15.8): For these claims the CAO focused on the methodology that was used to determine the hydropower plant's (HPP) environmental flow metrics and asked whether the EIA had considered risks for endangered species and properly evaluated the project's cumulative impacts on biodiversity. The legitimizing basis for these parameters is PS1 (ESIA) and PS6. According to the former ESIA should constitute an 'adequate, accurate and objective

[986] ESPF (2006), Section 2, paras 8-9; ESPF (2012), Section II, paras 9, 12-13.
[987] ESPF (2006), paras 13, 15, 17.
[988] CAO IR, section 1.4.

evaluation based on current information and appropriate E&S baseline data'.[989] The latter requires that threats to biodiversity arising from operations are avoided or mitigated and natural resources are sustainably managed. Projects in areas of natural habitats should not significantly convert or degrade them. Ideally, the end goal should be no net loss of biodiversity in natural habitats that's why when critical habitats exist, project requirements even more rigid.[990] The CAO noted that client's ESIA had acknowledged the high biodiversity value of the project area. It mentioned the presence of endangered/endemic species (flora and fauna) and that a partial limitation of habitat due to the diversion of the water would occur. However, the CAO pointed to the false classification of some as endangered rather than 'critically endangered', as per the IUCN criteria, and on occasions to the incomplete, inaccurate and non-detailed information about the project's impact on the species referred therein. For example, it was unclear if the residual water flow was adequate to protect the different functions of the river, conserving the habitats for plants, wildlife and aquatic species. Moreover, the IFC overlooked the client's reporting of the construction of another HPP in the same river system. Cumulative impacts on biodiversity were thus not addressed. Overall, the CAO observed that the quality of ESIA did not meet the standards of PS1&6 nor the client's biodiversity monitoring program could substitute the inadequate prior risk assessment. *IFC's pre-investment review was insufficient*, making it impossible to define the necessary mitigation measures for the Lengarica HPP to meet project requirements.[991]

Turning to the implementation phase, the CAO agreed with the IFC's response to the claims, namely that biodiversity concerns has been clarified and, where necessary, properly addressed after the biodiversity consultant hired for the biodiversity monitoring program expanded the scope of its work and closed the gaps of the ESIA by instructing additional biodiversity assessments. The relevant Environmental and Social Action and Monitoring Plan (ESAM) consolidated mitigation measures for the client to avoid impacts and comply with international requirements. The IFC concluded that critical habitats as defined in PS6 and the biodiversity values of the river were not impacted. Within this context, IFC's supervision was deemed adequate since it had taken all necessary steps to satisfy itself that the client managed risks in relation to the protection and conservation of biodiversity in compliance with PS6. CAO arrived to the same conclusion with regards to the evaluation of that quantity and quality of water flows. Truly, a competent consultant confirmed that the plant would change the natural dynamic of the river: aquatic species would be impacted during its operation due

[989] PS1 (2006), paras 4,7; ESPF (2006), para 15.
[990] PS6 (2006), paras 1, 4, 6, 7-8, 10.
[991] CAO IR, 18-19.

to reduced water depth; the dilution of thermal water in the river and the increase of chloride concentrations and water temperature would also contribute to this. However, data was inadequate to assess impacts with precision, so a two-year monitoring program was put in place. Assessments revealed that key species were present and that the river was a suitable habitat for their reproduction; fish migration was possible until the upstream river part where the second HPP was operating because it did not provide and environmental flow. Yet, temperature alterations and chlorine concentrations were the most risky factors. The IFC required that the client employed an adaptive management framework and continuous monitoring. Conclusively, no measurable negative effects on diversity were noticed.[992]

Impacts on ecosystem services (ecotourism value of Lengarica river) (SDG12/12.2/12.b, SDG8): According to the ESIA, the Lengarica Canyon provided opportunities for mountainous tourism and water sports alike. Moreover, the water springs were known for their curative value and the river was famous for its high natural scenic value and tourist attractions. The construction of the HPP would certainly decrease the touristic and landscape significance of the area. Whereas a hydrological study to assess the impact of the thermal springs was commissioned at pre-investment stage, the CAO found that further analysis was needed in order for the risks and impacts on the entire spectrum of ecosystem services (incl. the area's visual and touristic appeal). In that respect, the ESAP was incomplete because it did not instruct the client to undertake additional assessments. *The IFC had failed to ensure that the client's ESIA identified impacts on ecosystem services (PS1§5,14; PS6§4).*

As with the biodiversity concerns the ESAM was more comprehensive and demonstrated that a negative impact on ecotourism would result in income loss of the locals (SDG1.4). Indeed, the Tourism Impact Assessment (TIA) conducted signaled an overall positive effect on tourism because it would improve infrastructure (SDG9.1), yet receptors of some activities (e.g. hiking, rafting, kayaking) would not benefit equally from the investment due to landscape changes. Notably, local stakeholders were not consulted nor informed about the content of the TIA.[993] CAO noted that IFC's subsequent supervision of the Lengarica HPP confirmed project impacts on certain types of ecotourism activities. *However, in relation to these impacts, it did not ensure adequate stakeholder consultation or that appropriate*

[992] Id., 19-21.
[993] IFC Guidance Notes (2006), GN6 regarding PS6, para G4 about stakeholders' consultation <https://www.ifc.org/wps/wcm/connect/0b481a5d-958a-43a9-a1e4-2461b4bb8753/2007%2BUpdated%2BGuidance%2BNotes_full.pdf?MOD=AJPERES&CVID=jkD0J0V&myconnectid=1322804281925> accessed 20 September 2021.

measures to minimize, mitigate and/or offset impacts (compensation) were added to the ESAP as required by PS1§14.[994]

Impacts on protected areas and natural monuments (SDG6.6, SDG11/11.4, 12.b): According to the complainants, the construction of the Lengarica HPP violated the national legislation in relation to protected areas, having proceeded without authorization from the Ministry of Environment and damaging natural resources and monuments (the Canyon, Petran Stone, Banja's pigeons cave, Kadiu Bridge and thermal waters). The CAO confirmed that the plant was located in the Bredhi i Hotovës National Park before the IFC considered investing in the project. In fact, the plant operated within three of the four usage restrictions zones of the park – the sustainable use zone, the recreational zone and the traditional use zone that permitted seasonal and traditional economic activities and recreation under specific conditions. The IFC however raised the issue with the client much later, after protests took place and complainants challenged the legality of the construction's permitting process. It then reviewed a legal opinion issued on the client's behalf, which acknowledged the plan's location in the national park but assured that the client had not engaged in activities prohibited by the Law on Protected Areas and had complied with permitting requirements. *The CAO found the IFC at fault with regards to its due diligence responsibility at the pre-investment stage because it did not identify the HPP as being located within the national park.* As a result, *the IFC did not trigger the implementation of PS6§11, which sets out client requirements when planning a project in a legally protected area and did not take into account issues related to the application of Albanian law on protected areas.* Reviewing IFC's subsequent actions to verify the project's location and client's compliance with PS6,[995] the CAO found that a management plan for the national park had been adopted while the HPP's implementation was ongoing. As expected, the CAO did not elaborate on the legality challenge because it is outside the scope of its compliance review but opined that the IFC was not in a position to monitor whether the client was actually acting pursuant to the management plan since it was not aware of it. Therefore, the IFC's supervisory role was not effectuated and the CAO suggested the project's continuous supervision to ensure that the client follows the management plan for the park and consults stakeholders.[996]

Disclosure, consultation and stakeholder engagement (SDG16/16.7/16.10): The CAO's investigation confirmed that the project was not designed or implemented with transparency. Neither project information was properly disclosed to community stakeholders nor did

[994] CAO IR, 21-23.
[995] (n 965).
[996] CAO IR, 23-28.

consultations meet IFC policy standards. Pre-investment engagement with directly affected parties consisted of a questionnaire collected from inhabitants of the municipality. Not only that, but the questionnaire's scope was limited since it only surveyed servitude agreements between the company and community members regarding the use of their lands and access to irrigation for agricultural purposes. Concerns of locals whose livelihoods depended on tourism were not included and these stakeholders were also excluded from subsequent discussions with the company. According to the CAO, those client initiatives did not amount to consultation at all. Moreover, locals could not participate meaningfully in the discussions since they had not received relevant project information timely and in an understandable and accessible manner.[997] Neither the IFC nor the client had disclosed the ESIA upon which the former based its E&S review of the project. The IFC had thus failed to comply with its disclosure policy and PS1, whereby it should have ensured that the client disclose publicly the impact assessment and furnish stakeholders with copies in a culturally appropriate way (e.g. in their own language). Consequently, the local community members were deprived of their right to express their view on project risks, impacts and mitigation measures, hence have their views about the development benefits and drawbacks incorporated in the client's decision-making process.

During project operation the IFC encouraged its client to strengthen stakeholders engagement. The Client's Stakeholder Engagement Plan (SEP) demonstrated efforts to remedy the limited stakeholder engagement before construction. A local information office was established and a community liaison officer (CLO) was appointed who would serve as a grievance mechanism. Furthermore, a roundtable discussion with civil society took place in the capital of Albania. Nonetheless, there seemed to be no stakeholder engagement with these bodies, rendering questionable if locals were actually aware they existed. In light of this, the CAO concluded that IFC's supervision fell short of the requirements in PS1.[998]

In response to the CAO's investigation, IFC management took several remedial actions at the systemic and project-level. Currently, the IFC has improved its pre-investment E&S review in relation to cumulative impacts and environmental flows. Its current practice is informed by formal staff and client guidance found in the 'Good practice Handbook on Cumulative Impact Assessment and Management' and the 'Good practice Handbook on

[997] PS1 (2006), para 19: Community engagement will be free of external manipulation, interference, or coercion, and intimidation, and conducted on the basis of timely, relevant, understandable and accessible information; para 20 on information disclosure; para 21 on effective consultation based on prior information disclosure and effectuated in an inclusive and culturally appropriate way; para 22, highlighting free, prior and informed consultation and participation. CAO IR, 28.
[998] CAO IR, 28-30.

Environmental flows'.[999] Moreover, it has upgraded and uses more systematically the Integrated Biodiversity Assessment Tool (IBAT) at project level while it has established a biodiversity focal point and regional champion network to ensure E&S specialists have access to biodiversity support.[1000] Through these means the IFC is better equipped to identify protected areas and assess more comprehensively biodiversity risks in project areas. With respect to information disclosure, the IFC has a new Access to Information Policy (2012) now the focuses on greater disclosure at asset level ESIAs, which are included in the disclosure package.[1001] At project level, the IFC has released the original Lengarica ESIA on its project information portal to remedy the initial non-disclosure. To facilitate CAO's request for ongoing monitoring of client's compliance with the MP for the park and for mitigating the impacts on tourism, the IFC agreed on an AP with the client for being an active participant in the development of management plans for the park and the national springs. To date, Enso has met with the National Agency for Protected Areas and the company had become a formal consultee to a new MP already being drafted.[1002] Furthermore, the company has held discussions with the Mayor in order to manage tourism impacts. There is agreement for the HPP to release sufficient water for kayaking on minimum two weekend days in low flow season, however further measures need to be taken. To this end, the IFC will hold consultations with locals utilizing the CLO for engagement opportunities with stakeholders, who still oppose the construction of the plant.[1003] CAO monitoring is ongoing.

Commentary: The *Lengarica HPP* complaint is another example of the contested nature of development as a process. While being an investment that would improve Albania's energy infrastructure (SDG 7.a/7.b, SDG9), giving thus a boost to the country's economic growth and energy services, it simultaneously put at risk the region's biodiversity, water-related and terrestrial ecosystems, the management of natural and physical resources, the area's cultural significance and economic importance for the locals who depended on the river's economic and natural values as an income source. The conflict between the economic, social and environmental dimension of sustainable development is obvious. The number of SDGs engaged (SDG1, 6, 7, 8, 9, 11, 12, 16) confirms this since they can be easily matched

[999] MR, #1, 4 <http://www.cao-ombudsman.org/cases/document-links/documents/IFCManagementResponsetoCAOInvestigationReport-EnsoAlbania-Project30979.pdf>
[1000] Id, #7
[1001] Id., #10; AIP <https://www.ifc.org/wps/wcm/connect/c8a61c48-32c2-49b2-8e46-2ade87f774e0/IFCPolicyDisclosureInformation.pdf?MOD=AJPERES>
[1002] ComplMonRep, 4 <http://www.cao-ombudsman.org/cases/document-links/documents/CAOCompliance_MonitoringReport_EnsoAlbania-01_December2019.pdf>
[1003] Id., 5-6.

to the aforementioned dimensions. The CAO's findings pointed to the significance of robust impact assessments for their integration. By not complying with PS1 and PS6, the IFC failed to do so in its own assessment of the project and in assisting its client. Speaking in legalistic terms, its non-compliance violated *ILA Principle 7* (integration principle), which all sectors of society and all governance levels should implement, and *Rio principles 3 and 4*. By extension, the failures of the ESIA raised issues under *ILA Principles 1 and 4* and *Rio Principles 15 and 17* given that conservation issues, the management of natural resources and the protection of ecosystems in the project area were not adequately addressed, preventing thereafter a precautionary approach to risk management by the client. Scientific information was not up-to-date from the outset and transparency standards were not met. Indeed, the consultations with local community were missing and when stakeholder engagement took place, it did not meet IFC standards. Consequently, *Rio Principle 10 and ILA Principle 5* were not adhered to.

Yet, just like the IBRD complaint, neither the SDGs nor the ILA and Rio Principles were used to frame the complaint. The conclusion that the IFCCAO's compliance review promotes them derives from the interpretation and application of the PS by the CAO in the case. Unfortunately, the CAO was not as elaborative as the IP in the previous case study. The CAO didn't refer to international law standards regarding the environmental issues raised and did not really expound on the notion of consultation. It could plausibly be argued though that there was no need for this since PS1&6 refer to international law instruments on environmental protection and biodiversity respectively. The same holds true for the understanding of consultationn the practical and normative standards of which were codified in the PS provisions and IFC disclosure policy. Unfortunately, the human rights obligations of business were not mentioned at all given the standards IFC's statement that the PS that help the private sector address E&S risks are consistent with these responsibilities. By extension, the CAO did not comment on how the IFC in its supervisory role could have helped its client meet its human rights obligations. Similarly, there was no robust statement that the IFC's non-compliance at pre-investment and project-implementation stage moderated its role in poverty reduction through positive sustainable development outcomes. A more evident embracement of the IFI's Agenda 2030 commitment would be of course desirable.

That said, recourse to the CAO provided PAP with the right to access justice *(Rio Principle 10, ILA 5)*, to be heard and have the harm suffered mitigated. The compliance review per se, its outcomes and the remedial action by the IFC at systemic and project-level, being de facto remedies, fill in 'justiciability' gaps in the wider sense of the notion.

Successively, the CAO provides IFC's activities some legitimation, hinting to development effectiveness through a process informed by accountability and the rule of law.

4.5. IN CONCLUSION

This section firstly exhibited that sustainable development and the SDGs have been mainstreamed in the IBRD/IFC's funding program through the release of Bonds that finance projects aiming to realize specific SDGs outcomes. Secondly, the mission creep criticism was rebutted this time on the basis of the legal argument that the evolutive-teleological interpretation of the Bank's AoA according to Art.31VCLT supports the wider construction of the Bank's mandate in line with the contemporary legitimate expectations of the international community. Thirdly, it was argued that the IBRD/IFC have become addressees of existing and emerging norms of international law on sustainable development due to three reasons: the evolutive interpretation of their AoA; the pertinence of environmental and human rights considerations to their OPs, which indicate IBRD/IFC's (indirect) acceptance of their duty to uphold environmental and human rights legal norms; and their institutional role in development, as avowed anew in Agenda 2030 and the AAAA. Consequently, the case can be made that the IBRD/IFC have taken an affirmative legal duty to promote environmental and human rights objectives, which bear directly on sustainable development. This argument was complemented further by the analysis of the IBRD/IFC's safeguard policies and their positive assessment as a distinct legal body of common standards, rules and procedures for the promotion of sustainable development. For this reason it was contended that OPs not only constitute rules of the global administrative law for development, but also an autonomous source of obligations in development finance law and ISDL more broadly.

Then, the mechanism whereby the aforementioned legal duty is enforced was examined. The discussion proceeded with an account of the rationale and objectives of IAMs and a comparison between the WBAM/IP and IFCAO. They deemed effective when they deliver development effectiveness, accountability and redress through a transparent procedure that safeguards due process and the realism of the IFIs' functions. In this respect, the IP and CAO are hybrid in nature; they trigger the responsibility of IFIs' administration (accountability) and perform a quasi-judicial function too. As they interpret, apply and enforce IFIs' OPs and scrutinize IFIs' decision-making, they promulgate the OPs as a body of development finance law and promote their systematic application. Moreover, to the extent that OPs mirror sustainable development principles in international law, IAMs contribute to their 'hardening'

and clarification of IFIs' obligations towards the beneficiaries of development. IAMs, thus, become catalysts for the promotion of the rule of law, justice and good governance in development. The two case studies that followed illustrated how.

CHAPTER 5
HOW ACCOUNTABLE IS THE WBG FOR SUSTAINABLE DEVELOPMENT AND THE SDGS FINALLY?

I would say the answer is 'it depends on the narrative within which one understands the WBG's accountability and therefore on the criteria one uses to assess it'. Accountability for IOs like the WBG has been primarily understood within the political model of delegated powers to some authority: an authority that exercises public power has a duty to account to some entity for its actions. Institutional accountability by virtue of the IBRD/IFC AoA, namely answerability to internal stakeholders in line with the institutional relations between the WB and MS or between the institutions' organs, fits this model. This type of accountability responds to a demand to control and improve the WBG's administrative efficiency and eventually its operational effectiveness.[1004] The second accountability model brings the WBG under scrutiny to the public. It is a 'participatory' model. PAP's recourse to the IP/CAO in order to seek redress for the inflicted harm by Bank-financed projects is classified under this model. Accountability is perceived here within the narrative of justice. The two models are not mutually exclusive. However, the associated narrative to each model prioritizes different normative purposes of accountability; administrative efficiency and effectiveness v. justice. Accordingly, the narrative defines what actors are accountable for, according to what standards they can be held to account, and what consequences may be imposed.[1005] To answer thus the question posed here, one ought to be clear about how one defines the nature of IBRD/IFC AMs, because, depending on one's lens, the criteria for evaluating the outcome of the accountability process change. Secondly, one ought to be clear about what accountability in the context of sustainable development (SD) entails. By this I mean that one has to evaluate the outcome of the accountability process according to one's conceptualization of SD and the more specific rules that apply to the role the WBG plays in it.

Pursuant to the understanding of SD put forward in the thesis, its defining characteristics are substantive and procedural. The former depicts the normative end of human wellbeing, which in turn translates into practical outcomes (e.g. adequate living standard, natural resource management, biodiversity protection etc.) through the integration of the economic, social and environmental dimensions of development. The latter indicates that the

[1004] Infra section 4.3.2
[1005] S.Park, 'Accountability as Justice for the Multilateral Development Banks? Borrower Opposition and Bank Avoidance to US Power and Influence' (2017) 24(5) Review of International Political Economy 776.

achievement of substantive objectives relies on a process that facilitates people's free and meaningful participation, transparency, stakeholders' reasoned decision-making and the effective review of those decisions through accountability procedures that uphold due process. Obviously, this conceptualization of SD is people-centered and, generally, rights-based. Furthermore, the concept has policy and legal connotations. While SD is an aspirational policy objective agreed at high-political level, hence reflective of stakeholders' political and moral commitments to a universal, equitable, distributive and more comprehensive development paradigm, it has translated into a guidance principle for decision-making and dispute resolution, which dictates the international community's expectation that stakeholders take a holistic approach in these processes, aiming at the integration of the diverse rules and interests inherent in the economic, social and environmental fields. SD is not a rule, which prescribes a specific actor conduct. Thereafter, an actor may not be held accountable or even responsible for breaching an obligation to 'develop sustainably'. Rather, accountability would entail that an actor be subject to scrutiny for making development decisions that do not emerge from a process that promotes sustainable development. Accountability for SD, in my view, upholds the procedural dimension of SD first and when this is satisfied, the fulfillment of the substantive dimension becomes practical and effective too.

The WBG has reacted to both the policy and regulatory ramifications of SD in its capacity as a specialized agency of the UN and having become an advocate of *Agenda 2030* and the *SDGs* in its own right. Its active participation in the high-level political deliberations and the public proclamation of SD's compatibility with its institutional purposes, reformulated the demand for integration of SD criteria into financing. Specific financial tools have been employed to this end while broader commitments were made in the FFD conferences, and particularly the *AAAA*. The *AAAA*, which constitutes an integral part of *Agenda 2030,* endorsed the Rio Principles and the Busan principles for effective development cooperation, and stressed the relevance of the rule of law, good governance, human rights and accountability to financing. Nonetheless, the WBG's internalization of the expectation and demand for integration of socioeconomic and environmental considerations into development decision-making has taken place substantially through the IBRD/IFC safeguard systems. The IBRD OPs/new ESF and IFC's SF as interpreted and applied by the IP/CAO are instrumental vectors of SD for clients and the WBG itself. In this regard, though, the WBG has not been a passive recipient of the principles and objectives that define the international framework for SD but has exercised its own power and authority in development governance. Through the

safeguards systems it has set its own authoritative standards for SD and has shaped international practice through its decision-making. As a result, the standards against which the WBG is assessed with respect to the execution of its mandate may resonate in international SD norms but have also developed according to the WBG's own understanding of the notion and of its role as administrator of development. Notwithstanding this, the interplay with international law is there, as is the WBG's special responsibility to affirm the integration principle.

Against this backdrop, the IBRD/IFC are accountable to PAP for the impact their decision-making faults have on PAP's wellbeing and the procedure before the IP/IFCAO is essentially an investigation of the IBRD's/IFC's compliance with its obligation to employ the integration principle in its policy formulations and decision-making. The substantive and procedural requirements in each safeguard confirm the WBG's effort to provide a framework that concretizes integration in the context of project finance and stresses the importance of designing development interventions based on exhaustive planning and decision-making. Moreover, the IP/CAO have found the IBRD/IFC systematically non-compliant, demonstrating their willingness to reveal harm caused by IBRD/IFC-financed projects. In addition, the CAO's (and partially the IP's) power to monitor progress of MAP's in order to bring the IBRD/IFC back into compliance strengthens the WBG's effort to safeguard the process and objectives of SD. The case studies revealed the importance of process since the claims showed actually that the lack of enforcing the procedural aspects of the safeguards led to the harm caused to people and the environment by the IBRD/IFC. Consequently, access to the WBG's AM and the overall robustness of the compliance procedure[1006] before the IP/CAO, as informed by the criteria of their operational effectiveness, does facilitate the WBG in the discharge of its obligation to foster SD's procedural dimension. AMs create a liaison between the ultimate beneficiaries of the development process and the WBG as critical decision-maker, thus, striking a balance between the administrative and justice narrative of accountability. By giving PAP access to recourse, they hold the WBG directly answerable to them for upholding equitable participation and transparency, which are fundamental aspects of the procedural facet of the right to development.

Having said that, I should acknowledge the limitations of the IP/CAO function. The first relates to the effectiveness of the *de facto* remedial actions undertaken by Management. Without downplaying their positive impact at project- and institutional level, more empirical and multidisciplinary research is needed locally (in project areas) post-MAP monitoring to

[1006] Notwithstanding challenges, see infra section 4.3.2.1(ii).

identify their actual positive impact on communities. Such task shifts attention to the evaluation of MAPs and to a potentially more active involvement of the IP/CAO to the development of remedies. The recent revisions of the Panel's/CAO's function was a missed opportunity to address the issue formally in the amended IP resolution and CAO policy.[1007]

The second limitation concerns the regulatory convergence between the WBG's safeguards and the emerging international law on SD, a relationship that exists but is not explicit or firm enough. As shown from the foregoing analysis, the safeguards are authoritative in setting behavioral standards for the WBG and borrowers that are shaped by existing international obligations on human rights, environmental law and climate change treaty commitments (although the link with the latter is more scant). Their formal harmonization with hard and soft law instruments such as the Rio and ILA principles would enhance even more their authoritativeness as sources of the WBGs' legal obligation to promote SD, not to mention the 'emulation effect' they would have on other MDBs. Importantly, the WBG will be complying with the human rights and environmental obligations by which it is bound and would be directly implementing the Declarations on SD, which it has endorsed. Finally, harmonization would strengthen the credibility of the AMs since its current approach to referencing international law and developing the normative content of the safeguards, which now simply reverberate SD principles, will be tied to a firmer legal basis. Henceforth, the WBG would champion the holistic and rights-based approach to development that is furthered by the SDGs and that itself promulgates, escaping the criticism for 'lingering asymmetries in the SDGs and human rights'.[1008] More generally, however, with States and MDBs prescribing to the same rules and principles, development interventions would indeed be predicated on a coherent common law on SD.[1009]

Would such transformation of the WBG be ever possible? We should not forget the amalgam of interests that underlie the WBG's function and in turn the AMs' purpose. The public v. commercial mandate of the Bank and its effort to retain its currency as primary lender means that AMs subsume pressures from PAP, governments and Bank staff, all of which have different perceptions about the bindingness of international law on the WBG and

[1007] A.Fourie (n.791), 334-335.
[1008] D.Desierto, 'Lingering asymmetries in the SDGs and Human Rights: How Accountable are IFIs in the International Accountability Network' (*EJIL:Talk!*, 22 February 2019) <https://www.ejiltalk.org/how-accountable-are-international-financial-institutions-in-the-international-accountability-network/>
[1009] de Moerloose (n.694) 111-113.

conflicting expectations about accountability.[1010] In the current state of affairs, the AMs make an important contribution to development governance by turning it into a more transparent and legitimate process in line with SDG16.6. Nevertheless, accountability in development finance remains a sustainability challenge for the WBG.

[1010] B.K.Sovacool et al, 'Disequilibrium in Development Finance: The Contested Politics of Institutional Accountability and Transparency at the World Bank Inspection Panel' (2018) 50(4) Development Challenge 867.

BIBLIOGRAPHY

UNITED NATIONS SOURCES:

Agreement Establishing the World Trade Organization (1994) 33 ILM 1125

Agreement between the United Nations and the International Bank for Reconstruction and Development (adopted 16 August 1947, entered into force 15 November 1947) (1948) 16 UNTS 346.

United Nations and International Bank for Reconstruction and Development (acting for and on behalf of the International Finance Corporation: Agreement on Relationship between the United Nations and the International Finance Corporation (adopted 19 December 1956, entered into force 20 February 1957) (1957) 265 UNTS 312

Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119

UN Convention on Biological Diversity (5 June 1992, into force 29 December 1993), 1760 UNTS 79

Convention on the Privileges and Immunities of the UN (1946) 1 UNTS 15

Convention on Privileges and Immunities of Specialised Agencies (1949) 33 UNTS 261

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171

UNGA, Elaboration of An International Convention to Combat Desertification in Countries experiencing Serious Drought and/or Desertification, Particularly in Africa – Final Text of the Convention (12 September 1994) A/AC.241/27

UN Framework Convention on Climate Change (4 June 1992, into force 21 March 1994) 1771 UNTS 107, Art.3

Kyoto Protocol to the UNFFCC (1998) 37 ILM 22

Vienna Convention on the Law of Treaties (22 May 1969), 1155 UNTS 331

Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (adopted 21 March 1986, not in force), UN Doc A/CONF.129/15

UN General Assembly Resolutions:

UNGA Res 1240 (XIII) (14 October 1958)

UNGA Res 1710 (19 December 1961)

UNGA Res 1831 (XVII) (18 December 1962)

UNGA Resolution 2398 (XXIII) (3 December 1968)

UNGA Res 2542 (XXIV) (11 September 1969)

UN GA Res 2626 (XXV) (24 October 1970)

UNGA Res 3201 (1 May 1974) UN DOC A/RES/S-6/3201

UNGA Res 35/36 (5 December 1980)

UNGA Res 42/187, 'Report of the World Commission on Environment and Development' (11 December 1987) UN Doc A/RES/42/187

UNGA Res A/RES/41/128 (4 December 1986)

UNGA Res 45/199 (21 December 1990)

UNGA Res A/RES/55/2 (8 September 2000)

UNGA Res 66/288, *The Future we* want (11 September 2012) UN Doc. A/RES/66/288

UNGA Res 67/1 (24 September 2012) ('Declaration on the Rule of Law')

UN Agenda for Development (1997) UNGA Res A/RES/51/240

Charter of Economic Rights and Duties of States, UNGA Res 3281 (XXIX) (12 December 1974)

Consolidation of the Special Fund and the Expanded Program on Technical Assistance in a United Nations Development Program, UNGA Res 2029 (XX) (22 November 1965) UN Doc A/RES/2029

Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, UNGA Res 2526 (XXV) (24 October 1970)

Declaration on the Rights of Indigenous Peoples (2 October 2007) UN Doc A/RES/61/295

Declaration on the use of Scientific and Technological Progress in the Interests of Peace and for the benefit of Mankind, UNGA Res 3384 (XXX) (10 November 1975)

Program for Further Implementation of Agenda 21, UNGA Res S-19/2, Annex 28 June 28 1997, (1997) 36 ILM 1639

UNGA, 'Format and organisation aspects of the high-level political forum on sustainable development' (23 August 2013) UN Doc A/RES/67/290

Vienna Declaration and Programme of Action, UNGA Res 48/121 (20 Dec 1993)

World Charter for Nature, UNGA Res 37/7 (28 October 1982) UN Doc A/Res/37/7

ECOSOC Resolution:

ECOSOC, 'Conservation and Utilization of Resources', Resolution 32(IV) (28 March 1947), UN Publication Sales No.47.1.14, 5

UN Secretary-General Reports:

The United Nations Development Decade: Proposals for Action, Report of the Secretary General (E/3613), United Nations Publication No. 62. II.B. 2, New York 1962.

Kofi A. Annan, 'We the Peoples', The Role of the United Nations in the 21st Century' (2000) UN Department of Public Information <http://www.un.org/en/events/pastevents/pdfs/We_The_Peoples.pdf>

UNGA, 'Road map towards the implementation of the United Nations Millennium Declaration, Report of the Secretary-General' (6 September 2001) UN Doc A/56/326 Annex.

Report of Secretary-General, 'A life of dignity for all: accelerating progress towards the Millennium Development Goals and advancing the UN development Agenda beyond 2015' (26th July 2013) UN Doc A/68/202

Report of Secretary-General, 'The Road to Dignity by 2030: Ending Poverty, Transforming All Lives and Protecting the Planet' (4 December 2014) UN Doc A/69/700

UN Secretary General, 'Remarks at Inaugural Meeting of the High-Level Political Forum on Sustainable Development' (24 September 2013) <https://www.un.org/sg/en/content/sg/statement/2013-09-24/secretary-generals-remarks-inaugural-meeting-high-level-political>

UN Secretary-General, 'The Rule of Law and Transitional justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General' (Aug. 23, 2004) UN Doc S/2004/616*

Special Procedures Reports/Expert Group's Reports:

Report of the Special Rapporteur on the Right to Development (2 August 2017) A/HRC/36/49.

Report of the UN Independent Expert on Human Rights and International Solidarity, UN Doc A/HRC/35/35, Annex

Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development, Geneva, Switzerland, 26-28 September 1995 <https://digitallibrary.un.org/record/212979/?ln=en>

Report of Open-ended Working Group on the Right to Development (20 March 2001) E/CN.4/2001/26 Annex III

Report of Open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights (10 February 2005) UN Doc E/CN4/2005/52

Special Report of the International Labour Organisation (ILO) to the ECOSOC on the Implementation of the Program of Action adopted by the World Employment Conference (Geneva, 1-17 June 1976) (ILO 1977) <http://staging.ilo.org/public/libdoc/ilo/1977/77B09_1480_engl.pdf>

'The Parlous State of Poverty Eradication: Report of the special Rapporteur on extreme Poverty and Human Rights' (19 November 2020) UN Doc A/HRC/44/40

Treaty-Monitoring Bodies:

CESCR, 'General Comment No. 3' (1990) UN Doc E/1991/23

CESCR, 'General Comment 12' (1999) UN Doc E/C.12/1999/5

CESCR, 'General Comment 14'(2000) UN Doc E/C.12/2000/4

CESCR 'General Comment 15' (2003) UN Doc E/c.12/2002/11

CESCR, 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights' (10 May 2001) E/C.12/2001/10

CESCR, 'General comment No.2 (Art.22)' (2 February 1990) UN Doc E/1990/23, para 6; UN Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex 1

CESCR, 'General comment No.24' (10 August 2017) Un Doc E/C.12/GC/24

CESCR, 'General Comment No.23' (7 April 2006) UN Doc E/C.12/GC/23

CESCR, Concluding Observations (Belgium) (1 December 2000) UN Doc E/C.122/1/Add.54

CESCR, Concluding Observations (Italy) (23 May 2000) UN Doc E/C.12/A/Add.43

Committee on Elimination of Racial Discrimination (CERD), 'General Recommendation No XXI(21)' (8 March 1996) UN Doc. A/51/18

UNHCHR, 'Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (20 May 2003) UN Doc E/CN.4/sub.2/2003/12

UN HRC, Guiding Principles on Business and Human Rights: Implementing the UN 'Protect, Respect and Remedy Framework' (21 march 2011) UN Doc A/HRC/17/31

HRC, General Comment No 31 (26 May 2004) CCPR/C/21/Rev.1/Add.13

Conferences/Reports to Conferences/Declarations:

UNSCCUR, Conference proceedings (17 August-6 September 1949) UN Doc. E/CONF.7/7.

Development and Environment: Report and Working Papers of a Panel of Experts Convened by the Secretary General of the UN Conference on the Human Environment (16 June 1972), UN Doc A/Conf48/14/Rev.1, United Nations Publication, Sales No. E.73.II.A.14

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 (29 Nov-2 Dec 2008) UN Doc A/CONF.212/L/1/Rev.1 <https://www.un.org/esa/ffd/wp-content/uploads/2014/09/Doha_Declaration_FFD.pdf>

UN Conference on Environment and Development, *Rio Declaration on Environment and Development* (12 August 1992) UN Doc. A/CONF.151/26 (Vol. I)

UN Conference on Environment and Development, *Agenda 21* (12 August 1992) UN Doc. A/CONF.151/26

Report on the World Summit on Sustainable Development, Johannesburg, South Africa (26 August-2 September 2002) UN/CONF.199/20

Report of the Intergovernmental Committee of Experts on Sustainable Development Financing (5 August 2014) A/69/315

UN Conference for Sustainable Development, *Report of the Conference on Sustainable Development*
<http://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.216/16&Lang=E>

World Summit on Social Development (14 March 1995) UN Doc A/CONF.166/9

UN Report of the International Conference on Financing for Development, Monterrey-Mexico, 18-22 March 2002, A/CONF.197/11, UN Publications Sales No. E.02.II.A.7

Monterrey Consensus of the International Conference on Financing for Development – Final Texts and Agreements Adopted at the Conference on Financing for Development, Monterrey-Mexico, 18-22 March 2002, UN Publications, New York 2003

International Law Commission:

ILC, Commentary on Draft convention on the Law of Treaties Between States and International Organisations and Between International Organisations (1982) 2 Y.B. Int'l L.Comm'n 56, UN Doc A/CN.4/SER.A/1982/Add.I.

ILC, 'Draft Articles on the Responsibility of International Organisations (DARIOS)', (2011) II (Part Two) Yearbook of the International Law Commission

ILC, 'Identification of Customary International law – Statement of the Chairman of the Drafting Committee' (7 August 2014) <https://legal.un.org/ilc/sessions/66/pdfs/english/dc_chairman_statement_identification_of_custom.pdf

ILC, Report on the Work of its fifty-first (1999) UN Doc A/54/10 (1999)

ILC, Report on the Work of its Eighteenth Session (1996) UN Doc A/CN.4/191

ILC, Report on the Work of Its Fifty-seventh Session (2May-3 June, 11 July-5 August 2005) UN Doc. A/60/10
ILC, Report on the Work of its sixty-eighth (2016) A/71/1

ILC, Report on the Work of Seventieth Session, UN Doc A/73/10

ILC, 'First Report on Responsibility of International Organisations, Special Rapporteur Giorgio Gaja UN Doc A/CN.4/532

ILC, 'Responsibility of International Organisations: comments and Observations Received from Governments and International Organisations' (12 May 2005) UN Doc A/CN.4/556

ILC, 'Responsibility of International Organisations: comments and Observations Received from Governments and International Organisations' (25 June 2004) A/CN.4.545

ILC, 'Responsibility of International Organisations: comments and Observations Received from Governments and International Organisations' (14 February 2011) UN Doc A/CN.4/637

ILC, 'Responsibility of International Organisations: comments and Observations Received from Governments and International Organisations' (1 May 2007) UN Doc A/CN.4/582

Gerald Fitzmaurice, 'Third Report on the Law of Treaties' (1958) UN Doc A/CN.4/115 in (1958) 2 Y.B. Int'l L.Comm'n 20, 41-44, UN Doc A/CN.4/SER/A/1958/Add.1

Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc A/CN.4/L.682
Humphrey Waldock, 'Third Report on the Law of Treaties' (1964) UN Doc A/CN.4/167 in 2 Y.B Int'l Comm'n 44 UN Doc A/CN.4/SER/A/1964/Add.1

International Commission of Jurists:

International Commission of Jurists (2018) The right to a remedy and Reparation for Gross Human Rights Violations: Practitioner's Guide No.2, 19 <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf>

International Law Association

Committee on Legal Aspects of Sustainable Development, 'Searching for the Contours of International Law in the Field of Sustainable Development', International Law Association, Final Conference Report (New Delhi, April 2002)

ILA, 'Accountability of International Organisations', Final Report (Berlin Conference, 2004), 5. Preceding conferences on the topic were held in London (2000) and New Delhi (2002) <https://www.ila-hq.org/index.php/committees>

ICJ Case law /Arbitral Awards/ International Courts and Tribunals:

Asylum Case (Columbia v. Peru), 1950 ICJ 266, 276-77
Nuclear Weapons in Armed Conflict, Advisory Opinion [1996] ICJ Rep.226

Case Concerning Nuclear Tests (New Zealand and Australia v. France) (1974) ICJ Rep.457
Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway) [1993] ICJ Rep.38

Certain Phosphate Lands in Nauru (Nauru v. Australia) [1993] ICJ Rep. 322
United States-Import prohibition of certain Shrimp and Shrimp Products (20 Sept 1999) WT/DS58/AV/R (Appelate Body Report), WT/DS58/R (Panel Report)

Competence of the International Labour Organization to regulate, incidentally, the personal work of the employer', Advisory Opinion, PCIJ, Series B No 13
Gabčíkovo-Nagymaros (Hungary/Slovakia), Judgment [1997] *I.C.J. Reports* 7

Jurisdiction of the European Commission of the Danube', Advisory Opinion, PCIJ, Series B No 14

Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, (1980) ICJ 73

Iron Rhine Arbitration, Belgium v Netherlands, Award, ICGJ 373 (PCA 2005), 24th May 2005, Permanent Court of Arbitration [PCA]

Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion, 1971 ICJ Reports 16

Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 ICJ 66

SS Lotus (France v Turkey) [1927] PCIJ Series A No 10 <https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_10/30_Lotus_Arret.pdf>

Pulp Mills on the River Uruguay, Argentina v Uruguay [2006] ICJ Rep 113

Pulp Mills on the River Uruguay (Argentina v. Uruguay) Provisional Measures, Order of 13 July 2006, ICJ Reps. 2006

North Sea Continental Shelf (Fed.Rep. of Germany v. Denmark; Fed.Rep. of Germany v. Netherlands) 1969 ICJ 3

Reparation of Injuries Suffered in the Service of the United Nations', Advisory Opinion, 1949 ICJ Rep.174

Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, 1955 ICJ Reports 67, Separate Opinion of Judge Lauterpacht 106

IACHR, Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, doc. 10 rev. 1 (24 April 1997)

Bilateral Agreements:

EU-Singapore Free Trade and Investment Protection Agreements, OJEU I.294/3 (14.11.2019)

Free Trade Agreement between Canada and Costa Rica (Canada-Costa Rica) (adopted 23 April 2001, into force 1 Nov 2002), *La Gaceta of Costa Rica,* No.127 (3 Jul 2002).

*North American Free Trade Agreement (NAFTA) (*Canada-USA-Mexico) (adopted 17 December 1992, entered into force 1 January 1994), (1993) 32 ILM 289 and 32 *ILM* 605, to be replaced by *United States-Mexico-Canada Agreement (USMCA)* (signed 30 November 2018, not yet in force) <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>

USA-Chile Free Trade Agreement (USA-Chile) (adopted 6 June 2003, entered into force 1 January 2004) <https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text>

Partnership agreement 2000/483/EC between the members of the African, Caribbean and Pacific Group of States, and the European Community and its Member States, signed in Cotonou on 23 June 2000 (OJ L 317, 15.12.2000, 3-353)

Domestic Courts and Tribunals:

Bulankulama and Others v. Secretary, Ministry of Industrial Development and Others (Eppawela Case) (2000) 3 Sri LR 243 (2 June 2000)

Jam v IFC 139 S.Ct. 759 (2019) <https://www.supremecourt.gov/opinions/18pdf/17-1011_mkhn.pdf>

D.Bradlow, 'Brief of Amicus Curiae in Support of Plaintiffs-Appellants, *Jam v IFC*, DC Cir No 16-7051' (7 August 2016)

*Minors Oposa v. Secretary of the Department of Environment and Natural Resource*s (1994) 33 *ILM* 173

BOOKS:

Dapo Akande, 'International Organisations' in Malcolm D. Evans (ed.), *International Law* (5th edn, OUP 2018)

Bard A. Andreassen and Stephen P. Marks (eds), *Development as a Human Right: Legal, Political and Economic Dimensions* (Harvard University Press 2006)

Jean d'Aspremont, 'Subjects and Actors in International Lawmaking: the paradigmatic divides in the cognition of international norm-generating processes' in C.Brölmann, Y.Radl (eds.), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar 2016)

Giles Atkinson, Simon Dietz, Eric Neumayer and AMtthew Agarwala (eds), *Handbook of Sustainable Development* (Edward Elgar, 2nd edn 2014)

Ilias Bantekas, 'The Right to Development, Poverty and other Related Rights' I.Bantekas, Lutz Oette (eds.), *Human Rights Law and Practice* (2nd edn, CUP 2016)

I.Bantekas, F.Seatzu, K.Akestoridi (eds), *Oxford Commentary on the Sustainable Development Goals* (OUP forthcoming)

Cástor Miguel Díaz Barrado, Paloma Durán y Lalaguna *Sustainable Development Goals: Goal 16 – Peace, Justice and strong Institutions* (Thomson Reuters ARANZADI 2018)

C.M. Díaz Barrado, 'Sustainable Development Goals: a principle and several dimensions' in Paloma Durán Y Lalaguna et al (eds) *International Society and Sustainable Development Goals* (Thomson Reuters Aranzadi 2016)

M. Bedjaoui (ed), *International Law: Achievements and Prospects* (Martinus Nijhoff 1991)

Eyal Benvenisti, *The Law of Global Governance* (Hague Academy of International Law 2014)

Eyal Benvenisti, Georg Nolte (eds), *Community Interests Across International Law* (OUP 2018)

Steven Bernstein, 'The UN and the Governance of Sustainable Development Goals' in N.Kanie, Frank Biermann (eds), *Sustainable Development Goals as Governance Innovation* (MIT Press 2017)

Frank Biermann, Casey Stevens, Steven Bernstein, Aarti Gupta, Norichika Kanie, Mans Nilsson and Michelle Scobie, 'Global Goal Setting for Improving National Governance' in N. Kanie, Frank Biermann (eds), *Sustainable Development Goals as Governance Innovation* (MIT Press 2017)

Aron Broches, *International Legal Aspects of the Operations of the World Bank* (The Hague Academy of International Law 1959)

D.Bradlow, D.Hunter, *International Financial Institutions and International Law* (Kluwer Law 2010)

Elisabeth Bürgi Bonanomi, *Sustainable Development in International Law Making and Trade–International Food Governance and Trade in* Agriculture (Edward Elgar 2015)

Alan Boyle, David Freestone, *International Law and Sustainable Development* (OUP 1999)

D.Bradlow, A.Fourie, 'Multilateral Development Banks and Management of Human Rights Impacts' in Surya Deva, David Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar 2020)

C.Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart Publishing 2007)

Stephen Browne, *Sustainable development Goals and UN Goal setting*, Routledge 2017

Hans Christian Bugge, Christina Voigt (eds.), *Sustainable Development in International and National Law: What did the Brudtland Report do to legal thinking and legal development, and where can we go from here* (Europa Law Publishing 2008)

Commission on Global Governance, *Our Global Neighbourhood: Report of the Commission on Global Governance* (OUP 1995)
L. Boisson de Chazournes, 'Public participation in decision-making: the World Bank Inspection Panel' in E.B.Weiss, A. Rigo Sureda, L. Boisson de Chazournes (eds.), *The World Bank, international financial institutions, and the development of international law: a symposium held in honor of Ibrahim F.I. Shihata*, March 22, 1999 (American Society of International Law 1999)

L. 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* (OUP 2000)

Nathan Cooper, D.French, 'SDG17: partnerships for the Goals-cooperation within the context of a voluntarist framework' in D.French et al

J.Crawford, S.Olleson, 'The Nature and forms of International Responsibility' in M.D.Evans (ed) *International Law* (OUP 2003)

Kamran Dadkah, *The Evolution of Macroeconomic Theory and Policy* (Springer 2009

Herman Daly, *Ecological Economics and Sustainable Development, Selected Essays of Herman Daly* (Elgar 2007)

P.Dann, *The Law of Development Cooperation: A Comparative Analysis of the World Bank, the EU and Germany* (CUP 2013)

P.Dann, 'The Global Administrative Law of Development Cooperation' in S.Cassese (ed), *Research Handbook on Global Administrative Law* (Edward Elgar, 2016)

Kevin E.Davis, Angelina Fisher, Benedict Kingsbury and Sally Engle Merry (eds), *Governance by Indicators: Global Power through Quantification and Rankings* (OUP 2012)

Felix Dodds, Jorge Laguna Celis, Elizabeth Thompson, *From Rio+20 to a new development agenda: building a bridge to a sustainable future* (Routledge 2014)

Daniel W. Drezner, 'International Economic Order' in William A. Darity Jr., *International Encyclopaedia of the Social Sciences* (2nd edn, McMillan Reference 2008)

Abjorn Eide, 'Human Rights-Based Development in the Age of Economic Globalization: Background and Prospects' in Bard A. Andreassen and Stephen P. Marks (eds), *Development as a Human Right: Legal, Political and Economic Dimensions* (Harvard University Press 2006)

Mark S. Ellis, 'The World Bank; Fighting Poverty – ideology versus accountability in K.Nadakavukaren Schefer (ed.), *Poverty and International Economic Law: Duties to the Poor* (CUP 2013)

Wendy Nelson Espeland and Michael Sauder, 'The Dynamism of Indicators' discussing educational rankings in Kevin E.Davis, Angelina Fisher, Benedict Kingsbury and Sally Engle Merry (eds), *Governance by Indicators: Global Power through Quantification and Rankings* (OUP 2012)

G.Esteva, 'Development' in W.Sachs, *The Development Dictionary: A guide to Knowledge as Power* (Zed Books 2010)

G.Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Grotius Publications Ltd 1986)

Thomas Franck, *The Power of Legitimacy among Nations* (OUP 1990)

Duncan French, Louis J.Kotzé (eds.), *Sustainable Development Goals – Law, Theory and Implementation* (Edward Elgar Publishing 2018)

A.Naude Fourie, *The World Bank Inspection Panel and Quasi-Judicial Oversight: In Search of the 'Judicial Spirit' in Public International* Law (Eleven International Publishing 2009)

F.Gianviti, 'Economic, Social and Cultural Human Rights and the International Monetary Fund' in P.Alston (ed) *Non-State Actors and Human Rights* (OUP 2005).

Pieter Glasbergen, Frank Biermann, Arthur P.J.Moil (eds), *Partnerships, Governance and Sustainable Development–reflections on theory and practice* (Edward Elgar 2007)

Joyeeta Gupta, Måns Nilsson, 'Toward a Multilevel Action Framework for Sustainable Development Goals' Norichika Kanie, Frank Biermann (eds), *Sustainable Development Goals as Governance Innovation* (MIT Press 2017)

Terence C.Halliday, 'Legal Yardsticks: International Financial Institutions as Diagnosticians and Designers of the Laws of Nations' in Kevin E.Davis, Angelina Fisher, Benedict Kingsbury and Sally Engle Merry (eds), *Governance by Indicators: Global Power through Quantification and Rankings* (OUP 2012)

D. F. Frey and G. MacNaughton, 'Full Employment and Decent Work in the Post 2015 Development Agenda' in Noha Shawki (ed), *International Norms, Normative Change, and the UN Sustainable Development Goals* (Lexington Books 2016)

David Held, Anthony McGrew, David Goldblatt and Jonathan Perraton, *Global Transformations: Politics, Economics and Culture* (Stanford University Press 1999)

Rosalyn Higgins, *Problems and Process: International Law and How We use It,* (Clarendon Press 1994)

D.Hunter, James E. Salzman, Durwood Zaelke, *International Environmental Law and Policy* (5th edn, Foundation Press 2015)

G.Houghton, D.Counsell, *Regions, Spatial Strategies and Sustainable Development* (Routledge 2004)

D.Hulme, 'Governing Global Poverty: Global Ambivalence and the Millennium Development Goals' in Clapp, J & Wilkinson, R, (eds.), *Global Governance, Poverty and Inequality* (Routledge 2010)

IUCN, *World Conservation Strategy: Living Resource Conservation for Sustainable Development,* Gland, Switzerland (IUCN 1980)

IUCN, UNEP, WWF, *Caring for the Earth: a Strategy for Sustainable Living* (reprint, Routledge 2013)

R.Jolly (ed.) *Milestones and Turning Points in Development Thinking* (Palgrave McMillan 2012)

Norichika Kanie, Frank Biermann (eds), *Sustainable Development Goals as Governance Innovation* (MIT Press 2017)

David Kennedy, 'The "Rule of Law", Political Choices, and Development Common Sense' in D.Trubek,A.Santos (eds.) *The New Law and Economic Development-A critical Appraisal* (CUP 2006)

A.Khalfan, 'Division of Responsibility amongst States' in M.Langford et al (eds), *Global Justice, State Duties: The Extraterritorial Scope of economic, Social and Cultural Rights in International Law* (CUP 2013)

B.Kingsbury, 'Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples' in G.S.Goodwin-Gill, S.Talmon (ed.) *The Reality of International Law* (OUP 1999)

Damien Kingsbury, 'Introduction' in John MacKay, Janet Hunt, Mark McGillivray, Mathew Clark (eds.), *International Development: Issues and Challenges* (3rd edn, Palgrave McMillan 2016)

J.Klabbers, *An Introduction to International Institutional Law* (2nd edn, CUP 2009)

J.Klabbers, 'Sources of International Organisations' Law: Reflections on Accountability' in Jean d'Aspremont, Samanth Besson (eds) *The Oxford Handbook of the Sources of International Law* (OUP 2017)

Jan Klabbers, 'What Role for International Organisations in the Promotion of Community Interests? Reflections on the Ideology of Functionalism' in Eyal Benvenisti, Georg Nolte (eds), *Community Interests Across International Law* (OUP 2018)

Paloma Durán Y Lalaguna, Cástor M. Díaz Barrado and Carlow R. Fernández Liesa (eds) *International Society and Sustainable Development Goals* (Thomson Reuters Aranzadi 2016)

S.McInerney-Lankford, 'International Financial Institutions and Human Rights: Select Perspectives on Legal Obligations' in D.Bradlow, D.Hunter, *International Financial Institutions and International Law* (Kluwer Law 2010)

J.Linarelli et al, *The Misery of International Law* (OUP 2018)

Graham Long, 'Underpinning Commitments of the Sustainable Development Goals: indivisibility, universality, leaving no one behind' in D.French et al. *Sustainable Development Goals – Law, Theory and Implementation* (Edward Elgar Publishing 2018)

Joanna Aleria Lorenzo, 'SDG10: Reduce inequalities among and between states' I.Bantekas, F.Seatzu, K.Akestoridi (eds), *Oxford Commentary on the Sustainable Development Goals* (OUP forthcoming)

Vaughan Lowe, 'Sustainable Development and Unsustainable Arguments' in A.Boyle and D.Freestone (eds.) *International Law and Sustainable Development* (OUP 1999)

Mark MacGillivray, Matthew Clarke (eds.), *Understanding Human Wellbeing* (UN UP 2006)

John MacKay, Janet Hunt, Mark McGillivray, Mathew Clark (eds.), *International Development: Issues and Challenges* (3rd edn, Palgrave McMillan 2016)

Myres S.McDougal, Harold D.Laswell, James C.Miller, *The Interpretation of International Agreements and World Public Order: Principles of Concept and Procedure* (Yale Univ. Press, 1967)

Owen McIntyre, 'International Water Law and SDG6: mutually reinforcing paradigms' in D.French, L.Kotze (eds.), *Sustainable Development Goals – Law, Theory and Implementation* (Edward Elgar Publishing 2018)

Donella H.Meadows, Dennis L.Meadows, Jorgen Randers, William W. Behrens III, *The Limits to Growth: A Report for the Club of Rome's Project on the Predicament of Mankind* (Universe Books 1972)

Stephen P. Marks, 'The Human Rights Framework to Development: Seven Approaches' in Basu Mushumi, Archna Negi, and Arjun K. Sengupta (eds.), *Reflections on the Right to Development* (Sage 2005).

Ugo Mattei, 'Emergency-based Predatory Capitalism: The Rule of Law, Alternative Dispute Resolution, and Development' in D.Fassin, M.Pnadolfi (eds) *Contemporary States of Emergency: The Politics of Military and Humanitarian Interventions* (Zone Books 2010)

Manuela Moschella, Catherine Weaver (eds.), *Handbook of Global Economic Governance – Players, Powers and Paradigms* (Routledge 2014)

Scott Newton, 'The Dialectics of Law and Development' in D.Trubek, Alvaro Santos (eds.), *The New Law and Economic Development-A critical Appraisal* (CUP 2006)

Martha Nussbaum, A.Sen (eds) *The Quality of Life* (OUP 1993)

Overseas Development Council, ILO International Labour Office, *Employment, Growth and Basic Needs: A One-World Problem – The International "basic-needs strategy" against chronic poverty* (Praeger Publishers 1977).

Katharina Pistor, 'Re-Construction of Private Indicators for Public Purposes' Kevin E.Davis, Angelina Fisher, Benedict Kingsbury and Sally Engle Merry (eds), *Governance by Indicators: Global Power through Quantification and Rankings* (OUP 2012)

N.Piterse, *Development Theory: Deconstructions/Reconstructions* (2nd edn, Sage 2010)

Rajendra Ramlogan, *Sustainable Development: towards a judicial interpretation*, Martinus Nijhoff 2011

August Reinisch, 'Sources of International Organisations' Law: Why Custom and General Principles are Crucial' in J.d'Aspremont, S.Besson (eds) *The Oxford Handbook of the Sources of International Law* (OUP 2017)

Robert Repetto (ed.), *The Global Possible: Resources, Development and the New Century*, World Resources Institute Book (Yale University Press 1985)

Gilbert Rist, *The History of Development* (Academic Foundation 2009)

Walter Rostow, *The Stages of Growth: A Non-Communist Manifesto* (CUP 1960)

W.Sachs, *The Development Dictionary: A guide to Knowledge as Power* (Zed Books 2010)

Margot E.Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (OUP 2007)

M.E.Salomon 'Deprivation, Causation and the Law of International Cooperation' in M.Langford et al (eds), *Global Justice, State Duties: The Extraterritorial Scope of economic, Social and Cultural Rights in International Law* (CUP 2013)

A.Santos, 'The World Bank's Uses of the "Rule of Law" Promise in Economic Development' in D.Trubek,A.Santos (eds.) *The New Law and Economic Development-A critical Appraisal* (CUP 2006)

Rumu Sarkar, *International Development Law* (OUP 2009)

O.Schachter, *Sharing the World's* Resources (Bangalore: Allied Press 1977)

Krista Nadakavukaren Schefer (ed.), *Poverty and International Economic Law: Duties to the Poor* (CUP 2013)

H.Schermers, N.Blokker, *International Institutional Law* (5th edn, Brill 2011)

Werner Scholtz, Michelle Barnard, 'The Environment and the Sustainable Development Goals: 'We are on a road to nowhere'' in D.French, L.Kotze (eds.), *Sustainable Development Goals – Law, Theory and Implementation* (Edward Elgar Publishing 2018)

Nico Schrijver, Friedl Weiss (eds), *International Law and Sustainable Development – Principles and Practice* (Martinus Nijhoff 2004)

F.Seatzu, K.Akestoridi, 'SDG8: Promote Sustained, Inclusive and Sustainable Economic Growth, Full and Productive Employment and Decent Work for All' in I.Bantekas, F.Seatzu, K.Akestoridi (eds), *Oxford Commentary on the Sustainable Development Goals* (OUP forthcoming)

D.Seers, 'The Meaning of Development' in D.Lehmann (ed), *Development Theory: Four Critical Studies* (Routledge 2010)

Marie-Claire Cordonier Segger, Ashfaq Khalfan (eds.), *Sustainable development Law: principles, practices, and prospects* (Oxford University Press 2004)

M.C.Cordonier Segger, Ashfaq Khalfan (eds), *Sustainable Development Law* (OUP 2011)

Marie-Claire Gordonier Segger, 'Sustainable Development in International Law' in H.C.Bugge, C.Voigt (eds.) *Sustainable Development in International and National Law: What did the Brudtland Report do to legal thinking and legal development, and where can we go from here* (Europa Law Publishing 2008)

A.Sen, *Development as Freedom* (OUP 1999).

A.Sen, 'Capability and well-being' in Martha Nussbaum, A.Sen (eds) *The Quality of Life* (OUP 1993)

Arjun Sengupta, Archna Negi and Moushumi Basu (eds), Reflections on the Right to Development (SAGE Publications 2005).

Dinah Shelton, 'International Law and 'Relative Normativity'' in Malcom D.Evans (ed.) *International Law* (3rd edn, OUP 2010)

D.Shelton, *Remedies in International Human Rights Law* (3rd edn, OUP 2015)

I.Shihata, *The World Bank Inspection Panel: In Practice* (World Bank 2001)

Sabine Schlemmer-Schulte, 'Sustainable Development Priorities in the World Bank Inspection Panel decisions' in M.C.Cordonier-Segger, C.G.Weeramantry (eds) *Sustainable Development Principles in the Decisions of International Courts and Tribunals* 1992-2012 (Routledge 2017)

Sigrun I.Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (Cavendish 2001)

Eisuke Suzuki, 'Responsibility of IFIs under International Law' in D.Bradlow, D.Hunter, *International Financial Institutions and International Law* (Kluwer Law 2010)

D.Trubek, Alvaro Santos (eds.), *The New Law and Economic Development-A critical Appraisal* (CUP 2006)

D.Trubek, Alvaro Santos (eds.), 'Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice' in id.

UNDP, *Human Development Report 1990* (OUP 1990)

UNDP, *Human Development Report 1994* (OUP 1994)

UN, Yearbook of the UN 1948-49, Department of Public Information, UN Publications Sales No. 1950.I.II, 481-82 <https://read.un-ilibrary.org/united-nations/yearbook-of-the-united-nations-1948-49_e4eb38e2-en#page493>

Arild Underdal, Rakhyun E.Kim, 'The Sustainable Development Goals and Multilateral Agreements' in N.Kanie, Frank Biermann (eds), *Sustainable Development Goals as Governance Innovation* (MIT Press 2017)

W.Vandenhole, W.Benedek, 'Extraterritorial Human Rights Obligations and the North-South Divide' in M.Langford et al (eds), *Global Justice, State Duties: The Extraterritorial Scope of economic, Social and Cultural Rights in International Law* (CUP 2013)

I. Venzke, 'Contemporary Theories and International Lawmaking' in C.Brölmann, Y.Radl (eds.), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar 2016)

WCED, *Our Common Future* (OUP 1987)

E.B.Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (Transnational Publishers Inc. 1989)

Thomas G. Weiss, Ramesh Thakur, *The UN and Global Governance: An Idea and Its Prospects* (Indiana UP 2006)

Ben Thirkell-White, 'Ambitious Goals, limited Tools? The IMF and Poverty Reduction' in Krista Nadakavukaren Schefer (ed.), *Poverty and International Economic Law: Duties to the Poor* (CUP 2013)

David Williams, 'The History of International Development Aid' in Manuela Moschella and Catherine Weaver (eds.), *Handbook of Global Economic Governance – Players, Powers and Paradigms* (Routledge 2014)

Wouter G.Wegner, 'State Consent as Foundational Myth' in C.Brölmann, Y.Radl (eds.), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar 2016)

K.Willis. *Theories and Practices of Development* (Routledge 2005)

Oran R.Young, 'Conceptualisation: Goal setting as a Strategy for Earth System Governance' in N.Kanie, Frank Biermann (eds), *Sustainable Development Goals as Governance Innovation* (MIT Press 2017)

JOURNALS:

Sumayyah Abdul Aziz et al, 'A Critical Analysis of Development Indices' (2015) 1(1) Australian Journal of Sustainable Business and Society

Christiane Ahlborn, 'The Rules of International Organisations and the Law of International Responsibility' (2011) 8 Int'l Org l Rev 397

Philip Alston, 'Ships passing in the Night: the Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals', (2005) 27(3) Human Rights Quarterly 755

P.Alston, 'The International Monetary Fund and the Right to Food' (1987) 30 Howard Law Journal 473

Jose E.Alvarez, 'Governing the World: International Organisations as Lawmakers' (2008) 31 Suffolk Transnat'l L.Rev 591

Jean D'Aspremont, 'The Law of International Organisations and the Art of Reconciliation: From Dichotomies to Dialectics, (2014) 11(2) International Organization Law Review 428

Sumudu Atapattu, 'From Our Common Future to Sustainable Development Goals: Evolution of Sustainable Development under International Law' (2019) 36 Wisconsin International Law Journal 215

Virginie Barral, 'Sustainable development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) 23(2) European Journal of International Law 377

Magdalena Bexell, Kristina Jönsson, 'Responsibility and the United Nations' Sustainable Development Goals' (2017) 44(1) Forum for Development Studies 13

T.Berger, 'The World Bank's Independent review of India's Sardar Sarovar Projects' (1993) 9(1) American University International Law Review 33

Richard E.Bissell, Suresh Nanwani, 'Multilateral Development Bank Accountability Mechanisms: Development and Challenges' (2009) 6 Manchester Journal of International Economic Law 2

Kristen E.Boon, 'New Approaches to the Accountability of IOs' (2019) 16 IO Law Rev 1

Fernando Lusa Bordin, 'To what immunities are International Organisations entitled under general International Law? Thoughts on *Jam v IFC* and the 'default rules' of IO immunity' (2020) 72 QIL (Zoom-in) 5

D.Bradlow, C.Grossman, 'Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF' (1995) 17(3) Human Rights Quarterly 411

D.Bradlow, 'Should the IFIs play a Role in the Implementation and Enforcement of International Humanitarian Law' (2002) 50 U Kan L Rev 695

D.Bradlow, 'Private Complainants and International Organisations: A comparative study of the Independent Inspection Mechanisms in IFIs' (2005) 36 Georgetown Journal of International Law 403

D.Bradlow, A. Naude Fourie, 'The Operational Policies of the World Bank and the International Finance Corporation' (2014) 10 Int'l Org. L Rev 3

Kerryn Anne Brent, 'The Certain Activities Case: What Implications for the no-harm Rule?' (2017) (20) Asia Pacific Journal of Environmental Law 28

L.Brunnée, ‘International Legal Accountability through the Lens of the Law of State Responsibility’ (2006) XXXXVI Netherlands YIL 3

Natalie Bugalski, ‘The Demise of Accountability at the World Bank?’ (2016) 31(1) Am.U.Int’l L.Rev. 1

Aldo Caliari, ‘Guest Editorial: The Monterrey Consensus, 14 Years Later’ (2016) 59 Development 5

Fabián Augusto Cárdenas Castañeda, ‘A Call for Rethinking the Sources of International Law: Soft Law and the Other Side of the Coin’ (2013) XIII *Anuario Mexicano de Derecho Internacional* 355

Achala Chandani, ‘Distributive Justice and Sustainability as a viable Foundation for the Future Climate Regime’ (2007) 2 Carbon and Climate Law Review 152

LBoisson de Chazournes, ‘Partnerships, Emulation, and Coordination: Toward the Emergence of a *Droit Commun* in the Field of Development Finance’ (2013) 3 World Bank Legal Review 174

Michael Chibba, ‘Governance and Development, The current Role of Theory, Policy and Practice’ (2009) 10(2) World Economics 79

C.M. Chinkin, ‘The Challenge of Soft Law: Development and Change in International Law’ (1989) 38(4) The International and Comparative Law Quarterly 850

Gordon A.Christenson (1990) 1(1) Yearbook of International Environmental Law 392]

J.D.Ciorciari, ’The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretative Analysis of the IBRD and IDA Articles of Agreement’ (2000) 33 Cornell International Law Journal 331

Hassan Cisse, ‘Should the Political Prohibition in Charters of International Financial Institutions be revisited?’ (2012) 3 World Bank Legal Review 59

Alistair Rieu-Clarke, ‘The Duty to take appropriate measures to prevent significant transboundary harm and private companies: insights form transboundary hydropower projects’ (2020) 20 International Environmental Agreements 667

S.Cohen, A Demeritt, J. Robinson, D. Rothman, ‘Climate Change and Sustainable Development: towards dialogue (1998) 8(4) *Global Environmental Change* 341

Steve Connelly, ‘Mapping Sustainable Development As a Contested Concept’ (2007) 12(3) *Local Environment* 259

Leonardo A.Crippa, ‘Multilateral Development Banks and Human Rights Responsibility’ (2010) 25 American University International Law Review 531

Roberto Danino, ‘The Legal aspects of the World Bank’s Work on Human Rights’ (2007) 41(1) The Int’l Lawyer 21

Philip Dann, Michael Riegner, 'The World Bank's Environmental and Social Safeguards and the Evolution of Global Order' (2019) 32 Leiden Journal of International Law 537

Kristina Daugirdas, 'How and why International Law Binds International Organisations' (2016) 57(2) Harvard International Law Journal 325

K.Daugirdas, Sachi Schuricht, 'Breaking the Silence: Why IOs should acknowledge Customary International Law' (2020) 3 AIIB Yearbook of International Law: The Role of International Administrative Law at International Organisations 54

John C. Dernbach, 'Targets, Timetables and Effective Implementing Mechanisms: Necessary Building Blocks for Sustainable Development' (2002) 27 William and Mary Environmental Law & Policy Review 79

J. Donnelly, 'In search of the Unicorn: The Jurisprudence and Politics of the Right to Development' (1985) 15 California Western International Law Journal 473

Ellen Dorsey, Mayra Gomez, Bret Thiele and Paul Nelson, 'Falling Short of our Goals: Transforming the Millennium Development Goals into Millennium Development Rights', (2010) 28(4) Netherlands Quarterly of Human Rights 516

P.S.Elder, 'Sustainability' (1991) 36 McGill Law Journal 831

Richard A.Falk, 'On Treaty Interpretation and the New Haven Approach: Achievements and Prospects', (1968) 8 VA.J.Int'l L. 323

R.H.Fallon (Jr.), 'Legitimacy and the Constitution' (2004-5) 118 Harvard Law Review 1787

Maya Fehling, Brett D. Nelson, and Sridhar Venkatapuramd, 'Limitations of the Millennium Development goals: a literature Review', (2013) 8(10) Global Public Health 1109

Malgosia Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties', Part I (2008) 21 Hague YB Int'l Law 101

M.Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties', Part II (2009) 22 Hague YB Int'l Law 3

D.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) LV Netherlands International Law Review 23

D.French, R.Kirkham, 'Complaint and Grievance Mechanisms in International Law: One Piece of the Accountability Jigsaw?' (2009) 7 New Zealand Yearbook of International Law 179

Diane F. Frey, 'Economic growth, full employment and decent work: the means and ends in SDG 8' (2017) 21(8) The International Journal of Human Rights 1164

Wolfgang Friedmann, 'The Relevance of International Law to the Processes of Economic and Social Development' (1966) 60 American Society of International Law Proceedings 8

Van Ginneken, ‘Social protection, the Millennium Development Goals and Human Rights’ (2011) 42(6) Institute of Development Studies Bulletin 111

R.Gordon, J.Sylvester, ‘Deconstructing Development’ (2004) 22 Wisconsin International Law Journal 1

A. Gowlland Gualtieri, ‘The Environmental Accountability of the World Bank to Non-State Actors: Insights from the Inspection Panel’ (2001) British Yearbook of International Law 213

Gerhard Hafner, ‘Accountability of IOs’ (2003) 97 Proceedings of the Annual Meeting (American Society of International Law) 236

Gunther Handl, ‘The Legal Mandate of Multilateral Development Banks as Agents for Change toward Sustainable Development’ (1998) 92 American Journal of International Law 642

Inaamul Haque, Ruxandra Burdescu, ‘Monterrey Consensus on Financing For Development: Response Sought from International Economic Law’ (2004) 27 International and Comparative Law Review 219

John W.Head, ‘Law and Policy in International Financial Institutions: The Changing Role of Law in the IMF and the Multilateral Development Banks (2007) 17 Kansas Journal Law and Public Policy 194

J.Head, ‘Suspension of Debtor Countries’ Voting Rights in the IMF: An Assessment of the Third Amendment to the IMF Charter’ (1993) 33 Virginia Journal of International Law 591

Ivan L.Head, ‘The contribution of International Law to Development’ (1987) 25 Canadian Yearbook of International Law 29

Gail E.Henderson, ‘Rawls and Sustainable Development’ (2011-12) 7(1) McGill International Journal of Sustainable Development Law and Policy 1

J.Hickel, ‘The contradiction of the sustainable development goals: Growth versus ecology on a finite planet’ (2019) 27 Sustainable Development

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 Transnational Law 153

Geoffrey M. Hodgson, ‘On defining institutions: rules versus equilibria’ (2015) 11(3) *Journal of Institutional Economics* 497

Erling Holden, Kristin Linnerud and David Banister, ‘The Imperatives of Sustainable Development’ (2017) 25 Sustainable Development 213

William E.Holder, ‘Can International Organisations be Controlled? Accountability and Responsibility’ (2003) 97 ASIL Proceedings 231

D.Hunter, ‘Using the WBIP to Defend the Interests of Project-Affected People’ (2003) 4 Chicago Journal of International Law 201

ILA, New Delhi Declaration of Principles of International Law Relating to Sustainable Development (2 April 2002), (2002) 2 Politics, Law & Economics 211

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

G.Jokubauskaite, 'The Legal Nature of the World Bank's Safeguard' (2018) 1 Verfassung und Recht in Übersee, Law and Politics in Africa, Asia, Latin America 78

R.Jolly, 'Global Development Goals: the United Nations Experience' (2004) 5(1) Journal of Human Development 69

G. Kallis, J. Hickel, 'Is Green Growth Possible?' (2019) 25 New Political Economy 469

Irene Kahn, 'How can the Rule of Law Advance Sustainable Development in a Troubled and Turbulent World' (2017) 13 McGill Journal of Sustainable Development 211

René Kemp, Saeed Parto and Robert B.Gibson, 'Governance for Sustainable Development: moving from theory to practice' (2005) 8(1-2) International Journal Sustainable Development 12

Rakhyun E.Kim, 'The Nexus between International Law and the Sustainable Development Goals' (2016) 25(1) Review of European Community and International Environmental Law 15

Benedict Kingsbury, Nico Kirsch, Richard B Steward, 'The Emergence of Global Administrative Law' (2005) 68 Law & Contemp Probs 15

B.Kingsbury, LCasini, 'Global Administrative Dimensions of International Organisations' (2009) 6 Int'l Org L Rev 319

J.Klabbers, 'The Paradox of International Institutional Law' (2008) 5 International Organisations Law Review 151

G.Koehler, 'Seven Decades of "Development" and now What?' (2015) 27 Journal of International Development 733

Tor Krever, 'The Legal Turn in Later Development Theory: The Rule of Law and the World Bank's Development Model' (2011) 52 Harvard International Law Journal 287

Erlend Krogstad, 'The Post-Washington Consensus: Brand New Agenda or Old Wine in a New Bottle?' (2007) 50(2) *Challenge* 67

Tom Kuhlman, John Farrington, 'What is Sustainability' (2010) 2 Sustainability 3436

Caterina Ruggeri Laderchi, Ruhi Saith and Frances Stewart, 'Does it Matter that we do not Agree on the Definition of Poverty? A Comparison of Four Approaches' (2003) 31(3) Oxford Development Studies 243

M.Langford, ‘Lost in Transformation? The Politics of the Sustainable Development Goals’ (2016) 30(2) Ethics & International Affairs 167

Johanna Aleria P.Lorenzo, ‘Development versus Sustainable Development: (Reconstructing the International Bank for Sustainable Development’ (2018) 51 Vand.J.Transnat’l L. 399

J.Lorenzo, ‘International Lawmaking in the Field of Sustainable Development’ (2018) 7(2) Cambridge International Law Journal 327

Siobhan McInerney-Lankford, Hans-Otto Sano, ‘Human Rights and the Post-2015 Sustainable Development Goals: Reflections on Challenges and Opportunities’ (2016) 7 The World Bank Legal Review 167

Yong-Shik Lee, ‘General Theory of Law and Development’ (2017) 50 Cornell International Law Journal 415

Markku Lehtonen, ‘The environmental-social Interface of Sustainable Development: Capabilities, Social Capital, Institutions’ (2004) 49 Ecological Economics 199

Xuan Li, ‘Soft Law-making on Development: The Millennium Development Goals and Post-2015 Development Agenda’ (2013) 10(3) Manchester Journal of International Economic Law 362

Graham Long, ‘The Idea of Universality in the Sustainable Development Goals’ (2015) 29(2) Ethics & International Affairs 203

David Luff, ‘An Overview of International Law of Sustainable Development and a Confrontation between WTO Rules and Sustainable Development’ (1996) 29 Belgium Review of International Law 90

M.M.Mbengue, de Moerloose, ‘A Managerial Approach for the Coherent Development of Sustainable Development Law: The Kenya Electricity Expansion Project before the World Bank and the European Investment Bank’ 92018) 17(2) Revista Jurídica Piélagus 83

A.McBeth, ‘Breaching the Vacuum: A Consideration of the Role of International Human Rights Law in the Operations of the International Financial Institutions’ (2006) 10(4) International Journal of Human Rights 385

Alhaji B.M. Marong, ‘From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development’ (2003) 16 Georgetown International Environmental Law Review 21

Wade Mansell, Joanne Scott, ‘Why bother about a Right to Development’ (1994) 21(2) Journal of Law and Society 171

Stephen Marks, ‘The Human Right to Development: between Rhetoric and Reality’ (2004) 17 Harvard Human Rights Journal 137

Makane Moise Mbengue, Stephanie de Moerloose, ‘Multilateral Development Banks and Sustainable Development: On Emulation, Fragmentation and a Common law of Sustainable Development’ (2017) 10(2) Law and Development Review 389

Kevin Murphy, 'The Social Pillar of Sustainable Development: A Literature Review and Framework for Policy Analysis' (2014) 15(1) The ITB Journal 29

Ved P.Nanda, 'Accountability of IOs: Some Observations' (2005) 33(3) Denv J IL & Pol 379

Ved P. Nanda, 'The Journey from the Millennium Development Goals to the Sustainable Development Goals' (2016) 44(3) Denver Journal of International Law and Policy 389
S.Nanwani, 'Holding MDBs to Account: Gateways and Barriers' (2008) 10 International Community Law Review 199

K.Nathan, 'The World Bank Inspection Panel: Court or Quango? (1995) 12 Journal of International Arbitration 135

Christian Neuhäuser, 'Structural Injustice and the distribution of Forward-Looking Responsibility' (2014) 38 Midwest Studies in Philosophy 232

Yobei Okada, 'The immunity of International Organisations before and after *Jam v IFC*: is the functional necessity rationale still relevant?' (2020) 72 QIL (Zoom-in) 29

Ana Palacio, 'The Way Forward: Human Rights and the World Bank' (2006) 8(2) Development Outreach 35

Susan Park, 'The World Bank Group: Championing sustainable Development Norms' (2007) 13 Global Governance 535

S.Park, 'Accountability as Justice for the Multilateral Development Banks? Borrower Opposition and Bank Avoidance to US Power and Influence' (2017) 24(5) Review of International Political Economy 776

Sakiko Fukuda-Parr, 'Global Goals as a Policy Tool: Intended and Unintended Consequences' (2014) 15(2-3) Journal of Human Development and Capabilities 118

S.Fukuda-Parr, 'Reducing Inequality – the Missing MDG: A Content Review of PRSPs and bilateral Donor Policy Statements' (2010) 41(1) Institute of Development Studies Bulletin 26

Cristina Passoni, Ariel Rosenbaum, Eleanor Vermunt, 'Empowering the Inspection Panel: The Impact of the World Bank's New Environmental and Social Safeguards' (2017) 49(3) NYU J Int'l L & Pol 921

Nancy Perkins, Sally Pei, *Jam v IFC* (2019) 23(3) ASIL Insights

Ursula Werther-Pietsch, 'The impact of SDGs on International Law-A nucleus of a Right to Peace?' (2018) 47(1) OZP-Austrian Journal of Political Science 17

Thomas Pogge, Mitu Sengupta, 'The Sustainable Development Goals as Drafted: Nice Idea, Poor Execution' (2015) 24 Washington International Law Journal 571

T.Pogge, 'The First United Nations Millennium Development Goal: a Cause for Celebration?' (2004) 5(3) Journal of Human Development 377

Thom Ringer, 'Development, Reform and the Rule of Law: Some Prescriptions for a Common Understanding of the Rule of Law and its Place in Development Theory and Practice' (2007) 10 Yale Human Rights and Development Law Journal 178
John Robinson, 'Squaring the Circle? Some thoughts on the Idea of Sustainable Development' (2004) 48 Ecological Economics 369

Volker Roeben, 'Responsibility in International Law' (2012) 16 Max Planck Yearbook of United Nations Law 99

A.Ruckert, 'Towards an Inclusive Neoliberal Regime of Development: From the Washington Consensus to the Post-Washington Consensus' (2006) 39(1) Labour, Capital and Society 36

Ashwani Saith, 'From Universal Values to Millennium Development Goals: Lost in Translation' (2006) 37(6) Development and Change 1167

Margot E.Salomon, 'Poverty, Privilege and International Law: The Millennium Development Goals and the Guise of Humanitarianism' (2008) German Yearbook of International Law 30

M.E.Salomon, 'From NIEO to Now and the Unfinishable Story of Economic Justice' (2013) 62(1) International and Comparative Law Quarterly 31

Philippe Sands, 'International Law in the Field od Sustainable Development' (1994) 65 British Yearbook of International Law 303

Galit A.Sarfaty, 'The World Bank and the Internalisation of Indigenous Rights Norms' (2005) 114 Yale Law Journal 1791

Olivier De Schutter et al, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of economic, Social and Cultural Rights; (2012) 34 Human Rights Quarterly 1084

I.Shihata, 'The World Bank and Human rights: An Analysis of the Legal Issues and the Record Achievements' (1988) 17 Denv.J.Int'l L.& Pol'y 39.

I.Shihata, 'Human Rights, Development and International Financial Institutions' (1992) 8 Am. U. J. Int'l L. & Pol'y 27

I.Shihata, 'The World Bank and the Environment: A Legal Perspective' (1992) 16 Md J Int'l L & Trade 1

I.Shihata, 'The dynamic Evolution of International Organizations: The Case of the World Bank' (2002) 2 J Hist Int'l L 217

Priscilla Schwarz, 'Sustainable Development in International Law' (2005) 5(1) Non-State Actors and International Law 127

M-C.C.Segger, 'The Role of International Forums in the Advancement of Sustainable Development' (2009) 10 Sustainable Development Law and Policy 4

A.Sen, 'The Ends and Means of Sustainability' (2013) 14(1) Journal of Human Development and Capabilities: a Multidisciplinary Journal for People-Centred Development 6

Miguel de Serpa Soares, ‘Room for Growth: The Contribution of International Law to Development’ (2015) 14 Chinese Journal of International Law 1

B.Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 Recueil des Cours de l'Academie de Droit International 233

Francesco Sindico, ‘Soft Law and the Elusive Quest for Sustainable Global Governance’ (2006) 19 Leiden Journal of International Law 82

Susanne Soederberg, ‘Recasting Neoliberal Dominance in the Global South? A Critique of the Monterrey Consensus’ (2005) 30(3) Alternatives: Global, Local, Political 325

Louis B.Sohn, ‘The Stockholm Declaration on the Human Environment’ (1973) 14(3) Harvard Law Journal 423

Bui Ngoc Son, ‘Law and Development Theory: A Dialogical Engagement (2019) 51 George Washington International Law Review 65

B.K.Sovacool, A.Fourie, M.Tan-Mullis, ‘Disequilibrium in Development Finance: The Contested Politics of Institutional Accountability and Transparency at the World Bank Inspection Panel’ (2018) 50(4) Development Challenge 867

Marion Smiley, ‘Future-Looking Collective Responsibility: a preliminary analysis’ (2014) 38 Midwest Studies in Philosophy 1.

Viktoria Spaiser, Shyam Ranganathan, Ranjula Bali Swain, David J.T. Sumpter, ‘The Sustainable Development Oxymoron: Quantifying and Modelling the Incompatibility of Sustainable Development Goals’ (2016) 24(6) International Journal of Sustainable Development & World Ecology 457

Mary Stevens, ‘The Precautionary Principle in the International Arena’ (2002) 2 Int’l & Comp.Envtl.L.13

Christopher Stone, ‘Common but Differentiated Responsibilities in International Law’ (2004) 98(2) American Journal of International Law 276

Paul P. Streeten, ‘Basic Needs: Premises and Promises’ (1979) I Journal of Policy Modelling 136

E.Suzuki, S.Nanwani, ‘Responsibility of International Organisations: The Accountability Mechanisms of Multilateral Development Banks’ (2005) 27 Michigan Journal of International Law 177

C. Sweetser, ‘Humanity as Alpha and Omega of International Law, Four Replies to Anne Peters’ (2009) 20 European Journal of International Law 545

Mesenbet Assefa Tadeg, ‘Reflections on the right to development: Challenges and Prospects’ (2010) 10(2) African Human Rights Law Journal 325

Brian Z.Tamahana, 'The lessons of Law-and Development Studies' (1995) 89 American Journal of International Law 470

Celine Tan, 'Mandating Rights and Limiting Mission Creep: Holding The World Bank and the International Monetary Fund Accountable for Human Rights Violations' (2008) 2 Hum Rts & Int;l Legal Discourse 79

Koy Thomson, 'A Universal Social Minimum as a Foundation for Citizenship', (2007) 38(3) IDS Bulletin, 58.

H.Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989, Part III' (1991) 62 BYIL 44

Mara Tignino, Christina Brethaut 'The Role of International Case Law in Implementing the Obligation not to cause significant Harm' (2020) (20) Int Environ Agreements 631

Christian Tomsuchat, *Ensuring the Survival of Mankind on the Eve of a New Century*, (1999) 62 Recuel Des Cours 23

D.M.Truber, M.Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' (1974) Wisconsin Law Review 1062

Jeff Waage, Rukmini Banerjii, Oona Campbell, Ephraim Chirwa, Guy Collender, Veerle Dieltiens, Ansdrew Dorward, Peter Godfrey-Faussett, Piya Hanvoravongchai, Geeta Kingdon, Angela Little, Anne Mills, Kim Mulholland, Alwyn Mwinga, Amy North, Walaiporn Patcharanarumol, Colin Poulton, Viroj Tagcharoensathienm Elaine Unterhalter, 'The Millennium Development Goals: a cross-sectoral analysis and principles for goal setting after 2015' (2010) 376 *The Lancet* 991

Immanuel Wallerstein, 'After Developmentalism and Globalization, What?' (2005) 83(3) Social Forces 263

Heloise Weber, 'Politics of "Leaving No One Behind": Contesting the 2030 Sustainable Development Goals Agenda' (2017) 14(3*)* Globalisations 399

P.Weil, 'Towards Relative Normativity in International Law?' (1983) 77 American Journal of International Law 413 cited in Dinah Shelton, 'Normative Hierarchy in International Law' (2006) 100 American Journal of International Law 291

IngaT.Winkler, Margaret Satterthwaite,'Leaving no one behind? Persistent inequalities in the SDGs' (2017) 13 The International Journal of Human Rights 1073

Inga T. Winkler, Carmel Williams, 'The Sustainable Development Goals and Human Rights: A Critical Early Review' (2017) 21(8) The Interantional Journal of Human Rights 1023

Americo B.Zampetti, 'Entrenching Sustainable Human Development in the Design of the Global Agenda after 2015' (2015) 43(3) *Denver Journal of International Law & Policy* 277

ELECTRONIC SOURCES:

Encyclopaedias:

William Bristow, 'Enlightenment', *The Stanford Encyclopedia of Philosophy* (Summer, 2011) <https://plato.stanford.edu/entries/enlightenment/#toc>

Oliver Dörr, 'Declaration', *Max Planck Encyclopedia of Public International Law* (2015) <http://opil.ouplaw.com>

Maurizio Ragazzi, 'Financial Institutions, International' MPEPIL (last updated October 2017) <http://opil.ouplaw.com>

Victor Rodríguez Cadeño, María Isabel Torres Cazorla, 'Unilateral Acts of States in International Law, *MPEIL* (2019) <http://opil.ouplaw.com>

Christian Walter, 'Subjects of International Law' MPEPIL <http://opil.ouplaw.com>

Edith Brown Weiss, Ahila Sornarajah, 'Good Governance' *MPEPIL* (2015) <http://opil.ouplaw.com>

Rüdiger Wolfrum, 'International Law of Cooperation' *MPEPIL* (2013) <http://opil.ouplaw.com>

Karl-Heinz Ladeur, 'Theory of Governance' *MPEPIL* (2015) <http://opil.ouplaw.com>

Lexikon der Nachhaltigkeit <https://www.nachhaltigkeit.info/artikel/definitionen_1382.htm>

E-Books/E-Journals:

R.Hanlin, W.Brown, 'Contesting Development in Theory and Practice' in *International development in a Changing World* (The Open University, 2013) <https://www.open.edu/openlearn/ocw/pluginfile.php/321851/mod_resource/content/2/td223_openlearn_chapter2.pdf>

Marcel M.T.A. Brus, 'Soft Law in Public International Law: a pragmatic or principled choice? Comparing the Sustainable Development Goals and the Paris Agreement' (22 March 2017) <https://ssrn.com/abstract=2945942>

Simon Burall, Caroline Neligan, 'The Accountability of International Organisations' (2004) Global Public Policy Institute, Research Paper Series No.2 <https://www.gppi.net/media/Burall_Neligan_2005_Accountability.pdf>

D.French, 'The Global Goals: Formalism Foregone, Contested Legality and Re-Imaginings of International Law' in Zeray Yihdego, Melaku Geboye Desta, Fikremarkos Merso (eds.) *Ethiopian Yearbook of International Law 2016* <http://eprints.lincoln.ac.uk/id/eprint/25934/>

Jing Gu, 'International Development Law' *Oxford Bibliographies* (last review 2 November 2017) <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0121.xml>

Ahmed Shafiqul Huque, Habib Zafarullah (eds.), *International Development Governance* (online edn, Routledge 2017)

Alvin Leong, 'The pursuit of universality' (2015) 11(1) Mother Pelican <http://www.pelicanweb.org/solisustv11n01page4.html>

Kristen Lewis, Citizen-Driven Accountability for Sustainable Development: Giving Affected People a Greater Voice–20 Years On (June 2012) <https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/publications/CitizenDrivenAccountability.pdf>

Stephanie de Moerloose, *World Bank Environmental and Social Conditionality as vector of Sustainable Development* (DPhil thesis, University of Geneva 2019) <http://archive-ouverte.unige.ch/unige:121456>

O.Spijkers, The United Nations, the Evolution of Global Values and International Law (DPhil thesis, Intersentia 2011); Open Access Leiden University Repository <https://openaccess.leidenuniv.nl/handle/1887/17926>

Reports/Working Papers:

Sudgir Anand, A.Sen, 'Sustainable Human Development: concepts and priorities' (1994) UNDP Human Development Report Office Occasional Papers, 10-16, 42 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2294664>

Stefano Battini, International Organisations and Private Subjects: A Move Toward A Global Administrative Law? (2005) IILJ Working Paper 2005/3, 28 <https://iilj.org/wp-content/uploads/2016/08/Battini-International-Organizations-and-Private-Subjects-2005-3.pdf>

Jochen von Bernstorff, Philipp Dann, Reforming the World Bank's Safeguards: a comparative Analysis (GIZ, 2013) <https://consultations.worldbank.org/sites/default/files/consultation-template/review-and-update-world-bank-safeguard-policies/submissions/worldbankssafeguardsacomparativelegalanalysis.pdf

Annette Binnendijk, 'Results-based Management in the Development Cooperation Agencies: A Review of Experience' (2001) DAC Working Party on Aid Evaluation, 3-4 <https://www.oecd.org/development/evaluation/dcdndep/31950852.pdf>

D.Bradlow, External Review of the Inspection Panel's Toolkit (14 May 2018) <https://documents1.worldbank.org/curated/en/562131583764988998/pdf/External-Review-of-the-Inspection-Panel-s-Toolkit.pdf>

Commission of the European Communities, *A sustainable Europe for a better world: a European Union Strategy for Sustainable Development*, Communication from the Commission (Commission's proposal to the Gothenburg European Council), COM(2001) 264 final <http://europa.eu.int/eur-lex/en/com/cnc/2001/com2001_0264en01.pdf>

Nicholas Crafts, 'Fifty Years of Economic Growth in Western Europe: No Longer Catching-Up but Falling Behind?' (2003) Stanford Institute for Economic Policy Research, Discussion Paper No.03-21 <http://www-siepr.stanford.edu/papers/pdf/03-21.pdf>

Gilberto Gallopin, *Impoverishment and Sustainable Development* (ISSD 1996) <https://www.iisd.org/system/files/publications/impoverishment_and_sd.pdf>

Harvey Himberg, 'Comparative Review of Multilateral Development Bank Safeguard Systems' (May 2015), vii <https://consultations.worldbank.org/sites/default/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/related/mdb_safeguard_comparison_main_report_and_annexes_may_2015.pdf>

David Hulme, 'The Millennium Development Goals (MDGs): a Short History of the World's Biggest Promise' (2009) Brooks World Poverty Institute Working Paper 100

International Council for Science and International Social Science Council, *Review of the Sustainable Development Goals: The Science Perspective* (2015)

Harry Jones, 'Equity in Development – Why it is important and how to achieve it' (2009) ODI Working Paper No.311 <https://cdn.odi.org/media/documents/4577.pdf>

Naila Kabeer, 'Can the MDGs provide a pathway to social justice? The Challenge of intersecting inequalities' (2010) IDS, MDG Achievement Fund <http://www.mdgfund.org/sites/default/files/MDGs_and_Inequalities_Final_Report.pdf

Richard Manning, 'Using Indicators to Encourage Development-Lessons from the Millennium Development Goals' (2009) Danish Institute for International Studies Report 2009:01 <https://www.oecd.org/site/progresskorea/44117550.pdf>

Rebecca M.Nelson, 'Multilateral Development Banks: Overview and Issues for Congress' (11 February 2020) Congressional Research Service Report R41170, 1-11 <https://crsreports.congress.gov/product/pdf/R/R41170>

Sakiko Fukuda-Parr, 'Are the MDGs Priority in Development Strategies and aid Programs? Only few are!', International Poverty Centre Working Paper No.48 (UNDP 2008)

Erik S. Reinert, The Other Canon Foundation, Norway and Tallinn University of Technology 'Developmentalism' (2010) Working Papers in Technology Government and Economic Dynamics No.34 <http://technologygovernance.eu/files/main/2012032710251212.pdf>

Jan Aart Scholte, 'The Sources of Neoliberal Globalisation' (2005) UN Research Institute for Social Development, Overarching Concerns Program Paper No.8, 7 <https://www.files.ethz.ch/isn/102686/8.pdf>

Erik Solheim, 'Development Cooperation Report 2013: Ending Poverty' (2013) <http://www.oecd-ilibrary.org/docserver/download/4313111e.pdf?expires=1521481533&id=id&accname=guest&checksum=4DADD8F66F295E40D12A3344AA8A953C>

Sheri Torjman, 'The Social Dimension of Sustainable Development' (Caledon Institute of Social Policy 2000)

Sustainable Development Solution Networks, 'An Action Agenda for Sustainable Development: Report for the UN Secretary-General' (June 2013) <https://unstats.un.org/unsd/broaderprogress/pdf/130613-SDSN-An-Action-Agenda-for-Sustainable-Development-FINAL.pdf>

J.Vandemoortele, 'The MDGs and Pro-Poor Policies: Related but not synonymous', (2004) UNDP International Poverty Centre Working Paper No.3 <https://www.researchgate.net/publication/5129024_THE_MDGs_AND_PRO-POOR_POLICIESRELATED_BUT_NOT_SYNONYMOUS>

Jayashree Vivekanandan, 'Multilevel Governance: Toward a New Paradigm for Sustainable Development', (31 January 2009) <http://regardssurlaterre.com/en/multilevel-governance-toward-new-paradigm-sustainable-development>

Kevin Watkins, *The Millennium Development Goals: Three Proposals for renewing the Vision and Reshaping the Future* (UNESCO 2008)

Conference Papers:

W.M.Adams, 'The Future of Sustainability: Rethinking Environment and Development in the Twenty-First Century', Report of the IUCN Renowned Thinkers Meeting 29-31 January 2006 (IUCN 2006) <https://portals.iucn.org/library/node/12635>

Susan George, 'A Short History of Neoliberalism: Twenty Years of Elite Economics and Emerging Opportunities for Structural Change' (Conference on Economic Sovereignty in a Globalising World, Bangkok, 24-26 March 1999) http://www.globalexchange.org/resources/econ101/neoliberalismhist

Newspaper Articles/Magazines:

J.Hickel, 'The problem with saving the world' *Jacobin Magazine* (2015) <https://jacobin.com/2015/08/global-poverty-climate-change-sdgs/>

George Monbiot, 'Neoliberalism - the Ideology at the Root of all our Problems' *The Guardian* (London, 15 April 2016) <https://bookshop.theguardian.com/catalog/product/view/id/381048/?utm_source=editoriallink&utm_medium=merch&utm_campaign=article>

Blogs:

'Human Rights and Sustainable Development' (*Harvard University Press Blog*, 2 October 2015) <http://harvardpress.typepad.com/hup_publicity/2015/10/human-rights-and-sustainable-development-goals.html>

Giuliana Ziccardi Capaldo, 'What is Global Law?' (*OUPblog,* 10 August 2015) <https://blog.oup.com/2015/08/what-is-global-law-jurisprudence/>

K.Daugirdas, 'IOs Accountability Symposium: Reputation and Accountability' (*OpinioJuris*, 15 October 2019) <http://opiniojuris.org/2019/10/15/international-organizations-symposium-reputation-and-accountability/>

D.Desierto, 'Lingering asymmetries in the SDGs and Human Rights: How Accountable are IFIs in the International Accountability Network' (*EJIL:Talk!*, 22 February 2019) <https://www.ejiltalk.org/how-accountable-are-international-financial-institutions-in-the-international-accountability-network/>

Diane Desierto, 'SCOTUS Decision in Jam et al v IFC Denies Absolute Immunity to IFC…with Caveats' (*EJIL:Talk!* 28 February 2019) <https://www.ejiltalk.org/scotus-decision-in-jam-et-al-v-international-finance-corporation-ifc-denies-absolute-immunity-to-ifc-with-caveats/>

D.Desierto et al, 'The 'New' World Bank Accountability Mechanism: Observations from the ND Reparations Design and Compliance Lab' (*EJILTalk*, 11 November 2020) <https://www.ejiltalk.org/the-new-world-bank-accountability-mechanism/>

Sachintha Dias, 'Jam v IFC before the D.C. District Court: Forget the Floodgates, there won't even be a Trickle' (*EJIL:Talk!* 1 April 2020) <https://www.ejiltalk.org/jam-v-ifc-before-the-d-c-district-court-forget-the-floodgates-there-wont-even-be-a-trickle/>

Kate Donald, 'Winning a place for human rights in the new sustainable development agenda' (*Open Democracy*, 24 September 2015) <https://www.opendemocracy.net/openglobalrights/kate-donald/winning-place-for-human-rights-in-new-sustainable-development-agenda>

Casey Dunning, Molly Elgin-Cossart, 'Can the SDGs Really 'Leave No One Behind'?' (*Centre for Global Development*, 7 January 2015) <http://www.cgdev.org/blog/can-sdgs-really-leave-no-one-behind>

Alessandra Heinemann, 'Why I'm optimistic we can achieve SDG1–ending poverty in all its forms, everywhere' (*ADB Blog,* Aug 2019) <https://blogs.adb.org/blog/why-i-m-optimistic-we-can-achieve-sdg-1-ending-poverty-all-its-forms-everywhere>

Michael Igoe, 'The World Bank Chief defends New Safeguards' (*Devex*, 5 August 2016) <https://www.devex.com/news/world-bank-chief-defends-new-safeguards-88545>

Jaakko Kuosmanen, 'SDGs – A Beacon of Light or another Stumble in Global Governance?' (Oxford Human Rights Hub, 26 September 2015) <http://ohrh.law.ox.ac.uk/ sustainable-development-goals-a-beacon-of-light-or-another-stumble-in-global-governance/>

Share the World's Resources, '10 Policies to Finance the Global Sharing Economy' in Financing the Global Sharing Economy, London October 2012 <https://www.sharing.org/information-centre/reports/financing-global-sharing-economy>

Share the World's Resources, 'Beyond the Sustainable Development Goals: Uncovering the truth about global poverty and demanding the universal realisation of Article 25' (29 September 2015) <https://www.sharing.org/information-centre/reports/beyond-sustainable-development-goals- uncovering-truth-about-global>

Suzanne Nazal, '5 ways CSOs can help advance the SDGs' (*ADB Blog*, Sep 2018) <https://blogs.adb.org/blog/5-ways-csos-can-help-advance-sdgs>

'Third FFD Failing to Finance Development–Civil Society Response to the AAAA on Financing for Development', (*Global Policy Watch,* 16 July 2015*)* <https://www.globalpolicywatch.org/blog/2015/07/16/civil-society-response-agenda-financing-development/>

Vijaya Ramachandran, 'Fishermen, SCOTUS and the IFC: Litigating Development' (*CGD blog*, 5 November 2018) <https://www.cgdev.org/blog/fishermen-scotus-and-ifc-litigating-development>

Jan Vandemoortele, 'The MDGs: 'M' for Misunderstood?' (*WIDERAngle*, 2007) <https://www.wider.unu.edu/publication/mdgs-'m'-misunderstood>

Websites:

American Development Bank www.asdb.org

African Development Bank <www.afdb.org>

American Infrastructure Investment Bank <www.aiib.org>

Caribbean Development Bank <https://www.caribank.org/>

Central American Bank for Economic Integration <https://www.bcie.org/>

Commission on Sustainable Development <https://sustainabledevelopment.un.org/intergovernmental/csd19>

East and the West African Development Banks <https://eadb.org/>

European Bank for Reconstruction and Development <www.ebrd.org>

European Investment Bank <www.eib.org>

Inter-American Development Bank <www.iadb.org>

International Centre for Settlement of Investment Disputes (ICSID) <https://www.worldbank.org/en/about>

Islamic Development Bank <www.isdb.org>

High-level Political Forum on Sustainable Development <https://sustainabledevelopment.un.org/index.php?menu=1556>

Human Development Index (HDI) <http://hdr.undp.org/en/content/human-development-index-hdi>

IMF, 'The Fund's Mandate – An Overview' <http://www.imf.org/external/np/pp/eng/2010/012210a.pdf>

UNDP, Human Development Reports <http://hdr.undp.org/>

United Nations Millennium Campaign <http://www.millenniumcampaign.org/>

United Nations Millennium Project <http://www.unmillenniumproject.org/>

United Nations Statistics Division, 'Official List of MDGs and Indicators for Monitoring Progress 2008' <http://unstats.un.org/unsd/mdg/Host.aspx?Content=Indicators/OfficialList.htm>

Sustainable Development Knowledge Platform <https://sustainabledevelopment.un.org/rio20>

EU, 'The history of the European Union' <https://europa.eu/european-union/about-eu/history/1946-1959/1947_en>

Harry S. Truman Library and Museum, 'Truman's Inaugural Speech' (20 January 1949) <https://www.trumanlibrary.org/whistlestop/50yr_archive/inagural20jan1949.htm>

United Nations Security Council, Ombudsperson - sanctions regime in relation to Al-Qaida and ISIL <https://www.un.org/securitycouncil/ombudsperson>

WBG <http://www.worldbank.org>

WBG, Worldwide Governance Indicators (WGI) <https://info.worldbank.org/governance/wgi/#home>

MISCELLENEOUS:

ADB, Strategy 2020–The Long-term Strategic Framework of the Asian Development Bank 2008-2020 <https://www.adb.org/sites/default/files/institutional-document/32121/strategy2020-print.pdf>

AfDB, Regional Integration Policy and Strategy 2014-2023. Integrating Africa: Creating the Next Global Market (2015) <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/Regional_Integration_Stategy_RIPoS_-2014-2023_-Approved_-__Rev_1__-_11_2014.pdf

AIIB, 'The Role of Law at AIIB' <https://www.aiib.org/en/about-aiib/who-we-are/role-of-law/index.html>

DESA, *The United Nations Development Agenda: Development for All – Goals, commitments and strategies agreed at the UN world conferences and summits since 1990*, UN publication Sales No. E. 07.1.17 2007

DESA, *Financing for Development* <http://www.un.org/esa/ffd/overview/monterrey-conference.html>

DESA, The Millennium Development Goals Report 2015 <http://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20(July%201).pdf>

High Level Panel on Eminent Persons on a Post-2015 Development Agenda, 'A New Global Partnership: Eradicate Poverty and Transform Economies through Sustainable Development' (May 2013) <https://sustainabledevelopment.un.org/content/documents/8932013-05%20-%20HLP%20Report%20-%20A%20New%20Global%20Partnership.pdf>

IADB, Update to Institutional Strategy 2010-2020, Partnering with Latin America and the Caribbean to Improve Lives (March 2015) <https://publications.iadb.org/publications/english/document/Update-to-the-Institutional-Strategy-2010-2020.pdf>

Busan Partnership for Effective Development Cooperation, Fourth High-Level Forum on Aid Effectiveness (29 Nov- 1 Dec 2011) <https://www.oecd.org/dac/effectiveness/49650173.pdf>

OHCHR, 'Report to ECOSOC' (2002) U.N. Doc. E/2002/68 <http://www.un.org/documents/ecosoc/docs/2002/e2002-68.pdf>

OHCHR, 'Who will be accountable? Human Rights and the Post-2015 Development Agenda' (2013) HR/PUB/13/1 <https://www.ohchr.org/Documents/Publications/WhoWillBeAccountable.pdf>

OHCHR, 'Key Messages on Financing for Development and Human Rights', <*https://www.ohchr.org/Documents/Issues/Development/KeyMessageHRFinancingDevelopment.pdf*>

OHCHR, Special Procedures Rapporteurs, Letter to President of the WBG (12 December 2014) <https://www.ohchr.org/Documents/Issues/EPoverty/WorldBank.pdf>

OHCHR, 'UN Expert urges WB to amend its Constitution to Effectively Advance Human Rights' (14 September 2017) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22064&LangID=E

OECD, *Paris Declaration on Aid Effectiveness* (OECD 2005) <http://dx.doi.org/10.1787/9789264098084-en>

OECD, *Accra Agenda For Action* (OECD 2008) <http://dx.doi.org/10.1787/9789264098107-en>

OWG Proposal for Sustainable Development Goals <https://sustainabledevelopment.un.org/content/documents/1579SDGs%20Proposal.pdf>

OWG, Report of the Open Working Group of the General Assembly on Sustainable Development Goals (12 August 2014) UN Doc. A/68/970

ILO Indigenous and Tribal Peoples Convention (No.169) (1989) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169>

UNDP, *Human Development Report 2000*, 19 <http://hdr.undp.org/sites/default/files/reports/261/hdr_2000_en.pdf>

UNDP, *Human Development Report 2003* <http://hdr.undp.org/sites/default/files/reports/264/hdr_2003_en_complete.pdf

UNDP, Social and Environmental Standards (updated January 2021) <https://www.undp.org/publications/undp-social-and-environmental-standards>

UNEP, OHCHR, 'Universality in the Post-2015 Sustainable Development Agenda' (2015) <https://www.ohchr.org/Documents/Issues/MDGs/Post2015/OHCHR_UNEP.pdf>

UN System Task Team on the Post-2015 UN Development Agenda, 'Review of the Contributions of the MDG Agenda to foster development: Lessons for the Post-2015 UN development Agenda' (2012) Discussion Note, 12 <https://sustainabledevelopment.un.org/content/documents/843taskteam.pdf>

UN, *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict* (March 2017) <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/06/report/international-protocol-on-the-documentation-and-investigation-of-sexual-violence-in-conflict/International_Protocol_2017_2nd_Edition.pdf>

WORLD BANK GROUP SOURCES:

Reports/Briefs/Press Releases:

CIEL, 'Independent Review Confirms IFC Covered Up social and Environmental Impacts from Chilean Dam Project' <https://www.ciel.org/wp-content/uploads/2015/05/prbio2.pdf>

Development Committee, 'From Billions to Trillions: Transforming Development Finance Post-2015 Financing For Development: Multilateral Development Finance' <https://siteresources.worldbank.org/DEVCOMMINT/Documentation/23659446/DC2015-0002(E)FinancingforDevelopment.pdf>

Development Committee, 'Forward Look: a Vision for the WBG in 2030' (20 September 2016) <http://pubdocs.worldbank.org/en/545241485963738230/DC2016-0008.pdf>

International Capital Market Association (ICMA), 'Green Bond Principles: Voluntary Process Guidelines for Issuing Green Bonds' (June 2018) <https://www.icmagroup.org/assets/documents/Regulatory/Green-Bonds/Green-Bonds-Principles-June-2018-270520.pdf>

ICMA, 'Social Bond Principles: Voluntary Process Guidelines for Issuing Social Bonds' (June 2020) <https://www.icmagroup.org/assets/documents/Regulatory/Green-Bonds/June-2020/Social-Bond-PrinciplesJune-2020-090620.pdf>

ICMA, 'Green, Social and Sustainability Bonds: a High-Level Mapping to the SDGs' (June 2020) <https://www.icmagroup.org/assets/documents/Regulatory/Green-Bonds/June-2020/Mapping-SDGs-to-Green-Social-and-Sustainability-Bonds-2020-June-2020-090620.pdf>

Independent Evaluation Group, 'Safeguards and Sustainability Policies in a Changing World: an Independent Evaluation of WBG Experience' (2010) <https://openknowledge.worldbank.org/handle/10986/2571>

IFC, 'IFC's Contribution to the SDGs' (March 2018) <https://www.ifc.org/wps/wcm/connect/1433afde-d252-42f2-bbd9-839e30a69947/201803_IFCs-contribution-to-the-SDGs_v1.pdf?MOD=AJPERES&CVID=m9zP1Y->

IFC, 'Impact Investing at IFC' <https://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Development+Impact/Principles/>

IFC, 'International Bill of Human Rights and IFC Sustainability Framework' <https://documents1.worldbank.org/curated/en/470681480669101836/pdf/110689-IBHR-and-IFC-Policies-PS-DRAFT.pdf>

IFC, Social and Green Bonds <https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new/investor+relations/ir-products/socialbonds>; <https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new/investor+relations/ir-products/grnbond-overvw>

IFC, Social and Green Bonds Impact Reports <https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new/investor+relations/ir-info/impact+reports>

WBG Annual Report (2002) <http://documents.worldbank.org/curated/en/379051468163155729/pdf/multi0page.pdf>

WB, 'The World Bank's Safeguard Policies–Proposed Review and Update, Approach Paper (2012)

WB, *From Billions to Trillions: MDB Contributions to Financing For Development* (7 July 2015) <http://documents.worldbank.org/curated/en/602761467999349576/From-billions-to-trillions-MDB-contributions-to-financing-for-development>

WB, Brief (12 August 2020) <https://www.worldbank.org/en/about/leadership/brief/external-review-of-ifc-miga-es-accountability>

WB, *Bonds for Sustainable Development–Investor Newsletter* (April 2015) <http://pubdocs.worldbank.org/en/770351529080670295/WB-Sustainable-Development-Bonds-Newsletter-2015-v-13-FINAL-interactive.pdf>

WB, 'Bonds for Sustainable Development: Impact Report 2019' (May 2020) <http://pubdocs.worldbank.org/en/138051589440217749/World-Bank-Sustainable-Development-Bond-Impact-Report-2019.pdf>

WB, 'Conclusion of the Inspection Panel toolkit Review' (Factsheet, 9 March 2020) <https://www.worldbank.org/en/news/factsheet/2020/03/06/conclusion-of-the-inspection-panel-toolkit-review>

WB consultations on draft and revised proposed ESF in three phases <https://consultations.worldbank.org/consultation/review-and-update-world-bank-safeguard-policies>

WB, Effective implementation: key to development impact (Wapenhans Report) <http://documents.worldbank.org/curated/en/596521467145356248/Effective-implementation-key-to-development-impact-Wapenhans-Report

WB, Financing For Development Post-2015 (October 2013) <https://thedocs.worldbank.org/en/doc/932281485530446820-0270022017/original/Financingfordevelopmentpub101113web.pdf>

WBG, 'IBRD Funding Program'<https://treasury.worldbank.org/en/about/unit/treasury/ibrd>

WB, The WBG Goals: End Extreme Poverty and Promote Shared Prosperity <https://www.worldbank.org/content/dam/Worldbank/document/WB-goals2013.pdf>

WB Legal Vice Presidency, *Initiative in Justice Reform 2009* <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/JRInitiativestext2009.pdf>

WB, The Inspection Panel at 25 Years: Accountability of the World Bank Group (2018), 14 <https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/publications/25th%20Anniversary%20Book-PDF%20Version.pdf>

Memorandum Reporting on the Morse Commission and Environmental Defence Fund Press (19 June 1992) <https://timeline.worldbank.org/themes/timeline/pdfjs/web/viewer.html?file=%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20//timeline.worldbank.org/sites/timeline/files/timeline/archival-pdfs/event65_SardorSarovar_4_1662724.pdf>
WB, Policy and Procedure Framework: Development Policy Financing (issued 2 August 2017, entered into force 13 July 2017) <https://ppfdocuments.azureedge.net/b98d432b-7471-441b-9f39-36b7c380bd05.pdf>

WB, Policy and Procedure Framework: Investment Project Financing (issued 30 September 2018, entered into force 1 October 2018) <https://ppfdocuments.azureedge.net/796071c4-6875-4b6f-b9ba-5eeeb8de20a4.pdf>; <https://www.worldbank.org/en/projects-operations/products-and-services#IPF>

WB, Policy and Procedure Framework: Program-for-Results Financing (issued 10 November 2017, entered into force same date) <https://ppfdocuments.azureedge.net/f9e36a3b-72e0-4edb-9fdc-96bf555c7208.pdf> and for updated information <https://www.worldbank.org/en/programs/program-for-results-financing#1>

WB, Portfolio Management: Next Steps A Program of Actions (22 July 1993) <https://documents1.worldbank.org/curated/en/177411468178127024/pdf/multi-page.pdf>

WB, *Multiphase Programmatic Approach* (Operations Policy and country services, 18 July 2017) <http://documents1.worldbank.org/curated/en/203081501525641125/pdf/MPA-07192017.pdf>

WBG, *Poverty and Shared Prosperity 2016: Taking On Inequality* (The World Bank 2016)

WB, Report and Recommendations on the Inspection Panel's Toolkit Review (Board Report) (5 March 2020) <https://documents1.worldbank.org/curated/en/972351583772786218/pdf/Report-and-Recommendations-on-the-Inspection-Panel-s-Toolkit-Review.pdf>

WB, 'Sustainable Development: Overview-Context': 'The three pillars of sustainable development carry across all sectors of development' <http://www.worldbank.org/en/topic/sustainabledevelopment/overview>

WBG, Statistical Appendix in Global Economic Prospects: Broad-based Up- turn but for How Long?, Washington D.C. (January 2018) <http://www.worldbank.org/en/publication/global-economic-prospects#data>

WB, *The Sustainable Development Agenda and the WBG: Closing the SDGs Financing Gap* (2019 update–non-official publication) <http://pubdocs.worldbank.org/en/259801562965232326/2030Agenda-2019-final-web.pdf>

WBG, 'The WBG's Twin Goals, the SDGs and the 2030 Development Agenda <https://www.worldbank.org/en/programs/sdgs-2030-agenda>

WB, *World Development Report 1990 – Poverty* (OUP 1990)

WB, *World Development Report 2003: Sustainable Development in a Dynamic World–Transforming Institutions, Growth and Quality of Life* (OUP 2003)

IBRD/IFC Documents:

AoA/Operational Policies

IBRD, Articles of Agreement (as amended effective June 27, 2012) <http://pubdocs.worldbank.org/en/722361541184234501/IBRDArticlesOfAgreement-English.pdf> (last updated November 3, 2018)

IBRD, Environmental and Social Framework (2016) <https://thedocs.worldbank.org/en/doc/837721522762050108-0290022018/original/ESFFramework.pdf>

IBRD, Bank Directive, 'Addressing Risks and Impacts on Disadvantages or Vulnerable Individuals or Groups' (27 March 2021) <https://ppfdocuments.azureedge.net/9598117e-421d-406f-b065-d3dfc89c2d78.pdf>

IBRD Operational Policies:
OP 4.01 <https://ppfdocuments.azureedge.net/1565.pdf>
BP 4.01 <https://ppfdocuments.azureedge.net/1578.pdf>
OP 4.04 <https://ppfdocuments.azureedge.net/1567.pdf>
OP 4.09 <https://ppfdocuments.azureedge.net/1637.pdf>
OP 4.10 <https://ppfdocuments.azureedge.net/1570.pdf>
BP 4.10 <https://ppfdocuments.azureedge.net/1582.pdf>

OP 4.11 <https://ppfdocuments.azureedge.net/1571.pdf>
OP 4.12 <https://ppfdocuments.azureedge.net/1572.pdf>
OP 4.36 <https://ppfdocuments.azureedge.net/1574.pdf>

WB, 'World Bank Environmental and Social Framework' (2016) <https://documents1.worldbank.org/curated/en/383011492423734099/pdf/The-World-Bank-Environmental-and-Social-Framework.pdf>

IFC, AoA (as amended through 16 April 2020) <https://www.ifc.org/wps/wcm/connect/d057dbd5-4b02-40f8-8065-9e6315c5a9aa/2020-IFC-AoA-English.pdf?MOD=AJPERES&CVID=n7H2n-h>

IFC, Environmental and Social Policy Framework <https://www.ifc.org/wps/wcm/connect/f12fa7cb-267e-442b-ab9d-58f371b9198a/SustainabilityPolicy.pdf?MOD=AJPERES&CVID=kpI-B8K>

IFC, Environmental and Social Review Procedures Manual <https://www.ifc.org/wps/wcm/connect/6f3c3893-c196-43b4-aa16-f0b4c82c326e/ESRP_Oct2016.pdf?MOD=AJPERES&CVID=lRwoQFr>
<https://www.ifc.org/wps/wcm/connect/c02c2e86-e6cd-4b55-95a2-b3395d204279/IFC_Performance_Standards.pdf?MOD=AJPERES&CVID=kTjHBzk>

IFC, Performance Standards (2012) <https://www.ifc.org/wps/wcm/connect/7141585d-c6fa-490b-a812-2ba87245115b/SP_English_2012.pdf?MOD=AJPERES&CVID=kiIrw0g>

IFC, Performance Standards (2006) <https://www.ifc.org/wps/wcm/connect/3f3419f4-6043-4984-a42a-36f3cfaf38fd/IFC%2BPerformance%2BStandards.pdf?MOD=AJPERES&CVID=jkC.Eka&id=1322803957411>

IFC Guidance Notes (2006), GN6 regarding PS6 <https://www.ifc.org/wps/wcm/connect/0b481a5d-958a-43a9-a1e4-2461b4bb8753/2007%2BUpdated%2BGuidance%2BNotes_full.pdf?MOD=AJPERES&CVID=jkD0J0V&myconnectid=1322804281925>

IFC, Guidance Notes (2012) <https://www.ifc.org/wps/wcm/connect/9fc3aaef-14c3-4489-acf1-a1c43d7f86ec/GN_English_2012_Full-Document_updated_June-14-2021.pdf?MOD=AJPERES&CVID=nF3GZYM>

IBRD/CAO Documents

Review of the Resolution Establishing the IP-Clarification of certain Aspects of the Resolution (17 October 1996) <https://www.inspectionpanel.org/sites/ip-ms8.extcc.com/files/documents/ReviewResolution1966.pdf>

Clarification of the Board's second review of the IP (20 April 1999) <https://www.inspectionpanel.org/sites/ip-ms8.extcc.com/files/documents/ClarificationSecondReview.pdf>

Updated Operating Procedures of the IP (2014, with Annex 2 'Enhancing Consultation with Requesters and Tracking Action Plans' added in February 2016) <https://www.inspectionpanel.org/about-us/panel-mandate-and-procedures>

Resolution No.IBRD 2020-0005/No.IDA 2020-0004 (8 September 2020) <https://thedocs.worldbank.org/en/doc/619761599763139929-0330022020/original/AccountabilityMechanismResolution.pdf>

Resolution No.IBRD 2020-0004/No.IDA 2020-0003 (8 September 2020) <https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/documents/InspectionPanelResolution.pdf>

WBG, BP: IP Process (5 March 2021) <https://ppfdocuments.azureedge.net/38eff62b-68ed-4af5-b884-e5cf3f26f5fd.pdf>

CAO, Ombudsman <http://www.cao-ombudsman.org/howwework/NewCAOPolicy.htm>

CAO, Operational Guidelines (2013) <http://www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines2013_ENGLISH.pdf>
CAO, Operational Guidelines (Previous) <http://www.cao-ombudsman.org/howwework/2012OperationalGuidelinesUpdate.htm>

IFC, External review <https://thedocs.worldbank.org/en/doc/578881597160949764-0330022020/original/ExternalReviewofIFCMIGAESAccountabilitydisclosure.pdf>

IFC/MIGA IAM (CAO) Policy (28 June 2021) <https://documents1.worldbank.org/curated/en/889191625065397617/pdf/IFC-MIGA-Independent-Accountability-Mechanism-CAO-Policy.pdf>

CAO, Policy–Transitional Arrangements <http://www.cao-ombudsman.org/howwework/documents/CAOPolicy-TransitionalArrangements.pdf>

CAO, Terms Of Reference (2013) <http://www.cao-ombudsman.org/about/whoweare/documents/CAOTOR2013.pdf>

Inspection Panel Cases:

Albania Power Sector Generation and Restructuring Project (IDA Credit No.3872-ALB), Investigation Report (2009)

Argentina Special Structural Adjustment Loan (26 July 1999), Eligibility Report <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/17-Eligibility%20Report%20%28English%29.pdf>

Bangladesh Jamuna Multipurpose Bridge (23 August 1996), IP Report and Recommendation (26 November 1996) <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/8-Eligibility%20Report%20%28English%29.pdf>

Cameroon Petroleum Development and Pipeline Project, and Petroleum Environment Capacity Enhancement Project (25 September 2002), IP Report

<https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/27-Investigation%20Report%20%28English%29.pdf>

Chad Pipeline (22 March 2001), IP Report (17 July 2002), para 34-35 <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/22-Investigation%20Report%20%28English%29.pdf>

China Western Poverty Reduction Project (18 June 1999), Management Report and Recommendation (13 June 2000) <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/16-Management%20Report%20and%20Recommendation%20%28English%29.pdf>

China Western Poverty Reduction Project (18 June 1999) Investigation Report <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/16-Investigation%20Report%20%28English%29.pdf>
Electricity Expansion Project (26 October 2014) <https://inspectionpanel.org/panel-cases/electricity-expansion-project>

High Priority Roads Reopening and Maintenance (2nd Additional Financing) (P153836), DRC (3 August 2017) <https://inspectionpanel.org/panel-cases/high-priority-roads-reopening-and-maintenance-2nd-additional-financing-p153836>

Honduras Land Administration (3 January 2006), Request https://www.inspectionpanel.org/panel-cases/land-administration-project

India Eco-development Project (2 April 1998), Request <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/11-Request%20for%20Inspection%20%28English%29.pdf>

Jute Sector Adjustment Credit (Bangladesh 1996), IP Report (14 March 1997) <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/6-Eligibility%20Report%20%28English%29.pdf>

Mine Closure and Social Mitigation Project IP Recommendation (29 September 2006) <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/39-Inspection%20Panel%20Recommendation%20%28English%29.pdf>

Paraguay/Argentina Reform Project for the Water and Telecommunication sectors, SEGBA V Power Distribution Project (Yacyretá) (2002), Management Report and Recommendation to IP Report (6 April 2004) <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/26-Management%20Report%20and%20Recommendation%20%28English%29.pdf>

Rodonia Natural Resources Management Project (Brazil, 1995) <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/4-Eligibility%20Report%20%28English%29.pdf>

Tanzania – Power VI Project (1995), Management Response (18 July 1995) <https://inspectionpanel.org/sites/inspectionpanel.org/files/ip/PanelCases/3-Management%20Response%20%28English%29.pdf>

Compliance Advisory Ombudsman Requests:

Albania/Enso Albania-01/Lengarica (22 June 2015) <http://www.cao-ombudsman.org/cases/case_detail.aspx?id=240>

Indonesia/Wilmar Group-01/West Kalimantan (1 July 2007), CAO Appraisal Report, <http://www.cao-ombudsman.org/cases/document-links/documents/CAO_Appraisal_Report_C_I_R6_Y08_F096_ENGLISH.pdf>

Indonesia/Wilmar Group-01/West Kalimantan (19 June 2009), CAO Audit report, <http://www.cao-ombudsman.org/cases/document-links/documents/CAO_Audit_Report_C_I_R6_Y08_F096_ENG.pdf>

Tullow Oil/Kosmos Energy/Jubilee FPSO Ghana (19 August 2010), Appraisal Report (20 May 2011) <http://www.cao-ombudsman.org/cases/document-links/documents/CAO_Appraisal_Report_C-I-R4-Y11-F137.pdf>

Peru Agrokasa-01/Ica (2 June 2009), CAO Audit Report (22 February 2011) http://www.cao-ombudsman.org/cases/case_detail.aspx?id=139

****