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Accountability by proxy? The ripple effects of MDBs' international accountability mechanisms on the private sector

Vanessa Richard*

Between Fall 2010 and Spring 2012, allegations of serious harm caused by Corporación Dinant—a palm oil and food company in Honduras to which the International Finance Corporation (IFC) was providing a corporate loan—reached the IFC and its Compliance Advisor Ombudsman (CAO). These allegations included “forced evictions of farmers,” “violence against farmers on and around Dinant plantations ... because of inappropriate use of private and public security forces under Dinant’s control or influence,” and the fact that IFC had “failed to identify early enough and/or respond appropriately to the situation of Dinant in the context of the declining political and security situation in Honduras.”¹ The CAO, who is the independent recourse mechanism for the IFC and the Multilateral Investment Guarantee Agency (MIGA), decided to trigger an investigation to verify “whether IFC exercised due diligence in its review of the social risks attached to the Project; whether IFC responded adequately to the context of intensifying social and political conflict surrounding the project post commitment; and whether IFC policies and procedures provide adequate guidance to staff on how to assess and manage social risks associated with projects in areas that are subject to conflict or conflict prone.”² In the course of its investigation, CAO discovered that Dinant was one of the largest borrowers of a Honduran bank, Banco Financiera Comercial Hondureña (Ficohsa), and that the Board of IFC had approved an equity and sub-ordinated debt investment in Ficohsa. Thus, IFC had a significant exposure to Dinant not only through its corporate loan to Dinant but also its equity stake in Ficohsa. This led the CAO Vice President (CAO’s head) to trigger in December 2013 the first-ever investigation performed by the complaint mechanism of a multilateral development bank (MDB) on the degree of supervision exerted by a MDB over the environmental and social (E&S) risks attached to its investment in a financial intermediary.³ This was besides in line with the CAO’s sectoral audit on IFC’s Financial Sector Investments released in February 2013.⁴

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¹ CAO, *Honduras / Dinant-01/CAO Vice President Request*, CAO Appraisal for Audit, 13 August 2012, at 5 <<http://www.cao-ombudsman.org/cases/document-links/links-188.aspx>> (last visited 19 February 2015.) All CAO-related documents cited in this article can be accessed from <<http://www.cao-ombudsman.org/>>.

² *Ibid.*, at 8.

³ Financial intermediaries (FIs) are financial entities such as banks, insurance companies, leasing companies, microfinance institutions and private equity funds. IFC investments in FIs constitute almost half of its portfolio. As put by the European Bank for Reconstruction and Development (EBRD)’s Performance Requirement 9 on Financial Intermediaries, para. 1., they are “a key instrument ... to promote sustainable financial markets and provide a vehicle to channel EBRD funding to the micro, small and medium-sized enterprise (SME) sector. Through its network of partner FIs, the EBRD can support economic development at a scale of enterprise that is smaller than would be possible through direct EBRD investment.” The policy of the Asian Development Bank on Financial Intermediation Loans specifies that these loans “seek to help achieve a number of objectives: (i) furthering policy reforms in the financial and real sectors; (ii) financing real sector investments through market-based allocation mechanisms; (iii) strengthening the capacity, governance, and sustainability of participating financial intermediaries; and (iv) helping increase the outreach, efficiency, infrastructure, and stability of the financial system ... FILs can be provided on a stand-alone basis, or as components of sector development programs or sector or project loans” (paras. 2-3.)

⁴ CAO Compliance Audit of IFC’s Financial Sector Investments, 10 October 2012, released 5 February 2013, <<http://www.cao-ombudsman.org/newsroom/archive/>> (last visited 19 February 2015.)

This series of investigations throws light on quite interesting issues regarding the expression and scope of accountability in the current global regulatory governance setting. We all know that the activities of international organizations nowadays cover an impressive range of matters. “[I]n aggregate [international institutions] regulate and manage vast sectors of economic and social life through specific decisions and rulemaking.”⁵ And yet, they are immune to liability, unless they expressly agree not to be (and they hardly do.) International organizations such as MDBs therefore operate without having to render legal account to anyone for the adverse impacts of their activities. However, since the early 90’s MDBs have created international accountability mechanisms (IAMs): it is the case of the World Bank Group, the African Development Bank Group (AfDB), the Asian Development Bank (ADB), the European Bank for Reconstruction and Development (EBRD), the European Investment Bank (EIB)⁶ and the Interamerican Development Bank (IDB.) The role of the MDBs’ grievance mechanisms is to assess, upon request of the people affected, or likely to be affected, by MDB-supported projects the compliance of the bank with its own internal rules, that is to say with its policies and procedures for instance related to environmental and social impact assessment, indigenous peoples’ rights... The study of the cases submitted to the IAMs renders a fascinating account of how decision is made in the field of multilateral development finance and the extent to which MDBs are bound by the standards they adopt *vis-à-vis* project-affected people. These are some of the questions explored by the *International Grievance Mechanisms and International Law & Governance* (IGMs) project,⁷ within which framework this paper comes. Given that MDBs finance private sector’s investment in development, it is unsurprising that the adverse impacts of the activities of private companies might trigger the accountability of their banker before an IAM, on the ground that the support MDBs provide to these companies have permitted the occurrence of the E&S adverse impacts at issue. This is not, however, the subject of the present article. Instead, I propose to go further and look at this question the other way around: in turn, can the triggering of MDBs’ accountability regarding their support to a private project have some ripple effects on their clients in terms of accountability? The exploration of this path will have three steps. The first part of this article sketches out the ‘accountability’ analytical framework: what is it according to the relevant legal and political literature and how is it understood in this article? The second part goes back in detail over the features of MDBs’ IAMs so as to highlight their remit in relation with private clients’ projects. In the light of the first two parts, the third part questions how the accountability of private sector clients might come into play in the IAMs’ practice.

I - From Accountability to Accountability Mechanisms to Legal Accountability Mechanisms

Accountability is widely used as a catchword for describing quite varied phenomena, and is often mixed up with the concepts of participation and transparency.⁸ Accountability has been defined as “a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the

⁵ Benedict Kingsbury, Nico Krisch, Richard B. Stewart, “The Emergence of Global Administrative Law”, 68 *Law & Contemporary Problems* (2005), at 17.

⁶ In the framework of the EIB’s IAM, contrary to its counterparts, confidentiality in the treatment of requests is the rule. This article will therefore not take into account this IAM’s practice, as it is not public.

⁷ ERC Grant Agreement no. 312514. The IGMs project is nested at the CERIC, Faculty of Law and Political Science of Aix-Marseille University, and administered by the French Centre National de la Recherche Scientifique (CNRS.)

⁸ Richard B. Stewart, “Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness”, 108 *AJIL* (2014), at 233-236; Richard Mulgan, “Accountability: An Ever-Expanding Concept?”, 78 *Public Administration Review* (2000), at 555; Jerry L. Mashaw, “Structuring a “Dense Complexity”: Accountability and the Project of Administrative Law”, *Issues in Legal Scholarship* (2005), at 17, electronic version available at <<http://www.iilj.org/courses/documents/Mashaw.IssuesinLegalScholarship.pdf>> (last visited 12 February 2015.)

actor may face consequences."⁹ It thus means "that policy-makers have to "give an account" to accountability holders—publics or otherwise. This requires three things: (1) a set of standards to which they are held to account; (2) relevant information available to the accountability holders; and (3) the ability of the accountability holders to sanction the policy-makers."¹⁰ Based on the different definitions that have been proposed and brought back to "concrete practices of account giving,"¹¹ one can put forward that accountability is operative when the following components are gathered:

- Identifiable accountable entities (accounters);
- Identifiable account-holders;
- Standards by which the behaviour of accounters can be assessed;
- A forum or a procedure that frames the assessment of this behaviour;
- The assessment has an impact on the behaviour of the accountant (sanction, remedial measures, better performance...)¹²

Hence, this paper does not deal with the concept of accountability *per se*, but addresses issues related to the functioning and impacts of accountability *mechanisms*.

In this quick exploration of existing literature, it is also important to note that several taxonomies of accountability mechanisms have been proposed. The classification of the types of accountability mechanisms is first and foremost based on the nature of the link between the entities that are expected to account and the account-holders. In addition, depending on the framework in which the typology is elaborated, the nature of those links is more or less varied, because in different domains accounters and account-holders are different and have different kinds of relationship. For example, Mashaw proposes a taxonomy of "accountability regimes" distributed in three domains: in the realm of "State Governance", accountability regimes can be political, administrative or legal; in the realm of "Private Markets", accountability regimes relate to products, labor or financial; in the realm of "Social Networks", accountability regimes relate to the fact one belongs *inter alia* to a family, a profession or a team...¹³ Mashaw specifies that "Putting the characteristics of these accountability regimes into boxes or grids surely overstates the degree to which they are distinctive. In the real world, these "regimes" flow and blend into each other in just about every imaginable way. Nevertheless, broad differences in kind are clearly distinguishable."¹⁴ In mapping accountability, Bovens, whose work considers accountability as a social relation in the public sphere, proposes a classification which depends on whether accountability is based on the nature of the forum (political accountability, legal accountability, administrative accountability, professional accountability, social accountability), the nature of the actors (corporate accountability, hierarchical accountability, collective accountability, individual accountability), the nature of the conduct (financial accountability, procedural accountability, product accountability) or else based on the nature of the

⁹ Mark Bovens, "Analysing and Assessing Accountability: A Conceptual Framework", 13 *European Law Journal* (2007), at 447.

¹⁰ Robert O. Keohane, "Decisiveness and Accountability as Part of a Principled Response to Nonstate Threats", 20 *Ethics & International Affairs* (2006), at 221.

¹¹ Bovens, *op. cit.*, at 450.

¹² Put differently, "in any accountability relationship we should be able to specify the answers to six important questions: Who is liable or accountable to whom; what they are liable to be called to account for; through what processes accountability is to be assured; by what standards the putatively accountable behavior is to be judged; and, what the potential effects are of finding that those standards have been breached": Mashaw, *op. cit.*, at 17; see also Bovens, "A relationship qualifies as a case of accountability when: 1. there is a relationship between an actor and a forum; 2. in which the actor is obliged; 3. to explain and justify; 4. his conduct; 5. the forum can pose questions; 6. pass judgment; 7. and the actor may face consequences": *op. cit.*, at 452.

¹³ Mashaw, *op. cit.*, at 27.

¹⁴ *Ibid.*, at 28.

obligation (vertical accountability, diagonal accountability, horizontal accountability.)¹⁵ Analyzing accountability mechanisms in the narrower realm of world politics, Grant and Keohane count seven kinds of accountability mechanisms: hierarchical, supervisory, fiscal, legal, market, peer, public-reputational. As for Stewart, who addresses accountability as a means to remedy the problem of disregard in global regulatory governance—that is to say the fact that “*the present structures and practices of global regulatory governance often generate unjustified disregard of and consequent harm to the interests and concerns of weaker groups and targeted individuals*”¹⁶—he distinguishes between five types of accountability mechanisms. As this paper endorses Stewart’s approach as regards the purpose and functions of accountability mechanisms in the context of global governance, I will briefly describe his analytical framework.¹⁷

Stewart sees accountability mechanisms as one of the “*three basic types of governance mechanisms—decision rules, accountability mechanisms, and other responsiveness-promoting measures—as potential tools for addressing disregard.*”¹⁸ ‘Decisions rules’ indicate who can make decisions for an institution and how (along which procedures decisions are made). ‘Other responsiveness-promoting measures’ are those which “*provide global bodies with various incentives to give greater regard to disregarded interests*”.¹⁹ These include transparency, participation without decisional power, reasoned decisions, peer and public reputational influences, competition, market forces... Stewart specifies that “*Decision rules and accountability mechanisms tend to assign defined authorities and responsibilities to specified actors. The other responsiveness-promoting practices do not. Their operation is typically more diffuse and indeterminate.*”²⁰ Regarding accountability mechanisms, Stewart’s definition is that three fundamental requirements must be met: “*(1) a specified accouter, who is subject to being called to provide account, including, as appropriate, explanation and justification for his conduct; (2) a specified account holder who can require that the accouter render account for his performance; and (3) the ability and authority of the account holder to impose sanctions or mobilize other remedies for deficient performance by the accouter and perhaps also to confer rewards for a superior performance by the accouter.*”²¹ Based on this definition, Stewart counts five types of accountability mechanisms (electoral, hierarchical, supervisory, fiscal and legal), that belong to two categories (the first four types in the first category, legal accountability mechanisms in the second.) The first category is based on the fact the relationship between the accouter and the account-holders involves “*a delegation or a transfer of authority or resources ... where the accouters are to act in the interest of the grantors/account-holders or designated third persons.*”²² The second category is characterized by the fact it is triggered by the accouter acting contrary to the applicable law, applicable rules also providing for a legal remedy.

As Jutta Brunnée states, “*International legal accountability, then, involves the legal justification of an international actor’s performance vis-à-vis others, the assessment or judgment of that performance against international legal standards, and the possible imposition of consequences*

¹⁵ Bovens, *op. cit.*, at 461.

¹⁶ Stewart, *op. cit.*, at 211.

¹⁷ See Stewart, *op. cit.* For an earlier version of his work, see Richard B. Stewart, “Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance” (2008), Draft Paper for the Institute for International Law and Justice (IILJ) International Legal Theory Colloquium, New York University Law School, available at <<http://iilj.org/courses/documents/2008Colloquium.Session4.Stewart.pdf>> (last visited 12 February 2015.)

¹⁸ Stewart (2014), *op. cit.*, at 233.

¹⁹ *Ibid.*, at 234.

²⁰ *Ibidem.*

²¹ *Ibid.*, at 245.

²² *Ibid.*, at 246.

if the actor fails to live up to applicable legal standards."²³ In a global regulatory governance context, it would be unrealistic to expect such legal standards to always be legally binding rules, that is, rules provided for by instruments that belong to the traditional sources of international law. Huge areas of the global regulation are governed by the so-called soft law²⁴.

With respect to the specific subject of this article, one can note that the standards that MDBs apply are, according to the terminology of the Draft Articles on the Responsibility of International Organizations (DARIOs), "*rules of the organization.*"²⁵ Their legal nature is debated and there is no consensus on whether they are part of international law or can only bind the organization's staff.²⁶ Besides, the DARIOs specify that unless the *lex specialis* of the organization provides otherwise (Article 64), a breach of the rules of the organization can amount to an internationally wrongful act only if the rules "*are part of international law*"; what is more, "*while the rules of the organization may affect international obligations for the relations between an organization and its members, they cannot have a similar effect in relation to non-members.*"²⁷ This rules out the idea that the people affected by the activities of international organizations can invoke this organization's international legal responsibility. The recourse to the notion of legal accountability, which is not restricted to legal responsibility/liability mechanisms (where relevant standards are legally binding rules, and consequences are whatever form of compensation the law provides for), opens avenues for a legal analysis of the protean normative phenomena that occur in global regulatory governance.

II – Main features of IAMs with respect to MDBs-supported private projects

In the context of the rise of the sustainable development concept²⁸ and faced with widespread criticism of the E&S impacts of the projects they supported, MDBs started creating grievance mechanisms in the early 90s. The first ever created, the Inspection Panel of the World Bank, was established in 1993²⁹ and examines the requests submitted by people who allege they are or will be affected by a project which is supported by the International Bank for Reconstruction and Development (IBRD) and/or the International Development Association (IDA). In November 1995, the Inspection Panel received its fifth complaint, submitted by the Grupo de Acción por el BioBío (GABB) on its "*own behalf and that of 385 other concerned people—including 47 Pehuenche, 194 citizens from Concepción (located at the mouth of the Biobío), 145 Chileans from other cities, and three*

²³ Jutta Brunnée, "International Legal Accountability through the Lens of the Law of State Responsibility", XXXVI *Netherlands Yearbook of International Law* (2005), at 24 (emphasis in the original).

²⁴ See *inter alia* Kingsbury, Krisch, Stewart, *op. cit.*

²⁵ International Law Commission, Draft articles on the responsibility of international organizations, with commentaries, *Yearbook of the International Law Commission*, Part Two (2011), Article 2b): "*'rules of the organization' means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization.*"

²⁶ See the debates presented in Giorgio Gaja, Special Rapporteur, International Law Commission, *Third Report on Responsibility of International Organizations*, 13 May 2005, UN Doc. A/CN.4/553, paras. 18-19.

²⁷ International Law Commission, Draft articles on the responsibility of international organizations, Commentary of Article 5(3).

²⁸ On the impact of the 1992 Rio Declaration on World Bank's environmental policies and procedures, see Charles E. Di Leva, "International Environmental Law, the World Bank, and International Financial Institutions", in Daniel D. Bradlow and David B. Hunter (eds.), *International Financial Institutions and International Law*, The Netherlands: Wolters Kluwer (2010), at 343-362.

²⁹ On the reasons for creating the Inspection Panel see *inter alia* Dana Clark, "Understanding the World Bank Inspection Panel", in Dana Clark, Jonathan Fox, Kay Treakle (eds.), *Demanding Accountability. Civil-Society Claims and the World Bank Inspection Panel*, Lanham/Oxford: Rowman and Littlefield Pub. (2003), at 2-9. See also the accounts of James Wolfensohn, former President of the World Bank (1995-2005), and David Hunter, one of the "*driving forces behind the creation of the [Panel]*", in Maartje van Putten, *Policing the Banks. Accountability Mechanisms for the Financial Sector*, Montréal: McGill-Queen's University Press (2008), respectively at 345-355 and 356-367.

members of Parliament."³⁰ A petition was also sent to the then-World Bank President James Wolfensohn. The complaint was about the decision of the IFC, made in December 1992, to support the construction of the Pangué dam on the Biobío river basin in Chile by ENDESA, a Chilean electric utility. The Inspection Panel had no choice but to reject the complaint, as the IFC's doings are outside its remit.³¹ However, the project showed such serious violations of indigenous peoples' rights and negative environmental impacts, and such an absolute disregard for the fact the Pangué dam was planned in the framework of a series of dams which cumulative impacts had been neglected, that Wolfensohn decided to ask Jay Hair, the then-President of the International Union for the Conservation of Nature (IUCN), to perform an independent review of the Pangué dam project. The Hair report released in July 1997, even heavily redacted by the World Bank,³² is damning. The Pangué dam had been inaugurated in March, this same year... One of the positive outcomes of this nasty business was nonetheless the establishment of an IFC disclosure policy, of IFC environmental and social safeguards and the creation of the Compliance Advisor Ombudsman, since the Pangué dam case had highlighted the need for an accountability mechanism for the activities of the World Bank Group aimed at promoting private sector's investment in development, namely, the activities of both IFC and MIGA.

Other MDBs followed suit: the Interamerican Development Bank (IDB), who created and Independent Inspection Mechanism in 1994, replaced in 2010 by the Independent Consultation and Investigation Mechanism (MICI, for *Mecanismo Independiente de Consulta e Investigación*); the Asian Development Bank (ADB), who created an Inspection Function in 1995, replaced with the Accountability Mechanism (AM) since 2003; the European Bank for Reconstruction and Development (EBRD), who created the Independent Recourse Mechanism in 2003, replaced with the Project Complaint Mechanism (PCM) in 2010; the African Development Bank (AfDB), who created the Independent Review Mechanism (IRM), entrusted to a Compliance Review and Mediation Unit (CRMU) in 2004... Let us add to this list the Independent Redress Mechanism that is being created in the framework of the Green Climate Fund, and whose terms of functioning and articulation with existing MDBs' accountability mechanisms are still unclear,³³ and the combination of the Social and Environmental Compliance Unit (SECU) with the Stakeholder Response Mechanism (SRM) freshly created by the United Nations Development Programme (UNDP).³⁴ Except for the Inspection Panel, all these accountability mechanisms can receive complaints about these agencies' support to private projects sponsors/clients.³⁵

³⁰ For a detailed account of the Pangué/Ralco dams failures, see David Hunter, Cristián Oposo, Marcos Orellana, "The Biobío's Legacy: Institutional Reforms and Unfulfilled Promises at the International Finance Corporation", in Clark, Fox, Treakle (eds.), *op. cit.*, at 127. See also Bruce Rich, *Foreclosing the Future: The World Bank and the Politics of Environmental Destruction*, Washington/Covelo/London: Island Press (2013), at 54-55.

³¹ See on the website of the Inspection Panel: "Chile: Financing of Hydroelectric Dams in the Bío-Bío River (Not Registered)", <<http://ewebapps.worldbank.org/apps/ip/Pages/ViewCase.aspx?CaselId=37>> (last visited 13 February 2015.)

³² Hunter, Oposo, Orellana, *op. cit.*, at 129-131.

³³ Terms of Reference of the Independent Evaluation Unit, the Independent Integrity Unit, and the Independent Redress Mechanism, GCF/B.06/06, 13 February 2014.

³⁴ See on the UNDP website <<http://www.undp.org/content/undp/en/home/operations/accountability/secu-srm/>> (last visited 13 February 2015.)

³⁵ As regards the UNDP's SECU and SRM, the UNDP Social and Environmental Standards (SES) specify that "*Possible Implementing Partners* [of UNDP-supported projects] include government institutions (National Implementation Modality), eligible UN agencies, inter-governmental organizations (IGOs), eligible civil society organizations (CSOs), and UNDP (Direct Implementation Modality)"; however, the SES add that "*UNDP's Policy on Due Diligence and Partnerships with the Private Sector (forthcoming) stipulates due diligence requirements regarding such partnerships. Projects that may result from such partnerships would be subject to UNDP's screening procedure and may trigger SES requirements*": UNDP's Social and Environmental Standards, at 7, respectively notes 7 and 10, available at <<http://www.undp.org/content/dam/undp/library/corporate/Social-and-Environmental-Policies-and-Procedures/UNDPs-Social-and-Environmental-Standards-ENGLISH.pdf>> (last visited 13 February 2015.)

1. Objective and remit of IAMs

The objective of IAMs is to “provide an independent and effective forum for people adversely affected by [Bank]-assisted projects to voice their concerns and seek solutions to their problems”,³⁶ to “provide an opportunity for an independent review of complaints from one or more individual(s) or Organisation(s) concerning a Project which allegedly has caused, or is likely to cause, harm”,³⁷ to provide “people adversely affected by a project financed by the Bank ... with an independent mechanism through which they can request the Bank Group to comply with all its own policies and procedures”,³⁸ to “[a]ddress complaints from people affected by [the Bank’s] projects (or projects in which those organizations play a role) in a manner that is fair, objective, and equitable; and [e]nhance the environmental and social outcomes of [the Bank’s] projects (or projects in which those organizations play a role)”,³⁹ or else to “a. Provide a mechanism and process independent of Management in order to investigate allegations by Requesters of Harm produced by the Bank’s failure to comply with its Relevant Operational Policies in Bank-Financed Operations; b. Provide information to the Board regarding such investigations; and c. Be a last-resort mechanism for addressing the concerns of Requesters, after reasonable attempts to bring such allegations to the attention of Management have been made.”⁴⁰

Thus, the IAMs of MDBs do not record wrongful acts under international law attributable to the MDB at issue and they are not intended as judicial procedures. Generally speaking, their role is threefold:

- To assess, upon request of the people affected—or likely to be affected—by the Bank’s activities, the compliance of the Management of the Bank with its own internal rules, that is to say with its policies and procedures for instance related to the disclosure of information, environmental and social assessment, indigenous people rights... If the Management is found not compliant, it does not result in the legal implication of the Bank but it is expected to adopt corrective measures;
- To offer redress for negative environmental and social impacts, based on a problem-solving approach tailored to the needs of the requesters, using techniques such as fact-finding, mediation, consultation, negotiation... Except for the IRM and the MICI, the latest being the less accessible of all IAMs, access to problem-solving (sometimes called dispute resolution or consultation phase) is not conditioned by the fact claimants allege a breach of the Bank’s standards and;⁴¹

³⁶ ADB Accountability Mechanism Policy 2012, para. 103, <<http://www.adb.org/documents/accountability-mechanism-policy-2012?ref=site/accountability-mechanism/publications>> (last visited 14 February 2015.) All ADB AM-related documents cited in this article can be accessed from <<http://www.adb.org/site/accountability-mechanism/main>>.

³⁷ EBRD Project Complaint Mechanism, Rules of Procedure 2014, Introduction and purpose, <<http://www.ebrd.com/downloads/integrity/pcmrules2014.pdf>> (last visited 14 February 2015.) All PCM-related documents cited in this article can be accessed from <<http://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism.html>>.

³⁸ AfDB IRM Operating Rules and Procedures 2010, at 1, <<http://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/IRM%20Operating%20Rules%20and%20Procedures%20-%2016%20June%202010.pdf>> (last visited 14 February 2015.) All IRM-related documents cited in this article can be accessed from <<http://www.afdb.org/en/about-us/structure/independent-review-mechanism-irm/requests-register/>>.

³⁹ CAO Operational Guidelines 2013, para. 1.1., <http://www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines2013_ENGLISH.pdf> (last visited 14 February 2015).

⁴⁰ IDB MICI, Policy of the Independent Consultation and Investigation Mechanism, 2014, <<http://www.iadb.org/document.cfm?id=39313644>> (last visited 14 February 2015.) All MICI-related documents cited in this article can be accessed from <<http://www.iadb.org/en/mici/independent-consultation-and-investigation-mechanism-icim,1752.html>>.

⁴¹ IRM Operating Rules and Procedures 2010, para. 4 a); MICI Policy 2014, para. 24: “The objective of the Consultation Phase is to provide an opportunity to the Parties to address the issues raised by the Requesters related to Harm caused by the

- To provide the Bank with lessons learned from the cases, including recommendations related to changes in MDBs' policies and procedures that would be needed to prevent future noncompliance situations. In this respect, the CAO is the only IAM whose mandate expressly includes direct *"advice to the President and IFC/MIGA on broader environmental and social issues related to policies, standards, guidelines, procedures, resources, and systems established to improve the performance of IFC/MIGA projects."*⁴² As for the other IAMs, this 'lessons learned' function is part of their compliance review and/or problem-solving roles.⁴³

As far as the consequences of a problem-solving exercise or a compliance review are concerned, IAMs have varied remits.

The Special Project Facilitator (problem-solving officer) of the ADB AM is responsible for monitoring the implementation of the remedial actions agreed upon during the problem-solving process⁴⁴; the Compliance Review Panel (AM CRP) 'lost' its power to make recommendations based on its findings in the course of the 2012 review of its policy, but still monitors the implementation of the decisions made by the Board based on the findings of the AM CRP and the remedial actions proposed by the Management.⁴⁵

The CAO does not make recommendations but monitors the implementation of agreements reached during an Ombudsman/dispute resolution exercise;⁴⁶ regarding its compliance review role, in cases of non-compliance, the CAO monitors the situation *"until actions taken by IFC/MIGA assure CAO that IFC/MIGA is addressing the noncompliance. CAO will then close the compliance investigation."*⁴⁷

The EBRD PCM Officer monitors the agreements reached during problem-solving initiatives;⁴⁸ the Experts who perform compliance reviews can make recommendations to: *"a. address the findings of non-compliance at the level of EBRD systems or procedures in relation to a Relevant EBRD Policy, to avoid a recurrence of such or similar occurrences; and/or; b. address the findings of non-compliance in the scope or implementation of the Project taking account of prior commitments by the Bank or the Client in relation to the Project; and c. monitor and report on the implementation of any recommended changes."*⁴⁹ The PCM Officer then monitors the implementation of the Management Action Plan as approved by the Board or the President *"until the PCM Officer determines that monitoring is no longer needed."*⁵⁰

In the framework of the AfDB IRM, the Compliance Review and Mediation Unit monitors the implementation of agreements reached thanks to the problem-solving exercise;⁵¹ when the Bank is found non-compliant by a compliance review, the compliance review report includes both findings and recommendations on *"i. any remedial changes to systems or procedures within the Bank Group to avoid a recurrence of such or similar violations; ii. any remedial changes in the scope or implementation of the Bank Group-financed project ... ; and/or iii. any steps to be taken to monitor*

failure of the Bank to comply with one or more of its Relevant Operational Policies in the context of a Bank-Financed Operation."

⁴² CAO Operational Guidelines 2013, para. 5.1.1.

⁴³ PCM, Rules of Procedure 2014, para. 44 a); IRM Operating Rules and Procedures 2010, para. 52c) i); MICI Policy 2014, para. 61; CAO Operational Guidelines 2013, para. 1.2; Accountability Mechanism Policy 2012 paras. 128 vii), 128 viii), 131 xiii).

⁴⁴ ADB Accountability Mechanism Policy 2012, para. 128 vi).

⁴⁵ *Ibid.*, paras. 54, 85 and 131 xi).

⁴⁶ CAO Operational Guidelines 2013, paras. 3.2.3-3.2.4.

⁴⁷ *Ibid.*, para. 4.4.6.

⁴⁸ PCM, Rules of Procedure 2014, para. 38.

⁴⁹ *Ibid.*, para. 44.

⁵⁰ *Ibid.*, para. 47.

⁵¹ IRM Operating Rules and Procedures 2010, para. 40.

*the implementation of the changes ...*⁵² No provision describes who decides, and which basis, that the monitoring should end.

Finally, the MICI “*may ... provide its recommendations, views, or observations on findings or systemic issues relating to Relevant Operational Policy noncompliance*”;⁵³ it monitors the “*implementation of any action plans or remedial or corrective actions agreed upon as a result of a Compliance Review.*”⁵⁴

2. Applicable standards

Regarding the standards IAMs are competent to assess compliance with, all MDBs' rules share a common distinction: there are standards the bank itself must live up to, and standards on what is required from borrowers in the design and implementation of their project.⁵⁵ Most banks list these two kinds of requirements in two different categories of instruments. The first category is usually called ‘policies’; the second is called either ‘performance requirements’ (EBRD), ‘performance standards’ (IFC/MIGA), ‘operational safeguards’ (AfDB), or else ‘safeguard requirements’ (ADB). Note that in the framework of the IDB, ‘operational policies’ (OPs) designate the conditions of the bank’s activities, including which responsibilities are the bank’s and which are the borrower’s. MDBs are then expected not only to comply with the standards directly aimed at their Management but also with their due diligence obligation to check whether clients meet their performance standards throughout the whole life-cycle of the project. Due to the very mission of the banks (development), MDBs’ Managements also have an overarching obligation to “do no harm”, which means that development banks-supported projects should at the very least not result in the concerned people being worse off...

The standards that are applicable to the private sector may or may not be different from the standards applicable to sovereign borrowers depending on the MDB concerned, and the remit of IAMs may or may not be different depending on the nature of the borrower. Obviously, the CAO assesses compliance with standards completely tailored to the IFC and MIGA’s relations with private sector clients. Since 2006, these standards have been enclosed in a Sustainability Framework, consisting in an IFC Policy on Environmental and Social Sustainability⁵⁶ complemented by eight Performance Standards (PSs)⁵⁷ which “*define IFC clients' responsibilities for managing their environmental and social risks.*”⁵⁸ In addition, “[t]he World Bank Group Environmental, Health and Safety Guidelines (EHS Guidelines) are technical reference documents with general and industry-specific examples of good international industry practice. IFC uses the EHS Guidelines as a technical source of information during project appraisal. The EHS Guidelines contain the performance levels

⁵² *Ibid.*, para 52 c).

⁵³ MICI Policy 2014, para. 45.

⁵⁴ *Ibid.*, para. 49

⁵⁵ The purpose of this article is not to describe the substance of MDBs' policies and safeguards applicable to the private sector. The following paper provides a very good overview of the existing, using the example of public participation in MDBs' policies: Daniel D. Bradlow and Megan S. Chapman, “Public Participation and The Private Sector: The Role of Multilateral Development Banks in the Evolution of International Legal Standards”, 4 *Erasmus Law Review* (2011), at 91-125.

⁵⁶ Latest version: International Finance Corporation’s Policy on Environmental and Social Sustainability, 2012, <http://www.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf?MOD=AJPERES> (last visited 14 February 2015.)

⁵⁷ PS1: Assessment and Management of Environmental and Social Risks and Impacts; PS2: Labor and Working Conditions; PS3: Resource Efficiency and Pollution Prevention; PS4: Community Health, Safety, and Security; PS5: Land Acquisition and Involuntary Resettlement; PS6: Biodiversity Conservation and Sustainable Management of Living Natural Resources; PS7: Indigenous Peoples; PS8: Cultural Heritage.

⁵⁸ IFC, “Environmental and Social Performance Standards and Guidance Notes”, <<http://www.ifc.org/performancestandards>> (last visited 14 February 2015).

and measures that are normally acceptable to IFC, and that are generally considered to be achievable in new facilities at reasonable costs by existing technology ... When host country regulations differ from the levels and measures presented in the EHS Guidelines, projects are expected to achieve whichever is more stringent."⁵⁹ PSs are complemented by Guidance Notes plus an 'Interpretation Note on Financial Intermediaries' and an 'Interpretation Note on Small and Medium Enterprises and Environmental and Social Risk Management'. To date, the IFC Sustainability Framework is considered to be the most advanced and comprehensive set of international standards aimed at the private sector.

The IDB applies the same environmental and social safeguards to both sovereign and non-sovereign borrowers⁶⁰. From "*September 9, 2013, the ICIM applies to all relevant operational policies approved by the IDB Board of Executive Directors in effect as of that date,*"⁶¹ and the scope of the MICI's remit does not change depending on the public or private nature of the borrower.

As for the AfDB, it adopted in December 2013 an Integrated Safeguards System (ISS) that includes an Integrated Safeguards Policy Statement and five Operational Safeguards.⁶² The ISS is complemented by Environmental and Social Assessment Procedures (ESAPs—"*specific procedures that the Bank and its borrowers or clients should follow to ensure that Bank operations meet the requirements of the OSs at each stage of the Bank's project cycle*")⁶³ and Integrated Environmental and Social Impact Assessment Guidance Notes ("*IESIA Guidance Notes provide technical guidance for the Bank and its borrowers on specific methodological approaches or standards and management measures relevant to meeting the requirements of the OSs.*")⁶⁴ The IRM can assess complaints related to sovereign and non-sovereign projects; however, the IRM Operating Rules and Procedures specify that requests related to the "*private sector or other non-sovereign guaranteed projects*" are eligible in situations where complainants allege a "*breach of the Bank-Group's agricultural, education, health, gender, good governance or environmental policies*" only⁶⁵

Regarding the ADB's AM, it may assess compliance with the Bank's standards whether the project at issue is sovereign or not.⁶⁶ Under the Bank Policy OM Section D10/BP on 'Non-Sovereign Operations', ADB must assess each proposed financing to ensure *inter alia* that it "*(i) complies with the relevant provisions in ADB's policies on poverty reduction, safeguards (including environment, involuntary resettlement, indigenous peoples), governance, anticorruption, ... (ii) complies with the applicable country partnership strategy and sector policy ...*"⁶⁷ The Safeguard Policy Statement⁶⁸ of

⁵⁹ Performance Standards on Environmental and Social Sustainability, 2012, paras. 6 and 7, <http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES> (last visited 14 February 2015.)

⁶⁰ See for example IDB, Environment and Safeguards Compliance Policy, 2006, para. 2.1; IDB, Operational Policy on Indigenous Peoples and Strategy for Indigenous Development, 2006, Part III.

⁶¹ MICI, Scope of work, <<http://www.iadb.org/en/mici/scope-of-work,8166.html>> (last visited 14 February 2015.)

⁶² The Integrated Safeguards Policy Statement "[d]escribes common objectives of the Bank's safeguards and lays out policy principles"; Operational Safeguards (OSs) "*are a set of five safeguard requirements that Bank clients are expected to meet when addressing social and environmental impacts and risks. Bank staff use due diligence, review and supervision to ensure that clients comply with these requirements during project preparation and implementation*": African Development Bank Group's Integrated Safeguards System Policy Statement and Operational Safeguards, 2013, at 2, <<http://www.afdb.org/en/documents/document/afdb-integrated-safeguards-system-policy-statement-and-operational-safeguards-34993/>> (last visited 14 February 2015.) The five OSs are OS1: Environmental and Social Assessment; OS2: Involuntary Resettlement: Land Acquisition, Population Displacement and Compensation; OS 3: Biodiversity and Ecosystem Services; OS4: Pollution Prevention and Control, Greenhouse Gases, Hazardous Materials and Resource Efficiency; OS5: Labour Conditions, Health and Safety.

⁶³ ISS 2013, 11.

⁶⁴ *Ibid.*, 12.

⁶⁵ Para. 2xi).

⁶⁶ Bank Policy OM Section D10/BP, Non-Sovereign Operations, 2013, para. 15, <<http://www.adb.org/sites/default/files/institutional-document/31483/om-d10.pdf>> (last visited 14 February 2015.)

⁶⁷ *Ibid.*, para. 10.

the ADB lists four Safeguard Requirements (SRs)⁶⁹ which mix considerations on the Bank's and clients' responsibilities.

The PCM's remit isn't different for public and private EBRD-supported projects. It assesses compliance with "*relevant EBRD polic[ies]*,"⁷⁰ in particular the Public Information Policy (PIP)⁷¹ and the Environmental and Social Policy (ESP).⁷² The ESP includes the text of the policy itself, which is aimed at the Bank and "*outlines how the Bank will address the environmental and social impacts of its projects*," and the text of the ten Performance Requirements (PRs)⁷³ that frame what is expected from clients.

3. Some limits of IAMs' scope

Finally, when dealing with the scope of the control that IAMs can perform, a crucial consideration should be mentioned: with the exception of the CAO, IAMs' compliance reviews are request-based and project-based. This means that IAMs cannot self-trigger when informed of worrying situations involving their MDB's support to private clients. Nor can they launch a sectoral compliance review, or accept requests implicating what the World Bank Groups calls 'Development Policy Lending',⁷⁴ an expression which replaced in 2004 the infamous 'adjustment lending,' despite the fact development policy lending can have significant adverse environmental and social impacts.

The CAO is quite unique in that respect. The CAO Vice President can initiate a compliance review (following the CAO's terminology in force until 2012: a 'compliance audit', and since the 2013 Operational Guidelines: a 'compliance investigation') "*based on project-specific or systemic concerns resulting from CAO Dispute Resolution and Compliance casework.*"⁷⁵ Hence, concerns raised in the framework of the *Celulosas de M'Bopicia (CMB) & Orion-01/Argentina & Uruguay* case led CAO Vice President to commence a compliance audit related to internal due diligence issues, in order to ensure greater clarity in the implementation of social and environmental appraisal procedures by both IFC and MIGA. In particular, the audit focused on public disclosure of E&S documentation.⁷⁶

⁶⁸ Bank Policy OM Section F1/BP, Safeguards Policy Statement, 2013, <<http://www.adb.org/sites/default/files/institutional-document/31483/om-f1-20131001.pdf>> (last visited 14 February 2015.)

⁶⁹ SRs1: Environment, SRs2: Involuntary resettlement, SRs3: Indigenous Peoples, and SRs4: Special requirements for different finance modalities.

⁷⁰ PCM, Rules of Procedure 2014, Para. 24 b.)

⁷¹ Public Information Policy, 2014, <<http://www.ebrd.com/what-we-do/strategies-and-policies/public-information-policy.html>> (last visited 14 February 2015.)

⁷² Environmental and Social Policy, 2014, <<http://www.ebrd.com/news/publications/policies/environmental-and-social-policy-esp.html>> (last visited 14 February 2015.)

⁷³ PR1: Assessment and Management of Environmental and Social Impacts and Issues; PR2: Labour and Working Conditions; PR3: Resource Efficiency and Pollution Prevention and Control; PR4: Health and Safety; PR5: Land Acquisition, Involuntary Resettlement and Economic Displacement; PR6: Biodiversity Conservation and Sustainable Management of Living Natural Resources; PR7: Indigenous Peoples; PR8: Cultural Heritage; PR9: Financial Intermediaries; PR10: Information Disclosure and Stakeholder Engagement.

⁷⁴ As described by the World Bank, "*Development policy loans provide quick-disbursing assistance to countries with external financing needs to support structural reforms in an economic sector or in the economy as a whole. They support the government policy and institutional changes needed to create a dynamic environment that encourages fair and sustained growth for every segment of society. Over the past two decades, development policy lending-previously called adjustment lending-has accounted, on average, for 20 to 25 percent of total Bank lending. Development policy loans were originally designed to provide support for macroeconomic policy reforms and adjustment to economic crises. Over time, they have evolved to focus on longer-term structural, financial sector and social policy reforms. Loans seek to address complex institutional issues such as strengthening education and health policies, improving a country's investment climate, and addressing weaknesses in governance, public expenditure management and public financial accountability*": <<http://digitalmedia.worldbank.org/projectsandops/lendingtools.htm>> (last visited 14 February 2015.)

⁷⁵ CAO Operational Guidelines 2013, para. 4.2.1.

⁷⁶ CAO, *Uruguay / Celulosas de M'Bopicia (CMB) & Orion-01/Argentina & Uruguay*, CAO Audit of IFC's and MIGA's Due Diligence of Celulosas de M'Bopicia and Orion Paper Mills, 22 February 2006.

Following the *AD Hydro Power Limited-01/Himachal Pradesh* case—that was addressed under the CAO's Ombudsman (now called 'dispute resolution') role⁷⁷ and that involved SN Power, a commercial investor and developer of hydropower projects that IFC and MIGA had supported several times—in December 2008 the CAO Vice President requested a compliance appraisal of IFC's/MIGA's due diligence and supervision of health and safety issues on all the projects where SN Power was involved.⁷⁸ Following the events of April 2010 in the Gulf of Mexico involving deepwater offshore exploration of oil and gas, the CAO Vice President initiated an investigation to assess IFC's procedures and standards when appraising investments in deepwater off shore oil and gas exploration projects.⁷⁹ In the *Dinant* case, the CAO Vice President initiated in April 2012 an appraisal of IFC's investment in Corporación Dinant in response to concerns raised in a letter to the World Bank president in November 2010 and subsequent discussions between CAO and local NGOs.⁸⁰ Findings of the *Dinant* case resulted in the CAO Vice President initiating the *Ficohsa* case...⁸¹ The 2012 Financial Markets audit was a bit different because it did not stem from a specific case but from the findings of the CAO made on the occasion of the drafting of an Advisory note as a contribution to IFC's policy review and update. This Advisory note "*analyzed 18 real sector and 8 financial intermediary investments, and concluded that there were significant gaps between IFC's E&S requirements and their practical application for FI clients. The findings of the CAO's appraisal indicated that IFC's activities in the financial sector are creating a potentially increasing risk for IFC to the extent that its FM funding may result in environmental and/or social harm ... The compliance appraisal report, issued in June 2011, concluded that there were sufficient grounds to proceed to a CAO audit of IFC's FM investments.*"⁸² Moreover, the CAO provides the Board's Committee on Development Effectiveness (CODE) with a Management Action Tracking Record (MATR), which annually records actions taken by IFC/MIGA in response to CAO's recommendations and findings.⁸³

III - Do IAMs trigger the accountability of private sector clients?

Before presenting elements that may throw light on this issue, I believe it is useful to specify two things. First, the developments which follow are based on interviews of practitioners/experts of IAMs performed by the IGM's project team between July and November 2014, the study of compliance reviews 'case law' and of the relevant academic literature. Interviews include 17 practitioners or former practitioners and *ad hoc* experts of/for the CAO (IFC/MIGA), the PCM (EBRD), the MICI (IDB), the IRM (AfDB) and the AM (ADB.) These practitioners and experts were kind enough to share their views and experience and they are protected by confidentiality commitments on the IGMs' team part. Implicated entities (i.e. MDBs' Management and clients) have not been interviewed yet, so the field material presented here reflects the opinions of IAMs' practitioners/experts only.

Second, there are enterprises and enterprises. This paper focuses on private sector clients of MDBs, which leaves aside the MDBs-supported projects of state-owned companies, considered as public operations. For example, the PCM have investigated much more EBRD-supported projects of state-owned enterprises than purely private projects.⁸⁴ One must also note that all enterprises are

⁷⁷ CAO, *India / AD Hydro Power Limited-01/Himachal Pradesh*, Request received on 1st October 2004.

⁷⁸ CAO, *India / SN Power-01/CAO Vice President Request*, CAO Appraisal: Case of IFC and MIGA involvement with SN Power with special focus on the Allain Duhangan Hydropower Project in India, 17 December 2009.

⁷⁹ CAO, *Ghana / Tullow Oil, Kosmos Energy & Jubilee FPSO-01/CAO Vice President Request*, triggered 19 August 2010.

⁸⁰ CAO, *Honduras / Dinant-01/CAO Vice President Request*, triggered 17 April 2012.

⁸¹ CAO, *Honduras / Ficohsa-01/CAO Vice President Request*, triggered 21 April 2013.

⁸² CAO Audit of a Sample of IFC Investments in Third-Party Financial Intermediaries, 10 October 2012.

⁸³ The MATR is not available to the public.

⁸⁴ If one counts only the cases before the PCM (since 2010) that have to date ended up with a compliance review report, two cases out of ten are related to private sector projects (case 2012/1 *Paravani HPP* and case 2010/1 *D1 Motorway Phase I*). Almost all other are related to state-owned utilities or companies.

not equal in terms of awareness of corporate social responsibilities, good business governance and knowledge of their impacts on the ground. In this respect, financial intermediaries can be seen as “*typical laggard[s] because [they] do not have a material direct environmental footprint.*”⁸⁵ There also seems to be a general feeling that private businesses are first and foremost accountable to their shareholders, and accountability to other stakeholders is not exactly in the foreground of their preoccupations.⁸⁶ However, some experts/practitioners we interviewed also pointed out that when private sector clients consider E&S risks from the angle of potential reputational damage and risks, they are much more willing to know about their E&S impacts and responsibilities;⁸⁷ banks, being especially exposed to reputational risks, can have a “*lightening fast reaction*”⁸⁸ to these once they’ve realized the stakes. Besides, multinational companies could be expected to be more aware of international standards on environmental and social issues, but some interviewees denied this assumption on a divide between multinational clients and domestic clients. One of the interviewees pointed out that the attitude of clients is driven by who ultimately owns the company. Some national companies are ahead of a MDB’s standards, and in the same country other corporations have no idea of what is corporate social responsibility. In the end, it depends on whether shareholders value these things. Interviewees noted that usually, clients—whether multinational enterprises or domestic businesses—don’t know about the IAMs’ work and have no idea of what it is all about. The MDB has to inform them of the existence of an IAM but this information is drowned out by the tons of information the clients gets from the bank. In some rare instances, clients have threatened to sue IAMs’ staff before they realized what IAMs were and that they were part of the “package deal” of resorting to an MDB. Finally, the ‘beliefs’ and behaviors of enterprises regarding the scope of their E&S commitments might be different depending on whether they significantly rely on subcontractors and supply chains or not.⁸⁹

This said, it is likely that depending on the procedure—problem-solving/dispute resolution/consultation or compliance review/investigation/audit—triggered before an IAM, the extent to which MDBs’ private clients may experience some ripple effects from the work of IAMs is different: whereas the problem-solving stage does not necessarily include any consideration related to the Bank’s alleged breaches, compliance reviews explicitly focus on the accountability of the Bank, not the client’s.

1. Hints of accountability at the problem-solving stage

At the problem-solving stage, the idea should be at a minimum to create an environment that enables stakeholders to voice their concerns and point of views, to provide the information stakeholders might need to position themselves, so that they can reach a mutually acceptable solution. Some of the IAMs condition access to the problem-solving procedure by the fact requesters allege a breach of the Bank’s standards, others do not.

Regarding the IDB MICI, “*The objective of the Consultation Phase is to provide an opportunity to the Parties to address the issues raised by the Requesters related to Harm caused by the failure of the Bank to comply with one or more of its Relevant Operational Policies in the context of a Bank-*

⁸⁵ Interview of Herman Mulder, Senior Executive Vice President, Group Risk Management, ABN-Amro Bank, by Maartje van Putten *in van Putten, op. cit.*, at 370.

⁸⁶ van Putten, *op. cit.*, at 245-249.

⁸⁷ Along the same line see Bruce Holzer, “From Accounts to Accountability: Corporate Self-presentations in Response to Public Criticism”, *in Magnus Boström and Christina Garsten (eds.), Organizing Transnational Accountability*, Cheltenham/Northampton: Edward Elgar (2008), at 80-97.

⁸⁸ According to the word of one of the interviewees.

⁸⁹ Robert Faulkner, “Business and Global Climate Governance. A Neo-pluralist Perspective”, *in Morten Ougaard and Anna Leander (eds.), Business and Global Governance*, London/New York: Routledge (2010), at 105. The scope of IAMs’ assessment as regards subcontractors and supply chains will be addressed further in this paper.

Financed Operation. The Consultation Phase provides an approach that ensures unbiased, equitable treatment for all the Parties. There is no guarantee that a Consultation Phase process will resolve all the concerns to the satisfaction of the Parties." The MICI Policy does not specify who participate in the consultation stage. It only mentions that, at the stage of the assessment of the opportunity to perform a consultation, there can be "[m]eetings with the Requesters, Management, Executing Agency, Private Sector Client, civil society organizations, and/or other stakeholders."⁹⁰ The purpose of the AfDB IRM's problem-solving exercise is somewhat different. Although eligibility of requests is conditioned by the fact they allege a breach by the Bank of its own standards, the objective of problem-solving exercises "is to restore an effective dialogue between the Requestors and any interested persons with a view to resolving the issue or issues underlying a Request, without seeking to attribute blame or fault to any such party."⁹¹ Problem-solving exercises are supposed to include in any case the Management.⁹²

Depending on the fact the focus is more on the wrongs that must be redressed or more on the breaches of the Bank, the ripple effects on private clients of a complaint before an IAM are arguably stronger in the first situation. This hypothesis is however difficult to ascertain because the practice of the MICI and the IRM as regards bank-supported private projects is too thin. To date the AfDB's IRM has performed only one problem-solving exercise⁹³ that was related to a project which involved loans both to a public agency and a private client, and the private client was not involved in the problem-solving.⁹⁴ In the framework of the MICI, it seems that only three consultations on IDB-supported private projects have been performed till their end.⁹⁵

As for the IAMs whose problem-solving stage is unrelated to alleged violations of MDBs' policies, they more or less have the same philosophy. The EBRD PCM's problem-solving initiatives "ha[ve] the objective of restoring a dialogue between the Complainant and the Client to resolve the issue(s) underlying a Complaint without attributing blame or fault."⁹⁶ This doesn't mean that only the claimants and the private clients may be involved: problem-solving initiatives (PSIs) may involve whoever might be relevant to solve the issues, and depending of the kind of issues raised by the claimants, that might not be the client. For instance, in the *Tbilisi Railway Bypass 2* case, EBRD Management was invited to participate in the PSI, in particular because the requesters had little idea of how EBRD standards and guidelines concretely applied to their case and Management was best positioned to explain.⁹⁷ The ADB Special Project Facilitator engages "with all relevant parties, including the complainants, the borrower, the ADB Board member representing the country concerned, Management, and staff to gain a thorough understanding of the issues to be examined during problem solving."⁹⁸ The problem-solving function is "outcome-driven. It will not focus on the identification and allocation of blame, but on finding ways to address the problems of the project-affected people."⁹⁹ Regarding the CAO, "the focus of CAO's Dispute Resolution role is on accessing directly those individuals and/or communities affected by the project and helping them, the client, and other relevant stakeholders resolve complaints, ideally by improving environmental and social

⁹⁰ MICI Policy 2014, para. 28.

⁹¹ IRM Operating Rules and Procedures 2010, para. 36.

⁹² *Ibid.*, para. 39: "If the problem-solving exercise is successful, the Director will include in the Problem-Solving Report the solution agreed upon by the Requestors, Management and any interested person."

⁹³ As far as I can tell. Informations relating to some projects are not available on the Bank's website.

⁹⁴ IRM, *Sénégal: Dakar-Diamniadio Highway Project*, RQ 2011/01, Problem-solving Report, 25 March 2010.

⁹⁵ MICI, *Paraguay - Development of the Industry of Products of the Vegetable Sponge*, MICI-PR-2010-001 (successful); *Panama - Pando-Monte Lirio Hydroelectric Power Project*, MICI-PN-2010-002 (unsuccessful, the company withdrawn from the discussions); *Colombia - El Dorado International Airport*, CO-MICI002-2011, (partly successful.)

⁹⁶ PCM, Rules of Procedure 2014, Introduction and purpose, at 3.

⁹⁷ PCM, *Tbilisi Railway Bypass 2 (Georgia)*, 2011/2, Eligibility Assessment Report, 23 September 2011.

⁹⁸ ADB Accountability Mechanism Policy 2012, para. 128 iii).

⁹⁹ *Ibid.*, para. 126.

outcomes on the ground.”¹⁰⁰ “As a nonjudicial, nonadversarial, neutral forum, CAO’s approach provides a process through which parties may find mutually satisfactory solutions. This role facilitates an approach that ensures equitable treatment of participants in a dispute resolution process.”¹⁰¹ One may note however that the CAO, before the strengthening of its compliance function in 2005-2006,¹⁰² has sometimes included considerations related to whether IFC and the client had *prima facie* complied with their commitments in the assessment report, which is the first stage of the procedure and is supposed to precede a problem-solving exercise and possibly a compliance audit.¹⁰³ As mentioned earlier, to date the EBRD PCM has only had two cases related to private projects, and none of them gave rise to a problem-solving initiative.¹⁰⁴ The ADB AM has received two complaints related to private projects. Concerning the first, the problem-solving reports are not public, but the Compliance Review Panel (CRP) hints at the fact the mediation process ended because the requesters did not trust the mediation team.¹⁰⁵ The second case was directly handled as a compliance review case, as allowed by the new 2012 Accountability Mechanisms Policy, and the compliance report is not completed yet.¹⁰⁶ All in all, the biggest *corpus* of problem-solving reports is by far offered by the CAO: created in 1999, all its cases relate to private projects and in 2014, 58 requests had been at least partially settled by an ombudsman/dispute resolution exercise.¹⁰⁷

Though problem-solving is by definition tailored to the specifics of each case, the study of IAMs’ problem-solving reports, coupled with the experience shared by the interviewees, suggests that lessons in terms of private clients feeling more accountable thanks to IAMs can be drawn. First, the most difficult thing is to have all stakeholders sitting at a same table including the client who, as stated above, might have no idea of what the IAM is. Some clients are adamant about not discussing the issues raised in the complaint, or else so reluctant it precludes any prospect of meaningful dialogue.¹⁰⁸ There are often misunderstandings on the IAMs’ role, who are mistaken for auditors or judges. When the problem-solving team is able to explain and dispel the distrust, then there is a good chance to create a real dialogue. The client might learn how to build relationships with affected people. It might also gain from the opportunity to set up a fact-finding mission that can provide a common ground for discussion in case there is a disagreement on the facts.¹⁰⁹ Discussions can help clarify who is responsible for what, to the benefit of all stakeholders, and thus lead the client to understand why people are expecting it to take action and how. In the *Agri-Vie* cases, the client, New Forests Company (NFC), a UK-based forestry company operating established and growing timber plantations, invested after the Ugandan government had evicted the complainants from the lands where they were living, and did “not assume any direct responsibility for the evictions and claim[ed] that it was not involved in carrying out the evictions and was explicitly excluded by the

¹⁰⁰ CAO Operational Guidelines 2013, para. 1.2.

¹⁰¹ *Ibid.*, para. 3.2.

¹⁰² On this, please see further in this article.

¹⁰³ Elisa Morgera, “From Corporate Social Responsibility to Accountability Mechanisms”, in Pierre-Marie Dupuy and Jorge E. Viñuales (eds.), *Harnessing Foreign Investment to Promote Environmental Protection*, Cambridge/New York: Cambridge University Press (2013), at 343-344.

¹⁰⁴ The requesters sought a compliance review, not a PSI, in the *Paravani HPP* and *D1 Motorway Phase I* cases (*op. cit.*)

¹⁰⁵ AM CRP, *Visayas Base-Load Power Project (Philippines)*, 2011/1, Compliance Review Panel’s Final Report, 11 April 2012.

¹⁰⁶ AM CRP, *Mundra Ultra Mega Power Project*, 2013/01.

¹⁰⁷ Figure based on CAO, *2014 Annual Report*, Appendix B. Complaint log, FY 2000-14, Washington DC: CAO, at 56-68, electronic version at <<http://www.cao-ombudsman.org/publications/documents/CAOANNUALREPORT2014.pdf>> (last visited 17 February 2015.)

¹⁰⁸ See for instance Independent Recourse Mechanism (the predecessor of the PCM), *Sakhalin II (Russia)*, 2005/2, Eligibility Assessment Report, 6 September 2005, <<http://www.ebrd.com/downloads/integrity/200501.pdf>> (last visited 17 February 2015.)

¹⁰⁹ CAO, *Oyu Tolgoi-01/Southern Gobi* (Mongolia), request received on 12 October 2012 and CAO, *Oyu Tolgoi-02/Southern Gobi* (Mongolia), request received on 11 February 2013.

government.”¹¹⁰ IFC had become involved *via* its equity investment in Agri-Vie Agribusiness Fund, a private equity fund that had in its portfolio an investment in NFC... At the end of the dispute resolution process, in March 2014 for the first complaint and July 2013 for the second complaint, CAO stated that “*All the parties who participated, including the representatives of the affected community, their legal advisors, Oxfam, and the NFC showed considerable commitment, patience, tolerance, determination, creativity and goodwill through the mediation process.*”¹¹¹ The outcome was two agreements signed between NFC and respectively the Kiboga and Mubende affected people in which NFC agrees to provide financial and other support to two newly created cooperatives that from now on allow the Kiboga and the Mubende people to own their own lands where they can settle and develop their economic activities.¹¹² Sometimes, problem-solving ‘only’ leads to increased understanding of how to better handle environmental and social issues arising from the clients’ activities. Sometimes problem-solving helps the client mitigate project costs or reputational damage that were born from not addressing E&S issues. Sometimes it results in the client integrating in its corporate structure and processes all the things learned about E&S risks and how the IFC’s performance standards can help them prevent damaging situations.¹¹³

2. Hints of accountability at the compliance review stage

Given the compliance review stage’s features, the issue of the impact that the practice of IAMs might have in terms of indirect accountability of clients appears more precisely delineated. IAMs are unanimous about the scope of compliance reviews: the purpose is to investigate, upon request of the people affected or likely to be affected by the project at issue, the Bank’s compliance with its operational policies and procedures in respect of the design, implementation or supervision of the projects they support.¹¹⁴ This means that the compliance review stage is driven by two considerations in various proportions: is the MDB compliant or not, in substance and spirit? In case of non-compliance, did the breaches cause significant harm to project-affected people? In other words, has the MDB shown due diligence at the stages of the formulation, processing, and/or implementation of the project and in doing so, has it given due regard to the do no harm principle that should guide its actions? Arguably, this phase only concerns the behavior of the bank, not the client’s. But of course it is not that simple.

As the CAO Operational Guidelines state, “[t]he focus of CAO Compliance is on IFC and MIGA, not their client ... In many cases, however, in assessing the performance of the project and IFC’s/MIGA’s implementation of measures to meet the relevant requirements, it will be necessary for CAO to review the actions of the client and verify outcomes in the field.”¹¹⁵ IAMs can not only look into the client’s actions to assess the due diligence of the bank but beyond, into its subcontractors’ and supply chains’ if need be.¹¹⁶ From this point of view, the CAO’s remit is all the wider than since

¹¹⁰ CAO, *Uganda / Agri-Vie Fund-01/Kiboga and Uganda / Agri-Vie Fund-02/Mubende*, CAO Assessment Report Regarding Community and Civil Society Concerns in Relation to IFC’s Agri-Vie Fund project (#27674), April 2012.

¹¹¹ CAO, *Uganda/Agri-Vie Fund-02/Mubende*, CAO Progress Report, 14 August 2013.

¹¹² CAO, *Uganda/Agri-Vie Fund-02/Mubende*, Agreement between Mubende Community and New Forests Company in Uganda sees Community Resettled on New Land, 6 May 2014; CAO, *Uganda/Agri-Vie Fund-01/Kiboga*, CAO Progress Report, 5 June 2014.

¹¹³ See for instance CAO, *Turkey / Standard Profil-01/Duzce*, Ombudsman Conclusion Report, June 2012.

¹¹⁴ IRM Operating Rules and Procedures 2010, para. 44; MICI Policy 2014, para. 36; CAO Operational Guidelines 2013, para. 4.1.; PCM, Rules of Procedure 2014, para. 41; AM Policy 2012, para. 130.

¹¹⁵ Para. 4.1.

¹¹⁶ See *inter alia* CAO, *Indonesia / Wilmar Group-03/Jambi*, Compliance Appraisal Report, 25 June 2014; CAO, *Peru / Agrokasa-01/Ica*, CAO Audit of IFC Investments in Agribusiness in the Ica Valley, 22 February 2011; *Indonesia / Wilmar Group-01/West Kalimantan*, CAO Audit Report, 19 June 2009; *Brazil / Amaggi Expansion-01/IFC Executive Vice President Request*, CAO Audit Report, May 2005.

the 2005-2006 review of its Operational Guidelines, compliance audits/investigations can check how the IFC/IGA assured itself of the E&S performance of the projects it supports and whether the outcomes of the business activity or advice are consistent with the *intent* of the relevant policy provisions.¹¹⁷ The criteria to decide whether to undertake a compliance investigation are also rather open: “- *There is evidence of potentially significant adverse environmental and/or social outcome(s) now, or in the future.* - *There are indications that a policy or other appraisal criteria may not have been adhered to or properly applied by IFC/MIGA.* - ***There is evidence that indicates that IFC's/MIGA's provisions, whether or not complied with, have failed to provide an adequate level of protection.***”¹¹⁸ Standards directly aimed at the bank include an obligation to make reasonably sure (due diligence) that the client is complying with its obligations under the performance standards, performance requirements etc.¹¹⁹ In principle, these standards the client must comply with have gained legal standing by force of the loan agreement¹²⁰; IAMs look into the provisions of the loan agreement to the extent that it may shed some light on the bank's due diligence and the investigation teams make it clear that they are not investigating the client. Many interviewees stated that some clients were more welcoming than expected during the investigation stage. Hence, some clients use the opportunity to learn about the IFC standards and how they could use them to improve their performance and gain or keep a ‘social license’ to operate.¹²¹ In the *Lukoil case*, the April 2008 audit report had found IFC noncompliant on issues related to how IFC assured itself that emissions to air from the Karachaganak Project complied with IFC requirements. In January 2009, Lukoil ended its contractual obligations to IFC by prepaying its outstanding balance, which ended IFC's obligations to assure itself of project performance. However, the findings of the CAO led the company to become interested in how it could improve the monitoring of its impacts and kept working with IFC after the end of their contract to set up an action plan.¹²² In the *Visayas case*,¹²³ the first case related to a private project brought before the AM's Compliance Review Panel, the client proved to be very cooperative.¹²⁴ All in all, interviews hint that the Management and the Board are at least as reluctant as their clients, if not more, to let IAMs investigate a private project, particularly for reasons of confidential business information.

As stated above, when the MDB is found non-compliant, some IAMs issue recommendations on the remedial actions that are to be taken (the EBRD PCM, the IDB MICI, the AfDB IRM), others do not (the ADB AM since the 2012 version of the AM Policy and the CAO since the 2007 version of its Operational Guidelines). Recommendations are addressed to the MDB at issue, but the line can be very thin between findings concerning the bank / recommendations made to the bank and findings

¹¹⁷ CAO Operational Guidelines 2013, para. 4.1.

¹¹⁸ *Ibid.*, para. 4.2.1. (emphasis added.)

¹¹⁹ For a case where the obligations of the Management weren't clear enough in this respect, see CAO, *Republic of Kosovo: Kosovo KEK-01/Prishtina*, CAO Audit of IFC Advisory Services Project with the Korporata Energjetike e Kosovës, 22 February 2013.

¹²⁰ In the *Lukoil case* however, IFC—who had a 12% equity share in the company—hadn't required the IFC standards be integrated in the production-sharing agreement. The CAO has nevertheless investigated the case and “*examined how IFC, before the investment decision, assured itself that it had the information needed to correctly assess the Project impacts. The team also examined how IFC assured itself that the impacts would be in compliance with the requirements specified as conditions for IFC's investments*”: CAO, *Kazakhstan / Lukoil Overseas-01/Berezovka*, CAO Audit Report, 14 March 2008.

¹²¹ The social license refers to the degree of acceptance earned by project sponsors/operators from the local communities. On this, one can refer to John Morrison, “Business and Society: Defining the 'Social Licence'”, *The Guardian*, 29 September 2014, <<http://www.theguardian.com/sustainable-business/2014/sep/29/social-licence-operate-shell-bp-business-leaders>> (last visited 17 February 2015.)

¹²² CAO, *Kazakhstan / Lukoil Overseas-01/Berezovka*, CAO Audit Report, 14 March 2008 and case synopsis at <http://www.cao-ombudsman.org/cases/case_detail.aspx?id=104> (last visited 17 February 2015.)

¹²³ AM CRP, *Visayas Base-Load Power Project (Philippines)*, 2011/1.

¹²⁴ *Ibid.*, Second Annual Monitoring Report, 5 August 2014.

concerning the borrower / recommendations made to the borrower. Typically, findings of IAMs state that the Management should have seen that the client's environmental impact assessment was failing, or else that the client had not conducted meaningful and timely consultations with affected people as required, and should have made sure these compulsory steps were completed before submitting the project to the Board for approval. Typical recommendations request the Management to make sure the client proceeds to the consultations which can still be helpful or to conduct additional studies needed to determine the proper course of action as regards E&S issues that remain unsolved. In other words, when a MDB is found non-compliant because it failed verifying that affected people have been properly consulted by the client, or the environmental impact assessment was grossly insufficient, or pollution prevention and abatement technologies and measures are lacking, it is expected to ensure so that the client complies with the performance standards referred to in the loan agreement.

Thus, it is very important to bear in mind that while clients are not subject to the compliance review, they will bear the consequences, financial and/or otherwise, of a finding of non-compliance. For instance, the PCM's compliance review report in the *Paravani HPP* case recommends that "*in addition to effectively monitoring implementation of the Environmental and Social Action Plan EBRD should work with [the client] to prepare and disclose a comprehensive annual report which updates the [Environmental and Social Impact Assessment/ Environmental and Social Action Plan] on which consultation can take place and which can inform future HPP developments within Georgia.*"¹²⁵ From this point of view, the CAO's practice has greatly evolved. Designed much more to perform problem-solving than to conduct compliance reviews, this IAM's audit/compliance investigation function really began working with the appointment in late 2005 of Henrik Linders as Senior Specialist, Compliance Advisor. An early compliance case shows a mix up of the IFC's and the client's direct legal accountability, which is as interesting as it was potentially damaging, since such confusion could have been used internally as ammunition against the CAO. Indeed, in the second compliance audit the CAO performed,¹²⁶ in the *COMSUR* case (2004), the CAO makes direct recommendations both to the IFC and COMSUR. Besides, the final audit report is untitled "*Review of the Capacity of COMSUR to Manage Environmental and Social Responsibility Issues*"...¹²⁷ Subsequent practice does not show this confusion and compliance audits are careful to stick to findings related to IFC's compliance.

In addition, in practice the client might end up being more or less directly targeted by the monitoring of remedial actions. For example, the 1st Monitoring Report in the *Visayas* case, while stating that "[t]he focus ... is to ascertain the progress made by Management in implementing its remedial action plan for complying with the CRP's Board approved recommendations",¹²⁸ specifies that "[t]he CRP reviewed the environmental assessment report prepared by [the client] consistent with the CRP's recommendation ... The CRP is of the opinion that [the client]'s long-term ash disposal plan is reasonable and adequately addresses the potential impact and mitigation aspects."¹²⁹

In the end, either the client totally disagree with the requirements imposed by the performance standards and can repay the loan to get rid of unwanted consequences,¹³⁰ or it has no

¹²⁵ PCM, *Paravani HPP (Georgia)*, 2012/1, Compliance Review Report, 1st January 2014, at 44.

¹²⁶ The first audit was conducted in the *Peru / Compania Minera Antamina S.A.-01/Huarmey* case, request received on 1st September 2000, closed in January 2005. None of the documents related to this audit is available on the CAO's website.

¹²⁷ CAO, *Bolivia / Comsur V-01/Bosque Chiquitano*, Final Report, Review of the Capacity of COMSUR to Manage Environmental and Social Responsibility Issues, June 2004.

¹²⁸ AM CRP, *Visayas Base-Load Power Project (Philippines)*, 2011/1, First Annual Monitoring Report, 12 July 2013, para. 4.

¹²⁹ *Ibid.*, paras. 17-18.

¹³⁰ In cases where clients decided to repay the loan before due date or to abandon the project, it is often difficult to discern whether the fact that a complaint was submitted to an IAM has influenced their decision. In the *Agrokasa* case (*Peru / Agrokasa-01/Ica, op. cit.*) however, it is quite clear that the triggering of the CAO—whose audit report revealed that IFC had 'forgotten' to inform the Agrokasa company of the enhanced due diligence requirements that IFC had to apply because of

choice but to pay for unexpected additional studies or equipment, as provided for by the Action Plan validated by the Board of the MDB. Several interviewees noted that, from this viewpoint, governmental borrowers¹³¹ are generally much more defensive on the implementation of remedial actions than private companies. This nevertheless gives no indication as to whether the fate of project-affected people has concretely improved in the end.¹³²

Conclusions

What kind(s) of accountability of private businesses, if any, is (are) mobilized by IAMs' practice, with the affected people as account-holders? As described in the first part of this article, Stewart's definition of accountability mechanisms is based on three components: "(1) a specified accouter, who is subject to being called to provide account, including, as appropriate, explanation and justification for his conduct; (2) a specified account holder who can require that the accouter render account for his performance; and (3) the ability and authority of the account holder to impose sanctions or mobilize other remedies for deficient performance by the accouter and perhaps also to confer rewards for a superior performance by the accouter."¹³³ Based on this definition, Stewart counts two categories of accountability mechanisms:

- Delegation-based: electoral, hierarchical, supervisory¹³⁴ and fiscal¹³⁵ accountabilities; relationships between the accouter and the account-holders involve "a delegation or a transfer of authority or resources ... where the accouters are to act in the interest of the grantors/account-holders or designated third persons."¹³⁶

- Law-based: legal accountability; the specified account-holder can require that the accouter render account for his performance by legal standards.

Brought back to the example of the accountability of the private sector in the framework of IAM cases, a determination is not easy to make. Regarding the compliance review stage, on the one hand, at the end of the day when MDBs are found noncompliant, the onus is on clients to implement project-level remedial actions as recommended by IAMs/the Management and approved by the Board/the President of the MDB. On the other hand, these remedial measures must be implemented because the bank did not react consistently to its own standards to its client's noncompliance with the MDB's performance standards, made binding between the bank and the client *via* the loan agreement. Put differently, before IAMs the accouters are the banks and the account-holders are

the adoption of the 2006 Performance Standards—has been instrumental in the decision of Agrokasa to cancel its request for a third loan in September 2009: CAO, *CAO at Ten: Annual Report FY 2010 and Review FY 2000-10*, Washington DC: CAO, electronic version at <http://www.cao-ombudsman.org/publications/documents/CAO_10Year_AR_web.pdf> (last visited 17 February 2015.)

¹³¹ Who defend sovereignty considerations.

¹³² In the *Coastal Gujarat Power Limited* (CGPL) case for example, the CAO notes that CGPL, a subsidiary of Tata Power, is quite cooperative but the results on the ground remain so far very unsatisfactory: CAO, *India / Tata Ultra Mega-01/Mundra and Anjar*, CAO CGPL Monitoring Report, 21 January 2015.

¹³³ Stewart (2014), *op. cit.*, at 245.

¹³⁴ It is "a catchall category for relationships in which a delegation of authority or resources has occurred but in which the grantor does not have the right to control directly the grantee's conduct. Examples include the relations between clients and independent contractors or professionals, between the legislature and administrative agencies, and between states and the international organizations of which they are members. There may or may not be established standards and procedures and giving of reasons for evaluation of the accouter's conduct. Sanctions and other remedies include revocation or nonrenewal of the delegated authority or resources conferred, or other corrective measures such as organizational and policy changes": *ibid.*, at 247.

¹³⁵ Fiscal accountability "involves financial accounting and audit procedures by which the grantee of funds or other resources accounts for their use to an account holder, often the grantor, in accordance with generally accepted accounting standards and practices. Sanctions can include revocation of the grant and return of funds, denial of future grants, or imposition of more restrictive conditions on the activities of the grantee": *ibidem*.

¹³⁶ *Ibid.*, at 246.

the requesters. Clients are for their part legally accountable to the bank, not the requesters. However, if emphasis is put on who is eventually responsible for remedying noncompliance findings, responsibility is shared between the bank (project-level and systemic changes) and the client (project-level changes.) From that point of view, private borrowers are 'fiscally' accountable and indirectly legally accountable. Whether these fiscal accountability and indirect legal accountability can create systemic changes in the client's perception of the scope of its accountability towards affected-people is less than certain.

Concerning the problem-solving stage, several levels of accountability involving requesters as account-holders are also triggered but they hardly reach clients. First, some interviewees expressed their view that a MDB-funded problem-solving exercise, even entirely free from compliance-related considerations, by its very existence is a way of rendering the bank accountable for the environmental and social harm arising from the projects they support. Because it has some responsibility in the harm done, the bank has to pay the process that will lead to a remedy. It could be considered as a form of fiscal accountability to the benefit of affected people. There is also a legal component which is that the bank policies provide for this problem-solving mechanism. Requesters are then 'legally' entitled to a problem-solving exercise, but here the account-holder is the Management, not the client who is free to decline to participate in a problem-solving process. Some clients might feel accountable as a result of a problem-solving exercise and react accordingly; again, whether this can create systemic changes in the client's perception of the scope of its accountability towards affected-people is less than certain.

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