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JUSTICE BY ANY OTHER NAME? THE GRIEVANCE MECHANISMS OF MULTILATERAL DEVELOPMENT BANKS

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ABSTRACT

The activities of the multilateral development banks (MDBs) can have adverse impacts on water resources in an array of situations. It is obvious as regard their support to development projects related to agricultural or hydroelectric development, or to drinking water and sanitation infrastructure projects, but virtually all sectors of development can also result in water pollution or a reduction in access to water: mining, transportation, forestry, energy (other than hydroelectricity), housing… It is thus crucially important to ensure that people have the means to make themselves heard when harm to water resources occurs as collateral damage. In this contribution, access to justice is seen as a component of public participation. It allows public participation during the full lifecycle of norms, not only at the stage of decision- and law-making but taking account of their implementation and compliance-monitoring, possibly resulting in modifying the content of norms and/or procedures at issue.

RÉSUMÉ

Les activités des banques multilatérales de développement sont susceptibles d'avoir des impacts négatifs sur les ressources en eau dans de très nombreuses situations. Il est ainsi crucial de s'assurer que le public a la possibilité de se faire entendre quand des atteintes aux ressources en eau se produisent. Cette contribution envisage l'accès à la justice comme composante de la participation du public. Il permet la participation du public au cours du cycle de vie entier des normes, pas seulement au stade de la prise de décision et de l'adoption de règles mais en tenant compte de leur mise en œuvre et du contrôle du respect des normes, ce qui peut déboucher sur une révision du contenu des normes et/ou des procédures concernées.

Keywords : Bank, complaint, justice, accountability, international organisations, development

Mots clés: Banque, plainte, justice, accountability, organisations internationales, développement

Since the early 90's all MDBs—save for the Islamic Development Bank—have created accountability mechanisms that allow affected people to put forward their grievances. The role of each of these mechanisms is to assess, upon request of people affected by the activities of an MDB, the MDB's compliance with its own internal rules, policies and procedures related, for instance, to the disclosure of information, environmental and social impact assessment, or indigenous peoples' rights. The purpose of this chapter is to outline what role these grievance mechanisms can play in a normative (in the legal meaning of the term) protection of water resources.[1]

The first part sketches out the peculiarities of the MDBs' grievance mechanisms in terms of their eligibility criteria for complaints, procedure, law applied and outcome. The second part outlines some questions regarding the influence that international law related to public participation may have on these grievance mechanisms.

I. AN OVERVIEW OF MDB GRIEVANCE MECHANISMS' FUNCTIONING TERMS

The MDBs that guarantee accountability through an international accountability mechanism are 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) and the Inter-American Development Bank (IDB).[2] It is worth noting that in their present form, these mechanisms all are independent bodies.

A. EXISTING MDB GRIEVANCE MECHANISMS

The World Bank has created two grievance mechanisms. The first, and also the first of its kind, is the Inspection Panel, which addresses grievances arising from official development assistance provided by the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). It was created in 1993 and subsequently modified in 1996 and 1999. This independent body examines requests emanating from people who allege they are or will be harmed by a project financed by the IBRD or the IDA, where that present or potential harm results from a breach by the bank of the its operational policies and procedures.[3] The second grievance mechanism is the Compliance-Advisor/Ombudsman (CAO) created in 1999. It addresses grievances arising from the activities of the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA), which both promote private sector investment in development. In its 'Ombudsman' role, the CAO examines the complaints of currently or potentially project-affected people, regardless of whether the alleged harm stems from a breach of their internal rules by these agencies or not. In sensitive cases, the CAO may shift from its 'Ombudsman' mission to its 'Compliance' mission, and in addition may issue an audit of IFC/MIGA compliance with its procedures and policies.[4] The new (March 2013) version

1 How the rules applied by the MDBs address public information, consultation and participation is outside the scope of this contribution, which focuses on their grievance mechanism as a means of public participation. On the public participation dimensions of MDB safeguards and policies, see especially the very detailed analysis in D. D. Bradlow, M. S. Chapman, 'Public Participation and the Private Sector: The Role of Multilateral Development Banks in the Evolution of International Legal Standards', *Erasmus Law Review,* vol. 4, 2011, pp. 89-123.

2 For comparative studies of MDB accountability mechanisms, see R. E. Bissell, S. Nanwani, 'Multilateral Development Bank Accountability Mechanisms: Developments and Challenges', *Manchester Journal of International Economic Law*, vol. 6, 2009, pp. 2-55; D. D. Bradlow, 'Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions', *Georgetown Journal of International Law,* vol. 36, 2005, pp. 403-493.

3 Operating Procedures of the Inspection Panel, 7 Apr. 2014. This version replaced the 19 Aug. 1994 Operating Procedure, online: http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/2014%20Updated%20Operating%20Procedures.pdf. See also Executive Directors of IBRD and IDA, 'The World Bank Inspection Panel', Res. IBRD 93-10 and IDA 93-6, 22 Sep. 1993; Review of the Resolution, 17 Oct. 1996; Clarification of the Second Review, 20 April 1999, online: http://go.worldbank.org/NN6UOKNBZ0.

4 CAO Operational Guidelines, 8 Jun. 2007, online: http://www.cao-ombudsman.org/about/whoweare/documents/EnglishCAOGuidelines06.08.07Web.pdf.

of the CAO Operating Guidelines *inter alia* clarify the vocabulary, replacing the 'ombudsman' function with a 'dispute resolution' function and relabeling 'compliance audit' as 'compliance investigation'.[5]

Activities of the ADB can be examined by an Accountability Mechanism that was created in 2003 to replace the Inspection Committee created in 1995-1996. The Accountability Mechanism was revised in May 2012 and includes both a Special Project Facilitator (SPF) which acts as a mediation forum where project-affected people can file complaints regardless of whether the ADB's operational policies and procedures have been breached or not, and a Compliance Review Panel (CRP) that examines complaints based on an alleged breach of ADB policies and procedures. The 2012 review process dropped the requirement that affected people start with the consultation process before they can file for a compliance review.[6]

The EBRD created an Independent Recourse Mechanism in 2003. It was replaced in 2010 by the Project Complaint Mechanism (PCM), which has both a compliance review mission and a problem-solving function, depending on whether the complaint is assessed as eligible for a compliance review, a problem-solving initiative, or both. The PCM Rules of Procedure were updated in May 2014. This update does not result in significant procedural changes but intends to clarify a number of provisions.[7]

As regards the IDB, in 2010 the Independent Consultation and Investigation Mechanism (MICI, for *Mecanismo Independiente de Consulta e Investigación*) succeeded the Independent Inspection Mechanism created in 1994. It works on a two-stage basis, with a consultation phase that, if unsuccessful, can proceed to a compliance review phase.[8]

In the framework of the AfDB, the Independent Review Mechanism (IRM) entrusted to a Compliance Review and Mediation Unit (CRMU) was set up in 2004 and modified in 2010. Like the EBRD mechanism, it has a twofold (problem-solving/compliance review) structure that can lead to a compliance review, a problem-solving initiative, or both.[9]

Finally, the Complaints Mechanism of the EIB was created in 2008 and revised in 2010. It offers the possibility to access mediation, or compliance control, or mediation followed by compliance control if mediation is unsuccessful. The grievance mechanism has an additional procedural level that consists in the possibility of an appeal before the European Ombudsman if requesters are not satisfied with the EIB Complaint Mechanism's findings.[10] This paper will refer only marginally to the EIB Complaint Mechanism, since it is the most opaque of its kind.[11]

B. HARM: THE MAIN FOCUS OF THE GRIEVANCE MECHANISMS

The MDB grievance mechanisms address grievances from people who are affected or likely to be adversely affected by projects supported by (one or more) MDB. Hence 'the public' as such is not eligible to submit a request. Who these eligible, 'project-affected people' are depends on the specific eligibility requirements of each grievance mechanism.

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5 CAO Operational Guidelines, Mar. 2013, online: http://www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines_2013.pdf.

6 Accountability Mechanism Policy 2012, 24 May 2012, online: http://www.adb.org/site/accountability-mechanism/.

7 EBRD, Project Complaint Mechanism: Rules of Procedure, 7 May 2014, online: http://www.ebrd.com/downloads/integrity/pcmrules2014.pdf.

8 Política de constitución del Mecanismo Independiente de Consulta e Investigación, 17 Feb. 2010, online: http://www.iadb.org/en/mici/.

9 Independent Review Mechanism, Operating Rules and Procedures, 16 Jun. 2010, online: http://www.afdb.org/en/about-us/structure/independent-review-mechanism-irm/.

10 EIB, Complaints Mechanism Principles, Terms of Reference and Rules of Procedure, Feb. 2010, online: http://www.eib.org/attachments/strategies/complaints_mechanism_policy_en.pdf.

11 Before the EIB Complaints Mechanism, complaints are dealt with confidentially unless complainants waive their right to confidentiality, and conclusion reports are not published: *ibid.*, para. 13.

Operating Rules	Eligible Requesters
Accountability Mechanism Policy, para. 138 (ADB)	Any group of two or more people in a borrowing country where the ADB-assisted project is located or in a member country adjacent to the borrowing country who are directly, materially, and adversely affected
Independent Review Mechanism, Operating Rules and Procedures, para. 1 (AfDB)	Two or more persons with a common interest...who allege that an actual or threatened material adverse effect on the affected persons' rights or interests arises directly from an act or omission of...the Bank Group as a result of the failure...to follow any of its own operational policies and procedures
Project Complaint Mechanism: Rules of Procedure, paras. 1-2 (EBRD)	One or more individual(s) located in an Impacted Area, or who has or have an economic interest, including social and cultural interests, in an Impacted Area, may submit a Complaint seeking a Problem-solving Initiative…One or more individual(s) or Organisation(s) may submit a Complaint seeking a Compliance Review
Complaints Mechanism Rules of Procedure, paras. 2.1-2 (EIB)	Any person or group, including civil society organisations, who allege there may be a case of maladministration within the EIB Group...Members of the public who feel affected by the activities of the EIB Group but who are not aware of the rules, regulations, policies or procedures applying to the Group
Política de constitución del MICI, paras. 30 and 40f) (IDB)	One or more persons, groups, associations, entities or organizations... residing in the country(ies) where the Bank-Financed Operation is or will be implemented...[who] reasonably assert that it has been or could be expected to be directly, materially adversely affected by an action or omission of the IDB in violation of a Relevant Operational Policy in a Bank-Financed Operation
CAO Operational Guidelines 2013, para. 2.1.2 (World Bank - IFC and MIGA)	Any individual or group of individuals that believes it is affected, or potentially affected, by the environmental and/or social impacts of an IFC/ MIGA project
Operating Procedures of the Panel, paras. 10 and 12 (World Bank - IBRD and IDA)	[T]wo or more people with common interests and concerns who claim that they have been or are likely to be adversely affected by a Bank-financed operation, and who are in the country where the Bank-financed project is located..., [who] believe that their rights or interests may be adversely affected by a Bank-financed project, and [claim that] the material adverse effects (harm) that they believe they are suffering, or are likely to suffer as a result is linked to the project activities that the Requesters believe may be relevant to their concerns.

One should also note that the identity of 'project-affected people' is not limited to who the Management of the concerned bank decided they were during the design, appraisal and/or implementation of the project. The MDB grievance mechanisms are empowered to look beyond the project definitions and can find that people who were left outside[12] the project's design/appraisal/implementation process are nonetheless eligible to participate in a problem-solving exercise and/or compliance review.[13]

12 Either because some people were 'forgotten' or the project's area of influence was defined too narrowly with regard to the actual zone of impact.

13 Regarding the Inspection Panel, see for example *Jamuna Multipurpose Bridge Project* (Bangladesh, 1996), Eligibility Report, 26 Nov. 1996; *Western Poverty Reduction Project* (China, 1999), Investigation Report, 28 Apr. 2000; a useful reference is A. Naudé Fourie, 'The World Bank Inspection Panel's Normative Potential: A Critical Assessment, and a Restatement', *Netherlands International Law Review,* vol. 59, 2012, pp. 199-234, especially pp. 227-231. See also for instance before the ADB Accountability Mechanism: *Mundra Ultra Mega Power Project* (India, 2013), Compliance Review Panel Eligibility Report, 27 Dec. 2013; before the IDB MICI: *Panama Canal Expansion Program* (Panama, 2011), Assessment and Consultation Phase Report, 27 Jun. 2012; before the CAO: *Environmental and Social Categorization of the Amaggi Expansion Project* (Brazil, 2004), Audit Report, May 2005; before the EBRD PCM: *EPS Emergency Power Sector Reconstruction Loan, EPS Power II and EPS Kolubara Environmental Improvement Projects* (Serbia, 2012, 2013), Eligibility Assessment Report, 2014; before the AfDB IRM: *Medupi Power Project (South Africa, 2010)*, Compliance Review Report, 19 Dec. 2011.

Regardless of the specificities of each grievance mechanism's eligibility requirements, harm—whether already occurring or potential—appears as the central concern, even more than the breach of an applicable internal rule of the MDB. It is therefore not surprising that all MDB grievance mechanisms offer a combination of problem-solving techniques—mediation, good offices, consultation, etc.—and compliance review (except for the Inspection Panel, which has exclusively a compliance-control function). Likewise, access to a grievance mechanism's problem-solving function is not conditioned on a claim that the alleged harm stems from a breach of an applicable rule. Only the Inspection Panel, the Independent Review Mechanism (AfDB) and the MICI (IDB) require that the harm be a consequence of an action or omission of the concerned MDB, in breach of applicable policies and procedures. In addition, only the MICI (IDB) requires that claimants go through a problem-solving exercise, that it be unsuccessful and that a breach of policies and procedures is alleged, before accessing compliance review.[14]

C. PECULIARITIES OF THE COMPLIANCE REVIEW FUNCTION

The terms of the compliance review function of MDB grievance mechanisms show they are distinctively tailored to the kind of institutions (international organisations) and activities concerned, especially when it comes to the rules by which compliance is assessed and the possible outcomes of a compliance review.

As for the applicable rules, they are, according to the terminology of the Draft Articles on the Responsibility of International Organizations (DARIOs),[15] the 'rules of the organization'. The legal nature of such internal rules is highly contentious; there is indeed no consensus on whether they constitute part of international law, or can bind only the organisation's staff.[16] The DARIOs (Article 64) specify that unless the *lex specialis* of an organisation provides otherwise, the breach of an organisation's rules can amount to an internationally wrongful act only if those rules 'are part of international law' and, 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'.[17] All in all, with respect to project-affected people, the only thing that is sure is that operational policies and procedures are rules made by and for MDBs and are thus not subject to judicial settlement. The one exception is the situation of the EIB: it is a product of the State members of the European Union alone, and is an organ of the EU. As such, it must comply with the entirety of the obligations the EU itself has committed to. In particular, it must comply with the European regulation that transposes the international obligations binding the European Union under the Aarhus Convention on Public Information, Public Participation, and Access to Environmental Justice.[18]

The rules that can be invoked before each MDB grievance mechanism is thus defined by each MDB, and whether a particular rule can be invoked is specified in the grievance mechanism's rules of procedure and/or in the rules themselves. Rules related to fraud/corruption[19] and procurement, for example, can generally not be invoked. Some grievance mechanisms distinguish between the rules that can be invoked when the project is public/sovereign-guaranteed and those which are relevant for projects that are private/non-sovereign guaranteed;[20]

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14 The ADB Accountability Mechanism previously had a similar requirement; it was dropped in the 2012 revision.

15 International Law Commission, Draft Articles on the Responsibility of International Organizations, with Commentaries, *Yearbook of the International Law Commission*, Part Two (2011), Article 2(b): ' "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.'

16 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.

17 International Law Commission, *Draft articles on the responsibility of international organizations, commentary of Article 5(3)*.

18 In 2007 the Aarhus Compliance Committee received a communication of the Albanian NGO 'Civic Alliance for the Protection of the Bay of Vlora' (Albania) alleging that the European Community, through the European Investment Bank (EIB), was not in compliance with the Convention's article 6 by virtue of its decision to finance the construction of a thermo-power plant (TPP) in Vlora, Albania, without ensuring proper public participation in the process. The Committee found that the EC had not breached its obligations: Aarhus Compliance Committee, *Findings with regard to communication ACCC/C/2007/21 concerning compliance by the European Community with its obligations under the Convention,* 23rd meeting, Geneva, 31 March – 3 April 2009, online: http://www.unece.org/env/pp/compliance/Compliancecommittee/21TableEC.html.

19 Fraud and corruption issues are dealt with by specific, separate bodies.

20 See IRM Operating Rules and Procedures, para. 2(xi). The World Bank Group created two separate mechanisms, one dealing with official development assistance (the Inspection Panel, which controls compliance with IBRD and IDA policies and procedures), the other with support to private projects (the CAO, which reviews compliance with the IFC's environmental and social safeguards, and its performance standards).

others do not. All MDBs' rules share a common distinction: there are standards that the bank itself must live up to, and those placing requirements on borrowers in the design and implementation of their project. Most banks list these two kinds of requirements in different categories of instruments.[21] The first are usually called policies;[22] the second are called performance requirements (EBRD), performance standards (IFC), operational safeguards (AfDB), or safeguard requirements (ADB). References to international law that might be included in these rules are addressed in more detail in the second part of this chapter.

As for the outcomes of compliance reviews, they differ quite substantially from those offered through judicial processes. The MDB grievance mechanisms do not record wrongful acts under international law that would be attributable to the bank, and they do not decide on a responsibility based on the *lex specialis* of the bank. When a bank is found non-compliant, it does not result in a legal implication or compensation for the victims. Compliance-control generally leads to the adoption of remedial measures, so as to allow the project to carry on on a basis more respectful of affected people. Grievance mechanisms' findings can also result in improvements to the applicable policies and safeguards.[23]

MDBs grievance mechanisms' compliance control function can only verify the existence of serious breaches and cannot decide on remedial measures. The MDBs' executive bodies (their Boards) are the only ones who can decide on the consequences of an investigation report: implementation of remedial measures, temporary suspension of their assistance, and even withdrawal from the project.[24] This is the case for the Inspection Panel,[25] the CAO,[26] and the ADB Accountability Mechanism.[27] The MICI (IDB), the IRM (AfDB) and the PCM (EBRD) can make recommendations on remedial measures, but the final decision is up to the Board.[28]

Moreover, when remedial measures are decided, some but not all grievance mechanisms are competent to follow up on post-decision implementation. The EBRD PCM is explicitly competent to monitor the implementation of recommendations.[29] The CRMU of the AfDB monitors the solution reached during a problem-solving exercise and, in the case of a compliance review, decides on the person in charge of monitoring the implementation of remedial measures.[30] The Compliance Review Panel of the ADB Accountability Mechanism monitors the implementation of Board-approved remedial measures.[31] The MICI can only monitor remedial measures upon request of the Board.[32] The CAO can 'keep the compliance investigation open and monitor the situation until actions taken by IFC/MIGA assure CAO that IFC/MIGA is addressing the noncompliance.'[33] As regards the Inspection Panel, it is not granted any monitoring competence. In several occasions however, the Board has asked the Panel to conduct a follow-up, and the Panel tries to keep in touch with claimants in order to get their feedback on the investigation and the consequences of the final report.[34]

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21 Note that in the framework of the World Bank however, 'operational policies' (OPs) designate the general conditions of the bank's activities, including both the bank's and the borrower's responsibilities. The World Bank's 'bank procedures' detail how the bank's staff must implement the requirements provided for in the OPs.

22 But note that the ADB calls these 'procedures'.

23 See for example AfDB IRM Operating Rules and Procedures, *supra,* n. 9, para. 52(c)(ii); ADB Compliance Review Panel, *Integrated Citarum Water Resources Management Investment Program - Project 1* (Indonesia, 2012), CRP Final Report, 18 Feb. 2013, para. 103(ii); CAO*, Participatory Water Monitoring. A Guide for Preventing and Managing Conflict*, Advisory Note, 2008, online: http://www.cao-ombudsman.org/howwework/advisor/documents/watermoneng.pdf.

24 This is what happened in the *Western Poverty Reduction Project* (China, 1999) case: on this project, that was to take place in Tibet, the Inspection Panel found violations so serious that, despite heavy pressure from the Chinese government, the World Bank decided to withdraw its support: see for example Center for International Environmental Law, 'World Bank Effort to Support China's Population Transfer Into Tibet is Defeated', Aug. 2000, http://www.ciel.org/Intl_Financial_Inst/pressreleasefinaltibet.html (last visited 15 Mar. 2014).

25 Articles 68 and 71 of its Operating Procedures, *supra*, n. 3

26 CAO Operational Guidelines, *supra*, n. 4, p. 25.

27 Accountability Mechanism Policy, *supra*, n. 6, para. 191.

28 Política de constitución del Mecanismo Independiente de Consulta e Investigación, *supra*, n. 8, paras. 64, 71; Article 25 of IRM Operating Rules and Procedures, *supra*, n. 9; Project Complaint Mechanism: Rules of Procedure, *supra*, n. 7, paras. 45-46.

29 Project Complaint Mechanism: Rules of Procedure, *ibid*., paras. 44 and 47.

30 IRM Operating Rules and Procedures, *supra*, n. 9, arts. 40, 52(c) and 60.

31 Accountability Mechanism Policy, *supra*, n. 6, paras. 191-194.

32 Política de constitución del Mecanismo Independiente de Consulta e Investigación, *supra*, n. 8, para. 72.

33 CAO Operational Guidelines, *supra*, n 4. p. 25.

34 Inspection Panel, *Accountability at the World Bank: The Inspection Panel at 15,* World Bank: Washington DC, 2009, especially pp. 44-45 and 57-61.

II. ON THE INFLUENCE OF THE RULES OF INTERNATIONAL LAW RELATED TO WATER AND PUBLIC PARTICIPATION

The MDB's policies and safeguards (or procedures, or requirements) refer to—both hard and soft—international law, though direct and specific references are usually found in the safeguard/performance requirements aimed at borrowers. That does not mean that the MDBs' standards are less protective than international law; they are indeed much more detailed than most international law obligations, and this degree of precision allows grievance mechanisms to exercise in-depth control and review.

A. REFERENCE TO INTERNATIONAL LAW IN MDBS' STANDARDS

First, compliance with the international law obligations that the borrower country has committed to, or that are in force in the country where the project of a private borrower is located, can be mentioned in broad terms as a condition for the validity of certain documents without which the bank will not support the project. For example, the World Bank Operational Policy 4.01 on Environmental Assessment (EA) specifies that the 'borrower is responsible for carrying out the EA'[35] and that the 'EA takes into account...transboundary and global environmental aspects...and obligations of the country, pertaining to project activities, under relevant international environmental treaties and agreements. The Bank does not finance project activities that would contravene such country obligations, as identified during the EA.'[36]

Second, many references to specific international instruments can also be found in the standards borrowers must comply with. The IFC's Performance Standard 6 (IFC PS6), Biodiversity Conservation and Sustainable Management of Living Natural Resources, states that 'the requirements set out in this Performance Standard have been guided by the Convention on Biological Diversity'[37] and IFC PS8, Cultural Heritage,[38] claims to be not only '[c]onsistent with the Convention Concerning the Protection of the World Cultural and Natural Heritage' but also 'based in part on standards set by the Convention on Biological Diversity.'[39] The AfDB's Operational Safeguard 3 (AfDB OS3), Biodiversity, Renewable Resources and Ecosystem Services, 'reflects the objectives of the Convention on Biological Diversity...[and] also aligns with the Ramsar Convention on Wetlands, the Convention on the Conservation of Migratory Species of Wild Animals, the Convention on International Trade in Endangered Species of Wild Flora and Fauna, the World Heritage Convention, the UN Convention to Combat Desertification and the Millennium Ecosystem Assessment...the International Plant Protection Convention.'[40] EBRD Performance Requirement 10 (EBRD PR10), Information Disclosure and Stakeholder Engagement, explicitly mentions the influence of the 'UNECE Aarhus Convention, which identifies the environment as a public good.'[41]

Regarding direct references to international law in normative instruments aimed at the banks' staff, they are usually found in the strategies of the institution, which cannot be invoked before MDB's grievance mechanisms.[42] One can nevertheless find direct mentions, either in general obligations—'ADB will not finance projects that do not comply with...the host country's social and environmental laws and regulations, including those laws implementing host country obligations under international law'[43]—or through the quotation of specific texts,

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35 World Bank, OP 4.01 - Environmental Assessment, 2013, para. 4.

36 *Ibid.*, para. 3.

37 IFC PS6 - Biodiversity Conservation and Sustainable Management of Living Natural Resources, 2012, 'Introduction', para. 1.

38 Cultural heritage includes 'unique natural features or tangible objects that embody cultural values, such as sacred groves, rocks, lakes, and waterfalls': IFC PS8 - Cultural Heritage, 2012, 'Scope of Application', para. 3.

39 *Ibid.*, 'Introduction', para. 1.

40 AfDB OS3 - Biodiversity, Renewable Resources and Ecosystem Services, 2013.

41 EBRD PR10 - Information Disclosure and Stakeholder Engagement, date unknown, para. 2.

42 The Compliance Review and Mediation Unit, in the framework of AfDB's IRM, has however taken account of AfDB strategy documents—the Clean Energy Investment Framework and the Climate Risk Mitigation and Adaptation Strategy—as relevant context when interpreting the AfDB's climate change commitments in the *Medupi* case: see IRM, *Medupi Power Project (South Africa, 2010)*, *supra*, n. 13, pp. 4-8 and 11-14.

43 ADB Safeguard Policy Statement, 2013, para. 6. Along the same lines, see World Bank OP 4.01, *supra*, n. 35.

such as the Rio Declaration and Agenda 21,[44] or the Aarhus Convention, the Espoo Convention on Environmental Impact Assessment in a Transboundary Context and the EU Environmental Impact Assessment Directive.[45]

B. MADE-TO-MEASURE STANDARDS AND COMPLIANCE-CONTROL

Though international law related to public participation influences the content of MDBs' standards—in some cases quite substantially, as in the EBRD example—one must keep in mind that these standards are above all tailored to the specific constraints of MDBs' activities and the concrete issues arising in the design, appraisal and/or implementation of development projects. They go far more into detail than any rule of international law, in turn allowing the compliance-control mechanisms to assess the way Management has complied with its obligations with a remarkable degree of case by case precision. For instance, the MDBs' environmental impact assessment policies and procedures provide for the actions the banks' staff must take during the project's lifecycle step by step, and their associated safeguards or performance requirements detail what is expected from the borrower, when and how. As regards the participation of affected or potentially affected people, MDBs' standards and grievance mechanisms are by far more practical than general international law and international judicial dispute settlement, at least in comparison to the approach in the International Court of Justice's (ICJ) *Pulp Mills* judgment.[46] According to this judgment, there is an international obligation to carry out environmental impact assessments, but the content of such assessments is left up to individual states.[47] What is more, the ICJ was 'of the view that no legal obligation to consult the affected populations arises for the Parties from the instruments invoked by Argentina' (but what of international law beyond Argentina's reasoning?) and was satisfied with the fact that three public hearings were organized and 80 interviews of various stakeholders, without even questioning what kind of information was disclosed.[48]

In contrast, MDB grievance mechanisms rely on standards' 'substance and spirit'[49] to check up on the quality and quantity of information disclosed, as well as on the number and identity of the stakeholders able to participate in consultations. They also enter into the detail of actions and omissions of the Management to determine whether affected people were *effectively* informed and involved, including actions and omissions in Management's supervision of the borrower's own commitments.[50]

In addition, even a cursory glance at the *corpus* of standards of each MDB reveals that the banks have created a series of obligations that cannot be found in international law, such as standards on safeguards that the private sector must live up to,[51] on financial intermediaries, project-level grievance mechanisms—intended both to ease access for project-affected people and to make interventions more timely—, cumulative impacts and so on. All these may be subject to MDBs grievance mechanisms' in-depth control.[52]

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44 IDB Environment and Safeguards Compliance Policy, 2006, para. 2.3.

45 EBRD Social and Environmental Policy, 2008, para. 7:
'In particular, the EBRD expects clients to identify and interact with their stakeholders on an ongoing basis, and to engage with potentially affected communities through disclosure of information, consultation, and informed participation in a manner deemed by the Bank to be commensurate to the impacts associated with the project. Such stakeholder interaction should be consistent with the spirit, purpose and ultimate goals of the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, the EU Environmental Impact Assessment Directive and, for projects with the potential to have significant environmental impact across international boundaries, the UNECE Convention on Environmental Impact Assessment in a Transboundary Context, regardless of the status of ratification.'

46 ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 20 Apr. 2010, online: http://www.icj-cij.org/docket/files/135/10779.pdf.

47 *Ibid.*, para. 205:
'it is the view of the Court that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment. The Court also considers that an environmental impact assessment must be conducted prior to the implementation of a project. Moreover, once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken.'

48 *Ibid.*, paras. 217-219.

49 *Jamuna Multipurpose Bridge Project* (Bangladesh, 1996), *supra*, n. 13, para. 47.

50 A. Naudé Fourie, *supra*, n. 13, pp. 227-231.

51 See in particular D. D. Bradlow, M. S. Chapman, 'Public Participation and the Private Sector', *supra*, n. 1.

52 On the depth of the Inspection Panel's and the CAO's compliance-control, see especially D. D. Bradlow, A. Naudé Fourie, 'The Operational Policies of the World Bank and the International Finance Corporation: Creating Law-Making and Law-Governed Institutions?', *International Organizations Law Review*, vol. 10, 2014, pp. 3-80.

Finally, on rare occasions, the MDB grievance mechanisms also refer to international law in situations where the applicable standards do not. This occurred, for example, in the *Chad pipeline* case, where the Inspection Panel, concerned with allegations of massive violations of human rights, 'felt obliged to examine whether the issues of proper governance or human rights violations in Chad were such as to impede the implementation of the Project in a manner compatible with the Bank's policies'.[53]

Do the MDB grievance mechanisms promote public participation in water resources management? They undoubtedly fill international justiciability gaps, given that they are the only remedy available to people who believe MDBs are responsible for the harms they suffered as a result of bank-supported development projects. Yet 'justiciability' here should not be understood narrowly as an access to purely legal remedies but rather as an access to justice in the broad sense. The grievance mechanisms contribute to a balancing of social relations; they open a direct communication channel between international organisations and affected people regarding the consequences of international organisations' activities, an area where power and voice used to be the monopoly of international organisations. They can be seen as a public participation avatar, since their functioning terms and outcomes, quite different from those of judicial *fora*, are tailored to allow project-affected people to be heard and the harm they suffer mitigated. Like other public participation mechanisms, they are also more than a procedure or institution, providing an element of legitimation to the activities of international organizations and hinting at the rule of law.

Further reading

Bissell, R.E., S. Nanwani, 'Multilateral Development Bank Accountability Mechanisms: Developments and Challenges', *Manchester Journal of International Economic Law*, vol. 6, 2009, pp. 2-55.

Bradlow D.D., M.S. Chapman, 'Public Participation and the Private Sector: The Role of Multilateral Development Banks in the Evolution of International legal Standards', *Erasmus Law Review,* vol. 4, 2011, pp. 91-125.

Bradlow, D.D., A. Naudé Fourie, 'The Operational Policies of the World Bank and the International Finance Corporation: Creating Law-Making and Law-Governed Institutions?', *International Organizations Law Review*, vol. 10, 2014, pp. 3-80.

53 Inspection Panel, *Petroleum Development and Pipeline Project* (Chad, 2001), Investigation Report, 17 Jul. 2002, para. 35. On the Inspection Panel and human rights, see A. Naudé Fourie, *The World Bank Inspection Panel and Quasi-judicial Oversight: In Search of a 'Judicial Spirit' in Public International Law*, Eleven International Publishing, Utrecht, 2009, pp. 261-276; R. Oleschak-Pillai, 'Accountability of International Organisations: An Analysis of the World Bank's Inspection Panel', in J. Wouters et al. (eds.), *Accountability for Human Rights Violation of International Organisations*, Intersentia, Antwerp, 2011, pp. 401-429. By contrast, the ADB Accountability Mechanism's Complaint Review Panel recently declined to examine human rights-based allegations, considering that, though they do not mention human rights *per se*, applicable standards protected such rights in practice: CRP, *Greater Mekong Subregion: Rehabilitation of the Railway in Cambodia Project* (Cambodia, 2012), CRP Final Report, 14 Jan. 2014, paras. 253-256 and Appendix 4.