"Financing Infrastructure at Multilateral Development Banks: Global Administrative Law and Accountability Reforms in Infrastructure Project Financing in the BRICS bloc"

by

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University of Cape Town

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DECLARATION

I, Grant Sinclair Caswell, declare that *"Financing Infrastructure at Multilateral Development Banks: Global Administrative Law and Accountability Reforms in Infrastructure Project Financing in the BRICS bloc"* is my work and that it has not been previously submitted in whole, or in part, for the award of any degree or qualification at any university. All the sources used, referred to or quoted have been duly acknowledged.

Dated at Cape Town on 2 June 2021.

Signed by candidate

_____

Grant Sinclair Caswell

Acknowledgments

This research has simultaneously been the most challenging and most rewarding project of my career so far. I have learned and grown more than I ever anticipated when I started on this journey and for that I am so grateful.

I thank God for getting this far – this body of work is a culmination of equal parts hard work and faith.

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Abstract

One of the hallmarks of the last decade has undoubtedly been the rise to prominence of a group of five emerging economies – Brazil, Russia, India, China and South Africa - that have come to be known collectively as the 'BRICS bloc'. As a direct result of the increasingly prominent role of the BRICS bloc in global politics and economics, there has been a consequent increasing demand for improved infrastructure within these rapidly industrialising powers. This has compelled multilateral development banks to develop innovative funding solutions. Among these mechanisms is project finance, a relatively novel legal and financial structure typically used to fund public and private capital-intensive facilities and utilities.

Multilateral development banks' (MDBs) participation in large-scale public-sector infrastructure projects financing is primarily governed by the loan agreements they conclude with governments, other financial institutions, and private sector entities. However, projects of this nature have predictably widespread effects, particularly on stakeholders not party to the contractual scheme – they frequently involve resettlement of local populations, transformation of indigenous lands, deforestation, pollution, and employment of labour for heavy industrial tasks. This far-reaching impact has necessitated increased accountability for MDBs' financing practices, particularly where the actions of MBD lenders impact on human rights and have broader social and environmental effects.

This thesis examines two mechanisms to achieve accountability. The first of these solutions lifts the veil and entails reconceptualisation of how MDBs are held accountable at domestic level by reconfiguring the role of domestic judicial forums. The second is the formation of what is termed an independent 'super mechanism', an international body which would be created by agreement among all participating multilateral development banks and would serve to provide effective oversight and enhanced accountability.

This thesis ultimately focuses on advancing a novel contribution on the establishment of a super mechanism and it does so with reference to the interface between global administrative law principles and domestic administrative law principles. It addresses how supranational regulatory mechanisms should render the exercise of discretion and authority at the international level more transparent and accountable for the benefit of stakeholders in the developing world. The thesis formulates four benchmark criteria against which the development of an effective and successful super mechanism should be measured, it should: (i) be empowered with jurisdiction to conduct comprehensive investigations; (ii) provide

remedies that are effective; (iii) be empowered to monitor and enforce remedies and corrective measures at MDBs; and (iv) operate in a manner that does not directly or indirectly contribute to undermining the national sovereignty of developing states.

The thesis takes this further by examining how a super mechanism aligns with the core objectives and values of the BRICS bloc, and then advances a proposal to establish a BRICS super mechanism. It does this with reference to the practical challenges that may arise around the implementation of a BRICS-specific super mechanism, and it interrogates measures that the bloc has already implemented that may mitigate some of the theorised challenges.

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CHAPTER ONE
Regulating for Accountability: The Issues

1.1 Introduction

When historians reflect on the 2010s, one of the hallmarks of the decade will undoubtedly be the rise to prominence of a group of five emerging economies – Brazil, Russia, India, China and South Africa - that would come to be known collectively as the 'BRICS bloc'. The acronym 'BRIC' was first used by economist Jim O'Neil in 2001 in a paper that discussed the state of the global economy, and forecast what was to come in the next decade for what he saw as the most dominant economies of the developing world.[1] Indeed, subsequent to the publication of O'Neil's paper, the emerging economies that make up the BRICS bloc had continued to acquire an important role globally, as a result of their position as producers of goods and services, their large populations, political influence, demography, and their relatively large economic growth prospects.[2] China and India emerged as dominant global suppliers of manufactured goods and services, Brazil and Russia have become similarly dominant suppliers of raw materials, while South Africa's significance stemmed largely from its position as the largest economy on the African continent and its extensive regional political and economic influence.[3]

One of the direct results of the increasingly prominent role of the BRICS bloc in global politics and economics is the consequent increasing demand for transport, water, telecommunications, healthcare and energy infrastructure within these rapidly industrialising powers. This was recognised by the World Bank's Public-Private Advisory Facility, an institution tasked with assisting governments in developing countries with policies, regulations and private-sector partnerships to develop infrastructure. It has noted that the global demand for infrastructure between 2010 and 2030 is expected to rise dramatically; Asia will need an anticipated infrastructure investment of approximately US$15.8 trillion, Latin America will need approximately US$1.2 trillion, while Africa's demand stands at just under US$ 1 trillion.[4]

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[1] J. O'Neil 'Building Better Global Economic BRICs' (2001) 66 *Goldman Sachs: Global Economics Paper*, available at https://www.goldmansachs.com/insights/archive/archive-pdfs/build-better-brics.pdf (accessed 14 November 2019). While O'Neil initially excluded South Africa from the grouping, South Africa was formally inducted into the bloc in 2010 by invite of the People's Republic of China following an agreement reached by the leaders of the initial four members of the bloc. See Minister Maite Nkoana-Mashabane 'South Africa's Full Membership of BRICS' *Department of International Relations and Cooperation* (24 December 2010), available at http://www.dirco.gov.za/docs/2010/brics1224.html (accessed on 14 January 2020).

[2] N Vijayakumar et al., 'Determinants of FDI in BRICS countries: A panel analysis' (2010) 5(3) *International Journal of Business Science & Applied Management* at 2.

[3] Ibid.

[4] G Inderst and F Stewart (2014) *Institutional Investment in Infrastructure in Emerging Markets and Developing Economies* at 2.

Evidently, the gap between existing infrastructure expenditure and the demand cannot be understated, and current expenditure levels demonstrate that the gap appears to be widest in the developing countries that need it most. Recent statistics indicate that current expenditure on infrastructure in developing countries amounts to less than half of what is required in order to meet demand, with the bulk of that financial demand falling into the areas of energy, transport and water infrastructure.[5] The gap between infrastructure expenditure and demand has real-life implications for billions of people around the world, particularly the poor. As the Office of the United Nations High Commissioner for Human Rights recognises, "…for those living in poverty, infrastructure provides an opportunity to access water, electricity, jobs, schools, health clinics, social networks, markets and other essential goods, services and pathways out of poverty*"*.[6] The human rights implications of the large gap between current expenditure levels and the demand are manifest, particularly when global poverty statistics highlight the continuing shame that that over 880 million people lack access to safe drinking water, over 2 billion people lack access to basic sanitation, and billions more lack access to affordable and clean energy sources.[7]

As the demand for critical infrastructure has increased, so too has the demand for multilateral development banks[8] (MDBs) to provide innovative funding solutions for both the governments and private investors who drive infrastructure projects to meet the demand in developing countries. As a result of the nature of the funding process, the legal and financial instruments used, the public and private actors which these infrastructure projects involve, and the subject matter for which the funding is sought, it has become apparent that there are a host of legal implications. These are evident at international and domestic level, particularly in so far as administrative justice laws, rights and processes are concerned during the financing process.

It is precisely at the nexus of this increasing demand for infrastructure and the efforts to meet it that the present study is situated. Not only will the legal implications of the funding mechanisms be considered, but it would also be remiss of the study to disregard the direct socio-economic impact of infrastructure development projects, especially in developing

[5] Ibid at 2-3.
[6] The Office of the United Nations High Commissioner for Human Rights, *The Other Infrastructure Gap: Sustainability* (2018), available at https://www.ohchr.org/documents/Publications/TheOtherInfrastructureGap_FullLength.pdf (accessed 16 February 2020).
[7] Ibid.
[8] For the purposes of this study the term 'multilateral development bank(s)' shall refer to those entities commissioned by two or more countries for the purpose of providing finance for investments in a host of human, infrastructure and other capital projects which promote development.

countries such those in the BRICS bloc. The majority of the infrastructure projects in developing countries concern matters as critical as the provision of water and the reticulation of energy. Undoubtedly there are fundamental human rights implications where governments' service delivery obligations are adversely affected by challenges encountered during the infrastructure development financing processes. Consequently, there is inherent value in not only exploring the potential for global and domestic administrative justice laws to address the challenges MDBs face when funding infrastructure projects, but also in examining how legal reforms in infrastructure development financing can improve accountability and advance the progressive realisation of basic services in developing countries in a manner that meets increasing demand, advances accountability, and ensures that affected peoples' human rights are protected.

This introductory chapter will examine the research context of this study by providing an overview of MDBs and the intersection of their financing operations with global administrative law. This account will form the background against which the remainder of the study will be situated and it will include a particular focus on the BRICS bloc and the MDB which the bloc has established. The chapter will also describe the fundamental problem which this study seeks to address together with the headline issues and questions that will be considered in order to address the stated problem. Naturally, this will entail an introductory examination of the theoretical frameworks and methodologies which the paper will seek to employ. The chapter will conclude with an outline of the thesis that will provide an overview of the study's arrangement.

1.2 Research Context

This study has two broad aims. First, it will seek to interrogate the existing legal and regulatory models governing infrastructure development financing at MDBs and the extent to which existing international and domestic administrative justice laws interface with the procedures which regulate the funding of infrastructure projects. This will predominately be focused on the BRICS bloc. Secondly, it will examine whether and how legal reforms could be implemented at both an international and domestic level during the infrastructure funding process in order to improve accountability in the infrastructure funding process. This will be done with specific reference to how reforms can be implemented to address the challenges that stakeholders in developing countries experience when large infrastructure is financed, with a particular emphasis on how these reforms may advance the realisation of the human rights of

citizens. In this regard the thesis will focus on infrastructure financing in sectors such as energy, telecommunications, health care, water and sanitation. More narrowly, in so far as the BRICS bloc will generally be considered when examining the international aspects of the challenges which the MDBs face, at a domestic level the predominant focus will be on South Africa and India in light of the fact that both countries are constitutionally governed commonwealth jurisdictions.

What follows is an account of the research context of the study - it aims not only to provide a description of the prevailing landscape of MDBs both old and new, but also to serve as a precursor to the analysis of the intersection between MDBs and global administrative law that will follow. It is critical, at least from a contextual starting-point, that the study commences with a fundamental understanding of MDBs' structure, operation and function.

1.2.1 The World Bank: A blueprint for regional MDBs

The Second World War was a pivotal point of departure for global economics. As countries across the world were engaged in protracted conflict, the western Allied powers[9] rallied to develop both short-term military strategies to overcome the battles of the day, and long-term economic strategies to mitigate the devastating economic impact of the war. Armed with fresh lessons from the far-reaching impact of the First World War, the Allied powers quickly resolved to build a new sustainable global economic order which would emerge after the war. The final negotiations for this new economic order were held in July 1944 in Bretton Woods, New Hampshire in the United States and the outcome was largely shaped by the governments of the United States and United Kingdom. The economic system which they ultimately developed at this conference would eventually take its name from the town that hosted the negotiations, so it became known as the Bretton Woods System.[10] The system was a bold and unprecedented venture in international cooperation which established an international monetary order that was centred on the US Dollar and a fixed price for gold.[11] In effect, the arrangement provided for fixed exchange rates, with each member country fixing its currency value to the U.S. dollar, while the price of gold, fixed at US$35 per ounce, applied to official

[9] The 'Big Four' Allies of World War II consisted of the United Kingdom, the United States, the Soviet Union and China. They were joined by several other Western-aligned countries. See S Schlesinger, 'FDR's Five Policemen: Creating the United Nations' (1994) 11(3) *World Policy Journal* 88 at 89.
[10] J Frieden, 'The Modern Capitalist World Economy: A Historical Overview' in Dennis Mueller (ed), *The Oxford Handbook of Capitalism* (2012) at 30.
[11] Ibid at 31.

transactions between the national central banks of member countries.[12] While the system effectively came to an end on 15 August 1971 as the United States moved to terminate the link between its currency and the fixed price of gold - a move which was ultimately followed by other countries[13] - what remained were the institutions of the system and the far-reaching economic principles which, to a significant extent, set the rules of the game for global economics that largely remain in operation to this day.

At its simplest, the aim of the Bretton Woods System was threefold: it sought to restore global trade, to do so in a manner that freed the global economy from restriction and discrimination, and also to prevent the formation of conflicting economic blocs that could compromise the integrity of the global economy.[14] In order to achieve these aims two institutions were established; the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD), also known as the World Bank (the 'Bank'). Both the IMF and the Bank were endowed with extensive powers and substantial resources to carry out their extraordinary responsibilities.

The IMF was founded to execute the core task of supervising monetary relations among member nations. The IMF's Articles of Agreement[15] set out its purposes clearly: these include the promotion of international monetary cooperation, the facilitation of balanced global economic growth and trade, the implementation of mechanisms that encourage stability in countries' payment and currency exchange practices, the availing of IMF resources in times of need, and the provision of financing where there were deficits or shortfalls in nations' balance of payments[16] to obviate their having to resort to measures which could be considered destructive to global international trade.[17] These purposes gave life to the Bretton Woods System and reflected a general commitment by the Allies (and eventually by virtually all of the advanced industrial capitalist nations) to an open international economic order. [18] The system

[12] D. Hamms and D. Wills, 'Black Gold: The End of Bretton Woods and the Oil-Price Shocks of the 1970s' (2005) 9(4) *The Independent Review* 501 at 503.
[13] Ibid.
[14] J.W. Pehle, 'The Bretton Woods Institutions' (1946) 55(5) *The Yale Law Journal* 1127 at 1128.
[15] The Articles of Agreement of the International Monetary Fund, 27 December 1945, 60 Stat. 1401; 2 UNTS 39.
[16] The 'balance of payments' refers to a statement of the economic transactions of a nation with the rest of the world for a specific time period. The transactions include those for goods, financial assets, labour capital and/or services. The deficits or shortfalls which the IMF was tasked with financing referred to those instances where nations' international purchasing power is not sufficient to pay for imports of all the consumers' or producers' goods which are urgently required to maintain, if not also to raise, their productivity and standard of living. See The International Monetary Fund, 'Balance of Payments and International Investment Position Manual' (2019), 6ed *International Monetary Fund* at 7.
[17] Article 1 of the IMF's Articles of Agreement op cit (n 15).
[18] Frieden op cit (n 10) at 30.

achieved these purposes by compelling member-countries to adhere to clearly delineated practices, thus prescribing previously unprecedented levels of global cooperation at that time.[19] This enforcement was conducted through a host of mechanisms evident throughout the IMF's Articles of Agreement. Where member states failed any obligations under the Articles of Agreement, the IMF had broad powers that ranged from a limitation on members' ability to access the resources of the IMF to more extreme measures such as a mandatory expulsion order requiring the member state to withdraw from the organisation entirely.[20]

While the IMF was designed to meet the short- to medium-term credit needs of member countries and to act as the arbiter preventing destructive international trade practices between nations, the Bank formed the true MDB arm of the Bretton Woods institutions. The Bank operates as a crucial adjunct to the operation of the IMF and, at its inception, it was established primarily to finance longer-term infrastructure projects and facilitate private investment in developing countries by providing assistance to countries who cannot obtain sufficient capital for the purposes of reconstruction and development.[21] The Bank officially commenced operations on 25 June 1946 and it presently comprises over 180 member countries.

The Bank is in fact an amalgam of five organisations all operating under a common governing board, which collectively comprise the 'World Bank Group'. The first of these constituent organisations is the organisation already referenced above, the IBRD. It is the original and central component of the World Bank Group and its primary activity is the borrowing of funds to lend to qualifying member governments or public sector institutions for agreed projects.[22] The second component of the Bank is the International Development Association (IDA) – it was formally established in 1960 and its activities are confined to providing aid to developing countries funded by the profits generated by the Bank's commercial operations. The third component is the International Finance Corporation (IFC) founded in 1956 and it is tasked with lending to private sector institutions without government guarantees and taking equity shares in private sector enterprises. The fourth component, established in 1988, is the Multilateral Investment Guarantee Agency (MIGA) which is aimed at providing guarantees to private sector organisations in the form of political risk insurance vehicles in order to protect their

[19] Pehle op cit (n 14) at 1130.
[20] Article XXVI (2)(a)-(d) of the IMF's Articles of Agreement op cit (n 15).
[21] M. H. De Kock, 'International Bank for Reconstruction and Development' (1944) 12(3) *South African Journal of Economics* 223 at 223-224.
[22] C. L. Gilbert and D. Vines, 'The World Bank: An Overview of Some Major Issues' in C. L. Gilbert and D. Vines (eds) *The World Bank Structure and Policies* (2006) at 12.

financial interests against expropriation and repatriation risks in the developing countries they invest in.[23] The fifth and final component of the World Bank Group is the International Centre for the Settlement of Investment Disputes. It was established in 1966 and, as the name suggests, the organisation is mandated to facilitate conflict resolution between foreign investors and the member country hosting the investment forming the subject of the dispute.[24] Each of the constituent components of the Bank have their own founding and governing documents however, their objectives align closely, and they all ultimately fall under the umbrella of the Bank Group.

Much like the IMF, the Bank's Articles of Agreement[25] delineate its five primary purposes. The first of these is contained in section (I) of Article I of the Bank's Articles of Agreement and is the core tenet of the bank's operation. It establishes the Bank as an institution whose fundamental purpose is assisting in the reconstruction and development of member countries by facilitating capital investment projects for productive purposes and encouraging the development of productive facilities and resources in less developed countries. At its inception it was predominantly concerned with European reconstruction following the Second World War; however, it is notable that the Bank's capital investment and development mandate for member countries as it presently operates is not limited to being triggered only by wartime disruptions that lead to economic downturns. As will be examined later on in this study, the Bank's investment and developmental mandate is broad and its wide-ranging application has become central to the bank's contemporary operation.

Presently, the need for economic assistance may be triggered by an ever-increasing range of economically damaging events ranging from natural disasters to pandemics. The remainder of the Bank's purposes set out in Article I predominantly speak to the mechanisms the bank uses to give effect to its core purposes and these cumulatively form the bank's core mandate. The first of these mechanisms is the promotion of private foreign investment by means of providing guarantees as well as actively participating in or supplementing loans and other investments made by private investors.[26] The balance of the mechanisms set out in the section includes the promotion of balanced economic growth, trade and development,[27] and the arrangement of

[23] Ibid.
[24] World Bank Group, 'Introducing the International Centre for Settlement of Investment Disputes' (2018) at 1 – 2.
[25] The Articles of Agreement of the International Bank for Reconstruction and Development, 27 December 1945, 60 Stat. 1440, 2 U.N.T.S. 134.
[26] Ibid Article I (ii).
[27] Ibid Article I (iii).

loans and guarantees for various economic projects.[28] Naturally, the Bank's purposes are all intended to be exercised with due regard to the provisions of Article I, which articulates the need to generally raise the standard of living and conditions of labour in member countries across the world and the need for the bank to conduct its operations with due respect of the economic and business conditions in the countries in which it operates.[29]

As alluded to previously, the formation of the IMF and the Bank marked a shift in global economics. As inaugural institutions they undoubtedly set the standard for what followed. By the late 1950s it became apparent that the Bretton Woods institutions on their own would not be sufficient to address the financing needs of developing countries and thus a host of regional MDBs began to emerge.

The first of these was the European Investment Bank (EIB); it was established in 1958 under Articles 129 and 130 of the Rome Treaty[30] as one of the positive measures designed to raise the income of less economically prosperous parts of those countries which formed part of the European Economic Community established by the treaty.[31] The EIB drew on the blueprint of the Bank and aimed to contribute to balanced and equitable development within the European Economic Community, by partnering with private sector investors and by drawing on the bank's own resources through member state contributions to grant loans and provide guarantees to facilitate development projects.[32] The EIB's mandate to finance projects is specified in Article 130 of the Rome Treaty and, at least initially, it sought to target developmental projects in less developed regions in the European Economic Community as well as those projects aimed at the further integration of member states but which, by their size or nature, could not be financed by traditional means available. The EIB was given a broad degree of autonomy and its organisation and management was similar to that of the Bank's.[33]

In the western hemisphere, the Inter-American Development Bank (the 'IADB') was created in 1959 with significant resource support from the United States. It was the first regional multilateral development bank to commence operations in the Americas. The IADB focused predominantly on funding developmental projects in Latin America. It was borne from South American countries' dissatisfaction with what they perceived to be the Bank's priorities for

[28] Ibid Article I (iv).
[29] Ibid Article I (v).
[30] The Treaty Establishing the European Economic Community, 25 March 1957, 298 UNTS 11.
[31] J. Licari, 'The European Investment Bank' (1969) 8(3) *Journal of Common Market Studies* 192 at 193.
[32] Ibid.
[33] Ibid.

administering financial assistance – as the Bank globalised its operations, South American countries increasingly found themselves to be lower priorities.[34] Its operation and management structure, set out in Article VIII of the Articles of Agreement for the IADB,[35] was similar to that of the Bank. Moreover, as provided for in the bank's developmental mandate in section 2 of Article I, the bank was geared towards mobilising financial resources and technical assistance for member states as well as realising the broader aim of facilitating better regional integration and cooperation through development projects.

Africa certainly did not miss the wave of MDBs that emerged after the Bank was established. In 1963 the African Development Bank (AfDB) was formed as the continent's premier multilateral organisation.[36] Similar to other regional MDBs, the AfDB's Articles of Agreement[37] created governance and operational structures for the bank that mirrored the Bank in many respects. However, what set the AfDB apart as a uniquely African conception was that it had no non-regional shareholders for the first ten years of its operation.[38] The AfDB's core purpose is to contribute to the economic and social development of African states[39] and it gives effect to this by using the resources at its disposal and mobilising public and private investment in special and economic projects or programmes across the continent.[40] The AfDB's Articles of Agreement narrows this further and similar to other regional MDBs, it focuses on projects which enhance regional cooperation and integration as well as those which expand member countries' participation in the broader international markets.[41]

Finally, in 1966 the Asian Development Bank (the 'ADB') was established. It was the last of the institutions making up the initial wave of MDBs modelled on the Bank and benefitted significantly from the experiences of the regional MDBs which preceded it.[42] The idea for the bank was first proposed in the 1950s and unlike its African and American counterparts, the ADB chose to partner with industrialised developed countries from the outset, with strong resource support from the United States and Japan.[43] The ADB's Articles of Agreement[44]

[34] D. Tussie, *The Inter-American Development Bank* (1995) Lynne Rienner Publishers at 18-19.
[35] The Agreement Establishing the Inter-American Development Bank, 4 August 1959, 389 UNTS 70.
[36] E.P. English and H.M. Mule, *The African Development Bank* (1996) at 1.
[37] The Agreement Establishing the African Development Bank done at Khartoum on 4 August 1963, as amended by resolution 05-79 adopted by the Board of Governors on 17 May 1979, 7 May 2982, 1276 UNTS 3.
[38] Ibid at Annex A.
[39] Ibid at Article 1.
[40] Ibid at Article 2(c)-(d)
[41] Ibid at Article 2(a)(i)-(ii).
[42] R. Wihtol 'Whither Multilateral Development Finance' (2014) ADBI Working Paper 491 *Asian Development Bank Institute* at 5.
[43] N. Kappagoda, '*The Asian Development Bank'* (1995) at 14.
[44] The Agreement Establishing the Asian Development Bank, 4 December 1965, 571 UNTS 123.

clearly sets out the bank's primary purpose – it was established to foster economic growth, regional cooperation and to contribute to the economic development within Asia.[45] The bank has sought to prioritise projects in developing countries in the region by promoting investment through public and private capital, expanding intra-regional trade and regional economic integration and providing technical assistance for developmental projects.[46] This purpose, together with the ADB's foundational principles, have guided its operations since its establishment in 1966 as it employed a range of financing mechanisms across a number of public and private sector led developmental projects in the region.[47] However, the ADB's partnership with industrialised countries has not been entirely uncontroversial. Unlike the AfDB and IADB, the ADB partnered with industrialised countries from its inception and critics have charged that the ADB's two largest industrialised donors, Japan and the United States, have had a disproportionate influence over lending, policy and staffing decisions.[48] The issues around political influence over MDBs are certainly not unique to the ADB and many of the other MDBs referenced above have faced similar criticisms.

The inception of the BRICS bloc was briefly addressed earlier in this chapter and it is in the broader arc of the history of MDBs described above that the rise of BRICS and the formation of its MDB may be situated. The preceding overview tracing the progression of MDB's around the world has served to highlight some key considerations that will be examined when the BRICS MDB is discussed. In what follows, the BRICS MDB will be used as a case study to broadly demonstrate the significance of the legal instruments that establish a given MDB, the importance of the foundational principles and purposes set out in those instruments, the mechanisms employed to operationalise these purposes, the bank's structure and function, the impact of international and regional contexts on its operation, as well as the import of the "less legal" considerations which impact the MDB's operation such as political influence.

1.2.2 The BRICS MDB

1.2.2.1 Historical context

When economist O'Neil first drew attention to the rise of the BRICS bloc[49] few people at the time anticipated the exponential economic growth the countries would experience. Initial

[45] Ibid at Article I.
[46] Ibid at Article II.
[47] Kappagoda op cit (n 43) at 14-15.
[48] C. Kilby, 'Donor influence in Multilateral Development Banks: The Case of the Asian Development Bank' (2006) 1(2) *The Review of International Organisations* at 173-4.
[49] J. O'Neil op cit (n 1).

estimates anticipated that the bloc would account for 14% of the world's GDP by 2011 but by that time the countries had in fact accounted for 18% of the world's GDP while a subsequent report projected that by 2050 this share would grow to place the bloc (as a collective) among the six largest economies in the world.[50] It is easy to assume that the bloc's existence is a purely economic phenomenon. Indeed, financial markets often engage in assigning acronyms to groups of countries as passing fads. However, unlike many short-lived economic acronyms, the continuity of the BRICS bloc has had less to do with the increasing economic power of the bloc and more to do with a coordinated political and diplomatic agenda, such as the bloc's continued cooperation in various international forums.[51]

The political and diplomatic dialogue within the BRICS bloc first began in New York in 2006 when the foreign ministers of the bloc's founding members - Brazil, Russia, India and China ('BRIC') - met on the sidelines the sixty-first United Nations General Assembly. Following that initial meeting, the representatives of the bloc met regularly: at Russia's invitation, the leaders of the founding members met informally in July 2008 during the G8 Summit in Japan where they agreed to host a full-scale summit the following year. The finance ministers then met in Sao Paulo, Brazil in November 2008 and again in London in March 2009. Ultimately, these meetings culminated in the first formal BRIC summit, held on 16 June 2009 in Russia and attended by Brazil's president Luiz Inacio Lula da Silva, Russia's president Dmitry Medvedev, India's prime minister Manmohan Singh, and China's president Hu Jintao.[52] The inaugural summit's key theme was articulated in the joint statement of the BRIC leaders which, among others, declared the countries' demand for fairer decision-making processes in international institutions regarding global economic and foreign policy. In particular, the BRIC members articulated their principal commitment to ensuring that emerging and developing economies have a greater voice and representation in international financial institutions, reforming of the executive structures of these institutions and committing to advancing a fairer and more diversified international monetary system.[53] The first BRIC summit was widely lauded as a success, contrary to expectations. It asserted the newfound political importance of

[50] D. Wilson and R. Purushothaman, 'Dreaming With BRICs: The Path to 2050' (2003) 99 *Goldman Sachs: Global Economics Paper*, available at https://www.goldmansachs.com/insights/archive/archive-pdfs/brics-dream.pdf (accessed 7 June 2020) at 3

[51] F. Damico, 'Previous History: From a market acronym to political-diplomatic dialogue' in R. Bauman et al *BRICS Studies and Documents* (2017) at 55 – 56.

[52] O. Steunkel, 'Emerging Powers and Status: The Case of the First BRICs Summit' (2014) 38(1) *Asian Perspectives* 88 at 92.

[53] Joint Statement of the BRIC Leaders: 1st BRIC Summit, *Presential Executive Office: President of Russia* (16 January 2009) available at http://en.kremlin.ru/supplement/209 (accessed on 16 February 2020).

the rising developing powers and projected stability and confidence during a time of global uncertainty following the global economic recession at the time.[54]

A second BRIC summit followed in April 2010 in Brazil and by this time it was clear that the bloc sought to execute a more focused agenda. It was centred on enhanced cooperation in an attempt to strengthen the ties between the countries at different levels of their respective governments, among their civil society organisations, and among their business and labour sectors.[55] While the agenda and plans were more robust, the priorities of the Second BRIC Summit echoed that of the first to a large extent. This was particularly evident in the headline items such as the bloc's calls for reform of the existing global financial hegemony dominated by the Bretton Woods institutions, the need for an equitable international trade environment, and the commitment to a coordinated approach to using their leverage within existing international bodies to drive a developmental agenda.[56] However, it was also clear in the restated commitments around energy infrastructure and their endeavour to coordinate to develop clean, affordable and sustainable energy to combat climate change[57].

While this much of the agenda was uncontroversial, in the wake of the second BRIC summit, much of the attention fell on South Africa's concerted diplomatic efforts to lobby the founding BRIC members to join the grouping. The efforts were ultimately successful and, following an official meeting of Foreign Ministers of BRIC held on the margins of the UN General Assembly meeting of September 2010, the ministers agreed that Africa's leading economy would be invited to join the group. In late December 2010 the Chinese government extended a formal invitation to South Africa to attend the third summit in 2011.[58] With this invitation, the bloc took full ownership of the term; far from being seen as a mere additional member of an already mature structure, South Africa's inclusion fundamentally altered the nature of the bloc - removing it from the realm of a mere term of art for an economic grouping to a political construct. South Africa's inclusion transformed the bloc into a global alliance and built on the narrative that it had a stronger capacity to speak on behalf of the emerging world.[59]

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[54] Steunkel op cit (n 52) at 93-94.
[55] Ibid at 96.
[56] Joint Statement of the BRICS Leaders: 2nd BRIC Summit, *Ministry of External Affairs of the Government of India* (16 April 2010) available at https://www.mea.gov.in/bilateral-documents.htm?dtl/3983/ii+bric+summit++joint+statement (accessed on 16 February 2020).
[57] Ibid.
[58] O. Steunkel, 'South Africa's BRICS membership: A win-win situation?' (2013) 7(7) *African Journal of Political Science and International Relations* 310 at 311.
[59] Ibid at 310-311.

1.2.2.2 The New Development Bank and the Contingent Reserve Arrangement

In 2012 at the Fourth BRICS Summit in New Delhi the BRICS leaders announced that they would study the feasibility and viability of establishing an MDB that would focus on infrastructure and other sustainable development projects in BRICS and other developing countries. In the joint statement of the heads of state that followed the summit, what became known as the 'Delhi Declaration', the five heads of state took the first step toward institutionalising the countries' relationship by directing their finance ministers to examine the creation of an MDB.[60] By the sixth BRICS Summit held in Brazil in 2014 the BRICS bloc formally announced the establishment of the New Development Bank (the 'NDB') in the Fortaleza Declaration.[61] This decision was widely lauded as the countries' most direct response yet to their mounting discontent with the operation of the Bretton Woods institutions and the glacial pace of reform at existing international financial institutions. This discontent was not misplaced - for perspective, it was notable that in 2015 despite the BRICS countries accounting for 21% of global GDP, their cumulative share of the voting rights in the IMF was just 11% compared to the United States which held nearly 17% of the voting rights.[62]

In the Fortaleza Declaration the BRICS bloc recorded that the NDB would be headquartered in Shanghai and have an initial authorised capital of US$100 billion. Members of the bloc would provide an initial subscribed capital of US$50 billion to be paid in equal shares among them as founding members of the bank.[63] The senior executives of the bank would similarly be divided among the founding members, with the bloc agreeing that the first chair of the board of governors was to be from Russia, the first chair of the board of directors from Brazil and the first president of the bank from India. While South Africa did not feature in the bank's initial executive structure it was announced that the bank was to open a regional office in the form of the bank's Africa Regional Centre which would be located in South Africa.[64] Concurrently, the Fortaleza Declaration also contained the announcement that the BRICS bloc would sign a treaty

[60] Joint Statement of the BRICS Leaders: 4th BRICS Summit - The Delhi Declaration, *Ministry of External Affairs of the Government of India* (15 July 2014) available at https://mea.gov.in/bilateral-documents.htm?dtl/19158/Fourth+BRICS+Summit++Delhi+Declaration (accessed on 23 April 2020)
[61] Joint Statement of the BRICS Leaders: 6th BRICS Summit - The Fortaleza Declaration, *National Treasury of the Republic of South Africa* (15 July 2014) available at http://www.treasury.gov.za/brics/News/Sixth%20BRICS%20Summit%20Fortaleza%20Declaration.pdf (accessed on 23 April 2020)
[62] R. Biswas, 'Reshaping the Financial Architecture for Development Finance: The New Development Banks' (2015) 2 *London School of Economics Global South Unit: Working Paper Series* at 3.
[63] The Fortaleza Declaration op cit (n 61) at para 12.
[64] Ibid.

to establish the BRICS Contingent Reserve Arrangement (CRA).[65] This financial mechanism would allow the BRICS bloc to provide rapid financial support to countries experiencing actual or potential financial pressures in their balance of payments.[66] While the CRA will not be addressed in extensive detail in this study, it is worth noting that the establishment of the CRA was another aspect of the response to the challenges which the BRICS bloc and other developing countries experienced with the IMF's existing financial mechanisms aimed at balance of payment shortfalls. Many developing countries remain reluctant to make use of existing mechanisms due to the conditions attached to the financial assistance.[67]

What is clear from the foregoing is that the NDB was founded on the premise that it is to be a novel reconfiguration of existing MDBs in form while simultaneously operating complementarily within the existing framework of international financial institutions. This much is evident in both the language of the Fortaleza Declaration and the bank's founding documents.[68] Therefore, before reviewing the details of the formal legal instruments governing the bank, it is important to understand some of the broader principles and strategies which guide the NDB's operation. In the bank's 2017-2021 General Strategy, which articulates its founding principles, it is made clear that the bank is a "21st-century multilateral development bank that builds on the experiences of existing institutions to design policies and practices capable of living up to the challenges posed by global trends"[69] and that its creation "is an expression of the growing role of BRICS and other emerging markets and developing countries in the world economy and their greater willingness to act independently in matters of international economic governance and development".[70]

The bank's General Strategy is accordingly founded on three pillars which centre on its "new" approach to the world of MDB financing: Firstly, the bank aims to pioneer a new approach to relationships with member countries based on equality, mutual respect and trust. There is a strong focus on mutually beneficial partnerships and deference to national sovereignty. Secondly, embarking on innovative and sustainable infrastructure projects in developing

[65] Ibid at para 13.
[66] See (n 16) supra.
[67] A Mazenda and R Ncwadi, 'The rise of BRICS development finance institutions: A comprehensive look into the New Development Bank and the Contingency Reserve Arrangement' (2016) 3 *African East-Asian Affairs* 96 at 111.
[68] A. E. Abdeneur and M. Folly, 'The New Development Bank and the Institutionalisation of the BRICS' (2015) 3(1) *Revolutions* 66 at 83.
[69] The New Development Bank, 'NDB's General Strategy: 2017 – 2021' (2017) available at https://www.ndb.int/wp-content/uploads/2017/07/NDB-Strategy-Final.pdf (accessed 1 October 2020) at 3.
[70] Ibid at 6.

countries and emerging economies. Finally, adopting novel approaches to executing the provision of financing instruments for sustainable projects to ensure that developing countries and the emerging markets which benefit from financial instruments which the bank administers have recourse to finance in a manner that is fast, flexible and more efficient than existing MDBs.[71] It is evident throughout the General Strategy that the bank's founding members intend sustainable infrastructure development to be a central priority for the bank's operations. The General Strategy document defines sustainable infrastructure development as developmental projects that incorporate economic, environmental, and social criteria in their design, construction, and operation and it is notable that the NDB is explicit in that it does not perceive issues around sustainable development as constraints, but rather as opportunities for development and economic growth.[72]

These foundational guiding principles and purposes ground the NDB's operations, and they are certainly relevant when examining the legal instruments that govern the bank, at least in so far as they may be considered interpretative aids. Much of the principles and purposes discussed previously are encapsulated in the Agreement on the NDB[73] albeit in broader terms than the bank's General Strategy document that was published subsequently. The Articles of Agreement record the bank's commitment to developing countries, sustainable infrastructure development and the bank's aim to operate complementarily with existing international financial institutions like the Bank and other regional MDBs.[74] The founding membership together with the authorised and subscribed capital for the bank were discussed previously but it is worth noting from the Articles of Agreement that NDB has equal voting and capital contribution requirements among its founding members.[75] With regard to membership, membership is open to all members of the United Nations whether they are borrowing or non-borrowing parties[76] while the voting power of each member is equal to the number of its subscribed shares.[77]

Organisationally, the NDB's Board of Governors has been given broad powers to, among others, admit or suspend members, determine conditions of such membership, decide appeals from interpretative disputes decided by the bank's directors and conclude cooperative

[71] Ibid at 3-4.
[72] Ibid at 12.
[73] Agreement on the New Development Bank, 15 July 2014, UNTS No. 53647
[74] Ibid at Chapter I Articles I–III.
[75] Ibid at Article 2.
[76] Ibid at Chapter II Article 5
[77] Ibid at Chapter II Article 6.

agreements with other international organisations.[78] The bank's President and Board of Directors (a body distinct from the bank's Board of Governors) are tasked with the general day-to-day operation of the bank[79] and the rules and parameters for these operations are similarly set out in the bank's Articles of Agreement. For present purposes the provisions of Article 19 are notable as they set out the types of financial instruments which the NDB is authorised to use – these are particularly relevant as financial instruments like these at MDBs are at the centre of this study. Article 19 permits the bank to provide guarantees, participate in and/or make loans and/or provide support and collateral through other financial instruments in public and private projects. It furthermore authorises the bank to invest in or underwrite the equity of any business, facilitate the any businesses' access to international capital markets for business, industrial, agricultural or services enterprise. These mechanisms avail themselves under cover of the bank's principles which require that it operates alongside existing international financial institutions and support sustainable infrastructure projects.[80]

There are a number of further and more explicit limitations in the bank's Articles of Agreement including that the bank shall not allow a disproportionate amount of its resources to be used for the benefit of any particular member, a directive on the diversification in the nature of the banks investments, and a requirement ensuring that the proceeds of any loan, investment or financing only be used for the procurement of goods and services in member countries unless the bank's Board of Directors permits otherwise.[81] Article 22 is similarly important – it sets out the contract *essentialia* of the bank's finance instruments and requires all financing contracts that the bank enters into to contain a prescribed set of terms and conditions including those related to payment of principal debt, interest and fees, charges, commissions, maturities, currency and dates of payment among several others.[82] The bank's Board of Directors is empowered to develop further policies in this regard.

At this stage it is also apposite to consider Chapter VI of the Articles of Agreement that governs the bank's legal status, immunities and privileges as these have an impact on the administrative justice rights and processes – concepts which will be expanded on together with case studies from other MDBs over the course of this study. Article 30 sets out the bank's immunity from "*every form of legal process*" except those matters which arise from or are connected to the

[78] Ibid at Chapter III Article 10–11.
[79] Ibid at Chapter III Article 12-13
[80] Ibid at Chapter III Article 20-21.
[81] Ibid.
[82] Ibid at Chapter III Article 22(a)-(b).

bank's power to borrow money, guarantee obligations or buy, sell and/or underweight the sale of securities.[83] Where these exceptional circumstances do permit legal processes to follow, legal action may be taken against the bank in a court of competent jurisdiction in the territory of a country in which the bank has headquarters or regional offices.[84]

It is apparent from the purposes, principles, organisational structure and operations of the NDB that there are many parallels to be drawn with the structures of the Bank and other MDBs. However, there are also many distinctions such as the bank's emphatic commitment to deference to members' national sovereignty when financing projects, its mandate to partner on sustainable infrastructure projects in developing countries and its drive to position itself as an innovative and dynamic international finance institution that is more responsive than its more traditional peers. These differences are not unintentional. They flow directly from the "less legal" considerations which have influenced the formation, structure and operation of the NDB.

The political and economic factors that provide the context for the formation and operation of the bank are relevant as they demonstrate why its establishment is as notable amidst the landscape of existing MDBs. The IADB, ADB, and AfDB were all established in the context of developing countries' dissatisfaction with the dominance and operation of the Bank and IMF, a direct reflection of the post-war international political and economic climate.[85] But with this came an ever-increasing list of constraints and critiques. For example, while the ADB is notable for its substantial resources its policies and the projects it pursues have largely followed the preferences of its major donor, Japan. The AfDB, on the other hand, has achieved relatively more autonomy but its ability to secure resources has remained limited. The IADB's ability to provide more funding to a broader selection of projects has been limited by regulatory restrictions particularly due to some of the environmental impact of the projects it funds and it has been outperformed by the Latin American Development Bank, which has funded more projects than the IADB and the Bank combined.[86]

These individual constraints aside, there is also the broader issue that almost all the existing MDBs have seen a steady shift away from investing in infrastructure, despite this being a priority in the 1980s and 1990s.[87] For example, in the 1950s, 70% of the Bank's lending used

[83] Ibid at Chapter VI Article 30(a).
[84] Ibid.
[85] A. Vazquez, 'Is the BRICS New Development Bank a Fledgling Alternative to the World Bank' (2017) 4(3) *BRICS Law Journal* 6 at 31.
[86] Ibid at 32.
[87] H. Wang, 'New Multilateral Development Banks: Opportunities and Challenges for Global Governance' (2017) 8(1) *Global Policy* 113 at 114.

to be directed at infrastructure while in 1981 the IADB also directed 70% of its lending to infrastructure projects.[88] These high proportions in the early days of these MDBs must be contrasted against the marked declines that have been noted in recent years – a decline most acutely felt in the developing world. In a 2021 report on infrastructure development in Africa by international law firm Baker Makenzie, it was noted that infrastructure needs in Africa are 39% greater than the forecast investment. The firm noted that investment deal levels have registered a downward trend compared to peak levels in the early 2000s and 2010s, with infrastructure deal values dropping to US $31 billion from US$100 billion in 2014.[89] These statistics add credence to the multi-trillion US dollar infrastructure investment gap highlighted earlier on in this study.

The NDB ostensibly aims to move beyond mere dissatisfaction with the existing hegemony in MDB financing and this is evident in the principles and purposes of its founding and strategy documents. Moreover, unlike the regional MDBs which came before it, the NDB has fewer resource constraints, ostensibly fewer political and regional limitations and fewer regulatory restrictions due to its leaner governance structures and more dynamic and innovative operations in the execution of its finance instruments.[90] Working together, these factors cumulate in an MDB specifically geared towards meeting the urgent need for infrastructure investment in the developing world, stimulating reform of the global financial system and reducing developing countries' disproportionate reliance on 'Western' financing.[91]

1.3 MDB financing and global administrative law

MDBs cumulatively channel billions of US dollars to infrastructure projects in developing countries through a variety of financing mechanisms like those already mentioned; these include guarantees, loans, collateral, and equity investments. Regardless of the particular funding mechanism for infrastructure projects, one aspect remains constant – the vast majority of public infrastructure projects are either entirely government-executed or executed via public-private partnerships. When governments and private sector partners procure infrastructure using the various financing mechanisms which MDBs employ, it necessarily occasions an intersection between the contractual laws, the laws governing international financing

[88] Ibid.
[89] Baker Mackenzie, 'New Dynamics, Shifting Patters in Africa's Infrastructure Funding' (2021) available at https://www.bakermckenzie.com/-/media/files/insight/publications/2021/04/new-dynamics_africa_report_update.pdf?la=en (accessed 12 October 2021).
[90] The New Development Bank's General Strategy 2017-2021 op cit (n 69).
[91] Wang op cit (n 87) at 114.

instruments, global administrative law and the domestic administrative justice laws. The intersection of and interaction between these bodies of law has gained increasing attention. To a large extent this has been driven by the major institutional and regulatory changes which public procurement has undergone over the last three decades.[92] In this regard, at state level, particularly in developing countries with relatively young democracies, the ideological shift in the political and economic objectives which underlie state functions translated into a shift in how countries regulate the exercise of public power.

In South Africa, at the advent of its democracy, administrative justice rights were recognised at constitutional level in the Constitution of the Republic of South Africa[93] (the 'Constitution') which enshrined the right to administrative action which is lawful, reasonable and procedurally fair as well as the right to judicial review.[94] In India, its high courts and the Supreme Court of India were similarly empowered to conduct judicial review of administrative action by virtue of the provisions in the Constitution of India.[95] Developments such as these in countries around the world have had a consequent effect on international public actors like MDBs and their endeavours to finance infrastructure projects. MDBs and other international institutions began adopting administrative procedures and recourse mechanisms traditionally reserved for domestic public procurement leading to what has ultimately become the internationalisation of public procurement and the emerging phenomenon of global administrative and procurement laws and regulations.[96]

Global administrative law's relevance and applicability to MDBs and their financing operations in the context of state-lead infrastructure procurement projects forms the crux of this study – and this particular section intends to introduce just that. Some of the MDBs involved in infrastructure procurement transactions have already been identified and, later on, this thesis will examine the operation and the legal and regulatory schemes governing infrastructure project financing deals at these MDBs. It will also examine the specific theories of global administrative law in this context. However, before embarking on that task, it is conceptually valuable to first understand the broader impact of globalisation on the expansion of global

[92] E. Morlino, 'International Public Procurement' in S. Cassese (ed) Research Handbook on Global Administrative Law (2016) at 82.
[93] The Constitution of the Republic of South Africa, 1996.
[94] Ibid at section 33.
[95] The Constitution of India, 1950 at sections 32, 136 and 226-227.
[96] Morlino op cit (n 92) at 83

administrative law in order to situate the present regime of global administrative laws at MDBs in their broader legal context.

1.3.1 Globalisation and MDBs as drivers of global administrative law

The expansion of global administrative law can be linked to the exponential growth of the number of new international institutions which have emerged since the 1990s and the expansion of existing institutions. In what has been described as a 'bureaucratic haze' there is now a wide array of international institutions ranging from seminal bodies like the UN, historic wartime military alliances like the North Atlantic Treaty Organisation, specialist agencies like the International Labour Organisation and World Health Organisation (WHO), regional bodies like the European Commission and African Union, and quasi-state organisations such as the regular summit conferences of the G-20 and World Economic Forum.[97] Of the over 60,000 international organisations and 2,000 global regulatory regimes, there has been an inevitable and extraordinary expansion in the scope of international law in general and global administrative law in particular.

Casini identifies two perspectives on the proliferation of global administrative law.[98] On the one hand, it may be examined from the perspective alluded to earlier: that is, as specialist and regional actors proliferate in sectors such as trade and multilateral financing at MDBs, so too has there been a need to establish and expand rules. The expansion and operation of these rules as a result of these specialist 'drivers' may be defined as the 'horizontal' perspective as it is predominately focused on the interactions between international organisations and states at international level. On the other hand, the examination of the development of these rules and their influence on and interconnectedness with existing domestic legal orders may be described as the 'vertical' perspective because it focuses on the rules' downward impact and how they have permeated national legal orders.[99] Considering the both the horizontal and vertical perspectives on the proliferation of global administrative law is important, particularly in the context of the rules governing MDB infrastructure project financing at international level and the impact these projects and rules have at domestic level.

[97] L. Casini 'The Expansion of the Material Scope of Global Law' in S. Cassese (ed) Research Handbook on Global Administrative Law (2016) at 25
[98] Ibid at 26.
[99] Ibid.

1.3.1.1 The horizontal perspective

A functionalist approach should be adopted when examining the horizontal perspective of the expansion of global administrative law. The importance of such an approach is underscored when examining the perspective in the context of public procurement and infrastructure projects. According to the approach there has been a compelling need to expand international law generally and global administrative law in particular due to the need to pursue a global collective or public interest. This expansion unavoidably requires the development of norms, procedures and institutions which, in turn, occasions the need for the development and expansion of this particular branch of law. [100]

This link has been observed from at least the early twentieth century. As states formed international organisations to act as international public agencies to coordinate and pursue international public interests, there was increasing recognition that those interests and activities transcended the boundaries of what could be regulated at state level.[101] Indeed, the pursuit of any social or economic interest assumes an international character when, in order to succeed, it requires the experience, expertise and coordinated efforts of a number of states. The consequent regulation of the execution of these activities at international level necessitated the enactment of a legal framework that goes beyond what any single state could regulate. By its very nature this legal framework regulating the interactions between international organisations and states is one which is a direct result of the practical or functional needs of international organisations in their dealings with state actors.[102]

Klabbers notes that this functionalist conception of the origins of global administrative law recognises that international entities are "created to execute functions through specifically conferred powers, delegated to them by their member states" and, as a consequence, it necessarily follows that they possess powers – and only those powers – that are conferred on them to enable them to exercise their functions.[103] He furthermore recognises that there are two further corollaries of this. First, the validity of decisions, recommendations and activities of international organisations is contingent on whether those decisions, recommendations and activities relate to the authorised functions the organisations. Second, international

[100] Ibid at 27.
[101] P. S. Reinsch, 'International Administrative Law and National Sovereignty' (1909) 3(1) *American Journal of International Law* 1 at 1-2.
[102] Ibid.
[103] J. Klabbers, 'The Emergence of Functionalism in International Institutional Law: Colonial Inspirations' (2014) 25(3) *European Journal of International Law* 645 at 645.

organisations may only claim to be granted privileges and immunities which facilitate their functioning.[104] These aspects hint at some of the foundational pillars of administrative law theory and it is in this context that at least four main drivers of the need for global administrative law at MDBs may be identified.

The first driver of global administrative law has a direct link to the exponential growth in the global economy which has led to increases in cross-border trade, public procurement generally, and the financing of infrastructure projects in particular. There has evidently been a clear need to establish global rules as a result of these phenomena.

One of the most prominent examples of this is the World Trade Organisation (WTO). The WTO currently has over 150 member states and it is governed by a legal framework and complex system of norms and standards that span numerous fields.[105] In so far as these norms and frameworks traverse public procurement there are several notable ones which must be mentioned. First, the WTO's Agreement on Government Procurement (GPA)[106] is the organisation's attempt to globalise public procurement rules among signatory parties. The GPA entered into force in January 1996 and establishes rules regarding the state tendering processes that are to be followed by entities and countries covered by the agreement. Another significant framework which operates horizontally is the WTO's Agreement on Technical Barriers to Trade.[107] Finally, and perhaps most significantly, is the United Nations' Commission on International Trade Law (UNCITRAL) and its Model Law on Public Procurement (the "UNCITRAL Model Law").[108] These are but a few examples of how global economic expansion has driven the creation of enforceable rules and the establishment of empowered institutions.

The second driver of the expansion of global administrative law is the advancement of international human rights law. International institutions like the UN have given concrete expression to human rights standards and developmental goals through treaties and other legal and policy mechanisms. In the case of developmental goals, MDBs play a significant role through financing developmental projects and monitoring the implementation of their

[104] Ibid.
[105] Casini op cit (n 97) at 28.
[106] The Agreement on Government Procurement concluded at Marrakesh on 15 April 1994, 1 January 1996, 31874 UNTS 103.
[107] The Agreement on Technical Barriers to Trade (with Annexes) done at Geneva on 12 April 1979, 1 January 1980, 1186 UNTS 276.
[108] United Nations General Assembly Resolution 66/95 of 9 December 2011, *United Nations Commission on International Trade Law (UNCITRAL) Model Law on Public Procurement*.

investments.[109] The operation of international organisations in human rights protection and advancement as well as developmental projects has raised legal issues in several fields that directly implicate global administrative law. These issues include the international legal obligations around transparency, the provision of reasons for decisions, the use of review mechanisms and their operation, the issue of fairness in handling human rights complaints submitted by victims and other interested parties, the operation of the human rights bodies' deliberative and procedural processes during investigations and, the establishment of a variety of international and regional courts and tribunals.[110] Evidently, there is an inextricable link between the development of international human rights and its related institutional apparatus and the development of global administrative law. In so far as human rights are impacted by the infrastructure projects which MDBs finance, the connection is particularly apparent.

The third driver of the expansion of global administrative law is the emergence of international objectives for the broader public good. The pursuit of these objectives requires multi-state cooperation and has occasioned the need to establish international norms and institutions across many fields. There are many examples of these ranging from the global efforts to protect the environment to around healthcare, world heritage, internet access and international security.[111] These international objectives for the broader public good have often led to the formation of international administrative bodies which are tasked with controlling and leading states' exercise of powers to protect international public interests and advance objectives. However, the establishment of these international administrative bodies have occasioned their own challenges which have mirrored the challenges administrative bodies in domestic contexts have encountered. These include the proliferation and fragmentation of public administrative bodies, the growing use of private law instruments and their impact on rights and procedure, the proliferation of rulemaking which increase conflicts of laws[112]

The final driver expanding the scope of global administrative law to be addressed is the development spurred by transnational private institutions. These private institutions traverse fields ranging from accounting and specialist internet regulatory bodies to sports and food standards regulation. They have become increasingly 'public' in nature as they make use of public law instruments, increasingly involve states and other domestic and international public bodies in their operations and as described above, engage in the pursuit of objectives for the

[109] Casini op cit (n 97) at 29.
[110] Ibid.
[111] Ibid at 30.
[112] Ibid.

broader public good. As these private institutions increase the degree to which operate publicly, there has been a correlative need for them to employ mechanisms to ensure democratic accountability given the far-reaching impact these international private institutions possess.[113] Transnational private regulation differs from international regulation as the rules these institutions create are not necessarily based on states' domestic legislation. Instead, they are centred on the institutions and their interaction with states, other intergovernmental organisations and international organisations. These institutions' regulatory instruments differ from public international law instruments in that they are generally sector specific, driven by vastly different constituencies and usually set higher and more strictly enforced standards than the more traditional public international institutions. Transnational private regulation, like domestic private regulation, is also voluntary – parties are generally free to join and participate in regulatory bodies; however, once they are in, they are legally bound and violation of the rules is subject to legal sanction. [114] Despite this, the norms and legal frameworks produced within global regulatory regimes flowing from transnational private institutions remain hybridised and have significant knock-on effects at state level.[115] In the context of MDB financing infrastructure projects, the role of transnational private institutions remains relevant particularly in the field of environmental protection where organisations such as Greenpeace and the World Business Council on Sustainable Development have increasingly influential roles in infrastructure projects.

The examination of the practical or functionalist drivers of global administrative law above is demonstrative of how this branch of law functions between international organisations like MDBs and states at international level. Each of the drivers has a direct or indirect relation to the actors involved in the infrastructure projects that MDBs finance. It is evident that the proliferation of MDB project financing has a significant impact on global administrative law and it is this impact that will be further interrogated in the remainder of this study.

1.3.1.2 The vertical perspective

Given the complex and far-reaching impact of the infrastructure development projects that MDBs finance, it would be remiss not to acknowledge that these projects also have vertical impact, as Casini has done. Infrastructure projects expand global administrative law through

[113] Ibid at 31.
[114] F. Cafaggi, 'New Foundations of Transnational Private Regulation' (2011) 38(1) *Journal of Law and Society* 20 at 21.
[115] Casini op cit (n 97) at 32.

their downward impact on state-level domestic laws – international organisations inevitably need states in order to enforce norms and procedures and establish global networks. The state-based public administration bodies which international organisations establish are also usually regulated by the domestic laws of the country in which they operate. Conversely, international regulatory regimes generally develop by adopting legal norms, institutions and procedures that mirror or are inspired by State legal systems. The vertical perspective on how international organisations like MDBs impact domestic legal frameworks and how domestic legal systems impact international legal systems is important. The role of states in influencing and crafting global administrative law in particular cannot be understated.

The exponential growth of international legal norms has had significant implications on domestic legal orders. These norms vary and go by a variety of names: recommendations, standards, policies, and guidelines, among others. One such example is the operational policies issued by the Bank – these are addressed to developing countries that receive funding from the Bank for infrastructure projects.[116] Casini recognises that while most global norms are labelled 'soft law', it is increasingly the case that they have formal and binding public effect. For example, while the WTO's Codes of Good Practice from its Agreement on the Technical Barriers to Trade are not binding, all international standard setters comply with them in order to ensure that they fall within the scope of the agreement. Evidently, the international legal framework no longer relies solely on traditional treaties and conventions. Instead, it operates by an interaction between treaties, conventions and other legal tools like policies and guidelines which are consensus based. This extends to private sector actors operating in both the international arena and domestically. At domestic level, these actors frequently co-opt the language of these international public law instruments to build more sophisticated and powerful legal norms, instruments and review mechanisms.[117]

Private sector actors co-opting international public law norms and administrative functions have had a further effect. At international level the expansion of global administrative law has occasioned the need for oversight and review mechanisms – more rules necessarily require more enforcement mechanisms. In order to give effect to this, there has been a significant rise in the number of administrative tribunals within international organisations.[118] The operation of these administrative tribunals and their impact and operation in the context of MDB

[116] Casini op cit (n 97) at 33.
[117] Ibid at 34.
[118] Ibid at 35.

infrastructure financing will be dealt with more comprehensively later on in this study however, for present purposes their impact on the development of domestic administrative law and processes from a vertical perspective is to be noted. In this regard, while the operation of international administrative tribunals may have recently become more prominent, their existence is certainly not entirely novel. Their origins may be traced to 1927 when the League of Nations, the precursor to the UN, established the Administrative Tribunal of the League of Nations.[119] Following that, a number of other administrative tribunals were established after World War Two including the Administrative Tribunal of the International Labour Organisation established in 1946, the United Nations Administrative Tribunal established in 1949, the Administrative Tribunal of the Institute of Unification of Private Law established in 1952 and the Administrative Tribunal of the Bank established in 1980.[120] These administrative tribunals are also evident in transnational private institutions such as the Court of Arbitration for Sport linked to the International Olympic Committee.

The judicial function of these bodies has continued to operate globally, and their impact has similarly expanded and contributed to the development of legal regimes of both the organisations that they form part of and the states, private entities and other global actors that are impacted by their decisions. This impact is attributable to the nature of the disputes that international administrative bodies deliberate on. For example, decisions in an intergovernmental network such as the Basel Committee for Banking Supervision are not formally binding however, participating domestic officials are compelled to commit to implementation at state level. This inevitably has an impact on any later domestic administrative review procedures.[121]

A further dynamic of the influence of global administrative law at domestic level is the interface between the administrative apparatus of international organisations and states. Casini has identified that international organisations increasingly engage in activities which are neither legislative nor judicial and there has been a tendency for international organisations to establish administrative apparatus at state level to assist a given international organisation in the execution of its primary functions.[122] These administrative apparatuses include secretariats

[119] J. Gomula, 'The International Court of Justice and Administrative Tribunals of International Organizations' (1991) 13(1) *Michigan Journal of International Law* 83 at 85.
[120] Ibid.
[121] N. Kirsch and B. Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17(1) *The European Journal of International Law* 1 at 4
[122] Casini op cit (n 97) at 36.

or executive committees. In the context of MDBs, many of them have organisational structures which include bodies such as these to further the aims of the institutions.[123] The practical effect of this is that as international organisations enhance their administrative apparatus, so too is decision-making and implementation delegated downwards at administrative level.[124] The state-level effects are these are not inconsequential and are exemplified by the actions international organisations take during emergencies. For example, during the global pandemic of the Severe Acute Respiratory Syndrome (SARS) virus in 2002, the WHO took extraordinary emergency actions beyond its treaty mandate by adopting and issuing recommendations and measures to member states, private companies such as airlines and other individuals which were to be implemented. Another example is found in the WTO's response to the global financial crisis of 2008, where the organisation's Director General and Secretariat – that are not WTO legislative or judicial bodies – issued directives to a range of state and private actors to protect the economies.[125]

There is another layer to this, and it relates less to the nature of the decisions of administrative apparatus within international organisations and more to the procedural aspect of the decisions taken within international organisations, that is, *how* the decisions are taken. Almost all international legal regimes now contain procedural norms which include the right to participation, due process and the duty to give reasons.[126] The disputes that arise when procedural principles are not given force and effect triggers the invocation of global administrative law as administrative law principles are notionally ideally suited to resolving disputes of this nature for a number of reasons. Administrative law techniques and principles are well suited to balancing powers given the various role players involved at this level. These techniques and principles are similarly beneficial given international organisations' increased use of private law instruments - thus for example, in public procurement at international level there has been a need to adopt procedural mechanisms to ensure transparency and competition.[127]

Employing administrative law techniques and principles is important as the increase in 'proceduralisation' at international organisations has occasioned interactions between different levels of activity (national, regional and international), different bodies of law (public and

[123] Ibid.
[124] Ibid.
[125] Ibid.
[126] Ibid at 39
[127] Ibid.

private), and a plurality of actors (governments, administrations, international organizations, civil society).[128] There are many examples of this increase in proceduralisation – particularly in international financing where standard-setting procedures have become increasingly complex. Ultimately however, there is unmistakeably a domestic impact when decisions are taken by administrative apparatus within international organisations, demonstrating the wide-ranging and far-reaching vertical impact of global administrative law on domestic legal regimes.

1.4 Thesis outline

This chapter has introduced the broad historical, bureaucratic and legal context within which this thesis will be situated. MDBs such as the NDB and the Bank, their operation and regulatory processes related to their financing of infrastructure projects and the relevance of global administrative law to infrastructure project financing lies at the core of this thesis. The study's aims have also been articulated above. These aims include the interrogation of the existing legal framework governing infrastructure development financing at MDBs and the extent to which existing international and domestic administrative justice laws interface with the procedures which regulate the funding of infrastructure projects. These aims are significant in addressing the core problem which this study will seek to address, that is, the manner in which global administrative law has been and may continue to be developed to lead reforms that address the challenges in accountability experienced during the infrastructure financing processes. This will be done for the benefit of developing countries and will be specifically aimed at reforms in infrastructure development that advances the realisation of human rights.

The examination of the regulation of MDB infrastructure finance projects using global administrative law and the identification of potential reforms in accountability has occasioned the identification of four key questions. These questions and their answers are aimed at improving infrastructure financing processes at MDBs and the realisation of human rights in developing countries in general and the BRICS bloc in particular. The questions are as follows:

1. What is the role of global administrative laws in MDBs' decision-making process and, more narrowly, are there any specific contractual, regulatory or legal mechanisms within the existing regime governing MDBs' infrastructure financing projects that

[128] Ibid at 38

speak to enhancing accountability, fairness, and transparency for stakeholders adversely affected by the decision-making process of MDBs?

2. How does the current regime of global administrative law and its interface with domestic administrative laws achieve administrative justice where the administrative decisions taken by MDBs adversely impact the rights of persons involved in or affected by MDB-funded infrastructure projects?
3. What enforcement and recourse mechanisms exist which enhance accountability, fairness, and transparency, for persons adversely affected by the decision-making process at MDBs and, where such mechanisms are inadequate or do not exist, can comprehensive reforms be implemented to promote the achievement of administrative justice for persons adversely affected by decisions and conduct of MDBs?
4. In order to prevent or mitigate the adverse impacts on stakeholders affected by or involved in MDB-funded infrastructure projects, how could legal reforms be practically implemented or operationalised at either international or domestic level to address the challenges experienced in MDBs financing of infrastructure projects in the BRICS bloc and other developing countries?

The legal systems of the BRICS bloc vary - while Brazil, Russia and China follow civil law systems, India and South Africa have common law systems. Notwithstanding these differences, the study aims to predominantly focus on the international financing laws and regulation and global administrative laws governing multilateral development banks. The examination of the manner in which international financing laws and global administrative laws interact with domestic administrative and constitutional laws will be relatively limited and principally focus on the common law systems in South Africa and India.

The study will examine a range of theoretical legal perspectives in global administrative law in the context of attempting to answer the four questions which were posed above. In this regard, the thesis will seek to make the following case: Firstly, that global administrative law applies to the decisions of MDBs upon the establishment of certain preconditional jurisdictional facts –it is not to be assumed as trite that it automatically finds applicability to all conduct and decisions taken by MDBs. Secondly, that there are varying models or theories which govern the manner and extent to which global administrative law imbues the decision-making process of MBDs with adequate standards of lawfulness, reasonableness, transparency and procedural fairness. Thirdly, that where global administrative law does find applicability

with varying degrees of forcefulness, there are recourse mechanisms for those persons adversely affected by decisions.

This thesis is divided into eight chapters. The first, as an introductory chapter, has set out both the legal and situational context of this study, the aims and rationale of the thesis, and the research questions which it will aim to answer. Chapter Two will describe and analyse the legal and regulatory structure within which MDBs finance infrastructure development projects. Initially, it will focus on the "standard" process employed in project financed infrastructure transactions, including how these projects are structured and operate, with particular emphasis on the role of MDBs. In its analysis, this chapter will focus on the decision-making structures that drive the infrastructure development process.

Chapter Three will identify the problems which exist in the international legal and regulatory regimes applicable to MDB infrastructure development financing and interrogate how these legal and regulatory issues impact the rights and obligations of the state actors and private commercial entities involved in infrastructure development projects. It will commence with an examination of the legal status of MDB loan agreements and how they operate within project financed infrastructure transactions. The chapter will examine international law aspects of accountability within MDB-funded infrastructure transactions. Specifically, it will focus on the need for accountability in MDB-funded projects, how accountability mechanisms impact the rights of stakeholders involved in and impacted by infrastructure development projects with a particular focus on the BRICS countries, and the legal justifications for these mechanisms.

In Chapter Four, the accountability mechanisms at a select grouping of prominent MDBs will be examined because of their prolific operation in the BRICS bloc. The chapter will assess how MDB accountability mechanisms operate, and it will examine the broader challenges experienced within these accountability mechanisms. It will then specifically assess challenges within infrastructure projects that are funded using project finance model. In this regard it will highlight the issue of indirect or derivative legal accountability for MDBs and examine the two manners in which human rights breaches attract such accountability.

Chapter Five will examine the manner in which forms of breach attract accountability during the financing process. It will begin by assessing existing manners in which accountability operates and highlight some of the key critiques of the status quo. It will then turn to examine a suitable framework to address these accountability challenges. Specifically, it will examine the role of MDB accountability mechanisms and the application of global administrative law

within these processes. Applicable theories of global administrative law will be examined with particular reference to the tenet of accountability as a fundamental pillar of the body of law. In this regard the chapter will examine the legal status of MDB environmental, social and governmental policies in international law, and specifically situate them in the broader discourse on global administrative law. The chapter will finally turn to consider the role and operation of global administrative law's right of recourse to administrative or legal review procedures and position it as a central basis for accountability at MDBs and, in particular as a central part of the operation of MDB accountability mechanisms.

Chapter Six will advance two proposals which, at their core, aim to address how domestic and global administrative law may be leveraged to improve accountability within MDBs' financing processes and operations. The proposals seek to demonstrate how, within the existing regime of laws, regulations and practices which govern the infrastructure development financing processes of MDBs, reforms may be made to advance accountability in a manner that favours stakeholders who may not necessarily be part of the financing transactions' contract scheme – particularly in so far as those stakeholders may be in developing countries such as those in the BRICS bloc. The proposals advanced will include one which is focused on international accountability and another which aims to reform how MDBs are held accountable domestically. The chapter will also examine challenges with each of these proposals, dealing first with the issue of ineffective remedies, inadequate monitoring and enforcement of remedial recommendations, and then turning to how remedies, monitoring, and enforcement impacts on the tension between national sovereignty and MDBs as powerful international actors.

Chapter Seven will set out a proposal that aims to build on and improve the existing proposals and to address the challenges identified in the preceding chapters. It will commence with the formulation of benchmark criteria against which an effective and successful accountability mechanism should be measured. It will then consider two case studies at existing international financial institutions which demonstrate how their approach could be adapted and modified to address the challenges and protect and advance accountability. It will ultimately distil specific actionable measures that MDBs should implement should the reform proposals be implemented. It will also examine how these proposals for reform may be adapted to the unique legal, political and social contexts of the BRICS bloc.

The thesis will conclude with Chapter Eight, which will provide a summary overview of the thesis, highlight the critical findings that were made, and identify issues that may form the basis of future research.

In what follows, I will commence with an overview of some of the key mechanics of a project-financed transaction. It will highlight core features of the structure and ultimately provide a short case study thereafter to demonstrate how such a transaction operates practically.

CHAPTER TWO
Project-Financed Transactions at MDBs

2.1 Introduction

Project finance is a financing mechanism that has increasingly been used by governments and private sector actors since the early nineties, though the mechanism's origins may be traced to the Middle Ages.[129] The exponential growth in the use of this mechanism to finance infrastructure projects despite the fluctuations in the levels of public and private sector investment in infrastructure overall is largely attributable to the manner in which it operates in a global political and economic climate that has become increasingly tumultuous.[130] For this reason project financing has remained a popular financing mechanism, prevalent in infrastructure projects in developing countries and projects which involve MDBs.

This chapter begins with an analysis of project financing at MDBs. It will examine how the mechanism operates, the legal and regulatory frameworks that apply to it, the role of the various stakeholders involved, the contractual matrix of project finance transactions, and outline how it differs from other financing mechanisms. The chapter will then proceed to examine how project financing operates in the context of PPP infrastructure projects. It will emphasise the core features of the PPP structure, the competitive bidding process and the various PPP models which governments use when implementing infrastructure projects.

Finally, the chapter concludes with a case-study. This will provide a practical demonstration of how a typical PPP project operates and highlight some of the challenges that governments in developing countries frequently face when they embark on infrastructure development projects using a project finance PPP model. The case study will serve to set the scene for some of the issues that the thesis will address in the chapters that will follow by highlighting the important functions of the various role players in the process and emphasising the crucial role MDBs play in projects in developing countries to ensure that projects are successful.

2.2 Project finance

Project finance is one of the many sophisticated structures created within global financial markets that emerged response to the rapidly changing global political and economic environment. Following the wave of liberalisation across developing countries in the early

[129] J. Mullner, 'I International project finance: review and implications for international finance and international business' (2017) 67(2) *Management Quarterly Review* 97 at 101.
[130] B. C. Etsy, 'The Economic Motivations for using Project Finance' (2003) Working Paper, *Harvard Business School* at 1.

nineties, there was a boom of privatisation in the provision of public goods and the development of public infrastructure. This was evident in the increase in the monetary value of infrastructure investments. In developing countries, investments jumped from US$18 billion in 1990 to US$128 billion in 1997 while statistics from the Bank similarly show that between 1990 and 2001, 132 low- and middle-income countries introduced private participation in infrastructure projects. Private sector actors extended their involvement in approximately 2,500 infrastructure projects in developing countries in that period which attracted investment commitments of more than US$750 billion.[131] It is in response to this boom that private investors, MDBs and governments sought to mitigate the risks associated with financing long term investments in large infrastructure projects in developing countries. Developing countries often have turbulent economic and political environments and, consequently, project finance emerged in response to this need. It is a legal and financial structure that allows for a blend of public and private funding for projects that mitigates and apportions risks accordingly among the various private and public sector actors involved.[132]

2.2.1 What is project finance?

Project finance is typically used for funding public and private capital-intensive facilities and utilities.[133] It is a unique method of raising long-term finance for major projects such as infrastructure through a legal and financial structure that funds a given project by lending solely against the cashflow to be generated by the project once it is operational. The process has been termed 'financial engineering' and it is typically employed only after a detailed assessment of a project's construction, operating and revenue risks as well as an evaluation of the manner in which those risk will be allocated between investors, lenders and other parties through contractual and other arrangements.[134] Thus, with regard to pure non-recourse project finance structures, one of its most significant features is the fact that the funding for the project is not entirely contingent on the reliability or creditworthiness of the parties involved in the project. Nor is it entirely contingent on the value of the assets that the parties make available as collateral, to a large extent. Instead, the project's financiers look initially to the cash flows and

[131] S. Griffith-Jones and A. T Fuzzo de Lima 'Alternative Loan Guarantee Mechanisms and Project Finance for Infrastructure in Developing Countries' (2004) Research Paper, *Globalisation Team International Finance, Institute of Development Studies* at 1-2.
[132] Ibid.
[133] J. M. Pinto, 'What is Project Finance' (2017) 14(1) *Investment Management and Financial Innovations* 200 at 200.
[134] E. R. Yescombe, *Principles of Project Finance* (2014) at 1.

earnings of the project as the source of funds from which a loan will be repaid and to the assets generated by the project itself as collateral for the loan provided to develop the project.[135]

At this stage, it is appropriate to pause to address two points. First, it is important to distinguish 'project finance' from 'financing projects'. Projects may be financed by employing a variety of mechanisms. In developed countries traditionally large-scale public-sector infrastructure projects were funded by using public-sector debt while private sector projects were financed by large companies making use of corporate loans. Conversely, in developing countries governments often financed projects by resorting to borrowing from MDBs however, in line with the boom of privatisation described earlier coupled with the introduction of public-private partnerships and innovative mechanisms such as project financing, there has been a dramatic change in how infrastructure projects are financed.[136] Second, it is critical to understand that a further distinguishing characteristic of project finance is its wide-ranging and far-reaching effects. The nature of projects financed using this structure is such that it transcends traditional loan financing mechanisms, moving beyond impacting only the entity directing the finance, the loan finance provider(s) and the borrower. Among others, project finance requires the involvement of project developers, engineers, contractors, suppliers, product purchasers and – where project finance is used for infrastructure – the host of public sector actors and affected parties such as local communities and civil society groups.[137] This study will examine these far-reaching effects in the context of the application of global and domestic administrative justice laws, accountability, and recourse mechanisms available at MDBs for use by contracting parties and non-contracting parties such as the local communities that are adversely affected by decisions during the financing process.

Notwithstanding the definition of project finance reviewed above, it should be noted that there is certainly not a universally agreed legal or financial definition of project finance across the various industry sectors that use this model. Nevertheless, while project finance structures tend to differ from project to project, each unique in its own way, there are certainly common features and principles that underpin the model. One of the foremost definitions which encapsulates the fundamental principles of the project finance model is the one articulated by the Basel Committee on Banking Supervision (BCBS). The BCBS is an informal multilateral international body that facilitates cooperation between agencies that supervise and regulate

[135] Pinto op cit (n 133).
[136] Yescombe op cit (n 134).
[137] Ibid at 3.

banks. It was initially established by the central bank governors of the G10 group of countries in 1974 but it now spans 45 members from 28 jurisdictions.[138] The BCBS accordingly published the Basel II Rules, a multinational accord agreed to by participating members that aims to strengthen the stability of the international banking system, which contains the following definition of project finance:

> *"Project finance is a method of funding in which the lender looks primarily to the revenues generated by a single project, both as the source of repayment and as security for the exposure. This type of financing is usually for large, complex and expensive installations that might include, for example, power plants, chemical processing plants, mines, transportation infrastructure, environment, and telecommunications infrastructure. Project finance may take the form of financing of the construction of a new capital installation, or refinancing of an existing installation, with or without improvements. In such transactions, the lender is usually paid solely or almost exclusively out of the money generated by the contracts for the facility's output, such as the electricity sold by a power plant. The borrower is usually an SPE that is not permitted to perform any function other than developing, owning, and operating the installation. The consequence is that repayment depends primarily on the project's cash flow and on the collateral value of the project's assets. In contrast, if repayment of the exposure depends primarily on a well-established, diversified, credit-worthy, contractually obligated end user for repayment, it is considered a secured exposure to that end-user."*[139]

This definition is certainly not the only one – another used by Standard and Poor's, the international credit ratings agency, defines project finance as:

> *"…non-recourse financing of a single asset or portfolio of assets where the lenders can look only to those specific assets to generate the cash flow needed to service its fixed obligations, chief of which are interest payments and repayment of principal. Lenders' security and collateral is usually solely the project's contracts and physical assets. Lenders typically do not have recourse to the project's owner, and often, through the project's legal structure, project lenders are shielded from a project owner's financial troubles. Project-finance transactions typically are comprised of a group of agreements and contracts between lenders, project sponsors, and other interested parties who combine to create a form of business organization that will issue a finite amount of debt on inception, and will operate in a focused line of business over a finite period."*[140]

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[138] C. Goodhart, *The Basel Committee on Banking Supervision: A history of the Early Years* (2011) at 1 – 5
[139] Basel Committee on Banking Supervision, *International Convergence of Capital Measurement and Capital Standards – A Revised Framework Comprehensive Version* (2004) at 221 – 222.
[140] Standard and Poor's, *Updated Project Finance Summary Debt Rating Criteria* (2007) at 4.

Similarly, the Organisation for Economic Cooperation and Development (OECD), a multilateral international economic organisation established in 1961 to coordinate global economic activity and promote world trade, defines project finance transactions in its export credit consensus as:

> *"a) The financing of a particular economic unit in which a lender is satisfied to consider the cash flows and earnings of that economic unit as the source of funds from which a loan will be repaid and to the assets of the economic unit as collateral for the loan.*
>
> *b) Financing of export transactions with an independent (legally and economically) project company, e.g. special purpose company, in respect of investment projects generating their own revenues.*
>
> *c) Appropriate risk-sharing among the partners of the project, e.g. private or creditworthy public shareholders, exporters, creditors, off-takers, including adequate equity.*
>
> *d) Project cash flow sufficient during the entire repayment period to cover operating costs and debt service for outside funds.*
>
> *e) Priority deduction from project revenues of operating costs and debt service.*
>
> *f) A non-sovereign buyer/borrower with no sovereign repayment guarantee (not including performance guarantees, e.g. off-take arrangements).*
>
> *g) Asset-based securities for proceeds/assets of the project, e.g. assignments, pledges, proceed accounts;*
>
> *h) Limited or no recourse to the sponsors of the private sector shareholders/sponsors of the project after completion"*[141]

The three definitions of project finance above are but a few of the working definitions of the model that are common in infrastructure financing. Others include that of the Bank's International Finance Corporation[142] and the European Investment Bank.[143] Despite the various definitions, all ultimately speak to the following six core principles that govern project finance transactions:[144]

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[141] The Organisation for Economic Cooperation and Development, *Arrangement on Officially Supported Export Credits* (2020) at Appendix 1(I)

[142] The International Finance Corporation, *Lessons of Experience: Project Finance in Developing Countries* (1999) at 4-5.

[143] The European PP Expertise Centre, 'Project Finance' (2015) *The European Investment Bank*, available at https://www.eib.org/epec/g2g/annex/1-project-finance/ (accessed 22 October 2020))

[144] Yescombe op cit (n 134) at 7-8.

- The project forming the subject matter of the project-financed funding structure is usually a major infrastructure project with a long construction period and a long operating life.
- Typically, projects are financed for between 15 to 25 years.
- The project's lenders rely on the future cash flow which will be generated by the project in order to pay the debt, interest, and any fees that have been incurred in the provision of finance.
- Typically, all or portions of the project's cash flow to be legally 'ring-fenced' - this is achieved by making use of a special-purpose legal entity such as a specially incorporated company (the 'project company') whose only business is the execution of the project.
- A further hallmark of project finance transactions is the high ratio of debt to equity. In most cases, the project's debt may range between 70-90% of the total capital cost of the project. This has a number of consequential effects. In most instances, projects funded using project finance have physical assets that are worth much less than the debt if sold off after a default on the financing. However, in the case of public infrastructure projects, the infrastructure cannot be sold in any event should there be a default on the debt. Accordingly, as a result of this high debt-to-equity ratio, the primary security for lenders is in the project company's contracts, licences or other rights that form the source of its cash flow. This is generally why lenders in project-financed transactions conduct detailed risk analyses for projects they undertake and there is an equally detailed study of how risk is contractually apportioned between the parties involved. It is also important to note that in most cases projects have a finite life determined by the length of contracts, licenses, reserves of natural resources or a combination of all three – this is why projects are legally structured to ensure that debt is fully repaid by the end of the project's life.
- Finally, and perhaps most importantly, it should be noted that neither investors nor lenders who provide finance to the project company have recourse to the project owner (such as the government involved in commissioning the project) for the project company's debt, known as non-recourse debt. Alternatively, there may be a limited guarantee for investors, known as limited recourse debt. Through the project's legal

structure lenders and investors are accordingly shielded from the risks such as the project owner's financial or political difficulties.[145]

These core principles will be expanded on later in this chapter.

Before discussing the specific mechanics of project finance transactions in the context of state-led infrastructure projects a few further elements should be addressed. First, it is important to interrogate the nature of the non-recourse or limited recourse financing and its impact on the legal structuring of project finance models. This is one of the base motivations for why governments and private sector entities opt to use this model for financing public infrastructure projects. The interface between the equity provided by the investors or shareholders in the project and the project finance-based debt that is usually provided by one or more of the lenders, collectively referred to as the syndicate of lenders, should be examined. Yescombe notes that the distinction between these two groups has legal significance. The lenders' project financed debt has first call on the project's net operating cash flow, while the investors' return is contingent on the eventual operational and financial success of the project.[146] This distinction and the differing rights and obligations that accompany it has an impact on the structure of project finance transactions via what is known as the 'debt-to-equity ratio' and how this is contractually managed.[147]

Delmon describes a company's debt-to-equity ratio calculation as its long-term debt divided by shareholders' equity.[148] He notes that in project finance transactions where shareholding investors provide more equity-based financing, they take on a higher risk and expect a higher return. Farrell similarly notes that this is a critical consideration for the project's shareholders or sponsors.[149] Shareholders' exposure to any potential recourse has an impact on their own balance sheets thus the project's debt-to-equity ratio and the related risks associated with the balance is critical. The sponsor's risk rises as their exposure to potential recourse increases. In non-recourse project financing, the project is completely removed from the shareholders' balance sheets because the project is legally distinct from the shareholder or sponsor and does not affect the sponsor's debt to assets ratio.[150] Conversely, lenders prefer a lower debt-to-equity

[145] See J. Delmon, *Private Sector Investment in Infrastructure: Project Finance, PPP Projects and PPP Frameworks* 3rd ed (2015) at 1.3; and H. A. Davis, *Project Finance: Practical Case Studies* Vol 1 (2003) at 4-5.
[146] Ibid.
[147] Delmon op cit (n 145) 2.4.1.
[148] Ibid.
[149] L. M. Farrell, 'Principal-agency risk in Project Finance' (2003) 21 *International Journal of Project Management* 547 at 547.
[150] Ibid.

ratio in order to obtain greater investment from shareholders, ensure investors' commitment to the project and provide lenders with more security as a result of the additional equity capital injection into the project increasing the net value of project assets.[151]

In project finance transactions, the agreed level of debt-to-equity is negotiated between the project company and the lenders based on an assessment of the nature of the project, its value, the (regulatory, political, legal or economic) risks associated with the project, the respective amount of risk the lenders and investors are willing to carry and the identity of the project company's sponsors or shareholders which, in public infrastructure projects, usually includes a government institution or agency. The state parties involved in project finance transactions have a direct interest in how this balance is contractually managed as this forms the key motivation for why project finance structure is used, particularly where the subject matter of the project finance transaction is public infrastructure. Project financed tends to be highly leveraged, with a high debt to equity ratio: in developing countries, debt-to-equity ratios for energy projects tend to range from 80:20 to 70:30 while in projects with higher market-related risks tend to not exceed 50-60% debt.[152] The relation between the levels of debt finance versus equity or investor-backed finance is relevant and not only demonstrative of the differing rights and obligations lenders and investors have, but also the decision-making power each has in relation to the project and, ultimately, their respective exposure to legal challenges for those decisions.

Finally, it is manifest that financing infrastructure is nuanced.[153] Chandavarkar notes that the conventional wisdom that only the public sector can supply and finance services in developing countries has been refuted – increasingly, many public services in developing countries have been constructed using private financing in order to reduce the burden on limited government finances.[154] In these cases, for private-sector funded and operated infrastructure a project company may raise debt using traditional corporate finance mechanisms whereby lenders rely on cash flow from the business as a whole and security over the company's assets and the project company makes use of one or more subcontracts through which users of the infrastructure agree to pay for their use of the facilities services.[155] However, by employing a

[151] Yescombe op cit (n 134) at 7-8.
[152] Ibid; See also T. W. Oshikoya and K. Durosinmi-Etti, 'Infrastructure and Project Finance' in . W. Oshikoya and K. Durosinmi-Etti *Frontier Capital Markets and Investment Banking: Principles and Practice from Nigeria* (2019) at 192.
[153] Yescombe op cit (n 134) at 15 – 17.
[154] A. Chandavarkar, *Infrastructure Finance: Issues, Institutions and Policies* (1994) at 26.
[155] Yescombe op cit (n 134) at 15 – 17.

public-private partnership (PPP) model in which project financing is used - also known as a concession - there is a contract between the project company and the public-sector contracting authority in which the project company constructs or refurbishes public infrastructure.

Where a PPP model is used in project finance, the project company maintains and operates the infrastructure for a period and project revenue is derived from payments made by users such as tolls, fares or similar charges. The private party effectively leases the public infrastructure asset for a period after which ownership reverts to the public sector authority.[156] It may also operate in accordance with what is known as the private finance initiative (PFI) model in which construction or refurbishment of infrastructure takes place and project revenue is derived from payments made by the public sector contracting authority by way of service fees which the project company earns by making the project available to the contracting authority.[157] Generally, concession model PPPs are used for economic infrastructure like roads, bridges, railways and energy while PFI models of PPPs are used for social infrastructure like the construction of hospitals, prisons and schools.[158] This study focuses on the concession model PPPs of infrastructure project finance, which will form the predominant focus of this chapter. Importantly, it should be noted that while the focus shall be on the aforementioned concession model of PPP project finance transactions, this is certainly not the only type of PPP model. The model employed depends largely on the project risks and varies in its degrees of sophistication and other models will be defined further below.

2.3 The structure and operation of project-financed transactions

The life cycle of project financed infrastructure may be divided into three phases - the development phase, construction phase and operation phase.[159] A project commences with the development phase, also termed the pre-construction phase. This is the period during which the project is conceived, feasibility is assessed, due diligence is conducted and the suite of contracts which ultimately form the basis of the project financing structure are negotiated and

[156] Ibid; See also World Bank, *World Development Report 1994: Infrastructure for Development* (1994) at 8-9; J. Delmon, 'Understanding Options for Public Private Partnerships in Infrastructure: Sorting out the forest from the trees: BOT, DBFO, DCMF, concession, lease' (2010) Policy Research Working Paper, *The World* Bank at 9-10 and 12 available at https://openknowledge.worldbank.org/bitstream/handle/10986/19947/WPS5173.pdf?sequence=1 (accessed 17 December 2020).
[157] Yescombe op cit (n 134) at 15 – 17; See also Delmon op cit (n 156) at 60 for an example of how the PFI model was employed in a healthcare infrastructure.
[158] Yescombe op cit (n 134) at 15 – 17.
[159] Ibid at 29.

executed.[160] As Anderson et al note, the process can often take years and be very complex.[161] At this stage there are generally four core legal activities: forming a group of project sponsors, preparing the project's contract documents, defining and securing the project's financing, and ensuring that the secured finance is sufficient to sustain the project during the subsequent construction and operation phases.[162] The development phase is arguably the most legally sensitive phase and the complex matrix of legal, financial and public considerations that must be navigated means that the development phase may easily take several years to conclude – when it does eventually conclude, the end of the process is known as 'financial close'.[163] It is manifest that the variety of considerations may trigger conduct on the part of MDBs, the government entity involved or the private sector stakeholders that has adverse implications on either contracting parties or the citizen stakeholders affected by the development of a given infrastructure project.

The construction phase is the period in which the project is built and the point at which the finances secured are drawn down by the project's sponsors. During this phase, the lenders progressively provide financing as the infrastructure is designed, built and commissioned as drawdowns on the finance provided by the lenders is tied to payment events or project milestones.[164] Payment events are usually structured to require a few large drawdowns on the finance – usually, the provision of finance during the construction phase is tied to project milestones in order to incentivise the sponsors and the project company's various contractors to ensure the project is completed in a timely fashion. In most instances there is little or no revenue stream for the project during the construction phase and lenders will defer debt payments. Completion of the construction is understandably a critical milestone and its legal effect is substantial. Lenders must verify project completion in order to allow final drawdown of the finance that is to be used to pay the construction contractor. It also represents the end of the guarantees which the construction contractor may have provided for the project during construction. Completion of the construction phase may also signal the end to lenders' rights of recourse to sponsors' assets, where the project is subject to limited recourse finance. Accordingly, at this stage lenders will want to ensure that legal risks specific to the completion

[160] J. Anderson, M. Huhn and D. M. Rivera et al 'Phases of the Construction Project' in M. Klinger and M. Susong (eds) *The Construction Project: Phases, People, Terms, Paperwork, Processes* (2006) at 5.
[161] Ibid.
[162] S. Gatti, *Project Finance in Theory and Practice: Designing, Structuring and Financing Private and Public Projects* (2013) at 81
[163] Yescombe op cit (n 134) at 29.
[164] Delmon op cit (n 147) at 2.7.1.

phase are appropriately managed – particularly where contractual guarantees have been obtained.[165] As in the case of the development phase, the construction phase may also trigger conduct or decisions that have adverse impacts on contracting parties or the citizen stakeholders.

The operation phase is the period in which the project operates commercially and produces the cash flow to repay the lenders' debt and investors' equity returns.[166] Delmon notes that at this stage the infrastructure is expected to be operating at appropriate levels and lenders expect to be repaid from the project's revenues. The project company is usually afforded a period of three to twelve months to 'ramp-up' the newly completed project before the first loan repayments are expected. Repayment is typically calculated according to a contractually agreed repayment schedule and may take a wide range and combination of formats - agreed monthly rates, a percentage of the projects cashflow, a percentage of the projects revenue for output, a rate per unit of output or even unequal amounts based on calculations of projected income and maintenance needs. In infrastructure projects conducted using the PPP model of project finance it is often the case that projects generate revenue via the project company's relationship with a purchaser or purchasers, who will be contractually bound to purchase the projects outputs.[167] However, it is also not uncommon in the case of transport and energy infrastructure projects such as toll roads or renewable energy for revenue to be generated directly from purchases from the public as end-users of the project's outputs in which case income stream is not necessarily stable or guaranteed and will often be underwritten by guarantees from the government entity involved in the transaction.[168] Naturally, like the phases that precede it, the operation phase of a given infrastructure project may trigger conduct or decisions that have adverse impacts on contracting parties or the citizen stakeholders.

In the following section the legal mechanics of how project finance transactions operate will be demonstrated by examining the key role players, with a specific focus on MDBs in their capacity as project lenders, the role of government partners in project-financed transactions, and the project finance contract structure.

[165] Ibid.
[166] Yescombe op cit (n 134) at 29.
[167] Delmon op cit (n 147) at 2.7.2.
[168] T. C. Irwin, *Government Guarantees: Allocating and valuing Risk in Privately Financed Infrastructure Projects* (2007) at 24-25.

2.3.1. The key role players: sponsors, lenders and the role of MDBs

The sponsors are those individuals, agencies or companies that promote a project to obtain buy-in from the various stakeholders, bring together the various parties that will be part of the transaction and obtain the necessary initial permits and consents to initiate the project.[169] They are also tasked with organising the project company which includes preparing its articles of incorporation and negotiating the initial contractual arrangements among the project's sponsors such as the shareholders' agreement.[170]

In this preliminary phase the sponsors together with their legal and financial advisors must conduct the requisite due diligences in order to ensure that the project being undertaken has the necessary characteristics to be financed using the project finance model. This due diligence assessment together with the agreements the sponsors negotiate and conclude will, among others, regulate both the relations between sponsors and the distribution of project risks.[171] Evidently, despite the fact that it is a hallmark of project finance transactions that sponsors in the project company are shielded from lenders and other parties by the non-recourse or limited recourse nature of the project's legal structure, the identity of project's sponsors nevertheless remains important. One of the first things lenders such as MDBs consider when deciding whether to participate in a project financing is whether the sponsors of the project are appropriate and capable.[172] Generally, lenders such as MDBs who fund the project wish to have sponsors that have industry experience that directly relates to the project being undertaken, a reasonable amount of equity invested to ensure sponsors are incentivised to provide support to protect the investment if problems arise and that the deal is structured in a manner that ensures that sponsors have a reasonable return on their equity investment in the project company to further motivate their support for the project.[173]

One of the central outcomes of the work of the sponsors during the development phase of a project-financed transaction is the formation and incorporation of the project company. It is worth considering the role of the project company in greater detail as it is ultimately a distinct legal entity and serves a pivotal purpose in the transaction as the project company is actually the borrower of the financing secured and is the formal owner, developer and operator of a

[169] Dentons, 'A Guide to Project Finance' (2013) *Dentons* available at https://www.dentons.com/en/insights/guides-reports-and-whitepapers/2013/april/1/a-guide-to-project-finance (accessed 26 October 2020) at 10.
[170] Gatti op cit (n 162) at 112.
[171] Ibid.
[172] Yescombe op cit (n 134) at 30.
[173] Ibid.

given project-financed transaction. A project company is typically incorporated in the country in which the project is to operate, but it is not entirely uncommon for a project company to be incorporated outside of the country concerned where, for example, sponsors may want to take advantage of favourable tax laws.[174] Most critically for present purposes is that the project company is typically incorporated as a new special purpose vehicle or joint venture among the sponsor shareholders and that it is a party to all legal relationships within the project finance structure.[175]

The motivations for incorporating the project company as a new and special purpose vehicle are relatively straightforward and were alluded to earlier on in this study: if the project company also runs other operations which have nothing to do with the project, or has done so in the past, then there is a risk that liabilities that derive from its past activities could impact the operation and profitability of the project at hand. The limited or non-recourse nature of project finance is at the very core of the model and is among the primary drawing factors for lenders and sponsors that use it. It is antithetical to the fundamental principles of the project finance model to expose lenders or sponsors to risks unrelated to a project they intend to be involved in and could also result in an anomaly in which non-project lenders and sponsors benefit from investments in the project company. This is precisely why project companies tend to be legally ring-fenced upon incorporation, giving them a single or special purpose. This provides the project's lenders full control over the project's cash flow during the operation phase and allows them to ensure that cash flow is channelled among sponsors and lenders in the order of priority negotiated and recorded in the financial model that was agreed during the development phase.[176]

Notwithstanding that special purpose corporations tend to be the most commonly used form of ownership for projects sponsors of projects may adopt a variety of legal forms for the ownership of the project company and may also take the form of limited partnerships and limited liability companies. Baragona has noted that the chosen structure will ultimately depend on a variety of factors, each of which carry different weight depending on the particular infrastructure project being undertaken. [177] These factors include the amount of equity required for the project, the availability of tax benefits for the project, the need to allocate risks and the host governments' desire to remain directly involved in the project, which is ordinarily the case

[174] Yescombe op cit (n 134) at 41.
[175] M. Novo, 'Legal Aspects of Project Finance' in S. Gatti *Project Finance in Theory and Practice: Designing, Structuring and Financing Private and Public Projects* (2013) at 338-339.
[176] Ibid at 342.
[177] K. C. Baragona, 'Project Finance' (2004) 18(1) *Global Business and Development Law Journal* 139 at 143.

when the PPP model of project finance is used.[178] The ownership agreements among the sponsors which regulate their terms of engagement are dependent on the structure which sponsors elect to use.

Funding an infrastructure project-finance transaction is complex and in this regard the role of the project's lenders, primarily domestic private banks and MDBs, is pivotal. Given the sheer scale and cost of infrastructure projects, the funding provided by banks through either loans or through recourse to the capital markets in the form of bonds means that a large number of domestic private banks, MDBs and/or bond investors often participate in the financing as a syndicate. Given that syndicated loans are the most common form of financing in infrastructure, the focus will be on this mechanism.

Arranging the syndicated loans for the project company is the task of the bank appointed as the mandated lead arranger. The project company will contractually engage the arranger to structure and manage the finance contract that will regulate the provision of funding to the infrastructure project - the technical term for this process is called 'syndication'.[179] As a guarantee, a project's lead arranger underwrites the total cost of the loan being sought. This means that even if no lenders are found who are interested in supporting the project, the lead arranging bank carries the weight of the entire financial commitment of the project. This way, project sponsors are given a guarantee that funds for the project will be available and conversely, other lenders in the syndicate are given a degree of confidence that the mandated lead arranger has confidence in the project company's infrastructure venture. The central role of lenders means that project sponsors select both the lead arranger and all other lenders based on their experience, reputation, the cost of the financing required and the lenders' flexibility.[180] However, this has also had a further consequence - a market of lenders that is dominated almost exclusively by a relatively concentrated group of commercial banks. This concentration is most clearly evidenced in the concentration of mandated lead arrangers, with analysis of market data demonstrating that between 2010 and 2016 demonstrating that the top 25 commercial banks controlled between 65-70% of the market.[181]

It is in this context that the involvement of MDBs in project finance transactions may be situated. Traditionally MDBs have taken a more passive role in assisting private enterprises

[178] Ibid.
[179] Gatti op cit (n 162) at 216.
[180] Ibid.
[181] Ibid at 217.

undertake financially viable projects with economic and social merit to realise developmental aims. However, their role has evolved as governments and other project sponsors have recognised that they are uniquely positioned to assist in mobilizing international capital for projects.[182] MDBs now participate in international syndicated loans and have played a progressively leading role in project financed infrastructure development projects, particularly in developing countries in recent times. However, this was not always the case. Earlier on, this study highlighted the staggering gap between infrastructure expenditure and demand which runs into trillions of US dollars in developing regions like Africa, South America and Asia. It has also highlighted how traditional MDBs saw a decrease in official financial flows toward developmental projects. The rebound in MDB involvement in infrastructure development has only recently started and available data indicates that it began between 2010 and 2014.[183] Nevertheless, much of the steady decrease before this upturn is attributable to political shifts in industrialised countries that resulted in less funding for international aid organisations that, in turn, resulted in MDBs adjusting their policies to be more selective with the projects they elected to fund.

The recent increase in MDB involvement is largely attributable to the converse growth in private sector involvement development projects. As MDB infrastructure development funding steadily decreased up until the 2010s, private sector funding increased. Gatti has noted that it is this increase which ultimately led to a shift in how MDBs approach development projects – many MDB policies now tend to have transitioned away from financing governments in developing countries directly, but rather finance through deals such project financed infrastructure development which blend public and private sector investment. MDBs willingness to invest in high-risk developing countries and sectors has played a significant role in the growth of project financed infrastructure investment in recent years.[184]

It has further been postulated that their amplified role in developing countries is largely attributable to three factors.[185] Firstly, the institutional mandates and legal frameworks within which they operate are uniquely suited to taking on financial commitments in developing countries with high-risk political environments. Political risk in the countries in which infrastructure projects are situated is an important factor that influences the probability that a

[182] S. Griffith-Jones and A. T Fuzzo de Lima op cit (n 131) at 6.
[183] Gatti op cit (n 162) at 237.
[184] Ibid.
[185] Ibid at 237.

loan will be serviced as scheduled.[186] Second, the very nature of the manner in which MDBs raise financing is such that they conduct themselves in a manner that demonstrates both public and private attributes in their decision-making structures and the operation of their administrations. Many MDBs derive their decision-making power and funding from governments and they are therefore uniquely placed to influence the policies of the countries which host MBD-funded infrastructure projects. Their strategic geo-political importance is therefore manifest.

The opportunity to influence or demand policy shifts in developing countries as explicit or tacit conditions of their funding remains an attractive political motivation for the countries that control MDBs. For example, in Sri Lanka, the Bank was explicit in its objective to accelerate the transitional process from public-sector controlled infrastructure to private operation when it funded projects as part of the countries public-private partnership drive in the nineties while. At the same time, the ADB similarly leveraged its financing for Sri Lankan projects by withholding a second tranche of funding due to its dissatisfaction with reforms in Sri Lanka's energy sector.[187]

Finally, MDBs continue to promote private-sector financing and investment in infrastructure development, be it through explicit loan conditionality or indirect influence. In principle, MDBs serve as a counterbalance to infrastructure project financing which is traditionally led by the private sector by increasing their provision of financing in instances where downturns in financial conditions in the private sector result in periods of reduced interest or returns for private sector investors.[188]

As critical actors players in project finance transactions, MDBs employ a range of mechanisms when funding infrastructure projects in developing countries. Traditionally they invested indirectly using governments as intermediaries by providing financing to governments that, in turn, financed projects. However, the shift in global political and economic conditions and MDB policies has resulted in MDBs now becoming directly involved in project finance transactions by funding the special purpose vehicles in their capacity as lenders.[189] Their increasingly important and norm-setting role in these transactions, particularly in managing

[186] C. Hainz and S. Kleinmeier, 'Political risk, project finance, and the participation of development banks in syndicated lending' (2012) 21(2) *Journal of Financial Intermediation* 287 at 290.
[187] R. Appuhami et al, 'Coercive Policy Diffusion in a Developing Country: The Case of Public-Private Partnerships in Sri Lanka' (2011) 41(3) *Journal of Contemporary Asia* 431 at 440.
[188] Gatti op cit (n 162) at 239.
[189] Ibid at 242.

political and economic risks, is significant.[190] Often, MDB lenders' role transcends that of private-sector lenders and in this regard it is particularly useful to examine precisely what mechanisms the MDBs employ when they occupy this role.

In the context of project finance, the Bank predominantly provides direct involvement using the IFC and the MIGA. This generally takes the form of direct loans or forms of guarantees on portions of a project's risk or credit. Co-financing loans with other private sector lenders or extending guarantees is typically undertaken on condition that a given project company operates with the backing of a government guarantee and moreover, the operation of the project company's operations is typically partly subject to conditions, limits or rules imposed by the Bank or its arms.[191] In the case of the IFC, it offers a host of services and employs a series of legal mechanisms and in project-financed transactions in developing countries that extends beyond the provision of loans in project financed infrastructure projects. Not only does the IFC structure finance packages but it also coordinates finance from foreign and local banks and companies, provides direct equity investments and serves as the mandated lead arranger on projects. As Shihata has noted, in the case of the MIGA, it employs insurance contracts, not loans, and cooperates with private insurance companies by taking on a variety of project risks (including currency convertibility risks, war, terrorism, sabotage, breach of contract and defaults on financial obligations) and then reinsuring them with private insurers.[192]

It is worth noting that a few other MDBs have adopted similar approaches to their role in project-financed transactions. However, their role has tended to be more circumspect given that their share capital is generally held by governments of the regions in which they operate. The EIB's participation in financing infrastructure investment criteria has generally aligned with that of the private banking sector and, like the Bank group, it too provides loan and equity investments. Given the EIB's mandate, it's financing operations have generally been geared to projects that contribute to economic growth, development and cohesion within the EU and, as Honohan has noted, the EIB's has remained readily involved in providing project finance in regions of where the local financial market displays inefficiency to meet developmental

[190] See Hainz at 289 – 290; W. Buiter and S. Fries, 'What should multilateral Development Banks Do?' (2002) Conference Paper, *European Bank for Reconstruction and Development* at 4; A. Mendez and D. P. Houghton, 'Sustainable banking: The Role of Multilateral Development Banks as Norm Entrepreneurs' (2020) 12(3) *Sustainability* 927 at 14

[191] Gatti op cit (n 162) at 242.

[192] I. F. I. Shihata, *MIGA and Foreign Investment: Origins, Operations, Policies and Basic Documents* (1988) at 38.

needs.[193] Given its specific mandate and its strict financing criteria, its participation in loan syndicates may extend to providing up to 50% of the total project cost.[194] Loan conditions are particularly stringent, and projects are subjected to in-depth preliminary analysis to determine their technical sustainability, projects must meet EU environmental standards and follow procurement rules, it's funding also excludes project completion risks and, as such, risks associated with additional costs or delays must be borne by other parties to the project finance transaction.[195]

Targeted infrastructure development has remained a core focus of the AfDB with power, transport, water and telecommunications infrastructure projects dominating its financing operations. As is the case with other MDBs, the role of the AfDB has been to integrate and supplement private capital investment rather than to replace it. In this regard, by participating in project-financed transactions, the AfDB has sought to play an important role as a risk mitigator by taking on political risk to attract the involvement of foreign lenders in projects that are to be undertaken in economically and politically unstable countries. It has also increasingly taken on the role as mandated lead arranger in the projects it is involved in. The AfDB is commonly involved in traditional project-financed transactions in infrastructure as well as PPP projects where it offers financing in the form of loans and guarantees provided the project value exceeds US$ 9 million. The financing provided by the bank and its ability to leverage the involvement of international private partners are largely the result of its unique position as having reputable international financial standing, extensive regional experience and special relationships with African governments.[196] In PPPs in particular, the bank has provided assurances to private sector partners in the form of guarantees that governments involved in projects will meet their obligations - these guarantees can cover a host of government risks including government contractual payment obligations, currency risks, changes in law and the threat of expropriation and nationalization.[197]

Like other MDBs, the ADB has sought to position itself as a catalyst for private investment in the region in which it operates. Through its financing operations it has sought to encourage

[193] P. Honohan, 'The Public Policy Role of the European Investment Bank within the EU' (1995) 33(3) *Journal of Common Market Studies* 315 at 316.
[194] N. Hall, 'European Investment Bank Lending for Renewable Energy' in W. Jung and H. Schmitz-Borchert (eds) *Renewable Energies for the South* (2001) at 117.
[195] Hall op cit (n186) at 117-118; Gatti op cit (n 162) at 247;
[196] African Development Bank, 'Governance Strategic Framework and Action Plan' available at https://www.afdb.org/en/documents/document/governance-strategic-framework-and-action-plan-gap-ii-2014-2018-48003 (accessed 16 December 2020)
[197] Gatti op cit (n 162) at 247.

legal, institutional, and political reforms that encourage private investment in countries in which projects are executed.[198] In the context of its project finance operations, it too provides loans together with credit and risk guarantees with a predominant focus on PPP project financed concessions. One of the chief conditions under which it provides financing is its insistence that the projects it finances be compliant with the procurement rules established by the bank – sponsors must be selected according to a competitive bidding process. The maximum financial support it will extend to a single project is limited to the lesser of 25% of the total project cost and US$75 million.[199]

The IADB's operation is slightly different to that of other MDBs in that its loans are not typically accompanied by sovereign guarantees - its loan funding is made available for project financed infrastructure projects in key sectors like energy, health, transport and telecommunication are generally subject to typical private sector conditionalities. With regard to the guarantees it provides, these are limited to project guarantees for political risks, breach of contract, currency risk and violence like war for an amount not exceeding the lesser of 50% of the project cost or US$ 150 million.[200]

Finally, the NDB is a relatively new actor in project finance transactions. The bank offers both government- and non-government backed financing instruments and to-date its predominant focus in project-financed transactions has been in the renewable energy sector, as this study has already highlighted.[201] The bank itself has highlighted that its role as a lender is its most important developmental and financial asset and in this regard, it has divided its loan financing facilities into three main categories: i) sovereign operations or projects under sovereign guarantee; ii) loans without sovereign guarantee to national financial intermediaries either wholly or majority-owned by national governments and; iii) transactions without sovereign guarantee, consisting of financing to private sector clients, as well as state-owned entities or sub-national governments that are not guaranteed by the respective national government.[202] In this regard, like other MDBs, the NDB has sought to leverage its role as a government-backed international finance organisation to co-finance projects with private sector partners, other

[198] Asian Development Bank, *ADB: Strategy 2030* (2018) available at https://www.adb.org/sites/default/files/institutional-document/435391/strategy-2030-main-document.pdf (accessed 16 December 2020) at 14-19.
[199] Gatti op cit (n 162) at 247.
[200] Ibid at 254.
[201] The New Development Bank op cit (n 69) at 12.
[202] Ibid at 19.

MDBs and institutions like sovereign wealth funds that have appetite for infrastructure investment but are not able to manage on their own the risks involved.[203]

2.3.2. The contractual framework of project finance transactions

The contractual framework of a project finance transaction is the cornerstone of the entire model. This study has already highlighted that one of the core principles that defines this legal finance structure is that the lenders' security and collateral is usually solely the project's contracts and physical assets.[204] Project financed infrastructure developments employ a large and complex matrix of interrelated and interdependent contracts and sub-contracts each of which serves to apportion risk, rights and obligations among the parties executing the project. The contractual framework may be broadly divided into three core legal categories: finance documents, security documents and project documents.[205]

However, Novo has highlighted two critical steps before the contractual framework is put in place in the initial phases of project financing are the due diligence report and the project term sheet.[206] The due diligence report is a summary analysis of the project from a legal perspective and it is an essential tool for lenders to appraise and evaluate the project before it commences. The report assesses a number of pre-conditions including the financial viability of the project and its potential to be run as a non- or limited-recourse endeavour as well as various risks including an overview of any political, legislative or regulatory frameworks in which the project will operate such as, for example, energy, transport, water, and urban waste disposal or other laws regulating public infrastructure.[207] The legal analysis of the legislative and regulatory environment as well as the assessment of the various risks is a critical starting point for the project, and it is typically one of the conditions precedent to allowing the project company and sponsors from making the first drawdown on the lenders' loan.[208]

On the other hand, the term sheet is negotiated by the sponsors and lenders. It contains what is effectively a summary of the key terms of contract terms upon which the lenders will extend finance to the project, laying the groundwork for the contract structure that will be built around the lenders' financing itself. It is a forward-looking summary that contains the key aspects of

[203] Ibid at 14.
[204] Standard and Poor's op cit (n 137).
[205] Novo op cit (n 175) at 348.
[206] Ibid at 344-346.
[207] See also D. Gardner and J. Wright, 'Project Finance' in T. Rhodes *Euromoney Encyclopaedia of Debt Finance* (2012) at 9-10.
[208] Novo op cit (n 175) at 346.

the loan and, in short format, summarises the terms of credit to be extended to the project sponsors without necessarily detailing complete language of specific contract clauses which is usually reserved for the credit facility agreement(s) to be concluded as part of the main contracts that comprise the legal structure. The term sheet generally encompasses some of the economic terms upon which finance is to be extended to the project as well as outline basic contract provisions such as the conditions precedent, covenants and events of default which the lenders may want to include in the final agreements governing the extension of finance. In certain instances, parties may also include specific points to be addressed that are unique to the project finance framework in question which parties may consider essential in order to move forward with the deal.[209]

Once the pre-development documents and any other initial due diligence steps have been concluded the remainder of the contract framework is put in place. In this regard, the finance documents are central to lenders. As the name suggests, finance documents are those contractual agreements which regulate a project's financing. Outside of the equity finance provided by the sponsors, the bank debt provide by a project's syndicate of lenders is by far among the most important.[210] The lenders' financing is usually provided in accordance with the terms stipulated in a loan or credit agreement. The loan or credit facility agreement defines and regulates the financing. It defines and regulates the relationship between the syndicate of lenders and the project company as borrower. There may be more than one such agreement depending on the nature of the particular project being financed and the demands of the lenders. One of the central roles of the loan document is to ensure that the initial credit risk remains the same over the life cycle of the project while it is under finance obligations. It achieves this by implementing various lender conditions and borrower covenants in the loan agreement for the project company that will regulate the company's operation. Linked to this is the loan agreements' provisions ensuring that sponsors ensure that the project company maintains certain levels of liquidity, cash flow and other ratios which may adversely impact the project's risk profile.

A typical project finance loan or credit facility agreement will govern the following key aspects of the financing: the loan amount, conditions and repayment terms, interest rates, protections for the lenders in the form of borrower undertakings such as covenants, borrower representations and warranty undertakings for the project company and sponsors, clearly

[209] Ibid.
[210] Ibid at 348.

delineated terms regulating a wide range of actions that may constitute events of default and other miscellaneous aspects such as the agreement's governing law and jurisdiction. Importantly, in so far as governments, MDBs and international private partners are involved in project finance transactions, the loan or credit facility agreement will also contain terms and provisions which reflect the transnational nature of the transaction such as waivers of sovereign immunity and identification of the currency for debt repayments. Ultimately the goal of the project finance lenders is to ensure that the loan or credit facility agreement regulates their control over as many project risks as is possible which, in the case of infrastructure, are most often financial, economic and political in nature.[211]

Loan agreements are often supplemented by inter-creditor agreements which define the project creditors' rights *inter se.* Inter-creditor contract arrangements are employed where there is more than one class of debt held by the various creditors and where those classes of debt have different interests in the same collateral and they aim to delineate the priority of the lenders' ability to exercise their rights in instances where the project company is in default of its obligations under one of the contracts classified as project documents. This usually entails recourse to foreclosure, or affording creditors step-in rights that allow them to assume certain roles or undertake certain responsibilities in a particular order of preference.[212]

In project financed infrastructure transactions step-in rights are particularly important for MDB lenders. Step-in rights arise where the project company may find itself in breach of one of its obligations and the right allows lenders to "step in" with the project company, cure the relevant breach and put the project back on track. Other project participants are required to continue their contractual relationships with the substitute entity in lieu of the project company although the project company will not ultimately be released from its obligations under the project documents – remaining liable throughout the intervention. The corollary of the right is that lenders also retain the right to "step out" once the project is back on track without incurring any continuing liabilities.[213]

The next category of documents is the project's security documents. Novo emphasises that these are particularly pivotal in project finance as unlike more traditional loan financing, the hallmark of project finance transactions is that lenders have limited or no recourse to project

[211] A. Fight, *Essential Capital Markets: Introduction to Project Finance* (2006) at 118-119.
[212] Ibid at 136-137.
[213] Delmon op cit (n 147) at 2.8.7.2.

assets.[214] It is submitted that this is particularly critical in the case of infrastructure for public benefit. Indeed, Novo employs the example that it would be anomalous for a lender to, for example, take ownership of a public road or power plant should there be a major material breach - the purpose of security documents is therefore to create a system of contractual security interests that benefit the syndicate of lenders.[215] The matrix of security contracts vary from project to project however some of the documents that might need to concluded to record the lenders' security interests include: mortgages over land, buildings and other fixed assets, assignments of rights under underlying project documents (for example, construction contracts, performance bonds or licences), assignments of project insurances, assignments of sales contracts like tolling agreements, escrow accounts to control cash flows relating to the project, assignments of long term supply contracts, assignments of project management, technical assistance and consultancy agreements, and pledges of shares of project company, including charge over dividend rights.[216]

Practically, regardless of the specific nature of the security document in question, they all generally afford the lenders one or more of a combination of core rights. That is, either the right to sell to a third party and convert the asset to cash, a right of pre-emption or to obtain a priority other potential creditors of the same borrower to collect the amount owed from the sale of the asset or, the right to maintain the security over an asset even if that asset is purchased by a third party, thus securing the asset throughout all its later sales until the lender debt is repaid in full.[217]

Finally, project documents or agreements are the project company's operational contracts. Novo notes that project finance transactions are such that the list of project contracts for each project is a closed one, at least in theory. This is because the model is such that it requires the project company be restricted from entering into any contracts that are not associated with the construction, development or operation of the project and the structuring of its financing.[218] Novo notes that lenders are not parties to the project agreements but instead acquire certain rights through the security documents and direct agreements which may afford them step-in rights to directly intervene where the project company is in default or breach of its obligations. Generally, lenders approve the terms of the project agreements before they are concluded

[214] Novo op cit (n 175) at 376.
[215] Ibid at 349.
[216] Fight op cit (n 211) at 137 – 138.
[217] Novo op cit (n 175) at 376.
[218] Ibid at 349.

because of their direct interest in ensuring that the project is executed on time, according to specifications and with limited risk. The project company is prohibited from deviating from the contract system agreed by the lenders even though the lenders are not party to project agreements as this has a direct impact on the lenders' interest in the financial success of the project.[219] At its core, within the legal structure of project-financed transactions the project company has a predominantly financial function. It is a corporate shell that executes the project – it has only formal entrepreneurial and managerial independence but no entrepreneurial, corporate, or managerial resources of its own. Generally, it outsources all of these functions and does this by way of project agreements in terms of which it procures everything it will need to develop and operate the project in question.[220]

As previously noted, Novo has theorised that the list of project agreements is largely a closed one owing to the nature of a project-financed transaction. He lists the following agreements:[221]

The first is a *host country agreement*, which is most often used in developing countries where the domestic legal or political environment may be problematic or unstable for project implementation – two factors which are critical to the structuring of a project finance transaction. This agreement aims to regulate and shield sponsors from risks associated with legal and political instability that may have an adverse impact the construction, development, and operations of the project.[222]

A *concession agreement* is entered into with the domestic government in which the project is being executed. As Vinter notes, the concession agreement is the main instrument through which the contracting authority can seek to keep some degree of control over the project.[223] It is commonly employed in infrastructure projects where the nature of the project and domestic laws are such that it requires the government in question to concede certain rights to the project company to construction, development, and operate the project.[224] Control over the project is achieved by compelling the holder of the concession, that is the project company, to submit to various undertakings in favour of the contracting authority should certain adverse events occur

[219] Ibid.
[220] Ibid at 390.
[221] Ibid at 349.
[222] Ibid at 400.
[223] G. D. Vinter *Project Finance: A Legal Guide* (2006) at 94.
[224] Novo op cit (n 175) at 390.

which may necessitate termination or that the contracting authority step-in to assume certain responsibilities.[225]

Thirdly the *construction agreement* is not unique to project finance transactions but is particularly important as in this context the majority of the projects financing will eventually pay for the construction costs of the project.[226] Linked to this is the supply agreements for goods and services which are similar to construction agreements however, in the context of project finance, they too need to be demonstrably profitable in order for lenders to endorse the project company.

Ultimately, once the infrastructure has been constructed, the project is handed over to the project company. As the project company has no resources of its own, it will then outsource the running of and maintenance for the project to a third-party operator in accordance with the terms and conditions of an operation and maintenance agreement.[227]

The final form of project document is the *offtake agreement*. It is defined as the contractual arrangement in terms of which a third party agrees to purchase the project's outputs in whole or in part on a long-term basis, thus securing the project's cashflow. This is a critical step as the project's cash flow is ultimately the lenders' main source for recovering their capital invested in the project.[228] Offtake agreements are particularly important to PPP project finance transactions that concern energy and water infrastructure and are termed "power purchase agreements" or "water purchase agreements". Where the government entity involved in the project benefits from the project's outputs, it is common for elements of the offtake agreement to be included in the concession agreement.[229]

2.4. The PPP model, MDBs and public procurement

The foregoing overview of the structure and operation of project finance has been done with reference to the PPP model. By definition, the PPP model of project finance is used where a government entity serves as the lead initiator or project developer in a project that concerns the provision of goods and services (like the construction of infrastructure) for the public or public sector under a public-private partnership agreement. There are some aspects of a PPP model project-financed transaction that should be highlighted, particularly in so far as they concern

[225] Vinter op cit (n 223) at 94.
[226] Ibid.
[227] Ibid at 397.
[228] Ibid at 398.
[229] Delmon op cit (n 147) at 16.

infrastructure projects that include MDBs funding. In these instances, the government entity calls for proposals to finance and construct the project in order to provide the goods or service as the 'contracting authority'.[230] Government procurement in accordance with the PPP model inevitably adds a layer of complexity to the already complex project-finance structure. However, at its simplest, in a standard PPP project-financed transaction the project is effectively designed, developed or conceptualised by the government entity as the contracting authority, funding is for the project is secured from a consortium of sponsors and lenders like MDBs, and the project is ultimately also constructed, operated and maintained in accordance with the model.[231]

2.4.1 The PPP Model

What distinguishes the PPP project finance model from sponsor-developed projects is that it typically requires that a consortium of sponsors deploy the project company to bid for a government-developed infrastructure project through a competitive process. But the scope of that bid is much wider than in the case of ordinary public procurement endeavours. The project's design and construction are integrated thus expanding the scope of the procurement; the procurement is generally long-term, and ensuring the profitability of the project is a critical aspect for the relevant government entity to ensure it has the potential to be executed as a project financed PPP project.[232]

A further distinguishing feature of the PPP model is that it is incumbent on the relevant government entity as the contracting authority to adhere to international and domestic procurement laws, regulations and systems. Vinter highlights that when commencing a project, identifying any applicable procurement laws or regulations is a critical step.[233] This typically requires that the contracting authority, sponsors and lenders not only elect a governing law and applicable legal framework for the financing transaction, but also obtain a variety of formal approvals and follow the stipulated procurement processes at each stage of the project to ensure that it is executed in a legally complaint manner.[234]

Importantly, it is notable that despite the fact that procurement systems may differ from country to country, ultimately an infrastructure projects financed using the PPP model tend to follow a similar transaction structure. This structure broadly consists of four stages: bidder

[230] Yescombe op cit (n 134) at 44.
[231] Ibid.
[232] Ibid.
[233] Vinter op cit (n 223) at 10.
[234] Yescombe op cit (n 134) at 44.

prequalification, a request for proposals from pre-qualified bidders, negotiation, and bid evaluation.[235] Among the reasons for the uniformity in the use of this transaction structure is the underlying legal foundation of the competitive aspect of infrastructure projects that use the model, particularly the international convergence which has occurred, at least in part, due to the influential UNICTRAL Model Law. Accordingly, before providing an overview of the aforementioned four stages, it is worth examining the competitive aspect of the PPP model.

2.4.1.1 A competitive public procurement process

It is typical for a competitive procurement process to be run when a contracting authority engages in public procurement that uses public funds or where the subject matter of the procurement is for the public benefit, as is the case in infrastructure projects.[236] As Soudry notes, there is a general obligation to conduct a competitive tender processes – both internationally, as is typically the case under MDB loan conditionality, and domestically as many countries domestic procurement laws require.[237] The justification for running competitive bidding processes is that they have proven to be the best way of achieving the best deal for the contracting authority by allowing the authority to solicit bids on a similar or identical basis, making comparison easier and driving prices down through competitive pressure.[238]

Employing a competitive procurement process is notionally an incident of an open tendering process that allows any interested party to submit a bid. However, it should be noted that this is certainly not the only model and it may be contrasted with other models that operate on a more restricted basis: First, selected or restricted tendering procedures allow contracting authorities to approach specific bidders, conduct a pre-qualification process, request proposals from the pre-qualified bidders and then award the project to a successful bidder on the basis that bidders then just sign up to the contracting authority's pre-determined contract terms and project scope. Second, negotiated tender procedures are typically employed for complex contracts where contracting authorities' requirements cannot be specified in the initial stages. In negotiated tender processes a variety of bidders are afforded opportunity to submit different proposals for the project, these submissions will include proposals on the project's scope, requirements and contractual terms and the final award is then negotiated with the contracting

[235] Ibid.
[236] Ibid at 49.
[237] O. Soudry, 'A principal-agent analysis of accountability in public procurement' in G. Piga and K. V. Thai (ed) *Advancing Public Procurement: Practices, Innovation and Knowledge-Sharing* (2007) at 443.
[238] Vinter op cit (n 223) at 9.

authority, a preferred bidder is selected from among the submissions and the tender is awarded on that basis.[239]

Notwithstanding the degree of "openness" for a particular procurement process, competition generally remains a central element. To reiterate, the prevailing practice is for the procurement regulations of a given MDB to regulate the competitive bidding required in a project funded by that MDB – for example, in instances where financial support is received from the Bank, through the terms and conditions of its financing agreements it compels participants in its transactions to adhere to the Guidelines: Procurement Under IBRD Loans and IDA Credits.[240] As a consequence of this, it is important acknowledge influential international frameworks that have had an impact on both domestic procurement regulatory frameworks and MDB procurement regulatory frameworks.

At the outset, it must be noted that the GPA has relatively limited applicability – it applies to "*covered procurement[s]*" which must meet particular value thresholds, be conducted by designated procuring entities, and must not fall into any of the explicitly excluded categories articulated in the GPA.[241] On this basis, what must be examined instead is the UNICTRAL Model Law, which has arguably emerged as the most a widely influential and applicable procurement regulatory frameworks and its impact on advancing competitive public procurement processes.

Established in 1966, the UNCITRAL sought to serve as a progressive effort to modernise and standardise international trade through key legislative and non-legislative instruments. In so far as modernisation and standardisation efforts related to public procurement, the UNCITRAL issued its first comprehensive model law for the procurement of goods, services and construction was promulgated in 1994 which was to serve a template for countries wishing to regulate or reform their public procurement systems.[242] The 1994 model was lauded as widely successful and an amended version was promulgated by the UNCITRAL in 2011 to account for technological advances in procurement and the shift to increased use of PPPs and concessions and the related changes the shift has occasioned. With regard to competitive public procurement processes in PPP transactions, the preamble of the UNICTRAL Model Law notes

[239] Yescombe op cit (n 134) at 51.
[240] The World Bank, 'Guidelines: Procurement Under IBRD Loans and IDA Credits', May 2004 (as revised 1 October, 2006 & 1 May, 2010) available at https://thedocs.worldbank.org/en/doc/828321467230376082-0290022016/original/ProcurementGuidelinesEnglishMay2010.pdf (accessed 10 October 2021).
[241] The GPA at Article II.
[242] S. Williams-Elegbe, *Public Procurement and Multilateral Development Banks: Law, Practice and Problems* (2017) at 273-274.

that its central aims include promoting competition in the procurement process and it achieves this through a range of competition-enhancing mechanisms such as those in paragraphs 3, 5 and 6 of Article 34 and those articulated in Article 51.[243]

Within the BRICS bloc, Russia, India, and South Africa are among the states that have used the UNCITRAL Model Law and the accompanying Guide to Enactment in reforming their public procurement law and systems[244] and law's measures have been incorporated in their domestic procurement laws to varying degrees. In Russia, the law formed the basis of the first major reform of its public procurement regime in 1997.[245] In India, the enactment of the Rajasthan Transparency in Public Procurement Act in 2012 and its related rules was India's first UNICTRAL Model Law-inspired legislation.[246] While in South Africa, its existing public procurement regime and the recent draft Public Procurement Bill, 2020[247] has drawn significantly on the UNICTRAL Model Law, mirroring many of the same ideals and, in some instances, imposing even stricter regulation and thresholds.[248]

2.4.1.2 The four-staged bidding process

Notwithstanding the particular model of PPP which the contracting authority ultimately elects to adopt for a project, it is evident that projects of this nature typically contain the following structure: a form of pre-qualification for bidders, a contracting authority's request for proposals, a negotiation phase and an eventual award of the project to a successful bidder. The pre-qualification process commences with the contracting authority advertising the project and providing prospective bidding groups with a "request for qualification" (RFQ), in terms of which they are given more details of the project and its requirements and invited to demonstrate their qualification to undertake the project.[249] Bidding processes are generally a long and expensive process and, in order to manage this, a contracting authority "pre-qualifies" bidders

[243] Ibid at Article 30(4) and Article 51.
[244] The United Nations Commission on International Trade Law, 'Status: UNCITRAL Model Law on Public Procurement (2011)' available at https://uncitral.un.org/en/texts/procurement/modellaw/public_procurement/status (accessed 10 October 2021).
[245] A. Yakolev and O. Demidova, 'Access of firms to public procurement in Russia in the 2000s: before and after radical reform of regulation' (2012) 5(2) *International Journal of Economic Policy in Emerging Economies* 140 at 144.
[246] S. Verma, 'Use of Country Procurement Systems by MDBs— A Good Time to Switch? User Perspectives amidst Select Procurement Practices in the State of Rajasthan (India)' (2017), Conference Paper, *University of Nottingham: Public Procurement-Global Revolution VIII Conference* available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3024599 (accessed 10 October 2021).
[247] Public Procurement Bill, 2020 GN 94 in GG 43030 of 19 February 2020.
[248] C. Maas, 'The Reform of Public Procurement Remedies: A Domestic and Comparative Analysis' (2020) 7 *APPLJ* 63 at 71 – 75.
[249] Yescombe op cit (n 134) at 52.

who meet the project's requirements.[250] At this stage, a project company bidder will have to demonstrate its technical capacity, the experience of its personnel on similar projects and its financial capacity to execute the project. Should bidders not be able to demonstrate adequate qualifications to execute the project, they will be disqualified from submitting bids to the contracting authority.[251]

The RFQ phase is followed by the "request for proposals" (RFP) phase in which the contracting authority sends all qualified short-listed bidders an information package with a host of information on the project upon which the bidders bids will be predicated. Information typically includes a detailed project background, a legislative overview, a matrix of project risks, a draft of the project contracts to be concluded between the contracting authority and successful bidder, financial proposals, evaluation criteria and timetable, among others. The RFP will not prescribe specifications in too great a detail as this could compromise the integrity of the procurement and adversely impact fairness and a competitive process. In response to the RFP, bidders submit to the contracting authority a proposal which demonstrates an understanding of the project's requirements and the bidder's comparative advantage the other competing bidders.[252] As Delmon notes, this is not necessarily a one-sided process and bidders and contracting authority may exchange written comments, queries, engage with lenders and conduct conferences in order to obtain a better understanding of the project's requirements.[253]

The RFQ, RFP and bidders' submission of proposals pursuant thereto is followed by a period of negotiations between the contracting authority and the project company bidders. The format of the negotiations is largely dependent on what model of PPP procurement has been adopted for the particular project – however, at this stage the key aim for the contracting authority will be to ensure that a high degree of competition is maintained among more than one bidder to ensure that the best value is achieved.[254] A scenario in which only a single bidder is engaged in negotiations is not ideal. Vinter notes that the justification for running a highly competitive project is that they are the ideal mechanism for the contracting authority to procure at the best price and quality – enabling the authority to "*solicit and compare bids on a similar if not identical basis and drive prices down through competitive pressure*".[255]

[250] J. Delmon, *Public Private Partnerships in Infrastructure: An Essential Guide for Policy Makers* (2011) at 53
[251] Ibid at 55.
[252] Yescombe op cit (n 134) at 54-55.
[253] Delmon op cit (n 250) at 56.
[254] Ibid.
[255] Vinter op cit (n 223) at 9.

Following the receipt of proposals, the contracting authority must evaluate and compare the bids.[256] Bids are evaluated by comparing price or more commonly; they are evaluated using a point system for various aspects of the bid that includes price but also other factors such as the allocation of risk, efficiency and resource quality among others. The process is aided by the fact that the pre-qualification phase will have ensured that only the most suitably qualified bidders have reached this stage, ensuring that bidders who would have inadequate financial capacity due to their sponsors and lenders constraints or inadequate technical capacity due to the its subcontractors are excluded.[257] Award of the contract to a successful bidder project company may only take place once the four stages of the PPP procurement process have been concluded.

2.4.1.3 Types of PPP

While the predominant focus thus far has been on the concession model of PPP project finance transactions, it should be noted that this is certainly not the only type of PPP model. The model employed depends largely on the project risks and varies in its degrees of sophistication.

In the build-operate-transfer (BOT) or build-own-operate-transfer (BOOT) models, the private sector party project company incorporated by the project sponsors takes responsibility for building, operating and managing infrastructure asset. The project is government led in that it is the contracting authority that designs or conceptualises the project and project company bids to build and operate the infrastructure. The project is owned by the project company for a stipulated period after which the ownership of the asset is transferred to the public sector entity.[258] In this model, private sector project sponsors arrange the necessary financing for the project through equity contributions and loans from project lenders. The public sector contracting authority adopts no direct risk other than the possibility that the infrastructure might not meet its need or that the terms of the concession might not be favourable.[259]

In the design-build-finance-operate (DBFO) model the private sector party, usually a consortium of firms consisting of private partners, facilities managers, banks investors, MDB

[256] Ibid at 56.
[257] Ibid.
[258] E. Iossa et al, 'Contract Design in Public Private Partnerships', *Report Prepared for the World Bank* (2007) available at https://www.researchgate.net/profile/Elisabetta_Iossa/publication/327285899_Contract_Design_in_Public-Private_Partnerships_Report (accessed 13 November 2020) at 26.
[259] R. Akbiyikli and D. Eatonat, 'A comparison of PFI, BOT, BOO and BOOT procurement routes for infrastructure construction projects' (2005) Conference paper, *University of Salford: Research Institute for Built and Human Environment*, Salford available at https://edisciplinas.usp.br/pluginfile.php/5564875/mod_resource/content/1/Formas%20de%20contrata%C3%A7%C3%A3o.pdf (accessed 13 November 2020) at 506.

lenders and suppliers, is in charge of all stages of the project through a specially incorporated project company.[260] The inclusion of project design allows the consortium to conceptualise the project from the outset, manage risk accordingly and assess long-term operational efficacy of the project during its lifespan.[261] This is beneficial to the public in that there are no up-front payments from the government contracting authority as all design and build expenses are borne by the private sector and through the debt and equity financing made available through the project finance structure.[262] As Iossa indicates, and as recognised throughout on in this chapter, there are two different types of DBFO model: Firstly, there are financially free standing projects, such as concession contracts, where the private-sector party's primary source of income is constituted by user fees typically borne by the public – such as toll roads. The operation of this was traversed as the predominant focus of this chapter. Secondly, the PFI project model, where the private-sector party predominantly sells the service to the public-sector contracting authority – such as in the case of social infrastructure.[263]

2.5 MDB participation in PPPs – a case study from developing countries

A review of the key role players, the contract structure as well as the specific legal mechanics of the PPP model of infrastructure project finance transactions crystallises the importance of a project lender. This is only further underscored when examining the relatively unique position which MDBs occupy when they form part of the syndicate of lenders in project finance transactions in which project companies tender for government infrastructure development projects. Large-scale infrastructure projects have substantial impact on the living conditions where they are executed and MDBs hold considerable influence in ensuring that projects are successful through the financing and support they provide.[264] This much has been highlighted in the preceding sections. However, MDB involvement in projects may also occasion certain negative consequences. These organisations' influence is directly derived from their participation in the loan agreement with the project company and its sponsors. More specifically, the loan conditions that MDBs may impose on the project company contracting with the government or government entity as well as the manner in which MDB lenders exercise their rights and obligations recorded in the loan agreement.[265]

[260] Iossa op cit (n 258) at 25-26.
[261] Ibid.
[262] Akbiyikli and Eatonat op cit (n 259) at 511.
[263] Iossa op cit (n 258) at 25-26.
[264] N. Hachez and J. Wouters, 'A responsible lender? The European Investment Bank's environmental, social and human rights accountability' (2012) 49 *Common Market Law Review* 47 at 48.
[265] Ibid.

Hachez and Wouters have recognised that investments in large-scale projects often require careful oversight as they frequently involve resettlement of local populations, transformation of indigenous lands, deforestation, pollution, employment of labour for heavy industrial tasks and cooperation with entities and governments that have poor records on human rights and protecting other democratic norms.[266] This far-reaching impact has led to calls for increased accountability for MDBs' financing practices where their actions impact human rights and have broader social and environmental effects, particularly in light of certain projects that have harmed local populations and the environment.[267] What follows is a case study that demonstrates the practicalities of a PPP project-financed transactions and the central role that MDBs play in infrastructure projects.

2.5.1 Rift Valley Railways in Kenya and Uganda

The origins of the Kenya-Uganda railway network may be traced to the late twentieth century.[268] By 2005, the railway network encompassed over 2000km of tracks linking the city of Kampala in Uganda to the city of Mombasa in Kenya and was publicly managed, operated and maintained by joint operation of the Uganda Railways Corporation and the Kenyan Railways Corporation.[269] After decades of poor maintenance and underinvestment the railways were in dire need of refurbishment and expansion to meet the increasing needs to transport passengers and commodities and as a result, in 2006 the Rift Valley Railways Consortium, led by a private company, was awarded a 25-year concession to refurbish, expand, operate and maintain the state-owned railway lines.[270] The concession was ground-breaking in that it was the first multi-national concession of rail infrastructure on the African continent to a fully private concessionaire.[271]

The project was led by the respective governments of Kenya and Uganda. The Kenyan government initially commissioned the IFC to provide advisory services during the project's development stage and the IFC's pre-development studies on the project's viability ultimately culminated in the Kenyan and Ugandan governments deciding to proceed by way of a joint concession.[272] At its initial stages, the project seemed to garner a significant degree of interest

[266] Ibid.
[267] Ibid.
[268] E. Mutambatsere et al., 'What role for Multilateral Development Banks in Project Finance? Some thoughts from the Rift Valley Railways in Kenya and Uganda' (2013) 5(1) *Journal of Infrastructure Development* 1 at 2.
[269] Ibid.
[270] Ibid.
[271] Ibid.
[272] Ibid at 5.

from private investors and ahead of the governments' publication of the RFQ in 2004 around eight private firms had expressed interest in the concession. However, by the time the project reached bid submission stage in September 2005, only two firms submitted bids as most other interested firms were discouraged by the governments' position on tax breaks and the relatively small growth market for the railway. Following RFQ stage the Rift Valley Railways (RVR) consortium, led by private investor Sheltam (Pty) Ltd – a prominent private railway company, was ultimately the successful bidder for the project. RVR was an SPV consortium that, in addition to Sheltam, included a number of established private sponsors with experience in the railway projects on the continent and, at the time of bidding, was also able to demonstrate that it had secured commitments from similarly experienced construction and logistics contractors and lenders that included well-established private banks.[273]

The project was beset with a number of problems prior to reaching financial close. On the eve of the signature of the concession agreement with the governments, Sheltam announced that it had lost support of one of its main construction contractors and it also lost the support of one of its leading private bank lenders.[274] As a result, the IFC together with the project's other advisory firms stepped in and provided additional financing and ultimately, through a concerted effort, ensured that the concession was ultimately awarded to RVR.[275]

The issues did not however end once the project reached financial close and was awarded. The concession agreement for the project projected the volume of goods and services transported on the railway were expected to grow by 12 to 15 percent in the first five years of operation. Moreover, the project was expected to capture at least 42 percent of the market. However, due to Sheltam's poor management of RVR, and specifically the lead sponsor tasked with guiding and managing the project's execution, these targets were never met. Furthermore, in addition to failing to meet its concession targets, RVR reneged on its other contractual obligations under the concession – Sheltam, the lead sponsor, made none of the capital injections it was obliged to by the second year of the concession while the funds that were provided by the Lenders were misdirected to cover salaries of the RVR's employees rather than as capital injections for the project's construction.[276]

[273] Ibid at 8.
[274] Ibid.
[275] Ibid.
[276] Ibid at 9.

The project's mismanagement had a plethora of negative consequential effects. Locomotive speed was drastically reduced due to poor railway maintenance, average travel time from Mombasa to Kampala doubled from 14 days to 28 days and locomotive availability and railway track availability plummeted.[277] By 2008, the project had accumulated millions of US dollars in debt and project lenders, including the IFC, suspended disbursements as the project company repeatedly failed to meet conditions precedent such as mandatory adherence to the project's environmental and social action plans, accounting for project assets and payment of the requisite concession fees. By 2010 relations between lenders, sponsors and the contracting government authority had deteriorated. The project was beset with a host of legal challenges from shareholders and other interested parties. Ultimately it was only pursuant to IFC arbitration that lenders and responsible government authorities were able to compel RVR to relinquish its leading stake in the project and bring in new shareholders in the project company.[278] It was only by 2011 that RVR reached a degree of stability through a workable restructured shareholding, clearing its financial obligations to the contracting authority, implementing a revised business plan.[279]

The critical role of the MDB lending partner in this project cannot be understated. At the initial stages of the project, Mutambatsere recognises that the MDB partner's involvement in this project resulted in the achievement of the following four aims:[280] First, it was able to do the groundwork necessary to promote private sector participation in the running of the railway lines. Secondly, it was able to conduct and finance project preparation activities and regulatory reforms. Third, it was able to perform the more nebulous but often critical political and social advocacy work necessary for convergence of views across the affected countries on the details of the concession agreements. Finally, the MDB partner was ultimately able to provide credit enhancement facilities to make the transaction profitable and attractive to private commercial partners.[281]

With regard to the project's restructuring, many of the long-term risks during the restructuring were only made palatable to private sector sponsors as a result of the involvement of MDBs. The Bank's IDA took the lead by providing partial risk guarantees to the new sponsors for aspects of the project. The IDA's involvement was a direct result of the IFC's involvement as

[277] Ibid at 9-10.
[278] Ibid at 11-12.
[279] Ibid.
[280] Ibid at 14.
[281] Ibid.

a project advisor. The IDA's guarantees included guarantees to pay for the project's assets which the contracting authority was to acquire from the project company at the end of the project lifespan pursuant to government compensating the project company.[282] However, other MDBs involved in the project as lenders during the restructuring phase included the AfDB, the Netherlands Development Finance Company as well as the Belgian Investment Company for Developing Countries, all of whom were primarily involved as project lenders but also played the role of brokers in resolving outstanding issues such as social safeguards which included engaging with local communities on their challenges.[283]

The Rift Valley Railways case highlights not only some of the challenges that frequently beset infrastructure PPPs, but also the unique position that MDB lenders occupy in PPP projects. As previously indicated, MDBs often transcend the role of lenders like private commercial banks as a result of their developmental obligations and their special relationship with the governments of the countries in which infrastructure projects are executed. In the Rift Valley Railways case study, the extensive role of the Bank Group's multiple arms in bringing the project to financial close and ensuring its successful operation thereafter was highlighted. So too was the role of other MDB lenders such as the AfDB.

Ultimately, it is the unique position MDB lenders find themselves in PPP projects that warrants further examination of the common challenges they face, particularly around accountability. In this regard, the legal and regulatory regimes which govern accountability as well as the administrative laws applicable to PPP projects must be considered, In Chapter Three, this study will examine the issues that within MDB funded projects arrangements, particularly those around accountability. This will include consideration of the legal status of the instruments MDBs employ when they are involved in financing infrastructure projects, need for enhanced accountability at international level, and the framework within which global administrative law may apply to the operation of MDBs.

[282] Ibid at 13.
[283] Ibid at 14.

CHAPTER THREE
Financing Infrastructure at MDBs: The Legal Instruments, International Law and the need for Accountability

3.1 Introduction

The examination of the specific aspects of the PPP project finance model, coupled with the foregoing review of the broader structure and operation of project-financed transactions, demonstrates how these transactions are complex, multifaceted, and wrought with a myriad of junctures at which consequential decision-making must inevitably take place. Decisions are made by a host of parties critical to the project finance transaction - it includes the domestic contracting authorities such as government departments and state-owned companies procuring the infrastructure, as well as the project company's private sponsors and the MDB lenders. Each one of the key role players has varying degrees of decision-making power at various stages of the project that not only impacts on a variety of considerations such as where the project may be situated or the manner in which it will be operated and maintained, but also aspects of the project's overarching contract and finance structure.

Each of these aspects either directly or indirectly impacts on the rights and obligations of a host of affected stakeholders. MDB loan conditions may affect sponsors' rights or a contracting authority's legal obligations. Conversely, sponsors' decisions on aspects like the project company's sub-contracts or the execution of a particular project may have adverse consequences for MDB lenders. Similarly, both sponsor and lender decisions may impact on the contracting authority and, in the project's execution, the local communities in which the infrastructure projects are situated. The broader contractual scheme, encompassing the project, finance, and security documents as described in Chapter Two, is necessarily affected by the rights, obligations and decision-making power that MDBs possess.

At the outset of this thesis, it was noted that one of the core questions that this thesis will aim to answer is whether global administrative laws have any role to play in MDBs' decision-making processes when they fund infrastructure. In answering this, it was noted that what must be considered is whether there are any specific contractual, regulatory or legal mechanisms within the existing regime governing MDBs' infrastructure financing projects that speak to enhancing accountability, fairness, transparency, reasonableness and rationality for stakeholders adversely affected by the decision-making process of MDBs.

In order to interrogate the issues and influence of MDB involvement and in order to answer the aforementioned core question, the legal status of the instruments MDBs employ when they are involved in financing infrastructure projects must be examined. This will primarily be done through the prism of the MDB loan agreement. Accordingly, the chapter will commence with an analysis of the legal status of MDB loan agreements, which are the cornerstone of their participation in infrastructure projects. It will situate these agreements in their broader international law context and specifically focus on legal issues around interpretation, enforcement and dispute resolution. The chapter will then examine accountability – both as a core principle in the international legal and regulatory regimes that govern developmental infrastructure financing within MDBs and as a seminal touchstone for global administrative law. The chapter will analyse the need for enhanced accountability at international-level and the impact that accountability issues have on the rights and obligations of the state actors, private commercial entities and other stakeholders involved in infrastructure development projects.

Finally, the chapter aims to begin to introduce the framework within which global administrative law applies to the operation of MDB financing through an examination of the legal basis for holding MDBs accountable when they fund infrastructure projects. It will introduce some of the foundational aspects of where global administrative law may find application in the accountability mechanisms that operate at MDBs.

3.2 The legal status of MDB loan agreements

In Chapter One, this study highlighted the role MDBs play more generally in the international arena and emphasised the critical function they fulfil by funding infrastructure projects, particularly in so far as these projects align with the developmental mandates set out in their founding documents. As Gurara has noted,[284] while the largest share of lending to developing countries is provided by the private sector, international financial institutions like MDBs are critical actors in development finance, especially in light of heightened international commitments to financing infrastructure development such as those contained in the UN's 2030 Agenda for Sustainable Development.[285]

[284] D. Gurara et al., 'Borrowing costs and the role of multilateral development banks: Evidence from cross-border syndicated bank lending' (2020) 100 *Journal of International Money and Finance* 102090 at 1-2

[285] *Transforming Our World: The 2030 Agenda for Sustainable Development*, A/RES/70/1, United Nations General Assembly, 70th session (2015).

In Chapter Two, the study demonstrated the unique role which MDBs occupy when they participate in funding infrastructure projects via project financed PPP transactions – among others, MDBs' involvement in cross-border syndicated lending for PPP projects can be a signpost to other investors on the potential profitability of projects.[286] As Yescombe notes, MDB participation may provide comfort to private sector actors in high risk infrastructure projects in developing countries that would otherwise struggle to find funding.[287]

Evidently, the primary mechanism that MDBs employ to provide funding to the governments of developing countries or other institutions that qualify is through the provision of loans. These loans generally take two forms: A/B loans or parallel loans. In A/B loans, the MDB acts as the lead arranger, holding a portion of the loan for its own account (the "A loan") and then invites external participants to cover the remaining portions (the "B loan") under a single loan agreement. In parallel loans, the MDB and other lenders each conclude separate loan agreements with a particular borrower. Of the projects in which MDBs participate, A/B loans are the predominant format which MDBs employ for loan financing.[288] These loans are typically provided on either market-based terms or non-market-based terms - more commonly referred to as non-concessionary or concessionary terms, respectively - and are provided pursuant to a loan agreement instrument being entered into between the MDB and the recipient government, its agency or a private borrower such as a project company, where permissible and in the manner prescribed by the MDB's founding documents.[289] As is the case in any agreement for the provision of credit, a loan agreement will contain all the typical *essentialia* such as the amount of the loan, the purpose for which the loan is extended, the terms of repayment such as the pace and currency, as well as the interest rate to be applied to the loan.[290]

MDB loan agreements issued for the provision of funds are regarded as treaties and, as Williams-Elegbe notes, "a treaty is simply an agreement under international law entered into by international actors".[291] However, the benchmark for what constitutes a treaty is certainly not as straightforward as the aforementioned definition. She notes that there are a number of considerations that complicate this definition and directly impact on the interpretation and enforceability of MDB loan agreements. A seminal starting point in this regard is the definition

[286] D. Gurara et al. op cit (n 284) 1-2.
[287] Yescombe op cit (n 134) at 463-464.
[288] Ibid at 3.
[289] Williams-Elegbe op cit (n 242) at 39.
[290] Ibid.
[291] Ibid.

found in the Vienna Convention on the Law of Treaties[292] (the 'Vienna Convention') which, at Article 2(1)(a), defines 'treaty' as:

> *"…an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."*

Challenges arise when considering this definition together with what Scott identifies in his study on the enforceability of loan agreements of the Bank.[293] He notes that since the inception of the Bank and its loan operations, a significant part of its loan disbursements has been made to agencies of member states or private companies in member countries' territories. In each case, with the member country only providing a guarantee for the financial commitment.[294] Notionally, the definition set out in the Vienna Convention precludes loan agreements entered into between MDBs and agencies of member states or private companies in member countries' territories involved in project financed infrastructure transactions. However, Article 3 of the Vienna Convention states as follows:

> *"The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:*
>
> *(a) The legal force of such agreements;*
>
> *(b) The application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;*
>
> *(c) The application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties."*

The expansive definition in the Vienna Convention addresses aspects of the definitional challenges identified by Scott but also highlighted by authors like Klabbers[295] and Hollis,[296]

[292] The Vienna Convention on the Law of Treaties concluded at Vienna on 23 May 1969, 27 January 1980, 18232 UNTS 332.
[293] H. N. Scott, 'The Enforceability of Loan Agreements Between the World Bank and its Member Countries' (1964) 13(2) *American University Law Review* 185 at 186.
[294] Ibid.
[295] J. Klabbers, *The Concept of Treaty in International Law*, (1996) at 8 – 9.
[296] D. B. Hollis, 'Defining Treaties' in D. B. Hollis (ed) *The Oxford Guide to Treaties* (2012) at 11.

who have recognised that there are other manners in which international legal rights and obligations may be created in international law. This requires that any definition or criteria applied to what may be afforded the legal status of 'treaty' must operate by including consideration of more expansive factors.

Hollis notes that this is necessary as there are significant consequences which flow from affording an international agreement treaty status.[297] First, it requires a separate set of rules and procedures for enforcing an agreement. Second, the creation of obligations in international law warrants consideration of how a breach is identified and whether there are rights of recourse for affected parties. Finally, it necessitates consideration of whether or not a particular agreement should in fact be afforded status as a source of international law.[298] Importantly, the relevance of affording a loan agreement treaty status is equally relevant at domestic-level as the agreement's status has a direct impact the operation and enforcement of the agreement within national legal orders.[299] Cumulatively these considerations all have a bearing on the potential recourse that may avail to stakeholders – both those party to the infrastructure financing transaction and the non-contracting stakeholders such as the citizens that may be adversely affected by the infrastructure project.

The assertion that MDB loan agreements are subject to and part of international law has a long history. In 1959 the General Counsel of the Bank was among the earliest to make this argument.[300] International personality, such as that which MDBs possess, carries inherent treaty-making capacity. The treaty-making capacity or authority of MDBs is predominantly sourced in their founding instruments or articles of agreement. These instruments curtail the scope of MDBs' power by prescribing purposes and functions in terms of which they are compelled to operate.[301] As demonstrated in the first chapter of this thesis, these purposes and functions are generally limited to developmental aims and in some instances, may be prescribed even further by the limited regional operation of some MDBs. There are yet further limitations, as Broche notes, in that the treaty-making power of MDBs may also be developed by their historic practices.[302]

[297] Ibid at 13 – 14.
[298] Ibid.
[299] Ibid.
[300] Williams-Elegbe op cit (n 242) at 40.
[301] A. Broche, *Selected Essays: World Bank, ICSID and other Subjects of Public and Private International Law* (1995) at 29.
[302] Ibid.

The international status of MDB loan agreements has a further consequence that should be acknowledged: MDB financing has an impact on the broader legal obligations of state actors that request and accept financing for infrastructure projects. One impact that cannot be ignored is the public procurement demands which MDBs generally impose as conditions of their finance. The Bank and other development banks like the NDB implement procurement conditionalities through the use of guidelines and standard bidding documents when extending finance to projects.[303] This has a direct bearing on project-financed transactions for infrastructure which may employ the PPP model.

The intersection between the international law treaty-making powers which MDBs' have, the loan agreements they employ when they finance developmental infrastructure projects, and conditionalities attached to those loans necessitates a deeper consideration of select aspects of the legal status of those MDB loan agreements. This is particularly relevant in so far as it impacts whether and to what extent global administrative law finds application within the infrastructure financing processes of MDBs. In this regard, the manner in which MDB loan agreements are interpreted and enforced, and the operation of their dispute resolution mechanisms are all relevant and will be considered in the subsequent section. Notably, guidelines, standardised terms and any relevant loan conditions which MDBs apply will be examined in so far as they impact on state actors' broader legal obligations when implementing infrastructure development projects and the international nature of MDBs obligations to contracting parties and affected stakeholders such as the local communities affected by projects.

3.2.1 Interpretation and Enforcement

One of the primary considerations to be interrogated is how MDB loan agreements and the decisions and conduct that flow from those loan agreements are to be interpreted and enforced. Whether these agreements and MDBs' related decisions conduct are considered to be interpreted and enforced in accordance with the rules and principles of international or domestic legal schemes is relevant. Broche argues that MDB loan agreements may be directly governed by international law in so far as their conclusion, validity, force, effect, application, execution, interpretation and termination are concerned. However, he also argues that it is certainly possible for loan agreements to be concluded in instances where none of these elements is governed by international law through the parties' agreement.[304] Arrowsmith *et al*

[303] Arrowsmith et al., *Regulating Public Procurement: National and International Perspectives* (2000) at 111.
[304] Ibid at 31.

acknowledge that the predominant approach of the Bank and other MDBs is that loan agreements are structured in a manner that precludes the operation of the domestic laws of the borrower by agreement of the parties.[305]

The former approach is generally adopted where an MDB lends directly to a state actor – in such instances the loan agreement entered into between the state and the MDB is considered a treaty contract governed by international law.[306] However, the latter approach is more commonly adopted where, for example, MDBs provide loans to state enterprises or private commercial entities such as project companies in project-financed transactions. In such instances, the loan agreement may not necessarily be considered a treaty contract but rather be comparable to loan agreements between private parties.[307] In such instances, by electing to include "choice of law" provisions in MDB loan agreements, the parties tend to agree to exclude the operation of a particular domestic law[308] and thus place the agreements outside of the ambit of international law, as Broche has argued is possible.[309] The practical effect of such a configuration is that it is often the case that the MDB and the state enterprise or private sector entity will have agreed that the rights and obligations of the parties are valid and enforceable only in accordance with the terms and conditions of the loan agreement itself notwithstanding the applicability of any domestic law to the contrary.[310]

The configurations described above for MDB loan agreements with state entities or private entities are certainly not the only options. The MDB and state actor may agree to specify that the agreement is to be interpreted and enforceable in accordance with the domestic laws of a jurisdiction other than the one in which the project is being executed.[311] Or, as a further alternative, the parties may even agree to opt for a hybrid where only some aspects of the agreement are governed by domestic law, while other aspects remain governed by international law, thus affording the parties the option of having the loan agreement retain its character as a treaty contract, albeit only in part.[312]

Regardless of the elected configuration, of relevance for present purposes is that in those instances where loan agreements retain their status as treaty contracts, there are a number of

[305] Arrowsmith et al. op cit (n 303) at 113.
[306] Ibid.
[307] Williams-Elegbe op cit (n 242) at 40.
[308] Arrowsmith et al. op cit (n 303) at 113.
[309] Broche op cit (n 301) at 29.
[310] Ibid.
[311] Ibid.
[312] Ibid at 31.

further consequences that have bearing on loan agreements' interpretation and enforcement. Mahoney has identified that while the text of the treaty contract document is critical to determining the scope of the agreement between the lender and borrower, it is not entirely dispositive and extraneous information may be admitted in the interpretation of the contract.[313] This is particularly relevant in the context of MDB-funded infrastructure development projects and the broader context in which these projects are implemented, especially in so far as there are international legal instruments on development which may find application in the transaction. For present purposes however, the focus remains on the predominant configuration described by Arrowsmith *et al* and the various hybrids: that is, that MDB loan agreements are typically subject to international law and may not automatically be overridden by domestic law.

The predominant configuration may be exemplified in the context of the Bank with reference to section 8.01 of Article VIII of the bank's General Conditions for IBRD Financing,[314] which states as follows:

> *"The rights and obligations of the Bank and the Loan Parties under the Legal Agreements shall be valid and enforceable in accordance with their terms notwithstanding the law of any state or political subdivision thereof to the contrary. Neither the Bank nor any Loan Party shall be entitled in any proceeding under this Article to assert any claim that any provision of the Legal Agreements is invalid or unenforceable because of any provision of the Articles of Agreement of the Bank."*[315]

The Bank is certainly not alone in adopting this approach and, among others, it has been echoed by the BRICS bloc's MDB - at article 22 of the Articles of Agreement on the NDB, it states:

> *"In the case of loans made, participated in, or guaranteed by the Bank and equity investments, the contract shall establish the terms and conditions for the loan, guarantee or equity investment concerned in accordance with the policies established by the Board of Directors, including, as the case may be, those*

[313] C. J. Mahoney, 'Treaties as Contracts: Textualism, Contract Theory and the Interpretation of Treaties' (2007) 116(4) *Yale Law Journal* 824 at 826.
[314] Williams-Elegbe op cit (n 242) at 40.
[315] The International Bank for Reconstruction and Development, *General Conditions for IBRD Financing*: Investment Project Financing (14 December 2018) available at https://ppfdocuments.azureedge.net/710bb30a-16be-46e5-9695-c7176db21d55.pdf (accessed 25 November 2020)

relating to payment of principal, interest and other fees, charges, commissions, maturities, currency and dates of payment in respect of the loan, guarantee or equity investment, in accordance with the policies of the Bank. In setting such policies, the Board of Directors shall take fully into account the need to safeguard its income."[316]

This should be read with the provisions of Article 30(b) of the NDB's Articles of Agreement which precludes "…any member, or by any agency or instrumentality of a member, or by any entity or person directly or indirectly acting for or deriving claims from a member or from any agency or instrumentality of a member*"* from instituting legal action against the bank. As an alternative to this recourse mechanism, Article 30(b) of the NDB's Articles of Agreement prescribes that members "…shall only have recourse to such special procedures for the settlement of controversies between the Bank and its members as may be prescribed in the bank's [Articles of] Agreement, in the by-laws and regulations of the Bank, or in contracts entered into with the Bank."[317]

The legal relevance of these configurations for the Bank and other MDBs such as the NDB cannot be understated. This study has already highlighted the relatively complex legal structure which accompanies PPP project-financed infrastructure transactions in developing countries. Mettala emphasises that from a lender's perspective this structure primarily serves to reduce exposure to risk.[318] In the case of a PPP project-financed transaction, the concession agreement lies at the heart of most projects and, while the lender is not a party to the concession agreement, the terms and conditions of the concession agreement nevertheless forms the basis of the lenders' assessment of their exposure to the risks associated with the project.[319]

The MDB lenders' risk assessments on concession agreements and other aspects of the project directly impacts on the terms of the MDB loan agreement and the nature and extent of a given MDB's broader participation in the transaction. This is a consequence of the interconnected nature of project finance transactions. The risks which MDBs assess typically includes the commercial contractual risks such as limitations on the extent of the project company's exclusive rights to the project or the time period the concession is

[316] Articles of Agreement on the New Development Bank op cit (n 73).
[317] Ibid.
[318] A. Mettala, 'Governing Law Clauses of Loan Agreements in International Project Finance' (1986) 20(1) *The International Lawyer* 219 at 221
[319] Ibid.

expected to run and whether this will end before or after the project debt is expected to be repaid.[320] However, it also includes a number of broader legal and socio-economic risks attached to executing the project in turbulent domestic environments such as those in developing countries. These legal and socio-economic risks may include those such as the risk of expropriation[321] or, as Iyer and Sagheer identified in their study on the bevy of risks that arise in Indian transport infrastructure PPP projects, the risks associated with actions of an affected local community such as protests, or even the ever-present spectre of procurement-related corruption.[322]

There is evidently an inexorable link between project risks, their impact on the loan agreement, the unique position MDBs occupy in project finance transactions, and the configuration of the loan agreement terms which dictate how the agreement is to be enforced and interpreted.

It has already been acknowledged that the predominant view is that loan agreements of the Bank and other MDBs are typically not subject to the domestic laws of the borrower or, at the very least, this is tempered with a hybrid configuration that allows the agreements to retain their treaty contract status or one which permits the agreement only to be regulated by its own terms and conditions. The critical issue which therefore remains at the centre of the aforementioned matrix of interconnected considerations is whether MDBs, the loan agreements they enter into, the assessments and decisions they take pursuant to that agreement, and their broader involvement in PPP infrastructure projects, should be viewed and interpreted in a manner that excludes the application of states' domestic constitutions or other supreme laws.[323] If this is the case, there is the ancillary, but equally important question of how MDBs should be regulated and held accountable.

The issue of constitutional supremacy in the interpretation and enforcement of MDB loan agreements is particularly relevant to potential recourse which affected stakeholders might have when their rights are adversely impacted by the decisions taken by actors such as the MDB-lenders, private sector borrowers, and the state contracting parties during the infrastructure financing process. Mereiles notes that the approach to be adopted when

[320] Ibid.
[321] Ibid.
[322] K.C. Iyer and M. Sagheer, 'Hierarchical Structuring of PPP Risks Using Interpretative Structural Modeling' (2010) 136(2) *The Journal of Construction Engineering and Management* 151 at 152 – 154.
[323] Williams-Elegbe op cit (n 242) at 41.

examining the relationship between the treaty contracts and the related applicability of domestic constitutional laws is not without doctrinal differences.[324]

Historically, two approaches dominated. Both approaches are exemplified by the countries within the BRICS bloc: one the one hand, in countries like Brazil and Russia, duly ratified treaties automatically have the same rank as national statute law and cannot contradict national constitutional law and principles.[325] On the other hand, in jurisdictions like the United Kingdom, a treaty becomes domestic law only when the national parliament has conferred that status on it by special legislation, though this does not necessarily mean that the UK will not incur international responsibility if it breaches a treaty that has not yet been domesticated. [326] South Africa has a similar position to that of the UK[327] however, this is undercut by a number of caveats in its Constitution. Section 231(3) of the Constitution records that agreements of a technical, administrative or executive nature, or agreements which do not require either ratification or accession entered into by the national executive need not be approved by its national legislature. Furthermore, customary international law and self-executing treaties similarly do not need approval of the national legislature and are automatically deemed to be applicable law unless they are inconsistent with the country's constitution or a domestic law.[328]

In the context of MDB loans for infrastructure projects, the loan agreement's interaction with domestic constitutions most commonly operates as follows: If the constitution of a borrowing country contains principles or prescribes laws that regulates procurement, including rights of recourse such as administrative law rules on the bases and procedures in terms of which affected parties may legally challenge decisions and hold MDBs accountable for harm-causing conduct, then those principles or laws should have priority over the clauses of the MDB loan agreement. Accordingly, a domestic constitution should notionally regulate the decisions or actions an MDB may take during its involvement in the financing process. This regulation may take the form of, among others, prescribing rights around fair procedures for affects stakeholders, or rights around stakeholders' access

[324] M. Meireles, 'The World Bank Procurement Regulations: A critical analysis of the enforcement mechanism of the application of secondary policies in financed projects' (2006) Unpublished doctoral thesis, University of Nottingham at 86.
[325] Ibid.
[326] T. Buergenthal, 'Modern constitutions and human rights treaties' (1998) 36(1-2) *Colombia Journal of Transnational Law* 211 at 213.
[327] See section 231 of the Constitution of the Republic of South Africa.
[328] Section 231(4).

to information. In such cases, where the loan agreement's provisions contradict constitutional law or principles, the loan agreement and conduct of MDB lenders may yield to the demands of the domestic constitutional law of a particular jurisdiction.[329]

The interface between public international law and domestic constitutional law in this context is significant as it bears on the issues of adherence and enforcement for both MDBs as well as the parties to the loan agreements. Parties to a financing transaction for infrastructure necessarily want certainty. MDBs will want to ensure that state actors do not compromise their financial investment in the project by engaging in conduct such as arbitrarily changing laws or making unilateral political decisions to alter payment terms of the loan agreement. Conversely, the state actors party to the transaction will want to ensure that MDBs do not engage in activity that might compromise sovereignty or adversely impact citizens. External stakeholders affected by the transaction such as civil society organisations may want to challenge a decision to implement a particular infrastructure project due to its perceived conflict with or adverse impact on public policy or interests such as environmental or social welfare.[330]

Often, interpretive conflicts and issues of non-adherence are avoided by importing the terms and principles from international instruments to the contractual relationship between the MDB, the project company and the state actor.[331] This includes international instruments such as the Bank's Procurement Guidelines for Investment Project Financing[332] or the NDB's Procurement Policy.[333] As Head states, public international law and its various instruments are "substantial and extensive enough… to serve as the governing law for an MDB's public sector loan and guarantee agreements".[334] Consequently, including public international law principles and provisions in the terms and conditions of MDB loan agreements buttresses parties' enforcement rights by precluding

[329] Meireles op cit (n 324) at 86; Williams-Elegbe op cit (n 242) at 41.
[330] J. W. Head, 'Evolution of governing law for loan agreements of the World Bank' (1996) 90(2) *American Journal of International Law* 214 at 217.
[331] Arrowsmith et al op cit (n 303) at 114; Williams-Elegbe op cit (n 242) at 41.
[332] The World Bank, *Procurement Regulations for Investment Project Financing Borrowers* (2020) available at http://pubdocs.worldbank.org/en/178331533065871195/Procurement-Regulations.pdf (accessed 26 November 2020).
[333] The New Development Bank, *Procurement Policy* (2016) available at https://www.ndb.int/wp-content/uploads/2017/01/Procurement-Policy-20180302.pdf (accessed 26 November 2020).
[334] Head op cit (n 330) at 229.

borrowers, MDB lenders and state actors from claiming that international law and principles should be overridden if they conflict with domestic laws.[335]

On the issue of adherence, the effects of importing such terms are equally important. Parties are compelled to execute the loan agreement and adhere to its terms and conditions in good faith. This is particularly important in the context of infrastructure projects in developing countries as they often have an unstable political climate but, it should be noted, nevertheless remains an incident of the principle of *pacta sunt servanda*.[336] At an international level, Williams-Elegbe notes that the risk is addressed by operation of article 27 of the Vienna Convention which states in part:

> *"A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."*

The operation of this provision applies to borrowers as well as the MDBs, and holds that neither party may rely on its internal regulations to defeat the purpose of a loan agreement. However, not only does it shield MDBs from states which may want to unilaterally amend their loan obligations, but also protects borrowers and states from adverse MDB conduct by precluding MDBs from avoiding due performance by invoking their internal regulations.[337]

Evidently, as Scott has highlighted, delineating clear and effective parameters in terms of which a given MDB's rights, obligations, conduct and accountability are clearly discernible during infrastructure projects is critical.[338] Doing so means that disputes between the MDB and the recipient government, its agency or a private borrower such as a project company may be prevented entirely or, at the very least, mitigated.[339] For affected parties external to the contract structure, the public international nature of MDB involvement together with the application of domestic constitutional laws or other supreme laws, may provide similar recourse mechanisms to launch disputes or challenge decisions or conduct. These recourse or accountability mechanisms will be addressed in greater detail below.

3.2.2 Dispute Resolution

The variety of parties to a project-financed infrastructure development transaction and the unique nature of MDB lenders, borrowers, and state actors as participants in these transactions

[335] Arrowsmith et al op cit (n 303) at 114.
[336] Williams-Elegbe op cit (n 287) at 42.
[337] Scott op it (n 293) at 232; Williams-Elegbe op cit (n 242) at 42.
[338] Scott op cit (n 293) at 232.
[339] Ibid.

necessarily elevates the importance of dispute resolution among the parties to the transaction. For present purposes, dispute resolution refers to those agreed and recorded in the transaction's contract scheme, and which are available to the parties *inter se*. It is relevant and warrants examination not only in relation to how disputes among the contracting parties are dealt with, but also in so far as dispute resolution may impact the rights of recourse available to affected stakeholders outside of the transaction's contract scheme.

Naturally, the manner in which the dispute resolution clauses are designed and operate is of interest to all of the contracting parties. Iossa notes that dispute resolution mitigates potential risks which the project sponsors and MDB lenders may face in relation to the project, particularly for risks such as changes in the domestic laws or regulations which may impact the project - comprehensive dispute resolution mechanisms may accordingly reduce the cost of capital as a consequence of its impacts on MDB lenders' risk assessment for a given project.[340] With regard to the impact that dispute resolution may have on the public sector party, the efficiency and efficacy of dispute resolution mechanisms is equally significant. An ineffectual and inefficient mechanism could adversely affect continued service delivery which may, in turn, undermine the state actor's broader financial commitments, its obligations to provide critical infrastructure to citizens, and citizens' constitutional rights in instances where the infrastructure being developed is critical, such as energy, water or telecommunications.[341]

In the context of Bank-funded infrastructure projects, where there is a dispute arising from its loan agreements that cannot be settled by agreement between the parties, section 8.04(b) - (c) of Article VIII of the bank's General Conditions for IBRD Financing[342] provides that the dispute shall be submitted to arbitration under the following format:

> *"(b) The parties to such arbitration shall be the Bank on the one side and the Loan Parties on the other side.*
>
> *(c) The Arbitral Tribunal shall consist of three arbitrators appointed as follows: (i) one arbitrator shall be appointed by the Bank; (ii) a second arbitrator shall be appointed by the Loan Parties or, if they do not agree, by the Guarantor; and (iii) the third arbitrator ("Umpire") shall be appointed by agreement of the parties or, if they do not agree, by the President of the International Court of Justice or,*

[340] Iossa op cit (n 258) at 80 – 81.
[341] Ibid.
[342] The International Bank for Reconstruction and Development op cit (n 315)

failing appointment by said President, by the Secretary-General of the United Nations. If either side fails to appoint an arbitrator, such arbitrator shall be appointed by the Umpire."

Similarly, section G(e) of the NDB's Procurement Policy has the following provision:

"Procurement contracts should be structured to settle disputes expeditiously using arbitration processes. To resolve disputes arising from international procurement, the use of international commercial arbitration processes is encouraged. The use of dispute resolution processes such as mediation, review boards and adjudicators (being more time efficient and ensuring confidentiality of the hearing) is encouraged in additional to domestic arbitration to resolve disputes arising out of national procurement..."

The arbitral provisions of both the Bank and the NDB, among others, demonstrate how, taken together, the choice of law or enforceability provisions and the dispute resolution provisions provide a binding and comprehensive system through which MDBs may be subjected to dispute settlement under international law and avoid prolonged and ostensibly higher risk domestic laws and dispute resolution forums.[343] The fact that a breach triggers a dispute resolution process under international law as opposed to domestic dispute resolution processes is a consequence of the legal status of MDB loan agreements being elevated to treaty contract status. Indeed, as Olmstead has submitted, where disputes arise and one of the parties refuses to adhere to the provisions of the agreement, such action may be deemed a breach of an international agreement that occasions recourse to international law remedies.[344]

The practical effect of this is not insignificant. In the absence of a governing law clause specifically compelling parties to submit to a particular domestic legal system, the international-law nature of these agreements necessarily precipitates the use of dispute resolution mechanisms and remedies sourced in international law. In the case of the Bank, in 2005 with support of a host of regional development banks such as the ADB and AfDB, the Bank and FIDIC[345] promulgated a set of contract conditions known as the FIDIC Harmonised Edition of the Construction Contract for Multilateral Development Banks. These contract

[343] C. J. Olmstead, 'Economic Development Loan Agreements – Part I: Public Economic Development Loan Agreements; Choice of Law and Remedy' (1960) 48(3) *California Law Review* 424 at 434.
[344] Ibid.
[345] The Fédération Internationale Des Ingénieurs-Conseils, the international organisation based in Geneva that represents consulting organisations and which is best known as 'FIDIC',

conditions include recourse to dispute review boards, and they are now used as standard in projects funded by most of the world's leading MDBs.[346]

Chapman described dispute review boards at their simplest as "creatures of contract" established by contracting parties and empowered by those parties with jurisdiction to hear disputes in connection with the infrastructure project.[347] There is substantive benefit to using these dispute resolution mechanisms too. Contracts are not always dispositive of the rights, entitlements and obligations that arise during infrastructure projects and, at least for the contracting parties, Chapman notes that a dispute review board may devise solutions that avoids what he terms 'win-lose' situations, as is often the case in formal litigation, whilst keeping within the contractual boundaries.[348] The Bank and other MDBs now rely on dispute review boards as a mandatory and primary mechanism to adjudicate disputes which arise between contractors and borrowers. The marked success of dispute review boards has contributed to both avoiding and resolving disputes in a manner that is cost-effective and efficient.[349] However, recourse to and the efficacy of these boards must be viewed with regard to their limitations. Contracting parties' issues may not always fall within the ambit of the contractually prescribed jurisdiction of these boards. Moreover, while they may be cost effective and efficient, the efficacy of the remedies they are able to provide may remain similarly limited.

With that much being said for dispute resolution mechanisms for the contracting parties, recourse mechanisms for stakeholders not party to the financing contract scheme cannot be ignored. It is trite that MDBs' infrastructure projects have broad impact in the states in which projects are executed. In fact, Bradlow has acknowledged that "de facto, they are often key actors in the policy-making processes of their member states*"* which brings MDBs into contact with non-state actors and citizens in the states that use their services.[350] Despite this, historically there have only been limited ways in which private citizens and non-state stakeholders could seek to hold MDBs accountable for their actions.

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[346] P. H. J. Chapman, 'The Use of Dispute Boards on Major Infrastructure Projects' (2015) 1(3) *Turkish Commercial Law Review* 219 at 222.
[347] P. H. J. Chapman, 'Dispute Boards on Major Infrastructure Projects' (2009) 62 *Management, Procurement and Law* 7 at 7
[348] Chapman op cit (n 346) at 223.
[349] Chapman op cit (n 347) at 7; see also Williams-Elegbe op cit (n 242) at 44.
[350] D. D. Bradlow, 'International Law and the Operations of the International Financial Institutions' in D.D. Bradlow and D. B. Hunter, *International Financial Institutions and International Law* (2010) at 28.

Legally, citizens and non-state actors could only lobby their governments to raise the issue with MDBs' boards of governors and in effect, few governments actually did this. Consequently MDBs were largely unaccountable to non-state actors for the adverse consequences which flowed from their decisions and actions in projects.[351] But this changed in the mid-nineties, MDBs have since made significant strides to enhance accountability for non-state stakeholders who are directly affected but who do not have direct contractual relationship with them.[352] Accordingly, in what remains of this chapter the need for accountability mechanisms available to contracting and non-contracting parties will be examined, with a predominant focus on the latter group. More specifically, I will consider the grounding bases of the role global administrative law plays within these mechanisms and in particular, why accountability or recourse mechanisms are needed. I will also consider the broader legal bases of accountability mechanisms at international organisations like MDBs.

3.3 MDBs and international accountability mechanisms for affected stakeholders

The questions of why and how MDBs are held accountable in the context of financing developmental infrastructure is central to this study. Accordingly, the legal and regulatory issues which arise when affected stakeholders hold MDBs to account and the legal mechanisms and principles governing the resolution of those issues are critical. Before the mid-nineties MDBs had always been subject to a degree of accountability. However, prior to 1993 this was limited to MDBs being held to account for their actions by their shareholders and in all cases at the time, those shareholders were the governments that provided the working capital to the banks for their lending and developmental activities.[353] The very limited nature of this accountability is the underlying basis for why the establishment of formal accountability mechanisms at MDBs may be considered a landmark development.

The first of these accountability mechanisms was the Bank's accountability mechanism. Others were subsequently established at regional MDBs – these include the AfDB's Independent Review Mechanism, the ADB's Accountability Mechanism and the IADB's Independent

[351] Ibid.
[352] Bradlow op cit (n 350) at 28.
[353] R. E. Bissell and S. Nanwani, 'Multilateral Development Bank Accountability Mechanisms: Developments and Challenges' (2009) 3(2) *Central European Journal of International & Security Studies* 154 at 154.

Investigation Mechanism, among others.[354] While the practical operation of these accountability mechanisms will be examined in greater detail in Chapter Four, it is important to first understand why there is a need for substantive recourse to formal accountability mechanisms at MDBs and the legal foundations of these mechanisms.

MDB accountability mechanisms were formed to fulfil one predominant purpose: stakeholders such as the citizens affected by infrastructure projects who allege they have been harmed by adverse conduct or decisions, or whose rights have been infringed, or who are threatened with harm because of an MDB's failure to comply with its own policies and procedures in an operation in their country, should have recourse to mechanisms to hold MDBs to account.[355] The justification for this is well established. The developmental role of international organisations like MDBs and the wide-range of activities that they participate in across a number or areas of international life has occasioned a commensurate expansion of accountability for their actions to the non-state stakeholders affected by their actions.[356] Suzuki and Nanwani recognise that stakeholders include citizens individually and in groups but also, more broadly, civil society organisations, transnational corporations, minorities and indigenous peoples, all of whom are "claiming their particular legal positions within the ambit of international law".[357]

While MDBs have made significant strides since the mid-nineties to enhance accountability to stakeholders through the establishment of formal accountability mechanisms, it has been noted that their operation and effectiveness are at times limited.[358] There have been drastic changes in domestic and international social, political, environmental, and economic environments compared to when institutions like the Bank were first created. MDBs, as subjects of international law, are now compelled to determine how best to comply with all applicable international legal requirements – applying customary international law, complying with the domestic laws in the countries in which they fund and execute projects, and adhering to the prescripts of their respective articles of agreement, their internal policies, and the precedents of their historical practices.[359] In many instances, these international legal prescripts are

[354] See D. D. Bradlow, 'Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions' (2005) 36(2) *Georgetown Journal of International Law* 403.
[355] Bradlow op cit (n 350) at 28.
[356] E. Suzuki and S. Nanwani, 'Responsibility of International Organisations: The Accountability Mechanisms of Multilateral Development Banks' (2005) 27(1) *Michigan Journal of International Law* 177 at 180.
[357] Ibid.
[358] Bradlow, op cit (n 350) at 29 - 30.
[359] Ibid.

nebulous and when MDBs are faced with interpreting, adhering to, and enforcing these prescripts when they make decisions in the course of conducting their financing operations, they have a significant degree of autonomy.

Importantly, since the interpretation, implementation, and enforcement of these prescripts implicates significant, complex and often unsettled legal issues at international and domestic levels, it cannot be ignored that other international bodies often look to MDBs to establish precedent on how to handle these issues. As Bradlow notes, MDBs have become "relevant and active creators" of international law.[360] In this regard, the accountability mechanisms that MDBs are subjected to are at the forefront of the development of international law and, as such, considering the mechanisms they employ and the issues they deal with is important.

3.3.1 The need for enhanced accountability in projects in developing countries

MDB-funded infrastructure projects in developing countries and, more particularly, those which are funded using arrangements such as PPP project finance face unique challenges. Jandhyala has noted that historically MDBs have engaged directly with states to finance developmental projects and in so doing, they commonly have a direct influence on state behaviour as governments adopt policies and alter their regulatory environments "in response to multilateral coercive and legitimation pressures".[361] However, MDBs have pivoted to an alternative approach to achieve their developmental objectives by aligning, partnering, and working directly with non-state actors such as private commercial firms on projects. This has created a complex matrix of state and non-state actors, each subject to different legal obligations, regulation and governance.[362] Accordingly, the need for accountability remains central and the significance of this in the relations between MDBs and non-state actors is best demonstrated by examining MDB-funded infrastructure projects in developing countries and the issues that have arisen during these projects.

This study has previously highlighted the significant and complex financial and risk motivations which compel governments to select funding models such as the PPP project finance model when developing infrastructure. In the case of concessions, these infrastructure projects are capital intensive and require substantial up-front costs which are typically born by

[360] Ibid.
[361] S. Jandhyala, 'International Organisations and Political Risk: The case of Multilateral Development Banks in Infrastructure Projects' (2016) Research Paper, *The World Bank* available at https://ppi.worldbank.org/content/dam/PPI/resources/ppi_publication/global/The-case-of-multilateral-development-banks-by-Jandhyala2016.pdf (accessed 8 December 2020) at 2.
[362] Ibid.

the sponsors, such as the private sector investors, and the lenders such as MDBs. Moreover, the very nature of these infrastructure assets tends to be such that they are illiquid and indivisible, limiting their financial attractiveness for resale on a secondary market[363] and, in any event, the infrastructure is often of a nature which prohibits this in any event due to the public function they serve.

As noted, the hallmark of these infrastructure projects is that they are run using long-term concession contracts, that they generate stable and predictable cashflows, and that they tend to demonstrate low costs fluctuations in maintenance and operation. The interests of non-state actors, private investors, MDB lenders and governments often diverge in these projects and, at various stages of a given project, each party uses whatever leverage is available to it to favour its own interests. Private parties and lenders might leverage contract funding and terms, while governments might seek to amend laws, regulations or policies which influence projects[364] while citizens and civil society organisations may use the levers at their disposal such as resisting user-charges that may be associated with the project.[365] Each of these puts the project at risk and impacts project cash flows, and may lead to project completion delays or cancellation of projects entirely, consequences which adversely impact contracting parties and external stakeholders alike.[366] However, for stakeholders not party to financing transactions these risks may be particularly acute and have a human rights impact where the infrastructure project concerns critical infrastructure in areas such as healthcare, energy, transport or water and sanitation.

The adverse human rights impact and the need for accountability mechanisms to manage and mitigate these risks for affected stakeholders affected by MDB conduct or decisions during the infrastructure financing and development process are exemplified in projects that have been implemented in the developing countries in the BRICS bloc.

In India, Ramamurti and Doh have described how a US$2 billion energy concession project that was to be concluded with Enron, a multinational energy conglomerate, was cancelled by a new state government within a year of signing the concession agreement.[367]

[363] Ibid at 8
[364] Ibid.
[365] C. Chen et al., 'When Public Private Partnerships Fail' (2013) 15(6) *Public Management Review* 839 at 844.
[366] Jandhyala op cit (n 360) at 8.
[367] R. Ramamurti & J. P. Doh, 'Rethinking foreign infrastructure investment in developing countries' (2004) 39 *The Journal of World Business* 151 at 157.

In Brazil the Linha Amarela expressway toll-road concession project was intended to connect a residential area of Rio de Janeiro with the City's downtown area, but the project was beset with a host of legal challenges. Most of the challenges centred on the conduct of a new political administration's dissatisfaction with toll-rates – an issue which ultimately led to unilateral government action to reduce toll charges by over 15% with the contracting authority alleging the concessionaire failed to fulfil its contractual commitments.[368]

In South Africa, at the end of 2016, political equivocation on commitments to transition to making use of more renewable energy sources resulted in the country's state-owned power utility refusing to conclude power purchase agreements which would have permitted the South African government to purchase electricity from renewable energy infrastructure projects.[369] However, the adverse conduct of the contracting authority was not the only project risk - challenges were exacerbated by pressure from coal lobby groups and workers unions. Nevertheless, following a vociferous lobbying from opposition political parties and public interest organisations, the South African government eventually undertook to sign 27 power purchase agreements for various renewable energy projects in 2018. This, despite a failed last-minute court bid by a workers' union to interdict the country's Minister of Energy from signing the agreements by alleging that government's commitment to procure renewable energy would lead to job losses in the coal mining sector.[370]

Similar public pressure was also encountered in a transport infrastructure project in Taiwan. During the construction of the electronic toll concession project in 2003, there was widespread public resistance to the manner in which government, project sponsors and lenders shifted costs on to the public despite ongoing legal challenges over tendering and procurement irregularities during the project. Ultimately, public pressure and legal challenges led to the project sponsor agreeing to carry a larger share of the costs.[371]

What the above case studies reinforce is that infrastructure projects have far reaching consequences and draw significant attention because of their broad impact on peoples' lives and basic human rights. It is in this context and for this reason that the role of MDBs in funding infrastructure projects warrants scrutiny - specifically, the extent to which MDBs may be held

[368] Ibid at 158.
[369] E. R. Salakhetdinova and V. A. Sidorov, 'Russian Projects and Energy Cooperation in South Africa' (2018) 29(3) *Studies on Russian Economic Development* 336 at 341.
[370] T. Creamer, 'Legal challenge a hurdle, but 'not end of the road' for renewables' *Polity* (13 March 2018) available at https://www.polity.org.za/print-version/legal-challenge-a-hurdle-but-not-end-of-the-road-for-renewables-2018-03-13 (accessed on 9 December 2020).
[371] Chen op cit (n 364) at 847.

legally accountable when projects lead to adverse human right impacts on non-contracting stakeholders such as citizens, or when contracting parties' rights and obligations are adversely impacted either directly by MDB conduct, or other indirect actions (such as downstream civil society action, procurement issues such as corruption or political risks).

In the context of environmental and social rights protections for non-contracting stakeholders, arguments have been advanced that indicate that the existing accountability and oversight mechanisms at many MDBs are inadequate.[372] This is particularly so in developing countries where weak legal safeguards, poor implementation of existing safeguards or a combination of both are a fundamental challenge in MDB-funded infrastructure development projects. Failing to address the consequences of these adverse impacts threatens both the effectiveness and benefits attached to the project itself.

At domestic level, weak accountability and oversight mechanisms may undermine a country's social fabric and adversely impact the environment, while the global impacts of undermining social and environmental risks attached to projects are similarly dire as there are broader implications for global climate change, conflict and migration.[373] While many developing countries recognise these risks and are increasing domestic oversight and accountability mechanisms, other countries are willing to rely on short-term approaches of pushing ahead with projects and relying on the oversight and accountability safeguards that are built into MDBs operations when they fund infrastructure projects.[374] In this regard, relatively newer MDBs such as the BRICS bloc's NDB are uniquely positioned to formulate a better solution to the safeguards employed by their predecessors like the Bank – and they should accordingly be compelled to formulate such solutions.[375] A proposal in this regard will be detailed later on in this study.

Strong arguments may certainly be made to motivate for increasing domestic oversight and accountability mechanisms, as will be done later. However, for the purposes of examining the demand for enhanced accountability mechanism at MDBs, it is the reliance on the internal accountability safeguards that operate within MDBs when they participate in funding infrastructure projects that forms the crux of the present assessment.

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[372] C. Humphrey, 'Time for a new approach to environmental and social protection and multilateral development banks' (April 2016) Briefing Paper, *Overseas Development Institute* available at https://www.odi.org/sites/odi.org.uk/files/resource-documents/10419.pdf (accessed 10 December 2020) at 2.
[373] Ibid.
[374] Ibid.
[375] Ibid.

Further above it was submitted that it is inherent in the very nature of a project financed infrastructure transaction for each contracting party to use whatever leverage is available to it to favour its own interests. Indeed, as Meireles has submitted, the immunities and privileges that MDBs are afforded when they participate in funding infrastructure projects are based on their need to secure their interests.[376] This extends to protecting their interests in the oversight and accountability mechanisms that the projects will be subjected to in instances where, as Meireles describes, MDBs face allegations that that they are responsible for violations of contractual or non-contractual obligations.[377] Accordingly, there is a clear need to determine the legal basis for *when* affected stakeholders have recourse to MDB-controlled international accountability mechanisms. Moreover, there is a related need to examine *how* MDBs' accountability mechanisms operate when they are triggered as well as the adequacy and efficacy of those mechanisms.

3.3.2 The legal basis for holding MDBs accountable

Accountability is a multifaceted phenomenon and is directly linked to where MDBs source their power and authority, how they exercise that power and authority and, in turn, the parameters of that power and authority.[378] Holding international organisations such as MDBs to account is a consequence of a given organisation's international legal personality.[379] In its advisory opinion in the case *Reparation for Injuries Suffered in the Service of the United Nations*[380] (the 'Reparations case') the International Court of Justice (the 'ICJ'), when opining on the UN's status, held that international organisations would not be able to carry out the functions of their founders if they are deemed to be devoid of international personality. Accordingly, as the court held, international organisations like the UN are empowered by their founding members via their founding instruments to carry out certain functions and bear the attendant duties and responsibilities, which necessarily includes attributing to the UN and similar international organisations the *"capacity to maintain…rights by bringing international claims".*[381] It is also notable that these organisations may possess subsidiary or implied powers not expressly provided for in their founding instruments, as the ICJ noted in its advisory

[376] Meireles op cit (n 324) at 54.
[377] Ibid.
[378] B. S. Chimni 'International Financial Institutions and International law: A Third World Perspective' in D.D. Bradlow and D. B. Hunter, *International Financial Institutions and International Law* (2010) at 46.
[379] Meireles op cit (n 324) at 54.
[380] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion: 11 April 1949, ICJ Reports.
[381] Ibid at 179.

opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (the 'Nuclear Weapons case').[382]

It is thus well-established that international organisations possess international legal personality as well as powers, authority, duties and attendant responsibilities distinct from their member states. To the extent that MDBs' powers and authority are sourced in their distinct legal personality, and to the extent that the exercise of that power is confined to parameters recorded in their founding instruments or which may be subsidiary in nature, the legal basis for their accountability is similarly sourced and prescribed. Consequently, the main objective of attributing international legal personality to MDBs together with the attendant ability to be held accountable is to ensure that international institutions are prevented from breaching the obligations - either those explicitly contained in their founding instruments or international law more broadly - and to provide some form of remedy to parties affected by those breaches.[383]

In a report of the International Law Association (the 'ILA') it was noted that the form or mechanism under which international organisations may be held to account for a breach of an obligation will be determined by the context or circumstances surrounding the act or omission that led to the breach.[384] These forms or mechanisms of accountability may be legal, political, administrative or financial and, as the ILA has suggested, a combination of the four provides the best chances of achieving the necessary degree of accountability according to what the particular circumstances may require.[385] In the context of human rights, as Chimni states, in instances where human rights violations occur when state actors implement policies or programmes that may be conditions of their agreement to receive MDB funding for a particular infrastructure project, such violations must necessarily trigger a degree of accountability or responsibility on the part of both the state actor and the MDB.[386]

Earlier in this chapter, it was highlighted that MDBs were traditionally only liable to their shareholder governments, but reliance on this limited or narrow conception of accountability has been eroded.[387] It may be argued that this is a direct consequence of the broadening bases

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[382] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion: 8 July 1996, ICJ Reports at 78.
[383] Meireles op cit (n 324) at 55.
[384] International Law Association, *Accountability of International Organizations Final Report, Berlin Conference* (2004) Conference Report available at https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1058&StorageFileGuid=04c9caf1-2834-4490-9125-7d9ba3683246 (accessed 14 December 2020) at 5.
[385] Ibid.
[386] Chimni op cit (n 378) at 46.
[387] Bissell and Bradlow op cit (n 353) at 156 – 157.

upon which MDBs may be held accountable. In part, the expansion of the manner in which international organisations generally, and MDBs in particular, may be held accountable speaks to the four forms of accountability referenced above - legal, political, administrative or financial - and the increasingly recognised distinction between 'responsibility' and 'accountability' for MDBs in international law.

Chimni argues that the principle of accountability is broader than the concept of responsibility for MDBs. On the one hand, 'responsibility' is a narrower concept – it is the causal link used to attribute liability and is incurred where there is a breach of an international obligation. On the other hand, 'accountability' is more extensive - it demands that MDBs answer to the stakeholders whose lives are impacted by MDB loans and the conditions attached to those loans, it implies a more comprehensive form of recourse for harm caused.[388] A similar argument is made by Schermers and Blokker, who submit that while 'responsibility' is used narrowly in relation to breaches of international law, while 'accountability' or 'liability' more broadly encompasses acts that are not necessarily unlawful, but which cause harm or damage.[389]

It would be remiss not to acknowledge the motivations for the shift away from a narrow conception of responsibility. The move towards this broader conception of accountability for MDBs that encompasses legal, political, administrative or financial mechanisms of recourse for breaches may be traced to increased participation from civil society groups and stakeholders affected by projects. The increased participation from civil society groups and stakeholders affected by projects aligns with a concomitant shift towards developments that are sustainable.[390] As Bissel and Nanwani note,[391] sustainable development may be traced to the right to development formally being recognised at the 1992 UN Conference on Environment and Development which resulted in the adoption of the Rio Declaration on Environment and Development (the 'Rio Declaration').[392] This had far-reaching consequences. Following the Rio Declaration, the Bank and regional development banks such as the ADB and IADB all

[388] Chimni op cit (n 378) at 46.
[389] H. Schermers and N. Blokker, *International Institutional Law* (2009) as cited in C. Ryngaert and H. Buchanan 'Member State Responsibility for the Acts of International Organizations' (2011) 7(1) *Utrecht Law Review* 131 at 133.
[390] Bissell and Bradlow op cit (n 353) at 156 – 157.
[391] Ibid.
[392] *Report of the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development,* A/CONF.151/26, United Nations General Assembly, 47th session (1992). The recognition of the right to development in The Rio Declaration was preceded by the *Declaration on the Right to Development*, 41/128, United Nations General Assembly, 41st session (1986).

began to develop environmental and social policies to improve the effectiveness of and accountability within the developmental projects they funded. These policies specifically focused on emphasising the interests of affected communities on matters such as involuntary resettlement caused by MDB-funded projects, the environment and indigenous peoples.[393]

Ultimately, it is this shift that has led to the formation of the accountability mechanisms at MDBs around the world and the reassessment of their jurisdiction and efficacy. Accordingly, the operation of these formal accountability mechanisms and their broader interface during MDBs' funding processes and engagements with states and affected stakeholders will form the basis of Chapter Four.

[393] G. Handl, 'The Legal Mandate of Multilateral Development Banks as Agents for Change Toward Sustainable Development' (1998) 92(4) *The American Journal of International Law* 642 at 642 and 655.

CHAPTER FOUR
MDB Accountability Mechanisms: Challenges in the Status Quo

4.1 Introduction

In Chapter Three, I highlighted the consequential decision-making power of MDBs as well as the similarly impactful effects of the terms of their loan agreements. The evolution of these powers has demonstrable repercussions for the relationship between individual international organisations and their member states, as well as the relationship between international organisations and the stakeholders affected by their operations, such as the private commercial entities they engage with and the citizens affected by their projects.[394] In the case of developmental infrastructure financing, Mendez and Houghton describe how MDBs are not only expected to implement their member states' policy mandates, but also how they influence policy reforms which member state governments may want to implement through the execution of particular projects funded by MDBs.[395] This influence extends to environmental, social and governmental aspects of projects that a given MDB may finance. As Bradlow has noted, MDBs have thus "become leaders in formulating, interpreting and applying standards for dealing with the environmental and social impacts of development projects".[396]

The broad impact of MDBs' developmental infrastructure financing is precisely why the role and operation of accountability mechanisms are so crucial. I have previously highlighted MDBs' efforts to enhance accountability through the formation of accountability mechanisms. Before the formation of these mechanisms in the mid-nineties, policies on governmental, environmental and social issues such as corruption, pollution, involuntary resettlement and access to information found little application as MDBs were free to design, approve, finance and implement projects in coordination with borrowing countries and project sponsors, and to rely exclusively on borrowing governments to deal with any issues that may have arisen from affected communities.[397] To reiterate a point made above, and as Bissell and Nanwani have highlighted, the establishment of formal accountability mechanisms at MDBs therefore marked a fundamental shift in international governance.[398] For the first time, stakeholders such as the citizens adversely affected by poorly designed and/or implemented infrastructure projects

[394] D. D. Bradlow, 'Multilateral Development Banks, Their Member States and Public Accountability: A Proposal' (2019) *Indian Journal of International Economic Law* 21 at 22.
[395] Mendez and Houghton op cit (n 187) at 3.
[396] Bradlow op cit (n 350) at 22.
[397] Bissell and Bradlow op cit (n 353) at 156.
[398] Ibid at 154.

financed by MDBs had recourse to file claims "through a formal accountability mechanism or forum to redress their grievances".[399]

The establishment of accountability mechanisms is a direct consequence of the expanding role of international organisations after World War II. However, more than just a consequence, the establishment of these mechanisms was a necessary development as international organisations actively engaged in functions that states ordinarily executed. This was particularly evident where organisations financed and implemented developmental infrastructure projects and programmes and found themselves making decisions and exercising authority in a manner that directly affects the lives of citizens of the states where the projects were executed.[400] This remains the case to this day.

The availability of recourse or accountability mechanisms at MDBs in instances where decisions or exercises of authority have impacted rights is central to the respect for and advancement of human rights of citizens affected by development projects. As I have previously indicated, it is manifest that MDBs transcend the role of ordinary lender in these transactions. First, due to their developmental mandates and special relationship with member-states who are often contributing members of the very MDBs from which they seek funding from. Second, as Arrowsmith and others have noted, it is common that when international institutions like MDBs finance developmental infrastructure projects, the contracting authority will generally conduct the procurement for the project, entrenching their intimate and extraordinary involvement.[401] Finally, in project-financed transactions in particular, the contract which results from the procurement process for the project affects a number of parties. While, an MDB-lender generally avoids contractual relations with the project company's contractors, as Arrowsmith indicates, it is frequently the case in developmental infrastructure financing that the MDB "is interested in procurement because it wants to use the procurement process to impose accountability in the disbursement of financing and plays some role in the supervising of the procurement process".[402] MDBs accordingly make decisions, impose conditions, promulgate guidelines and demand use of certain standardised contracts and bidding documents, among others,[403] which affects a wide range of parties.

[399] Ibid.
[400] Bradlow op cit (n 394) at 22.
[401] Arrowsmith op cit (n 303) at 142.
[402] Ibid at 143.
[403] Ibid.

Ultimately the effects of the involvement of an MDB on the entity established specifically to execute a project (such as the project company bidding for a state contract in a project finance transaction) raises an important question about whether the entity, the contracting authority, or affected stakeholders have any recourse against the MDB in respect of acts which may cause harm done or influenced by the MDB in the course of its involvement in or supervision of the process.[404] In developing countries in particular, the issue of recourse mechanisms for entities and contracting authorities where their interests (or the interests of stakeholders whose interests they might represent) are adversely affected by MDB decisions is important as there is often no or limited recourse against the contracting authority under the domestic law of the state concerned.[405]

The relevance of accountability mechanisms and the operation of these mechanisms in the context of project-financed transactions is therefore critical. McIntyre notes that MDB lenders funding infrastructure projects have increasingly promulgated and made use of environmental, social and governmental policies that either incorporate or informally enforce values or rules set down in domestic and international laws on environmental protection, social protection and human rights.[406] It is of interest to note that polices such as these are not limited to MDBs. The trend has also extended to the private lenders involved in project financed infrastructure transactions. McIntyre notes further that "80 private sector lenders in 35 countries covering over 70% of international project finance debt in emerging markets" have adopted the Equator Principles[407] which lay down similar environmental and social policies for private sector actors.

In this chapter, the formal accountability mechanisms at a select grouping of prominent MDBs will be examined because of their prolific operation in the BRICS bloc: the Bank, the NDB and the ADB. I will assess how the MDB accountability mechanisms operate, will examine the challenges experienced within these accountability mechanisms, and I will then specifically assess challenges within infrastructure projects that are funded using the project finance model.

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[404] Ibid.
[405] Ibid.
[406] O. McIntyre, 'Development Banking ESG Policies and the Normativisation of Good Governance Standards Development Banks as Agents of Global Administrative Law' in K. Wendt (ed) *Responsible Investment Banking* (2015) at 144.
[407] Ibid. The Equator Principles are a risk management framework, adopted by financial institutions, for determining, assessing and managing environmental and social risk in projects. It is intended to provide a minimum standard for due diligence and monitoring to support responsible risk decision-making and, for those institutions and organisations that have adopted the framework, it applies globally, to all industry sectors and to financial products including project finance transactions. See, Equator Principles, *The Equator Principles* (July 2020) available at https://equator-principles.com/wp-content/uploads/2020/05/The-Equator-Principles-July-2020-v2.pdf (accessed 5 January 2020) at 4 - 6.

I will highlight the issue of indirect or derivative legal accountability for MDBs and examine the two manners in which human rights breaches attract accountability in international law.

4.2 MDB accountability mechanisms

At the outset, it should be acknowledged that there are some broadly recognised international legal standards which apply to the social and environmental issues which arise during infrastructure development financing. These legal standards include those such as the International Covenant on Economic, Social and Cultural Rights[408] and the International Covenant on Civil and Political Rights,[409] which almost every MDB member state has signed and ratified.[410] While standards like these recognise and seek to protect the rights of individuals, as Bradlow makes clear, they are also explicit in delineating that the ultimate obligation to respect, protect and advance the realisation of human rights lies with states.[411] These standards do not elucidate where responsibility or accountability lies for human rights in transactions such as those infrastructure projects which MDBs finance. In particular, they do not address how responsibility for human rights should be shared among states, MDB financiers, project sponsors and/or project contractors.

It is therefore left to states, MDBs, sponsors, and contractors to determine, at their own discretion, whether to participate in and fund a particular project based on their individual assessment of the project's environmental and social impact. They have similarly broad discretion on the nature of their participation, including the parameters of their potential liability for harmful conduct. On a practical level this leaves a significant risk in large and complex critical infrastructure projects where there are substantial environmental and social implications.[412] More specifically, it leaves open the question of precisely how MDBs are to be held accountable for conduct has caused harm to stakeholders during the execution of projects – particularly those stakeholders not party to a project's contract scheme.

4.2.1 Media and publicity as accountability mechanisms

It is useful to consider how MDB accountability tended to operate historically. Opposition to the environmental and social risks that accompany large infrastructure projects tended to play out in the media, and not necessarily in legal or quasi-legal forums. In the absence of formal

[408] International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3.
[409] International Covenant on Civil and Political Rights, 999 UNTS 171.
[410] Bradlow op cit (n 394) at 25.
[411] Ibid at 26.
[412] Ibid.

recourse mechanisms at MDBs, the media remained the primary mechanism citizens and civil society stakeholders used to raise their concerns in order to lobby politicians, governments and the directors of MDBs who implemented and administered infrastructure projects.[413] This was particularly evident in developing countries in the BRICS bloc. Chapter Three of this study outlined a few prominent projects that were demonstrative of the shift towards increased accountability at MDBs. However, there are two infrastructure projects within the bloc that warrant consideration. They are indicative of the historically important role of the media in advancing accountability at MDBs.[414] Both of the infrastructure projects to be considered were located in BRICS bloc countries; they also played an influential role in the move towards the establishment of formal accountability mechanisms at MDBs.

The first of these projects was executed in India. The Narmada Dam project gained notoriety in the sixties and seventies as tensions among the four states in India affected by the water infrastructure project began to rise.[415] In the absence of national- or state-level laws or policies giving detailed guidelines for the resettlement and rehabilitation of people who were displaced or whose livelihoods were affected by the project, affected people were left at the mercy of the Indian state apparatus, project developers, and contractors.[416] Citizens and civil society groups estimated that at least a quarter of a million people stood to be displaced by the project and in the absence of grassroots organising in opposition to the project, protests and the high profile media attention, it is unlikely that the Bank, one of the project's lead funders, would have intervened to investigate the serious human rights concerns that were raised around the project.[417] The Narmada dam project was one of three such projects in India, that drew significant criticism – others being the Sardar Sarovar Project (the "SSP") in Gujarat and the Sagar Project (the "NSP") in Madhya Pradesh. And it was in response to the domestic and international controversy and protests around the SSP that the Bank commissioned an independent review, the Morse Commission, team to re-examine the SSP.[418]

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[413] Ibid.
[414] Ibid at 27
[415] J. R. Wood, *The Politics of Water Resource Development in India: The Narmada Dams Controversy* (2007) at 106.
[416] S. Wagle, 'The Long March for Livelihoods: Struggle against the Narmada Dam in India' in J. Byrne, L. Glover and C. Martinez (eds), *Environmental Justice: Discourses in International Political Economy – Energy and Environmental Policy*, Vol 8 (2002) at 74.
[417] Ibid 74
[418] A. Rosencranz & Ka. D. Yurchak, "Progress on the Environmental Front: The Regulation of Industry and Development in India" (1996) 19(3) *Hastings International and Comparative Law Review* 489 at 513 – 514.

In the early 1980s in Brazil, the Polonoroeste Amazon road project had a similar trajectory. The project was partially funded by the Bank and came to be known as a paradigm shifting case for accountability at MDBs. At the time, absent recourse to formal accountability mechanisms within the Bank itself, US-based non-governmental groups drew on Brazilian and Indian experts as well as Bank consultants who had worked on the infrastructure project to highlight the decision-making processes at the Bank that led to rainforest destruction during the project's execution.[419] A concerted and sustained grassroots campaign that drew significant media attention eventually led to the Bank suspending loan disbursements for the project for environmental reasons.[420] The Polonoroeste project is particularly significant because from 1983 to 1987 it was the media attention driven by local and international non-governmental organisations, civil society groups and affected citizens that served as the primary catalyst motivating the Bank to investigate and ultimately introduce reforms in its policies on accountability for environmental damage.[421]

These two high profile projects are certainly not the only ones in which media attention played a significant role in advancing accountability. Throughout the eighties and early nineties there were a number of high-profile and grassroots-organising campaigns targeting MDB-funded projects. These campaigns were frequently led by non-governmental organisations and civil society groups in the US and Europe and were supported by organisers in developing countries across a variety of infrastructure projects. Notable projects include the Yacyretá Hydroelectric Project in Argentina and Paraguay[422] and the Samut Prakarn Wastewater Management Project in Thailand,[423] both of which saw sustained pressure to launch investigations into deleterious decisions that ultimately led to the projects being referred to formal investigation.

The sustained efforts to draw media attention across projects in developing countries were evidently successful. Sustained campaigns that specifically targeted donor governments and policymakers (predominantly in developing countries) had a clear message: campaigners demanded reform and urged developed countries to cut funding to MDBs if accountability for

[419] M. E. Keck, 'Planafloro in Rondônia: The Limits of Leverage' in J. A. Fox and L. D. Brown (eds), *The Struggle for Accountability: The World Bank, NGOs and Grassroots Movements* (1998) at 181.
[420] Ibid at 25-26.
[421] R. H. Wide, 'Boulevard of Broken Dreams: The Inside Story of The World Bank's Polonoroeste Road Project in Brazil's Amazon' (2011) Working Paper No. 55, *Grantham Research Institute on Climate Change and the Environment* at 5.
[422] See I. E. Kornfeld, 'Adios to Paradise: The Yacycreta Dam and the Destruction of Environmental and Human Rights' (2021) 7(2) *Florida A&M University Law Review* 181 at 200 - 209
[423] See C. Poboon, 'Samut Prakarn Wastewater Management Project' (2008) 1(1) *NIDA Case Research Journal* 149 at 163 – 166.

these institutions was not improved.[424] In the context of the Bank, the victory for those organisations and groups campaigning for reform was ultimately two-fold as they secured a pair of major reforms.[425] The first was a host of internal reforms that allowed increased public access to information about bank-funded projects. The second was the Bank's response to the ongoing challenges to projects in developing countries - that is, the establishment of the World Bank Inspection Panel (the 'Panel'),[426] first formal MDB accountability mechanism in an international organisation, a landmark development that allowed non-state actors to hold the organisation directly accountable for the consequences of its conduct. This formal accountability mechanisms was significantly influenced by the controversy around the aforementioned projects, the Morse Commission, and the publication of the Wapenhans Report. The latter report is one of the most famous in the Bank's history – it was commissioned by the Bank in 1992, a study headed by Willi Wapenhans. It examined the Bank's basic portfolio management and evaluation process for loans and credits, ultimately finding that the Bank did not pay enough attention to the implementation and supervision of loans and recommended that the Bank consider sustainable development impact as the true measure of success.[427]

4.2.2 The World Bank's Inspection Panel

Any consideration of the Panel's operation must necessarily be done in the context of these founding instruments that constitute its governing framework. The Panel at the Bank is independent, it is comprised of three members, and was established by a resolution of the Bank's Board of Executive Directors (the 'Board') in 1993 (the '1993 Resolution').[428] While the Panel was established in 1993, the Board subsequently reviewed this resolution and issued further clarifications on its powers, jurisdiction and operations in 1996[429] and 1999.[430]

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[424] J. Fox, 'Introduction: Framing the Inspection Panel' in D. Clark, J. Fox and K. Treakle (eds), *Demanding Accountability: Civil Society Claims and the World Bank Inspection* Panel (2003) at xiii.
[425] Ibid.
[426] Ibid; Bradlow op cit (n 394) at 27.
[427] The World Bank Group, 'Records of the Portfolio Management Task Force (Wapenhans Report) and follow-up (2006) available at https://archivesholdings.worldbank.org/records-of-portfolio-management-task-force-wapenhans-report-and-follow-up (accessed 12 October 2021).
[428] The International Bank for Reconstruction and Development, *The World Bank Inspection Panel*, 22 September 1993, Resolution No. IBRD 93-10.
[429] The International Bank for Reconstruction and Development, *Review of the Resolution Establishing the Inspection Panel: 1996 Clarification of Certain Aspects of the Resolution*, (17 October 1996) available at https://www.inspectionpanel.org/sites/ip-ms8.extcc.com/files/documents/ReviewResolution1966.pdf (accessed 29 December 2020).
[430] The International Bank for Reconstruction and Development, *Clarification of the Board's Second Review of the Inspection Panel*, (20 April 1999) available at https://www.inspectionpanel.org/sites/ip-ms8.extcc.com/files/documents/ClarificationSecondReview.pdf (accessed 29 December 2020).

Furthermore, the Panel itself adopted standard operating procedures, most recently updated in April 2014 (the 'Operating Procedure').[431]

The Panel is authorised to investigate complaints from any two or more people who claim they have been harmed or threatened with harm by failure of the Bank to comply with its operational policies and procedures.[432] The Panel is appointed by the Board,[433] reports directly to the Board[434] and operates independently of the ordinary management of the Bank.[435] Members of the Panel are appointed for one non-renewable term of five years[436] and their services may only be terminated by a resolution of the Board.[437]

Bradlow highlights that the resolution establishing the Panel employs a number of mechanisms to protect the independence of its members.[438] The resolution prohibits members from being appointed if they have worked for the Bank for the two years prior to their appointment, it requires any removal effected by the Board of Directors to be "for cause",[439] it prohibits members of the Panel from participating in any hearing in which they have a personal interest or significant involvement[440] and it bars members of the Panel from working for the Bank after ending their term on the Panel.[441]

The Panel serves two important functions set out in the Operating Procedure. First, it provides a forum for "people, including those who are often poor and vulnerable, to seek recourse for harm which they believe result from Bank-supported operations" with the aim of promoting "more inclusive and sustainable development by giving project-affected people a greater voice in Bank-financed projects that impact them".[442] Second, it "provides an independent and impartial assessment of claims about harm and related non-compliance with Bank policies as

[431] The Inspection Panel at the World Bank, *Operating Procedures* (April 2014) available at https://www.inspectionpanel.org/sites/ip-ms8.extcc.com/files/documents/2014%20Updated%20Operating%20Procedures.pdf (accessed 29 December 2020).
[432] Bradlow op cit (n 394) at 27.
[433] Resolution on the World Bank Inspection Panel op cit (n 428) at section 2.
[434] Ibid at section 22.
[435] Ibid at section 4.
[436] Ibid at section 3.
[437] Ibid at section 8.
[438] Bradlow op cit (n 354) at 412.
[439] Resolution on the World Bank Inspection Panel op cit (n 428) at 8.
[440] Ibid at 6.
[441] Ibid at 10.
[442] The Operating Procedure op cit (n 431) at section 1.1(2)(a).

a check-and-balance for the Board and other concerned stakeholders" with the aim of, among others, improving effectiveness of Bank operations.[443]

As a matter of process, the Operating Procedure records that the Panel functions in accordance with a phased and interactive process that is available to persons adversely affected by Bank decisions or conduct who are requesting investigation, known as 'requesters'.[444] Section 12 of the 1993 Resolution sets out the five categories of person who may approach the Panel and request an "inspection" or review of Bank conduct in projects that the Bank funds.[445] These include: an affected party in the territory of the borrower which is not a single individual (that is, a community of persons such as an organization, association, society or other grouping of individuals); a local representative of such party; an executive director of the Board in special cases of serious alleged violations of such policies and procedures; and the Board itself by way of a special resolution.[446] Bradlow notes that in practice, most cases which the Panel investigates fall into the first category, that is, they are submitted by affected parties or their representatives.[447]

Requests for inspection must be in writing, state all relevant facts, describe the nature of the alleged acts or omission, explain all steps already taken to deal with the issue, and must specify the actions that have been taken to bring the issue the attention of the Bank's management and their response, if any.[448] In submitting a request for inspection, requesters must ensure that their complaint meets the following substantive criteria:

> *"The affected party must demonstrate that its rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank (including situations where the Bank is alleged to have failed in its follow-up on the borrower's obligations under loan agreements with respect to such policies and procedures) provided in all cases that such failure has had, or threatens to have, a material adverse effect."*[449]

[443] Ibid at section 1.1(2)(b).
[444] Ibid at section 1.2(3).
[445] Bradlow op cit (n 354) at 413.
[446] The 1993 Resolution op cit (n 428) at section 12.
[447] Bradlow op cit (n 354) at 413.
[448] The 1993 Resolution op cit (n 428) at section 16.
[449] Ibid at section 12; see also the Operating Procedure op cit (n 431) at section 2.2(12).

Importantly, there is also an explicit list of exclusions recording those matters which the Panel does not have jurisdiction to investigate. These include requests dealing with actions that are the responsibility of other parties and which do not involve an action or omission of the Bank;[450] requests dealing with procurement decisions;[451] requests filed after 95% of the Bank's funding for a particular project has been disbursed;[452] and requests in matters where the Panel has already made a recommendation based on a prior request for inspection, unless there is new evidence or circumstances that were not known at the time of the initial investigation.[453]

Once in receipt of the request, the Panel will consider whether a requester has met all the requirements described above[454] and, if so, the Panel will investigate.[455] The Panel investigates as a collective and will then prepare a report containing recommendations for the Board to consider.[456] Lin highlights that once an investigation has been authorised, the Panel has extensive investigatory powers.[457] Members of the Panel may receive information from a variety of sources and where necessary, they are empowered to conduct interviews with staff involved with the project under investigation, access Bank documents such as contracts related to the project, and visit the country where the project is being conducted after obtaining the host country's prior consent.[458] The Panel is also authorised to hold public hearings with the requester during its in-country visits and conduct interviews and receive information from project-affected people.[459]

Ultimately, once the investigation has been concluded the Panel's report will contain all relevant facts related to the requesters' issues, the Panel's findings, and will conclude with the Panel's recommendations to the Board on whether the Bank has complied with all relevant operational policies and procedures.[460] Thereafter, the Bank's operational management will also be afforded an opportunity to submit a report to the Board in response to the Panel's investigatory findings and recommendations.[461] The Board will ultimately decide whether to

[450] The 1993 Resolution op cit (n 428) at section at section 14(a).
[451] Ibid at section 14(b).
[452] Ibid at section 14(c).
[453] Ibid at section 14(d).
[454] Ibid at sections 17 – 19.
[455] Ibid at section 20.
[456] Ibid at section 22.
[457] W. Lin, 'Implementing Environmental Treaty Obligations in Project Finance Activities through an Accountability Mechanism: An Analysis if the World Bank Inspection Panel' (2016) 5(2) *Cambridge Journal of International and Comparative Law* 238 at 245.
[458] Ibid.
[459] Ibid.
[460] The 1993 Resolution op cit (n 428) at; see also Bradlow op cit (n 354) at 417.
[461] Ibid at section 23.

adopt the Panel's findings and recommendations, whether the bank's operational management's response to those findings are adequate, and whether remedial action, if any, should be implemented.[462]

4.2.3 The New Development Bank's Independent Evaluation Mechanism

At the time of conducting this study, the BRICS bloc's NDB has not yet established a formal accountability mechanism. The bank is one of the world's newest MDBs and currently it operates by ensuring that its involvement in funding infrastructure projects is imbued with principles of accountability, transparency and oversight without recourse to an accountability mechanism at a high level. In the face of this gap in its operations, the NDB has expressed an intention to create an accountability mechanism and the bank's constituent documents have outlined how it envisages such a mechanism will operate once it is established.

Turning firstly to how the bank currently operates, Article 15 of the Agreement on the NDB is its touchstone for accountability. It states:

> *"Transparency and Accountability:*
> *The Bank shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents."*

Echoing this foundational commitment to transparency and accountability, the NDB's General Strategy (the 'General Strategy') articulates how this is given effect in its operations – in this regard the bank explicitly commits to "promote the highest levels of transparency, responsible conduct, integrity and accountability".[463] In promoting transparency, the General Strategy records that it is "guided by an underlying presumption that information concerning its activities will be made available in a timely manner to the public in the absence of an appropriate reason for confidentiality."[464] With regard to its commitment to responsible conduct and integrity the NDB is guided by a Code of Business Conduct[465] approved by its board of directors. This document articulates the bank's core values, principles, duties and requirements for bank staff and emphasises transparency, accountability and integrity.[466] On accountability in particular, the General Strategy notes the following:

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[462] Ibid; see also Bradlow op cit (n 354) at 417.
[463] The New Development Bank's General Strategy op cit (n 69) at 32.
[464] Ibid.
[465] The New Development Bank, *Code of Business Conduct and Ethics* (1 March 2018) available at https://www.ndb.int/wp-content/uploads/2017/12/Code-of-Business-Conduct-and-Ethics-2018-1.pdf (accessed 30 December 2020).
[466] The New Development Bank's General Strategy op cit (n 69) at 32.

> *"Board-approved policies outline internal self-assessment mechanisms to ensure compliance to internal policies and processes. These mechanisms are aimed at managing risk, promoting transparency, and upholding responsible conduct and integrity. Accountability is also ascertained during integrity reviews, internal audit and independent evaluation."*[467]

It is the accountability leg of the bank's commitments that stands out among the rest. The strategic reference to "independent evaluation" introduces the NDB's intention to establish a formal accountability mechanism. This intention is supported by the description of how the bank envisages its independent evaluation process will work in the General Strategy. The NDB's independent evaluation will comprise an independent team that will undertake "*…objective evaluations of the Bank's policies, projects, and investment decisions*".[468] Moreover, similar to the Panel at the Bank, the NDB's evaluation team will report to the bank's board of directors and make recommendations, where necessary, on decisions or actions following the team's assessment of bank-funded projects.[469]

The independent evaluation mechanism will be focused on the impact of decisions, actions or inaction during bank-funded infrastructure projects. Independent evaluations will be development focused and the NDB's General Strategy records that projects that evaluations and investigations will be executed by assessing risks, project stakeholders' ability or inability to manage those risks, and the environmental and social impacts of those risks.[470]

The assessment of environmental and social impacts will not take place in a vacuum and, in this regard, the NDB has adopted an Environment and Social Framework[471] (the 'Framework') that applies to all NDB funded or administered projects[472] and compels all clients to meet the key requirements of the Framework for environmental and social impacts of projects, involuntary resettlement requirements, and standards for indigenous peoples affected by projects.[473] Importantly, the Framework records that the NDB relies on domestic systems and

[467] Ibid.
[468] Ibid.
[469] Ibid.
[470] Ibid.
[471] The New Development Bank, *Environment and Social Framework* (2016) available at https://www.ndb.int/wp-content/themes/ndb/pdf/ndb-environment-social-framework-20160330.pdf (accessed 31 December 2020).
[472] Ibid at section 2.
[473] Ibid at section 5.

the corporate systems of funding recipients such as project companies to enforce the requirements and standards set out in the Framework.[474]

There are a few particularly notable aspects of the Framework. The first of these is its requirement for public consultation on bank-funded projects. It relies on funding recipients, encompassing the contracting authorities and/or the corporate entities implementing the project, to conduct a "*meaningful consultation process*" on infrastructure projects in a manner that is compliant with "*national laws and regulations*" as well as the prescripts of Framework.[475] This includes an obligation to ensure that the process of consultations:

> *"(i) engages with communities, groups, or people affected by proposed projects; (ii) begins early and is carried out on an ongoing basis; (iii) provides timely disclosure of relevant and adequate information that is understandable and readily accessible, is undertaken in an atmosphere free of intimidation or coercion; (iv) is gender inclusive and responsive, tailored to the needs of vulnerable groups; and (v) enables the incorporation of all relevant views of affected people and other stakeholders into decision making."*[476]

A further aspect of the Framework is the NDB's commitment to ensuring that funding recipients establish grievance and redress mechanisms on projects to receive and facilitate timely resolution of affected peoples' concerns and grievances about the project's environmental and social implementation and performance.[477] Notably, the bank allows contracting authorities and/or the corporate entities implementing the project to make use of domestic grievance and redress mechanisms where they are deemed adequate.[478]

Despite the NDB's commitment to establishing an independent evaluation mechanism, the bank has still undertaken to prioritise the use of the domestic legislation, regulations and oversight procedures of borrowing countries wherever possible.[479] In doing so, it has emphasised that the bank views this as the best way to strengthen the capacity of the developing countries in which its projects are situated and contribute towards long-term development. The General Strategy records that "*use of country systems for NDB will mean following processes closely to encourage clients to thoroughly apply the country's own legislation and procedures,*

[474] Ibid at section 6.
[475] Ibid at section 22.
[476] Ibid.
[477] Ibid act section 27.
[478] Ibid.
[479] The New Development Bank's General Strategy op cit (n 69) at 15.

and work together with relevant agencies to propose actions whenever compliance falls short of national and local requirements".[480]

The NDB appears to be among the pioneers of a trend that has seen MDBs increasingly make use of countries' own domestic systems and processes for grievance and recourse mechanisms on projects. Prinsloo and Markowitz et al refer to the "*use of country systems"* in the financing of developmental projects such as infrastructure as a means to respect countries' sovereignty, strengthen domestic systems, decrease costs and bureaucratic delays and ensure greater domestic participation in aspects of projects such as procurement.[481] The aims Prinsloo and Markowitz have articulated align with the NDB's emphatic commitment to deference to members' national sovereignty that this paper highlighted in Chapter One as being one of the foremost aims of the bank's operation.[482]

The NDB's use of country systems does not necessarily exclude the operation of accountability mechanisms on the projects it funds, as has been evident in MDB-funded infrastructure projects in the BRICS bloc. Albeit in the context of a Bank project, in South Africa, the Medupi coal-fired power station project[483] was the first MDB-funded project where, despite the fact that the project made use of country systems, the Bank deployed the Panel to investigate a number of grievances with the project.[484] In so far as the NDB's involvement in the Medupi power plant is concerned, the bank committed to financing US$476 million to fund a project that aims to reduce the power plant's sulphur dioxide emissions through the design and construction of six flue gas desulphurization units along with ancillary facilities.[485] The aim is to reduce the plant's emissions to levels prescribed in the National Environmental Management Air Quality Act.[486]

Prinsloo and Markowitz acknowledge that reconciling the operation of MDB accountability mechanisms with the country systems is not without challenges and it necessitates harmonising the two in a way that "provides necessary checks while leaving space to accept divergent

[480] Ibid.
[481] C. Prinsloo & C. Markowitz et al., 'Informing the Approach of Multilateral Development Banks to Use of Country Systems' (2017) discussion paper, *Global Economic Governance Africa* at 6.
[482] See the New Development Bank's General Strategy op cit (n 69) at 16.
[483] See Eskom, 'Medupi Power Station Project' available at https://www.eskom.co.za/Whatweredoing/NewBuild/MedupiPowerStation/Pages/Medupi_Power_Station_Project.aspx (accessed 31 December 2020).
[484] Ibid at 37.
[485] New Development Bank, 'Environmental Protection Project For Medupi Thermal Power Plant' available at https://www.ndb.int/wp-content/uploads/2019/03/Project-Summary-Eskom-SA-Final.pdf (accessed 9 February 2021) at 1–3.
[486] Act 39 of 2004.

country contexts and systems".[487] While this will be discussed in greater detail later in this study, this is an issue that the NDB and other MDBs will necessarily have to grapple with.

4.2.4 The Asian Development Bank's Accountability Mechanism

The ADB's experience establishing its own accountability mechanism may be attributed to a number of internal and external factors. The origins of the bank's accountability mechanism may be traced to December 1995 when its board of directors established an Inspection Function - a formal recourse mechanism for stakeholders to appeal to an independent body that would monitor and ensure compliance with the ADB's operational policies and procedures in the projects it funded.[488] This resolution was motivated by the establishment of the Panel at the Bank and the accountability mechanism at the IADB – similar to those MDBs, the ADB also sought to promote transparency and accountability in its operations, and enhance the efficiency and effectiveness of its developmental projects.[489] Moreover, the ADBs board of directors was eager to respond to the findings of an internal task force that reviewed its operations in 1994. This task force was commissioned with the aim of enhancing the ABD's operations and it made a number of findings on how the bank could improve transparency, confidentiality and accountability.[490] Accordingly, in May 2003, the board of directors voted to establish the ADB's Accountability Mechanism to replace the 1995 Inspection Function.[491] In 2010 the president of the ADB announced that the bank would be conducting another review of the Accountability Mechanism. The review included wide-ranging consultations with affected stakeholders and a review of the Accountability Mechanisms' operations since 1995. This ultimately culminated in the publication and adoption of a new Accountability Mechanism Policy in 2012,[492] which used the 2003 policy as its basis and incorporated a number of recommendations that emerged from the review process.

The ADB's Accountability Mechanism has two functions.[493] The first is termed a consultation phase and it is aimed at assisting stakeholders affected by problems that arise on ADB-funded projects. This phase is managed by a Special Project Facilitator (the 'SPF') independent of the

[487] Eskom op cit (n 483) at 37.
[488] Asian Development Bank, *Review of the Inspection Function: Establishment of a new ADB Accountability Mechanism* (May 2003), available at https://www.adb.org/sites/default/files/institutional-document/32108/adb-accountability-mechanism.pdf (accessed 4 January 2020) at para 1.
[489] Bissell and Nanwani op cit (n 353) at 158.
[490] Ibid.
[491] Asian Development Bank op cit (n 484) at 150(i)-(vii).
[492] Asian Development Bank, *Accountability Mechanism Policy: 2012* (2012) available at https://www.adb.org/sites/default/files/institutional-document/328211/accountability-mechanism-policy-2012.pdf (accessed 4 January 2020).
[493] See also Bradlow (op cit n 354) at 425.

bank's operational department and the facilitator is tasked with assisting "people directly, materially, and adversely affected by specific problems caused by ADB assisted projects through informal, flexible, and consensus-based methods with the consent and participation of all parties concerned".[494] Problem solving at the ADB through its Accountability Mechanism includes recourse to consultative dialogue with stakeholders, access to information, fact-finding investigations and mediation.[495] Among others, the SPF is empowered to compile reports, make recommendations and monitor remedial actions.[496]

The second function of the ADB's Accountability Mechanism is the compliance review phase. This phase is managed by a Compliance Review Panel (the 'CRP') and, as the 2012 Accountability Mechanism Policy records, the CRP is tasked with investigating non-compliance with ADB operational policies and procedures "in the course of the formulation, processing, or implementation of the project that directly, materially, and adversely affects local people".[497] Its powers are limited to investigating bank conduct and, as such, the CRP is explicitly precluded from investigating the conduct of the borrowing country, contracting authority, or private sector client and, furthermore, is precluded from providing "judicial-type remedies" such as monetary damages or injunctions.[498] The CRP's role, according to the 2012 Accountability Mechanism Policy, includes processing complaints submitted by stakeholders, engaging with internal and external parties, conduct comprehensive and objective reviews, drafting reports of findings for submission to the bank's board of directors and management and, monitoring compliance with remedial action recommended by the board.[499]

The roles of both the SPF and the CRP are central to enforcing the ADB's policy commitments to environmental, social and governmental safeguards and standards. These commitments include the banks own Environment Operational Directions[500] and its Social Protection Operational Plan[501] and also extend to its broader commitments to overarching international obligations such as the Rio Declaration.

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[494] Asian Development Bank op cit (n 488) at para 126.
[495] Ibid.
[496] Ibid at para 128(i)-(xiv).
[497] Ibid at para 130.
[498] Ibid.
[499] Ibid at para 131(i)-(xv).
[500] Asian Development Bank, *Environment Operational Directions 2013 – 2020* (2013) available at https://www.adb.org/sites/default/files/institutional-document/33869/environment-operational-directions-2013-2020.pdf (accessed 4 January 2020).
[501] Asian Development Bank, *Social Protection Operational Plan 2014 – 2020* (2013) available at https://www.adb.org/sites/default/files/institutional-document/42704/files/social-protection-operational-plan.pdf (accessed 4 January 2020).

Importantly, both the SPF under the consultation phase and the CRP under the compliance review are authorised to receive a complaint from any group of two or more people in a borrowing country, a local representative of the affected group or, in exceptional cases, a non-local representative.[502] In the case of a compliance review, complaints may also be filed by any one or more of the ADB board members, after first raising their concerns with the bank's management.[503] Complaints must demonstrate direct and material harm, with reference to the rights and interests that have been, or are likely to be, affected as a result of an act or omission of the ADB during the course of the design or implementation of the project.[504]

The establishment of these two mechanisms at the ADB has been lauded as heralding a new dimension of accountability at the MDB because it overhauled the previous system that focused solely on inspection and, instead, transitioned to a more comprehensive recourse system that encompasses both problem-solving and compliance review.[505]

4.3 Challenges in MDB accountability mechanisms

Independent accountability mechanisms at MDBs have notionally provided an effective mechanism for the enforcement of policies on environmental, social and governmental issues as international standards at what McIntyre termed the 'coalface' of project implementation.[506] However, while these mechanisms aim to engender a greater culture of accountability at MDBs, governments and government agencies, and in private entities involved in major infrastructure development,[507] they have not operated entirely without issue. A number of substantive challenges have been identified and it has been argued that although MDBs remain leaders in promoting international organisational accountability, "their mechanisms of accountability are not keeping up with the evolution of their operations".[508] A few of the broader challenges on MDB accountability will be addressed in what follows; these are significant as they have a bearing on the examination of the challenges and the proposed solutions that will follow later on in this thesis.

[502] Asian Development Bank op cit (n 488) at para 138.
[503] Ibid at para 139.
[504] Ibid at paras 126 and 130.
[505] Bissell and Bradlow op cit (n 353) at 158.
[506] McIntyre op cit (n 406) at 148.
[507] Ibid.
[508] Bradlow op cit (n 350) at 2.

4.3.1 Broad challenges for MDB accountability mechanisms

The first broad challenge is that accountability mechanisms at MDBs have continued to contribute to the long-standing tension which exists between the states that fund MDBs, which generally tend to be developed countries, and the states that borrow from MDBs, which tend to be developing countries. Bradlow identifies that this tension is due, in part, to borrowing states' ongoing concerns that accountability mechanisms may inadvertently contribute to undermining their sovereignty and cause problems for their governments.[509] These problems include that accountability mechanisms may lead to inequitable benefits and preferential treatment for the requesters that approach MDBs for recourse. There is also concern that a government's political opponents may use MDB accountability mechanisms to achieve political aims such as embarrassing the government or frustrating development – an outcome that is antithetical to the entire purpose of accountability mechanisms that ultimately aim to contribute towards depoliticising disputes around infrastructure development projects.[510]

Another challenge is that of funding. Consequences follow where an MDB's accountability mechanism conducts an investigation and that investigation confirms that the relevant MDB has failed to comply with applicable operating procedures, process or international law commitment and that this has caused harm.[511] In these instances, Bradlow notes that by operation of the MDB's processes, the bank's management will develop an action plan that is intended to either mitigate or correct the harm that the MDB conduct has caused based on the recommendations of the accountability mechanism.[512] The implementation of the action plan is either funded by the borrower, the relevant state entity involved in the transaction, or the MDB itself. However, regardless of who pays, there are distinct disadvantages for whichever party ultimately bears the cost of funding the action plan. For borrowers this will mean increasing the size of the loan sought from the MDB and in the case of developing countries, this has budgetary implications on other development projects. Conversely, should the MDB fund the action plan, there are similar consequences for a given bank's budget for developmental projects in other countries.[513]

[509] Ibid at 9.
[510] Ibid.
[511] Ibid at 30.
[512] Ibid at 31.
[513] Ibid.

A further challenge is the consequent effects of the increasingly prevalent tendency for MDBs to collaborate on funding infrastructure development projects.[514] Shelepov in particular has highlighted that a number of recent studies indicate that large-scale co-financing and collaboration appears to be an increasingly common phenomenon, particularly for the future operation of MDBs.[515] Indeed, on 4 July 2016, the presidents of the NDB and the ADB signed a memorandum of understanding in which they agreed to facilitate cooperation between the institutions and in order to identify areas of strategic partnership and joint interests, with a particular focus on sustainable development projects in renewable energy, energy efficiency, sustainable transport infrastructure, water management and sewage treatment.[516] The president of the NDB concluded a similar agreement with the Bank and the Development Bank of Latin America on 9 September 2016.[517] Bradlow has identified that a broad challenge MDBs face in this regard is that more than one MDB could receive a request for investigation from an affected community and, in principle, each bank's accountability mechanism would be limited to only investigating compliance with its own operational policies, procedures or international commitments to which it has acceded.[518] There is also the heightened risk of MDBs' accountability mechanisms making inconsistent findings on jointly funded projects.[519]

Nanwani has also highlighted the challenge for accountability in the face of increased collaboration among MDBs. He notes many development projects receive funding from more than one donor institution and they have led to parallel claims filed with more than one accountability mechanism filed at the same or different times on the same project.[520] In particular, Nanwani has referenced an infrastructure project referred to further above in this study, the Yacyretá Hydroelectric Project in Argentina, which saw claims brought before the Panel at the Bank and the IADB's accountability mechanism. This ultimately led to both institutions informally collaborating on the investigation.[521]

[514] Ibid.
[515] A. Shelepov, 'New and Traditional Multilateral Development Banks: Current and Potential Cooperation' (2017) 12(1) *International Organisations Research Journal* 127 at 127.
[516] Ibid at 132.
[517] Ibid at 133.
[518] Bradlow op cit (n 350) at 31.
[519] Ibid.
[520] S. Nanwani, 'Directions in Reshaping Accountability Mechanisms in Multilateral Development Banks and Other Organisations (2014) 5(2) *Global Policy* 242 at 249.
[521] Ibid.

4.3.2 Challenges in project-financed development

In the context of project financed infrastructure development transactions in particular, a specific issue around self-regulation and accountability exists. In 2013, Sarro conducted a study of project lenders' ability to self-regulate and conduct oversight over borrowers' infrastructure projects in the context of the Equator Principles.[522] He observed that MDBs such as the Bank increasingly encouraged less developed countries to use project finance to fund infrastructure developments.[523] Lenders have sought to ensure that funding and project implementation processes avert the adverse environmental, social and governmental risks. They have also sought to ensure that projects subjected to a degree of accountability through internal policies and the adoption of frameworks such as the Equator Principles. However, notwithstanding these aims, Sarro noted that a key issue that remains is whether these project risks are adequately mitigated through MDBs' robust monitoring and enforcement of policies and frameworks as they are effectively left to act as self-regulators.[524]

A number of authors have focused on self-regulation and its attendant consequences as evidence of the broader inadequacies of MDB accountability mechanisms. Nanwani has noted that MDB accountability mechanisms, including those of the Panel at the Bank, the ADB's Accountability Mechanism, and other MDB systems "have been viewed or perceived by civil society actors to be effectively limited even though they have given opportunities for citizens to voice and present their grievances".[525] He emphasises that one of the key issues in this regard is that requesters who approach MDBs have little to no guarantee that a successful claim will "lead to improvements at the project level" and that the reality remains that accountability mechanisms are internal governance tools with parameters that are largely circumscribed.[526] He specifically raises the challenge that accountability mechanisms preclude state or government conduct from their jurisdiction, that accountability mechanisms are not adjudicative, that they do not provide remedies that aggrieved parties might have recourse to in a traditional judicial forum such as damages or injunctions, and that accountability mechanisms often preclude a host of substantive matters from their ambit such as procurement

[522] D. Sarro, 'Do Lenders Make Effective Regulators? An Assessment of the Equator Principles on Project Finance' (2013) 13(12) *German Law Journal* 1549.
[523] Ibid at 1528
[524] Ibid at 1535.
[525] S. Nanwani, 'Holding Multilateral Development Banks to Account: Gateways and Barriers' (2008) 10 *International Community Law Review* 199 at 205.
[526] Ibid at 206.

issues.[527] The exclusion of procurement issues, together with the others he raises, has a direct impact on MDBs that fund projects via project finance transactions.

Other authors have acknowledged similar issues. The Panel has provided a unique case study in this regard. At the Bank, both Bradlow and Lin have drawn specific attention to the fact that the Panel does not have any role in monitoring the implementation of the board of directors' final decision regarding the recommendations in the Panel's reports on its investigations or the bank management's recommendations in response to the Panel's report.[528] This has led to instances where independent observers have noted that, among others, complainants have not seen improvements in their conditions as promised by the Bank's Board.[529] Tan has levelled similar critiques, noting that initially there were high hopes that the Panel would progressively develop and safeguard policies on environmental, social and governance issues globally and influence the development of international and domestic laws. However, this has not been borne out by the Panel's track record.[530]

The self-regulation challenges highlighted above are exacerbated in the context of MDBs' involvement in project financed infrastructure developments. In most large-scale infrastructure projects where a non-contracting stakeholder such as citizen groups have suffered harm, MDB lenders are generally insulated from responsibility in the international sphere because, in most instances, they have no physical presence at the place of the alleged harm.[531] Consequently, most criticism of MDBs' impact on human rights tends to refer to derogating from those rights rather than direct breaches of them, since lenders like MDBs are often not directly involved in project implementation such as in the case of project-financed infrastructure transactions in which MDBs participate. This is analogous to the situation private commercial banks operating under the UN's Guiding Principles on Business and Human Rights[532] (the "Guiding Principles") may find themselves in. The Guiding Principles place an obligation on designated business enterprises seek to prevent or mitigate adverse human rights impacts that are directly

[527] Ibid.
[528] Bradlow op cit (n 354) at 419; Lin op cit (n 457) at 456.
[529] Ibid.
[530] C. Tan, 'Mandating Rights and Limiting Mission Creep: Holding the World Bank and the International Monetary Fund Accountable for Human Rights Violations' (2008) 2(1) *Human Rights and International Legal Discourse* 79 at 97 as cited in Chimni op cit (n 378) at 50.
[531] C. N. Radavoi, 'Indirect Responsibility in Development Lending: Do Multilateral Development Banks Have an Obligation to Monitor Project Loans?' (2018) 53(1) *Texas International Law Journal* 1 at 1-2.
[532] The UN Working Group on Business and Human Rights, 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' (2011) available at https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf (accessed 12 October 2021).

linked to businesses' operations, products or services by their business relationships, even if businesses' have not contributed to those impacts.[533]

A second key issue which arises for MDB accountability in the context of project financed infrastructure transactions is what authors have termed indirect or derivative responsibility.[534] Indeed, this study has specifically examined the PPP project finance model above, and that examination centred on how the model operates. To reiterate, infrastructure development projects that use this model typically require that sponsors deploy the lender-funded project company to bid for a government-developed infrastructure project through a competitive process. Both the contracting authority and project company are not only bound by applicable domestic and international laws, but they are also bound by an applicable MDB loan conditionalities. However, the issue of whether and how the MDB is to be held accountable remains.

As alluded to at the outset of this chapter, the practical reality of the nature of the financing structure is that MDB lenders avoid legal responsibility through their policies and the loan agreement. While MDBs may finance a particular project, it is ultimately the contracting entity as borrower that remains responsible for implementing the procurement together with any environmental, social and governmental requirements that are generally imposed by the MDB financing the project. This practice is certainly not a novel one. The findings of the European Court of Justice in 1997 in the matter *Geotronics SA v Commission of the European Communities*[535] (the "*Geotronics* matter") is demonstrative of this. The court had to decide on the temporal effect of the entry into force of the Agreement on the European Economic Area.[536] However, for present purposes the following facts relevant: the case concerned a programme funded by the EU in which the government of Romania and the European Commission jointly issued an invitation to tender for the supply of certain goods. The tender specified that the goods had to originate in an EU member state however the supplier, Geotronics, sourced certain goods from a non-member state and, as a result, the Romanian government rejected Geotronics' tender. The programme was funded by the EU's general budget and the provisions of its financing regulations applied to the impugned decision. These regulations dictated that power

[533] Ibid at 14.
[534] Ibid at 2.
[535] *Geotronics SA v. Commission of the European Communities*, Judgment of the Court of 22 April 1997, [1995] ECR11-2797.
[536] The Agreement on the European Economic Area (with protocols, annexes, final act and protocol of correction of 15 July 1993). Concluded at Porto on 2 May 1992 concluded at Porto on 2 May 1992, 1 January 1994, 31121 UNTS 1973.

to award a contract remained with the beneficiary country and contracts funded by the EU programme in question "were to be regarded as national contracts, which are binding only on the beneficiary country and the economic operator".[537] The court accordingly held that "no legal relationship arises between the tenderers and the Commission, since the latter restricts itself to taking funding decisions on behalf of the Community, and its measures cannot have the effect, in relation to tenderers, of substituting a Community decision for the decision of the beneficiary country".[538] The international organisation avoided legal responsibility as the court ultimately held was for the state as contracting party to enforce the conditions of tender, as it rightly did, and Geotronics' application to set aside the decision of the state contracting party to reject the tender was dismissed.

A more recent example that is also indicative of MDB lenders' continued endeavours to avoid legal responsibility is found in a matter that was before the Supreme Court of Canada, *World Bank Group v Kevin Wallace & Others* (the *"Wallace* matter").[539] While the matter was a criminal law one, the court also ruled on important questions relating to the immunities of international organisations in Canada and it is certainly significant that the AfDB, EBRD, ADB, IADB and Nordic Investment Bank joined proceedings. The facts of this matter will not be recanted in their entirety however, among the key issues the court had to rule on was the Bank's Integrity Vice-Presidency, an independent unit within the World Bank Group responsible for investigating allegations of fraud, corruption and collusion in relation to projects financed by the World Bank Group.[540] On this score, the court articulated four arguments which supported an interpretation of the Bank's Articles of Agreement which afforded it immunity from having to disclose or production of documents for the respondents in the matter and ultimately held that the provisions of Article VII(1) were "merely a descriptive, purposive clause".[541]

First the court held that unlike subsections 3, 5 and 8 of Article VII of the Banks Articles of Agreement, subsection 1 was not imported into in Canadian law through its legislative process. Second, the court rejected the opportunity to adopt an interpretation that amounted to a recognition of "functional immunity", that is, a limited immunity that only applies when the

[537] The Geotronics matter op cit (n 529) at para 31.
[538] Ibid at 32.
[539] *World Bank Group v Kevin Wallace & Others* 2016 SCC 15, [2016] 1 S.C.R. 207.
[540] Ibid at 208 – 209.
[541] D. Galagan, 'Supreme Court of Canada in World Bank Group v Wallace: On Production of Records, Immunities of International Organizations and the Global Fight against Corruption' (2017) 40(3) *Manitoba Law Journal* 303 at 314.

Bank is able to demonstrate that it is necessary carry out its operations and responsibilities. Third, the court held that subsection 6 provides that the Bank's property and assets shall be free from any restrictions only to the extent necessary to carry out the operations provided for in its Articles of Agreement. The court accordingly found it would be redundant if the immunities set out in Article VII of the Bank's Articles of Agreement were subject to the functional necessity requirement that the respondents attempted to read into subsection 1. Finally, he Court contrasted the immunities set out in the Bank's Articles of Agreement and the "broad and flexible immunity" provided for in Article 105 of the Charter of the United Nations, concluding that to "import an added condition of functional necessity would undermine what appears to be a conscious choice to enumerate the specific immunities rather than to rely on one broad, functional grant of immunity".[542] Taking this even further, the court went on to hold that the Bank's archival immunity cannot be waived, explaining that, among other reasons, the inviolability of archives denotes protection from unilateral interference and voluntary disclosure and that the subsection 1 does not mention the possibility of waiver as it does is subsection 8.[543] The court ultimately held that the Bank's appeal should be allowed and that the order to produce the requested documents be set aside.

The examples cited above are demonstrative of the MDBs immunities MDBs frequently invoke in project financed transactions. It is critical that this challenge is borne in mind as this is a particularly important consideration given the unique power and influence MDBs exert as their involvement in funding infrastructure developments extends far beyond that of an ordinary private commercial lender or sponsor.

Schlemmer-Schulte et al. draw specific attention to this challenge and take specific issue with instances where MDBs invoke legal immunity in domestic forums to skirt accountability.[544] As they note, claims brought against an MDB in a domestic court on the basis of contractual or delictual liability would only be admissible if the MDB in question were to waive its immunity.[545] However, even if an MDB were to do so, Schlemmer-Schulte and others note that such claims are unlikely to be successful on their merits as MDB's are likely to raise the fact that their involvement would relate to the financing of a project which "consist of entering into contracts-loan agreements and guarantee agreements-with member states and private investors,

[542] Ibid.
[543] Ibid at 322.
[544] S. Schlemmer-Schulte, D.D Bradlow & D. A. Wirth et al, 'The accountability of international organizations to non-state actors' (1998) 92 *Proceedings of the American Society of International Law* 359.
[545] Ibid at 361.

not with the individuals who might be affected by the financed project".[546] Accordingly, particularly in the context of stakeholders outside of the project's contractual scheme, there is no privity of contract with these people and the claim would fail. While with respect to delictual liability, the project is likely to have been constructed by sub-contractors of either the project company or the government party involved, and an MDB is unlikely to be found to be in a position to have directly caused harm.[547]

As a result of these difficulties, the theories on the indirect or derivative liability of MDBs and other international organisations remain increasingly relevant, particularly where MDBs have extended developmental lending to a project company in an infrastructure project that employs the project finance model.

One such theory has been articulated by the UN's Special Rapporteur on the Responsibility of International Organisations, who noted that "an international organization could incur responsibility for assisting a State, through financial support or otherwise, in a project that would entail an infringement of human rights of certain affected individuals".[548] Radavoi, on the other hand, turns to identify two types of human rights breaches that may occur on a MDB funded project which might attract the need for accountability and recourse. The first is a breach that may be associated with the loan's very existence, that is where an MDB decision to fund a project that may be assessed to be "bad" from the outset and which presupposes a degree of *ex ante* knowledge of the impact of the financed projects on human rights in a borrowing country.[549] The second type of breach is one which may occur only once a given project has been implemented, that is, a loan may be for a project that is assessed to be "good" from the outset but occasions a rights breach after the fact and warrants consideration of whether or not an MDB may have an obligation *ex post* to conduct ongoing project monitoring.[550]

This chapter has outlined the operation of official and unofficial mechanisms of accountability for MDBs at international level. The examination establishment of independent mechanisms at a select grouping of prominent MDBs has provided insight into their operation and revealed some of the unique challenges which have arisen in the context of project-financed

[546] Ibid.
[547] Ibid.
[548] G. Gaja, 'Third Report on Responsibility of International Organisations' (13 May 2005) *International Law Commission* available at https://legal.un.org/ilc/documentation/english/a_cn4_553.pdf (accessed 7 January 2020) as cited in C. N. Radavoi, 'Indirect Responsibility in Development Lending: Do Multilateral Development Banks Have an Obligation to Monitor Project Loans?' (2018) 53(1) Texas International Law Journal.
[549] Radavoi op cit (n 531) at 5.
[550] Ibid.

infrastructure transactions. The challenges are complex and multifaceted and, unsurprisingly, the solutions to these will be demonstrated to be similarly nuanced. However, before examining the solutions, Chapter Five will lay the groundwork and provide an examination of the status quo. The chapter will assess the manner in which forms of breach attract accountability during the financing process, the role of MDB accountability mechanisms and the application of global administrative law within these processes.

CHAPTER FIVE
Global Administrative Law as a Response to Accountability Challenges

5.1 Introduction

In the preceding chapter this study examined accountability mechanisms at a select grouping of MDBs and the policies and documents that guide the operation of these mechanisms. The consideration of how these mechanisms operate practically culminated in an assessment of the substantive challenges which accountability mechanisms occasion when MDBs finance large-scale infrastructure projects in developing countries. Substantive challenges both broad and narrow were considered.

Broadly, the study highlighted the challenges MDB funding poses to the national sovereignty of developing countries, the potential for accountability mechanisms to be used (and abused) to achieve political aims, and the impact that increased collaboration among MDBs has on stakeholders' ability to seek recourse and the efficacy of the investigations they are able to conduct. Narrowly, the thesis highlights two challenges which pose unique threats to accountability that MDBs face in the context of their involvement in project financed large-scale infrastructure projects – self-regulation, on the one hand, and the issue of indirect or derivative responsibility given the unique position MDBs occupy in the contract structure of project financed infrastructure development transactions, on the other.

In the context of these challenges, but with specific regard to those that pose unique threats to accountability in project-financed transactions, the impact on stakeholders generally and human rights in particular is of central concern. The aim of this chapter is to interrogate the manner in which MDBs' breaches or derogations of applicable human rights obligations and internal and external policy obligations attract accountability. The chapter will examine the role of accountability mechanisms and more specifically, the role of global administrative law within the processes as a solution to holding MDBs to account where there conduct occasions breaches of human rights obligations.

The chapter will commence with a consideration of accountability for breaches of human rights obligations. This analysis will lead to consideration of the adequacy of internal accountability standards and mechanisms in instances where MDBs have promulgated environmental, social and/or governmental standards. It will assess critiques of whether the operation of existing internal accountability mechanisms and strategies establish a sufficient standard of accountability as opposed to external accountability mechanisms, in light of what Tan termed,

"the inherent deficiencies within the organisational governance structures of the institutions concerned and the normative limitations of the international human rights regime".[551] It will then turn to examine areas where these gaps can be addressed through, among others, approaches to how MDB policies are implemented or operationalised by MDB accountability mechanisms and then, importantly, the role of global administrative law in this regard.

5.2 Rights breaches and accountability

This study has already examined the international legal personality of MDBs and the treaty-status of loan agreements into which they enter. It drew attention to how MDBs' powers are prescribed by the developmental aims recorded in their articles of agreement, the terms and conditions of the loans agreements they enter into as well as their policies and historic practices. It was noted that the source of MDBs' authority has a direct bearing on the scope of their power and how they are held accountable. In the context of MDB loans for infrastructure projects, in order to establish whether a MDB should be held accountable for a violation of human rights during a project's implementation, it must be determined whether the MDB lender is under an obligation to monitor the implementation of the project and satisfy itself with the quality.[552] This obligation may be "legal" in the sense that it may be sourced in principles of international law, customary law, the domestic laws of the borrowing state, or the policies and practices of the MDB itself.[553] However, it may also be "contractual" in the sense that it may be sourced in the loan agreement that the MDB enters into with the project company in the case of project financed infrastructure.[554]

Determining whether an MDB has such an obligation is not entirely without challenge, even in the context of the legal and contractual matrix highlighted above. MDBs frequently rely on their distinct international legal personality and their ability to claim immunity. As this study has highlighted, MDBs' articles of agreement often explicitly set out their power to claim immunity from legal process.[555] Raffer described MDBs' position on immunity, rights breaches and accountability frankly, stating:

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[551] C. Tan, 'Mandating Rights and Limiting Mission Creep: Holding the World Bank and the International Monetary Fund Accountable for Human Rights Violations' (2008) 2(1) *Human Rights and International Legal Discourse* 79.
[552] Radavoi op cit (n 531) at 10.
[553] Ibid.
[554] Ibid.
[555] See, for example, Article VII of the International bank of Reconstruction and Development, Article 30 of the Agreement on the New Development Bank, Article 50 of the Agreement Establishing the Asian Development

> *"… all International Financial Institutions [IFIs] claim the privilege of absolute immunity from any financial responsibility for their own actions, decisions, and omissions. Moreover, in contrast to developing countries that feel the economic consequences of inadequate implementation of projects and programs, external financial agencies have benefited economically from the very disasters they have helped to create or even created themselves. Claiming the status of preferred creditors and benefiting from the total absence of any financial accountability for their decisions, IFIs profit from their own errors at their clients' expense."*[556]

Other commentators have echoed this position. In the context of the Bank, Tan argues that MDBs enjoy a significant degree of freedom in their financing activities, even from the standards and principles that regulate commercial and other financial institutions. She draws attention to the challenge this precipitates: when MDBs are shielded from accountability or invoke their immunity to avoid accountability for their conduct, without external justiciability mechanisms, there is little oversight or scrutiny of these institutions' compliance with their fiduciary obligations, both with regard to their founding principles and mandates but also with any required due diligence and the decision-making on the projects they fund.[557]

Notably, MDBs' claims of immunity are not limited to the provisions in their articles of agreement. I have alluded to how MDB loan or credit facility agreements with private sector partners or domestic governments in project finance transactions also often contain terms governing immunity. Radavoi also describes how accountability is often avoided in MDB loan agreements – contracts are often silent on MDBs' monitoring obligations or only incorporate these obligations indirectly by reference to MDBs' environmental, social and governmental policies.[558] This necessitates consideration of the role and legal status of those policies and how they are monitored and adjudicated.

Most MDBs have environmental, social and governmental policies – reference has already been made to the NDB's Environment and Social Framework and the ADB's Environment Operational Directions and Social Protection Operational Plan, but others include those such

Bank, Chapter VII of the Agreement Establishing the African Development Bank, and Article XI of the Agreement establishing the Inter-American Development Bank.

[556] K. Raffer, 'International Financial Institutions and Financial Accountability' (2004) 18(2) *Ethics and International Affairs* 61 at 65.

[557] Ibid.

[558] Radavoi op cit (n 531) at 10.

as the Bank's Environment and Social Framework.[559] Lin has described the aim of policies such as these with reference to the Bank's operational policies and procedures. She notes that these policies generally aim to minimise the negative social and environmental impacts from MDB-financed projects, govern the internal activities of MDBs, and form the substantive rules for reviewing complaints brought by affected stakeholders who challenge MDB conduct before accountability mechanisms.[560] Similarly, Tan notes how these policies are generally operationalised by MDBs through mandatory environmental social impact assessments, voluntary information disclosures, and providing opportunities for public participation, among others.[561]

In the context of project financed infrastructure transactions, the development or pre-construction phases are where project stakeholders usually conduct the feasibility studies and due diligence on the project. These phases generally involve environmental and social impact assessments and, accordingly, this is where MDBs' environmental, social and governmental policies come into play. The successful conclusion of these assessments (which generally involves project sponsors demonstrating that a given project satisfies MDB policy standards) is made a contractual condition and allows project companies to access the MDB lenders' funding. Tan has noted that assessments and safeguards can be linked to the financing negotiations with borrowers[562] and Lin similarly indicates that MDBs' environmental and social policies become externally binding when they are incorporated in the loan agreement between the MDB and the borrower.[563]

Consequently, where there are breaches of these environmental and social policies (to the extent that they may be incorporated in loan agreements as conditions of financing) and where those breaches rise to the level of constituting breaches or violations of human rights, it is MDB accountability mechanisms that serve to enforce and adjudicate claims submitted by affected stakeholders.[564] The question which ultimately arises then is whether MDBs' policies and the indirect use of accountability mechanisms to enforce them are effective and sufficient recourse for stakeholders who suffer harm or whose rights may be adversely affected.

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[559] The World Bank, *Environmental and Social Framework* (2017) available at http://pubdocs.worldbank.org/en/837721522762050108/Environmental-and-Social-Framework.pdf (accessed 13 January 2021).
[560] Lin op cit (n 457) at 246.
[561] Tan op cit (n 551) at 89.
[562] Ibid.
[563] Lin op cit (n 457) at 246.
[564] McIntyre op cit (n 406) at 148; Tan op cit (n 551) at 89-90.

5.2.1 Critiques on the status quo in MDB accountability

It has been argued that the prevailing manner in which environmental, social and governmental policies are incorporated into project-financed transactions as a means or form of indirect accountability mechanism is weak for a number of reasons. These arguments need to be considered. Accordingly, what follows will serve as an assessment of the critiques of both the limitations of MDB policies and the indirect use of accountability mechanisms to enforce MDB policies. However, before commencing with an assessment of the critiques, it is critical to understand the international context which has led to the prevailing status quo in which MDBs have, in certain circumstances, effectively had to rely on domestic country systems in order to address environmental, social and governmental issues. It is necessary to consider these two issues together. MDBs' increasingly relied on their internal environmental, social and governmental policies. At the same time, they attempted to advance the increased use of domestic systems to give effect to protections for harm-causing environmental, social and governmental issues that arise during infrastructure development projects. This warrants consideration because it is an ostensibly contradictory state of affairs.

During 2005, the Bank and the Organisation for Economic Co-operation and Development (the "OECD"), under the auspices of its Development Co-operation Directorate, launched a pilot initiative in which they sought to increase the use of country systems in Bank operations. The initiative commenced with operational rules on environmental and social safeguards[565] - one of the key focus areas that the Bank believed would counteract fund mismanagement once loans were disbursed for projects. Other focus areas included public financial management, competitive bidding, and the selection of consultants.[566]

At the time, the Bank's motivations to implement enhanced use of country system were three-fold. First, the Bank sought to enhance local ownership and capacity-building in projects. The Bank believed that many countries had excellent laws and the primary issue was weak implementation or enforcement. It was theorised that using country systems for projects could change that. The Bank would evaluate of country systems, a prerequisite for permission to use those systems in Bank projects and then would recommend or co-author upgrades of existing governance structures and procurement practices where necessary and appropriate. The Bank believed this would incentivise borrowers to fully implement existing laws and Bank-

[565] C. L. Pallas and J. Wood, 'The World Bank's Use of Country Systems for Procurement: A Good Idea Gone Bad?' (2009) 27(2) *Development Policy Review* 215 at 216.
[566] Ibid at 216

sponsored changes while give borrowers a greater sense of ownership over any given Bank-funded project.

Secondly, the Bank sought to harmonise the provision of aid. Developing countries receiving substantial amounts of development financing from various sources often found themselves contending with dozens of different procurement systems and reporting requirements set out by donors. The bureaucratic burden of these situations can be overwhelming, and strain already-stretched human and financial resources, thus subtract from the resources available for development. Thirdly ,the Bank believed making use of country systems would streamline the lending process and reduce costs on projects.[567]

These all provided promising motivations for the implementation of the system. However, country systems are seldom used in financing transactions, whether for developmental infrastructure or for aid. While the Bank piloted the use of country systems for specific projects in its investment lending profile in 2005, it has not been able to scale up its use of the initiative with only approximately 25 Bank projects implementing the initiative in some form since its inception.[568] In the context of procurement, the Banks inability to scale up the initiative in a meaningful way is largely attributable to their historic practices. MDBs' non-borrower shareholders have been determined in insisting that borrowers in developing countries bypass their own national laws and systems and instead use specially designed and highly restrictive MDB procurement policies and environmental, social and governmental policies, as a standard practice. However, there has been a shift as MDBs have come to realise that this system is cumbersome and inefficient. Furthermore, the approach also overlooks a fundamental development aim, that is, ensuring robust and long-lasting reform of borrowing countries procurement systems to ensure transparent, cost-effective procurement systems that impact all government procurement, not just those projects that are funded by MDBs.[569]

The minority of projects that make use of the country systems initiative and the correlative majority of projects that rely on MDB procurement policies and environmental, social and governmental policies require consideration of critiques of the prevailing manner in which environmental, social and governmental policies are incorporated into the majority of project-financed transactions as a means or form of indirect accountability mechanism.

[567] Ibid at 219.
[568] Prinsloo and Markowitz et al. op cit (n 481) at
[569] Humphrey op cit (n 372) at 7

The first critique is that the incorporation of these policies in transactions via a specific contractual obligation to monitor projects is ostensibly flexible and, as Radavoi notes, only establishes norms exclusively and internally applicable at a given MDB.[570] The norms established by human rights-consistent policies are "policed" internally in a number of ways[571] however, they ultimately amount to MDBs acting as police, prosecutor, and adjudicator for their own violations of human rights. In the context of the Bank, Chimni notes that the status of these policies and MDBs' approaches to enforcing and adjudicating them are such that the bank has moved away from universally applicable mandatory norms in favour of discretionary standards.[572]

Another critique is that reliance on MDBs' internal environmental, social and governmental obligations are diluted by the fact that these policies only promote and protect human rights to the extent acceptable by member states of the MDBs.[573] In this regard, the influence that MDB donor countries have on banks' operations and decision-making has long been recognised. As Kellerman has noted, in assessing MDBs from an institutional perspective a number of scholars have assessed how banks are generally dependent on resources allocated by the member states that make up their shareholders.[574] He goes on to state further that the actions of member state shareholders at MDBs are the "*primary determinant of institutional change*" and lists findings of how MDBs shareholders have used their position to influence the policies, procedures and lending decisions of MDBs.[575]

Yet another critique of the weak nature of existing forms of indirect accountability is that MDBs' self-imposed environmental, social and governmental obligations are often further curtailed when banks prescribe specific or limited commitments on individual projects instead of broadly adopting standardised commitment to environmental, social and governmental policies across all funded projects.[576] This further dilutes the efficacy of project monitoring, any subsequent enforcement or compliance and, further still, it limits the scope of remedies that may be available to complainants when their complaints are adjudicated. Bugalski has

[570] Radavoi op cit (n 531) at 11.
[571] Tan op cit (n 551) at 89.
[572] Chimni op cit (n 378) at 50.
[573] Radavoi op cit (n 531) at 11.
[574] M. Kellerman, 'The Proliferation of Multilateral Development Banks' (2019) 14(1) *The Review of International Organisations* 107 at 110.
[575] Ibid.
[576] Radavoi op cit (n 531) at 11.

highlighted the impact that the newer MDBs have in this regard with specific reference to the emergence of the BRICS bloc's NDB.[577]

She notes that the emergence of newer MDBs such as the NDB and the Asian Infrastructure Development Bank, both notably headquartered in China (in Shanghai and Beijing, respectively), has placed additional pressure on existing MDBs through increased competition in the field of international development financing.[578] At the time of writing, Bugalski drew attention to the prevailing assumption that newer MDBs were likely to go against the trend among existing MDBs to improve social and environmental accountability and place fewer requirements on borrowers in this regard. Consequently, she argues that less onerous financing requirements at newer MDBs are likely to be more attractive to lenders than existing MDBs such as the Bank. This shift would not only diminish the geopolitical influence that Western shareholders like the United States wield through the governance structures of older MDBs but, in so far as the move towards increased accountability was concerned, it would precipitate a shift away from more robust accountability regimes and safeguards for human rights on MDB-funded infrastructure projects.[579]

Further above in Chapter Four this thesis considered the Framework at the NDB and highlighted the environmental, social and governmental obligations it places on both project finance borrowers and those who take advantage of the bank's other financing instruments. While these obligations do not necessarily lack the substantive robustness that Bugalski projected, it does nevertheless emphasise the NDB's reliance on domestic systems and the corporate systems of funding recipients such as project companies to enforce the requirements and standards. The NDB's prioritisation of the use of the domestic legislation, regulations and oversight procedures of borrowing countries wherever possible speaks to the prevailing assumption referred to above that she highlighted.

The shifts in process are also evident at older MDBs – though not entirely motivated by increased competition from newer MDBs, the Bank reviewed its existing safeguard policies in 2016 after extensive consultations.[580] This review culminated in the promulgation of its

[577] N. Bugalski, 'The Demise of Accountability at the World Bank' (2016) 31(1) *American University International Law Review* 1 at 3.
[578] Ibid at 3 – 4.
[579] Ibid.
[580] The World Bank, *Review and Update of the World Bank's Safeguard Policies: Environmental and Social Framework (Proposed Third Draft)* (2016) available at https://consultations.worldbank.org/sites/default/files/materials/consultation-template/review-and-update-world-

Environmental and Social Framework, which became effective on 1 October 2018. The Bank's new framework is a marked departure from its previous set of policies as it is more negotiable, more flexible, reduces the requirements for assessments on projects to expedite funding approvals, and it places a significantly greater emphasis on borrowers' own mechanisms to assess project risks, implement safeguards and monitor progress.[581] Bugalski has also drawn attention to the manner in which the Bank's accountability mechanism, the Panel, has ostensibly circumvented its mandate by allowing the bank to renegotiate agreements with individual borrowers on how to deal with accountability to stakeholders adversely affected by bank-funded projects. This has the potential to "portend an erosion of the system of accountability that recognizes clear policy entitlements of project-affected people and provides recourse to claim those entitlements through an independent investigation."[582]

It is evident that the evolution of MDB environmental, social and governmental policies, the manner in which they are implemented, and the operation of accountability mechanisms are trending towards a system in which accountability is being diminished rather than deepened. There is a marked shift away from establishing robust internal policy entitlements and protections for stakeholders whose rights are affected by infrastructure projects. Instead, there is an increasing preference for systems in which managing human rights risks and redress mechanisms can be negotiated and in which MDBs can only be held indirectly liable through use of domestic accountability and enforcement mechanisms rather than internal accountability mechanisms.

The observation of this trend warrants a return to a central question posed further above. That is, whether MDB policies, the shift away from universally applicable mandatory norms, and the use of indirect accountability mechanisms to enforce them, are effective and sufficient to monitor, enforce and provide recourse for rights breaches for MDB-funded infrastructure projects in light of the weaknesses identified.

5.3 Addressing accountability challenges at MDBs

Following consideration of the critiques and the central question posed above it is appropriate to turn to examining solutions to some of the key challenges that have been raised on

bank-safeguard-policies/en/materials/board_paper_for_es_framework_third_draft_for_disclosure_august_4_2016.pdf (accessed 18 January 2021).

[581] Bugalski op cit (n 577) at 4-5.

[582] Ibid at 5.

accountability at MDBs. In the context of the Bank, Chimni has identified key interrelated considerations that may be used as a general framework within which to situate solutions to accountability challenges more broadly across MDBs:[583]

The first examines how to ensure that environmental, social and governmental standards set out in MDB policies are not diluted in order to guarantee that appropriate standards exist against which MDB conduct can be measured. Second, the mandatory obligation and operation of MDB standards should be examined in relation to the power of accountability mechanisms in providing reparations for harm or rights violations. Third, the role of global administrative law in the operation of MDB accountability mechanisms should be assessed. This a critical consideration for this study as it is concerned with ensuring that MDB accountability frameworks are imbued with transparency, procedural fairness and lawfulness in so far as broader frameworks around accountability at MDBs are aimed at regulating monitoring, enforcing and providing potential reparations for stakeholders affected by adverse MDB conduct. Also related to this is the need for reform to address broader procedural challenges stakeholders face when they challenge MDBs' conduct.

Cumulatively, these procedures should ensure that MDB accountability mechanisms are used effectively and that access to and the operation of these mechanisms does not unnecessarily inhibit stakeholders' ability to seek recourse. These will be considered in what follows.

5.3.1 The legal status of MDB environmental, social and governmental standards

The diminishing force and efficacy of MDBs' environmental, social and governmental standards is a direct challenge to ensuring enhanced accountability at MDBs. Across most MDBs' operations, when they engage in funding infrastructure projects, monitoring and enforcing standards remain in the purview of the borrowing entity rather than the MDB lender. This thesis has already drawn attention to the obligations and operations of a select group of MDB lenders, in this regard. At the Bank, I highlighted how the bank's environmental and social framework has shifted to place a significantly greater emphasis on borrowers' mechanisms to assess project risks, implement safeguards and monitor progress. The NDB relies on domestic and corporate systems of funding recipients to enforce the requirements and standards set out in the bank's environmental, social and governmental policies. Similarly, the ADB's processes were also assessed and, while it makes a clearer commitment to conduct monitoring and assessments on risks which may occasion human rights violations than its

[583] Chimni op cit (n 378) at 51.

peers, it is submitted that its conduct remains demonstrably reactive rather than proactive. It continues to rely on claimants seeking recourse to craft remedies or effect changes in projects' execution and commentators have highlighted how the "complex process" of its accountability mechanism and its "uncertain consequences" have both resulted in few requests.[584]

Evidently, there is a marked shift towards what the Bank has termed "less front-loading during project preparation" across MDBs.[585] The underlying assumption, as Buglaski advances, is that MDBs and borrowers are following an approach that allows them broader discretion to negotiate responsibility and agree on applicable monitoring and evaluation obligations within a given project's contractual scheme on a project-by-project basis. This generally tends to shift the balance of responsibility for the implementation of environmental, social and governmental protections contained in MDBs safeguard policies to borrowers while simultaneously shifting the focus to project outcomes by absolving borrowers from up-front obligations to prepare detailed plans on mitigating project risks. The corollary is that it also notionally decreases the burden on MDBs from having to engage in vigorous consideration of the various human rights impacts before approving funding for a given project outside of what might have been negotiated in the development phase of a project financed infrastructure transaction.[586]

Notwithstanding this weakening of "up front" mechanisms, Carrasco *et al* note that the goal for MDBs generally and regional MDBs in particular nevertheless remains ensuring that banks develop an effective framework of internal accountability and oversight. Frameworks of this nature should promote and improve compliance with environmental and human rights norms and the effectiveness of developmental aid in general.[587] For the contracting parties, delineating clear and effective contractual parameters in terms of which a given MDB's rights, obligations, conduct and accountability are clearly discernible during infrastructure projects is critical – particularly in so far as those rights and obligations relate to environmental, social and governmental standards. However, while parties to the contractual scheme may have recourse to mechanisms such as dispute review boards and other negotiated contractual rights in the loan agreement, recourse for project-affected stakeholders external to the contractual scheme is less

[584] See F. Fukuda and Mekong Watch – Japan, 'Critical Analysis of the New Accountability Mechanism of the Asian Development Bank' (2003) *Asienhaus, focus Asien: A handbook on the Asian Development Bank* 31 at 33.
[585] The World Bank, *Environmental and Social Procedure* (Deliberative Working Draft) (2015) available at http://documents1.worldbank.org/curated/en/748451469107442841/pdf/107175-BR-R2016-0145-IDA-R2016-0198-Box396279B-PUBLIC.pdf (accessed 19 January 2020) as cited in Bugalski op cit (n 555) at 11.
[586] Bugalski op cit (n 577) at 11-12.
[587] E. R. Carrasco, W. Carrington and H. Lee, 'Governance and Accountability: The Regional Development Banks' (2009) 27(1) *Boston University International Law Journal* 1 at 60.

accessible and less certain. Reliance on MDB accountability mechanisms and MDBs environmental, social and governmental standards accordingly emerges as a primary route for asserting their rights. In order to examine how MDBs maintain effective accountability for both contracting parties and project-affected external stakeholders, the legal status of the environmental, social and governmental standards that MDBs promulgate must be considered.

Examining the legal status and efficacy of these standards for stakeholders, Suzuki highlights the central issue of the extent to which "decisions and instruments adopted by the constituent documents of an international organisation should be part of 'international law' proper".[588] In this regard, the International Law Association's *Final Report on the Accountability of International Organisations* established that international organisations such as MDBs may be held to account for breaches of an obligation depending on the context or circumstances surrounding the act or omission that led to the breach.[589] That same report goes on to recognise that "the principle that [international organisations] may be held internationally responsible for their acts is nowadays part of customary international law."[590] In order to codify the practical operation of this principle of customary international law, the International Law Commission (the 'ILC') adopted Articles on the *Responsibility of States for Internationally Wrongful Acts*[591] in 2001 and then, over the course of the following years, developed the *Draft Articles on the Responsibility of International Organisations*[592] (the 'DARIO') which was ultimately adopted at the sixty-third session of the ILC in 2011 and submitted to the UN's General Assembly as part of the ILC's report on the session.[593] Gal-Or and Ryngaert have emphasised that the adoption of the DARIO is a landmark development in public international law and that it may have revolutionary implications for international relations and global governance.[594]

[588] E. Suzuki, 'Responsibility of IFIs under International Law' in D.D. Bradlow and D. B. Hunter, *International Financial Institutions and International Law* (2010) at 78.
[589] International Law Association op cit (n 384) at 5.
[590] Ibid at 25 as cited in Chimni op cit (n 378) at 53.
[591] International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts*, A/RES/56/83, United Nations General Assembly, 56th Session (2001) available at https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf (accessed 19 January 2021).
[592] International Law Commission, *Draft Articles on the Responsibility of International Organisations as*, A/RES/66/98, United Nations General Assembly, 66th session (2011) available at https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf (accessed 19 January 2021).
[593] F.E Marouf, 'Holding the World Bank Accountable for leakage of funds from Africa's Health Sector' (2010) 12(1) *Health and Human Rights* 95 at 98.
[594] N. Gal-Or and C. Ryngaert, 'From Theory to Practice: Exploring the relevance of the Draft Articles on the Responsibility of International Organisations (DARIO) – The Responsibility of the WTO and the UN' (2019) 13(5) *German Law Journal* 511 at 511.

Suzuki notes that the role and status of MDBs' environmental, social and governmental standards is directly impacted by and tied to the promulgation of the DARIO. While MDBs fund projects and operate in borrowing member states to pursue their respective mandates and functions, they adopt policies, directives, and implementation guidelines that are independent of the internal laws of any member states.[595] According to Article 11 of the DARIO:

> *"1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned.*
>
> *2. Paragraph 1 includes the breach of any international obligation that may arise for an international organization towards its members under the rules of the organization."*[596]

Attention should be drawn to the commentary on Article 11 of the DARIO, as Suzuki does,[597] which states that "[f]or an international organisation many obligations are likely to arise from the rules of the organization" and further that "[o]bligations arising from the constituent instruments or binding acts that are based on those instruments are indeed international obligations."[598] It is submitted that Suzuki's position may be endorsed. It establishes that breaches of obligations created by the policies, directives, and implementation guidelines of MDBs are covered by the DARIO. In so far as policies articulate rules that create international obligations, they are subject to international law.[599]

5.3.2 MDB standards and the creation of international legal obligations

It may be recalled that one of the first critiques of the status quo in accountability is that MDBs have tended to approach policies as establishing norms that are exclusively internally applicable and subjectively enforced. However, given the position that rules contained in policies create international obligations that are subject to international law, what must be considered is the nature of these obligations, that is, their external effect and the extent to which MDBs are duty-bound to fulfil them as part of their broader international law obligations, particularly in the context of promoting and protecting human rights. This is a necessary

[595] Suzuki op cit (n 588) at 80.
[596] The DARIO op cit (n 592) at Article 11.
[597] Suzuki op cit (n 588) at 80.
[598] International Law Commission, *Draft Articles on the Responsibility of International Organisations, with Commentaries*, A/RES/66/10, United Nations General Assembly, 66th session (2011) available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf (accessed 20 January 2021) at 63.
[599] Suzuki op cit (n 588) at 80.

consideration given the position articulated by Tan. In the context of the Bank and the IMF she emphasises that MDB actors such as these have a role as normative actors in the international human rights regime. This is because they contribute towards the development of legal and other regulatory norms through their policies and in the manner in which they incorporate and enforce these policies by incorporating them as loan conditionalities in their financing transactions.[600]

One position on the externally binding nature of the obligations is that they may be seen as unilateral declarations in international law.[601] In this regard, the environmental, social and governmental policies of MDBs have been found to meet three conditions in that they (i) possess the requisite publicity, (ii) are imbued with the requisite authority given their source, and (iii) notionally present an objective expression of MDBs' intention to be bound to the obligations they promulgate.[602] Importantly, the satisfaction of the third element may be gleaned from the language employed to articulate MDBs' commitment to monitor and enforce the obligations articulated in their respective policies. This is an important criterion as it triggers the necessary responsibility or accountability envisaged by the application of Article 11 of the DARIO referred to above.[603]

Radavoi submits that a clear intention to be bound to the obligations articulated in the policies should be extracted from the text, regardless of the author's real intent[604] – an approach adopted in a number of high-profile cases that have come before the International Court of Justice, including the matter *Nuclear Tests (Australia v. France)*[605] and the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* matters.[606] D'Aspremont notes that this formalistic approach has been espoused across the case law at international level.[607] He notes further that the position in mainstream theory continues to be that the identification of an agreement's membership of the international order is primarily based on its existence as a written instrument, rather than a more flexible approach that would leave it to the fluctuating

[600] Tan op cit (n 551) at 90.
[601] Radavoi op cit (n 531) at 14-15.
[602] Ibid.
[603] Ibid at 16.
[604] Ibid.
[605] *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 253 at 268.
[606] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1986, p. 14 at 132.
[607] J. d'Aspremont, 'Formalism versus Flexibility in the Law of Treaties' in C. J. Tams and A. Tzanakopoulos et al. *Research Handbook on the Law of Treaties* (2014) at 269-271.

substantive content of a given agreement or instrument to determine its binding status in international law.[608]

Accordingly, it should be acknowledged that MDBs' environmental, social and governmental standards may at times be drafted ambiguously and skirt explicit accountability on monitoring, enforcement and duties on reparations. However, in so far as these policies and standards may articulate international obligations, they form part of the framework of binding international law and should not be dismissed forthwith.

5.3.3 MDB policy standards as an incident of global administrative law

At the very outset of this thesis one of the four fundamental questions which was posed was how global administrative law achieves administrative justice where the administrative decisions taken by MDBs adversely impact the rights of persons involved in or affected by these projects. Evidently, there are yet further bases to reinforce the binding nature of MDB policies as establishing obligations in international law. Hunter situates the international legal obligations of MDBs and their environmental, social and governmental policy standards within the discipline of global administrative law.[609] He notes that to some extent the standards which MDB policies set are internal regulations predominantly aimed at setting norms that aim to constrain the conduct of the institution itself.[610] Indeed, this has been demonstrated in this study through the examination of policy standards at a select grouping of MDBs and the manner in which MDB accountability mechanisms operate to give effect to and enforce these standards.

However, it has also been submitted that a narrow focus on the internal aspects of MDB policy standards misses the substantial external impact that they have, particularly given how these standards have also been crafted to change the behaviour of their borrowers.[611] This too has been demonstrated above when it considered, as Hunter has done, the impact of MDBs' environmental, social and governmental policies as they are incorporated into their loan agreements with government borrowers and private entities.[612] Similarly, the external impact of these policies on non-contracting stakeholders were considered with reference to employing

[608] Ibid.
[609] D. B. Hunter, 'International Law and Public Participation in Policy-making' in D.D. Bradlow and D. B. Hunter, *International Financial Institutions and International Law* (2010) at 206.
[610] Ibid.
[611] Ibid.
[612] Ibid.

them as a means to protect the rights and interests of third parties that may be affected by projects.[613]

Significantly, notwithstanding the impact of MDB policies on accountability and their impact both internally and externally, both Hunter and this thesis have emphasised that the legal status of these policies in international law nevertheless remains somewhat unsettled.[614] While the arguments advanced in this chapter have demonstrated how they should be seen as part of the framework of international law as unilaterally binding commitments, yet another perspective that reinforces their binding nature may be considered. This perspective warrants a return to a point made in Chapter One of this study.

To reiterate in brief, Casini submits that the proliferation of global administrative law stems from the proliferation of specialist and regional actors such as MDBs whose presence and operation has occasioned a correlative expansion of rules.[615] It was noted that the examination of the expansion and operation of these rules in so far as they regulate the interactions between international organisations and states at international level may be defined as the 'horizontal' perspective while the examination of the development of these rules and their influence on and interconnectedness with existing domestic legal orders may be described as the 'vertical' perspective because it focuses on the rules' downward impact and how they impact domestic legal orders.[616]

The rules in question forming the subject of this analysis of the horizontal and vertical perspectives on global administrative law are, among others, the environmental, social and governmental standards which MDBs have promulgated. Thus, a consideration of the proliferation of these rules as elements driving the broader proliferation of global administrative law is necessary. Accordingly, the section that follows will analyse the role of applicable environmental, social and governmental standards and the related accountability mechanisms at MDBs as an incident of the proliferation of a framework of binding global administrative law.

[613] Ibid.
[614] Ibid at 207.
[615] See Casini op cit (n 97) at 25.
[616] Ibid.

5.4 Global Administrative law and MDB accountability

Chapter One of this thesis focused on the key emerging drivers of global administrative law. However, it is necessary to consider it more narrowly by examining what it is and how it may operate as a mechanism to improve accountability at international organisations such as MDBs.

5.4.1 An appropriate conception of global administrative law for better accountability

Dyzenhaus submits that most scholars of global administrative law define the body of law with the implicit assumption that "global bodies are public legal authorities that make substantive legal decisions" as a basis for grounding their theories on how to hold these bodies accountable for their decisions and conduct.[617] In this regard he refers to the seminal definition of global administrative law developed by of Kingsbury, Kirsch and Stewart (hereafter 'Kingsbury'),[618] as:

> *"…comprising the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring that they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make."*[619]

They go on further to define administrative action as the "rulemaking, adjudications, and other decisions that are neither treaty-making nor simple dispute settlements between parties".[620] McIntyre positions this definition of global administrative law and administrative action as a direct response to the "changing realities of transnational regulation" which he records as involving various forms of industry self-regulation, hybrid forms of public-private regulation, private-private regulation, and governance by intergovernmental or multilateral organisations with direct or indirect regulatory powers, among others.[621] This aligns with Kirsch and Kingsbury's identification of the emergence of a "global administrative space" where they note that the "strict dichotomy between domestic and international has largely broken down, in which administrative functions are performed in often complex interplays

[617] D. Dyzenhaus, 'Accountability and the Concept of (Global) Administrative Law' in H. Corder (ed) *Global Administrative Law: Innovation and Development* (2009) at 5.
[618] B. Kingsbury, N. Kirsch and R. B. Stewart 'The Emergence of Global Administrative Law' (2005) *Law and Contemporary Problems* 15 as cited in Dyzenhaus op cit (n 595) at 5.
[619] Ibid at 17
[620] Ibid.
[621] McIntyre op cit (n 406) at 149.

between officials and institutions on different levels, and in which regulation may be highly effective despite its predominantly non-binding forms."[622]

Related to this is what Kingsbury has submitted is the role of global administrative law as a means to address that which cannot be fully addressed by the application of domestic regulatory regimes alone.[623] As regulatory decisions increasingly shift from domestic to international level as a result of the advances of globalisation, the detail and implementation of this regulation is similarly increasingly determined by transnational administrative bodies. These bodies include international organisations and informal groups of officials that perform administrative functions but who are not directly subject to control by national governments, domestic legal systems, or, in the case of treaty-based regimes, states party to the treaties.[624] This is significant because, as Kingsbury notes, these administrative and regulatory decisions and determinations are increasingly implemented against private parties or, more commonly, through implementing measures at the national level.[625]

Morlino has drawn attention to MDBs' funding developmental infrastructure projects and how, within that process, the rules set out in MDB policies create administrative and procedural duties for borrowers at the international and state levels. In so far as environmental, social and governmental standards or rules are concerned, these have wide ranging impact, as has been argued above in this thesis. Not only do they impact the state parties to the transactions, but also the rights of the private entities involved in those projects.[626] In this context, Morlino refers to MDBs as occupying a special position as the 'third entities' that stand between states and private parties as a result of their status.[627] This inevitably leaves a gap of accountability for MDBs in instances where they implement decisions that affect state parties, private entities or non-contracting stakeholders – MDBs are both rule-makers and rule-breakers, but with few guardrails or referees to adjudicate on their accountability for harm-causing conduct. This is a gap that global administrative law stands poised to fill. Dyzenhaus distils the three normative conceptions of the role of global administrative law that Kingsbury identifies as a mechanism to stand in this 'gap' of accountability.[628]

[622] Kirsh and Kingsbury op cit (n 121) at 1.
[623] Kingsbury et al op cit (n 618) at 16.
[624] Ibid.
[625] Ibid.
[626] Morlino op cit (n 92) at 88.
[627] Ibid.
[628] Dyzenhaus op cit (n 617) at 5.

The first of these is global administrative law's ability to serve as a system of internal accountability or, as Kingsbury defines it, its ability to serve as a mechanism to ensure 'intra-regime accountability'.[629] In essence, this conception holds that global administrative law is merely functional in nature; it seeks to ensure that where a given order within a system of rules exists, the various components and agents within that order should perform their appointed roles and conform to the internal law of the regime.[630] On this basis, global administrative law is seen as an instrument to maintain and protect the operation of a given institutional order that is justified independently.[631] This functionalist approach was alluded to earlier in this study and will be returned to further below.

Dyzenhaus submits that the second conception of the role of global administrative law is normatively more demanding than the first.[632] It holds that the role of global administrative law is the protection of the rights of states, private individuals, firms, or non-governmental organisations. Kingsbury notes this would occur where the decisions of international organisations infringe rights through the imposition of sanctions, liabilities, disadvantageous determinations of status, or the denial of licensing approvals, among others.[633] Conduct such as this would amount to administrative action and would generally require prior hearing for the affected person, specific justifying reasons, and the possibility to review by an independent mechanism.[634] Dyzenhaus highlights Kingsbury's critique to this approach in which he notes that in a pluralist global society in which human rights are not protected at all or only minimally protected, the social basis for global administrative law based on individual rights is largely absent.[635] In this regard Kingsbury argues that "once regulation of, and even the provision of, important governmental functions becomes transnational or international, the problem of diverse social orders in different nations and regions becomes central" because none of the participating states would be able to demand that its ideologies and approaches should govern international institutions.[636] On a practical level, in the context of MDBs, it is not difficult to postulate how the critiques of this conception might

[629] Kingsbury et al op cit (n 618) at 44.
[630] Ibid.
[631] Ibid.
[632] Dyzenhaus op cit (n 617) at 6.
[633] Kingsbury et al op cit (n 618) at 46.
[634] Ibid.
[635] Dyzenhaus op cit (n 617) at 6; Kingsbury et al op cit (n 618) at 46.
[636] Kingsbury et al op cit (n 618) at 46.

be realised among the BRICS bloc and the operation of the NDB, given the diversity of ideological approaches among members of the bloc.

The third conception of global administrative law is the most normatively demanding of the three. It situates the need, performance and possibilities of the body of law in the tradition of the pursuit of democratic ideals at a global level.[637] Kingsbury alludes to this conception as being ambitious and democracy-enhancing.[638] Framed in a more limited fashion, he submits that this conception sees the aim of the body of law as "controlling the periphery to ensure the integral function of a regime, protecting rights, and building meaningful and effective mechanisms of accountability to control abuses of power and secure rule-of-law values".[639]

In identifying a preferred conception of global administrative law which may appropriately and adequately address the accountability needs at MDBs, it is worth returning to the first conception of global administrative law. Dyzenhaus approaches the adoption of a functionalist conception or approach to global administrative law as being normatively more demanding than what Kingsbury's critique suggests.[640] In fulfilling its function as a mechanism for promoting increased accountability, he argues that a truly functionalist approach to global administrative law is an independent justification. It should "come from whatever goals or purposes law is instrumental to" such as, for example, furthering democratic aims or, alternatively, some environmental, social or governmental objective.[641]

His argument in this regard may be endorsed with reference to the functionalist approach to global administrative law outlined in Chapter One of this study. To echo the submission made in that chapter, Reinsch found that international organisations such as MDBs were formed to act as public agencies coordinating and pursuing global public interests, such as social and economic development.[642] This necessitates regulation of these activities at an international level. As Klabbers argues, a functionalist conception recognises that global administrative law operates at international organisations as a means to regulate their functioning. There is argument to be made for global administrative law's role as a system to ensure for intra-regime accountability. MDB's are created to execute functions through

[637] Ibid at 48.
[638] Ibid at 50.
[639] Ibid at 51.
[640] Dyzenhaus op cit (n 617) at 6.
[641] Ibid.
[642] Reinsch op cit (n 101) at 1-2.

specifically conferred powers delegated to them by their member states and as a consequence, they must necessarily be constrained to only conduct themselves in accordance with those powers conferred on them by states. Accordingly, the validity of their decisions, recommendations and activities is contingent on whether those decisions, recommendations and activities relate to the authorised functions of the organisations.[643] These authorised functions will be contained in promulgated instruments such as MDBs' environmental, social and governmental policies. These internal policies, as has been demonstrated, create responsibilities in international law and amount to representations by MDBs in terms of which outside parties may monitor their conduct, enforce obligations, and in terms of which arguments may be made for reparations for adverse conduct.

5.4.2 Practical consequences of the advancement of global administrative law

The functionalist approach to global administrative law occasions a correlative inquiry about what this means for accountability at MDBs on a practical level. In order to assess these consequences, it is useful to articulate the practical manifestation of the 'gap' in accountability identified in the aforementioned section. In this regard, Marks has articulated this structural gap in the international system as follows:

> *"The contradiction has to be confronted between 'structures of power that seem to be increasingly internationalised, globalised, in some sense universalised and processes of participation, representation, accountability and legitimation that remain rooted in the institutionalised apparatuses of states'… The central implication of this is that the nation-state cannot remain democracy's container."*[644]

The key question in the debate about the role of global administrative law is therefore how to make global administrative agencies accountable.[645] In this regard, the identification of this structural gap and the attendant realisation of administrative procedural rights as a means to fill the accountability gap faced by international institutions such as MDBs is increasingly recognised as being part of the emerging principles of international law, particularly in so far as these principles are applicable to the advancement of sustainable development.[646]

The manifestation of these administrative procedural rights at MDBs in the context of sustainable development are generally divided into three specific rights for stakeholders

[643] Klabbers op cit (n 103) at 645.
[644] S. Marks, 'Democracy and International Governance' in J. Coicaud and v. Heiskanen (eds) *The Legitimacy of International Organizations* (2001) at 11-12 as cited in Hunter op cit (n 609) at 212.
[645] Dyzenhaus op cit (n 617) at 12.
[646] Hunter op cit (n 609) at 212

affected by decisions or conduct of international institutions such as MDBs: (i) the right of access to information; (ii) the right to participate in decisions that adversely affect rights, lives or livelihood; and (iii) the right of access to justice in some form.[647] Stewart argues that these three procedures for decision-making at international institutions are core components of global administrative law.[648] Moreover, these principles have also been supported by substantial practice among states and international organisations.[649]

On the issue of the proliferation of the practice of implementing global administrative law principles at international institutions, Hunter refers to Principle 10 of the Rio Declaration that first recognised the importance of the three foundational principles of global administrative law.[650] It states as follows:

> *"Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."*[651]

The relevance of the Rio Declaration in the field of sustainable project financed infrastructure development was articulated in Chapter Three above. It was highlighted that the Declaration is a key driver of the shift away from a narrow conception of accountability at MDBs towards a broader conception that encompasses legal, political, administrative or financial mechanisms for breaches that infringe stakeholders' rights.

In addition to this, there are further consequences of the broad influence of the Rio Declaration. Principle 10 in particular, and its relation to the three foundational principles of global administrative law identified above may be highlighted. These principles have also been exemplified in the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters[652] (the 'Aarhus Convention'). In

[647] Ibid at 213.
[648] R. B. Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness' (2014) 108(2) *American Journal of International Law* 211 at 255.
[649] Hunter op cit (n 609) at 213.
[650] Ibid.
[651] The Rio Declaration op cit (n 392) at Principle 10.
[652] The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998, 2161 UNTS 447 referred to as the 'Aarhus Convention', named after the Danish town in which the convention was first signed.

Article 1, the Aarhus Convention articulates access to information, public participation and the availability of recourse to administrative or legal review procedures as foundational objectives for environmentally significant decisions by states and international organisations party to the Convention.[653] It is worth noting, as Hunter does, that while the Aarhus Convention is open for signature, its operation remains largely regional given that it was primarily aimed at the integration of former Soviet bloc countries into the European Union.[654] Some other regions have followed the model of establishing a similarly binding regional convention. In Latin America the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, known as the Escazú Agreement, was promulgated in 2018.[655] While the Organisation of American States that has chosen to implement Principle 10 of the Rio Declaration via a non-binding action programme.[656]

Ultimately what the above has demonstrated is that there is evidence of a clear shift towards a broader conception of global administrative law within the international legal framework and a core set of three principles that are intended to deal with breaches that infringe stakeholders' rights. These operate in conjunction with the promulgation of environmental, social and governmental policies and the formation of accountability mechanisms at almost all MDBs.

The section that follows limits its consideration to only one of the trio of procedural rights - namely, the availability of recourse to administrative or legal review procedures. Particular attention will be paid to this right in the context of how it has been practically realised through the formation of formal MDB accountability mechanisms.

5.4.2.1 Recourse to administrative or legal review procedures

For the purposes of examining the advancement of accountability at MDBs in project financed infrastructure transactions, the focus will be narrow, limited to a consideration of accountability mechanisms as an incident of global administrative law's procedural right of recourse to administrative or legal review procedures. This is so because, while access to information and transparency and public participation are certainly not to be disregarded, what will be demonstrated is that their role is ancillary in nature, as it has been argued that they are not accountability mechanisms in and of themselves.

[653] Stewart op cit (n 648) at 255-256.
[654] Hunter op cit (n 609) at 215-216.
[655] The Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean done at Escazu on 4 March 2018, No. 56654
[656] Ibid.

Reference may be made to Stewart, who situates the tenets of access to information and transparency and public participation within a broader conception of accountability. He refers to Harlow's characterisation of the role of transparency which defines it as a process by which international institutions engage in open decision making and information disclosure as a process of giving an account to civil society and other stakeholders.[657] While, on the role of public participation, he refers to Grant and Keohane who characterise public participation as a participatory model of accountability through which the performance and decisions of power holders are evaluated by those affected by their actions, who are given an 'equal say'.[658]

Transparency and public participation, along with more imprecise forms of accountability such as the role of the media in promoting public reputational influences and incentives (as was discussed in Chapter Four), may all be harnessed to address rights violations.[659] However, it has been submitted that none may be characterised as an accountability mechanism in its narrower sense - this is because none of these mechanisms involves what Stewart terms a delegation of resources, authority, or a system of legal rights and duties.[660] He argues that the broader forms of accountability do not exhibit three structural elements of accountability mechanisms, namely:

> *"(1) a specified accounter, who is subject to being called to provide account for his conduct; (2) a specified account holder who can require the accounter to render account; and (3) the ability and authority of the account holder to impose sanctions or other remedies for deficient performance."*[661]

The practices of transparency and participation, in so far as they are non-decisional in nature, do not involve any prescribed rendering of account to an 'account holder' imbued with authority to make consequential decisions or reach a verdict on whether the 'accounter' has adequately satisfied its obligations.[662] While transparency practices and non-decisional participation practices play a role in the effective operation of certain accountability mechanisms, they are not, in themselves accountability mechanisms.[663] This narrow

[657] C. Harlow, *Accountability in the European Union* (2002) at 10-12 as cited in Stewart op cit (n 626) at 252.
[658] R. W. Grant and R. O. Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99(1) *American Political Science Review* 29 at 31 as cited in Stewart op cit (n 626) at 252.
[659] Stewart op cit (n 648) at 253.
[660] Ibid.
[661] Ibid.
[662] Ibid.
[663] Ibid.

conception of accountability is primarily satisfied by the operation of the third tenet of global administrative law's procedural right of recourse to administrative or legal review procedures.

Mulgan's conception supports Stewart's articulation of the third tenet of the procedural right of recourse to a review procedure. He begins by noting that one aspect of accountability which is almost universally agreed is that accountability must involve a form of being called to account before an authoritative body.[664] From there, as Stewart did, Mulgan identifies core structural elements of an effective accountability mechanism – he configures the elements of robust accountability as follows: it involves a "social interaction and exchange" as one side, in "calling for the account, seeks answers and rectification while the other side, that being held accountable, responds and accepts sanctions".[665] This, Mulgan submits, implies the existence of "rights of authority" allowing those calling for account to assert rights to demand answers, reparations and/or impose sanctions over those being held accountable.[666]

In the context of MDBs, Hunter posits that the third tenet and its operation through MDB accountability mechanisms together with their environmental, social and governmental policies are recognised as giving effect to provisions across a host of international legal instruments that deal with human rights.[667] He notes that Article 10 of the Universal Declaration of Human Rights states:

> *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."*[668]

This due process right has been extended to civil matters that affect individuals' rights and responsibilities in a host of international legal instruments and national constitutions.[669] In the context of MDBs, this thesis has already demonstrated that access to judicial review of conduct or decisions of these institutions remains limited – MDBs are largely self-regulated, the nature of project-financed transactions triggers only indirect or derivative accountability and MDBs retain the ability to claim immunity from legal process when they are brought before domestic judicial bodies. This highlights the importance of MDBs establishing a robust rights-based system of administrative or judicial review where judicial review in the traditional sense is

[664] R. Mulgan, 'Accountability: An ever-expanding concept?' (2000) 78(3) *Public Administration* 555 at 555.
[665] Ibid.
[666] Ibid.
[667] Hunter op cit (n 609) at 219.
[668] The Universal Declaration of Human Rights, UN General 10 December 1948, 217A(III), United Nations General Assembly at Article 10.
[669] Hunter op cit (n 609) at 220.

either limited or not available at all.[670] Accordingly, powers and operation of MDB accountability mechanisms and the role of environmental, social and governmental policies are crucial – their effective operation is critical in promoting and protecting the internationally recognised human right to due process and, in particular, the fundamental global administrative law right of recourse to administrative or legal review procedures.

This is an argument supported by Hunter, who recognises that stakeholders' access to an independent administrative or judicial review function may be fulfilled (even if only partially) by independent accountability mechanisms such as the Panel at the Bank. He notes that accountability mechanisms "provide an opportunity to mediate a dispute or investigate the [MDBs] compliance with its own policies and procedures, or both" and, moreover, provide "a limited opportunity to be heard and the potential for a remedy to harm they may have suffered".[671]

In light of the central role of MDB accountability mechanisms, Chapter Six will consider how domestic and global administrative laws can be applied more effectively to the existing accountability regimes at MDBs when they finance infrastructure projects. It will deal with whether domestic and global administrative laws should be leveraged more effectively to improve the operation of MDB accountability mechanisms. It will detail where there are lacunae in global and domestic administrative laws in so far as they apply to infrastructure financing and accountability at MDBs and examine potential reforms.

[670] Ibid.
[671] Ibid at 221.

CHAPTER SIX
Reforms for Accountability: Lifting the Veil and A Super Accountability Mechanism

6.1 Introduction

In the preceding chapter, I outlined how an MDB's unique position and status in international law together with the manner in which such bodies operate has precipitated an accountability 'gap' in which rights breaches or derogations may go without consequence or remedy. However, I also established that this challenge is not insurmountable. In this regard, attention was drawn to three interrelated functions which present a solution to the challenges in accountability.

Firstly, MDBs' environmental, social, and governmental standards were identified, and their legal status was evaluated. It was demonstrated that these standards create international obligations and, it was submitted, that they may be situated within the emerging body of global administrative law. Secondly, it was submitted that these standards may be situated within the emerging body of global administrative law and given that among others, the standards exhibit all the hallmarks of the trilogy of foundational global administrative law principles. Finally, I submitted that for the purposes of protecting and advancing accountability, the availability of a form of recourse to administrative or legal review procedures is critical. On this score, it is notable that these standards operate in conjunction with the formal accountability mechanisms at MDBs.

The tools which stand as solutions to the gap in accountability at MDBs are thus the existence of MDB standards, their legal status as instruments that create international legal obligations and form part of the body of global administrative law, and their operation through accountability mechanisms. However, while these tools may exist, they remain imperfect given the existing systemic accountability issues at MDBs. It is among the core aims of this thesis to examine whether legal reforms can be implemented at either international or domestic level to address the challenges experienced in MDBs' financing of infrastructure projects, particularly in developing countries such as the BRICS bloc. Central to this aim is a consideration of how the functioning of accountability mechanisms at MDBs may be improved to either prevent or provide remedies for human rights derogations or violations for stakeholders affected by or involved in the infrastructure projects.

Accordingly, this chapter will consider how domestic and global administrative law must be better leveraged within the existing accountability regimes at MDBs when they participate in financing infrastructure projects. This will be done with reference to how these administrative laws and principles may be used to improve the operation of MDB accountability mechanisms on a practical level. The chapter will examine whether there are lacunae in global and domestic administrative laws in so far as they apply to infrastructure financing and accountability at MDBs, will consider the interface between domestic and global administrative laws, and will examine potential reforms to improve accountability and the operation of accountability mechanisms.

6.2 Leveraging global administrative law as a tool for reform in accountability

The expanded role of MDBs has complicated their relationships with their member states and non-state stakeholders during their infrastructure financing activities.[672] It would be illusory to define this triangular relationship as being purely economic in nature given the inevitably political and social considerations which arise in developmental project transactions that involve sovereign states, private companies, MDBs and affected stakeholders.[673] Based on a prevalent emerging perspective on development, infrastructure projects should not be treated as isolated economic events but rather as part of the broader project of advancing social, economic and environmental transformation.[674] In project-financed infrastructure transactions this means that from the development and construction to operation phases, it is necessary to engage in constant assessment of a given project's manifold impacts - particularly the social and environmental impacts – and consider how these may evolve over the lifespan of a project.[675]

Bradlow identifies a number of consequences which flow from this prevalent emerging perspective on development, and chief among these is that MDBs have more complex responsibilities. They are responsible not only for "prudent financial decisions in regard to the projects that they fund" but also "comprehensive assessments of the impact of these projects

[672] D. D. Bradlow, 'Southern African governments, multilateral development banks, non-state actors, and sustainable infrastructure: Managing changing relationships' (2015) 22(3) *South African Journal of International Affairs* 289 at
[673] Ibid.
[674] Ibid at 295.
[675] Ibid.

on the physical and human environment in which they are situated".[676] Inextricably linked to these complex responsibilities is the duty to account and, in this regard, the mechanisms that MDBs use to fulfil this duty are critical.[677]

Further above this thesis examined how MDBs have promulgated environmental, social and governmental policies and created formal accountability mechanisms in direct response to the view that they should be subjected to a more complex conception of responsibility. These mechanisms are reformative and serve as a means to satisfy the need for robust accountability as incidents of the proliferation of a framework of binding global administrative law. However, it is submitted that the veracity of these mechanisms as a means to protect and advance accountability at international institutions is contingent on how effectively they give expression and effect to principles of global administrative laws on accountability.

Indeed, the need to effectively leverage global administrative laws at international institutions in this manner has been recognised in this thesis and elsewhere. Chimni's critical approach in this regard is an apposite starting point. He positions global administrative law as a reformative salve for what he broadly terms the "imperial" and "non-democratic" character of international institutions.[678] However, he goes on to submit that while global administrative law is an integral part of international law, ultimately its efficacy must be assessed against whether it can serve as a "tool of resistance and change" at international institutions.[679] Accordingly, in order to assess whether global administrative law is an effective and reformative solution to improve the operation of MDB accountability mechanisms, what should be examined is how the body of law interfaces with these mechanisms on a practical level. Related to this are questions on whether this solution is sufficient to meet the demands of MDB projects that occasion human rights violations or derogations, and whether there is a need for further reforms at MDBs to strengthen accountability.

6.2.1 Shortcomings in the global administrative law approach?

It is conceptually useful to begin by acknowledging that there have been critiques of global administrative law's potential shortcomings in addressing increased accountability at international institutions such as MDBs. In Chapter Four, this study addressed how MDBs employ claims of legal immunities to avoid being held accountable for rights violations or

[676] Ibid at 295-296.
[677] Ibid.
[678] B. S. Chimni, 'Co-option and Resistance: Two faces of Global Administrative Law' (2006) 37 *New York University Journal of International Law and Politics* 799 at 806.
[679] Ibid.

derogations when they participate in funding large infrastructure projects. It then proceeded to draw attention to the role of MDBs, the environmental, social and governmental policies of MDBs, and the use of accountability mechanisms as means to establish a robust rights-based system of administrative or judicial review where judicial review in the traditional sense is limited or not available at all. Importantly, despite this, Turkeli has noted that even this has not prevented MDBs from skirting responsibility for harm-causing conduct. MDBs continue to shield themselves from liability for wrongdoing "even when wrongdoing is ascertained during an internal review and investigation".[680]

The persistent circumvention of liability, or gaps in accountability as it has been termed in this thesis, has had a number of adverse effects that relate directly to the efficacy of the administrative law approach to holding MDBs accountable. Firstly, MDBs have begun adopting a piecemeal approach to regulating human rights issues in areas such as indigenous peoples and involuntary resettlement rather than focusing on comprehensive rights regimes for affected people or stakeholders more broadly.[681] The consequences of this are manifest: even where a stakeholder files a complaint with an accountability mechanism, any related benefits or remedies that flow from such a process have tended not automatically to translate into enhanced accountability to affected rights-holders, as they are usually project-specific benefits or remedies.[682] In other words, the specific remedies crafted for specific projects have no precedent-setting power in similar circumstances.

Secondly, Daniel notes that the outcomes that flow from these procedures "…rarely provides adequate remedy for the harm that people and communities affected by development projects have experienced".[683] It is to be recalled that each MDB's policy carefully circumscribes the nature and purpose of its accountability mechanism and in most cases this limits their jurisdiction to undertaking independent, but institutionally internal, administrative reviews.[684] These limitations extend to the ability to afford effective remedies. Internal reviews conducted by internal accountability mechanisms are generally not to be equated with the conduct of judicial proceedings. Unlike an administrative tribunal, no MDB accountability mechanism is

[680] E. Turkeli, 'The best of both worlds or the worst of both worlds? Multilateral Development Banks, immunities, and accountability to rights-holders' (2020) 12 *Hague Journal on the Rule of Law* 251 at 261.
[681] Ibid.
[682] Ibid.
[683] C. Daniel et al (eds), 'Glass Half Full? The State of Accountability in Development Finance' (2016) *Centre for International Environmental Law* available at https://www.ciel.org/wp-content/uploads/2016/01/IAM_DEF_WEB.pdf (accessed 12 February 2021) at 2 as cited in Turkeli op cit (n 680) at 261.
[684] Suzuki and Nanwani op cit (n 356) at 206

empowered to settle disputes between contractual parties and, moreover, no MDB accountability mechanism can provide judicial-type remedies such as injunctions or damages for noncompliance with its policies and procedures.[685]

Thirdly, while stakeholders are undoubtedly in a better position than they would have been without a complaint procedure for rights violations, MDBs' ability to prescribe which rights-holders are entitled to transparent review of policies, decisions and operations affecting them without reference to *external* oversight or international standards is yet another of the clear shortcomings in the administrative law approach to regulating MDBs.[686]

At a theoretical level the challenges in adopting a global administrative law approach to accountability at MDBs may be said to relate to the process by which international institutions are positioned to be treated in a manner that is not analogous to how public institutions are treated at domestic level.[687] Inherent in the operation of domestic administrative law is the existence of what has been described as a "failsafe": many domestic public institutions in democratic states are subject to a rule of law that automatically situates their operation and decision-making powers within a legal system that contains automatic external review and judicial oversight mechanisms.[688] In the case of MDBs, their ability to circumvent liability via claims of immunity, to set the rules of review procedures, and to set the terms of available remedies, precludes the analogy with domestic public institutions from being taken to its natural conclusion. That is, that external review and judicial oversight should occur when self-regulation fails to deliver sufficient accountability.[689]

Ultimately, notwithstanding these ostensible shortcomings in adopting a global administrative law approach to accountability at MDBs, it is submitted that global administrative law nevertheless remains an effective reformative solution to improving accountability at MDBs. As has been demonstrated in preceding chapters, MDBs have taken steps to modernise internal review mechanisms, including obligatory measures on banks' management to induce compliance with findings and remedies, and compensation to affected persons. However, the efficacy of these as levers to give effect to improved accountability is contingent on how they are operationalised as tools giving effect to the principles of global administrative law. In this regard, what should be considered is how the foundational principles global administrative law

[685] Ibid.
[686] Turkeli op cit (n 680) at 261.
[687] Ibid.
[688] Ibid.
[689] Ibid at 262.

may be better applied within these mechanisms. This is a multifaceted query and requires consideration of, among others, how global administrative law may be used to address MDB claims of immunity, how administrative law may be used to promote good governance at MDBs, and how it may interface with domestic administrative law systems to protect and advance accountability.

6.3 Global administrative law as a response to MDB claims of immunity

One of the responses to the ostensible absence of external oversight for MDB decisions and conduct linked to their non-sovereign lending activities such as their project-financed infrastructure transactions is to "dispense of the legal fictions surrounding their functional purpose and the linked arguments on the necessity of far-reaching immunities to protect that purpose".[690] In this regard, two proposed solutions may be advanced, both of which promote subjecting MDBs to a form of external scrutiny and oversight through forms of procedural and judicial mechanisms. Both have a common thread that entails removing the ostensible limitations which MDBs' extensive immunities have on advancing accountability for affected stakeholders. Notably, while these solutions may be independently implemented, they may also operate interdependently where they are implemented in tandem, with each enhancing the efficacy of the other.

6.3.1 Lifting the veil

The first of these solutions is termed "lifting the delegate veil". This entails recognising that MDBs effectively operate as market players when they provide financing support through the guarantees and loans they provide for projects in developing countries. In this regard, Turkeli rightly submits that MDBs are more akin to private commercial entities than international public institutions to which domestic public institutions have delegated decision-making and implementation power.[691]

Evidently, it is fundamental to this solution to recognise that MDBs are hybrid in nature. Indeed, as Turkeli acknowledges, his approach to strengthening accountability is sourced in the notion that examines the practical substance of MDBs' functioning rather than their legal form.[692] This approach theorises that imposing a limitation on MDBs' expansive claims of immunity, whether internally imposed or otherwise, should lead to the application of rule of

[690] Ibid at 263.
[691] Ibid.
[692] Ibid.

law norms to MDBs' conduct such as their project-financed infrastructure transactions. At its core, this entails subjecting an MDB's performance to a form of external scrutiny and oversight through regular procedural and judicial mechanisms via effective domestic judicial review.[693]

Other authors have also called for a fundamental shift that reconceptualises how MDBs are held accountable by reconfiguring the role of domestic procedural and judicial mechanisms. Saper, writing in the context of the IFC and MIGA, notes that stakeholders affected by projects tend to have four theoretical options for holding these institutions to account given their extensive immunities. [694] They may (i) persuade the relevant state party to the transaction to hold the institution accountable on their behalf; (ii) persuade the institution to waive their immunity; (iii) legally persuade a court to set aside the institution's immunity because the institution has acted *ultra vires,* with gross negligence, or with wilful recklessness; or (iv) legally persuade a court to "pierce the veil" and hold the institution's member states accountable for the institution's harm-causing conduct.[695] However, as Saper notes, to enhance accountability for MDBs some "hard force" is required to allow project-affected stakeholders to hold MDBs to account and provide a solution to the accountability problem.[696]

Herz similarly recognises that the scope of the jurisdictional immunities enjoyed by MDBs "is a function of the interplay between the domestic law and international legal obligations" of the state and MDBs.[697] He notes that while the immunity enjoyed by MDBs is most eminently a question of domestic law, domestic sources alone do not settle the matter due to the state and MDBs international law obligations on MDB immunities via, among others, a given MDB's constituent agreement, treaty obligations, or customary international law.[698]

Accordingly, as a result of the need to balance these domestic and international considerations, Herz submits that a reappraisal of the scope of MDB immunities and the powers of domestic courts to intervene is necessary. Strong arguments for reform may therefore be advanced particularly where those arguments for reform are sourced in contemporary norms on accountability and situated in instances where human rights are affected by MDB conduct.[699]

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[693] Ibid.
[694] B. M. Saper, 'The International Finance Corporation's Compliance Advisor/Ombudsman (CAO): An Examination of Accountability and Effectiveness from a Global Administrative Law Perspective' (2012) 44(4) *NYU Journal of International Law and Politics* 1279 at 1322.
[695] Ibid.
[696] Ibid at 1325.
[697] S. Herz, 'Rethinking International Financial Institution Immunity' in D.D. Bradlow and D. B. Hunter, International Financial Institutions and International Law (2010) at 154.
[698] Ibid.
[699] Ibid at 161.

He notes that as the rights of individuals have increasingly been recognised as subjects of international law, so too has the normative case for affording aggrieved stakeholders greater access to mechanisms of accountability.[700] However, despite this, "the jurisprudence of [MDB] immunity has not evolved in accordance with these developments" and as a consequence, MDBs continue to enjoy broader immunities than their members agreed to provide them in their constituent charters or than what they may need to fulfil their mandates.[701]

There is evidently a clear need to strike an appropriate balance between the following three factors: the role of domestic procedural and judicial mechanisms for accountability, an appropriate level of immunity to ensure MDBs can operate effectively, and the pre-existing international law obligations of MDBs in the context of the protection and advancement of human rights. In matters such as *Richard Waite and Terry Kennedy v. Germany*[702] international judicial bodies have recognised that states cannot simply evade human rights obligations by delegating the authority to MDBs that then operate without consequence for the harm they inflict.[703]

Of course, this harm is not limited to individuals, groups or communities affected by projects. It is necessary to also highlight that in the context of project-financed infrastructure transactions stakeholders include the private commercial parties involved in the transaction. In fact, Arrowsmith submits that firms participating in infrastructure development contracts as project sponsors or contractors must frequently grapple with the question of whether they have recourse and remedy against the MDB partner participating in the transaction as project lender.[704] She notes that the question is an understandably important one because, due to the immunities MDBs enjoy, little to no recourse avails against the international institution for their supervisory role in transactions.[705]

Recognising the fundamental need to reconceptualise how MDBs' are held accountable by reconfiguring the role of domestic procedural and judicial mechanisms therefore warrants a deeper consideration of "lifting the veil" as a solution to improving accountability for MDBs. On this, it has been noted that MDBs' ability to exist and operate behind a veil despite their manifest autonomy from their shareholding states and the corporate-like nature of many of

[700] Ibid at 163.
[701] Ibid.
[702] *Richard Waite and Terry Kennedy v. Germany (*24 February 1997) European Commission of Human Rights, Application No. 26083/94 at para 67 as cited in Herz op cit (n 671) at 161.
[703] Ibid at 163-164.
[704] Arrowsmith op cit (n 303) at 143.
[705] Ibid at 143 -148.

their activities is at odds with the rule of law and the need to advance and protect accountability for affected stakeholders. Accordingly, any comprehensive formulation of the rule of law at domestic or international level should include rules concerning human rights protection for individuals and groups.[706] This may be extended to general protections, recourse mechanisms, and remedies for affected stakeholders such as project sponsors in project-financed transactions. I therefore propose, as Trundle appropriately recommends, that the solution to this is to lift the veil under which they operate so that they may be held accountable domestically for the wrongs they commit when they act, in effect, as commercial players in the marketplace.[707]

The need to engage in this exercise at domestic and international level is long overdue. In the matter of *Budha Ismail Jam et al. v. the International Finance Corporation*,[708] the Supreme Court of the United States recognised that while international organisations are generally answerable to their member countries alone via those countries' representatives on the organisations' boards, this is not an irrevocable position and, in fact, "rules might themselves change over time in light of developments in the law".[709] The court ultimately concluded that the immunity of international organizations is similar to the restricted immunity of foreign states codified in the US' Foreign Sovereign Immunities Act.[710] This ruling abrogated international organisations' previously absolute immunity in the US and opened the door to domestic recourse forums and remedies.[711]

Turkeli consequently submits that the ruling in *Budha Ismail Jam et al. v. the International Finance Corporation*,[712] together with the broader shifts in the developments of the law on accountability for MDBs warrant a concomitant reconsideration of MDBs' immunities at domestic level around the world. In particular, reforms permitting greater levels of recourse against MDBs at domestic level must be pursued and seen as part of the shift towards more effectively applying of external accountability to all MDBs. He rightly submits that a broad shift of this nature has the potential to level the playing field and obviate fears that

[706] Turkeli op cit (n 680) at 275.
[707] C. Trundle, 'A revised take on the immunity of international organizations in U.S. Courts: Jam v. International Finance Corporation' (2019) *Minnesota Journal of International Law Blog* available at https://minnjil.org/2019/03/29/a-revised-take-on-the-immunity-of-international-organizations-in-u-s-courts-jam-v-international-finance-corporation/ (accessed 16 February 2021) as cited in Turkeli op cit (n 680) at 275.
[708] *Budha Ismail Jam et al. v. the International Finance Corporation* 586 U. S. (2019); 139 S. Ct. 759; 203 L. Ed. 2d 53.
[709] Ibid at 12.
[710] Foreign Sovereign Immunities Act (FSIA) of 1976, Pub. L. No. 94-583, 90 Stat. 2891
[711] Trundle op cit (n 707).
[712] *Jam et al. v. IFC* op cit (n 708).

implementing more stringent accountability standards at only one (or a few) MDBs will allow other less scrupulous MDBs to poach clients and have an even greater detrimental impact on human rights.[713] Without such a broad-based shift to enhance MDB accountability at domestic level in jurisdictions around the world, MDBs may indeed face varying degrees of immunity depending on the jurisdiction in which a claim is brought against them – an issue avoided by the more preferable remedy discussed in the section that will follow.

This shift towards greater domestic accountability for MDBs to curtail their traditionally absolute immunities should not be seen as derogating from their status internationally. Instead, it rather affirms their position as powerful global economic actors with extensive rights and corresponding obligations.[714] Absolute immunity is at odds with the type of accountability administrative laws seek to advance. Where MDBs have promulgated environmental, social and governmental policies, absolute immunity cannot be invoked to shield MDBs from being held to account in external forums, at either domestic or international levels. On the contrary, it should mean that MDBs must be held to basic standards of accountability through externalised domestic procedural and judicial processes which should compel MDBs to respect human rights, advance norms within MDBs' regulatory structures, and provide a remedy where there have been derogations or violations of stakeholders' rights. These must operate in conjunction with and complement existing internal accountability mechanisms which should continue to serve effectively as internal compliance, problem-solving and advisory functions.

6.3.2 A super-independent accountability mechanism

With that much being said for a more robust legal approach to domestic accountability for MDBs, the second solution to MDBs' extensive immunities is a proposal developed by Bradlow which is international in nature. He calls for what he terms a "super- independent accountability mechanism" ('super mechanism') to improve accountability.[715] The super mechanism would be created by agreement among all participating MDBs according to his proposal and would serve as an independent international body that should effectively provide an accountability service to all participating MDBs. He proposes further that each MDB would contribute towards the super mechanism's budget on a *pro rata* basis according to the number of cases arising from a given MDB, while admission to membership of the super mechanism would be determined by an approving vote from the board of directors of each participating

[713] Turkeli op cit (n 680) at 276.
[714] Ibid.
[715] Bradlow op cit (n 350) at 12.

MDB. The super mechanism would be staffed by experts and officials on secondment from its members for a stipulated period.[716]

The super mechanism would operate similarly to how existing accountability mechanisms do currently. It would be authorised to accept requests for investigation from any two or more persons alleging they have suffered harm or who are being threatened with harm due to the conduct of an MDB. The super mechanism would accordingly fulfil a compliance and review function similar to what existing internal accountability mechanisms do – it would determine for itself the eligibility of requests for investigation and, if a complaint is deemed eligible, it would investigate, based on the given MDBs environmental, social and governmental policies and/or procedures.[717] Bradlow recommends that the super mechanism should submit investigatory reports to the relevant MDB's board of directors to either accept the findings and implement remedial measures, or reject the findings with reasons. Importantly, where the super mechanism's findings are accepted, it would also be tasked with monitoring the implementation of any remedial measures which an MDB's board of directors may have agreed to.[718]

Bradlow goes on to distil a number of advantages which might flow from the creation of this mechanism.[719] The first is that it reduces the risks associated with formally litigating disputes between stakeholders and MDBs and thus preserves an appropriate (but not absolute) level of immunity for MDBs. Avoiding the risks associated with litigation is in and of itself a commendable advantage. For the project company and state(s) party to a project-financed transactions it mitigates the possibility of having to litigate disputes with MDBs in foreign courts with unpredictable outcomes and potentially adverse publicity.[720] For affected citizens and domestic civil society stakeholders it is arguably far more cost-effective and efficient for stakeholders to resolve their claims using a super mechanism with robust powers to investigate and meaningful remedies rather than formal litigation, particularly when the creation of such a super mechanism is coupled with Bradlow's proposal to establish an independent international assistance fund to provide financial and other resources to communities harmed by MDBs' failure to comply with their policies.[721]

[716] Ibid.
[717] Ibid.
[718] Ibid at 13.
[719] Ibid at 13.
[720] Ibid at 10.
[721] Ibid at 14.

Secondly, the centrality of an overarching super mechanism would provide a basis from which a rich database of information could be compiled on MDBs' implementation of and adherence to environmental, social and governmental policies. The super mechanism would serve as a repository of information and precedents that should lead to broad improvements in the design and implementation of MDB-funded projects and the formulation and interpretation of their policies. [722] Finally, Bradlow notes that a super mechanism would mitigate the risk of inconsistent decisions across different MDBs, particularly in instances where a given project is funded by more than one MDB.[723]

Bradlow's proposal for an external super mechanism is certainly not the only one. Saper has similarly called for the creation of a tribunal to serve as an external appeal function for MDBs' existing internal accountability mechanisms.[724] Saper's proposal, in the context of the IFC and MIGA, envisages that internal accountability mechanisms would continue to serve compliance, problem-solving and advisory functions while the super mechanism would act as a judicial review mechanism where internal accountability mechanisms fail to provide adequate remedy for stakeholders.[725]

Notably, Saper also proposes that establishing such an external review function need not necessarily require the formation of an entirely new body – he submits that a second route to external judicial review may lie in expanding the jurisdiction of the Bank's pre-existing Administrative Tribunal, which is currently empowered to issue final binding decisions on contract complaints filed by employees of the World Bank Group.[726] The creation of a super mechanism under the umbrella of World Bank Group that is open to all MDBs has a number of advantages similar to those which Bradlow identified. However, Saper goes further to suggest a limitation on the mechanism's subject matter jurisdiction to social and environmental matters which will allow the super mechanism to gain specialist institutional knowledge from one MDB's projects and apply them to all the others. This should bolster its ability to gain specialized expertise in how to evaluate projects on those dimensions and craft effective remedies.[727]

[722] Ibid at 13.
[723] Ibid.
[724] Saper op cit (n 694) at 1327.
[725] Ibid.
[726] Ibid
[727] Ibid at 1328.

Another proposal similar to Bradlow's super mechanism is Raffer's proposal for a permanent international court of arbitration which, he submits, would be particularly advantageous for developing countries.[728] It would be constituted in a manner similar to what Bradlow has proposed – MDBs would be allowed to nominate members of the court however, Raffer recommends that developing countries be given the power to nominate the same number of members. The members would then elect one further member to reach an uneven number in total to avoid deadlocks in the court. He proposes further that governments, NGOs and international organisations be given the right to file complaints and that the court should be empowered to determine whether MDBs are at fault and have to pay for (part of) the damage their conduct has caused.[729]

Implementing a super mechanism would have perceptible rule of law implications as it notionally satisfies the need to impose limits on MDBs' expansive claims of immunity by externalising accountability. The super mechanism would serve as a quintessential example of how the touchstone principles of global administrative law may be leveraged at international level as a tool for reform in accountability. It is submitted that this is undoubtedly preferable to relying on internal mechanisms that, in effect, allow MDBs to serve as accused, judge and juror in their own trial.

An external super mechanism adequately respects the sovereignty of MDB member states, protects and advances the rights of project-affected groups and provides a basis for courts and member states' governments to provide MDBs with an appropriate level of immunity.[730] Establishing a super mechanism does not necessarily prevent domestic oversight mechanisms for MDBs operating concurrently. The need to empower domestic courts with the ability to "lift the veil" on the extensive immunities that MDBs enjoy remains. Recourse to a super mechanism need not be exhaustive of the levers affected stakeholders may have to ensure their rights are protected where an MDB's conduct has caused harm.

6.4 An effective super mechanism: remedies and the role of global administrative law

The foregoing examination of two remedial proposals that aim to mitigate the extensive immunities of MDBs underscored the important role of global administrative law in each. First,

[728] Raffer op cit (n 556) at 71.
[729] Ibid at 72.
[730] Bradlow op cit (n 350) at 17.

it examined its importance when lifting the veil to permit judicial forums at domestic and international level to hold MBDs accountable for harm-causing conduct. Second, it highlighted the potential of global administrative law to ensure the effective operation of an international super mechanism – advancing the trio of touchstone procedural rights. In both of these proposals a common thread may be distilled, that is, the interaction between domestic procedural and judicial review processes and principles with that of global administrative law processes and principles. While this interface is a critical consideration because each impacts on the other, Kingsbury nevertheless notes that direct analogies between national and international administrative laws requires a judicious approach.[731]

The project of global administrative law inevitably concerns efforts to identify, design, and construct international governance and accountability structures that fulfil functions that are comparable to those in domestic administrative law.[732] However, conversely, the project of global administrative law also includes endeavours to "reform aspects of domestic administrative law to enable it to deal with the increasingly global character of regulation".[733] In pursuing these tasks, Davis and Corder have recognised that the existing literature has considered the advancement of global administrative law with a predominant emphasis on its application in the financial and trade sector contexts.[734] Furthermore, they note that it has also focused on considering the interface between global administrative law and domestic administrative laws from the perspective of developed countries.[735] Developing countries have largely remained on the periphery of such studies. In light of this, in what follows I will highlight two gaps which I believe an effective super mechanism must address if it is to be considered successful as an accountability enhancing structure in the international arena.

First, I will address a problem that has remained pervasive in accountability mechanisms across MDBs: namely, that accountability mechanisms have tended to provide ineffective remedies and inadequate monitoring and enforcement of their remedial recommendations. This ineffective relief has disproportionally affected stakeholders in developing countries who have been adversely affected by MDB conduct and decisions.

[731] Kingsbury et al op cit (n 618) at 28.
[732] Ibid.
[733] Ibid.
[734] D. Davis and H. Corder, 'Globalisation, National Democratic Institutions and the Impact of Global Regulatory Governance on Developing Countries' in H. Corder (ed) *Global Administrative Law: Innovation and Development* (2009) at 68
[735] Ibid.

Second, I will address a highly relevant concurrent consideration; namely, how effective remedies together with robust monitoring and enforcement impact on the tension between national sovereignty and MDBs as powerful international actors. The prevailing issues that existing accountability mechanisms encounter when crafting remedies for stakeholders crystalises what Davis and Corder recognise as the "dark side" of the development of global administrative law. They rightly draw attention to the residual effects of the prevailing neoliberal hegemony in the global order that emanates from developed countries and is given effect to by international institutions and multinational corporations that wield substantial financial and political influence to exert pressure on developing countries to comply with the global economic consensus through their decision- and rule-making processes.[736]

The question which must therefore be answered is where this leaves Bradlow's super mechanism and the remedies that such a mechanism may craft. Accordingly, what will be considered is how domestic and international bodies may align their functions to strike an appropriate balance between the inherent potential of a robust global governance system to adjudicate disputes to effectively protect and advance human rights, while simultaneously respecting national sovereignty, enhancing the role of domestic judicial forums and their ability to leverage domestic administrative law principles to hold international institutions such as MDBs to account.

6.4.1 The problem with remedies and enforcement

In this thesis I have examined how MDBs' independent accountability mechanisms are intended to provide stakeholders both recourse and redress when they have suffered harm. I have similarly examined the broad challenges for accountability mechanisms as well as some specific challenges that stakeholders face in project-financed transactions. While I endorse Bradlow's proposal to establish a super mechanism – and similarly endorse Saper and Raffer's analogous proposals – it is apparent that these are frameworks. The framework addresses some of the larger structural elements of how a super mechanism might function such as, among others, how it will be staffed, how it will be funded, and broadly, how it would conduct investigations and make recommendations on remedial actions. However, as is the nature of structural frameworks, they are not comprehensive. While Bradlow has provided a framework, he has not dealt with some of the substantive challenges to which this thesis has drawn attention. It is accordingly argued that establishing a super mechanism without regard to how

[736] Davis and Corder op cit (n 734) at 82.

that mechanism may remedy the substantive challenges inherent in the operation of existing accountability mechanisms may simply result in those same challenges persisting, albeit on a larger scale.

These challenges are not insignificant. They largely centre on the power (or lack thereof) of accountability mechanisms to investigate harm-causing conduct effectively, the efficacy of the remedies that accountability mechanisms are empowered to provide, and their powers to enforce and monitor the implementation of any remedial measures that they may recommend. It is worth pausing here to emphasise the critical importance of these factors and the significant challenge they pose in the practical operation of existing accountability mechanisms. This is quintessentially evidenced in the operation of the Panel at the Bank that, in its recent history, has demonstrated how these challenges have manifested in practice.

I have noted that the Bank's Environmental and Social Framework formed a marked departure from its previous set of policies as it is more negotiable, more flexible, reduces the requirements for assessments on projects, and it places a significantly greater emphasis on borrowers' own mechanisms to assess project risks, implement safeguards and monitor progress.[737] In practice, the increased flexibility and less onerous requirements have been noted as problematic. In project-financed transactions, even though the project company borrower is supposed to engage meaningfully with project-affected stakeholders throughout the duration of the project, in practice these stakeholders often have limited influence in negotiations between the Bank and the borrower. This affects any agreed remedial measures to mitigate harm that an infrastructure project may cause due to effects such as displacement or other project related impacts such as environmental harm. Consequently, when affected stakeholders seek accountability and remedy for harm through the Panel, they may have a harder case to make before the Panel under the Bank's Environmental and Social Framework due to the flexible due diligence, monitoring, and supervision requirements that dramatically decrease the criteria against which the Panel can assess compliance and craft effective relief through their remedies.[738]

The indistinctly drafted responsibilities mean that a more conservative or reticent Panel could interpret the Bank's responsibilities narrowly, sticking strictly to the letter of the Policy in its compliance assessments and remedies, while a more bullish Panel could infer that the

[737] Op cit section 5.2.1 at 127.
[738] Bugalski op cit (n 577) at 32.

imprecision of the Policy provides ample leeway for it to apply its own judgments as to the reasonableness of the Bank's actions and decisions in the circumstances and to craft innovative recommendations accordingly.[739] Of the two options, it is not unreasonable to conclude that a review of the Panel's investigations, decisions and remedies appear to favour the former being a more common occurrence.

In the matter of the *Ethiopian Protection of Basic Services Project*,[740] which sought to expand access to basic services such as health, agriculture, water supply, sanitation, and rural roads, Sovacool *et al* noted how the Panel's investigation and Bank management's subsequent action triggered significant criticism.[741] The Bank contested the existence of a 'plausible causal link' between its actions and omissions and whether it caused and actual or potential harm. Subsequent reviews of this matter by independent non-governmental organisations found the Bank to have ignored damning evidence of widespread human rights abuses in connection with the programme in order to exonerate the bank and one of its biggest clients of responsibility for mass forcible population transfers that occurred between 2010 and 2013.[742] In South Africa in 2012, the Eskom Power Investment Support matter[743] provides another example where, following the conclusion of the investigation and recommendations, management rejected all of the Panel's findings of non-compliance and identified no corrective actions to be implemented.[744]

These projects, among others, serve as examples the Panel's processes, and remedies do not necessarily provide effective relief for stakeholders who suffer harm as a result of MDB conduct, an issue that is widespread across MDB accountability mechanisms. They also serve as further evidence of the fact that the failures of an accountability mechanism tend to disproportionally affect stakeholders in developing countries. From a global administrative law perspective, such failures cannot be said to advance the project of ensuring that MDBs conduct

[739] Ibid.
[740] The World Bank, Project Information Document (PID): Ethiopia Protection of Basic Services Program Phase III Project, (2012) available at http://documents1.worldbank.org/curated/en/138391468770082647/pdf/PID0Print0P128891004032012013334300083402.pdf (accessed 24 March 2021).
[741] B. K. Sovacool, A. N. Fourie and M. Tan-Mullins, 'Disequilibrium in Development Finance: The Contested Politics of Institutional Accountability and Transparency at the World Bank Inspection Panel' (2019) *Development and Change* 867 at 881.
[742] Ibid.
[743] The World Bank, Project Information Document (PID): Eskom Power Investment Support Project, (2010) available at http://documents1.worldbank.org/curated/en/485951468164377650/pdf/EISP0PID01appr10revised012191201001.pdf (accessed 24 March 2021).
[744] Sovacool et al op cit (n 720) at 882.

themselves in a manner that advances accountability for harm-causing decisions and conduct. Rather, gaps such as these perpetuate the systemic issues around the ability of MDBs to provide effective remedies to stakeholders for harm-causing decisions and conduct.

6.4.2 National sovereignty and MDB accountability mechanisms

With that much said for the efficacy of the remedies crafted by accountability mechanisms and their powers to monitor and enforce, there is one further factor that warrants consideration given its potential impact on a proposal to establish a super mechanism. That is, the role of and interaction between accountability mechanisms and domestic laws and, more specifically, the ostensible tension between national sovereignty, MDBs as powerful international actors, and the operation of a super mechanism.

I have previously noted that the NDB is among the pioneers of a trend that has seen MDBs increasingly make use of countries' domestic systems and processes to address stakeholders' grievances and provide recourse on projects where stakeholders have suffered harm.[745] As I indicated, the proponents of the "use of country systems" approach argue that it respects countries' sovereignty, strengthens domestic systems, decreases costs and bureaucratic delays and ensures greater domestic participation in aspects of projects such as procurement. However, this is not always the case and in this regard an examination of the weaknesses inherent in both the NDB and Bank's efforts to increasingly rely on domestic systems should be examined.

6.4.2.1 The NDB, accountability and national sovereignty

Turning first to the NDB's proposal for an independent evaluation mechanism, given that it is not yet fully operational, its weaknesses must chiefly be assessed from the perspective that there are significant gaps in the bank's framework for how it intends to have the mechanism operate. This thesis has already outlined how the bank intends to have this mechanism operate. In addition to the fact that the bank's General Strategy makes no mention of providing support to the accountability mechanism or how aggrieved stakeholders can access the bank directly, there are further issues that specifically implicate the accountability mechanism's impact on national sovereignty in light of the heavy reliance on domestic systems. On this score, the NDB only requires borrowers to establish a grievance mechanism for specific projects and to ensure

[745] Op cit section 4.2.3 at 110.

that that mechanism is "fair and effective"[746] - the Framework gives no further detail or guidance.[747]

Mirza has correctly observed that the NDB's internal standards are concerned with environmental and social sustainability, involuntary resettlement, and indigenous peoples.[748] While these are couched in rights-based language, they are not supplemented by actions the NDB will take to remedy any violations of these standards or any forms of redress available to aggrieved communities or how its accountability mechanism will interact with domestic legal systems to enforce standards.[749] The lack of detail on how the NDB's accountability mechanism sets the stage for a dangerous gap in for stakeholders seeking to hold the bank accountable.

Absent critical details on this interaction, it is likely that MDBs, borrowers and governments will take advantage of the gap and leave stakeholders without adequate recourse or remedies where they have suffered harm. The key lesson here for any proposal for establish an overarching super mechanism is that comprehensive details on the operation of the mechanism and its interaction with domestic laws are critical to ensure that it can serve as an effective measure to enhance accountability for stakeholders.

6.4.2.2 Sovereignty and skirting accountability at the World Bank

In so far as the Bank's operations result in involuntary displacement of communities, these occurrences serve as an example of both why the ostensible benefits of increased reliance on domestic systems for accountability do not necessarily materialise in practice, and why MDB conduct may adversely impact on national sovereignty.

Standard 5 of the Bank's Environmental and Social Framework recognises that project-related land acquisitions and the limitations on land use that projects may occasion can have adverse impacts on communities and individuals. The Environmental and Social Framework sets out some of the adverse effects of land acquisitions and use limitations. These vary and include physical displacement, which the framework defines as "relocation, loss of residential land or loss of shelter", or economic displacement which the framework defines as "loss of land, assets

[746] The New Development Bank op cit (n 467) at para 27.
[747] S. I. Mirza, 'Global South Empowerment or Business as Usual: The Challenges Presented by the New Development Bank's and the Asian Infrastructure Investment Bank's Accountability Mechanisms' (2018) 106(1) *California Law Review* 929 at 955-956.
[748] Ibid.
[749] Ibid.

or access to assets, leading to loss of income sources or other means of livelihood".[750] The framework accordingly sets out a number of measures which aim to mitigate these negative effects. Mitigation measures include providing compensation, financial and social support where relocation is unavoidable, and broad commitments to respect human rights, promote sustainable development and alleviate poverty.[751]

Despite the Bank's endeavours to recognise the adverse effects of land acquisitions and use limitations and the mitigation measures, and further given the increasingly prevalent trend to rely on country systems, where involuntary displacement has occurred some borrowers have proved keen to rely on domestic expropriation laws and resettlement policies, if any exist. They invoke domestic systems to govern projects instead of Standard 5 of the Bank's ostensibly more onerous Environmental and Social Framework. Unfortunately, in many client countries in the developing world the legal and regulatory frameworks on eviction, resettlement, and economic displacement are weak or incomplete.[752] As a result, in practice it is rare for borrowers to achieve objectives materially consistent with the Standard 5 of the Environmental and Social Framework in developing countries. Bugalski has therefore noted that households and communities without title are frequently left without domestic law protections or, at best, such protections are woefully inadequate. Residents of informal settlements are frequently subjected to evictions.[753]

The Bank's Environmental and Social Framework is intended to serve as a gap-filling measure to bolster domestic frameworks to reflect Bank standards and respect displaced people's human rights. The opposite has tended to occur, and stakeholders have little assurance that the gap-filling measures in MDB policies such as those of the Bank will be adopted. In practice involuntary resettlements remain controversial and politically charged notwithstanding the undertakings provided by both the state party, the borrowers and the MDB funder(s) developing the infrastructure project.[754]

The contentious nature of implementing these measures and the adverse human rights impacts occasioned by the gaps between domestic laws and the bank's policy requirements only stand to be exacerbated in instances where a given MDB's post-completion monitoring and enforcement measures are weak. After a project has been approved, MDBs' procedures only

[750] The World Bank op cit (n 559) at 53.
[751] Ibid at 53-54.
[752] Bugalski op cit (n 577) at 18.
[753] Ibid.
[754] Ibid.

provide for limited monitoring in accordance with a framework that the borrower has developed in accordance with the bank's ordinary project review processes during the subsistence of the project and, to a limited extent, for an agreed period thereafter.[755]

At least in the context of the Bank, though similarly apparent at other MDBs that adopt use of country systems, the increased use of domestic systems may ironically expose MDBs to situations in which they may inadvertently influence in the political affairs of their clients, something most MDBs are loath to do.[756] Not only are MDBs' loathe to do so, but most MDBs articles of agreement explicitly prohibit them from doing this – for example, Article 13(e) of the NDBs Articles of Agreement states "The Bank, its officers and employees shall not interfere in the political affairs of any member". Article 36(2) of the ADBs Articles of Agreement contains a near-verbatim provision, and so as does Article IV(10) of the Banks Articles of Agreement.

Evidently, avoiding situations in which MDBs are exposed to the potential of political interference of members or borrowers is precisely what MDBs' shift to increased use of domestic systems aims to achieve. It is challenging for an investigation conducted by an accountability mechanism to avoid wading into an adjudication of compliance with domestic legal frameworks that were applied in place of an MDB's policy framework as part of its investigation of the MDB's funding and supervision of an infrastructure project.[757] Respecting the sovereignty of states in which MDB-funded projects are executed remains a central tenet of all MDBs' operations. This is precisely why most MDBs continue to remain reluctant to conduct comprehensive investigations and engage in this manner during investigations of alleged harm.

This reluctance is not without consequence. It has a deleterious impact on the need to enhance accountability and the rule of law at MDBs. The Eskom matter referred to earlier provides an ideal case study of this. In that matter, the Bank refused to develop a remedial action plan despite critical findings of the Panel stating that "Management has seriously considered the issues raised by the Requesters and continues to be of the view that any impacts... can be and are being effectively addressed by the responsible South African authorities through the

[755] Ibid.
[756] Ibid.
[757] Ibid at 20.

country's legal and regulatory system".[758] This decision is illustrative of how the Bank has sought to evade its responsibility to protect stakeholders affected by its harm-causing conduct through the use of borrower systems.[759]

The Bank's evasion of responsibility is typical of how MDBs are increasingly engaging in what Mirza has termed "the race to the bottom".[760] Despite the critical necessity for MDB accountability mechanisms to fill the vacuum that exists for stakeholders seeking redress, most MDBs appear to be devoting insufficient resources to ensuring that their accountability mechanisms work effectively[761] either as robust mechanisms on their own, or in conjunction with domestic systems in a manner that respects sovereignty and advances accountability. Instead, as MDBs increasingly move towards using domestic systems in the projects they fund, at best it could be said that they are mere participants of an unwieldy system of accountability with gaps that frequently leave stakeholders without effective remedies. At worst, but with far more likely probability, MDBs have benefitted from maintaining the status quo in their systems of accountability. They do this by exploiting the soft law nature of their environmental, social and governmental polices and by being exceedingly and disingenuously deferential to "respecting sovereignty" in order to skirt accountability where their decisions and conduct have caused harm.

For this reason, in Chapter Seven I shall develop a framework for reform that will aim to address the problems identified in the operation of existing accountability mechanisms. This framework will 'fill the gaps' and counteract the trend of decreasing accountability, establishing benchmark criteria against which accountability reform proposals should be judged against, importing lessons from promising developments in accountability at existing international institutions, and then, drawing these together, build on a reform proposal for a super mechanism by outlining specific and substantive actionable measures that MDBs should implement in the pursuit of establishing such an accountability mechanism.

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[758] The World Bank Inspection Panel, *Management Report and Recommendation in Response to the Inspection Panel Investigation Report* INSP/64977-ZA (2012) available at https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/ip/PanelCases/65-Management%20Report%20and%20Recommendations%20%28English%29.pdf (accessed 24 March 2021) as cited in Bugalski op cit (n 577) at 21.
[759] Bugalski op cit (n 577) at 21.
[760] Mirza op cit (n 747) at 940.
[761] Ibid.

CHAPTER SEVEN
Benchmarks for an Enhanced Super Mechanism and an Opportunity for BRICS to Lead on MDB Accountability

7.1 Benchmarks for an effective super mechanism

The success of a super mechanism must be measured against whether it addresses the substantive challenges that are evident in the operation of existing accountability mechanisms. In what follows I will therefore set out a proposal that aims to build on and improve the existing frameworks to establish a super mechanism by addressing the challenges I identified in the preceding section. This proposal will be made with reference to the interface between global administrative law principles and domestic administrative law principles. The proposal will also ultimately aim to identify and address how supranational regulatory mechanisms should render the exercise of discretion and authority at the international level more transparent and accountable for the benefit of stakeholders in the developing world.[762] In this regard, the proposal will also include a formulation that may specifically be adapted to the countries in the BRICS bloc.

As a starting point, in developing a proposal to enhance the remedial and enforcement powers of a super mechanism it is useful to return to the four substantive challenges that I examined in the preceding chapters in the context of existing MDBs, albeit with a different approach. Instead of challenges, these may be reformulated as benchmark criteria against which the development of an effective and successful super mechanism should be measured. Accordingly, a successful and effective super mechanism should: (i) be empowered with jurisdiction to conduct comprehensive investigations; (ii) provide remedies that are effective; (iii) be empowered to monitor and enforce remedies and corrective measures at MDBs; and (iv) operate in a manner that does not directly or indirectly contribute to undermining the national sovereignty of states, especially developing countries. These criteria will form the foundation of the proposal to be advanced in this chapter.

7.2 Lessons from the IFC and EBRD: enhancing the remedial and enforcement powers of accountability mechanisms

By now it is evident that the success of a super mechanism will chiefly be contingent on its remedial and enforcement powers. In order to achieve this, it is imperative that the super mechanism import and adapt a promising development that has been put in place at a small

[762] Davis and Corder op cit (n 734) at 82.

group of international financial organisations. Namely, the super mechanism should establish an enforcement body or, at the very least, be given specific enforcement powers. This proposal to establish an enforcement body or specific enforcement powers will ensure that it does not accede to the prevailing trend among MDBs to "race to the bottom" and skirt its obligation to protect and advance accountability for project-affected stakeholders. The proposal also aligns with arguments advanced by Balaton-Chrimes and Haines[763] who motivate for bolstering MDBs enforcement of remedial powers to improve accountability.

Balaton-Chrimes and Haines argue that at best, existing MDB accountability mechanisms can provide a degree of relief for stakeholders who are adversely affected by what they term "imminent complaints"; that is, complaints about environmental and social impacts that may arise during a project's implementation. However, they also argue that MDBs' accountability mechanisms are poorly placed to address what they term "contestational grievances", which refers to more fundamental challenges whereby stakeholders raise issue with or entirely reject underlying capitalist models of development that a particular project may be advancing.[764] They note that these types of challenges are particularly prevalent where stakeholder disputes relate to projects that cause conflicts around land "in which affected communities reject industrial capitalist approaches to the value, ownership, control, access to and use of land".[765] It is not difficult to postulate that these challenges would also arise when dealing with MDB-funded projects that occasion human rights violations or derogations. Accordingly, so they argue, when stakeholders' grievances run counter to the fundamental development objectives of the financing institution, even if only in part, it is difficult for these challenges to be accommodated through the existing accountability mechanisms embedded in these lending institutions – particularly where those existing mechanisms have weak remedial and/or enforcement powers.[766]

It is for this reason that over time a number of MDBs have sought to enhance the remedial powers and enforcement potential of their accountability mechanisms. Among the most prominent of these mechanisms is the IFC's establishment of a Compliance Advisory

[763] S. Balaton-Chrimes and F. Haines, 'The Depoliticisation of Accountability Processes for Land-Based Grievances, and the IFC CAO' (2015) 6(4) *Global Policy* 446 at 446.
[764] Ibid.
[765] Ibid.
[766] Ibid at 448.

Ombudsman (the 'CAO') which is specifically tasked with an enforcement role.[767] Another is the European Bank of Reconstruction and Development's (the 'EBRD') Project Complaint Mechanism (the 'PCM') which was restructured and, on 1 July 2020, replaced by an Independent Project Accountability Mechanism (the 'IPAM'). It is worth noting that less stringent enforcement enhancing measures also exist. They include the IADB's accountability mechanism, which is empowered to get involved in post-investigation monitoring at the request of the bank's board, and the AfDB's accountability mechanism, which is permitted to make recommendations that contribute to crafting potential remedies for stakeholders albeit with no enforcement powers.[768]

The establishment of these enforcement bodies and/or powers at MDBs aligns with Bradlow and Fourie's call in which they appropriately identify that further research into the remedial and enforcement powers of MDBs accountability mechanisms is required in order to effectively assess and advance the reformation of these mechanisms in order to improve their efficacy.[769] They noted that such research is particularly valuable given the evolving enforcement role of the accountability mechanisms at MDBs, the potential of distinct enforcement bodies or powers to further strengthen the normative development of the MDBs operational policies and procedures, and the potential to provide clarity on and bolster MDBs' obligations towards affected stakeholders.[770]

It is on this basis that I will proceed to examine the operation of enforcement bodies and powers at MDBs by specifically examining the IFC's CAO and the EBRD's IPAM. This examination will be done with the aim of better understanding how aspects of these enforcement bodies or powers may be imported into the operation of a super mechanism.

7.2.1 The CAO at the IFC

The IFC's CAO supervises compliance investigations of the environmental and social performance of IFC and MIGA. It does so with a particular focus on sensitive or high-risk projects in order to ensure compliance with environmental and social policies, standards, guidelines, procedures, and conditions with the ultimate aim of improving IFC and/or MIGA

[767] D. D. Bradlow and A. N. Fourie, 'The Evolution of Operational Policies and Procedures at International Financial Institutions: Normative Significance and Enforcement Potential' (2011) Working paper, *American University Washington College of Law* at 24-25.
[768] Ibid.
[769] Ibid.
[770] Ibid.

environmental and social performance.[771] The examination that follows will limit itself to the CAO's oversight, compliance and enforcement role at the IFC.

The CAO assesses how and whether the IFC has sufficiently assured itself that it has met applicable environmental and social standards on projects and whether the outcomes of the IFC's business activity or advice on a particular project aligns with the relevant and applicable policies. Generally, the CAO limits itself to the conduct of the IFC and not the client making use of the international financial institution's services such as project company or state party borrowers. However, in many cases in order to assess a particular project the CAO has found it necessary to review the actions of the IFC's client and verify outcomes in the field.[772]

The CAO's investigations are "a systematic, documented verification process of objectively obtaining and evaluating evidence to determine whether environmental and social activities, conditions, management systems, or related information are in conformance with the compliance investigation criteria".[773] The "compliance investigation criteria" are IFC policies, performance standards, guidelines, procedures, and requirements whose violation might lead to adverse environmental and/or social outcomes. The CAO recognises that compliance investigation criteria may originate in the environmental, social, health, or safety provisions of the Bank Group, the environmental and social assessments or plans that are developed for specific projects, a given host country's legal and regulatory requirements, and/or international legal obligations which may be applicable to the project.[774]

With regard to the CAO's investigations, these are typically based on a review of documents, interviews, observation of activities and conditions, or other appropriate means.[775] The CAO is empowered to conduct its affairs independently, and it is responsible for determining the skills and expertise required to undertake the compliance investigation and for hiring specialists with appropriate expertise to form a compliance panel. The key considerations when hiring external panellists for compliance investigations are expertise, independence, and impartiality.[776]

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[771] The International Finance Corporation, *Compliance Advisor Ombudsman*: *Operational Guidelines* (2013) available at http://www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines2013_ENGLISH.pdf (accessed 29 March 2021) at 5.
[772] Ibid at 22.
[773] Ibid at 23.
[774] Ibid.
[775] Ibid.
[776] Ibid at 24.

In cases where the IFC is found to be compliant, the CAO will close the investigation. However, in cases where the IFC is found to be non-compliant with policies, the CAO will keep the compliance investigation open and monitor the situation until actions taken by IFC assure the CAO that the IFC is addressing its non-compliance and implementing any recommended remedial action. Only once the CAO is satisfied that there is compliance, and that remedial action has been implemented appropriately, will it then proceed to close the compliance investigation. The CAO makes public the current status of all compliance cases.[777]

The efficacy of the CAO's monitoring and enforcement powers has generally been praised and considered successful. In 2016 the CAO commissioned an independent compliance peer review of its operations. The review was conducted by a former member of the ADB's Compliance Review Panel and found the CAO's reports to be "robust with evidence even-handedly set out and analysed prior to reaching conclusions" and that "there was solid justification for the decision to investigate in each of the cases that proceeded to the compliance investigation stage".[778] Thus it seems as though valuable and justifiable lessons can be learned from this experience in ensuring compliance with the obligation to account for the exercise of authority by a prominent international financial body.

7.2.2 The IPAM at the EBRD

The most recent institutional reforms at the EBRD to enhance the enforcement potential of its accountability mechanism are among the most progressive to have taken place at an international financial institution.[779] Initially, the PCM at the EBRD was established to assess and review complaints of bank-funded projects and provide project-affected stakeholders such as individuals, organisations and local groups with means to raise complaints and seek recourse.[780] The PCM effectively operated from 2010 to the end of June 2020; however, on 1 July 2020 following a review of its operation, it was restructured and replaced by the IPAM to further enhance transparency and accountability, improve stakeholder engagement, and foster good governance.[781]

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[777] Ibid at 25.
[778] L. De Silva, *The Compliance Advisor Ombudsman: Peer Review of CAO Compliance Cases – Report Summary* (2016) available at http://www.cao-ombudsman.org/about/governance/documents/CompliancePeerReview_WebSummary_July18_2017.pdf (accessed 29 March 2021) at 3-4.
[779] Bradlow and Fourie op cit (n 767) at 25.
[780] N. Seiler and J. Madir, 'Oversight mechanisms at the EBRD' (2013) 14(2) *Business Law International* 135 at 145.
[781] European Bank of Reconstruction and Development, *Project Accountability Policy* (2019) available at http://www.ebrd.com/documents/occo/ipam-policy.pdf (accessed 30 March 2021) at 2.

The IPAM's purpose is threefold: it aims to (i) facilitate dispute resolution between the EBRD and stakeholders on environmental and social issues; (ii) assess and make determinations on whether the bank has complied with its Environmental and Social Policy,[782] Access to Information Policy[783] and any other project-specific provisions which may be agreed between the bank and borrowers; and, where applicable, (iii) address any existing non-compliance with policies, while preventing future non-compliance by the Bank.[784]

The scope of the IPAM's functions is divided into two complementary, non-judicial and non-adversarial divisions: the Problem-Solving Function and the Compliance Function. The Problem-Solving Function facilitates engagements between stakeholders who file requests for investigation and borrowers in order to resolve environmental and social issues. It does so as a neutral third party, "without attributing blame or fault", in order to help find mutually satisfactory solutions without recourse to domestic or international judicial forums. It is empowered to make resolutions through flexible, consensus-based problem-solving approaches.[785]

For present purposes, the Compliance Function remains the primary focus. It determines whether the EBRD has complied with its Environmental and Social Policy, Access to Information Policy and/or any other project-specific provisions which may be agreed between the bank and borrowers. The Compliance Function only deals with bank compliance rather than borrower compliance. It engages with stakeholders, bank staff, and borrowers in order to determine whether the EBRD has, through its actions or inactions, failed to comply with applicable policies. If the EBRD is found to be non-compliant, the Compliance Function is empowered to propose project-specific and procedural changes to the bank's practices to address existing non-compliance and/or to prevent future non-compliance. More generally, the promotion of institutional learning and capacity building is advanced.[786]

The Compliance Function commences with an investigatory compliance assessment phase in which the IPAM will determine whether a stakeholder's request has provided grounds to

[782] European Bank of Reconstruction and Development, *Environment and Social Policy* (2019) available at https://www.ebrd.com/documents/comms-and-bis/environmental-and-social-policy.pdf (accessed 30 March 2021).
[783] European Bank of Reconstruction and Development, *Access to Information Policy* (2019) available at https://www.ebrd.com/cs/Satellite?c=Content&cid=1395282205899&d=&pagename=EBRD%2FContent%2FDownloadDocument (accessed 30 March 2021).
[784] European Bank of Reconstruction and Development op cit (n 781) at 2.
[785] Ibid at 5.
[786] Ibid.

conduct a formal review due to the bank's failure to comply with applicable standards.[787] Where the IPAM concludes that the Bank was not in compliance with either of the applicable policies, it will send a report to the bank's management in order for them to develop a management action plan which must contain remedial changes related to the actions or omissions of the Bank. Remedial action may include project-specific actions which the EBRD will be compelled to effect. This is done in order to, among others, ensure that a given project is brought into compliance in order to address the harm or potential harm associated with the IPAM's findings of non-compliance in its compliance review report.[788]

Importantly, the EBRD's management will submit a draft of the management action plan to the IPAM. Upon receipt, the IPAM will send the draft action plan to stakeholders (or their representatives, if any) for review and comment, and append the IPAM's review report for information. A final management action plan will ultimately be developed which will include stakeholders' inputs.[789]

Ongoing monitoring of the implementation of the action plan is among the critical aims of the IPAM's operations. In this regard, an action plan to be implemented by the management is considered implemented if or when the EBRD's management has implemented commitments and recommendations effectively and done so in accordance with any stipulated timetables.[790] The IPAM submits bi-annual monitoring reports to the EBRD's president and the board of directors to keep them apprised of the status of remedial actions and to provide updates on the implementation of management's action plans. This will be done "until IPAM determines that full implementation of the Management Action Plan has been achieved".[791]

Since the launch of the PCM, the IPAM's predecessor, the main complainants have been local and international civil society organisations acting on behalf of stakeholders adversely affected by bank-funded projects. The vast majority of these complaints have related to large infrastructure projects with high environmental and social impacts.[792]

Seiler and Madir have observed that the EBRD's procedures under its Problem-Solving Function and, more specifically its Compliance Function in so far as its enforcement policies

[787] Ibid at 16.
[788] Ibid at 17.
[789] Ibid at 18.
[790] Ibid at 19.
[791] Ibid.
[792] Seiler and Madir op cit (n 780) at 148-149.

and procedures are concerned, approximate a judicial model.[793] The review process, the ongoing involvement of stakeholders, and the monitoring and enforcement of remedial actions is commendable. The processes are fundamentally administrative in nature and are demonstrative of the key underlying principles of global administrative law including lawfulness, equity, procedural fairness, and transparency. I contend that the IPAM provides further evidence of the direction in which compliance-monitoring and -enforcement mechanisms ought to be developing on the international governance plane.

7.3 A proposal to enhance accountability and enforcement at a super mechanism

The foregoing review of the CAO and the IPAM has provided insights which may be particularly useful in conceptualising an effective super mechanism that addresses some of the challenges that prevail in the operations of existing accountability mechanisms at MDBs. However, it is beneficial to frame these insights using the criteria formulated at the outset of the section in order to distil some specific actionable measures that MDBs should implement should the proposal to establish a super mechanism be pursued.

7.3.1 Comprehensive jurisdiction

A super mechanism should be empowered with jurisdiction to conduct comprehensive investigations. There are at least three considerations which must be addressed in the jurisdiction of a super mechanism in order to advance accountability.

At the outset it is useful to consider the nature of the obligations that affected stakeholders are seeking to enforce against MDBs. For both contracting parties and external stakeholders, disputes that come before a super mechanism will predominantly concern harm-causing failures to adhere to the requirements set out in MDBs' applicable governmental, environmental and social policy documents. In the main, these will likely fall into two categories. In the first category, disputes are likely to concern harm caused by MDBs' failure to adhere to their pre-contractual obligations. In the second category, where the loan agreement has already been executed, disputes may arise from harm caused by or as a result of the implementation of the terms and conditions of the loan agreement. These are critical jurisdictional considerations as they certainly have a bearing on the appropriate forum that stakeholders may have recourse to where they have suffered harm.

[793] Ibid at 152.

For contracting parties, this thesis has already examined how, in a project financed transaction, contracting parties have extensive powers to determine the jurisdiction in which contractual disputes will be resolved and the governing law of those disputes. Naturally, some disputes will remain within the purview of traditional dispute resolution mechanisms such as a dispute review board, arbitration forums and domestic courts as they are fundamentally contractual in nature. In the context of the establishment of a super mechanism, stakeholders who are contracting parties to the transaction (MDBs, project company borrowers, sub-contractors, other lenders) must ensure that they accede to the jurisdiction of the super mechanism for those disputes that fall within the jurisdiction of the super mechanism. This may be relatively easy to incorporate into loan agreements as part of the loan conditionalities that MDBs impose in he projects they fund.

For external stakeholders, it is critical that they are made aware of the parameters of the super mechanism's jurisdictional limitations and the nature of the obligations that may be sought to be enforced before them. On this score, it is incumbent on the MDBs party to the super mechanism to ensure that project-affected stakeholders on the various projects they engage in are made aware of the existence of recourse via the super mechanism. This should be part of the broader duties that should exist which compel MDBs to engage with stakeholders to provide notice of projects being implemented, any related potential impacts, and recourse mechanisms which may be resorted to where a project entity's breach of an MDBs governmental, environmental and social policy during the execution of the project has caused harm.

Superseding these issues is that of the nature of the complaints that the super mechanism has jurisdiction to investigate and on which complaints it may make remedial recommendations. Evidently, for both external and internal stakeholders, the disputes that are intended to be resolved before a super mechanism will predominantly centre on breaches of MDB policies. Firstly, to the extent that these breaches may precede the execution of the loan agreement the incorporating terms and conditions into an MDB loan agreement may provide a mechanism to extend the super mechanisms jurisdiction to also cover harm-causing decisions and conduct that may have taken place in the developmental stages of the project. Secondly, as is evident in the operation of virtually all pre-existing accountability mechanisms, generally their jurisdiction is limited to environmental, social and governmental issues as recorded in their respective policy documents on these issues. Furthermore, to a greater and lesser extent among the various MDBs, that jurisdiction is also bolstered by taking into account project-specific

aspects and/or broader international law obligations on environmental, social and governmental issues. A super mechanism should effectively be empowered with the same level of jurisdiction. It may be argued that an overarching environmental and social policy be developed to govern projects across all MDBs. However, given the disparate nature of the regions that they operate across, the wide variety of projects they fund, and the competing interests of various donor countries that fund various MDBs, this may not necessarily be feasible, at least not from the outset of a super mechanism's establishment. Thirdly, it should also be noted that the jurisdiction of a super mechanism and the obligations it may seek to enforce does not necessarily oust that of domestic judicial *for a*. The interaction between these mechanisms may certainly have a bearing on a super mechanism's jurisdiction and accordingly further below in this chapter the role of domestic courts is discussed below in greater detail with a focus on how a super mechanism might interact with such *fora*.

7.3.2 Effective Remedies

A super mechanism should provide remedies that are effective and be empowered to monitor and enforce the implementation of those remedies at MDBs for the benefit of stakeholders. On both remedies, monitoring and enforcement, this study has underscored MDBs' shift towards systems that are less onerous for them, and more onerous for borrowers and the governments developing infrastructure projects. This is generally achieved through project-specific contractual schemes that are more negotiable, more flexible, and reduce the requirements for assessments on projects for the MDBs involved. This tendency places greater emphasis on borrower and state-party obligations in financing transactions.

This thesis has demonstrated that existing MDB accountability mechanisms generally source their remedial powers in the environmental, social and governmental policies that they have promulgated. Following an accountability mechanism's investigation, an assessment is made to determine whether an MDB has conducted itself in compliance with applicable policy, and with legal, regulatory and/or project specific requirements. The accountability mechanism will then make a recommendation on remedial action to be implemented where non-compliance is found.

Given the increasingly negotiable and flexible contract schemes, the risk remains that remedies may not be sufficiently comprehensive for stakeholders seeking relief. This is particularly so if remedial powers remain limited to compliance-based recommendations that only ensure that MDBs' harm-causing conduct is corrected and is in compliance with applicable internal

requirements. In the context of a super mechanism, while the ambit of its powers may be similarly constrained, in order to advance accountability and ensure truly effective operation, the fundamental principles of global administrative law should be imported.

In this regard, the pre-eminent global administrative law principle - the right of recourse to a review procedure – holds that one of the core structural elements of an effective accountability mechanism is its ability to provide robust and effective remedies. I have noted in this thesis that the robust accountability has been formulated as involving a social interaction and exchange.[794] It cannot be reduced to a mere compliance check. To reframe Mulgan's formulation[795] in the context of a super mechanism: resorting to a super mechanism should provide stakeholders with something more - they are calling for the MDB to account for harm-causing conduct and they should consequently be provided with comprehensive relief or remedies that encompass (i) comprehensive answers or information in response to the alleged harm, (ii) rectification of the harm-causing action to bring MDB conduct into compliance and, to go further, (iii) may include sanctions such as the payment of damages to affected stakeholders.

7.3.3 Robust monitoring and enforcement powers

A super mechanism should be empowered to monitor and enforce remedies and corrective measures at an MDB. On this score, the manner in which the CAO and the IPAM conduct monitoring and enforcement of their remedial actions provides frameworks on which a super mechanism may build. As is the case for the CAO and IPAM, a super mechanism will benefit from a system through which investigations remain open and under monitoring while the remedial action ordered in recommendations is being implemented. Only once the super mechanism's investigatory panel has satisfied itself that there is compliance and remedial action has been implemented appropriately should it then close the compliance investigation.

A key lesson to be drawn from the IPAM is its oversight function and the role that the EBRD's board and directors have over its remedial process. In this regard, a super mechanism is likely to benefit from an obligation to submit reports to the boards of respective banks on the projects of those banks that are under investigation. This will allow various MDB boards to ensure that remedial action is implemented, adding another critical layer of oversight.

[794] Supra section 5.2.1 at 142
[795] Mulgan op cit (n 664).

In addition to the two international examples that have been drawn on, it is worth noting that strong monitoring and enforcement powers following a judicial order or recommendation are not entirely without precedent at domestic level. In South Africa, the High Courts, Supreme Court of Appeal and Constitutional Court are empowered to make an order known as a structural interdict. Where the court hands down such orders, the rights violator is directed to rectify the breach of fundamental rights under the supervision of the court.[796] These orders have proved particularly useful in instances where socio-economic rights have been violated.

Generally the structural interdict order operates according to the following five-staged approach: first, the court declares the conduct unconstitutional; second, the court orders the person or entity that caused the breach of rights and/or harm to comply with its constitutional obligations, which may include remedial actions; third, the court orders the person or entity that caused the breach of rights and/or harm to produce a report within a specified period of time on the steps it has taken and the future steps that will be taken; fourth, the person or entity affected by the rights breach and/or harm is afforded an opportunity to respond to the report; and finally, the matter is enrolled for hearing and, if satisfactory, the report is made an order of court. Failing to comply with the obligations and remedial actions set out in the court order report will amount to contempt of court, for which criminal sanctions may be imposed.[797]

A super mechanism will benefit from drawing on pre-existing international and domestic principles on robust monitoring and enforcement as a means to realise accountability for project-affected stakeholders who have suffered harm.

7.3.4 Super mechanism and sovereignty

A super mechanism should operate in a manner that does not directly or indirectly contribute to undermining the sovereignty of states, especially developing countries. As Davis and Corder have recognised, rapid globalisation and the proliferation of international institutions demand recognition of the domestic impacts of global regulatory governance.[798] This is no less the case when examining how a super mechanism might begin to navigate the vexed relationship between national sovereignty and international bodies such as MDBs and the establishment of a super mechanism.

[796] I. Currie and J. De Waal, *The Bill of Rights Handbook*, 3rd ed (2009) at 217-218.
[797] Ibid.
[798] Davis and Corder op cit (n 734) at 72.

This is particularly so when considering the role and applicability of global administrative law in a super mechanism's operation and the domestic impacts of such a mechanism's investigations and the remedial action that might be ordered. When global administrative law's domestic impact is considered from a developed world perspective, when viewed through the lens of advocates of globalisation, the predominant assumption is that the introduction of global standards at domestic level should advance the legality (including the advancement of transparency, procedural fairness and accountability) of the global activities of all the major actors in the global administrative law space[799] - from the MDBs themselves to the national governments involved in project financed infrastructure transactions.

Accordingly, what should be considered is how domestic and international bodies may align their functions not only to strike an appropriate balance between the inherent potential of a robust global governance system to adjudicate disputes, but also to effectively protect and advance human rights while simultaneously respecting national sovereignty, thus enhancing the role of domestic judicial forums and their ability to leverage domestic administrative law principles to hold international institutions such as MDBs to account. Two elements warrant consideration in this regard: First whether domestic courts will have a role to play in light of the establishment of a super mechanism. Second, if domestic courts are to have a role, what that will entail.

On the first issue, it is proposed that domestic courts continue to have a role where MDBs have caused harm. However, in the context of the operation of a super mechanism, recourse to domestic courts should only be triggered where an MDB has failed to implement remedial action recommended by the super mechanism. Practically, this effectively means that a failure to comply with and implement remedial action recommended by a super mechanism should vitiate a given MDB's ability to claim immunity from domestic legal process in accordance with their respective articles of agreement. Domestic legal process should then follow in the ordinary course.

Where this failure to comply has occurred, the second element described above must be considered - that is, the role of domestic courts and the nature of the powers to hold MDBs to account. In the US, courts have extended the reach of their domestic administrative laws to assert more effective control and review of actions taken by international actors that have

[799] C. Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17(1) *The European Journal of International Law* 187 at 210.

harmful domestic effects.[800] Chesterman has noted that this has increasingly occurred at domestic level as courts and legislatures around the world have progressively exercised their authority to review matters such as the domestic implementation of global standards and national officials' participation in global administrative decisions which lead to rights derogations or violations, both of which are apparent in MDB financing transactions.[801] This has proved particularly effective for developing countries. By extending the reach of their domestic administrative laws to assert more effective control and review on international conduct and decisions which have deleterious domestic effects, domestic courts may serve as the lead drivers of accountability for international institutions such as MDBs.[802] Allowing domestic courts to determine the parameters of their review power also mitigates potentially adverse impacts on states' sovereignty.

This approach has been endorsed by Stewart. In the context of a proposal for US courts to implement such an approach when they adjudicate disputes that involve international institutions, he noted that courts might compel domestic agencies implementing global regulatory norms and policies to extend the administrative law procedural requirements, techniques and remedies of judicial review applicable to purely domestic operations.[803] This would not necessarily preclude courts from having regard to environmental, social and governmental standards which MDBs have promulgated. Instead, working together, it is argued that this may be particularly effective in the context of enhancing accountability in project-financed infrastructure transactions in developing countries.

Accordingly, when an analogy is drawn with some of the proposals Stewart made when he expressed his views on the domestic implementation of global regulatory measures, a number of measures and principles may be distilled for developing countries that wish to enhance accountability in project-financed infrastructure transactions using their domestic courts.[804] These measures include empowering courts to order a domestic contracting authority in a project-financed transaction to afford the public an opportunity for "notice and comment" before entering contract negotiations. Courts could also order a domestic contracting authority

[800] R. B. Stewart, 'US Administrative Law: A Model for Global Administrative Law' (2005) 68(3/4) Law and Contemporary Problems 63 at 71-72.
[801] S. Chesterman, 'Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law' (2008) 14 *Global Governance* 39 at 40.
[802] Stewart op cit (n 800) at 71-72.
[803] Ibid.
[804] Ibid.

to provide a summary of negotiations, decisions and terms together with an analysis and justification of decisions, the project or the terms and conditions to which they are agreeing.[805]

Leveraging domestic administrative laws in this manner has been recognised as a grassroots mechanism for stakeholders to generate greater awareness and publicity on implementation of projects or policies that are inconsistent with or derogate from either domestic or international human rights norms.[806] The power of publicity should not be disregarded as this study has already highlighted the role of the media and publicity as part of the broader spectrum of levers that stakeholders have at their disposal to hold MDBs to account. However, this is no substitute for the use of domestic administrative laws and principles to increase transparency and accountability at MDBs by lifting the veil. Tan has noted that a study by the Global Transparency Initiative found that domestic access to information mechanisms is generally far more detailed than MDB information disclosure policies, that they provide an easier, more effective, and more accessible way for stakeholders to hold MDBs accountable through legal action.[807] The same can be said for domestic administrative law regimes more broadly, particularly in so far as the remedies available to stakeholders are concerned.

Empowering domestic courts to make administrative rulings that compel MDBs to give effect to greater accountability to the stakeholders affected by their projects is not a disproportionate burden for either the courts or MDBs to bear. On the contrary, rulings such as these fit neatly into the ethos and promulgated requirements of pre-existing administrative regimes at international level such as MDBs' accountability mechanisms and environmental, social and governmental policies. However, rulings by domestic courts may go further. To the extent that domestic systems have more robust review measures, they may compel an even greater accountability and more efficacious remedies where MDB accountability measures fail or are inadequate. This is particularly so in so far as domestic courts are notionally better positioned to assess the adverse effects of projects "on the ground" and provide more efficacious relief in the remedies they craft. Accordingly, the development of a domestic administrative law framework to regulate the conduct of international institutions may ultimately render the exercise of discretion and authority at the supra-national level more transparent and accountable for stakeholders in the developing world.

[805] Ibid.
[806] Tan op cit (n 551) at 114.
[807] Ibid.

Moreover, as a further corollary, to the extent that domestic courts take cognisance of international policies, the resultant precedents flowing from their decisions may inevitably have a beneficial impact on the development of domestic administrative law regimes. Such processes have the potential to imbue domestic legal systems with good governance principles and procedures gleaned from the international global administrative space. This, in fact, aligns with the aims of many MDBs that, like the Bank, have been among the most vocal advocates of good governance, transparency, and accountability in developing countries.[808]

7.3.5 Core features of a 'generic' super mechanism

The foregoing sections have examined the core elements of this thesis' proposal to enhance accountability and enforcement at a generic global super mechanism for MDBs. However, it is beneficial to draw the elements together to provide a brief summary of how such a mechanism might look on a practical and operational level.

On the matter of jurisdiction, a super mechanism must avail its services to contacting parties who accede to the mechanism's jurisdiction. The mechanism must also be available to external parties such as the communities affected by projects, and it should be incumbent on both the MDB and other contracting parties to ensure that affected communities are aware of the mechanism's existence and the claims it may adjudicate. With regard to the type of issues it may adjudicate, a given MDB's applicable environmental and social policy documents for the project at hand will be the touchstone for the parameters of its jurisdiction.

The remedies a generic super mechanism may provide must be centred on those available in global administrative law to ensure their efficacy. To reiterate, they should include remedies such as access to information in response to the alleged harm, rectification of the MDB's harm-causing conduct on a particular project, and/or sanctions such as the payment of damages to affected stakeholders.

The super mechanism's power to order remedies must be accompanied by the ability to monitor and enforce remedies and corrective measures at MDBs. In this regard, this thesis has drawn on the jurisprudence of the South African Constitutional Court and its power to grant and administer structural interdict orders.

[808] K. Raffer, 'Introducing Financial Accountability at the IBRD: An Overdue and Necessary Reform' (1999) Conference Paper, *Northwestern University* available at https://homepage.univie.ac.at/kunibert.raffer/CHICAGOH.pdf (accessed 25 February 20201) at 2.

Finally, on the mechanism's interaction with domestic legal systems, it must operate with the necessary deference to national sovereignty. There are two important considerations in this regard. First, as this thesis has previously noted, domestic courts must continue to have a role where MDBs have caused harm. Their involvement should be triggered where an MDB has failed to implement remedial action recommended by the super mechanism. By extending the reach of their domestic administrative laws, domestic courts may assert more effective control and review on international conduct and decisions that have deleterious domestic effects.

Secondly, the relationship between the MDB, the super mechanism and the jurisdiction of domestic judicial forums remains a critical matter. This relationship, and the manner in which the jurisdiction of domestic courts is established in the context of the operation of a super mechanism has a direct bearing on national sovereignty. This thesis has previously examined how MDB loan agreements, and the decisions taken pursuant to the terms of those loan agreements, are to be interpreted and enforced.[809] Lessons and analogies may certainly be drawn from this. As previously stated, the predominant configuration for the interpretation and enforcement of the terms of loan agreements is that parties negotiate and reach agreement on the appropriate legal system to govern the agreement. This has tended to result in MDBs' loan agreements being subjected to a variety of configurations in terms of which the contracting parties rely on a hybrid of international and domestic laws and legal systems to govern the interpretation and enforcement of the agreements. The specific nature of the hybrid configuration may depend on, among others, MDBs policies on interpretation and enforcement, and/or project-specific environmental, social, or governmental risks. Similar negotiation-based determinations may be made in the context of determining domestic judicial forums' jurisdiction to adjudicate stakeholders claims for relief. In effect, the contracting parties to a project financed infrastructure could negotiate and reach consensus on submitting to the jurisdiction of a domestic court where harm or injury has arisen and there has been no resolution of the dispute or effective remedy via the super mechanism. Whytock has noted that judicial enforcement or non-enforcement of choice of forum agreements can help determine whether a court will adjudicate a dispute.[810]

However, the ability of stakeholders to seek relief should not be overly circumscribed, particularly for non-contracting parties. In this regard Whytock has also noted that domestic courts fulfil an important global governance function when they adjudicate transnational claims

[809] Supra section 3.2.1 at 79.
[810] C. A. Whytock, 'Domestic Courts and Global Governance' (2009) 84(1) *Tulane Law Review* 67 at 79.

involving international actors.[811] I have already endorsed the approach that domestic courts should be allowed to determine the parameters of their review power[812] and this necessarily includes making determinations on whether they have jurisdiction or adjudicative authority to entertain a stakeholder's claim against a MDB.

7.4 BRICS, accountability, and the super mechanism

At the very outset of this thesis, I outlined the context in which the research would be situated. Central to this context was the history of the formation of the Bank and the NDB – both of which necessitated a herculean coordinated international effort that demanded a clear alignment of political will, substantial financial commitments, and the development of complex legal and administrative structures. It need not be overemphasised that the establishment of these international institutions was no small feat. In their own right, the formation of the Bank and, in the early 2010s, the NDB, marked revolutionary moments in the global political and economic space. Furthermore, their continued operation and evolution to meet the demands of the present-day global political and economic space are similarly remarkable.

It is in this context that the proposal to establish a super mechanism must be viewed. Undoubtedly, the proposal to enhance accountability at MDBs by establishing a super mechanism is an ambitious one. But it is no less ambitious than the initial efforts to establish the Bank and the NDB, not only because of the substantial and novel powers that a super mechanism will wield, but also because of the resource commitments that such a global structure will require.

While the project of establishing a super mechanism remains attainable, an incrementalist approach would not be inappropriate given the prevailing global political and economic environment. In this regard, in what follows I will set out a high-level examination of how a super mechanism might align with some of the core objectives and values of the BRICS bloc and then turn to consider some practical considerations related to how a BRICS super mechanism might function.

7.4.1 An objectives- and value-based motivation for a BRICS super mechanism

Earlier in this thesis I noted that the members of the BRICS bloc have, at their core, articulated a commitment to ensuring that developing economies have a greater voice and better

[811] Ibid at 74-75.
[812] Supra section 7.3.4 at 181-183.

representation in international financial institutions. The bloc has committed to leveraging their participation in existing international bodies and structures for the benefit of developing economies by driving fairer processes and more diversified and inclusive decision-making.[813] While these objectives are admirable, they must be coupled with the reality that each of the BRICS bloc members face on the ground – that is, relatively high levels of corruption at national level due to the unique ethical and accountability challenges that each of them faces.[814]

These challenges necessarily impact on the international objectives of the bloc and, to the extent that they persist, and the bloc continues to position themselves as a countervailing reformative force in the global arena, Sambo and Kanyane's argument should be highlighted. Their argument is formulated in the context of the ethical and accountability challenges each member of the BRICS bloc faces domestically with particular reference to corruption. They posit that ethics and accountability must be central to shaping the BRICS bloc's responses, cooperation, and development to address the substantial challenges each member of the bloc faces.[815] The manner in which Sambo and Kanyane have articulated the demands for reforms in the approach to ethics and accountability at the respective domestic levels within the bloc[816] may be transposed to the international level as follows: ethics and accountability at international level demands that international financial institutions, systems and structures such as MDBs be subjected to forms of accountability and review in a manner that is tailored to the developmental needs of the countries in the BRICS bloc. It is on this basis that the following proposal may be advanced: establishing a global super mechanism is a markedly ambitious project, therefore, there is space to modify this proposal and establish a tailor-made super mechanism with a more limited jurisdiction – one that is limited to adjudicating and/or reviewing harm-causing MDB-funded projects within the BRICS bloc.

This proposal for a BRICS bloc super mechanism is not misplaced. Rather, it aligns with the values and objectives that the bloc has articulated. In 2014 Thakur rightly noted that the BRICS bloc's identity crisis is rooted in what he identifies as differing and sometimes clashing national priorities.[817] He also noted that the BRICS bloc must move beyond merely having similar stances on a few contentious international issues.[818] I would include in this the formation of the

[813] Supra section 1.2.2.1 at 16.
[814] V. T. Sambo and M. H. Kanyane, 'Ethics and Accountability in BRICS Countries: Analysing Critical Issues' (2020) Research Paper, *University of South Africa* at 8 – 9.
[815] Ibid.
[816] Ibid.
[817] R. Thakur, "How representative are BRICS?" (2014) 35(10) *Third World Quarterly* 1791 at 1805
[818] Ibid.

NDB which, while historically significant, is but one of many regional MDBs. There is still the opportunity for the bloc to demonstrate a real commitment to being a pioneer of reform in the global arena, particularly in advancing accountability. Accordingly, by establishing a BRICS bloc super mechanism, there is an opportunity for the bloc to evolve from what Thakur described as a mere "countervailing economic grouping" to a truly powerful political alternative.[819]

The bloc has thus far demonstrated the capacity to make this shift. They have been "increasingly successful at 'norm spoiler-ship'" by blocking or defeating proposals in international forums that they dislike, forming coalitions to achieve their preferred outcomes, and driving reform to embed and advance the interests and policy preferences of developing countries.[820] Pioneering a super mechanism that operates within the bloc but with a membership that may be expandable to include other countries that may wish to join, much like the bloc has already done with their membership requirements for the NDB, would advance their objective to become a viable and powerful alternative force on the international stage.

7.4.2 Practical considerations for a BRICS super mechanism

The proposal to establish a BRICS super mechanism may notionally align with the bloc's objectives and values, but there are practical considerations related to how such a mechanism might function that warrant further examination. In section 7.3 of this chapter, I framed the insights gleaned from the operation of the CAO and the IPAM using the benchmarks formulated at the outset of the chapter in order to distil specific actionable measures on the establishment of a super mechanism. To a large extent, the benchmarks of comprehensive jurisdiction, effective remedies, and robust monitoring and enforcement powers apply *mutatis mundatis* to the proposal advancing the establishment a BRICS super mechanism. However, it is the fourth benchmark that warrants somewhat more detailed consideration in the context of a BRICS super mechanism.

To reiterate in brief, the fourth benchmark requires that a super mechanism operate in a manner that does not directly or indirectly contribute to undermining the national sovereignty of states, especially developing countries.[821] I have already emphasised some of the core aspects governing a super mechanism's interface with sovereignty: I noted that in the context of the operation of a super mechanism, recourse to domestic courts should be triggered where an

[819] Ibid.
[820] Ibid.
[821] Supra section 7.1 at 166.

MDB has failed to implement remedial action recommended by the super mechanism and it should accordingly vitiate a given MDB's ability to claim immunity from domestic legal process. In this regard, I noted that developing countries that wish to enhance accountability in project-financed infrastructure transactions using their domestic courts may in these instances apply and import into their own legal systems international laws and principles, international regulatory processes, and domestic laws and principles from other BRICS jurisdictions. This is to be expected given that disputes that concern MDB-funded infrastructure projects frequently traverse human rights, a host of international laws, regulatory processes and principles, and commercial legal aspects of infrastructure financing transactions.

As a result of the nature of these disputes there are two practical considerations that should ameliorate the potentially adverse impacts on sovereignty when courts within the BRICS bloc adjudicate disputes that concern MDB conduct that has caused harm. Both of the considerations have already, at least in part, been on the agenda of the BRICS bloc.

The first consideration concerns the various domestic legal regimes and structures that exist within of the BRICS bloc. Central to this is how the bloc manages the manner in which the varying laws and legal structures interface. This is a particularly important consideration given that one of the fundamental aims of the bloc is to promote trade, investment and other financial transactions. These aims require a common legal platform or, at the very least, a set of agreed principles which would find application across the legal systems of the bloc. Accordingly, in 2014 the BRICS Legal Forum (the 'Legal Forum') was created pursuant to a meeting of the BRICS bloc in Brasília, Brazil. The aim of the Legal Forum is to promote integration of legal principles and systems among the BRICS bloc to advance integrated legal-economic development.[822]

The Legal Forum is intended to serve as a platform for the bloc to promote the realisation of BRICS objectives through, among others, the coordinated use of legal principles in the countries' respective dispute resolution mechanisms, decision-making processes, and relationships with other international organisations. It is a platform designed to serve as a think-tank instrument on BRICS legal issues, to deliberate on common legal instruments, and to foster long-term strategic legal cooperation.[823] This coordination is done in pursuit of enhancing mutual understanding among the bloc's members about their respective legal

[822] S. Mancuso, "Contract Law in the BRICS Countries" in R. J. Neuwirth, A. Svetlicinii and D. De Castro-Halis (eds) *The BRICS-Lawyer's Guide to Global Cooperation* (2019) at 248.
[823] Ibid.

systems and promoting and protecting the diversity of the legal culture in each member country.[824] Respecting the sovereignty of its individual members is a core tenet of the BRICS bloc's founding values. When this is coupled with the proposal to establish a BRICS super mechanism, the Legal Forum presents a unique opportunity to ensure legal coherence within the bloc. Even if viewed exclusively from the perspective of principles, a super mechanism presents an opportunity to ensure coherence in cases across the bloc from the time a complaint is lodged through to the potential initiation of legal proceedings at domestic level in one of the member countries.

The second consideration relates to the expressed critiques of the form and operation of existing and proposed dispute resolution mechanisms within the BRICS bloc. The proposal for a BRICS super mechanism shares many similarities with dispute resolution structures that the bloc has previously contemplated and attempted to implement. Examining some of the underlying motivations and critiques on the practical implementation of dispute resolution structures allows parallels to be drawn and lessons to be learned for the benefit of the establishment and operation of a BRICS super mechanism for MDB-related disputes.

In 2016, India chaired BRICS for the year and in October of that year, it hosted the Eighth BRICS Summit under the theme 'Building Responsive, Inclusive and Collective Solutions'.[825] Among the aims for its term as chair was an effort to advance novel mechanisms in which BRICS member states could cooperate. In the months preceding the summit India hosted the 'Conference on International Arbitration in BRICS: Challenges, Opportunities and Road Ahead' in New Delhi. At the conference, national and international experts in the field of international arbitration from the BRICS bloc discussed the need to develop an international arbitration mechanism for members of the bloc that addressed challenges that members encountered in existing international arbitral systems.[826]

The BRICS bloc's motivation for the proposal to establish a specialised dispute resolution centre at the New Delhi conference stemmed from criticisms within the existing landscape for international commercial and investment-related dispute resolution.[827] These criticisms included that existing forums were monopolised by the developed world, biased against developing economies, lacked adequate representation of developing nations in the dispute

[824] Ibid.
[825] F. D. Simões, 'A Dispute Resolution Centre for the BRICS?' in R. J. Neuwirth, A. Svetlicinii and D. De Castro-Halis (eds) *The BRICS-Lawyer's Guide to Global Cooperation* (2019) at 292 and 297.
[826] Ibid at 292.
[827] Ibid at 293.

resolution process, and lacked understanding of the 'local' concerns of developing nations.[828] Evidently, many of the criticisms that motivated the establishment of a BRICS dispute resolution forum are similar to the challenges apparent in the prevailing landscape of MDBs and their respective accountability mechanisms, as has been highlighted in this thesis.

It is worth turning to consider some high-level challenges that were raised in relation to the BRICS dispute resolution forum, but framing these as critiques and challenges applicable to the potential establishment of any proposed BRICS super mechanism. The BRICS Dispute Resolution Forum was established in 2015 to deal with commercial contract arbitrations in the BRICS countries[829] and it presents a useful case study of how the failure to address systemic and operational challenges might play out for a super mechanism. It has not received a single arbitration application since it was established – rendering it largely ineffectual.[830]

One of the primary critiques which arose in the context of a dispute resolution mechanism was whether creating yet another international dispute resolution forum was necessary and added value. A similar critique may be directed at the establishment of a BRICS super mechanism. Accordingly, the response to the critiques of an international BRICS dispute resolution forum may be adapted to a BRICS super mechanism as follows: an efficient and efficacious super mechanism that advances accountability and seeks to protect and advance the rights of affected stakeholders is imperative to the economic cooperation and advancement of members of the BRICS bloc.[831] In fact, the economic opportunities and benefits for cooperation appear to far outweigh the challenges of establishing a super mechanism.[832] However, it is submitted that this may only be position subject to a number of caveats that the bloc must ensure that the super mechanism addresses in its operation.

First, much like a BRICS dispute resolution forum, while a super mechanism may aim to enhance legal coordination and to bridge regulatory and judicial disparities when dealing with MDB-related disputes, its mere creation may not be a panacea for advancing accountability.[833] Practically, the block must ensure the mechanism's sustainability. As was the case for the BRICS bloc's dispute resolution forum, a super mechanism will only prosper if the number of

[828] Ibid at 294.
[829] See BRICS Dispute Resolution Centre Shanghai, *About Us* available at http://www.shiac.org/BRICS/aboutus_E.aspx?page=1 (accessed 3 May 2021).
[830] Simões op cit (n 825) at 299.
[831] Ibid at 298.
[832] Ibid.
[833] Ibid.

proceedings it administers progressively increases and, as such, much work will need to be done to ensure that the mechanism is actively marketed and promoted to attract cases.

Further above, I noted how it will be incumbent on the MDBs party to the super mechanism to ensure that project-affected stakeholders on the various projects they engage in are made aware of the existence of recourse to accountability via the super mechanism.[834] Ostensibly, there is nothing preventing MDBs from insisting that this form part of the contractual conditions of the projects they finance. In fact, this should be encouraged and mandated as a contractual condition precedent to securing finance for a MDB infrastructure project in the BRICS bloc. A step such as this will be strategically significant to ensuring the sustainability of a BRICS super mechanism.

Second, it is critical that the BRICS bloc implement measures to ensure the neutrality of a super mechanism to investigate and adjudicate stakeholders' complaints. In this regard, to draw an analogy with Simões' findings on the dispute resolution forum, a BRICS super mechanism must aim to be perceived as impartial.[835] The institutional culture of accountability mechanisms is largely shaped by factors such as location, membership, languages, leadership and administrative structure, staff diversity, and the background of its adjudicators and investigators. Consequently, a BRICS super mechanism should strive towards a strong image of legitimacy for all parties and stakeholders that are seeking investigation and remedial action for harm.[836] As stakeholders will come from BRICS bloc countries which have vastly different social and legal backgrounds, the plural composition of the BRICS super mechanism is a critical element of its success.[837]

Third, if it is among the aims of a BRICS super mechanism to advance legal coordination and bridge regulatory and judicial disparities when dealing with MDB-related disputes, it may be beneficial to consider adopting and implementing uniform principles, rules and administrative processes when dealing with stakeholders' disputes on MDB-funded infrastructure projects.[838] Much like the proposals to address the critiques levelled against the BRICS dispute resolution forum, these principles, rules and administrative processes for a BRICS super mechanism should be highly flexible, provide stakeholders with autonomy, take into account differing legal

[834] Supra section 7.3.1 at 173.
[835] Simões op cit (n 825) at 299.
[836] Ibid.
[837] Ibid at 300.
[838] Ibid.

cultures and backgrounds, and attempt to standardise the processes for judicial intervention where a remedial recommendation by the super mechanism has not been implemented.[839]

7.4.3 Operationalising a BRICS super mechanism

The foregoing section has provided an objectives- and value-based motivation for the establishment of a BRICS super mechanism. It also examined important practical considerations that are unique to the establishment of such a mechanism. However, it is worth examining in brief what it will take to operationalise such a mechanism. In this regard, there are certainly lessons to be drawn from the establishment of the NDB. The NDB's formation and continued operation is arguably the BRICS bloc's most successful institutional venture to-date.

A recent report has indicated that as of 2019, the NDB's staff component stood at 145 and it had targeted increasing this to approximately 500 by 2021.[840] It is not entirely unreasonable to postulate that an independent BRICS super mechanism is not likely to need 500 staff members, a staff component of about 100 will be within a more reasonable range, particularly given that the caseload of the mechanism is likely to limited to the BRICS bloc members, at least in its early stages, and assuming the mechanism is as at least busy as the NDB, which is dealing with approximately 80 projects.

As for the nature of its staff component, regard may be had to the manner in which existing accountability mechanisms are staffed. First, the super mechanism's organisational structure may benefit from adopting one similar to that of the CAO at the IFC - the mechanism could be headed by a president and managed by a board of directors and sub-divided into three separate divisions: dispute resolution and adjudication, pre- and post-project compliance monitoring, and an advisory function.[841] Secondly, with regard to the experience and qualifications of its staff component, the mechanism will likely draw on legal and financial experts with experience in projects, compliance, and dispute resolution and adjudication.

The BRICS super mechanism must remain independent. As is the case with the Panel at the Bank, dispute adjudicators and investigators should be afforded a limited non-renewable term and their tenure should be protected by disallowing removal other than by a resolution of board

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[839] Ibid at 300-301.

[840] C. Wright, 'NDB: The BRICS Bank Takes Shape' *EuroMoney* (2019) available at https://www.euromoney.com/article/b1f9vf7w1cf3d8/ndb-the-brics-bank-takes-shape (accessed 30 May 2021).

[841] The Compliance Advisor Ombudsman, 'About the CAO: The CAO's Structure' (2012) available at http://www.cao-ombudsman.org/about/whoweare/ (accessed 30 May 2021).

members upon independent satisfaction of certain jurisdictional facts such as gross misconduct. For each project investigation, the mechanism should deploy no more than three expert investigators who will be tasked with investigating, adjudicating disputes, and making remedial recommendations which the board will approve.

The mechanism's jurisdiction should be assured by making it peremptory for all members of the BRICS super mechanism to ensure that all contracting parties to the financing transactions submit to the jurisdiction of the super mechanism as a condition of receiving MDB financing. This could be enforced by MDB lenders such as the NDB but, where the MDB in question is not the NDB, it could then be made incumbent on the state party to ensure that the rights and interests of its citizens are protected by compelling contracting parties to submit to the jurisdiction of the super mechanism.

With regard to the conduct of its investigations and guaranteeing the implementation of the super mechanism's findings and recommendations, this should fall to either the MDB party to the financing transaction and/or the state party to the financing transaction. Where this does not take place, further above this thesis detailed the role of domestic courts as well as the sanctions for MDBs (and possibly other parties to the finance transaction).

This chapter has set out a proposal to enhance accountability and enforcement at a super mechanism and has done so with reference to a number of important concepts, processes and principles. It has also gone further by setting out a BRICS-specific super mechanism on a slightly smaller scale and detailing some objectives- and value-based considerations together with practical considerations for its implementation within the bloc. In the chapter that will follow, I shall provide a summarising overview of the key points and arguments raised in this thesis – tying together the examination of the foundations of project financed infrastructure, global administrative law, accountability at MDBs, and demonstrating how these have ultimately been critical to the development of the proposal.

CHAPTER EIGHT
Summary, Findings, Conclusion and Recommendations

8.1 A challenging global environment

There can be no doubt that the rapid industrialisation of developing countries has ushered in a new era for both infrastructure development and the related financing that countries rely on to fund the infrastructure projects. The activity in the BRICS bloc stands as a quintessential example of this new era. Undoubtedly, it is an exciting period for the social and economic advancement of people in countries that had historically been left behind. The new era has seen governments in these countries make substantial structural improvements in sectors such as energy, telecommunications, water and sanitation. These advances are most acutely felt at domestic level as the large infrastructure deficits have had a direct impact on millions of people in the developing world living in abject poverty who rely on government-led development in order to improve the quality of lives of their citizens. More broadly, given the staggering trillion-dollar infrastructure deficits developing countries face in comparison to their more developed peers, these advances have marked the starting point for governments' attempts to address inequality internally and close the gap externally between rich and poor countries.

The pace and importance of this new era of industrialisation have put a spotlight on the role of MDBs and the innovative financing mechanisms they have developed. This thesis has centred its consideration of the dynamics of infrastructure development on the relatively novel project-financing funding mechanism. Arguably, more than any other funding mechanism, project financing is at the nexus of a wide variety of competing interests. As this thesis has demonstrated, the nature of projects that employ this complex mechanism is such that it transcends traditional financing mechanisms – it impacts on and requires the participation of MDBs, governments, private sector investors, citizen stakeholders and interest groups, and a myriad of contracting parties that include project developers, engineers, contractors, suppliers, and product purchasers. Further still, the operation of the model is complicated by procurement laws as government entities employ the PPP model and are compelled to call for proposals which competing entities bid on for various aspects of the project, ranging from the financing itself to the execution of various services or the supply of various goods.

As governments have increasingly relied on project financing and PPP models of facilitating infrastructure development, and as MDBs continue to channel billions of US dollars into infrastructure projects in developing countries, fundamental questions and challenges have

emerged. This has been exemplified throughout this thesis by case studies that traversed infrastructure projects in developing countries such as the Rift Valley Railway project in Kenya and Uganda, and a number of projects in the BRICS bloc including the Polonoroeste Amazon road project in Brazil, the Medupi and Kusile coal power plants in South Africa, and the Narmada Dam project in India.

As the case studies have demonstrated, most challenges have centred on MDBs' decision-making processes at various stages. These critical decision-making stages include MDBs' decisions to award funding, their power and influence on the governments seeking funding, their relationship with the commercial private stakeholders, project companies and contractors involved in the projects, and the impact that their conduct has on the communities affected by the infrastructure projects they fund. MDBs' powers are demonstrably wide-ranging, and the institutions wield substantial influence. As a corollary, the challenges are similarly effectual - not limited to impact on the contractual rights of the private investors or government entities party to the financing transactions, but also on the basic human rights of people who are supposed to benefit from the projects they fund.

Consequently, if developing countries in particular do not address these challenges, this study has detailed the many adverse consequences that may flow from MDB-funded infrastructure projects. At domestic level, there exists the potential to undermine countries' sovereignty, social fabric and environments, while the global impacts are similarly dire given the broader impacts MDB conduct may have on matters such as the coordinated efforts to tackle climate change and resolve conflicts.

8.2 MDBs: new financing models and old challenges

Undoubtedly the environment and the multifaceted challenges that have arisen demonstrate a clear justification for a deep interrogation of the consequential decision-making that MDBs engage in when they elect to fund infrastructure projects, as this study has done. This thesis has analysed the project finance mechanism and the legal status of MDB loan agreements as the cornerstone of MDBs' participation in funding infrastructure projects. It has also situated these agreements in their broader international law context and focused on the legal issues around interpretation, enforcement and dispute resolution in these agreements.

It became manifest that while the project financing model may be novel, the challenges inherent in it traverse more settled and foundational principles of international law. Pivotal to this is the legal status of MDB loan agreements which, as has been demonstrated, is of substantial

consequence. Particularly at domestic level, the relevance of affording an MDB loan agreement treaty status impacts on its operation and enforcement within domestic legal orders. As was demonstrated, MDB loan agreements are typically subject to international law and may not automatically be overridden by domestic law, such as in the case of domestic constitutional or supreme laws. This is a critical factor that bears directly on the ability of governments, private investors and citizen stakeholders to hold MDBs to account for harmful conduct.

On the issue of the international legal status of MDB loan agreements and the applicability and supremacy of domestic constitutional laws, two doctrinal approaches were noted. Examples from the BRICS bloc were employed to exemplify how, despite these varying approaches, residual risk remained. Namely, the most powerful parties to financing transactions (that is, the state parties and MDBs) are in better positions to avoid adherence to the terms and conditions of financing and to skirt accountability by taking advantage of international law principles that disproportionately favour them. The immunities that MDBs possess have been shown to be far-reaching and, at times, absolute. This disparity is most acutely felt when MDBs' harmful conduct affects less powerful parties such as private investors involved in the transactions and/or the citizen stakeholders, and they declare disputes and seek recourse.

It is in the context of dispute resolution that the manifest need for remedies where harm has occurred and the availability and efficacy of mechanisms to hold MDBs accountable have been demonstrated to be particularly important. This study has noted the significant strides to improve accountability that have been made since the mid-nineties. While commendable, ongoing development is necessary as MDBs continue to modify their approach towards executing their developmental mandates through their financing operations. As MDBs resort to innovative funding models like project finance and work with non-state actors like private investors, the increasingly complex matrix of international, state and non-state actors, each subject to different legal obligations, regulation and governance, demands more from existing accountability mechanisms than ever before. This thesis has emphasised that MDBs possess international legal personality and, with that, comes a correlative responsibility that demands more than merely protecting the contractual rights of parties to financing transactions. There is a clear need to protect and advance environmental and social rights of external stakeholders affected by infrastructure projects such as the communities affected by projects.

It is on this front that the thesis has examined the operation and efficacy of existing accountability mechanisms at MDBs. This examination acknowledged that the media and the

resultant publicity from MDBs' harm-causing conduct on infrastructure projects has been a major driver of accountability. But for the pressure exerted by the public and interest groups, it is doubtful that MDBs would have implemented accountability reforms and established accountability mechanisms to begin with. Importantly, this thesis maintains that the media and non-governmental organisations and interest groups will continue to play a pivotal role in this regard.

However, notwithstanding the continued relevance of the media, it is the promulgation of MDBs' environmental, social and governmental policies and the operation and efficacy of formal accountability mechanisms that remain the primary routes for stakeholders to seek recourse and obtain remedies where they have suffered harm. This thesis has examined the policies and accountability mechanisms of a select grouping of MDBs - the Bank's Inspection Panel, the NDB's Independent Review Mechanism, and the ADB's Accountability Mechanism. Among the key observations it has made is that newer MDBs such as the NDB and ADB are uniquely positioned to formulate better remedies and accountability safeguards. This is evident in the NDB's "use of country systems" as a basis for accountability and the ADB's move to empower its mechanism with more robust problem-solving and review powers.

Despite the operation of these accountability mechanisms, the thesis has identified common challenges across all MDBs that continue to be prevalent. Broadly these include the ongoing tension caused by the disproportionate influence that developed countries have on MDB decision-making processes which may contribute to undermining the sovereignty of developing countries; the lack of funding and resources for thorough investigations or effective remedial action; and the issues surrounding attribution of liability for harm-causing projects executed with funding from multiple MDBs. More narrowly, this thesis has identified challenges that have a more direct and substantial impact on project-financed transactions. Among these, MDBs' self-regulation and the attendant consequences this has on the broader efficacy of MDB accountability mechanisms was highlighted.

I have emphasised how accountability mechanisms are not adjudicative, that they do not provide comprehensive remedies that aggrieved parties might have recourse to in a traditional judicial forum such as damages or injunctions, and that accountability mechanisms often preclude a host of substantive matters from their ambit such as procurement issues. Furthermore, I have drawn attention to the issues around indirect or derivative responsibility which are a direct consequence of the extensive immunities that MDBs possess as international

financial institutions. All of this impacts on affected stakeholders' ability to seek effective recourse and remedy against an MDB when they have suffered harm.

Notably, while the context may be relatively novel, the challenges which this thesis has raised indicate that many of them implicate historic challenges that have long been present in international law and governance. I accordingly identified that the solutions to these challenges find their source in pre-existing principles and relatively novel concepts in international law such as the discipline of global administrative law.

By examining the role of global administrative laws in MDBs' decision-making process and, more narrowly, assessing the contractual, regulatory and legal mechanisms within the existing regime governing MDBs' infrastructure financing projects, I analysed the specific mechanisms that speak to enhancing accountability, fairness, and transparency for stakeholders adversely affected by the decision-making process of MDBs. This analysis also highlighted systemic challenges and ultimately set the stage for the thesis' proposed solutions.

8.3 Global administrative law and the dawn of supranational accountability for international institutions

In the context of accountability challenges, but with specific regard to those that pose unique threats to accountability in project-financed transactions and that occasion breaches of human rights, I have positioned the proposed solutions to these challenges at the nexus of the laws governing international financing instruments, global administrative law, and domestic administrative laws.

The first component of the proposed solutions that the thesis has examined was the role and status of the MDBs' environmental, social and governmental standards. I noted that there has been a perceptible shift that has trended towards diminishing the force and efficacy of these standards. This is particularly so where standards are incidentally or indirectly incorporated into the contractual terms and conditions of MDBs' financing instruments. However, in order to advance accountability, these standards must be interpreted and elevated to a status that shifts them beyond being seen as exclusively internally applicable and subjectively enforceable. Instead, this thesis has argued that there is in fact a clear basis to find that the rules and protections contained in these environmental, social and governance standards create binding international obligations that are subject to international law as they meet all the requisite conditions to be afforded this status.

Among the seminal aims of this thesis has been the demonstration that MDBs' environmental, social and governmental policy standards are incidents of global administrative law and, furthermore, that situating these standards in this discipline is critical to advancing accountability at MDBs for stakeholders who suffer harm. This thesis has extensively examined the theoretical bases of global administrative law, widely accepted definitions, as well as the core criteria that need to be met for a framework of rights to be appropriately situated within the discipline. I have accordingly demonstrated that MDBs' environmental, social and governmental policy standards amount to a manifestation of these administrative procedural rights. It is certainly worth reiterating that in the context of MDBs' financing transactions these administrative procedural rights have manifested as stakeholders' rights to access information, participate in decisions that adversely affect rights, lives or livelihood, and access to justice via recourse to mechanisms that provide effective accountability and remedy. This trio of rights is core to global administrative law's operation within and applicability to the process of MDBs. The rights are pivotal to advancing accountability for contracting and non-contracting parties to financing transactions, particularly where MDBs' decisions have caused harm.

The examination of policy standards, their status in international law and their positioning as incidents of global administrative law has been particularly important. It effectively highlighted the manner in which the current regime of global administrative law and its interface with other international laws and domestic administrative laws achieves administrative justice where the conduct of MDBs adversely impact the rights of persons involved in or affected by infrastructure projects. It was also demonstrative of the pre-existing enforcement and recourse mechanisms exist which enhance accountability, fairness, transparency, reasonableness and rationality for persons adversely affected by the conduct of MDBs and, where such mechanisms were found to be lacking, where there were gaps for reforms that could promote the achievement of administrative justice for persons adversely affected by decisions of MDBs

This was a central premise of this thesis. At its core, it has focused on addressing the challenges inherent in strengthening accountability at MDBs and, as such, I have advanced two proposals that seek to leverage global administrative law as a tool for reform. These proposals align with emerging perspectives that view MDB-funded infrastructure development as being part of a broader project that seeks social, economic and environmental transformation at global level and that favours the advancement of developing countries and the protection of stakeholders' rights. In this regard, I have also demonstrated that the impact of projects both on the rights of

stakeholders not party to funding transactions and their own sustainability are both central considerations.

The proposals for reform are a response to the extensive immunities that MDBs have traditionally enjoyed both internationally and before domestic courts and, as I have submitted, they may also operate interdependently, with each enhancing the efficacy of the other. Both subject MDBs to a more robust form of external scrutiny through procedural and judicial oversight, and empower stakeholders with the ability to seek effective remedy where they have suffered harm.

The first of the reforms, lifting the veil, recognises that MDBs are hybrid in nature and operate as market players when they provide financing support through the guarantees and loans they provide for projects in developing countries. This is premised on the notion that MDBs' ability to exist and operate behind a veil despite their manifest autonomy from their shareholding states and the corporate-like nature of their activities is at odds with the rule of law and the need to advance and protect accountability for an affected stakeholder. Lifting the veil aims to empower domestic judicial forums – it provides protections, recourse mechanisms, and remedies for affected stakeholders such as project sponsors in project-financed transactions by using domestic legal systems as the primary route to hold MDBs to account where they have caused harm. This thesis has argued that "lifting the veil" empowers domestic courts to use global and domestic administrative laws and principles to increase transparency and accountability as a more accessible and more effective means for stakeholders to hold MDBs to account where they have caused harm. As I have demonstrated, not only is there a sound legal basis for this in international law, but there are MDBs that already make use of this system to varying degrees: using countries' domestic systems and processes for grievance and recourse mechanisms on projects and, importantly, permitting recourse to an internal accountability mechanism that effectively serves as internal compliance, problem-solving and advisory functions to further enhance accountability.

The second of the proposed reforms is the establishment of a super mechanism created by agreement of the participating MDBs. I have examined how such a mechanism would be funded and how it would operate. The efficacy of a super mechanism will be contingent on the nature and extent of its powers to investigate and provide an adequate remedy to complainants who have suffered harm due to MDB conduct. In this regard, I have therefore noted that establishing a super mechanism will provide a unique opportunity for MDBs around the world

to empower an external body with adequate resources, sufficient independence and comprehensive jurisdiction to advance accountability. Should these criteria be met, in the context of project finance I have emphasised that such a mechanism would have a number of benefits for private sector contracting parties, the state(s) party to the transactions and community stakeholders who may be affected by an MDB-funded infrastructure project.

It is significant that the reforms speak to the horizontal and vertical perspectives of global administrative law that were examined early on in this thesis. The first proposal aligns with the understanding that MDB-funded infrastructure projects have a role to play in expanding global administrative law through the downward impact on domestic laws – international organisations inevitably need states in order to enforce norms and procedures and establish global networks. The second proposal aligns with the horizontal perspective on the expansion of global administrative law which recognises that the expansion of global administrative law is driven by the need to pursue a collective or public interest at international level.

8.4 Accountability through an effective super mechanism

While I have endorsed the reform proposals to enhance accountability, I have also noted that they are frameworks. Moreover, simply transplanting them without regard to how they might address some of the prevailing challenges in accountability at MDBs will do little to advance accountability for stakeholders adversely affected by MDB-funded infrastructure projects. There is therefore work to be done to conceptualise how a super mechanism might effectively function at MDBs and how that mechanism might interact with both global administrative law and domestic administrative laws and legal systems. Whether the principles of global administrative law are employed by domestic courts lifting the veil or by an international super mechanism, or both, ultimately the goal of a super mechanism remains ensuring that the exercise of discretion and authority at the supra-national level is more transparent and accountable for stakeholders, particularly those in the developing world.

In this regard, I have made proposals that seek to enhance the remedial and enforcement powers of a super mechanism. In particular, I have developed four benchmarks or criteria against which an effective and successful super mechanism should be measured. These benchmarks were informed by a review of some of the more robust compliance, monitoring and enforcement bodies and powers that exist at two prominent international financial institutions. To reiterate, ultimately, I have identified that a successful and effective super mechanism should: (i) be empowered with jurisdiction to conduct comprehensive investigations; (ii) provide remedies

that are effective; (iii) be empowered to monitor and enforce remedies and corrective measures at MDBs; and (iv) operate in a manner that does not directly or indirectly contribute to undermining the sovereignty of states, especially developing countries. I have expanded on specific measures that a super mechanism might implement in order to satisfy each of these four benchmarks and highlighted some key practical and operational aspects of its establishment.

Furthermore, noting the ambitious nature of such a proposal and the dire need for this mechanism to serve developing countries, I have laid out a more specific proposal on how such a mechanism might be established on a more limited basis in the BRICS bloc. In this regard I have formulated an objectives- and value-based motivation for a BRICS super mechanism and outlined a number of practical considerations for its operation. In addition to this, I have laid out a number of proposals on what it is likely to take to operationalise a BRICS super mechanism – this included an examination of core features such as how it may be staffed, how its independence will be guaranteed and how its remedial actions might be enforced and monitored.

8.5 Conclusion

This thesis has interrogated the legal framework governing project-financed infrastructure transactions at MDBs. It has considered how this framework and MDBs' harmful conduct during financing transactions impacts developing countries and focused on harm-causing conduct that adversely impacts on the rights of stakeholders affected by MDB-funded infrastructure projects.

Beyond highlighting the operation of this MDB financing mechanism and some of the challenges inherent in these transactions, central to this thesis has been the examination of how stakeholders hold MDBs to account where their rights have been adversely impacted by MDB conduct. In this regard the thesis has demonstrated how existing global and domestic administrative justice laws interface with the procedures which regulate the funding of infrastructure projects.

This thesis has demonstrated how the principles of accountability, fairness, and transparency have a direct bearing on the financing operations of MDB and, furthermore, how these principles should form the foundation of a robust framework that seeks to enhance accountability at MDBs.

Accountability has ultimately formed the crux of this thesis. It has not only highlighted the operation and challenges in existing accountability mechanisms, it has also examined and advanced proposals that seek to provide more effective and more accessible relief to stakeholders who suffer harm as a result of MDBs' harmful conduct or decisions. This was done with a specific emphasis on how developing countries might benefit from enhanced accountability and better access to recourse mechanisms and remedies. In addition to making proposals that sought to advance the conception of a super mechanism as a primary tool for accountability at international level, the ever-important role of domestic administrative laws and principles was also highlighted. This was important given that domestic laws continue to have a direct impact on the developing body of global administrative law and, conversely, also stand to be influenced by some of the novel concepts in global administrative law which may have beneficial domestic impacts.

With regard to the reforms and proposals in particular, it is important to note that this thesis has not been a dispositive assessment of the complex and multifaceted challenges in accountability at MDBs or the solutions which may provide a response to these challenges - particularly in so far as those solutions may be sourced in the emerging body of global administrative law. There are certainly opportunities for further research on the role and impact of global administrative law in the operations of MDBs and in the role and influence of global administrative laws in domestic legal systems. Moreover, there are yet further bases to conduct research on the role of domestic administrative law rules, principles and remedies in developing countries as a tool to push back against the harm-causing conduct of international institutions dominated by developed countries.

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