

A managerial approach for the coherent development of sustainable development law: The Kenya Electricity Expansion Project before the World Bank and the European Investment Bank's international accountability mechanisms*

Un enfoque gerencial para el desarrollo coherente del derecho del desarrollo sostenible: El Proyecto de Expansión de Electricidad de Kenia ante los mecanismos internacionales de rendición de cuentas del Banco Mundial y del Banco Europeo de Inversiones

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ABSTRACT

While judicial bodies have proliferated in the last fifty years in a process that has been deemed “quasi-anarchic” (Guillaume, G., 2000) creating a risk of inconsistency in their decisions which would endanger the international law system, quasi - judicial bodies such as Multilateral Development Banks' accountability mechanisms are not spared by this legal phenomenon. They have diverse proceedings and jurisdictions, operate with different sets of environmental and social safeguards, but may confront similar factual scenarios, especially in the case of co-financing.

The recent Kenya Electricity Expansion Project presented before the World Bank and the European Investment Bank's accountability mechanisms illustrates that, through a managerial approach, potentially conflicting findings can be avoided. This paper aims to show that quasi-judicial bodies can constitute a source of inspiration for the integrated development of international law.

KEYWORDS

Environmental and Social Safeguards; European Investment Bank; Fragmentation; International Accountability Mechanisms; Quasi - Judicial Bodies; Sustainable Development; World Bank.

RESUMEN

Los órganos judiciales a nivel internacional han proliferado en los últimos cincuenta años en un proceso que se ha considerado “casi anárquico”, creando un riesgo de inconsistencia en sus decisiones que podría poner en peligro el

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sistema de derecho internacional; los organismos cuasi judiciales como los mecanismos internacionales de rendición de cuenta de los bancos multilaterales de desarrollo no se salvan de este fenómeno legal. Aun cuando tienen diversos procedimientos y jurisdicciones y operan con diferentes conjuntos de salvaguardas ambientales y sociales, pueden enfrentar escenarios fácticos similares, especialmente en el caso de la cofinanciación.

El reciente Proyecto de Expansión de Electricidad de Kenia presentado ante los mecanismos de rendición de cuentas del Banco Mundial y del Banco Europeo de Inversiones ilustra que, a través de un enfoque gerencial, se pueden evitar resoluciones potencialmente conflictivas. Este artículo pretende evidenciar que los órganos cuasi judiciales pueden constituir una fuente de inspiración para el desarrollo integrado del derecho internacional.

PALABRAS CLAVE

Banco Europeo de Inversiones; Banco Mundial; Fragmentación; Desarrollo Sostenible; Mecanismos Internacionales de Rendición de Cuentas; Órganos Cuasi Judiciales; Salvaguardias Ambientales y Sociales.

INTRODUCCIÓN

In 2015, when the process of resettlement of Maasai communities during the Kenya Electricity Expansion Project was reviewed at the same time by the World Bank Inspection Panel and the European Investment Bank's (hereinafter also EIB) Complaints Mechanism, the danger of inconsistencies in their findings threatened both the situation of the complainants as well as the coherent development of international law.

Indeed, the proliferation of quasi-judicial and judicial bodies, which participate in the development of international law, brings about challenges such as unpredictability of decisions, inequalities and forum-shopping, endangering the international law system¹. However, through a managerial approach², the World Bank Inspection Panel and the EIB's Complaints Mechanisms avoided inconsistency and turned potential competition into cooperation.

This paper briefly introduces the issue of fragmentation in international law. Then, it presents the World Bank and the EIB's accountability mechanisms and their respective environmental and social safeguards, which are vectors for the implementation of sustainable development in

Multilateral Development Bank (hereinafter MDB)³ projects. Finally, it analyses the accountability mechanisms' reports on the Kenya Electricity Expansion Project, arguing that dialogue among quasi-judicial bodies can constitute a source of inspiration for the integrated development of international law.

1. THE PROLIFERATION OF JUDICIAL AND QUASI-JUDICIAL BODIES AND THE POTENTIAL FRAGMENTATION OF INTERNATIONAL LAW

The judicial nature of accountability mechanisms, such as the World Bank Inspection Panel or the EIB's Complaints Mechanism, has been subject to some doctrinal discussions for over twenty years (Kathigamar-V.S.K., N., 1995; Naudé-Fourie, A., 2015; Mitzman, E., 2010). Clearly, they are not judicial mechanisms: they cannot determine the consequence of a violation of the safeguards and have to transmit their findings to the Banks' respective authorities for their final decisions (Boisson de Chazournes, L., 1999).

Scholars have described these accountability mechanisms as independent investigatory mechanisms (Boisson de Chazournes, L., 1999) and also as "quasi-

¹On this risk of inconsistency and international law, see for instance: J. I. Charney, "Is International Law Threatened by Multiple International Tribunals?" (1998) 271 *Recueil des Cours* pp. 134-135; P. Webb, *International Judicial Integration and Fragmentation* (Oxford University Press, Oxford, 2013) e.g., pp. 4-8.

²This concept was introduced in L. Boisson de Chazournes, "Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach", 28 *The European Journal of International Law* no. 1 (2017) pp. 13-72, see explanation below.

³The term "MDB" includes three institutions of the World Bank Group (the International Bank for Reconstruction and Development (hereinafter IBRD), the International Development Association (hereinafter IDA), both hereinafter collectively referred to as the World Bank, and the International Finance Corporation) and the four Regional Development Banks (the Asian Development Bank, the African Development Bank, the European Bank for Reconstruction and Development and the Inter-American Development Bank) as well as the European Investment Bank (hereinafter EIB). Conclusions of a former version of this paper was posted on a blog: M. M. Mbengue, S. de Moerloose, "Quasi-Judicial Dialogue: Kenya Electricity Expansion Project before the World Bank and the European Investment Bank's International Accountability Mechanisms", EJIL: Talk! –Blog of the European Journal of International Law (9.11.2016).

judicial” mechanisms or bodies⁴. Quasi-judicial bodies have been defined by Mara Tignino (2016) as having “a mandate to monitor compliance with a body of norms, settle disputes regarding those norms, or make determinations on the basis of investigations of one form or another, yet none empowered to make final, binding decisions on questions of international law”. Tignino includes in this category “the International Financial Organizations” investigative mechanisms such as the Inspection Panel⁵. This approach is adopted by the paper. Indeed, this broad categorization helps highlight the commonalities of accountability mechanisms with classical judicial mechanisms and allows the borrowing of judicial review concepts for comparative purposes.

Just like judicial bodies, quasi-judicial bodies have grown rapidly in the last fifty years, in a process that has been deemed a “quasi-anarchic proliferation” (Guillaume, G., 2000)⁶. Indeed, a plurality of specialized international and regional fora deciding disputes in accordance with international law have been established practically without coordination.

There is no hierarchy between these bodies, and generally no notion of litispence or *res judicata* (*ibid.*). As judicial bodies participate in the development of international law (Webb, P., 2013) and because their jurisdiction may overlap or they may hear cases on the same type of facts, scholars have warned of conflicting decisions and therefore of fragmentation of international law⁷.

Quasi-judicial bodies such as MDB accountability mechanisms (Mitzman, E., 2010) are not immune to this legal phenomenon. They have diverse proceedings and jurisdictions and operate with different sets of

environmental and social safeguards, but may confront similar factual scenarios. The quest for coherence is especially important in the case of co-financing, where parties affected by an investment may seize simultaneously more than one of the co-financers’ respective accountability mechanisms. This is what happened in the Kenya Electricity Expansion Project, when Maasai communities complained about the resettlement process to three of the project’s multiple co-financers: the World Bank, the European Investment Bank and the Agence Française de Développement (hereinafter AFD)⁸. The complaint was investigated by the World Bank Inspection Panel and the European Investment Bank Complaints Mechanism.

2. TWO INTERNATIONAL ACCOUNTABILITY MECHANISMS: THE WORLD BANK INSPECTION PANEL AND THE EUROPEAN INVESTMENT BANK COMPLAINTS MECHANISM

2.1. Two International Accountability Mechanisms, one history

The creation of International Accountability Mechanisms (hereinafter also IAMs) such as the World Bank Inspection Panel and the European Investment Bank Complaints Mechanism in MDB is one consequence of the integration of sustainable development in MDB mandates. Several trends have played a role in this integration: the international acceptance of the sustainable development principle, despite its controversial legal character⁹; the pressure from environmental NGOs and Members States on MDB¹⁰; institutional changes triggered in part by the

⁴M. Tignino, “Quasi-judicial bodies” in C. Brolmann, Y. Radl (eds.), *Research Handbook on the Theory and Practice of International Lawmaking* (Cheltenham: Edward Elgar, 2016), pp. 245-248; Andria Naudé Fourie, *The World Bank Inspection Panel and Quasi-Judicial Oversight, in Search of the ‘Judicial Spirit’ in Public International Law* (Utrecht: Eleven International Publishing, 2009).

⁵*Ibid.*, pp. 245-248. Also labelling the Inspection Panel a quasi-judicial mechanism, see Naudé-Fourie, A., *The World Bank Inspection Panel and Quasi-Judicial Oversight*, *op. cit.*; P. Dann, *The Law of Development Cooperation, A Comparative Analysis of the World Bank, the EU and Germany* (Cambridge, UK and New York, USA: Cambridge University Press, 2013), pp. 495-496; M. Riegner, “Towards an International Institutional Law of Information”, 12 *International Organizations Law Review* no. 1 (2015), p. 71; Mbengue, de Moerloose, “Quasi-Judicial Dialogue”, *op. cit.*, Stéphanie de Moerloose, “Sustainable Development and the Use of Borrowing State Frameworks in the New World Bank Safeguards”, 51 *Verfassung und Recht in Übersee / Law and Politics in Asia, Africa and Latin America* (2018), pp. 53-77, at 73-74.

⁶See also G. Abi-Saab, “Fragmentation or Unification: Some Concluding Remarks” (1999) 31 *NYU Journal of International Law and Politics* pp. 923-930

⁷Charney, *op. cit.*; Webb, *op. cit.*

⁸AFD has been contacted by the authors in July 2016 to request information about the complaint. No answer has been received to date.

⁹On the evolution of MDB mandates until 1997, concluding that MDB have an international legal obligation to take sustainable development concerns into account, see G. Handl, “The Legal Mandate of Multilateral Development Banks as Agents for Change Toward Sustainable Development” (October 1998) 92:4 *The American Journal of International Law* pp. 642-665.

¹⁰See for instance R. Wade, “Greening the Bank: The Struggle over the Environment, 1970-1995”, in D. Kapur, J.P. Lewis and R. Webb (eds.), *The World Bank: It’s First Half Century, Volume 2: Perspectives* (Brookings Institution Press, Washington D.C., 1997); S. Park, “Norm diffusion within international organizations: a case study of the

convictions of MDB staff that sustainable development development should be taken into account¹¹, as well as the quest for accountability mechanisms, as MDB enjoy immunity from local jurisdiction¹². The integration of sustainable development contributed to the strengthening of environmental and social safeguards and to the creation of the World Bank Inspection Panel (hereinafter the Panel or the WB-IP) in 1993¹³ in order to review compliance with the Bank's policies. Other MDB followed the example (D. B. Hunter, 2008) such as the European Investment Bank which established its Complaints Mechanism (hereinafter the Complaints Mechanism or the EIB-CM) in 2018¹⁴.

2.2. Two IAMs, two mandates

Although they have a common history, the WB-IP

and the EIB-CM have dissimilar mandates. The Panel undertakes investigations to determine whether there is a serious Bank failure to observe its operational policies and procedures with respect to a project's design, appraisal and implementation, in response to requests from affected people¹⁵. It submits its investigation report to the Bank's Board of Executive Directors¹⁶. Then, the Bank Management is required to submit its own recommendation report in response to the Panel¹⁷. The Board of Executive Directors considers both the Panel's and the Management's reports and decides future actions¹⁸.

The EIB-CM is accessible to any person or group alleging a case of maladministration¹⁹ by the EIB, including persons or groups affected by the environmental, developmental or social impacts of the

World Bank" (2005) 8:2 *Journal of International Relations and Development* pp. 122-134; S.J. Macekura, *Of Limits and Growth: The Rise of Global Sustainable Development in the Twentieth Century* (Cambridge University Press, New York, 2015) pp. 198, 205, 211; S. Nanwani, "Holding Multilateral Development Banks to Account: Gateway and Barriers" (2008) 10 *International Community Law Review* pp. 204-205.

¹¹I.F.I. Shihata, *The World Bank Inspection Panel: In Practice* (Oxford University Press, New York, 2000) pp. 1-8, 16. D. Freestone, *Legal Aspects of Sustainable Development: The World Bank and Sustainable Development: Legal Essays* (Martinus Nijhoff Publishers, The Netherlands, 2012), p. 16; L. Boisson de Chazournes, "Policy Guidance and Compliance: the World Bank Operational Standards", in D. Shelton (ed.), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford University Press, Oxford, 2000), pp. 283-284.

¹²S. Nanwani, "Directions in Reshaping Accountability Mechanisms in Multilateral Development Banks and Other Organizations" (2014) 5:2 *Global Policy* pp. 242-243. In general on immunity see Bradlow, D. D. "Using a Shield as a Sword: Are International Organizations Abusing Their Immunity", 31 *Temple International & Comparative Law Journal* no. 1 (2017).

¹³World Bank (1993) *The World Bank Inspection Panel* (IBRD Resolution No. 93-10, IDA Resolution No. 93-6, 22 September) 17 June 2016. This Resolution was reviewed in 1996 and 1999, see: World Bank, *Review of the Resolution Establishing the Inspection Panel 1996 Clarification of Certain Aspects of the Resolution*, June 2016; World Bank, 1999 *Clarification of the Board's Second Review of the Inspection Panel*, 17 June 2016. The Inspection Panel Operating Procedures were updated in 2014, see The Inspection Panel at the World Bank, *Operating Procedures* (April 2014 with Annex added February 2016), paras. 67-69, 17 June 2016. On the Inspection Panel, see in general: Shihata, *op. cit.*; L. Boisson de Chazournes, "The World Bank Inspection Panel: about Public Participation and Dispute Settlement" in T. Treves, A. Fodella, A. Tanzi, M. Frigessi di Rattalma (eds.), *Civil Society, international courts and compliance bodies* (T.M.C. Asser Press, The Hague, 2005); Naudé-Fourie, *op. cit.*

¹⁴See *Memorandum of Understanding between the European Ombudsman and the European Investment Bank concerning information on the Bank's policies, standards and procedures and the handling of complaints, including complaints from non-citizens and non-residents of the European Union* (9 July 2008), for instance art. 2, <www.eib.org/attachments/strategies/complaints_mou_eo_eib_en.pdf>, 17 June 2016. On the Complaints Mechanism, see for instance N. Hachez, J. Wouters, "The Role of Development Banks: The European Investment Bank's Substantive and Procedural Accountability Principles with Regard to Human Rights, Social and Environmental Concerns", in O. De Schutter, J. Swinnen, J. Wouters (eds.), *Foreign Direct Investment and Human Development* (Routledge, London, New York 2013), pp. 329-332.

¹⁵The Inspection Panel at the World Bank, *op. cit.*, para. 1.1.1.

¹⁶*Ibid.*, para. 65.

¹⁷*Ibid.*, paras. 67-69.

¹⁸*Ibid.*, para. 71.

¹⁹Maladministration is defined by the EIB (2010) as: "poor or failed administration. This occurs when the EIB Group fails to act in accordance with the applicable legislation and/or established policies, standards and procedures, fails to respect the principles of good administration or violates human rights. Some examples of failure to respect the principles of good administration, as set by the European Ombudsman, are: administrative irregularities, unfairness, discrimination, abuse of power, failure to reply, refusal of information, unnecessary delay. Maladministration may also relate to the environmental or social impacts of the EIB Group activities and to project cycle related policies and other applicable policies of the EIB". *EIB, Complaints Mechanism Principles, Terms of Reference and Rules of Procedure* (February 2010, amended in April and October 2012), Art. II.1.1.2, <www.eib.org/attachments/strategies/complaints_mechanism_policy_en.pdf>, 17 June 2016.

EIB's activities. The Complaints Mechanism attempts to evaluate compliance, resolve concerns raised by complainants, provide advice to the EIB Management and follow-up on corrective actions²⁰. Dissatisfied complainants may lodge a complaint to the European Ombudsman, which can act as the high tier of the Complaints Mechanism²¹.

Thus, the main differences between the mechanisms are the criteria of eligibility to file a complaint, the jurisdiction *ratione materiae*, the existence of a follow-up mandate and the possibility to ask for a review of the IAM's decision. In all four aspects, the World Bank's policy is more restrictive than the EIB. First, a request to the Panel may only be submitted by "two or more people with common interests and concerns who claim that they have been or are likely to be affected by a Bank-financed operation, and who are in the country where the Bank-financed project is located"²² or their duly appointed representative, while the EIB-CM is accessible to any person or group alleging maladministration²³. Then, the Panel's jurisdiction covers no more than the World Bank's policies,²⁴ while the EIB-CM's is vast due to the broad definition of what can constitute maladministration²⁵.

A follow-up mandate is conferred to the EIB-CM only,²⁶ while the Panel's mandate generally finishes when its report is submitted²⁷. Finally, in contrast to the EIB system,²⁸ there is no possibility to ask another international body for review in the World Bank system.

2.3. Two IAMs, two sets of social and environmental safeguards

MDB safeguard policies encompass a variety of documents, generally binding on the organization's staff.²⁹ The World Bank social and environmental safeguards are included in its operational policies, specifically in its "Operations Manual"³⁰.

The EIB's social and environmental safeguards are entailed in a wider and more complex spectrum of documents. Indeed, the EIB is a body of the European Union³¹ and must, according to its Statute, "perform its functions and carry on its activities in accordance with the provisions of the Treaties and of this Statute".³² Contrarily to the World Bank,³³ the EIB is a "policy-driven" institution,³⁴ tasked with

²⁰ *Ibid.*, Art. II.3.3.1.

²¹ *Ibid.*, Art. III.1.1.2 and IV.12. N. Hachez, J. Wouters, *op. cit.*, pp. 329-332.

²² The Inspection Panel at the World Bank, *op. cit.*, para. 2.2.1; the paragraph also states that in certain cases, an Executive Director may submit a request, while the Board may at any time instruct the Panel to conduct an investigation.

²³ EIB, *Complaints Mechanism Principles...*, *op. cit.*, Art. IV.2.2.1.

²⁴ The Inspection Panel at the World Bank, *op. cit.*, Art. 1.1.1.

²⁵ EIB, *Complaints Mechanism Principles...*, *op. cit.*, Art. III.1.1.2 and IV.12.

²⁶ *Ibid.*, Art. II.3.3.1.

²⁷ In some cases, the Board has asked the Panel to remain involved after the Report is submitted (see 2002 Paraguay/Argentina Reform Project for the Water and Telecommunication Sectors, SEGBA V Power Distribution Project (Yacyretá) and 2004 India Mumbai Urban Transport Project), although the 1999 Resolution states that it should not (World Bank, 1999 Clarification of the Board's Second Review of the Inspection Panel, *op. cit.*, para. 16), see Naudé-Fourie, *op. cit.*, pp. 182, 205, 207-208.

²⁸ EIB, *Complaints Mechanism Principles...*, *op. cit.*, Art. III.1.1.2 and IV.12.

²⁹ L. Boisson de Chazournes, "Policy Guidance and Compliance...", *op. cit.*, pp. 282-285; Bekhechi, M. A. "Some Observations regarding Environmental Covenants and Conditionalities in World Bank Lending Activities". (1999). 3 *Max Planck Yearbook of UN Law* p. 287; Shihata, *op. cit.*, pp. 43-44.

³⁰ World Bank, Operations Manual, <web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,menuPK:64142516~pagePK:64141681~piPK:64141745~theSitePK:502184,00.html>, 29 June 2016. The IBRD and the IDA have adopted their new set of safeguards in August 2016, which is scheduled to go into effect in 2018, see World Bank, The New Environmental and Social Framework, <web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTSAFEPOL/0,,menuPK:584441~pagePK:64168427~piPK:64168435~theSitePK:584435,00.html>, 25 August 2016.

³¹ EIB, *EIB Statement of Environmental and Social Principles and Standards+* (2009), Background para. 10, <www.eib.org/attachments/strategies/eib_statement_esps.en.pdf>, 1 July 2016; K. Lenaerts, P. Van Nuffel, *European Union Law* (Sweet & Maxwell, London, 2011) pp. 552-553.

³² *Statute of the European Investment Bank* (version dated 1 July 2013), Art. 1, <www.eib.org/attachments/general/statute/eib_statute.2013_07_01.en.pdf>, 29 June 2016.

³³ Only economic considerations shall be relevant to the decisions of the World Bank and its officers, who are barred from interfering in the political affairs of the members. See IBRD, *Articles of Agreement* (as amended effective 27 June 2012), Art. 4.X, <siteresources.worldbank.org/BODINT/Resources/278027-1215526322295/IBRDArticlesOfAgreement.English.pdf>, 1 April 2016; IDA, *IDA Articles of Agreement*, Art. V, Section 6, <www.worldbank.org/ida/articles-agreement/IDA-articles-of-agreement.pdf>, 15 May 2016.

³⁴ EIB, *EIB Statement...*, *op. cit.*, Background para. 1. *EIB, Frequently Asked Questions, How does EIB differ from commercial banks*, <www.eib.org/infocentre/faq>, 1 July 2016.

pursuing the policy objectives of the European Union.³⁵ This is why applicable environmental and social safeguards are twofold:³⁶ first, for projects within the EU, EU law is mandatory, but the EIB reserves the right to set its own higher standards;³⁷ then, for projects outside the EU, because EU law formally does not apply, the EIB uses the legal principles and standards of the EU only as a benchmark,³⁸ which can be detailed in the Environmental and Social Handbook.³⁹

Projects must comply with national law and international agreements ratified by the Borrower.⁴⁰ The EIB's staff is guided in its work by the Statement of Environmental and Social Principles⁴¹ and the Environmental and Social Handbook.⁴² The safeguards' architecture consists therefore of several layers, including applicable international law and principles, national law and the institution's safeguards.⁴³

2.4. Two IAMs and the development of

sustainable development law

Safeguards are interesting instruments for Law and Development studies because of their "external effect" (Boisson de Chazournes, L., 1999): they are legal vectors for the transposition of sustainable development⁴⁴ into national contexts.⁴⁵ Sustainable development is set as a critical objective of the World Bank Safeguard policies, which declare for instance that "*The Country Assistance Strategy... identifies the key areas in which Bank Group support can best assist a country in achieving sustainable development and poverty reduction*".⁴⁶ It is also part of the EIB's mandate. The EIB Statement announces for instance that "*The general approach of the EIB to the environment and social well-being... is derived from the Treaty, in which the EU is given the task of promoting sustainable development...*".⁴⁷ Therefore, outside the EU, the EIB exports the EU's conception of sustainable development as a benchmark.⁴⁸ When interpreted and applied by MDB and their IAMs⁴⁹, the safeguards are defined, "hardened"⁵⁰. Sustainable

³⁵ See *Consolidated Version of the Treaty on the Functioning of the European Union* (2012) *Official Journal of the European Union*, Art.309; EIB, *EIB Statement...*, *op. cit.*, Background, para. 10.

³⁶ *Ibid.*, para. 30.

³⁷ *Ibid.*, para. 18.

³⁸ *Ibid.*, para. 19.

³⁹ EIB, *Environmental and Social Handbook* (version 9.0 of 02.12.2013), <www.eib.org/attachments/strategies/environmental_and_social_practices_handbook_en.pdf>, 4 July 2016.

⁴⁰ See for instance EIB, *EIB Statement...*, *op. cit.*, para. 39.

⁴¹ See in general *ibid.*

⁴² EIB, *Environmental and Social Handbook* (version 9.0), *op. cit.*

⁴³ For a detailed description of the EIB's instruments addressing environmental and social safeguards, see N. Hachez, J. Wouters, *op. cit.*, pp. 307-313.

⁴⁴ The paper considers sustainable development as a principle because of its broad acceptance, see P. Sands, J. Peel, A. Fabra and R. Mackenzie, *Principles of International Environmental Law* (3rd ed. Cambridge University Press, Cambridge, 2012) p. 206. See on that matter for instance D. Barstow-Magraw, L. D. Hawke, 'Sustainable Development', in D. Bodansky, J. Brunnée, E. Hey (eds.), *The Oxford Handbook of International Environmental Law* (Oxford University Press, Oxford, 2007), pp. 622-626; C. Voigt, *Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law* (Martinus Nijhoff Publishers, Leiden, Boston, 2009).

⁴⁵ Therefore, it corresponds to the approach famously described in D.M. Trubek and M. Galanter, "Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States" (1974) *Wisconsin Law Review*, pp. 1062-1102. See B. Z. Tamanaha, "The Primacy of Society and the Failures of Law and Development" (2011) 44 *Cornell International Law Journal*, pp. 209-248. S. de Moerloose, "The World Bank's Sustainable Development Approach and the Need for a Unified Field of Law and Development Studies in Argentina" (December 2015) 8:2 *Law and Development Review* pp. 365-366.

⁴⁶ See World Bank, *Operations Manual*, *op. cit.*, BP 2.11.

⁴⁷ EIB, *EIB Statement...*, *op. cit.*, Background, para. 10.

⁴⁸ *Ibid.*, para. 19.

⁴⁹ On the question of the Inspection Panel's interpretation mandate and its evolution, see D. Bradlow, A. Naudé-Fourie, "The Operational Policies of the World Bank and the International Finance Corporation: Creating Law-Making and Law-Governed Institutions?" (2013) 10 *International organizations Law Review* pp. 41-43; Naudé-Fourie, *op. cit.*, pp. 232-236.

⁵⁰ On role of MDB in the development of international law, see B. Kingsbury, "Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples", in G.S Goodwin-Gill and S. Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* (Clarendon Press, Oxford, 1999), p. 338; Bradlow, D; Naudé-Fourie, A. *op. cit.*, p. 61; L. Boisson de Chazournes, "Les Panels d'Inspection", in Société Française pour le Droit International, *Colloque de Lyon - Droit international et développement* (Editions A. Pedone, Paris, 2015), pp. 118-120; Park, *op. cit.*, pp. 111-141.

development is “transplanted”⁵¹ in the Borrower’s system where it influences and regulates behaviours⁵². The consistent interpretation and application of safeguards by IAMs at the time of complaints is therefore particularly important to the coherent development of sustainable development law.

3. THE KENYA ELECTRICITY EXPANSION PROJECT BEFORE THE PANEL AND THE EIB-CM

The objectives of the KEE are to increase the supply and access of geothermal electricity, which is considered green energy⁵³. The project is an IDA Specific Investment Loan, which was approved by the Bank’s Board on May 27, 2010, in an amount equivalent to US\$330 million.⁵⁴

It is part of the Energy Sector Recovery Project, started in 2004 by the World Bank in the country.⁵⁵ The provision of energy is much needed in Kenya, where 45 percent of the population is still not connected to the electricity grid (Kuo, L., 2017) while the country aims for universal access by 2020.⁵⁶ The project is situated in the Greater Olkaria Geothermal Area, next to Hell’s Gate National Park.⁵⁷ The implementing agency, the Kenya Electricity Generating Company Ltd. (hereinafter KenGen) estimated that a total of 1,461 hectares were needed for the new power station and that the total number of project-affected households was 335, which were distributed between four different villages.⁵⁸ In

addition to the World Bank (7%) and the EIB (12%), the project is co-financed by the Government of Kenya (22%), the AFD (15%), the Japan International Cooperation Agency (23%), the German Development Agency (7%), with the balance being provided by the implementing agency, KenGen (14%).⁵⁹

3.1. The Complaints

In 2014, both the Inspection Panel and the Complaints Mechanism received several letters requesting the investigation of issues related to the Kenya Electricity Expansion Project.⁶⁰ The members of the Maasai community who were resettled due to the project complained mainly about: not receiving land titles; the exclusion of some vulnerable people; the adverse effects of the resettlement which should have restored livelihoods; and the inadequate consultation and participation processes.⁶¹

Being confronted with the same complaints based on the same facts while working with different mandates and operating with different types of environmental and social safeguards, the IAMs came up with interesting solutions to integrate their respective processes and guarantee the coherence of their decisions.

3.2. The IAMs’ integration mechanisms

3.2.1. IAM Jurisdiction *ratione materiae*: harmonization at first

⁵¹B. Z. Tamanaha, *op. cit.*, p. 225.

⁵²See for instance on environmental conditionality: Di Leva, “International Environmental Law and Development” (1997–1998) 10 *The Georgetown International Environmental Law Review*, p. 501; J.W. Head, “Environmental Conditionality in the Operations of International Development Finance Institutions” (1991) 1 *The Kansas Journal of Law and Public Policy*, p. 15.

⁵³ Kenya Electricity Expansion Project (IDA Credit Agreement 4743-KE); World Bank, “World Bank Approves US\$330 Million to Expand Electricity Access to Kenyans” (27 May 2010), available at: <http://www.worldbank.org/en/news/press-release/2010/05/27/world-bank-approves-us330-million-expand-electricity-access-kenyans>.

⁵⁴World Bank, “World Bank Approves US\$330 Million”, *op. cit.*

⁵⁵*Ibid.*

⁵⁶The Presidency, Official Office of the President, “Access to Electricity”, available at: <http://www.president.go.ke/projects/access-to-electricity>, last accessed 4 December 2017.

⁵⁷ World Bank Inspection Panel, *Report and Recommendation on Request for Inspection, Kenya Electricity Expansion Project -P103037-* (2 July 2015), para. 12, p. 3, available at: <http://ewebapps.worldbank.org/apps/ip/PanelCases/97-%20Eligibility%20Report%20-%20Inspection%20Panel%20-%20Kenya%20Electricity%20Expansion%20Project.pdf>.

⁵⁸World Bank Inspection Panel, *Report and Recommendation on Request for Inspection, Kenya Electricity Expansion Project*, *op. cit.*, para. 12, p. 3.

⁵⁹*Ibid.*, para. 4.2.

⁶⁰World Bank Inspection Panel, *Report Kenya Electricity Expansion Project* (2 July 2015), paras. 1-3, <ewebapps.worldbank.org/apps/ip/PanelCases/97-Inspection%20Panel%20Investigation%20Report.pdf>, 12 July 2016. EIB Complaints Mechanism, *Conclusions Report, Olkaria I and IV Kenya* (Complaint SG/E/2014/07-08, 11 November 2015), para. 1.1, <www.eib.org/attachments/complaints/2015-12-08-conclusions-report-olkaria.pdf>, 12 July 2016.

⁶¹World Bank Inspection Panel, *Report Kenya...*, *op. cit.*, Executive Summary, paras. 1, 4. EIB Complaints Mechanism, *op. cit.*, paras. 1.1, 2. Table 1 - Summary of Allegations.

The Maasai fulfil the eligibility criteria under both IAM policies. Thus, the first problematic issue in the case is different applicable safeguards and, in consequence, different IAM jurisdictions *ratione materiae*.⁶² With five foreign co-financers and as many sets of environmental and social safeguards, different sets of norms applicable to the Project could have been a significant issue already during the appraisal and implementation phases. Multiple reports and compliance matters would have meant a serious burden for both the Borrower and the co-financers and set the stage for conflicting decisions regarding the same factual scenario in case of dispute.

However, the co-financers found solutions before the beginning of the project. First, the project is financed under the Mutual Reliance Initiative,⁶³ a cooperation arrangement between the EIB, the AFD and the German development bank, KfW. Under this Project, the AFD was appointed to take the leadership in appraising and monitoring the social impacts.⁶⁴ Then, all the EU financers decided to apply the World Bank's policies for land acquisition and involuntary resettlement as safeguards for the design and implementation of the Resettlement Action Plan (hereinafter RAP).⁶⁵ Indeed, the use of the World Bank safeguards is contemplated in the EIB's Statement, determining that:

In the case of co-financing, the Bank is prepared to accept a common approach based on the relevant requirements of one of its financial partners, for reasons of consistency and harmonization, and to avoid duplication. For instance, in projects outside the EU, working in cooperation with other international public and private financial institutions, a common approach based on the Equator Principles or the safeguards of the World Bank may be followed.”⁶⁶

As a consequence, the EIB's loan agreement with the Government of Kenya is partly subject to the World Bank safeguards. It states that, before the disbursement of the first tranche, evidence shall be provided: “*satisfactory to the Bank on the implementation of the Resettlement Action Plan demonstrating acceptable progress in the resettlement of the people affected by the Project, in accordance with World Bank's Land Acquisition and Resettlement Policy Framework*”.⁶⁷ One can observe here the strength of the World Bank's environmental and social safeguards as vectors for the development of sustainable development law: the World Bank safeguards can become an obligation for a Borrower when entering into a loan agreement with another MDB.

Both the leadership of AFD for the appraisal and then the application of the World Bank safeguards by three of the co-financers help to tackle, from the very beginning, possible issues of different interpretation and application of safeguards. Furthermore, and even if the delegation of tasks to one financer is not without difficulties, namely because it implies the reliance on a Lead Financer's interpretation and implementation of the safeguards,⁶⁸ this type of arrangement also contributes to the international aid effectiveness agenda, as it encourages common arrangements and procedures by Donors.⁶⁹

3.2.2. A managerial approach to the dispute settlement process

In addition to the appraisal and implementation stage with the common application of the World Bank safeguards, integration was also considered by the Panel and the EIB-CM from the beginning of the complaints process. A Memorandum of Understanding (MoU) was signed between them on 25th April 2015, setting forth the elements of their

⁶² As explained by Boisson de Chazournes: “the Panel's jurisdiction *ratione materiae* includes not only the internal operational rules of the organization, but also the loan and credit agreements to the extent that they reflect operational policy requirements” (emphasis added), see Boisson de Chazournes, “Public participation in decision-making”, *op. cit.*, p. 92.

⁶³ “Under an MRI arrangement, one of the institutions is appointed Lead Financier, and it takes the leadership in appraising/monitoring certain aspects of the project on behalf of the three EU International Financial Institutions”, EIB Complaints Mechanism, *op. cit.*, Executive Summary.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, Executive Summary and para. 84.2. On fragmentation and harmonization of safeguards, see M.M. Mbengue, S. de Moerloose, “Multilateral Development Banks and Sustainable Development: On Emulation, Fragmentation and a Common Law of Sustainable Development”, 10 Law and Development Review no. 2 (October 2017).

⁶⁶ EIB, *EIB Statement...*, *op. cit.*, Background, para. 23.

⁶⁷ Para. 1.04A of the Finance Contract signed between the Government of Kenya and the EIB on 12 December 2010, see *op. cit.*, para. 6.4.

⁶⁸ *Ibid.*, for instance 8.2.19, 8.4.2-8.4.9, 9.16-9.18.

⁶⁹ Second High-Level Forum on Aid Effectiveness, *Paris Declaration on Aid Effectiveness*, paras. 32-42, <www.oecd.org/dac/effectiveness/34428351.pdf>, 26 April 2016.

cooperation⁷⁰. It foresees the sharing of information and joint field visits, while guaranteeing confidentiality and the respect of the policies and procedures of each IAM.⁷¹

The MoU was effectively implemented. The EIB-CM allocated internal resources to the investigation team put in place by the WB-IP.⁷² The WB-IP and the EIB-CM carried out joint missions to assess the allegations, both at the time of preliminary fact-finding and during the investigations process.⁷³ The investigation team was composed principally of World Bank appointed staff: one Panel member, two World Bank officers, two experts and one EIB-CM representative.⁷⁴ The EIB-CM stated, in its Conclusions Report, that the findings of the Panel independent experts on involuntary resettlement are fully applicable to the EIB-CM's investigation because the EIB and the promoter are obliged to implement the resettlement according to the relevant World Bank policy framework.⁷⁵

The common World Bank safeguards, the composition of the investigation team by a majority of World Bank appointed members as well as the application by the EIB-CM of the findings of World Bank appointed experts are all elements which seem to indicate that the investigation process is under the leadership of the Panel. KenGen, the promoter, did not consider that it had to handle two processes from two different mechanisms. Rather, Ken Gen viewed the mechanisms as one investigation unit, sending the same memorandum to both IAMs on the discussions held during the field visit.⁷⁶ This integrated investigation process corresponds to the emerging managerial approach described by Laurence Boisson de Chazournes.⁷⁷

Indeed, Boisson de Chazournes observes that in order to mitigate the risks of uncoordinated jurisdiction, procedural tools to coordinate jurisdiction have been devised by courts and tribunals.⁷⁸ The signing of the MoU by the Panel and the EIB-CM, which foresees several procedures to coordinate the investigations, illustrates this managerial approach, this time in what can be labeled a “quasi-judicial” context.

Regarding the decisions, both IAMs underline in their reports that, in order to preserve their independence and because of their different mandates, they had prepared these reports separately, based on their respective policies.⁷⁹ This was also clear from the MoU.⁸⁰ One could preliminarily conclude that the managerial approach is strictly procedural but is not concerned with the harmonization of interpretations and decisions; the EIB-CM stated that it coordinates its efforts and resources with the WB-IP to: “(i) maximise the interaction with all the parties, (ii) avoid duplications and overlaps and (iii) complement, to the greatest extent possible, each other's activities”.⁸¹ It did not mention coordination of decision-making. However, the analysis of the decisions seems to indicate otherwise.

3.2.3. The Conclusions' de facto harmonization

The Conclusions Report of the EIB-CM was submitted several months later than the Panel's Report.⁸² Interestingly, the findings of both IAMs are practically identical.

3.2.3.1. Involuntary Resettlement

The IAM findings are grounded, for involuntary resettlement, on the same applicable policies, namely the World Bank Operations Policy 4.12 (hereinafter

⁷⁰ *Memorandum of Understanding Between The World Bank Inspection Panel And The European Investment Bank Complaints Mechanism on cooperation regarding complaints received in relation to the Kenya Electricity* (28 April 2015), in World Bank Inspection Panel, *Report Kenya...*, *op. cit.*, Annex D. It is not the first time accountability mechanisms sign this type of MoU, *see for instance* Nanwani, *op. cit.*, pp. 249-250, Tignino, “Quasi-judicial bodies”, *op. cit.*, pp. 247-248.

⁷¹ *Memorandum of Understanding...*, in World Bank Inspection Panel, *Report Kenya...*, *op. cit.*, Executive Summary, Annex D.

⁷² EIB Complaints Mechanism, *op. cit.*, para. 7.3.

⁷³ World Bank Inspection Panel, *Report Kenya...*, *op. cit.*, para. 17; EIB Complaints Mechanism, *op. cit.*, Executive Summary, para. 7.2 and footnote 4.

⁷⁴ World Bank Inspection Panel, *Report Kenya...*, *op. cit.*, para. 17; EIB Complaints Mechanism, *op. cit.*, footnote 4.

⁷⁵ *Ibid.*, para. 7.6.

⁷⁶ World Bank Inspection Panel, *Report Kenya...*, *op. cit.*, footnote 21.

⁷⁷ Boisson de Chazournes, “Plurality in the Fabric of International Courts and Tribunals”, *op. cit.*, pp. 45, 71-72.

⁷⁸ *Ibid.*, p. 45.

⁷⁹ World Bank Inspection Panel, *Report Kenya...*, *op. cit.*, para.17; EIB Complaints Mechanism, *op. cit.*, para. 1.2.

⁸⁰ *Memorandum of Understanding*, para. 7, in World Bank Inspection Panel, *op. cit.*, *Report Kenya Electricity Expansion Project*, Annex D.

⁸¹ World Bank Inspection Panel, *Report Kenya...*, *op. cit.*, para.17; EIB Complaints Mechanism, *op. cit.*, para. 1.2.

⁸² The World Bank Inspection Panel's Report is dated 2 July 2015 while the EIB Complaints Mechanism's Conclusions Report is dated 11 November 2015.

OP 4.12)⁸³ and the opinions of the same experts.⁸⁴ Both IAMs' findings of noncompliance with OP 4.12 are very similar. For instance, both found that the identification of project-affected people was not in compliance with the policy.⁸⁵ Furthermore, both found that the mechanisms for consultation and participation were not satisfactory⁸⁶ and that the displacement occurred before the elements necessary for the resettlement were in place, such as land-titles or water access.⁸⁷ They also found that the restoration of livelihoods after resettlement was not ensured.⁸⁸ Although they are organized somewhat differently, several findings are phrased practically in the exact same terms in both reports.⁸⁹

3.2.3.2. Indigenous People

One of the issues of the Project was that the Maasai had not been categorized as Indigenous People by the World Bank, nor by the European co-financers.⁹⁰ This is especially relevant as this categorization entails special protection measures, as explained below. Here, as the World Bank Policy on Indigenous Peoples (hereinafter OP 4.10) was not formally adopted by the EU co-financers for the Project, the WB-IP and the EIB-CM were confronted with a different set of safeguards. The EIB-CM notes that the EIB does not have separate Indigenous People policies and that issues related to these topics were taken into account in the Environmental and Social Handbook (hereinafter

the ES Handbook).⁹¹ Both the ES Handbook and the World Bank Policies enumerate essentially similar elements to identify Indigenous People.⁹² Both IAMs concluded that the project had failed to identify the Maasai community as Indigenous.⁹³

The consequences of the non-categorization as Indigenous Peoples are also determined by each MDB's safeguards. Interestingly, the IAMs came again, almost verbatim, to the same conclusions. Namely, this non-categorization implied: insufficiently informed consultation and culturally compatible resettlement; as well as a lack of benefits-sharing arrangements and Maasai-specific expertise.⁹⁴ The EIB-CM even cited the World Bank policies, although they are not applicable in this respect.⁹⁵

The converging reasoning followed by the IAMs can be exemplified by their treatment of the first cited consequence of the non-categorization, which is the failure to comply with the enhanced requirement for consultation and participation for Indigenous Peoples affected by a project.⁹⁶ The World Bank policy states that the World Bank shall provide "*financing only where free, prior, and informed consultation results in broad community support to the project by the affected Indigenous Peoples*"⁹⁷ while the ES Handbook determines that "*Bank staff will endeavor to ensure that appropriate arrangements for effective*

⁸³World Bank, *Operations Manual*, *op. cit.*, OP 4.12.

⁸⁴EIB Complaints Mechanism, *op. cit.*, para. 7.6.

⁸⁵World Bank Inspection Panel, *Report Kenya...*, *op. cit.*, paras. 46 - 66; EIB Complaints Mechanism, *op. cit.*, paras. 8.2.13 - 8.2.24.

⁸⁶World Bank Inspection Panel, *Report Kenya...*, *op. cit.*, paras. 67 - 83; EIB Complaints Mechanism, *op. cit.*, paras. 8.2.71 - 8.2.85.

⁸⁷World Bank Inspection Panel, *Report Kenya...*, *op. cit.*, paras. 84 - 107; EIB Complaints Mechanism, *op. cit.*, 8.2.2 - 8.2.12; paras. 8.2.25 - 8.2.38.

⁸⁸World Bank Inspection Panel, *Report Kenya...*, *op. cit.*, paras. 108-150; EIB Complaints Mechanism, *op. cit.*, paras. 8.2.39 - 8.2.70.

⁸⁹See for instance: WB-IP para. 107 and EIB-CM para. 8.2.38; WB-IP para. 106 and EIB-CM para. 8.2.12; WB-IP para. 150 and EIB-CM para. 8.2.70 in World Bank Inspection Panel, *Report Kenya...*, *op. cit.* and EIB Complaints Mechanism, *op. cit.*; World Bank Inspection Panel, *Report Kenya...*, *op. cit.*, para. 17.

⁹⁰EIB Complaints Mechanism, *op. cit.*, para. 8.3.6.

⁹¹The EIB-CM refers to the *Environmental and Social Handbook* (Version 2 of 24/02/2010), in force at the time of the Board approval, EIB Complaints Mechanism, *op. cit.*, para. 7.6.

⁹²OP 4.10 cited in the World Bank Inspection Panel, *Report Kenya...*, *op. cit.*, para. 25; EIB, *Environmental and Social Handbook* (version 2), *op. cit.*, p. 112, cited in EIB Complaints Mechanism, *op. cit.*, para. 8.3.3.

⁹³World Bank Inspection Panel, *Report Kenya...*, *op. cit.*, paras. 22-37; EIB Complaints Mechanism, *op. cit.*, paras. 8.3.8, 9.10.

⁹⁴World Bank Inspection Panel, *Report Kenya...*, *op. cit.*, para. 35; EIB Complaints Mechanism, *op. cit.*, para. 8.3.8.

⁹⁵The EIB-CM states that "(...) the content of this policy [the World Bank Indigenous People Policy -IPP-] also has implications for the implementation of the involuntary resettlement programme as it provides stricter social safeguards for protecting the rights of the communities involved. It could then be said that the relevant parts of the IPP related to the resettlement process would have also influenced the involuntary resettlement framework mentioned in the EIB's Finance Contract," see *ibid.*, para. 8.3.2 and see also para. 8.3.8.

⁹⁶World Bank Inspection Panel, *Report Kenya...*, *op. cit.*, para. 35; EIB Complaints Mechanism, *op. cit.*, para. 9.10.

⁹⁷World Bank, *Operations Manual*, *op. cit.*, OP 4.10.I.

consultation with stakeholders are put in place".⁹⁸ Although the safeguards differ and seem more stringent in the case of the World Bank, the IAMs come to the same conclusion of violation of the policy, mostly by arguing that the consultation process should have been undertaken in Maa language.⁹⁹

The use of an indigenous language for consultation is phrased as an example of good practice in the Operations Manual,¹⁰⁰ but the Panel interpreted over time that a consultation could be meaningful only if the language was understandable to the affected people (Naudé-Fourie, A., 2015). One can see here that this expansive interpretation¹⁰¹ is shared by the EIB-CM.¹⁰²

3.2.3.3. Problem-solving

The Panel's mandate generally finishes when its report is submitted,¹⁰³ while a follow-up mandate is conferred to the EIB's Complaints Mechanisms.¹⁰⁴ This could have created an imbalance between the two processes, whereby one MDB remains involved as an active actor for problem-solving, while the other MDB exits. Here, the Panel introduced the EIB-CM mediation in its Report, stating that *"it will seek to restore the trust between the affected community and Project authorities as well as within the community. It will also aim to provide redress of outstanding issues considered important by the parties"*.¹⁰⁵

In October 2015, a couple of months after publishing its Report, and just before the release of the EIB-CM's Conclusions Report, the World Bank published a press release, giving an account of its meeting with

the World Bank Management and the World Bank Board of Directors, titled "World Bank Approves Mediation to Resolve Issues in Kenya Inspection Panel Case".¹⁰⁶ It stated that, as the EIB-CM had started a mediation process "to agree on actions to address the issues identified by the Panel",¹⁰⁷ the World Bank Management would join the mediation process through its Grievance Redress Service (hereinafter GRS).¹⁰⁸ The GRS is a body that reports to the World Bank Management, launched in 2015, described as a "flexible tool that addresses grievances of project affected people and communities by supporting World Bank task teams to assess the issues and identify solutions, so as to provide effective redress (...)".¹⁰⁹

The press release demonstrates that the World Bank has not only identified the same issues as the EIB-CM, but also that the World Bank concurred with the EIB-CM in its problem-solving approach. While the Inspection Panel exited the process, it was the GRS that would work with the EIB-CM. Indeed, the GRS listed the case in its 2015 Annual Report, explaining that it participated as a co-facilitator in the mediation process initiated by EIB-CM, and that it was entrusted with this task by Management "given that the mediation's objective is a joint understanding about remedial actions".¹¹⁰ The EIB-CM also introduced the mediation process and its scope in its Conclusions Report, but without mentioning the participation of the World Bank.¹¹¹

The mediation process took place between August 2015 and May 2016, with the participation of community representatives, the KenGen team, GRS and EIB - CM representatives and local mediators.¹¹²

⁹⁸EIB, *Environmental and Social Handbook* (version 2), *op. cit.*, p. 66, cited in EIB Complaints Mechanism, *op. cit.*, para. 9.10.

⁹⁹World Bank Inspection Panel, *Report Kenya...*, *op. cit.*, para. 35; EIB Complaints Mechanism, *op. cit.*, paras. 8.3.8, 9.10.

¹⁰⁰World Bank, *Operations Manual*, *op. cit.*, OP 4.12.X(b) and footnote 11.

¹⁰¹*Ibid.*, p. 244.

¹⁰²EIB, *Environmental and Social Handbook* (version 2), *op. cit.*, para. 99, also states: "The EIB encourages the promoter to make any environmental and social impact studies, in local language, available to the public (...)".

¹⁰³*See comment op. cit.*

¹⁰⁴EIB, *Complaints Mechanism Principles...*, *op. cit.*, Art. II.3.3.1.

¹⁰⁵World Bank Inspection Panel, *Report Kenya...*, *op. cit.*, para. 177.

¹⁰⁶World Bank, *News Release: World Bank Approves Mediation to Resolve Issues in Kenya Inspection Panel Case*, 23 October 2015, <www.worldbank.org/en/news/press-release/2015/10/23/world-bank-board-approves-mediation-to-resolve-issues-in-kenya-inspection-panel-case>, 19 July 2016.

¹⁰⁷*Ibid.*

¹⁰⁸*Ibid.*

¹⁰⁹World Bank, *Grievance Redress Service (GRS) Annual Report 2015*, p. 1, available at: pubdocs.worldbank.org/en/489201458312157191/GRSAnnualReport2015.pdf#zoom=80.

¹¹⁰World Bank, *News Release: World Bank Approves Mediation to Resolve Issues in Kenya Inspection Panel Case*, *op. cit.*, pp. 8-9.

¹¹¹EIB Complaints Mechanism, *op. cit.*, paras. 9.20 - 9.23.

¹¹²World Bank, IBRD, IDA, *Addendum to Management Report and Recommendation in Response to the Inspection Panel Investigation Report Kenya Electricity Expansion Project* (Loan no. p103037), paras. 14, 17 available at: <http://documents.worldbank.org/curated/en/407691481338889626/pdf/148133888515-000A10458-Kenya-Adden>

An agreement was signed in May 2016 between KenGen, community representatives, the World Bank and the EIB.¹¹³

3.3. Towards IAM complementarity?

Because of the application of the World Bank safeguards in the respective loan agreements, the joint investigation process, the references to World Bank policies in the EIB-CM Conclusions Report, the converging reasoning and interpretations and the similar and often verbatim conclusions, it seems that the Panel and the EIB-CM undertook a deep formal and informal managerial approach in the Kenya Electricity Expansion Project. The managerial approach exceeded the procedural borders to permeate, informally, in the decision-making process. The MDB also seem to have taken turns in the leadership of the process.

First, the application of the World Bank policies in the loan agreement, the leadership of the World Bank in the investigation process, the references to World Bank policies in the EIB-CM Conclusions Report and the timing of the publishing of the reports may indicate that the Panel functions as the “leading quasi-judicial body” in the managerial approach devised for this case. However, once the Panel concluded its tasks by meeting with the Board and Management, the EIB-CM lead the problem-solving phase, where it was joined by the World Bank Management’s GRS. The hypothetical competition and fragmentation of decisions due to the proliferation of quasi-judicial bodies turned into cooperation thanks to the managerial approach. The added-value of this cooperation was recognized by the Panel itself on the first page of its Report.¹¹⁴

If the work of two or more IAMs can be complementary even in the presence of fragmented safeguards, it remains to be determined how the managerial approach could become an established practice for MDB. As scholars have said regarding judicial courts, dialogue between the institutions is crucial and must be formalized.¹¹⁵ First, in case of co-financing, MDB should enter an agreement stipulating, as much as possible, the use of common environmental and social safeguards for the project. This has major advantages for the effectiveness and sustainability of the project and for the coherence of outcomes during a potential dispute resolution. It should be noted that this cannot in any way entail a “race to the bottom”.

The stricter safeguards should be adopted, in order not to violate any MDB’s respective set of safeguards. In case of complaints, the co-financers should enter a MoU to formalize their cooperation during the investigation, which should encourage the IAM’s staff to work together as closely as possible, benefitting from each other’s competitive advantages and to avoid duplication.

As IAMs must preserve their independence and reach their findings independently, there is a strong need for the use of a single set of safeguards and close cooperation during investigation in order to avoid as much as possible conflicting decisions. At the time of decision, one can assume that the EIB-CM has informally stayed its decision until after the Panel published its Report: the EIB-CM concurred and sometimes repeated the decision of the WB-IP, albeit without saying so. The result being one of coherence in the development of sustainable development law, this technique could be formally foreseen in the MoU,

[dum-11282016.pdf](#).

¹¹³It was the result of a “complex process” according to the World Bank Management, which warns of foreseeable implementation challenges - see IBRD, IDA, Addendum to Management Report and Recommendation, paras. 18-19. In February 2017, the World Bank Board of Directors approved an Action Plan presented by the Management. According to the World Bank, the Action Plan “was substantially informed by the mediation agreement and addresses issues identified by the Inspection Panel report (...) [and] includes measures to verify affected individuals who have been left out from the resettlement process, improvements in the physical infrastructure of the resettlement site, and livelihood restoration and infrastructure of the resettlement site, and livelihood restoration.” - see World Bank, “News Release, Kenya Electricity Expansion Project: World Bank Board Approves Action Plan for Kenya Inspection Panel Case” (16 February 2017), available at: <http://ewebapps.worldbank.org/apps/ip/PanelCases/97-News%20Release-16%20Feb%202017.pdf>.

Its implementation remains problematic, as denounced by a coalition of international NGOs in March 2017 – see Bank Information Center and fifteen other NGOs, “RE: Intimidation of Indigenous Communities affected by Geothermal Projects in Kenya”, letter to the EIB, the World Bank and six other donors (3 March 2017), available at: <https://bankwatch.org/wp-content/uploads/2017/04/letter-IFIs-KenGen-law-suit-03Mar2017.pdf>.

¹¹⁴The Report declares that “The Panel expresses special appreciation to the Complaints Mechanism of the European Investment Bank (EIB-CM) for its cooperation and exemplary professionalism during this investigation. The partnership between the EIB-CM and the Inspection Panel added significant value to the process,” see World Bank Inspection Panel, *Report Kenya...*, *op. cit.*, Acknowledgements.

¹¹⁵ Webb, *op. cit.*, pp. 221-227.

although it may require amending the IAMs charters to provide for such a possibility.

Another progressive solution would be the establishment in the MoU of a process of joint decision of the co-financer IAMs, whereby the IAMs would issue a single Report, at least on the matter covered by the same safeguards. Joint decisions and consistent approaches would further support coherence in the system. Finally, the MoU should provide for a complementary and coherent role by MDB during an eventual problem-solving phase.

This cooperation may also provide inspiring tools to judicial bodies to respond to the threat of growing inconsistency in international law. First, it supports the effort towards the harmonization of international law. Just as scholars have called for the creation of systematic legal norms to help “synchronize interpretations” by judicial bodies,¹¹⁶ the World Bank safeguards were used by both IAMs, contributing to the coherence of the outcomes. Secondly, it shows that there is no need for one body to withdraw¹¹⁷, when the same type of complaint is brought before two bodies.

On the contrary, in addition to reducing costs,¹¹⁸ value is added to the process when each mechanism contributes with its own advantages (safeguards, experience, experts, problem - solving capacity), which *in fine* benefits the claimants and the coherent development of international law. Even a hypothetical review by the EU Ombudsman can be seen as beneficial. Indeed, the complementary work of the mechanisms can resolve some of the main problems and criticisms faced by each institution, which in this case would be the lack of problem-solving capacity and of a review mechanism for the World Bank Inspection Panel (Wong, Y., & Mayer, B., 2015) and the loose phrasing of the EIB safeguards for its activities outside the EU.¹¹⁹

This cooperation process requires a delicate balance: the managerial approach must be as formalized as possible in order to forge a predictable system where the same norms and corresponding interpretation are used and the same MoU is entered into. However, the managerial approach should especially remain flexible and adaptable to each institution and each case, so as not to affect complainants. The case study illustrates that, even with similar cases, different IAMs and sets of environmental and social safeguards, fragmentation is preventable with a formalized yet flexible managerial approach.

CONCLUSIONS

Despite the proliferation of judicial and quasi-judicial bodies, the Kenya Electricity Expansion Project presented before the World Bank and the European Investment Bank’s international accountability mechanisms demonstrates that, instead of issuing conflicting decisions, their managerial approach can constitute a source of inspiration for the integrated development of international law. Both judicial and quasi-judicial bodies could emulate their approach, which led to harmonization of jurisdiction *ratione materiae*, procedural integration, similar findings and joint problem-solving, where each mechanism cooperated with its own advantages. Tools such as MoUs and concepts as *stare decisis* or *lis pendens* could come in handy, with the objective of creating a formal yet flexible managerial approach for the coherent development of international law.

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¹¹⁶ *Ibid.*, pp. 221-228.

¹¹⁷ Guillaume, *op. cit.* Webb, *op. cit.*, pp. 223-224.

¹¹⁸ See Nanwani, *op. cit.*, pp. 249-250.

¹¹⁹ N. Hachez, J. Wouters, *op. cit.*, pp. 307-313.

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