

# Shared Responsibility or Institutional Accountability? Continuing Conceptual and Enforcement Issues for Grievance Mechanisms of Public and Private International Finance Institutions

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## 1 Introduction

This contribution builds on one aspect of David Freestone's academic writing that spanned his World Bank career, namely, the relationships between international and transnational actors on environmental issues. Due to the increasing role of environmental and social considerations within multilateral development finance, which David was instrumental in bringing about, there is a need to ensure that the relevant international/transnational actors concerned are held accountable for their efforts to inculcate such considerations within institutional decision-making processes. This contribution therefore assesses the different legal and institutional means by which such accountability is brought about. In doing so, this contribution examines the role of a variety of actors within international development finance law, and in particular, the public and private international finance institutions (IFIs) involved with major infrastructure development projects that have socio-economic and environmental impacts. In this regard, this contribution is also in keeping with David's indefatigable efforts to advance the frontiers of knowledge in the international environmental law field. These efforts in turn stem from his abiding interest in securing justice for those that are deprived of access to environmental services due to the machinations of international/transnational actors. The provision of environmental justice in this regard is especially pertinent as the role of *private* IFIs grows in the field of international development projects. By focussing on the institutional accountability of public and private IFIs in this context, this contribution both charts and engages with these new frontiers of international environmental law.

Multiple international actors are now commonly involved in major natural resource and/or infrastructure development projects, usually comprising a mix of State and international/transnational non-State actors. These projects are

often financed and/or technically supported (in the form of specialist advice) by public and private IFIs. When these IFIs are alleged to contribute towards violations of international norms for social resilience (protected via human rights and workers' rights), as well as environmental protection, issues of institutional accountability and even international responsibility on the part of these non-State actors may arise, alongside the accountability/responsibility of the States involved. A variety of legal and institutional measures have been proposed to respond to these allegations. These responses range from calls for the 'shared responsibility' of the States and international/transnational non-State actors involved in a project, to institutional accountability mechanisms for responding to the claims of victims, who have suffered personal harm or loss of their environmental services from the infrastructure development projects supported by these non-State actors.

This chapter explores the legal issues associated with attempts to exert accountability for public and private IFIs for violations of international law norms in respect of major infrastructure projects that they have either funded or otherwise assisted. Within this context, this chapter focuses on accountability mechanisms as one of the three basic types of international institutional mechanisms according to a typology described by Stewart.<sup>1</sup> Section 2 will first engage with the conceptual questions surrounding accountability and responsibility on the part of these non-State actors for violations of international norms, assessing the viability of 'shared responsibility' of international/transnational non-State actors for these violations. Specifically, this discussion will juxtapose conceptual arguments in favour of the 'shared responsibility' of these institutions for their role in any breaches of international law against the practical development of institutional mechanisms for asserting accountability over public and private IFIs for such violations.

In Section 3, I will assess different types of institutional grievance mechanisms established to exert accountability on the part of these international finance institutions for their compliance with international obligations. These attempts to ensure the institutional accountability of public and private international finance institutions will be examined as a normative alternative to the 'shared responsibility' paradigm examined in Section 2. The effectiveness of these grievance mechanisms will be examined in two case studies, highlighting the continuing deficiencies of these mechanisms when addressing violations of international law, especially in the human rights and environmental

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1 RB Stewart, 'Remediating Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness' (2014) 108(2) *American Journal of International Law* 211–270, 214.

fields. These deficiencies are both conceptual as well as practical in nature. They are laid bare by the increasing role played by international organizations (IOs) generally and international finance institutions, specifically in major infrastructure development projects. These two case studies involve, respectively, the Compliance Advisor Ombudsman (CAO) office of the World Bank's International Finance Corporation (IFC),<sup>2</sup> and the 'Equator Principles'.<sup>3</sup> These case studies will first assess the relationship between the implementation by these non-State actors of relevant international obligations for social resilience and environmental protection and the institutional mechanisms established to hold these non-State actors accountable for any deficiencies in the implementation of these international obligations. These case studies will then highlight continuing practical enforcement issues for these accountability mechanisms.

The chapter concludes by addressing continuing issues of *enforcement* of international social and environmental norms that the two case studies highlight within the 'institutional accountability' alternative, as opposed to the 'shared responsibility' of these institutions. In doing so, this chapter will highlight the continuing structural issues inherent to public international law when it comes to addressing violations of international obligations caused by the increasing roles played by IOs generally, and international finance institutions specifically.

## 2 Institutional Accountability Mechanisms as an Alternative to 'Shared Responsibility' for International/Transnational Actors

The discussion of the 'shared responsibility' doctrine in this section highlights continuing conceptual and practical difficulties with this doctrine. The responsibility for breaches of international law by IOs has been the subject of draft articles proposed by the International Law Commission (ILC).<sup>4</sup> However, these ILC draft articles have received a mixed reception within the international

2 The work of the Compliance Advisor Ombudsman (CAO) office of the International Finance Corporation (IFC) is accessible at <http://www.cao-ombudsman.org>; all websites accessed 2 October 2020 unless otherwise noted.

3 The Equator Principles and related information are available at <http://www.equator-principles.com>.

4 See International Law Commission (ILC), Draft Articles on the Responsibility of International Organizations, 2011, adopted at the sixty-third ILC session in 2011 and submitted to the United Nations General Assembly as a part of the Commission's report covering the work of that session (UN Doc A/66/10, para. 87). Also in (2011) *Yearbook of the International Law Commission*, vol. 11, Part Two.

community. Daugirdas has observed that many States and IOs were sceptical of the ILC's undertaking.<sup>5</sup> This is echoed by others. Thus d'Aspremont highlights the fact '[t]hat the Articles on the Responsibility of International Organizations (ARIO) fell short, in the view of – almost all – observers, of meeting the conceptual consistency which legal scholars expect from such a set of secondary rules was a foregone conclusion.'<sup>6</sup>

After examining theoretical concerns in the academic literature on 'shared responsibility', an assessment of the practical issues will be undertaken through a detailed engagement with the Seabed Chamber Advisory Opinion on the 'Area'.

### 2.1 *Conceptual Challenges to 'Shared Responsibility'*

The notion of non-State actor responsibility for breaches of international law that occur when these non-State actors operate alongside States has generated calls for the attribution of 'shared responsibility' between such actors. As envisaged by Nollkaemper and Jacobs, 'shared responsibility' arises in situations when multiple actors have contributed to a single harmful outcome in ways which cannot be individually attributed to any of the actors involved, which for these purposes include States, IOs, as well as other actors such as multinational corporations and even individuals.<sup>7</sup> However, it is notable that Nollkaemper and Jacobs do not first engage with the question of the international legal personality of all these other, 'new' international/transnational actors. Moreover, they suggest that if a non-State actor assumes international obligations alongside recognized international legal actors, then these non-State actors must thereby accept 'shared responsibility' for any breach of such international obligations.<sup>8</sup> On the basis of the criteria they establish for the 'shared responsibility' of these multiple international/transnational actors, I argue that the shared responsibility fails to provide a suitable model

5 K Daugirdas, 'Reputation and the Responsibility of International Organizations' (2014) 25(4) *European Journal of International Law* 991–1018, 992.

6 J d'Aspremont, 'The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility' (2012) 9 *International Organizations Law Review* 15–28, 16.

7 A Nollkaemper and D Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34(2) *Michigan Journal of International Law* 359–438, 366–367. This 'shared responsibility' initiative is the subject of a major research project called 'SHARES' based at the University of Amsterdam, The Netherlands. See SHARES website, <http://www.sharesproject.nl>.

8 *Ibid.*

of analysis for relationships between States and public/private international/transnational non-State actors.

Bassan identified Young as the first commentator who sought to remedy identified patterns of 'structural injustice' by re-conceptualizing assessments of causation and responsibility along the lines of 'shared responsibility'.<sup>9</sup> This is despite the fact that, according to Nollkaemper and Jacobs, the term 'shared responsibility' that they engage with under international law 'has hardly been used in legal literature at all'.<sup>10</sup> For Bassan, the call for 'shared responsibility' arises because 'the need to trace a direct relationship between the action of an identifiable entity and harm under traditional theories of responsibility might let certain powerful parties involved in causing the injustice, albeit indirectly, off the hook'.<sup>11</sup> This concern had led Young to claim that even if not all contributors can be blamed, it is inappropriate to dismiss them.<sup>12</sup> However, as Bassan observes, Young was ultimately constrained to note that '[i]n most cases of structural injustice, it is impossible to determine which specific actions of which specific actor caused each specific aspect of the structural process or its outcome'.<sup>13</sup> Moreover, 'the accountability parameter allocates responsibility according to the extent to which actors have contributed to bringing about the unjust situation, according to the causal connection of their actions'.<sup>14</sup> As Bassan then notes, '[i]n view of the difficulties of pinpointing a single body or entity accountable for the injustices that occur, this model does not fit all cases of structural social injustice'. Thus, even at this evolutionary stage in the development of 'shared responsibility', there is a tension between the legal concepts of 'responsibility' and 'accountability'. This is encapsulated by Bassan's summation that:

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- 9 S Bassan, 'Shared Responsibility Regulation Model for Cross-Border Reproductive Transactions' (2016) 37 *Michigan Journal of International Law* 299–349, 302, citing IM Young, 'Responsibility and Global Justice: A Social Connection Model' (2006) 23(1) *Social Philosophy and Policy* 102–130, 114. Young defined 'structural injustice' as 'social processes [that] put large categories of persons under a systematic threat of domination or deprivation of the means to develop and exercise their capacities, at the same time as these processes enable others to dominate or have a wide range of opportunities for developing and exercising their capacities'.
- 10 Nollkaemper and Jacobs, above (n 7), 365.
- 11 Bassan, above (n 9), 318.
- 12 Young, above (n 9), 118.
- 13 Bassan, above (n 9), 317, citing Young, above (n 9), 115.
- 14 Bassan, *ibid* 319, citing Young, *ibid* 119.

Accountability is the common ground between the shared responsibility model and the classic blame model, a parameter that links the responsibilities of actors to the unjust structure. The difference is that the blame model looks at unacceptable behavior to inflict punishment or to exact compensation for past misbehavior, or potentially seek prevention of similar future events.<sup>15</sup>

If we return to the formulation of ‘shared responsibility’ by Nollkaemper and Jacobs, as observed above, they do not engage in what is arguably the *a priori* question of whether international responsibility, either individual or shared, can be attributed to private, non-State actors that are not usually recognized as subjects of public international law. This is significant in light of the accountability (but not responsibility) of the private international finance institutions that will be the focus of Section 4 of this chapter. Moreover, even the relatively recent, albeit growing, provision of international legal personality to IOs and other institutions does not necessarily lead to their acceptance, implementation, accountability, and ultimately, responsibility for the application of *all* international obligations normally incumbent upon States.

Ahlborn has highlighted the problem of establishing the necessary connexions between provision of the international legal personality and the assumption of legal obligations by the IOs involved, *prior* to the attribution of responsibility to IOs for breach of such obligations, as follows:

Legal personality can be defined as the capacity to be bearer of right and obligations. In turn, obligations are standards of conduct that legal persons must comply with (i.e. what to do and what not to do). The attribution of conduct to a particular entity such as a state or international organization thus underscores the legal personality of that entity. In other words, the attribution of rightful or wrongful conduct plays a crucial (role) in showing that the state or international organization exists as a constituted legal entity. It is thus at the level of international legal personality that the attribution of conduct connects with the breach of an international obligation. *Only if an actor has the obligation to act in a certain way, can that conduct be then attributed to that actor.*<sup>16</sup>

15 Bassan, *ibid* 319.

16 C Ahlborn, *To Share or Not to Share? The Allocation of Responsibility between International Organizations and their Member States*, SHARES Research Paper 28 (2013), ACIL 2013–26, 7 (emphasis added). Also published at (2013) 88(3–4) *Die Friedens-Warte/Journal of International Peace and Organization* 45–75.

In the seminal Advisory Opinion of the International Court of Justice (ICJ) in the *Reparations* case,<sup>17</sup> the ICJ first established that the UN Charter conferred upon the UN rights and obligations separate to those of its constituent Members. Accordingly, the ICJ concluded that the UN, as an IO exercising functions and enjoying rights and duties, has 'a large measure' of international personality and the capacity to operate upon an international plane. However, the Court cautioned that this did not mean that its legal personality was the same as that of a State, let alone a super-State.<sup>18</sup> More pertinently, the ICJ held that the rights and duties of the UN 'must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice'.<sup>19</sup> In other words, the functional limits of international personality restrict the scope of the responsibility of international organizations only to acts or omissions arising under international obligations assumed when fulfilling their functions.

The difficulties associated with linking the international legal personality of an international organization to its assumption of specific international obligations in the performance of its functions for the purpose of assigning international responsibility for any breach of those obligations is exacerbated when we go beyond the usual inter-governmental character of such IOs. For example, in relation to multinational enterprises as international/ transnational non-State actors, Karavias notes that corporations are not direct addressees of primary international law obligations and therefore their individual conduct cannot by itself alone trigger secondary international law rules of responsibility.<sup>20</sup> Crawford and Olleson go even further on this point, observing that 'no general regime of [international] responsibility has developed to cover them'.<sup>21</sup> In this regard, it is significant to note that d'Aspremont et al. have recently acknowledged that non-State actors should not be assumed to be bound by primary international law norms in the first place, nor subject to international responsibility merely through the transposition of traditional rules of State responsibility.<sup>22</sup>

17 *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, (1949) ICJ Reports, p 174.

18 *Ibid* 179.

19 *Ibid* 180.

20 M Karavias, 'Shared Responsibility and Multinational Enterprises' (2015) 62 *Netherlands International Law Review (NILR)* 91–117, 96.

21 J Crawford and S Olleson, 'The Character and Forms of International Responsibility' in M Evans (ed.), *International Law* (4<sup>th</sup> ed, Oxford University Press, Oxford, 2014) 443–476, 445 (my addition).

22 J d'Aspremont, A Nollkaemper, I Plakokefalos and C Ryngaert, 'Sharing Responsibility between Non-State Actors and States in International Law: Introduction' (2015) 62 *Netherlands International Law Review* 49–67, 49–50.

Within the present context, the question then is whether an IO, or other international/ transnational non-State actors, can be held responsible for violations of international obligations committed by the joint conduct of that entity and any other international legal personalities, when it is unclear first of all whether the alleged violations are of international obligations that are actually binding or applicable as between the IO and the other international legal personalities involved. As Article 4(b) of the ARIIO prescribes, 'there is an internationally wrongful act of an international organization when conduct consisting of an action or omission ... constitutes a breach of an international obligation of the international organization'. This statement presumes the applicability of an international obligation to the IO concerned and by extension, according to the doctrine of 'shared responsibility' as espoused by Nollkaemper and Jacobs, to the non-State actors examined in this chapter, namely, the public and private international finance development institutions (IFIs) concerned. However, this connexion between the international obligation and the IO/non-State actor concerned has first to be proven in each and every case. As paragraph 2 of the ILC Commentary to Article 4(b) of the 2011 ARIIO notes: 'The obligation may result either from a treaty binding the international organization or from any other source of international law applicable to the organization'. Thus, it cannot be presumed that any single obligation applicable to one IO is automatically shared with a State or any other IO; the specific international obligation has to be proven to be applicable to the specific IO concerned before the question of an internationally wrongful act in breach of that obligation can even be entered into, and well before the question of whether the 'shared responsibility' of that IO with a State or other IO even arises. Moreover, as Hirsh has observed, this ambiguity and its consequential need for basic principles to govern these legal relationships is even more evident in situations of alleged responsibility on the part of IOs to third persons.<sup>23</sup>

A study of the global legal governance of public international finance institutions has also highlighted 'the lack of available practice from international organizations; and the ambiguity concerning the primary rules applicable to international organizations'.<sup>24</sup> Arguably, both these points undermine efforts

23 M Hirsch, *The Responsibility of International Organizations Toward Third Parties: Some Basic Principles* (Martinus Nijhoff, 1995).

24 H Cissé, DD Bradlow and B Kingsbury (eds), *International Financial Institutions and Global Legal Governance*, The World Bank Legal Review Vol 3 (The World Bank, 2012) 154, citing J Alvarez, 'International Organizations: Accountability or Responsibility?' Luncheon Address, Canadian Council of International Law, Thirty-Fifth Annual Conference on Responsibility of Individuals, States and Organizations (27 October 2006).



to exert international legal responsibility over such IOs. Alvarez went further, noting that

it is highly unusual for international law – from human rights instruments to general rules of custom – to address IOs as subjects. ... Even with respect to the general rules of international law with the strongest claim to applicability to IOs – human rights – the law of international human rights remains as even Andrew Clapham acknowledges, “of ambiguous applicability” to IOs.<sup>25</sup>

Thus, Alvarez concludes that Article 3(2)(b) of the (then) draft IO rules (which relies on the existence of international obligations that apply to IOs) may be exceedingly shallow.<sup>26</sup>

Following on from the above points, a second factor that undermines the notion of shared responsibility for international non-State actors that breach international obligations they have allegedly accepted/applied is the immunities accorded to these IOs.<sup>27</sup> Although there is a trend to restrict these IO immunities, especially within US courts,<sup>28</sup> a recent World Bank study highlights an additional problem: ‘No international judicial or quasi-judicial bodies have direct jurisdiction over the acts or omissions of international organizations’.<sup>29</sup> Moreover, as paragraph 6 of the Commentary of the ILC to Article 3 of the ARIO states:

The fact that an international organization is responsible for an internationally wrongful act does not exclude the existence of parallel responsibility of other subjects of international law in the same set of circumstances. For instance, an IO may have cooperated with a State in the breach of an obligation imposed on both. Another example may be that of conduct which is simultaneously attributed to an IO and a State and

25 Alvarez, *ibid* 14, citing A Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006).

26 *Ibid*.

27 E Suzuki, ‘Responsibility of International Finance Institutions under International Law’ in DD Bradlow and DB Hunter (eds), *International Financial Institutions and International Law* (Kluwer Law International, 2010) 61, 67–69.

28 A Reinisch, *International Organizations before National Courts* (Cambridge University Press, 2000); S Hertz, ‘International Organization in US Courts: Reconsidering the Anachronism of Absolute Immunity’ (2007–2008) 31 *Suffolk Transnational Law Review* 471.

29 Cissé et al., above (n 24), 154.

which entails the international responsibility of both the organization and the State.

Thus, at least for IOs, as opposed to other international/transnational actors, the ILC envisaged simultaneous and parallel responsibility for both States and IOs that are implicated in a breach of a common international obligation, in terms which raises the question as to whether the notion of 'shared responsibility' is even necessary in this context at all.

## 2.2 *Practical Challenges to 'Shared Responsibility'*

Apart from the *a priori* objections to the notion of 'shared responsibility' between non-State transnational actors, there are several further issues relating to the practical allocation of 'shared responsibility' between these different entities as a result of their alleged breach of international obligations. These issues will be examined in light of the Advisory Opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) in 2011.<sup>30</sup> According to Plakokefalos, issues of 'shared responsibility' arise from activities in the deep seabed 'Area' because the primary obligations for environmental protection in this 'Area' are shared between States, IOs (i.e., the International Seabed Authority (ISA)) and any private entities sponsored by the States or the ISA.<sup>31</sup> Thus, the *a priori* objections relating to the international personality of these non-State actors and application of relevant international obligations to all of these entities do not pertain here. Plakokefalos notes that these obligations operate on three levels. First, the Advisory Opinion confirmed the existence of an obligation to protect and preserve the environment, which extends to States that sponsor entities to undertake exploration or exploitation activities in the Area.<sup>32</sup> The Chamber added that this obligation consists of a number of direct obligations as well as a general obligation of due diligence over the sponsored entities operating in the Area.<sup>33</sup> Second, the ISA is also under an obligation to take measures to protect and preserve the environment in the

30 See *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p 10.

31 I Plakokefalos, 'Shared Responsibility Aspects of the Dispute Settlement Procedures in the Law of the Sea Convention' (2013) 4(2) *Journal of International Dispute Settlement* 385–405, 395.

32 Area Advisory Opinion, above (n 30), para 113, citing Article 194 of the 1982 United Nations Convention on the Law of the Sea (LOSC), 1833 UNTS 3.

33 Area Advisory Opinion, above (n 30), paras 117–120.

Area,<sup>34</sup> which is enhanced by the supervisory role of the ISA.<sup>35</sup> The third level of application of these obligations concerns the State-sponsored entities operating in the Area, all of which must conclude a contract with the ISA.<sup>36</sup> Both the standard clauses of this contract and ISA regulations contain obligations that pertain to the protection of the environment on the part of the State-sponsored contractors.<sup>37</sup> Plakokefalos concludes that

most of these obligations are couched in similar terms for all actors involved but at the same time they rest on distinct legal bases. The sponsored entity will obviously be liable for the actual damage caused by the exploration activities in the deep seabed, while the sponsoring State will be liable for the breach of its own supervisory obligations. The ISA, on the other hand, may be liable for breach of either its supervisory and regulatory obligations or for breach of its emergency response obligations.<sup>38</sup>

Reverting to the conception of 'shared responsibility' proposed by Nollkaemper and Jacobs, it may be asked whether the fact that these three international/transnational actors are subject to a similar set of obligations necessarily gives rise to a 'share' of 'responsibility' for each of these actors. This is especially pertinent bearing in mind that the notion of 'shared responsibility' was envisaged by Nollkaemper and Jacobs to fill an alleged deficiency caused by the lack of 'conceptual or normative tools for allocating responsibility between a plurality of actors in situations where contributions to harmful outcomes cannot be attributed based on individual causation of each actor'.<sup>39</sup> However, it would seem from the ILC's notion of the 'parallel responsibility' of international obligations, as well as the conclusions of Plakokefalos, that the same set of obligations is specifically divided between and among each of the three categories of

34 LOSC, above (n 32), Art 145.

35 Ibid Art 153(4).

36 Ibid Annex III, Art 3(4).

37 Ibid Annex III, Art 22; see also, *inter alia*, International Seabed Authority (ISA), Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, Doc ISBA/6/A/18 (4 October 2000) (hereinafter Nodules Regulations).

38 Plakokefalos, above (n 31), 396. It should be noted that the liability regime is still under development and it is not yet evident what compensation measures or otherwise will apply for environmental damage. See H Lily, *Sponsoring State Approaches to Liability Regimes for Environmental Damage Caused by Seabed Mining*, Liability Issues for Deep Seabed Mining Series Paper No 3 (December 2018); see also ISA, *Liability Issues for Environmental Harm from Deep Seabed Mining Activities*, Papers No 6 and 8 (February 2019).

39 Nollkaemper and Jacobs, above (n 7), 364.

international/transnational actors involved, so that responsibility can in fact be attributed to the individual actor concerned, whether it is the sponsored entity, sponsoring State or the ISA. Indeed, it is possible to re-conceive the specific international legal framework for establishing environmental responsibility for activities in the Area as having a nested, 'Russian-doll' effect, rather than one of 'shared responsibility'. This is discernible from the fact that the Chamber found that the relevant 1982 United Nations Convention on the Law of the Sea (LOSC) provisions and contractual clauses convey the direct and specific obligation to protect the marine environment onto the sponsored entity, while the more general and supervisory obligation of due diligence was placed upon the sponsoring State and the ISA. The Chamber's finding in this respect is also in keeping with Nedeski and Nollkaemper's observation that in the international legal relations between States there is no equivalent of the more hierarchical normative relationship between an international organization (like the ISA) and its member States.<sup>40</sup> This hierarchical, rather than strictly equal, legal relationship must then be reflected in the theoretical basis for the responsibility of IOs, and arguably all other non-State actors whose functions render them beholden to international law.

A further difficulty that arises in this regard is the different thresholds for responsibility that the performance of different types of obligations (over the same issue) entails. An appreciation of the different thresholds for finding responsibility between and among the different actors involved in deep seabed activities can be seen by the fact that 'the sponsoring State's liability arises not from a failure of a private entity but rather from its own failure to carry out its own responsibilities. In order for the sponsoring State's liability to arise, it is necessary to establish that there is damage and that the damage was a result of the sponsoring State's failure to carry out its responsibilities. Such a causal link 'cannot be presumed and must be proven.'<sup>41</sup> On the other hand, if a sponsoring State has done all it can to reasonably discharge its due diligence duties *vis-à-vis* the regulation and supervision of its sponsored entities then no responsibility or liability will arise for the State, despite the fact that damage has occurred within the Area.<sup>42</sup> In this regard, the Chamber noted that the deep seabed liability regime 'does not provide for the attribution of activities of sponsored contractors to sponsoring States'.<sup>43</sup> In such situations, the

40 N Nedeski and A Nollkaemper, 'Responsibility of International Organizations in Connection with Acts of States' (2012) 9 *International Organizations Law Review* 33–52, 34.

41 Area Advisory Opinion, above (n 30), para 182.

42 Ibid para 209.

43 Ibid para 182.

Chamber also refused to consider extending even a residual form of international responsibility or non-fault liability to the sponsoring State concerned.<sup>44</sup> Neither did the Chamber specify that any residual liability should be borne by the contractor/operator. Thus, ambiguity on the ultimate bearer of responsibility/liability arises but the jurisprudence of the Chamber (above) appears to have explicitly ruled out any resolution of this dilemma based on the notion of shared responsibility between or among the international/transnational actors involved.

In this context, Plakokefalos is correct to highlight the possible application of joint and several liability for both States and international organizations (e.g., ISA),<sup>45</sup> as well as its application for multiple sponsoring States,<sup>46</sup> if their actions together contribute to any damage in the deep seabed Area. However, the Chamber then explicitly denies joint and several liability in relation to the contractor and sponsoring State because their liabilities exist in parallel, with only one point of connection, namely, that the liability of the sponsoring State depends upon the damage resulting from activities or omissions of the sponsored contractor. In the view of the Chamber, this is merely a trigger mechanism. Moreover, such damage is not automatically attributable to the sponsoring State.<sup>47</sup> Nevertheless, the Chamber did accept that

[t]he situation becomes more complex if the contractor has not covered the damage fully. It was pointed out in the proceedings that a gap in liability may occur if, notwithstanding the fact that the sponsoring State has taken all necessary and appropriate measures, the sponsored contractor has caused damage and is unable to meet its liability in full. It was further pointed out that a gap in liability may also occur if the sponsoring State failed to meet its obligations, but that failure is not causally linked to the damage.<sup>48</sup>

This finding by the Chamber is especially pertinent given the concerns expressed by Plakokefalos about the difficulties of apportioning responsibility and liability in a 'shared responsibility' situation.<sup>49</sup> In this regard, it is significant to note that the Chamber saw fit to contemplate an ultimate scenario

44 Ibid para 204.

45 LOSC, above (n 32), Art 139(2).

46 Area Advisory Opinion, above (n 30), para 192.

47 Ibid para 201.

48 Ibid para 203.

49 Plakokefalos, above (n 31), 397.

whereby the complete coverage of responsibility is simply not forthcoming, and advocating the establishment of a civil liability compensation scheme to fill this perceived gap. Thus, in situations where a contractor does not meet its liability in full but the sponsoring State is also not liable under the LOSC, the Chamber was of the view that the ISA may wish to consider the establishment of a trust fund to compensate for the damage not covered, drawing attention to Article 235(3), of the Convention which refers to such possibility.<sup>50</sup> After further noting that the efforts made by the ILC to address the issue of damages resulting from acts not prohibited under international law have not yet resulted in provisions entailing State liability for lawful acts, the Chamber drew the attention of the Authority to the option of establishing a trust fund to cover such damages not covered otherwise.<sup>51</sup>

It will not have gone unnoticed that the solution mooted by the Chamber here is conceptually similar to that which is already in place for tanker oil spill pollution compensation<sup>52</sup> and liability for nuclear power generation accidents.<sup>53</sup> While the Chamber does not elaborate on which of the entities concerned – the sponsoring States, their licensees, or both – should contribute towards this trust fund, this option does allow for the possibility that the liabilities of State-sponsored entity involved in deep seabed activities could be covered by such a trust fund and thus be captured by international law in line with the risks that their activities pose to the fragile environment of the deep seabed ‘Area’, which is subject to the ‘common heritage of mankind’ principle.<sup>54</sup>

50 Area Advisory Opinion, above (n 30), para 205.

51 Ibid para 209.

52 The International Oil Pollution Compensation (IOPC) Funds are two intergovernmental organizations (the 1992 Fund and the Supplementary Fund) which provide compensation for oil pollution damage resulting from spills of persistent oil from tankers. See IOPC Funds website, <http://www.iopcfunds.org/>; accessed 6 October 2020.

53 The international nuclear civil liability regime was initially embodied in two instruments, namely, the Vienna Convention on Civil Liability for Nuclear Damage of 1963 and the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 1960, both of these linked by a Joint Protocol adopted in 1988. The Paris Convention was later added to by the 1963 Brussels Supplementary Convention. This was followed by the adoption of a 1997 Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage, as well as a further Convention on Supplementary Compensation for Nuclear Damage (1997). See International Atomic Energy Agency, ‘Nuclear Liability Conventions’, <https://www.iaea.org/topics/nuclear-liability-conventions>; OECD, ‘OECD Legal Instruments: Paris Convention’, <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0038>.

54 LOSC, above (n 32), Art 136.

It should be noted that these alternative mechanisms further signal the limitations of the ‘shared responsibility’ approach to situations of a single harmful outcome involving three different types of international/transnational actors. MacLeod goes further in relation to private security companies (PSCs), noting that d’Aspremont et al. recognize ‘that the traditional rules on State responsibility probably cannot be applied to PSCs and acknowledges that “strengthening standards and commitments by both non-State actors and States, coupled with supervisory mechanisms” is a promising alternative.’<sup>55</sup> As will be shown in the next Section, this alternative paradigm of institutional standard-setting/implementation and supervisory/accountability mechanisms is better equipped to deal with the activities of public and private IFIs than the ‘shared responsibility’ concept espoused by Nollkaemper and Jacobs.

In response to critiques of their approach, Nollkaemper and Jacobs have suggested that the term ‘shared accountability’ can better explain the role played by these mechanisms. They utilise the phrase ‘shared accountability’ to cover situations in which ‘a multiplicity of actors is held to account for conduct in contravention of international norms, but where this does not necessarily involve international responsibility for internationally wrongful acts in its formal meaning’.<sup>56</sup> However, as noted in Section 3 below, even the phrase ‘shared accountability’ cannot be sustained in view of the individualized nature of the institutional accountability mechanisms established by the public and private IFIs. The rest of this chapter will therefore examine the practical alternative to the concept of ‘shared accountability’ within the legal relationships between States and these public and private IFIs, specifically with regard to alleged breaches of social and environmental norms. It is argued that these particular relationships are better encapsulated within the concept of ‘institutional accountability’, rather than ‘shared responsibility’ or even ‘shared accountability’, for the implementation of international legal obligations within the fields of human rights and environmental protection. While Nollkaemper and Jacobs accept that ‘shared accountability’ would apply to actors that are subject to international obligations but are not subject to international responsibility,<sup>57</sup> the reality of the situation is that the accountability mechanisms examined here are strictly designed to hold their institutions accountable

55 S MacLeod, ‘Private Security Companies and Shared Responsibility: The Turn to Multistakeholder Standard-Setting and Monitoring through Self-Regulation-“Plus”’ (2015) 62 *Netherlands International Law Review* 119–140, 120, citing d’Aspremont in the same issue, in Section 5.3 of their Introduction.

56 Nollkaemper and Jacobs, above (n 7), 369.

57 Ibid.

rather than establish any shared notion of accountability, much less responsibility. Indeed, as Ahlborn suggests, 'responsibility' is a distinct concept, that can be distinguished from 'wrongfulness', such that responsibility is not the internationally wrongful act, but the consequence or result of the internationally wrongful act, and in particular the duty to make reparations.<sup>58</sup> Thus, the notion of *institutional accountability*, rather than individual or shared responsibility as traditionally conceived under public international law, is arguably more appropriate for the public and private IFIs examined in this chapter, if only because reparations as a consequence of individual or shared responsibility under international law are not usually available under the institutional accountability mechanisms established by these public and private IFIs.

At this juncture, it is therefore possible to highlight at least two key arguments *against* extending the notion of responsibility under international law to encompass 'shared responsibility' in relation to international/transnational non-State actors in conjunction with States. First, notwithstanding the uncertain status within international law of such non-State actors, the co-option of international norms and standards by public and private IFIs in projects they have funded or otherwise assisted has been presumed. However, the apparent co-option of such international norms by these institutions does not necessarily mean that they can be held responsible under international law for their non-compliance with these norms. Second, there is growing provision of grievance mechanisms for asserting accountability over the activities of these institutions as a consequence of their acceptance of these international norms. As Nollkaemper and Jacobs concede, the notion of 'shared accountability', rather than 'shared responsibility' allows us to include 'situations where quasi-judicial or political procedures might be used as the preferred process for supervising compliance by the actors involved in joint action'.<sup>59</sup> A third argument, which will be examined in more detail in Section 3 of this chapter, relates to the continuing lack of effectiveness of the grievance mechanisms established by public and private IFIs. The accountability of the IFIs themselves is only evident within projects funded or otherwise supported by *public* IFIs such as the World Bank and the IFC, but not yet by the *private* IFIs, which under the Equator Principles only have to ensure the establishment of grievance mechanisms against their borrowing project companies, rather than these IFIs themselves.

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58 Ahlborn, above (n 16), 12–13.

59 Nollkaemper and Jacobs, above (n 7), 369.



Thus, as a preliminary conclusion, this section has shown how the conceptual and practical difficulties of the ‘shared responsibility’ proposition necessarily lead the discussion to the accountability mechanisms established by the public and private international development finance institutions, even if these too have their continuing practical/enforcement issues.

### 3 Accountability of Public and Private International Finance Institutions: the World Bank Group and the ‘Equator Principles’

In this section, it is postulated that the development of *accountability* mechanisms for public and private IFIs is a viable alternative to the attribution of *responsibility* to these non-State actors under international law. The growing calls for the accountability of these public and private IFIs have been at least partly answered through further institutional developments in the public and private sectors of this industry. In *Policing the Banks* (2008), van Putten called for the global accountability of all powerful financial players, including the ‘transnational’ *private* banks that are now co-funding many development projects in third world countries, usually alongside *public* IFIs.<sup>60</sup> Van Putten described how private non-State actors have been slow to accept responsibility for the consequences of their investments, even when they cause significant social and environmental damage in developing countries, and argued that new accountability mechanisms were necessary to reduce or prevent such damage.<sup>61</sup> Moreover, because such institutions operate on a global scale, only international institutional mechanisms can provide the necessary accountability for any deficit in the due diligence of these institutions with regard to their decision-making processes. According to van Putten, the private financial sector was beginning to follow multilateral financial institutions in creating independent mechanisms, mediation procedures and access to decision makers for people harmed or potentially harmed by projects financed by these multilateral financial institutions.<sup>62</sup>

Two types of relationships resulting in the establishment of grievance mechanisms can be identified as heralding this concept of ‘institutional accountability’. First, the relationship between ‘donor’ States and the public IFIs they have established (for example, the World Bank group and its related agencies)

60 M van Putten, *Policing the Banks: Accountability Mechanisms for the Financial Sector* (McGill-Queen’s University Press, 2008) 22–26 (emphasis added).

61 Ibid 26.

62 Ibid 215–216, 324–325.

for financing projects in ‘host’ States, where such projects lead to violations of human rights and environmental protection standards, thereby causing harm to communities or to the natural environment within the ‘host’ State. This relationship is initially built on the co-option of such human rights and environmental protection standards by these public IFIs. Examples of the institutional co-option of such standards include the World Bank’s Environmental and Social Framework, incorporating ten Environmental and Social Standards,<sup>63</sup> and the IFC’s eight Performance Standards on Environmental and Social Sustainability.<sup>64</sup>

Buttressing these institutional standard-setting exercises, is the introduction of institutional grievance mechanisms, *inter alia*, in the form of the Inspection Panel for World Bank projects, and the CAO for projects assisted by the IFC. These mechanisms provide for alternative modes of institutional accountability directly against these public IFIs for the socially and environmentally harmful outcomes of projects that they have financed or otherwise technically assisted. However, such IFI institutional *accountability* does not entail their institutional *responsibility*, at least not in ways envisaged by the ILC in its Draft Articles on the Responsibility of International Organizations.

The second type of relationship examined here is between the private IFIs (for example, the Equator Principles Financial Institutions) and the companies they finance when projects funded by them lead to violations of human rights and/or environmental protection standards, causing harm to communities or to the natural environment within the ‘host’ State.

Both these types of relationship will be the subject of case studies within this section. The first is the provision of World Bank agency funding and technical advisory services in the privatization of the Kosovo Energy company (KEK) that led to complaints to the CAO against the advisory services branch of the IFC.<sup>65</sup> The second is the establishment of the Equator Principles by a group

63 World Bank, *Environmental and Social Framework: Setting Environmental and Social Standards for Investment Project Financing* (4 August 2016), [http://consultations.worldbank.org/sites/default/files/materials/consultation-template/review-and-update-worldbank-safeguard-policies/en/materials/the\\_esf\\_clean\\_final\\_for\\_public\\_disclosure\\_post\\_board\\_august\\_4.pdf](http://consultations.worldbank.org/sites/default/files/materials/consultation-template/review-and-update-worldbank-safeguard-policies/en/materials/the_esf_clean_final_for_public_disclosure_post_board_august_4.pdf).

64 International Finance Corporation, *Performance Standards on Environmental and Social Sustainability* (1 January 2012), [https://www.ifc.org/wps/wcm/connect/24e6bfc3-5de3-444d-begb-226188c95454/PS\\_English\\_2012\\_Full-Documents.pdf?MOD=AJPERES&CVID=jkV-X6h](https://www.ifc.org/wps/wcm/connect/24e6bfc3-5de3-444d-begb-226188c95454/PS_English_2012_Full-Documents.pdf?MOD=AJPERES&CVID=jkV-X6h).

65 For a fuller discussion of this case study, as well as its implications for the broader concept of ‘transitional environmental justice’, please refer to the following publications by the present author, respectively: ‘The Legal Framework for Private Investors in Kosovo: Implications for Environmental Protection in a Transitional Economy’

of mainly private (but also including some public) IFIs that in turn call themselves, the Equator Principles Financial Institutions (EPFIs).<sup>66</sup> The Equator Principles were promulgated by the EPFIs in the face of civil society and non-governmental organization (NGO) complaints of breaches of a variety of social norms (comprising of individual human, and collective worker rights) as well as environmental protection norms. Each case study will cover the following aspects: First, the institutional standard-setting process by which international obligations are accepted by the public and private IFIs involved. Second, the institutional grievance mechanisms established by, or through the intervention of, these institutions, to ensure compliance with international norms on the basis of the shared accountability of these institutions. Prior to these case studies, the institutional accountability mechanisms of both the World Bank and the IFC, namely, the Inspection Panel and the CAO, respectively, will be introduced in the next two sub-sections.

### 3.1 *The World Bank Inspection Panel: Paving the Way for Accountability of Public International Finance Institutions?*

The general acceptance by public IFIs of their legal obligation to inculcate sustainable development within their overall mandates is now well-documented<sup>67</sup> and a continuing feature of their operational policies. As noted above, an important aspect of this mandate is the co-option of international social and environmental standards by the World Bank, *inter alia*, through its Environmental and Social Framework. This is notwithstanding the fact that public IFIs in general are still criticized for their perceived failure to inculcate international human rights standards in projects they support.<sup>68</sup> A further

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in S Michalowski (ed.), *Corporate Accountability in the Context of Transitional Justice* (Routledge, 2013) 208–227; ‘Prospects for Transitional Environmental Justice in the Socio-Economic Reconstruction of Kosovo’ (2017) 30 *Tulane Environmental Law Journal* 217–272.

66 For previous publications on the Equator Principles by the present author, see ‘From “International” to “Transnational” Environmental Law? A Legal Assessment of the Contribution of the “Equator Principles” to International Environmental Law’ (2010) 79(1) *Nordic Journal of International Law* 35–74; ‘Public Accountability for Private International Financing of Natural Resource Development Projects’ (2016) 85(3) *Nordic Journal of International Law* 201–233.

67 G Handl, ‘The Legal Mandate of Multilateral Development Banks as Agents for Change toward Sustainable Development’ (1998) 92 *American Journal of International Law* 642.

68 See, for example, D Desierto, ‘Lingering Asymmetries in SDGs and Human Rights: How Accountable Are International Financial Institutions in the International Accountability Network?’ *EJIL Talk!* (22 February 2019), <https://www.ejiltalk.org/how-accountable-are-international-financial-institutions-in-the-international-accountability-network/>. (I am indebted to Richard Barnes, co-editor of this volume, for bringing this *EJIL Talk!* Comment to my attention.)

aspect of this new policy agenda is focussed on ensuring better accountability for the achievement of these goals within the World Bank group operations. The history of the inception of the World Bank's Inspection Panel offers lessons for advocates of greater accountability of both public and private IFIs. One of these lessons is arguably to focus advocacy policy and campaigning practice not just on the institution itself, but also on the sources of finance of that IFI. In the case of the World Bank, human rights and environmental NGOs targeted the Bank itself, but perhaps more significantly also its main donor – the United States (US) government – and specifically, US congressional leaders who controlled funding to World Bank agencies. This lobbying exercise was so successful that the pressure placed by the US Congress on World Bank accountability for its operational policies and funding strategies has been used as an example of how to ensure the democratic legitimacy of international organizations generally.<sup>69</sup>

According to Szablowski, this pressure ultimately resulted in the establishment of the Inspection Panel in 1993.<sup>70</sup> As Fox notes, 'the panel's very existence challenges key assumptions of national sovereignty'<sup>71</sup> by allowing the citizens of borrowing countries (that are hosting the projects funded by these IFIs) to present their claims directly before an international complaints mechanism.<sup>72</sup> This last point resonates with the aims of the present exercise of assessing the viability of existing institutional accountability mechanisms for IFIs rather than seeking to determine possible avenues of exerting shared accountability or even shared responsibility between States and IFIs for compliance with international human rights and environmental protection norms. The normative significance of the establishment of such an institutional compliance and accountability mechanism, along with the jurisprudence it has since generated, is notable.<sup>73</sup> This is especially the case when it is observed that, in the

69 K Daugirdas, 'Congress Underestimated: The Case of the World Bank' (2013) 107 *American Journal of International Law* 517.

70 D Szablowski, *Transnational Law and Local Struggles: Mining, Communities and the World Bank* (Hart, 2007) 90–91, citing, *inter alia*, JA Fox and ID Brown (eds), *The Struggle for Accountability: The World Bank, NGOs and Grassroots Movements* (MIT Press, 1998) 8; S Schlemmer-Schulte, 'The World Bank Inspection Panel: A Record of the First International Accountability Mechanism and Its Role for Human Rights' (1998) 6(2) *Human Rights Brief* 279.

71 JA Fox, 'The World Bank Inspection Panel: Lessons from the First Five Years' (2000) 6 *Global Governance* 279–318, 288.

72 Szablowski, above (n 70), 91.

73 B Kingsbury, 'Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples' in G Goodwin-Gill and S Talmon (eds),

performance of its latter function, the Panel is arguably the first forum in which individuals can hold an international organization directly accountable for the consequences of its failure to follow its own rules and procedures.<sup>74</sup> Moreover, according to Darrow, the success of the Inspection Panel in this path-breaking role is evidenced by ‘the establishment of similar grievance mechanisms across a range of other international financial institutions’,<sup>75</sup> most notably in the form of the Compliance Advisor Ombudsman of the International Finance Corporation.

### 3.2 *The Compliance Advisor Ombudsman of the International Finance Corporation*

As the main private sector-oriented agency of the World Bank, the IFC performs a significant supporting role providing either financial and/or advisory services for natural resource development and public infrastructure projects in developing countries around the world.<sup>76</sup> In similar fashion to the co-option of international norms by the World Bank noted above, the IFC has initiated an internal standard-setting institutional process in the form of the IFC Sustainability Framework. This Framework articulates the IFC’s strategic commitment to sustainable development, and is an integral part of IFC’s approach to risk management. The Sustainability Framework comprises IFC’s Policy and Performance Standards on Environmental and Social Sustainability, and IFC’s Access to Information Policy.<sup>77</sup> For IFC-sponsored projects, updated Performance Standards applying similar international social and environmental protection standards to that of the World Bank were approved by the IFC Board and came into effect on 1 January 2012.<sup>78</sup>

This was followed by the establishment of a grievance mechanism for ensuring IFC accountability for these co-opted international norms, in the form of

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*The Reality of International Law: Essays in Honour of Ian Brownlie* (Clarendon Press, 1999) 323, 332.

74 D Bradlow, ‘International Organizations and Private Complaints: The Case of the World Bank Inspection Panel’ (1994) 34(3) *Virginia Journal of International Law* 553, 554.

75 M Darrow, *Between Light and Shadow: The World Bank, The International Monetary Fund and International Human Rights Law* (Hart, 2003) 143.

76 See IFC, ‘About IFC: Overview’, [https://www.ifc.org/wps/wcm/connect/corp\\_ext\\_content/ifc\\_external\\_corporate\\_site/about+ifc\\_new](https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new).

77 See IFC, ‘IFC Sustainability Framework’, [https://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/sustainability-at-ifc/policies-standards/sustainability+framework](https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/sustainability+framework).

78 See IFC, ‘Performance Standards’, [https://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/sustainability-at-ifc/policies-standards/performance-standards](https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/performance-standards).

the CAO.<sup>79</sup> The IFC Sustainability Framework explains the rationale for the CAO as catering for situations where grievances and complaints from those affected by IFC-supported business activities are not fully resolved at the business activity level or through other established mechanisms.<sup>80</sup> This conforms to the notion of institutional accountability for the IFC in such situations.

The IFC has summarized the three complementary roles of the CAO as follows: First, a dispute resolution role, whereby when responding to complaints, CAO attempts to resolve the issues raised using a flexible, collaborative, problem-solving and, essentially, non-adversarial approach. The focus of CAO's dispute resolution role is thus based on communicating directly with those individuals and/or communities affected by the project and assisting them, the (usually corporate) client(s) of the IFC, and any other relevant stakeholders to resolve complaints, ideally by improving environmental and social outcomes on the ground. Second, the CAO performs a compliance role, whereby it oversees investigations of the environmental and social performance of IFC, to ensure compliance with policies, standards, guidelines, procedures, and conditions for IFC involvement, with the goal of improving IFC performance. Third, the CAO has an advisory role, whereby it is a source of independent advice to the IFC President. Advice is based on insights gathered from CAO's dispute resolution and compliance interventions and is focused on broader environmental and social policies, strategic issues, and trends, based on the experiences gained through its case work, with the goal of fostering systemic improvements in IFC.<sup>81</sup> In comparison with the Inspection Panel of the World Bank introduced above, Darrow notes that the powers of CAO are more focussed on conciliation and arbitration,<sup>82</sup> as we shall see in the case study below.

### 3.3 *Case Study of the CAO in the Kosovo Energy Privatization Project*

An example of the utilization of the CAO mechanism can be seen in the form of complaints made against the financial, and especially the technical, support provided by the World Bank group and its related agencies for the privatization of the previously public/socially-owned Kosovo Energy power-generating

79 See CAO, 'About the CAO: Who We Are', <http://www.cao-ombudsman.org/about/whowere/index.html>.

80 IFC, Policy on Environmental and Social Sustainability, 1 January 2012, Chapter VI: Compliance Advisor/Ombudsman (CAO), para 54.

81 See CAO, CAO Operational Guidelines (World Bank/IFC, n.d.), [http://www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines\\_2013\\_ENGLISH.pdf](http://www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines_2013_ENGLISH.pdf).

82 Darrow, above (n 75), 144, footnote 148.

company, known locally as 'KEK'. An initial US\$5 million International Development Association (IDA) grant was made to the UN Mission in Kosovo (UNMIK) in late June 2007 to support the KEK and domestic Kosovar authorities' clean-up of a gasification plant, to enhance Kosovo's long-term power development and electricity supply and to mitigate an urgent risk to public health and environment in Kosovo. Following this clean-up operation, IFC Advisory Services were deployed in 2009 to assess and prepare KEK for the possible unbundling and privatization of the electricity distribution functions of KEK via private sector partners (PSPs), that is, private economic actors involved in this project. However, in August 2011, a confidential complaint was made to the CAO of the IFC.<sup>83</sup>

The Kosovar complaint to the IFC on its role in the KEK privatization project contended first, that access to information regarding the privatization was inadequate to allow people to address potential adverse impacts of the process, and second, a failure to conduct an appropriate Social and Environmental Assessment that would have taken into account project impacts on relevant members of the community and workforce, as well as the environment. In September 2011, the CAO found the complaint eligible for further assessment. The CAO's Ombudsman team then conducted two field trips to Pristina, Kosovo, in November 2011 to engage with numerous stakeholders in a collaborative dispute resolution process to address the issues raised in the complaint. However, the complainants informed the CAO that they considered their interests (and those of the Kosovar public) would be best served by the CAO's compliance function, rather than its dispute resolution role. The CAO Ombudsman thus concluded its involvement, and the case was formally transferred to the CAO's compliance team in January 2012.<sup>84</sup>

Following an appraisal of the IFC's role in this project, the CAO compliance branch concluded in April 2012 that an audit of IFC's advisory services for the project was merited. Accordingly, the CAO drew-up terms of reference for, and then conducted an investigation into the scope of the IFC's social and environmental due diligence review for this project. This investigation found, *inter alia*, that it was unclear whether appropriate guidance existed to ensure

83 Documents related to this CAO complaint are accessible at CAO, 'Republic of Kosovo: Kosovo KEK-01/Prishtina', [http://www.cao-ombudsman.org/howwework/documents/Office\\_of\\_the\\_Compliance\\_Advisor\\_Ombudsman\\_About\\_the\\_CAO\\_How\\_We\\_Work\\_Publications\\_Contact\\_Us.htm](http://www.cao-ombudsman.org/howwework/documents/Office_of_the_Compliance_Advisor_Ombudsman_About_the_CAO_How_We_Work_Publications_Contact_Us.htm).

84 Kosovo KEK-01/Prishtina, CAO Compliance Audit of IFC, Kosovo KEK Project #29107, C-I-R4-Y12-F158, Monitoring Report, 16 January 2015, [http://www.cao-ombudsman.org/documents/CAOCompliance\\_Monitoring\\_Report\\_Kosovo\\_KEK\\_January162015.pdf](http://www.cao-ombudsman.org/documents/CAOCompliance_Monitoring_Report_Kosovo_KEK_January162015.pdf).

that the IFC delineates the scope of its Advisory Services projects in line with IFC policy provisions, presumably including the Performance Standards mentioned above. This implicit criticism of the lack of co-ordination between the Advisory Services provided by the IFC and its operational policies did not prevent the CAO audit from finding that the IFC itself was in material compliance with its policies. However, the CAO audit noted that the IFC did not have a structured approach to assess whether the clients of its Advisory Services, that is, the private sector partners (PSPs) hoping to benefit from the KEK privatization process, were committed to IFC's environmental and social goals.<sup>85</sup> Moreover, the CAO will not audit IFC clients, as it considers only issues related to the IFC performance in this exercise. Therefore, the CAO did not pass any judgment on the performance of IFC's client in the KEK privatization process.

The provision of an international and ostensibly independent individual grievance mechanism, especially within a transitional society such as Kosovo, where confidence in local administrative and judicial systems is nascent and still riven with communal divisions, represents a positive sign in favour of such international financial institutional intervention. This is despite continuing fears such grievance/complaint mechanisms only apply in these finance/economically-oriented circumstances. For example, when commenting on the possibility that in the absence of its own 'court', the rules and practices of the international finance system will eventually be adjudicated within the World Trade Organization (WTO) dispute settlement system, Howse cautions as follows: '[T]his dispute-settlement arrangement risks viewing the rules of global finance from a narrow perspective on growth, development, and equity, without consideration of the norms that have emerged from UN institutions concerned with human rights and development'.<sup>86</sup> However, as we can see from the above case study, contrary to these expressed concerns, the liberal economic agenda of public IFIs for increasing the participation of private economic actors within a market for public infrastructure and public services provision has not always resulted in the complete subsumption of other public international law agendas, notably the human rights and environmental protection projects of international law. Whether the CAO can ensure not merely accountability, but also 'shared responsibility' of the IFC, should it be implicated in any breaches of international human rights and environmental protection standards, is still an unanswered question. Even less likely is the

85 Ibid.

86 See R Howse, 'Fragmentation and Utopia: Towards an Equitable Integration of Finance, Trade, and Sustainable Development' in A Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012) 427, 429.



possibility of the CAO exerting, let alone responsibility accountability, over the borrowing/commercial entity that will take over the functions of KEK following the privatization exercise that the IFC is overseeing.

### 3.4 (Non-)Accountability of Private International Finance Institutions: the 'Equator Principles'

As noted in Section 1 above, capital input for natural resource development, public infrastructure, and public services provision projects within developing and transitional economies, is usually sought from public and increasingly private sources of international finance. An appropriate rate of return or profit on investment is a significant incentive and motive for the participation of private international finance institutions within such projects. Much of this combined public-private financing is undertaken through international 'project finance' – a mode of capital investment characterized by the term 'non-recourse'. This term specifies that the returns on that initial capital investment made by the lending (private international finance institutions) tie the interests of both lenders and borrowers to the continuing success of the project itself. This is at variance to the 'corporate finance' mode of lending, whereby the returns of the initial capital investment by the lender are linked to the capital assets of the borrowers, rather than the assets of the project itself.

'Project finance' is generally described as a bank-lending method whereby the lender relies primarily on the revenues generated by a specific project run by a so-called 'Special Purpose Entity' (SPE) – a specifically established project company that is also the source of repayment for the original loan, as well as the security for the exposure of the lending bank itself.<sup>87</sup> 'Project finance' projects can thus be distinguished from 'corporate finance'-type projects, whereby the lending bank's capital exposure is secured *both* on the corporate assets of the investing company (usually a foreign multinational or transnational company (MNC/TNC)) as well as assets and revenues of the project company (or SPE). To reiterate, the distinguishing factor here lies in the fact that in 'project finance'-type projects, the lending bank concerned relies *only* on the individual SPE or project company's revenues and assets for *both* the repayment of the loan and security for its own exposure, whereas within 'corporate finance'-type projects, the lending bank's loan is also secured on the

87 This definition is adapted from a more detailed version available from Basel Committee on Banking Supervision, *International Convergence of Capital Measurement and Capital Standards (Basel II)* (November 2005), <http://www.bis.org/publ/bcbs18.pdf>. It is notable that these international banking standards have also been adopted within the context of a transnational, non-State actor organization, namely, the Basel Committee.

assets of the borrowing, or sponsoring, parent company (foreign MNC/TNC) itself – this being thus a more secure investment from the perspective of the commercial bank concerned.

‘Project finance’-type projects entail a high exposure to risk on the part of the lending bank and are more likely to be located in countries with greater risk potential. Such commercial lending practices to firms that are often located in foreign jurisdictions have given the banks concerned a more significant stake in the borrowers’ financial performance. This relationship in turn provides the banks with not only a financial, but perhaps more importantly, a corporate ‘reputational’ incentive to consider the environmental, social (and other) risks raised by these projects. This is especially the case where these project finance-type projects involve large-scale extractive and/or infrastructure-type development activities, such as oil and gas exploration, mining, dam-building, and the construction of highways/motorways. Globally, ‘project finance’ related loans for 2012 amounted to US\$ 195.4 billion, down 12.6 per cent from the US\$223.4 billion of loans structured in 2011, according to the 2012 Thomson Reuters report on ‘project finance’,<sup>88</sup> but this appears to be a mere blip in an otherwise steady period of growth of up to 15 per cent over the previous few years.<sup>89</sup>

Both the scale and impacts of these projects have also brought the companies and banks involved to the attention of campaigning environmental and human rights NGOs. Increasingly, this type of private international financing is also expected by the international community to comply with generally accepted human rights and environmental norms. This is the case even when these norms are initially developed within the public international law domain for application to States and only later accepted and implemented by private international/transnational actors. A striking example of the co-option of human rights and environmental protection norms by private international/transnational economic actors within large infrastructure projects that are financed through the project finance mode is the Equator Principles (EPs or Principles).<sup>90</sup>

These Principles were initially adopted in June 2003 by a leading group of mainly private (but also including some public) IFIs intent on establishing a banking industry framework for addressing environmental and social risks

88 Thomson Reuters, ‘Project Finance Review, Full Year 2012’ (December 2012) 1.

89 E Reviglio, ‘Financing Future Infrastructure: EU 2020 and Long-Term Financing’ presentation at Joint EC-EIB/EPEC Private Sector Forum, Brussels, 6 June 2012, [https://ec.europa.eu/economy\\_finance/events/2012/2012-06-06-ec-epec/documents/cdp.pdf](https://ec.europa.eu/economy_finance/events/2012/2012-06-06-ec-epec/documents/cdp.pdf).

90 See the current version of the Principles EP4 (July 2020), <https://equator-principles.com/wp-content/uploads/2020/05/The-Equator-Principles-July-2020-v2.pdf>.

in the 'project finance' sector.<sup>91</sup> They represent a common and coherent set of environmental and social policies that is applicable globally and across all industry sectors. The Principles have been periodically updated, most recently in 2020. According to these Principles, the so-called Equator Principles Financial Institutions (EPFIs) undertook that they 'will only provide loans to projects that conform with the following ten Principles'. There are currently 111 EPFIs that have adopted the Equator Principles, accounting for a significant portion of the project finance market, especially within developing and transitional economies.<sup>92</sup>

The Equator Principles are based on the IFC Performance Standards on social and environmental sustainability. Thus, when the IFC initiated a review and update of its Sustainability Framework and Performance Standards, both of which were updated and re-launched in January 2012, the Equator Principles Association followed suit and initiated a Strategic Review in 2010 to ensure that the EPS continued to be viewed as the 'gold standard' in environmental and social risk management for project finance within the financial sector. This led to an updated, third version of the Equator Principles III (EP III), effective from 4 June 2013 to be applied to all new transactions from 1 January 2014.<sup>93</sup> In November 2019, a fourth iteration of the principles was adopted, and these will apply to all new transactions from 1 October 2020.<sup>94</sup>

In addition to the standard-setting role of the Equator Principles for EPFIs, a further, institutional requirement that emulates, but does not fully replicate, the grievance mechanisms epitomized by the World Bank's Inspection Panel and the IFC's CAO, is provided here in the form of a 'Principle 6: Grievance Mechanism', which provides, *inter alia*, as follows. For all Category A projects and Category B projects 'as appropriate' that are located in non-Organisation for Economic Co-operation and Development (OECD) or non-high income countries, the borrower is enjoined to establish a grievance mechanism; the existence of which the borrower has to inform the affected communities.

91 Ibid, Preamble. For a discussion of the implications of the promulgation of environmental standards by private non-State actors for traditional, State-based regulatory theory, see M Schaper, 'Non-State Environmental Standards as a Substitute for State Regulation?' in A Peters, L Loechlin, T Förster and G Fenner Zinkernage (eds), *Non-State Actors as Standard Setters* (Cambridge University Press, 2009) 304.

92 Equator Principles, 'EP Association Members & Reporting', <http://www.equator-principles.com/index.php/members-reporting>.

93 Accessible at: [https://equator-principles.com/wp-content/uploads/2017/03/equator\\_principles\\_III.pdf](https://equator-principles.com/wp-content/uploads/2017/03/equator_principles_III.pdf).

94 The fourth iteration of the Equator Principles was adopted by EPFIs in July 2020. Above (n 90).

According to (Equator) Principle 6, the grievance mechanism is required to be scaled to the risks and adverse impacts of the project, and have 'affected communities' as its primary user. It will seek to resolve concerns promptly, using an understandable and transparent consultative process that is culturally appropriate, readily accessible, at no cost, and without retribution to the party that originated the issue or concern. The mechanism should not impede access to local judicial or administrative remedies. The client will inform the affected communities about the mechanism in the course of the stakeholder engagement.<sup>95</sup>

The grievance mechanism to be established is thus subject to the following qualifiers: first, this mechanism is scaled to the level of risk and adverse impacts of the project; and second, it is part of the management system. The former qualifier is understandable, albeit affording the borrower much discretion to decide on the scope and method of the grievance mechanism employed. This is especially pertinent when it is considered that Category B projects will be subject to a grievance mechanism only 'as appropriate', presumably from the borrower's perspective? The second qualifier is subject to more serious concerns. First, it is clear that this mechanism does not have to amount to an independent and objective dispute settlement mechanism for addressing community grievances. Its explicit attachment to the project management system undermines any notion of such objectivity or independence in its procedures. Secondly, there is nothing in this requirement under Principle 6, or indeed in the consultation and disclosure requirements under Principle 5, that deals with the issue of standing for NGOs concerned with nature conservation and wildlife protection issues to participate in such grievance mechanisms, where these issues are not raised by the 'affected communities' concerned. Such NGOs will not necessarily be encompassed within the definition of 'affected communities', except perhaps if they have individuals from these 'affected communities' among their membership.

The structural difficulty that EPFIs face when seeking to ensure that their clients/borrowers comply with the Equator Principles arises from the nature of the relationship between the EPFI concerned and the borrowing company, usually known as the 'Special Purpose Entity' (SPE), which utilizes the loan to finance the actual project on the ground. While the EPFI itself may well be committed to, and in compliance with, the application of the Equator Principles, there is an understandable concern as to how far such a commitment can be translated into effective action on the environmental and social

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95 Ibid Principle 6.

fronts by the borrowing SPE project company itself, given that it would usually be operating in a separate, foreign territorial jurisdiction from the EPFI concerned. Here, the EPFIS' main compliance mechanism is contractual, binding their borrowers to covenants in their funding documentation to comply with the relevant international and domestic laws on social and environmental issues.<sup>96</sup> Moreover, the EPFIS require borrowing companies to arrange third-party independent monitoring and reporting of project finance projects,<sup>97</sup> with the clear implication that its poor performance on the social and environmental fronts can jeopardise future tranches of scheduled funding for the project. However, given the repayment structure for project finance loans described above, the EPFI concerned may thereby be placing its own source of revenues from the repayment of the project finance loan at risk of default if it impinges too heavily on the operations of the borrowing company on social and environmental compliance issues. This presents a significant challenge to the institutional accountability model since such accountability may operate in a commercial environment that mediates against social and environmental considerations.<sup>98</sup>

A further source of control that can be exercised by the EPFIS in respect of errant borrowers is to blacklist these companies from future project finance-type lending. However, the competitive nature of the project finance market and the presence of new entrants (especially from non-Western countries), which have not yet been inducted into the 'Equator Principles', raises possible 'free rider' issues and thereby acts as a deterrent against the use of this form of sanction. It is therefore in the interests of the current EPFIS to induce as many of these new entrants into accepting the Principles as part of their lending policy in order to reduce the potential for 'free riders' within the project finance lending market.

The next question to be addressed is what, if any, are the compliance-inducing or enforcement methods to be employed against the EPFIS themselves for non-compliance with the Equator Principles? Initially, this question might be considered superfluous given the self-regulatory, non-binding nature of these Principles. In this regard, the 'Disclaimer' attached to the end of the 'Equator Principles' list is apposite. It indicates, *inter alia*, that these principles 'do not create any rights in, or liability to, any person, public or private. Financial institutions adopt and implement the Equator Principles voluntarily and independently, without reliance on or recourse to IFC or the World Bank

96 Environmental Principles, above (n 90), Principle 8.

97 Ibid Principle 9.

98 I am indebted to Barnes (co-editor) for suggesting this point.

Group, the Equator principles Association, or other EPFIS.<sup>99</sup> Yet the depth of the commitment to the Principles by the EPFIS in their PF-type lending activities is indicated by the fact that they are willing to lose potential profits by withdrawing from PF projects that fail to meet the requirements established by these Principles. Moreover, the EPFIS concerned are acutely aware of their exposure to NGO, media and general public scrutiny over their lending activities.

Thus, despite their consensual, rather than compulsory, character, most if not all these EPFIS are now able to show a significant level of internalization of these Principles within their lending criteria and practice, at least as evidenced from their published corporate policies. As Meyerstein argues, while measuring how individual EPFIS have changed their organizational structures, policies and procedures following adoption of the EPs is not a perfect proxy for measuring ground-level impacts, it is a useful gauge for the study of how transnational private regulation engages with corporate human rights accountability issues.<sup>100</sup> Principle 10 also requires these EPFIS to commit to publicly available reports, on at least an annual basis, about its Equator Principles implementation processes and experience. While this informational requirement will assist others (especially NGOs) to monitor the EPFIS' implementation records in this regard, the voluntary nature of this requirement will not prevent 'shirking' of responsibilities from occurring. Moreover, as Richardson observes, the EPFIS themselves do not see the Principle 6 'Grievance Mechanism' as a formal dispute resolution system that can confer obligations or liabilities against them.<sup>101</sup> Here we see that even the individualized institutional grievance mechanisms established through the application of the Equator Principles nevertheless do not address all the actors involved. Thus, in mixed actor contexts such as international project development, different forms of control are needed since neither individual nor shared State (or international institutional) responsibility necessarily apply, but neither do purely domestic law remedies. Rather, specific institutional accountability mechanisms that link or transcend or cut across the levels are required.

Finally, going beyond enforcement of the Equator Principles by the participating EPFIS themselves, a further legal enforcement avenue has presented

99 Equator Principles, above (n 90), 5.

100 A Meyerstein, 'Transnational Private Financial Regulation and Sustainable Development: An Empirical Assessment of the Implementation of the Equator Principles' (2013) 45 *New York University Journal of International Law & Politics* 487, 499.

101 BJ Richardson, 'Financing Sustainability: The New Transnational Governance of Socially Responsible Investment' (2008) 17 *Yearbook of International Environmental Law* 73, 92.

itself. This possibility arises from the fact that most international project finance contracts are often governed by US law. Since the US courts have allowed non-parties to enforce a contract under the third-party-beneficiary rights doctrine in US contract law,<sup>102</sup> this legal avenue may also provide a remedy for project-affected communities to ensure compliance with the social and environmental standards enumerated in the Equator Principles. Recognition of a third-party-beneficiary right in project-affected communities would place enforcement power in the hands of the parties most interested in compliance.<sup>103</sup> This further enforcement possibility is also in line with the fact that these social and environmental standards originate from *public* international finance institutions (especially World Bank Group) regulations. These standards are in turn specific applications of human rights and environmental protection principles laid down by public international law. These very same standards are then applied to private IFI project finance transactions through the Equator Principles that are not enforceable at the international level, but may be enforceable within at least one domestic (US) legal regime. This arguably completes a full circle from international law, through 'transnational' institutional accountability, back to national law for their eventual enforcement. Traditional domestic legal remedies may therefore ultimately still prove to be more effective than the institutional accountability mechanisms established by the public IFIs involved.

#### 4 Conclusion

The relationship between public and private international finance institutions on the one hand, and the international social and environmental protection norms that are applicable within major natural resource and infrastructure investment projects on the other hand, may be characterized as one of institutional *accountability*, rather than *responsibility*, for their involvement in any breach of these norms. Over the course of this chapter, the discussion has moved from an examination of proposed doctrinal innovation within international law (in the form of shared responsibility) to alternative, institutional accountability mechanisms (in the form of the Inspection Panel/ CAO/ Equator

102 M Marco, 'Accountability in International Project Finance: The Equator Principles and the Creation of Third-Party Beneficiary Status for Project-Affected Communities' (2011) 34 *Fordham International Law Journal* 452.

103 Ibid.

Principles) while maintaining a critical eye on the effectiveness of such alternative mechanisms in relation to any breaches of international law.

There is evidence of the progressive co-option and implementation of international norms by both public and private international finance institutions, for example through the World Bank's Environmental and Social Framework, and IFC's Performance Standards, as well as the Equator Principles. However, gaps remain in relation to the accountability of these public and private international finance institutions, if and when they fail to implement these co-opted international principles, rules and standards within their activities. In the first case study (Kosovo), it was found that the CAO office of the IFC was established to highlight deficiencies in the implementation of international social and environmental norms by the IFC, but not its client companies. In the second, 'Equator Principles' case study, it was noted that although the Equator Principles require the Special Purpose Entities (SPE)/project companies borrowing from EPFIS to establish local grievance mechanisms, these accountability mechanisms will only ever highlight the deficiencies of these SPEs/project companies, rather than those of the EPFIS themselves. Neither are the parent MNC/TNC companies that establish the SPE/project companies in the host States where they operate necessarily implicated by the non-compliance of the subsidiary SPE/project companies in these host States.

As a final observation, the fact remains that public and private IFIs now explicitly recognize the importance of international norms and regulate their activities according to these norms. The corollary to this observation is that whether practised by States, or by these international/transnational non-State actors, public international law continues to suffer from well-known deficiencies in the provision of universal, consistent and effective forms of enforcement. This holds true even when 'enforcement' as such is exercised through established institutional accountability mechanisms, rather than traditional means of international (State) responsibility, or even innovative notions of 'shared responsibility'. This chapter has shown that both public and private IFIs have developed grievance mechanisms to ensure institutional accountability for the possible harmful outcomes of their lending activities. However, these mechanisms have not extended the notion of (institutional) accountability into the requirement under international (State) responsibility, whether shared or otherwise, for full reparation for any injury, comprised of material or moral damage,<sup>104</sup> suffered by the victims of breaches of international norms.

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104 As provided by Articles 31 of both the ILC Draft Articles on State Responsibility and Draft Articles on Responsibility of International Organizations, above (n 4).



While such institutional grievance mechanisms denote a significant improvement on the previous lack of accountability of these IFIs, they still fall short of ensuring that justice prevails in every instance of a breach of international environmental obligations and/or standards. They represent expanding 'frontiers' of progressive legal development, but in keeping with the inherently uncertain notion of 'frontiers', it is perhaps just as well to note that such 'frontiers' are often contested, both figuratively and literally.