The Future Development Finance and Accountability Landscape

Workshop Summary and Outcomes

April 21 – 22, 2016
Columbia University

NATURAL JUSTICE
Lawyers for Communities and the Environment

HEINRICH
BÖLL
STIFTUNG
NORTH
AMERICA

Contents

Introduction 2
The Development Finance Calculus 4
Existing Development Finance & Accountability Work 8
The Development Finance Narrative 9
The Institutional Landscape 11
Accountability Standards and Mechanisms 13
Way Forward 17
Conclusion 21
Appendix A: Infrastructure Project Financial Actors 23
Appendix B: Participants 24
Appendix C: Overview of Existing Work (Revised) 26

This report is a summary of the discussions at a workshop on "The Future Development Finance and Accountability Landscape," held on April 21-22, 2016, at Columbia University. The workshop was organized by Columbia University's Institute for the Study of Human Rights (ISHR), Natural Justice, Center of Concern, Heinrich Böll Foundation, and Inclusive Development International with the financial support of the Heinrich Böll Foundation and the 11th Hour Project of The Schmidt Family Foundation.

The report was written by Joanne Bauer, Senior Researcher, Institute for the Study of Human Rights, with contributions from Columbia University graduate students Xin Yi Cheow, Ishita Petkar, and Ginger Whitesell, who served as workshop rapporteurs.

Introduction

On April 21-22, 2016, Columbia University's Institute for the Study of Human Rights (ISHR), Natural Justice, Center of Concern, Heinrich Böll Foundation, and Inclusive Development International, with the financial support of the Heinrich Böll Foundation and the 11th Hour Project of The Schmidt Family Foundation, co-organized a brainstorming workshop that brought together experts in finance, development finance, infrastructure development, and human rights to identify the human rights risks of the current development finance system and of projected future financial models.[1] The organizers sought to build a better understanding of development finance and how that knowledge can be used by affected communities and the non-governmental organizations (NGOs) that support them as means to hold capital providers accountable to international human rights standards. The aim was to identify research and advocacy needs in the field and identify a program of work to address them.

The workshop was concerned with future financial models as well as the current financing landscape. With respect to both, it sought to identify 1) the capital providers and other institutions whose actions we seek to change and the most promising means for influencing them; 2) the most relevant and effective existing safeguards for the avoidance and mitigation of harms to communities; and 3) obstacles to applying these safeguards as well as accountability gaps where operations are exempt from safeguards.

The workshop was structured in six sessions: 1) Understanding the Development Finance Calculus, featuring development finance practitioners; 2) An Overview of Existing Development Finance and Accountability Work; 3) The Current Development Finance Narrative; 4) The Institutional Landscape of Development Finance; 5) Accountability Mechanisms and Gaps; and 6) a final session exploring options for a work plan on the subject. The first session was organized as a panel discussion of investment practitioners, whereas the remaining sessions were open dialogues, each kicked off by brief prepared remarks by two or three individual participants.

---

[1] See Appendix B for a list of participants. The finance practitioners were able to stay for only the first session.

Workshop Rationale

The world is on the brink of the biggest infrastructure boom in history, with approximately US $6 to 9 trillion annually dedicated to ever larger scale projects.[2] Infrastructure project funding, formerly directed toward developed states and selected emerging economies, is increasingly slated for the Global South.[3] While these projects have the potential to lift millions out of poverty, reports on the harmful impacts of ongoing infrastructure projects on communities indicate that they also constitute serious threats to already marginalized peoples.[4] Often coupled with resource extraction, the projects tend to be located in environmentally and socially sensitive areas, including on lands inhabited by indigenous peoples and other vulnerable groups. Despite existing safeguards, human rights harms related to infrastructure development remain widespread, and existing accountability mechanisms have mostly failed to provide effective redress.[5]

A lack of transparency around the increasingly complex global financing of these large-scale projects creates a significant challenge for human rights defenders. New policy trends, backed by a global consensus and by all major public financing providers, emphasize attracting private sector funding, and in catering to the private sector dramatically redefine the hitherto dominant paradigm on how the public relates to the private sector in such financing arrangements. A wide diversity of government and private investors and opaque rules of governance make it extremely difficult to trace individual projects back to capital providers, rendering accountability mechanisms even less effective than usual. Moreover, to date the new development finance institutions - in particular, the Global Infrastructure Facility, and the New Development Bank - have not publicly communicated means for ensuring genuine civil society engagement with

---

[2]Nancy Alexander, "The World Bank: in the vanguard of an infrastructure boom" in *At Issue, Bretton Woods Project*: http://www.brettonwoodsproject.org/wp-content/uploads/2015/02/At-Issue_infrastructure_PDF.pdf

[3] An example is the Program for Infrastructure Development in Africa (PDIA). See: http://www.icafrica.org/fileadmin/documents/PIDA/PIDA%20Executive%20Summary%20-%20English_re.pdf

[4] See for example:
http://www.unrisd.org/80256B3C005BCCF9/search/5DD2D68B93A7B609C12579B3004C49BC?OpenDocument
http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534980/EXPO_STU(2014)534980_EN.pdf
https://www.amnesty.org/en/documents/AMR01/002/2014/en/
http://assets.survivalinternational.org/documents/373/Serious_Damage_final.pdf

[5] See for example, *What is Remedy for Corporate Human Rights Abuses? Listening to Community Voices: A Field Report*, School of International and Public Affairs (SIPA), Columbia University and ACCESS Facility, December 2015 http://accessfacility.org/Columbia-University-Student-Case-Story, and *Glass Half Full: The State of Accountability in Development Finance*, SOMO et al, January 2016. http://grievancemechanisms.org/resources/brochures/IAM_DEF_WEB.pdf

the design and monitoring of these new institutions or ways of insuring that investment decisions take account of human rights.

Large-scale infrastructure projects constitute just one piece of the landscape of human rights and development finance.[6] Taking infrastructure investment as an "entry point" was a means to focus the discussion on different sources of finance. Therefore, for instance, international financial regulation of capital flows is a relevant subject to the discussions to the extent that these policies endeavor to increase investments in infrastructure.

The meeting was designed to bring development finance and human rights practitioners together to clarify blind spots that human rights advocates often face in the context of development finance. What ideas, plans, motivations, and investment calculi are behind the current and expected wave of mega infrastructure projects? What actors and institutions are driving this and are open to dialogue? Where should efforts be focused to ensure that human rights considerations are adequately and effectively incorporated into these projects? This report aims to clarify the underlying issues as a step toward answering such questions.

The Development Finance Calculus

The panel on the development finance calculus consisted of finance practitioners, among them three asset managers, an independent responsible-investment consultant, and an advisor to developing and emerging market governments The session began with an asset manager explaining how projects are funded by drawing a diagram of the full range of debt and equity investors of a hypothetical infrastructure project. The hypothetical model for the diagram and discussion was a transportation infrastructure project, and the speaker explained that the actors and relationships might vary slightly for other industries, such as energy or extractives. See Appendix A for a replica of the blackboard diagram.

The speaker noted that a project typically begins when a government makes a policy decision or has an idea for development. The government will work with advisors in the

[6] The Monterrey Consensus on Financing for Development is usefully organized around chapters that cover all sources of development finance; questions of accountability are arguably relevant to each one of them, regardless of whether the financing in question is directed to a specific project. See: http://www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf

private sector, including multilateral development banks (MDBs) and financial advisors, to flesh out the scope and plans of the project. The government will then release a procurement bid, which is sometimes aligned with a concession agreement. This agreement can be very specific or general.

At this point, a special purpose vehicle (SPV), or single purpose entity that contains the business proposition, will be created. On the equity side, the SPV will have a strategic and/or a financial sponsor, which often has a relationship with the government.

- A strategic partner might be a subsidiary or a parent of the company carrying out the project. The objectives of the strategic partner are not strictly financial in this project and may have an external objective.

- A financial sponsor does not build any part of the project and has no specialized project knowledge. They are generally represented by a fund manager concerned with its clients' needs. These can be pension funds, direct investors, insurance providers, and/or sovereign wealth funds with their own extensive staff. They are generally concerned with return on investment (ROI).

Farther downstream, the SPV hires a builder and an operator that should be connected via an interface agreement. In turn, they may each subcontract labor. Sometimes the builder and operator will have policies that reflect care for health, safety, and the environment.

On the other side of the SPV are the debt investors. In the event of bankruptcy, investors have differing priority claims against the remaining assets. Lenders have priority over equity holders. There are two classes of lenders:

- Senior debt investors - These are the key investors that are the first to onboard the project, and include export credit agencies, multilateral and national development banks, A/B structures, and bond holders. These stakeholders have objectives other than just ROI, which includes environmental and social factors as well as other factors, such as promoting country exports in the case of export credit agencies. Development banks have their own motivations.

- Mezzanine investors - These are debtors that have the option of converting their loan to equity if it is not paid back in time. Because mezzanine investors

are lenders they have a similar priority to ordinary lenders, but by virtue of their potential ownership stake (at their option) they might be given lower priority. Mezzanine investors usually provide loans very quickly with little due diligence.

Institutional Investor Motivations

In general, investors care about their fiduciary duty and not about human rights issues, although human rights may fall within fiduciary duty if they represent a significant risk to a project. Likewise, for political or other reasons, governments may not have much interest in environment, social and governance (ESG) guidelines.

On the equity side, a financial player's motivation is to get a high ROI, and thus they seek out different types of project risk. For example, a "completion risk" refers to the risk that a project may not be completed and the investor may not get their money out of it in the end. "Market risk" refers to the risk that a project may not provide a good return.

Strategic sponsors, such as a construction company or developer, have a short-term stake in building the project and making sure they get paid; they are more likely to have an interest in making the project more expensive and bigger in scope, since the bigger the deal the more money there is to be made. As a generalization, strategic sponsors will be less sensitive to ESG issues than financial players who have choices in responding to project opportunities and can better leverage the needs of their clients in relation to ROI and ESG risks before making the investment decision.

Pressure Points

Where within the project finance map are the opportunities to push investors to address human rights risks? In resource extraction/refinement projects, sponsors have a stake in the long-term viability of the project. In this example, commercial banks may be the best pressure point, as they have a wider range of choice in where to invest and can more easily pass on an investment that presents "reputational issues." For this reason, commercial banks can also afford to establish environmental- and human rights-sensitive guidelines and adhere to them.

The ABP pension fund in the Netherlands is the fifth largest in the world, and is the country's only public sector pension fund. Because the fund accounts for about 25 percent of Dutch pensions, it is highly visible and a strong pressure point. Large funds like ABP are increasingly interested in environmental and social (E&S) risks, both

because they can harm financial returns and because their customers care about these issues.

Finance experts in the room suggested that the Equator Principles (EPs) are sufficient safeguards to address the challenges, as fund managers will not support projects with human rights violations. However, it was acknowledged that there is a large gap between the protections the EPs are intended to provide and actual compliance with the principles. Similarly, the perception remains among institutional investors that E&S risks are low if backed by the World Bank Group's International Finance Corporation (IFC) because of the IFC's standards for evaluating them. The IFC's involvement is particularly important in emerging markets, as it makes the project financeable by lowering sovereign risk.

The large commercial banks do not usually have local representation in the countries where they are giving money, which means they must remotely analyze risks, making them reliant on advisors on the ground. Bank managers, therefore, need to be critical and challenge these advisors as well as have a knowledge of local stakeholders.

Passive investors – investors in asset classes or indexes - are not currently a target for advocacy, as they are not big players, are mostly new to the business, and their fiduciary obligations are not clear. Likewise, project operators are not generally targeted as pressure points; builders can sometimes be targeted because of their direct links to projects.

When asked where considerations of human rights risks fit into investment decision making, finance experts indicated that by the time the project is being considered by an investor, there is an assumption that these issues have already been flagged sufficiently through the project vetting process. The IFC Performance Standards and the safeguards of other development finance institutions (DFIs) are considered authoritative seals of approval.

From the banking sector's perspective, once the project is identified, a process of evaluating the identified opportunity and risks, including E&S risks, gets underway. Insurmountable harms are considered a deal-breaker. For some banks, a due diligence process beyond the EPs standards is initiated, and both reputational risk as well as the quality and experience of sponsors is considered. In general, banks take this process seriously: if these risks are realized, they will lose money through the impaired loan induced by delays or cancellation of the project.

From the investor's perspective, once IFIs are engaged in advising the governments according to the IFC Performance Standards and banks have structured the project according to the EPs and other best practice measures, global standards are presumed to be already integrated within the project. At this point, the social risks are treated as a '"checklist item," to be handled by lawyers in due diligence reviews ensuring the project meets legal requirements. From the pension fund's perspective, in addition to their fiduciary duty, they also have a responsibility to make sure the investments to align with the values, identity, and culture of the pensioners.

There is an inherent difference in risk between the extractives and infrastructure sectors, with infrastructure projects usually dependent upon explicit government buy-in in order to be implemented. When risks arise after deals are done they are regarded as the result of a failure of enforcement and a breakdown of regulatory processes.

Several participants reflected on the diagram and the challenges it presents for ensuring respect for human rights in development finance. It was noted that IFC's role in development finance has expanded to include providing advice to governments, lenders, and direct investors. There is a dearth of technically-trained government officials in developing countries to ensure project integrity. Moreover, the project finance system reflected in the diagram remains opaque, which is complicated by the fact that funding throughout the lifespan of a project is dynamic, with DFIs playing shifting roles between debt and equity in the SPV.

Existing Development Finance & Accountability Work

This session was a stock-taking of the array of ongoing official initiatives that aim to improve the consideration of social and environmental concerns and accountability in development finance. The intention was to establish a common awareness among participants of existing efforts, before turning to identifying opportunities for strengthening accountability.

The discussion was based on two assumptions: 1) despite the proliferation of accountability mechanisms; they have failed to deliver; and 2) the development finance landscape is shifting and widening, resulting in a need to reevaluate existing accountability frameworks.

A compilation of initiatives was circulated in advance. During the session participants were invited to provide feedback and additions. See Appendix C for the compilation, which includes the workshop additions.

The Development Finance Narrative

This session focused on the macro-perspective of the diagram created in Session I, the development perspective influencing these project finance models, and the global narrative on infrastructure finance. Underpinning the discussion was a recognition that to distinguish good from bad projects, civil society organizations need to better understand infrastructure development.

The emerging consensus on development finance is blurring the lines of the Global North/Global South dichotomy, as seen in the advance of the New Development Bank and the Asian Infrastructure Investment Bank (AIIB). DFIs in all regions are generally held to the same standards; although China's lead role within the AIIB has drawn scrutiny of its standards, signs so far are that the AIIB will adhere to global standards.

As infrastructure projects grow in scale, G20 members hold significant stakes in "mega" and "giga" projects. The increasing size of the projects, and range in investors - pension funds, hedge funds, sovereign wealth funds - have led to significant pressure to short-circuit the required environmental and social impact assessments, reducing them to another item on a checklist. Reacting to the demand for regulatory stability in infrastructure projects, the G20 has produced high-level principles for long-term finance that render environmental and social standard protection as optional.

Increasingly DFIs are investing in project preparation, reducing their direct role in project financing. The implication is that the project can be sold in a secondary market, removing the DFI from the project. Another concern is that because government advisory partners in some of the project preparation facilities—for instance the World Bank's recently created Global Infrastructure Facility—can be companies themselves, they may have excessive influence where civil society has little.

In order to facilitate investors' uptake of infrastructure-based assets in their portfolios, policymakers seek to encourage standardization and bundling together of a number of projects. This potential for securitization of infrastructure assets has implications that are not yet fully understood, but the problems that arose in the US housing market in

2008 point to the risks of the practice. As with the sub-prime mortgage crisis, financial regulators are key to accountability since they are the creators of the “scaffolding” from which the private sector designs practices to extract benefits.

Public Private Partnerships (PPPs) tend to keep project risk with the public sector, and therefore ultimately with taxpayers, rather than share the risk with private investors. There is typically no social cost-benefit analysis done for the projects and no one questions who is “subsidizing” the project. PPPs are not inherently bad, but the mindset that the public sector must bear the risks, and that local communities are excluded from the agreement structures and denied a voice, needs to change to ensure that projects avoid harm.

In Africa, one of the many challenges is institutional fragmentation that results in actors, including governments, operating in silos. In the case of the infrastructure projects already underway there is a lack of sufficient project preparation, particularly when they are cross-border. Even as China continues to exert influence, Africa’s negative experience with Chinese investment on the continent has resulted in a “homegrown push” for development. African development actors themselves are not structured efficiently to interface with each other, or civil society, which often results in ineffective monitoring of ESG implementation.

Hundreds of billions of dollars are required annually to meet the Sustainable Development Goals (SDGs) as noted in the Addis Ababa Action Agenda.[7] Even if all of the more affluent countries met the minimum target contribution of 0.7% of gross national income (GNI) to overseas development assistance (ODA), there would still be a shortfall. Therefore, alternative forms of investment are needed, and bringing together public, private, and international finance as complements, not substitutes, is crucial. While this financing can come in different forms, there are circumstances where PPPs can play a positive role, notwithstanding the liabilities of PPPs noted above. For example, Islamic finance options, such as *sukuk* bonds, give investors good returns on projects that do well, but also losses when they do not, thus constituting a more equitable risk-return allocation.

The Addis Ababa Agenda acknowledges these issues and highlights the following shifts in focus for development finance:

[7] See: http://www.un.org/esa/ffd/wp-content/uploads/2015/08/AAAA_Outcome.pdf

- From foreign direct investment to institutional investment (e.g., DFIs and commercial banks)
- From trade to PPPs
- From foreign aid to domestic public resources (e.g., taxation)

These shifts imply an increased emphasis on "country systems'—national level environmental and social legislation—and point to the need for advocates to extend their focus to the national level. At the same time the multiplicity of investors implies a wide range of accountability mechanisms, and a need for NGOs to bring their attention beyond the MDBs. While pension funds have a degree of built-in accountability by virtue of their public ownership, there is no parallel accountability embedded in private equity funds, hedge funds, and other private investments. A weakness of the Addis Ababa Action agenda is the focus on data collection that ensures accountability to investors and other actors, instead of to adversely affected communities.

The session ended with a discussion of the importance of ensuring international human rights standards are understood and integrated throughout the project finance system. It was also noted that because violations, such as tax evasion, corruption, and human rights abuses, are intertwined, it is difficult to determine which issue advocates should focus their energies. This situation also requires human rights advocates to develop new methods of utilizing existing human rights mechanisms, particularly since conventional methods, such as securing visits from UN Special Rapporteurs to the sites where harms have occurred, has had limited effect.

The Institutional Landscape

Drawing on the previous discussion, this session was a deeper examination of how the range of financial actors are implementing the development finance policies discussed above, and the way the objectives, methods and priorities are framed and justified in practice.

The first speaker started with a point made in the first session, that when the IFC or other DFI is involved in a project, the project is considered "safe" for investment. While the IFC Performance Standards apply to 70 percent of project financing for cross-border, emerging markets, in practice the project assurance it provides is weakened by the fact that by the time a project gets flagged as potentially harmful, the commitments have already been made. The speaker cited a representative of a DFI, who explained,

“The cake has been baked, we just put on the icing.” For safeguards to be considered at project inception, there must be more robust engagement between banks and governments, especially over procurement rules, which are not linked to safeguards in any meaningful way.

What are the prospects for improved accountability? NGOs have always played an important role as evident from the fact that World Bank safeguards were put in place as a result of NGO pressure. Moreover, today national laws are “no longer silent on ESG issues.” In Peru, for example, banking regulators understood the connections between the country’s volatile mining sector, with its negative impacts on communities, and its bad sovereign debt, which threatens Peru’s credit rating, and now require banks to conduct human rights due diligence. Peru’s action mirrors the connections IFIs have made between community harm and reputation, which was the impetus for the revision of the IFC’s performance standards. In fact, it follows a pattern we are seeing where the locus of E&S standards is moving across geographies, from international to regional to national.

The next speaker noted that it’s important to distinguish the “world we want” from the “world of bankable projects,” and to recognize that investors need to choose from what is available to them under their fiduciary obligations. He pointed to the brighter spots in development finance, citing CalPERS as a pioneer in formalizing a sustainable investment philosophy into three strands—financial , human and physical. Sovereign wealth, or pension funds, especially those established as impact investing funds with socially positive but financially neutral returns, can provide a positive model for traditional investing.

The discussion during this session was wide-ranging, at times offering contrasting views. There was significant focus on the new DFIs—the AIIB and the New Development Bank—and the need to integrate commercial, economic and human rights risks with projects on the ground. One participant flagged corruption as a major issue for infrastructure finance. Another participant noted that the currency the development finance deals are done in has implications for where the money flows and the systems of governance they generate.

The emergence of the new infrastructure banks could present new opportunities for states to pressure other states or even enterprises. BRICS countries in particular have an interest in promoting their institutions as responsible international investors. And where BRICS institutions declare that they will abide by new rules of social responsibility, they provide a business case to businesses whom they offer loans to also

abide. On the other hand, it's not clear that these countries will have in place the regulatory infrastructure to address the fundamental risks of PPPs. The same can be said for most of Africa.

Projects need to embed ESG concerns at the start and "get control" upstream. As one participant put it, "We need to spend more time thinking about how to stop a project before it begins, rather than helping the community when it hurts." Another unaddressed issue is who will pay for the cost to remediate the negative impacts once they are discovered. One way to do that is to create an insurance fund for affected communities; borrowers would be required to buy insurance or an E&S performance bond, which would be stipulated in the contract. Other ways are contingency funds and penalties for violations of E&S requirements. Participants acknowledged the need to ward against a moral hazard that incentivizes players to undercut rules.

Toward the end of the session participants turned to the field of impact investing and its potential to promote better financing models. A notable positive effect of this form of investing is addressing pervasive problems in infrastructure financing: the need for transparency and the construction of effective ratings system that give full consideration to social and environmental risks as well as financial risks. On the other hand, participants noted that BlackRock, the world's largest asset manager, has a small impact investing unit that does not seem to have had an influence on the company's overall investing practices.

Accountability Standards and Mechanisms

This session reviewed existing accountability mechanisms and their effectiveness as a means to identify accountability gaps.

The moderator began the session by drawing the accountability landscape over the project finance map drawn on the chalk board in Session I. The main accountability mechanisms relevant to development finance are the independent accountability mechanisms (IAMs) of the major DFIs and the National Contact Points (NCPs) of the OECD Guidelines for Multinational Enterprises. These mechanisms can potentially address the accountability gaps left by courts in home and host countries, in light of myriad obstacles for complainants to use those courts to hold companies and

development finance actors accountable.[8] UN procedures, including the Universal Periodic Review, primarily relate to States' obligations under human rights treaties, and thus do not provide for direct corporate accountability. The new development banks, including AIIB, the New Development Bank, the Global Infrastructure Fund, and the Silk Road Fund, have yet to put in place strong accountability mechanisms. In the absence of such mechanisms, those seeking accountability tend to rely upon media exposure to pressure development finance actors.

Overall, the accountability context is one of weak rule of law, few opportunities for recourse through courts, few opportunities for civil society to engage with regulators, large actors such as MDBs with a claim to legal immunity, and increasing numbers of finance actors with uncertain leverage over the primary corporate human rights violator (the SPV) or unwillingness to use the leverage they do have. Moreover, repression of civil society has become increasingly endemic, and with the growing importance of the private sector and the rise of China in development finance, the political space for defending human rights is shrinking.

Even the most developed accountability mechanisms, the IAMs of MDBs, have significant weaknesses that impede access to effective remedy for affected communities.[9] For example, IFC's Compliance Advisor Ombudsman (CAO) is hampered by a limited mandate, which prevents it from assigning penalties to clients and sub-clients for findings of non-compliance with the institutions' human rights standards. Moreover, the IFC tends to discount the findings of their own compliance review office. In any case, in order to make a complaint to an IAM, there must be enough information to establish a financial link to an MDB, in the case of an NCP, to an OECD country.[10]

Accountability is also hampered by poor access to information for affected communities, in particular information about who is backing a project, with investors often hidden by confidentiality agreements. While most IAMs have publicly available databases, it is often difficult to know the other key actors in a project. Even with access to financial

---

[8] Gwynne Skinner, Robert McCorquodale, Olivier De Schutter, Andie Lambe, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business,* International Corporate Accountability Roundtable, CORE, and European Coalition for Corporate Justice, December 2013.

[9] See SOMO, et al, *Glass Half Full* and *What is Remedy for Corporate Human Rights Abuses?*

[10] "Adhering governments are obliged to set up National Contact Points (NCPs) whose main role is to further the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries, and contributing to the resolution of issues that arise from the alleged non-observance of the guidelines in specific instances. All 34 OECD countries, and 12 non-OECD countries have subscribed to the Declaration." See: OECD Responsible Business Conduct, "National Contact Points," http://mneguidelines.oecd.org/ncps/ (accessed July 29, 2016)

databases (e.g., Bloomberg, Thomson Reuters, Capital IQ), which are fee-based, mapping a full picture of investors is challenging. If NGOs cannot access this information to know who is behind a project, there is little chance that affected communities can.

One civil society effort aimed at addressing the information gap is the push to get governments to disclose contracts. The Columbia Center for Sustainability Investment is working to make agriculture and extractives contracts publicly available. Infrastructure projects could be the next frontier of contract disclosure.

Even when a link to the MDB is identified allowing access to an IAM and it finds that a violation of the MDB's standards has taken place, the MDB often fails to act on the findings and bring its projects into compliance. When the institutional investor or project company agrees to enter into mediation with communities—a voluntary process—the mediation must overcome formidable power and resource imbalances to be effective. Not only do companies have money and relationships with powerholders on their side, they sometimes demand that communities' access to advisors is restricted and that they accept confidentiality clauses that restrict their use of media and other advocacy tools that are important for correcting the power imbalance. Moreover, in the few cases in which an agreement is reached through this process, there are often few if any viable means to hold the investor or project company accountable in the event they renege on their agreements reached during mediation. As compared to the MDB IAMs, the NCPs may hold an even stronger bias towards the company resulting in even more inequitable processes.

Often communities are not even aware of the existence of the IAM in the first place; that responsibility, many argue, rests largely with the IAM, which has not done enough to disseminate information. For example, informing affected communities about the IAM could be a stipulation of financing the SPV (it is already a requirement of some MDBs).

Several NGOs – including those represented at the meeting – have spent years trying to influence these institutions to improve their accountability mechanisms, in particular the enforcement of standards. There is a constant need for new methods, including advocacy to the boards or government institutions. Advocates also need to continue to use the independent evaluation mechanism of IAMs, which scrutinizes lending and investment policy and safeguard processes and draws attention to the need for improvements can provide an upstream function of preventing harm.

Company-led operational level grievance mechanisms, which the UN Guiding Principles on Business and Human Rights companies mandate companies to create, do not provide an adequate solution. They are not independent, as they are run by those who are allegedly perpetrating the harm.

Some multi-stakeholder initiatives (MSIs), which include civil society, corporations and sometimes governments in their governance, may have the potential to be more effective. The Roundtable on Sustainable Palm Oil, for example, is a good example of an MSI that has developed a market-based approach to finding private sector players that are willing to demonstrate leadership by setting a standard and complying with it. Other MSIs have been less willing to hold member-companies to account.[11] At best, campaigns against those companies and their violations with industry E&S codes can embarrass the offending company before its competitor companies.

To date, most MSIs are geared to downstream buyers, as opposed to upstream investors. Recent efforts to push the EPs to develop a grievance mechanism could have a significant impact on the accountability of project finance investors. Yet, given a lack of responsiveness of the EP banks so far, and the fact that the principles only address project finance and corporate finance over a certain threshold, it may be necessary to start anew by finding a small group of investors willing to start a discussion around best practices and perhaps a certification system.

What lessons does the anti-corruption movement hold for the business and human rights movement? When the US passed the Foreign Corrupt Practices Act in 1977, it stood alone, no other country wanted to attach anti-corruption provisions to agreements because of private sector pushback that to do so would kill business. Today, these provisions are essential to doing business. This begs the question of whether we can replicate that for environmental and social issues.

Another accountability obstacle is the Investor State Dispute Settlement (ISDS) mechanism, a common feature of today's trade and investment treaties. ISDS enables an investor to bring a country to arbitration if the country, in creating laws and policies that protect citizen's rights, is seen to violate the expectation of the investor. In this way ISDS provisions provide strong investor protections and have a chilling effect on the

[11] IDI found this to be the case with Bonsucro for the sugar industry. It has filed a complaint with Bonsucro for readmitting the Thai company, Mitr Phol, alleging that Mitr Phol had not remedied documented rights abuses the company was responsible for. For the complaint and the response of Bonsucro see: https://business-humanrights.org/en/cambodia-ngos-oppose-mitr-phol%E2%80%99s-re-admission-to-sugar-industry-group-bonsucro-citing-failure-to-address-rights-abuses-mitr-phol-bonsucro-respond (accessed July 28, 2016)

ability and willingness of governments to regulate without. Non-transparent negotiation of agreements with these provisions undermines the rights of people to participate and to self-determination. One way to counter ISDS is to incorporate exception clauses into investment agreements that will protect and promote citizens' rights. For example, there can be clauses that exempt certain assets, such as indigenous lands, from the agreements.

Indigenous peoples are the citizens who are often most vulnerable to harmful uses of development finance, particularly in the extractive sector, and are therefore a bellwether of the quality of accountability mechanisms. In recent years they have made great strides in organizing to gain the recognition of the international community. This is manifested in the achievement of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and the standard it established of free prior and informed consent (FPIC), which is being incorporated into investment criteria through the IFC Performance standards and widely adopted by IFIs. This can be seen as positive forward momentum, a first step in creating the legal culture and climate that can have spillover effects on the private sector.

In many ways social movements to promote accountability in development finance are at a crossroads. The business and human rights treaty being negotiated could provide an opportunity to move the agenda forward to the private sector, by determining how to attribute responsibility with respect to existing human rights instruments, including UNDRIP.

.

Way Forward

During the final session participants considered what the future development finance and accountability agenda should be.

In advocating for better policies and practices it is important to draw upon existing good practice and "harness capitalist instincts" of competition to achieve a race to the top and improve human rights performance. There is also a need for creating bankable development projects that respect rights and for leveraging impact investors for this purpose. Two requirements need to be met to achieve these goals: 1) "closing the communication gap" between the financial sector and civil society on project risks; and 2) promoting the idea that in order to avoid bad investments, smart investors must consider environmental and social risks as material risks.

Participants identified the following agenda of initiatives for research, policy advocacy and dialogue relating to three project stages: Initial Project Conception (or the Policy Stage), the Project Cycle Stage, and Impact.

Initial Project Conception – policy advocacy targets

Target: States

- Strengthening existing state institutions of accountability
- Ensuring human rights considerations are built into national and local level master plans and national development plans
- Developing national action plans on business and human rights (NAPs) and making sure there is coherence with national development plans
- Developing the legal infrastructure and capacity support for community-led development plans and communicating those plans to policy practitioners. For example, adjust goals to change the direction of a road cutting through a community, instead of stopping the project.
- Reforming legal definitions of fiduciary duty to require consideration of ESG issues
- Redesigning investor state dispute settlement (ISDS) agreements to empower affected citizens, for example by enabling them to bring claims before tribunals.

Target: DFIs

- Reforming MDB policy and practice surrounding the financing of financial intermediaries (FIs)
- Increasing MDB transparency by advocating for early disclosure of: 1) projects and clients under consideration; and 2) the rationale behind choosing one intermediary over others
- Changing IFI internal incentive structures to prioritize human rights

Target: Multilateral Institutions

- Including considerations of green infrastructure in the context of the Paris Conference of Parties (e.g., "no development zones" where indigenous peoples have instituted traditional economic practices)

- Ensuring human rights considerations are built into G20 policies

- Inserting protections into the Business and Human Rights Treaty

Target: Investors

- Leveraging shareholder activism to strengthen the voice of communities in determining where investments are being made, especially with regards to pension funds.

Project Cycle (policy advocacy, research, template design, engagement)

Target: States, DFIs

- Promoting sustainable procurement policy and practice, including by embedding IFC Performance Standards in Procurement Rules.

- Improving contract design, including embedding penalties and sanctions for human rights violations in contracts

- Promoting contract disclosure

- Promoting early FI project disclosure for different project stages, including relating to choice of client

Target: World Economic Forum

- Promoting disclosure of project facilitation platforms, especially the World Economic Forum (WEF)

Target: Business, Institutional Investors

- Promoting joint civil society – business/bank human rights impact assessments

- Improving how ratings agencies capture human rights risks, including through better human rights impact assessments

Project Impact

Target: States/ DFIs

- Strengthening existing accountability mechanisms, both those of MDBs and the OECD NCPs

Target: Equator Principles

- Creating effective EPs grievance mechanisms

Target: Institutional Investors

- Improving communication between banks and NGOs on the ground regarding potential and real project risks

Target: States, Institutional Investors, DFIs

- Recognizing that solutions typically require multiple stakeholders, devising better multi-stakeholder initiatives (MSIs) with effective accountability mechanisms

- Creating a database of problematic projects (e.g., within the African continent), which would effectively monitor, track, and spotlight projects

- Expand and refine the practice of investment chain mapping to clarify the upstream, midstream and downstream investors of a project

Nearly all aspects of this agenda are being addressed in one way or another, including by the groups represented at the meeting. For example, the International Institute of Sustainable Development (IISD) is working on research and advocacy related to replacing the ISDS system. The Columbia Center for Sustainable Investment (CCSI), also working on ISDS reform, has been active in the area of contract transparency. IDI, with the support of SIPA's Business and Human Rights Clinic, is working on reforming the IFC's policy and practice surrounding financial intermediaries and on investment chain mapping. IHRB, Rethinking Bretton Woods Project and the Heinrich Böll Foundation are working on influencing G20 policies. Accountability Counsel, IDI and others are working on strengthening existing MDB accountability mechanisms. SIEU is working in partnership with other unions to leverage shareholder activism. In addition, groups not represented at the meeting are pursuing some of these initiatives (e.g. Bank Track re: advocacy for EP grievance mechanisms).

It is necessary to strengthen and extend this work agenda and improve coordination among initiatives. In addition, participants noted the need for better engagement with certain groups, including: organized labor, urban planners, and progressive finance,

including through the UN Principles for Responsible Investment, and UN agencies, such as UNCTAD.

Conclusion

The workshop provided a rare opportunity for human rights practitioners to learn from finance practitioners about how they and other financial actors approach development finance. The conversation underscored the value of such conversations in understanding the internal conversations, attitudes and constraints within finance institutions, and bridging the disconnect between the approaches and perspectives of finance managers and what human rights practitioners see on the ground.

There is great scope in this complex and shifting landscape for learning and improving practices to avoid harm. Uncertainty surrounding what entity inherits accountability for harms by the SPV is a chief accountability challenge brought about by the rise of private finance. This uncertainty gives rise to two questions: Where do we find accountability of last resort? Where does the money to compensate for harms come from? The workshop identified answers to the latter question—insurance funds, E&S performance bonds, contingency funds, and penalties—but the challenge of the accountability holder of last resort still looms large. With projects getting bigger and moving faster, the accountability machinery that we do have will no doubt struggle under the burden of what is to come.

Infrastructure projects present particularly significant challenges as compared to oil, gas and mining extraction projects. Extractives SPV's and their investors have come to understand the macro and micro level impacts of these operations, but the same cannot be said of large-scale infrastructure projects.

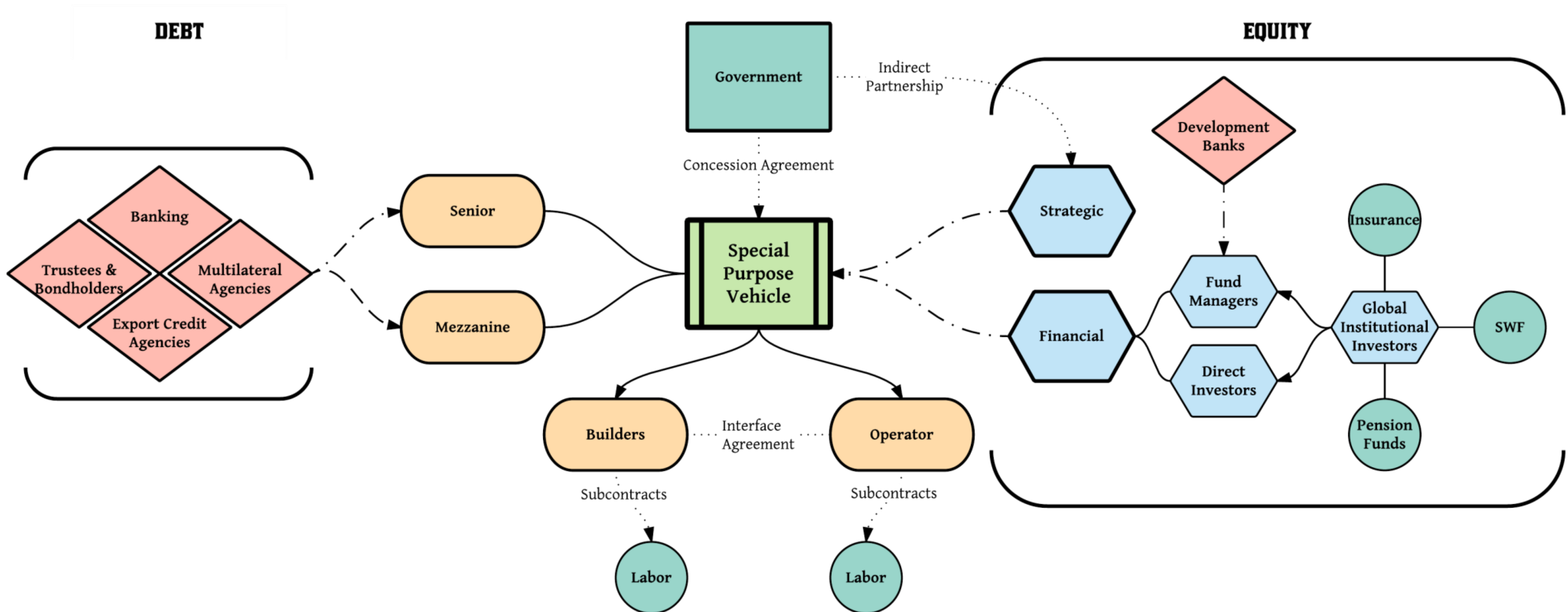
How can we incentivize investors to recognize the deficiencies of existing accountability mechanisms and pay more attention to improving them? To what extent can ratings agencies and benchmarking efforts move financial managers to address these problems? Since MDBs are critical development finance actors, despite the small amount of financing they provide relative to private banks, how do we incentivize them to up their game? How can we encourage transactional lawyers, who typically advise client companies against transparency, to better grasp these issues?

Workshop participants considered the need for communities to be more active players in creating the development they want. Communities must do more than resist the projects they do not want; they need to get organized to become more involved in planning the future of their communities, creating desirable, bankable projects they do want, and attracting capital providers to respond to that.

In all of this, we need to rethink the role of government, which can no longer sit outside of the conversation. The government needs to have the capacity to design projects that channel community aspirations for development into project planning and execution.

These are the key questions and challenges that make up the development finance and accountability agenda going forward.

Appendix A: Financial Actors of Sample Infrastructure Project



Appendix B: Participants

Motoko Aizawa, Managing Director, Institute for Human Rights and Business
Joanne Bauer, Adjunct Professor of International Affairs, Columbia University
Larry Beeferman, Director, Pensions & Capital Stewardship Project, Harvard Univ
Astrid Bernal, Asociación Ambiente y Sociedad
Nathalie Bernasconi-Osterwalder, Senior International Lawyer, IISD
Johanna von Braun, Executive Director, Natural Justice
Vonda Brunsting, Director of Capital Stewardship Program, SIEU
Natalie Bugalski, Inclusive Development International
Aldo Caliari, Director, Rethinking Bretton Woods Project, Center of Concern
Peter Chowla, Economic Affairs Officer, Financing for Development, UN
Evelyn Deng, Director of Infrastructure Practice, 32 Advisors
John Fullerton, President, Capital Institute
Cesar Gamboa, Executive Director of Derecho, Ambiente y Recursos Naturales (DAR)
James Guidera, Adjunct Professor of International Affairs, Columbia Univ; Group Head, North America, Energy & Infrastructure Group, Credit Agricole
Carol Jeppesen, Principles for Responsible Investment
Maria Koulouris, 11th Hour Project, Schmidt Family Foundation
Gayatri Kumar, Compliance Advisor Ombudsman, IFC
Rob Lake, Independent Responsible Investment Advisor
Michael Likosky, Principal, Infrastructure, 32 Advisors
Jael Makagon, Head, Sustainable Finance Program, Natural Justice
Kindra Mohr, Accountability Counsel
Joel Moser, CEO, AQM Capital; Adjunct Prof of International Affairs, Columbia Univ
Maree Newson, Compliance Advisor Ombudsman, IFC
Luis Rodriguez Pinero, OHCHR
Matthieu Rousson, Director, Energy & Infrastructure in Latin America, Credit Agricole
Katarina Pistor, Michael L. Sovern Professor of Law, Columbia Law School
Jeffrey Potent, Adjunct Professor of International Affairs, Columbia University
David Pred, Inclusive Development International
Mzukisi Qobo, Associate Professor, University of Johannesburg
Jenik Radon, Adjunct Professor of International Affairs, Columbia University
Ryan Schlief, International Accountability Project

Liane Schalatek, Associate Director, Heinrich Boell Foundation
Graham Sinclair, Sustainable Investment Consulting
Elsa Stamatopoulou, Director, Indigenous Peoples Rights Program, Columbia Univ
Sophie Thomashausen, Columbia Center for Sustainable Investment, Columbia Univ

Business and Human Rights Clinic Attendees
Xin Yi Cheow, School of International and Public Affairs
Anatole Douaud, School of International and Public Affairs
Haoran Luan, Columbia Law School, LLM
Ishita Petkar, Human Rights Studies Masters
Satbir Singh, School of International and Public Affairs
Allison Walker, School of International and Public Affairs
Ginger Whitesell, School of International and Public Affairs

Appendix C: Overview of Existing Work (Revised)

The following is a compilation of official initiatives aimed at improving the human rights accountability of development finance. It is intended to serve as a common knowledge base for identifying non-official (e.g. civil society or academic) advocacy and research needs. A draft list was presented at Session 2. This list is revised to reflect the input from workshop participants during that session.

World Bank: Ongoing review of environmental and social safeguards for project lending.
International Finance Corporation (IFC): Action Plan in Response to Compliance Advisory Ombudsman (CAO) Compliance Audit of IFC's Financial Sector Investments ("financial intermediaries")
Asian Development Bank: Upcoming review of its safeguards.
Asian Infrastructure Investment Bank: Developing an oversight mechanism for its recently-adopted Environmental and Social Framework.
New Development Bank: Process to develop its own (upstream) safeguards.
Inter-American Development Bank: Efforts to adapt its pre-existing accountability mechanism – MICI – to address extension of mandate to Inter-American Investment Corporation (private sector arm).
Export-Import Bank of the United States (EXIM): Process to develop an accountability mechanism.
European Investment Bank: Review of its Independent Accountability Mechanism
DFIs of Netherlands and Germany: Review of their shared Independent Accountability Mechanism
OECD Guidelines: Responsible Business Conduct Institutional Investors project providing guidance on implementation of the OECD MNE Guidelines in regards to the financial sector.
UN Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights: Elaborating a binding treaty on the subject.
UNCTAD: Work program on investment with respect to implementing the Investment Policy Framework for Sustainable Development. This initiative aggregates a number of approaches to crafting national investment policy and investment treaties to support sustainable development.
UNCTAD: Development of a model law on public-private partnerships.

Principles on Responsible Investment (UNPRI) and United Nations Environment Programme (UNEP) Finance Initiative: Effort to integrate sustainability into the concept of investors' fiduciary duty.
Green Climate Fund: process of creating safeguards and establishing accountability units.
UN Principles for Responsible Investment (PRI): ongoing work on ESG issues in infrastructure and private equity.
Sustainable Stock Exchanges Initiative: Encouraging transparency and performance of publicly listed companies on Environmental Social and Governance issues
OECD Common Approaches for Officially Supported Export Credit Agencies: Establishing human rights due diligence standards and grievance mechanisms compatible with the UN Guiding Principles on Business and Human Rights.
Initiative for the Integration of the Regional Infrastructure of South America (IIRSA): Establishing a forum for civil society engagement
UN Economic Commission for Europe: Process setting international standards for public-private partnerships (PPPs)
Local regulations allowing institutional investors to take into account ESG factors: for example, in South Africa Regulation 28
Financing for Development and Addis Ababa Action Agenda: UN Department of Economic and Social Affairs

- o Taking stock of work to establish a new infrastructure forum [para. 14]
- o Follow up to "Protecting labour rights and environmental and health standards in accordance with relevant international standards and agreements, such as the Guiding Principles on Business and Human Rights and the labour standards of ILO, the Convention on the Rights of the Child and key multilateral environmental agreements, for parties to these agreements […]We will promote sustainable corporate practices, including integrating environmental, social and governance factors into company reporting as appropriate, with countries deciding on the appropriate balance of voluntary and mandatory rules." [para. 37]
- o Ensuring that policy and regulatory environment supports financial market stability and promotes financial inclusion in a balanced manner and with appropriate consumer protection. . .." "Endeavoring to "design policies, including capital market regulations where appropriate, that promote incentives along the investment chain that are aligned with long-term performance and sustainability indicators and that reduce excess volatility." [para. 38]
- o Taking stock of "regulatory gaps and misaligned incentives" [para. 105] in the international financial system and accelerating progress in reducing specified systemic risks [para. 109]

- New development banks to “develop safeguard systems in open consultation with stakeholders on the basis of established international standards,” and encouragement to all development banks to “establish or maintain social and environmental safeguards systems, including on human rights, gender equality and women’s empowerment, that are transparent, effective, efficient and time-sensitive.” [para. 75]