

# Accountability in Development Aid Law: The World Bank, UNDP and Emerging Structures of Transnational Oversight

By Philipp Dann, Washington/Heidelberg \*

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## Introduction

This paper analyzes accountability mechanisms in development aid law. It defines development aid law as the legal regime regulating the transfer of official development assistance. The paper focuses on the rules and regulations of two multilateral global donor institutions, the World Bank<sup>1</sup> and the United Nations Development Program (UNDP). It also examines the transnational mechanisms of accountability governing the recipients of aid, since the transfer of aid involves not only a donor but also a recipient.

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<sup>0</sup> Dr. iur., LL.M., currently Visiting Researcher at Georgetown University Law Center, Washington DC. – An earlier version of this paper has been presented at the 2<sup>nd</sup> Global Administrative Law Seminar in Viterbo, Italy in June 2006. I am grateful to comments from participants of the seminar, especially Francesca Bignami and Richard Stewart. I also thank Jürgen Bast, Matthias Goldmann, Leonie Guder, Martin Serrano and Rudy Van Puymbroek for comments on an earlier draft.

<sup>1</sup> The World Bank is comprised of five separate but related institutions: the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Cooperation (IFC), Multilateral Investment Guarantee Agency (MIGA) and the International Center for Settlement of Investment Disputes (ICSID) (see A Guide to the World Bank, 2003, pp. 10). This article refers to the first two, IBRD and IDA, both of which support public sector projects.

The paper will argue that there is a (perhaps surprising) plenitude of accountability mechanisms that go far beyond the conventional mechanisms of supervisory control by member states. The paper will describe these mechanisms which involve several actors, standards and types of sanctions, but it will also ask whether they add up to a coherent system, give voice and access to the relevant constituencies and thus achieve a satisfactory standard of accountability. Or to put it into a little picture: the question is whether the trees form a sheltering forest, maybe even an eye-pleasing Tuscan avenue, or whether they are only some crooked, ineffective wind breakers on a wide and sandy Prussian plain.

The paper will proceed in three steps: It will start by clarifying the concepts of ‘development aid law’ and ‘accountability’ and by sketching out briefly the context that shapes the system of accountability and the interests that are involved (Part I.). It will then turn to the actual analysis of accountability mechanisms regarding donors (Part II.) and regarding recipients (Part III.). In a third step, the findings will be summed up and assessed (Part IV.).

## **I. Concepts, Contexts and Interests**

### **1. Development Aid Law**

‘Development aid law’ as it is called here, is far from being an established field of law. The term and the underlying concept are rather a proposal. It suggests carving out an area of law which is coherent enough to be analyzed as a distinct field of law and offers an especially interesting reference point for the discussion on global administrative law.<sup>2</sup> What does the term encompass?

Development aid law is the law regulating the transfer and use of development aid. It covers the instruments, procedures and standards according to which development aid is transferred and used. It refers to the category of ‘Official Development Assistance’ (ODA) that was established by the OECD and is generally used to determine which public spending is recognized as development aid.<sup>3</sup> The category of ODA helps to define the relevant institutions in this field of law (public donors and recipients), its object (development assistance<sup>4</sup>) and its instruments (grants/loans). It also helps to determine, what is not part of development aid law: trade law, financial regulations law or other legal regimes that might be of relevance for development, but do not directly determine the process of transferring ODA.

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<sup>2</sup> Kingsbury / Krisch / Stewart, *The Emergence of Global Administrative Law*, *Law and Contemporary Problems* Vol. 68, Nos. 3&4 (2005), pp. 15 and the other contributions in that issue; also Alvarez, *International Organizations as Law-makers*, 2005, pp. 244-257.

<sup>3</sup> See the OECD’s webpage at <http://www.oecd.org/dac/stats/> , also the explanation sheet of German’s Federal Ministry for Economic Cooperation and Development [http://www.bmz.de/de/zahlen/imDetail/0-1\\_Leitfaden\\_Was\\_ist\\_ODA.pdf](http://www.bmz.de/de/zahlen/imDetail/0-1_Leitfaden_Was_ist_ODA.pdf).

All of the web addresses cited in this paper were last visited in May 2006.

<sup>4</sup> This excludes e.g. military aid or private direct investments, see *ibid*.

A progenitor of development aid law is the ‘international development law’ and the ‘law and development’ approach in general.<sup>5</sup> Scholars of this approach, which was first formulated in the 1960s, demand special attention to the position of developing countries in public international law, especially international economic law. Development *aid* law, as proposed here, however, has a slightly different focus. It is in its core institutional law, since it regulates the procedures and standards of public institutions transferring public money. These can be national, regional or global institutions, such as the USAID, the EU or the World Bank. Development aid law hence exists on different levels of government, national, regional and global, which allows for systematic and comparative analysis. This paper, however, will focus on the global level of development aid law. The internal law of global development aid institutions has hardly been analyzed so far. There is literally no legal literature on UNDP<sup>6</sup>, while attention to the World Bank has focused on specific aspects, most notably its (non-)commitment to human rights<sup>7</sup>, while the analysis of its internal rules and procedures has come mostly from present or former staff of the World Bank.<sup>8</sup>

## 2. *Accountability*

The concept of accountability is more difficult to describe, for two reasons. First of all, accountability is a fairly elusive term for it is not anchored in any conventional legal concept. Even in the English-speaking world, accountability (in contrast, for example, to responsibility) is not a fixed concept, not of domestic administrative law, but neither of public international law.<sup>9</sup> It is thus also unclear, whether and how it could be part of a global administrative law.<sup>10</sup> Perhaps not surprisingly, political scientists seem therefore more comfortable with the term.<sup>11</sup>

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<sup>5</sup> Bradlow, *Differing Conceptions of Development and the Content of International Development Law*, in: *South African Journal of Human Rights* 21 (2005), pp. 47; Feuer/Cassan, *Droit International du Développement*, 1991; Carty (ed.), *Law and development*, 1992.

<sup>6</sup> Political scientists seem more attentive, see Hampe, *Das Entwicklungsprogramm der Vereinten Nationen (UNDP)*, 1998; older but invaluable Wiegand, *Organisatorische Aspekte der internationalen Verwaltung von Entwicklungshilfe*, 1978.

<sup>7</sup> Clark, *The World Bank and Human Rights*, *Harvard Human Rights Journal* Vol. 15 (2002), pp. 205; Bradlow, *The World Bank, the IMF, and Human Rights*, *Transnational Law and Contemporary Problems* Vol. 6 (1996), pp. 47; see also, Killinger, *The World Bank’s non-political mandate*, 2003.

<sup>8</sup> See Shihata, *The World Bank in a Changing World*, 1991; Rigo Sureda, *The Law Applicable to the Activities of International Development Banks*, *Recueil des Cours*, Vol. 308 (2004); Schlemmer-Schulte, *Die Rolle der internationalen Finanzinstitutionen*, in: Bothe (ed.), *Das Internationale Recht im Nord-Süd-Konflikt*, 2005, pp. 149; but see also on the World Bank, Wiegand, *Fn. Errore: sorgente del riferimento non trovata*.

<sup>9</sup> For an analysis of the domestic usage, see Mulgan, ‘Accountability’: An Ever-expanding concept?, *Public Administration* 78 (2000), p. 555; for an attempt to clarify the notion in the vocabulary of public international law, see *Final Report of the International Law Association Committee on the Accountability of International Organisations* (Berlin Conference 2004).

<sup>10</sup> Harlow, *Global Administrative Law: The Quest for Principles and Values*, *EJIL* 17 (2006), pp. 187.

<sup>11</sup> See Grant / Keohane, *Accountability and Abuses of Power in World Politics*, *American Political Science Review* 99 (2005), p. 29 and references therein.

Even so, one might decide to just employ the term but use it rather restrictively in the sense of a more rule of law based understanding of administrative control and oversight. Then, however, one faces a second difficulty, as one has to acknowledge that our understanding of the concept of domestic administrative control is profoundly changing. The traditional concept of administrative control, based primarily on judicial review, grasps only a very limited aspect of what administrations do.<sup>12</sup> Instead, more cooperative and dynamic forms than ex-post control and more actors than courts have come to be analyzed.<sup>13</sup> But then again, this broadened horizon also facilitates the transfer of domestic administrative law concepts to the global sphere<sup>14</sup>, since it eases the fixation on courts as dominant means of accountability. In a way, the vagueness and blur might even be the actual allure of the term ‘accountability’. Precisely its imprecision makes it attractive as a ‘buckle-notion’ between domestic and international law, and between law and other disciplines.

Nevertheless, the concept of accountability can be clarified and made more workable, especially with a rather restrictive approach to it. On a basic level, accountability means “to have to answer for one’s action or inaction, and depending on the answer, to be exposed to potential sanctions”.<sup>15</sup> Starting from that point, accountability for the use in this paper shall contain three elements, which will be used as heuristic tools to identify relevant mechanisms and as path-marker for the analysis of the described mechanisms. What are these elements?

First, accountability involves a certain *distance* between the power wielder and those, who hold him accountable (the accountability holder, as Grant and Keohane put it<sup>16</sup>). Self-control thus does not qualify. Second, accountability is based on the possibility of a *sanction*. This does not have to be a formal fine; public outcry can be quite an effective sanction too. But accountability has an amendatory character, based on the effect of sanctions. And, thirdly, accountability in principle presupposes the existence of certain fixed and legitimate *standards* of review. There are certainly exceptions to this third element; the vote in an election, for example, is an accountability mechanism but it is not based on a general standard. However, it seems expedient to focus the notion of accountability and not include any influence on a decision-making process. This would make it indistinguishable from participation. A certain element of transgression and retrospective review however appears necessary to recognize a mechanism as accountability mechanism.

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<sup>12</sup> Seminal: Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee*, 2nd ed., 2004, pp. 229.

<sup>13</sup> See the contributions in Hoffmann-Riem / Schmidt-Aßmann (eds.), *Verwaltungskontrolle*, 2001; also Drewry / Oliver, *Public Service Reforms*, 1996.

<sup>14</sup> On such transfers, see Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, *Law and Contemporary Problems* 2005, pp. 63, 76; Sarooshi, *The Essentially Contested Nature of the Concept of Sovereignty*, *Michigan Journal of International Law* 25 (2003), pp. 1121.

<sup>15</sup> Oakerson, *Governance Structures for Enhancing Accountability and Responsiveness*, in: Perry (ed.), *Handbook of Public Administration*, 1989, p. 114.

<sup>16</sup> Grant / Keohane, *Fn. Errore: sorgente del riferimento non trovata*, p. 36.

On the basis of these elements, the paper will examine different types of accountability mechanisms. To that end, it will rely on those types that have been outlined by Ruth Grant and Robert Keohane.<sup>17</sup> Their seven types include mechanisms of hierarchical, supervisory, fiscal, legal and peer accountability, which will play major roles in this paper. Moreover, it should be pointed out that a *legal* analysis of accountability mechanisms in international organizations must be based on a broad notion of law.<sup>18</sup> At least for a first survey, the horizon should be kept wide. It should not be limited to the formal law of treaties or conventions, but should also take into account secondary rules promulgated by the international organizations themselves.<sup>19</sup>

### 3. *Context and Interests*

Finally, we should briefly consider the non-legal context of development aid law.<sup>20</sup> Certain characteristics of the development aid system seem especially important to understand the logic that underlies the accountability mechanisms in this field of law. First, development aid is about transferring money. This might be obvious to an economist, but should also shape legal analysis of development aid. In contrast to other areas of public international and global administrative law, which have a more regulatory character and thus govern social behavior through legal norms alone, development aid law deals with the transfer of money and thus directs social behavior through financial incentives.<sup>21</sup> It is, in a sense, a global law of state aid or subsidies. Secondly, development aid is about a long-term goal pursued in hundreds of short-term projects. Development aid projects are financed to further economic growth and sustainable development in the developing countries. Development aid law thus deals with the standards and procedures of a constantly repeated exercise in planning and implementation.

And finally, development aid is about power and interests. The donor organizations are often dominated by high-income countries, whereas recipients are the governments of mostly low-income countries.<sup>22</sup> These are almost always in dire need of the ODA. Behind

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<sup>17</sup> Grant / Keohane, Fn. Errore: sorgente del riferimento non trovata, pp. 36/37.

<sup>18</sup> On broader concepts of international law and legalization, see also Chinkin, Normative Developments in the International Legal System, in: Shelton (ed.), *Commitment and Compliance*, 2000, pp. 33; Abbott et al., *The Concept of Legalization*, International Organization 54 (2000), pp. 401.

<sup>19</sup> Alvarez, Fn. Errore: sorgente del riferimento non trovata, pp. 109, 184; see also contributions in Wolfrum / Röben (eds.), *Development of International Law in Treaty-Making*, 2005.

<sup>20</sup> There is (surprisingly) little thinking on the development aid system in general. The two most important recent books about development hardly mention the aid system (Sachs, *The End of Poverty*, 2005; Sen, *Development as Freedom*, 1999); however, a fascinating intellectual account provides Menzel, *Das Ende der Dritten Welt*, 1992; for a passionate attack on aid bureaucracies, see Easterly, *The Cartel of Good Intentions: Bureaucracy versus markets in foreign aid*, Center for Global Development, Working Paper 4/2002, and more recently, Easterly, *The White Man's Burden*, 2006.

<sup>21</sup> Spending volume at the World Bank (IBRD/IDA) in 2004 was about 19 billion USD; the one of UNDP is by far smaller but still transferred around 2 billion USD in projects world wide.

<sup>22</sup> On the representational structure in UNDP, Hampe, Fn. Errore: sorgente del riferimento non trovata, pp. 41; in the World Bank, Woods, *Making IMF and World Bank More Accountable*, International Affairs 2001, pp. 85/86; on representation in development institutions generally, Wiegand, Fn. Errore: sorgente del

the governments of donating and recipient countries also stand powerful economic interests.<sup>23</sup> Yet more interests and more potential accountability holders are to be taken into account. While direct recipients of development aid are governments, actually affected by development projects are the people living in the area in which a project is conducted. Their interests can be distinct from those of their governments and vary among themselves. There are also the taxpayers in the donating high-income countries, which have a particular interest in holding their governments accountable for the use of considerable amounts of public funds.<sup>24</sup> One might also consider yet another constituency which has been termed global civil society or cosmopolitan public.<sup>25</sup> Here, interested groups and actors are not aligned along geographical (national or regional) lines but along border-crossing interests and issues. Actors of such a (fragmentary) global public can articulate general demands of access, respect to human rights or lend its voice to the causes of specifically affected people.

Development aid law is one medium in which these interests are dealt with. It can be an instrument of the powerful to further their interests, but it could also be, in a more benign perspective, a means to balance the imbalance of power and provide access for diverse and less powerful interests. This would start with holding the donors accountable. How does it work?

## II. Accountability of Donors

Accountability of donor institutions, i.e. here the World Bank and UNDP, can be achieved through a number of mechanisms.<sup>26</sup> The following analysis will start with the more traditional instruments of supervisory and legal accountability. The further analysis will then concentrate on mechanisms that are less known but correspond perhaps more directly to the characteristics of development aid. It will focus on mechanisms of fiscal, hierarchical and peer accountability. These mechanisms are to some extent results of two general trends that have shaped the development aid system since some 10 years. One is the growing awareness about the extent and effects of corruption,<sup>27</sup> the other the slowly

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riferimento non trovata, pp. 368-371.

<sup>23</sup> United Kingdom, *Eliminating World Poverty*, White Paper on International Development, 2000, para. 284, 320-323.

<sup>24</sup> On the financial resources of UNDP, see Hampe, *Fn. Errore: sorgente del riferimento non trovata*, pp. 32, UNDP Annual Report 2006, p. 34; on those of IBRD and IDA, see Wiegand, *Fn. Errore: sorgente del riferimento non trovata*, pp. 216, and the IDA 14<sup>th</sup> Replenishment Report.

<sup>25</sup> Keane, *Global Civil Society?*, 2003; Held, *Democracy and the Global Order*, 1995; more cautious Grant / Keohane, *Fn. Errore: sorgente del riferimento non trovata*, pp. 33/34.

<sup>26</sup> For an overview of rather doctrinal control mechanisms, Klabbbers, *Constitutionalism Lite*, *International Organizations Law Review* 1 (2004), pp. 37-45.

<sup>27</sup> Mallaby, *The World's Banker*, 2004, pp. 174; Abed / Gupta (eds.), *Governance, Corruption, and Economic Performance*, 2002; Williams / Theobald (eds.), *Corruption in the developing world*, 2000.

accepted view that it is more important to assess development aid by its outcomes than by the amounts of money invested.<sup>28</sup>

### 1. *Supervisory and Legal Accountability*

At a first glance, the World Bank and UNDP are subject to those supervisory mechanisms of accountability by which the member states typically hedge and influence the actions of international organizations.<sup>29</sup> For example, member states hold sway over the appointment and dismissal of the heads of both organizations. In the World Bank, it is the Board of Executive Directors, the representation of member states in the Bank, which appoints the Bank's president.<sup>30</sup> In UNDP, the administrator is appointed by the UN Secretary General (after consultation with member states) and confirmed by the General Assembly.<sup>31</sup> Through their representations, member states can also control policies and concrete decisions of both organizations. The Board of Executive Directors of the World Bank, which meets twice per week, is responsible for deciding about the general policies guiding the Bank's operations as well as for the approval of all loans and of the annual administrative budget.<sup>32</sup> In UNDP, the Executive Council has the overall responsibility for UNDP operations and the effective use of funds, while the administrator is himself directly responsible to the Council.<sup>33</sup> However, the existence of these instruments does not necessarily mean that they are used or used equally by all member states. In fact, the lack of effective member state oversight or the circumvention of formalized mechanisms has been stated as a main problem and reason for the perception of a lack of accountability.<sup>34</sup> Moreover, high-income states and especially the US exert a much stronger influence and hold organizations almost unilaterally accountable, for example, by determining who is president of the World Bank.

To a lesser but certainly growing degree donor institutions are also held accountable by the general public. Both, the World Bank and UNDP have publicized or introduced disclosure

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<sup>28</sup> Paris Declaration on Aid Effectiveness, 2 March 2005, para. 43-46 ( [www.oecd.org/dataoecd/11/41/34428351.pdf](http://www.oecd.org/dataoecd/11/41/34428351.pdf) ) and the accompanying report, esp. pp. 49-53; critically Easterly, Cartel of Good Intentions, Fn. Errore: sorgente del riferimento non trovata, pp. 21.

<sup>29</sup> On the notion of supervisory accountability, see Grant / Keohane, Fn. Errore: sorgente del riferimento non trovata, pp. 36. On the delicate relationship between member states and international organizations generally, Blokker, International Organizations and their Members, International Organizations Law Review 1 (2004), pp. 140-152;

<sup>30</sup> Art. V Sec. 5 Articles of Agreement IBRD. This is, of course, only the formal side. Informally and based on a compromise between the US and Western European countries, the Bank president is always chosen by the US administration whereas the Europeans determine who heads the IMF, see Woods, Fn. Errore: sorgente del riferimento non trovata, p. 88; Mallaby, Fn. Errore: sorgente del riferimento non trovata, pp. 42.

<sup>31</sup> Hampe, Fn. Errore: sorgente del riferimento non trovata, p. 49.

<sup>32</sup> See Art. V Sec. 4a Articles of Agreement IBRD; also Wiegand, Fn. Errore: sorgente del riferimento non trovata, pp. 285.

<sup>33</sup> See GA Resolution 2688 (XXV), Art. V, VII Annex.

<sup>34</sup> See Woods, Fn. Errore: sorgente del riferimento non trovata, pp. 84-90.

policies. These provide clear rules for the access to documents as well as complaint mechanisms in case of denial.<sup>35</sup>

Legal accountability is a rather delicate issue. The option for recipient governments to sue donors exists mostly in theory. Although every legal agreement between recipient government and donor contains clauses on arbitration, these clauses have never (sic!) been invoked.<sup>36</sup> The World Bank and UNDP, moreover, have mostly succeeded in shielding themselves against legal action in domestic courts by reference to their privileges and immunities.<sup>37</sup> However, in an unprecedented step the World Bank in 1993 established an institution of legal review, the Inspection Panel.<sup>38</sup> The Panel has the task of scrutinizing whether the Bank adheres to its operational policies and procedures in the design, preparation and implementation of projects. The three-member Panel of external experts is separated from the Bank's management in that it does not report to the Bank's President but to the Executive Board and that its staff is separated from the Bank's staff. More importantly, the Panel is open not only to the complaints of states (through their representatives in the Bank) but also to the complaints of affected individuals. This makes it a unique institution. However, the Panel is not an independent tribunal. The influence of the member states is immense, while the influence of (private) parties in its proceedings is weak. Besides, its sanctions against the Bank are mild and do not include compensation for illegally damaged parties.

## **2. Fiscal Accountability**

Development aid is about money. Public money is used to finance projects, intended to support economic growth and development in developing countries. Despite good intentions, the susceptibility of donors to corruption, fraud and simple waste is immense.<sup>39</sup> The system of financial control is therefore especially important. It involves a range of mechanisms and employs a number of actors: audits are performed by external experts (a), internal investigators are charged with the investigation of fraud and corruption (b), and whistleblowers are asked to report misconduct (c).

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<sup>35</sup> World Bank, Policy on Disclosure of Information, at [www.worldbank.org/disclosure](http://www.worldbank.org/disclosure) ; for the UNDP policy, see [www.undp.org/idp/](http://www.undp.org/idp/); for a critical assessment Bernasconi-Osterwalder / Hunter, Democratizing Multilateral Development Banks, in: Environmental Law Institute (ed.), *New Public*, pp. 152-156, also available at [http://www.ciel.org/Publications/Democratizing\\_MDBs\\_NewPublic.pdf](http://www.ciel.org/Publications/Democratizing_MDBs_NewPublic.pdf) ; also Woods, Fn. Errore: sorgente del riferimento non trovata, pp. 90/91.

<sup>36</sup> See for example the General Conditions for IDA legal agreements, Sec. 7.03 (at: <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/EXTTOPGENCON/0,,menuPK:1581351~pagePK:64168427~piPK:64168435~theSitePK:1581337,00.html> ).

<sup>37</sup> See Art. VII World Bank Articles of Agreement.

<sup>38</sup> There is plenty of literature on the Panel, see Orakhelashvili, *The World Bank Inspection Panel in Context*, *International Organizations Law Review* 2 (2005), pp. 57; Alfredson / Ring (eds.), *The Inspection Panel of the World Bank*, 2001; for an internal perspective, see World Bank, *Accountability at the World Bank: The Inspection Panel 10 years on*, 2003.

<sup>39</sup> US News and World Report, <http://www.usnews.com/usnews/biztech/articles/060403/3worldbank.htm>.



a) Auditing as an instrument of fiscal accountability is well-known in domestic systems and also in the law of IOs.<sup>40</sup> The audit of the financial statement of the World Bank is proscribed by Art. V, Sec. 13 of the Articles of Agreement.<sup>41</sup> It is performed by an external private company, which is chosen by the Audit Committee of the Board of Executive Directors.<sup>42</sup> Similarly for UNPD, Regulation 4.01 of the UNDP Financial Regulation and Rules (FRR) in conjunction with Art. VII of UN FRR proscribes an annual audit of UNDP's financial statement.<sup>43</sup> This audit is performed by the UN Board of Auditors. Audits in both cases are performed according to the auditing standards generally accepted in the United States and International Standards of Accounting. These involve compliance with the respective laws of sound management. The sanctions at hand, however, are mild: the audit reports are published and reaction is thus left to a vigilant public.<sup>44</sup>

b) Audits serve the financial credibility of these institutions, which are, last but not least, dependent on the trust of donating member states or financial markets. If audits are hence indispensable, they are also toothless. To battle the persistent problem of fraud and corruption, both donor institutions have established new institutional and legal means for more proactive efforts, echoing European actions when the EU established OLAF.<sup>45</sup>

In 2001, the World Bank created the Department of Institutional Integrity (INT), basically a prosecutor's office within the Bank.<sup>46</sup> This unit has the mandate to investigate allegations of fraud and corruption in World Bank projects and of misconduct of staff within the World Bank.<sup>47</sup> It has unrestricted access to Bank records, documents and properties, is institutionally separated from regular staff and reports directly to the President. Its mandate as well as definitions of fraud and corruption are laid out in its Terms of References (ToR)<sup>48</sup> and in Section 1 a (3) and 3 of the Sanctions Committee Procedures, which were approved by Senior Management and endorsed by the Board of Executive Directors in July 2004.<sup>49</sup> If allegations prove substantiated, sanctions can involve the termination of contract with the Bank and a debarment from re-hiring, or disciplinary actions.<sup>50</sup> The INT has today

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<sup>40</sup> Schermers / Blokker, *International Institutional Law*, 4<sup>th</sup> ed., 2003, § 1125.

<sup>41</sup> I.e. the founding document of the World Bank.

<sup>42</sup> See <http://siteresources.worldbank.org/INTANNREP2K5/Resources/AR05-FS001IBRD.pdf> for the Audit Report for FY 2004/5 and further information.

<sup>43</sup> The Financial Regulations are adopted by the Executive Board of UNDP and can be found at [www.undp.org/execbrd/pdf/UNDPFinRegsRules.pdf](http://www.undp.org/execbrd/pdf/UNDPFinRegsRules.pdf).

<sup>44</sup> Even this can be ineffective though. The Court of Auditors in the EU for years did not approve of the financial statement of the EU, but with no effect.

<sup>45</sup> On such efforts in international organizations generally, De Cooker, *Ethics and Accountability in International Civil Service*, in: De Cooker (ed.), *Accountability, Investigation and Due Process in International Organizations*, 2005, pp. 42-49; on the European Anti-Fraud Office (Office Européen de Lutte Anti-Fraud / OLAF) see Commission's Decision of 28 April 1999 to establish OLAF (OJ 1999, L136).

<sup>46</sup> See [www.worldbank.org/integrity](http://www.worldbank.org/integrity).

<sup>47</sup> It also investigates external cases, see *infra* Part III.1.

<sup>48</sup> See <http://siteresources.worldbank.org/INTDOII/Resources/Integritytermsofreference.doc>.

<sup>49</sup> See <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:50002288~pagePK:84271~piPK:84287~theSitePK:84266,00.html>.

<sup>50</sup> On the rights of the staff in such investigations, see Dean, *Due Process: The Rights of World Bank Staff in Misconduct Investigations*, in: De Cooker (ed.), *Fn. Errore: sorgente del riferimento non trovata*, pp. 97.

a staff of 55 professionals. According to its Annual Report, it investigated 125 cases in 2003 and 151 in 2004.<sup>51</sup>

In 2004, UNDP also created a special unit charged with the investigation of fraud and corruption, the Investigation Section of the Office of Assessment and Performance Review (OAPR).<sup>52</sup> The OAPR generally has the task to organize and perform internal audits, Art. 3 of the Financial Regulations and Rules of UNDP. The Investigation Section reports to the Office of Audit and Legal Support, which is responsible for issuing sanctions. The legal regime of its investigative task doesn't seem to be clearly spelled out. A recent report mentions that a Fraud Policy Statement and a Fraud Prevention Strategy are in preparation.<sup>53</sup> Such a Policy Statement, drafted by the OAPR itself could provide a general legal regime concerning fraud in UNDP projects. But the preparation of this policy has been reported since years now and has not materialized. Despite its small number (it has mere four professionals) it investigated 25 cases in 2004, which resulted in five summary dismissals and one letter of reprimand for the concerned UNDP staff members.

c) Both institutions also adapted the concept of 'whistle-blowing', which has been known in private business and national labor law for quite some time.<sup>54</sup> It is in itself not an accountability mechanism, but contributes to the accountability of institutions.<sup>55</sup> Both institutions appeal to individuals within and outside the institution to report any suspicious behavior and to that end provide open and potentially anonymous channels and protection. The World Bank provides a secret channel (telephone hotline, email submission formula and postal address) and advises on how to report.<sup>56</sup> Its Staff Rule 8.01 prohibits any retaliation against informants. UNDP also offers a complaint hotline and postal address.<sup>57</sup> The accompanying policy statement ensures the confidentiality of name and informant, and forbids any form of retaliation. The information received will be investigated by OAPR, according to this statement.

### 3. *Hierarchical Accountability*

Hierarchical accountability refers to relationships within an organization and to mechanisms, by which superiors supervise and evaluate the performance of subordinates and can react, be it by removing an employee, constraining or changing his tasks or adjusting her payment.<sup>58</sup> Within the World Bank and UNDP, it is especially the instrument

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<sup>51</sup> See <http://siteresources.worldbank.org/INTDOII/Resources/INTFY04AnnualReport2005.pdf> .

<sup>52</sup> See Internal Audit and Oversight – Report of the Administrator, DP/2005/26, p. 17/18.

<sup>53</sup> *Ibid.*

<sup>54</sup> See De Cooker, *Fn. Errore: sorgente del riferimento non trovata*, pp. 39-42; Alford, *Whistleblower*, 2001.

<sup>55</sup> Whistleblowing has been described as appealing to the 'active responsibility' of individuals, see Bovens, *The Quest for Responsibility*, 1998, pp. 190.

<sup>56</sup> See FAQ section on webpage ([www.worldbank.org/integrity/](http://www.worldbank.org/integrity/)).

<sup>57</sup> See [http://www.undp.org/hotline/complaint\\_form.shtml](http://www.undp.org/hotline/complaint_form.shtml) .

<sup>58</sup> Grant / Keohane, *Fn. Errore: sorgente del riferimento non trovata*, p. 36.

of evaluations, which is a central tool to organize this kind of accountability. Both organizations have established internal but fairly independent evaluation units.<sup>59</sup>

The World Bank's Independent Evaluation Group (IEG), established under President McNamara in the early 1970s<sup>60</sup>, is headed by a Director-General, who is appointed by the Board of Executive Directors. It is organizationally independent from the Bank's other departments and reports directly to the Board.<sup>61</sup> The IEG rates the efficacy and efficiency of World Bank's operational programs. It has developed a set of tools to review projects, country programs, to perform sector or thematic reviews or undertake impact evaluations. These reviews rate performance according to a set of four criteria: outcome, sustainability, institutional impact, Bank and Borrower performance. The concrete standards applied are derived from the objectives, which the Bank and projects set for themselves.<sup>62</sup>

The equivalent unit in UNDP is called the Evaluation Office. This unit too is institutionally independent from UNDP's regular staff and its Director reports to the Executive Board, through the Administrator, i.e. the 'President' of UNDP. In comparison to the World Bank's IEG, however, it is much smaller; it has 11 professionals.<sup>63</sup> Recently, the Executive Board adopted a comprehensive UNDP Evaluation Policy which codifies the existing policies and outlines principles and norms, roles and responsibilities as well as types of evaluations.<sup>64</sup>

Sanctions in the evaluation system have different, although rather mild forms. For one, the units report their findings to the Senior Management of World Bank and UNDP as well as to the representation of Member States. At the same time, most of these reports are made public.<sup>65</sup> The most important point, however, is that management has to respond to the report. Form and content of such response, however, seem hardly regulated.<sup>66</sup>

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<sup>59</sup> Evaluations are also performed by the Project Teams. Since these evaluations lack the element of distance, we will not analyze them. But see for the World Bank's Operational Policy (OP) 13.55, and Operational Directive (OD) 10.70 (to be found at <http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/05TOCpages/Operational%20Manual>); for UNDP see, Ch. 7 of Programming Manual, at <http://stone.undp.org/undpweb/eo/evalnet/docstore3/yellowbook/documents/FrameWORKfinal.pdf>. On the status of these internal rules of the World Bank, see Alvarez, Fn. Errore: sorgente del riferimento non trovata, pp. 235; Kingsbury, Operational Policies of International Institutions as Part of the Law-Making Process, in: Goodwin-Gill / Talmon (eds.), The Reality of International Law, 1999, pp. 323.

<sup>60</sup> Until 2002, the office was called Operations Evaluations Department (OED), on its history see Grasso et al. (eds.), The World Bank's Operations Evaluations Department: The first 30 years, 2003.

<sup>61</sup> See generally <http://www.worldbank.org/ieg/about.html>; for its Mandate and Terms of Reference, see [http://www.worldbank.org/ieg/dgo\\_mandate.html](http://www.worldbank.org/ieg/dgo_mandate.html).

<sup>62</sup> See [http://www.worldbank.org/ieg/oed\\_approach\\_summary.html](http://www.worldbank.org/ieg/oed_approach_summary.html).

<sup>63</sup> General information on the EO in the 'Annual Report of the Administrator on evaluation 2004', DP/2005/25; see also the OECD-DAC Peer Review Report, at <http://www.undp.org/eo/>.

<sup>64</sup> See UNDP DP 2005/28 of 23 June 2006; see also further policies at <http://www.undp.org/eo/policy.htm>.

<sup>65</sup> All UNDP evaluations are public documents; for the World Bank, see World Bank, Disclosure Policy (Fn. Errore: sorgente del riferimento non trovata), para. 48-50.

<sup>66</sup> I am grateful to David Rider Smith of UNDP for clarifications on these points.

#### 4. Peer Accountability

The distance between the controlled and the controller is necessarily bigger, if the evaluation is conducted by an external actor. This is the case when donors evaluate each other and thus apply the basic idea of a peer review.<sup>67</sup>

Peer reviews of multilateral aid organizations are a recent phenomenon. The OECD Development Assistance Committee (DAC) traditionally conducted only reviews vis-à-vis members (i.e. states). In the newly founded Network on Development Evaluation multilateral aid organizations such as the World Bank and UNDP have observer status and have come to be reviewed as well.<sup>68</sup> New too is the review by bilateral donors or networks thereof. One example is the Multilateral Organization Performance Assessment Network (MOPAN), formed by seven donor countries<sup>69</sup> that carry out regular assessments of multilateral organizations at country level. Another example is the British Department for International Development (DFID) and its Multilateral Effectiveness Framework (MEF) to assess performance of multilateral aid organizations.<sup>70</sup>

Peer reviews normally function on a voluntary and cooperative basis, and those performed by OECD-DAC do so. MOPAN and DFID, however, conduct their assessments on their own initiative and with their own resources, are hence more independent and perhaps more adversarial. The scope of such reviews can vary. As mentioned earlier, the DAC recently reviewed only UNDPs' evaluation system. Other reviews have targeted specific strategies (e.g. Results-based Management) or whole systems of development aid. As the scope and topics of such reviews vary, so do the used standards, which are thus not abstractly fixed. In the case of the DAC's review, it reviewed UNDPs evaluation system against standards, which a special UN task force had established for evaluation systems in the UN generally.<sup>71</sup> The review thus assessed the UNDP evaluation system against the general UN standards, but from an outside perspective.

Even more than for internal evaluations, the question of sanctions is delicate here. Obviously, these external reviews are not followed by any formal sanction. However, the rating by their counterparts certainly has a reputational effect.<sup>72</sup> Also, multilateral aid organizations are dependent on money from their member states. Negative evaluations can thus have a deteriorating effect on their financial situation and thus seriously affect their room for maneuvers.<sup>73</sup>

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<sup>67</sup> On peer reviews see the OECD-study by Pagani, *Peer Review: A Tool for Cooperation and Change*, SG/LEG(2002)1; also Grant / Keohane, *Fn. Errore: sorgente del riferimento non trovata*, p. 37.

<sup>68</sup> See [http://www.oecd.org/site/0,2865,en\\_21571361\\_34047972\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/site/0,2865,en_21571361_34047972_1_1_1_1_1,00.html).

<sup>69</sup> MOPAN was created in 2002 by Austria, Canada, Denmark, the Netherlands, Norway, Sweden, Switzerland and the United Kingdom.

<sup>70</sup> See <http://www.dfid.gov.uk/news/files/meff-faq.asp>.

<sup>71</sup> See <http://www.undp.org/eo/policy.htm>.

<sup>72</sup> See Goldmann, *The Accountability of Governance by "Naming and Shaming": Legal Aspects of Transnational Policy Review in the Field of Education*, Paper presented at the 2<sup>nd</sup> Global Administrative Law Seminar, 2006 (not yet published).

<sup>73</sup> On financial crises in the World Bank, esp. IDA, because of balking members, Wiegand, *Fn. Errore: sorgente del riferimento non trovata*, pp. 220-222, 295: UNDP Annual Report 2006, pp. 34/35.

### III. Accountability of Recipients

The discussion on accountability in the development aid system focuses on the donors - and rightfully so, given the uneven allocation of power in the donor-recipient relationship. Yet, the limited success of aid efforts especially in Africa has also lead to question the ways in which recipients use the aid and to international efforts to increase transparency and accountability in recipient country regime's.<sup>74</sup> It therefore seems expedient to examine the legal regime of accountability pertaining to the recipients. Since recipient governments are entrusted with public money, they too should be held accountable as to how they use this money.

The accountability mechanisms of different levels have to be distinguished. There are, first, the domestic mechanisms of accountability in the aid receiving countries. These can be different forms of political, legal or financial control, used by national parliaments, courts and publics. These mechanisms are beyond the reach of this paper, given their domestic nature.<sup>75</sup> Yet fully in scope of this paper are those transnational mechanisms, with which donors supervise the use of 'their' money. Donors have installed mechanisms of fiscal accountability to control the implementation of projects (1.a). Fascinating from the perspective of global administrative law is, secondly, the system by which the World Bank can hold individual contractors accountable (1.b). And, thirdly and equally fascinating is a new mechanism involving the peer review of recipients by other recipients (2.).

#### 1. Donor Control

a) The system by which donors hold the governmental recipients of development aid accountable has two elements, one is a set of contractual tools of supervision, the other their sanction mechanisms.

The World Bank obliges itself to supervise the implementation of Bank financed projects and has, to that end, developed an extensive system regarding its own monitoring, evaluation reviews, and reporting.<sup>76</sup> Its internal law also states, however, that the recipient's project team is primarily responsible to overview a project's implementation and outcome. It spells out precisely which procedure the recipients have to obey in monitoring and evaluating the project's process and outcome, and what to report to the Bank.<sup>77</sup> The General Conditions, which set forth the terms and conditions generally applicable to the legal agreements between the Bank and the recipient, specify these

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<sup>74</sup> See the Monterrey Consensus of International Conference on Financing of Development, 22 March 2002, para. 13, 15; Paris Declaration on Aid Effectiveness, Fn. Errore: sorgente del riferimento non trovata, para. 19, 20, 48.

<sup>75</sup> On a new approach to strengthen domestic systems of accountability and its application in Kenya, see Akech, Development Partners and Governance of Public Procurement: Enhancing Democracy in the Administration of Aid, International Law and Justice Working Papers, NYU, 2006/3.

<sup>76</sup> OP/BP 13.05, OP 13.55.

<sup>77</sup> OD 10.70, para. 5-7, and OP 13.55, para. 1.

obligations. These General Conditions also add the duty of recipient governments to periodically audit their financial statements.<sup>78</sup>

UNDP has a similar, although much less extensive system of contractual supervision. With respect to the progress and conclusion of regular projects, its Programming Manual (PM) only states that “the institution managing the project must set up mechanisms to track progress towards results”.<sup>79</sup> More concretely, the PM spells out the duties regarding the financial accountability of the implementing institution. The PM proscribes in some detail how the recipient is obliged to record the receipt and use of funds and its obligation to submit financial reports.<sup>80</sup>

These duties of the recipient to monitor, evaluate, report and audit are backed in the laws of World Bank and UNDP by the possibility of legal sanctions. These start with the suspension or even termination of the financing of projects. The Basic Standard Agreement, which UNDP concludes with its recipients, regularly contains a clause stating that UNDP can suspend or terminate financial support for a project in the case that circumstances arise which interfere with or threaten to interfere with the successful completion of the project (normally Art. XI). The World Bank has a considerably more elaborate system of legal sanctions. These encompass the possible suspension or termination. Here it is again its General Conditions that regulate in detail, under which circumstances the Bank can suspend or cancel its financial support for a project. The Bank can go further though. It can force a recipient to accelerate its payment of dues or even demand a refund of already paid sums.<sup>81</sup> These sanctions can be triggered in cases of corrupt, fraudulent or collusive behavior on the side of the recipient. However such sanctions can also be based on performance failure on the side of the recipient. And obviously, they are imposed unilaterally by the Bank.

b) In recent years, the World Bank also developed an elaborate sanctioning system that is geared not towards the recipient government but targets individual contractors, consultants, bidders or other individuals. The system has evolved since the late 1990s and is now formally based on the Sanctions Committee Procedures (SCP), as approved by the Board of Executive Directors in 2004.<sup>82</sup>

The process starts with the above mentioned Department of Institutional Integrity (INT)<sup>83</sup> investigating any allegation of fraud and corruption in a Bank financed project (Sec. 3 SCP). If it finds sufficient evidence, the INT notifies the so-called Sanctions Committee,

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<sup>78</sup> GC-IDA, Sec. 4.08 and 4.09, see Fn. Errore: sorgente del riferimento non trovata.

<sup>79</sup> PM 6.1. The Programming Manual used to be the main guideline for UNDP staff and was published on the internet as a Pdf-file. In April 2006, it has suddenly been taken off the web. I was not able to find out yet, what the current status of the PM is and what exactly will replace it.

<sup>80</sup> PM 6.5.1, 6.5.6.

<sup>81</sup> GC-IDA Sec. 6.02-6.07.

<sup>82</sup> See supra Fn. Errore: sorgente del riferimento non trovata; see also the so-called Thornburg report at <http://siteresources.worldbank.org/PROCUREMENT/Resources/thornburghreport.pdf> ; also De Cooker, Fn. Errore: sorgente del riferimento non trovata, pp. 48/49.

<sup>83</sup> See Part II.1b.

which is composed of five members of the World Bank staff.<sup>84</sup> The Sanctions Committee then assesses the charges in a strictly formalized, quasi-judicial procedure. In that procedure, it has to inform the respondent, who has the right to submit his own written arguments (Sec. 5 SCP). The Committee then conducts a hearing (Sec. 9, 10) in which the respondent as well as the INT is represented. If the Committee finds the evidence sufficient, it can impose sanctions on the respondent. These sanctions can reach from reprimanding the respondent in a formal letter of censure, to declaring the respondent ineligible to be awarded future bank-contracts to “any other sanctions that the Committee deems appropriate under the circumstances” (Sec. 13 c).

UNDP has, as far as I know, no comparable kind of procedure and instrument to prosecute and debar individuals from UNDP contracting.

## 2. *Peer Review*

Holding the recipients of development aid accountable is not only a task of the donors. In an unprecedented move, a number of African countries have recently created a mechanism to hold each other accountable. The ‘African Peer Review Mechanism’ (APRM) is embedded in the New Partnership for Africa’s Development (NEPAD), which was founded by five countries (Algeria, Egypt, Nigeria, Senegal, South Africa) and today comprises 19 members. NEPAD has the objective to establish the conditions for sustainable development by promoting policy reforms and mobilizing resources.<sup>85</sup> The APRM is a central building block of this endeavor.<sup>86</sup> It is formally regulated in the Base Document, approved by the Heads of States and Government Implementation Committee of NEPAD and endorsed by the African Union Summit in 2002.<sup>87</sup>

The APRM is open to all member states of the African Union, which adopt the Declaration on Democracy, Political, Economic and Corporate Governance.<sup>88</sup> By adoption, the country commits itself to a set of reviews, starting with a base review within 18 months of signing on to APRM, following periodic reviews every 2-4 years and special reviews if so desired (according to Base Document, para. 14). Reviews are undertaken by a Country Review Team which is appointed by the standing Panel of Eminent Persons, composed of 5-7 experts overseeing the APRM process (para. 6-8).

The reviews are geared towards two sets of standards. One is the Program of Action, which every participating country has to develop and which sets out its development agenda

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<sup>84</sup> Two Managing Directors, the General Counsel as well as two senior members of the Bank staff, all appointed by the President, Sec. 1 a SCP.

<sup>85</sup> The central document, the Strategic Framework Document, was formally adopted in 2001.

<sup>86</sup> See Mbata Mangu, What future for human and peoples' rights under the African Union, New Partnership for Africa's Development, African Peer-Review Mechanism and the African Court? South African Yearbook of International Law 29 (2004), pp. 136 (147-151).

<sup>87</sup> At <http://www.nepad.org/2005/files/aprm.php> (at the bottom); see also the accompanying documents on the organization and process of APRM as well as the objectives, standards and criteria (ibid.).

<sup>88</sup> See again <http://www.nepad.org/2005/files/aprm.php> (at the bottom).

(para. 17). The other standard used to review the country's performance is the Declaration on Democracy, Political, Economic and Corporate Governance, which endorses a clear set of objectives, standards, criteria and indicators (para. 15). The Country Review Reports are finally adopted by the Heads of States and Governments (Implementation Committee), including recommendations on the follow-up, and published. A monitoring of the follow-up process is envisioned.

This, however, was only the theory. So far, there is little information on whether the mechanism is actually working. Ghana and Rwanda have completed the first full-cycle peer review and their respective reports are expected to be published in 2006.<sup>89</sup>

#### **IV. Analysis and Assessment**

The foregoing description of accountability in global development aid law revealed a whole variety of mechanisms. With regard to the accountability of donors, the paper examined mechanisms such as audits, fraud- or corruption-investigation tools, evaluations and peer reviews; it also mentioned the oversight by member states and the World Bank's Inspection Panel. As to the accountability of recipients, it analyzed contractual mechanisms of oversight as well as peer reviews. For a systematic analysis of this material, we shall now return to the three elements of accountability that were established in the beginning, i.e. distance, standards and sanctions, and accordingly ask: Who is accountable to whom, and is there sufficient distance between them? What are the standards applied and who sets them? And, finally, what sanctions are available for misconduct or transgression of these standards? In a second section, we will attempt an assessment.

##### **1. *Of Distance, Standards and Sanctions***

a) Accountability is based on a power wielder being answerable to an accountability holder. Distance between these two is necessary to ensure the independence of the accountability holder. The critical aspect in development aid law certainly lies in the question of who is and who should be an accountability holder. But before we turn to this point, we should briefly clarify, who is held accountable. In development aid law, these are of course primarily the donor institutions, i.e. those who have the power to decide to whom to grant development assistance and under which conditions. For the global plane, the paper therefore focused on the World Bank and UNDP. Yet, this paper also proposed that the recipient governments of aid could be answerable power wielders. They are entrusted

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<sup>89</sup> Grimm / Mashele, *The African Peer Review Mechanism – How Far so Far?*, German Development Institute, Working paper No. 2/2006.



with public money and should be accountable as to how they use this money. The analysis therefore inquired into the accountability of both, donors and recipients.

Yet, the more important question is to whom are donors and recipients accountable. Who are the accountability holders?<sup>90</sup> With regard to the donor organisations, the analysis showed that accountability holders in development aid law are most often internal control units or detached external experts. Internal control was found in the evaluation and investigation units of the World Bank and UNDP, charged with hierarchical and fiscal scrutiny.<sup>91</sup> External experts were found to be relevant actors in the Inspection Panel as a legal accountability mechanism, in audit mechanisms as fiscal accountability, but also in peer reviews. With regard to the internal control units, one has to ask whether they bring along the necessary distance to the actual power wielders.

The more serious problem, however, is not the missing distance of internal control units but the lacking voice of three other constituencies.<sup>92</sup> Accountability mechanisms in development aid law show little to no role for either those people affected by projects in developing countries or for the recipient governments or for taxpayers in donor countries. The affected people in developing countries have only one direct mechanism against the donors and that is the Inspection Panel. All other mechanisms are indirect or beyond their influence. The position of the recipient governments is hardly better in practice. Even though they are represented in the Executive Boards of both donor organizations, their position there is weak.<sup>93</sup> Their theoretically existent legal tools against the donors are deflated by the economic and political implications of, let's say, Mali suing the World Bank. Finally, taxpayers in those countries that contribute to finance UNDP and the World Bank are equally barred from direct influence.

However, the general public, be it a global civil society or national publics in developing or developed countries, has become a relevant accountability holder. Actually most of the rules that establish accountability mechanisms are geared towards a public taking up the cue (publication of reports, of evaluation or audit results, of peer reviews). The problem here lies rather in the potential sanctions at hand.

Hardly a consolation, but certainly noteworthy is the fact that the group of accountability holders on other levels of development aid law is equally deficient. In national as well as the European development aid law, the voice of the affected and of the recipient governments is very weak. A central problem of accountability in global development aid law is hence a characteristic of this transnational system in general.

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<sup>90</sup> Krisch, *The Pluralism of Global Administrative Law*, EJIL 17 (2006), pp. 247.

<sup>91</sup> Part II.1./2.

<sup>92</sup> See above, Part I.3.

<sup>93</sup> More so in the World Bank because of weighed voting rights there (Woods, *Fn. Errore: sorgente del riferimento non trovata*, p. 85). However, economic imbalance reduces their leverage in UNDP too (Hampe, *Fn. Errore: sorgente del riferimento non trovata*, pp. 88/89).

As to the accountability of recipients, the picture looks decidedly different. Even though the primary accountability holders should here be domestic ones, we have seen that the donors have a rich arsenal of tools to hold the recipients of ‘their’ money accountable.<sup>94</sup>

b) Standards are a second element of accountability. These define not necessarily for all, but for most of the accountability mechanisms, where conduct turns into ‘misconduct’. The question here is not only, whether there are standards and what these are, but also who is there to set them. The paper shows that, first of all, standards exist for most mechanisms, including legal, fiscal, hierarchical and peer accountability, but not in the area of supervisory accountability. Second, these standards necessarily vary according to the area concerned. Most clearly stated are standards of legal accountability as used by the Inspection Panel. These are the internal policies and procedures of the Bank. Standards of fiscal accountability are contained in several sources and include auditing rules, provisions that define fraudulent or corrupt behavior, and generally rules of economic due diligence. These standards are mostly set in legal rules. Less precise are often the standards for hierarchical and peer accountability. For the World Bank these were mostly standards of efficiency, sustainability, and impact assessment. According to which standards UNDP evaluates its projects, is not clearly stated.

Most of these standards were set by power wielders themselves and not by independent, external ‘legislators’. Similar to findings on the question of who is an accountability holder, the standard setting is thus often internalized. Exceptions to this rule are the standards for external expert mechanisms, like auditing or peer reviews. Here, the applied standards are general laws or global best practices. The standards pertaining to the transnational accountability of recipients are set by donors or peers.

c) Finally, we should analyze accountability mechanisms with regard to their potential sanctions. Again, we have to distinguish between sanctions against donors and against recipients. The question of sanctions against donors points to another general weakness of the entire system. Accountability mechanisms in development aid law are mostly devoid of hard and curtailing sanctions. The paper shows that most mechanisms only result in publicized reports, such as audit reports, Inspection Panel investigation reports, evaluation reports or peer reviews. These appeal to the public for some kind of reputational sanctioning, but are not followed by any legally enforceable reactions. In contrast to these mild sanctions against donors, sanctions against recipients are of a different kind. As we have seen, donors can react to the recipient’s misconduct with the end of funding or even the demand of paying back the received funds.<sup>95</sup> These are certainly effective instruments. Hence, again, we see a striking imbalance between the accountability of global donor organizations and recipients.

Another aspect seems noteworthy. Development aid law does not only know accountability mechanisms with regard to institutions, but also with regard to individuals. We saw

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<sup>94</sup> Part III.1.

<sup>95</sup> Part III.1.

mechanisms by which the World Bank and UNDP can ‘prosecute’ their own employers but also contractors in cases of misconduct.<sup>96</sup> It is interesting that these sanctions, which include the removal from a post and debarment from future contracts, are much stronger than any sanction the institution as such could face.

## 2. *On New Sources, Old Principles and Remaining Gaps*

Finally, we shall attempt some general observations and assessments. We will do this along three issues, asking first about the sources containing the mechanisms observed, examining then whether we actually deal with *administrative* law, and inquiring finally whether these mechanisms provide a satisfactory level of accountability.

Striking from a legal perspective is, first of all, that accountability mechanisms in development aid institutions are not only in flux but undergo an increasing formalization and legalization. Most of the rules and institutions described here have developed only since the 1990s. These new rules establish new accountability holders (like the Inspection Panel or internal oversight units) and formalize the procedures of mechanisms of accountability. However, if these rules and mechanisms shall fall into the scope of *legal* analysis, as proposed here, one has to adopt a broad notion of law. The institutional or procedural structures observed were only to a limited extent prescribed by primary (treaty) law. More are organized by ‘secondary’ law (like Operational Policies), or in even “softer” internal rules (like guidelines for evaluation, policy papers, etc.).<sup>97</sup> In this respect, our analysis of global development aid law confirms a broader trend towards new sources in international law.<sup>98</sup> But perhaps, one can take this observation even further by focusing on the driving forces behind these changes. At least in development aid law the trend towards formalization seems to be driven by the multilateral organizations themselves, not so much by member states.<sup>99</sup> Not the treaty-amending powers appear to have the will to install accountability measures, but the institutions find ways to introduce them themselves.

One context of this case study is the discussion on the emergence of a global administrative law.<sup>100</sup> We should therefore ask whether the mechanisms observed are actually mechanisms of *administrative* law. Certainly, the organizations whose laws were examined here are public administrations and use public power. We also surely deal with institutional law. But did we encounter mechanisms that are well-known tools of administrative law? This was hardly the case. Audits and evaluations are instruments of any larger organization; investigation units are rather reminiscent of criminal proceedings; contractual oversight and fines are better known in private law; and peer reviews are an

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<sup>96</sup> Part II.1b; III.1b.

<sup>97</sup> On the legal character of such rules, Chinkin, Fn. Errore: sorgente del riferimento non trovata; also Kingsbury, Fn. Errore: sorgente del riferimento non trovata.

<sup>98</sup> See Diversity or Cacophony?: New sources of Norms in International Law, Michigan Journal of International Law 25 (2004) 845-1375; also Krisch / Kingsbury, Global Governance and Global Administrative Law in the International Legal Order, EJIL 17 (2006), p. 12.

<sup>99</sup> Alvarez, Fn. Errore: sorgente del riferimento non trovata, pp. 246/247.

<sup>100</sup> See supra, Fn. Errore: sorgente del riferimento non trovata.

entirely new instrument altogether. Beyond the instruments of legal (Inspection Panel) and supervisory (member state oversight) accountability we thus hardly dealt with instruments familiar from domestic administrative law. However, this doesn't mean that we are not dealing with a (albeit new) form of administrative law. Not only that domestic mechanisms of administrative control and accountability themselves are changing profoundly. Decisive is rather whether the mechanisms analyzed here are instrumental in furthering those normative principles that are essential for our understanding of a legitimate use of public power and thus follow the central values of (Western) administrative law. In the domestic context these are the rule of law and democracy.<sup>101</sup> Accountability can be understood as a hybrid form of these two principles, especially suited for a non-national arena. Hence, asking for accountability already means to put on an administrative law lens to analyze a given legal material. Or to put it differently: we might not encounter familiar instruments, but given the context (i.e. public institutions using public power) we are certainly asking the right question.

This leads to the third and final issue of whether the described mechanisms form a system which provides a satisfactory level of accountability. This question is difficult to answer since it is unclear what the appropriate level of accountability should be. Where should one take the normative standards from?<sup>102</sup> For now, we can only point out some obvious aspects and deficits. We might begin by stating that the accountability mechanisms of global donor institutions show a somewhat surprising similarity. Except for the Inspection Panel, there seemed to be hardly any instrument that is not to be found in World Bank regulations and those of UNDP. Both stress especially fiscal, hierarchical and peer accountability, while mechanisms of legal accountability are weak. On a second look, however, one also has to point out that the World Bank's mechanisms are almost always more advanced in the sense that they are often more transparent and supported by more resources.<sup>103</sup>

Yet, their similarity does not translate into clarity or transparency. Instead, the accountability mechanisms in development aid law are often obscure. Transparency does not only mean disclosure of documents somewhere. It would also mean a somewhat intelligible system of rules and standards. In the current state of development aid law it is hard to find the applicable rules, and to understand their scope and meaning.

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<sup>101</sup> Harlow, Fn. Errore: sorgente del riferimento non trovata, pp. 190; Schmidt-Aßmann, Fn. Errore: sorgente del riferimento non trovata, pp. 43.

<sup>102</sup> Grant / Keohane, Fn. Errore: sorgente del riferimento non trovata, pp. 34/35.

<sup>103</sup> The reasons for this seem to be (at least) twofold. For one, the World Bank has been the object of much more attention and public scrutiny than UNDP and appears to have reacted at least to some extent to the public pressure (cf. Mallaby, Fn. Errore: sorgente del riferimento non trovata, pp. 44-48, 58-64). And, secondly, the Bank has not only more financial resources to deploy, for example, a bigger evaluation unit, but it also has a self-understanding and 'corporate culture' which is geared more towards private-sector banks than international bureaucracies. This might also contribute to its openness for more efficient structures (Wiegand, Fn. Errore: sorgente del riferimento non trovata, pp. 359/360).

However, even more dramatic are the obvious gaps and imbalances in the system, especially the lacking voice of affected people and the muzzled voice of recipient governments. It is in this regard that the imbalance of economic power is indeed continued in legal structures. The central problem of accountability in the global development aid system does not lie in the absence of mechanisms. On the contrary, at least with respect to the World Bank one can argue that it is very accountable but only to a few member states, especially the US. The problem is rather that aid organizations are too little accountable to those who are the intended beneficiaries of aid and too accountable to actors which pursue their own national interest.<sup>104</sup> A global civil society might have increasing information about the work of the donor organizations and perhaps reputational leverage. But it too lacks mechanisms that are not depending on the benevolence of the donors.

The problem of imbalance of influence and interests, however, is not unique to the global level of development aid, but runs through all levels of development aid law, national, supranational and global alike. It is rooted in the transnational nature of development aid law, in which the most affected party, the people in developing countries, is structurally excluded from holding the donors directly accountable. Global development aid law, as we have seen, provides a number of alternative devices. But these seem to miss the political dynamics at work.

## **Conclusion**

Accountability in development aid law turns out to be a tricky topic, not least because of the opaque term of accountability itself. Yet, with a somewhat plucky reduction of complexity and a restrictive understanding of accountability as an ex-post, regularly sanctions-oriented concept of administrative oversight, this paper described a surprisingly differentiated and increasingly formalized system of accountability mechanisms. These go beyond conventional mechanisms of member state control and present examples for emerging structures of transnational oversight. However, this structure is also beset with deficits. Development aid law ignores important voices, lacks transparency and is ill-aligned to the underlying structure of interests. In returning to the opening picture, one could say: There are certainly bushes, also some trees, but for a sheltering avenue these trees are too young and set with some wide gaps. What it would need is a gardener and a lot of care. This could partly be the role of legal scholarship, which could contribute to political efforts to reform the system. In that sense, even legal research could be a tool of accountability.

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<sup>104</sup> Similarly, Grant / Keohane, Fn. Errore: sorgente del riferimento non trovata, pp. 37 and 39.