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The World Bank – Safeguard for Public Participation in Environmental Decision-Making?

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Contents

Summary

Public participation in environmental decision-making has been increasingly recognised in national, regional and international law in the last decades. In parallel, the World Bank - an inter-state development bank and international organisation - has developed a set of *safeguard policies* including provisions on public participation in environmental decision-making. Public participation is about re-thinking *who* is taking the decisions and *how* they are taken, and therefore public participation targets the fundamental concept around which the World Bank as well as international law traditionally has been organised, namely state sovereignty. This master thesis analyses the status of the norm of public participation in environmental decision-making - how well it is safeguarded - in different laws (chapter 2) and policies (chapter 3), and how they cohere (chapter 4). On the one hand it presents some developments of the norm in international and regional law and national law in developing countries as well as in World Bank activities and policies. On the other hand it addresses what "public", "participation" and "decision-making" are according to these different legal norms.

The master thesis concludes that compared to international legal instruments the World Bank policies have rather detailed provisions on public participation in environmental decision-making. The policies are slowly improving their provisions on public participation and they have global outreach. To this end and considering the fact that the World Bank gives loans of 18 billion US-dollars a year, it is argued that the World Bank has a potential to promote safeguarding the implementation of the norm in developing countries. However, the essay underlines, advancements are needed. The safeguard policies are as of yet no guarantee for safeguarding public participation in Bank activities. For example, the policies (e.g. on Environmental Impact Assessment and Indigenous Peoples) are often unclear on who is to be considered as "the public", their focus is mostly on "consultation" instead of "participation" and the public is not let in often enough during the decision-making process. Moreover, the mechanism of policy enforcement, the Inspection Panel, has limited possibilities to have an impact as it focuses only on Bank staff performance and not on the policy compliance of the Borrower. This has to be compensated by improved contractual means between the World Bank and the Borrower as well as capacity building. The problems of policy compliance are illustrated in two case studies. Today all sectors of the international society, including the World Bank, are required to work towards sustainable development, and public participation is an indispensable element of this concept. Therefore it is argued that the World Bank now has a clearer mandate than ever to improve policy provisions on public participation and put pressure on policy compliance of the Borrower. Development is the core activity of the Bank and it is best achieved by empowering people.

Preface

From idea to final product my master thesis has been a journey, not only intellectually but also in practice. I started in Stockholm, passed Moscow, landed for a while in Geneva (at the Aarhus Convention Secretariat), decided on a subject for the thesis and made a tour to Kenya. Finally, I reached the conclusions and my final destination at home, in Lund. I would like to thank all the people that have inspired and supported me along the way.

Everybody knows it has to start with us, but nobody asks for our participation.
Moses, Pangani Slum area, Nairobi, Kenya 13 of May 2004

We don't want to be invited to a ready-made dinner, discuss and complement it and then leave. We want to participate in the preparations of the dinner - we want to cook!
The NGO OSIENALA on how NGOs may participate in World Bank projects, Kisumu, Kenya, 31 of May 2004

Participation matters – not only as a means of improving development effectiveness, as we know from our studies – but as a key to long-term sustainability and leverage. We must never stop reminding ourselves that it is up to the government and its people to decide what their priorities should be. We must never stop reminding ourselves that we cannot and should not impose development by fiat from above – or from abroad.
Quotation by the Bank President from the report "Participation and the World Bank"

Abbreviations

BP	Bank Practice
CSD	Commission on Sustainable Development
EIA	Environmental Impact Assessment
EMP	Environmental Management Plan
EU	European Union
GP	Good Practices
IBRD	International Bank for Reconstruction and Development
IDA	International Development Agency
IFC	International Finance Corporation
ILO	International Labour Organisation
IP	Indigenous Peoples
IPDP	Indigenous Peoples Development Plan
IPP	Indigenous Peoples Plan
LVEMP	Lake Victoria Environmental Management Project
NGO	Non Governmental Organisation
NEAP	National Environmental Action Plan
MDB	Multilateral Development Banks
OD	Operational Directive
OP	Operational Policy
SA	Social Assessment
SEA	Strategic Impact Assessment
UN	United Nations
UNECE	United Nations Economic Commission of Europe
UNEP	United Nations Environment Programme
US	United States (of America)

1 Introduction

1.1 Presentation of the Subject

The World Bank,[1] an inter-state development bank and an international organisation, transfers 18 billion US dollars[2] per year from the developed world to the developing world.[3] Transferring money means having power, but also having obligations.

Public participation in environmental decision-making targets the fundamental concept around which the World Bank as well as international law was originally organized - state sovereignty. International law traditionally governed relations between states amongst each other and the Bank was created to be apolitical and not interfering with the domestic affairs of its member states. However, under pressure from a stronger civil society governments as well as the Bank have been pushed to start acknowledging that development issues can be neither sustainable nor legitimate without the linkage to the environment and the participation of the public. A trend where decision-making in environmental matters has become more people-centred is set in motion. The norm of public participation in environmental decision-making, interlinking traditional human rights with environmental law, is getting globally recognised. The last decades it has materialized into legal instruments, both in international law, national law and internal policies of the Bank - the safeguard policies. The public has got formal possibilities to raise their voice - they are recognised as legal subjects. *I ask: To what extent is public participation in environmental decision-making safeguarded by these sources? What are the challenges?*

However, the ownership - the control - of a decision-making process is hard to share, especially in developing countries where democracy, to which public participation is key, is weak. In these countries people are often dependent on natural resources for their livelihood and the question of environmental governance - *who* is making the decision and *how* is it made - is crucial. It is in many of these developing countries that the Bank is an

[1] The World Bank has developed to comprise of a number of institutions such as the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes (ICSID), however the term "World Bank" normally refers to the two main institutions, namely the International Bank for Reconstruction and Development (IBRD), and the International Development Association (IDA) (*sic!*) which works primarily in middle-income countries and in the poorest countries respectively. In this master thesis "the World Bank" will adhere to the normally used definition given above and often be referred to as "the Bank".

[2] The figure is for the Fiscal year 2003, see www.worldbank.org, and includes IBRD and IDA.

[3] The money are loans that have to be repaid, see www.worldbank.org for more information on repayments.

actor and has a lot of influence. The Bank is active in different kinds of activities, traditionally mostly infrastructure projects and industry. The safeguard policies are internal Bank policies that, next to an Inspection Panel, were created to improve the relationship between the Bank and the people in developing countries when they finance such projects. However, because of their design, as will be shown, they also affect the behaviour of the Borrower. *I ask: Can the World Bank implementing its policies also be a safeguard for implementation and consolidation of public participation in environmental decision-making in developing countries?*

Against this backdrop and convinced by the premise that public participation in environmental decision-making should increase in all parts of the world, this thesis argues that the coherence of safeguard policies with other international law instruments on public participation and their design and impact, both on a project level but also in a broader context in developing countries and international law, is worth examining. *In sum, what are the possibilities for the Bank, using its policies, to be a safeguard for public participation in environmental decision-making?*

1.2 Purpose and Limitations

1.2.1 Purpose

The purpose of this thesis is to estimate:

- the status of public participation in environmental decision-making in international and regional law, and to exemplify its manifestation in national law in developing countries,
- the status of public participation in environmental decision-making in Bank policies and what mechanisms for policy enforcement there are,
- the role of the World Bank as an implementer and consolidator of public participation in environmental decision-making in developing countries.

1.2.2 Limitations

Although it has been my clear ambition to cover as many aspects as possible of public participation in international law as well as its acceptance in Bank activities, naturally, all aspects cannot and should not be addressed. Concerning the text discussing international law, relevant legal instruments have been chosen from the two normative sources of human rights law and international environmental law. The compilation tries to cover and estimate the presence of public participation in environmental decision-making *de lege lata* and *de lege feranda* in traditional sources of international law (e.g. treaties) as well as in soft law, a non-binding source of international law. While focus is mainly on international law, some attention is also given to national law in developing countries. The aim of chapter 2 is to show the

status of the norm today - implicitly indicating the need for progressive work by the Bank. The compilation of legal norms is limited to this end.

As far as the World Bank is concerned, the following limitations have been taken into consideration. Firstly, it should be emphasised, that the focus of this thesis is law, not economics or political science. Therefore I have tried to focus on the legal aspects, although the subject chosen has made it difficult. Secondly, the information given on the organisational structure of the Bank aims at contributing to the understanding of the relationship between the Bank and international law, as well as the delicate relationship between the Bank, the Borrower and the potential beneficiaries of the projects - the people. Thirdly, my interest partly being to give focus to the impact of Bank policy on public participation in developing countries, attention is given to policies related to participation in projects (i.e. EIA and Indigenous Peoples policy) and plans (i.e. New Environmental Action Plans (NEAP) and Strategic Environmental Assessment (SEA)). Hence, my focus is mostly on possibilities for the public to participate in Bank activities related to planning and performance of *infrastructure projects and other Bank activities having an impact on the environment*. These activities are also relevant to consider when comparing with the provisions on public participation in international law and concluding on the possibilities and challenges of public participation in World Bank activities in the future. Therefore, I do not analyse how the Bank can influence national law by financing legal reform programmes, although it would be/is interesting. The focus of the thesis is mainly on legal norms *per se* but some attention will be given to what extent the policies are implemented in practice, the case study on Lake Victoria and the Quinghai project being examples of that.

For practical reasons I use the word participation in the text as a general term without describing what it comprises. However, when I want to analyse it further and emphasize it's meaning it is mentioned as "participation" or, as to Bank policy, "consultation".

Moreover, it should be noted, that as the three so called "access principles" (access to public participation, access to information and access to justice) are necessarily interlinked and mutually reinforcing, they cannot be treated in isolation from each other and will hence be given attention in all chapters. However, because of limits in space and time, I have chosen to focus on the public participation pillar, letting it somehow embrace the other two principles.

1.3 Method and Material

The thesis has a twofold approach in examining public participation in environmental decision-making in law and World Bank policy. On the one hand I present the developments of the norm in international law, national law in developing countries and in Bank activities and policy. On the other hand I address what "public", "participation" and "decision-making" are

according to these different legal norms. This clarifies the characteristics of the norm, originating from two normative sources (human rights and environmental law) and actualised in different contexts - different kinds of decision-making processes - and serves as a background for the analysis in chapter 4.2. As will be shown, "the public" can be a natural and legal person, an organisation, association or a group. "Participation" can comprise everything from the sharing of information, being consulted, or participation worthy its name - having a part of the ownership - control - of a process. Hence, it can or should have a different meaning in different processes of decision-making. "Decision-making" can take place at different stages of the process and in different kind of processes at different levels - e.g. at local (project) and regional (plan) levels.

The use of both primary and secondary data is needed. The primary data are foremost the legal texts of law and policy and the secondary data are books, articles and Bank reports. I have e-mailed questions on different aspects of public participation and the World Bank as well as questions on public participation and human rights to Bank staff and the Council of Europe. The replies have served as a background for the text, but are not referred to directly. Additionally, a golden opportunity to get some practical experience from a World Bank project revised by the Inspection Panel[4] and to meet with the concerned NGO was given in the final stage of the writing of the thesis. The case study on Lake Victoria is therefore based not only on official Bank documents but also on a meeting with NGO representatives in Kisumu, a Kenyan city by the lake.

1.4 Former Research

Much has been written on the development of participatory environmental rights in international environmental law as well as on its relation to traditional human rights.[5] Much information can also be found on how the Bank has gradually responded to the growing pressure from outside actors and how its different organisational structures have adhered to the recognition of the need for public participation.[6] Research on the international obligations of the Bank as well as on the consequences of the international recognitions of sustainable development on World Bank activities has also been carried out.[7] Altogether, the studies have sought to see how the World Bank has reacted or should have reacted to international law and policy, but little attention has been given to present how public participation in different sources of law cohere with Bank policy and the possibilities of the Bank to be more proactive as an implementer of the norm in developing countries. Moreover, the thesis analyses the new draft policies on indigenous peoples recently launched.

[4] See 3.5.
[5] See for example: Ebbesson, (1997); Cameron and Mackenzie, (1996); Handl, (2001).
[6] See for example: Miller-Adams, (1999); Fox and Brown, (1998); Gualtieri, (2001); Boisson de Chauzournes, (2000).
[7] See for example Skogly, (2001); Kingsbury, (1999); Handl, (2000).

1.5 Why Public Participation?

The emergence of public participation in international environmental law has been explained and justified with many different arguments,[8] and there are easily more pros than there are cons. The following justifications are relevant for this thesis:

It has *local justifications* by; building public support for a planned project, thinking in forms of alternatives and different interests, identifying potential conflicts and problems in due time, increasing effectiveness (failure to provide for public input can bring unnecessary conflict and resistance resulting in longer processes or even interrupted projects, something that the World Bank has experienced),[9] and promoting long-lasting projects. Public participation has *global justifications* by; being essential for global environmental governance (who is making the decisions on the environment and how are they made?), e.g. promoting legitimacy for decision-making processes at all levels, taking into consideration interests otherwise ignored (nature interests or interests of minority groups), and helping implementing national and international law as well as the policies of international organisations. Moreover, public participation, as will be shown, is recognised as being a necessary element in the process towards sustainable development. Placing public participation at the very heart of development is perhaps its strongest rationale next to the fact that it promotes democratisation.

Although there are numerous arguments why public participation is key in creating local and global benefits, it should not be forgotten that its rationale has been questioned. Public participation can be seen as difficult, time-consuming, costly and tricky. Other negatives covered in literature are that public participation can permit elites or free riders to get more than their share; it can stir up conflict that society has been able to keep under wraps, as well as alienate governments.[10] Why not only leave the decision-making to the experts? In the beginning of the 1990's these arguments were frequently underlined in various World Bank documents when discussing World Bank operational policies on public participation.[11]

1.6 Outline of the Thesis

In the first part, chapter 2 presents from a human rights and environmental law perspective how the norm of public participation in environmental decision-making has materialised in international and regional law, and national law of developing countries (2.2-2.3). Concluding on the status of public participation in international law and national law of developing

[8] See Ebbesson, (1997), p. 63, on different international political theories.
[9] See 3.3.1.
[10] Dichter, (1992), p. 89.
[11] See note 91-93.

countries (2.4-2.5) the chapter serves as a background to the context to which the World Bank has to adopt and according to which it has to act.

The second part of the thesis presents the characteristics of the Bank as an inter-state bank and an international organisation (3.2-3), the gradual recognition of public participation in World Bank environmental decision-making (3.4), and the possibilities for policy enforcement (3.5-3.7). In short, the chapter sums up the status of public participation in environmental decision-making in Bank activities today.

Finally, the third part interlinks the two first parts placing the World Bank in the international legal system, and addresses, in 4.1-4.3, the following questions: How do the Word Bank norms on public participation cohere with soft law and traditional international law, and, which are the similarities and differences? How far can the mandate be pushed? Are we being propelled towards public project ownership where the public is getting more control over the decision-making process? Are the norms of the World Bank part of international law? Can the use of Bank policies help consolidating and implementing international and national law in developing countries? The conclusion of the chapter, 4.4, addresses the title and the main question: The World Bank - safeguard for public participation in environmental decision-making?

2 Public Participation in Law

2.1 Outlines of the Chapter

The purpose of this chapter is to show how and to what extent the norm of public participation in environmental decision-making has gained recognition and materialized in different normative sources of international law, as well as to indicate the possibility for its implementation in national laws in different parts of the world. Hence, the chapter gives the context to which the World Bank has to adopt and wherein it has to act.

As public participation is cutting across normative sources of law as well as national and international law, there is a need for a broad compilation of legal norms. The chapter is presenting general developments as well as showing, when possible, how different legal instruments address "public", "participation" and "decision-making". The chapter will be divided into four sub-chapters. Chapter 2.2 draws the attention to how public participation has materialized in human rights law whereas 2.3 focuses on environmental law. The sections survey the manifestation of the norm in international law, regional law, and national law of developing countries. Presenting the advancements in the European hemisphere is partly done as the European countries, being donor countries to the World Bank, have a lot of influence in the setting of Bank policy. Hence, the presentation of these progressive instruments sets a benchmark of how detailed the norm can get. In Chapter 2.4, the status of the norm in international law is estimated, and its manifestation in the law of some developing countries exemplified. The conclusion in 2.5 will summarize the status and challenges of the norm in a broader context.

2.2 Public Participation in Human Rights Law

An essential argument for public participation in environmental decision-making not mentioned earlier is found in its manifestation in traditional human rights law.[12] Traditionally human rights do not deal with participation in the context of the environment. Nevertheless traditional human rights can be mobilized to achieve environmental ends.[13] The existing human rights that would promote participation in environmental decision-making mainly take part in what is called first generation of rights – the civil and political rights. To this end there are several human rights instruments that could be used promoting public participation also in environmental decision-making. One example with global application would be the Covenant on Civil and Political Rights (ICCPR), whereas a regional example is the African Charter on the Human and Peoples'

[12] Ebbesson, (1997), p. 70.
[13] Anderson, (1996), pp. 5-7.

Rights.[14] But even if, as argued by Ebbesson, the political participatory rights can be realized in multiple ways and thus be a conceptual basis for public participation in environmental matters,[15] advancements have been called for.

To concretise the linkage between participation and environmental ends, a UN report for the Commission on Human Rights, the Ksentini report, suggested the adoption of Draft Principles on Human Rights and the Environment containing the right to participation in planning and decision-making processes including prior environmental impact assessment.[16] The report has been called a way of greening existing human rights but is also a way of creating new ones.[17] As a minimum, the report emphasises, people should have the right to receive notice of and to participate in any significant decision-making regarding the environment, especially during the process of environmental impact assessment and before potential damage is done. Furthermore, the participation should be meaningful, timely and effective. Altogether the Ksentini report is progressive in the sense that it makes an effort to tackle what participation should be and when it should take place. Being highly politically sensitive, this report hasn't led to any further action of substance. On the European level a protocol on Human Rights and the Environment including the individual's right to participate in decision-making related to the environment has been under discussion. Should it one day be realised, although unlikely for the moment, the possibilities for its enforcement through the work of the European court of Human Rights, would exist.[18]

According to the above-mentioned instruments the right to participate for the "public" remains a right provided for each individual. However, it should be mentioned, that even if the African Charter adheres to this approach in its article on political participation, it could be argued that the

[14] International Covenant on Civil and Political Rights, (1976), Article 25 states that "Every citizen shall have the opportunity…without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives…"; African Charter on Human and Peoples´ Rights (1982), Article 13.1: "Every citizen shall have the rights to participate freely in the government of his country, either directly or through freely chosen representatives…"; Generally see Handl, (2001), pp. 303-328; On Africa, Odote and Makoloo, (2002), p. 123 "The charter (therefore) contains provisions that can be used and expanded upon to guarantee good governance and public participation within the continent."

[15] Ebbesson, (1997), p. 72.

[16] UN Commission on Human Rights, Sub Commission on Prevention of Discrimination and Protection of Minorities, Human Rights and the Environment, Final Report of the Special Rapporteur. UN Doc. E/CN.4/Sub.2/1994/9, Part III Para 18. For environmental impact assessment, see chapter 2.3.3.

[17] Boyle, (1996), pp. 44-45.

[18] The "*possible* relationship between the environment and human rights" is still under consideration; see Commission on Human Rights Resolution 2003/71 para. 11. See for proposed protocol of Council of Europe in the report: Environment and Human Rights, Doc. 9791 16 April 2003 and Recommendation by the Parliament Assembly Doc. 1614 (2003) and reply by Committee of Ministers of the Council of Europe Doc. 10041 referring the issue to the Steering Committee for Human Rights to make a draft instrument.

focus on the individual as such is not as strong. This would be the case if the article was read together with the right to a healthy environment as a right of all "peoples". The debate on how cultural differences affect or should affect the concept of human rights is extensively discussed in literature.[19] In this context it is of interest to note that there clearly is a group dimension to political participation,[20] and it especially comes into focus in developing countries, that constitute the field of work for the World Bank.

Human rights law has acknowledged the "group" rights of indigenous peoples in different softer or harder legal instruments.[21] The ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries defines, in its article 1, who is to be considered as right-holder according to the Convention.[22] The Convention provides that Governments shall consult the peoples concerned when considerations are being given to certain measures that may affect them directly as well as establish means by which these peoples may freely participate in all levels of decision-making. Moreover, and of great importance, the rights granted also comprise the use, management, and conservation of the resources that, as argued by Ebbesson, make the procedure more than a pro forma consultation.[23] It is one thing to be given the possibility to comment on a planned project, another to have some kind of control over the creation of the project. Some Latin American countries ratify the Convention but it has not yet been ratified by any African or Asian state.[24] However the Convention sets a benchmark for participation and decision-making that could be compared with the policies of the Bank, although it is not a party of the Convention.[25]

Even if human rights related to participation in environmental decision-making can come in many forms the overall characteristic of human rights is the right-based language. When approaching public participation in decision-making from environmental law the language has instead developed to be "access" based. This softer language is probably the reason why the participatory principles have gained a broader recognition by the international community.

2.3 Public Participation in Environmental Law

The international dimensions of environmental law include treaties as well as what has been labelled as "soft law", i.e. non-binding instruments in the

[19] See discussion e.g. Ignatieff, (2003), pp. 66-67.
[20] On group dimension in political participation Ebbesson, (1997), p. 73.
[21] For compilation of legal instruments see Handl, (2000), pp. 115-119.
[22] Convention Concerning Indigenous and Tribal Peoples in Independent Countries ILO (No. 169), (1991), Article 1 "self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of the Convention apply."
[23] Ebbesson, (1997), p.73.
[24] See www.ilo.org.
[25] See 4.2.

international system. Although there has been an extensive debate on the legal definition of the latter, it is commonplace to note that it has a complex and potential impact on the development of "traditional" international law i.e. treaties, customary law and general principles.[26] In the field of environment in general and procedural rights in particular, international soft law instruments are key. Their "softness" facilitates reaching agreements by states but also, and most importantly for this thesis, they have the potential to more actively involve other stakeholders like international organisations and the public in the process. The chapters below will give extensive attention to soft law sources, but also show examples of "harder" provisions of public participation in different specialised treaties.

2.3.1 Soft law from Stockholm via Rio to Johannesburg

This sub-chapter describes how international environmental soft law has extended the traditional concept of rightholders as well as shifted away from the nation-state based international system by recognising the role of other actors than states.

The first attention to procedural "rights" in international law can be traced back to 1972 at the Stockholm Conference on Human Development. At this time focus was on the individual's possibility to influence and it was a call upon Governments to act.[27] Ten years later, the adoption of the World Charter for Nature by the UN General Assembly provided opportunities for participation in the context of formulation of decisions (without getting into details what decisions it would concern) and this with a focus not only on the individual but also on the possibilities to act together with others.[28] It was a statement by state representatives for states. Although the World Charter may be seen as recognising participation of individuals in groups, next to the participation of individuals as such, the breakthrough for this view took place at the Rio Summit on Environment and Development in 1992.

Building on the outcome of the report "Our Common Future" the Summit recognised the concept of sustainable development and the need for public participation for its realisation.[29] In the Rio Declaration's Principle 10 it was provided that each individual should, on the national level, have appropriate access to information concerning the environment and the opportunity to

[26] See e.g. Shelton, (2000), p. 6.
[27] 1972 Action Plan for the Human Environment, Recommendation 7 (a) in the report of the United Nations Conference on the Human Environment. For text see Supplement A.1 of this thesis.
[28] World Charter for Nature, (1982), Principle 23. See Supplement A.2 of this thesis.
[29] Sustainable development is defined by the report as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs" and public participation is linked with it, as "the pursuit of sustainable development requires a political system that secures effective citizen participation in decision-making." Our Common Future, (1987), p. 8 and 65.

participate in decision-making processes.[30] The focus on the group dimension of public participation was more clearly expressed in Agenda 21, as;

"One of the prerequisites for the achievement of sustainable development is broad public participation in decision-making. Furthermore, in the more specific context of environment and development the need for new forms of participation has emerged. This includes the need of individuals, groups and organisations to participate in environmental impact assessment procedures[31] and to know about and participate in decision, particularly those which potentially affect the communities in which they live and work."[32]

In line with this the Agenda also addresses the role of Indigenous Peoples. The Agenda aims at recognising and strengthening the role of indigenous people and their communities and calls upon governments as well as intergovernmental organisations to incorporate their values, views and knowledge in policies and programmes that may affect them. Moreover, intergovernmental organisations are to assist;

"…Governments in ensuring the coherent and coordinated incorporation of the views of indigenous people in the design and implementation of policies and programmes. Under this procedure, indigenous people and their communities should be informed and consulted and allowed to participate in national decision-making, in particular regarding regional and international cooperative efforts."[33]

This complements the Rio Declaration, which states that the "effective participation" of the indigenous peoples should be recognized and duly supported.[34] Altogether, it is clear that the Rio Summit opens up the concept of "right" holders. However, most important for further analysis, is that the signatory states declared by the wording, although not in a binding document, that the public should be given possibilities for participation in decisions. This indicates that they should have some kind of ownership - control - over the process, not merely be consulted. Concerning indigenous peoples, information, consultation and participation is mentioned in high-level decision-making.[35]

At the latest Conference of the World Summit on Sustainable Development in Johannesburg 2002, however, little progress was made on the critical issue of citizens' "rights" to participation. The inter-governmental

[30] United Nations Declaration on Environment and Development, (1992), (hereafter Rio Declaration) Principle 10. For full text see Supplement A.3.
[31] For explanation on EIA see 2.3.3.
[32] Agenda 21, (1992), Chapter 23.2.
[33] Ibid, Chapter 26.3 (b) and 26.5 (a). See generally, Cameron and Mackenzie, (1996), p. 129ff.
[34] Rio Declaration, (1992), Principle 22.
[35] See 4.2.

negotiations were not very progressive in furthering or making the language more detailed. The relevant paragraph of the Johannesburg Plan speaks of ensuring access to public participation in decision-making, but a proposal for more detailed global guidelines to promote public participation was, as expressed by French, "left on the cutting room floor."[36] Moreover, the paragraph in the Johannesburg Plan of Implementation makes a cross-reference to other principles of the Rio Declaration such as Principle 7 on "common but differentiated responsibilities." Interpreted in a negative way this reference could imply that a lower standard of public participation should be applied in developing countries. Watered down to be a paragraph of cross-references instead of advancements, the paragraph does not add much to the concept of public participation in environmental decision-making. This is somewhat worrying as the focus of this Johannesburg Summit was, as the name of the Plan of Implementation indicates, on how to implement the agreements - to make advancements. However, progress was made in other areas, as for example in the increased activity of other stakeholders.

Next to the fact that the two summits made stakeholders as NGOs that had been waiting to participate and be let into the decision-making process, they urged actors such as Multilateral Development Banks (MDBs) to become more proactive. Not only was this a shift away from the nation-state based international system but consequently it led to the following: by recognising MDBs as actors toward sustainable development the MDBs were triggered to adhere their work to the principles of sustainable development e.g. to implement public participation in environmental decision-making. Even if the Rio Declaration, Agenda 21 as well as the Johannesburg Plan of Implementation, are agreements between states and the relevant paragraphs address decision-making "at the national level" they can be seen as setting an international standard. As argued by Cameron "this internationally agreed national model of individual and NGO involvement provides a template that can be applied to the international context."[37] Surely, this is also applicable when indigenous peoples are concerned. As seen above, Agenda 21 in this case mentions intergovernmental organisations as important actors. Further attention to this will be given in Chapter 3 when discussing how the World Bank has adhered to the principle of public participation in environmental decision-making.

In sum, international environmental soft law has, endorsing the concept of sustainable development, broadened the concept of right holders and opened up for actors like the MDBs to be implementers of the concept. But the language remains soft and general, and there is no sign of making it harder and more detailed.[38] This is reserved for European regional agreements.

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[36] Johannesburg Plan of Implementation, (2002), Paragraph 128. For text see Supplement A.4 in this essay; French, (2002).

[37] Cameron and Mackenzie, (1996), pp. 135-136. See also Raustiala, (1997), on NGOs as a part of the "Participatory Revolution" in International Environmental Law.

[38] In its Decision 22/17 (7 Feb. 2003) the Governing Council of UNEP requests the Executive Director to determine "if there is a value in initiating an intergovernmental

2.3.2 Hard Law from Aarhus

The Aarhus Convention, ratified so far by 29 states of the United Nations Economic Commission of Europe (UNECE), is perhaps the most far-reaching example of how the vague commitments of Principle 10 of the Rio Declaration can be turned into specific and rather detailed legal provisions. Using a right-based language is a clear indication of how environmental law and human rights law are approaching one another.[39] The Convention's article 3.7 provides for the Parties to promote its application within the framework of international organisations, giving it increasing global importance.[40] How does this progressive instrument deal with "public", "participation" and in what kind of decision-making is the public involved?

The Convention addresses environmental decision-making not only in development of specific activities but also of policies, plans, programmes as well as in the preparation of laws and regulations by public authorities. As the Convention includes multi-level decision-making and many different situations, the timing for participation (concerning projects, policies, plans and programmes) is held in general terms. In Annex 1 of the Convention it is listed in which special activities public participation should take place.[41] Participation should be early and take place when all options are open and effective participation can take place. For decision-making concerning laws and regulations participation should be provided at the "appropriate stage". Taking due account of the outcome of public participation is of importance.[42] The Convention defines both "the public" and "the public concerned". Whereas the former has a broader scope including one or more natural or legal persons and their associations, organisations and groups, and is applied to development of plans and programmes, the latter includes people that are likely to be affected by or have a special interest in the matter and applies to decision-making in specific activities. The Convention does not provide any details on what "participation" should be. Nevertheless, from the main text some minimum requirements can be deduced; "public participation should be timely, effective, adequate and

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process for the preparation of global guidelines on the application of Principle 10." This work is currently done within the Montevideo Programme III. See Decision 21/23 (9 Feb. 2001) chapter 7.

[39] Article 1 provides that "each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters." Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, (1998).

[40] An expert group on public participation in international forums is now drafting guidelines which will be designed to help the Parties of the Aarhus Convention in their work internationally. It is under discussion if the guidelines will extend to international financial institutions such as the World Bank. See UNECE doc. MP.PP/WG.1/2004/13.

[41] The Annex includes e.g. activities in the Energy Sector, Mineral Industry and Chemical Industry. For comparison with Bank policies see 3.4.3.1 and 4.2.2.

[42] See Article 6.8 and 8, in above n. 39; *The Aarhus Convention Implementation Guide*, (2000), p.86 provides that "the public input should be capable of having a tangible influence on the actual content of the decision. When such influence can be seen in the final decision, it is evident that the public authority has taken due account of public input."

formal, and contain information, notification, dialogue, consideration, response."[43]

2.3.3 Public Participation in EIA and SEA

One of the clearest examples of the possibilities for citizens to participate in environmental decision-making today is through the EIA. Shortly, one can say that an EIA is the process of identifying the future consequences of a current purposed action. Originally focus was on biological consequences and the approach was technical. However, increasingly the process has come to involve social aspects and the approach has developed to be more participatory including consultation with the public. I will now focus on how the element of public participation is addressed in international and national law.

The development of the concept of environmental assessments in global soft law has to a large extent followed the general policy development from Stockholm via Rio to Johannesburg. From not being explicitly identified in Stockholm it is clearly reflected in Principle 17 of the Rio Declaration and, as mentioned above in the Agenda 21.[44] But, as argued by Sands; "The language is nevertheless couched in general terms, does not describe what at a minimum the process should comprise, and does not state who may participate in the assessment procedure.[45] Still being so in Johannesburg,[46] one can conclude that there is no international agreement of global application that more closely says how public participation should be incorporated in the EIA process.[47]

Instead, the international agreements with "harder" provisions are once more to be found on a regional European level, where UNECE and EU law are complementing each other. The implementation of the Aarhus Convention has required an amendment of the EU Directive on EIA and hence the provisions on public participation have hardened accordingly.[48] However, coloured by the principle of subsidiarity, the Directive leaves to the member states to determine who is to be considered as the public

[43] Ibid, p. 86.
[44] For full text Principle 17 see Supplement A.5 in this essay. For compilation of instruments see Handl, (2000), pp. 94-97.
[45] Sands and Werksman, (1995), p. 188.
[46] See e.g. Paragraph 18(e), 34(c), 56(h), 91(d), 119(b) in Johannesburg Plan of Implementation, (2002).
[47] Several international organisations have involved themselves in EIA through guidelines and training. The UNEP guidelines (1997) are however not very detailed on public participation stating in its principle 7 that "Before decision is made on an activity, government agencies, members of the public, experts in relevant disciplines and interested groups should be allowed appropriate opportunity to comment on the EIA". Generally on development of EIA see Wood, (2003), p. 4.
[48] Except for the Aarhus Convention, (1998), the UNECE has a Convention on Environmental Impact Assessment in a Transboundary context, (1991), and amended guidance for public participation in Decision II/3. The EU has a Council Directive 97/11/EC on EIA and Directive 2003/35/EC amending the Directive following the signature of the Aarhus Convention.

concerned and the detailed arrangements for consultation. Hence, the provisions are not very detailed and do not use the word of participation.[49] The EIA Directive lists in its Annex the activities for which an EIA is necessary, may it be the building of roads, nuclear power plants and dams.[50] Both organisations have also responded to a new tendency where the aims and principles of EIA are extended to a higher level of decision-making, addressing policies, plans, programmes and law, through the adoption of a Strategic Environmental Assessment (SEA).[51] This time the provisions are harder. Studying the latest document, the UNECE SEA Protocol, it can be noticed that the provisions on public participation are more detailed including how "the public" should be identified, using "participation" and not consultation and outlining when the public should be able to participate.[52] In sum, although not very detailed, the EU EIA regulations, next to SEA regulations and the Aarhus Convention, take part of a system supporting compliance.[53] Hence, they are developing towards potential vehicles for meaningful public participation in different kinds of decision-making in countries taking part in the UNECE and the EU. Other regions of the world lack regional agreements but have EIA instruments on the national level.

A survey[54] shows that although the use of EIAs in many countries has grown in Latin American and the Caribbean region in the past 20 years, and although it has dramatically increased public access to decision-making that affects the environment, EIA alone does not ensure adequate public participation. The findings argue that all surveyed countries had laws relating to public participation in EIAs but in practice, the public was not consulted early enough to really be able to influence key decisions, and none of the examined countries had EIA laws, policies or guidelines that provided for public participation in monitoring compliance or implementation of EIA processes. The report concludes; "In other words, public consultations occur mainly in the middle stages of decision-making, when the parameters of the problem of possible solutions have already been defined, but before they are actually implemented or adopted." Furthermore what stands out across the majority of cases is that the onus of initiating participation in the decision-making process is on the public. Another recent study[55] confirms that legislation is an essential pre-cursor to an effective

[49] See Article 6 and 9 Council Directive 97/11/EC which also provides that the public, as a minimum, should be informed and be able to express an opinion before the development consent is granted and be informed about the decision once it is taken.
[50] Directive 97/11/EC Article 4 and Annex 1. In Annex 2 activities left for the Member State to include or not as requiring an EIA are listed.
[51] The EU has adopted Directive 2001/42/EC of the European Parliament and the Council on the Assessment of the Effects of certain Plans and Programmes on the environment and the UNECE a recent Protocol on Strategic Environmental Assessment, (2003).
[52] See e.g. Article 2, 3, 5, 6, 7, 8 and 11 of the SEA Protocol, (2003).
[53] The Aarhus Convention has established a Compliance Committee and the EU has its Court of Justice. See also 3.5.2.
[54] *Decision for the Earth; Balance, Voice and Power*, World Resource Institute, (2003), pp. 58-60.
[55] Wood, (2003), p. 8.

EIA but is often, when existent, too difficult to implement. The same study also shows that developing countries generally have weak requirements on consultation and public participation.

2.3.4 Public Participation in Global Conventions

In other global environmental conventions the element of public participation has proliferated at the time of and after the adoption of the Rio Declaration.[56] This proliferation shows that public participation increasingly is gaining support as an indispensable element when new environmental treaties are agreed, which of course has an impact on the status of public participation as a legal norm in international law.

2.4 The Status of Public Participation as a Legal Norm

2.4.1 International Law

In spite of an increasingly widespread recognition and usage of public participation in international law, as shown above, its legal status remains somewhat ambiguous. Article 38 of the Statue of the International Court of Justice recognises conventions, custom and general principles as sources of law.[57] The presence of the norm of public participation in the Rio Declaration, which is "indisputably viewed as an international instrument that reflects a consensus on certain general principles of law", as well as the fact that it is followed by state practice providing "evidence of existence of the *opino juris* from which customary rules develop and become binding"[58] are relevant in estimating its status as a source of law. Additionally, support can be found in the fact that it is an indispensable element of sustainable development, which is estimated as a general principle.[59]

According to Handl public participation can be seen as a "general legal requirement". He states; "While 'public participation' is universally recognized as a fundamental public policy tenant, it also has a strong international legal underpinning as evidenced in treaty practice and the resolutions and declarations of various multilateral conferences, which specifically support the existence of a corresponding legal obligation of states. Moreover, public participation is essential for EIA. In sum, it is

[56] See e.g. 1992 United Nations Convention on Climate Change Article 6 and 1994 United Nations Convention to Combat Desertification in those Countries Experiencing Drought and /or Desertification Article 3, 5, 10 and 19.
[57] Article 38 of the Statue of the International Court of Justice recognises the following sources of law; expressly recognised conventions; custom as evidence of general practice accepted as law; general principles recognised by civilized nations.
[58] Bekhechi, (2002), p. 30.
[59] Sands, (2000), p. 374.

probably correct that as a normative concept 'public participation' extends beyond the narrow context of EIA and in this wider sense reflects an international legal obligation."[60] On participatory rights for indigenous peoples the legal status of their participation has, according to Handl, reached a status as an established public policy concept.[61]

Given that participatory rights originate not only from the source of environmental law but also from human rights law, it can also be claimed that public participation as a human right with a well defined normative reach, has a believable claim to potential universal validity. The attempts, mentioned earlier in the chapter, to develop procedural human rights related to the environment and with the Aarhus Convention as an example of how the normative source of human rights and environmental law approaches one another are also signs of its characteristics and progression.

Summing up on the legal status of public participation in environmental decision-making, it can at least be said - independently of normative source, legal labelling or right-based conception - that the legal norm has enjoyed considerable recognition and will continue doing so.[62] Adding to this is its proliferation as an indispensable element in global conventions. Its repeated promotion in various forums, by various actors and its aspiration to be valuable not only in a domestic and regional context but also in international institutions, is an undeniable hallmark and hence triggers to its use in the work of the World Bank. The status of the norm in national legislation has been shortly mentioned when discussing EIA. However, some further attention can be given to it before concluding this chapter.

2.4.2 National law

A recent UNEP publication[63] on law and practice relating to the three access principles in the African, Asian and Pacific regions and the Latin American and Caribbean region concludes that although it is clear that a lot has been done to reflect Principle 10 of the Rio Declaration, the actions taken are still inadequate because in most cases the law and regulations adopted cover just a part of the principle. Another study,[64] focusing on constitutional rights in African countries, shows that the public participation pillar is frequently missing, actually more often than the other two access principles.

[60] Handl, (2000), p. 153.
[61] Ibid, p. 115.
[62] See also Article 16 of the Malmö Ministerial Declaration (First Global Environmental Forum 29-31 May 2000) providing for broad participation in decision-making.
[63] *A report on models of national legislation, policy and guidelines in the Africa region, Asia and Pacific region and the Latin America and Caribbean region*, UNEP (2002). The report covers more than the status of public participation in more than 80 countries of the world.
[64] ELI Report, (2000).

2.5 Conclusion

In conclusion, the chapter has drawn the attention to the following; public participation in environmental decision-making has broad recognition as a legal norm in both human rights law and international environmental law. "The public" is recognised as individuals as well as NGOs and other groups. "Participation" is frequently expressed in general terms, however this term and not "consultation" is used in important legal documents. Global human rights law as well as environmental law are still vague on in what kind of decision-making - on what levels - and at which stage of the process participation should take place. They are also silent about in which activities public participation should take place. On this issue the European instruments such as the Aarhus Convention and the EIA Directive have Annexes where relevant sectors and activities are listed.

Although the international community now, according to the policy tenant of the Johannesburg Summit, is focusing on implementation, turning the norm into an operational reality at all levels is the next step. As presented in this chapter many developed countries are implementing the norm and have mechanisms for its enforcement whereas developing countries are lagging behind. A legal divide is created. The battleground for the norm today, when it is well recognized in international law, has returned to where it started, to the national level.[65] This time, however, the domestic battle for its recognition is now mainly taking place in developing countries.

How can it be implemented not only into national legislation but also, once there, in practice? The norms having global outreach are soft and not very detailed; how can it be guaranteed that participation does not stay cosmetic but include meaningful public participation? As has been shown in 2.3.1, all sectors of society are now required to cooperate to move towards the objective of sustainable development. I will now focus on how and to what extent the World Bank gradually has adapted to this call for participation.

[65] Ebbesson, (1997), p. 1.

3 Public Participation in World Bank Policy and Practice

3.1 Outlines of the Chapter

The purpose of this chapter is to show how and to what extent public participation in environmental decision-making has gained recognition through a gradual reinterpretation of the Bank's mandate and how it has materialized in Bank policy and practice. The chapter continuously discusses the relationship between the Bank, the Borrower and the Public who are the potential beneficiaries of the development projects.

In examining the evolution of the Bank's mandate the following will be in focus. Firstly, in chapter 3.2, the important characteristics of the Bank, being not only an inter-state bank with an apolitical mandate but also an international organisation with international obligations, will be presented. Secondly, chapter 3.3 addresses how the Bank, owing to outside pressure, has let the public gain influence but also how the paradigm of sustainable development to some extent has enabled it to go from reactiveness to proactiveness.

The focus on how public participation has materialized in Bank policy and practice will also be presented in two chapters. Chapter 3.4 analyses how the present policies of the Bank mention public participation and include some tendencies of possible future developments. Chapter 3.5 pays attention to one of the most important possibilities for enforcement of the policies - the World Bank Inspection Panel. Chapter 3.6-3.7 follow this with two case studies showing the lacunas of policy in practice and possibilities for improvement. The conclusion in 3.6 sums up on the status and challenges of public participation in environmental decision-making in World Bank activities today.

3.2 An Inter-State Bank under International Law

The Articles of Agreement[66] establishing the Bank some 60 years ago serve two legal purposes. Firstly, they serve as international treaties establishing an international organisation and describing the rights and obligations of the states that decide to become members through ratification of the instrument. Secondly, they serve as a "constitution" giving the purposes and principles to guide the organisation in its daily operations.[67] When analysing the evolution of the Bank's mandate and the dynamics of the relationship

[66] World Bank Articles of Agreement for IBRD and IDA, www.worldbank.org.
[67] See Skogly (2001), pp. 26ff and for example in the adoption of Bank policies, see 3.4.1.

between the Bank, the Borrower and the people the Articles of Agreement are key.

3.2.1 An "Apolitical" Bank

The Bank was established after the Second World War as one of the Bretton Woods institutions created to finance the reconstruction of Europe. However in the wake of decolonisation when other states became borrowers, the focus on "reconstruction" shifted to the promotion of "development".[68] At this time "development" was understood in purely economic terms, literally following the Articles of Agreement stipulating; "The Bank shall make arrangements to ensure that the proceeds of any loan are used (…) without regard to political or other non-economic influences or considerations."[69] It was a belief that through sufficient financial transfer of money the developing countries would fairly quickly move from their status as developing to developed countries. Thus development, in line with the Articles of Agreement, was seen as an apolitical process and this perception became one of the Banks key norms. This norm had its origin in the multinational character of the Bank and the need to obtain support from and lend to an as broad range of governments as possible, often independently from the political situation in the world. Though considered as an "organisational myth", as all actions of the Bank naturally have political dimensions, the official avoidance of politics has increased its legitimacy, especially in the time of the Cold War.[70]

Created in a post-war era and consolidated in a cold-war era, the Bank was organised around the principle of state sovereignty. It was, and still is, an inter-state bank giving loans to governments, which in turn may pass them on to public and private agencies.[71] A Board of Governors, comprising of one representative from each member country, including borrowers and lending countries, supervises the Bank. A Board of Executive Directors, including lending countries, meets more frequently to decide on Bank policy and approve loans. Voting rights are allocated in accordance with the proportion of the financial contribution of the member states.[72] The most influential actors in the organisation are therefore the industrialized nations that provide the Bank with capital backing.[73]

It should be underlined, that the Bank is primarily not an aid-agency, but a Bank - it gives loans but at the end of the day, even if the project is a failure, the loans have to be repaid, and that with an interest rate. As Bradlow puts

[68] The IBRD Articles of Agreement Article III (4) (vii) provides that "Loans made or guaranteed by the Bank shall, except for in special circumstances be for the purpose of specific projects of reconstruction or development."; see also Gualtieri, (2001), p. 216.
[69] See IBRD Articles of Agreement Article III (5) (b).
[70] Miller-Adams, (1999), p. 22-24.
[71] However, the Bank today offers some possibilities for people to take so called micro loans. Loans to business is transferred though the International Financial Corporation (IFC).
[72] See generally Smillie, (1993).
[73] Miller-Adams, (1999), p. 10.

it; “The new organisations were still organized around the principle of sovereignty, but they were given some ability to compel member states to comply with their rules and decisions.”[74] There are several possibilities for the Bank to promote compliance with its rules. One of them is through contracts;[75] another is to put pressure on the borrowing government in more sophisticated ways.

In the 1970s, as a response to the increasing attention to development issues, the Bank reinterpreted its mandate to include concern for the poor segments of the population with programmes for education, health and nutrition. Steadily increasing loans to the developing countries, partly as a result of a steadily growing debt repayment burden, eventually made the Bank augment its use of conditions linked to loan and therefore increased its influence over national policies.[76] The act of balance between what could and could not fall within apolitical and economical considerations early became key. As long as the Bank interpreted something as economical considerations action could be taken. The increasing focus on “good governance” related issues by the global development community seems to have influenced the Bank to start using “good economic governance” when influencing a number of areas that could have relevance to economic development. The idea of separating “pure” political considerations from “pure” economical, as well as domestic from international interests, was easily questioned.

3.2.2 An Organisation with Human Rights Obligations

Created by states the Bank is also an intergovernmental organisation. Although it has not been granted explicit legal personality through its Articles of Agreement it has been argued that as it has entered into agreements with the UN as well as with member states it possesses international legal personality. This, in its turn, would imply that it could have certain obligations under international law. The institution, Skogly argues, is at least bound to customary international law and to general principles of law. Consequently, a situation appears where not only the states that created the Bank have obligations under international law but their creation too, the World Bank. At the same time, however, set up under the discretion of the member states, the Bank can never function completely independently from the will of the founders. In carrying out its acts it must apply rules and procedures laid down by the constitution governing the conduct of the organisation - the Articles of Agreement.[77] Neither human rights nor environmental concerns are mentioned in the Articles of Agreement, and in that sense the Bank is a product of its time, respecting these issues to be reserved for the domestic political arena. However, as argued by Skogly “there is nothing in the Articles of Agreement which will prevent (the World Bank) from taking human rights issues into

[74] Grossman and Bradlow, (1993), p. 2.
[75] See 3.4.2.
[76] Skogly, (2001), p. 16.
[77] Skogly, (2001), pp. 68, 70, 84.

consideration as to the effects of their operations side by side with 'pure' economic considerations."[78] Hence, the silence on the issue in the Articles of Agreement can be used to refrain from action, but also to interpret the Bank's mandate in the light of global policy development. To what extent have human rights been recognised and codified in the policies, the "domestic law" of the Bank? The Bank still give limited attention to human rights standards as such in the policies. The need is to link them to economic concerns.[79] Nevertheless the following text will show how the right to participate in environmental decision-making - interlinking environmental concerns and traditional human rights - progressively has gained support within the Bank and has come to be a part of "good economic governance". It will be shown how the recognition of public participation initially was a reaction to pressure for Bank accountability, but how its justification with the paradigm of sustainable development - interlinking environment, development and economics - is becoming consolidated.

3.3 From Reactiveness to Proactiveness

Presenting the recognition and development of public participation in Bank activities gives a useful background to how Bank policies have developed, are organized and can be used.

3.3.1 Campaigning for Public Participation[80]

In parallel to the gradual understanding within the Bank that development was so much more than a transfer of money and that a successful project was dependent on other considerations than strict economical criteria, a gradual international recognition of the international dimensions of, and the Bank's impact on, human rights and environmental issues was increasingly advocated by civil society. The explanation for the higher pressure from outside was twofold. Firstly, though formally accountable only to its member states, the governments of these member states whose money supports and underwrites the Bank have to face their voters and taxpayers back home.[81] Therefore the spending has to be transparent and politically correct. Secondly, as has been pointed out above, since the 1970s the poverty alleviation came into focus of Bank activities, and the loans had to be beneficial for the people. The legitimate question increasingly asked by the civil society was therefore, as Horta puts it; "To who is the institution accountable and for what?[82] Accountability, in this case closely linked to

[78] Skogly, (2001) p. 108.
[79] See 3.2.1.
[80] In Miller-Adams, (1999), p. 85 and 98 one can see the escalation of public participation in projects over time and a timeline of participation related developments.
[81] Undall, (1998), p. 392.
[82] Horta, (1996), p. 132.

legitimacy, became essential - especially for an international organisation governed by high-level politics but doing business. [83]
In the 1980s rainforest destruction and large dams brought environmentalists, development NGOs, human rights activists, and indigenous peoples activists together into a broad effort to question multilateral economic development decision-making more generally and underscore the institutional problems within the Bank.[84] The Articles of Agreement, authorizing the Bank to "cooperate with any general international organisation and with public international organisations having specialized responsibilities in the related fields" was interpreted by the Bank's general council as to include the possibility of working with NGOs, however only with the full knowledge of the governments and consistent with their policies.[85] This was a good example of the dynamics and constraints that lie within the mandate of the Bank. The focus was not only on Bank-Borrower relations but increasingly also on the voice of the people in the borrowing and lending countries. But pressure did not only come from outside, but also "bubbled up from the Bank's own grassroots". There was a pragmatic insight that participation in projects could improve the prospects for success of the project, and hence the performance of the staff.[86]

Even if a rethinking of the concept of development as "participatory development" gained recognition, and Bank policies that would give people information and possibilities to be consulted were adopted, they were often not translated into practice.[87] Reacting to pressure and adopting policy is one thing, being more proactive, implementing the norm is another. In the following chapter I will analyse how the paradigm of sustainable development has affected the mandate and use of language by the Bank.

3.3.2 The Bank and Sustainable Development

As has been pointed out above, the Bank's Articles of Agreement do not require environmental or human rights considerations and no amendments have been made. Still, its interpretation of the Bank's its mandate has adjusted to changes in the international community's perception of how environment interrelates with the concept of development. Therefore, it has been argued in literature, there has been no need for any amendments. With the paradigm of sustainable development the Bank became "not only free to take sustainable development concerns into account, but it also has an

[83] See Skogly, (2001), p. 11 for a discussion on what legal accountability implies as well as Bodansky (1993) on legitimacy of international governance as a coming challenge for international institutions and international environmental law. See also generally Fox and Brown, (1998), p. 439ff.
[84] Generally see Udall, (1998), pp. 391- 403.
[85] Miller-Adams, (1999), p. 72 and IBRD Articles of Agreement Article V (8).
[86] Miller-Adams, (1999), p. 96, 70.
[87] This eventually led to the establishment of the Inspection Panel, see 3.5.

international legal obligation to do so - not despite (its) constituent instruments, but rather, (…) because of them!"[88]

This chapter provides some insights, from a public participation perspective, into how the Bank gradually has adopted to the new paradigm, paying respect to the sovereignty of the borrowing state but at the same time claiming in its documents to be able to play an active role in promoting increased participation - of the public but also of the Borrower!

3.3.2.1 Rio - Participation of all Actors

The Rio Conference on Environment and Development 1992 became a benchmark for a global consensus on treating environment and development in an integrated manner. Although the operational implications of the concept were far from clear, the perception of development was more clearly outspoken than ever before. This was of course important for the Bank, as its main purpose is to promote development. Even more important, however, was the fact that the conference documents expressed that the responsibility of making the transition to sustainable development not only (although first and foremost) is the responsibility of national governments but also lies with the international organisations.[89] The era when the Bank was reactive to international policy, mainly adopting its mandate *ad hoc* when the pressure from different actors had become too strong, was over. It had to become more active, and its mandate to do so was reinforced. Public participation had been recognised in the centre of sustainable development and the soft law adopted in Rio required the UN system (the Bank being a part of it) to design "open and effective means to achieve participation of non-governmental organizations."[90] Therefore the trend of "participatory development" in Bank activities, set in motion well before the Rio Conference, could become reinforced. The situation, however, was not easy. Whereas the Bank on the one hand had to follow the call, made by governments, due to the need to be more active in promoting sustainable development and for development projects to include e.g. the participation of the people, on the other hand it had to adhere to its apolitical mandate and the fact that it is lending to governments, not their people. Therefore the advancements were slow and politically sensitive.

When studying Bank documents on public participation from this time one may say that a learning process on public participation is at hand. Several studies trying to prove the positive aspects of public participation are carried

[88] Handl, (2000), p. 35. The World Bank's Article of Agreement can be compared with the Constituting Agreement of the European Bank of Reconstruction (EBRD) from 1990 which in its Article 2 (vii) has provisions constituting that the Bank should "promote in the full range of its activities environmentally sound and *sustainable development*".

[89] This is confirmed by General Assembly Resolution 47/191 paragraph 23 inviting the World Bank and other international, regional and sub regional financial and development institutions to report to the Commission on Sustainable Development (CSD) on their implementation of Agenda 21. See also Handl, (2000), p. 23.

[90] Agenda 21, paras. 38.43. See also Sands, (1994), p. 360.

out.[91] However, interestingly to note, the process that started focuses as much on the increased participation of the Borrower as on that of the public, the two being necessarily interlinked. Asking for a more active role of the Borrower seems to be a way of promoting public participation. In a workshop report on "Participatory Development: Directions for Change" it is clearly stated that "projects and programs supported by funding agencies such as the Bank should not, and can not, be 'donor projects'. Government and various organisation interests in society make participation possible. The Bank can help support participatory process, but its clients must make participation happen." In spite of this it was pointed out: "this does not imply that external agencies must remain passive. It does mean, however, that the Bank's strength lies in its ability to engage in dialogue with governments about appropriate policies and methods to promote people's involvement in the development processes and to influence borrowers to successfully implement all aspects of Bank-financed operations, including participation related aspects."[92] Other reports also claim that the Bank will seek opportunities to support governmental efforts to promote a more enabling environment for participatory development and good practices of "stakeholder participation" are assessed and evaluated.[93] In a progress report five years after Rio it is concluded: "The Bank can foster dialogue between governments and NGOs. In each country, political realities will dictate practice."[94]

In sum, during the 90s the Bank increasingly pays attention to stakeholder participation. The focus of the Rio conference made it possible for the Bank to start working more actively on public participation. At the same time it carefully watches its steps when it comes to the "political realities" of the involved country, making its advancements slow.

3.3.2.2 Johannesburg - Implementation by all Actors

In a review report 1997 on Further Implementation of Agenda 21 the UN General Assembly enjoin the MDBs to strengthen their commitment to sustainable development.[95] Bank documents some years before the Johannesburg Summit on Sustainable Development and until today show that the Bank is progressing towards a more co-ordinated, strategic and unified action concerning sustainable development.[96] This action also seems

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[91] *Popular Participation in Economic Theory and Practice* (1993); *Does Participation Improve Project Performance? Establishing Causality with Subjective Data* (1994); *Does Participation Cost the World Bank more? Emerging Evidence.* (1994); *Making Development Sustainable: The World Bank group and the Environment* (1994), p. 47 it is stated that "substantial local participation is *likely* to improve the chances of success of environmental projects." (Emphasis added).

[92] *Participatory Development and the World Bank: Potential Directions for Change*, (1992), p. 5 and 13.

[93] *Participation in Practice: the Experience of the World Bank and other Stakeholders* (1996); *A Participation Sourcebook* (1996), *Participation and the World Bank: Successes, Restraints and Responses* (1998).

[94] *Advancing Sustainable Development: The World Bank and Agenda 21* (1997), p. 74.

[95] Handl (2000), p. 7.

[96] See note 97 and 98.

to include that the Bank expects more of its borrowers. As an example the report 'Making Sustainable Commitments' argue: "We need to search for ways of assisting and helping develop in-country capacity to adopt and internalise the principles of sustainable development, and create incentives and rewards for good performance by delegating responsibility to borrowers with demonstrating capacity to manage the environmental aspects in their own programs."[97] In a First Environmental Strategy Implementation Progress Report named "Putting our Commitments to Work" the Bank refers to the Johannesburg Summit as a reference influencing its work on the Environmental Strategy.[98] Although public participation is not in centre of the Environmental Strategy as such, one of its priorities is to improve the implementation of the safeguard policy system in which, as will be shown later, forms of public participation is present. Hence, the implementation of sustainable development includes firmer action on public participation.

Another sign of its aspiration to be a committed actor is that the Bank joins a Partnership for Principle 10; a so-called "type 2 partnership" launched at the Johannesburg Summit somewhat compensating for the lack of progress in the wording of the Plan of Implementation. In this partnership the Bank commits itself to support the accelerated and enhanced implementation of Principle 10 at the national level and in their own policies and practice related e.g. to public participation. In the commitments to Partnership for Principle 10 it is stated that the uniform application of Bank policies have shown to be "an excellent means by which the World Bank has indeed, been able to influence and grow public participation in countries where it was previously extremely limited."[99] The quotation above indicates that the Bank itself finds the policies important, not only in Bank activities, but also in a broader context (that chapter 4 will address). How do the policies of today deal with public participation in environmental decision-making? To present how policies are adopted is vital in understanding their origin, design and possibilities for improvement.

3.4 Public Participation in Bank Policy

3.4.1 Adoption of Policies

The process for adoption of policies is not a systematic internal legal process but as Boission de Chauzurnes emphasizes, an *ad hoc* procedure: when a topic emerges and becomes important this justifies the adoption of a new policy. Staff and management prepare draft documents under

[97] *Making Sustainable Commitments* (2001), p. 31.
[98] See *Putting our Commitments to Work: Environment Strategy Implementation Progress Report* (2003), e.g. p.13. See further 3.4.3.1 for safeguard policy system.
[99] First commitments of the World Bank to PP10, http://www.pp10.org/partners.htm, 2004-05-10. The new commitments that were launched in June 2004 are now available at the same site.

consultation with NGOs.[100] The Board, comprising member states and the Board's Executive Directors, with donor countries, considers the draft.[101] Altogether it is a political process of compromise between different stakeholders. However, as all policies must be consistent with the Bank's "constitution", the Articles of Agreement, and since the Board interprets them, it is the Board that makes the final decision determining matters of policy for the Bank. The evolution of policies is limited to their interpretation. Although the main objective of the policies is to mainstream and guide Bank staff in their work, the addressee of the policy is often the Borrower. The Borrower is responsible for the assessments required by the policy, while the Bank is responsible for overall policy compliance. This fact influences how polices are designed and how the wording is set but also how they are enforced. Whereas staff compliance of policies is up-held by the Inspection Panel,[102] the Borrower compliance can be safeguarded by contracts.

3.4.2 Contract between Bank and Borrower

Contractual loan agreements between the Bank and the Borrower can refer to policies and hence comprise provisions on forms of public participation. The Borrower should resort to all necessary means and measures to comply with the contractual commitment. The Bank, for its part, should exercise compliance supervision with *due diligence*. A breach of the terms of these legal agreements may allow the Bank to take action under international treaty law. If this is politically possible is however, another issue. Policies have increasingly formed the basis for legally binding conditions incorporated in loan agreements between the Bank and the state concerned.[103] Although the negotiation process of loan agreements commonly rests between the Bank and the Borrower without insight from the public,[104] the policy reform into safeguard policies (see below) more clearly outlines what should be incorporated into loan agreements and hence gives more transparency to the process. This is the way policies become not only politically binding but also legally binding for the Borrower.

3.4.3 Safeguard Policies and other Policies

Some Bank policies are labelled "safeguard policies" and some are not. The difference is that the safeguard policies are a special set of mandatory environmental and social policies that should ensure that development projects do not harm people or the environment.[105] The other policies have a more general character, including internal rules as disbursement and procurement. With the launching of safeguard policies in 1997 and the establishment of the Panel a process of converting old policies into new

[100] Generally for NGOs in policy dialogue see Covey, (1998), p. 81ff.
[101] Boission de Chazournes, (2000), p. 282.
[102] See 3.5.
[103] Boisson de Chazournes, (2000), pp. 289-290.
[104] Mucklow, (2000), p. 105.
[105] See www.worldbank.org/safeguards. Interestingly the focus is on "do no harm" and not on "do good".

ones began. The old policies, the operational directives (OD), consisted of a mixture of binding provisions and general guidelines. As will be shown later this often led to problems in interpretation by Bank staff, the Borrower as well as by the Panel. The new policies are designed as mandatory Operational Policies (OPs) and Bank Procedures (BPs) and non-mandatory Good Practices (GPs). This new structure aims at clarifying policy interpretation and hence promoting more effective and consistent implementation. In the following text attention will mainly be given to policies on EIA, Indigenous peoples, NGO involvement and Environmental Action Plans (EAP), as these policies have important provisions on public participation in environmental-related decision-making.[106] The process of conversation of the policies is still going on and the changes are indeed interesting.

3.4.3.1 Environmental Impact Assessment[107]

The new Operational Policy and Bank Procedure (OP/BP) 4.01 on EIA is an umbrella policy in the sense that it is often combined with other policies, i.e. those related to indigenous peoples. The "public" can therefore be different groups depending on the situation, hence, the policy speaks with a general language of "project affected groups and NGOs". The project-affected groups can be intended beneficiaries, at-risk groups and other affected stakeholders. Since affected groups in many developing countries have sincere problems voicing their concerns a variety of people often act as representatives for the affected people. These could include public representatives such as village headmen, tribal elders and religious leaders, private sector representatives from business interest groups and of course local groups (including NGOs) for example labour organisations and neighbourhood organisations.[108]

When the project is likely to have regional or sectoral impact a sectoral or regional assessment is required. In these assessments the public consultation component becomes even more complex, as it is more difficult to judge who should be considered as "project affected groups and NGOs".[109] The judgment of who should be involved is however always a vital step in meeting requirements on consultation but also a highly political one. It is made between the Bank and the Borrower under the preparations of the EIA. According to the Good Practices[110] on NGO Involvement it is stated; "While decisions concerning NGO involvement are the responsibility of the borrower, Bank staff may assist borrowers in identifying and assessing NGO partners and, as appropriate, encourage the involvement of NGOs

[106] Provisions on public participation can also be found in other policies such as OP 4.12 on Involuntary Resettlement para. 14, OP 4.04 on Natural Habitats para. 10, see Supplement A.6 and OP 4.36 on Forestry para. 12 (a).

[107] For relevant provisions on public participation referred to see Supplement A.7-8 of this thesis.

[108] See e.g. *Public Involvement in Environmental Assessment: Requirements, Opportunities and Issues* (1993).

[109] *Sectoral Environmental Assessment*, (1993), pp. 6-7. A sector could e.g. be mining.

[110] The quotations from the policy that follows are found in GP 14.70 paras. 17 and 3 and further down para. 13.

throughout the project cycle." The Good Practice Policy also emphasises that; "In the context of Bank lending, it is important for Bank staff to have an understanding of the nature of the relations between NGOs and the government. Bank staff should be aware that while government/NGO collaboration can enhance the quality of Bank-supported operations, it might not be possible in every country situation." These quotations are good examples of the limits that come with the Bank's original mandate. The act of balance between not interfering but at the same time encouraging cannot, in practice, result in anything else than great variation when identifying the "public".

The findings of a recent Bank review[111] on Environmental Assessments, evaluating projects during the introduction of the new policy system, could be seen as an indication of the delicacy in early identification of these issues. The report shows that one out of five projects sampled for the review lacked a plan for public consultation before the consultation process started. However, positively viewed the findings show that 80% had such plans, and this was an improvement compared with earlier studies. This could be an indicator of Bank success to deal with these issues under the negotiations with the Borrower as well as a failure to follow policy. Today the Bank Procedure on EIA clearly requests Bank staff to record proposed consultation with project-affected groups and local NGOs.[112] A harder instrument used by the Bank is the contract. The Good Practice, although non-binding as such, states that Bank staff should describe anticipated and actual NGO involvement in the project documentation and should set out in the legal documents any arrangements agreed upon with the Borrower. In conclusion, the onus of identification of "the public" often lies with the Borrower, although the Bank has possibilities but no obligations to influence.

The continuum of "participation" is in the Operational Policy and Bank Procedure limited to information sharing and consultation, the former being a prerequisite for making the latter meaningful and should be provided by the Borrower "in a timely manner prior to consultation and in a form and language that are understandable and accessible to the groups being consulted."[113] It is interesting to note how the Bank has differed consultation from participation by avoiding the wording of participation altogether. According to the Bank documents both are based on a two-way flow of information, but the latter invites involvement in decision-making to a greater extent. Hence, the difference is a question of control by the people: participation implies some formal measure of control that consultation does not.[114] The case study on Lake Victoria in chapter 3.6 will put this question of control more into focus.

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[111] *Public Consultation in Environmental Assessments: Findings from the Third Environmental Assessment Review 1997-2000*, (2002), p. 8.
[112] BP 4.01 paras. 3 and 19.
[113] See Supplement A.8 and further OP 4.01 paras. 17-19. These provisions are complemented by a separate Bank policy on Disclosure of Information (1994).
[114] *Public Consultation in the EA Process: A Strategic Approach* (1999), p. 14.

An interesting question is at what stage of the process the consultation according to the policies should take place and how often it really occurs according to the Bank's own evaluations. An EIA process passes trough the different phases of identification (screening), preparation (scooping), appraisal, negotiation/approval, implementation and evaluation. Firstly, relevant to consider is that even if the Operational Policy states that the Borrower initiates consultations as early as possible, it is only for Category A[115] projects that more detailed provisions are given for when it should happen. Hence, it is absolutely crucial for the possibilities to participate if the projects are classified as A, or as e.g. Category B. The policy is quite vague on this classification stating that A projects "are likely to have significant adverse environmental impact that are sensitive, diverse or unprecedented and require more of the EIA procedure" and that the impacts of B projects "are less adverse of those of A projects". Therefore, qualification is *not* an issue of listing activities that could be harmful, but the key issue is what is to be considered as "sensitive, diverse or unprecedented". The policy gives some guidance indicating that it is "sensitive" if it may be irreversible (e.g., lead to loss of a major natural habitat) or raise issues covered by policies e.g. on Indigenous Peoples.[116] Naturally, drawing the line poses problems, and has led to complaints to the Panel.[117]

For Category A projects, the Borrower according to the policy should consult the groups at least twice: (a) shortly after environmental screening and before the terms of reference for the EIA are finalized (scooping); and (b) once a draft EIA report is prepared. This means that the views of the public can be taken into account *before* fixing the terms of reference and the EIA report. To this extent it is an improvement compared to the EIA policy in the OD 4.01 before 1999 that provided that consultation should occur shortly *after* EIA category was assigned and once the EIA report *had* been prepared. The consultations are now to take place before decisions are made. The EIA review made by the Bank estimates that approximately 87% of the projects reviewed held these consultations.[118] Even if the result had improved since earlier EIA reviews, the results are discouraging, considering the fact that the Bank has had policies on EIA since 1989 and an Inspection Panel established to see to their compliance for more than ten years. This outcome merits further attention later on.[119] Much more discretion on when public participation should be carried out is hence left to the Borrower when Category B projects are planned. Perhaps as a result, the review of EIA mentioned earlier concludes that Category B project

[115] The projects are classified as A, B C or FI according to OP 4.01 para. 8.
[116] See footnote 10 of OP/BP 4.01.
[117] The Qinghai Project studied later in 3.7 is one of them. See also 4.2.2.
[118] *Public Consultations in Environmental Assessment: Findings from the Third Environmental Assessment Review 1997-2000*, (2002), pp. 9-10.
[119] See 3.5.

implemented fewer consultations during the EIA process. Nevertheless the consultations conducted were "considered good practice".[120]

In spite of consultations taking place before the draft EIA it is not yet required neither by the policy nor common practice that consultations are carried out on the environmental management plan, which is a component of the final EA that outlines the project consequences, possible alternatives and preferred solutions, and the final EIA. The review shows that the Borrower often opts to make the final report publicly available, which allows for sharing of information but does not open channels for responsive dialogue.[121] This means that it is more difficult for the public to highlight if they consider that their views have not been taken into account, which is a requirement according to the policy.[122] After the EIA is finalised the Borrower shall, according to the policy, consult with the public throughout the project implementation. Being consulted at this stage, if not adequately before is probably not appreciated by the public. Public in-put at this late stage of the process is difficult to take into consideration and will hardly change anything, only slightly modify it. The case study on Lake Victoria is an example of the feeling of being ignored.

Even if consultations take place at the different stages of the process the negotiation process as such stays between the Bank and the Borrower, and this is unlikely to change.[123] Hence, the incorporation of public participation practices is limited to special occasions when the public is invited. As mentioned before, the new BP more clearly guides how Bank staff during the project cycle should include the issues of participation in project documentation. This could result in an improved outcome of the next EIA review although the provisions on consultation are still quite vague. In sum, the EIA process normally does not give any control to the public; it is a Bank-Borrower project creating, as expressed by the Bank, "a sense of local ownership."[124] Ultimately, the level of consultation will depend on the efforts of the staff and the will of the Borrower. The role of the Bank is to strengthen and supervise the work of the Borrower. The role of the Borrower is to pay attention to World Bank policies and carry out what was agreed upon. And the public? It is at the best informed and consulted.

I will now shortly give attention to two interesting tendencies, related to EIA, which may have an impact on future possibilities for the public to participate in Bank activities.

Harmonisation. EIA is today a recognised and necessary tool in Bank projects in developing countries but as has been pointed out before, it is also

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[120] *Public Consultations in Environmental Assessment: Findings from the Third Environmental Assessment Review 1997-2000*, (2002), p. 19.
[121] Ibid, p. 11.
[122] See BP 4.01 para. 19.
[123] Mucklow, (2000), p. 105.
[124] *Public Involvement in Environmental Assessment: Requirements, Opportunities and Issues* (1993) p. 1.

frequently in place in the national laws of the developing countries. At an early stage of the EIA process in Bank projects there is a review if conditions related to consultation exist in national law. The lack of national EIA legislation or compatibility between the EIA requirements and procedures of borrowing countries and the ones of the Bank have been a well-recognised difficulty not only for the Bank, but also for other financial institutions. Adding to this, it is today more common that different financial institutions work in the same country and even on the same project. This creates a situation where different national and several international standards are used at the same time. Therefore the request for harmonisation at the institutional level (between institutions) but also at the national level (between countries and institutions in a broader context than for a specific project) has grown.[125] On the institutional level differences in policies between financial institutions may lead borrowers to "shop" for donors with the less strict requirements. In this context a potential area for harmonisation is the EIA. Interestingly, one of the most significant differences seems to be the procedural requirements for public consultation, that is when, and how often affected groups should be consulted. The process of harmonisation is still in its early stages but will unarguably have consequences for policies on public participation.

Concerning harmonisation at the national level (between country legislation and institutional policy), this should be analysed in a broader context of a development paradigm increasingly emphasizing country ownership and demand for implementation of Bank policies. Although the Bank "cannot delegate its responsibility for due diligence, it must maintain an overseeing role at the project appraisal stage and ensure appropriate levels of supervision." It is forecasted that the Bank "could move towards more reliance on national systems"…"when these systems are consistent with internationally recognized good practice."[126] Pilot projects comparing requirements in national laws and standards of co-operating financial institutions are now taking place. The aim is to develop guidance for the scope and preparation of EIA documents that would satisfy the basic requirements of the governments and donors.[127] Moreover, a process has just started concerning how to make safeguard systems more coherent.[128]

Strategic Environmental Assessment (SEA). Another tendency in Bank activities with potential impact on the possibility for the public to participate is the gradual recognition of SEA. To date the Bank has had an ad-hoc approach to SEA. Although the Bank's EIA policy can include an

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[125] See generally *Harmonisation of Operational Policies; Procedures and Practice – Experience to Date*, (2001) and *A Common Framework: Converging Requirements of Multilateral Financial Institutions: 1. Environmental Impact Assessment (EIA)* (2003), *Harmonisation: Recent and Future World Bank Activities* (2003).

[126] *Safeguard Policies: Framework for Improving Development Effectiveness: A Discussion Note*, (2002), p 14.

[127] Ibid, p. 15. See also discussion in chapter 4.

[128] Ibid, p. 6; see also generally *Putting our Commitments to Work: Environment Strategy Implementation Progress Report* (2003).

environmental assessment in a broader context, such as a region or a sector, the scope of SEA is to some extent different. It covers decision-making on policies, plans, programmes not the impacts of a single project. However, today when the Bank moves towards more sector lending programmes the potential utility of SEA is increasing. This includes the questions of who is the public and when the public should be consulted. But, since the SEA normally covers policies, plans and programmes it has often been assumed that public consultation becomes too complex and sensitive. The problem is often phrased as a question: Whom should you consult with if the affected community is the entire population of a country? Or: How do you explain to ordinary people the complex cause and effect relations between economic policy decisions and the environment?

According to Kjorven and Lindhjem experiences of the Bank through pilot projects show that consultation strategies in SEA are being developed, but the Bank is still testing and learning. Meanwhile the interest for SEA in developing countries is growing. The authors conclude: "While in the past the environmental profession has tended as much as any other development related profession to take a somewhat technocratic approach to development, SEA could represent a significant shift. As such, SEA may provide benefits that go beyond the environmental sphere as such."[129] To Kjorven and Lidhjem, the SEA in this respect has potential of contributing to the empowerment of people. When the EIA process of today is interlinked with the policy on indigenous peoples, participation of a higher degree than consultation is required.

3.4.3.2 Social Impact Assessment – Indigenous Peoples

The World Bank was the first multilateral agency to recognize the need to provide special protection to indigenous peoples (IP), twenty years ago, although the implementation of policies has not always been successful. The applicable policy on IP, Operational Directive (OD) 4.20, is still valid but is now under revision and evaluation. However, a final draft policy on the new Operational Policy Bank Procedure (OP/BP) 4.10 has been made public.[130] This draft indicates that many improvements regarding possibilities for participation are under way. The following presentation will present the new policy focusing on the improvements of the old OD.

The final draft of the OP/BP 4.10 has to a large extent kept the criteria of the policy for identification of who is to be seen as "the public". The Bank does not provide a single universal definition but instead the policy identifies indigenous peoples in particular geographic areas by the presence of some of five distinctive characteristics.[131] When the legislation of the Borrower affords special status to groups with these characteristics, or where there has already been a process in which the Bank and the Borrower have agreed on the general identification, this provides the starting point in

[129] Kjorven and Lindhjelm, (2002), pp. 2 and 5.
[130] See "Draft policy on OP 4.10" and "Comparison Matrix OD 4.20 and Draft OP 4.10" www.worldbank.org/indigenous, 2004-07-30.
[131] See draft OP 4.10 para. 4-5.

determining whether the policy applies in a particular project context. Only indigenous peoples "affected" by the project are concerned. An evaluation report of the OD shows that only 62% of the projects that, according to the evaluation team affected IP, applied the OD. The report argues that in countries without legal frameworks but with groups regarded as deserving protection under the Directive, the use of the term "indigenous peoples" may have constrained applications of the OD provisions because of political considerations.[132] Moreover there does not seem to be a clear understanding in Bank documents or practice of the term "affect". This has triggered the application of the OD, whether it refers to direct or indirect effects as well as if it refers to both positive and/or adverse effects and has led to severe problems.[133] The latter example will be presented in a case study later.[134]

The new OP/BP tries to do something about the lack of policy compliance by introducing, heavily inspired by the environmental assessment, a procedure for identification (screening) to indicate if there may be indigenous peoples in the project area. It is not by changing definition of "indigenous peoples" or going into details about who should be seen as "affected". The Bank staff should bring the policy provisions to the attention of the Borrower and discuss its application. The draft policy also introduces, where feasible, the possibility for an agreement on the groups covered by the policy between the Bank and the Borrower at this early stage. Additionally, the new OP/BP mentions that other relevant Bank internal documents should indicate whether indigenous peoples may be affected, and if so, what steps may be taken to comply with policy requirements.[135] To improve the identification of IP is a necessary prerequisite for participation.

The earlier mentioned evaluation report of OD 4.20 shows that in projects where the OD were applied, participation was 84% as to project design but only 62% and 51% in implementation and decision-making respectively.[136] The OD provides for "informed participation" which is to be addressed in an Indigenous Peoples Development Plan (IPDP) and the responsibility lies with the Borrower. This IPDP should outline a strategy for the extent of local participation during the different phases of the project although "no foolproof methods exist to guarantee full local-level participation."[137] The vague provisions on what "informed participation" should include and how it should be carried out have resulted in lack of compliance. The OD has often been interpreted, as will be seen in the case study later, as if a majority of project beneficiaries were IP then no IP plan or other special measures were necessary. Staff interpreted that the whole project was an IPDP in

[132] *Implementation of Operational Directive 4.20 on Indigenous Peoples: An Independent Desk Review*, (2003), p. 15.
[133] Ibid, p. 24 and see case study 3.7.
[134] See 3.7.
[135] See e.g. draft BP 4.10 para. 7.
[136] *Implementation of Operational Directive 4.20 on Indigenous Peoples: An Independent Desk Review*, (2003), p. 20.
[137] Ibid, p. 42.

itself.[138] Only 77% of the projects that applied the OD had an IPDP. Consequently, the evaluation requested clarification of roles and incorporation of the plan into legal documents. Also it requested the need for these issues to be dealt with, not only at the project-level but also at a regional and country level.[139] The question is how this has been considered in the new policy.

Already in the objective of the new draft policy it is provided that Bank assisted projects should provide indigenous peoples "with a voice in design and implementation".[140] This indicates that the IP should play a role throughout the process. The draft policy gives that Bank-assisted operations, which may affect indigenous peoples, require "meaningful consultation" with all such affected groups. At the same time it advocates mechanisms incorporated into project design and implementation that foster the "informed participation" of such affected groups. This need for consultation and participation should take place regardless of whether or not a separate IP plan is needed. This indicates that "participation" is key although one may find reasons for not establishing a plan (see below).

Although "meaningful consultation" is not defined as such the policy outlines that to ensure this kind of consultation the Borrower provides relevant information in a timely and culturally appropriate manner as well as establishes an appropriate framework for dialogue and involves local representatives of indigenous organizations in discussions using culturally appropriate consultation methods, which allow the representatives to express their views and preferences. The Borrower should initiate consultations on the nature and scope of potential impacts early in the project cycle. To make this possible the draft policy requires, when projects have adverse impact on indigenous peoples, that the Borrower undertakes a social assessment (SA) in order to determine the nature and extent of impacts as well as provide for a framework for consultation with key stakeholders. Consultation may take part as prior to Screening or as part of this assessment. Important in this sense is that the Borrower prepares an Indigenous Peoples Plan (IPP) in consultation with the affected indigenous groups based on the SA. This means that the Borrower has the onus for establishing the plan, but the plan itself should not be a single-stakeholder job. The content and level of such a plan can vary according to the specific characteristics of the project and the nature of impacts addressed. This approach tries to eliminate the ambiguity of the OD, which was, as mentioned above and further developed in the case study, sometimes interpreted to mean that if a majority of project beneficiaries were IP, then no plan was needed. Now an IPP is always needed if the project affects IPs.

[138] Relevant OD 4.20 provisions are e.g. 8 and 15 (a) and see case study chapter 3.7.
[139] *Implementation of Operational Directive 4.20 on Indigenous Peoples: An Independent Desk Review*, (2003), e.g. p. 18 and 25.
[140] Draft OP 4.10 para. 1, further relevant paras. are e.g. 7, 9, 10, 14, 16, 17 and BP paras. 1, 2 and 8.

"Meaningful consultation" continues throughout the preparation process and a record of the consultation process forms part of the project files. The draft BP clarifies the responsibility of planning by placing it with the Borrower. It also states that the Borrower and the Bank should take into account the result of consultations when deciding whether to proceed with the project. The outcome of the IPP should be confirmed and reflected in the final documents between Bank and Borrower and legal agreements should contain provisions, as needed, obligating the Borrower to carry out the IPP. In the phase of project implementation the reports should evaluate how this has been followed. The draft policy on IP also introduces a new interesting mechanism for policy compliance stating that "in cases where application is unclear or where questions arise about how the policies are interpreted, questions may be referred by staff or Borrower to the Bank's Policy Safeguard Committee."[141]

Interesting to note is that the policy does not only mention participation in the different phases of a planned project as such. A heightened recognition is made of the links between identities of IP and their ties to lands and natural resources as the policy recognises both individual and collective rights to the use and development of the lands that the IP occupy. Although the matters were dealt with in the OD the wording is now more clear and mandatory. When the projects involve the commercial exploitation of natural resources (including forests) on land owned or customarily used by these groups, the draft OP is far more explicit regarding how the Borrower should act. The affected IP should be informed, consulted at an early stage and involved in decisions affecting them. They should also be provided with the possibility to derive benefits from the project. An even higher level of participation - the right to say no - should apply in cases where a project envisions the commercial use of cultural resources, including the knowledge of indigenous peoples.

The new draft policy, with diplomatic wording, encourages the Borrower to provide for an opportunity to be more fully included not only in projects but also in sector policy frameworks. In sum, the Operational Policy tries to avoid the hurdles of the Operational Directive by establishing a more detailed framework to underline that the views of the indigenous peoples are taken into account from the start to the end of the process. Screening, SA and IPP together with contractual agreements are attempts to improve identification, consultation and compliance. They are designed to create a more developed safeguard net for compliance. To more clearly define the right to use and manage natural recourses is also an improvement. This will be further addressed in chapter 4. The policy on indigenous peoples mainly focuses on participation in an actual project. Compared to this a higher level

[141] See "Comparison Matrix OD 4.20 and Draft OP 4.10" note 130 and 3.7 and 3.8 for more on the possible role of the Bank Policy Safeguard Committee. It seems like the mandate of the Committee is still unclear. No further literature has been found on this subject.

of decision-making is provided for when designing National Environmental Action Plans (NEAP).

3.4.3.3 Environmental Action Plans

The introduction of Operational Policy 4.02 is an example of how the Bank responds to the call made at the Rio Summit for all countries to prepare national environmental action plans to accelerate environmentally sound and sustainable development. These environmental action plans are intended to be demand-driven, participatory, and result in a time-bound plan of action to help countries integrate environmental concerns in their overall development strategies, which include making an agenda of needs.[142] The participatory element of the policy defines "the public" as "interested parties including NGOs". The views of these parties should be taken into account "through means that induce public participation." According to an evaluation, NEAP in the best cases helped creating a forum for debate and stronger environmental management institutions, introduced environmental protection policies, prepared innovative pilot projects, and increased public awareness of environmental issues.[143] Although vague in its wording and difficult to estimate if successful or not, the instrument is one of the gateways, managed by the Bank, to improve possibilities for participation – and notably it is labelled as such, not as consultation – on a higher level of decision-making for interested parties.

Summing up on the Bank policies with participatory elements it can be concluded that policies related to public participation in environmental decision-making include the whole continuum of participation: information sharing, consultation and participation, and aim at decision-making processes at different levels. The public is referred to as NGOs and other groups. The special and improved policy on Indigenous Peoples provides for more participation than the EIA policy, which is still only referring to "consultation". Nevertheless the EIA, according to Bank documents, increasingly seems to be implemented and optimistically the new policy on Indigenous Peoples could lead to a similar development. Implementation has to be dealt with in different ways.[144] The policies are binding as such for Bank staff but for the Borrower they become binding through contractual agreements. The Inspection Panel, analysed below, is an important link in the chain of possibilities for and enforcement of public participation. Many of the complaints registered by the Panel invoked violations of Bank policy on environmental and social assessments and, hence, participation.

3.5 The Inspection Panel – Enforcing Policy?

In short, the chapter wants to draw attention to the limitations in the work of the Inspection Panel to be a real safeguard for the implementation of Bank policies, but also to how it nevertheless has an important role to play.

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[142] OP 4.02 para. 4, see Supplement A.9 in this essay.
[143] *Environmental Assessments and National Action Plans*, (1996).
[144] One way is through the establishment of a Quality Assurance Group, see *Safeguard Policies: Framework for Improving Development Effectiveness: A Discussion Note*, (2002).

Several factors led to the establishment of the Panel in 1993. Increasing criticism from NGOs and donors concerning non-compliance with the operational policies of the Bank and a need for quality control were perhaps the main explanations. In a broader context this happened in a time when the international community increasingly recognized public participation, including access to justice, as a necessary means to enhance the legitimacy of decision-making. As has been mentioned, Principle 10 of the Rio Declaration also extends to international institutions, and the Bank was at this time in sincere need of legitimacy. However, whereas it was, and still is, politically sensitive to judge how the Borrowing countries live up to Bank policies, creating a Panel focusing on the relationship between the Bank staff and the (potential) beneficiaries of the projects, the poor, was feasible, although controversial. The establishment of the Panel was a sign of the increased attention of participatory possibilities for the public.

The establishment of the Panel was also part of a broader reorientation of international law, towards a people-centred legal order challenging the dominant perspective where the state is the intermediary between an international organisation and individuals.[145] Hence, first of its kind, a *sui generis*, followed by the establishment of Panels in the other MDBs, it broke new ground in the international legal order.[146] However, although the establishment in itself was a praiseworthy forward-looking initiative for accountability it is relevant to ask: can it provide policy enforcement?

3.5.1 No Remedies and International Law Considerations

Under the Resolution establishing it, the Inspection Panel provides a mechanism for people whose rights and interests have been directly affected by Bank-financed projects to bring complaints before it on grounds of the Bank's failure to abide by its own policies and procedures in the project design, appraisal and implementation.[147] Hence, a case can be brought to the Panel at any stage of the project process, before it is finalized.[148] Even if the Panel is an independent body within the Bank it does not act completely on its own. Its work is closely linked to decisions of the Bank's board. Under the Resolution, the Panel's role is formed in two stages. Firstly, an assessment whether request for inspection meets the eligibility requirements of the Resolution is carried out. Secondly, after the Board has authorised an investigation, the Panel carries out its investigations, often out in the field. Then it reaches its findings on whether the Bank has been in serious

[145] Hey, (1997), p. 62ff. The EU Court of Justice is another organisation challenging this dominant perspective. On comparisons between the two, see Schlemmer-Schulte, (2001), especially on "direct effect".

[146] At the same time it takes part in trend of establishing non-compliance procedures, especially for environmental treaties. On this trend, see Fizmaurice and Redgwell, (2001).

[147] Resolution Establishing the Panel (Res. No IBRD 93-10, IDA 93-6), para. 12. For further information on criteria and for eligibility and investigation process see generally Gualtieri, (2001) and Shiata, (2001).

[148] See Resolution Establishing the Panel (Res. No IBRD 93-10, IDA 93-6), para. 14.

violation of its operational policies.[149] The findings are presented before the Board, which decides on how to proceed. The result of the Panel, hence, is *not* an enforceable judgement but only findings handed over to the Board. The Board's decision could be to establish an action plan for improvements or simply cancel the project. Its decisions on how to proceed are only binding for the Bank's Management, not judicial decisions in favour of, or against, affected parties. Therefore, the Panel is not a means for claiming legal liability. The one who is wrongfully treated is not given the right to be remedied and the judgement is not enforceable.[150] Nevertheless, during the ten years of its existence, the coverage of the Panel's mandate to investigate has been politically sensitive and therefore reviewed. It has been argued that the formation of alliances among borrowing countries to block investigations has been effective and represents one of the most fundamental threats to the effectiveness of the inspection function.[151] Going through the cases registered by the Panel it shows that many do not reach full Panel investigation. The reasons for this are not officially explained.[152]

Hence, as argued by Sclemmer-Shulte, although the Resolution gives standing to groupings of individuals, it does not create new legal responsibilities vis-à-vis outsiders. It does not normally have any contractual relationship with third party non-state actors, only with the borrowing government. Instead, "the idea of the Panel is to enable the Board to improve its control of Management with the help of non-state actors' vigilance in concrete cases and in general."[153] However, as the Bank is immune from suits in domestic courts the existence of the Panel is an improvement for accountability.[154]

Another important aspect to address is if the Panel considers international law. In literature a hope of a Panel that "gradually comes to encompass the international human rights standards" has been expressed.[155] According to the Resolution, the Bank is only to consider compliance with its operational policies and is neither created to consider international law standards nor vested with general law-making powers and thus lacks competence to enact new standards or amend existing operational policies and procedures.[156] Hence, it is not to consider if the Bank has violated international legal standards as such. However, a recent case broke new ground when the Panel

[149] See Gualtieri, (2001), p. 234ff. and Shiata (2001), p. 18ff for more detailed procedural requirements. In the case further developed in 3.7 the inspections in the field led to the important observation that consultation was difficult due to the political situation and therefore that Bank staff should have paid more attention to this in interpreting the policies.
[150] Schlemmer-Shulte, (1999), p. 180. Hence, the resolution establishing the Panel is silent on possible remedies.
[151] Gualtieri, (2001), p. 236. For history see e.g. Shiata (2001).
[152] See www.worldbank.org/inspectionpanel
[153] Schlemmer-Shulte (1999), p. 179. Se also above note 145.
[154] See IBRD Articles of Agreement Article VII, (1) and (3) and the IDA´s Articles of Agreement Article VIII (1) and (3).
[155] See Melander (2001) and generally Alfredsson (2001), p. 47ff. and Gualtieri (2001) p. 245ff.
[156] Boission de Chazournes, (2001), p. 294.

examined the situation of human rights and governance in light of Bank policies.[157] The Chairman of the Panel expressed "convinced that the approach taken in our report, which finds human rights implicitly embedded in various policies of the Bank, is within the boundaries of the Panel's jurisdiction." The decisive argument made is that the Bank's "work translates into a prohibition to interfere in a manner in which a country deals with political human rights, as long as this has no demonstrable effect on the country's economy."[158] The international law standards used are hence the ones that through interpretation can be seen as codified into the policies. The norm of public participation in environmental decision-making is one of them. The possibilities for development lie within the interpretation.

3.5.2 Focus on Staff, not States

The Panel's mandate is, as mentioned above, to make specific recommendations to the Bank's Board arising from the complaints by people claiming to suffer from a failure by the Bank to follow its operational policies and procedures with respect to design, appraisal, or implementation of a project. However, as could easily be seen in former chapters it is the Borrower, not the Bank that according to the policies, implement the project. Therefore, to Shiata the obligation of the Bank is restricted to be an "obligation de moyens" and not an "obligation de résultat". The Bank's obligation is not a guarantee that the intended outcome will materialize in each case, but through *due diligence* to try to ensure that the Borrower will indeed carry out its obligations. The harm must therefore result from the Bank's own failure either in accepting the project design, in appraising the project or in the supervision of its implementation – i.e. when it fails to ensure that the Borrower does abide by its contractual obligations.[159] Hence, the performance of the Borrower is never mentioned in the Investigation Reports, although the success of the project is mostly dependent on it. In conclusion, the focus of the Panel is staff performance, not state performance.[160]

To enlighten the characteristics of the Bank some comparisons could be done with the court of the European Union, although there is a great difference between the two organisations as such. Today, thanks to the implementation of the Aarhus Convention, both individuals and NGOs will

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[157] The case was Chad: Petroleum Development and Pipeline Project, Request number RQ1/1 (2001).

[158] *Accountability at the World Bank - The Inspection Panel: ten years on*, (2003), pp. 96-98. Interesting to note is that in the beginning of the 90s, while the Inspection Panel was being created, a parallel process inside the Bank began to revise, shorten and reorganise the Bank's policies. Many argued that the new policies would water down the scope of the Panel's mandate, see Udall, (1998), p. 426. I would argue that the contrary is possible, see 3.7, 3.8 and chapter 4.

[159] Shiata, (2001), pp. 40-41. The Bank has special policies on supervision, see OP 13.05.

[160] Another issue is however how the implementation can influence the performance of the borrowing state, see 4.3. See case study in 3.7 on how the Panel in a smart way keeps to their mandate addressing that staff has not made enough to guarantee consultation although the failure is with the Borrower.

soon be able to bring complaints to the court in environmental matters. The complainants, having certain rights to participation according to different provisions, will be able to go to court arguing that a member state, the addressee of the directives, has failed implementation. The court then rule on the subject and deal with the failure of the member state.[161] Now, would the system of the Panel apply, the Court would not mention the failure of the member state, although they are to carry out the implementation of the directives in question, but to rule on the way the Commission had failed to make the member states comply with the text. Regarding this example and put shortly; the fact that the Panel only consider performance of the staff and not the Borrower made its creation possible, but at the same time constrains the possibilities for policy enforcement.

As has been shown earlier, unclear policies have been reasons for lack of conformity in interpretation and compliance. In the Qinghai Project (China), which include policy on EIA and indigenous peoples and will be further examined below in a case study, the Bank expressed serious concern over a "disturbingly wide range of divergent, and even opposing, views among staff on how the operational policies and procedures should be applied" which "raises serious questions about the ability of Management to apply them with any reasonable degree of consistency."[162] Therefore the Panel begins its investigation report by explaining how it understands the safeguard policies in relation to the question of compliance. Exemplified with the actual case the Panel presents that some staff saw policies as hardly mandatory at all, whereas others expressed that polices were clear enough to distinguish areas that are binding from areas where the policies expressed general guidelines. The staff expressing the latter view saw flexible possibilities for interpretation, especially in a political and social system as the one in China. The Panel report concludes that exceptions, which are not authorized by the text of the OD, must be kept to a minimum. The report is interesting for two reasons.

Firstly, it shows how the Panel in carrying out its task - the promotion of the enforcement of policies - has an alibi to deal with issues that are politically sensitive. The political situation in China or elsewhere should not influence how the policies are interpreted. Secondly, it shows how a case investigation also attempts to give general policy interpretation, which with very unclear policies was well needed. The Panel addresses the case in a broader context of the Bank staff's lack of policy commitment. The importance of the Panel investigation is therefore not limited only to judge upon the case itself but also to create some kind of case law and trigger the work of the organisation as such. To this end it helps in enforcing policy. The Borrowing countries involved have, according to Shiata, seen it as an

[161] See note 145 on "direct effect" and Commission Proposal for a Directive on Access to Justice (COM(2003)624) and other relevant directives such as on public participation and access to information at http://europa.eu.int/comm/environment/aarhus/index.htm, 2004-05-10.
[162] *China Western Poverty Reduction Project Investigation Report*, (2000), chapter 3.7.

embarrassment to the government when a case from their country is brought before the Panel.[163] A sign of its importance is also that it in fact has been used by many NGOs.

The following two chapters will continue to draw the attention to the hurdles in policy implementation; the delicate relationship between the Bank and the Borrower and the problems of policy interpretation. The first case relates to EIA. Issues like how and why consultation failed and how it should be developed are brought up. The second case mainly concerns indigenous peoples and will address if the new up-coming OP could have avoided what went wrong with the old OD.

3.6 Case Study: Lake Victoria - Public Participation on Deep Water[164]

Lake Victoria is the second largest lake in the world and bound by three riparian countries: Tanzania, Uganda and Kenya. During the past half century, there has been an increased population growth around the lake. Human, agricultural and industrial waste has increased enormously. This has had the consequence that water hyacinth has spread, choking important waterways. Communities that rely on the ecosystem services of the basin as a source of food, fibre, drinking water and transportation are under severe threat and national and local politicians are under pressure to act. It was against this backdrop that the World Bank agreed to support a project, within a broader international framework called Lake Victoria Environmental Management Programme (LVEMP). The aim of the project was to manage and control the spreading of water hyacinth through the use of a chopping machine. However, no environmental impact assessment was carried out before the Bank gave its "no objection" stating that: "we do not require any further environmental assessment of this approach prior to signing the contract."[165] So the water hyacinth was not removed from the lake but disposed on the bottom of the lake. The activities were carried out close to Kisumu at the Kenyan lakeshore. Upset NGOs from this region filled in a request to the Inspection Panel. They claimed that the activities would harm more than they would solve, and that no EIA and meaningful public consultation had occurred. How could a large-scale project be carried out without EIA and meaningful consultation? What was the opinion of the Panel?

Bank management explained that for them the activity was a pilot study and therefore not requiring an EIA. In any case, Management declared, "…it

[163] Shiata, (2001), p. 29.
[164] For references to the following case study, see generally *Kenya: Lake Victoria Environmental Management Project Panel Investigation Report*, (2000) and *Management's Report and Recommendation to the Investigation Report* (2001).
[165] Ibid, (2000), p. 19.

would be impossible to do an EIA in anything less than 3-5 years or more (the time it would take to collect the minimum amount of baseline data)."[166] Instead it saw the pilot project as a "core" of an EIA that would be carried out later if the project was a success. The Panel accepted the approach viewing the project as an environmental assessment in the making, but it concluded that a situation where there was no assessment at all appeared to contradict the purpose of OD 4.01. It states; "Management appears to have focused on questions concerning possible environmental hazards for the lake as a whole, and neglected questions about possible risks in the specific area subject to the shredding…"[167] Even more interesting, however, is that neither the Borrower nor the public understood that it was a pilot project. The Panel "finds it difficult to understand how the Borrower as Management alleges could have misunderstood the objective of the tender and believed that shredding and sinking was a lakewide solution to water hyacinth control. It was the Borrower that initiated the shredding and sinking operation. And it seems evident that the Bank agreed to finance the operation only as one of the trial pilots, and one not to be applied lakewide unless subsequently found to be environmentally, socially and economically feasible. The Panel finds it disturbing that the Bank did not ensure that the Borrower and local stakeholders possessed a full understanding of the purpose and scope of the operation."[168] By limiting the scope to be a pilot study the Management thought they could get around the EIA policy and hence consultation. The Panel didn't agree.

Instead the only form of consultation was a teleconference that took place two years after the idea of the project appeared with the purpose to listen to concerns expressed. This was the only chance for NGOs that had been active in other activities within the LVEMP to raise their voices. The Panel concludes that "some consultation should have been undertaken" and this is another reason why the Bank is not in full compliance with OD 4.01.[169] The more detailed provisions of OP/BP 4.01 might have made a significant difference. The main problem in this case, however, was not the provisions of the policy as such but the mutual understanding between Bank and Borrower that an EIA was not needed at all. It is questionable if the new policies help avoiding this ignorance.

One of the NGOs complaining to the Inspection Panel was OSIENALA. I had the opportunity to meet this NGO in Kisumu and discuss the case and ask about their general impression of the possibilities of consultation/participation in the Bank activities.[170] To my question they replied using a metaphor: "We do not want to be invited to a ready-made dinner, discuss and compliment it and then leave. We want to participate in the preparations of the dinner - we want to cook!" What matters is not only

[166] Ibid, p. 20.
[167] Ibid, p. 26.
[168] Ibid, p. 26.
[169] Ibid, p. 27.
[170] Meeting with OSIENALA in Kisumu, Kenya 31 May, 2004.

to take part in the decision-making during the project process but also to decide which projects should be carried out. In this case not even the consultation during the project took place. I think the Lake Victoria case is a good example of a typical situation. The Borrower is facing severe political pressure and wants to act. Without traditions of environmental management it does not consider EIA and consultation. The Bank, on the other hand, stretches the rules to appease the Borrower and to speed up the process. In ignorance Management therefore disregard the public as not even worthy to inform. In this case the NGOs were not even invited to the dinner.

The question is if the situation has improved? In its response to the Panel's findings the Management says that heightened community participation would take place, especially in the preparation of the next phase of the LVEMP. This aspiration has now resulted in a new Vision and Strategy for Lake Victoria prepared with the participation of in total 15 000 stakeholders from the three riparian countries, OSIENALA included. Central and local governments, communities, NGOs, private sector and academia have participated and donors in the region try to co-ordinate their work. One could say that this time the people have at least been invited to set the menu. Next step would be to let them prepare the courses too.

3.7 Case Study: Qinghai Project - Participating under the Threat of Being Prosecuted[171]

The objective of the Qinghai Project was to reduce the incidence of absolute poverty in the region by voluntarily resettling approximately 57 000 poor farmers from one area (Move-out area) to a Tibetan and Mongolian Autonomous Prefecture area (Move-in area) where a new irrigation project would be carried out. In 1999 the International Campaign for Tibet, a US based NGO, acting on behalf of the affected people who lived in the Move-in area argued that the affected people would suffer potentially irreversible harm form the project and that this harm stemmed from Management's failure to comply with several Bank policies. The World Bank Board authorized the Panel to conduct an investigation. In the following attention will be given to different findings of the Panel regarding the classification of the project as "B" instead of "A", definition of project area, the lack of IPDP and how consultations were carried out. It should be emphasised that the failures to a large extent were related to the political situation in China, especially regarding the situation of the Tibetan people, and the incapacity of Management to deal with this.

The project was classified as "B", not "A". This meant that the environmental and social assessments undertaken could be less comprehensive. The Panel found that this was not in accord with the terms and spirit of the OD 4.01 valuable at this time. The OD, in contrast to the

[171] For reference to the following case study see generally; *China Western Poverty Reduction Project Investigation Report,* (2000).

current OP/BP 4.01, had an annexed list of project requiring classification as "A" including the activities undertaken in the actual case. Nevertheless, Management and Borrower, using, according to the Panel "unconvincing arguments", classified the project differently.[172] One can only speculate in the real reasons for the chosen classifications, however it is worth remembering that less requirements on consultation were actualised through this classification. Worth noticing is also that the new revised policy doesn't list examples of activities like the old policy did, the OP/BP 4.01 only speaks of more or less "sensitive" projects.[173]

The findings of the Panel also showed that by defining the "project area" far too narrowly many villages with Tibetan and Mongol people lying directly on a supply-canal route to the planned irrigated area were overlooked and glossed over, which influenced the possibilities for carrying out environmental and social assessments properly. Moreover, the consultations that nevertheless were carried out had several deficiencies. In the entire Move-out area the consultations that would indicate if people were interested in resettling were not confidential (the name of the respondent was on the questionnaire), the questionnaire was filled out by someone other than the individual respondent and indicated that the only source of information was from government propaganda. The hazards of using these methods of consultation were even greater in the Move-in area, according to Panel, because here the respondents were asked, without guarantee of confidentiality, whether they would welcome the influx of settlers. During its field investigation the Panel saw how people were afraid of freely expressing themselves.

The Panel states in its report that the Management "must bear in mind that if there is even a *perception* of potential adverse effects that could result from a truthful statement of opposition to this Bank-financed project, then the Bank staff has a responsibility to guarantee confidentiality of the respondent."[174] The Panel derives this from the policy requirements that provide for informed consultation. If those consulted perceive that they could be adversely affected for expressing their opposition to, or honest opinions about, Bank-financed projects the requirement of informed participation is not reached. Once participation was carried out, it was under the threat of being prosecuted. Management had in the Project Appraisal Document admitted that the consultation process "was not always smooth" but concluded "the will of the move-in host population was adequately expressed".[175]

Making its own interpretation of the OD and the requirement for an IPDP the Management and Borrower concluded that the whole project would constitute an IPDP itself as the majority of beneficiaries were minorities.

[172] Ibid. p. 70.
[173] Fore more, see discussion in 4.2.2.
[174] Ibid, p. 46.
[175] Ibid, p. 42.

The Panel did not accept this view. It considered that the project as a whole does not constitute the IPDP required by the policy and that a free standing IPDP was required to be able to take into consideration the views of minorities with needs that differ greatly from each another.
Would the application of the new draft policy OP/BP 4.10 have led to better policy compliance? Even if the new policy does not make any attempts of defining what should be "project area" and hence if all affected people were identified, the new policy provisions on the repeated occasions of discussion - early screening, SA and IPP - and the increased focus on documentation and contractual agreements could help avoiding a situation with uncertainty and ambiguity in the use of this term. The lack of confidentiality in consultation would according to the new policy clearly be non-compliance as the new policy provides that the Borrower is to use culturally appropriate consultation methods that allow indigenous peoples to express their views and preferences. Moreover, the Project Appraisal Document with the new policy should treat the nature of the consultation process. As the draft provides that an IPP is to be carried out as soon as the there are effects on the people, the ambiguity of the OD concerning the need for an IPDP optimistically is eliminated. The draft also states that the IPP should be tailored to address significant differences in the needs of separate indigenous groups. This should enhance that the different voices of the different groups are given attention to.

The investigation of the Panel surely has influenced the improvements made in the new policy. The new policy, in its turn, with committed Bank staff, would perhaps make improvements possible in the future. With the establishment of a Safeguard Policy Committee to which Bank staff can make a request, policy can be interpreted before ending in a request by the affected people to the Panel. This is definitely an improvement to enhance compliance before a total failure is a fact. However, the new policy does not change the fact that the project initiative - what kind of project people think would reduce poverty - still lies with the government and is carried out without a participatory process.

3.8 Conclusion

This chapter has been an assessment of institutional change and Bank policy related to public participation in environmental decision-making. As has been shown Bank performance is coloured by the original mandate, the international perception of what development is and of what the role of the Bank should include. The Bank's search for legitimacy has shifted from the claim to be an apolitical Bank to be an accountable international organisation. The paradigm of sustainable development has been of great importance for the Bank and the evolution of the mandate. However it often fails to live up to its rhetoric. In short one can say that the safeguard policies as such are not fully safeguarding public participation, although there have been some improvements. This view will be further developed in chapter 4.

Another endeavour is to implement the policies. The policies are binding for Bank staff and become not only politically but also legally binding for the Borrower when incorporated into a loan agreement. Although I have not found how and to what extent this is done in practice, it is clear that the Bank tries to develop this further, especially concerning indigenous peoples. However, public participation is not automatically safeguarded by a contract. It is what happens on the field that counts, which is in the end a question of the knowledge of the staff and Borrower about participatory processes. This discussion will be further developed in chapter 4.

As has been presented the Panel is an important link in policy compliance. Although dependent on the decisions of the Board and with no possibilities to remedy for the complainants the investigations by the Panel to some extent safeguard good policy interpretation and challenge staff performance. The new policies, with clearer provisions on responsibilities, might help the Panel to safeguard policy compliance better. It will hereby be easier to judge if staff failed to live up to policy provisions. The establishment of the Safeguard Policy Committee could also prove to be useful. Even if the Safeguard Policy Committee won't be open to the public, it could help Bank staff performing in a manner to avoid policy interpretations like the ones presented in the two case studies.

4 A Safeguard for Public Participation?

4.1 Outlines of the Chapter

In this chapter it is my intent to interlink the two first parts of the essay, placing the Bank in the international legal system, and examining: How do the Word Bank norms on public participation cohere with soft law and traditional international law and, which are the similarities and differences? How far can the mandate be pushed: are we being propelled towards public ownership where the public is getting more control over the decision-making process? Are the norms of the World Bank part of international law? Can the use of Bank policies help consolidating and implementing international and national law in developing countries?

4.2 Coherence between Law and World Bank Policy

4.2.1 The Public

A crucial prerequisite for meaningful public participation is the identification of the stakeholders in the process; who should be allowed to participate? Seen as a political right public participation has a focus on the individual as a right holder and does not, with its general language, state any criteria of qualification for participation as such. The ILO Convention on indigenous peoples identifies the group concerned in matters that may affect them directly. International environmental soft law has recognised new forms of participation including individuals, groups and organisations, referred to as “the public”. More detailed European legal instruments such as the Aarhus Convention have the same approach referring to one or more natural or legal persons as well as their associations, organisations and groups. As for the Aarhus Convention, participation in specific activities includes people that are *likely* to be affected, a non-existent requirement in higher-level decision-making.

The World Bank does not pay attention to the individual’s possibility to participation but focuses *only* on project affected groups and NGOs, and for EAP “interested parties”. This has its explanation in the fact that it was groups and NGOs that through hard pressure forced the Bank to adopt policies, but also, likely, because the Bank is an actor in countries where it is common with less focus on the individual and more on the will of the community. As has been shown above the lack of clarity in what should be considered as “affected” has led to inconsistent policy interpretation.

Hopefully an improved framework for stakeholder identification will avoid this and make something good out of the flexibility of the provision. Policies clearly place the onus for making the public participate with the Borrower. In countries where the onus for public participation, as mentioned in chapter 2, in reality often lies with the public this is an improvement and could be of great importance, if complied with.

4.2.2 Decision-Making

Neither human rights law nor international environmental soft law is precise about at what level of decision-making public participation should take place. The Rio Declaration keeps a general wording of “at the relevant level” and “at the national level”. When it comes to European instruments they are of course more detailed fixing the participation to project, policy, plan- and legislative levels. The Bank has acknowledged that participation should take place on different levels of decision-making. The EIA policy mentions the project level and the EAP policy applies to the plan and policy level. The focus however is still on the project level. Although the SEA is increasingly gaining recognition this has not materialized into Bank policies yet. Policies are, as mentioned above, adopted ad hoc when topics emerge, become especially important and politically possible. Developments in this field are needed for, as public participation in SEA would enhance the empowerment of people.

The global instruments are silent with regard to at what stage of the process participation should take place. Compared to the European instruments the policies are quite detailed, at least concerning “A” projects. The consultations in Bank activities should take place earlier now than before, making it possible to consider the input from the public better. This is an improvement. Compared with national laws in developing countries, where consultation often takes place too late in the process, this can constitute a good example. However, the policies lack provisions making the in-put of the public meaningful at the final stages of the process. This is needed, as it would emphasize that the views of the public are fully considered. However, not only A projects but also projects qualified as less “sensitive” should have more detailed provisions on when the consultation should take place. This issue is related to the process of qualification of a project as “A” or “B”. Whereas the detailed European instruments indicate in which activities public participation should be carried out/an EIA taking place, the OP/BP is very unclear on this matter as the line between “A” and “B” projects is difficult to draw. Further clarifications are needed so Management and Borrower do no ”misinterpretations”.

The special provisions for indigenous peoples in the ILO Convention provide for participation at all levels of decision-making. The new Bank draft policies focus on participation in decision-making at the project level but encourage governments to provide opportunities for participation in sector policy framework. On the project level it is clearly stated that the

voice of indigenous peoples should be heard in as well design as implementation of the project.

In sum, the possibility for participation in the decision-making process in Bank activities is slowly moving up towards higher levels of decision-making, like the European instruments, and takes place earlier. Nevertheless, improvements are called for.

4.2.3 Participation

The word "participation" can be frequently used without giving further details on what it should include. As such it is a risk that it becomes only something cosmetic to make projects look better, when in reality it lacks substantive meaningful participation. However, as has been shown, both law and policy uses different labels; consultation as well as participation can be noticed, next to the prerequisite of information sharing. In environmental soft law and some European hard law the term "participation" is mainly used, although not explicitly defined, as the legal term. For indigenous peoples the ILO Convention speaks of consultation but also comprises the right to the use, management and conservation of resources. In World Bank policies the EIA solely uses consultation whereas the new policies on indigenous peoples speak of informed participation, meaningful consultation and recognize the right to the use and development of the lands that the indigenous peoples occupy. When commercial exploitation of cultural resources may take place, this gives them the right to say no. How can the distinction between consultation and participation be explained against this background, and can the provisions get more detailed?

Tylor has described public consultation as "a process in which the public is asked for their opinions and comments on a proposal" after which the manager of the project, having the authority, makes a decision, after hopefully having considered the public input, has described public consultation. Consequently, the project manager, not the public "carries both the ownership of and the responsibility for the decision."[176] In this situation it is not unusual that the public feels both alienated and bemused by the process.[177] The public input is banished to take place before the decision and is more of a single event than part of the process.

When applying "participation", however, the public should be able to have a direct involvement in the decision-making and consequently have a share in its ownership. In this case the public is presented with a range of potential outcomes, not just a single option and public involvement takes place at different stages of the process, not just one.[178] In this situation the public is not only reactive - but proactive too. This approach to public participation demands a lot from the project manager as well as from the public

[176] Tylor, (2003), p. 3. See also 4.2.4; Whose ownership?
[177] Ibid, p. 3,
[178] Ibid, pp. 4-5.

throughout the project process. Without enough attention however participation "can turn from a process to a technique, which continues to assure the practitioners that they are fostering popular participation, while in reality, it serves merely as a way to get people to agree with what the project wants to do."[179]

A still higher level of intensity may be said to occur when people themselves are able to take the initiative in terms of actions to the project itself. The intensity of public participation has at this point reached its peak. The ownership of the project in this case is in the hands of the people. Whereas discussing the labelling is one thing, defining what participation should consist of is another.

Precise qualitative and quantitative dimensions of public participation are not easily translated into legal terms. Public participation in environmental decision-making can, as has been shown, take a variety of forms depending on the kind of decision being made, the stakeholders involved, the time and budget available and not at least depending on the political and cultural circumstances. Can and should public participation be more clearly defined? Ebbesson argues; "When developing these notions in international law, it is clear that the forms of participation must be so designed as to be adaptable to different legal systems and contexts. The concept is dynamic, and it would be contradictory in an international treaty to agree on the precise manner in which public participation is to be given form in all contexts and all legal systems."[180] Even policies have to be designed to be applicable to different types of projects in different parts of the world. Hence, public participation can and should have different meanings depending on the context.

However, another approach of defining participation is to go back to basics, placing human motivation in the centre of the concept and ask "ourselves what it would take to get us to participate fully and actively in something that an outsider initiates."[181] The answer to this would, according to Dichter, include a sense that we are respected; a sense that we will be heard when we have something to say; a sense that we will be treated fairly and can understand the rules; a sense that following these rules will bring about a desirable effect and a sense that we will get something in return for our participation. If most of these things are carried out well most of the time, "we will be willing to be involved with it, participate in its activities, work hard for it, or learn what it has to teach us."[182] This approach is more universal in its character, assuming that all human beings have the same motivations and needs. Do the Bank policies meet these needs?

[179] Dichter, (1992), p. 92.
[180] Ebbesson, (1997), p. 59.
[181] Dichter, (1992), p. 93
[182] Ibid, p. 93.

For the World Bank the line between consultation and participation is spelled control. How much control over the process should the public have? Using and furthering the OSIENALA metaphor mentioned in the case study on Lake Victoria the line between consultation and participation is easier to draw. To consult someone is to ask for the recipe, perhaps use some of the ideas when cooking and then invite them for comments. To let someone participate is to let someone into the kitchen for the preparations, to let that someone sit down at the table to enjoy the dinner but also - to share the dishes and the cleaning up. So far consultation is the prevalent form of participation in Bank EIA activities, although the new policies on indigenous peoples give possibilities for higher forms of participation. Even if it could be argued that what happens on the field is more relevant than the labelling, using "consultation" instead of "participation" is at least a way of honestly admitting that the issue is politically sensitive. It is a question of ownership of the development process.

4.2.4 Whose Ownership?

As mentioned in the introduction public participation is about sharing ownership of the decision-making process and this is highly political and difficult especially in developing countries. However public participation is gaining recognition both in international law as well as in Bank policies. Sixty years ago, when the Bank was established, the poor were excluded from decisions. Today they have, at least, some possibilities to raise their voices. But the original mandate still has an impact. The Bank remains an inter-state bank. However, it could be of interest to ask: How far can the mandate be pushed? How people-centred can it become? In a report of the Bank the following is stated; "Because of the Bank's Articles of Agreement, governments are, in strict sense, its only clients. Some staff, however, feels that the poor, who are meant to be the ultimate beneficiaries of project interventions, should be considered as the Bank's primary clients."[183] Although, as has been shown, participation is increasing with possibilities for higher level decision-making as well as policies and frameworks that promote continuous participation and early identification of the affected the ownership - the initiative - of the majority of projects and plans will probably stay with the Bank and the Borrower. As been seen in this chapter Bank polices to some extent match the standard set out in European instruments such as the Aarhus Convention, however it is questionable if they really provide for the kind of participation that Dichter put forward; are the voices of people respected, heard and do the people get something in return for the participation? Considering the fact that the potential beneficiaries of the project are the people, the Bank should constantly strive towards increased possibilities for public project ownership. The consultation in the EIA process should be changed to participation. But changing wording in policies is useless if not complied with. For this, as has been shown, the performance of the Borrower is crucial.

[183] *Participation and the World Bank: Successes, Restraints and Response,s* (1998), p.20.

As stated earlier, there are indications that the Bank wants the Borrower to increase its ownership of development projects. If this through e.g. contractual agreements and higher standards of good governance leads to increased policy compliance it will automatically and positively give more possibilities for public participation and promote democratic behaviour. To avoid the failing of participatory processes because of Borrower unwillingness or lack of knowledge demands a lot of the Bank staff. Fostering public participation, like fostering development, should be seen as an art not as a science. Therefore the question if the art can be learned and hence whether it can be taught can be asked.[184] Can the Bank teach the Borrower participatory processes?

4.3 Transferring Money is Transferring Norms

4.3.1 Are the Internal Policies a Part of International Law?

Hard law treaties like the Aarhus Convention, soft law declarations like the Rio Declaration as well as the safeguard policies of the Bank are all instruments negotiated by states (under the influence of NGOs!). However, whereas binding treaties and soft law instruments, although not legally binding *per se*, are agreed upon to be generally applicable to all member states, World Bank policies become politically binding for the member state borrowing money for a project and legally binding if incorporated into the loan agreement. Nevertheless, and especially if policy harmonisation will be further developed between different financial organisations, Kingsbury is right in arguing that the standard set in policies can be seized upon by NGOs as defining what is right and minimally fair.[185]

Awaiting more detailed guidelines with global outreach on public participation in environmental decision-making[186] the rather detailed Bank policies are important benchmarks. The main advantage of the current policies is that they have global outreach and still are rather detailed. The transnational policies are, although internal instruments for carrying out the work of an organisation, definitely taking part in the mainstreaming, evolution and maintenance of standards; they improve the status of the norm in international law. This makes them an important instrument in the international legal system. It is commonplace to note that the international system has undergone tremendous changes much due to globalisation where many actors have emerged to play important roles. As such, Shelton argues, all actors both contribute to the making of international norms and increasingly are bound by them.[187] International law has progressively been defined as consisting of rules and principles of general application dealing with the conduct of states and of international organizations and with their

[184] See generally Dichter, (1992).
[185] Kingsbury, (1999), p. 339.
[186] See 2.3.3 and footnote 38 and 47.
[187] Shelton, (2000), p. 6.

relations *inter se* as well as with some of their relations with persons, whether natural or juridical.[188] Transferring billions of dollars a year means having power and obligations. The money as well as the policies of the Bank have global outreach. With its money and policies the Bank is an important actor.

4.3.2 Implementor and Consolidator of International and National Law

As has been shown in this thesis one of the difficulties of the norm of public participation in environmental decision-making is its implementation; both from international law into practice in developing countries as well as from policies into project performance. In being detailed and important benchmarks for public participation in environmental decision-making policies definitely help consolidating the status of the norm in international law as such, as well as promoting its implementation in developing countries. The latter is build into the system of policy compliance. The creation of the Panel has, as mentioned above, led to an increased normative significance of policies. It promotes to their "hardening". The new policies, especially the ones on indigenous peoples include, as has been shown, provisions that will facilitate implementation. When it becomes clearer for staff what they are expected to do, they will not as easily be able to make excuses for non-compliance referring to unclear policy interpretation. Most likely this will lead to Bank staff more carefully, to avoid Panel investigation, pushing for policy compliance by the Borrower. The existence of the Panel will trigger policy compliance. According to Bank reports a true hurdle for implementation is not only the reluctance by Bank staff to support public consultations but the lack of knowledge about participatory processes amongst local government institutions.[189]

Money is often a good incitement for learning. Therefore implementing policies can be seen as a catalyst for learning public participation in environmental decision-making in developing countries. Moreover, the EIA procedure requires that national legislation be taken into consideration when implementing the policy.[190] Hence, implementing policy can promote implementation of national EIA requirements.

4.4 Concluding Summary

The World Bank – safeguard for public participation in environmental decision-making?

[188] Malanczuk, (1997), p. 1.
[189] See generally *Public Consultation in Environmental Assessments: Findings from the third Environmental Assessment Review 1997-2000*, (2002).
[190] See OP 4.01 para. 3.

Public participation in developing countries should not and cannot be imposed from above - or from abroad. It is process-based and in the centre of the democratisation of a country. It cannot be harmonized to "one-solution-fits-all." It should be a bottom-up process allowing for regional differences. Still, the norm of public participation has a human rights dimension and should gain universal recognition. This process can be facilitated and many actors can play a role. In an era where states have agreed upon that implementation of the principles of sustainable development is the onus of everyone; the Bank has a clearer mandate than ever to act more forcefully in promoting public participation in the borrowing countries. Using contractual means is one alternative, capacity building another. The Bank's obligations as an international organisation under international law have to prevail. Although its policies are formed as internal rules their potential impact on international law and the behaviour of the Borrower is evident. Implementing the policies properly is a start for safeguarding public participation in Bank projects and at the same time acting for a learning process and making the Borrower live up to international principles.

However, implementation is not enough. As has been shown, the possibilities for participation according to Bank policy are not what they could be. The ownership - control - of the process must be shared to a higher extent with the potential beneficiaries of the project - the people. Letting the public into the decision-making process to a larger extent gives legitimacy to the work of the Bank as well as the Borrower. Therefore, the information sharing and consultation provided for today is not enough; participation worthy its name must take place, although the need for it is different in different projects. Generally, it could be said that participation should occur *more often* during the project performance but also *before*; in the decision-making of which projects are needed. Considering the fact that the Bank's core activity is development and development is best achieved by empowering people, the Bank's policies and the use of them need to be further improved to safeguard public participation in environmental decision-making.

Supplement A

1. 1972 Action Plan for the Human Environment, Recommendation 7(a)
It is recommended that Governments and the Secretary-General provide equal possibilities for everybody, both by training and by ensuring access to relevant means and information, to influence their own environment by themselves.

2. 1982 World Charter for Nature, Principle 23
All persons, in accordance with their national legislation, shall have the opportunity to participate individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage and degradation.

3. 1992 Rio Declaration, Principle 10
Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

4. 2002 Johannesburg Plan of Implementation, Paragraph 128
Ensure access, at the national level, to environmental information and judicial and administrative proceedings in environmental matters, as well as public participation in decision-making, so as to further principle 10 of the Rio Declaration on Environment and Development, taking into full account principles 5, 7 and 11 of the Declaration.

5. 1992 Rio Declaration, Principle 17
Environmental Impact Assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a national authority.

6. OP 4.04 on Natural Habitats, Paragraph 10
The Bank expects the borrower to take into account the views, roles, and rights of groups, including local nongovernmental organizations and local communities, affected by Bank-financed projects involving natural habitats, and to involve such people in planning, designing, implementing, monitoring, and evaluating such projects. Involvement may include identifying appropriate conservation measures, managing protected areas and other natural habitats, and monitoring and evaluating specific projects.

The Bank encourages governments to provide such people with appropriate information and incentives to protect natural habitats.

7. OP 4.01 on Environmental Impact Assessment, Paragraph 15
For all Category A and B projects proposed for IBRD or IDA financing, during the EA process, the borrower consults project-affected groups and local nongovernmental organizations (NGOs) about the project's environmental aspects and takes their views into account. The borrower initiates such consultations as early as possible. For Category A projects, the borrower consults these groups at least twice: (a) shortly after environmental screening and before the terms of reference for the EA are finalized; and (b) once a draft EA report is prepared. In addition, the borrower consults with such groups throughout project implementation as necessary to address EA-related issues that affect them.

8. OP 4.01 on Environmental Impact Assessment, Paragraph 16
For meaningful consultations between the borrower and project-affected groups and local NGOs on all Category A and B projects proposed for IBRD or IDA financing, the borrower provides relevant material in a timely manner prior to consultation and in a form and language that are understandable and accessible to the groups being consulted.

9. OP 4.02 on Environmental Action Plans, Paragraph 4
The Bank encourages the government to secure support for the EAP and to help ensure its effective implementation by (a) by using multidisciplinary teams from appropriate agencies within the government to assist with preparation, and (b) taking into account the views of interested parties (including local nongovernmental organizations (NGOs), obtained through means that induce broad public participation.

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