

**The Development of the World Bank as an Autonomous Legal
System**

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The candidate confirms that the work submitted is his own and that appropriate credit has been given where reference has been made to the work of others.

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Abstract

This thesis positions the World Bank Inspection Panel at the centre of a World Bank legal system. International legal positivism can no longer explain the governance role and actions that the World Bank is undertaking and, instead, systems theory is put forward as an alternative tool of legal understanding.

The conceptual tool of systems theory, as a tool of legal understanding, is analysed and constructed to provide a mechanism via which the Bank's behaviour can be framed in terms of law. The essentialist analysis of systems theory identifies, inter alia, the need for a Court-like body ruling upon the legal/illegal binary communication divide as being a required element for the evolution of a normative system into a legal system. The World Bank Inspection Panel is put forward as this Court-like body and its evolution identified as triggering a formative change in the understanding of how the World Bank operates.

This thesis concludes that this shift into a legal system demands a new understanding of the problems and issues that confront the Bank today. Rather than framing its issues in terms of legal positivism, issues such as the Bank's democratic accountability, conditionality and mission creep should instead be framed in terms of systems theory.

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Abbreviations

ARIO	Draft Articles on the Responsibility of International Organizations
BPs	Bank Procedures
GATT	General Agreement on Tariffs and Trade
IBRD	International Bank for Reconstruction and Development
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IDA	International Development Association
IFC	International Finance Corporation
ILC	International Law Commission
IMF	International Monetary Fund
MIGA	Multilateral Investment Guarantee Agency
NGO	Non-Governmental Organisation
OPs	Operational Policies
SDR	Special Drawing Rights
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

Introduction Chapter

0.1 Introduction

This thesis examines the work of the International Bank for Reconstruction and Development and provides an answer in law to explain the governance role that it occupies. The international law of positivism no longer adequately explains the international organisation's work and, instead, systems theory is proposed as an alternative to understand the World Bank's actions within law. This theory is applied to demonstrate that the Bank has developed into an autonomous legal system.

0.2 Background

In the summer of 1944, 730 delegates representing 44 countries convened at the Mount Washington Hotel in New Hampshire, United States of America. Although the Second World War was not yet over, governments were planning for the future in an effort to prevent further outbreaks of hostilities and to ensure their own economic prosperity. Amongst the multitude of causes of the war, States believed that the financial instability in the years between wars, and especially the financial shocks suffered in the 1930s, contributed to the outbreak of war across the globe for the second time within their lives. The policy makers at the time had the ardent belief that free trade not only led to increased prosperity for all but also international peace.¹ The aftermath of the Great Depression had seen States exploit the financial system to gain trade advantages in an effort to pull their own economies out of recession at the expense of others. The resulting instability and ensuing economic warfare was viewed by all sides at the conference as a danger to the world's peace.

Upon arrival at the conference, the delegates were split into three separate Technical Commissions. Commission I would consider a potential International Monetary Fund; its purpose, operations, organisation and form, whilst Commission III was tasked with exploring other potential means of international

¹ For the United States of America government perspective, see: <http://history.state.gov/milestones/1937-1945/BrettonWoods> accessed July 2013.

financial cooperation. Commission II was tasked with creating a framework for a Bank for Reconstruction and Development. This included four committees to examine the purposes, policies and capital of the Bank, the operations of the Bank, the organisation and management and finally the form and status of the Bank.²

Commission II heard a number of proposals but settled upon a Bank with a dual aim of helping to rebuild war torn Europe and development. The notion of development was primarily included due to the Latin American delegations that represented States who were not in need of rebuilding but were in need of development lending.³ The Articles of Agreement left the question over which aim was primary to the Bank itself yet included a provision that the Bank 'pay special regard to lightening the financial burden' on members that 'have suffered great devastation from enemy occupation or hostilities'.⁴ The members who were to hold the highest share of stock and, therefore, make the largest contribution were primarily concerned with reconstruction.⁵

Three weeks after the conference began the delegates signed the Final Act of the United Nations Monetary and Financial Conference⁶ and put an end to a meeting that would after be known as the Bretton Woods Conference. On 27 December 1945, the World Bank Articles of Agreement entered into force.

States came together to create a new regime, but relied upon old legal principles to do so. The ability of States to create formal agreements between each other had been recognised for thousands of years⁷ and whilst public international law had developed to encapsulate more than treaties, the primary legal source in the international forum was and remains a written agreement between nations. The predominant modern understanding of public international law stems from the

² Final Act of the United Nations Monetary and Financial Conference (22 July 1944)

³ <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTARCHIVES/0,,contentMDK:64054691~menuPK:64319211~pagePK:36726~piPK:36092~theSitePK:29506,00.html> accessed August 2013.

⁴ International Bank for Reconstruction and Development Articles of Agreement (hereafter IBRD Articles of Agreement), Article III (Section 1)(b)

⁵ Edward Mason & Robert Asher, *The World Bank Since Bretton Woods* (The Brookings Institution 1973) pg. 23

⁶ 22 July 1944

⁷ The peace treaty between Egypt and Hittite Empire dates back to 1280 BC.

positivist school of thought⁸ and it is from this positivist analytical tool that this thesis commences.

This thesis examines the work of the World Bank against the legal paradigm in which it was created. The World Bank today is acting in a governance role, and requires that its member States conform to certain policies in order to access its assistance. The Bank was created using public international law that is itself traditionally seen as based upon the widely accepted positivist theory that an international law is only valid if it is created by sovereign States as an expression of sovereign will; international legal positivism. In international law, the State accepted rules concerning the relationship between a State and an international organisation are usually seen as ones of delegated authority; an organisation can only work within either the explicit or implied powers given to it by its member States. To act otherwise would be for the international organisation to encroach upon the sovereignty of its members. The thesis will demonstrate that the actions of the World Bank, although accepted by States as valid in law, can no longer be accurately traced to these accepted rules within the international community.

The thesis will argue that the actions of the World Bank have moved the understanding of its actions in law beyond this theory. The governance role that the Bank is undertaking is not reflected in its Articles of Agreement. States are accepting the actions of the World Bank as within the law yet the accepted legal theory offers no explanation as to why. This thesis posits that a change in the theory in this narrow area is required and proposes systems theory as an alternative tool of understanding. The work of the World Bank will then be analysed against systems theory to demonstrate for the first time that an autonomous legal system has been created. In particular, the work of the World Bank Inspection Panel will be closely examined to demonstrate that this Court-like structure has moved the World Bank from a normative regime involving a governance function into a fully autonomous legal system. The value of this work is to allow a more thorough understanding of the World Bank and to frame the challenging questions that are raised about the Bank's conduct within an alternative setting and, therefore, allow alternative answers to the questions that challenge the Bank today. Analysis of the work of the Bank is still framed in terms

⁸ Which itself replaced the natural school of law. This issue will be further examined in Chapter One.

of State consent. This thesis will add to knowledge by framing the analysis of the Bank in terms of an autonomous legal system, and allow a reconceptualization of the issues challenging the Bank to allow for alternative unconsidered options to be explored.

There is significant debate existing from a variety of authors, both legal and non-legal, on whether the World Bank should be acting the way that it is.⁹ The thesis will take no position on the morality of the governance being exercised by the World Bank. There will be no debate on the normative position it should adopt in relation to its governance in both what is being governed and how it is governed. Instead the thesis will prescriptively focus upon the legal reality that presents itself and consider the position of the World Bank in relation to the legal paradigm that exists. Whether the World Bank *should* be acting in the fashion that it does is a separate debate. This thesis takes the position that States are accepting the World Bank actions and tries to make sense of this in law.

0.3 Subject Area Chosen

The World Bank is not the only international financial organisation whose role and mandate have been questioned. In other instances the attempt by organisations to expand their mandate has been rejected¹⁰ which raises the question of why the World Bank's actions, despite drawing criticism, are readily accepted by States. The quantity of international organisations increases yearly, yet, even in a scope limited to the three main international economic organisations, the level of criticism regarding breaching their respective treaties is profound. Whilst the works of the International Monetary Fund (IMF) and the General Agreement on Tariffs and Trade (GATT), subsequently the World Trade Organization (WTO), also have the potential to raise issues for an analysis of their work against the positivist international law theory, both will be beyond the scope of this thesis. Much

⁹ For a legal position, see Bhupinder Chimni, 'IFIs and International Law: A Third World Perspective', in Daniel Bradlow & David Hunter (eds.), *International Financial Institutions and International Law* (Kluwer Law International 2010). For a non-legal position, see Catherine Weaver, *Hypocrisy Trap: The World Bank and the Poverty of Reform* (Princeton University Press 2009)

¹⁰ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 ICJREP. The ICJ rejected the request of review by the World Health Organization (WHO) as the WHO was acting outside of its mandate.

scholarship has been written upon the legal position of the WTO, particularly its Dispute Settlement Body,¹¹ and the potential constitutional nature that it could now hold.¹² Yet in relation to an analysis of the organisation against the positivist theory, the WTO is in a different legal position to the World Bank.

The GATT was replaced comparatively recently with the WTO in 1995 and whilst this does not preclude the organisation developing upon its agreed upon role away from what was consented by States, the potential for it to do so is correspondingly less. The GATT and the WTO also embark on regular trade negotiation rounds that involve discussions over the role of the organisation allowing States a regular opportunity to update the agreements and agree a role for the organisation. The practice in negotiations is to reach a consensus rather than using a voting system, which is a key reason why some rounds of negotiation have lasted considerable lengths of time. Since 2001, the Doha Development Agenda has been on going as key issues are negotiated over and, whilst this is not ideal in moving the agenda forward, it does provide States with a constant legal opinion over the work of the WTO grounding its work in State consent.

The area of the WTO that has drawn the most scholarship is the Dispute Settlement Body. The Dispute Settlement Body applies the laws agreed upon by States in the founding articles in its proceedings. In contrast, the World Bank Inspection Panel, as will be discussed in Chapter Five applies the “law” that the World Bank has created itself. Although the Dispute Settlement Body could be examined by reference to systems theory, the developed nature of the legal arguments already published on the WTO preclude its inclusion within this thesis.

The IMF conversely is regularly seen as a sister organisation to the World Bank in legal scholarship.¹³ As they were both created at the same time, have headquarters situated geographically adjacent and have historically become

¹¹ For example, Jeffrey Lagomarsino, ‘WTO Dispute Settlement and Sustainable Development: Legitimacy through Holistic Treaty Interpretation’ (2011) 28(2) *Pace Environmental Law Rev.* 545

¹² Deborah Cass, *The Constitutionalization of the World Trade Organization* (OUP 2005)

¹³ See for example: Ngaire Woods, *The Globalizers: The IMF, The World Bank and Their Borrowers* (Cornell University Press 2006), Stephen Zamora, ‘Regulating the Global Banking Network – What Role (if any) for the IMF?’ (1994) 62(7) *Fordham Law Review* 1953, 1954 and *Ms. N. Sachdev, Applicant v. International Monetary Fund, Respondent* (2012) Administrative Tribunal of the International Monetary Fund, Judgment No. 2012-1, Para. 35

involved in similar and even shared competencies, the temptation has been to deal with the two organisations together rather than separately. Especially since the 1980s where countries pushed both organisations to cooperate on conditionality to ensure that adjustment lending programs were consistent,¹⁴ it has become the norm to refer to both organisations together. Criticism regarding the organisations has also become interlinked with the main non-governmental organisation (NGO) criticism involving the use of conditionality by both organisations¹⁵ or has now become vogue, the lack of conditionality¹⁶ or more nuanced, that the organisations are not using the “right” conditionality.¹⁷ Yet despite this, they are and remain separate organisations with different staff, agendas and legal personalities.

As will be shown, the World Bank has consistently changed its mandate and focus as one core of its *raison d'être* has disappeared. This has not been the case for the IMF and although many of the arguments that are developed in this thesis could be applied to the Fund, the IMF is not in the same legal position that the World Bank has now come to occupy. The modern day work of the IMF can still be readily traced back to its purposes within its Articles of Agreement, which have changed multiple times to incorporate updates to the IMF's mission. Although there exist similar legal disputes to the ones levied against the World Bank that may incur a similar analysis to the one that is presented in this thesis (over the effect of its work,¹⁸ its effect on national sovereignty,¹⁹ its organisational structure²⁰ and disputes over its expansion of its mandate,²¹ mission creep) the

¹⁴ Domenico Lombardi & Bessma Momani, 'Explaining IMF and World Bank Relationship' prepared for The Political Economy of International Organizations, January 28-30, 2010, pg. 10

¹⁵ For example, Oxfam's position is outlined in Hetty Kovach & Sebastien Fourmy, *Kicking the Habit: How the World Bank and the IMF are still Addicted to Attaching Economic Policy Conditions to Aid* (Oxfam International 2006)

¹⁶ This has come about due to the introduction of the Program for Results initiative in 2012.

¹⁷ Korinna Horta, 'Rhetoric and Reality: Human Rights and the World Bank' (2002) 15 Harv. Hum. Rts. J. 227

¹⁸ Axel Dreher & Roland Vauber, 'The Causes and Consequences of IMF Conditionality' (2004) 40(3) *Emerging Markets Finance and Trade* 26

¹⁹ Phillip Trimble, 'Globalization, International Institutions and the Erosion of National Sovereignty and Democracy' (1997) 95(6) *Michigan Law Rev.* 1944

²⁰ Murilo Portugal, 'Improving the IMF Governance and Increasing the Influence of Developing Countries in IMF Decision-Making' prepared for G24 Technical Group Meeting, March 17-18, 2005

IMF is a separate organisation, with a separate mission, that is designed to operate independently of the World Bank. Crucially, the internal rules that both organisations apply are fundamentally different²² due to both organisations seeking separate goals and, therefore, although parts of this analysis might be of relevance to the IMF, similar to how they might be of relevance to any other international organisation, this thesis will exclusively focus upon the development and work of the World Bank.

0.4 What the World Bank Does and How it Operates

The World Bank of today is a fundamentally different organisation to the one that the founders envisioned at Bretton Woods. Today there are five arms to the World Bank Group; the original International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), International Finance Corporation (IFC), Multilateral Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes (ICSID). The term 'World Bank', as used by the World Bank Group, refers to the work of the IBRD and the IDA.

The IDA was created in 1960 with the aim 'to promote economic development, increase productivity and thus raise standards of living in the less-developed areas of the world'.²³ It does this by providing interest free loans to the world's 82 poorest countries²⁴ on a long repayment plan, 25 or 40 years, with a 5 or 10-year grace period²⁵ or pure grants for specific projects. The IDA is financed primarily through contributions from richer members of the World Bank Group on a three yearly basis known as IDA Replenishments.

The IFC is the private sector arm of the World Bank Group established in 1956. Unlike the IBRD, which can only lend directly to States, the IFC can lend to private

²¹ Robert Hockett, 'From Macro to Micro to "Mission-Creep": Defending the IMF's Emerging Concern with the Infrastructural Prerequisites to Global Financial Stability' (2002) 41 Columbia Journal of Transnational Law 62

²² See the World Bank Operational Manual contrasted with the By-Laws Rules and Regulations of the International Monetary Fund (IMF 2011).

²³ International Development Association Articles of Agreement, Article I

²⁴ <http://www.worldbank.org/ida/what-is-ida.html> accessed September 2013.

²⁵ IDA Terms (Effective July 1, 2011), available at <http://siteresources.worldbank.org/IDA/Resources/Seminar%20PDFs/734491271341193277/IDATermsFY12.pdf>

enterprises within member States without guarantee of repayment by the member government concerned²⁶ in an effort to further economic development. The IFC borrows upon capital markets and lends on a commercial basis to private enterprises that cannot raise sufficient private capital on reasonable terms.²⁷

The MIGA, founded in 1988, encourages the flow of investments to developing countries that are members²⁸ by offering political risk insurance guarantees to private sector investors and lenders.²⁹ It aims to attract investors into difficult environments to promote development by removing the risk that external factors could damage the financial benefits of a project.

The ICSID is the dispute settlement arm of the World Bank Group and provides 'facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States'.³⁰ The Convention establishing the ICSID entered into force in 1966 due to the need to establish a specialised investment dispute settlement body that could provide facilities for the resolution of legal disputes between contracting parties through conciliation or arbitration.³¹

Although the World Bank as originally envisioned has grown to encompass more than just the original IBRD, throughout the thesis, the terms 'World Bank' or 'Bank' will refer only to the work of the IBRD. The IBRD is legally and financially independent of the other arms of the World Bank Group and so can be analysed in its own right rather than as part of the whole. Any reference to other parts of the World Bank Group will be explicitly acknowledged.

The initial aim of the IBRD was to provide finance to Europe post-World War II³² with its reconstruction needs caused by the war, yet the Bank was clearly given a mandate for development as witnessed by its name as the International Bank for Reconstruction and *Development* and its Articles of Agreement. The World Bank

²⁶ International Finance Corporation Articles of Agreement, Article I (i)

²⁷ *Ibid.* Article III (Section 3) (i)

²⁸ Convention Establishing the Multilateral Investment Guarantee Agency, Article 2

²⁹ *Ibid.* Article 11 and <http://www.miga.org/whoware/index.cfm?stid=1786> accessed September 2013.

³⁰ Convention on the Settlement of Investment Disputes between States and Nationals of other States, Article 1 (2)

³¹ https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home accessed July 2013.

³² *A Guide to the World Bank* (Second Edition, IBRD 2007) pg. 1

today has focused heavily upon this second aim and operates to end extreme poverty in middle-income and creditworthy poorer countries.³³ It does this by providing finance at favourable terms to countries that struggle to raise capital at acceptable rates on capital markets. The Bank raises money on international capital markets using its AAA rating,³⁴ adds a premium to cover costs, and lends to member States at rates favourable in comparison to what the member could achieve independently on the capital markets. One reason that the IBRD enjoys its AAA status is the fact that it has never written off a loan since its inception³⁵ which combined with its preferred creditor status³⁶ and large capital structure (both called up and subscribed) allow it to borrow at an extremely favourable yield.

There are two basic types of lending that the IBRD uses: investment project loans and development policy loans. Investment loans are to finance infrastructure that is necessary for poverty reduction and sustainable development.³⁷ Development policy loans in contrast are used to support structural reforms in an economy through a program of policy and institutional actions that promote growth and enhance the well-being and increase the incomes of poor people.³⁸ Outside of its lending operations, the Bank uses technical assistance to advise members on how to make their economies more efficient. All loans are either made directly to the member government or with a government guarantee. In the financial year 2012/13, the World Bank lent a total of US\$15.2 billion.³⁹

From the initial membership of 41 States, the IBRD has grown to a membership of 188 States so is one of only a handful of organisations to enjoy near worldwide

³³ <http://www.worldbank.org/en/about/what-we-do> accessed August 2013.

³⁴ The three largest credit rating agencies have all given the World Bank the highest credit rating. Fitch: AAA, Standard and Poor: AAA, Moody's: Aaa.

³⁵ Standard and Poor's International Bank for Reconstruction and Development Credit Report, June 17 2011, page 12. One reason for this, however, is due to the introduction of the Heavily Indebted Poor Countries Initiative that cancelled the debt of some countries who were unable to pay, therefore, avoiding the need to write down the loan as unpaid.

³⁶ Preferred creditor status prevents the debts owed to the World Bank being restructured by its member States. For an analysis of preferred creditor status under international law, see Rustel Martha, 'Preferred Creditor Status under International Law: The Case of the International Monetary Fund' (1990) 39(4) The International and Comparative Law Quarterly 801

³⁷ *Supra* Note. 32 pg. 67

³⁸ Operational Policy 8.60 – Development Policy Lending, 2

³⁹ IBRD Management's Discussion & Analysis and Financial Statements, June 30, 2013, pg.

membership.⁴⁰ Not all members are, however, eligible to borrow from the IBRD. The World Bank Group classifies countries by the gross national income per capita. Lower income \$1035 or less; lower middle income \$1036-\$4085; upper middle income \$4086-\$12,615; and high income \$12,616 or above.⁴¹ Middle income States and credit worthy lower income members are eligible to apply for IBRD funding.⁴² Blend countries are members that are eligible to apply for funding from both the IDA and the IBRD due to being lower income countries that are creditworthy. Including blend countries, 80 members are currently eligible to apply for IBRD funding.⁴³

Each member appoints a governor as a representative who is assigned a voting share dependent upon the size of the member's contribution to the World Bank's capital. In 2010, the Bank changed the voting structure to increase the voting share of developing nations by an extra 3.13%. The United States (15.14%), Japan (8.45%), Germany (4.48%), France (4.00%) and the United Kingdom (4.00%) hold the largest quotas and, therefore, the largest votes.⁴⁴

This large American share, that historically was larger, has led political theorists and international relations experts to explain the history of the World Bank using the term "Washington consensus". The original usage of the term was by John Williamson, an economist, in relation to ten broad economic conditions that the World Bank, IMF and United States Treasury recommended that borrowing nations adopt, specifically in Latin America, to recover from the 1980s economic crises.⁴⁵ Yet despite this narrow interpretation, the term evolved to encompass a wider definition that was a 'synonym for neoliberalism or market fundamentalism'.⁴⁶ The original author was against the adoption of this new

⁴⁰ Notable absentees from membership include North Korea and Cuba.

⁴¹ Figures are accurate as of September 2013.

<http://siteresources.worldbank.org/DATASTATISTICS/Resources/CLASS.XLS>

⁴² Non-credit worthy lower income members are eligible for IDA funding.

⁴³ <http://data.worldbank.org/about/country-classifications/country-and-lending-groups> accessed August 2013.

⁴⁴ International Bank for Reconstruction and Development Voting Power of Executive Directors August 30, 2013

⁴⁵ John Williamson, *What Washington Means by Policy Reform*, in: John Williamson (ed.), *Latin American Readjustment: How Much has Happened* (Institute for International Economics 1989)

⁴⁶ John Williamson, 'A Short History of the Washington Consensus' for a Conference 'From the Washington Consensus to a new Global Governance', Barcelona, September 24-25, 2004, pg. 7

term⁴⁷ yet despite this it has evolved in popular media to encompass this second meaning.

The notion of a Washington consensus among the leading lending institutions stems from a concept of American hegemony. This assumes that the United States as the largest funder, its share of the World Bank, which gave the United States an effective veto over changes to the World Bank, and the fact that the United States has always been allowed to nominate the President of the World Bank allows the United States to shape or influence World Bank policies to further the United States' interests. These theories were particularly prevalent during the Cold War when the World Bank funded Western allies to shore up sympathetic regimes and to limit the influence of the Soviet Union in the developing world.⁴⁸

The notions of a Washington consensus, narrow or broad, or an American hegemony affecting the World Bank are, however, not legal positions. The value of this thesis is that it makes sense of how the World Bank is behaving in law, not in political theory or international relations theory.

0.5 Methodology

The research methodology employed is founded in a doctrinal literature survey and on legal analysis from primarily two schools of thought, the positive philosophical school and the systems theory school, to ascertain an understanding in law of the actions of the World Bank. This research is undertaken by an analysis of the actions of the Bank against the positive philosophical school that is prevalent within public international law that would inform that the Bank is bound by its constituent document agreed by States. Subsequently, the systems theory school is employed as an analytical tool to explain subsequent practice of the World Bank and to ground its actions within legal philosophy once the positive

⁴⁷ *Ibid.*

⁴⁸ On this point particularly, Ngaire Woods, 'The International Monetary Fund and the World Bank' (2002) <http://www.globaleconomicgovernance.org/wp-content/uploads/Woods%20for%20Routledge.pdf> accessed August 2013. For further information on these theories generally, see: Robert Gilpin, "The Rise of American Hegemony", in Patrick Karl O'Brien & Armand Clesse (eds.), *Two Hegemonies: Britain 1846-1914 and the United States 1941-2001* (Ashgate Publishing, Ltd. 2002) pg. 165-182; Robert Wade, "US Hegemony and the World Bank: the Fight over People and Ideas" (2002) 9(2) *Rev. of Int'l Political Economy* 201 and Richard Peet, *Unholy Trinity: The IMF, World Bank and WTO* (Zed Books Ltd. 2003)

philosophical school is rejected within this context. As the systems theory school of legal philosophy focuses heavily upon the internal structure of a system, a detailed examination of the modern World Bank structure will take place with particular emphasis upon the Inspection Panel as a decision maker upon actions occurring within the World Bank system.

Although other philosophical schools of thought are considered,⁴⁹ the focus upon positive law as the dominant format for understanding public international law is used due to the general acceptance of its main arguments by States, international organisations and other non-State actors. Historically the natural philosophical approach has had relevance towards an understanding of public international law, however, due to the thesis being concerned with the World Bank and the treaty establishing it, natural law is not considered due to the formation of treaties being considered a primarily positivist action by States. Systems theory is chosen as a subsequent tool of analysis due to the rejection of other major schools and systems theory best explaining the practice of the Bank within a legal framework.

The thesis does not intend to replace the positivist school of thought within wider public international law for the legal position of international organisations. The focus of the thesis is exclusively upon the World Bank and its development and, although parts can have relevance for analysis of other international organisations, it is not the intention of the author within this work to extrapolate this example into a wider context.

Within the current literature, this thesis develops an alternative approach and analysis regarding the work of the World Bank. There is considerable consideration of the legal status of other international organisations yet for the Bank the analysis has been lacking. Specifically on the Bank the legal literature has focused on two key areas. Firstly, the development and use of conditionality, including analysis of the legal context in which it resides. Secondly, the development of the Inspection Panel has been considered, but primarily from a descriptive perspective rather than analytical of the implications for the World Bank system. This thesis provides a contribution between the two areas, by considering the normative framework that the World Bank has developed and

⁴⁹ See Chapter Two for an examination of the administrative, constitutional, institutional and progressive positive schools of thought.

charting the development of the Inspection Panel to demonstrate that this normative framework has developed into a legal system.

0.6 Chapter synopsis

0.6.1 Chapter One

The governance role that international organisations undertake has been a subject of controversy in academic literature. In attempting to identify the legal basis for this governance role, the thesis begins by outlining the current widely accepted understanding of public international law and applying it against the World Bank. Although positivism has come into criticism over the last number of decades, it still remains as the principle mechanism for understanding public international law due to its fundamental principle of State consent that is reflected in State practice. An analysis of the positivist tool creates a benchmark for the understanding of how an international organisation should act under the theory. As this theory is premised upon the principle of State consent, treaty interpretation is examined as a central core of the paradigm on the foundation that an international organisation can only act in the fashion that States have consented to and, therefore, the interpretation of the limits of consent within a treaty are central.

Once this benchmark is developed and set, a historical analysis of the World Bank will occur to demonstrate how the Bank has moved beyond its mandate and is no longer readily understood by conceptualising its behaviour by reference to the positive theory. The positive theory, based upon State consent and organisations only acting in a fashion that is proscribed by States, does not explain the introduction of various mechanisms within the World Bank process through either express or implied powers. Crucially however, whilst the World Bank would seem to be acting outside of its Articles of Agreement, States have readily accepted this and whilst there is criticism from NGOs of mission creep, States themselves are allowing the Bank to act in this fashion with apparent acceptance that this is legal. It is from this point that the thesis moves forward to examine alternative tools of analysis to explain in law the actions of the World Bank.

0.6.2 Chapter Two

The positive theory of international law has been under attack for a number of decades. The governance role being exercised by the World Bank has also been alleged to occur with other international organisations. A number of dominant theories have emerged to explain these actions in law. Alternative theories have been proposed, largely drawn from national law, to explain the new behaviour that is exhibited in the international law arena. This chapter critically evaluates a number of the key theories that are present that may be mechanisms via which to understand the Bank and explains why they are not readily applicable to an understanding of the work of the World Bank.

Four main theories are evaluated; international administrative law, constitutionalisation of international organisations, international institutional law and, what is being termed, “progressive positivism”. International administrative law, international institutional law and constitutionalisation of international organisations are theories that have been applied to other international organisations in an effort to garner legal insights into the actions of the organisations. They will be examined and applied against the World Bank to demonstrate that none adequately explains the World Bank’s actions that were discussed in Chapter One. Progressive positivism is a new concept stemming from the work of the International Law Commission on the Articles on the Responsibility of International Organizations⁵⁰ that seeks to bind international organisations to customary international law. This theory is created for this thesis, based upon recent developments in international law, and whilst much of such work is still in a formative stage, it is examined to seek an alternative explanation under the positivist theory that might explain within law the actions of the Bank.

Although all four theories are ultimately rejected as the actions of the Bank are incompatible with an understanding under each theory, this analysis is required to demonstrate that the theories that academics have utilised in other contexts to explain international organisations' actions in legal terms do not adequately explain the actions of the World Bank.

⁵⁰ Available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_11_2011.pdf accessed September 2013.

0.6.3 Chapter Three

Reflecting the inadequacies of the prevalent theories used in other contexts, the focus of Chapter Three turns the thesis towards the tool that this thesis will use to examine the work of the World Bank, systems theory. The chapter charts the progress of systems theory from its creation within biology to its modern application to law. Crucial elements are identified from the systems theory legal school for the identification of an autonomous legal system and are examined in detail to provide a framework of application.

In contrast to Luhmann's systems theory, the requirement of a Court within a legal system is identified and requires special examination for its fundamental importance on ruling upon the legal/illegal communication divide. This work posits that the formative stage of a legal system, the evolution from a normative system to a legal system, requires the presence of a Court-like body to stabilise normative expectations. Having identified the framework of analysis, its application to the Bank, and particularly the work of the Inspection Panel, are discussed.

0.6.4 Chapter Four

For a legal system to develop there must be a normative system in place. The work of systems theory provides for the development of a normative system to a legal system. The focus of this chapter is to analyse the construction of a normative system that the World Bank has created through its work, that is required for the Bank's development into an autonomous legal system under systems theory. This development has been *ad hoc* and inconsistent through the use of conditions but has stabilised through the development and implementation of Operational Policies and Bank Procedures.

The legal status of World Bank loans, including the loan documentation and the attached conditions, is examined from both the World Bank's view and from a systems theory perspective. The creation and use of Operational Policies and Bank Procedures is key in the normative system that is constructed. The Operational Policies and Bank Procedures contained in the World Bank's Operational Manual are considered from a systems theory perspective to demonstrate that they are amounting to norms and provide a normative framework for application by the Bank against its borrowing member States.

0.6.5 Chapter Five

The identification of a Court-like body as a mechanism via which normative systems evolve into legal systems is considered against the Inspection Panel. The introduction of the Panel sparked the change from a normative system into a legal system by allowing for the stabilisation of normative expectations. The development of the Inspection Panel is seen, via systems theory, to be a crucial stage in the development of the legal system and so an examination occurs regarding how the World Bank created the Inspection Panel, what the Panel actually rules upon and what powers the Executive Directors assigned to it.

A case analysis demonstrates the shift from an advisory body into a Court-like structure by highlighting specific cases that have pushed the Panel into a systems theory Court ruling upon a legal/illegal divide. In this regard, six specific cases are chosen and analysed to demonstrate this development. The Panel is highlighted as occupying a role via which it rules upon the legal/illegal divide and, therefore, has both placed itself in the centre of the Bank's legal system as it stands today but also been the catalyst that moved the World Bank towards an understanding of its actions in terms of law.

0.6.6 Chapter Six

The final chapter examines the implications the conclusion that the World Bank has developed into a legal system will have. Firstly, the boundaries of the World Bank legal system are explored before the implications of this understanding for the Bank are examined. This includes an examination of the accountability of an international organisation outside of the positivist theory and offers a new way of understanding the conditionality conundrum. Secondly, the implications for the relationship between the Bank and its membership are examined and subsequently reforms are considered based on this new understanding.

The final conclusion is of a need for reflection. Systems theory offers an understanding of the work of the Bank in law, yet it should be clear to all actors; the Bank itself, the member States and the people whose lives the work of the Bank affects, what exactly is the purpose of the Bank.

Chapter One: The Positive International Law Theorem and its Application to the World Bank

1.1 Introduction

International organisations, such as the World Bank, are actors created by and bound by public international law. As actors of international law, their actions must be explainable by reference to law. The World Bank of today is alleged to be exercising a governance function:¹ it instructs its member States on how to behave and governs both the actions of the governments and how it affects its citizens. A theory of law that explains the actions of the World Bank should be able to explain the role that it is acting today.

As creations of public international law, it is the theory of law most readily identified and used to explain public international law that is most readily applied to international organisations, positivism.

The modern day incarnation of public international law is often traced back to the Treaty of Westphalia and the work of Emmerich de Vattel. Since that date, although the substance and style of international law has changed, the fundamental principles upholding the system have remained in essence the same. Vattel outlined the positive theory of public international law, which since that time has remained the dominant, although not sole, theory of public international law. Sovereignty and the equality of States with the forthcoming consequence that a State cannot be legally bound by a rule that it has not agreed to have been the cornerstone that the modern understanding of international law have been built upon. This chapter argues that for a particular area, the relationship between international organisations and States, this understanding no longer holds true in all contexts. Specifically, this chapter will compare the modern

¹ See for example; Joseph Stiglitz, 'Democratizing the International Monetary Fund and the World Bank: Governance and Accountability' (2003) 16(1) *Governance: An International Journal of Policy, Administration, and Institutions* 111; Ngaire Woods, 'The Challenge of Good Governance for the IMF and the World Bank Themselves' (2000) 28(5) *World Development* 823; and Benedict Kingsbury, Nico Krisch & Richard Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15, 27

fundamental understanding of international law, which arises from and is based upon positivism, against the history of the World Bank to establish that the actions of the World Bank do not fit the widely used legal model.

The chapter will begin by examining the creation of the Bank, examining its reason for creation and what its founders sought it to achieve. The positive international law theory, as the mostly widely used legal tool for analysis of public international law actions, will be examined in order to determine how it has developed and how it moved understanding away from natural Grotian concepts to the modern positivism paradigm. As fundamental principles of international law, sovereignty and sovereign equality are examined to outline the basis of the positivist application to international law. The exact model that is widely accepted will be articulated upon before being utilised in the context of international organisations to demonstrate that to not conflict with sovereignty, international organisations can only perform functions allocated to them via their treaty.² In turn, treaty interpretation is examined as a subject matter, from treaty, customary international law and World Bank perspectives.

Once the model and the proposed theoretical behaviour are developed, the chapter will move on to a historical analysis of the World Bank since its creation to demonstrate that the legal behaviour of the Bank does not match the behaviour that the widely accepted model would suggest. The powers assigned to the Bank by its members are assessed against the evolution of the Bank's mandate in order to demonstrate that the legal link between the Bank's actions and its Articles of Agreement is broken.

1.2 The Creation of the World Bank and its Articles of Agreement

“We, the Delegates of the Conference, have been trying to accomplish something very difficult to accomplish. We have been operating, moreover, in a field of great intellectual and technical difficulty. We have had to perform at one and the same time the tasks appropriate to the economist, to the financier, to the

² Excluding the application of a peremptory norm of general international law under Article 53 VCLT.

politician, to the journalist, to the propagandist, to the lawyer, to the statesmen – even, I think, to the prophet and to the soothsayer...

And I make bold to say...we have been successful.”³

A thorough history of the World Bank could amount to a thesis in itself, yet a short history of the creation of the Bank and its work since its inception is crucial to assess whether the actions of the Bank have complied with the positivist understanding of international law by keeping within its founding treaty and any subsequent amendments. The quote by John Maynard Keynes is one indication that the founders of the Bank believed that they had been successful in their aims and had provided an organisation suited to its goals; a history of the Bank since its inception will determine whether the Bank has agreed.

The section will examine the circumstances that led to the creation of the Bank and how and why its competence was shaped as it originally was in an effort to provide a baseline for analysis. If it can be shown what the World Bank was originally intended for, an objective measure can be used to see how far it has shifted from this baseline.

1.2.1 Events Leading up to the Bretton Woods Conference

The path that led to the creation of the World Bank at the Bretton Woods Conference began long before 1944 when the Bank was established. Although the events of the Conference have reached an almost infamous level within international economic law for the profound effect they have had on the world's economic development, it was the events that led up to the Conference that shaped the aims and directions of the World Bank, the International Monetary Fund and the GATT/WTO.

The Bretton Woods Conference, and the three organisations that can be traced to it, was held to prevent the reoccurrence of events that led to the great depression in 1929,⁴ the events that stemmed from it and to attempt to revive international

³ John Maynard Keynes, quoted in Roy Harrod, *The Life of John Maynard Keynes* (W. W. Norton and Company 1951) Pg. 582-84

⁴ John Horsefield, *The International Monetary Fund 1945-1965* Vol.1 (IMF 1969) Pg. 33

trade after World War II.⁵ The Conference itself was in this sense reactive to past events in an effort to eliminate what was perceived at the time as harmful and predatory practices prevalent during the 1930s.⁶

The great depression began in 1929 in the United States with what has come to be known as Black Tuesday and rapidly spread throughout the world to cripple economies both large and small. Industrial States had increasingly come to rely on the stock market as a source of funding. Market rules allowed buyers to purchase shares with only a small down payment and to borrow the majority of the capital required to fund the acquisitions. Low interest rates and sharply rising prices allowed buyers to purchase shares with a small down payment and large loan, then sell at a later date for a high price and repay back the loan whilst making a large profit in the process. This approach led to artificially high prices whilst individuals and companies became increasingly reliant upon the stock market.

In the month leading up to Black Tuesday investors became increasingly nervous at the amount borrowed and the slow down in price rises.⁷ As the market began to turn an increasing amount of panic selling occurred that led to the Black Tuesday collapse. Banks that had lent money could no longer continue as going concerns as loans turned to non-performing; individuals lost their life savings on the market but still had to repay the loans they used to fund their portfolios; companies that were exposed could no longer afford to finance their activities so either declared bankruptcy or were forced to issue mass redundancies; even businesses that were not heavily invested were paralysed due to their savings in banks being lost when banks collapsed.

The depression led States to devalue their currencies and to place restrictions on trade in order to maintain domestic income.⁸ As a growing number of countries exercised their traditional sovereign right to follow these procedures and protect their own economy, the result was a reduction in trade and employment for all

⁵ Rajesh Swaminathan, 'Regulating Development: Structural Adjustment and the Case for National Enforcement of Economic and Social Rights' (1998) 37 Colum. J. Transnat'l L. 161, 164

⁶ Michael Malloy, 'Shifting Paradigms: Institutional Roles in a Changing World' (1994) 62 Fordham L. Rev. 1911, 1912

⁷ More than \$8.5 billion was on loan; more than the entire amount of money in circulation in the United States.

⁸ Kim Reisman, 'The World Bank and the IMF: At the Forefront of World Transformation' (1992) 60 Fordham L. Rev. S349, S351

States concerned.⁹ Protectionist measures became the norm in an effort for States to protect their own producers at the expense of foreign products¹⁰ and retaliatory measures were used on a regular basis. Even between close allies it was seen as more important to pursue a protectionist agenda, especially when raw materials were concerned, than it was to keep an open market.¹¹

The imposition of tariffs, import quotas and other restrictive measures imposed by States can all be seen as evidence of an increased exercise and affirmation of State economic sovereignty throughout the period. States were exercising rights in what they felt was their sovereign duty to protect their citizens and even though these measures had a negative effect on a global level, it was still the States' prerogative to do so. In the lead up to the Conference States realised that something had to be done to prevent a repeat of the crisis, yet State sovereignty was still rigidly protected.

1.2.2 The Effect of World War II

Some State economies began to recover during the mid-1930s but many did not recover until World War II. Although the economic effects of the depression were profound, the effects on international peace and security were also of grave concern. In the lead up to and at the Conference it was believed that the economic conditions in Germany were a factor in Hitler's rise to power. European States were hit particularly hard by the depression, as they had not yet fully recovered from the spending both during World War I and in the process of redevelopment post war.¹² The German economy recovered in the mid-1930s as the Nazis, membership boosted by massive unemployment, focused upon the expansion of Germany's ammunition production facilities.¹³

As World War II began, the United States economy began to come out of a post-great depression recession. The Allied forces continuous orders for supplies

⁹ *Ibid.*

¹⁰ For example, see the Smoot-Hawley Tariff Act in the United States Pub. L. 71-361. This act alone raised tariffs on over 20,000 foreign products.

¹¹ Geoffrey Malcolm Gathorne-Hardy, *A Short History of International Affairs, 1920-1939* (OUP 1968) pg. 75

¹² John Jackson, *Legal Problems of International Economic Relations: Cases, Materials, and Text on the National and International Regulation of Transnational Economic Relations* (West Group 1977) pg. 396-398

¹³ Francis Snyder & Peter Slinn, *International Law of Development: Comparative Perspectives* (Professional Books 1987) pg. 3

helped boost the United States economy and with America joining the war in 1941 the economy thrived. As the war continued the fall in the price of raw materials was a direct cause of the devaluation of exchange rates that benefited all global economies.¹⁴

Commentators from both sides of the Atlantic could view events at the end of World War I as contributing to the causes of World War II and could recognise the need not to repeat the same mistakes. The Great Depression and the subsequent actions by States to protect their own citizens had been a major contributor to the war and the links between trade and world peace were made. Two plans were drawn up by the Allied powers as early as 1941 for a post-war strategy to prevent a reoccurrence of the proceeding events. The United States drew up the White Plan: named after Harry Dexter White. The United Kingdom drew up the Keynes Plan: named after John Maynard Keynes.

The plans had to walk a careful line between what States had traditionally seen as their own sovereignty and would, therefore, seek to protect on one side and the need to prevent a further mass economic recession and any further outbreak of war on the other side. States had shown a particular value to their economic sovereignty during the preceding period and though compromises would have to be given up in order to achieve the lofty aims, States would only be willing to go so far and had a clear interest in limiting exactly what was delegated.

It is in this combined economic and security conscious background that the Bretton Woods Conference was called.

1.2.3 The Conference

The main focus of the Conference, at least when it was called, was to create the International Monetary Fund. The invitations sent out to the Allied States stated the purpose of the Conference was to 'formulate definite proposals for an International Monetary Fund, and possibly a Bank for Reconstruction and Development'.¹⁵ As such, the Bank received only a fraction of the scrutiny that States assigned to the IMF. The sovereign debate at the Conference surrounding

¹⁴ J. Keith Horsefield, *The International Monetary Fund, 1945-1965: Twenty Years of International Monetary Cooperation Vol. III* (IMF 1969) pg. 119

¹⁵ Sandra Blanco & Enrique Carrasco, 'The Functions of the IMF and the World Bank' (1999) 9 *Transnat'l L. & Contemp. Probs.* 67, 70

the IMF does, however, provide valuable context for decisions that were made regarding the Bank.

Both the White Plan and Keynes Plan agreed that an organisation had to be formed to remedy balance of payments issues that States might experience. Balance of payments problems occur when the current account for a State is in deficit as it results in a State building up an increasing deficit or foreign ownership of assets. A balance of payments crisis occurs when a State can no longer service this debt.

Each plan, shaped by their respective nations, had vastly different means of fulfilling this role. Keynes Plan allowed for the creation of an International Clearing Union that would allow States to borrow directly from each other to rectify balance of payment deficits. The United States, as the only State after World War II with the potential to offer credit, objected to placing so much of their currency at risk in such a system.¹⁶ The United States negotiators were conscious of Congress' probable objections to placing so much of the United States security in the hands of foreign nationals. This was essentially a protectionist measure to ensure that Congress was always in control of the United States financial position. In these terms, it is clear that the reluctance of the negotiators was linked to protecting United States sovereignty.

The White Plan called for the creation of a Stabilization Fund where members would contribute gold as well as their own respective currency. The Fund itself would then lend to members rather than direct state-to-state borrowing but this was foreseen to require a fixed exchange rate system to operate.¹⁷

The British Parliament was not prepared to accept the White Plan in relation to the Stabilization Fund as of the requirement of a fixed exchange rate system. They wanted to retain the sovereign right to control monetary policy to protect the British economy.¹⁸ Although protectionist behaviour had caused many of the problems that the Conference was trying to eradicate, the British government still felt that an element of control had to be maintained. Recognising that the system would not work without the approval of both the United States and the United

¹⁶ *Ibid.* pg. 71

¹⁷ *Ibid.* pg. 71

¹⁸ *Ibid.* pg. 72

Kingdom, compromises were reached to assuage each side. The length of the debates from all sides surrounding this subject provides evidence to how careful and wary States were in delegating traditional sovereign powers to the respective international organisations. Any transfer would happen on the express terms outlined and agreed upon by States with a clear demarcation of what was to be considered the respective areas of competence between State and organisation and, in light of events at the conference, between organisations.

It is in this context of a careful protection of sovereignty in relation to transfer to organisations that focus was upon establishing the Bank.

When discussions revolved around the Bank, the main issue of contention concerned what was the primary objective of the Bank: development or reconstruction.¹⁹ As would be expected, European nations that were coming to the end of a war were eager to push the Bank as an avenue for reconstruction whilst developing nations without reconstruction needs sought to move the Bank towards a development agenda. Perhaps not surprisingly, the developing States failed in a bid to make development the Bank's main agenda. Mexico's tabled amendments to these effects were turned down but a compromise led to the amendment of Article III of the agreement to include the phrase that resources of the Bank will be used 'with equitable consideration to projects for development and projects for reconstruction alike'.²⁰ Although European States won the argument and the central focus of the Bank was reconstruction, in a twist of fate the developing States' vision has prevailed.²¹

As of the sovereignty issues that were encountered during the IMF debates, States were eager to prevent the World Bank infringing beyond its mandate. To this end, John Maynard Keynes pushed for the inclusion²² of Article IV Section 10 (with the Soviet Union principally in mind²³) detailing that:

¹⁹ *Ibid.* pg. 72

²⁰ IBRD Articles of Agreement Article III, Section 1(a)

²¹ Berta Hernandez-Truyol, 'Cuba and Good Governance' (2004) 14(2) *Transnat'l L. & Contemp. Probs.* 655

²² Interview with Abram Chayes, Harvard Law School, in Cambridge (April. 10, 1998)

²³ Edward Mason & Robert Asher, *The World Bank Since Bretton Woods: The Origins, Policies, Operations, and Impact of the International Bank for Reconstruction* (Brookings Institution Press 1973) pg. 27

'The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes states in Article 1.'²⁴

This Article should be seen in the light of the uniqueness of the Bretton Woods institutions. States were taking the unprecedented steps of relinquishing control of financial activities that had always been considered part of the States' sovereign powers. The run up to World War II saw an increased use of economic sovereign options by States in order to protect their citizens and even though it was recognised that compromises had to be made, even during negotiations it was seen that States were only willing to give up a certain amount of sovereignty and not transfer full economic sovereignty to the World Bank or IMF. Article IV Section 10 should therefore be seen in its context as a limit on the sovereign powers that the State was transferring to the World Bank.

In this context with States seeking to limit the sovereignty they were transferring, it was of essential importance that the purposes of the Bank and the exact function it was to perform were clearly articulated in the treaty establishing the World Bank, the IBRD Articles of Agreement.

1.2.4 Powers Assigned by the Treaty

The purposes of the Bank were clearly set out in Article 1 of its Article of Agreements.

- (i) To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less developed countries.
- (ii) To promote private foreign investment by means of guarantees or participations in loans and when private capital is not available on

²⁴ IBRD Articles of Agreement Article IV, Section 10,

reasonable terms, to supplement private investment by providing finance for productive purposes out of its own capital.

- (iii) To promote the long-range balanced growth of international trade
- (iv) To arrange the loans made or guaranteed by it in relation to international loans through other channels so that the more useful and urgent projects will be dealt with first.
- (v) To conduct its operations with due regard to the effect of international investment on business conditions.²⁵

The final qualifying statement of Article I is that 'The Bank shall be guided in all its decisions by the purposes set forth above'. This is a limiting statement for the purposes of the Bank: any purpose not set forth in the mentioned purposes of the Bank is not a purpose the founders sought the Bank to undertake and not a purpose that States consented to. If a new purpose should develop that the member States should seek to use the Bank for, the process of amendment exists to modify the existing purposes.

The structure of the Bank is outlined in the Articles. Members are limited to those who are members of the IMF;²⁶ voting for these members is assigned in comparison to the value of shares given to the Bank;²⁷ voting is decided by a simple majority of voting share cast by the Board of Governors²⁸ except on issues that modify the World Bank through modifying the Articles of Agreement that requires four-fifths of the voting share.²⁹ The Executive Directors sit below the Board of Governors and contains twenty-five directors who are responsible for the general operations of the Bank.³⁰ Importantly in this analysis, as noted earlier the Executive Directors are responsible for the initial interpretation of the Articles of Agreement.³¹ The President is the head of the Bank and is officially elected by

²⁵ IBRD Articles of Agreement Article I (i)-(v)

²⁶ IBRD Articles of Agreement Article II, Section 1(b)

²⁷ IBRD Articles of Agreement Article V, Section 3(a)

²⁸ IBRD Articles of Agreement Article V, Section 3(b)

²⁹ See 1.8.3 World Bank Usage (Treaty Interpretation). The original Articles required eighty-five percent for an amendment to be effective.

³⁰ Originally there were twelve, as outlined in IBRD Articles of Agreement Article V, Section 4(a), however, in November 2010, the number, which had previously been increased, was increased to the current number of twenty-five.

³¹ IBRD Articles of Agreement Article IX (a)

the Executive Directors.³² In practice, however, the President has always been decided upon by the United States who nominates a candidate for the Executive Directors to approve.

Originally in the Bretton Woods negotiations the United States sought and obtained the informal right to nominate the head of the IMF, which was seen as vastly more important to the American government than the Bank, and Europe collectively was allowed to nominate the head of the World Bank. However, the first American nominee to be an Executive Director was Harry Dexter White, who had been the key American representative at the Bretton Woods conference and, along with John Maynard Keynes, a visionary of the post-World War II financial order. White was due to be nominated for the position of Managing Director yet after being nominated to be the American Executive Director, the Federal Bureau of Investigation director, J. Edgar Hoover, alleged to the United States President Harry Truman that White was a Soviet spy. Rather than risk raising questions over why they were passing over White to nominate someone else to the Managing Director position, the American government announced they would instead back a candidate for President of the World Bank and Europe could choose the Managing Director of the IMF.³³

As discussed earlier, amendments to the Articles are presented to the Board of Governors for consideration. Three-fifths of members, with four-fifths of the total voting power, must accept proposed amendments for the Board to confirm them.³⁴ Amendments enter into force for all members of the Bank. This area of law has been seen to be a potential source of controversy as it could be seen to deviate from the positive international law theory that a State cannot be bound without their consent.³⁵ Whilst traditionally this might be seen as a limitation on State sovereignty, as States consented to this provision when they signed the treaty the argument is circular and can merely be seen as an affirmation of State consent.

³² IBRD Articles of Agreement Article V, Section 5(a)

³³ New York Times, "Banker, Tailor, Soldier, Spy" April 8th 2012, available at <http://www.nytimes.com/2012/04/09/opinion/banker-tailor-soldier-spy.html>

³⁴ IBRD Articles of Agreement Article VIII (a)

³⁵ See for example; Dennis Leech, 'Voting Power in the Governance of the International Monetary Fund' (2002) 109 *Annals of Operations Research* 373

At this point in the analysis it is useful to note that members have the right to withdraw from the Bank³⁶ or suspend their membership.³⁷ If the Bank's membership ever has a problem with the legal manner in which the Bank is behaving, the founders of the Bank gave States, at least in legal theory, the option to withdraw from their obligations under the Agreement.

The Bank was given a clear purpose by its founders, enshrined within its treaty, and, as a subject of public international law, its actions since that time should be able to be explained and framed in terms of law. The positive theory of public international law is the most commonly utilised tool via which international law is understood. As such, the Bank's actions should conform to this model. It has been seen that the founders had a clear vision for the Bank. The time and setting of the creation ensured this. Yet the legal requirements for the Bank to conform to this vision would depend upon the theory used to explain both the creation of the Articles of Agreement and the work of the Bank since.

The dominant theory, that has traditionally been utilised to explain the actions taken in an international law setting, will be examined to determine whether the actions of the Bank can be explained in law by this theory. This requires a full elucidation of the theory, with its basis and development being understood so as to attempt to frame in law both the creation of the Bank but also its actions since.

1.3 The Positivist Theory from State Law

When viewing modern public international law, there is a sizeable disconnect with the original theories of a positive law taken from a nationalist setting to the theory of positive law that is utilised today. Positive law developed as a rejection of the natural law paradigm that law should concern itself with the application of universal principles of morality that could constrain what was considered "law" on a basis of morality.³⁸ Instead positive law asserted that the morality of a law was irrelevant and its legal nature developed from its creation by a sovereign

³⁶ IBRD Articles of Agreement Article VI, Section 1

³⁷ *Ibid.* Section 2

³⁸ "The existence of a law is one thing, its merits or demerits are another thing" John Austin, *The Province of Jurisprudence Determined*, W Rumble (ed) (CUP 1995) pg. 157

authority. Significantly, positive law rejected all other forms of law as invalid and not true "law".

Although a number of legal philosophers had already articulated upon of the separation between natural law and positive law,³⁹ it is the work of Austin, influenced by Bentham,⁴⁰ which readily articulates the classic position of positive law:

‘Every positive law, or every law simply and strictly so called, is set by a sovereign, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme.’⁴¹

This encapsulates the position that law is set by a person or body who society obeys: the law is framed in terms of sovereign will. Law is commands by a sovereign backed by a sanction yet morality and customs without sanctions are merely habit or opinion. In contrast to its forerunners, this focus upon sovereign will was not concerned with a prescriptive analysis of what the law should be based upon absolute principles. Instead, it sought to create theory based upon observable events.⁴²

The concept of positive law has however evolved from such beginnings⁴³. Hart disagreed with the position of Austin’s that laws could only be commands of the sovereign backed by sanction as modern democracies no longer worked in such a fashion of one supreme ruler that created all of the law.⁴⁴ Hart instead articulated upon a theory that a legal system could exist when there are a combination of primary rules of obligation and secondary rules of recognition. Primary rules require citizens ‘to do or abstain from certain actions, whether they wish to or not’.⁴⁵ Austin had recognised this and focused upon this rule. Hart, however,

³⁹ See Thomas Hobbes, *Leviathan*, J. Gaskin (ed.) (OUP 2009), Richard Zouche, *Iuris et Iudicii Faecialis, sive, Iuris Inter Gentes* (Oxford 1650) and Cornelius van Bynkershoek, *De Dominio Maris* (1702)

⁴⁰ Brian Tamanaha, *A General Jurisprudence of Law and Society* (OUP 2001) pg. 24

⁴¹ *Supra*. Note. 38

⁴² Malcolm Shaw, *International Law* (Sixth Edition, CUP 2008) pg. 25

⁴³ For modern criticisms of the application of Austin’s positive law see for example *Infra* Note. 44, Ronald Dworkin, *Law’s Empire* (Harvard University Press 1986) and John Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980).

⁴⁴ H.L.A. Hart, *The Concept of Law* (Second Edition, Clarendon Press 1994)

⁴⁵ *Ibid*. pg. 81

claimed that for a legal system to exist secondary rules must be present that 'are all concerned with the primary rules themselves'.⁴⁶

These secondary rules can exist in three forms and all three must be present. Firstly, the rule of recognition requires that a rule exists which determines which rules are binding.⁴⁷ Secondly, the rule of change that allows the society subject to the primary rules to add, remove and modify valid rules. Thirdly, the rule of adjudication that allows society to determine when a valid rule has been violated. As well as the existence of primary and secondary rules, for the existence of a legal system the society must generally accept the application of the primary rules and officials must accept the legal validity of the secondary rules.⁴⁸

These writings on sovereign will, particularly the early work that was primarily concerned with national law, have underpinned its application to international law and the positivist school of thought that has developed in regards to law beyond the State.

1.4 The Application of Positive Theory to International Law

The foundation of modern international law is often traced to the Treaty of Westphalia⁴⁹ yet it was the work of the 'father of international law'⁵⁰ Hugo Grotius, published twenty three years previously, that created the legal principles used in the Treaty.⁵¹ Although international law had existed previously, Grotius transformed the *jus gentium* (law of peoples) that had dominated previous thinking on international law into a different concept called the law of nations. Unlike the *jus gentium*, which was concerned with the application of natural law to peoples, the law of nations was a distinct body of law outside the law of nature

⁴⁶ *Ibid.* pg. 92

⁴⁷ This has been the most controversial aspect of Hart's theory. See for example, Jeremy Waldron, 'Who Needs Rules of Recognition?' in Matthew Adler & Kenneth Himma (eds), *The Rule of Recognition and the U.S. Constitution* (OUP 2009) and Joseph Raz, *The Authority of Law* (Clarendon Press 1979)

⁴⁸ *Supra* Note. 44 pg. 113

⁴⁹ Treaty of Munster and Treaty of Osnabruck (concluded 24 October 1648) that are referred to collectively as the Treaty of Westphalia. See for example, Harold Koh, 'Why do Nations Obey International Law?' (1997) 106(8) *Yale Law Journal* 2599; Stephen Krasner, 'Compromising Westphalia' (1995-6) 20(3) *International Security* 115 and Leo Gross, 'The Peace of Westphalia, 1648-1948' (1948) 42 *AJIL* 20.

⁵⁰ *Supra* Note. 42 pg. 23

⁵¹ Hugo Grotius, *On the Law of War and Peace*, Stephen Neff (eds.) (CUP 2012)

that applied only to the rulers of States.⁵² Grotius was a naturalist and although the law of nations was outside of natural law, it was intended to coexist rather than act as a replacement.

If Grotius was the legal philosopher who created the paradigm, the Treaty of Westphalia provided the blueprint of its use by dividing competence between national and international spheres. The law of nations would deal solely with areas in the international sphere, whilst sovereigns were free to deal with areas in a national sphere. This law of nations was further divided up by Vattel, who expressly linked the law of nations to sovereign consent, or as national positivist theory would have stated it, sovereign will. Vattel split up the law of nations into four distinct areas; the necessary law of nations, based upon natural law but not binding between States; the voluntary law of nations, the rules of conduct between States based on presumed consent; the conventional law of nations, the law of treaties based on express consent; and the customary law of nations, based on tacit consent.⁵³ These three areas combined to provide the “positive law of nations”.⁵⁴

In the nineteenth century, however, arose a ‘positive philosophy’⁵⁵ within international jurisprudence that rejected all previous thinking on natural law and applied positive law to the international sphere. This built upon and based its theories upon the work of Vattel. Instead of law that was constrained by natural philosophies, law was constrained by the will of the sovereign. If sovereigns did not express a will on a subject, there was no law on the subject. International law was now ‘law between States and not law above States’⁵⁶ with States having sole law creating responsibility.⁵⁷ Law could, therefore, only be evidenced by State behaviour rather than induced from naturalist writings. By the end of the 19th century positivism had replaced natural law as the principle analytical tool for the

⁵² Stephen Neff, ‘A Short History of International Law’ in Malcolm Evans (ed.), *International Law* (OUP 2003) pg. 40

⁵³ Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns, with an introduction by Albert De Lapradelle* (Carnegie Institution of Washington 1916) Preliminaries paras. 21-26

⁵⁴ *Ibid.* para. 27

⁵⁵ This positive philosophy was primarily created by August Comte who envisioned a world governed by objective thought rather than speculative or religious modes of thought. *Supra* Note. 52, pg. 13

⁵⁶ *Ibid.* pg. 15

⁵⁷ Christiana Ochoa, ‘The Individual and Customary International Law Formation’ (2007) 48(1) *Virginia Journal of International Law* 119

examination of law.⁵⁸ This positivist system was based upon three central assertions: the existence of sovereigns who had exclusive jurisdiction within States, that international law was only created by sovereign consent and the equality of all States in law.

In terms of application to the World Bank, these three areas are of fundamental concern as to both the creation of the Bank, and the limitations that the Bank must act under going forward. If sovereigns have exclusive jurisdiction in a State, the World Bank's governance role that has been asserted can be rejected. If international law is only created by sovereign consent, then the World Bank can only act within the framework that States have consented to. Whilst if all States were equal in law, it would follow that some member States cannot use the World Bank to legally control other member States. Each of these three areas will briefly be examined in turn to establish their exact meaning, before attention can turn to the application to international organisations.

1.4.1 Sovereignty

[T]here exists perhaps no conception the meaning of which is more controversial than that of sovereignty. It is an indisputable fact that this conception, from the moment when it was introduced into political science until the present day, has never had a meaning which was universally agreed upon.⁵⁹

The term 'sovereignty' and its exact meaning are heavily debated.⁶⁰ Whilst there is a general acceptance that international law is based upon, or at least started from, a base of sovereignty, the continuing evolution of the term has offered differing conclusions to exactly what the term entails. Sovereignty encompasses

⁵⁸ Prabhakar Singh, 'From 'Narcissistic' Positive International Law to 'Universal' Natural International Law: The Dialectics of 'Absentee Colonialism'' (2008) 16(1) African Journal of International and Comparative Law 56, 58

⁵⁹ Lassa Oppenheim, *International Law: A Treatise Vol. I Peace* (Third Edition, The Lawbook Exchange 1928)

⁶⁰ See generally, Stephen Krasner, *Sovereignty Organized Hypocrisy* (Princeton University Press 1999); Georg Nolte, 'Sovereignty as Responsibility?' (2005) 99 Am. Soc'y Int'l. L. Proc 389; Jack Goldsmith, 'Sovereignty, International Relations Theory, and International Law' (2000) 52(4) Stanford Law Review 959 and Daniel Drezner, 'On the Balance between International Law and Democratic Sovereignty' (2001) 2 Chi. J. Int'l L. 321.

the principle of non-intervention in the affairs of another State,⁶¹ the ability to enter into agreements on the international stage,⁶² the non-dependence on another authority to control a territory⁶³ and, through its evolving usage, a potential multitude of other factors depending on how one defines it.

An understanding of exactly what sovereignty entails is required to understand exactly what member States were concerned to protect during the negotiations at Bretton Woods.

Sovereignty was originally a national concept in place to protect the sovereign.⁶⁴ At this time it involved absolute authority being vested in one individual, the sovereign, who had authority to make decisions for the territory of which he was in command. With the introduction of the treaty of Westphalia it became an international concept where by States had the right to exclude external actors from their domestic affairs, as all States were seen as independent and equal.⁶⁵ Throughout the adjoining years the concept has come to involve a number of different facets and has been used in different ways.⁶⁶ It is this evolution of the term that has made sovereignty so difficult to define.

Brownlie defines sovereignty by its consequences. Sovereignty implies an exclusive control over a permanent population, a duty of non-intervention for areas that are within the exclusive jurisdiction of States and the dependence upon obligations arising from treaty law and customary international law that the State has consented to.⁶⁷ Brownlie's definition, whilst useful for seeing the effect of sovereignty, does not consider which specific powers attributed to sovereignty cause these consequences and does not consider whether these consequences are responsible for the creation of sovereignty rather than a power of it. For example, it can be argued that an exclusive control over a permanent population

⁶¹ Jianming Shen, 'The Non-Intervention Principle and Humanitarian Interventions Under International Law' (2001) 7 Int'l Legal Theory 1 and Georg Sørensen, 'Sovereignty: Change and Continuity in a Fundamental Institution' (1999) 47(3) Political Studies 590

⁶² *Wimbledon Case* (1923), PCIJ, Ser. A, no. 1, pg. 25

⁶³ Lassa Oppenheim, *International Law Volume 1*, Jennings and Watts (eds.) (Ninth Edition, Universal Law Publishing 1996) pg. 122

⁶⁴ Ulrich. K. Preuß, 'Equality of States – Its Meaning in a Constitutionalized Global Order' (2008) 9 Chi. J. Int'l L. 17, 23

⁶⁵ Stephen Krasner, 'Compromising Westphalia' (1995-1996) *International Security* 20, 115

⁶⁶ *Supra* Note. 60 (Krasner) pg. 3

⁶⁷ Ian Brownlie, *Principles of Public International Law* (Sixth Edition, OUP 2003) pg. 287

is a requirement of Statehood that gives an area sovereignty⁶⁸ rather than being a result and use of sovereign power.

Simpson takes an alternative different approach to Brownlie in his attempts to define the term. He begins by describing all definitions of sovereignty as 'shallow and ahistorical'⁶⁹ due to its 'ceaseless modification and re-negotiation in the face of material forces in world politics (e.g. war), institution building, inter-disciplinary struggle and theoretical contestation'.⁷⁰ Whilst this point is useful to demonstrate the development that sovereignty has undergone, the term sovereignty is used to describe the powers that a State has, not what they previously had. Although the powers a State has might be constantly in flux, and therefore the term constantly changing, at any one time there is a set amount of powers given to a State and so at any one time, at least in theory, a correct definition of sovereignty can exist.

Although the principle of 'absolute sovereignty'⁷¹ has fallen out of favour by the international community, Simpson argues that it has been replaced by the theory of 'relative sovereignty', with 'absolute sovereignty' no longer being desired by States or even possible.⁷² Relative sovereignty is a theory that the sovereignty of States is subordinate to international law but equal with all other States.⁷³ Whilst 'absolute sovereignty' has indeed fallen out of favour, as States acknowledge an international legal community and act as if they are bound by international law, the theory of 'relative sovereignty' that Simpson advocates is not the correct theory to replace it. Even though all States are legally equal, international law is not on a level above these States. Except potentially in limited circumstances,⁷⁴ States must give consent to be bound by international law and it is the ability of

⁶⁸ Christian Hillgruber 'The Admission of New States to the International Community' (1998) 9 EJIL 491, 493

⁶⁹ Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (CUP 2004) pg. 11

⁷⁰ *Ibid.*

⁷¹ The principle that States are bound by neither international law nor any conception of an international legal community – *Ibid.* pg. 40

⁷² Gerry Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Postcolonial Age' (1996) 32 *Stan. J. Int'l L.* 255, 263

⁷³ *Supra* Note. 69 pg. 41

⁷⁴ *Jus cogens* and a new State being bound by all existing customary law. Both of these circumstances can, however, potentially be traced to consent. *Jus cogens* are traditionally seen as a natural law concept as they presuppose that there are natural standards that override the consent of States. Yet for a *jus cogen* to exist, it must have acceptance by the international community as a whole (Vienna Convention on the Law of Treaties, Article 53), therefore, requiring their consent. The binding of a new State to all previous existing customary law can be seen as a term of consenting to join the international community.

States to give, withhold or withdraw this consent that prevents international law being placed above all States.

Koskenniemi, although agreeing with Simpson that seeking a fixed meaning of the term sovereignty is futile,⁷⁵ instead of seeking to define sovereignty by the relationship between States and international law, he seeks to examine the ways that sovereignty *has* previously been considered and highlight the way in which he believes it *should* be considered.

1. **Legal Approach** – Sovereignty is only a description of the rights, liberties and competences that are attributed to each State. Each of these individual benefits must be grounded in a distinct legislative source.⁷⁶
2. **Pure Fact Approach** – State sovereignty is the starting point of international law and can only be restricted by a law that is enacted in the correct procedure.⁷⁷ This was the approach taken by the Permanent Court of International Justice in the Lotus case.⁷⁸
3. **Constructivism** – Sovereignty involves a balancing of contradictory principles and it is only through this balancing that a State's obligations and rights can be defined.⁷⁹ This is the approach that Koskenniemi advocates should be used to define sovereignty and believes that it is the only approach to use as it can solve issues of conflict between two validly created restrictions.

Koskenniemi asserts that the modern discourse on sovereignty shifts between the legal and pure fact approaches but argues that neither can adequately describe the 'real' situation.⁸⁰ Perhaps it is not then possible to describe all that sovereignty entails by one distinct definition.

Finally, Krasner splits sovereignty into distinct different areas and it is this recognition that sovereignty cannot be easily defined by a single all-encompassing

⁷⁵ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005) pg. 242

⁷⁶ *Ibid.* pg. 246

⁷⁷ *Ibid.* pg. 255

⁷⁸ *Lotus Case (France v Turkey)* [1927] PCIJ (ser A) No 10.

⁷⁹ *Supra* Note. 75 pg. 258

⁸⁰ *Ibid.* pg. 225

definition that sets his work apart and above others. Instead of one grand definition, Krasner splits sovereignty down into four constituent parts.

International Legal Sovereignty: An area of State power involved in the recognition of other States and the ability to enter international agreements.⁸¹

Westphalian Sovereignty: State control associated with the political organisation of the State and the ability of the State to exclude external actors from the authority structures within the State's territory.⁸²

Domestic Sovereignty: This involves the State being able to organise its political structure in whatever way it sees fit and the ability of this public structure to exercise effective control within the State.⁸³

Interdependence Sovereignty: This area concerns the ability of the State to regulate the flow of information, ideas, goods, people, pollutants or capital across the borders of the State's territory.⁸⁴

Unfortunately the distinctions are not as clear as Krasner would have us believe. Whilst he acknowledges there is some overlap,⁸⁵ it is clear from his definitions that there is in fact considerable overlap in the areas of sovereignty. International legal sovereignty is dependent upon domestic sovereignty;⁸⁶ Westphalian sovereignty can override interdependence sovereignty through consent; with the ability to give consent coming from international legal sovereignty.

Whilst it is useful to show the distinct parts of sovereignty so that we can see exactly what powers are attributed to States, it is crucial that sovereignty is viewed as an all-encompassing concept that cannot easily be broken down into distinct parts. Whilst the analysis of the Bank's actions vis-à-vis its member States will primarily focus upon what Krasner defines as Westphalian sovereignty, the

⁸¹ Stephen Krasner, *Sovereignty Organized Hypocrisy* (Princeton University Press 1999) pg. 3

⁸² *Ibid.* pg. 3-4

⁸³ *Ibid.* pg. 4

⁸⁴ *Ibid.* pg. 4

⁸⁵ *Ibid.* pg. 4-5

⁸⁶ The ability to exercise effective control over a territory is a criterion of Statehood – *Supra* Note. 67, pg. 493

effect of any potential breach of this sovereignty is felt across all of the four areas that Krasner distinguishes.

1.4.2 Consent

In line with the notion of sovereignty moves the principle of consent. If States are sovereign and maintain control to legislate for the population, a State cannot be bound unless it has agreed to be bound. Consent is central to the modern understanding of international law.⁸⁷ From the sources of international law,⁸⁸ consent may be given expressly in a treaty,⁸⁹ or it may be implied by a State acquiescing in the creation of a customary law.⁹⁰

Consent has classically been seen as central for a number of reasons. If international law has no coercive force, then States' consent and acceptance ensures that States generally comply with the law.⁹¹ Consent allows for the protection of individual States and reinforces sovereign equality by providing that no State can be forced to comply with a law that has withheld its consent from. Yet in addition and importantly, international law can be seen to obtain its legitimacy from the consent of States as States represent their individual populations in international law.⁹²

Within this traditional positivist paradigm, a 'law' that is created without the consent of the sovereign is not a law and any action that goes beyond what States have consented to, is outside of the law.

1.4.3 Sovereign Equality

International law under this 19th century positive theory approach and as advocated by Vattel is that law is the will of sovereign States. Law is created by

⁸⁷ Anthony Aust, *Handbook of International Law* (CUP 2005) pg. 4. See Andrew Guzman, 'Against Consent' (2012) 52(4) *Virginia Journal of International Law* 747, 748 for a detailed examination in academic literature of the general acceptance of consent as the basis of international law.

⁸⁸ These are examined in 1.5 The Creation of Rules

⁸⁹ José Cabranes, 'International Law by Consent of the Governed' (2007) 42 (1) *Valpariso University Law Review* 119, 131

⁹⁰ *Ibid.* 132 and J Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, Humphrey Waldock (ed) (Sixth Edition, OUP 1978) pg. 51

⁹¹ *Supra* Note. 87 (Guzman) pg. 752

⁹² Matthew Lister, 'The Legitimizing Role of Consent in International Law' (2010) 11 (2) *Chicago Journal of International Law* 663, 669. For alternative views on the requirement of consent for legitimacy see; Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (OUP 2004) 243-52 and Jack Goldsmith & Eric Posner, *The Limits of International Law* (OUP 2005) 189-93

State consent either expressly, in a treaty, or tacitly, in custom international law. This approach rejected the traditional natural theory of international law advocated by Grotius with its top-down approach of law existing above the State and instead replaced it with a bottom-up approach as law being created by the States themselves between States. This moved the sovereign equality of States central to the theory as it was only through a States sovereign nature were they able to contribute to law creation and only through their consent were they bound.

Despite the obvious inequalities and differences between States in terms of size, population, financial and military might, the doctrine of sovereign equality ensures that in public international law all States are equal. This encompasses both a protection under the law, that all States are equally entitled to enjoy their rights and an obligation under the law, and that all States are required to fulfil their obligations to other States. It has been said that “(n)o principle of general law is more universally acknowledged than the perfect equality of nations”⁹³ and that the principle “has never been expressly doubted or denied... in any formal judicial utterance in a national court”.⁹⁴

Yet more than being a basis for international law and justice,⁹⁵ the principle of equality between States is a reflection of the positivist theory that law can only be created by sovereign will. If all States are not equal, law could be created by a more powerful State and applied against a less powerful State thereby rejecting the sovereign paradigm. The equality of States highlights the pluralist nature of the positivist school of thought. International law was separate to national law and, at least originally with absolute sovereignty, there was a principle of absolute non-intervention in the domestic affairs of another State. Although international law regulated conduct between States, it was distinct from the legal affairs of a State and in turn, the domestic affairs of a State could not be used to justify the non-performance of an international obligation.⁹⁶

⁹³ Chief Justice Marshall, *Antelope* (1825) quoted in Arnold McNair, ‘Equality in International Law’ (1928-29) 26 Michigan Law Review 136

⁹⁴ Edwin Dickinson, *The Equality of States in International Law* (CUP 1920) pg. 161

⁹⁵ *Norwegian Shipowners’ Claims* case (1922), Permanent Court of Arbitration, *United Nations Reports of International Arbitral Awards*, Vol. I, pg. 338

⁹⁶ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Article 27

1.5 The Creation of Rules

Sources are central to positivism. If law is the will of States and States can only be bound by what they have consented to, then it is evident that only through an expression of will can a law be created. All sources of law must, therefore, be able to be traced to the consent of States to be bound. Article 38 of the International Court of Justice is traditionally seen as the modern embodiment of the sources of international law.⁹⁷ Of course, the various sources existed before this date yet Article 38 codified State thought on the subject.⁹⁸

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Article 38 is a reflection of the theory of positivism that law must emanate from States. The only law under Article 38 without a readily identified form of consent from States are the judicial decisions and teachings under (d) that can be argued to be implied consent by being based upon laws that States have consented to and State practice.⁹⁹

⁹⁷ *Supra* Note. 67 pg. 5

⁹⁸ For an analysis of the creation of Article 38 see, Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm (eds.), *The Statute of the International Court of Justice: A Commentary* (OUP 2006) pg. 689-690

⁹⁹ International conventions (treaties) can be viewed as consented to by a State's signature, exchange of instruments, ratification, acceptance, approval or accession; VCLT Article 11 & Anthony Aust, *Modern Treaty Law and Practice* (Second Edition, CUP 2007) Chapter 7. International custom (customary international law) and general principles of international law can be viewed as consented to by a combination of practice, *opinio juris*, acquiescence or, in the case of general principles, by "being recognized by civilized

1.6 Evolution

This classic positivism approach survived largely unscathed through to the 20th century as can be seen in the Lotus case providing that:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.¹⁰⁰

However, in the years following World War II, classic positivism came under attack and demanded a more nuanced understanding. Although the UN Charter reaffirmed the sovereign equality of all States¹⁰¹ and the principle of non-intervention,¹⁰² the creation of international bodies by States challenged the concept of sovereignty as an absolute control over a population¹⁰³ as no longer could a State claim exclusive jurisdiction in all aspects over its territory.¹⁰⁴

Human rights developed and came to the fore of international law that prevented States legislating or acting on any subject or restricting any right that they wished.¹⁰⁵ The sovereignty of a State was no longer completely inviolable under the law and rather than sovereignty being seen as invested in a sovereign, or a supreme ruler, it is invested in the people of a State creating a people's sovereignty.¹⁰⁶ Humanitarian law developed and still develops to this day,

nations"; Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (CUP 1999) pg. 3

¹⁰⁰ *Supra* Note. 78, Para. 44

¹⁰¹ Article 2, Section 1

¹⁰² Article 2, Section 7

¹⁰³ Jenik Radon, 'Sovereignty: A Political Emotion, Not a Concept' (2004) 40(2) *Stanford Journal of International Law* 195, 200

¹⁰⁴ Chapter VII of the United Nations Charter is the most commonly cited limitation as it restricted the ability of States to use force.

¹⁰⁵ *Jus cogens* could also be seen to develop along this argument to a greater degree.

¹⁰⁶ Kofi Annan, 'Two Concepts of Sovereignty', *The Economist* 352 (September 18, 1999) pg. 49

challenging the positivist theory by allowing for the intervention in the internal affairs of another State in limited circumstances. Humanitarian intervention, including the emerging norm of Responsibility to Protect,¹⁰⁷ would appear to be at contrast with the consent of sovereignty outlined in the positivist paradigm by allowing the interference within the territory of a sovereign State without that State's express consent.¹⁰⁸

Consent also came under challenge as if positivism sought to find the will of States by viewing State conduct, conduct existed that States were bound by law that they had not consented to. Newly created States were and are bound by existing customary international law. This was of particular relevance during the period following the end of the World War II as the process of decolonization occurred and a large number of new States were formed in a short period of time. Despite being newly created States, all existing customary international law, that other States had an option to either be bound by or maintain a position of a persistent objector, bound these newly created sovereign States.¹⁰⁹

Jus cogens and obligations *erga omnes* developed that again challenged the concept of consent. The contents of both concepts are heavily debated,¹¹⁰ yet both legal norms restrict the ability of States to consent to actions either intra or extra territorially by ruling that some norms are fundamental principles accepted by the international community from which no derogation is ever permitted.¹¹¹

Although both of these circumstances could be traced back to a form of consent,¹¹² academics also sought to challenge consent as central to international law by arguing that the global challenges faced were too large for any one State to

¹⁰⁷ See generally 60/1 2005 World Summit Outcome A/RES/60/1 Paras. 138-140 and specifically for the challenge to sovereignty see Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101 (1) AJIL 99, 102-104 & 112-115; Gareth Evans & Mohamed Sahnoun, 'The Responsibility to Protect' (2002) 81 (6) Foreign Affairs 99, 110

¹⁰⁸ Although it could be argued that in consenting to create humanitarian law, States have freely given up their right to consent in these limited circumstances.

¹⁰⁹ Sir Claud Waldock, *General Course on Public International Law* (Sijthoff 1962) pg. 52

¹¹⁰ See Alfred Verdross, 'Jus Dispositivum and Jus Cogens in International Law' (1966) 60 AJIL 55; Cherif Bassiouni, 'International Crimes: Jus Cogens and Obligations Erga Omnes' (1996) 59(4) Law and Contemporary Problems 63; and *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)* (2012) ICJ 143 Paras. 92-97

¹¹¹ VCLT Article 53

¹¹² *Supra* Note. 74

opt out from by withholding consent.¹¹³ The totality of challenges from human rights to *jus cogens* has led to the strength of the positivist movement as an analytical tool for understanding public international law waning within the last century. Yet, although the tenants of positivism have been challenged, modern international law remains largely best understood in terms defined by a positivist understanding. Whilst sovereignty is no longer absolute, the concept of sovereignty linked with being able to exclude actors from interfering in the domestic affairs of a State is limited on strict grounds that States have generally consented to. Human rights have posed the greatest challenge to the concept of exclusive control yet the notion of humanitarian intervention or a responsibility to protect are still in their infancy.

Positivism as a tool of legal understanding survived these attacks as it is still the best tool to generally describe the system of law creation within public international law. There exist other schools of thought that have developed to counter the positivist thought¹¹⁴ yet despite the challenges to positivism, international law is still, at least largely, based upon notions of sovereignty, consent and equality and positivism remains the dominant legal theory.¹¹⁵ In specific circumstances, and in relation to some relationships, positivism does not provide acceptable answers to how States (and now individuals, organisations and companies) are behaving in terms of law and so appropriate theories have developed and have been used. Yet States are still predominately the actors of international law in law creation and whether sovereignty is vested in a supreme ruler or the people, it is States in their sovereign equality that primarily create public international law. International organisations can create law on the limited mandates transferred to them by States, and whilst individuals and companies have become subjects of international law, the creation of law is still dominated by States.¹¹⁶

The modern day positivism theory, although more nuanced to allow limited circumstances for restriction of certain areas of law creation, is still largely similar

¹¹³ See for example Jonathan Charney, 'Universal International Law' (1993) 87(4) AJIL 529

¹¹⁴ See Chapter Two.

¹¹⁵ Shirley Scott, 'International Law as Ideology: Theorizing the Relationship between International Law and International Politics' (1994) 5 EJIL 313, 322. Also see the decisions of the ICJ; *Asylum Case* (1950), ICJ Rep., pg. 266; *Anglo-Norwegian Fisheries case* (1951), ICJ Rep., pg. 116; & *US Nationals in Morocco case* (1952), ICJ Rep., pg. 176

¹¹⁶ Antonio Cassese, *International Law* (Second Edition, OUP 2005) pg. 71-72

to the 19th century theory although not as strict on its definition of sovereignty. State consent and sovereign equality of States¹¹⁷ are still central concepts and whilst States do not retain an exclusive right to law creation or an exclusive right to behave in any manner in its own territory, States dominate law creation and only international organisations within their mandates given by States are also able to contribute.

1.7 The Application of Positive Theory to International Organisations

The work so far has concentrated on the application of legal theory to the conduct of States. However, in terms of the work of the World Bank, an appropriate legal theory would need to go beyond the conduct of States in creating the organisation, and consider and explain the actual work of the organisation. Once States create an organisation, it needs to be considered how that respective organisation's actions are framed in terms of law. This is critical for an understanding of the actions that the World Bank has taken since its inception.

International organisations have acquired competence to regulate in matters that were traditionally seen as within the domestic domain of States.¹¹⁸ Rather than being seen as an actual reduction on sovereignty, in terms of law, membership of organisations is seen as "delegation" or "transfer" of powers depending upon the degree to which members have given away their powers.¹¹⁹ Yet sovereignty is legally seen to remain with the State as, in terms of law, States expressed their will in joining the organisation to be bound by such terms within that specific competence.¹²⁰ This is despite organisations adopting majority voting or weighted voting as States express their consent to join under those terms. Martinez in her

¹¹⁷ Article 2 (1) United Nations Charter (1945)

¹¹⁸ For example, the United Nations Security Council regulates the use of force in international law, the International Monetary Fund regulates the use of exchange arrangements and the World Trade Organization regulates import tariffs and other trade barriers.

¹¹⁹ Dan Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (OUP 2005) Chapters 5 and 6

¹²⁰ Ian Brownlie, *Principles of Public International Law* (Sixth Edition, OUP 2003) pg. 290

work on the limits that national constitutions put on transfer of sovereignty, established three implicit requirements in the transfer.¹²¹

Firstly, organisations can exercise certain powers but ownership remains with States.¹²² Secondly, there are limits to how much power can be transferred by a State. 'Constitutions prohibit the transfer of the totality of the state's powers which, although vested in Parliaments and other internal institutions, emanate directly from the people'.¹²³ Organisations can, therefore, never replace a State¹²⁴ and must act within the limited competence transferred to them. Thirdly and finally, there are temporal limits to the transfer in that a State can always withdraw from an organization either under the provisions of the treaty or unilaterally.¹²⁵ Although a State might incur international responsibility for unilateral withdrawal, it is conceptually and legally impossible to keep a State within an organisation against its will.¹²⁶

These three national constitutional requirements demonstrate that the transfer or delegation of powers to an organisation is always legally at the continuing will of the State and that if the will of a State changes it can reassert its powers to regulate upon the transfer or delegated powers. In addition, and in keeping with the positivist school of thought, an international organisation can only act within the boundaries that the sovereigns creating it set out. This is as under the positivist paradigm a law is only if a sovereign has consented to it, and if an organisation acts outside its mandate, it is acting outside of the sovereign will and therefore encroaching upon the member States' national sovereignty.

The legal boundaries that define an organisations mandate are primarily found within the treaty establishing the organisation. The treaty is what confers legal

¹²¹Magdalena Martinez, *National Sovereignty and International Organizations* (Martinus Nijhoff Publishers 1996)

¹²² *Ibid.* pg. 68

¹²³ *Ibid.* pg. 68-69

¹²⁴ Martinez notes the *Reparation for Injuries* case, *Infra* Note 127, pg. 178 which, although affirming the international personality of an international organisation, limits its personality by confirming that an organisation 'is not the same thing as... a State, which it is certainly not, or that its legal personality and rights and duties are the same as those of a State.' *Ibid.*

¹²⁵ *Ibid.* pg. 69

¹²⁶ Nathan Feinberg, 'Unilateral Withdrawal from an International Organization' (1963) 39 *Brit. Y.B. Int'l L.* 189

personality upon the organisation and what defines the said personality.¹²⁷ If an organisation was to act outside of its terms under its founding treaty, the organisation would be acting contrary to the will expressed by its member States which would in turn infringe upon their sovereignty under the positivist theory. Sovereign equality would also, therefore, be questioned if the organisation acting outside of its mandate and treated some member States in a different fashion to others. The theory would, therefore, suggest that States would rigorously seek to prevent organisations acting outside of their mandate to protect their sovereignty and their sovereign equality. Recent statements in relation to sovereignty demonstrate that protection of sovereignty is of fundamental importance to States.¹²⁸ If a State was unable to prevent an organisation breaching its sovereignty, via being outvoted in either majority or weighted voting, States would be free to avail themselves of either a negotiated exit under the treaty or a unilateral withdrawal in order to protect its sovereignty.

The positivist theory of public international law, therefore, requires that the actions of organisations stay within their mandates. If sovereign States can act in any way that they wish as long as they do not contravene an explicit law,¹²⁹ the opposite is true for international organisations in that they can only act in a manner grounded within the law creating them. This consequently moves treaty interpretation to a central concept within the positivist school in regard to

¹²⁷ *Reparation for Injuries* case, ICJ Reports (1949), pg. 178-9

¹²⁸ In relation to Gibraltar, "As I have said before, we will never agree to any transfer of *sovereignty* – or even start a process of negotiation of *sovereignty* – without your consent" British Prime Minister David Cameron 10 September 2013, available at <https://www.gov.uk/government/news/gibraltar-national-day-message-from-the-prime-minister> accessed September 2013. In relation to Mali, 'The members of the Security Council shared the concerns raised by representatives of ECOWAS regarding the current challenges for the restoration of full constitutional order in Mali and for upholding the *sovereignty*, unity and territorial integrity of Mali.' SC/10676 AFR/2407 18 June 2012. In relation to Pakistan, "We want our American friends to respect our *sovereignty*". Pakistan's ambassador to the United States of America, Ambassador Rehman, reported at <http://www.thenews.com.pk/Todays-News-13-15490-Pakistan-asks-US-to-respect-its-sovereignty> available September 2013. In relation to China, "China will... never waver from its determination to guard its national *sovereignty*". Chinese Defense Minister Liang Guanglie reported at <http://english.sina.com/china/2012/0530/472178.html> available June 2013. In relation to the United States, "Critics claim we would surrender U.S. *sovereignty* under this treaty. But, in fact, it is exactly the opposite. We would secure *sovereign* rights" Secretary Hillary Clinton testimony before the Senate Committee on Foreign Relations, 23 May 2012, *The Law of the Sea Convention (Treaty Doc. 103-39): The U.S. National Security and Strategic Imperatives for Ratification*. Emphasis added in all quotes.

¹²⁹ *Lotus Case (France v Turkey)* [1927] PCIJ (ser A) No 10

international organisations as determining the exact legal will of the member States is imperative to ensure that an organisation does not encroach upon States' sovereignty.

In analysing the actions of the World Bank, the positivist theory would require that its actions be grounded in its treaty. If the Bank were to take actions outside of this mandate, outside of how this can be interpreted, then the positivist theory would not be able to explain how the Bank was working. For any analysis of whether the Bank is acting in or outside of its mandate, an understanding of treaty interpretation must, therefore, be developed.

1.8 Treaty Interpretation

Under the positivist theory, consent is central to international relations in terms of law. When applied to international organisations, consent and sovereignty require that an organisation can only act within its mandate otherwise the organisation is breaching the sovereignty of its members by acting in areas that the State had intended stay within its jurisdiction. The rules for interpreting treaties have developed over the history of international relations but in 1949 work began to codify existing rules in the creation of the Vienna Convention on the Law of Treaties (VCLT). The purpose of the convention was to cover treaties that applied between States¹³⁰ either bilaterally or multilaterally, such as in the case for the creation of an international organisation.

There exists a subsequent, unratified, Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations.¹³¹ Although it largely reflects the VCLT, it will not be examined at this point as the legal status of agreements between the World Bank and individual members is examined in Chapter Four.

¹³⁰ VCLT Article 1

¹³¹ (adopted 21 March 1986) 25 ILM 543. Although there are 41 parties who have ratified the treaty, only 29 are States and the other 12 are international organisations. 35 States are required for the treaty to enter into force (Article 85). 16 States and 5 organisations are signatories who have not yet ratified. The World Bank is neither a signatory or ratified party.

1.8.1 The Vienna Convention on the Law of Treaties

As of September 2013, 113 States have ratified the VCLT with a further 14 signatories who as of yet have not ratified. Although not every State is a signatory of the VCLT, the majority of Articles have been seen to either restate what customary international law was at the time of signature or have since developed into customary international law.¹³²

Article 31 stipulates the general rule of interpretation for treaties.

1. A treaty shall be interpreted in *good faith* in accordance with the *ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose*.¹³³

The rules of interpretation articulated upon by the VCLT placed the interpretation of provisions ‘in good faith’ as the central proponent.¹³⁴ This is the requirement that parties ‘act honestly, fairly and reasonably, and to refrain from taking unfair advantage’.¹³⁵ Out of the possible alternative approaches to interpretation,¹³⁶ the VCLT focuses upon a textual approach emphasising the ordinary meaning of the words. This is reflected in the primary interpretation through the ‘ordinary meaning to be given to the terms of the treaty’ as the text is presumed to be the accurate expression of the intentions of the parties, or, under the positive theory, the will of the States in consenting to a treaty. It is presumed that the parties, if meaning something different, would have used different terms and, therefore, the ordinary meaning is relied upon. The text of the Articles of Agreement of the World Bank, reflecting the will of the founders at Bretton Woods, is consequently the central premise from which a legal analysis of the work of the Bank should begin to evaluate its work under the positivist theory.

However, one could not interpret the Articles of Agreement purely through use of a dictionary in the abstract as the terms must be interpreted ‘in their context and in light of its object and purpose’.

¹³² *Fisheries Jurisdiction (United Kingdom v. Iceland)*, 1973, I.C.J. Rep. 3

¹³³ Emphasis added.

¹³⁴ Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill 2009) pg. 425

¹³⁵ *Ibid.*

¹³⁶ See Duncan French, ‘Treaty Interpretation and the Incorporation of Extraneous Legal Rules’ (2006) 55 (2) Int’l & Comparative L.Q. 281

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - a. Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - b. Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

Paragraph 2 defines the context that can be used for interpreting a treaty. This context is seen to be the treaty as a whole¹³⁷ and any agreement related to the conclusion of the treaty made between the parties. Whether this agreement is to be seen as part of the treaty depends upon the intention of the parties.¹³⁸

3. There shall be taken into account, together with the context:
 - a. Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - b. Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - c. Any relevant rules of international law applicable in the relations between the parties.

Paragraph 3 is concerned with the agreement of States after a treaty has been concluded as a tool of interpretation of terms. In addition to any agreement between all of the parties regarding interpretation, subsequent practice in the application of the treaty should be taken into account when interpreting terms. Both forms of subsequent agreement under the positivist paradigm envision that the sovereign will of States might evolve over time and therefore allow parties to

¹³⁷ *Competence of the ILO to Regulate Agricultural Labour*, P.C.I.J. (1922), Series B, Nos. 2 and 3, pg. 23

¹³⁸ Draft Articles on the Law of Treaties with Commentaries, 1966, Interpretation of Treaties, para. 13

agree on one specific meaning for a piece of text. All State parties must agree either explicitly or implicitly by not disputing the interpretation.¹³⁹

4. A special meaning shall be given to a term if it is established that the parties so intended.

As a final point under the general rule of interpretation, a special meaning can be given to a term if the alleging party can demonstrate that the parties, at the point of establishment, sought to give it a special meaning.¹⁴⁰

These rules provided within Article 31 are consistent with a positivist understanding of international law. What the State has consented to is central to the textual approach placing the ordinary meaning of the words central to the interpretation. This in turn allows States to carefully negotiate the terms of a treaty in the knowledge that the terms are the crucial examined provision. In terms of treaties establishing international organisations, the textual approach allows States to limit the sovereignty that they delegate or transfer by reference to the wording that is used in the founding treaty. If States seek to change the meaning of a particular term, States can use the Article 31 (3)(a) procedure, as a general rule, or any specific procedure contained within the treaty to modify the existing interpretation and establish a new meaning for a clause.

Further than the general rule provided for in Article 31, Article 32 provides the rules of interpretation where the meaning from interpretation is unclear or to confirm a meaning using Article 32.

Recourse may be had to *supplementary* means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or

¹³⁹ *ibid.* para. 15

¹⁴⁰ *ibid.* para. 17

(b) leads to a result which is manifestly absurd or unreasonable.¹⁴¹

The word 'supplementary' confirms that Article 32 cannot be used as an alternative interpretative tool but only as an aid to interpretation under Article 31¹⁴² or when a meaning is ambiguous, obscure or leads to a result that is manifestly absurd or unreasonable. This is inline with the positivist paradigm in that the preparatory work and the circumstances of a treaty's conclusion can both be used as an aid to discern the will of the signatory States. If wording in the World Bank's Articles of Agreement is unclear, recourse may be had to these supplementary means of interpretation. The final rule of interpretation provided in the VCLT concerns when a treaty has been authenticated in two or more languages and establishes that the text in each language is equally authoritative.¹⁴³

1.8.2 Customary International Law

The VCLT, as a treaty, only binds the 111 States who have ratified it as these are the States who have expressed a sovereign will to be bound. However, as a reflection of customary international law, the rules of interpretation within the VCLT have the potential to bind non-signatories.

Prior to the VCLT, interpretation proceeded on an *ad hoc* basis with different tribunals giving different weights to the text of the treaty, the intentions of the parties and the objects and purposes of the treaty.¹⁴⁴ All of these processes sought to confirm the will of the signatory States in line with the positive theory to affirm what the States have consented to. The work of the ICJ has been littered with interpreting treaties,¹⁴⁵ including its 1994 judgment of the *Territorial Dispute* case¹⁴⁶ that held that various provisions of the VCLT, including Article 31, were a reflection of customary international law.¹⁴⁷ The VCLT, even if it could be argued

¹⁴¹ Emphasis added.

¹⁴² *Supra* 138 para. 19

¹⁴³ VCLT Article 33

¹⁴⁴ *Supra* Note. 138 Introduction

¹⁴⁵ See for example; *Corfu Channel Case (United Kingdom v. Albania)* I.C.J. Reports 1949, 244; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* ICJ Reports 1986, 14; and *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion*, I.C.J. Reports 1950, 71

¹⁴⁶ *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)* I.C.J. Reports 1994, 6

¹⁴⁷ *Ibid.* Para. 41

to be an accurate reflection of customary international law since its inception and, therefore, binding upon non-signatories, would only be binding upon the World Bank Articles of Agreement from the ratification of the VCLT. The foundational customary international law that the VCLT was based upon could in contrast be binding from 1945 and the World Bank's inception depending upon when the customary law was formed.

In specific relation to international organisations, the ICJ has established that beyond the interpretation concerning express powers attributed by a founding treaty, an organisation can also exercise 'implied powers' to achieve its objectives. The *Reparations case*, that established the international legal personality of international organisations, allowed the ICJ to recognise for the first time the concept of implied powers.¹⁴⁸

"Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."¹⁴⁹

These implied powers are limited by the need of the organisation 'to achieve their objectives'¹⁵⁰ and in addition in the *Interpretation of Peace Treaties Advisory Opinion* the ICJ stated that:

"(t)he principle of interpretation expressed in the maxim: *ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which...would be contrary to their letter and spirit."¹⁵¹

The role of interpretation and the attributing of implied powers is, therefore, not to revise the treaty by running counter to the terms of the treaty but instead to supplement the existing express powers only so far as to allow an organisation to

¹⁴⁸ The Permanent Court of International Justice had previously established the doctrine in the *Interpretation of the Greco-Turkish agreement of December 1st*, 1926 [1928] Publ. PCIJ 4 advisory opinion.

¹⁴⁹ *Supra* Note. 127 pg. 182

¹⁵⁰ *Legality of the Threat or Use of Nuclear Weapons*, ICJ Advisory Opinion, (1996) para. 25

¹⁵¹ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, I.C.J. Reports 1950 pg. 229

fulfil its purpose. Under the positivist theory, if a treaty provision were to run counter to an implied power, the treaty provision would prevail as a sign of express consent of the parties.

There are two principal views on implied powers.¹⁵² The wide view asserts that they are necessary for the performance of an organisation's duties.¹⁵³ The narrow view asserts that there should be an explicit power from which the implied power could be implied.¹⁵⁴ Within the positivist school of thought, both views regarding the doctrine of implied powers are acceptable as they are seeking to establish what States consented to when creating an international organisation. Whether a power is necessary for the performance of a specific duty or implied from an explicit power, neither option allows an organisation to act contrary to its treaty or establish new powers that are not directly linked to what the founding States sought the organisation to do.

Outside of implied powers, potential customary international law exists concerning the role of practice in interpretation. The International Law Commission (ILC), in its sixtieth session in 2008, included the topic "Treaties over time" within its programme of work with the aim to examine subsequent agreements and practice in relation to interpretation of treaties.¹⁵⁵ Acknowledging that some treaties are being interpreted in vastly different time periods and settings to when they were created, the Commission is seeking to establish subsequent practice by international courts and tribunals to ascertain what the established procedure is. The ILC has currently appointed a Special Rapporteur to examine the project.

The 2009 decision by the ICJ in the *Costa Rica v. Nicaragua*¹⁵⁶ case lent credence to an evolutionary approach to treaty interpretation that has diverged from the role of practice in interpretation. Whilst the role of practice seeks to identify subsequent agreement, either tacit or explicit, in the manner in which States have

¹⁵² Jan Klabbers, Anne Peters & Geir Ulfstein, *The Constitutionalization of International Law* (OUP 2009) pg. 75

¹⁵³ *Supra* Note. 127 pg. 182

¹⁵⁴ The dissenting opinion from the *Reparation Case* of Judge Hackworth, *Ibid.* pg. 198

¹⁵⁵ Official Records of the General Assembly, Sixty-third Session, Supplement No. 10 (A/63/10) para. 353. The title of the topic was later changed to 'Subsequent agreements and subsequent practice in relation to interpretation of treaties'.

¹⁵⁶ *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* ICJ Reports 2009, pg. 213

interpreted a treaty provision, the evolutionary approach seeks to identify an intention by the parties to create a treaty that is capable of evolving over time to remain effective and relevant in light of potentially changing conditions.¹⁵⁷ The ICJ found that:

“there are situations in which the parties’ intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used – or some of them – a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law. In such instances it is indeed in order to respect the parties’ common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied.”¹⁵⁸

This approach was in contrast to previous ICJ cases on the issue where the ICJ applied the original meaning the parties had assigned to the word and ruled out subsequent developments in the words meaning.¹⁵⁹ Such an interpretative tool could be of considerable importance in assessing the World Bank, as the organisation rests upon a treaty that has been in force for considerable amount of time.

Two tests must be fulfilled for an evolutionary approach to be considered. Firstly, the parties must have used generic terms in the treaty with the parties having been aware that the terms were likely to evolve over time.¹⁶⁰ Specialist terms could not be considered for an evolutionary interpretation. Secondly the treaty has been entered into for ‘a very long period or is “of continuing duration”’.¹⁶¹

¹⁵⁷ Julian Arato, ‘Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences’ (2010) 9 (3) *Law & Practice of International Courts and Tribunals* 443, 445 and Malgosia Fitzmaurice, ‘Dynamic (Evolutive) Interpretation of Treaties’ (2008) 1 *Hague YRBK Int’l L.* 101, 102

¹⁵⁸ *Supra* Note. 156 pg. 242, para. 64

¹⁵⁹ *Rights of Nationals of the United States of America in Morocco (France v. United States of America)* ICJ Reports 1952, pg. 176 and *Kasikili/Sedudu Island (Botswana/Namibia)* ICJ Reports 1999 (II), pg. 1062, para. 25

¹⁶⁰ *Supra* Note. 156 pg. 243, para. 66

¹⁶¹ *Supra* Note. 156 pg. 243, para. 66

This interpretative tool of using an evolutionary approach stays within the positive paradigm by seeking to establish the original intention of the parties and precisely what they had consented to. The evolutionary approach, similar to a textual or purposive approach, is not a rigid rule of interpretation but rather a tool an interpreter can use to best identify the exact consent a State has transferred to an international organisation. If it can be demonstrated or presumed that States sought to allow terms to have an evolutionary character, then allowing an evolutionary interpretation is simply fulfilling the wishes and consent of contracting States. Although the evolutionary approach allows for the changing in meaning of terms over time, the approach does not allow for the contradiction of other treaty provisions. Where the founding States have unambiguously either allowed or prevented the actions of an international organisation, the evolutionary approach as a tool of identifying the limits of consent transferred to an organisation does not override or allow for interpretations that are in conflict with separate treaty provisions.

1.8.3 World Bank Usage

The VCLT only binds States who have ratified it and the applicability of customary international law directly to organisations is debatable.¹⁶² The interpretation of the World Bank Articles of Agreement is legally conducted by the Board of Directors in the first instance.¹⁶³ In 2000, the late Ibrahim Shihata, former General Counsel of the World Bank,¹⁶⁴ published *The World Bank Legal Papers*¹⁶⁵ that articulated upon the process that the World Bank follows in interpreting its founding treaty. This process is crucial under the positivist theory of public international law as it is only through acting within its purposes that the Bank can ensure that it does not encroach upon the sovereignty of its members.

The Bank employs a teleological, functional approach to interpretation of its Articles¹⁶⁶ seemingly counter to the textual approach enshrined in the VCLT. This, however, often renders the same result as the textual approach yet for the World Bank, in relation to a conflict between the teleological approach and the textual

¹⁶² See Chapter Two.

¹⁶³ World Bank Articles of Agreement Article IX. Subsequent interpretation, if a State disputes the findings of the Board of Directors, is conducted by the Board of Governors.

¹⁶⁴ From 1983 to 1998.

¹⁶⁵ (Martinus Nijhoff Publishers 2000)

¹⁶⁶ *Ibid.* pg. LIX

approach, the teleological approach will prevail. The Bank envisions three scenarios where such a conflict could exist; firstly, where a special meaning is demonstrated to apply to the text in question from the beginning by the founders. This is in turn covered by Article 31(4) of the VCLT. Secondly, where the context suggests a broader meaning or thirdly, where the context suggests a narrower meaning.¹⁶⁷ These in turn are covered by Article 31(1) of the VCLT, which states that terms of a treaty should be interpreted 'in their context'. The teleological approach employed by the Bank and the textual approach employed by the VCLT are, therefore, not as different as might be suggested. This is primarily because the VCLT does not employ a pure textual approach to the exclusion of all else as it maintains two safeguards; that the treaty be interpreted in 'good faith' and secondly that the terms are interpreted 'in their context and in the light of its object and purpose'. This teleological approach or VCLT object and purpose approach is limited by the text of the treaty; '(o)ne of the ordinary meanings will eventually prevail'.¹⁶⁸ The objects and purposes can, therefore, not be used to override an express provision of the treaty.

Neither approach, however, allows an interpreter to transpose their purposes over a treaty or use an overriding treaty purpose to override the specific context of a provision. This could be demonstrated if 'the Bank was interfering in matters prohibited under its Articles' or acting '*ultra vires*'.¹⁶⁹

In addition to the teleological approach, the World Bank interpretative process uses the tool of practice as an aid to interpretation yet acknowledges that this cannot be substituted for amendment or used by the Bank to avoid the amendment process.¹⁷⁰ The process of 'a subsequent, repetitive practice accepted by member states without interruption or controversy, and thus establishing a virtual agreement of the parties'¹⁷¹ is, in theory, akin to the subsequent practice provided for by the VCLT Article 31(3)(b). Such a process of modification 'cannot, however, be intentionally introduced from the beginning as

¹⁶⁷ *Ibid.* pg. LX

¹⁶⁸ Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill 2009) pg. 428

¹⁶⁹ *Supra* Note. 165 pg. LVI

¹⁷⁰ *Ibid.* pg. XLIV and XLVIII

¹⁷¹ *Ibid.* pg. IV

an amendment of the text by unauthorized means'.¹⁷² The restriction of this approach would, therefore, appear to be that the Bank cannot deliberately introduce policies that are counter to its Articles of Agreement yet that they can develop unintentionally, in whatever form that appears, and over time be seen to become consistent with the Articles. Setting aside questions over the competency of bodies that can unintentionally begin practice that is counter to their own Articles of Agreement, under the positivist theory of public international law the practice of an organisation should always be constrained by the Articles of Agreement. Although practice can be used under the VCLT in a fashion as evidence of the understanding between parties as to the meaning of the treaty, it cannot be used as a form of amendment as the World Bank usage would by implication provide.

Even if the World Bank argument regarding practice is to be accepted and even if States were to accept the actions of the World Bank in this regard, there is a period between first break of treaty and acceptance where the World Bank is acting outside of its mandate, either by furthering its mandate and infringing upon the sovereignty of its members or by not doing the job that was given to it by the signatories. This is incompatible with the principle of consent within the positivist theory.

Under the Articles of Agreement of the Bank this separation between interpretation and amendment is evident as the Articles also contain a provision for amendment of the Articles.¹⁷³ Any proposal to amend the Articles of Agreement, after approval from the Board, requires three-fifths of members holding four-fifths of the total voting power to approve the amendment.¹⁷⁴ Once approved, the amendment enters into force for all members.¹⁷⁵ The separation between interpretation and amendment by the member States in creating the Bank confirms a willingness to distinguish between the two independent concepts. Whilst interpretation, under the relevant rules, can be used to keep the World Bank's work current without a constant requirement of amendment as time lapses between ratification and work, it cannot be used to expand the

¹⁷² *Ibid.* pg. IV

¹⁷³ Article VIII

¹⁷⁴ *Ibid.* (a)

¹⁷⁵ *Ibid.* (c)

mandate of the Bank beyond what the member States had already consented to: that is the role of amendment. If the members sought to use the Bank in a new purpose, the process of amendment exists for this in keeping with the rule of positive theory that the law is based upon consent of States. If, however, only a small percentage of members sought to use the Bank in a new fashion, the process of amendment protects other members from having their sovereignty infringed upon.

This separation between interpretation and amendment establishes a willingness of the Bank's membership to not allow the Executive Directors to use interpretation as an informal means of amendment. Interpretation has its role and in turn amendment has its role.

The Bank also has another form of treaty interaction by creating a third category between interpretation and amendment that Shihata defines as 'filling of gaps'. If interpretation is governed by principles in relation to the VCLT and amendment by Article VIII of the Articles of Agreement, 'filling of gaps' is 'supplementing the text and allowing its provisions to meet the requirements of its purpose'.¹⁷⁶ This is akin to the implied powers doctrine from customary international law in that it allows an organisation powers to fit the purposes States agreed for it to have. This is wider than the narrow form of implied powers provided for by Article V (2)(f):

“The Board of Governors, and the Executive Directors to the extent authorized, may adopt such rules and regulations as may be necessary or appropriate to conduct the business of the Bank.”

Both for interpretation and filling of gaps, neither can be used to “reach a meaning that goes into directions unrelated to the declared objective of the text or violates its explicit wording”.¹⁷⁷ Any such use would create an actual amendment of the treaty by the interpreters and go against the will of the member States.

The Bank is, therefore, limited by two factors expressly within its Articles of Agreement when interpreting provisions. Firstly, they must be consistent with the

¹⁷⁶ *Supra* Note. 165 pg. XLVIII

¹⁷⁷ *Ibid.* 127 pg. LII

purposes of the Bank, as all work of the Bank must be consistent with the purposes. Secondly, the interpretation must be consistent with other areas of the Articles in that if one article expressly denies the ability of the Bank to perform an action, this in turn limits possible interpretations of separate articles. Deriving from outside the Articles, through either using the teleological or textual approach, the Bank is limited to apply one of the possible ordinary meanings to words.

1.9 Model for Application to the World Bank

In relation to an international organisation, the definitive position of the modern positivist theory is that an organisation can only legally act within the confines of what its founding treaty provides. This is as this reflects the sovereign will of the organisation's member States and what they have consented the organisation to do. This can only be changed by an amendment or subsequent agreement. If an international organisation were to act outside of this confine, it would be encroaching upon the sovereignty of its membership. In turn, a focus is then upon treaty interpretation and the rules that it provides to ascertain the exact will of its members and to ensure their sovereignty is not infringed upon.

The World Bank, in its legal view of treaty interpretation towards its own Articles of Agreement, uses a teleological approach whilst the VCLT uses a textual approach, however, it has been established that the end result of using one approach as seen from the positive theory's perspective is not substantially different from the other. Any treaty interpretation cannot take the place of amendment procedures and interpreters must at all times ensure that they do not replace the members' purposes or text with their own. Any infringement would be against the positivist school of thought that organisations are bound by their founding treaty as the infringement would dispute the positivist understanding that an organisation is bound by the sovereign will that created it. The positivism approach outlined here is not the only analytical tool to examine international organisations. It is, however, the predominant one. Additional theories that have arisen will be examined in Chapter Two.

The positivism model that has been elaborated upon will now be applied against the World Bank to determine whether the Bank has kept within its mandate. If it has not, an alternative legal analytical tool will need to be sought in order to make sense of the Bank in law.

1.10 World Bank History

The history of the World Bank has been recorded in numerous sources¹⁷⁸ and is one of evolution and perhaps even at various points revolution. The Bank itself seeks to record all major events and announcements related to its work¹⁷⁹ since the Bretton Woods conference and make this available to the public under the transparency doctrine that it has implemented. Although the history of the World Bank is an area that is already extensively covered within the literature, the application of an analytical framework based upon the positivist theory to this history is not. The history section is crucial to not only establish that the Bank has moved from its original mandate, but just how far it has gone. If it can be determined that the World Bank is no longer acting in law under the positivist theory, an alternative analytical framework can begin to be sought and applied in an effort to better understand the legal ramifications of what has occurred.

This section will argue that whilst sometimes the World Bank has sought to expand its work by the creation of new arms of the Bank, with associating new Articles of Agreement for States to sign, it has shown on other occasions a remarkable willingness to read into, ignore and add to its own Articles of Agreement with little to no input via its member States in the traditional sense envisioned by the positivist theory. This has included the creation of a new dialog in international law allowing the direct access of individuals to an international organisation for the first time. The Inspection Panel, its creation and issues, will be written on extensively in Chapter Five but will be referred to at its relevant point in the history of the Bank within this chapter.

¹⁷⁸ Edward Mason & Robert Asher, *The World Bank Since Bretton Woods: The Origins, Policies, Operations, and Impact of the International Bank for Reconstruction* (Brookings Institution Press 1973); Devesh Kapur, John Lewis & Richard Webb (eds.), *The World Bank: Its First Half Century* (Brookings Institution Press 1997); and Michele Alacevich, *The Political Economy of the World Bank: The Early Years* (Stanford University Press 2009)

¹⁷⁹ World Bank Group Historical Chronology; available at go.worldbank.org/Z052FIDA70 accessed September 2013.

1.10.1 The Reconstruction Years

The Bank began operations on 25 June 1946. Early warning indicators to States that the Bank could be seeking to fulfil a different purpose to that which was given to it actually pre-dated the date operations began to 7 May 1946 when the Executive Directors met for the first time. The meeting is remembered for trying and failing to appoint the first President of the Bank but of greater concern should have been the early quest by the Bank to “adapt” the Articles of Agreement. The meeting had the intention of expressing general purposes for the Bank (as opposed to those given in the Articles) and to adapt the Articles to an international situation that had gone through deep changes since the articles were written.¹⁸⁰ Whilst the end to World War II had changed circumstances on the international scene, the Bank and the IMF had been created for application after the war had ended: as evidenced by the focus on reconstruction. Although the primary job of interpretation was given to the Executive Directors, the Bank’s willingness to begin adapting the purposes of the organisation, which had been carefully worded and negotiated in the Conference, before it had already begun should have been an early warning indicator to States of the Bank’s ambition.

Eugene Meyer, the first President of the Bank, had an uneasy relationship with the Board. Meyer resented the Board, who represent Member States within the Bank, intruding into the running of the Bank and challenging his authority eventually leading to his resignation.¹⁸¹ John J. McCloy only took the position of President on the condition that he would have the Board’s subordination. This has led to a sizeable independence of the working staff of the Bank¹⁸² where the Board still votes upon loan proposals but the staff decides what to propose.

With the United States population still sceptical of the new institutions, members of staff from the World Bank undertook a series of lecture tours throughout the country to provide a better understanding of the organisation. On 14 October 1946, J.W. Beyen, who was an Executive Director at the Bank, clarified his position on what he felt the purposes of the Bank were, to provide the finance necessary

¹⁸⁰ Edward Mason & Robert Asher, *The World Bank Since Bretton Woods: The Origins, Policies, Operations, and Impact of the International Bank for Reconstruction* (Brookings Institution Press 1973) pg. 40-2

¹⁸¹ Sebastian Mallaby, *The World’s Banker* (Penguin 2004) pg. 21

¹⁸² *Ibid.*

to re-build war-torn countries and when reconstruction was complete, to fund development programs that could not find adequate private funding.¹⁸³

Early loans focused upon this purpose of reconstruction after the war¹⁸⁴ but even the early loans were not without controversy. Poland was the first country to withdraw from the Bank under the belief that the Bank was taking criteria that was not contained in the Articles of Agreement into account in its loan application process. The Bank had sent a mission to Poland in 1947 to obtain information regarding the application¹⁸⁵ and later when the loan was refused, Poland took the step of withdrawing from the Bank. Poland's accusation, as put forward by the Polish ambassador to the United States, was that the Bank had denied the Polish loan application as Poland had refused to accede to the Marshall Plan.¹⁸⁶ The Bank heavily refuted these accusations at the time yet this was the first time that an accusation had officially been made that the Bank had overstretched its mandate and was considering outside influences in its decisions. Subsequently the Bank has acknowledged that outside influences effected its decision.¹⁸⁷

Any action taken by the Bank that does not correspond with the purposes set out would be seen, under the positive theory, as an infringement on the sovereignty of members. This is in keeping with the positivist theory of delegated authority on the strict areas consented to. Yet even in the early years of the Bank, it was clear that the Bank was taking elements into account that it was not empowered to do and was ignoring sections of its founding treaty that it did not feel should apply to it. The positive theory cannot explain this, as these actions are not linked to State consent and are explicitly against it.

1.10.2 The Move to Development

There cannot be a meaningful discussion on the history of the World Bank without reference to the Marshall Plan as it was the creation of this plan that truly shifted the World Bank's focus. The Marshall Plan, also known as the Economic

¹⁸³ World Bank Group Historical Chronology pg. 12

¹⁸⁴ For example, Loan 0001 to 0004.

¹⁸⁵ World Bank Group Historical Chronology pg. 17

¹⁸⁶ World Bank Press Releases, March 15, 16, 17, 1950

¹⁸⁷ See; <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTARCHIVES/0,,contentMDK:20504728~pagePK:36726~piPK:437378~theSitePK:29506,00.html> accessed August 2013.

Cooperation Act of 1948,¹⁸⁸ was a bilateral assistance program between the United States and various European States to assist European States in post-war recovery. The plan provided \$13 billion to European countries that joined the Organisation for European Economic Co-Operation.¹⁸⁹ The plan, whilst widely seen as a success,¹⁹⁰ took from the Bank of one of its two primary objectives allowing it to shift its resources to its only other primary objective: development.¹⁹¹ This meant that within two years of J. W. Beyen's assurances that the Bank was concerned with post-War reconstruction, the focus of the Bank had fundamentally shifted.

As Europe was largely availing itself of the Marshall Plan, the Bank's focus increasingly moved outside of Europe (as the States there no longer required its assistance) and focused upon financing the development of less economically developed countries.¹⁹²

On 25 March 1948, the Bank issued its first development loans. Both loans were to Chile to help the State develop their power, irrigation and agricultural sectors. This new shift to development loans was envisioned in the Articles but as noted earlier, the introduction was only done under pressure from developing nations and was not considered the primary purpose of the Bank by the majority of its founders. The founders, however, had envisioned a time when reconstruction would be complete and the Bank would have to shift its focus and, therefore, had provided adequate regulations in the Articles on how these loans should progress and what they should be for. The only difference was that the shift from reconstruction to development had happened far faster than any States had anticipated.

¹⁸⁸ 62 Stat. 137

¹⁸⁹ J Bradford de Long & Barry Eichengreen, 'The Marshall Plan: History's Most Successful Structural Adjustment Program' published in Rudiger Dornbusch, et. al. (eds.), *Post-World War II Economic Reconstruction and its Lessons for Eastern Europe Today* (MIT Press 1993)

¹⁹⁰ See for example; Michael Moore, 'International Arbitration Between States and Foreign Investors – The World Bank Convention' (1966) 18 Stan. L. Rev. 1359

¹⁹¹ Halim Moris, 'The World Bank and Human Rights: Indispensable Partnership or Mismatched Alliance' (1997) 4 ILSA J. Int'l & Comp. L. 173, 178

¹⁹² Gerald Meier, 'The Bretton Woods Agreement – Twenty-Five Years After' (1971) 23 Stan. L. Rev. 235

1.10.3 The Beginning of Activism

The success of the Marshall Plan allowed the Bank a relative amount of freedom. Policies that were not expressly stated in the Articles were allowed to pass by States in relation at how the post-war development was progressing¹⁹³ and blinded States to the future consequences for their sovereignty.

Article V Section 6 of the Articles of Agreement details the creation of an Advisory Council at the Bank to advise the Bank on general policy. Looking at the present structure of the Bank might raise the question of where this Council sits in the current command structure as it is not shown. In 1948 the Executive Directors took their first step to outright deny a provision of the Articles. The first meeting of the Advisory Council was held but the Chairman of the Council recommended to the Executive Directors that the Council would not provide value for the cost and time. Agreeing with the Chairman, after a study, the Bank was effectively abolished by not appointing any new councillors after the initial terms had expired. Although of seeming little consequence at the time, it denies States an element of control at the Bank. If the Advisory Council had recommended a course of action and advised the Executive Directors so, the Executive Directors would have to explain any deviation from this recommendation. Instead now, more power is vested in the Executive Directors and President than the Articles provided. Now it is for the Executive Directors to decide solely on Bank policies without recommendation.

The Executive Directors represent the interests of the member States within the organisation and so on a narrow reading this may appear consistent with the positivist theory. The five largest contributors (United States, Japan, Germany, France and United Kingdom) each appoint a Director and the current 183 other members elect the remaining 20. The amount of Directors has evolved since the original 12 to the 25 that are in place currently. Yet the agreement to dissolve the use of the Advisory Council and the tacit agreement reached after Eugene Meyer's resignation paved the way for President's agendas becoming the focus of the Bank.

¹⁹³ Immanuel Wexler, *The Marshall Plan Revised: The European Recovery Program in Economic Perspective* (Greenwood 1983) pg. 10

As the 1950s progressed, increasingly senior employees at the Bank began to refute the Articles of Agreement. Advisors at the Bank began to take other considerations into account for development loans¹⁹⁴ before the Bank began to openly admit that its mission had changed with the Chairman of the Board of Governors stating “I do not regard its mission encompassed within the narrow definitions of reconstruction and development”.¹⁹⁵ Additionally, in 1956, Eugene R. Black, then President of the Bank stated that even if Hungary were a member of the Bank, he would not be prepared to recommend a loan to the present Hungarian government.¹⁹⁶ This was the first open acknowledgement that the Bank was openly acting outside its Articles by taking political considerations into account when deciding upon loan applications yet still there remained no amendment of the Bank's Articles to account for it.

The Bank began to broaden its interpretation of what ‘development’ encompassed and in 1963 introduced concept of lending for education.¹⁹⁷

Throughout the 1950s and 60s the World Bank sought to expand its mandate via the creation of new arms of its organisation. The International Finance Corporation was established in 1956, the International Development Association in 1960 and was subsequently followed by the International Centre for Settlement of Investment Disputes in 1966. As the creation of these arms of the World Bank Group, and the subsequent creation of the Multilateral Investment Guarantee Agency in 1988, took place via the signing of individual agreements via member States they can be seen as complying with the positive international law theory. In contrast to the rest of the Bank’s activities concerning the International Bank for Reconstruction and Development, the creation of these new arms to the World Bank can be explained by the traditional positive approach to international law as States have consented to the activities of these branches as envisioned at the time of creation and the treaties were created in the expected legal fashion. The IFC in its work uses the same policies and guidelines that apply to the IBRD. Many

¹⁹⁴ Such as using them as a defense against communism, World Bank Group Historical Chronology pg. 36

¹⁹⁵ World Bank Group Historical Chronology, pg.46

¹⁹⁶ World Bank Press Release, December 26, 1956

¹⁹⁷ Katherine Marshall, *The World Bank: From Reconstruction to Development to Equity* (Routledge 2009) pg. 31

of the subsequent arguments developed during this thesis may also be applied to it.

The creation of the IFC led to the first of two amendments of the IBRD Articles of Agreement. In 1965 the first amendment allowed the IBRD to lend to the IFC up to four times the IFC subscribed capital.¹⁹⁸ The second amendment was introduced in 1989 and modified the voting structure to require an 80% majority of votes,¹⁹⁹ compared to the previous 85% majority of votes. The use of the amendment procedure demonstrates that the Bank can, if it chooses to, implement the procedures envisioned within the Articles consented to by States and, in relation to the first amendment, that the amendment procedure is an effective mechanism to increase the powers of the Bank if States require it. As there was no provision within the Articles of Agreement to lend to another organisation, the member States changed the Articles to incorporate it. If the Bank were to extend its mandate in other areas at the will of States, it should follow this model of amendment. This process of amendment reflects the expectations from the positive theory and readily demonstrates that the Bank and its member States can be willing to change the Articles if sought.

1.10.4 Quantity Rather Than Quality

In 1968 Robert S. McNamara became President of the World Bank Group and quickly set out his vision for the development of the Bank. Instead of focusing upon loans for actual projects, President McNamara sought to shift the Bank's emphasis towards research loans.

In 1969 he called for a doubling of the amount lent from the previous five years (which would mean in the next five years that the Bank would lend as much as it had in its first twenty-two)²⁰⁰ and in 1971 approved the first loan solely for research. During the 1970s the IBRD lent three times as much to Africa as it had in the previous decade,²⁰¹ replacing former colonial powers as the principal actor on the continent.

¹⁹⁸ Article III Section 6

¹⁹⁹ Article VIII (a)

²⁰⁰ World Bank Group Historical Chronology, pg. 134

²⁰¹ Devesh Kapur, John Lewis & Richard Webb (eds.), *The World Bank: Its First Half Century* (Brookings Institution Press 1997) pg. 696

President McNamara sought to overtly change the Bank when previous Presidents had sought to do covertly. He argued that development encompassed more than just financial concerns (that were stipulated in the Articles) and sought to widen definitions of development to include nutrition, education, a more equitable distribution of income, improvements in the quality of life, the environment, and, crucially for the future of the Bank, saw the elimination of poverty as a part of the Bank's responsibility.²⁰² The departments of the Bank reflected this with the introduction of departments on a variety of new subject areas such as the environment and population control.

Aaron Broches was the Bank's longest serving General Counsel working at the Bank from 1959-1978. Subsequent to his leaving the Bank's service, Mr Broches commented that the most important function of the legal department at the Bank was to ensure "that the President and the Board of Executive Directors observed their respective powers laid out in the Articles of Agreement".²⁰³ When Robert McNamara took the role as President of the Bank Mr Broches commented that his role as mediator was "severely challenged".²⁰⁴

The concern highlighted by Broches would suggest that the Bank's President and Board of Executive Directors were acting outside the positive theory. If international organisations are bound by State consent, this concept of a President challenging the Articles of Agreement is outside of this. If States' have only consented to the Bank behaving in one way, then it would be counter for the President to challenge, reinterpret, edit and replace in way that he sees fit. Instead the positivist theory would require that international organisation respect the sovereignty and consent of its members.

Throughout the 1970s the focus of the Bank did not change in respect of moving away from development, its only aim left, but the President changed the definition of what "development" meant and the focus changed with that. The

²⁰² See for example; *World Bank, Assault on World Poverty: Problems of Rural Development, Education, and Health* (John Hopkins Press 1975); 1975 Annual Meeting Speech and 1977 Annual Meeting Speech (both have summaries available at World Bank Group Historical Chronology pg. 155 & pg. 160 respectively)

²⁰³ Karen Hudes & Sabine Schelmmmer-Schulte, 'The Gentleman's Agreement: Multilateralism or Hegemony?: Accountability in Bretton Woods' (2009) 15 ILSA J. Int'l & Comp. L. 501

²⁰⁴ *Ibid.*

freedom given to the President by the abolition of the Advisory Council allowed him to define “development” personally (even though it was different to what other Presidents and the founders had defined the term to mean) and led to a vast expansion of what the Bank was willing to lend for. The Bank’s increased activism, however, came at a cost to States that is examined below.

Up until this point, the changes that the World Bank had been making are in respect of increasing its powers under its Articles of Agreement. This provides evidence of an evolution at the Bank from the organisation it was set up to be, towards a system outside of the control of States. The following period, however, explains a further evolution in the Bank’s legal personality towards an organisation that is exercising a governance function over States through the creation of a normative regime. This area will be examined extensively in Chapter Four.

1.10.5 Conditionality, Corruption and Good Governance

In the 1980s, the Bank increasingly moved into the areas of competence that were traditionally conceived of as domestic jurisdiction. This was done through the introduction of guidelines unrelated to finance and the introduction of Structural Adjustment Loans. Developing States that had borrowed heavily to fund development were increasingly encountering financial troubles repaying the debt.²⁰⁵ The new form of loans issued by the Bank provided new loans to borrowing countries to pay back old loans but crucially borrowing countries had to agree to change certain macro-economic policies to what the Bank has proscribed as an acceptable model.²⁰⁶ The loans were in essence a crisis-driven tool where a member State could receive assistance to restructure their existing debts but on the condition that they underwent fundamental economic reforms.

The Structural Adjustment Loans and the conditions that they placed upon States for their approval built upon existing “conditionality” that was present for the World Bank. As the countries that required assistance generally were receiving assistance from the IMF to help resolve balance of payment problems, States encouraged the IMF and the World Bank to develop simultaneous policies so that

²⁰⁵ Kevin Anderson, ‘International Law and State Succession: A Solution to the Iraqi Debt Crisis?’ (2005) *Utah L. Rev.* 401, 412

²⁰⁶ David Woodward, *Debt, Adjustment and Poverty in Developing Countries* (Pinter Publishers 1992) pg. 31

they were not asked to implement conflicting conditions by the two main multilateral finance providers. This was the point where the work of the IMF and the World Bank became closest as they dealt with similar areas and imposed similar conditions. Criticism before, during and after the implementation of Structural Adjustment Loans was fierce and the events of the 1980s led directly to the protests that helped change the shape of the Bank in the 1990s.²⁰⁷

The Bank argues that it has a responsibility to use conditions to protect its limited resources²⁰⁸ to keep them available for member States should they need and legally derive from Article III Section 4 (v) of the Articles of Agreement:

In making or guaranteeing a loan, the Bank shall pay due regard to the prospects that the borrower, and, if the borrower is not a member, that the guarantor, will be in position to meet its obligations under the loan; and the Bank shall act prudently in the interests both of the particular member in whose territories the project is located and of the members as a whole.

The conditions are, therefore, from the Bank's perspective, a means of the Bank ensuring repayment.

The conditions attached to loans quickly evolved to encompass a huge degree of reform required to receive funding. As the Bank evidenced that members often did not fulfil these conditions, the conditions became more detailed and specific.²⁰⁹ As well as the agreement to pursue economic reform, other structural adjustments were required by States. Fiscal restraint, opening trade, trade liberalisation and privatisation²¹⁰ were all standard elements that also caused a focus for other Bank loans. As State resources were pushed towards the private sector in an effort to enable growth, Bank loans were, therefore, required for basic social services such as health, education and housing.²¹¹ This resulted in the

²⁰⁷ See Chapter Four.

²⁰⁸ *Review of World Bank Conditionality* (World Bank 2005) pg. 2

²⁰⁹ *Supra* Note. 197 pg. 40

²¹⁰ Berta Hernandez-Truyol, 'Cuba and Good Governance' (2004) 14(2) *Transnat'l L. & Contemp. Probs.* 655, 663

²¹¹ James Gathii, 'Human Rights, the World Bank and the Washington Consensus: 1949-1999' (2000) 94 *Am. Soc'y Int'l L. Proc.* 144, 145

Bank introducing "safeguards" and "operational directives" in areas such as indigenous people, the environment and relocation due to heavy NGO lobbying for the Bank to consider the ramifications of its lending.

The current Operational Manual, that contains all instructions to staff on how to prepare projects, includes:

- Operational Policy/Bank Procedure 4.0 - Piloting the Use of Borrower Systems to Address Environmental and Safeguard Issues in Bank-Supported Projects
- Operational Policy/Bank Procedure 4.01 – Environmental Assessment
- Operational Policy/Bank Procedure 4.02 – Environmental Action Plans
- Operational Policy/Bank Procedure 4.04 – Natural Habitats
- Operational Policy/Bank Procedure 4.07 – Water Resources Management
- Operational Policy/Bank Procedure 4.09 – Pest Management
- Operational Policy/Bank Procedure 4.10 – Indigenous Peoples
- Operational Policy/Bank Procedure 4.11 – Physical Cultural Resources
- Operational Policy/Bank Procedure 4.12 – Involuntary Resettlement
- Operational Policy/Bank Procedure 4.20 – Gender and Development

The Operations Manual and the Operational Policies and Bank Procedures that it contains bind the staff of the Bank. However, a State cannot have a project approved unless the staff follows these procedures so in turn the Operations Manual binds borrowing States. The link between conditions being placed upon a State to ensure repayment of the Bank's resources is broken as a number of these policies are not linked to economic factors but instead to politically desirable outcomes.

This push by the Bank to incorporate areas not traditionally associated with lending and not provided for in the Articles is hard to reconcile with the positivist international law theory. This governance role, in telling member States what to do, presents a challenge to conceptualising in law this governance authority. If the positive theory of international law is based upon consent, the will of the sovereign, then it is unclear how this theory can describe what is happening when a sovereign is restricted and governed itself.

The Bank's argument that State's "own"²¹² the loan and do not have to agree to it is weak when considering the financial position many of the States were and are in. With mounting debt and increasing foreign pressure for actions to be taken, States were left with no choice but to accept the Bank's proposals. On the one hand the beneficiary State agrees to a loan under these conditions but on the other the World Bank is requiring conditions are met that are in conflict with the provision within the Articles of Agreement stipulating that only "economic considerations" are taken into account. There is, therefore, a conflict with consent.

A distinction should be established between what some might consider a moral obligation, for example that the World Bank considers environmental factors in its lending, and what is legally possible under the positivist theory. A number of actors pushed for the introduction of environmental, indigenous rights and other policies that the World Bank then introduced. Yet the question over environmental standards is inherently political and not economical. Should a State proceed with a project that they know will harm the environment but will increase development (in whatever form the State decides that term to encompass) for the people of the State? This judgment is political for borrowers and is, therefore, outside the remit of the World Bank. By implementing safeguard policies in this area, the Bank is acting against its political prohibition and has usurped the borrowing State's sovereign right. "Too often... development institutions including the World Bank had taken too heavy a hand in program design, suiting it to their perceptions of how development should proceed".²¹³

Increasingly throughout the 1980's, the World Bank sought to push private sector reform rather than public sector reform²¹⁴ even going as so far as to say that "Economic growth in all countries can only be achieved in the context of a liberal trade environment".²¹⁵ The days of States seeking money for projects had fallen aside and instead the balance of power in the relationship between the World Bank and its members had reversed. Whilst initially loan applications were approved unless there was a specific reason not too, now loans were only

²¹² See for a recent example; Nicola Smithers, *The Importance of Stakeholder Ownership for Capacity Development Results* (World Bank Institute 2011)

²¹³ *Supra* Note. 197 pg. 16

²¹⁴ World Bank Group Historical Chronology, pg. 181

²¹⁵ World Bank Group Historical Chronology, pg. 184

approved if the State could satisfy the Bank that the State would meet Bank conditions. The fact that these conditions had never been agreed upon at the Bretton Woods Conference or implemented through amendments to the Articles did not encumber the Bank. Instead of States directing the Bank as provided for in positive international law theory, the Bank was and is directing States: the Bank is occupying a governance role. This issue, the creation of operational guidelines and the conditions placed upon loans, is further assessed in Chapter Four to consider whether they have amounted to the creation of a normative system.

Throughout this period the definition of “development” continually widened to allow the Bank to encroach upon an increasing area of governance until in 1989 the term “good governance” was coined. The term emerged in an analysis of operations in Africa in the 1989 World Bank Study “Sub-Saharan Africa – from Crisis to Sustainable Growth”. The report argued that a better public sector was required in order to facilitate growth yet the study itself defined governance as “the exercise of political power to manage a nation’s affairs”.

Furthermore, corruption and its effect upon member State governments became a focus of the Bank during the tenure of James Wolfensohn as President.

The evolutionary approach, outlined by the ICJ in the *Costa Rica v. Nicaragua* case, could encapsulate this change in the definition of “development” if the two tests that it identified are met. First, the parties must have used generic terms in the treaty that the parties were aware were likely to evolve over time. Specialist terms could not be considered for an evolutionary interpretation. Secondly, the treaty has been entered into for ‘a very long period or is “of continuing duration”’.

Whilst the second test may be judged to be met by a treaty in force for forty years at the time of these reforms, the first test would depend upon the intention of the parties and how they viewed “development” within the World Bank’s purposes. As a starting point, the VCLT and the purposive approach adopted by the Bank, would both see development as a specialist term, and as the long term aim for the Bank (with post-war reconstruction always going to come to an end at some point), it is difficult to argue that the founders would use a generic term in this context. Furthermore, given the considerable influence that the protection of sovereignty had upon the Bretton Woods conference as the context in which the

agreements were made, it is considerably doubtful that the founders considered that the word development was a term that was likely to evolve over time.

Nevertheless, if it could somehow be argued that an evolutionary approach should be adopted in relation to this term, *quod non*, then the evolutionary approach would still require that the term development be bound by the other wordings of the Articles of Agreement.

Good governance and corruption are inherently political as they deal with the political nature of a State and the relationship with its citizens. The Bank had legal counsel stating that to become involved in issues of corruption would be against the requirement from the Articles of Agreement that the Bank not consider political affairs. The Bank legal counsel identified six requirements from the Articles in relation to the Bank and politics:

‘One, that the proceeds of each loan be used with due attention to considerations of economy and efficiency, not under political or other non-economic influences; two, that the Bank not interfere in the political affairs of its members; three, that the Bank not be influenced by the political character of members; four, that only economic considerations which are weighed impartially be taken into account; five, that the loyalty of the President and staff be entirely to the Bank and their duty be international in character; and six, that members of the Bank respect the international character of this duty.’²¹⁶

This legal report demonstrates the fallacy of the Bank’s legal reasoning. Whilst they were willing to use a purposive approach towards the interpretation of the purposes of the Bank to view them as wide as possible, they did not question the purposes of the Bank’s non-political nature and apply accordingly. The founders had clear reason to move the Bank outside of political concerns: as a worldwide organisation it should not in law be influenced by one political viewpoint and as political decisions are sometimes of a contentious nature, they are best kept to those they affect to make those decisions. The evolutionary approach would,

²¹⁶ IBRD Executive Directors meeting April 11, 1991 minutes pg. 9

therefore, fail to make sense of the term development as, even if utilised, it is bound by the political prohibition provision of the Articles of Agreement.

In turn, a purposive approach as used by the Bank towards the Articles should have included all Articles, i.e. that the World Bank can act within its general purposes except where it is specifically excluded from doing so. The textual approach adopted by the Vienna Convention also would fail to provide a reason for the Bank moving into areas that were political due to the ordinary meaning of the words prohibiting political activity on behalf of the Bank.

In 1992, the report of the Independent Review of the Sardar Sarovar Project was published by the Bank. This was the first independent review of a Bank project commissioned by the Bank since its inception²¹⁷ and criticised the Bank for falling short of the standings that were expected from the Bank's guidelines and policies. This report and other factors that will be examined in Chapter Five, directly led to the creation of the World Bank Inspection Panel in September 1993.

The Inspection Panel is an independent body within the World Bank Group that assesses the projects of the IBRD and the IFC to see if management has complied with the operational policies and procedures they should follow in creating a loan, i.e. has management made the borrowing State comply with the conditions for assistance. It is sufficient for this chapter's purpose to note three areas of concern:

- 1) The Panel, its purpose, its process, its recommendations and its powers are not mentioned in the Articles of Agreement and cannot be implied by judicial interpretation.
- 2) The Panel was created without treaty amendment.
- 3) The Panel allowed, for the first time in international financial law, individuals to directly contact an international organisation without going through their respective State.

The creation of the Inspection Panel significantly deviates from the positivist international law theorem. States had not consented to be bound by this new area of the Bank, nor provided for the new dialog between individuals and

²¹⁷ World Bank Group Historical Chronology, pg. 210

international organisations. The State's traditional place as a conduit in law between the individual and the international legal plane had been broken for the first time. Whilst international law had previously reached beyond States to individuals,²¹⁸ never before had individuals reached into the international law sphere.

In 1996 the Bank for the first time took a decision completely outside of its Articles of Agreement in relation to its membership. Article III Section 1 (a) stipulates that "The resources and facilities of the Bank shall be used exclusively for the benefit of members". Yet after the break-up of Yugoslavia, the Bank lent money to Bosnia before it became a member.²¹⁹ This is further evidence of the lack of ability of the positive theory to explain how the World Bank has acted.

The increasing use of conditions on an increasing amount of subject areas, even when economical, could not continue. The Bank was in an ironical position of forcing States who least could afford it and, therefore, required external funding, to apply conditions they could not afford to do. The decline in lending was dramatic as States that could do so rebelled and sought funding elsewhere.²²⁰ Unfortunately this left States who could not afford to raise funding through any other mechanism using the Bank and having to implement its conditions.

The Bank resolved to use less conditionality upon its loans but the current Operational Manual, as examined above, still contains the same requirements that are placed indirectly upon a State. Recent developments on conditionality and the Operational Procedures include the first time use in Chad of the Bank insisting on the creation of a public institution²²¹ and the 2005 review of conditionality when the Bank undertook a review of its policy of attaching conditions to loans. It concluded, "Bank support remains broadly consistent with the good practice principles on conditionality".²²²

1.10.6 President's Agendas

The actions of the Bank should be grounded in the Articles of Agreement, yet this has not always been the case. As the Bank's role has evolved, the link to the

²¹⁸ For example, war crimes are an element of international law against individuals.

²¹⁹ Sebastian Mallaby, *The World's Banker* (Penguin 2004) pg. 135

²²⁰ In 2000, the Bank lent less than half what it had the year before.

²²¹ *Supra* Note. 219 pg. 352

²²² 'Conditionality in Development Policy Lending' (World Bank 2007)

Articles and what the founders envisioned this role to be has been lost. An interesting exercise is to note how each of the successive World Bank Presidents described the Bank's role:

Eugene Meyers (June 1946 – December 1946): "(t)o promote international flow of long-term capital and to assure funds for the reconstruction of devastated areas and the development of resources in member countries."²²³

John J. McCloy (March 1947 – June 1949): "The reconstruction phase of the Bank's activities is largely over. The development phase – assisting in developing the productive facilities and resources of the world wherever the opportunities present themselves – is under way."²²⁴

Eugene R. Black (July 1949 – December 1962): "We ourselves must play a significant part in helping these countries to achieve the new standards of life to which they aspire."²²⁵

George David Woods (January 1963 – March 1968): "(w)e have no objective to serve but economic development."²²⁶

Robert S. McNamara (April 1968 – June 1981): "The lesson of the last decade has been that we cannot simply depend on economic growth alone...Future places of the World Bank...must give far greater attention to the basic problems affecting the lives of the developing peoples"²²⁷

Alden Clausen (July 1981 – June 1986): "The World Bank and the IFC can help to strengthen the private sector in the developing nations...not because it is an end in itself, but because it is a vital means of alleviating poverty and securing economic growth."²²⁸

²²³ World Bank Group Historical Chronology, pg. 12

²²⁴ World Bank Group Historical Chronology, pg. 28

²²⁵ World Bank Group Historical Chronology, pg. 78

²²⁶ World Bank Group Historical Chronology, pg. 107

²²⁷ World Bank Group Historical Chronology, pg. 139

²²⁸ World Bank Group Historical Chronology, pg. 177

Barber Conable (July 1986 – August 1991): “The central challenge of the World Bank...is the same in 1986 as in 1946: to mobilize the will and resources of the affluent and of the afflicted alike in the global battle against poverty.”²²⁹

Lewis Preston (September 1991 – May 1995): “sustainable poverty reduction is the overarching objective of the World Bank.”²³⁰

James D. Wolfensohn (June 1995 – May 2005): “(W)e must tackle the issue of economic and financial efficiency. But we also need to address transparency, accountability, and institutional capacity. And let’s not mince words: we need to deal with the cancer of corruption.”²³¹

Paul Wolfowitz (June 2005 – June 2007): “(g)overnance is a necessity and important part of the development agenda.”²³²

Robert B. Zoellick (July 2007 – June 2012): “It is the purpose of the Bank Group to assist countries to help themselves by catalyzing the capital and policies through a mix of ideas and experience, development of private market opportunities, and support for good governance and anti-corruption – spurred by our financial resources.”²³³

Jim Yong Kim (July 2012 – Present): “As a global institution with 188 member countries, the World Bank must play a pivotal role in brokering solutions to achieve a world free of poverty.”²³⁴

When Wolfensohn gave his inaugural speech as the Bank's President Malloch Brown, the Vice President of External Affairs, commented that Wolfensohn was not "on message". A fellow staff member observed that "(H)e's the President, I think you'll find that is the message".²³⁵

²²⁹ *The Conable Years at the World Bank: Major Policy Addresses of Barber B. Conable, 1986-91* (IBRD 1991) pg. 2

²³⁰ World Bank Group Historical Chronology, pg. 211

²³¹ Annual Meetings Address by James D. Wolfensohn (1 October 1996)

²³² Annual Conference of the Parliamentary Network on the World Bank address by Paul Wolfowitz (16 March 2007)

²³³ The National Press Club address by Robert B. Zoellick (10 October 2007)

²³⁴ Dr. Jim Yong Kim at the Brookings Institute, Global Development at a Pivotal Time: A Conversation with World Bank President Dr. Jim Yong Kim (19 July 2012), available at; <http://www.worldbank.org/en/news/2012/07/18/world-bank-group-president-jim-yong-kim-brookings-institution> accessed September 2013.

²³⁵ Caroline Ansley email, 17th December 2003 quoted in *Supra* Note. 219, pg. 89

These statements show a clear shift in time away from the purposes laid down in Article 1 of the Articles of Agreement. The realm of politics treads closely in the footsteps of international law and it must always be with care that statements are analysed. However, as the Presidents are the head of the institution and head of the employees of the World Bank, their statements deserve some consideration.

It can be seen that as Presidents have changed, their interpretation of the precise role of the Bank has changed. This has been sought to be remedied by the Bank attempting to stretch the meaning of words in its Articles of Agreement to incorporate new areas of competence as old ones have elapsed (the shift from reconstruction to development) or when other aims have not fallen within explicit meanings of words (the increasingly wider interpretation of the word “development” to incorporate large swaths of society).

If law emanates from States as the positivist theory asserts, then the express will of States should direct the World Bank, and not a President’s agenda. The evolution of the Bank has not been reflected in an amendment to the purposes of the Bank, as laid down in Article 1 of the Articles of Agreement.

1.11 Conclusion

The World Bank of today is a very different organisation to the one created in 1945. As the various Presidents have used their own interpretation on what the Bank should do, it has shifted from the original vision of reconstruction in large infrastructure projects to attempting to represent the world’s poorest in loosely framed development terms. As shown, the World Bank has gone through this remarkable metamorphosis with numerous steps in between. The crucial element of this brief history has been to argue the lack of State control in the change in emphasis in the Bank and that this change has not occurred with necessary matching changes to the Bank’s Articles of Agreements.

It is difficult to argue that the abolition of poverty is not a worthwhile and lofty goal that the world should aim for. However, this in turn raises a number of questions of effectiveness. Is the World Bank the best avenue for achieving this goal? Who gave it the power to assume this mantle? As seen throughout its history, the Bank has consistently argued that its emphasis has stemmed from a

legal interpretation of its treaty. However, the Bank's actions are not consistent with any form of treaty interpretation. The introduction, use and requirement of conditions and Operational Policies has forced the Bank away from its mandate to the obtuse position where its aim is to reduce poverty but it cannot lend to some of the poorest people as they do not meet its environmental or political conditions.

The problems arising from the acts of an international organisation outside of its mandate, such as the World Bank, are 'far from being resolved, and in any case are not susceptible to resolution by means of simplified formulations'.²³⁶ Chapter Four will examine these issues and what they mean when framed in terms of governance and law.

However, the most remarkable feature of the Bank's evolution has been the behaviour of States. States are largely, with a very few exceptions, accepting that the Bank can behave in such a manner, even when it is not in their own best interest. Where States have rigorously sought to protect their sovereignty elsewhere, they have not in relation to the Bank. As the most readily utilised tool of understanding public international law, the history of the World Bank has been analysed against the positive theory. This tool cannot explain the actions of the Bank acting outside of its mandate and, therefore, outside of and at times against State consent.

In particular, the governance role that the Bank is exercising needs to be framed in terms of law. The Bank is telling member States to do, and is doing it based on rules that it has established itself. If governance cannot be based upon State consent, alternative theories need to be considered to frame this role that the Bank is exercising in terms of law.

²³⁶ Ian Brownlie, *Principles of Public International Law* (Sixth Edition, OUP 2003) pg. 667

Chapter Two: Alternative Theories

2.1 Introduction

The history of the philosophy of law, or jurisprudence, is a history of theories attempting to either tell how the law should be (normative jurisprudence) or how the law is (analytical jurisprudence) although at many times both. Public international law has its own subset of theories that have been used to describe how it operates, either emanating from national law theories being applied internationally or theories specifically and only designed for the international arena.

The theory of law between nations has repeatedly moved between two main basis of law, positive law and natural law.¹ Hugo Grotius is seen as the modern founder of international law,² yet law governing the conduct between nations is thousands of years old and, although the most prevalent, the positive school of thought is by no means the only theory that has or is used to explain the work of international organisations within public international law.

Chapter One demonstrated that the actions of the World Bank can no longer be adequately explained by reference to the positivist theory. A plethora of theories exist that attempt to outline the legal basis for the work of organisations in international law and although the focus of this thesis is the systems theory approach, this chapter will consider the main alternative legal approaches that have been used to explain the work of international organisations and highlights why they are an inappropriate mechanism for explaining the work of the World Bank.

International organisations acting outside of their founders' mandate, as well as the governance function that they arguably now possess, of telling States what to do, are not exclusive to the World Bank. Other organisations have been considered in the academic literature and in reflecting upon this shift in

¹ Stephen Hall, 'The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism' (2001) 12(2) EJIL 269

² Malcolm Shaw, *International Law* (Sixth Edition, CUP 2008) pg. 23

governance, a number of dominant approaches have emerged via which the actions of international organisations have sought to be explained in law. This chapter examines and rejects these other theories, in order to argue that the traditional tools that have been utilised to explain the work of international organisations are not adequate to explain the actions of the World Bank.

Four alternative analytical tools are examined: progressive positive, constitutionalisation of international organisations, global administrative law and international institutional law. The constitutionalisation of international organisations, global administrative law and international institutional law are developed areas of legal scholarship that have been applied to other international organisations in order to explain their work and their governance function. This chapter argues that whilst they may be acceptable models for the understanding of other international organisations, they fail to explain in law the work of the Bank. In addition to these established theories, the progressive positive tool, a term coined for this thesis, is a developing area of international law that is explored, but ultimately found unsuccessful, to explain in law the work of the World Bank.

2.2 Theories at Work

According to the traditional conception of international law based upon the positive theory, States and only States can create and alter international law, as the only valid expression of sovereign will. Although this account is successful enough to describe the majority of law making that occurs at the international level, it has been found, especially since the 1940s and the creation of the current multilateral system that the behaviour exhibited by both States and international organisations could not always be explained within this model. Instead an alternative model is necessary to be adopted in a number of specific circumstances.

The evolution and shift in theories of law is nothing new. As seen in Chapter One, the positive theory itself overtook natural law as the prevalent theory to explain law.³ The multitudes of separate theories that exist to define what law is, with

³ See Chapter 1.4 The Application of Positive Theory to International Law

supporters for and against, acts as ample evidence that the popularity of theories strengthens and fades over time. The waning of influence that the positive theory wields in international legal theory since the end of the Second World War has been demonstrated in Chapter One.⁴ Yet even at its height of influence, the positive theory was by no means universal in its following. Supporters of alternative theories have existed since the inception of the theory of positivism in international law⁵ and in the present, with the fading of support for the positive theory in some respects, other theories have gained an increasing amount of supporters.

Yet supporters of various theories appear to be polarised by their support for a chosen theory.⁶ Theories are generally seen as mutually exclusive concepts with applicability across the legal spectrum. In science, however, the applicability of different theories for different concepts is readily accepted; the concept of 'model-dependent realism' exists.⁷ This is the conception that if a model accurately predicts events, it is attributed a seal of truth for the area that it attempts to explain. However, if two separate models with two different fundamental philosophies can both accurately explain previous and predict future events, model-dependent realism states that one theory is not anymore 'true' than the other. The user is free to employ whichever model is most convenient to any circumstance.⁸

This model dependant concept can be seen in modern international law with the propagation of theories in an attempt to accurately describe events that have

⁴ See Chapter 1.6 Evolution

⁵ See for example; James Lorimer, *The Institutes of Law: a Treatise of the Principles of Jurisprudence as Determined by Nature* (Edinburgh 1872), Pasquale Mancini, *Diritto Internazionale* (Reprinted by Nabu Press 2010) & Quincy Wright, *Mandates Under the League of Nations* (University of Chicago Press 1930)

⁶ This has particularly been demonstrated in relation to the Soviet school of positivism. See for example; "scholars such as Korovin who argued that the Soviet Government should recognise only treaties [as a source of] international law and should reject custom are absolutely wrong" quoted in Pashukanis, *Ocherki po Mezhdunarodnomu Pravu (Essays in International Law)*, (Moscow 1935) Ch. 2, cited in Jan Triska, 'Treaties and Other Sources of Order in International Relations: The Soviet View' (1958) 52(4) *American Journal of International Law* 699, 704-5. Although note the limited use by some authors of the applicability of different theories to describe different areas of law; Kal Raustiala & Anne-Marie Slaughter, 'International Law, International Relations and Compliance', in Thomas Risse & Beth Simmons (eds.), *The Handbook of International Relations* (Sage Publications 2002) 538

⁷ Stephen Hawking & Leonard Mlodinow, *The Grand Design* (Bantam Press 2010)

⁸ *Ibid.* pg. 46

occurred. Fragmentation,⁹ constitutionalisation,¹⁰ and spheres¹¹ are examples of attempts to separate international law into discreet sections that can be explained by reference to individual legal theories. The four legal theories that will be examined in this chapter are all instances of existing and developing theories used to describe the relationship between international organisations and sovereign States. The very presence of so many competing theories demonstrates that it is increasingly difficult for one theory to adequately describe every eventuality of law. If one theory managed to fit all existing circumstances, there would be nothing to compete with. However, in a fragmented world of international law, if two (or more) theories accurately predict future events and adequately describe current events, if the model dependent realism concept was applied to law, it is difficult to argue that one theory is better or more true than another.

During the first thirty years of the twentieth century, scientists discovered that the models they were using to explain reactions that occurred through observation were no longer accurate when applied at the atomic level. A distinct set of theories had to be developed and used called quantum mechanics. Since this time, theoretical physicists have been attempting to unify these quantum theories (theories that describe what happens on the macroscopic level) with Einstein's theory of general relativity (a theory that describes what happens on the everyday level and higher). Science from the days of Plato, to Newton to modern M-theory has been on a quest to find better and better theories or models to describe the laws that govern the universe. Legal scholars have been on

⁹ Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law. Available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf; Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15(3) *Leiden Journal of Inter'l L.* 553; and Andreas Zimmermann & Reiner Hoffmann, with assisting editor Hanna Goeters, *Unity and Diversity of International Law* (Duncker & Humblot 2006)

¹⁰ Jan Klabbers, Anne Peters & Geir Ulfsten, *The Constitutionalisation of International Law* (OUP 2009); Ernst-Ulrich Petersmann, 'How to Reform the UN System? Constitutionalism, International Law, and International Organizations' (1997) 10(3) *Leiden Journal of Int'l L.* 421; and Klaus Armingeon, Karolina Mileqicz, Simone Peter and Anne Peters, 'The Constitutionalisation of International Trade Law' within Thomas Cottier (ed.), *The Prospects of International Trade Regulation* (CUP 2011)

¹¹ Sir G. Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) 92(2) *Hague Recueil* and Hersch Lauterpacht, *The Development of International Law by the International Court* (CUP 1982) 399

a similar search for better and better models to describe what law is and why people follow it. Again from Plato, to Locke and Hart, legal scholars have put forward an increasing amount of theories in efforts to describe this.

Crucially, however, this search to better describe and predict circumstances has led to a specialisation in legal thinking. There are now theories to describe national law, indigenous law and international law. Even within international law, due to fragmentation we have different theories to explain different areas: constitutionalisation for organisations,¹² compliance theory for observance,¹³ rational choice theory¹⁴ and game theory¹⁵ for customary international law and many more. We are left in a position where, like modern day physics, we have different theories to describe distinct separate areas but are lacking a widely accepted theory to link them all together or to adequately describe what is 'law' in every circumstance.

Nevertheless, there does exist at least one crucial difference between the philosophies of law and physics that must be analysed. Since the universe began, the laws that govern physics have never changed; only our understanding of the laws has. Laws that govern the binding of atoms in the universe have not changed and, importantly, never will in the future. Law is altogether different. Five hundred years ago before the introduction of modern international law, States would not have followed a rule laid down by an international body with an exclusive jurisdiction on the use of force. A State's right to wage war was viewed as an integral part of statehood and an international body passing a resolution either forbidding or allowing the use of force would not have been viewed as law. Similarly today, many people might object to a religious organisation laying down

¹² *Supra* Note. 10 (Jan Klabbers, Anne Peters & Geir Ulfsten)

¹³ Andrew Guzman, 'A Compliance-Based Theory of International Law' (2002) 90 California L.R. 1823 and George Downs, David Roche and Peter Barsoom, 'Is the Good News about Compliance Good News about Cooperation?' (1996) 50 International Organization 379

¹⁴ Alexander Thompson, 'Applying Rational Choice Theory to International Law: The Promise and Pitfalls' (2002) 31 Journal of Legal Studies 285; Robert Keohane, 'Rational Choice Theory and International Law: Insights and Limitations' (2002) 31 Journal of Legal Studies 307 & Andrew Guzman, *How International Law Works: A Rational Choice Theory* (OUP 2008)

¹⁵ Jack Goldsmith and Eric Posner, 'A Theory of Customary International Law' (1999) 66 University of Chicago L. Rev. 1113; Mark Chinen, 'Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner' (2001) 23 Michigan J. Int'l L. 143 & Francesco Parisi & Nita Ghei, 'The Role of Reciprocity in International Law' (2003) 36 Cornell Int'l L. J. 93

rules that they must abide by, something that the Roman Catholic Church did on a regular basis throughout Europe during the Middle Ages.¹⁶

Internationally the pace of change in relations and legal dealings has been significant, yet in essence international lawyers are still using the same traditional sovereignty based theory to describe events.

For example, the presently accepted sources of international law that are widely quoted in both academic opinion and supported by previous State practice are enshrined in Article 38 of the International Court of Justice Statute. State practice, however, has moved beyond these rigid structures and to persist with an inflexible adherence to these sources has been said to undermine the relevance of international law.¹⁷ A more fluid plurality of sources would benefit the survival, and continuing relevance, of international law.¹⁸

Law has evolved and will continue to evolve so that what people accept as a law or even where law comes from will adapt as it has in the past. This has the implication that, at best, any theory that is offered to explain 'what is law?' can only adequately explain what is happening in present circumstances and in the past whilst having a diminished future value. Every theory has an unknown time stamp attached to it; it might expire after six months, ten years or at some distant point in the future but at some stage a model will no longer accurately describe current and future events as law will have evolved beyond it.

The only way to provide 'future-proof' theories is to create a theory so basic that it is of extreme difficulty to argue against. 'Law is what people perceive as law', that in itself is so simplistic as to always apply, does not provide any meaningful tool for analysis of norms.

Model dependent realism and the evolution of understanding of law are fundamental aspects of this analysis. It is not the intention of this work to dispute the applicability of the positive theory generally, no such analysis is contained and

¹⁶ Louis Goodman, 'Democracy, Sovereignty and Intervention' (1993-1994) 9 AM. U. J. Int'l L. & Pol'y 27

¹⁷ Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 EJIL 265, 269-270

¹⁸ Andrea Bjorklund & Sophie Nappert, 'Beyond Fragmentation', in Todd Weiler & Freya Baetens (eds.), *New Directions in International Economic Law – in Memoriam Thomas Wälde* (CMP Publishing 2011) 439, 446

the work done throughout cannot be extrapolated to other areas of public international law with ease. The positive theory has failed to make sense in one area of public international law, international organisations, of one aspect of that area, the World Bank. Alternative theories are, therefore, sought to explain the workings of this one particular aspect. If a theory can adequately explain the workings of the World Bank, it should be accepted as applying in that context, but not automatically refuting the work of others either in relation to the World Bank or more generally.

2.3 What is Public International Law?

Perhaps international law has developed to such an extent that one model can no longer accurately reflect all areas of the discipline. Fragmentation has led to the specialisation of subject areas within the field resulting in the possibility that what is perceived as 'international law' might be different depending upon the area concerned. Understanding this area is required for an analysis of the World Bank in order to determine whether general rules of applicability should be sought, laws that apply in all areas of public international law, or whether rules that are only applicable to the World Bank can be classified as law.

For example, a UN General Assembly resolution can be argued to be law within human rights¹⁹ but might struggle to overcome the threshold to amount to law within an area such as international banking regulation.²⁰

This would result in a series of models that would be required to describe in law different areas, each would describe their own specific regime. Perhaps as Bjorklund and Nappert suggest, a 'nuclei model' might exist with the traditional

¹⁹ Gregory Kerwin, 'The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts' (1983) *Duke L. J.* 876; Marko Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2005) 16 (5) *EJIL* 879; and, in reference to Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960) as an "important stage in [the] development" of international law, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16. para. 52

²⁰ Kern Alexander, 'The Role of Soft Law in the Legalization of International Banking Supervision: A Conceptual Approach' (2000) ESRC Centre for Business Research, University of Cambridge, Working Paper No. 168

sovereignty based concept of international law at the centre with various subject areas, such as human rights, having separated and now revolve around a centre.²¹ This could explain both fragmentation and why the areas that have separated off have largely the same structure but also have some crucial differences. It is these differences that have caused the subject areas to break off but they maintain ties with the original concept. Crucially all the separated areas as well as the traditional centre combine together to make international law as a whole.

This model that Bjorklund and Napport propose, and ultimately disagree with, can be readily described by a metaphor of viewing international law as an unstable nucleus. If international law was seen as a nucleus originally, the areas that have separated off can be seen as ejected from the original nucleus into an electron like orbit. The model of fragmentation and separation would suggest that in the future, other areas of international law will separate off from our traditional view and continue to develop into their own distinct areas of law. If we follow this model to a point of *reductio ad absurdum*, international law would fracture to a point where the traditional theory would encapsulate nothing. Yet international law possesses laws that apply across all of the separated areas that continue to develop after these areas are apparently separated from the main: *jus cogens*. There is also evidence that the separate areas that are ejected communicate with each other in the form of tribunal decisions.²² This would suggest that a constitutional model would be more appropriate with a top-down approach to law making.

Yet this constitutional model does not match our modern understanding of how States interact and how international law works. For general international law to exist in a constitutional model above the sovereignty of States, a rule of recognition would have to exist that places a norm of international law above all of the distinct areas. This draws on the legal positivism work of Hart who started from the premise that a system of law relied upon a single rule of recognition to exist. Any norm within the system could not amount to a law without passing this rule of recognition as this rule would identify what are the primary rules of obligation within a system.²³ In a national setting, this rule of recognition might be

²¹ *Supra* Note. 18 pg. 446-7

²² *Ibid.* pg. 448-52

²³ H.L.A. Hart, *The Concept of Law* (Second Edition, Clarendon Press 1944) pg. 92

'a norm has to be passed by the democratically elected Parliament for it to be law' yet Hart argued that there did not exist any one single meta-norm in international law that rested above States.²⁴ Hart instead believed that international law was binding because legal officials on the international stage acted as if it was so²⁵ resulting in a somewhat illogical result of international law being binding but not a legal system.²⁶

This constitutional model, for the whole international legal system, also does not match our current understanding of international law. Hart could find no rule of recognition that would bind each area together²⁷ and the fragmentation of law into separate sections would reflect a shift away from one centralised model to differing models for different sections.

Law, however, is a concept that is greater than the area encapsulated by international law. If a model existed that replaced positivism across all areas of international law, simply observing international law is not enough because of the interaction that it has with national law. Common themes can be seen between the law propagated at the national law, sub-national and international level. There even exist common themes between the distinct areas within international law. Although the sources, subjects and participants might change among the various areas of law, all areas of the discipline share a distinction based upon the behaviour of the participants; a binary legal/illegal distinction. This is that wherever law is defined it must always contain an element of analysing behaviour to see if it is either legal or illegal.

The positive theory, even with all the caveats and problems that have developed, remains the dominant model of understanding in legal terms public international law, yet that does not preclude the introduction of more specialised models for application to specific international legal regimes. In examining the relationship between international organisations and their member States, a number of dominant theories have developed. The specialisation of international law would allow for the development of "law" within these theories that only apply within

²⁴ *Ibid.* Chapter 10

²⁵ *Ibid.* pg. 234

²⁶ *Ibid.* pg. 236. Although Hart never explicitly classed international law as a 'primitive legal order', its lacking a rule of recognition placed it in this category. Mehrdad Payandeh, 'The Concept of International Law in the Jurisprudence of H.L.A. Hart' (2010) 21(4) EJIL 967, 978

²⁷ *Ibid.* pg. 233-4

the context of this specialisation; either perceived as the general relationship between international organisations and States or, narrower, in this circumstance the legal relationship between the World Bank and its member States. Although there may be both general and specific models available, it is their applicability to this specific context and how well they explain the actions that is of concern.

In this context, four models are analysed against the World Bank to see if and how well they can explain the actions of the Bank.

2.4 Progressive Positivism

2.4.1 Defining Progressive Positivism

The term ‘progressive positivism’ is a term coined for this thesis. It is used to describe a school of thought that is emerging from the positive school and is used in this context as a potential candidate to explain in law the actions of the World Bank and its acceptance by States.

In 2000 the International Law Commission (ILC), that is responsible for the codification and progressive development of international law,²⁸ began research on the topic “Responsibility of international organizations”.²⁹ This work stemmed from the completion of the Draft Articles on Responsibility of States for Internationally Wrongful Acts. After eight Special Rapporteur reports, seven drafting committee reports and seven rounds of comments from States and international organisations, in the 3119th meeting on 8 August 2011 the ILC finalised the Draft Articles on the Responsibility of International Organisations and decided to recommend to the United Nations General Assembly ‘(a) to take note of the draft articles on the responsibility of international organizations in a resolution, and to annex them to the resolution; (b) to consider, at a later stage, the elaboration of a convention on the basis of the draft articles’.³⁰

The Articles on the Responsibility of International Organisations (ARIO) were acknowledged by the General Assembly and a time slot has been provisionally

²⁸ Statute of the International Law Commission, Article 1, Paragraph 1

²⁹ Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10 (A/55/10), paras. 726-728 and 729 (1)

³⁰ ILC 63rd Session, Provisional Summary Record of the 3119th Meeting, 8th August 2011 A/CN.4/SR.3119

timetabled for the sixty-ninth session (2014) to consider the question of the form that might be given to the articles³¹.

The ARIO is intended to cover and answer two issues; the responsibility of an international organisation for an act that is internationally wrongful and the responsibility of a State for the conduct of an international organisation.³² According to its commentary, the ARIO exclusively handles secondary rules, which consider the existence of a breach of an international obligation and the consequence for the relevant international organisation, and seeks to leave primary rules, which establish obligations for international organisations,³³ outside of its remit. Yet, to establish when a breach has occurred, the ILC has had to clarify what an 'international obligation' is and when an organisation breaches it.

Article 10

1. There is a breach of an international obligation by an international organization when an act of that international organization is not in conformity with what is required of it by that obligation, *regardless of the origin or character of the obligation concerned*.
2. Paragraph 1 includes the breach of an international obligation that may arise for an international organization towards its members under the rules of the organization.³⁴

Traditional positivism thought on international organisations informs that international organisations are bound by their founding treaties. Although the obligations of an international organisation can be modified over time by practice, it is from the original treaty that the organisation derives its sovereign consent and responsibility. As examined in Chapter One, a subsequent treaty can modify the obligations of the organisation either towards its membership as a whole or towards a group of members provided the subsequent treaty fulfils the

³¹ UNGA Res. 66/100 (27 February 2012) Responsibility of International Organizations

³² Draft Articles on the Responsibility of International Organizations, with Commentaries 2011 (2)

³³ *Ibid.* (3)

³⁴ *Ibid.* Article 10. Emphasis added.

requirements set down by the Vienna Convention on the Law of Treaties. Yet the ARIO, with what is being termed for this thesis 'progressive positivism', is seeking to bind international organisations to more than their respective founding treaties.

By including the text 'regardless of the origin or character of the obligation concerned', the ILC are expanding or acknowledging the available sources of breach that incur international responsibility. The commentaries attached to the ARIO confirm that for an international organisation, an international obligation 'may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order'.³⁵ This moves the laws binding upon international organisations from the narrow traditional positivist school, where only the treaty is binding, to a wider progressive positivist understanding, that any collective legal expression of sovereign will is binding upon an international organisation.

If the actions of the World Bank have not been able to be explained by reference to its Articles of Agreement or any subsequent agreement between its membership, the progressive positive tool would consider wider expressions of sovereign will as also being able to influence and be an appropriate legal basis for action by the World Bank. Therefore, the extent to which the Bank's actions have a possibility to be grounded in this wider framework, in customary international law and general principles, needs to be examined.

The implications of the progressive positive theory and its possible applicability to the Bank need to be established as a precursor to any analysis. In this respect, the practicalities of the progressive positive position raise interesting questions for international organisations in the future. As an example, if an organisation's treaty prohibits it from taking a certain action, yet customary international law requires that it takes that action, the international organisation will either incur international responsibility for breaching its treaty or for breaching customary law. Ordinarily in a conflict of laws, the *lex specialis* tool is applied and the ARIO contains a provision concerning this tool.³⁶ The concept that a specialist rule overrides a general rule has a long history in international jurisprudence with roots

³⁵ *Ibid.* Article 10 Commentary (2)

³⁶ *Ibid.* Article 64

back to Grotius³⁷ yet in the context of responsibility of international organisations does not offer as much assistance as is required. In the above example, the specialist rule would relate to the treaty as that is referencing conduct of the organisation whilst the customary international law is referencing conduct generally. Yet if the organisation's treaty is silent on an issue, under the progressive positive understanding the organisation would be bound by customary international law. Or, for an approach with greater nuance, if both the treaty and the customary law require positive action and the customary international law is more specialist than the treaty, the customary law would apply.

As treaties are created at a specific time and customary international law is continually evolving as continual practice occurs, as the period between any conflict of laws and creation of a treaty becomes greater, the greater the possibility that customary international law would become more specialist than the treaty. Particularly if an organisation's treaty is silent on an issue, under the progressive paradigm an organisation is bound by customary international law and would have to act in a manner as to not bear responsibility for breach of that law.

The tool as articulated upon by Article 64 ARIO does not sufficiently limit the competence of an organisation to only its treaty or internal rules.

Article 64

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act... of an international organization... are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members.

Firstly, to use this Article to articulate that the responsibility of an organisation, what it is and how it is created, stems solely from the treaty would undermine every preceding Article in the ARIO by rendering them worthless as every organisation has a founding treaty outlining rules applicable to that organisation. Secondly, the application as articulated upon only allows for the use of *lex*

³⁷ Hugo Grotius, *De Jure belli ac pacis. Libri Tres*, Book II Sect. XXIX.

specialis when a special rule of international law already exists. Although the traditional positivist theory position is that organisations are generally expressly limited to the purposes laid down in their treaties (and, therefore, unable to consider customary international law as it is not under their purposes), this does not necessarily preclude the application of customary law *within* the purposes laid down, particularly where a large time frame has elapsed between ratification of the treaty and a potential conflict as customary international law has the potential to become more specialised. Thirdly, the commentary makes clear that this was not a blanket statement applicable to all organisations by stating that '(t)hese special rules may concern the relations that certain categories of international organizations or one specific international organization have with some or all States or other international organizations'.³⁸ Fourthly, if the ARIO is a reflection of customary international law, then this would imply that there exists in customary international law a minimum duty binding upon all organisations that, unless their treaty specifically rejects, allows for the application of customary international law norms to an organisation. In these circumstances, Article 10 is merely a reflection of customary international law that acknowledges that legal responsibility can stem from customary international law.

This leaves an unclear situation where it would appear that some organisations are only bound by their treaty in areas of law, whilst some are bound by customary international law as well. For application to the World Bank, it would, therefore, need to be established that as a minimum customary international law could only bind within the specific purposes of the Bank, and whether the criteria in Article 64 ARIO apply.

It should be noted that it is only assumed that in a conflict the *lex specialis* tool would be applied by any relevant decision maker. If States give a clear affirmation of the progressive positive principle it is possible that a decision maker might seek to distinguish laws, in which case an international organisation would be bound by both its treaty and customary international law, or seek to apply the *lex posterior* principle, that later rules override earlier rules, as a more recent confirmation of State consent. Alternatively a customary international law could exist that does

³⁸ *Supra* Note. 32, Article 64 Commentary (1)

not amount to a *jus cogen* yet does not allow for the application of the *lex specialis* principle.³⁹

Whilst a treaty seeks to limit the scope of an organisation under the positivist theory by only allowing it to act within the limit the member States have consented too, the progressive positivist understanding would appear to be only limited by the applicability of a customary international law to the work of the organisation.

Under the progressive positive interpretation proposed by the ARIO, an organisation is bound by both its treaty and customary international law and in case of conflict must bear responsibility for the law it breaches. The nature of 'responsibility' is not examined in the ARIO⁴⁰ yet it is clear that an organisation bears a responsibility to act within the law and that if customary international law maintains that an organisation acts in contrary to its treaty then an organisation faces a choice on whether to bear responsibility for either a breach of its treaty or for a breach of customary international law or alternatively seek to claim that the *lex specialis* tool should be applied.

Using the tool of *lex specialis* will allow a treaty to prevail for an organisation in some circumstances yet, as demonstrated, circumstances can exist that preclude the blanket use of the tool in favour of a treaty to limit an organisation's competence. An organisation is usually limited by the purposes that are assigned to it under its treaty which at the time of creation, with the *lex specialis* tool, would allow an organisation to claim that its treaty took precedence over customary international law and, therefore, it had to act in conformity with its treaty. However, as time progresses, a greater possibility exists that customary international law will bear a relevance to an organisations work if customary international law becomes more specialised on the purposes that the organisation is created to handle. This may have implications and allow for an understanding of the actions of the World Bank if customary international law, for example defining

³⁹ International Law Commission, 'Fragmentation of International Law: Topic (a): The function and scope of the *lex specialis* rule and the question of 'self-contained' regimes', 2.5.2 Prohibited *lex specialis* available at http://untreaty.un.org/ilc/sessions/55/fragmentation_outline.pdf accessed August 2013.

⁴⁰ *Supra* Note. 38, Article 3 Commentary (4)

development or allowing for a governance role, had developed to be more specialised than the treaty provisions.

2.4.2 What Evidence Supports the Progressive Positivist Understanding?

As the ARIO is not yet in treaty form, the only legal possibility some or all of its provisions can be binding upon States is if it amounts to customary international law. This questions the role that the ILC has played in the creation of the ARIO in whether it has sought to codify existing customary international law or has sought to progressively develop the law in this area. Whilst the work of the ILC has been the primary mover towards the development of this school of thought, there exists other legal scholarship that claims that customary international law is directly applicable to international organisations.

Disputes on this subject are rare which has led to little practice in Courts on the subject of the responsibility of international organisations.⁴¹ However, the ICJ has ruled that international organisations, as subjects of international law, are bound by 'general rules of international law'⁴² whilst the European Court of Justice has acknowledged that 'the European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law'.⁴³ Notwithstanding these judgments, and the allowance by the United Nations for the application of international humanitarian law to peacekeeping operations,⁴⁴ the practice of the application of customary international law to organisations or even the acknowledgement by organisations that they are bound is sparse. The majority of the academic work on the application of customary international law to organisations has developed in relation to human rights and whether international organisations are bound to respect them.⁴⁵

⁴¹ *Supra* Note. 32, General Commentary (5)

⁴² *Interpretation of the Agreement of 25 March 1951 between WHO and Egypt*, I.C.J. Reports

1980, pp. 890-900, para. 37

⁴³ Case C-162/96, *Racke v. Hauptzollamt Mainz* [1998] ECR I-3655, para. 45

⁴⁴ Observance by United Nations forces of international humanitarian law, 6 August 1999, ST/SGB/1999/13

⁴⁵ For example see; for the United Nations; Nigel White, 'Towards a Strategy for Human Rights Protection in Post-Conflict Situations', in Nigel White and Dirk Klaasen (eds), *The UN, Human Rights and Post Conflict Situations* (Manchester University Press 2005), for the European Union; Tawhida Ahmed & Israel de Jesus Butler, 'The European Union and Human Rights: An International Law Perspective' (2006) 17(4) EJIL 771, for the WTO; Joost

The ARIO contains a number of provisions that have been contested by numerous governments and international organisations, including the World Bank.⁴⁶ The attribution of customary international law to international organisations drew criticism on a number of grounds. The IMF sought to ensure that inconsistent customary international law ‘would neither override the provisions of an organization’s charter nor govern actions taken pursuant to the provisions of the organization’s charter’⁴⁷ yet as demonstrated, the lack of explicit recognition of this situation within the ARIO does not preclude the application of customary international law over an organisations treaty in specific circumstances. The International Labour Organization, in questioning the existence of customary international law on responsibility binding upon organisations, states ‘the views expressed by international organizations reflect not only the lack of *opinio juris* but rather a clear opposition to the existence of any customary law in the field except for a very narrow set of norms that may be recognized as *jus cogens* in international law’.⁴⁸

The World Intellectual Property Organization in contrast sought to include ‘established or generally accepted principles of international law’ within the definition of the rules of the organisation⁴⁹ and the Council of Europe specifically acknowledged ‘general international law’ as a part of the legal system governing international organisations.⁵⁰ Whether ‘general international law’ is the same as ‘customary international law’ is questionable yet it is clear that these organisations sought legal grounding outside of their traditional internal law of the treaty. The International Criminal Police Organization specifically states that ‘applicable rules of customary international law’ are ‘obligations resting upon international organizations’.⁵¹

Pauwelyn, ‘The Role of Public International Law in the WTO: How far can we go?’ (2001) 95 AJIL 535 and for the World Bank and the IMF; Sigrun Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (Cavendish Publishing 2001)

⁴⁶ For governments see A/CN.4/547 and A/CN.5/636. For international organisations see A/CN.4/545, A/CN.4/556, A/CN.4/568, A/CN.4/582, A/CN.4/593, A/CN.4/609 and A/CN.4/637. For the World Bank specifically see A/CN.4/568 and A/CN.4/637.

⁴⁷ A/CN.4/545 pg. 13

⁴⁸ A/CN.4/637 pg. 15

⁴⁹ A/CN.4/556 pg. 39

⁵⁰ A/CN.4/637 pg. 7

⁵¹ A/CN.4/556 pg. 30

Germany acknowledges that there is no customary international law on the responsibility of international organisations⁵² yet goes on to state that ‘a minimum standard of responsibility can be derived from customary international law and from human rights standards as well as generally accepted standards contained in widely ratified treaties’.⁵³ In contrast, Democratic Republic of the Congo state that ‘any action or omission by an organization that is incompatible with the rules of general customary law or the provisions of a treaty to which it is a party constitutes an internationally wrongful act that will be attributable to that organization’.⁵⁴

One major fault behind the ARIO is that it readily assumes that like States, all international organisations enjoy the same legal personality and so general rules can apply to all organisations equally.⁵⁵ This is known not to be the case. All organisations have the personality given to them by their founding treaty and vary according to the powers given to them and the manner States sought them to behave both in the relations to members and relations to non-members.⁵⁶ The ARIO, in attempting to create a general framework, has sought to ignore this. The different opinions expressed by both States and organisations demonstrate that there is no general consensus amongst actors on this subject. Some organisations are happy to be bound by customary international law obligations, some are not, yet the ARIO seeks to apply rules to them all equally.

⁵² A/CN.4/556 pg. 47

⁵³ *Ibid.*

⁵⁴ A/CN.4/556 pg. 28

⁵⁵ This is highlighted in A/CN.4/637 by the European Commission (pg. 8), International Labour Organization (pg. 8), International Monetary Fund (pg. 9), a Joint submission of the Comprehensive Nuclear-Test-Ban Treaty Organization, the International Civil Aviation Organization, the International Fund for Agricultural Development, the International Labour Organization, the International Maritime Organization, the International Organization for Migration, the International Telecommunication Union, the United Nations Educational, Scientific and Cultural Organization, the United Nations World Tourism Organization, the World Health Organization, the World Intellectual Property Organization, the World Meteorological Organization and the World Trade Organization (pg. 10), North Atlantic Treaty Organization (pg. 11) and the Organization for Economic Cooperation and Development (pg. 13).

⁵⁶ The ICJ has stated that “international organizations do not, unlike States, possess a general competence, but are governed by the ‘principle of specialty’, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.” *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, I.C.J. Reports 1996, p. 66 at 78, para. 25.

The evidence supporting the ARIO is, therefore, debatable and support amongst States and international organisations for the application of customary international law to organisations is not uniform. However, it is clear that if the ARIO is given a treaty form which is ratified or an otherwise clear endorsement by States, then conceptually the application of customary international law norms to the work of international organisations will be possible and legally allow organisations to work within limits set by customary international law that is of relevance to their mandate.

2.4.3 Applied to the World Bank

Despite the reservations outlined above, if the World Bank is bound by customary international law under the progressive positive school of thought, there is potential to legally explain some or all of the actions that the World Bank has taken outside of the positive theory. The introduction of environmental, indigenous and resettlement rights, the focus upon a widening definition of development including good governance and corruption and more broadly the shift away from its original role as a project financier could potentially be explained under the progressive positivist school if there were customary international law in place that the Bank could rely upon as legal justification for its actions.

As the ARIO is not a treaty and is only binding if it is customary international law, a circular argument is created in reference to its applicability. Assuming that the ARIO accurately reflects customary international law, the ARIO contains the provisions that stipulate international organisations are bound by customary international, yet only apply to international organisations if international organisations are bound by customary international law in the first place. There is no readily available solution to this paradox until the form of the ARIO is settled by the General Assembly in 2014 and until that point the law on this area will remain unclear.

Setting aside this paradox, there are a number of issues that do not readily allow the application of the progressive positive thought to the World Bank to explain in law the World Bank's actions since its inception.

Firstly, it is clear that this is an emerging school of thought. If States give a clear affirmation of the progressive positive paradigm by ratifying the ARIO in a treaty

form, this could only explain the World Bank's actions going forward from that point or, if States articulate that this is in their opinion a reflection of existing customary international law, explain the actions of the Bank from the emergence of this thought forward. The controversy associated with the creation of the ARIO demonstrates that there is no general consensus as of yet and whilst it could possibly explain recent or future actions of the Bank, historical actions are not readily justified.

Secondly, although progressive positivism would suggest the applicability of customary international law within the purposes of an organisation, in the event of conflict the *lex specialis* tool is applied and the organisation's treaty would *prima facie* prevail. Although this is a developing area and the application of these legal principles is not clear, it would appear that although customary international law can be binding if it concerns a matter within the principles of the organisation and is not expressly counter to a provision of the treaty, customary law on unrelated subjects or that is expressly counter to a provision is not binding.

The introduction of OP 4.01 Environmental Assessment, OP 4.10 Indigenous Peoples and OP 4.12 Involuntary Resettlement are all examples of World Bank actions that have dealt with areas potentially governed by customary international law.⁵⁷ Yet, as examined in Chapter One, human rights are inherently political and the Bank's actions on these topics are expressly against the no political interference clause of the Articles of Agreement.⁵⁸ Setting aside whether human rights are within the purposes of the Bank, if customary international law is in conflict with a treaty provision, the treaty provision prevails. In the examples given above the Bank's actions are expressly against a treaty provision and, therefore, cannot be explained via the progressive positive school of thought.

Thirdly, it is unclear if the areas of law that the World Bank have introduced despite its treaty actually exist in customary international law. An examination of the exact legal status of human rights is beyond the scope of this thesis yet it is sufficient to note that there is considerable debate surrounding whether all,⁵⁹

⁵⁷ The status of norms concerning the environment, indigenous peoples and involuntary resettlement is unclear. The subject is discussed further below.

⁵⁸ Article IV Section 10

⁵⁹ Marc Cogen, "Human rights, prohibition of political activities and the lending policies of World Bank and International Monetary Fund" in Subrata Chowdhury, Erik Denters & Paul

some⁶⁰ or no⁶¹ human rights are customary international law. The ICJ in its judgments has tended towards the opinion that only some human rights are customary international law,⁶² none of which are of direct relevance to the Bank's work. Even when human rights are given the status of customary international law, there is debate that they possibly only extend to State responsibility as they were created as protection against the power of States.⁶³

Finally, if the ARIO is customary international law, it raises the possibility of an international organisation amounting to a persistent objector. As this is a developing area of law, it is unclear whether international organisations can attain this status. One of the areas of concern that has raised such controversy in relation to the ARIO is the readiness that the ILC has transferred areas of law applicable to States to international organisations.⁶⁴ Although it is law that States can be persistent objectors, it should not be assumed that international organisations can attain this status simply as they have legal personality, particularly in a situation where all of its members accept the applicability of customary international law. The World Bank expressly states that the internal

de Waart (eds.), *The Right to Development in International Law* (Martinus Nijhoff Publishers 1992) 379, at 387

⁶⁰ The United Nations Office of the High Commissioner of Human Rights advocates that '(s)ome fundamental human rights norms enjoy universal protection by customary international law'. Available at <http://www.ohchr.org/en/issues/Pages/WhatareHumanRights.aspx> accessed September 2013.

⁶¹ In reference to the International Covenant on Economic and Social Rights, the IMF has stated that 'it is not generally accepted that the Covenant (or the norms contained in it) form part of general or customary international law' François Gianviti, 'Economic, Social and Cultural Rights and the International Monetary Fund' (2002) available at <http://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/gianv3.pdf> accessed August 2013.

⁶² The right to self-determination (*East Timor case (Portugal v. Australia)* [1995] ICJ Rep 90, at 101), the prohibition on genocide (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* [1951] ICJ Rep 15, at 23), freedom from racial discrimination including apartheid, and the prohibition on slavery (*Barcelona Traction Light and Power Co. Ltd. (Belgium v. Spain)* [1970] ICJ Rep 3, at 32), freedom from arbitrary detention and the right to physical integrity, (*Diplomatic and Consular Staff in Tehran* [1980] ICJ Rep 3, at 42) protection against denial of justice (*Barcelona Traction Light and Power Co. Ltd. (Belgium v. Spain)* [1970] ICJ Rep 3, at 47). For a further discussion of this topic see Tawhida Ahmed & Israel de Jesus Butler, 'The European Union and Human Rights: An International Law Perspective' (2006) 17(4) EJIL 771

⁶³ Namita Wahi, 'Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability' (2006) 12 U.C. Davis J. Int'l L. & Pol'y 331, 376

⁶⁴ For a government's perspective see A/CN.4/636 pg. 8 Portugal (1). For an international organisation's perspective see the IMF's comments A/CN.4/637 pg. 9-10

law of an organisation 'prevail(s) over *all* international obligations other than those deriving from *jus cogens*'⁶⁵ and rejects the ARIO's ability to codify primary rules of responsibility.⁶⁶ However, it is unclear whether this would be sufficient to allow the Bank to act as a persistent objector in a situation where some or all of its members accept the progressive positive argument under the ARIO.

Despite the potential that the progressive positive school of thought offers for explaining some of the actions of the World Bank going forward, its application to explaining the previous actions in law is insufficient due to not all actions being able to be traced to customary international law and the limited extent to which it can be applied to historical actions.

Other, more widely accepted, tools of analysis are, therefore, examined. These tools have found a use in explaining the work of other international organisations in terms of law and may serve a similar purpose for the World Bank.

2.5 Constitutionalisation of International Organisations

2.5.1 Defining Constitutionalisation

Defining the term 'constitutionalisation' is no easy task due to the multitudes of work applying the term in different forms. In general uncontroversial forms, it refers to a rejection of the traditional positivist theory of international law based upon bilateral relations between equals and the acceptance of a verticalization within international law in terms of an international constitutional order. What form this constitution takes, how it is articulated and what exactly is encompassed within this order are all readily debated. Academic literature in this discipline has in general evolved from seeking constitutionalised orders within one specific fragment of international law generally involving an international organisation, assuming that the fragmentation of international law holds true, to seeking a constitutionalist reading for public international law in its entirety based upon 'common interests'⁶⁷ or 'community interests'⁶⁸ that limit State sovereignty

⁶⁵ A/CN.4/637 pg. 41 World Bank (4) Emphasis in original.

⁶⁶ *Ibid.* World Bank (1) & (2)

⁶⁷ Thomas Kleinlein, *Konstitutionalisierung im Völkerrecht* (Springer-Verlag, 2012)

⁶⁸ Steven Wheatley, *The Democratic Legitimacy of International Law* (Hart 2010) pg. 171

like a constitutional order.⁶⁹ Yet it is this initial understanding, one based upon the constitutionalisation of international organisations, which is examined in this section as to determine its applicability to the World Bank.

The term 'constitutionalisation' is created in reference to the traditionally domestic view of a constitution. What is recognised as a constitution domestically was created by legal philosophy in the 18th and 19th centuries⁷⁰ as a means of limiting the powers of the State for the intrusion on domestic rights and guaranteeing the political participation of a State's citizens.⁷¹ This domestic constitution typically includes the basic structures in which political power is organised, the checks and balances between different areas of government, human rights protection, political legitimacy and a means of social integration⁷² and it is these processes that are being extrapolated onto the international plane to provide a legal theory for the work of international organisations. Nevertheless, the attempted introduction of the Treaty establishing a Constitution for Europe demonstrates a willingness outside of academia to accept that a constitution is more than limited to a domestic sphere and can be employed as terminology within the international legal domain.

Inside academia, the acceptance of the term 'constitutionalisation' in relation to international organisations has been present since the term was initially used in reference to the United Nations charter and debates surrounding whether it amounted to a constitution for a new world order.⁷³ The evolutionary processes of the EU and the WTO have also drawn increasing parallels with domestic systems and spawned a furore of academic debate surrounding the exact nature of constitutionalisation present within these organisations.⁷⁴

⁶⁹ See generally, Jan Klabbers, Anne Peters & Geir Ulfstein, *The Constitutionalization of International Law* (OUP 2009) and Ernst-Ulrich Petersmann, 'Constitutionalism and International Organizations' (1996) 17 Nw. J. Int'l L. & Bus. 398

⁷⁰ Erika de Wet, 'The International Constitutional Order' (2006) 55 Int'l & Comp. L.Q. 51

⁷¹ Bardo Fassbender, 'The United Nations Charter as Constitution of the International Legal Community' (1998) 36 Columbia J'nal of Transnational L. 573

⁷² Frank Schorkopf and Christian Walter, 'Elements of Constitutionalization: Multilevel Structures of Human Rights Protection in General International and WTO-Law' (2003) 4 German L. J'nal 1359, 1360

⁷³ Wilfried Jenks, 'Some Constitutional Problems of International Organizations' (1945) 2 BYIL 11. For a more current account, see Pierre-Marie Dupuy, 'The Constitutional Dimension of the Charter of the United Nations Revisited' (1997) 1 Max Planck UNYB 1

⁷⁴ For work on the EU see; Jürgen Habermas, 'The Crisis of the European Union in the Light of a Constitutionalization of International Law' (2012) 23(2) EJIL 335; Thomas Christiansen

Constitutionalisation within this context focuses upon the founding treaty of an international organisation and it having or giving it (depending on one's view) a special character; namely as a constitution of that organisation. The treaty, therefore, creates a new subject of international law that is empowered to realise specific common goals between its members yet is crucially constrained by the same document as the powers attributed to an international organisation have to be exercised within the legal framework given to it.⁷⁵

'The constitution of an international organization thus embodies the legal framework within which an autonomous community of a functional (sectoral) nature realizes its respective functional goal, e.g. trade liberalization, human rights protection, or the maintenance of international peace and security.'⁷⁶

Organisations must, therefore, only exercise powers that can be readily traced to their respective legal frameworks and constitutionalisation provides a viewpoint for the rejection in law of *ultra-vires* actions. Whilst similar to the traditional positivist understanding up until this point, the constitutionalist school seeks to move beyond the existence of a legal framework, which if the only requirement would allow all treaty based international organisations to be constitutionalized to differing extents, and identifies and/or advocates for the application of certain constitutionalist principles, 'such as the rule of law, checks and balances, human rights protection, and possibly also democracy, to the law of international

& Christine Reh, *Constitutionalizing the European Union* (Palgrave 2009) and Berthold Rittberger & Frank Schimmelfennig, 'The Constitutionalization of the European Union' (2006) 13(8) *Journal of European Public Policy* 1148. For work on the WTO see; Deborah Cass, *The Constitutionalization of the World Trade Organization* (OUP 2005) which is in contrast to her earlier work in Deborah Cass, 'The "Constitutionalization" of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade' (2001) 12 *EJIL* 39 and Markus Krajewski, 'Democratic Legitimacy and Constitutional Perspectives of WTO Law' (2001) 35 *J'nal of World Trade Law* 167. For international organizations generally see; José Alvarez, 'Constitutional Interpretation in International Organizations', in Jean Marc Coicaud & Veijo Heiskanen (eds.), *The Legitimacy of International Organizations* (United Nations UP 2001) and Neil Walker, 'The EU and the WTO: Constitutionalism in a New Key', in Grainne de Búrca & Joanne Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues* (Hart 2001)

⁷⁵ Anne Peters, 'Global Constitutionalism Revisited', presented at a seminar on the Future of International Constitutional Law in Amsterdam 28 November 2003 available at https://ius.unibas.ch/fileadmin/user_upload/fe/file/Peters_Global_Constitutionalism_Revisited.pdf accessed July 2013.

⁷⁶ *Supra* Note. 70, pg. 53

organizations'.⁷⁷ This seeks to recreate the nationalist idea of a constitution within the international sphere.⁷⁸ The constitutionalist theory is, however, accepting of the incomplete constitutionalist make-up of its organisational subjects and acknowledges that organisations can appear at different stages of constitutionalisation along a spectrum⁷⁹. It then proceeds to advocate for further constitutionalising of organisations with the introduction of the various principles outlined above.

If the World Bank is accepted as falling within this theory, it may explain the actions that it has taken by reference to the constitutionalist nature of its founding document. The requirement to introduce these other areas of constitutionalist principles, such as human rights protection, could explain the need for the Bank to consider such areas despite not being found in its Articles of Agreement.

Beyond the requirement of a founding treaty, certain legal aspects can be identified that are highlighted as evidence of a process of constitutionalisation. Different authors have highlighted different aspects yet the main points are examined below.⁸⁰ This is not a requirement list that outlines every aspect an organisation must possess. This is demonstrated as of the acknowledgment by the school of thought that different organisations can embody some or all of these aspects and are, therefore, at different points of being constitutionalised. Dunoff even urges that scholars do not close down constitutionalisation to only those principles extrapolated from national regimes and instead scholars 'articulate

⁷⁷ Jan Klabbers, Anne Peters & Geir Ulfstein, *The Constitutionalization of International Law* (OUP 2009) pg. 204

⁷⁸ This view of constitutionalization rejects the somewhat traditional concept of a constitution as embodying the total governance applicable to a grouping of people and instead is based upon a pluralistic understanding of law. It therefore allows constitutions to develop in various sectors of international law that are not in conflict with each other or with national constitutions or even with one overarching international law constitution. For further work on this see *Ibid.* pg. 202.

⁷⁹ This is particularly relevant for work on the WTO that advocates for further constitutionalising of the organisations such as Klaus Armingeon, Karolina Milewicz, Simone Peter and Anne Peters, 'The Constitutionalisation of International Trade Law' in Thomas Cottier & Panagiotis Delimatsis (eds.), *The Prospects of International Trade Regulation: From Fragmentation to Coherence* (CUP 2011) pg. 69

⁸⁰ See Deborah Cass, *The Constitutionalization of the World Trade Organization* (OUP 2005) Chapter 5 for an appreciation of the points created by an 'institutional managerialism' approach, 'rights-based constitutionalization' approach and 'judicial norm-generation' approach.

forms of constitutionalism designed to open up spaces⁸¹ by focusing beyond a static frame. However, some constitutional principles are articulated upon here to create a framework for application against the World Bank.

Existence of constitutional principles: Constitutional principles such as human rights, the rule of law or democracy, emanating from the founding treaty, should bind Member States.⁸²

Autonomy of the organisation: The organisation exists autonomous from its creators. Although international organisations are acknowledged as being 'endowed with a certain autonomy',⁸³ this feature of constitutionalisation examines how autonomous an organisation is by considering a number of features such as the relationship between members and the organisation, the basis of validity for the organisation's law and the supremacy of the organisation's law over Members.⁸⁴

The legalization of dispute settlement: The organisation contains a judicial system to adjudicate upon disputes that arise in relation to the constitution. This is based upon the process of judicial review from national legal systems that provide a check and balance over the power of the executive and legislature. The EU, with the ECJ, and the WTO, with its Appellate Body, are held as two examples of this in action.

Direct application of organisational rules at a national level: This aspect entails the direct application of the organisation's rules within Member Courts allowing citizens of the members to constrain the domestic government by reference to the rules of the organisation. Work in this area has primarily stemmed from analysis of the EU in light of the ECJ's decision in the *Costa v ENEL*⁸⁵ case that highlighted the supremacy of EU law over national law.⁸⁶

⁸¹ Jeffrey Dunoff, 'Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law' (2006) 17(3) EJIL 647, 673

⁸² *Supra* Note. 75, pg. 7

⁸³ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, 66, para. 19

⁸⁴ For more discussion of the features examined see *Supra* Note. 77, pg. 208-210

⁸⁵ Case 6/64 *Costa v ENEL* [1964] ECR 1251

⁸⁶ See for example G. Federico Mancini, 'The Making of a Constitution for Europe' (1989) 26 Common Market L. Rev. 595

Overcomes the domestic political process-deficiencies: The international organisation's law prevents deficiency that can arise from the domestic political process by not allowing certain actions from taking place. Work on the WTO has focused upon the ability of international trade rules to prevent national protectionist interests.⁸⁷

Accountability towards its citizens: The organisation must be legally accountable for its actions. Traditionally this has involved accountability to the Member States of the organisation yet from a constitutionalist perspective also involves accountability to the citizens of the Member States.⁸⁸

Existence of the rule of law and human rights responsibilities: The organisation must be bound by legal principles, specifically identified from its treaty, that act to contain the scope and limit the application of the organisation. All secondary law must flow from and not be in conflict with the primary constitution creating an internal hierarchy of law norms with the primary norms emanating from the treaty acting above secondary norms. Peters additionally calls for the requirement that organisations respect human rights due to them forming 'the core of modern constitutional law'.⁸⁹

The constitutionalist school of thought seeks to improve the work of organisations by drawing in other elements from a constitutionalist construction, mainly legitimacy and democratic accountability, and offering solutions to the problems that they present.⁹⁰ The work on constitutionalisation is nonetheless not relevant to every organisation, as evidenced by the plethora of work in relation to the United Nations, EU and the WTO and the relatively small amount of application to other organisations. The existence of some or all of the above aspects only

⁸⁷ Ernst-Ulrich Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (Westview 1991) pg. 96

⁸⁸ See for example ECJ, Case 26/62, *Van Gend & Loos* [1963] ECR 3, at II.B that subjects of the Community legal order 'comprise not only member states but also their nationals'.

⁸⁹ *Supra* Note. 77, pg. 214

⁹⁰ Jean Marc Coicaud, 'Conclusion: International Organizations, the Evolution of International Politics, and Legitimacy' in Jean Marc Coicaud & Veijo Heiskanen (eds.), *The Legitimacy of International Organizations* (United Nations UP 2001) 519 and Steven Wheatley, *The Democratic Legitimacy of International Law*, (Hart, 2010) pg. 193-207

provides evidence of a process of constitutionalising taking place rather than an organisation being explicitly constitutional.⁹¹

2.5.2 Applied to the World Bank

A constitutionalist approach to the World Bank would offer a number of legal answers to the actions that the Bank has taken.

The autonomy of the Bank from its Members was demonstrated in Chapter One yet rather than seeing World Bank actions that are outside of or against the treaty as encroaching upon the sovereignty of a Member State as the positivist school of thought would suggest, the actions under a constitutionalist approach are simply *ultra vires* and should be accorded no legal status and the Bank should only act in accordance with its Articles of Agreement as its constitution. Alternatively, as seen with the introduction of human right norms within the Bank's legal system, this can be seen as evidence of constitutional principles that, as are core to modern constitutional law, offer an explanation for why the Bank has read into the treaty, despite their traditionally non-economic position, as requirements for lending. Their use as Operational Policies and conditions upon loans provide evidence of the organisation seeking to bind its Members to its own internal law as well preventing domestic political process-deficiencies that could allow Members to regulate in a fashion inconsistent with the internal law of the Bank or with human rights obligations generally.

The introduction of the Inspection Panel can be seen as an attempt to legalise dispute settlement that had previously only taken place in diplomatic or political spheres. Also the Inspection Panel provides an accountability mechanism for citizens of Member States who are eligible to apply to start proceedings against the World Bank to ensure that the Bank does not act outside of its internal law.

Despite this apparent suggested constitutional nature, a number of significant problems are present that prevent the ready application of this school of thought. The constitutionalist theory is based upon the premise of an organisations founding treaty being a constitution. As a constitution is a higher form of law that cannot be broken, any act outside of the treaty would be *ultra vires* and, therefore, by application of the legalization of dispute settlement, be void and the

⁹¹ *Supra* Note. 81, Footnote 33

actions brought back into line of the constitution. When this is applied against the World Bank, two points dispute the application. Firstly, as demonstrated in Chapter One, States are accepting the actions of the World Bank despite them being outside the treaty. It is not the case that States are alleging the World Bank has broken its mandate and that its powers should be constrained to only those attributed under the treaty, they are willing to accept the World Bank dictating terms in agreements and requiring environmental, indigenous peoples and other standards in loans that are not encompassed within the original treaty and in some cases are explicitly against the words of the treaty. The use of constitutionalist theory, like the positivist school, cannot explain this occurrence as under the constitutionalist approach, despite the autonomy given to the organisation, the members of the Bank would be requiring it to act within its constitution.

Secondly, although the creation of the Inspection Panel could be explained by the legalization of dispute settlement, as will be examined in Chapter Five, the creation and use of the Inspection Panel is not concerned with the interpretation of the treaty as the constitutionalist theory would suggest but is instead concerned with the legalisation of the secondary norms that exist within the World Bank. The Panel does not interpret or concern itself with the treaty and examine whether the World Bank's actions are *ultra vires*, unlike the WTO Dispute Settlement system that examines disputes concerning interpretation of the primary documents,⁹² it instead is concerned with the interpretation and application of the Operational Policies and Bank Procedures and whether the Bank's actions have complied with these norms.

In addition as examined in Chapter One, the Operational Policies are explicitly against the treaty in interfering with the political affairs of its Member States which under a constitutionalist approach could not occur. Instead, the Operational Policies, as secondary norms, would have to be in compliance with the Articles of Agreement as its constitution. The Operational Policies also only concern a small number of human rights rather than a protection of all human

⁹² Annex 2 of the World Trade Organization Agreement, Understanding on Rules and Procedures Governing the Settlement of Disputes, Appendix 1

rights or even a specific subset such as civil and political rights appearing to put the place the Bank against 'the core of modern constitutional law'.⁹³

Despite the attractions that a constitutionalist reading of the World Bank offers, the problems presented prevent the application as an effective tool for understanding the Bank's actions in law. In the future, it is possible that the World Bank will develop to such an extent that a constitutionalist approach offers a better understanding of its workings, yet without the development of the legal aspects identified above, particularly in reference to the hierarchal form of the internal law with all secondary norms existing in compliance with the treaty, the current problems of application prevent any meaningful analysis using this tool.

2.6 Global Administrative Law

2.6.1 Defining Global Administrative Law

The notion of a global administrative law is, similar to progressive positive, an emerging school of thought.⁹⁴ However, unlike progressive positive, this theory has garnered considerable academic debate since a seminal paper in 2005 alleged the emergence of a global administrative law that could be utilised to explain aspects of global governance that the positivist school no longer was able to explain.⁹⁵ The theory is built upon the twin premise that much of what is described as global governance can be understood as regulatory administration and that this regulatory capacity is often organised and shaped by principles of an administrative law character.

⁹³ *Supra* Note. 77, pg. 214

⁹⁴ Although the term 'international administrative law' has been in use, it has typically referred to the administrative rules, procedures and tribunals of international organisations that are concerned with an organisation's staff. See Nassib Ziadé (ed.), *Problems of International Administrative Law* (Martinus Nijhoff 2008). However in the early twentieth century scholarship on this area was concerned with a wider formulation that encompassed what is now being referred to as global administrative law. See Paul Reinsch, 'International Administrative Law and National Sovereignty' (1909) 3 AJIL 1. Some authors have however in the inter-years used the term 'international administrative law' in the wider sense that is now being used by 'global administrative law'. See for example, Daniel Partan, 'International Administrative Law' (1981) 75(3) AJIL 639 and Henry Perritt, Jr, 'International Administrative Law for the Internet: Mechanisms of Accountability', (1999) 51 *Administrative Law Review* 871.

⁹⁵ Benedict Kingsbury, Nico Krisch & Richard Stewart, 'The Emergence of Global Administrative Law' (2005) 68 (3 & 4) *Law and Contemporary Problems* 15

The focus upon global governance is premised upon the claim that there are a number of transnational systems of regulation, established either formally via a treaty or in an informal fashion, that address global issues that a single State cannot manage alone which have shifted regulatory competence, in these specific areas, from national governments to a global level.⁹⁶ Beyond the accepted positivist theory, which as examined in Chapter One explains the transfer of governance as an extension of sovereignty, global administrative law alleges that:

“much of the detail and implementation of such regulation is determined by transnational administrative bodies... that perform administrative functions but are not directly subject to control by national governments or domestic legal systems or, in the case of treaty based regimes, the states party to the treaty.”⁹⁷

This distinction of transnational bodies acting outside the effective control of States is what separates global administrative law from simply being the application of administrative law principles to administrative bodies within the positivist theory. The application of existing administrative law principles is based upon the assertion that the exercise of global governance is either done or should be done in a fashion consistent with administrative law ideals. This descriptive-prescriptive dichotomy is used to examine existing legal mechanisms, principles and practices that promote or affect the accountability of global administrative bodies to ensure that these bodies meet adequate standards of transparency, consultation, participation, rationality, and legality, and provide effective review of the rules and decisions these bodies make.⁹⁸

The focus on governance by international organisations and the acceptance that these organisations take actions outside of State consent is what offers global administrative law theory as a potential model of understanding for the World Bank.

Kingsbury, Krisch and Stewart define administrative action in the domestic setting as State acts that are not legislative or judicial and, whilst accepting there is a blur

⁹⁶ *Ibid.* pg. 16

⁹⁷ *Ibid.* pg. 16

⁹⁸ *Ibid.* pg. 17 and see ‘Global Administrative Law Project Concept and Working Definition’, Institute for International Law and Justice, New York University School of Law available at <http://www.iilj.org/gal/GALworkingdefinition.asp> accessed September 2013.

in the boundaries of this definition and acknowledging that there is no agreed functional differentiation beyond the domestic settings, allege that many actions of international institutions can be understood as within a similar definition applied to the international setting.⁹⁹ It includes rulemaking, adjudications and other decisions that do not consist of treaty making or simple dispute settlements between parties.¹⁰⁰ Administrative law, as distinct from administrative action, is law that governs the exercise of power by public officials¹⁰¹ and it is the application of administrative law to administrative action that the global administrative law theorem is concerned with.

The use of global administrative law, and its focus upon accountability, raises the issue of to who are organisations accountable. Under the positivist theory, organisations are only accountable to their signatory States yet national administrative law is concerned with ensuring that public officials are accountable to the public.¹⁰² Global administrative law seeks to ensure that organisations are accountable to the subjects that their work affects, whether that is States, individuals or private entities.¹⁰³

One specific element of global administrative law is the focus upon the work of formal international organisations and the global administrative regulation that they propagate.¹⁰⁴ International organisations are alleged to be the main

⁹⁹ *Ibid.* pg. 17 and see Carol Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17(1) EJIL 187 for an analysis of the administrative basis for these standards.

¹⁰⁰ Richard Stewart, 'U.S. Administrative Law: A Model for Global Administrative Law?' (2005) 68(3 & 4) Law and Contemporary Problems 63

¹⁰¹ David Dyzenhaus, 'The Rule of (Administrative) Law in International Law', (2005) 68(3 & 4) Law and Contemporary Problems 127

¹⁰² 'Therefore, the concept of accountability involves two distinct stages: answerability and enforcement. Answerability refers to the obligation of the government, its agencies and public officials to provide information about their decisions and actions and to justify them to the public and those institutions of accountability tasked with providing oversight. Enforcement suggests that the public or the institution responsible for accountability can sanction the offending party or remedy the contravening behavior.' within Rick Stapenhurst & Mitchell O'Brien, 'Accountability in Governance' available at <http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/AccountabilityGovernance.pdf> accessed September 2013.

¹⁰³ Specifically see, Nico Krisch, 'The Pluralism of Global Administrative Law' (2006) 17(1) EJIL 247 and generally see Simon Chesterman, 'Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law' (2008) 14 Global Governance 39

¹⁰⁴ Benedict Kingsbury & Lorenzo Casini, 'Global Administrative Law Dimensions of International Organizations Law' (2009) 6 Int'l Organizations L. Rev. 319; Benedict Kingsbury & Richard Stewart, 'Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of

administrative actors of international administration¹⁰⁵ with the application of administrative law theory useful for three specific reasons. Firstly, the growing demand for improved accountability of organisations¹⁰⁶ has the potential to ‘seriously limit the effectiveness’¹⁰⁷ of organisations as ‘oversight and control by states... can distort priorities and effective structures, and may even worsen problems of (international organisation) misconduct and corruption’.¹⁰⁸ In this area, the global administrative law theorem is in direct contrast with the positivist school that demands organisations are only accountable to the States that are members. Global administrative law offers alternatives to the accountability problem.

Secondly, global administrative law offers insights into the horizontal relationship (relations between organisations and States) and vertical relationship (relations between organisations, States and national administrations)¹⁰⁹ that international organisations currently practice.¹¹⁰ Finally, organisations now produce a wealth of ‘rules, principles, decisions, soft-law, and non-legal norms’.¹¹¹ As these are largely fragmented and do not always reconcile with each other, traditional formal norms and rules of jurisdiction, such as found in treaty law and customary international law, are not enough to effectively manage the sheer amount but ‘by a dynamic

Administrative Tribunals of International Organizations’ in Katerina Papanikolaou (ed.), *International Administrative Tribunals in a Changing World* (Esperia Publications 2008) and, for the World Bank specifically, Pascale Dubois & Aileen Nowlan, ‘Global Administrative Law and the Legitimacy of Sanctions Regimes in International Law’ (2010) 36 *Yale Journal Int’l L. Online*

¹⁰⁵ Steven Wheatley, *The Democratic Legitimacy of International Law* (Hart, 2010) pg. 21

¹⁰⁶ See August Reinisch, ‘Securing the Accountability of International Organizations’ (2001) 7 *Global Governance* 131, Thomas Zweifel, *International Organizations and Democracy: Accountability, Politics and Power* (Lynne Rienner 2006), for development banks generally see Eisuke Suzuki & Suresh Nanwani, ‘Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks’ (2005-2006) 27 *Mich. J. Int’l L.* 177 and for the World Bank specifically see Jonathan Fox & L. David Brown (eds.), *The Struggle for Accountability: The World Bank, NGOs, and Grassroots Movements* (MIT 1998).

¹⁰⁷ Benedict Kingsbury & Lorenzo Casini, ‘Global Administrative Law Dimensions of International Organizations Law’ (2009) 6 *Int’l Organizations L. Rev.* 319, 356

¹⁰⁸ *Ibid.*

¹⁰⁹ See Richard Stewart & Michelle Ratton Sanchez Badin, ‘The World Trade Organization: Multiple Dimensions of Global Administrative Law’ (2011) 9(3 & 4) *Int. J. Constitutional L.* 556 and Georgios Dimitropoulos, ‘Collegial Rule-Implementation: Peer Reviews in Global Administrative Law’ prepared for the Global Fellows Forum, 6 December 2011, at New York University Law School available at http://www.law.nyu.edu/sites/default/files/ECM_PRO_070658.pdf accessed August 2013.

¹¹⁰ *Supra* Note. 107, pg. 357

¹¹¹ *Ibid.*

process of regulation in which global administrative law can play a useful part¹¹² a tool can be created to manage these normative activities.

2.6.2 Applied to the World Bank

Conceptually the theory of a global administrative law is hampered by the variety of global governance. In attempting to capture all forms of governance within its work, it falls upon the same fallacy as the ARIO in not acknowledging the distinct differences between organisations. The structure, voting mechanisms, decision making bodies, judicial organs including compulsory or voluntary settlement, the subjects of regulation, purposes of the organisation, quantity of State involvement as well as the quantity of State members all have an effect upon the make-up and “administrative action” of the organisation and in defining administrative action as rulemaking, adjudications and other decisions that do not consist of treaty making or simple dispute settlements between parties, the theory moves away from the conceptual base that separated it from the positivist paradigm: that the action was outside of State control. The wide basis and definitions used by global administrative law in turn ensure it is difficult to stipulate that something is not administrative action, particularly within an international organisation.

In reference to the work specifically on international organisations, there is also a disconnect in the descriptive-prescriptive element in the global administrative law theory. Rather than focusing upon a descriptive element of what States’ are accepting, the theory focuses upon describing how organisations *should* behave and how governance *should* function: if an organisation governs, it should use administrative law principles. The descriptive element is, therefore, focused upon the search for governance rather than the search for existing administrative law principles within an organisation. Again, the differences in organisations and their mandates do not readily suggest the wide acceptance of administrative principles by States otherwise all organisations would already incorporate the principles of transparency, consultation, participation, rationality, and legality, and provide effective review of the rules and decisions that they make. It is not disputed that some organisations have incorporated various elements from administrative law into their mechanisms and structures, but rather than being seen as a widespread

¹¹² *ibid.* pg. 358

evidence of a paradigm shift towards a global administrative law this should be seen as evidence of the individuality of organisations and their ability to evolve in a fashion that is relevant towards the organisation rather than some outside ideal standard that all organisations are moving towards.

However, beyond the positive, progressive positive or constitutionalisation schools of thought, the theory of a global administrative law goes furthest in accurately describing the World Bank's actions in law. As Chapter One demonstrated that the World Bank is no longer under the direct control of States' who were party to the treaty, global administrative law explains this in law by using it as the basis of its theory that this should be understood as global governance. The rules, including the Operational Policies and best practice, established in relation to the World Bank's lending, are seen as administrative action under the theory from a global governance perspective that should be subject to administrative law ideals.

The work of non-governmental organisations will be examined in Chapter Five for the effect that they had on the creation of the Inspection Panel and environmental policies. This inclusion could be seen as evidence of consultation and public participation yet this *ad hoc* inclusive nature by one World Bank President¹¹³ cannot be seen as a widespread adoption of consultation or public participation.

The World Bank has also been praised for its transparency policy in relation to global administrative law.¹¹⁴ Yet the transparency allowed for by the Bank is different from transparency as called for by global administrative law.¹¹⁵ Board meeting deliberations concerning how policies are created, the key arm of governance used by the Bank, are only eligible for disclosure after declassification that is governed by strict timelines,¹¹⁶ when these policies have even been sent to

¹¹³ Sebastian Mallaby, *The World's Banker* (Penguin 2004) pg. 87

¹¹⁴ Euan MacDonald, 'Transparency at the World Bank', available at <http://globaladminlaw.blogspot.co.uk/2010/04/transparency-at-world-bank.html> accessed September 2013.

¹¹⁵ 'Decisional transparency and access to information are important foundations for the effective exercise of participation rights and rights of review', Malcolm Shaw, *International Law* (Sixth Edition, CUP 2008) pg. 39. Also see Michael Barr & Geoffrey Miller, 'Global Administrative Law: The View from Basel' (2006) 17(1) EJIL 15 for the application of global administrative transparency in an international law context.

¹¹⁶ The World Bank Policy on Access to Information, 1 July 2010, para. 16 (B)

the Board at all. This additionally affects the public participation in governance, as without a transparency policy in place to readily make available information pertaining to how and why rules are created, public participation is necessarily limited. In addition, information provided by a Member State in confidence cannot be disclosed without the express permission of the country, therefore, again restricting the transparency policy required by administrative law.¹¹⁷

The creation and work of the Inspection Panel has also drawn attention under the global administrative law theorem¹¹⁸ and could be seen as providing a review of the World Bank's actions against its policies yet the limitations of this approach should be established. Firstly, despite it providing reasoned decisions as called for by global administrative law,¹¹⁹ as will be examined in Chapter Five, the *locus standi* of the Panel only allows groups of individuals directly affected by the Bank's lending to make a request for inspection. States who are directly affected by policies, such as a borrowing State in any loan agreement, cannot use this avenue to review management's conduct,¹²⁰ therefore, limiting, in this context, who the Bank is accountable to. Secondly, there is no review of the actual policies, simply management's actions against the policies, which whilst similar to the administrative law concept of judicial review does not allow for an effective review of the rules that are actually affecting the governance of individuals. The World Bank is, therefore, not accountable to the people its decisions affect in this context.¹²¹

In addition, if administrative law is the constraint of power by public officials in accordance with the law, staff at the Bank would in turn be constrained from regulating on subjects outside of their legal mandate. As demonstrated in Chapter One, the Bank has repeatedly regulated on subjects that cannot be traced to its Articles of Agreement. The global administrative law theorem would suggest that this is legally prohibited which runs counter to the acceptance by States of this

¹¹⁷ *Ibid.* para. 14

¹¹⁸ Mariarita Circi, 'The World Bank Inspection Panel: *The Indian Mumbai Urban Transport Project Case*', within Sabino Cassese, Bruno Carotti, Lorenzo Casini, Marco Macchia, Euan MacDonald & Mario Savino (eds.), *Global Administrative Law Cases, Materials, Issues* (Second Edition, University of Rome 2008) pg. 129

¹¹⁹ *Supra* Note. 95, pg. 39

¹²⁰ On issues of interpretation of the Articles of Agreement, States have the option of availing themselves of Article IX (b) requesting the matter by referred to the Board of Governors whose decision is final on a four-fifths majority.

¹²¹ *Supra* Note. 103 (Krisch) pg. 250

action, even when it is not in a State's best interest such as when they are seeking financial assistance.

Similar to the problem that prevents the application of the progressive positive theorem for historical acts, whilst the global administrative law theorem offers potential insights for the work of the Bank going forward, the theorem struggles to understand the role of past actions of the Bank. Even if it is accepted that the transparency policy, consultation on a limited number of subjects and introduction of the Inspection Panel amount to a furtherance of administrative law ideals within the Bank within the last two decades, the global administrative law theorem can only explain the actions of the Bank previous to these as administrative actions which raises the question of why has the Bank not voluntarily introduced or been required, either legally or politically, to introduce administrative ideals in the proceeding four decades if it has been acting in an administrative capacity.

In terms of explaining how and why the Bank is acting in a governance function, the global administrative law theorem may still make valuable contributions to the analysis. Yet the lack of administrative law ideals refutes the application of this doctrine to the World Bank generally. Whilst there has been slight evidence of a shift towards these ideals, with the transparency of certain elements and the Inspection Panel process acting as a review, there is no wide spread adoption of administrative law ideals. The wide definition of administrative action leaves a situation where either the theory is applied and the World Bank is seen as acting in an administrative function without the administrative oversight, a reasonable conclusion that would require the Bank to begin introducing these administrative ideals into its work, or an alternative legal theory is sought that better explains the present position of the World Bank.

2.7 International Institutional Law

“From a formal standpoint, the constituent instruments of international organizations are multilateral treaties,... their character... is conventional and at the same time institutional”¹²²

The final major theory that is present in the literature concerning the legal work of international organisations is international institutional law. Although each organisation is viewed as having its own unique law and practice,¹²³ international institutional law examines “those rules of law that govern their legal status, structure and functioning”¹²⁴ as common elements across international organisations.¹²⁵ When a new international organisation is formed, it builds upon the previous work of other international organisations and mimics their institutional character (although of course there can be differences). International institutional law is, therefore, as a starting point, a theory of generality. It is not seeking to describe the details of every organisation, but is a comparative analysis of all organisations to determine which elements are common across the scope of applicability. Once these points are identified, the analysis has progressed to influencing how other organisations should evolve or should be created in order to match this international institutional law.

Although this theory has become prevalent in the literature, its very nature precludes the ready application to the World Bank as a tool for explaining how the Bank is acting. International institutional law focuses upon the laws that develop in relation to the institutional setting of the organisation: membership, organs of the organisation, decision-making, voting, judicial organs and the general legal status of the organisation are examples of such. Whilst these offer valuable insights into both a normative and prescriptive analysis of the Bank’s structure, it is not the institutional arrangements of the Bank that the Bank’s work is questioning, but how to explain in law its actions. If the institutional arrangements of the Bank as set down by the Articles of Agreement are not respected by the Bank, for example with the refusal to create the Advisory

¹²² *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, 66, para 19.

¹²³ Henry Schermers & Niels Blokker, ‘International Institutional Law’ (Fifth Edition, Martinus Nijhoff 2011)

¹²⁴ *Ibid.* pg. 4

¹²⁵ Jan Klabbers, ‘An Introduction to International Institutional Law’ (CUP 2002) pg. 2

Council, the actions cannot be explained in law by reference to the very institutions themselves and the rules that they propagate.

Therefore, although the theory may be of use on a general scale, and allow for the examination of legal consequences in relation to the creation of the internal rules such as Operational Policies, its general proposition, that the institutional make-up of the organisation is the starting point, prevents its ready application to the Bank.

2.8 Conclusion

Four legal theories; progressive positive, constitutionalisation, global administrative law and international institutional law, that may be used to describe in law the conduct of international organisations have been examined and found to inadequately explain in law the work of the World Bank and why States are willing to accept that the Bank acts the way that it does. Despite the calls from academia and NGOs for the World Bank to respect its mandate, States themselves appear willing to allow the Bank to dictate terms when lending that were never delegated to it under the original agreement.

The emerging field of progressive positive theory that seeks to bind international organisations to customary international law was examined. Despite the application of the theory to possibly explain the introduction of environmental, indigenous and resettlement rights, the focus upon a widening definition of development including good governance and corruption and more broadly the shift away from its original role as a project financier, the theory was demonstrated to be broadly unsuitable for application to the World Bank. Firstly, as an emerging school of thought it could possibly explain recent or future actions of the Bank but is incapable of explaining historical actions. Secondly, the use of *lex specialis* would suggest, despite this being an emerging field of law that the application of customary international law cannot counter an express treaty provision such as the no political interference clause of the Articles of Agreement. Thirdly, it is unclear if the areas of law that the World Bank has introduced despite its treaty actually exist in customary international law. Finally, the World Bank

expressly rejects the ability to codify primary rules of responsibility and the ability of any law, except *jus cogens*, to prevail over its treaty.

Subsequently, the constitutionalisation of international organisations theory was applied against the World Bank. The theory offered potential insights into the human rights norms introduced by the Bank as constitutional principles, its use of the Inspection Panel as an attempt to legalise dispute settlement and as an accountability mechanism and the use of Operational Policies and conditions as evidence of the organisation seeking to bind its Members to its own internal law. However, again there was demonstrated to be sufficient problems to make the constitutionalisation theory unsuitable for the World Bank. Firstly, if the Articles of Agreement were seen as a constitutional document, States would not be willing to let the Bank act outside of it as demonstrated by Chapter One. Secondly, the Inspection Panel does not act as a court that judges the Bank's actions against the Articles of Agreement as a constitution. Instead it rules on secondary norms within the Bank system. Thirdly, the limited number of human rights chosen by the Bank to legalise within its system is counter to the constitutionalist reading that human rights are at the core of modern constitutional law.

Then, global administrative law, as an emerging school of thought, was analysed for potential application to the World Bank. The theory offers valuable insights into the work of the World Bank as a governance actor yet could not be effectively applied due to the lack of administrative ideals present within the Bank. Firstly, again, as an emerging school of thought this could only explain the recent or future work of the Bank but is incapable of explaining historical actions. Secondly, the *ad hoc* nature of consultation and public participation, limited transparency and limited review of World Bank action do not suggest the widespread adoption of administrative law ideals within the Bank system. Finally, the Bank has repeatedly regulated on subjects that cannot be traced to its Articles of Agreement. The global administrative law theorem would suggest that this is legally prohibited which runs counter to the acceptance by States of this action.

Finally, international institutional law was considered but rejected due its focus upon the institutional arrangements of the Bank, rather than explaining the Bank's actions in terms of law.

This chapter has argued that the Bank cannot be using customary international law as a basis for its action; nor can its work be explained under the constitutionalisation theory that is offered for other organisations; and finally, neither can it be explained by global administrative law or international institutional law. If none of the main analytical tools that have been used to explain the governance role of international organisations adequately explain what is happening, an alternative is required. Systems theory is offered as an alternative analytical tool to make sense of the Bank's actions in law and States' acceptance of these actions.

Chapter Three: Systems Theory

3.1 Introduction

The dominant theories that have been used to describe in law how international organisations are supposed to act have failed to explain the work that the World Bank has endeavoured in since its inception. In addition to this, States have accepted this behaviour in a manner that cannot be explained. This is particularly questionable under the positivist approach to public international law, as the most common and readily accepted tool of understanding in this field, as it is on this tool that the basis of consent is built upon. 'Fragmentation', 'constitutionalisation', and 'spheres' are all terms that have been used to describe the current legal understanding of international law whilst it is alleged that they all essentially remain within the positivist public international law theory of consent.¹ This chapter will introduce an alternative theory that will be applied throughout the rest of this thesis that offers an alternative legal perspective of the Bank's actions.

As demonstrated in Chapter One, the positivist theory of international law cannot explain the practice of the World Bank and, as examined in Chapter Two, the readily available alternatives are inappropriate. The Bank is exercising powers that were neither given to it, either directly or that can be implied, by its founding treaty, subsequently introduced through treaty amendment or introduced with the consent of all member States. Yet in contrast States do not object and allow for the Bank to act in such a fashion.

The inference of the positivist theory of international law from Chapter One can be summarised as that if a norm does not emanate from a State, then it cannot be seen as 'law' and holds no legal standing. Although the norm might contain a political or a moral force, it lacks a legal force to characterise it as 'law'. Yet if this theory, and other theories that remain within this assumption of consent, does not fully explain both the relevant actions of the World Bank and State's acceptance of these actions, it needs to consider what is 'law' under alternative

¹ See Tai-Heng Cheng, 'Positivism, New Haven Jurisprudence, and the Fragmentation of International Law' within Todd Weiler & Freya Baetens (eds.), *New Directions in International Economic Law* (Martinus Nijhoff 2011) pg. 411

theories to provide an alternative legal explanation. Chapter Two examined four alternative prevalent theories; this chapter in turn examines systems theory as an alternative tool.

Although none of the dominant theories have been shown to understand in terms of law the work of the World Bank, an alternative theory, solely for application to this relationship between the World Bank and States, is now suggested. As a tool of analysis that is not often used in the context of international organisations, this chapter will scrutinize both the fundamentals of the theory itself to provide a comprehensive overview of the tool, but also the specifics that the theory would require for the development and ready application of a legal system.

3.2 Systems Theory

When referring to a “system of law” it could be assumed that all legal theorists refer to the same phenomenon. Traditional legal systems such as municipal law,² indigenous law³ and even the sometimes more controversially assigned international law⁴ are all defined as systems of law in academia. However, the understanding over what exactly amounts to a system of law is not clear. Each of these recognised different systems of law have fundamentally different elements, but to be recognised as systems at all, it would be assumed that a number of common factors exist that allow for the classification of a “system of law”. What these factors are, and how they will be applied to the World Bank is the focus of this chapter.

If positive law, as discussed in Chapter One, is one attempt to describe various legal systems, systems theory is an alternative attempt by academics to answer these questions. Although not widely used in Western academia since its inception, recently there has been an increase in the amount of work citing it,

² David Palmetier, 'The WTO as a Legal System' (2000) 24(1) *Fordham International Law Journal* 444, 445

³ Ernest Uwazie, 'Modes of Indigenous Disputing and Legal Interactions Among the Ibos of Eastern Nigeria' (1994) 34 *Journal of Legal Pluralism* 87

⁴ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP 1995) Chapter 3

particularly in non-legal academia.⁵ Systems theory, like all the other theories that have been examined, is a tool of analysis via which the work of a legal system can sought to be explained.

The origin of autopoiesis systems theory is from biological science. Maturana and Varela had the belief that a biological entity could be defined in reference to its autonomy.⁶ 'Autopoiesis' was the word created to define this: 'what defines life is the existence and persistence of a self-referential and self-reproducing organization of the elements that constitute each living system'.⁷ This theory provided a new theory for the understanding of the living system and its relationship to other systems.

The 'self-reference' in the definition refers to the fact that each living system is independent and is solely composed of fundamental parts that do not interact with the outside world but only with each other. The order of a system is created by how these parts interact with each other rather than from being defined from outside the system. As these fundamental parts are defined by the system itself, the system is said to be 'self-reproducing'.

As the system is self-reproducing, changes to the structure of the system can only occur internally rather than through external forces. This is not to say that an external environment can have no effect upon a system, it is instead that the internal structure of the system defines how this change takes place. Biological autopoiesis systems theory acknowledges that a system cannot exist in a vacuum. The system and the outside environment constantly cause minor changes to each other, but it is the structure of both the external environment and the internal

⁵ See for example Kristof Van Assche & Gert Verschraegen, 'The Limits of Planning: Niklas Luhmann's Systems Theory and the Analysis of Planning and Planning Ambitions' (2008) 7(3) *Planning Theory* 263; Diederich Hinrichsen & Anthony Pritchard, *Mathematical Systems Theory: Modelling, State Space Analysis, Stability and Robustness* (Springer-Verlag 2010); and Barry Gibson & Olga Boiko, 'Luhmann's Social Systems Theory, Health and Illness' in Graham Scambler (ed.), *Contemporary Theorists for Medical Sociology* (Routledge 2012)

⁶ Humberto Maturana, Francisco Varela & Ricardo Uribe, 'Autopoiesis: The Organization of Living Systems, Its Characterization and a Model' (1974) 5 *Biosystems* 187 which was later expanded upon in Humberto Maturana & Francisco Varela, *Autopoiesis and Cognition: The Realization of the Living* (D. Reidel Publishing Company 1980)

⁷ Ana Lourenço, 'Autopoietic Social Systems Theory: The Coevolution of Law and the Economy' (2010) Centre for Business Research, University of Cambridge, Working Paper No. 409

system that define what these changes are. This constant interaction between systems is caused 'structural coupling'.⁸ This coupling can only occur between closed systems, rather than earlier manifestations of the systems theory model that were called open systems.⁹ A closed system is a system that, as described above, is identified by 'a network of dynamic processes whose effects do not leave the network',¹⁰ that is to say that the internal structure of the system has no effect upon the environment outside but only the system as a whole does. This explains why the environment cannot effect structural change upon a system: the pressure from the external environment is interpreted through the internal language of the system.¹¹ An open system in contrast has a free-flow of information and interaction between the elements of the system and its external environment.

3.3 Luhmann and the Law

Niklas Luhmann applied this closed system approach from biology to the social sciences.¹² His intention was to create a theoretical framework that could be applied across the various borders of the social sciences to any system. In Luhmann's work, he defines the crucial conceptual leap that autopoiesis system makes over general systems theory is its self-reproducing nature.¹³ Not only did a system create its own structure, but 'everything that is used as a unit by the system is produced as a unit by the system itself'.¹⁴ This theory of autopoietic systems results in an operational definition of systems.¹⁵ For biological systems, life was the crucial element for autopoiesis defined by cell production and reproduction. For psychic systems, consciousness was the element required for

⁸ Humberto Maturana & Francisco Varela, *The Tree of Knowledge: The Biological Roots of Human Understanding* (Shambhala Publications Inc 1992) pg. 99

⁹ See for example; Ludwig van Bertalanffy, 'The Theory of Open Systems in Physics and Biology' (1950) 111 *Science* 23; Daniel Katz & Robert Kahn, *The Social Psychology of Organization* (Wiley 1966) &, for open systems application to law, Lawrence Friedman, *The Legal System: A Social Science Perspective* (Russel Sage 1975) pg. 237-246

¹⁰ *Supra* Note. 8, pg. 89

¹¹ *Supra* Note. 7

¹² The seminal piece of Luhmann's introducing the concept of autopoietic social systems was Niklas Luhmann, *Soziale Systeme: Grundriß einer allgemeinen Theorie* (Suhrkamp 1986).

¹³ Niklas Luhmann, *Essays on Self-Reference* (Columbia University Press 1990) pg. 3

¹⁴ *Ibid.*

¹⁵ *Supra* Note. 5 pg. 267

autopoiesis defined by thoughts generating thoughts. To distinguish between systems, an analysis must distinguish the repeated elements that allow the creation of a system. This analysis of the repeated elements that allow for the creation of a system led Luhmann to argue that for social systems, the specific requirement for autopoiesis was communication.¹⁶ It was the internal communication of the system that allowed it to be self-reproducing. Communication can only result from previous communication and result in further communication.

For a system to exist, it has to absorb information from the outside world and then interpret it in a form that exists solely for that system to give meaning to the outside environment.¹⁷ This allows the identification of systems through the meaning that is given to communication in different contexts. For example, the systems of politics, law or the economy can be identified by the various meanings that they give to communication. In Luhmann's work, he identified the boundaries of these various systems by the application of various binary codes to the communication. It was the communication along these binary codes this allowed the autonomy and identification of each system. For law, the binary code that he established was a legal/illegal code that works on the premise that law is continuously involved in defining actions as legal or illegal. Any communications that invoke other codes belong outside the system in the environment. Thus the legal system becomes operationally closed and defines external communication in reference to its own code. It also results in legal/illegal communication being available only to a legal system, as other systems will interpret the communication under its own procedures.

This analysis by Luhmann and application of systems theory results in a very specific view of a legal system. It is not defined by reference to the structures of a system, such as Parliaments, Courts or even lawyers; it is defined in reference to the communication that occurs within any societal system. In society, if communication is concerned with legal/illegal behaviour, it belongs to the legal system. If it is not concerned with this binary divide, it belongs outside of the legal system but within another area of society. The legal system is not split from

¹⁶ *Supra* Note. 13

¹⁷ Fabio Carvalho & Simon Deakin, 'System and Evolution in Corporate Governance.' (2010) ESRC Centre for Business Research, University of Cambridge. Working Paper n^o 391

society as a whole, but is one of multiple differentiated systems that make up and contribute to the societal system as a whole.¹⁸

If Luhmann was the original applier of systems theory to law, others have taken his mantle and found applications for it throughout legal academia.¹⁹ Baxter extended this work to state that the inherent closure of the system does not deny that other systems can influence each other and that there is natural part of interdependencies.²⁰ The 'openness' of this closed system however does not rest upon an exchange of information but only the way a system views its external environment. Each system observes each other but the information garnered from the environment is conditioned by the internal programming of the system. Deakin applied this to the legal system and concluded that a legal system receives information and processes it for the purpose of creating legal meaning.²¹

As a system has to continuously perform the self-referential operation that provides the basic elements for production and re-production, it is essential that a legal system continuously frames itself in terms of the legal/non-legal meaning of communication. Yet as the only way to decide if an action is lawful is via the law itself, a continuous loop is created once a system comes into place. The difficulty is a system *evolving* to an autonomous legal system in the first place and in fact involves a paradox.

For a system to exist it firstly has to be truly autonomous but as soon as a system claims this it cuts itself from the roots that created it.²² Yet when this is applied to public international law, this creates a paradox. Although the application of the positive theory to the World Bank has been disputed, it is readily accepted for the creation of international organisations there must be an element of State consent. The movement beyond that is questionable and requires further

¹⁸ Niklas Luhmann, 'Law as a Social System' (1989) 83(1 & 2) *Northwestern University Law Review* 136, 138

¹⁹ Specifically for law; Gunther Teubner, *Autopoietic Law: A New Approach To Law And Society* (de Gruyter 1987); David Nelken, (ed.) *Law as Communication* (Dartmouth Publishing, 1996) & Michael King, 'The "Truth" About Autopoiesis' (1993) 20(2) *Journal of Law and Society* 218

²⁰ Hugh Baxter, 'Autopoiesis and the "Relative Autonomy" of Law' (1998) 19(6) *Cardozo Law Review* 1987, 2008

²¹ Simon Deakin, 'Evolution for our Time: A Theory of Legal Memetics.' (2002) ESRC Centre for Business Research, University of Cambridge Working Paper n^o 242.

²² Gunther Teubner, *Global Law Without a State* (Ashgate 1997) pg. 16

analysis, but as a starting point it is not disputed that the genesis of international organisations is based in State consent. This then leads to the paradoxical position if systems theory is to be applied where an autonomous system is created which in theory is self-producing and self-reproducing yet only occurred as States 'produced' it. The only way to rectify this paradox is if the institution goes through the 'deparadoxification technique of externalization'.²³ Rather than following through the internal paradox of State consent to autonomy to how can it be autonomous with State consent, the system simply externalises the question and acts as if it has always been autonomous. Teubner states that the simplest way to go through this process is to start arbitrating upon the internal "laws" of the system.²⁴ It essentially creates secondary rules and begins arbitrating upon them. This is one element that leads to the proposition that a system can only be truly autonomous if it has a quasi-Court like element that will be further examined later on.

This work was elaborated and built upon by Calliess and Renner.²⁵ If law was communication based upon a legal/illegal divide, the purpose of the communication was 'the stabilization of normative expectations'.²⁶ Actors of the system could rely on the norms contained in the system as they had reason to believe that actions would be assessed in reference to these norms, and found to be either legal or illegal. Normative expectations could only be stable and relied upon if actors exist in an operationally closed system, as in an open system external factors could always override or change existing norms. If the closed system were self-referencing and self-reproducing, a continual process of remembering and forgetting would occur. It would remember and stabilise normative expectations for norms that amount to law, and forget norms that are not law so they cannot be relied upon. This stabilisation of normative expectations through the continual remembering and forgetting process in turn relies upon communication circulating around a system. If actors in a system are not aware of the legal communication, their normative expectations cannot become stabilised.

²³ *Ibid.* pg. 17

²⁴ *Ibid.*

²⁵ Galf-Peter Calliess & Moritz Renner, 'From Soft Law to Hard Code: the Juridification of Global Governance' (2009) 22(2) Ratio Juris 260

²⁶ *Ibid.* pg. 263. See also *Supra* Note. 18 for Luhmann's work on the stabilisation of normative expectations.

Systems theory has a particular use when binding norms are recognised within an environment rather than traditional conceptions of what amounts to “law”. As previously discussed in Chapter One,²⁷ within international law the traditional approach to sources are outlined in Article 38 of the Statute of the ICJ. Yet systems theory when analysing communication from the environment does not ask the question ‘is the law a recognised law?’. It only frames the communication in a legal/non-legal meaning and assesses whether it belongs to the legal system. ‘If the question arises whether something is legal or illegal, the communication belongs to the legal system, and if not then not.’²⁸ If an international organisation could be shown then to be framing its rules and procedures in terms of law and acting as if they are law, systems theory would allow an explanation to this phenomenon in a way that the traditional theory of State sovereignty based international law would not.

3.4 From a Normative System to a Legal System

Although systems theory developed out of biology to play in role in numerous academic analyses across social fields, it was the work primarily of Luhmann and subsequently Teubner that developed the role of systems theory and its application to law. However, systems theory as outlined so far is questionable for an analysis of the development of a legal system as it only provides elements to understand when a system has become functionally differentiated.²⁹ Whilst it readily identifies the criteria of what a legal system looks like, this in itself does not provide an answer to how a legal system develops initially as to ascertain what causes the shift from a normative system to a legal system. Both Luhmann and Teubner developed independent tests, that will be examined, but the main focus that writers have centred upon is using the analytical tool to work with already established legal systems.

It is crucial that in developing a tool of analysis to be applied to the World Bank that the elements that are common to all systems of law under systems theory are identified. If systems theory is to successfully explain the actions of the Bank,

²⁷ See 1.5 The Creation of Rules

²⁸ Niklas Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' (1992) 13(5) *Cardozo Law Review* 1419, 1428

²⁹ Simon Roberts, 'Against a Systemic Legal History' 1 *Rechtsgeschichte*

the elements that are required to firstly create a normative system and the elements required for this system to evolve into a fully operational closed legal system must be identified to see if these elements do or have existed within the World Bank framework. It is only through the application of these various stages to the Bank that it can be argued that the Bank has developed into an autonomous legal system under systems theory.

Luhmann developed his analysis of the requirements for a legal system within his seminal work, *Law as a Social System*.³⁰ The legal system as defined by Luhmann is a normatively closed system that is continuously involved in a self-reference and self-reproduction.³¹ The system develops from a normative system into a legal system by the operation of communication along the legal/illegal divide: as this operative divide is what defines a system of law. The two tests proposed by Luhmann to discern the validity of a legal system are the 'functional specification of law', that the system and its laws are focused upon a specific problem within the overarching societal system; and that the system is involved in a binary distinction between positive conduct ('legal') and negative conduct ('illegal').³² This involvement in the distinction must not occur on an *ad hoc* basis but must be a continuous self-reference of legal terminology. Only if they 'refer recursively to each other (and pretend that this has always been the case) can a legal system tighten and become operatively closed'.

The language used here by Luhmann suggests that there is a point where a system can be at a point between a normative system and legal system; as the system 'tightens', yet this area is insufficiently dealt with by Luhmann. Luhmann's two tests also are insufficient for gaining an insight into the evolution between normative and legal systems. All normative systems will be involved in a 'functional specification' as they will be creating norms to guide expectations (as provided for under Luhmann's analysis).³³ Calling for the functional specification to be 'of law' does not deter this criticism as the test to see if a function is 'of law' is contained within the second test i.e. that it is operating on the legal/illegal binary distinction.

³⁰ Niklas Luhmann, *Law as a Social System*, translated by Klaus Ziegert (OUP 2004)

³¹ *Ibid.* pg. 70

³² Steven Wheatley, *The Democratic Legitimacy of International Law* (Hart 2010) pg. 284

³³ Niklas Luhmann, *A Sociological Theory of Law*, translated by Elizabeth King and Martin Albrow (Routledge & Kegan Paul 1985) pg. 33

The qualifying language used for the second test also allows for ambiguity when analysing either an evolving or newly created legal system. As the language being used to define the legal/illegal behaviour must occur more than once, Luhmann turns his tests from an objective analysis to a subjective one. This then leads to questions of how many times are required for the system to use legal/illegal communication before a normative system turns into a legal system and what is the status of the system when the legal/illegal binary distinction has been invoked more than once yet less than this operative amount.

The answers to these questions from Luhmann's work are inconclusive, and rather than duplicate the work put forward by others (primarily Teubner) and using their tests for a system, as this work will develop a separate argument outside of Luhmann's understanding of system theory, a consideration of the general requirements of a legal system is required.

3.4.1 Requirements of a Legal System

Systems theory is an attempt at a general jurisprudence by attempting to identify various elements that are common to all legal systems. Although systems theory identifies the operative requirements for a system that were examined previously, a search through other attempts at a general jurisprudence is required to develop a critique of the tests that Luhmann proposes as requirements for the existence of a system and to develop a framework independent of Luhmann that can be applied to the World Bank.

The traditional position for any critique of a general jurisprudence of a legal system starts with the work of Hart. Hart's work provides that a legal system must contain a rule of recognition, a rule that establishes which norms within a system are identifiable as norms.³⁴ Yet Hart's work goes further to identify two key elements that are required for the creation of a legal system.

A legal system can only exist if it contains both primary rules, 'human beings are required to do or abstain from certain actions',³⁵ and secondary rules, 'human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence

³⁴ H.L.A. Hart, *The Concept of Law* (Third Edition, OUP 2012) pg. 100

³⁵ *Ibid.* pg. 81

of control their operations'.³⁶ Primary rules are, therefore, the 'laws' that guide individual's behaviour in a society and secondary rules are the rules that legal actors use to identify and change primary rules.³⁷

Hart's theory is a theory based upon positivist law. Although it has other elements that have been critiqued,³⁸ the analysis in Chapter One has already demonstrated that the positivist theory of law does not adequately explain what is happening at the World Bank. What Hart's work does, however, is provide an introduction to the concept of secondary rules within a legal system: the rules that actors within the system use to identify primary rules. If this concept is taken over and applied to systems theory, it questions whether a similar rule is necessary.

Systems theory in itself is binary, in that communication is either along the legal/illegal divide or it is not. The theory put forward by Luhmann makes no allowance for the presence of secondary rules, in that if the tests that he put forward are met, of a functional specification of law with communication along the binary divide, then at least in Luhmann's initial theory, a system of law would be established, regardless of subsequent secondary rules that can be used to identify and change primary rules. In this sense, the key element that can be taken from Hart's theory of secondary norms, is not a direct transposition into systems theory, but to raise the question of the purpose that Hart sees for secondary rules within a system, principally of identifying laws.

In terms of systems theory, the identification of the communication can only be done by an actor within the system. This process cannot be externalised from the system as if that was the case it could only engage with the system through structural coupling, which in turn would require that the external communication be interpreted through the internal language of the legal system, i.e. legal/illegal

³⁶ *Ibid.*

³⁷ See *Ibid.* & Kenneth Abbott, Robert Keohane, Andrew Moravcisk, Anne-Marie Slaughter & Duncan Snidal, 'The Concept of Legalization' (2000) 54(3) *International Organization* 401, 403

³⁸ See Kaila Morin, 'Bridging the Conceptual Gap Between Law and Morality: A Critical Response to H.L.A. Hart's The Concept of Law' (2012) 1 *UCL Journal of Law and Jurisprudence* 120 and Scott Shapiro, *Legality* (Harvard University Press 2011) Chapter 4. For a modern defence of Hart see Matthew Kramer, 'In Defense of Hart' in Wil Waluchow & Stefan Sciaraffa (eds.), *Philosophical Foundations of the Nature of Law* (OUP 2013) pg. 22.

binary code, and, therefore, fall foul of the situation that required it to be externalised in the first place.

Instead this requirement of identifying communication must develop internally within the system, whilst retaining a separation from both the body that creates the norms and the subjects of the norms. This would allow a third party to determine the incidence of communication, and by determining the incidence, contribute to the propagation of communication within the system. One avenue to create this third party that identifies what is and what is not a law is the creation of an independent dispute settlement body. This provides an intellectual basis to claim that the development of a Court or a Court-like body is a crucial element in the shift from a normative system into a legal system. This area is a potential source of debate and is examined below.

3.4.2 The Requirements for an Evolution into a Legal System

Hart's work moves the debate forward when considering what elements are required for a legal system, yet does not help when considering what elements are required to form a legal system. The distinction is narrow, but it is the difference between identification and evolution. Whilst the elements required for a legal system gives an indication to the elements required to form a legal system, it does not allow for the identification of the key elements that move a system from one stage of normative to a second stage of legal.

When trying to seek how a normative system develops into a legal system, it is logical to make the assumption that all currently accepted legal systems must at some point have evolved into themselves and, therefore, must have been a normative system prior to the evolution (for this purpose ignoring arguments surrounding the creation of natural law). If an accurate history can be traced to the start of these currently accepted systems, the fundamental elements that were required for the *creation* of the system should be in place and the potential to identify what elements actually drove the evolutionally process. The clear place to start is on the systems of law that are universally accepted: the system of state law. Underpinning both Hart's work and systems theory are, according to Tamanaha, two myths regarding the development of law: the evolutionary myth

and the social contract myth.³⁹ If the recognised theories behind the creation and evolution of law generally provide criteria that can be identified for the creation of a legal system, it is possible that there are elements that can be identified in the history of the World Bank that would point towards the development of its own legal system and, therefore, be able to explain the actions that the Bank has undertaken.

Tamanaha discusses the evolutionary myth that is purported in Western discourse regarding the nature of law. Law is postulated to have developed out of a “primordial soup”, before law was chaos and disorder ruled solely by custom, after law there is order. The logical conclusion to be drawn from this myth, that Tamanaha alleges underlies all major theories behind the existence of law, is that law is required to take a society to an ordered form of existence. Law is not only wanted by a society but is in fact required.⁴⁰ An important point of this myth that needs to be highlighted and will be returned to later in this chapter is that the development from custom to law allows the development of custom alongside law. Both have a legitimate place within a society.

A problem that is associated with this concept is that law is seen as the inevitable conclusion in the evolution of a system. Law is the highest pinnacle that can be achieved and is in fact required to ‘offset the deficits arising with the collapse of the traditional ethical life’.⁴¹ Also with this conception of the creation of legal systems there is no single point that can be pointed too where “law” is created and society ascends to a higher plane. The development from custom to law is an evolutionary process that has all the benefits and drawbacks of such. It progresses on an inconsistent and *ad hoc* basis with back-steps and even side-steps.

This is an important element for systems theory when attempting to discern when a normative system develops into a legal system. Systems theory, at least as outlined by Luhmann, assumes that to become an operationally closed legal system, a distinction between legal and illegal conduct must occur recursively and pretend that this has always been the case. This evolutionary process from the evolutionary myth can be seen as signs of a “system”, in whatever form it is, tightening on its path to becoming operationally closed.

³⁹ Brian Tamanaha, *A General Jurisprudence of Law and Society* (OUP 2001) pg. 52

⁴⁰ *Ibid.* pg. 56

⁴¹ Jürgen Habermas, *Between Facts and Norms* (MIT Press 1996) pg. 113

The social contract myth is perhaps better known within Western academia as it stems from the work of Hobbes, Locke and Rousseau.⁴² This is the proposition that law, and the State, developed through the combined will of the population who contracted together as individuals. The aim of this contact and the creation of the law was mutual self-preservation.⁴³ This involved a deliberate act by the citizens of the state that all consented to be governed by a legal authority,⁴⁴ in contrast to the evolutionary myth where there is no conscious moment of decision.

Again the law, and the state, are seen as a natural consequence of the development of a society. The law protects society from disorder and violence that would naturally occur without it. In terms of systems theory, this would suggest that a system is created by a conscious act by the *demos* of the system, whoever they may be in an effort to stave off the disorder that would exist without legal rules.

There are many criticisms to be made regarding these myths but as Tamanaha points out, they underlie the most prominent general jurisprudence present in Western academia.⁴⁵ Important elements from these two theories can, however, be picked out to be viewed through the lens of systems theory and allow for the identification of elements that may lead to the development of a normative system into a legal system:

- 1) Both myths ignore the social mechanisms that are required for a society to develop: the same as Luhmann's tests for systems theory. The evolutionary myth focuses upon the evolution from customary norms to legal norms, yet this cannot always be the case or every normative system would eventually evolve into a legal system, something that history has readily shown not to be the case. The social contract myth focuses upon the collective decision of a society regardless of any elements within the society. Both myths in turn still run into the problem that a general jurisprudence tries to avoid, the issue of separating norms

⁴² Christopher Morris (ed.), *The Social Contract Theorists: Critical Essays on Hobbes, Locke and Rousseau*, (Rowman & Littlefield 1999)

⁴³ Janet Coleman, *A History of Political Thought, From the Middle Ages to the Renaissance* (Blackwell Publishers 2000) pg. 36

⁴⁴ *Supra* Note. 39, pg. 57

⁴⁵ *Ibid.* Chapter 2

from laws and being able to identify the elements that trigger a shift from one form of system into another. Various mechanisms within a society can satisfy the function of law but that does not mean they should be regarded as “laws” and leaves the question open of having to identify law from other norms.⁴⁶

- 2) Both myths do, however, envision law as a specialised area of society in a similar fashion to the systems theory view of society which views society as being split up into various sectors with law as an autonomous section of the overarching society. Law becomes the purview of lawyers.⁴⁷ The legal system is still a part of society but, as seen in Hart’s account, it has a special function that can only be fulfilled through lawyers. Although this would suggest a shift in approach from an essentialist to a functionalist, as seen when ignoring the social mechanisms, various mechanisms can fulfil the function of law. Systems theory asserts that all outside communication must be interpreted through the internal language of the system. This, therefore, leads to a specialisation of lawyers as people who can understand the internal language and points to a requirement for the development of a legal system as needing actors or people who view communication in terms of legal/illegal.
- 3) One element from the evolutionary myth that is important is the development from custom into law. Crucially not all customs develop into law and law can exist alongside customs. Evidence of this can be seen today in modern domestic constitutions.⁴⁸ If a legal system under systems theory develops from a normative system, potentially norms may exist that are outside law (as they are not viewed as legal/illegal under the binary code) yet are still norms that guide behaviour within the system. Customs and conventions can be seen as an example of this. Although not law, they are norms as they guide behaviour and are more than best practice. However, this should be distinguished from “customs” that have developed into laws as they now rely upon

⁴⁶ *Ibid.* pg. 137

⁴⁷ Alan Watson, *The Evolution of Law* (John Hopkins University Press 1985) pg. 118

⁴⁸ See Geoffrey Marshall, ‘What are Constitutional Conventions?’ (1985) 38(1) Parliamentary Affairs 33

communication along a legal/illegal divide such as customary international law.⁴⁹

- 4) The crucial element regarding both myths in reference to State law is that societies are generally ignorant of their own births. Locke acknowledged this in his work on social contract theory stating that ‘for it is with common-wealths as with particular persons, they are generally *ignorant of their own births and infancies*.’⁵⁰ As these two myths point to a time before records began they are based purely on conjecture rather than facts. In recent times facts that have arisen have directly contradicted evolutionary theory.⁵¹ The evolutionary myth cannot point to a specific point where a social system changes from a normative system into a legal system and the social contract myth cannot point to a time when society gathered together as a whole and consented to be bound by a legal authority.⁵² This ignorance is similar to the deparadoxification technique of externalization that a system must go through under Teubner’s system theory so that a legal system acts as if it has always been a legal system.

This ignorance regarding the creation of a system would suggest a simple rule would hold true:

A system would amount to an autonomous legal system only when it fulfils the criteria of being one *and acts like it has always been*.

If Hart’s conceptualisation of law can be simplified to and as wide as ‘a normative order that lawyers recognise as law’, perhaps a legal system can be simplified to ‘a system that recognises itself as a legal system’. Yet the essentialist analysis that previously occurred had suggested the possibility that a Court-like structure has to be present, or an assessment of actions against the legal/illegal divide, a concept

⁴⁹ The requirements of customary international law recognise this distinction in requiring that the States see the “custom” as being required as law.

⁵⁰ John Locke, *Second Treatise of Government*, C.B. Macpherson (ed.), (Hackett Publishing Co. 1980) s.101 emphasis added.

⁵¹ Peter Manicas, *A History and Philosophy of the Social Sciences* (Basil Blackwell 1987) pg. 71-2

⁵² Even examples such as the formation of the United States Constitution, which were written for the population as a whole, involved a tiny fraction of the population in the authorship.

not included within the above understanding. Whilst both myths provide illumination on various parts of systems theory, as of this ignorance of their own birth, neither can answer the fundamental question of how a normative system develops into a legal system and what elements are required.

3.4.3 International Law Theories Contribution

Whilst theories grounded in state law provide one consideration to help to determine the elements of a system, a consideration of public international law and the specific viewpoint of “fragments”, or systems, can be considered to determine whether there are particular elements present that may be of use in identifying the requirements of a system within international law. Within the context of the World Bank, as a body at least created by international law, elements from accepted international law theories and systems may provide illumination on the criteria that the Bank must fulfil for it to be accepted as a legal system.

There is currently considerable academic debate occurring regarding whether international law is becoming constitutionalised,⁵³ which has moved forward from, but also alongside, the debate on whether international law has become specialised or fragmented.⁵⁴

Systems theory provides that law becomes an autonomous system but is within a wider society. One possible consequence of systems theory is a specialisation or fragmentation of the traditional domain covered by international law. Public international law itself is part of wider society, but the fractionalisation of this legal system as a result of the creation of autonomous systems within the wider legal system is a possible consequence of systems theory. If each autonomous legal system develops the necessary characteristics of a system, then it would be possible for these autonomous legal systems to be part of the wider legal system

⁵³ See for example, Jan Klabbbers, Anne Peters & Geir Ulfstein, *The Constitutionalization of International Law* (OUP 2009) and Jürgen Habermas, ‘The Crisis of the European Union in the Light of a Constitutionalization of International Law’ (2012) 23(2) EJIL 335

⁵⁴ See for example, Martti Koskeniemi & Päivi Leino, ‘Fragmentation of International Law? Postmodern Anxieties’ (2002) 15(3) *Leiden Journal of International Law* 553 & Jan Klabbbers & Silke Trommer, ‘Peaceful Coexistence: Normative Pluralism in International Law’ in Jan Klabbbers & Touko Piiparinen (eds.), *Normative Pluralism and International Law* (CUP 2013).

and part of society as a whole. This issue is itself naturally linked to the questions surrounding pluralism.

In this area of fragmentation, one area, which has already been examined in Chapter Two, is the issue of the constitutionalisation of public international law. One variant of the constitutionalisation theory argues that specific parts of public international law have become or are in the process of becoming constitutionalised. The constitutionalisation of international law argument begins from a point immediately recognised from systems theory: more actors than just the State are creating law.⁵⁵ Delbrück went as far as to say that ‘the monopoly of the state as a political actor in the international system has been entirely broken.’⁵⁶ It is doubtful States would agree yet if either the constitutionalisation theory or systems theory were successfully applied to public international law, the consequence would be the removal of the State as the sole law creator. Arguments develop upon this to posit that various international organisations or specific sectors of international law are acting as lawmakers within international law and have developed a constitutional structure. The basis of the argument, again similar to systems theory, is that these organisations and sectors have developed an autonomy from States⁵⁷ and are, therefore, not under their control.

Supporting evidence for the autonomy of certain organisations comes from case law. The ECJ has ruled in the infamous *Van Gend & Loos* case that ‘the Community constitutes a new legal order of international law’⁵⁸ whilst the ICJ has acknowledged that the charter of an organisation as innocuous as the World Health Organization created a legal subject ‘endowed with a certain autonomy’.⁵⁹ Yet crucially, Anne Peters in her work establishes a break between autonomy and constitutionalisation by highlighting that there are various factors that put constitutionalisation on a scale rather than a simple ‘constitutionalised or not’ argument.

⁵⁵ Jan Klabbers, Anne Peters & Geir Ulfstein, *The Constitutionalization of International Law* (OUP 2009) pg. 85

⁵⁶ Jost Delbrück, ‘Prospects for a “World (Internal) Law?”: Legal Developments in a Changing International System’ (2002) 9 *Indiana Journal of Global Legal Studies* 401, 410

⁵⁷ *Supra* Note. 55, pg. 208

⁵⁸ Case 26/62 *Van Gend & Loos* [1963] ECR 3, at II.B

⁵⁹ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion*, ICJ Reports 1996, 66, para 19.

The argument revolving around constitutionalisation of international law is distinct from the argument of an autonomous system. Although a constitutionalised body could be considered an autonomous system, an autonomous system does not necessarily entail a constitutionalised body. If the argument developed from Hart's work demonstrated the need for an independent third party within an autonomous system that can determine the incidence and control the operation of primary rules, this would seem to mimic the constitutional structure of the domestic legal system yet it should be noted that this simply means that the dispute resolution body is exercising constitutional functions, not that the system has developed a constitution.⁶⁰

This application of a scale is important and highlights a fundamental distinction between systems theory and constitutionalisation. Under systems theory as articulated by Luhmann, a system is either a normative system only *or* a legal system (which entails it is a normative system as well). As soon as a system becomes a legal system, it acts as if it has always been and, therefore, there cannot exist a scale along which a legal system can lie until it is fully fledged. Constitutionalisation arguments in contrast focus upon the ECJ and the WTO simply as they are the *most* constitutionalised organisations.⁶¹ They contain elements of a constitutionalised body yet may not amount to a full constitution as of yet.⁶² If full constitutionalisation is the final destination, organisations can be pointed to on a scale between autonomy and full constitutionalisation

Although there can be no direct ports from one legal theory to another, the concept of viewing the development of a legal system as a development along a line, rather than the binary distinction that Luhmann's systems theory provides, is an element that should be considered. If systems theory allows the identification of completed systems of law through the application of the binary legal/illegal code to communications, constitutionalisation focused far more specifically upon the shift from one societal construct (an international organisation) into another (a constitutional body). This focus upon the shift is useful and allows the answering of the question that Luhmann's version of systems theory cannot.

⁶⁰ *Supra* Note. 55, pg. 127

⁶¹ *Ibid.* pg. 205

⁶² For example see Deborah Cass, 'The Constitutionalization of International Trade Law: Judicial Norm Generation as the Engine of Constitutionalization' (2001) 13 *EJIL* 39

‘The acts of the organization itself must be subject to judicial or to a functionally similar review which controls whether the constitutional principles are observed and sees that the constitutional limits are respected by the organization itself.’⁶³

‘In institutional terms, it matters that the EU possess a full-fledged compulsory judicial system and that the WTO has progressively entrenched quasi-compulsory and quasi-judicial proceedings which lead to judgment-like reports.’⁶⁴

Under the constitutionalisation theory, a Court, or Court-like body, is required to shift from an international organisation into a fully autonomous legal unit. This is different to the intellectual basis established earlier within systems theory that required a Court for a system to be fully autonomous. If this application from constitutionalisation theory was to hold true for systems theory, it is not only a Court-like body that is required for a system, but it is the very process of a Court-like body judging behaviour against norms that would be the shift from a normative system to a legal system.

3.5 The Importance of a Court-like Body for the Development of an Autonomous Legal System under Systems Theory

If systems theory requires a Court-like body to be a fully autonomous system, as the body internal to the legal system that rules upon the legal/illegal divide and allows for the stabilisation of normative expectations, it can be examined if the presence of this Court-like body is the trigger that shifts a normative system into a legal system.

As discussed previously, the two tests proposed by Luhmann to discern the validity of a legal system are the ‘functional specification of law’, that the system and its laws are focused upon a specific problem within the overarching societal

⁶³ *Supra* Note. 55, pg. 213

⁶⁴ *Ibid.* pg. 215

system; and that the system is involved in a binary distinction between positive conduct ('legal') and negative conduct ('illegal').

Although Luhmann does not highlight it as one of the key tests for the establishment of a legal system, elsewhere in his work he does highlight the importance of dispute resolution bodies for a system.⁶⁵ As law is a mechanism to allow its subjects to guide their behaviour by basing their actions on expectations (both on the expectations themselves and on the result of failing to meet those expectations), sanctions and a dispute resolution body enforce those expectations both by providing a punishment and a clarification over the expectation.

Teubner develops this argument in his work and asserts that the presence of norms invoking the binary code of legal/illegal is insufficient to change a normative system into a legal system.⁶⁶ Instead Teubner asserts that:

'Autonomous law (with or without a state) only exists when institutions have been established which systemically assess all first order observations that use the code legal/illegal by means of second order observations on the basis of the code of law.'⁶⁷

Under the understanding that law is an autonomous social system to guide expectations, a Court then moves from the periphery of a system to a central role as it 'allows for the development of legal arguments and determination of content of law norms that other actors can rely on to structure their affairs'.⁶⁸ As law has shifted from the positivist understanding, with a basis upon sovereign will, to a systems theory understanding, with a basis upon a legal/illegal binary code and relying upon an institution that assess all first order observations of the code (i.e. a Court-like body), the body that establishes the norms that has traditionally been seen as central to a legal system has now been shifted to the periphery and been replaced by a Court.⁶⁹

⁶⁵ Niklas Luhmann, *Law as a Social System*, translated by Klaus Ziegert (OUP 2004) pg. 107

⁶⁶ Gunther Teubner, 'Global Bukowina: Legal Pluralism in the World-Society' in Gunther Teubner (ed.), *Global Law Without a State* (Ashgate 1997) pg. 3

⁶⁷ Gunther Teubner & Peter Korth, 'Two Kinds of Legal Pluralism: Collisions of Laws in the Double Fragmentation of World Society' in Margaret Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (CUP 2012)

⁶⁸ Steven Wheatley, *The Democratic Legitimacy of International Law* (Hart 2010) pg. 285

⁶⁹ Gunther Teubner, 'Breaking Frames: the Global Interplay of Legal and Social Systems' (1997) 45 *American Journal of Constitutional Law* 149, 158

As examined, systems theory interprets law in a decentralized fashion. This is to say that the source of the communication does not matter, it is simply if the communication is framed in terms of legal/illegal. The law/politics distinction can easily be divided in this system using this fashion and allows us to examine norm creation that occurs outside the political field. This changes the structure in which we examine national law. Parliamentary bodies (or legitimate law creating bodies) are no longer seen as centralist to the creation of law. Whilst acknowledging that they still exist and are an important part of the system, other bodies can create 'law', and this places the Court as the centralist body in a system as ultimately it is the Court that rules on what is law as it is a Court that decides whether an action is legal or illegal.⁷⁰ When this model is applied to the international law stage, the decentralised norm creation process and the increasing proliferation of norm making bodies would suggest that Court-like bodies would be required to assess whether actions associated with these norms are legal/illegal. The criteria given in Article 38 of the ICJ Statute, whilst still important, are not the only sources of "law" anymore. If in the fragmented world of international law, each fragment is to develop into an autonomous systems, a Court (or dispute-settling body) is central to the system in having the role of deciding the legal/illegal distinction.

Politics and the norm creation that occurs is still within the system but Teubner's work classes it as periphery and highlights that this breaking of the traditional hierarchal model allows actors to:

'recognize other types of social rule production as law production, but only under the condition that they are produced in the periphery of the legal system in structural coupling with external social processes of rule-formation.'⁷¹

This allows the recognition of the presence of various norm creating features outside of a system that exist and have an effect upon a system. '(T)echnical standardization, professional rule production, human rights, intra-organizational regulation, and contracting'⁷² all become legal systems in their own right and have an effect upon other systems.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*

The role a Court-like body plays is crucial in establishing 'what is law?' within a system by providing a mechanism for self-referencing. Through arbitration a Court-like body in an international organisation has not only to consider the rules that are given to it from its founding document (the internal processes of the system) and internal norms that have developed, it also must consider the effect of wider international law upon the system through structural coupling, information that it can interpret along its own internal processes. The Court-like body, through its case law, is the body that provides the clear demarcation between what is included in a system and what is excluded, as well as interpreting the actual norms that are included and allowing for the self-referencing process to occur.

Yet, as well as being central to the existence of an operating autonomous legal system, a Court-like body is central to the evolution of a normative system into a legal system. If law is a system of communications marked by a binary code legal/illegal, an entity needs to classify communication as either legal or illegal. This happens when conflicts regarding norms are to be decided and, therefore, contributes to the stabilization of normative expectations by remembering and forgetting.

'The departure point for the evolution of law is the initially barely marked distinction between uncontested and contested cases of disappointment. Only if conflicts can be verbalized... can a second-order observation arise, because only then is one obliged to decide who is in a legal position and who is in an illegal position.'⁷³

The creation of a third party dispute settler is the most obvious and common mechanism via which conflicts can be verbalised and, therefore, a decision reached on whether an action is legal or illegal. An alternative mechanism would be for consensus to be reached among actors within a system on if an action is legal or illegal; such as can be witnessed in some elements of customary international law.⁷⁴

⁷³ Niklas Luhmann, *Law as a Social System* (OUP 2004) pg. 246

⁷⁴ For example see the *Caroline Case* (1837) that established the legal groundings for the modern understanding of anticipatory self-defence where the dispute was settled by the consensus of the parties.

A Court-like body acting as a third party dispute settler is preferable for the process of remembering and forgetting that must occur to stabilise normative expectations. Calliess and Renner point to precedent in common law jurisdictions as an example of fulfilling this criterion of remembering and forgetting to establish which norms are relevant for legal/illegal communications.⁷⁵ These points of references between past and future legal communications to stabilise normative expectations can occur through the publication of legal disputes to allow future communications a certainty, and, therefore, stabilising normative expectations.

The presence of a Court-like body for the evolution into a legal system accompanies Calliess's and Renner's argument that an enabling condition for the evolution of a legal system is a mechanism that allows for the 'interlinkage and mutual referencing of legal communications'.⁷⁶ They site the development of precedent from a Court as the most likely example of this mechanism but also point to a doctrinal elaboration of legal principles, which would also be provided by a Court, as another example.⁷⁷

The evolution of a normative system into an autonomous legal system would, therefore, require at least two conditions; the verbalisation of conflicts with a determination whether an action is legal or illegal (most often manifested in the creation of a Court-like body) and the publication of legal communications to guide and stabilise future normative expectations. Without this verbalisation and stabilisation through a Court-like body or consensus of actors, a system of norms cannot evolve into a legal system.

This understanding leads to the conclusion that for a system of law to exist under systems theory, a dispute settlement body must be incorporated into the system, invoking legal language, settling disputes on the legal/illegal binary code, which publishes its judgments for all of the actors within a system to scrutinise.

⁷⁵ Galf-Peter Calliess and Moritz Renner, 'From Soft Law to Hard Code: the Juridification of Global Governance' 22(2) Ratio Juris 260, 272

⁷⁶ *Ibid.* pg. 273

⁷⁷ *Ibid.*

The fundamental test of systems theory elaborated by Luhmann and Teubner, therefore, remains unchanged (as point 1) but a secondary question is now required:

- 1) Are communications identified through the binary coding legal/illegal?
- 2) Is there a dispute settlement body that assesses conduct in relation to the coding legal/illegal?

If both answers are yes, a legal system exists. The questions themselves are intrinsically linked as the easiest way to demonstrate the answer to question 1 is to prove the existence of a dispute settlement body for question 2.

3.5.1 The Structure of the Court-like Body within a Legal System

The essentialist analysis over what form of structure is needed to develop from a normative system to a legal system has identified the required presence of a Court-like body ruling upon the legal/illegal binary code. To achieve its purpose of stabilising normative expectations, the results of disputes should be available to the actors affected by judgments.

This in turn suggests that all that is required is a body that assesses conduct on a legal/illegal binary code that makes available its findings to the actors that within a system, which in turn implies that the form of the body is irrelevant. However, although the form of the body may not dictate whether it achieves its purpose of settling disputes along the legal/illegal divide, there may be identifiable elements that would better achieve that purpose for the purposes of systems theory.

Geir Ulfstein, in his work on constitutionalisation, has highlighted a variety of criteria that are required for a body to be classed as a Court.⁷⁸ These criteria are pulled from various international human rights treaties⁷⁹ yet Ulfstein cites the International Criminal Tribunal for the Former Yugoslavia from the *Tadic* case in stating that an international criminal Court 'ought to be rooted in the rule of law

⁷⁸ Jan Klabbers, Anne Peters & Geir Ulfstein, *The Constitutionalization of International Law* (OUP 2009) pg. 126-152

⁷⁹ Article 14 of the International Covenant of Civil and Political Rights; Article 6 of the European Convention on Human Rights; and Article 8 of the American Convention on Human Rights.

and offer all guarantees embodied in the relevant international instruments⁸⁰ and that the rule of law in turn requires that the Court must be established 'in accordance with the proper international standards; it must provide all the guarantees of fairness, justice, and even-handedness, in full conformity with internationally recognized human rights instruments.'⁸¹

The requirements that Ulfstein identifies are:

- 1) Expertise – the judges should possess the necessary legal qualifications to hear the case.⁸²
- 2) Independence – the Court should be independent both from state control and from the international organisation itself.⁸³
- 3) Equal access – the demos should have equal access to the court.⁸⁴
- 4) Fair hearing – parties to the dispute should be allowed to properly present their case, the judges should be aware of the law in the relevant area and the proceedings are conducted in a transparent manner.⁸⁵
- 5) Need for consistency – specifically, the Court should follow its own decisions on the relevant law. Generally, the Court should take the decisions of other relevant courts into account (this is of particular relevance to international law where it is generally acknowledged that there is no concept of binding precedent).⁸⁶
- 6) Democratic control – Ulfstein's final requirement is that international Courts balance their activism against the democratic law making procedures of the organisation.⁸⁷ The stronger the democratic law making powers, the more active the Court can be. As this final requirement is specifically related to the constitutionalisation of an international organisation and the separation of powers that it enjoys, this requirement can be excluded from a systems theory based analysis.

⁸⁰ *Prosecutor v Dusko Tadic, Decisions on the Defence Motion for Interlocutory Appeal on Jurisdiction* Case IT-94-1-AR72 Appeals Chamber of 2 October 1995, para 42

⁸¹ *Ibid.* para 45

⁸² *Supra* Note. 78, pg. 128

⁸³ *Ibid.* pg. 130

⁸⁴ *Ibid.* pg. 132

⁸⁵ *Ibid.* pg. 133

⁸⁶ *Ibid.* pg. 139

⁸⁷ *Ibid.* pg. 147-150

Systems theory, *stricto sensu*, only requires the presence of a Court-like body to stabilise normative expectations. Nonetheless, the requirements that Ulfstein identifies are useful for assessing the development of a Court-like body within a legal system, by assessing how well any body achieves the purpose that is required for under systems theory. The presence of the initial five of Ulfstein's requirements all contribute towards the stabilisation of normative expectations within a system, by furthering the stabilisation. Without judicial expertise, independence from other organs within the system, equal access to the demos of the system, a fair hearing and a consistent approach by the dispute settlement body; the laws that the body would try to uphold would not be able to effectively guide actors' expectations.

3.6 How Systems Theory Views the World

A systems theory view of the world makes for quite a different sight to one based upon the positive theory. Fragmentation, global legal pluralism, the wealth of Courts, quasi-Courts and other conflict-resolving bodies,⁸⁸ as well as the autonomy of certain international institutions all have the potential to fit into the model. If it is accepted that the fragmentation of international law has occurred (always running counter to the notion that international law was 'whole' in the first place), then systems theory allows for the possibility to see the fragmented areas of the field as distinct autonomous units. For example, and making no assumption that these areas are either fragmented or have amounted to autonomous systems, human rights law with its own Court system, laws and framing its communication in terms of human rights could be seen as autonomous; international trade law with its own dispute bodies, laws and framing its communication in terms of international trade could be seen as autonomous; any area that has been fragmented, has the potential to be seen as autonomous. If both could ever be acknowledged as autonomous legal systems, whilst communication would occur between these two areas of human rights and international trade, both would interpret the communication to give meaning to

⁸⁸ In 2004, the Project on International Courts and Tribunals found a total of 125 dispute-resolution bodies existed on the international plane. http://www.pict-pcti.org/publications/synoptic_chart/synop_c4.pdf accessed July 2013.

their respective normative values. This is perhaps why there has been great difficulty amalgamating the two areas of law.⁸⁹

Simma and Pulkowski, in their work concerning self-contained regimes in international law, dispute the notion that the regimes that exist are fully autonomous but instead argue that as the individual legal systems do not live in a vacuum they cannot ever amount to be fully autonomous as they rely upon other areas of international law.⁹⁰ As evidence for this, they sites cases from the WTO Appellate Body and the European Court of Justice where both acknowledge that general international law has a bearing on their jurisdictions.⁹¹ Yet systems theory allows this acknowledgement of other systems through structural coupling. If it could be argued that both the WTO and the European Union were autonomous units, this is not to say that each area is closed off to the outside legal world. It instead creates a situation where other systems of law (general international law for example) are interpreted via the internal mechanisms of the respective systems. General international law as a source of information, and other communication from outside the specific system, will, therefore, always apply but be interpreted in the context of the system.

Teubner argues that globalisation has led to a vast increase in international relations in subject areas outside the traditional global work of politics.⁹²

‘Not only the economy, but also science, transport, communication media and tourism are nowadays self-reproducing world systems.’⁹³

For Teubner, this presence of a plethora of self-reproducing world systems dismisses the positivist theories of international law in understanding legal globalization as they are constantly based around the State and its consent as well as circumventing theories of “power politics” as they will ignore the legal systems

⁸⁹ Peter Hilpold, ‘WTO Law and Human Rights: Bringing Together two Autopoietic Orders’ (2011) 10(2) Chinese Journal of International Law 323

⁹⁰ Bruno Simma & Dirk Pulkowski, ‘Of Planets and the Universe: Self-contained Regimes in International Law’ (2006) 17(3) EJIL 483, 492

⁹¹ US – Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body, 29 Apr. 1996 WT/DS2/AB/R at 17 & Opinion 1/91, EEA1, 14 Dec. [1991] ECR, I-6079, at paras 39 and 40 respectively.

⁹² Gunther Teubner, *Global Law Without a State* (Dartmouth 1997) pg. 5

⁹³ *Ibid.*

that are being produced in the above areas.⁹⁴ Instead he focuses upon society as the driver for change with the political centres of nation States being pushed aside in preference of 'fragmented social systems'.⁹⁵ This systems theory view of the world causes some issues that can readily be witnessed in international law today:

- 1) Boundaries: Rather than international law being based upon territorial boundaries, law has shifted to be based upon invisible boundaries defined by the subject matter.
- 2) Sources of law: International law will no longer emanate exclusively from centralised legislative bodies but from highly specialised systems.
- 3) Independence: The argument that global law has little of the judicial independence witnessed in national law. Instead the law is dependent upon the social field that it is legislating upon.⁹⁶

The issue of global law emanating from outside of State control is not a new area of research. The legal area and effects of *lex mercatoria* have been prevalent within international legal research for decades. Systems theory, however, views this area like any other and views it as 'a self-reproducing, worldwide legal discourse which closes its meaning that boundaries by the use of the legal/illegal binary code and reproduces itself by processing a symbol of global...validity'.⁹⁷ Therefore, it matches all of the criteria laid out by systems theory to have the potential to amount to a fully autonomous system.

Yet the debate around the creation of a *lex mercatoria* highlights the difficulty systems theory has in being accepted as a legitimate theory of international law. Many authors outright reject the premise that *lex mercatoria* can exist as a legal field as in their view international law cannot be created without State consent.⁹⁸ These arguments are generally positivistic with a traditional view of law that law

⁹⁴ *Ibid.*

⁹⁵ *Ibid.* pg. 6

⁹⁶ *Ibid.* pg. 7 for all of these points.

⁹⁷ *Ibid.*

⁹⁸ See for example; George Delaume, 'Comparative Analysis as a Basis of Law in State Contracts: the Myth of the Lex Mercatoria' (1989) 63 Tulane Law Review 575; Keith Highet, 'The Enigma of the Lex Mercatoria' (1989) 63 Tulane Law Review 613 and Andreas Spickhoff, 'Internationales Handelsrecht vor Schiedsgerichten und staatlichen Gerichten' (1992) 56 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 116

emanates only from sovereign States. Nevertheless, model-dependent realism should be utilised and inform that for a theory to be accepted as an alternative to the positivist theory, it does not have to answer this question of link to sovereign States any more than positivism has to answer the question of why it no longer applies in every circumstance. If systems theory can accurately model and explain the events witnessed currently on the international stage in a particular circumstance and make predictions for the future, then it can be seen as a 'true' model. This shifts the debate away from ideological preferences to disputing facts and the applicability of a theory.

The difficulties that fragmentation presents also become more apparent in a systems theory view of the world when considering the boundaries that Teubner discusses. Systems theory assumes that autonomous systems act in conjunction on the same level. This, therefore, presumes that no system is subordinate to another simply because if it were so, the system could not be an autonomous unit without including the superior system within the original frame. For example, in a closed environment where only a Magistrate's Court and a Court of Appeal exist, the Court of Appeal must be within the same system as the Magistrate's Court. This leads to conflict resolution between laws not occurring in the traditional fashion of international laws versus national laws, but conflict between various systems acting on the same level of international law. If fragmentation has led to an increase in the amount of autonomous units acting on the international stage, then the potential for conflict has correspondingly increased.

There is no easy solution to this issue with the wealth of suggestions with no clear answer acting as testament to that. Oellers-Frahm argues that the ICJ should act as a Court of Appeal in all circumstances when a new tribunal is created.⁹⁹ This argument would cause issues from a systems theory perspective as a tribunal might not see itself as a Court or even as a quasi-Court. Various authors have argued that the ICJ's Advisory Opinions should be used in cases of conflict,¹⁰⁰

⁹⁹ Karin Oellers-Frahm, 'Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions' (2001) 5 Max Planck U.N.Y.B. 67, 67

¹⁰⁰ *Report of Stephen M. Schwebel, President of the international Court of Justice*, U.N. GAOR, 54th Sess., Agenda Item 13, 4, U.N. Doc. A/54/PV.39 (1999); Pierre-Marie Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice' (1999) 31 N.Y.U.J. Int'l L. & Pol. 791, 801; *Study by Gerhard*

however, even using the Project on International Courts and Tribunals conservative estimate of 125 dispute-resolution bodies from 2004,¹⁰¹ the amount of conflict would tie down the resources of the ICJ for years to come. Fisher-Lescano and Teubner suggest a 'formalization' of the law to allow clear (or at least clearer) boundaries between systems.¹⁰² However, as in most cases the Court, quasi-Court or other body's jurisdiction is non-compulsory, all of these approaches run into issues that have been inadequately examined. States who are in conflict with each other would be assumed to argue to have the dispute examined in the 'Court' that best supports their position. Fisher-Lescano and Teubner's approach would solve this but the practicalities of sorting out the jurisdiction of over 125 different bodies with various institutions being created and dissolved on a continual basis would be extremely challenging if not impossible. This approach would also assume a simplistic view of disputes where only one issue was under contention which as seen is not always the situation. The interesting phenomenon is not as has been suggested which 'Court' out of the many examines a case, it is when a Court has to examine areas of international law that are outside its jurisdiction.

3.7 Global Legal Pluralism

If systems theory is used to define the boundaries of different areas of competence within a society, legal pluralism defines the relationship between the various systems.

The positivist approach to international law has focused upon the conflict that has occurred in a top-down fashion: international law, national law and indigenous law. This is an acknowledgement of systems of law and the care to stress that this view is not of a hierarchal structure. If the understanding of systems theory is correct, however, we not only have multiple autonomous systems acting within international law but multiple versions acting within national law as well.

Hafner, Risks Ensuing from Fragmentation of International Law, U.N. GAOR, 55th Sess., Supp. Nr. 10, at 326, U.N. Doc> A/55/10 (2002)

¹⁰¹ *Supra* Note. 88

¹⁰² Andreas Fischer-Lescano & Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 Michigan J. Int'l L. 999, 1044

This area of law becomes increasingly complicated as it is never static and continually evolving. As new tribunals (or alternative dispute settling bodies) are created, new areas of law are created. Some previous autonomous systems might be replaced and with each new system that is found to exist, a new examination would have to take place defining the relationship between the new system and the various systems around it.

The creation of various autonomous systems fits satisfactorily into the accepted view of fragmentation of international law. Despite the recent trend to examine the subject, Wilfried Jenks, who saw it as an inevitable consequence of the international legal structure, predicted fragmentation more than fifty years ago.¹⁰³ The International Law Commission in their workings on the subject acknowledged as much but fragmentation had become such an issue that it felt that the subject was still worthy of an examination and full report.¹⁰⁴ If fragmentation can be described as 'the successive development of specialized international and transnational regulatory orders with neither hierarchy, nor stated relationship to each other'¹⁰⁵ this would appear to fit into the definition of law via systems theory.

The distinction within systems theory and law of legal/illegal naturally creates a multitude of possibilities for pluralism. However, the basis of the theory rests upon the proposition that law is defined as communication and that there is no hierarchal structure in systems. Instead a heterarchy is created.¹⁰⁶ This is a system of organisation where the elements share a horizontal position of power and allows us to view pluralism as 'a multiplicity of communicative processes in a given social field that observe social action under the binary code of legal/illegal'.¹⁰⁷ This does not solve the conflict of regime collisions that global legal pluralism has thrown up but allows a better understanding of a solution.

¹⁰³ Wilfried Jenks, 'The Conflict of Law-Making Treaties', (1953) 30 Brit. Y.B. Int'l L. 401, 403

¹⁰⁴ U.N. Doc. A/CN.4/L.628 Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law (2006)

¹⁰⁵ Andrea Bjorklund & Sophie Nappert, 'Beyond Fragmentation', in Todd Weiler & Freya Baetens (eds.), *New Directions in International Economic Law – in Memoriam Thomas Wälde* (CMP Publishing 2011) 439, 439

¹⁰⁶ *Supra* Note. 92, pg. 12

¹⁰⁷ *Ibid.*

The structural coupling that systems theory provides for informs that systems are continuously exchanging information with their external environments and other systems. It is also argued that issues in today's society cannot be readily placed into only one category as they are too multi-faceted (this problem is what causes regime collisions in the first place). Rather than attempt to simplify matters by fitting a multi-faceted problem into a single-issue system, for example forcing human rights issues through the WTO, attempts should be made to increase the flow of information and communication outside and between systems. This will in turn provide the information to other systems and crucially those other systems will interpret the information in their own internal language.

The structural coupling between competing systems that systems theory presupposes could arguably have already been witnessed and demonstrated within international law. Bjorklund and Nappert write on the borrowing that has occurred in international investment law.¹⁰⁸ Their argument rests upon the denial that the World Trade Organisation has become constitutionalised, directly in conflict with current writings,¹⁰⁹ and that there therefore has to be an alternative explanation that adequately describes the current circumstances.

They elaborate upon, what they describe as, an 'inter-nuclei communication model' to explain international law, an evolution from their 'nuclei model'. This model differs from the traditional sovereignty model by stating that international tribunals look to each others decisions for influence and guidance when ruling on areas of international law that involve similar concepts. In this model, similar to the 'nuclei model' discussed earlier, traditional international law is envisioned at the centre with the areas that have fragmented gravitating around it. Unlike their earlier model, however, the fragmented areas are interconnected. This connection can be seen as the communication that occurs between them so that tribunals can 'borrow' judgments from other areas.

¹⁰⁸ *Supra* Note. 105

¹⁰⁹ For work on the WTO see; Deborah Cass, *The Constitutionalization of the World Trade Organization* (OUP 2005) which is in contrast to her earlier work in Deborah Cass, 'The "Constitutionalization" of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade', 12 *EJIL* (2001) 39 and Markus Krajewski, 'Democratic Legitimacy and Constitutional Perspectives of WTO Law' (2001) 35 *J'nal of World Trade Law* 167.

Bjorklund and Nappert highlight four cases as examples of where tribunals have looked to other areas of international law in influencing their decisions.¹¹⁰ The importance, however, is that the various systems interpreted the decisions of other tribunals within their own internal mechanisms and did not simply defer jurisdiction to the other tribunal.

A debate that has drawn a considerable amount of academic debate has been the furore surrounding the issue of human rights and trade.¹¹¹ One explanation, from a systems theory perspective is that it is not, as has been suggested, that the WTO ignores human rights, it simply interprets the information in a fashion inline with its own internal structure and reaches conclusions within its own system. A commentator might not be happy with the *process* that a system interprets external communication, but it should not be denied that the information has been taken into account.

This in turn shifts the responsibility away from international organisations to compete for jurisdiction for an issue, back to States to have responsibility to select which organisation they best feel is equipped to deal with it. This is an imperfect solution as a State can contest which jurisdiction an issue would fall into to best serve their purpose,¹¹² however, it can always be known that all issues are considered.

3.8 Application of Framework

In terms of autonomous systems in international law, the work of the World Bank has received insufficient scrutiny. The organisation drawing the most academic debate in this area is the WTO¹¹³ but in a non-systems theory context. The reasons put forward for the examination of the World Bank as an autonomous legal system are the same that are suggested for the benefits of the examination

¹¹⁰ *Supra* Note. 105

¹¹¹ See for example; *Supra* Note. 89; Thomas Cottier, 'Trade and Human Rights: A Relationship to Discover' (2002) 5(1) J. Int. Economic L. 111 & Drusilla Brown, Alan Deardorff & Robert Stern, 'Labor Standards and Human Rights: Implications for International Trade and Investment' (2012) IPC Working Paper 119

¹¹² Brian Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2007) 29(3) Sydney L. R. 375

¹¹³ See for example; Deborah Cass, *The Constitutionalization of the World Trade Organization* (OUP 2005)

of fragmentation. Fragmentation has led to a web of actors participating and acting on international law from a system that was never intended or designed to accommodate them. Fragmentation could in fact be seen as the traditional system realigning itself to accommodate these actors. Nevertheless, international law is left with the relics of a system that was intended for the exclusive jurisdiction of States and has been designed as such. The active participation of non-State actors, the standing of international organisations and the increasing proliferation of tribunal verdicts have caused a re-examination of international law in the light of fragmentation.

The World Bank can be viewed in a similar light. It is acting from a privileged place within a system that was never designed to accommodate it.

However, having defined the intellectual framework that is available to use for analysis, attention must turn to how the framework will be applied to the World Bank.

If systems theory defines law as a communication with a legal/non-legal meaning, the work of the World Bank, to be classed as an autonomous system, must then be seen in terms of this. Also, as discussed if the role of a Court-like body has become crucial to an understanding of how a system both develops and operates, as it is the Court that is the most ready mechanism to apply the legal/non-legal meaning to communications, for systems theory to be successfully applied to the World Bank to demonstrate the development of an autonomous legal system, a body must exist within its structure that amounts to a Court-like body. First must be the presence of a normative system, then, through the introduction of a Court, a normative system can develop into a legal system.

3.9 Conclusion

The international agreements that occur between States are comprehensible as they are governed by law; this is to say that their behaviour can be modelled. The analytical tools examined and applied in Chapters One and Two have failed to accurately explain the actions of the World Bank in law. The tool put forward in this chapter has sought to move understanding beyond the traditionally accepted

tools based upon consent towards a new understanding of the law based upon communication. Law is communication termed in a legal/non-legal meaning.

The systems theory model requires a number of different elements: a self-reproducing, self-referencing autonomous system that is characterised by communication along a binary code legal/illegal with the purpose of stabilising normative expectations. The most obvious mechanism via which communication is classed as legal/illegal to stabilise normative expectations is through the introduction of a Court-like body. Without this communication being classed as legal/illegal, a normative system cannot develop into a legal system.

The strength of any theory, however, is based upon how accurately it accounts for current and previous events as well as making predictions for the future. As examined in Chapter One, the World Bank has made remarkable strides forward away from its treaty seemingly without State permission that would seem to contradict the traditional sovereignty based model yet States accept these actions. To examine if a legal system exists under systems theory firstly requires establishing whether a normative system exists. The next chapter will apply systems theory thinking to the World Bank to establish whether the work of the Bank has led to the creation of a normative system and then, subsequently, the steps that the Bank has took to begin developing into an autonomous legal system.

Chapter Four: Development of a Normative System

4.1 Introduction

The prevalent theories via which international lawyers have understood the actions of international organisations have failed to make sense of the work of the World Bank. The Bank itself is acting outside of the clear mandate given to it by Member States in its Articles of Agreement and in some cases is acting plainly against this mandate. Systems theory is offered as an alternative tool to explain in law how the World Bank is behaving and why its Member States allow it to behave in such a fashion.

Systems theory describes the creation and working of an autonomous legal system. The Bank behaving outside of its Articles, however, does not in itself amount to the creation of a new legal system as required by systems theory; the Bank has to be fundamentally and, as a first point, be involved in a normative system of telling States what to do, as well as meeting the other tests required under systems theory. When this communication within the system develops into communication along the legal/illegal divide, a legal system can be said to be created. As interesting and challenging as explaining the work of the World Bank acting outside of its mandate is, this does not in itself create a normative system and instead only demonstrates the ability of the Bank to act independently without State consent, as well as demonstrating the problems that the most prevalent theories have in explaining its actions. To develop into a normative actor that affects the behaviour of participants under its control, the Bank has to be telling States what to do, judging their actions against a model and enforcing a model of behaviour onto them. Only through the development of a normative system can a legal system develop under systems theory where communications are defined along the legal/illegal divide.

The Bank exercising a governance function and telling States what to do is a concept that is often claimed, although not always in a legal context.¹ This is

¹ See for example; Joseph Stiglitz, 'Democratizing the International Monetary Fund and the World Bank: Governance and Accountability' (2003) 16(1) *Governance: An International Journal of Policy, Administration, and Institutions* 111; Ngaire Woods, 'The Challenge of Good Governance for the IMF and the World Bank Themselves' (2000) 28(5)

usually attributed to the conditionality that the World Bank puts upon its loans. Conditionality is a concept that has plagued the history of the World Bank. Although there is no formal definition of conditionality within the Bank's legal framework,² and various actors use the term in different ways,³ conditionality describes the conditions that the member State must fulfil to have access to financing by the World Bank: both to have access to initial disbursements of an agreed loan and the conditions that must be met on a continuing basis and in the future to have access to subsequent disbursements of lending. Criticism over the conditions imposed by the Bank has been far and wide from a range of sources that would not usually be combined. Criticism has focused upon the effect upon democracy,⁴ the economic benefits and effectiveness of conditionality,⁵ the range and depth of issues that are covered by conditions⁶ and whether the conditions imposed go beyond economic concerns into politics⁷ as well as many other areas.⁸

Stemming from the introduction of conditionality has been the Operations Manual.⁹ The Operations Manual contains the Operational Policies (OPs) and Bank Procedures (BPs) that the World Bank must follow when granting assistance. These are officially internal policies and procedures that bind the conduct of the Bank staff and are seen by the Bank as instructions from the Bank Management to

World Development 823; and Benedict Kingsbury, Nico Krisch & Richard Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15, 27

² Review of World Bank Conditionality: Legal Aspects of Conditionality in Policy-Based Lending, Legal Vice Presidency World Bank, June 29, 2005, para. 2

³ Stefan Koeberle, Harold Bedoya, Peter Silarszky & Gero Verheyen (eds.), *Conditionality Revisited: Concepts, Experiences, and Lessons* (World Bank 2005), pg. 5-6

⁴ Stephen Knack, 'Does Foreign Aid Promote Democracy?' 48(1) *International Studies Quarterly* (2004) 251, 253-4 & 262

⁵ Joseph Stiglitz, 'The World Bank at the Millennium' (1999) 109 *The Economic Journal* F577, F591

⁶ Ngaire Woods & Amrita Narlikar, 'Governance and the Limits of Accountability: The WTO, the IMF and the World Bank' 53 *Int'l Social Science Journal* (2001) 569, 570

⁷ This has been a longstanding criticism of conditionality. See for example Heather Marquette, 'The Creeping Politicisation of the World Bank: The Case of Corruption' (2004) 52(3) *Political Studies* 413

⁸ See for example; Patricia Adams, 'The World Bank's Finances: An International S&I Crisis' (1994) 215 *Policy Analysis* 1, arguing that the lack of conditions has exposed the Bank to risks; Bruce Rich, *Mortgaging the Earth: The World Bank, Environmental Impoverishment, and the Crisis of Development* (Beacon Press 1995), arguing that the focus of conditions is wrong, and Henry Owen, 'The World Bank: is 50 Years Enough?' (1994) 73(5) *Foreign Affairs* 97, arguing the counter that the criticism of conditionality is misplaced.

⁹ The World Bank Operations Manual, 31 July, 2013

its staff.¹⁰ Rather than being conditions upon borrowing member States per se, they are criteria that the staff must follow and meet when preparing and maintaining a project.

The Bank has responded to this critique of conditionality by conducting a wide-ranging review of conditionality, mainly focused upon policy-based lending conditionality rather than investment lending.¹¹ Although incremental changes had occurred to conditionality, through experience and reflecting the changing nature of assistance lending, this review has established the model of conditionality that the World Bank applies today.

This chapter examines the normative development of the Bank through the use of conditionality and operational policies to demonstrate the construction of a normative system. As examined in the previous chapter, this normative system must be in place for the possibility of a system developing into an autonomous legal system under systems theory. The evolution in the Bank's handling of conditionality demonstrates how the Bank developed from the tradition positivist theory of an international organisation acting within the boundaries of the framework consented to by States to one where it is a normative regime ordering States how they ought to behave. The final key requirement for a normative system to develop into a legal system was the Court-like structure elaborated upon in Chapter Three; how the Inspection Panel developed from an advisory body to this Court-like structure is the focus of Chapter Five.

The chapter begins by considering the Bank's own view of the legal relationship between itself and its members. In order for a normative framework to exist, a hierarchal relationship must be present and the Bank's own view would dispute this. Section 4.3 then charts the requirements for a normative system under systems theory before Section 4.4 considers how the Bank has used conditionality as a governance mechanism and how the *ad hoc* use of conditions allows for the creation of an incomplete normative framework. Section 4.5 then considers the closing of this normative framework and evolution of the relationship between

¹⁰ Ibrahim Shihata, *The World Bank Inspection Panel: In Practice* (Second Edition, OUP 2000) pg. 41

¹¹ See 'Review of World Bank Conditionality' (World Bank 2005); 'Good Practice Principles for the Application of Conditionality: A Progress Report' (World Bank 2006); 'Conditionality in Development Policy Lending' (World Bank 2007); and *Supra* Note. 3.

the Bank and its membership by the introduction and use of OPs and BPs, and their predecessors, before section 4.6 considers how the Bank has also sought to extend its normative relationship beyond only borrowing member States, to non-borrowing States who are part of its membership.

4.2 The World Bank View on the ‘Legal’ Relationship between the Bank and its Membership

The traditionally seen legal relationship that exists between the World Bank and a borrowing Member State incorporates the Articles of Agreement and, in addition, the specific lending documentation that the State and the Bank sign for each project. This is the documentation that exists between the member State and the Bank that governs the terms and conditions of any specific lending. These agreements are seen as in and of themselves a consensual relationship between the two actors; with the Articles of Agreement involving both the State requesting membership and the World Bank agreeing to it,¹² and the Bank and member State agreeing to the specific lending project.

The Bank characterises the loan agreements between itself and its borrowing member States as ‘international agreements governed by international law’.¹³ The Bank itself being a subject of international law, that enjoys treaty-making capacity, drove the international nature of the agreement and the assessment of the General Counsel of the Bank that the agreements reached with member States fell within that capacity.¹⁴ The loan agreement is, therefore, seen by the Bank and its membership as an international agreement between the World Bank

¹² IBRD Articles of Agreement Article II Section 1 (b)

¹³ Aron Broches, ‘International Legal Aspects of the Operations of the World Bank’ (1959) III Hague: Academie de droit International: Recueil des cours 297 and, for a modern confirmation of this position, see http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,contentMDK:2218822~pagePK:148956~piPK:216618~theSitePK:445634,00.html#What_is_the_legal_status_of_loan_agreements_made_by_the_World_Bank_? accessed July 2013. Aron Broches was the General Counsel of the World Bank at the time of publication.

¹⁴ *Ibid.*

and the borrowing member State and is registered at the United Nations as such.¹⁵

The existence of legal lending documentation is in direct contrast to how the IMF operates. All legal obligations towards the IMF from borrowing Members stem from the application of the treaty and there is no subsequent legal agreement for when a Member State avails itself of IMF resources. Instead, the program is explicitly Member State “owned” where the State can stop a program of assistance at any point and its only legal obligation to the IMF is to repay the assistance, an obligation deriving from the IMF Articles of Agreement. The relationship between the IMF and the borrowing State is contained in, beyond the IMF Articles of Agreement, a Letter of Intent, outlining the State’s request to use IMF resources, and a decision of the Executive Board, that stipulates the IMF’s acceptance that a State can use its resources.

These additional documents do not provide an additional legal relationship due to the belief that if there was a legal document signed by both parties this could force a borrowing State to continue borrowing or the IMF to continue lending rather than both having the option to stop assistance at any time¹⁶: either as the State no longer wants or needs the assistance or as the IMF believes the State has not met the condition criteria. Legal obligations to repay instead stem from the treaty rather than being stipulated in any documentation specific to that assistance.

For the World Bank, the stipulation of an international agreement would suggest a relationship of legal equals, and the position of containing the relationship of each assistance in a legal document, counter to the IMF, would suggest that the Bank has purposefully sought this relationship to be framed in terms of law. For States, regardless of their relative wealth, military power or other factors, in law the ability to conclude international agreements is equal. Whether this equality extends to international organisations, and the ability that they may be given to conclude agreements, or whether there exists a hierarchical relationship between States and international organisations should be examined. Although an

¹⁵ *Supra* Note. 13 and John Head, ‘Evolution of the Governing Law for Loan Agreements of the World Bank and Other Multilateral Development Banks’ (1996) 90 AJIL 214, 221

¹⁶ Ross Leckow, ‘Conditionality in the International Monetary Fund’ in *Current Developments in Monetary and Financial Law Volume 3* (IMF 2005) pg. 59

international organisation can only create and sign treaties if it has the capacity to do so,¹⁷ and on subject matters related to the authority that has been delegated to it, it would be circular to say that States can delegate authority for a subject to an international organisation but also not delegate full treaty making capacity to the organisation as well if they clearly wish it to be so. This would be a limitation of the delegation that could take place. As long as the treaty signed by the organisation forwards and abides by the purposes of the delegated authority, which is a crucial element to prevent the international organisation acting outside the mandate that has been given to it, a relationship of equals is created between the international organisation and the sovereign States who sign the respective treaty. In terms of the World Bank relationship with borrowing member States that is contained in an international agreement signed by the two, this would appear to legal preclude the introduction of a hierarchical relationship as needed for the development of a normative system.

Many international organisations, including the Bank, have specific provisions allowing for the creation of international agreements¹⁸ and the practice of organisations concluding treaties with States, both on a bilateral basis such as for the World Bank loan agreements and on a multilateral basis such as signature of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, points to an acknowledgement that, at a minimum, within the confines of the organisations mandate, an organisation can conclude agreements on equal terms to a State.¹⁹

If this equality were true in terms of the World Bank, this equal relationship would preclude the development of a normative framework between the Bank and its

¹⁷ Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Article 6. For a fuller account of this topic, see J.P. Dobbert, 'Evolution of the Treaty-Making Capacity of International Organizations' in *Essays in Memory of Jean Carroz: The Law and the Sea* (FAO 1987)

¹⁸ See for example, World Bank: IBRD Articles of Agreement Article V, Section 8; IMF: IMF Articles of Agreement Article X; European Union: Article 216 The Treaty on European Union and ECJ, Case 22/70 *Commission of the European Communities v. Council of the European Communities* [1971] ECR 263; European Stability Mechanism: Treaty Establishing the European Stability Mechanism, Article 32.

¹⁹ For further work on this subject including arguments on how international organisations may have more powers than this minimum, see: José Alvarez, *International Organizations as Law-makers* (OUP 2006), Rüdiger Wolfrum & Volker Röben, *Developments of International Law in Treaty Making* (Max Planck 2005) and Jan Wouters & Philip De Man, 'International Organizations as Law-Makers' (2009) Leuven Centre for Global Governance Studies Working Paper No. 21 pg. 22-25

member States. By its very nature, a normative framework requires a hierarchical relationship via which one actor tells another actor what to do. In a legally equal relationship, this would not be possible.

The key documents of the Bank that, therefore, require an assessment for the relationship between the Bank and its members are the two documents that govern the legal relationship between them: the IBRD Articles of Agreement and the specific lending documentation for each project. It has already been examined how the World Bank is acting outside of its Articles of Agreement and acting outside of the consent that member States gave the Bank when joining the international organisation. This, in and of itself, would suggest there is not an equal relationship, as the Bank is taking authority and decisions that it is not empowered to do. Yet, the specific lending documentation establishes a further legal relationship between the Bank and a member State.

The documentation governing any specific World Bank project is contained in at least two main documents, the General Conditions²⁰ and a project-specific Loan Agreement.²¹ The General Conditions are the backbone of every project agreement and are incorporated by reference in each project assistance that the IBRD makes.²² The General Conditions outline specific elements that are common to each project: withdrawal amounts,²³ loan terms,²⁴ arbitration,²⁵ termination of the agreement,²⁶ etc.. With a baseline established that applies in every assistance, the project-specific Loan Agreement contains the terms of direct relevance for each individual project such as the actual loan amount. When there are inconsistencies between the General Conditions and the Loan Agreement, the Loan Agreement prevails.²⁷

²⁰ IBRD General Conditions for Loans, March 12, 2012

²¹ For an example of a Loan Agreement, see Official Documents – Loan Agreement for Loan 8273-PL (Closing Package) between Republic of Poland and IBRD, July 2, 2013. In addition, the Bank has a number of specific legal documents that are incorporated by reference as and when required.

²² <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,contentMDK:22198708~menuPK:6205946~pagePK:148956~piPK:216618~theSitePK:445634,00.html> accessed September 2013.

²³ Article II

²⁴ Article III

²⁵ Article VIII

²⁶ Article IX

²⁷ Article I, Section 1.02: Inconsistency with Legal Agreements

In addition to containing the exact financial terms of the individual project, the Loan Agreement contains the obligations of the borrower and the conditions that must be met for the release of each tranche of assistance. It is these conditions and obligations that have dictated the development of a normative system between the Bank and its borrowing member States.

4.3 Normative System under Systems Theory

The work of systems theory has focused upon the movement from a normative system to a legal system: either through elaborating upon the requirements that a legal system must have, or through examining the shift itself. The development of an original normative system has been inadequately examined. The work done in a legal context focuses upon the development into a legal system, with communication along the legal/illegal divide:

‘When legal systems become differentiated as special functional systems to society, this occurs on the basis of a special binary code, by which the operations of this system are oriented.’²⁸

This focus upon the dividing line, the legal/illegal binary code, is critical for allowing for the shift from a normative system into a legal system, but the requirements of a normative system are not examined.

Yet the usefulness of this definition beyond an already functioning autonomous legal system has been questioned.²⁹ The work done focuses upon the shift from a normative system into a legal system. For the normative system to develop, a system to constrain the actions of participants, there must fundamentally be two participants with communication of instruction within the normative system. Only when this develops into a system where this communication develops into being along the legal/illegal divide does it become a legal system, but the development of an initial normative discourse is unclear.

If a normative system is a communication of what an actor ought to do, a legal system is when this is done along a legal/illegal divide. Furthermore, if the

²⁸ Niklas Luhmann, ‘The Coding of the Legal System’, (1991/1992) *European Yearbook in the Sociology of Law* 145, 146

²⁹ Simon Roberts, ‘Against a Systemic Legal History’ 1 *Rechtsgeschichte*

purpose of the communication within a system of law is 'the stabilization of normative expectations',³⁰ then normative expectations must be present within a normative system, although perhaps not of such stable nature as those developed in a legal system.

'The legal system is seen as a system of actions, comprising not only legal discourse about norms or organized action like court decisions and legislation, but any human communication which has reference to legal expectations.'³¹

That communication must occur in a normative system is clearly established, that it must also not be along a legal/illegal divide is also established, as otherwise it would already be a legal system. Yet this normative system is not merely a starter point that is lost upon the adoption of a legal system, but the norms, as the constraint of what an actor ought to do, remain in place, but it is the communication along the legal/illegal divide that serves to guide the expectations of actors within the legal system.

'Decisions are legally valid only on the basis of normative rules because normative rules are valid only when implemented by decisions.'³²

The circular logic outlined by Luhmann, of normative rules requiring decisions to be valid, that are themselves only valid if normative rules are present, would suggest that no normative system could exist without decisions being taken in relation to them. Yet this communication of a decision cannot be legal/illegal or it would already amount to a legal system.

The implication of this is that for the development into a legal system, and for communication to occur along the legal/illegal divide, a system must have in place a set of normative rules: rules that are created by one actor to tell another actor what they ought to do, and, therefore, constraining the actions of this actor. In addition, decisions of implementation or applying these rules must be made. It is

³⁰ Galf-Peter Calliess and Moritz Renner, 'From Soft Law to Hard Code: the Juridification of Global Governance' (2009) 22 (2) Ratio Juris 260, 263

³¹ Gunther Teubner, 'Autopoiesis in Law and Society: A Rejoinder to Blankenburg' (1984) 16(2) Law & Society Review 291, 294

³² Niklas Luhmann, 'The Self Reproduction of Law and its Limits' in Gunther Teubner (ed.), *Dilemmas of Law in the Welfare State* (Walter de Gruyter & Co. 1984) pg. 115

not enough to have a set of rules that no one abides by; they must be enforced against an actor and more than a mere suggestion with an actor's behaviour judged and constrained by the rules.

In this context, of the development of a normative system via which one actor directs and judges the behaviour of another actor, focus can turn to the World Bank and the governance role that it plays, how this governance role has coincided with the development of a normative system and how the Bank has sought to make this system both wider, applying to more of its membership, and deeper, in increasing the quantity and depth of norms that it has established.

4.4 World Bank Conditionality as a Governance Mechanism and its Value within Systems Theory

The IBRD of today conducts two main forms of financial assistance to its membership: investment project loans (to fund a specific project in order to promote poverty reduction and development)³³ and development policy lending³⁴ ('to help a borrower achieve sustainable reductions in poverty through a program of policy and institutional actions').³⁵ In every loan that the World Bank makes under either of these two forms of assistance, the Bank attaches conditions that must be fulfilled for the release of funds.

These conditions have developed into norms that constrain the behaviour of the Bank's membership. They are instructions that the member States must follow if they are to have access to the Bank's funding. Within the area that the Bank operates, i.e. countries that do not have the ability to raise the funding themselves, there is no alternative for the member State. The Articles of Agreement themselves dictate that the Bank can only lend if it is satisfied that the member State would not be able to obtain the loan elsewhere under reasonable conditions.³⁶ States had come together in 1944 to create an organisation that

³³ Operational Policy 10.00, para. 1

³⁴ The ability of the World Bank to conduct lending for non-specific projects falls under the "special circumstances" exception of Article III, Section 4(vii): "Loans made or guaranteed by the Bank shall, except in special circumstances, be for the purpose of specific projects of reconstruction or development".

³⁵ Operational Policy 8.60, para. 2

³⁶ IBRD Articles of Agreement, Article III, Section 4(ii)

would lend to them when they had rebuilding and development needs, a State centric system with the power resting with the State to request assistance.³⁷ Instead, the Bank now operates on a basis of telling their States how to behave to be eligible for this assistance.

At the negotiations for the World Bank the subject of conditionality was raised, but in the context of the IMF and, however, no decision was taken over whether the IMF assistance should come with conditions or not.³⁸ Although not raised at Bretton Woods, the nature of the Bank required that certain elements of conditions on assistance needed to be in place. The World Bank funds its lending by borrowing on the capital markets.³⁹ To best achieve its purposes, it has to maintain the highest possible creditworthiness. As a practical matter, this is essential as it is the difference in creditworthiness between the Bank and those that it lends to that actually assists the member States. If the Bank's creditworthiness deteriorated, the funding cost for each borrower would increase and, to an extent, defeat the purpose of Bank lending. Therefore, it is essential for its operations that the Bank ensures that the money that it lends for projects is repaid. In addition, if the Bank did not pay due regard to the prospects of repayment it would not be able to repay the money that it has borrowed itself on the capital markets and would force member States as a whole to contribute capital.⁴⁰

However, this practical matter is somewhat counter to the Bank's purposes. The Bank lends to countries that cannot achieve the financing on reasonable terms themselves, which occurs because the markets believe that there is a risk that the State will not be able to pay it back. If the Bank simply replaced the State in the borrowing, the World Bank would have a similar borrowing profile of those member States that it lent to, and, therefore, only be able to lend at the high yields that the member States themselves would turn to the Bank to avoid. To

³⁷ The only criterion envisioned was an ability for the member State to repay, as evidenced by the use of "loans" rather than grants.

³⁸ Alex Dreher, 'The Development and Implementation of IMF and World Bank Conditionality' (2002) HWWA Discussion Paper pg. 8

³⁹ The IBRD has an authorized capital base of \$278.4 billion, with \$13.4 billion having been paid-in. This capital base assists the Bank in achieving the highest credit rating. See: IBRD Financial Statements June 30, 2013 pg. 25

⁴⁰ See IBRD Articles of Agreement, Article III, Section 4(v) that specifically requires the Bank to "act prudently in the interests both of the particular member in whose territories the project is located and of the members as a whole".

assure markets that it will be repaid, the Bank can only lend to member States that it can expect to be repaid from. This meant lending to member States where certain macroeconomic conditions were met⁴¹ but also to those countries that would undertake reforms in order to improve their economy and, therefore, be able to repay the assistance.⁴² These reforms are designed to bring the member State either back to or to a position of economic prosperity where it can be assured that the Bank is repaid.

The legal bases for requesting these reforms are references in the Articles of Agreement to “suitable conditions”⁴³. However, it is acknowledged by the Bank that ‘the concept of “conditionality” is not explicitly discussed in either IBRD or IDA’s Articles.’⁴⁴ Unlike the Bank, in 1969, via a formal amendment of the Articles of Agreement, the IMF introduced conditionality into its legal system.⁴⁵ The Bank has instead never moved to formally introduce conditionality, and instead continues to rely on this “suitable conditions” provision.

The interpretation of the Bank’s Articles of Agreement, its history of acting outside of them and how this cannot be explained in terms of the prevalent theories of public international law has been discussed previously in Chapters One and Two. Whether the Bank is acting beyond its mandate in the use of conditionality is an open question that may require a nuanced answer of depending upon what the conditions are for. It is apparent that conditions that ensure repayment may be possible under the Articles of Agreement, but conditions outside of this, that are unrelated to the repayment of the project, have been argued to not be.⁴⁶ For the purposes of development of a normative framework that guides the actions of its membership, this is a secondary consideration. The primary consideration is that the establishment of conditions that govern to whom and how the Bank will give financial assistance has led to a

⁴¹ *Supra* Note. 38, pg. 9

⁴² This also explains the creation of the IDA that lends to the member States at the lower end of the income scale.

⁴³ IBRD Articles of Agreement, Article I(ii)

⁴⁴ Review of World Bank Conditionality: Legal Aspects of Conditionality in Policy-Based Lending, Legal Vice Presidency World Bank, June 29, 2005, para. 18

⁴⁵ IMF Board of Governors Resolution No. 23-5 (1968)

⁴⁶ See for example; Ngaire Woods, ‘A Short Introduction to the IMF and the World Bank’ in *Routledge Encyclopedia* (Routledge 2002) pg. 964-966; Jonathan Fox & Dave Brown (eds.), *The Struggle for Accountability: The World Bank, NGOs, and Grassroots Movements* (MIT 1998) pg. 15; and Joel Oestreich, *Power and Principle: Human Rights Programming in international Organizations* (Georgetown University Press 2007) pg. 68

position where the Bank actively seeks to govern the behaviour of its member States. Regardless of the motives, this development fundamentally changes the relationship between the Bank and its borrowing member States to a hierarchical relationship.

4.4.1 Depth of the Conditionality Norms

Despite being a change in the relationship between the Bank and its membership, it is not a total shift in relationship, as the use of conditions does not affect the totality of the Bank's membership. Conditions are *ad hoc* terms that only apply to borrowing member States in an inconsistent and incomplete manner. The conditions on any project are not contained within the General Conditions of World Bank assistance, but are contained in the bespoke Loan Agreement. Within this Loan Agreement though, there is controversy over what are "conditions" and to what extent they may be norms.

The Bank view of conditionality is perceived as narrow.⁴⁷ The agreement between the Bank and the respective member State for any given project contains "triggers, outcomes and benchmarks". The Bank does not classify these as conditions, as they are not directly related to the release of funds. Instead, these are seen as non-binding commitments that can either be met or not. The World Bank classifies only requirements that are contained in the Bank's Loan Agreements that are directly linked as actions that must be undertaken for the release of funds as "conditions".⁴⁸

For policy-based assistance, the Bank has clarified that three essential elements constitute the conditions:

- '(a) maintenance of an adequate macroeconomic policy framework;
- (b) implementation of an overall program in a manner satisfactory to the Bank; and (c) compliance with critical policy and institutional

⁴⁷ Benedicte Bull, Alf Jerve & Erlend Sigvaldsen, 'The World Bank's and the IMF's use of Conditionality to Encourage Privatization and Liberalization: Current Issues and Practices' Report Prepared for the Norwegian Ministry of Foreign Affairs as a Background for the Oslo Conditionality Conference, November 2006, pg. 4. Criticism has been particularly strong from NGOs; see A SEED (supported by OXFAM), *World Bank & Conditionalities: Poor Deal for Poor Countries* (2008) pg. 7 and Actionaid International, *What Progress? A Shadow Review of World Bank Conditionality* (2006)

⁴⁸ World Bank, *Conditionality in Development Policy Lending*, November 15, 2007 para. 12-13

actions that are critical for the implementation and expected results of the program.’⁴⁹

These elements that constitute the conditionality,⁵⁰ for both policy-based assistance and investment project loans, can be implemented in a number of different manners within the legal agreement with the member State.

‘Prior actions’ are conditions that must be met before the World Bank Board of Directors approves the loan or release of an individual tranche. These are usually required by the Bank to be met before the project is presented to the Board.

‘Tranche-release conditions’ are distinct from prior actions as they firstly can be met after the Board of Directors has approved the project but before subsequent tranches are released.

The Bank does not, however, consider “triggers, outcomes and benchmarks” as part of conditionality as they are not directly related to disbursement.⁵¹ Instead, ‘triggers’ assess the achievement of certain outcomes (although may become future prior actions); ‘outcomes’ are the expected results of the financing and ‘benchmarks’ are standards against which the performance or achievements are assessed.⁵² None of which, if met or not, in theory affect whether a loan or release of tranche is approved.

Critics, and conversely the IMF, use a wider definition of conditionality that includes all of these additional elements that although not linked to disbursements, form part of the conditions of assistance.⁵³

In terms of a normative relationship between the Bank and the borrowing member State, the type of conditionality, whether if taken to have the broader

⁴⁹ Review of World Bank Conditionality: Legal Aspects of Conditionality in Policy-Based Lending, Legal Vice Presidency World Bank, June 29, 2005, para. 9 and Operational Policy 8.60 para. 13

⁵⁰ An important distinction is present between “conditions” and standard contractual provisions. Standard provisions that govern the contract (e.g. when and to where the money should be repaid, what is the purpose of the assistance, etc.) are not seen as “conditions” to the extent that they are not imposed by the Bank to guide the behaviour of the member State, but instead are a mutually agreeable part of the assistance that dictate the terms like any other loan.

⁵¹ Review of World Bank Conditionality: Legal Aspects of Conditionality in Policy-Based Lending, Legal Vice Presidency World Bank, June 29, 2005, para. 15-16

⁵² *Ibid.*

⁵³ *Supra* Note. 47, pg. 5

meaning assigned to it or with the Bank's narrow definition, has certain consequences. If a normative framework requires rules that are created by one actor to tell another actor what to do and judge their actions against these norms, that in addition require the norm creator to apply the norms against an actor so as to be more than a mere suggestion, it is apparent that the different types of conditions fall into different categories. Prior actions and tranche-release conditions fulfil both conditions of being rules that are applied, whilst triggers, outcomes and benchmarks may be rules that guide the behaviour of an actor, but as they are not enforced (i.e. the loan is disbursed regardless of whether they are met or not), they do not amount to norms for the creation of a normative framework.

4.4.2 Width of the Conditionality Norms

Despite the *ad hoc* nature of the application of conditions against borrowing member States, the amount of areas that have fallen under conditionality has steadily increased over time. The presence of these norms and the widening topics that they cover deserves an examination.

In 1980, the World Bank introduced Structural Adjustment Lending. This was lending with conditions that required 'reforms of policies and institutions covering micro-economic (such as taxes and tariffs), macro-economic (fiscal policy) and institutional interventions'.⁵⁴ Unlike previous World Bank assistance, there was no project as such, instead a wide goal of reform. The literature in this area is extensive and well known with heavy criticism both initially externally but subsequently internally from the Bank over the content,⁵⁵ lack of enforcement,⁵⁶ effect on sovereignty⁵⁷ and amount of conditions.⁵⁸

'Structural adjustment goes beyond the simple imposition of a set of macroeconomic policies at the domestic level. It represents a political

⁵⁴ *Structural Adjustment and Poverty: A Conceptual, Empirical and Policy Framework* (World Bank 1990) pg. 27

⁵⁵ Stefan Koeberle, 'Conditionality: Under What Conditions?' (World Bank 2004)

⁵⁶ See for example; Paul Mosley, Jane Harrigan & John Toye, *Aid and Power: The World Bank and Policy Based Lending in the 1980s* (Second Edition, Routledge 1995) & Jakob Svensson, 'Why Conditionality Aid Does Not Work and What Can be Done About it?' (2003) 70 *Journal of Development Economics* 381, 383

⁵⁷ See for example; Mary Tsai, 'Globalization and Conditionality: Two Sides of the Sovereignty Coin' (1999) 31 *Law & Pol'y Int'l Bus.* 1317

⁵⁸ Angela Wood and Matthew Lockwood, 'The 'Perestroika of Aid'? New Perspectives on Conditionality' (1999) *Bretton Woods Project*

project, a conscious strategy of social transformation at the global level.⁵⁹

This period of time, and the heavy criticism that it brought to the Bank, led the World Bank to undertake reforms that have affected the nature of the norms.

Firstly, prior to the reforms, the subjects that conditionality covered was increasingly widening⁶⁰ and, furthermore, the amount of conditions per loan was increasing. Whilst initially conditionality only focused upon ensuring repayment by the Bank, with a narrow focus on pure macroeconomic conditions,⁶¹ the areas covered by conditions rapidly expanded to encompass a wide variety of topics. Recognising that the focus was too wide, the Bank refocused and has attempted to limit the number of conditions⁶² and the topics that they encapsulate. This in turn affects the normative orders the Bank has in place. The individual relationship between the World Bank and borrower is affected by the existence of norms between the two. The decrease in norms affects this relationship.

Secondly, it was acknowledged by the Bank that conditions were not being met, and the Bank was taking no action. Disbursements occurred regardless of whether conditions were met.⁶³ The Bank responded that the situation was improving and that conditions were now being enforced.⁶⁴ In terms of development of norms, having the rules actually being applied is a critical criterion. The presence of rules that had no consequences if they were not followed would prevent the rules amounting to norms, but the changes introduced by the Bank to enforce the conditions that were in place points to the change from rules into norms.

⁵⁹ United Nations Commission on Human Rights: Effects of Structural Adjustment Policies on the Full Enjoyment of Human Rights, reported by independent expert Fantu Cheru, E/CN.4/1999/50, 24 February 1999

⁶⁰ Günther Handl, 'The Legal Mandate of Multilateral Development Banks as Agents for Change Towards Sustainable Development' (1998) 92 AJIL 642, 648

⁶¹ Devesh Kapur, John Lewis & Richard Webb, *The World Bank – Its First Half Century, Vol. 1* (Brookings Institute Press 1997) pg. 480

⁶² Stefan Koeberle, Harold Bedoya, Peter Silarszky & Gero Verheyen (eds.), *Conditionality Revisited: Concepts, Experiences, and Lessons* (World Bank 2005), pg. 46-48

⁶³ M Thomas, 'Can the World Bank Enforce its Own Conditions?' (2004) 35(3) *Development and Change* 485 and Tony Killick, Ramani Gunatilaka & Ana Marr, *Aid and the Political Economy of Policy Change* (Taylor & Francis 2003)

⁶⁴ Review of World Bank Conditionality: The Theory and Practice of Conditionality: A Literature Review, Development Economics, World Bank, July 6, 2005 para. 33

Alongside these reforms, the Bank acknowledged that imposing conditions that were not wanted by a member State was not achieving the results that the Bank had intended. To remedy this, the Bank introduced “country ownership”, with borrowing member States taking strong ownership over the reforms, rather than the Bank dictating standard terms to every borrower.⁶⁵

The concept of country ownership can be contrasted with the counterfactual situation of the Bank lending without conditions. If the conditions are “country owned” and not imposed by the Bank as is claimed, then it can be questioned why the conditions need to be placed into Bank lending documentation. If a member State freely chose to undertake the conditions, without the direction of the Bank, then the member State would not need to include the conditions in the lending documentation, and would instead simply undertake the conditions without undertaking external legal obligations to do so.⁶⁶ The absence of this challenges the Bank’s assertion that the conditions are country owned and would instead reinforce the presence of a normative relationship, with the Bank instructing the member State how to act and judging their actions against these norms.

Further reinforcement of this normative relationship has occurred with the introduction of “good governance” by the Bank.⁶⁷ Definitions of this term are controversial with different opinions contributing both to confusion and misunderstandings over what the term encompasses. The Bank defines the term “governance” as “the manner in which power is exercised in the management of a country’s economic and social resources for development”⁶⁸ and “includes the capacity to formulate and implement sound policies”⁶⁹ whilst ‘good governance is epitomized by predictable, open and enlightened policymaking (that is, transparent processes); a bureaucracy imbued with a professional ethos; an executive arm of government accountable for its actions; and a strong civil society

⁶⁵ *Supra* Note. 49 pg. 13-14

⁶⁶ Stephen Coate & Stephen Morris, ‘Policy Conditionality’ in James Vreeland & Gustav Ranis (eds.), *Globalization and the Nation State: the Impact of the IMF and World Bank* (Routledge 2005) pg. 43

⁶⁷ The origins of the term are from a 1989 World Bank report, ‘Sub-Saharan Africa: From Crisis to Sustainable Growth (World Bank 1989), that stated the region was suffering from a “crisis of governance”.

⁶⁸ *Governance and Development* (IBRD 1992) pg. 1

⁶⁹ *The Quality of Growth* (OUP 2000) pg. 137

participating in public affairs; and all behaving under the rule of law.⁷⁰ Setting aside whether the issue of governance can be separated from the political prohibition in the Bank's Articles of Agreement, the 'shift from the notion of governance to good governance introduces a normative dimension addressing the quality of governance.'⁷¹ Conditions related to good governance are concerned with meeting the Bank's standards for how governance should be, with an assessment of the member State's governance regime against standards set by the Bank.

As conditions have evolved, and particularly with the introduction of country ownership, conditions have also become specific to a country rather than having a particular model applied against all members. Conditions are, therefore, State specific and apply only to one Member State. Although they constrain the behaviour of that member, they form individual norms that apply only to that State rather than a general normative framework that can be applied in all different circumstances. This, therefore, prevents the stabilisation of normative expectations as it is unclear how each member State will be treated when a loan is required. Despite the evolution of conditionality to move away from a one-size fits all model of application, there remains loose goals that conditions strive to reach so there is significant cross over in the conditions. Yet in each specific instance of borrowing, different formulations of the conditions are reached that would prevent one generally applicable framework developing in the current formulation.

Although the content of the conditions is a feature that has been examined, it is the presence of conditions themselves that is the important criteria in the development of the World Bank. These are not unilateral undertakings that a sovereign State of its own volition undertakes for its citizens benefit, but are a prescription of what must be done by an outside actor with the subsequent actions of the State judged against these norms. The Bank tells its member States what it ought to do, both to initially access the resources (prior actions) and to continue to access the resources throughout the length of the programme. A normative relationship is established, of the Bank instructing its member States

⁷⁰ *Governance: The World Bank's Experience* (IBRD 1994) pg. vii

⁷¹ Carlos Santiso, 'Good Governance and Aid Effectiveness: The World Bank and Conditionality' (2001) 7(1) *The Georgetown Public Policy Review* 1, 5

what they ought to do and then enforced if not met by withholding funds, which although of importance in and of itself, was not a relationship that member States agreed to with the Bank taking upon itself a role that States did not delegate to the World Bank to undertake.

Conditions though, although normative orders, can never be a normative framework and instead are only norms. They direct and control the behaviour and actions of the borrowing member States of the Bank but, despite the consistent presence of certain criteria, are in principle country specific. They may amount to normative orders and communication between the Bank and a State, but conditions can, therefore, never amount to a normative framework as they are not applied against all borrowing member States equally, and instead are applied on an *ad hoc* basis. There are no expectations that can be relied upon on how they are applied.

4.5 Presence of a Fixed Normative Framework: Operational Policies and Bank Procedures

Conditions are elements that directly affect the relationship between the World Bank and borrowing member States. Although they may be norms, the *ad hoc* nature would preclude the establishment of a normative framework. However, the relationship between the World Bank and borrowing member States is also indirectly affected, not through the *ad hoc* norms, but through the rules that the Bank has developed internally to govern to whom and how it can lend. These do not, in the Bank's view, legally bind a member State, as they are rules governing World Bank employees, but the ability of the Bank staff to agree to and support projects is bound by these internal Bank policies and procedures.

The Structural Adjustment Lending of the 1980s led to an evaluation of the affect of World Bank projects. This evaluation was driven both internally by the Bank but also externally by NGOs and a limited number of member States. This drive to assess the affects pushed the Bank to introduce "safeguards", as means via which to ensure that Bank lending did not have certain affects and that lending met certain minimum standards dictated by the Bank. The Bank itself acknowledges these safeguards as 'the basis of a renewed partnership between the Bank and its

borrowers – a partnership rooted in a common commitment to environmental and social sustainability⁷².

These safeguards, or OPs and BPs⁷³ as formally known, are contained in the World Bank Operations Manual. This is a manual for staff that covers all aspects of World Bank lending and how each operation should be arranged. Formally the OPs and BPs are directions from Management to Bank staff and, therefore, formally do not require Board of Directors approval before creation.⁷⁴ Initially, the earlier versions of OPs and BPs were passed as such,⁷⁵ yet since then a number of OPs and BPs, if considered controversial, have been circulated amongst the Executive Directors.⁷⁶ Although formally still instructions from Management to staff, the current procedure is that 'policy papers submitted to the Board for approval that address difficult or controversial issues normally have the draft OP attached to them.'⁷⁷

The OPs and BPs apply to all lending by the Bank. If a project falls into an area covered by an OP or BP, the staff are required to ensure that project complies with that specific OP or BP. The Operations Manual has evolved and grown over time to incorporate a wide variety of subject areas. The current version of the Operations Manual contains seventy OPs and BPs including OPs and BPs on:

- Operational Policy/Bank Procedure 4.0 – Piloting the Use of Borrower Systems to Address Environmental and Safeguard Issues in Bank-Supported Projects
- Operational Policy/Bank Procedure 4.01 – Environmental Assessment
- Operational Policy/Bank Procedure 4.02 – Environmental Action Plans
- Operational Policy/Bank Procedure 4.04 – Natural Habitats
- Operational Policy/Bank Procedure 4.07 – Water Resources Management
- Operational Policy/Bank Procedure 4.09 – Pest Management

⁷² <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTSAFEPOL/0,,contentMDK:23277451~pagePK:64168445~piPK:64168309~theSitePK:584435,00.html> accessed June 2013.

⁷³ Operational Policies and Bank Procedures are the current names given to such internal Bank rules. However, previously they were known as Operational Manual Statements, Operations Policy Notes or Operational Directives.

⁷⁴ Ibrahim Shihata, *The World Bank Inspection Panel: In Practice* (Second Edition, OUP 2000) pg. 42

⁷⁵ *Ibid.* pg. 41

⁷⁶ *Ibid.* pg. 41-42

⁷⁷ *Ibid.* pg. 44

- Operational Policy/Bank Procedure 4.10 – Indigenous Peoples
- Operational Policy/Bank Procedure 4.11 – Physical Cultural Resources
- Operational Policy/Bank Procedure 4.12 – Involuntary Resettlement
- Operational Policy/Bank Procedure 4.20 – Gender and Development

These OPs and BPs establish rules that must be followed by the Bank’s management. A number of these OPs and BPs refer directly to the responsibilities of management and are addressed only to Bank staff.⁷⁸ Most OPs and BPs, however, refer to the implementation of projects that rests upon other external actors, in most cases the borrowing member State. Still in these circumstances, the obligation does not fall directly on the borrowing member State, but on management, and requires the actions that the Bank should seek from its borrowers.⁷⁹ These actions may be recorded in the Loan Agreement or other accompanying documentation. Failure on behalf of the Bank would be if the Bank does not require the borrower to implement the actions under the OPs and BPs or does not properly ensure that the borrowing member State follows through on its commitments.⁸⁰

⁷⁸ See for example; BP 4.04 para 1: “Early in the preparation of a project proposed for Bank financing, the task team leader (TL) consults with the Regional environmental sector unit (RESU) and, as necessary, with the Environment Department (ENV) and the Legal Vice Presidency (LEG) to identify natural habitat issues likely to arise in the project.” and BP 4.10 para 12: “The Regional vice president, in coordination with the relevant country director, ensures the availability of resources for effective supervision of projects affecting Indigenous Peoples. Throughout project implementation, the TTL ensures that Bank supervision includes appropriate social science and legal expertise to carry out the provisions of the Loan Agreement. The TT also ascertains whether the relevant legal covenants related to the Indigenous Peoples and other instrument(s) are being implemented. When the instruments are not being implemented as planned, the Bank calls this to the attention of the borrower and agrees with the borrower on corrective measures (see OP/BP 13.05, *Project Supervision*).”

⁷⁹ See for example; OP 4.01 para 15: “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”; and OP 4.12 para 14: “Upon identification of the need for involuntary resettlement in a project, the borrower carries out a census to identify the persons who will be affected by the project (see the [Annex A](#), para. 6(a)), to determine who will be eligible for assistance, and to discourage inflow of people ineligible for assistance. The borrower also develops a procedure, satisfactory to the Bank, for establishing the criteria by which displaced persons will be deemed eligible for compensation and other resettlement assistance.”

⁸⁰ *Supra* Note. 74 pg. 47

For the first time, the Bank has begun a comprehensive process of reviewing a number of the OPs and BPs, those that it considers as the environmental and social safeguard policies, with an expected result by mid-2014.⁸¹ This followed an Independent Evaluation Group report that concluded with five recommendations that the Bank consolidate and improve the standard of the current OPs and BPs.⁸²

The OPs and BPs are binding upon staff.⁸³ Deviation can only occur with the approval of the Office of the President.⁸⁴ OPs discussed by the Executive Directors can only be deviated after consultation with the Board.⁸⁵ Earlier versions of OPs and BPs raised questions over whether they were binding upon staff due to problems in their implementation,⁸⁶ so when all internal policies were changed to the current OPs and BPs, it was clearly established that these policies were binding upon staff.⁸⁷

All projects must meet these OPs and BPs, and when they do not, as will be examined in the subsequent chapter, the Inspection Panel may be asked to investigate and provide recommendations on corrective action.

In terms of a normative framework, the World Bank Operations Manual provides the norms in the World Bank normative system. The OPs and BPs constrain the actions of the borrower via stipulating to staff what they require to allow lending. If a member State does not conform, it is not eligible to receive Bank financial assistance. These rules meet the two tests identified of norms under systems theory, in that they provide an instruction on what an actor ought to do and are enforced in that a member State is not eligible for assistance if they are not followed.

Although already seen in Chapter One that a number of these policies cover areas prohibited by the political prohibition provision of the Bank's Articles, and

⁸¹ The World Bank's Safeguard Policies Proposed Review and Update: Approach Paper, October 10, 2012

⁸² IEG Study Series: Safeguards and Sustainability Policies in a Changing World: An Independent Evaluation of World Bank Group Experience (IBRD 2010) pg. xxi - xxiii

⁸³ *Supra* Note. 74 pg. 44

⁸⁴ *Ibid.* pg. 42-43

⁸⁵ *Ibid.* pg. 43

⁸⁶ *Ibid.* pg. 42

⁸⁷ *Ibid.* pg. 44. The presence of Good Practices should, however, be noted. These are non-binding guidelines for how the Bank staff should implement projects, based upon experience and outlining how situations have been handled on previous occasions.

furthermore how these policies can be seen as an expansion of the Bank's mission,⁸⁸ the introduction of these policies create a normative framework in constraining the actions of the Bank's borrowers albeit indirectly by directly binding the Bank's staff. This leaves the borrowing State in a position where it can no longer decide on how best to deal with domestic situations but must conform to the Bank's norms. Ironically, the Bank, whilst seeking to widen the remit of development, now prevents some projects that a sovereign member State has sought to undertake that would aid in the development, as the project is not done in a way that the Bank wishes. The member State definition of what amounts to development and how best to achieve it is now secondary, behind what the World Bank itself has established.

This normative framework although applying to the total of the Bank's membership, as all World Bank member States can ask the Bank for assistance, only is enforced against those who request assistance. It is the request for assistance that allows the enforcement of the norms against the State.

4.6 Development of a Wider Normative Framework

The evolution and use of conditions and the implementation by the Bank of OPs and BPs have provided the basis for a normative system yet are limited to only those World Bank member States that avail themselves of Bank resources as borrowers. If a member State does not borrow from the Bank, they do not need to comply with any of these norms, as they cannot be applied against them. In strict terms, there is no avenue of communication via which the Bank can communicate on what a member State ought to do, as this communication occurs only through the Loan Agreement. Rather than being a normative system that encapsulates all 197 World Bank member States, the use of OPs and conditions only truly constrains the behaviour of those that wish to borrow from the Bank and, therefore, limits the scope of the normative framework. Conditions and OPs are though not the only mechanism via which the World Bank seeks to extend its influence. Through the use of varying annual reports the Bank seeks to influence the totality of its membership.

⁸⁸ José Alvarez, 'International Organizations: Then and Now' (2006) 100 AJIL 324, 328

Reports contain work of the Bank examining a variety of issues that apply to its membership. Each issue has an individual report that is published, usually annually, and contains the Bank's analysis of how it or its member States have acted on certain issues.

Since 1948, the World Bank has released an annual report summarising the financial and lending activity of the Bank over the previous financial year. However, reports have grown from an assessment of World Bank activities to an assessment of member activities.

For example:

- The Global Monitoring Report, introduced in 2004, monitors how successful the Bank's membership is in implementing policies and actions for achieving the Millennium Development Goals.
- The World Development Reports, introduced in 1978, focuses on one specific topic per year, chosen by the World Bank's President, and assesses the issue in respect of member States responses. Topics have included climate change,⁸⁹ gender equality⁹⁰ and the role of the State.⁹¹
- The Global Economic Prospects, introduced in 1998 and published twice yearly, examines growth trends for the global economy and how they affect development countries.
- Policy Research Reports, introduced in 1992, focus on a wide variety of issues that the Bank conducts research into concerning development policy. The focus of the reports can be on Bank projects⁹² or more general to the entire membership.⁹³

The assessment of non-borrowing member States activities is a growth in the ability of the Bank to assess the performance of its member States. Although

⁸⁹ *World Development Report 2010: Development and Climate Change* (World Bank 2010)

⁹⁰ *World Development Report 2012: Gender Equality and Development* (World Bank 2012)

⁹¹ *World Development Report 1997: The State in a Changing World* (World Bank & OUP 1997)

⁹² See for example *Policy Research Report: Assessing Aid – What Works, What Doesn't, and Why* (World Bank 1998)

⁹³ See for example *Policy Research Report: Reforming Infrastructure: Privatization, Regulation, and Competition* (World Bank 2004)

there is no enforcement mechanism behind the benchmarks these reports rely upon, the reports assess member States' activities against benchmarks set by the Bank. The reports involve the World Bank telling member States what they ought to be doing, yet as of yet there is no way that this communication is enforced.

The constraints on State behaviour are, therefore, not compulsory as under the conditions, OPs or BPs but still involve a judgment of Member State behaviour against a benchmark. The process of creation and judgment against rules is still evolving and widening as evidenced by the introduction by the Bank of the Global Financial Development Report in 2012.

The widening of the Bank's attempts to apply rules from only applying to borrowing Member States to the entire membership is evidence of an important step in the evolution of the Bank. The Bank is attempting to constrain the actions of its membership by inducing the members to behave in a manner consistent with the Bank's own established policies, regardless of whether a State requires assistance or not. The continuing evolution and use of norms created by the Bank demonstrates the continuing expansion of the Bank's framework.

However, even as the framework gets wider in the amount of norms actions are assessed against, it is not getting deeper in the effect of this assessment. The Bank seeks to constrain and influence the actions of its membership through the release of these reports yet it is clear that it has been far from successful in this attempt. Member States to varying degrees are still acting in a fashion inconsistent with the rules and the Bank has no means via which it can compel member States to obey to truly constrain their actions. This is in direct contrast to the conditions and OPs/BPs that truly constrain the actions of borrowing member States as they are compulsory to achieve World Bank assistance.

4.7 Conclusion

The development into a normative system has been a continuing evolutionary process of the Bank. Whilst there exists no defining moment which marked the shift in the relationship towards a position of normative control when communication between the Bank and its membership occurred along an 'ought' line, the evolutionary process has left the Bank in a position where it can be

classified as acting in a normative fashion in its current work. World Bank norms are currently applied to the membership of the Bank in two forms, both to borrowing member States; firstly, through the use of conditionality, the Bank creates *ad hoc* norms that each borrower must abide by; secondly, the OPs and BPs establish a normative framework that apply to borrowing member States. It is the presence of this normative framework, where actions of member States are constrained by the Bank and enforced against the borrowing State, which creates the possibility for the Bank to have evolved into a legal system. Although it is directly the staff's actions that are assessed against the standard, it is the member States indirectly who are bound by the norms.

More widely, the Bank has moved to judge all member States' actions through the use of annual reports against standards that it has developed itself, although as of yet the Bank has no mechanism via which it can ensure that these standards are met.

The competing theories of international law examined have been unable to make sense in law of the ways in which the World Bank is carrying out its work. Yet for systems theory to offer solutions requires more than a normative system: a legal system must develop. The development of a legal system under systems theory requires a number of factors, including a normative system, but crucially requires the presence of a Court-like body that defines actions as legal/non-legal.

The Inspection Panel is asserted to be that Court-like body for the World Bank and is the critical juncture through which the World Bank has changed from a normative system to a legal system. This issue is examined in the following chapter.

Chapter Five: Development into an Autonomous Legal System through the Work of the Inspection Panel

5.1 Introduction

The development of a Court-like body ruling upon the legal/illegal binary code is seen, via systems theory, to be a crucial stage in the development and use of a legal system. This is as the presence of a body that rules upon the legal/illegal binary code allows for the verbalisation and stabilisation of normative expectations. This chapter charts the development of such a Court-like body within the normative system of the World Bank, an evolution that has pushed the World Bank from a normative system into a legal system.

With little fuss and to general acclaim from the international community, the World Bank on 22 September 1993 passed Resolutions 93-10 and 93-6¹ and changed the way that citizens interact with international organisations. The creation of the Inspection Panel heralded in a new era of accountability for international organizations; not only now were international organizations accountable to their member States, as has been the traditional position since Westphalia, but the Panel establishes the precedent of an international organization being directly accountable to the citizens of those States.²

The World Bank Inspection Panel investigates whether the World Bank itself, in its lending to member States, has complied with the Operational Policies and Bank Procedures that bind the staff of the Bank. The Board of Directors then decide upon the remedial action needed to be taken, which can include changes to the conditionality up to and including stopping disbursements of the loan.

As a unique element of the World Bank system, a *sui generis* mechanism within international organisations when it was introduced, the resolution establishing the Panel is analysed to provide how the Panel was intended to work, how a

¹ Resolution No. IBRD 93-10: The World Bank Inspection Panel (22 September 1993) and Resolution No. IDA 93-6: The World Bank Inspection Panel (22 September 1993); hereinafter, "Inspection Panel Resolution".

² A precedent that has been followed by other international banks such as the Inter-American Development Bank and the Asian Development Bank.

procedure of complaint is examined but also why the Panel was introduced. The chapter will then consider how the Panel has evolved into a Court-like body, that in turn has allowed for the evolution of the Bank from a normative system into a legal system. This analysis will consider a variety of cases that the Panel has considered to demonstrate that the work of the Panel allows for the verbalisation of conflicts with a determination whether an action is legal or illegal and the publication of legal communications to guide and stabilise future normative expectations. These are the elements that have triggered the evolution of the World Bank into an autonomous legal system.

Although the chapter will chart the development of the Inspection Panel into a Court-like body as required by systems theory for the development of an autonomous system, the assertion of the presence of a Court-like body under systems theory is not the same assertion as stipulating that the Panel has developed into a Court as identified in traditional legal thinking. A Court-like body for systems theory is any mechanism that allows for the stabilisation of normative expectations via providing communication on the legal/illegal divide, whilst a “Court”, in the traditional sense of the word, has greater connotations and a greater role than this. As such, although this chapter will argue that the development of the Inspection Panel meets the necessary criteria for the development of a Court-like body under systems theory, it will not argue that the Panel has developed into a Court in the traditional sense.

5.2 The Creation of the Panel

It is widely perceived, or at least publicly presented by the Bank, that the creation of the Inspection Panel was an outward sign of the World Bank attempting to make it self more accountable to the citizens that it most effected. The policies of the Bank, as previously examined, radically expanded throughout the 1980s to have an affect on an increasingly large area of society. This led to the Bank having a profound influence on an increasing large amount of citizens within any given borrowing member State. The rapid expansion in the amount of loans given by the Bank also multiplied the amount of citizens the Bank’s activities were affecting. With a large amount of citizens coming into contact with the World Bank and the creation of the Panel for those citizens to have a voice, the

impression presented was that the Bank was actively attempting to bring its decisions closer to those who it was affecting.

However, the origins of the Panel can be traced back to an internal event but also to an external event, the Morse Commission Report³ and the renewal of the World Bank's funding in the United States Congress respectively.

The Morse Commission Report arose due to issues in the implementation of two projects on the Narmada River in India.⁴ The projects resulted in a negative environmental impact and resulted in vastly more people having to be relocated than originally foreseen. As worldwide press attention turned to the poor implementation of these projects, the World Bank commissioned a report to conduct an assessment as to the projects implementation of the Bank's OPs, or Operational Directives as they were then known, in relation to indigenous peoples and environmental concerns.

The report concluded that the Bank had failed to adequately incorporate the Bank's policies into the project agreements and then had subsequently failed to ensure that those policies that had been introduced had been implemented.⁵ This combined with an earlier internal report that had been leaked, the Wapenhans Report, that argued the Bank had an approval culture where staff were less concerned with having conditions met than with getting new loans approved,⁶ to create considerable internal debate within the Bank and a drive for change.

The two reports did, however, create external forces that would have an influence on the Bank in creating the Panel. External pressure from both NGOs and member States had been rising on the World Bank for the previous decade for a poor environmental and social record. NGOs repeatedly pushed for better mechanisms, both for investigation of the Bank and also for accountability purposes, and when the Bank did not respond, the NGOs turned to the United States Congress. Congress became frustrated with Bank efforts to remedy situations after the problem had occurred rather than deal with issues up front. In

³ Bradford Morse & Thomas Berger, *Sardar Sarovar: The Report of the Independent Review* (Resource Futures International 1992)

⁴ Narmada River Development (Gujarat) Sardar Sarovar Dam and Power Project, and the Narmada River Development (Gujarat) Water Delivery and Drainage Project

⁵ *Supra* Note. 3, pg. 353-4

⁶ *Effective Implementation: Key to Development Impact* (R92-125), 3 November 1992

1990 and 1991, Congress imposed restrictions on money for the Bank. In 1993, Congress conditioned the appropriation of \$30 million upon the implementation of public access to the Global Environmental Facility. When this did not happen, Congress diverted funds to the Agency for International Development. After lobbying by both the Bank and other member States, Congress finally made the United States payment to replenish the IDA conditional on the creation of an oversight system at the Bank.

At this point in time of the history of the World Bank, this thesis has identified that the Bank had developed into a normative system by the introduction of Operational Policies and Bank Procedures, but due to lacking a Court-like body that allows for the verbalisation of conflicts along the legal/illegal divide, had not yet amounted to an autonomous legal system. In this sense, the outside influences are not ones of structural couplings, as the system was not operationally closed, but of direct influence on the Bank. As the system was not closed, the changes do not need to manifest themselves from within the Bank itself (although that is not to deny the apparent internal push for change).

In response, to both the internal and external forces, the Executive Directors of the IBRD and the IDA responded by passing Resolution No. 93-10 and Resolution No. 93-6 respectively, creating the Inspection Panel.

5.3 Analysis of Resolutions 93-10 and 93-6

The Panel governs the activities of the IBRD and the IDA and, upon requests from citizens who are effected by the actions of the World Bank, investigates whether the staff of the Bank have followed the Operational Policies and Bank Procedures laid down in the World Bank Operations Manual. As the IBRD and IDA are separate legal entities, separate resolutions had to be passed by the respective bodies for the activities of the bodies to fall into the Panel's jurisdiction. Two subsequent clarifications of the original resolutions have been issued by the Executive Directors.⁷

⁷ Review of the Resolution Establishing the Inspection Panel 1996 Clarification of Certain Aspects of the Resolution (1996) and 1999 Clarification of the Board's Second Review of the Inspection Panel (1999)

A brief analysis of these resolutions that established the Panel is necessary to provide the context in which this Panel has developed into a Court-like body under systems theory.

5.3.1 The Powers Given to the Panel

The Inspection Panel does not follow the model of a traditional Court but instead acts along a process similar to judicial review. The party who brings the case before the Panel must demonstrate that its rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its OPs and BPs with respect to the design, appraisal and/or implementation of a project financed by the bank as long as the failure will bring about a material adverse effect.⁸

This explicit power given to the Panel in the resolution limits the criteria in which a case can come before the Panel. A person unhappy with the Bank's decision to give a loan cannot question the actual policies or procedures that the Bank staff use when determining the viability of a loan, only if the policies and procedures have been followed.⁹ The complaining party must also demonstrate that the failure to follow the policies and procedures directly affects their interests and that the failure to follow them affected the decision. The Panel should seek the advice of the Bank's legal department on matters related to the Bank's rights and obligations in relation to the complaint.

The Executive Directors further sought to limit the requests that could go before the Panel by excluding a number of forms of complaints:

- 1) Complaints regarding the actions of the borrowing State which do not involve the action or omission of the Bank.¹⁰ This is the Bank's attempt to not infringe upon the sovereignty of the borrowing State by excluding from the Panel's jurisdiction any decision that is solely the borrowing members.

⁸ Inspection Panel Resolution Point 12

⁹ Further clarified in Review of the Resolution Establishing the Inspection Panel 1996 Clarification of Certain Aspects of the Resolution (1996)

¹⁰ Inspection Panel Resolution Point 14 (a)

- 2) Complaints in relation to procurement decisions by Bank borrowers from suppliers of goods or services that have been affected by Bank loans.¹¹ The Bank already has procedures in place to deal with these complaints.
- 3) Requests for investigations that are filed either after the closing date of the loan or after the loan has been substantially disbursed (classes as 95% disbursal).¹² This is to prevent frivolous regarding decisions that the Panel or the Executive Directors can do little about as the loan has already been disbursed.
- 4) Complaints that have already been dealt with by the Panel unless new evidence has come to light.¹³

Finally, the Panel must be satisfied that the Management of the Bank has already heard the complaint in question and has failed to demonstrate that it has followed, or is taking adequate steps to follow the Bank's policies and procedures.¹⁴ This gives the Panel the equivalency of an appeals process rather than the direct avenue for a complaint.

The manner in which the Inspection Panel can receive these complaints is also of huge significance. An affected party (two or more persons who share some common interests or concerns)¹⁵ in the territory of the borrower is eligible to send requests directly to the Panel;¹⁶ either personally or through their local representative.¹⁷ For the first time in international law, the affected party does not have to seek a remedy through their government or seek permission of the government to speak to the Panel.

5.3.2 Membership of the Panel

The Panel consists of three permanent members of different nationalities from Bank member States¹⁸ with each member holding a maximum term of five years.

¹¹ *Ibid.* Point 14 (b)

¹² *Ibid.* Point 14 (c)

¹³ *Ibid.* Point 14 (d)

¹⁴ *Ibid.* Point 13

¹⁵ *Supra* Note. 9

¹⁶ Inspection Panel Resolution Point 12

¹⁷ In the exceptional cases where a local representative is not available, another representative can be used with the Executive Directors approval.

¹⁸ Inspection Panel Resolution Point 2

A member can never be re-elected after a term expires and the terms expire on a rotation so that only one vacancy needs filling at a time.¹⁹

A set of criteria is examined in the search for a member of the Panel. '(T)heir ability to deal thoroughly and fairly with the requests brought to them, their integrity and their independence from the Bank's Management, and their exposure to developmental issues and to living conditions in developing countries. Knowledge and experience of the Bank's operations will also be desirable.'²⁰ The first members originally chosen for the Panel all came from a background that heavily fulfilled these criteria in order to avoid controversy with one being a former President of the European Investment Bank,²¹ another being a former head of policy at the U.S. Agency for International Development²² and the final member being a former Minister of Natural Resources for Costa Rica.²³

Certain provisos are in place to attempt to prevent a bias being present in the Panel towards the Bank. All staff members, interpreted in the widest possible means, are ineligible to serve on the Panel for a two year period following employment with the Bank.²⁴ This is an interesting area in that it is desirable for members of the Panel to have inner working knowledge of the Bank's operations,²⁵ which would be best learnt through actually working for the Bank, but the appearance and dangers of possible bias have outweighed this and a time frame of ineligibility has been introduced.

Some further steps to avoid the appearance of bias are present in the resolutions. A Panel member shall be disqualified in participating in the hearing and investigation of a request that he has a personal interest in or has had significant involvement in any capacity.²⁶ Also members of the Panel can only be removed by a decision of the Executive Directors for cause and not for any other reason.²⁷

¹⁹ *Ibid.* Point 3

²⁰ *Ibid.* Point 4

²¹ Mr. Ernst Gunther Bröder

²² Mr. Richard E. Bissell

²³ Mr. Alvaro Umaña-Quesada. Information on all of the former members of the Inspection Panel can be found at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20205101~menuPK:434360~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html> accessed September 2013.

²⁴ Inspection Panel Resolution Point 5

²⁵ *Ibid.* Point 4

²⁶ *Ibid.* Point 6

²⁷ *Ibid.* Point 8

However, the most comprehensive provision in the resolutions to avoid the appearance of bias by the Panel is that a member of the Panel can never again be employed by the Bank following the end of their term.²⁸ This again broaches the dichotomy between competence and avoiding the appearance of bias but the result is the only logical result available. Although this provision might exclude certain people who might be best for the job of a Panel member, anyone who ever has intentions to work for the Bank again, a decision to side with Bank's management would always be questioned if a Panel member took a position with the Bank after his term had ended.

The final provision related to the composition of the members of the Panel is related to the Chairperson of the Panel. The members themselves elect a chairperson of the Panel for a period of one year²⁹ and he is the only full time member with the others only working when a case is before the Panel. However once a case is before the Panel the Chairperson's role is largely procedural in relation to the handling of complaints and will be examined further on.

5.3.3 Procedure of a Complaint

The resolutions explain how a complaint should be set out and the procedure the Panel should take upon receipt of a complaint. The request should be in writing, include all relevant facts and express the harm either suffered or that is going to be suffered by the parties.³⁰ The request for inspection must also detail the steps the requesting party has taken to address the issue with the Bank's management and their response to these overtures.³¹

The Bank makes all of the reports issued by either the Panel or the Executive Directors in relation to a complaint public after the respective stage of the complaint is complete.³² This is an attempt by the Bank to increase the transparency of its operations. Not only now do people have an insight and an avenue for complaint against the Bank (even only in limited circumstances), they can be sure to know the true results of the investigations. However, the true value of this provision comes into light when there are disagreements in relation to the

²⁸ *Ibid.* Point 10

²⁹ *Ibid.* Point 7

³⁰ Inspection Panel Resolution Point 16

³¹ *Ibid.*

³² *Ibid.* Point 25

complaint between the various branches of the Bank. If the Executive Directors disagree with the Panel's recommendations, a report has to be released detailing the reasons why. Also any reports made by the General Counsel of the Bank in relation to a claim must be made public "promptly".³³ The Panel must also publish a yearly report concerning its activities.³⁴

These publications of reports are crucial when a systems theory perspective considers the Panel. If one of the requirements for a Court under systems theory is that it provides for the publication of legal communications to guide and stabilise future normative expectations, it is essential, if the Panel is seen to fulfil this function, for the decisions that it issues to be public, which these provisions of publication ensure.

Once a complaint has been received, the Chairperson of the Panel must inform the Executive Directors and the President of the Bank "promptly"³⁵ and the Management of the Bank should provide the Panel their response to the request within 21 days of the complaint³⁶ except for reasons of *force majeure*. The Management should provide evidence to demonstrate that either:

- a) It has complied with the policies or procedures that have been questioned.
- b) It acknowledges that there are 'serious failures attributable exclusively to its own actions or omissions in complying' but that it will comply with the relevant policies or procedures before continuing any further.
- c) Any failures that may exist are 'exclusively attributable to the borrower' or that other external factors to the Bank have caused the failures.
- d) The serious failures that may exist are attributable to both the Bank and the borrower or other external factors.³⁷

³³ *Supra* Note. 9. However, the Board can decide to withhold General Council opinions in specific cases.

³⁴ Inspection Panel Resolution Point 26

³⁵ *Ibid.* Point 17

³⁶ *Ibid.* Point 18

³⁷ 1999 Clarification of the Board's Second Review of the Inspection Panel (1999) Point 3

In the case of (b) or (d), Management must provide in their response evidence that intends to comply with the OPs and BPs under examination.³⁸ The Panel must then satisfy itself whether this evidence is adequate.³⁹

The Panel should then within a further 21 days of the Management's response make a recommendation to the Executive Directors on whether an investigation is warranted and come to an assessment over whether they agree or disagree with Management's position in relation to the apportioning of blame.⁴⁰ The Panel should take into account all of the criteria already mentioned in deciding whether to recommend a course of action.⁴¹ In making their decision over whether an investigation should take place, the Executive Directors should not consider the relative merits of the claim but instead focus upon whether the claim fulfils the technical requirements needed for a claim examined earlier. If the Executive Directors deem that an investigation is due, the Chairperson of the Panel should designate one or more of the members of the Panel to be the lead inspector in the case and set a time period for when the report of the inspector is due.⁴²

The inspector for the Panel has been given wide powers in relation to his dealings with the Bank's staff. They have access to 'all staff who may contribute information and to all pertinent Bank record' as well as access to the Director General, Operations Evaluation Department and the Internal Auditor if required.⁴³ This is a move by the Executive Directors to give the appearance of transparency in the Panel's investigation: if they can access all of the information required they should be able to come to the correct decision. This is, however, undermined, as in relation to the dealings the Panel can have with the respective member State, the powers given to the Panel to investigate complaints are far more limited.

The borrowing State, and the Executive Director representing that country for the loan, should be consulted on the investigation, both before the Panel makes a recommendation for an investigation and during the course of the investigation itself. However, an inspection within the borrowing State itself can only take place

³⁸ *Ibid.* Point 4

³⁹ *Ibid.* Point 5

⁴⁰ *Ibid.* Point 3

⁴¹ Inspection Panel Resolution Point 19

⁴² *Ibid.* Point 20

⁴³ *Ibid.* Point 21

with the borrowing State's permission.⁴⁴ This is a conflict of interest for the borrowing country. The Panel has the power to recommend to the Executive Directors the termination of the loan if it is deemed that the Bank did not follow its own policies and procedures and the borrowing State knows this. Asking the State for its permission is the Executive Directors attempt to preserve the consent of the borrowing State.

After an investigation is complete, the Panel should reach a consensus on a course of action and make a recommendation to the Executive Directors. If a consensus cannot be reached then the recommendation should contain both a majority and a minority opinion.⁴⁵ The report to the Executive Directors and the President should include all relevant facts and include with the Panel's findings on whether the Bank staff had complied with all the relevant OPs and BPs that were under consideration.⁴⁶ The report focuses only open whether there has been a 'serious failure' by the Bank to observe the OPs or BPs under question by the requesters and not any other failures there might have been with the loan.⁴⁷ As with the initial decision to decide if an investigation is warranted, the Panel should look at whether any failures are the responsibility of the Bank only, the borrowing State, or a combination of both⁴⁸ and only comment upon failures that are the responsibility of the Bank. Any failures that are either partially or fully the responsibility of the borrowing State should be acknowledged in the report but 'without entering into analysis of the material adverse effect itself or its causes.'⁴⁹ In practice, the Panel has found it difficult to separate and distinguish between apportioning the blame and although in theory this process would seem to preserve the sovereignty of the State in this context, in practice it has been more difficult to apply.

In the report to the Board, the Panel must examine the consequences of the failure to follow the correct procedures or policies. If there is a "material adverse effect" on the citizens bringing the claim then this is of greater significance than if

⁴⁴ *Ibid.* Point 21

⁴⁵ *Ibid.* Point 24

⁴⁶ *Ibid.* Point 22

⁴⁷ *Supra* Note. 37, Point 13

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

there has been no effect. The criteria the Bank has laid down for examining what is a “material adverse effect” is of interest.

The base line used for comparison is the “without-project situation”:⁵⁰ the situation the claimants were in before the loan was taken. This though seems to involve the Panel making an assessment on the general worth of the project. To see the position of the affected party before and after the loan was approved naturally involves seeking the difference in circumstances as of the result of the loan. Combined with assessing if the effect is “material” this gives the Panel the power to determine the loans general worth for the people involved and make a recommendation to the Board over whether the loan should continue to be disbursed. A clear exercise of a governance function being executed by the Panel.

If the Bank truly has the aim of making itself more accountable and to force its staff to correctly follow its procedures, then the assessment over whether there has been a “material adverse effect” on the citizens bringing the claim should be of little consequence to the Bank. Instead the Panel should make an assessment on what would have happened if the policies had been followed by Management and make this clear to the Board and the borrowing State.

The Bank itself seems to acknowledge the difficulty of the “material adverse effect” approach in its clarification of the resolution with the acknowledgement that little information might be available and assessing the effect of a breach in the complexity of a project is difficult.⁵¹ It has, however, persisted with it.

Subsequently, the Management has a further six weeks to respond to the recommendations of the Panel by issuing a report to the Executive Directors detailing its recommendations for actions that should be taken in response.⁵² At this stage the Board makes a decision on what actions should be taken in respect of the complaint and informs the affected party of the result of the investigation and the action taken, if any.⁵³ Here one of the weaknesses or strengths (depending on how you look at it) of the Inspection Panel as it was intended becomes apparent. The Panel can only make recommendations to the Executive

⁵⁰ *Ibid.* Point 14

⁵¹ *Ibid.*

⁵² *Supra* Note. 5 Point 23

⁵³ *Supra* Note. 5 Point 23

Directors: their decisions are non-binding. It is the Executive Directors who must make a decision on if an investigation should take place in the first place (after the Panel's recommendation) and if there should be any consequences after an investigation is complete (after the Panel's recommendation).

The Inspection Panel and the way it works are a revolutionary step in the evolution of the World Bank. For the first time, the citizens of a borrowing State have a voice within the Bank to air their concerns, even if it is only in limited circumstances. Although it can only provide recommendations to the Executive Directors on a course of action in a claim, these "recommendations" have had a great effect on the Board's actions and carry a weight that is more than persuasive.

5.4 Systems Theory and the Panel

Systems theory has been proposed as a tool of understanding to frame in law the actions of the World Bank. The essentialist analysis conducted identified the requirement of a Court-like body ruling upon the legal/illegal divide as a critical component to drive the evolution from a normative system into a legal system.

The Inspection Panel is proposed as this Court-like body for the World Bank. Systems theory itself will be utilised upon the World Bank and specifically the Inspection Panel to determine if the World Bank has developed into an autonomous legal system under systems theory. As the operative language (communication along a legal/illegal divide) and the operative structure (a Court-like body ruling upon this divide) must be present, this examination will involve a case analysis charting the development of the language used by the Inspection Panel in its findings as well as examining the outside systems that have had an effect upon the development of the Panel to make the World Bank system operationally closed.

For a legal system to exist, normative procedures must be in place to guide actors' behaviour. In relation to the World Bank system, the OPs and BPs can be seen as these norms. It is these internal OPs and BPs that the Inspection Panel rules upon

to determine whether management has abided by them.⁵⁴ These operational policies and procedures are contained within the World Bank Operational Manual. The resolution creating the Panel itself clearly establishes the meaning of “operational policies and procedures” and defines them as ‘the Bank’s Operational Policies, Bank Procedures and Operational Directives, and similar documents issued before these series were started’⁵⁵ and explicitly excludes ‘Guidelines and Best Practices and similar documents or statements.’⁵⁶

The exclusion of ‘guidelines and best practice’ from being under the Panel’s purview is equivalent to the exclusion of terminology in relation to conduct under systems theory. It is not enough that conduct is ‘unwise’ or ‘not in accordance with best practice’. The conduct needs to be framed in ‘either ‘legal’ or ‘illegal’ or some equivalent (judgmental) terminology’⁵⁷ under systems theory. It also is equivalent to the exclusion of custom from the purview of law in systems theory. Whilst custom can exist alongside a legal system, communication along the legal/illegal divide is not to be confused with customs.

The OPs and BPs have amounted to a normative system. These policies and procedures are providing a reference for the conduct of the Bank (and borrowing member States) and seek to provide a prescription of what ought to be done that is then enforced. Clear norms have been set and must be abided by. However, to amount to ‘law’, these norms as communication must be framed in the legal/illegal binary coding that is required from systems theory. The manner in which the Bank defines its policies would seem to preclude them becoming “law”: ‘The Bank’s policies and procedures provide the Bank’s Management and staff members with guidance on how to prepare and supervise projects.’⁵⁸ Yet, the Bank itself acknowledges that the policies and procedures ‘provide certain rights for local affected people’⁵⁹ and alleges they are binding upon staff. The provision of rights is communication that belongs to the legal domain, yet, the policies themselves, as well as providing rights to affected individuals, also place a duty

⁵⁴ Inspection Panel Resolution Section 12

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Steven Wheatley, *The Democratic Legitimacy of International Law* (Hart 2010) pg. 283

⁵⁸ Accountability at the World Bank: The Inspection Panel 10 Years On (2003) pg. 7 available at http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/TenYear8_07.pdf accessed August 2013.

⁵⁹ *Ibid.*

upon Bank's management to comply. Management must comply with the policies laid down and before a project is approved, Management must confirm that the policies and procedures of the Bank are met.⁶⁰.

As the Bank's reach and loans have expanded, so have the procedures and policies that the Management must follow in order for a loan to be approved. There are now policies and procedures governing every aspect of the loan process that must be complied with from pre-loan assessments (environmental,⁶¹ water,⁶² pest,⁶³ etc.) to loan specific (dams,⁶⁴ dealings with *de facto* governments,⁶⁵ international waterways,⁶⁶ etc.) to policies and procedures for loans governing the technical aspects of the loan agreements (disbursement,⁶⁷ project supervision,⁶⁸ closing dates,⁶⁹ etc.).

The wealth of policies and procedures that create rights for the individuals and duties for the Management definitively create a normative system to guide the behaviour of Management and, in turn, requesting member States. However, to definitively separate a legal system from a normative system the two tests from systems theory must be met. As the first test (are communications identified through the binary coding legal/illegal?) is satisfied most easily through satisfying the second test (is there a dispute settlement body that assesses conduct in relation to the coding legal/illegal?), and now that the norms in question have been identified, focus will now turn to answering the second test.

⁶⁰ *Ibid.*

⁶¹ World Bank Operational Manual OP 4.01 – Environmental Assessment, BP 4.01 – Environmental Assessment

⁶² World Bank Operational Manual OP 4.07 – Water Resources Management

⁶³ World Bank Operational Manual OP 4.09 – Pest Management

⁶⁴ World Bank Operational Manual OP 4.37 – Safety of Damns, BP 4.37 – Safety of Damns

⁶⁵ World Bank Operational Manual OP 7.30 – Dealings with De Facto Governments, BP 7.30 – Dealings with De Facto Governments

⁶⁶ World Bank Operational Manual OP 7.50 – Projects on International Waterways, BP 7.50 – Projects on International Waterways

⁶⁷ World Bank Operational Manual OP 12.00 – Disbursement, BP 12.00 – Disbursement

⁶⁸ World Bank Operational Manual OP 13.05 – Project Supervision, BP 13.05 – Project Supervision

⁶⁹ World Bank Operational Manual OP 13.30 – Closing Dates, BP 13.30 – Closing Dates

5.5 Inspection Panel Cases

The Bank's Executive Directors created the World Bank Inspection Panel on 22 September 1993 in an attempt to improve the Bank's compliance with the social and environmental policies and procedures.⁷⁰ The Panel reviews Management's compliance with the policies and procedures for loans that are laid down by the Executive Directors. Since its inception, the Panel has received 89 requests for inspection⁷¹ on subjects ranging across the loans of the IBRD and IDA. In theory, after receiving a request for inspection, the Panel reviews the request and ascertains whether it meets the requirements for inspection and recommends to the Executive Directors whether a full investigation should take place. Management formulates their own response to the request and the Executive Directors then make the decision, from Management's response and the Panel's recommendation, on whether a full investigation should take place. If a full investigation is authorised, the Bank proceeds to scrutinize the conduct of Management during the loan process to see if they have matched the standards required by the policies and procedures. The Panel will then publish a decision on the results of their investigation asserting whether Management has fulfilled the standards expected of the Bank.

The Inspection Panel was viewed as a *sui generis* body when it was introduced. The development of it, the unprecedented access for individuals to organisations and even its function were one off events in international law. Yet it is precisely this unique position that it holds that requires it is subject to a greater degree of scrutiny than other international bodies. The following cases will argue and demonstrate a clear emergence of a dispute settlement body, a Court like structure, that has moved beyond the mandate provided in its founding resolution and is now operating and making decisions upon the legal/illegal divide.

⁷⁰ Sabine Schlemmer-Schulte, 'Introductory Note to the Conclusions of the Second Review of the World Bank Inspection Panel' (2000) 39(1) International Legal Materials 39

⁷¹ As of September 2013. A full list of Inspection Panel cases can be found at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20221606~menuPK:64129250~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html> accessed September 2013.

5.6 Case 1: Establishment of a Baseline

The first case that needs to be examined is the first case that the Inspection Panel examined. This will allow for the establishment of a baseline to demonstrate the development of the language the Panel have used in their findings. The normative framework that has developed within the World Bank may only evolve into a legal system if the communication inherent within the system occurs along the legal/illegal divide. The case will also serve to highlight how the Panel initially operated: in deference to the Executive Directors will as set out in the Resolution establishing the Inspection Panel.⁷² Although not an IBRD case in that it concerns the IDA, the case establishes the structure for application against the IBRD in future cases.

5.6.1 The Case

The *Proposed Arun III Hydroelectric Project*⁷³ (hereafter *Arun III*) was the first case that was both submitted and examined by the Panel.⁷⁴ The management of the IDA were planning approval for a Special Drawing Rights (SDR) 99.5 million development loan to the Kingdom of Nepal and the restructuring of an existing credit of SDR 24.4million to finance the creation of the proposed Arun III Hydroelectric Project, a damn. Although the finance was not directly for the creation of the damn itself, it was designed to put in place the necessary infrastructure for the future development of the damn by providing a road along which construction equipment for the damn could be transported. These SDR loans would amount to a \$170.4 million loan. On October 24 1994 the Panel received a request from two citizens from within Nepal who claimed that their rights and interests had been, or were likely to be, materially and adversely affected by the acts or omissions of the IDA during the design and appraisal of Arun III. The requesters cited six policies and procedures that the management of the Bank had violated in their work.⁷⁵ Management responded to the claim that

⁷² Inspection Panel Resolution

⁷³ Full details of the case can be obtained from <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:22515755~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html> accessed September 2013.

⁷⁴ <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20221606~menuPK:64129250~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html> accessed August 2013.

⁷⁵ Operational Policy/Bank Procedure 10.04: *Economic Evaluation of Investment Operations; The World Bank Policy on Disclosure of Information*, September 1994, Bank

their response 'clearly demonstrates that the Bank has followed its operational policies and procedures with respect to the design and appraisal of the proposed project'⁷⁶ and rejected all inferences of wrong doing.

The Panel, despite finding the request did not match the eligibility criteria laid down in the resolution establishing the Panel, found in their initial report that 'adverse effects appear to be a direct result of omissions by IDA during preparation and appraisal of the project and appear to be a serious violation of IDA's resettlement policies.'⁷⁷ The Executive Directors, in turn, approved a full investigation by the Panel into the management's actions in relation to the Arun III project.

After the Executive Directors approved a full investigation, management reassessed and implemented changes to the project in an attempt to comply with all of the procedures in question. This was before the Panel investigation was complete. In the full report, the Panel outlined their findings: both highlighting where management had brought the project back within the guidelines by their actions, and where the project was still inadequate. For the purposes of this analysis, the work will focus upon the wording the Panel used in its findings, as communication is the key element under systems theory, both where they found the managements conduct inline with policies, and where they found it was outside of policies. For the Panel to be the Court-like body required for the evolution of the normative system, it needs to be judging actions of the legal/illegal divide to stabilise expectations of actors.

5.6.2 The Decision

A number of important points can be developed from this case. Firstly, in this initial request before the Panel, the Panel took the step of rejecting some of the criteria laid down in the Resolution establishing the Panel in regard to the eligibility of a request. The Panel introduced a proportionality criterion to their assessment of eligibility when they stated that:

Procedures 17.50 and 10.00, Annex A; Operational Directive 4.01: *Environmental Assessment*; Operational Directive 4.30: *Involuntary Resettlement*; and Operational Directive 4.20: *Indigenous Peoples*

⁷⁶ *Arun III Management Response (1994)*, Chapter 4, Section 1

⁷⁷ *Arun III Eligibility Report (1994)*, Section 84

‘The Panel judged that the serious nature of the substance of the Request as a whole and its timing in relation to the project process outweighed outright rejection of the Request on the grounds of doubts on the standing of the Requesters and incomplete compliance with formal procedures.’⁷⁸

The Panel was, therefore, making a subjective judgment call as to the importance of a case, over the written rules that had been laid down for its workings by the Executive Directors; a sign of independence from the onset.

The Panel also took the step of analysing the wording of one of the internal rules and procedures and provided Management with their interpretation: Operational Manual Statement 2.33.

‘When development projects require people to be relocated, the Bank’s general policy is to help the borrower to ensure that, after a reasonable transition period, the displaced people regain at least their previous standard of living and that, so far as possible, they be economically and socially integrated into the host communities. Planning and financing the resettlement should be an integral part of the project, and the measures to be taken in this regard should be clarified before, and agreed upon during loan negotiations.’⁷⁹

The Panel proceeded to develop a series of tests that they deemed must be met for compliance:

- ‘Does the project adequately recognise the range of economic, social and environmental problems that will affect people displaced by the project?’
- Does the project deal with the “long-term” nature of the hardship and damage it may cause?
- Are the measures appropriate?
- Are the measures carefully planned and likely to be carried out?’⁸⁰

⁷⁸ *Arun III* Eligibility Report (1994), Section 6

⁷⁹ OMS 2.33

⁸⁰ *Arun III* Investigation Report (1994), Section 1, para. 15

This development of a series of tests upon one of the Bank's policies is a clear demonstration of the Panel's view that the policies and procedures are requirements that the Management must meet and an indication that the Panel would interpret the policies as a set of binding constraints. They are more than mere suggestions or recommendations and are norms to guide the behaviour of Management. This development of a test enforced upon Management the newly founded Panel's requirement that policies be met, and met in a fashion that the Panel deemed appropriate.

Yet, systems theory requires that communication is on the basis of legal/illegal binary coding (or equivalents).

The Investigation Report concludes with a section on the Panel's "Findings"⁸¹ and is within this section that the Panel enters into the realm of legal communication. Consistently throughout their findings Management is found to have not met the requirements as laid down by the policies and procedures of the Bank.

"The Panel finds that the IDA *failed* to observe in substance the policy requirements for supervision of resettlement components and consequently *failed* to enforce covenants in the Credit Agreement."⁸²

"The Panel finds that appropriate mechanisms for their protection have *not* been included under the RAP."⁸³

"The Panel found *inadequate* capacity for sustained coordination of all these different aspects."⁸⁴

In each case, Managements actions have been judged against a standard and found wanting. Although the language is not classing their actions as 'illegal', they are judging actions against a standard and are either supporting them⁸⁵ or are, in most circumstances under this investigation, finding them wanting. A clear

⁸¹ *Arun III* Investigation Report (1994) Section 7

⁸² *Arun III* Investigation Report (1994) Section 7, para. 9 emphasis added

⁸³ *Arun III* Investigation Report (1994) Section 7, para. 18 emphasis added

⁸⁴ *Arun III* Investigation Report (1994) Section 7, para. 19 emphasis added

⁸⁵ In situations of support, they have generally occurred due to Management introducing a Plan of Action after an investigation was authorised. The Panel is, therefore, not supporting Management's original actions, it is supporting the remedial action suggested or already taken.

judgment is, therefore, occurring under the investigation by the Panel and is occurring using equivalent judgmental terminology to the legal/illegal divide used under systems theory.⁸⁶ The extent and terms used are in a formative stage of legal communication along the legal/illegal divide, but demonstrate that the initial fundamental steps that the Panel had taken to interpret the actions of Management.

However, analysis provided on systems theory stipulated that *ad hoc* uses of legal language are insufficient to provide the basis for a legal system. Continuous usage is required and, therefore, other cases must be analysed. This case provides a fundamental baseline for the wording used by the Panel and helps to demonstrate the paralysis that affected the Panel for the next five years.

5.7 Case 2: Compulsory Enforcement?

The resolution establishing the Inspection Panel would seem to exclude the Panel from being fully independent of the Executive Directors as all of its decisions must be ratified by the Executive Directors, as they are mere recommendations.⁸⁷ This is in stark contrast to most international tribunals whose decisions cannot be overruled by any political or executive body.⁸⁸

The background of this case is different to all the other cases that will be analysed as it involves viewing the history of the Inspection Panel as a whole.

After *Arun III*, the Inspection Panel entered a period of paralysis due to a conflict within the Executive Directors. Directors representing borrowing member States felt that the Panel was being used to investigate the borrower rather than dealing with Management's compliance with policies and procedures.⁸⁹ On the back of numerous rejections of Panel recommendations⁹⁰ serious questions arose regarding the Inspection Panel's role, its independence and on whether it would

⁸⁶ Steven Wheatley, *The Democratic Legitimacy of International Law* (Hart 2010) pg. 283

⁸⁷ Inspection Panel Resolution Section 19 & 23

⁸⁸ Jan Klabbers, Anne Peters, and Geir Ulfstein, *The Constitutionalization of International Law* (OUP 2009) pg. 130

⁸⁹ Ibrahim Shihata, *The World Bank Inspection Panel: In Practice* (Second Edition, OUP 2000) pg. 155-201

⁹⁰ Andria Fourie, *The World Bank Inspection Panel and Quasi-Judicial Oversight: In Search of the 'Judicial Spirit' in Public International Law* (Eleven International Publishing 2009) pg. 187

be able to function in the future. When the Panel was authorised by the Executive Directors to commence an investigation, Management would attempt to circumvent the process by developing and implementing Action Plans to rectify any mistakes. By the time the Panel was publishing a decision it was, therefore, redundant as the requesters concerns had already been met.

In an effort to “save” the Inspection Panel, the 1999 Board Review of the Inspection Panel took place. A range of actors was invited to participate in the process including both States and NGOs.⁹¹ Two crucial changes occurred to save the Panel process and reassert the Panel’s independence. Firstly, the Executive Directors agreed not to assess the merits of a case at the initial request stage,⁹² this would only occur after a full Panel investigation has occurred. Secondly, the Board changed the procedure concerning Action Plans. The review explicitly stated that the plans were ‘outside the purview of the Resolution, its 1996 clarification, and these clarifications.’⁹³ Although the Panel could submit a report on the adequacy of the consultations that took place to formulate the Action Plans, they could not express an opinion on other aspects of the plans⁹⁴ and, therefore, Management had no need to refer the plan to the Panel and circumvent the whole process. This is of express importance as it limited the functionality of the Panel. Although they could investigate previous breaches of the OPs, BPs and Management’s recommendations, the recommendations that the Panel made after the investigation for rectifying the problems were mere recommendations to the Executive Directors. The power of decision still remained with the Executive Directors and not with the Panel. In terms of systems theory, this would create difficulties in placing the Court-like body in the centre of the system.

The Board review of the Panel’s function ended in April 1999 and two months later the *China Western Poverty Reduction* request was received. The objective of the project was to ‘reduce the incidence of absolute poverty in remote and inaccessible villages of three provinces of China’.⁹⁵ The request was for an

⁹¹ Daniel Bradlow, ‘Precedent-Setting NGO Campaign Saves the World Bank’s Inspection Panel’ (1999) 6(3) Human Rights Brief 7

⁹² 1999 Clarification of the Board’s Second Review of the Inspection Panel (1999) Point 9

⁹³ *Ibid.* Point 15

⁹⁴ *Ibid.* Point 16

⁹⁵ *China: Western Poverty Reduction Project Investigation Report* (2000) pg. 2

investigation into the conduct of the Bank in relation to one of these provinces, Qinghai. The project would voluntarily relocate 57,775 farmers from one area to another. The requesters⁹⁶ claimed that the resettlement would ‘impact 4000 local people, and will have indirect impacts on the entire county’ whilst it would ‘raise serious questions about the recognized risk of escalation of ethnic tension and resource conflicts; and the long-term development implications for the area.’⁹⁷ The main source of this harm was alleged to be caused by Management’s failure to abide by policies and procedures concerning Indigenous Peoples, Involuntary Resettlement, and Environmental Assessment.⁹⁸

The Panel investigation uncovered several instances of Management’s failings to match the requirements of the OPs and BPs. Importantly, the Panel sought to underline the significance of the policies and procedures to the World Bank system and elaborate upon the standards required of Management. When referring to the compliance procedures of the Bank, the Panel made clear that some members of Management felt that ‘even a one-page environmental assessment of a major project could be in compliance if it passed the desk of, and was checked off by, the appropriate persons at the appropriate times in the decision process.’⁹⁹ The Panel fundamentally rejected this approach and insisted that professional standards be met.

The Panel also elaborated upon Management’s interpretation of various OPs and BPs where Management argued that they were flexible rather than binding. Decisions were a ‘judgement at Management’s sole discretion’.¹⁰⁰ The Panel again rejected this approach.

‘Read in their entirety, the Panel feels that the directives cannot possibly be taken to authorize a level of “interpretation” and “flexibility” that would permit those who *must follow* those

⁹⁶ The request actually came from an international NGO based outside the country, a process that required Board approval.

⁹⁷ *China: Western Poverty Reduction Project Request for Inspection* (1999) pg. 1

⁹⁸ *Ibid.* pg. 2

⁹⁹ *China: Western Poverty Reduction Project Investigation Report* (2000), pg. 20, para. 39

¹⁰⁰ *Ibid.* para, 36

directives to simply override the portions of the directives that are *clearly binding*.¹⁰¹

The language the Panel used in its communication to Management is of particular importance to an understanding under systems theory and the legal/illegal binary coding of communication. Management “must follow” the policies and procedures with the directives (OPs and BPs) being “clearly binding”. This is a development from the language used in *Arun III* and other earlier cases, which was one of ‘failure’ to comply and ‘inadequacy’, to a language that more closely follows an understanding of law by acknowledging the “binding” nature of the obligation. This hardened the internal normative status of the OPs and BPs, and clarified to Management that these were not best practice, advice or guidance that could be taken or left, but norms that had to be followed in execution of World Bank loan agreements.

China reacted harshly to the Inspection Panel report: “[t]he Panel takes on the role of a critic of the Chinese government and the social and political system of China, rather than carry out a review of Bank staff and Management’s compliance with Bank policies.”¹⁰² The Panel is explicitly excluded, via the World Bank Articles of Agreement, from interfering in the political affairs of its members.¹⁰³ With the Executive Directors deadlocked on how to proceed following the Panel investigation report, China withdrew their application for funding.

After the Board review in 1999, there was significant doubt over whether the Inspection Panel would ever amount to an independent structure within the Bank and whether the paralysis of the Executive Directors would continue. *China: Western Poverty Reduction Project* clearly demonstrated the independence of the Panel, both from Management and, crucially, from the Executive Directors. Since the Second Panel Review and *China: Western Poverty Reduction Project*, not a single Panel recommendation for an investigation has been rejected.¹⁰⁴

¹⁰¹ *Ibid.* para. 37 emphasis added

¹⁰² Chinese Government’s Statement on the Inspection Panel Investigation Report for the *China: Western Poverty Reduction Project* (Qinghai Component) of 6 July 2001, 1

¹⁰³ World Bank Articles of Agreement, Article IV, Section 10

¹⁰⁴ *Supra* Note. 90, pg. 178. The *Lebanon: Greater Beirut Water Supply Project* did involve, after a Board discussion and commissioning by Management of specific studies, the Board requesting the Panel to review its decision to ask for an investigation. The Panel decided to await further developments.

5.7.1 Structural Coupling and the Internationalisation of External Communication

All normative and legal systems are open to the influence of other systems, and this case clearly demonstrates that this is so.

The process of the Second Panel Review clearly demonstrated the influence of other systems upon the World Bank system. As discussed, NGOs and various States exerted pressure to break the deadlock that had occurred within the Executive Directors. A system of law exists within the wider system of society. The system and the outside environment constantly cause minor changes to each other, but it is the structure of both the external environment and the internal system that define what these changes are. This constant interaction between systems is defined as 'structural coupling'. The important element for the development of a World Bank autonomous legal system is not that it was influenced via other systems; it is that it took the communication from these other systems and interpreted it in its own fashion. The change in the Executive Directors approach to uniformly approve Panel recommendations for investigation is an important step for the evolution of the Panel as it reaffirms its independence from the Executive Directors and control over Management.

There has been no formal change to the language of either the World Bank Articles of Agreement (where the Inspection Panel is still not even referred to), to the regulations establishing the Inspection Panel¹⁰⁵ or to the internal procedures of the Bank that alludes to the fact that all cases passed by the Panel must be accepted by the Executive Directors. Although referenced in the 1999 Board Review that the Executive Directors would only reject a recommendation by the Panel based upon the eligibility of the request, even when the eligibility of the claimants has not been satisfied or where requirements have explicitly not been met, the Executive Directors have still ratified all Panel recommendations. However, as seen in domestic constitutions and legal systems, changes can occur through formal written documents or, as in this case, by practice. The consistent and uniform approach taken by the Executive Directors since this case has been to approve the findings of the Panel.

¹⁰⁵ The 1999 Board Review did state in Point 9 that "the Board will authorize an investigation without making a judgment on the merits of the claimants' request".

China's decision to withdraw their funding request is also an example of structural coupling occurring. The Chinese domestic legal system interpreted the information the Bank was presenting it in its own fashion, and concluded that in its own interests it would fund the project itself.

5.8 Case 3: Incorporating Other Legal Norms

In the *Chad-Cameroon Petroleum and Pipeline Project*,¹⁰⁶ the Inspection Panel sought to introduce a new concept to World Bank law. Rather than focusing solely upon the policies and procedures of the Bank, they incorporated human rights, a distinct system of law in its own right, into the Bank's workings.

The Panel received a request for inspection on 22 March 2001¹⁰⁷ concerning three closely related projects within Chad and Cameroon. The requested funding was to contribute towards developing the oil fields in Chad and provide subsequent infrastructure for the transport through Cameroon. However, as the request to the Panel was made by citizens of Chad, the Inspection Panel chose to only focus on areas of the project that were contained within Chad's borders.¹⁰⁸ The specific objective of the project was to develop Chad's natural resources 'in an environmentally and socially sound manner and thereby, inter alia, increase the Borrower's resources and expenditures for poverty alleviation'.¹⁰⁹ The World Bank in this case had sought a first of its kind program where the Chad Parliament passed a law outlining the government's poverty reduction objectives and detailed how money raised via the development of the oil fields would be used. World Bank funding was contingent upon these assurances.¹¹⁰ The World Bank contribution to the project was relatively modest, only 4% of total costs, but the

¹⁰⁶ *Chad-Cameroon Petroleum and Pipeline Project* (Loan No. 4558-CD); *Petroleum Sector Management Capacity Building Project* (Credit No. 3373-CD); and *Management of the Petroleum Economy* (Credit No. 3316-CD)

¹⁰⁷ *Chad-Cameroon Petroleum and Pipeline Project* Eligibility Report, Para. 1

¹⁰⁸ *Ibid.* Para. 3

¹⁰⁹ IBRD Loan Number 4558- CD, Schedule 2

¹¹⁰ *Accountability at the World Bank: The Inspection Panel 10 Years On* (IBRD 2003) pg. 90 available at http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/TenYear8_07.pdf accessed August 2013.

private companies made World Bank involvement a necessary component for their own investment.¹¹¹

The requester was the head of the national opposition party, a Member of Parliament in Chad's National Assembly on behalf of more than 100 residents who currently lived within the fields that were to be developed. The requesters alleged that 'the Pipeline Project constituted a threat to local communities, their cultural property and the environment and that people in the oil field region were being harmed, or were likely to be harmed, because of the absence, or inadequacy, of environmental assessment and compensation; and that proper consultation with and disclosure of information to the local communities had not taken place.'¹¹² In total, twelve policies were alleged to have been broken by Management in setting up the loans.¹¹³ Crucially, however, the requesters alleged that a 'violation of our human rights' had occurred as a result of the Bank's action.¹¹⁴

In the background to the request, various other events occurred. The private investors had given a \$25 million welcome bonus to the Chad government and it was widely reported that \$5 million was spent on the acquisition of arms¹¹⁵ which resulted in the immediate freezing of the loan until all government expenditure was more transparent. Also the leader of the opposition party (the future requester) was imprisoned and reportedly tortured after he spoke out against the project. World Bank President James Wolfensohn personally called the President of Chad to secure the opposition leaders release¹¹⁶.

After receiving Board approval, the Panel began an investigation into the alleged breaches. Whilst the Panel's findings of breach or non-breach are interesting in their own right, the relevant point that needs to be extracted from this case concerns the Panel's view regarding the alleged violation of human rights.

The Panel stipulated that for the first time in their analysis that there was an obligation to examine human rights. Specifically 'whether the issues of proper

¹¹¹ *Supra* Note. 90, Pg. 201

¹¹² *Chad-Cameroon Petroleum and Pipeline Project Investigation Report*, ix, Para. 3

¹¹³ *Ibid.* Para. 4

¹¹⁴ *Chad-Cameroon Petroleum and Pipeline Project Request*, Para. 5

¹¹⁵ Hernandez Uriz, 'To Lend or Not to Lend: Oil, Human Rights, and the World Bank's Internal Contradictions' (2001) 14 *Harvard Human Rights Journal* 197, 225. Also see *supra* Note. 110 pg. 92

¹¹⁶ *Supra* Note. 110, pg. 92

governance or human rights violations in Chad were such as to impede the implementation of the Project in a manner compatible with the Bank's policies.'¹¹⁷ The Panel, therefore, managed to link human rights to its mandate of examining compliance with the Bank's policies and procedures. However, this approach seemingly runs counter to the position of the Articles of Agreement that states that the Bank should not interfere with the political affairs of its members. Management took this position but in a strong argument before the Executive Directors the Panel's Chairman argued that:

'Given the world-wide attention to the human rights situation in Chad... and the fact that this was an issue raised in the Request for Inspection by a Requester who alleged that there were human rights violations in the country, and that he was tortured because of his opposition to the conduct of the project, the Panel was obliged to examine the situation of human rights and governance in the light of Bank policies.'¹¹⁸

The Panel's Chairman then further elaborated that:

'The Panel...believes that the human rights situation in Chad exemplifies the need for the Bank to be more forthcoming about articulating its role in promoting rights within the countries in which it operates.'

From a systems theory perspective of the World Bank being an autonomous legal unit this is a significant development. Structural coupling had occurred but the manner in which it has happened has important ramifications for the World Bank system. The Inspection Panel has applied relevant concepts from another body of law, something allowed for in systems theory by structural coupling, yet the way they have done so demonstrates the fundamental changes to the World Bank system that the Inspection Panel has had as a unit within the Bank.

In 1990 and 1995 the position of the World Bank in respect to human rights was clearly set out by two legal opinions by the Bank's general counsel and the senior

¹¹⁷ *Chad-Cameroon Petroleum and Pipeline Project Investigation Report*, xvi, Para. 35

¹¹⁸ E.S. Ayensu, 'Remarks of the Chairman of the Inspection Panel to the Board of Executive Directors on the Chad-Cameroon Pipeline Projects' September 12, 2002

vice president respectively.¹¹⁹ Both positions highlighted the prohibition of political activities in the Bank's Articles of Agreement and placed the Bank's legal position as unable to deal with political human rights as long as they had no demonstrable effect on the country's economy. Yet, the Inspection Panel in the *Chad-Cameroon Petroleum and Pipeline Project* rejected this accepted approach, the approach required by the Bank's Articles of Agreement, incorporated their own approach that human rights were inherently held within the OPs and BPs of the Bank, and the whole Bank's position changed. Now the Bank states 'the Articles of Agreement permit, and in some cases require, the Bank to recognize the human rights dimensions of its development policies and activities since it is now evident that human rights are an intrinsic part of the Bank's mission.'¹²⁰ Not only is the examination of human rights now acceptable in limited circumstances, it is now, according to the Bank, required by the Articles of Agreement and intrinsic to the Bank's mission. This is in spite of no change to the Articles.

The Panel's role in reinterpreting the Articles of Agreement in *Chad-Cameroon Petroleum and Pipeline Project* cannot be overstated. They changed the position of the World Bank in relation to another system of law from outright rejection to complete acceptance. Crucially, to maintain the autonomy of the World Bank legal system, human rights law is interpreted through the structure of the World Bank (the World Bank OPs and BPs) and human rights law is not accepted en-mass as overriding World Bank 'law'. The Panel has, therefore, situated itself as central to the World Bank system of law as not only has it partially reinterpreted the Articles of Agreement, by reading into the OPs and BPs a human rights aspect, they have solidified their role of interpreters of the OPs and BPs as 'law'.

5.9 Case 4: Increase in the Powers of the Panel

In the 1999 Board Review, the Executive Directors explicitly made clear to the Panel that they were not to deal with Management's Action Plans.¹²¹ The

¹¹⁹ Accountability at the World Bank: The Inspection Panel 10 Years On (2003) pg. 96

¹²⁰ Roberto Dañino, Senior Vice President and General Counsel, 'Legal Opinion on Human Rights and the Work of the World Bank', 27 January 2006

¹²¹ Except as so far as to ensure that adequate consulting had taken place in the formulation of the Action Plan. 1999 Clarification of the Board's Second Review of the Inspection Panel (1999), Paras. 15 & 16

decisions of the Panel, therefore, remained as recommendations to the Executive Directors, to be weighed against the provisions put in place by Management's Action Plans. However in *Paraguay – Argentina*,¹²² this process was reversed and power was placed with the Inspection Panel.

The Yacyretá Hydroelectric Project was the subject of two individual requests for inspection. The first occurred in 1996 but the Panel was refused the right to investigate due to the paralysis of the Executive Directors that has previously been mentioned.¹²³ Yet, in May 2002 the Panel received a second request for inspection via a NGO based in Paraguay on behalf of more than 4000 families.¹²⁴ The project was for the creation of a 65 km dam in the main channel of the Paraná River with the aim of providing 'an adequate energy supply in the Buenos Aires area for economic growth requirements.'¹²⁵ The request alleged that the affected population were suffering 'social and environmental consequences because of the raising of the Yacyretá power plant's reservoir to 76 metres above sea level'¹²⁶ (or higher). The resettlement programs were alleged to be insufficiently implemented leaving families with no or inadequate compensation.¹²⁷

Management in their response acknowledged that there had been issues with the project but asserted that they had complied with all the relevant Bank OPs and BPs.¹²⁸ Having met all the requirements for eligibility, the Board approved the Panel's recommendation to conduct an investigation.

The language used by the Panel in their Investigation Report is of 'compliance' and 'requirements'. Although they found that '[m]any Bank staff and other people

¹²² *Paraguay – Reform Project for the Water and Telecommunications Sector* (Loan No. 3842-PA); *Argentina – SEGBA V Power Distribution Project* (Loan 2854-AR)

¹²³ *Yacyretá Hydroelectric Project Request* (1996)

¹²⁴ *Paraguay – Reform Project for the Water and Telecommunications Sector* (Loan No. 3842-PA); *Argentina – SEGBA V Power Distribution Project* (Loan 2854-AR) Request (2002)

¹²⁵ *SEGBA V Power Distribution Project Overview* available at <http://web.worldbank.org/external/projects/main?pagePK=64283627&piPK=73230&theSitePK=40941&menuPK=228424&Projectid=P005968> accessed September 2013.

¹²⁶ *Paraguay – Reform Project for the Water and Telecommunications Sector* (Loan No. 3842-PA); *Argentina – SEGBA V Power Distribution Project* (Loan 2854-AR) Investigation Report, 1.2.4

¹²⁷ *Ibid.* 1.2.7

¹²⁸ *Ibid.* 1.3.10

concerned have put an inordinate amount of effort over the years ‘to get the Project right’¹²⁹ this had not resulted in a particularly successful project.

‘Management met *requirements* of OD 4.01.’¹³⁰

‘Environmental Assessment for the main works of Second Yacyretá Hydroelectric Project is in *compliance* with OD 4.01.’¹³¹

‘Resettlement plan as designed could not prevent influx of ineligible population. Legal framework was inadequate. This does not *comply* with OD 4.30.’¹³²

Although this continues the Bank’s policy of classing conduct as equivalents of legal/illegal as under systems theory’s binary code, the real value of this case for systems theory comes from the subsequent Board review. In the 1999 Board Review of the Inspection Panel process, the Board had explicitly removed the assessment of Management’s Action Plans from the Inspection Panel’s purview. This could have questioned the role of the World Bank Inspection Panel as a centre point in the World Bank legal system as demanded by systems theory. With *Chad-Cameroon Petroleum and Pipeline Project* the Panel moved to put itself at the centre of the World Bank legal system but further evidence could be seen by the Board’s decision in *Paraguay – Argentina*. Rather than sticking to the 1999 Review, the Executive Directors instructed the Inspection Panel to monitor Management’s Action Plan, first by reviewing it to check its adequacy and then by monitoring its implementation.¹³³ This reversal of the Board’s previous decision placed the Inspection Panel at the centre of the World Bank structure.

Now not only did the Inspection Panel have authority to rule upon the conduct of Management on the legal/illegal binary code, it now had the authority to monitor Management’s compliance with its ‘recommendations’ to the Executive Directors. If Management do not comply, the Panel can report them to the Executive

¹²⁹ Andria Fourie, *The World Bank Inspection Panel and Quasi-Judicial Oversight: In Search of the ‘Judicial Spirit’ in Public International Law* (Eleven International Publishing 2009) pg. 204

¹³⁰ *Supra* Note. 126, Annex A, pg. 128 emphasis added

¹³¹ *Ibid.* emphasis added

¹³² *Ibid.* pg. 133 emphasis added

¹³³ Inspection Panel Review of Management Progress Report on Implementation of the Management Recommendations and Action Plan, and Additional Implementation Measures. INSP/SecM2005-0001, February 10 2005

Directors in their progress reports and have the Executive Directors force Management to comply. This is further evidence that the Inspection Panel has located itself at the centre of the World Bank legal system as dictated by systems theory. This is another aspect of assurance of compliance by actors with the norms of the World Bank legal system.

5.10 Case 5: Increase in the Effect of Panel Decisions

The reports of the Panel took on a new significance subsequent to the *India: Mumbai Urban Transport Project*¹³⁴ case.

The Mumbai Urban Transport Project was an ambitious project of the Bank involving an unprecedented move in India to relocate 120,000 people¹³⁵ so that the project could ‘facilitate urban economic growth and improve quality of life by fostering the development of an efficient and sustainable urban transport system’.¹³⁶ In total, the Bank provided the equivalent of US \$463 million to finance the project.¹³⁷ Whilst aiming to be unprecedented on the scale of the relocation, the project was also successful for the unprecedented scale of requests the Panel received. Four separate requests were received concerning the project, although all were dealt with by one Panel investigation.

All requests alleged that the Bank had failed to follow its OPs and BPs related to resettlement and rehabilitation and that the requesters would suffer adverse effects directly as a result of this.¹³⁸ Due to the amount of requests received, the distinct areas involved in the complaints were incredibly varied and complicated. Some requests mirrored certain topics with others yet in total there were complaints concerning resettlement sites, housing and living conditions, income

¹³⁴ *India: Mumbai Urban Transport Project* (IBRD Loan No. 4665-IN; IDA Credit No. 3662-IN)

¹³⁵ *India: Mumbai Urban Transport Project* Investigation Report pg. 18, para. 75

¹³⁶ Mumbai Urban Transport Project Overview available at <http://web.worldbank.org/external/projects/main?Projectid=P050668&theSitePK=40941&piPK=64290415&pagePK=64283627&menuPK=64282134&Type=Overview> accessed August 2013.

¹³⁷ *India: Mumbai Urban Transport Project* Investigation Report, xvi

¹³⁸ *Ibid.* xiii

and living standard restoration, access to information, consultation and grievance redress procedures.¹³⁹

Management submitted two reports in response to the requests. In the first report, Management explained their reasoning in reference to the OPs and BPs in question stating that they felt they had met the various requirements.¹⁴⁰ However, in the second report, Management identified several serious weaknesses in the implementation of the project.¹⁴¹

Although the Panel acknowledged in its investigation report that '[t]here is no doubt that the Project is intended significantly to advance needed economic development in Mumbai and that large numbers of people will benefit from it',¹⁴² when confronted with the information that the project would affect 120,000 people rather than the 80,000 originally proposed ruled that '[t]his startling 50% increase was received by the Country Department without significant management reaction on the record, without proper Board notification, and without any decision to reconsider the entire component's appraisal, cost, or organizational support arrangements. The Panel found this surprising since it is far from Bank expected and normal procedures.'¹⁴³

As well as numerous failures to meet the policies and procedures,¹⁴⁴ the Panel found that 'incorrect information on several key issues was communicated'¹⁴⁵ to the Board of Executive Directors.

Again the terminology used in the Investigation Report was one of 'compliance' and 'requirements' meeting the equivalents required by systems theory for binary coding legal/illegal:

'This was not in *compliance* with OD 4.30.'¹⁴⁶

'As a result, [the] Bank *failed to comply* with basic policies of OD 4.30 regarding the preparation, appraisal and implementation of resettlement operations.'¹⁴⁷

¹³⁹ *Ibid.* xiii-xiv

¹⁴⁰ *Ibid.* xiv-xv

¹⁴¹ *Ibid.* xv

¹⁴² *Ibid.* xvii

¹⁴³ *Ibid.* pg. 73

¹⁴⁴ *Supra* Note. 129, pg. 207

¹⁴⁵ *India: Mumbai Urban Transport Project Investigation Report*, pg. 47

¹⁴⁶ *Ibid.* pg. 197 emphasis added

'Project EA did not meet all OP 4.01's requirements.'¹⁴⁸

The relevant part though of *India: Mumbai Urban Transport Project* that developed the Panel further is what happened with the Panel's findings. For the first time the Board took the action of suspending disbursements of the loan.¹⁴⁹

This again was evidence of the growing influence of Inspection Panel 'recommendations' to the Executive Directors and the effect that they can have on Bank projects. Not only is the Inspection Panel ruling upon the conduct of Management through coding their conduct as equivalents of legal/illegal, it is centring its position at the heart of the World Bank legal system.

5.11 Case 6: Modern Work of the Inspection Panel

The historical analysis that has occurred throughout this chapter has demonstrated a clear development in the legal language the Inspection Panel has used, the powers the Panel can use and the effect of the reports it issues. The final case that will be analysed is one of the later cases that the Panel has issued an investigation report on. Although there are many cases that are under investigation by the Panel or have later been rejected on eligibility grounds, one of the final investigation reports available is the *Peru: Lima Urban Transport Project*.¹⁵⁰

The project had the aim of constructing a bus system through the city of Lima in Peru. This had the aim of 'enhancing the economic productivity and the quality of life within the Lima Metropolitan area'.¹⁵¹ The project was partly financed by the IBRD with a development loan of US \$45,000,000.¹⁵² The requesters were citizens of Lima who were concerned with the adverse long-term impacts of the creation of the bus system. Traffic and pedestrian safety were the two concerns explicitly raised.¹⁵³ The requesters alleged that Management had failed in its duty to

¹⁴⁷ *Ibid.* pg. 199 emphasis added

¹⁴⁸ *Ibid.* pg. 210 emphasis added

¹⁴⁹ World Bank Press Release 2006/342/SAR India's Urban Challenge: Building Better While Fighting Poverty

¹⁵⁰ *Peru: Lima Urban Transport Project* (Loan 7209-PE)

¹⁵¹ *Peru: Lima Urban Transport Project* Investigation Report (2011) Report No. 58832-PE, x

¹⁵² *Ibid.*

¹⁵³ *Ibid.* xi

include environmental management plans and that consultations about the project were inadequate.¹⁵⁴

Management acknowledged in their response that in some areas, environmental assessment, policies were not fully met yet in most areas stated they believed they had met the OPs and BPs. The request was registered on 14 October 2009 and the Board approved the Panel's recommendation that an investigation should take place on 16 December 2009 after the Panel found that the requesters met all of the eligibility criteria.¹⁵⁵ In its Investigation Report, the Panel disagreed with Management's response and found on the Environmental Impact Studies, the Analysis of Alternatives, the Consultation and Dissemination of Information, and the assessments concerning Traffic and Cultural Property Issues in Barranco that Management had failed to abide by the policies and procedures of the Bank.¹⁵⁶

The Executive Directors reviewed the Panel's findings but as the project had already finished and Management had already began a new traffic management study to comply with the Panel's findings, focused upon the lessons learnt from the project for future loans.

A number of elements can be pulled from this case to demonstrate that the Panel is still acting upon the legal/illegal binary code.

'In this respect [the] reports *comply* with OP 4.01 on Environmental Assessment.'¹⁵⁷

'Panel finds that dissemination of information and consultation with affected people in Barranco *failed to meet the requirements* of OP 4.01.'¹⁵⁸

'This did not happen and is not in *compliance* with OMS 2.20.'¹⁵⁹

¹⁵⁴ *Ibid.*

¹⁵⁵ *Peru: Lima Urban Transport Project* Report and Recommendation (2009) Report No, 52071-PE

¹⁵⁶ *Peru: Lima Urban Transport Project* Investigation Report (2011) Report No. 58832-PE, xiii - xxii

¹⁵⁷ *Ibid.* 51-52 emphasis added

¹⁵⁸ *Ibid.* 52 emphasis added

¹⁵⁹ *Ibid.* 54 emphasis added

‘Panel finds, however, 2005 Traffic Study contains [a] number of weaknesses in its analysis, and as [a] result *falls short of meeting* [the] *requirements* of OP 4.01.’¹⁶⁰

The operative language used by the Panel in this case to discern if conduct is legal/illegal is concerned with ‘compliance’ and ‘requirements’. Again, although it is not ‘legal’ or ‘illegal’ terminology, it is equivalent to assessing actions against a normative framework. These actions are then found in compliance (legal) or not (illegal).

5.12 Ulfstein’s Requirements for a Court

It has been mentioned previously, that systems theory, *stricto sensu*, only requires the presence of a Court-like body to stabilise normative expectations. Nonetheless, the requirements that Ulfstein identifies are useful for assessing the development of a Court-like body within a legal system, by assessing how well any body achieves the purpose that is required for under systems theory. The presence of the initial five of Ulfstein’s requirements all contribute towards the stabilisation of normative expectations within a system, by furthering the stabilisation. Without judicial expertise, independence from other organs within the system, equal access to the demos of the system, a fair hearing and a consistent approach by the dispute settlement body; the laws that the body would try to uphold would not be able to effectively guide actors’ expectations.

With the language of the Panel clearly amounting to communication upon the legal/illegal binary coding, and the Inspection Panel acting as a dispute settlement body under systems theory, attention can now turn to Ulfstein’s requirements for a Court.

Expertise – The easiest criteria to satisfy is that the judges have the necessary qualifications to hear the case. As examined, Section 4 of the Resolution deals with the appointment of members to the Panel. They cannot be appointed without ‘exposure to developmental issues and to living conditions in developing

¹⁶⁰ *Ibid.* 55

countries' and '[k]nowledge and experience of the Bank's operations will also be desirable'. The history of the judges that have been nominated for the positions on the Panel demonstrates that they have clearly fulfilled these criteria laid down (and more) and moves their expertise beyond disrepute.

Independence – Despite the requirements set out in the Resolution concerning the independence of judges,¹⁶¹ the cases examined above clearly demonstrate that the Panel has been under pressure from Management since its inception. This is unsurprising since its Management's conduct that the Panel is reviewing and they would seek to narrow the scope of Panel proceedings as far as possible. Early efforts by Management involved not giving the Panel the information requested¹⁶² as in *Chad Pipeline*,¹⁶³ avoiding dealing with the requesters' claims in their response as in *Brazil Rodonia Natural Resources Management Project* and via claiming that all harm suffered on projects was due to the borrower (and, therefore, not under the Panel's jurisdiction) as in *Bangladesh Jute Sector Adjustment Credit*.¹⁶⁴ In all efforts the Panel has vigorously defended its position and forced Management to comply.

The Panel also continuously proves its independence from the Executive Directors with the acceptance of all Panel calls for inspection and by the shift in powers for the Panel to monitor the implementation of action plans to remedy its findings (something that is not in its mandate).

Equal Access – The barriers to entry required by the Executive Directors in the Resolution were that the requesters must be 'an affected party in the territory of the borrower which is not a single individual'¹⁶⁵ and that '[t]he affected party must demonstrate that its rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank'.¹⁶⁶ The Panel, as demonstrated in *Arun III*, have, however, consistently ignored elements of the procedural requirements in order to accept requests for

¹⁶¹ Inspection Panel Resolution, Section 5

¹⁶² Andria Fourie, *The World Bank Inspection Panel and Quasi-Judicial Oversight: In Search of the 'Judicial Spirit' in Public International Law* (Eleven International Publishing 2009) pg. 194

¹⁶³ Inspection Panel Chairman's Board address in the 2001 *Chad Petroleum Development & Pipeline Project*, para. 6

¹⁶⁴ 1996 *Bangladesh Jute Sector Adjustment Credit Project*, ER, Box 1 at 7

¹⁶⁵ Inspection Panel Resolution, section 12

¹⁶⁶ *Ibid.*

inspection. As the policies and procedures of the Bank provide individuals rights, the barrier for entry is correspondingly low and equal to all who meet the minimum requirements. This ensures a further stabilisation by increasing the amount of actors who can rely upon the OPs and BPs.

Fair Hearing – The requirement that parties are allowed to present their case properly and that the proceedings are conducted in a transparent manner are without doubt met by the Panel. All workings of the Panel are published, from first examination of the request to final conclusions, ensuring a transparent process for both Management and the requesters. This, in particular, allows for the stabilisation of normative expectations by providing communication specifically on the legal/illegal nature of actions relative to the norms. The Panel has, however, had to work harder to meet the requirement that it is well-informed regarding the facts of the case. Management has previously withheld information (as in *Chad Pipeline*)¹⁶⁷ and have had to delay fact-finding missions on other occasions. Yet the Panel has consistently rejected Management delays and sought extra information when they felt it was required. This consistent rejection of lack of information has led the Panel to a point where it can acquire information as it sees fit to decide upon a case.

Need for Consistency – Normative expectations can only stabilise and be relied upon if it is ensured that the norms are applicable consistently. The work of the Panel to achieve this has involved two approaches. Specifically, although no precedent exists from the cases, the Panel has consistently applied the same approach and interpretation to the policies and procedures that it rules upon, even referring to previous cases.¹⁶⁸ The work that Calliess and Renner provided on systems theory regarding the ‘interlinkage and mutual referencing of legal communications’¹⁶⁹ for the development of a legal system is also of relevance. Although no formal precedent exists, Calliess and Renner cited the example of a doctrinal elaboration of legal principles as capable of fulfilling this. The Panel’s work on interpreting the various policies and procedures and the tests they have provided for them, satisfy this criteria. Also in terms of specific consistency, the

¹⁶⁷ Supra Note. 163

¹⁶⁸ *Papua New Guinea Smallholder Agriculture Development Project* Investigation Report, Paras. 527 & 530; and *Peru Lima Urban Transport Project* Investigation Report, Para. 216

¹⁶⁹ Graf-Peter Calliess & Moritz Renner, ‘From Soft Law to Hard Code: the Juridification of Global Governance’ (2009) 22(2) *Ratio Juris* 260

Panel has rejected Management claims that loans are country specific and, therefore, a 'country precedent' could be set where a countries past behaviour would affect the future decisions of the Bank¹⁷⁰ as seen in *China: Western Poverty Reduction Project*. This is to provide a consistent approach across all loans offered by the Bank.

The second element of the 'need for consistency' is to apply the decisions of other Courts on relevant areas of law. Although not directly applicable, the Panel has sought to include human rights concerns in its interpretation, as witnessed in *Chad-Cameroon Petroleum and Pipeline Project* and has sought to expand that to be relevant to all Bank work. The use by the Panel of other legal norms, incorporated into the World Bank legal system through structural coupling did not only occur in the *Chad-Cameroon Petroleum and Pipeline Project* with the introduction of human rights. It has continued in other cases of the Inspection Panel.¹⁷¹ This is further evidence of structural coupling under systems theory.

Although the Inspection Panel meets the strict test lain down by systems theory of allowing for the stabilisation of normative expectations by the verbalisation of conflicts with a determination whether an action is legal or illegal and the publication of legal communications to guide and stabilise future normative expectations, it is apparent that it is also maximising its ability to conform to this role by the actions that it has taken in its work.

5.13 Conclusion

The two tests that guide the creation of a legal system under systems theory were that there exist a body of norms that were involved within the distinction of legal/illegal conduct and that a Court-like body existed to oversee this legal/illegal conduct. The Court-like body was the instrument that triggers the change between a normative system and a legal system.

Throughout the history of the Panel, the actions of Management have been judged against the internal rules and procedures of the World Bank. This is a clear

¹⁷⁰ *Supra* Note. 162, pg. 280

¹⁷¹ *Honduras: Land Administration Project* Investigation Report (2007) Para. 258, where the Panel expressed its concern that the Management had not adequately considered an ILO Convention.

normative system. The test put forward via systems theory to judge whether a normative system was also a legal system was that the system is involved in a binary distinction between positive conduct ('legal') and negative conduct ('illegal'). The case analysis has shown that this binary distinction between conduct is occurring through the work of the Inspection Panel. The terminology might change from case to case, evolving to appearing to closely match legal language (rights and binding obligations), yet the fundamental actions of the Panel do not: the Panel is judging the conduct of Management against a clear standard and is finding the conduct either positive or negative. The terminology used by the Panel is of little relevance as long as it judges and communicates the conduct either way.

In every case that the Panel has issued an investigation report on, it has found the Management's actions in non-compliance with the OPs and BPs. Although this would point towards a constant illegal conduct of the Management, the reports have generally differentiated between conduct that the Panel has assessed is in compliance (legal) and in non-compliance (illegal).

Both the initial case before the Panel and a recent case have been analysed to demonstrate that this is not an *ad hoc* use of legal terminology. Sixteen years separate the cases and yet the Panel is involved in the same distinction of conduct today as it was on the day it was created. The powers and effects of the Panel's reports have changed and developed yet the fundamental role of providing a binary distinction over conduct has not. Under systems theory, the World Bank, by creating the Inspection Panel, has now clearly evolved into an autonomous legal system by the closure of the system.

The development of the OPs and BPs from within the World Bank, to initially create a normative framework, and the evolution of the Inspection Panel, from a *sui generis* body that simply made recommendations to the Executive Directors, to a court-like institution that is operating and overseeing the legal/illegal binary conduct of management, has pushed the Bank into a position of being a fully autonomous legal system whose actions need to be analysed and understood in terms of law.

What this means for international law, what this means for the World Bank and what this means for an analysis of the World Bank's actions will be examined in the following chapter.

Chapter Six: Conclusions and Implications of The World Bank Acting as an Autonomous Legal System

6.1 Introduction

This thesis has sought to explain a very particular issue within the field of public international law, namely, how the actions of the World Bank can be framed in terms of law. The Bank has taken upon itself a governance role in relation to its membership and although the actions of the Bank have arisen interest in the fields of political science and international relations, it is the work of the Bank and its ability to explain these actions in terms of law that has concerned the undertaken of this thesis. This work has particularly focused around the governance role that the World Bank has taken upon itself and has sought to explain the legal relationship that has evolved and developed between the Bank and its constituent member States.

The application of systems theory to the World Bank has demonstrated that the Bank of 2014 is a very different organisation to the one that its founders envisioned in 1944. Over the intervening years since its inception, the Bank has evolved and expanded upon its mandate to a point where its actions can no longer be readily traced to its founding treaty and, instead, systems theory can be utilised to explain in terms of law how the Bank operates.

This chapter summarises the conclusions that have been drawn throughout the preceding chapters, before considering the implications of these conclusions by analysing the implications of the Bank acting as an autonomous legal system. Examination of the implications is done by, firstly, examining the boundaries of the Bank's legal system and establishing both where the Bank is today and where it may develop to in the future. Secondly, the chapter will conclude by considering the effects of this shift to an autonomous legal system and how it will affect the Bank itself, the relationship with member States and, in a wider sense, consider the effect that such breakages may have on public international law generally.

6.2 Conclusions

In seeking to frame the actions of the World Bank in terms of law, this thesis has considered a number of alternative legal analytical tools before utilising the conceptual tool of systems theory, as the most appropriate mechanism via which the Bank's behaviour can be framed in terms of law.

6.2.1 The Positive International Law Theorem and its Application to the World Bank

As a body of public international law, in seeking to explain in law the actions of the World Bank and the governance role that it has occupied, this work began from the most prevalent theory used within the legal sphere of public international law, the positive theory.

The positive theory applied to international law developed from its original application to national law, with its focus upon an expression of sovereign will. No law was seen as valid without an express link to the will of the national sovereign. When applied to international law, primarily through the work of Vattel, three central tenants of the positive theory were necessary: the existence of sovereigns who had exclusive jurisdiction within States, that international law was only created by sovereign consent and the equality of all States in law. Stemming from the application of these three tenants, sources become central to the positivist theory, in that if law is the will of States, only through evidence of an expression of sovereign will, can a law be created. In the application of this to international organisations, this has traditionally required that all actions of the organisations be grounded in and constrained by the formulating treaty.

Treaty interpretation, therefore, becomes of fundamental importance in assessing the limits of sovereign consent and the limits that international organisations can act within. In the application of treaty interpretation to the Bank, a number of different interpretations are of relevance: the Vienna Convention on the Law of Treaties, customary international law, implied powers and the evolutionary approach were all examined and contrasted with the Bank's own approach. All such approaches stay within the positive theory by providing methods to best ascertain the exact will of the sovereigns when creating a treaty.

However, when considering the history and development of the World Bank since its inception in 1944 to the present day, all of these methods of interpretation that are available under the positive theory fail to explain the actions of the Bank. This is namely as the Bank was not only seeking to expand its mandate as it evolved and interpret provisions such as “development” in a wider manner, but to go expressly against the consent of its membership by taking into account considerations in lending that were non-economic. Any interpretative method under the positive theory must allow for the constraint of actions of the respective international organisation by its founding treaty, and whilst various methods could be used to expand beyond the textual words to seek the exact will of the membership of sovereigns, going expressly against provisions of the treaty is inconsistent with the positive theory.

As the Bank was taking actions inconsistent with its Articles of Agreement and the consent of sovereign States, its actions cannot be framed in terms of law by reference to the positive theory. Although States have repeatedly and often asserted their sovereignty in other contexts, the member States of the World Bank were willing to allow the Bank to behave in such a manner. As such, alternative tools to the positive theory are required to explain the actions of the Bank.

6.2.2. Alternative Theories

Having rejected the application of positive theory to model the actions of the World Bank, a number of alternative theories were examined as to the benefits that they could bring in understanding the operations of the World Bank. Although the positive theory, as the most prevalent theory within public international law, could not model the actions of the World Bank in law, the positive theory is not the only available tool of analysis that lawyers have available. In seeking to frame in law the actions of the Bank, four alternative legal theories were examined, as four theories that have either been used to explain in law the works of other international organisations or as developing areas of law that could seek to accurately model the Bank’s work.

Progressive positive theory, a term coined for this thesis, was examined as an emerging area of public international law that seeks to bind international

organisations to the application of customary international law. This theory rests upon the work of the International Law Commission in the development of the Articles on the Responsibility of International Organisations. As a mechanism for understanding the work of the Bank, the theory could usefully be utilised to explain how the Bank could take into account areas outside the strict consent given by its Articles of Agreement, and consider areas of law such as environmental, indigenous and resettlement rights, however, due to the specific provisions contained within the Bank's treaty, the theory could not be fully utilised as it could not explain the Bank expressly ignoring provisions of its Articles of Agreement such as the no political interference clause in order to take into these outside areas of consent.

An alternative model considered was the constitutionalisation of international organisations theory. As a theory that rejects that international law is based upon bilateral relations, whilst instead positing a verticalisation within the international legal order, the theory had the potential to explain the governance role that the World Bank has undertaken in relation to its member States. Yet, as a theory that puts the "constitutional" document, which in this case would be the Bank's Articles of Agreement, at the centre of the legal system created, the theory again ran into difficulties explaining the work of the Bank if the Bank's work was no longer explainable by reference to its treaty. The theory offered insights into the application of human rights norms within the Bank's work, the introduction of the Inspection Panel as an attempt to legalise dispute settlement, as well as an accountability mechanism, and the application of conditions, but could not explain the de-linking of the Bank's work from the Articles of Agreement.

Global administrative law, as an alternative to the positive theory, rests upon the premise that there is an aspect of global governance that the positive theory can no longer explain. The theory claims that there exist a number of transnational systems of regulation that address global issues that a single State cannot manage alone and so, regulatory competence in these areas has shifted from a national level to a global level. These areas of global competence can be characterised by either the presence of administrative law ideals or, the assertion under the theory, that these areas should consider such ideals. The World Bank though has not adopted administrative ideals in the manner prescribed by the global

administrative law theory and neither has it acted within the area of competence assigned to it by its membership, its purposes within its Articles of Agreement.

Finally, international institutional law was considered as of its application in other similar circumstances of international organisations, yet, due to its focus upon the institutional arrangements of the Bank, rather than seeking to explain in terms of law the actions of Bank, was rejected.

As such, none of the prevalent theories chosen have been able to explain in law the actions of the World Bank and the governance role that it has undertaken.

6.2.3 Systems Theory

Having examined both the most prevalent theory and alternative theories that have been used in other international organisation's context, systems theory was posited as the theory that could best frame in terms of law the work of the World Bank.

The model of systems theory, as developed by Luhmann, requires a self-reproducing, self-referencing, autonomous system with the identification of communication occurring along the legal/illegal divide for a legal system to be in place. Yet, whilst useful in assessing the existence of a legal system once fully in place, to accurately model the behaviour of the Bank since its inception requires not only a focus on if a legal system exists today, but the elements that are necessary to shift into a legal system. From systems theory, this starts with the fundamental presence of a normative system.

This thesis positions the development of a Court-like body as central to the evolution of a normative system into a legal system. Although systems theory positions a body ruling upon the legal/illegal divide as central to a legal system, the model of systems theory developed by this work has centred the presence of such a Court-like body not only as a necessary component of a legal system, but as a catalyst which triggers the shift from a normative system into a legal system. It is this Court-like body that allows for the stabilisation of normative expectations and closes the boundaries of the legal system.

Put differently, as an autonomous system under systems theory must produce all elements necessary for a system internal to the respective system itself, a body internal to the system must allow for the necessary stabilisation of normative expectations. This is done by the body internal to the system ruling upon the legal/illegal divide and contributing to the propagation of legal communication. It is the verbalisation of conflicts through a Court-like body with a determination of legal/illegal behaviour, combined with the publication of legal communications to guide and stabilise future normative expectations, which triggers the fundamental shift in systems from a normative system to a legal system.

As such, and given this development, two fundamental questions are posited for the identification of a legal system:

- 1) Are communications identified through the binary coding legal/illegal?
- 2) Is there a dispute settlement body that assess conduct in relation to the coding legal/illegal?

6.2.4 Development of a Normative System

The application of systems theory as a model of understanding presupposes the presence of a normative framework being in place. To explain the actions of the World Bank in terms of law through the application of systems theory, therefore, requires the presence of a normative system with the Bank exercising a normative role in relation to its membership.

Although the Bank views the relationship between itself and its borrowing member States as a horizontal relationship, the acceptance of a normative system within systems theory as a system that has in place a set of normative rules, that are created by one actor to tell another actor what to do, and, therefore, constrain the actions of the actor, allows for a redefining of this relationship. This is reinforced by the actions of the Bank to enforce these normative rules upon its membership.

The primary mechanism via which the World Bank operates its normative rules is through the application of the World Bank Operations Manual, which provides a fixed normative framework in relation to World Bank lending operations.

Although the ad hoc norms provided by conditionality were the starting point of a normative evolution of the Bank's framework, it is the fixed nature of the norms created by the Operations Manual that established a normative framework applicable to borrowing member States. Conditionality is country specific and, at least in theory, is meant to vary between borrowing member States depending upon their specific situation. In contrast, the Operations Manual applies to all member States whose borrowing touches upon one of the areas concerned. The Operational Policies and Bank Procedures are instructions that the member States must follow if they are to have access to the Bank's funding, which are enforced and followed up upon by the World Bank's staff.

The enforcement of this normative framework may only occur against borrowing member States and, as such, could be perceived as a narrow framework as, under systems theory, no communication occurs to non-borrowing member States on what they ought to do through the application of the Operations Manual. However, the Bank has sought to expand and develop the premise of a wider normative framework by attempting to influence its entire membership by the publication of annual reports. Although there is as of yet no enforcement mechanism regarding these annual reports, the reports contain the Bank's analysis of its entire membership's behaviour against standards established by the Bank, therefore, seeking to influence member States behaviour on these subjects.

Although the presence of such annual reports is of importance for the analysis of explaining the Bank's behaviour, it is the presence of a fixed normative framework that allows for the starting point of application of systems theory to explain in law the actions of the World Bank.

6.2.5 Development into an Autonomous Legal System through the Work of the Inspection Panel

The presence of the World Bank Operations Manual and its application to borrowing member States created a fixed normative framework within the World Bank system. However, whilst necessary for the initial application of systems theory, the presence of a legal system requires that the two tests identified be met:

- 1) Are communications identified through the binary coding legal/illegal?
- 2) Is there a dispute settlement body that assess conduct in relation to the coding legal/illegal?

The tests are intrinsically linked as if the second test can be met, the first test is also met. Furthermore, this thesis has posited that the presence of a Court-like body, acting as the dispute settlement body, is the catalyst that triggers the evolution of a normative system into a legal system.

In September 1993, the World Bank created the Inspection Panel, which receives complaints from citizens and then investigates compliance with the Operations Manual. The development of the Panel, and the framework that it works within, has been moved forward by a number of key cases that have gone before the Panel and, in particular, with how the Panel has dealt with those cases. The move towards a model of compulsory enforcement, the incorporation of human rights as evidence of structural coupling, combined with an increase in both the powers and effects of Panel decisions have demonstrated the true nature of the Panel under systems theory. When combined with the fundamental nature of Panel decisions, of providing a differentiation between behaviour that is in compliance with norms (legal) and in non-compliance (illegal), all of these elements have contributed towards a movement from the Panel towards the Court-like body required by systems theory.

The development of the Inspection Panel into such a Court-like body allows for the two tests of identification of a legal system under systems theory to be met, demonstrating that the Bank today is an autonomous legal system.

Since its inception, the Inspections Panel, although not a judicial Court in the classically understood sense, has developed into the Court-like body required by systems theory, providing communication on the legal/illegal divide on the action of the World Bank staff on compliance with the Operations Manual. This development has triggered the shift for the World Bank from a normative system into an autonomous legal system. Unlike other theories that failed to adequately model the actions of the World Bank in law, the application of systems theory to demonstrate the evolution of the Bank from a normative system into a legal

system allows for the actions of the Bank, and in particular the governance role that it has come to occupy, to be framed in terms of law.

This new framing of the World Bank's actions have a number of implications that need to be considered and offers an alternative perspective to the issues that confront the modern World Bank.

6.3 Implications of the World Bank Acting as an Autonomous System

The World Bank has developed into an autonomous legal system. The creation of a normative framework and a Court-like body ruling upon whether actions are legal/illegal has moved the Bank away from its original conception to an organisation that is best understood in law by the analytical tool of systems theory.

The modern Bank is a self-reproducing, self-referencing autonomous system that is characterised by communication along a binary code legal/illegal for the purpose of stabilising normative expectations. The normative framework that developed with the introduction and use of Operational Policies (OPs) and Bank Procedures (BPs) has, through the evolution of the Inspection Panel into a Court-like body, allowed for the stabilisation of normative expectations via communication along the legal/illegal divide. Actors affected by the work of the World Bank now have a normative expectation on how the World Bank will act. The OPs and BPs bind the Bank and allow for this stabilisation to occur.

In addition, the self-reproduction and self-referencing of the system occur through the work of the Panel. The communication of the Panel and it establishing the legal/illegal divide binary code, establishes the self-reproduction by constantly creating and providing understanding to the information that it produces¹ whilst allowing for a constant process of remembering and forgetting by the rulings that the Panel provides. In addition, the Panel offers an avenue for the Bank to interpret information external to the Bank system in a fashion

¹ See Niklas Luhmann, 'The Autopoiesis of Social Systems' in Felix Geyer & Johannes Van Der Zouwen (eds.), *Sociocybernetic Paradoxes: Observation, Control and Evolution of Self-Steering Systems* (Sage 1986)

consistent with the internal code of the Bank.² The Panel's role cannot be overemphasised when viewing the World Bank as a legal system. Its establishment of rules on how to interpret the OPs and BPs, as well as the publishing of its findings, allows for the elimination of inconsistencies by linking its findings to future operations³ (actors know how it will react on what is legal/illegal). This allows for the stabilisation of normative expectations.

If the World Bank is viewed as an autonomous legal system, systems theory provides an analytical tool that allows observers to make sense of this legal framework in ways that are not possible under either the positivist theory or other commonly used analytical tools.

6.4 Boundaries and Limitations of the World Bank Autonomous

Legal System

The World Bank acting as an autonomous legal system raises two questions that can be asked in relation to the extent of the legal system: what are the boundaries of the legal system and who does the legal system encapsulate? The answers to these questions are a starting point that can be developed upon to extrapolate the implications for both the Bank and other actors as to the effect of the legal system.

6.4.1 What are the Boundaries of the World Bank Legal System?

The norms that the World Bank legal system provides communication along the legal/illegal divide are the OPs and BPs. The OPs and BPs are the internal rules that govern the actions of World Bank staff, and, through them, the membership of the Bank and are the "laws" of the World Bank legal system. Although, as seen in Chapter Four, there are two other avenues via which the Bank attempts to influence its membership, conditionality and reports, the normative framework that has allowed the Bank to develop into a legal system are the OPs and BPs.

In this sense, some conditions are linked to the OPs and BPs in that the staff of the Bank are required to ensure that the OPs and BPs are followed through the

² See the *Chad-Cameroon Petroleum and Pipeline Project* Inspection Panel Case.

³ Niklas Luhmann, 'Law as a Social System' (1989) 83(1 & 2) *Northwestern University Law Review* 136, 140

imposition of conditions upon the borrower. However, in other areas the conditions that are attached to the legal agreement between the Bank and a borrower are unrelated to the OPs and BPs.

Furthermore, the traditional legal documents of the World Bank, the Articles of Agreement and Loan Agreements, are also not covered by the norms provided in the OPs and BPs or, in theory, the work of the Inspection Panel. This can subsequently be seen as a limitation via which the Bank legal system communicates along the legal/illegal divide.

In this sense, the legal system of the World Bank is somewhat constrained. It is not the intention of this work to deny the legality of either the Articles of Agreement or Loan Agreements, yet it is also apparent that in the World Bank autonomous legal system, neither is encapsulated by the communication directly from the Panel, as the Panel is not empowered to examine either outside of the OPs and BPs. On the other side of this argument, it is clear that the OPs and BPs can only occur within a framework established by the Articles of Agreement and Loan Agreements. Without either legal agreement being in place, the OPs and BPs would be ineffective and there would be no communication at all.

This paradox of the boundary of this legal system is only solved by viewing the World Bank itself as a system, with the legal system within it constrained by the limits of this system. As systems theory is based upon communication, the boundaries of a legal system are not institutional (i.e. Courts, Parliament, etc.) but operational, in that every communication that is along the legal/illegal divide within a greater system is deemed part of the legal system. Whether communication about the legality or illegality of the actions of the Bank vis-à-vis its Articles of Agreement or Loan Agreements is part of the World Bank legal system depends upon its ability to be challenged before the Inspection Panel. If a Court-like structure is integral to the operation of a legal system as has been posited, the ability of the Panel to provide a communication on the legality/illegality of an action is the constraining factor on the limits of the World Bank system. In this respect, it is significant that the Panel has demonstrated a

willingness to consider the Articles of Agreement and Loan Agreements within its remit when examining OPs and BPs.⁴

This is a non-ideal solution, with elements of the Articles of Agreement and Loan Agreements falling within the remit of the Panel depending upon their link to the OPs and BPs. Whilst this would incorporate the majority of the Loan Agreement, it would also suggest an alternative mechanism be available for the settling of disputes vis-à-vis the Articles of Agreement. This is present although has never been used.⁵ In addition, the individual Loan Agreements contain, via reference to the General Conditions, *ad hoc* dispute settlement procedures to provide a ruling on the legality/illegality of actions taken in respect of the agreement.⁶

The limitation of the work of the Panel being linked to OPs and BPs, whilst other communication regarding the World Bank occurs along a legal/illegal divide but unrelated to the work of the Panel, leaves a non-ideal situation when defining the limits of the system. At a minimum, it is apparent that the World Bank legal system incorporates the OPs and BPs, but the demonstrated ability of the Panel to link this to the Articles of Agreement and Loan Agreements and make rulings on these, as well as the presence of alternative Court-like bodies to provide communication on the legal/illegal divide, points to a wider legal system. Ideally this would be rectified by the consolidation of legal procedures within the Bank, with one Court-like body responsible for all communication on the legal/illegal divide regarding all Bank activities. Moving forward with the Bank, if the Bank is to accept its development into an autonomous legal system, this is an amendment to the Bank's structure that could be adopted.

The limits of the system are also temporal as well as spatial. By breaking the intrinsic link with State consent that is present in the positivist theory, it allows system theory to explain the work of the World Bank as it is acting today and since the introduction of the Panel. However, despite the analysis regarding the creation of the normative system in Chapter Four, the origins of a system of law question the applicability of systems theory back beyond a point where a

⁴ For the Articles of Agreement, see for example: The Inspection Panel Investigation Report: The Qinghai Project, China: Western Poverty Reduction Project (2000) para. 78. For the Loan Agreement, see for example: Red Sea-Dead Sea Water Conveyance Study Program Report No. 66811-MNA (2012) para. 49.

⁵ IBRD Articles of Agreement Article IX

⁶ IBRD General Conditions for Loans, March 12, 2012, Article VIII

normative system began to develop. The period of time before this, when the Bank was acting outside of its Articles of Agreement yet had not developed into a normative system is an open question within the systems theory model.

Systems theory does, however, offer an opportunity to understand the Bank's actions related to the Articles of Agreement. As the communication on this issue, whether the Bank has been acting legally/illegally regarding its actions to the Articles, develops internally and is interpreted by the internal structure of the Bank, it is this internal structure that is continuously reproducing itself that assess this Bank conduct. Issues, such as whether the political activity prohibition has been respected, are assessed internally and develop an understanding internal to the system. This evolution of understanding allows for an evolution of legal meaning within the system. The norms that have developed have developed internal to the Bank's structure, and whether they comply with the Articles is, therefore, internalised within the Bank's system.

6.4.2 Who does the World Bank Legal System Encapsulate?

The question of whom the Bank's legal system encapsulates is linked to where the boundaries of the Bank legal system are. It is also apparent that there are multiple ways in which to view the applicability of the OPs and BPs in law under systems theory.

The OPs and BPs are directly binding upon the staff of the World Bank, although in Chapter Four it was demonstrated that they also indirectly bind the member States of the World Bank who request assistance as the OPs and BPs outline rules for how any project should be undertaken. This in turn implies three possible scenarios for the applicability of the World Bank legal system.

As a starting point, the direct applicability of the OPs and BPs to the staff of the Bank could limit the legal system to only allowing for communication from the Panel to the staff. It is in relation to the staff's actions that the Panel creates communication relative to the legal/illegal divide.

Alternatively, as the indirect applicability includes the borrowing member States, and the communication, although not directly on the member States behaviour, has significant implications for the member State and is indirectly on the member States behaviour. If the staff have failed in implementing the required OPs and

BPs, it is because the member State itself has acted against them. Furthermore, the finding of legal/illegal has implications for the member State as a finding of illegal would require the Bank to take corrective action (i.e. imposing extra conditions on the member State) or to stop funding the project.

Thirdly, the communication by the Panel, although directly related to a specific project, serves the function of stabilising the expectations of the entire membership of the World Bank. All member States, via the publication and decision taken, are given an expectation on how future requests for assistance will be handled by the Bank vis-à-vis the OPs and BPs.

The conditions of the legal system under systems theory, in allowing for the stabilisation of normative expectations would point to the third scenario being the most likely in relation to the World Bank's autonomous legal system. The normative framework of the OPs and BPs is only enforced against those who are borrowers, yet legally all member States have the potential to borrow from the Bank, even if they do not meet the economic criteria today. In that sense the legal system has both a narrow and wide focus, in that it only is applied in relation to the borrowers, but as all member States have the ability to borrow from the Bank, it serves to stabilise the expectations of the entire membership. Therefore, the legal system under the OPs and BPs applies to the entire membership of the Bank.

The answers to these questions provide a basis for the subsequent analysis on the implications of the World Bank acting as an autonomous system.

6.5 Implications of the World Bank Acting as a Legal System for the World Bank Itself

The shift in understanding from an organisation that acts within a mandate established by its member States to an autonomous legal system has a number of implications for the World Bank itself.

Systems theory views law as an autonomous legal system. However, the autonomy does not take law out of larger society, law remains part of the overall

system of society but becomes a subsystem of the greater society system.⁷ Whether the boundary of the legal system is established as only the OPs and BPs or the wider legal framework of the Bank, it is apparent that in some form the Bank has differentiated itself from a wider system and achieved a functional differentiation.

For the World Bank to be an autonomous system, there are two consequences in this respect. Firstly, as a system is not independent from but a part of a wider society, the Bank as an autonomous system presupposes an overarching society, a global society, that the World Bank has differentiated itself from but is apart of. This can be better explained and understood by viewing public international law as an autonomous system of law within the global society,⁸ and the World Bank has differentiated itself from this public international law system.⁹

Secondly, that despite the differentiation of the Bank from this global societal system, the consequence of it remaining part of the wider system is that the autonomous legal system of the World Bank must serve a purpose for the wider societal system. In the words of Luhmann, 'the legal system fulfils a function for society'.¹⁰ In this respect it can be challenged what is the function that the Bank as an autonomous system is providing to the wider global system? The answer as such can only be what purpose the wider global system's membership has given the World Bank: i.e. the purposes within its Articles of Agreement. Furthermore, as part of wider society, the Bank's legal system must contribute to the construction of that wider system.

A number of important considerations arise out of this.

⁷ Niklas Luhmann, 'Law as a Social System' (1989) 83(1 & 2) *Northwestern University Law Review* 136, 138

⁸ For analysis of public international law as an autonomous legal system within systems theory, see Gunther Teubner, 'Global Bukowina: Legal Pluralism in the World-Society' in Gunther Teubner (ed.), *Global Law Without a State* (Dartmouth 1996) pg. 3 and Andreas Fischer-Lescano & Gunther Teubner, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25(4) *Michigan Journal of International Law* 999

⁹ The acceptance that the differentiation of the Bank from public international law does not take the Bank out of the wider public international law system has important implications, both for the Bank and for the public international law system. These implications will be examined in a dedicated section further on.

¹⁰ Niklas Luhmann, 'Law as a Social System' (1989) 83(1 & 2) *Northwestern University Law Review* 136, 138

Firstly, are the Articles of Agreement that were signed in 1944 still adequately reflective of the role that the wider society would wish the World Bank to play? Much has been written on the larger member States' influence upon the Bank,¹¹ but it is the membership as a whole, as a reflection of the wider society, that appears willing to allow the Bank to work outside of these purposes and the mandate that they gave it. It has been demonstrated in Chapter One that the Bank regularly has acted outside of and at times against its agreed mandate. The OPs and BPs themselves also take into account considerations that the Bank is prohibited from taking into account.¹² The consequences of these considerations is to challenge the assumption that the function of the Bank stipulated in the Articles of Agreement is truly the role that wider society is seeking the Bank to undertake.

This would imply two options that in either case would require that the Bank, as a legal system, reflect upon its role. As one option, the Bank's membership, as part of both the legal system of the Bank and part of the wider society system, need to question whether the purposes given to the Bank are appropriate for the function that the Bank has. Changes to the structure of a legal system happen internally to the system, and the ability to amend the Articles of Agreement is a change that can occur internally to the World Bank legal system.¹³ This reflection would give the Bank an option to decide upon the extent that the legal system should reach; whether it should apply in some form to the entire membership of the Bank (through the use of the reports for example) or whether to retain the current position of the application only to those who request assistance. Although the normative expectation is provided for all of the membership, the applicability is currently limited to the application of the Bank's purposes, i.e. to the granting of financial assistance. Although the Bank has sought to widen the applicability of a normative framework by the use of reports to attempt to govern the entire membership, the lack of requirement to follow the assessment of the Bank

¹¹ See for example; Robert Gilpin, "The Rise of American Hegemony", in Patrick Karl O'Brien & Armand Clesse (eds.), *Two Hegemonies: Britain 1846-1914 and the United States 1941-2001* (Ashgate Publishing, Ltd. 2002) pg. 165-182; Robert Wade, "US Hegemony and the World Bank: the Fight over People and Ideas" (2002) 9(2) Rev. of Int'l Political Economy 201 and Richard Peet, *Unholy Trinity: The IMF, World Bank and WTO* (Zed Books Ltd. 2003)

¹² IBRD Articles of Agreement Article IV, Section 10: Political Activity Prohibited

¹³ IBRD Articles of Agreement Article VIII

regarding the behaviour of its member States prevents these reports amounting to norms. In addition, it is clear that although the legal system of the Bank may extend to the wider legal areas of the Articles of Agreement and Loan Agreement, there is at present no justification to claim that the reports provide the basis for a legal/illegal communication. A reassessment of the purpose of the Bank may allow this to adapt and change.

Alternatively and as a second option, the Bank can itself revert back to the original function that it had for the wider society system, i.e. it constrains itself by the purposes that it has within its Articles of Agreement. This would require a withdrawal from the OPs and BPs to the extent that they take into account political concerns and a wider question of the role of the reports going forward. Lending would have to occur only on the grounds stipulated by the Articles of Agreement.

The desirability of either option is not a legal concern, and goes to the will of the global society. The current acceptance by the wider societal system of the World Bank taking upon itself the function that it has, wider than the one originally granted to it, would point more towards the conclusion that the first option is more appropriate.

This reflection upon the role of the Bank also is important for a reflection of the role of World Bank assistance. Currently, the Bank prioritises certain efforts, for example the eradication of poverty, and to this end attempts to ensure through the use of OPs and BPs that no matter what its lending, it does not have negative effects upon wider elements of development that it has prioritised. The issue with this purpose is that it removes the understanding of what is best in a situation from a member State, and allows the World Bank to dictate to a member State what policies it may not encroach upon. Whilst it is not the intention of this work to undermine efforts to protect water supplies, environmental standards, indigenous peoples rights or many other areas of legitimate concern, it should be clarified to what extent these are legal obligations of the member States that the Bank is enforcing, and to what these are standards that the Bank is developing itself. Currently the policies of the Bank can lead to obtuse results where a member State details a legitimate development need but cannot move ahead as it would conflict with World Bank OPs and BPs. To the extent that there is a

weighing of priorities, the traditional position has been for member States as sovereigns to take this decision although in these circumstances it is clearly not the case. Whether this should continue should come as a secondary concern after a reflection of the Bank's purposes.

A second implication is also present considering the differentiation of the Bank from the wider society; the actual contribution that the Bank as an autonomous system makes to the wider system needs to be reflected upon. As the Bank should contribute to the construction of the wider societal system, the communication between the two areas should be enhanced. The Bank has already undertaken measures to increase its transparency; therefore, contributing greater communication between the two, but the communication can be enhanced in both ways. The Bank can increase its contribution outwards and has done, but it can also improve the mechanisms via which it incorporates the communication that occurs outside of its system.

Finally, the recognition of the World Bank as an autonomous legal system presents the Bank a choice. The differentiation of the Bank from the wider public international law legal system rests upon the self-referencing, self-reproducing process that the Bank continuously goes through via the communication along the legal/illegal code in relation to the OPs and BPs. One element is that this process of differentiation must be continuous. If at any point this differentiation were to stop, the Bank's legal system would be reabsorbed into the wider public international law legal system.

Knowing this, the Bank as a system has a continuous choice. It must continuously choose to be apart from the wider system. In practical terms, if the Bank were to stop the process of OPs and BPs or stop the stabilisation of normative expectations via communication along the legal/illegal divide by abolishing the Inspection Panel, the autonomous legal system would dissolve, either back into a normative system or potentially, depending upon how the stop occurred, back to its original intention of being part of the wider public international law legal system.

The following analysis assumes that the realisation of the Bank as an autonomous legal system does not cause the Bank to move back to a position of within the wider public international law system. This assumption rests upon the acceptance

by States of the Bank's behaviour in acting outside of the areas of State consent previously, and it is assumed that this acceptance will continue.

6.6 Implications for the Relationship between the World Bank and Member States

The relationship of the World Bank to its Member States can no longer be understood in terms of sovereign consent. Although sovereign consent established the World Bank, the Bank as a present day institution, through the development into an autonomous legal system, has moved beyond the sovereign consent principle into acting as an autonomous unit. Sovereign consent is not irrelevant, as it provides the starting point for operations, however, it can no longer provide all answers to the Bank's behaviour.

The autonomy of the Bank as a legal system has considerable implications for the relationship between the Bank and its member States, in particular given the break that this has caused with the principle of State consent.

The legal system of the Bank revolves around the OPs and BPs, yet the application of these to member States occurs partially through conditionality on assistance. Systems theory offers a mechanism via which to frame in law what is occurring with the use of conditionality.

The Inspection Panel is judging the actions of Bank staff on the conditions they place on loans (the action) against the OPs and BPs (the law). It is not, according to the Bank, judging whether a State has complied with conditions, it is judging whether management has complied with the OPs and BPs, although this is somewhat undermined by the requirement of the staff to effectively monitor the application of the conditionality. In respect of Panel decisions if the action is judged illegal, the Bank awards no damages to the individuals complaining and instead the Bank has to either renegotiate loans or withdraw the finance from the Bank.

This has important implications for the concept of State responsibility. As part of the legal system of the World Bank, the applicability of the OPs and BPs to the member State through conditionality may have repercussions for the member

State's wider legal responsibility. If the OPs and BPs are in conflict with an international legal obligation of the member State, there potentially may be a conflict of responsibilities for the State concerned.

The World Bank as an autonomous legal system that interacts with States through conditionality based on the OPs and BPs also raises questions as to the responsibility of the Bank. In this respect, the work of the International Law Commission in attempting to clarify the responsibilities of international organisations should be welcomed.¹⁴ Yet, not every organisation is an autonomous legal system, and the shift from a traditional international organisation linked to State consent and an organisation amounting to an autonomous legal system would suggest a different level of responsibility is necessary depending upon the status of the organisation. It would be a considerable feat to achieve such a legal framework in a constantly evolving situation as international organisations develop and evolve. In terms of the World Bank, and potentially other autonomous international organisations, as an autonomous legal system, it is evident that responsibility for its actions should rest with the organisation. This has important implications for the effect of its work, particularly for an evolution in the Inspection Panel and the remedies that applicants have.¹⁵

This consideration of the responsibility of the Bank also points to a possible evolution in the governance arrangement between the Bank and borrowing member States. The OPs and BPs are directly binding upon staff, but indirectly binding upon all borrowers from the Bank. The reality of the obligations that are upon the Bank's membership through the OPs and BPs should be reflected in a shift in focus of the laws. Although the Panel, and at times States, have pushed the applicability of the OPs and BPs to member States, this should be reflected by an explicit change in the binding nature of the World Bank Operations Manual, from a manual binding upon staff, to a manual binding upon the access to World Bank resources.

However, not all Member States are borrowers, which results in a two-tier system within the Bank. Members who borrow are bound by the OPs and BPs in so far as

¹⁴ ILC Draft Articles on the Responsibility of International Organisations (2011)

¹⁵ See Section 6.3.3

that they cannot get assistance unless the policies are followed, whilst Member States who do not borrow are not subject to the requirements set down in the OPs and BPs. The Bank is, therefore, an autonomous system of law in so far as that it is a normative actor where communication is divided by a Court-like body along the legal/illegal divide yet this law does not *de facto* apply equally among the States who are members of the World Bank. Although it was stated that the legal system encapsulates the entire membership, as it allows for the stabilisation of normative expectations of all member States vis-à-vis lending by the Bank, the stipulation that in practice it only applies to borrowers limits the applicability of the law in a practical context. This, again, reaches back to the purpose that the global society seeks for this system and what function the World Bank legal system is seeking to fulfil. In contributing to the global society, the focus on borrowers can be maintained or sought to be expanded in some form to the wider membership.

6.6.1 World Bank Law vs. National Law vs. Public International Law

Once a Loan Agreement is entered into by the Bank with the application of the OPs and BPs contained therein, the judgment against these decisions under the agreement is not governed by State law or public international law, it is governed by “World Bank law” (i.e. the OPs) and the Inspection Panel is the “Court” that decides if these conditions meet the standard required in the OPs. The application of the OPs and BPs through the tool of conditionality, therefore, becomes the main mechanism via which the Bank exercises its authority over its subjects. This relationship between systems of law is further complicated by the presence of borrowing member States in at least three forms of legal systems: national law, public international law and the World Bank system.

The World Bank achieving the status of an autonomous legal system has implications for how this relationship is viewed. Whilst public international law and State law are recognised legal systems, there now exists a system alongside in “World Bank law”. The traditional relationship has always been to maintain a top-down approach with international law affecting States, with national law being beyond the scope, although since the introduction of human rights and other areas of international law in the 21st century this presumption has already been challengeable. Whilst an examination of pluralism and the work on this area is beyond the scope of this thesis, the World Bank now clearly exercises a

governance role in applying standards to, what it perceives are the benefits of, subjects of national law, i.e. citizens. The structural coupling that occurs between these systems allows each system to influence each other, but only to the extent that the communication from each system is interpreted internally within the others.

This development is crucial for an understanding of how the Bank should in the future act in relation to other systems; be they fully autonomous legal systems, such as national legal systems, or simply external communication. Rather than rejecting the premise of the applicability of certain external forces upon the World Bank, the Bank should seek to enhance the communication that occurs between itself and others in order to better allow the Bank to internalise this communication.

The recognition of the World Bank as a system of law would allow it exclude values from its work (political expediency, etc.), yet would allow it to include through structural coupling other communication. This would be of particular relevance for including within the Bank's work other areas of public international law which the Bank system is a part of. Assuming that the mandate and function of the Bank could be clearly established by the wider societal system, the Bank would be able to interpret communications from outside its own autonomous system along its own internal communication framework. This would be of particular use in two areas.

Firstly, in general relations with all of its member States, the Bank would be able to consider and interpret customary international law. Customary international law is the minimum standard of public international law encapsulating the Bank's membership.¹⁶ As a system of law, the Bank could interpret customary international law from the wider public international law system and apply it along its own communication. This has demonstrably happened in the *Chad-Cameroon Petroleum and Pipeline Project* case of the Inspection Panel when the Panel introduced human rights into the legal system of the Bank. It is also apparent from the OPs and BPs that certain areas of customary international law

¹⁶ Excluding persistent objectors.

should be taken into account,¹⁷ however, this is in an extremely limited area rather than applicable as a general principle.

The acceptance of the wider application of customary international law and its applicability to the World Bank would not override the Bank's own legal system. Being an autonomous legal system, the Bank would interpret it and apply customary international law within its own framework. In practical terms, the applicability of customary international law would only occur in relation to lending decisions and to what extent the Bank would seek to incorporate customary international law into its OPs and BPs.

Secondly, on individual relations between the Bank and its member States, particularly in the application of loans from the Bank to the State, the Bank would be able to incorporate wider legal norms within its work. For example, treaty obligations of a respective member State should be considered when establishing the Loan Agreements. This would not detract from the State's responsibility to meet its legal obligations outside of the Bank legal system, but would allow an integration between the two as much as was necessary and required by the Bank.

6.6.2 Erosion of State consent

The move away from State consent and the development of an autonomous system has further implications for the relationship between the World Bank and its member States in terms of State consent.

The application of systems theory to the World Bank reflects a reality; it is not the application of systems theory that moves the Bank away from State consent, but the application of systems theory allows this move away to be explained in law. However, once this realisation is realised, the move away from State consent has a number of consequences in law.

Firstly, for the Bank itself, it challenges the legitimacy of the operations of the Bank. If, as has been argued by some, consent is what gives public international law its legitimacy,¹⁸ then a move away from consent in the differentiation that the Bank has made for itself from public international law would also signal a move away from the legitimacy that consent brings. Over the proceeding decades, the

¹⁷ See for example, OP 7.30

¹⁸ See for example, Matthew Lister, 'The Legitimizing Role of Consent in International Law' (2010) 11 (2) Chicago Journal of International Law 663, 669

legitimacy of international law generally has become a genuine and central concern.¹⁹ Governance by international organisations has been a central premise in this with the legitimacy of their role being questioned,²⁰ particularly in a link to the democratic accountability of such organisations.²¹

The World Bank as a legal system outside the control of sovereign States moves this debate forward in two important respects. As an autonomous system of law, the legitimacy of that law must materialise from within that system, rather than be exerted through national law and structural coupling. In the sense that the OPs and BPs bind States and have an effect upon citizens' lives, the Bank should have a strong internal governance structure to give the legitimacy that is required. This is particularly important in relation to the approval and review of the laws, the OPs and BPs. Currently the process of sending the OPs and BPs to the Executive Board is inadequate in that it does not allow for the system as a whole to assess and challenge the OPs and BPs, and instead allows only a limited review by the blocks of countries represented on the Executive Board. A more appropriate mechanism would be for a review and passing by the Board of Governors. Even this, however, creates concerns as to the ready ability of the Governor of a country to represent his or her citizenship within the World Bank system.

The second area in which the World Bank has moved the legitimacy debate forward is the creation and use of the Inspection Panel. If legitimacy can be defined as 'a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pose judgement, and the actor may face consequences',²² then the Inspection Panel provides an element of legitimacy vis-à-vis the citizenship of member States by giving those affected by Bank actions an opportunity to challenge the conduct of the Bank. The similar procedures introduced by the Inter-American Development Bank and the Asian Development Bank can only be

¹⁹ Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15(5) EJIL 907

²⁰ Dominik Zaum (ed.), *Legitimizing International Organizations* (OUP 2013)

²¹ See for example, Joseph Nye Jr., 'Globalization's Democratic Deficit: How to Make International Institutions More Accountable' (2001) 80 Foreign Affairs 2 and Armin von Bogdandy & Ingo Venzke, 'On the Democratic Legitimation of International Judicial Lawmaking in Armin von Bogdandy & Ingo Venzke (eds.), *International Judicial Lawmaking* (Springer 2012)

²² Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13(4) European Law Journal 447

seen as positive developments in legitimising the role of these organisations. However, this should in no way be viewed as a complete solution to the legitimacy issue due to the inability of citizens through the Panel to challenge the actual OPs and BPs, only to challenge whether the World Bank has followed these laws.

Carrasco and Guernsey propose that the Inspection Panel be reformed into a true arbitration function in order to promote true accountability for the World Bank.²³ This would be achieved by making Panel decisions binding, conducting arbitration along a framework established in international arbitration standards and allowing for the award of damages to citizens. The Panel, as it stands, provides an adequate mechanism via which the Bank can communicate along the legal/illegal divide vis-à-vis Bank actions relative to the OPs and BPs. Through this it allows for the stabilisation of normative expectations of actors within the World Bank legal system. Yet the proposal of Carrasco and Guernsey to strengthen the arbitration nature of the Panel would allow for the acceptance of the Bank of its international responsibility as well as allowing to break the *de jure* link between the Panel and the Executive Directors. Such provisions could only be welcomed in strengthening both the Panel's position within the legal system and allowing for the Bank to strengthen its claim to be internalising the legitimacy concerns that it faces.

A second consequence for the move away from State consent is that, for the member States of the World Bank, it challenges the position of sovereigns as the appropriate mechanism via which citizens can organise their dealings. If States have been the traditional mechanism via which citizens have organised themselves in order to best handle their affairs, the implications of a governance regime outside of and independent from State control would appear to question the applicability of the World Bank legal system against the State. The inclusive (States are part of the World Bank system) yet exclusive (the State legal system is external to the World Bank legal system) nature of the World Bank legal system presents a paradox as to the extent that States have an effect upon the World Bank legal system. In this respect, the need for appropriate mechanisms to ensure democratic accountability and legitimacy of operations are only strengthened.

²³ Enrique Carrasco & Alison Guernsey, 'The World Bank's Inspection Panel: Promoting True Accountability Through Arbitration' (2008) 41(3) Cornell International Law Journal 577

6.7 Reforms of the World Bank

Throughout the history of the World Bank, there have been many calls to reform its work, or even to abolish the Bank completely. The acknowledgement of the Bank as an autonomous legal system has a number of consequences relevant to the reform of the Bank.

6.7.1 The Operational Policies and Bank Procedures

Luhmann argues that in observing and describing the legal system one must presuppose the acceptability of the legal/illegal code.²⁴ The norms, in the case of the World Bank the OPs and BPs, are presumed to be acceptable, as well as the legal/illegal communication regarding them. However, a second stage of the analysis, once a full system is established, must be clarifying the acceptability of the code, not in terms of whether it is accepted or not (which in the case of the World Bank it clearly is), but in terms of the norms desirability and whether the code and the norms on which it is judging best serve the function the system plays within society.

Furthermore, Luhmann also argues that once it is acknowledged that a legal system has evolved, this develops the possibility for reflection. The combination of these two would suggest that the Bank embark upon a reflection of the desirability of the OPs and BPs. To this end, the Bank has already began a consultation over the safeguard policies incorporated within the OPs and BPs that it expects to give a result by mid-2014.²⁵ This review should be widened to include all OPs and BPs but only be concluded upon once the function of the World Bank is established. Whilst the review at the moment allows a chance for the wider system to communicate with the Bank what changes the wider system would prefer, the reflection should be driven by what function the society requires from the Bank. The legal nature of the OPs and BPs would suggest that they are subject to a scrutiny equal to this status.

²⁴ Niklas Luhmann, 'Law as a Social System' (1989) 83(1 & 2) Northwestern University Law Review 136, 145

²⁵ The World Bank's Safeguard Policies Proposed Review and Update: Approach Paper, October 10, 2012

6.7.2 Accountability

It has been identified there is a need to reconceptualise the legitimacy debates in terms of systems theory as the link between sovereign will and the Bank is broken. The internal structure of the World Bank has to provide the legitimacy if is an autonomous legal system which in turn implies that the accountability of the World Bank needs to be framed in terms of the function that the global society is seeking the Bank to have.

However, there is accountability in a wider sense that needs to be considered. If the Bank were to recognise the existence of various systems in international law it would allow the Bank to focus upon its core mission; reconstruction and development, with acceptance that other areas of international law will develop into specialist systems of law. This does not mean that the World Bank as a legal system cannot consider other areas of law, in fact any external communication, including legal communication that develops in either wider society or other legal systems, is interpreted along the internal structure of the Bank. However, in terms of accountability it should be clear who is accountable for actions.

Whether this results in the World Bank, as an autonomous system, considering all aspects of law or focusing upon its core mission, will, again, depend upon the role that is chosen for the Bank by wider society.

6.7.3 The Inspection Panel

The World Bank Inspection Panel is not officially a Court. Yet, the Panel hears complaints and judges actions in accordance with standards termed in the fashion of laws. The non-compulsory official nature of its findings is contrasted with its *de facto* status as arbitrator whose recommendations have, since its early work, always been followed. This is of a similar nature to a domestic Court what cannot enforce its decisions but relies upon the executive and the compliance of actors that go before it to do so.

Currently, the Panel only formally makes recommendations to the Executive Directors and the power to adopt binding decisions rests with the Executive Directors. Although, as demonstrated in the previous chapter, the situation has changed somewhat since the adoption of the resolution establishing the Panel so that in practice the Executive Directors now adopt every decision of the Panel, this is not yet reflected in the resolution itself. It has been demonstrated that for

systems theory that this has not stopped the creation of a Court-like body. This can also be linked to the operation of Courts in national legal systems. Although a Court makes the binding decision, it relies upon others for enforcement and requires their tacit approval and respect of the jurisdiction of the Court to decide matters. A similar system has developed within the Bank with the Executive Directors tacitly approving the Panel's recommendations.

To better reflect this practice, the Bank should consider directly empowering the Inspection Panel to make binding decisions. The practical effect would be the same but would allow an acknowledgment of the role that the Panel has come to occupy within the Bank's system. Furthermore, it would enhance the ability of the Inspection Panel to provide judgment along the legal/illegal divide by having direct enforceability.

Furthermore, the evolution in the responsibility of the World Bank should dictate a change in the remedies that are available to applicants of the Panel. Currently remedies are limited to a change in the conditions attached to a loan, in order to ensure that the member State follows the respective OPs and BPs, or the Bank can stop funding the project. As an autonomous legal system, responsibility for actions should rest with the World Bank. If the Bank as an autonomous system has failed to abide by its own legal framework, then responsibility should rest with the Bank to place those that are damaged by its actions back into their previous position. This would imply that the Bank should reflect upon the remedies available and introduce the notion of damages when it has failed to abide by the OPs and BPs.

6.7.4 The Articles of Agreement

Any change to the Articles of Agreement would, as a primary concern, reflect the role that the membership of the World Bank seeks the Bank to have. Whether this would require a change as such to the purposes would depend upon the outcome of this reflection. Changes to the Articles of Agreement would also need to mirror the decisions taken in other contexts of reform.

6.7.5 Voting

Over the history of the Bank, there have been numerous attempts to reform the voting arrangements of the Bank. Within a system of law, systems theory places the development of norms secondary to the communication and stabilisation that revolves around the norms. Yet, the creation of norms within the World Bank is subject, to a certain extent now and possibly to a larger extent in the future, to the voting system that the Bank maintains. The link between voting rights and contribution to the subscribed capital of the Bank ensures that those who contribute most have the largest say, yet in a two-tier system of the Bank where the application of norms are only directly upon those who borrow, it questions the link between those who establish the norms and the applicability to borrowers.

The reform of voting procedures is a subject unto itself, but if the purpose of an autonomous system is to serve the wider society, the rules of that internal system should seek to maximise this benefit to wider society. Whether this involves a wider interpretation of the function of the World Bank to incorporate and enforce the particular model of development that it currently adopts or a narrowing of the Bank focus to ensure development at the direction of the member States is unclear. Nonetheless, the voting and ability of member States to affect the OPs and BPs should reflect this issue. If the focus is upon ensuring a wider role of development for those who borrow from the Bank, a greater role should be given to the borrowers in order to reflect the concerns that they have as to what this wider role of development should entail. On the other side, whilst taking no position on the benefits or disadvantages of their current structure, leaving the voting structure as it currently stands may be acceptable if the Bank's role is narrowed and a larger role given to the respective borrowing member State within the World Bank system as to the role of development within their respective State.

6.8 Effect upon Public International Law

As referred to earlier, the autonomous system of the World Bank presupposes an acceptance that it is part of a wider societal system; the public international law system that is itself part of a wider global society.

The effect of the World Bank system upon international law is two fold: firstly, the presence of the system itself alters the dynamic and understanding of existing public international law; secondly, the introduction and use of the Inspection Panel has changed the traditional dynamic between citizens and international law.

6.8.1 Dynamic of Public International Law

Public international law has been labelled as fragmented or functionally differentiated for a number of years. In the area of international organisations, as organisations have become more powerful and began to exercise a global governance function, a number of theories have developed and been applied to understand in law this phenomena.

It is clear that one more is required to be added, systems theory, to the work of the World Bank. The unique character of international organisations belays any attempt to extrapolate directly this work to other organisations. As a model of understanding, systems theory could offer a tool to better understand the evolving nature of the work of international organisations yet each organisation would require a specific examination rather than any general rule being applied. Public international law however, is undergoing a theoretical movement away from one central theory of understanding to numerous theories explaining the work of different areas. General rules fall down when applied to specific situations as it becomes clear that States are willing to allow different areas to evolve at differing rates and in different directions.

The development of the World Bank into an autonomous legal system does, however, question the applicability of systems theory to public international law as a whole and what the relationships between the different areas are. "Public international law", as a distinct legal system, is distinct from the World Bank legal system but the World Bank is part of this system, only differentiated from it. Whilst when systems theory views society as a whole, it is obvious that

communication along the legal/illegal divide belongs within the realm of the legal system (the same way that communication along other binary divides belongs in other systems within the totality of society), when communication occurs between two legal systems, both along the legal/illegal divide, it needs to be established how each is interpreted.

It is posited that this should be done along the normative system contained within the autonomous legal system. The normative system as such is the one that the communication is concerned with: the guiding of expectations of the implementation of the norms. The communication between the Bank, national law, international law and other legal systems, both potential and actual, should be interpreted along the normative framework that the bank has established. Structural coupling, when understood in this way, therefore, pushes the communication from other systems along the Bank's internal code.

Whilst the intention of this thesis has not been to demonstrate a position of autonomous legal systems in any organisation except the World Bank, nor to imply that any currently exist, the analysis of the Bank opens up the possibility that other autonomous legal systems may or can in the future exist. There is considerable work on the governance function being exercised by other international organisations.²⁶ If other organisations develop into autonomous legal systems, the fragmentation of international law will only increase. As the newly autonomous legal systems differentiate and separate themselves from the wider public international law system, it is not that this wider public international law system is undermined or loses value, nor that it is applicable in a lesser context. The fragmentation into autonomous legal systems only allows for a specialisation to occur on the legal/illegal divide into the different areas that fragments exist. Public international law is still applicable and will be interpreted through structural coupling to be applicable, however, the generality of the application is premised upon each specialist autonomous legal system interpreting the general law in its own way.

²⁶ See IMF: Armin Schäfer, 'A New Form of Governance? Comparing the Open Method of Co-ordination to Multilateral Surveillance by the IMF and the OECD' (2006) 13(1) *Journal of European Public Policy* 70; EU; Helen Wallace, William Wallace & Mark Pollack (eds.), *Policy-Making in the European Union* (OUP 2010), WTO; Andrew Guzman, 'Global Governance and the WTO' (2004) 45(2) *Harvard International Law Journal* 303, and generally, Ngaire Woods, 'Governance and the Limits of Accountability: The WTO, the IMF and the World Bank' (2001) 53(170) *International Social Science Journal* 569

The danger of such a response is that the applicability and content of public international law can be interpreted differently in different forums. However, this position is already apparent for public international law, even without a fragmentation into different autonomous systems. By its very nature, public international law broaches different national legal systems, each able to interpret the obligations in different ways. Although on a dispute, the specifics of the situation such as who and where it is being applied will dictate a result, the interpretations across different jurisdictions does not defeat the stabilisation of normative expectations that public international law brings. This stabilisation will also apply within the fragmentation of a wider public international law. As this thesis will only position itself relative to the World Bank, the application of public international law in the context of the Bank does not defeat or destabilise the normative expectations that public international law brings, and in theory should achieve the exact opposite. The application of the norms in a wider context allows for a stability of normative implementation. In the example of human rights, when applying the customary international law obligations of human rights, whatever they may be, it is not immediately clear why a customary international law would be applied in some contexts and contradicted in others (i.e. by Bank lending that did not have to take human rights into account). The subject of State responsibility and customary international law has been broached previously in this chapter but it is sufficient to note for the purposes here that the separation of autonomous legal systems from the wider legal system does not pose a threat to the stability of normative expectations from the wider public international law legal system.

The separation and move away from generality of international law would, however, imply that there is not one ready response than can be used to address the issue of fragmentation, and instead each fragment would require a bespoke response with a differing relationship with States. The theories of public international law would need to reflect this shift. Whether systems theory can explain the work of other international organisations or, more generally, other areas of public international law is an open question that would require further scholarship. What, however, is apparent, is that legal scholarship is offering different legal tools of analysis for different areas. Systems theory is only one tool that is currently being used, and whilst work may continue to find an overarching

legal tool that applies in every context, the specialisation and fragmentation of international law would argue against the success of this endeavour.

6.8.2 Citizens and Public International Law

The breaking of the principle of consent has important implications for the relationship between public international law and citizens of States. The World Bank has already taken a lead in this respect by introducing the Inspection Panel, which allowed for the first time a citizen to bypass its State and appeal directly to an international organisation.

Klabbers, Peters and Ulfstein highlight that the accountability forum for international organisations should be the global citizenship and not the member States that make up the membership of the organisations²⁷. 'In doctrinal terms, the claim is that individuals should be full and active legal subjects of the respective organization's legal order.'²⁸ The work of the Inspection Panel within the World Bank's legal order moves the World Bank into a separate phase vis-à-vis the organisations that the authors point to. Whilst not allowing for a complete transformation as of yet, due to the findings of the Panel only being related to the conduct on the legal/illegal divide and not on the OPs and BPs themselves, the Panel allows for an accountability mechanism for individuals that is not readily present within other organisations. The systems theory perspective on this is to allow to the findings of the Panel their true purpose; to communicate along the legal/illegal divide to member States of acceptable behaviour, and, therefore, reaching beyond the traditional concept of binding only on the World Bank to provide an acceptable accountability mechanism via which, at least in World Bank member States that take assistance, citizens have the ability to be 'full and active legal subjects of the respective organization's legal order'. The changes proposed in relation to arbitration and remedies would only increase this role of citizens within the Bank.

²⁷ Jan Klabbers, Anne Peters, and Geir Ulfstein, *The Constitutionalization of International Law* (OUP 2009) Pg. 211

²⁸ *Ibid.*

6.9 Conclusion

This thesis has chartered the development of the World Bank. The Bank today is a very different organisation to that which was created in 1945 and to that which was envisioned by its creators. The overarching conclusion is one of a need for reflection of the role of the Bank. The Bank has demonstrated a remarkable trend to act within its own interests and move itself beyond what is readily accepted in terms of public international law and whilst in 1945 and for a significant period afterwards, the positivist theory was an adequate and useful tool via which to explain the World Bank's workings, legal theory has moved on and needs to turn its attention to and explain the work of the Bank.

The critics of the positivist tool have been growing for a significant period of time, and it is not the intention of this work to add. The positivist tool of understanding public international law may still be the most appropriate in a wide variety of circumstances. It, however, is not the most appropriate in every circumstance, and scholarship needs to move beyond the tool being the one most readily used. This work has been a reflection on the most appropriate legal tool to understand how the Bank acts in terms of law.

The Bank itself still maintains and tries to work within the theory of positivism, by linking all of its actions back to the Articles of Agreement. It is simply at a point, however, where this is not the most appropriate tool of analysis to describe its actions. Chapter One demonstrated an evolution of the Bank away from this tool and argued that the tool, once described, no longer is able to make sense of the work of the Bank. The analysis of the theory of positivism as applied in public international law no longer applies in this one specific context, and so the concept of model dependent realism was raised as justification to not dispute the application of positivism generally. There may yet come a time when the theory of positivism does not describe any actions under public international law, yet this thesis has applied model dependent realism to determine that multiple theories can be acceptable within public international law if they can all be given the seal of 'truth', in that they accurately model behaviour of international law actors.

In other contexts, other tools have been successfully used to explain how other organisations are acting in terms of law. This work only adds one more tool to the list specifically for the World Bank and makes no claim as to its wider applicability

without further analysis. The main tools used in other contexts, both established and emerging, also were not able to make sense in law of the Bank's actions. This is not a critique of these tools as such, as they have proven themselves to be applicable in other circumstances, but is a reflection of the necessity of having a number of tools to describe different situations. Specifically the work of progressive positivism was identified and applied to the Bank in order to attempt to reach a non-conventional understanding of the Bank's actions. Although in this context it failed, the development of the Draft Articles on the Responsibility of International Organisations may have profound effects both on the World Bank and other international organisations generally in the future. This is a topic of analysis that will raise questionable results going forward, specifically for the Bank in its actions of to what extent it should, in its role as an autonomous legal system, incorporate the norms of customary international law into its legal structure.

Reflecting the inadequacies of other tools of analysis to explain the World Bank in law, systems theory has been offered as an alternative tool. The non-approachability and significant understanding hurdles of the tool may have led scholars to avoid its use, although this has been changing. As an analytical tool, it offers an explanation for the work of the Bank in a way that other tools have failed. The essentialist analysis of the systems theory model identified a number of different elements as necessary for the establishment of a legal system: a self-reproducing, self-referencing autonomous system that is characterised by communication along a binary code legal/illegal with the purpose of stabilising normative expectations. Where this thesis departed from Luhmann's systems theory and developed into a new direction was in identifying that the most obvious mechanism via which communication is classed as legal/illegal to stabilise normative expectations is through the introduction of a Court-like body and that without this communication being classed as legal/illegal, a normative system cannot develop into a legal system.

Application of the tool began with a summation of the normative framework of the World Bank. In a strict sense, the normative framework is limited to the OPs and BPs. Yet, the Bank has demonstrated itself to be a norm creator in the area of conditionality, if only on an *ad hoc* basis as it applies the conditions to each

borrowing member State differently. The Bank has also demonstrably moved itself into a position of judging the actions of its entire membership through the use of reports of their actions against standards set by the Bank. Although as of yet these do not amount to norms, it is an area of the Bank that has been poorly examined both in terms of governance and legal theory. The development of these areas going forward depending upon the role that global society seeks the Bank to undertake will have profound effects upon the progress of the World Bank as a legal system.

The requirement of systems theory that a legal system requires a Court-like body that judges on the legal/illegal divide led to an examination of the introduction and use of the Inspection Panel. The work of the Panel, and its development into providing communication along the legal binary code specifically led to the operational closure of the World Bank legal system. The work of the Panel continues and provides an opportunity for the Bank to continually reproduce its constituent element of communication and stabilise normative expectations of actors in the legal system.

Finally, the implications of the Bank acting as an autonomous legal system have been analysed. A number of reforms are required, even if no change to the purposes of the Bank takes place, but the principle conclusion from this work has been the need for global society, as represented by the membership of the Bank, to reflect upon what function the Bank is supposed to fulfil. The wide and increasing areas that the Bank considers are at variance with the function that the Bank was assigned in 1945. Whilst this is not a negative, it leaves a disconnect between how the Bank is presented and what the Bank does. Legal theory can explain the work of the World Bank via the use of systems theory yet it should be clear to all actors; the Bank itself, the member States and the people whose lives the work of the Bank affects, what exactly is the purpose of the Bank.

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