Innovation in Governance of Development Finance:
Causes, Consequences and the Role of Law
April 8-9, 2013, Furman Hall, Lester Pollack Colloquium Room, New York University School of Law

Convened by Philipp Dann, Kevin Davis, Benedict Kingsbury

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Note: Draft papers (accessible via the password "innovate", all lower case) and selected video of some sessions are available at http://www.iilj.org/newsandevents/DevelopmentFinanceConferenceProgram.asp.

Workshop Report

SESSION 1 – INTRODUCTORY THEMES

1. *Benedict Kingsbury, New York University School of Law – Welcome*

The focus of this workshop was on innovations in the field of development finance: not just innovative flows themselves, although there were elements of that, but also how changing patterns of development finance were generating questions of governance. The workshop attempted to situate these concepts within the context of the purposes of development finance.

The workshop was structured around the following thematic sessions, with each session followed by open discussion:

a) Big picture perspectives on fundamental themes.
b) World Bank innovation in its financing instruments.

c) World Bank innovation in non-financing instruments and borrower approaches.
d) Issues of corruption and rule of law.
e) Sovereign borrowing.
f) Private philanthropic flows.
g) New financial sources including China and India.
h) A review of what was happening inside countries, with a focus on public-private partnerships.

2. *Annalisa Prizzon, Overseas Development Institute – "Old puzzles, new pieces: Implications of the new development finance landscape for post-2015 scenarios and for partner countries"*

Annalisa Prizzon provided an overview of how the development finance landscape had evolved over last ten years and what it is going to look like going forward. Prizzon provided a macro picture of the trends in development finance and brought together the different pieces that would be discussed throughout the workshop. She used the 2012 oversubscribed Zambia Eurobond issue to illustrate that this is an "age of choice".

Four different drivers:

a) Macroeconomic change:
    - Emerging and developing countries are driving growth. There is increasing foreign direct investment (FDI) into developing countries.
    - Developing countries are looking to end official development assistance (ODA) and related aid dependency (e.g., Rwanda, Liberia).
    - There have been impressive innovations in international commercial transactions, particularly in private giving (e.g., peer-to-peer, M-Pesa).
b) "New" actors (but some have been around for decades):
    - Increasing role of official donors that aren't members of the Development Assistance Committee (DAC) (e.g., BRICs). Some countries have changed their delivery mode from purely technical assistance to financial assistance and thus have become became more visible.
    - Philanthropic organizations (e.g., the Gates Foundation, the Rockefeller Foundation) have moved from domestic to international giving.
    - The private sector has become more involved and innovative, for example with social impact investment.
    - Vertical health funds (e.g., the Global Fund to Fight AIDS, Tuberculosis and Malaria (GFATM), the GAVI Alliance) are largely financed by traditional donors but are innovative in the way they fundraise and the way that they deliver assistance.

- Development finance institutions (DFIs) (e.g., the European Investment Bank, the German KfW) have expanded their private wings and have developed "blended" financial mechanisms (grants combined with concessional loans).

c) Motives have changed:
   - For instance, there is increased financing of global public goods such as climate, health, food security and security.

d) New instruments:
   - For instance, *person-to-person* giving/loans (KIVA).[1]
   - Innovative finance instruments such as the International Finance Facility for Immunisation (IFFIm) and global currency transaction tax. But it is still difficult to judge their relative magnitude and to estimate their future impact.

Past and future trends in development finance:

The most important source of development finance in emerging and developing countries has been and will continue to be *taxation*. General government revenues in developing countries are estimated to have increased 4x in the last ten years. The IMF forecasts that this trend will continue. It is the largest source of income for both the middle and low income countries. ODA plays a more important role for low income countries and comes close to matching amounts of government revenue, so we have to be careful who we are referring to when talking about ODA recipients. In terms of development assistance numbers:

- From 2000 to 2010, ODA provided by Development Assistance Committee (DAC) donors rose from approximately US$80 billion to approximately US$130 billion.
- From 2000 to 2010, US-based philanthropic assistance rose from approximately US$3 billion to approximately US$60 billion (so roughly half of official DAC ODA flows).
- It was difficult to track non-DAC donors in 2000, but in 2010, the ODA number for these donors was approximately US$15 billion.

New trends in aid delivery (related in part to the recent credit crunch):

a) Demand for making ODA more *accountable* to tax-payers has led to an increased focus on results, value for money and transparency. For example, push for DAC members and philanthropic organizations to publish commitments.
b) Greater risk aversion by DAC donors: for instance, DFID and the EU want to reduce budget support.

[1] See H. Kharas and A. Rogerson, Horizon 2025: Creative Destruction in the Aid Industry, Overseas Development Institute (2012).

c) Greater focus on support for the private sector: ODA has become a catalyst for other flows of development finance. This can be linked to the aforementioned trend in "blended" finance mechanisms.
d) Country selectivity: there is an ongoing debate in ODI and other similar organizations, as low income counties graduate to middle income countries and there is a need to assess whether they still need aid. Zambia, for example, or UK to India, which is no longer receiving grants, just loans.

Characteristics of South-South cooperation (e.g., assistance from the BRICs):

a) Modes of South-South cooperation do not always overlap with the Paris Declaration principles (for DAC donors).
b) For example, South-South cooperation often entails *reciprocity* and *non-interference* and has greater focus on *technical assistance* (e.g., from Brazil regarding agriculture, social protection, cash transfers).

In sum:

a) A larger share of development is to be financed domestically, from taxation and *financial deepening*.
b) Private cross-border flows are much more important than aid, for middle income countries, at least. This suggests a decreased importance for ODA in the coming years.
c) Non-DAC donors are now much more important sources of development finance and knowledge transfer. This trend is likely to accelerate.
d) ODA is likely to decrease in relative importance, apart from the poorest countries. For middle income countries, there will be fewer grants and more *soft loans*. Further, a growing share of ODA will be earmarked for global public goods (e.g., climate finance). It is still difficult to estimate how much ODA is being set aside for global public goods, but it is something that the ODI is currently focusing on.
e) Philanthropy is likely to continue to grow as a source of development finance, albeit from a low base.
f) An expanded scope for technological innovation to promote greater person-to-person giving, with progressive disintermediation from traditional channels. Though these are still pretty negligible amounts (roughly US$30 million per year), they are on a steep path in recent months.
g) Innovative finance mechanisms are providing alternative tools for both raising and spending resources. However, their implications for the overall funding envelop remain unclear and still represent a relatively minor amount of money (roughly US$12 billion in 2009 or 10% of ODA).[2]

[2] See S. Ketkar and D. Ratha (eds.), Innovative Financing for Development, The World Bank (2009).

3. *Philipp Dann, University of Giessen, Kevin Davis, New York University School of Law and Benedict Kingsbury, New York University School of Law – Introductory Themes*

Philipp Dann sketched out the context of the endeavor of this workshop and located innovative development finance within the broader study of development finance and law. The law of development finance is not a well-established field of legal study: there are no books and no courses, except at NYU. So this is a somewhat groundbreaking exercise.

The current study of development and law (which asks how law can guide development aims) can be broadly distinguished by two main approaches, which look at different sources of law:

a) Through domestic law (in developing countries), which is related to the *law and development* movement, which has enjoyed a renaissance since the 1990s (partly related to World Bank recognition), and of which David Trubek is a leading voice.
b) Through an international law perspective, in general and in specific fields: for example, environment, trade, intellectual property and climate change. This involves a discussion of duality of norms. This discussion was started by French scholars in the 1950s and 1960s, and is now much broader.

There was an *institutional turn* in development studies in the 1990s as the focus shifted away from development as such to sources, instruments, delivery, actors and governance. There was a shift in different disciplines, first in economics (e.g., incentive structures) and then in political science (e.g., power structures). We can connect this shift to the larger debate on global governance. This institutional turn is also reaching the law, and there is a connection between this turn and global administrative law (GAL). There is a new interest in governance of development assistance (e.g., actors, instruments and procedures). We can ask whether there are different rules for different sources and different providers of funding. We need to ask whether old donors and new donors play by same rules. We also need to ask which tools promote aid effectiveness and prevent corruption.

There is thus a shift in perspective across various disciplines (informed by questions of governance) and this conference seeks to bring together these various disciplines (e.g., economics, political science and law). In addition, there is an overlap between this new approach and traditional approaches, and we hope that this workshop will advise how this third area can be approached from different perspectives and what types of questions we can raise in this regard.

Kevin Davis reiterated that the workshop was focused on the institutions that channel development finance. The workshop sought to take a particular slant on this, regarding institutional innovation. Innovation for Davis means novel changes than can be replicated across different contexts (e.g., across countries and financial institutions). The premise or

hypothesis of this workshop was that innovation entails both a distinctive phenomenon and one than can be examined through distinctive analytical tools.

Davis mapped out the types of enquiries that we can make in this area:

a) One mode of analysis, as used by Annalisa Prizzon, is to *describe the innovations*. This entails mapping out the sources and types of innovation and attempting to ascertain their relevant prevalence.
b) A second mode of analysis is to *propose innovations*. The paper by Devesh Kapur presented here certainly does that.
c) Another kind of analysis is *explanatory* analysis, regarding the causes of various kinds of innovation (creation and diffusion). Borrowing from literature on more traditional forms or innovation (i.e., technological as opposed to institutional), we can look at:
    - Changes in *demand* (changes that influence the value of innovation): Annalisa Prizzon pointed to some of these changes, such as changes in the broader demand for finance, based on the shift in the balance of global financial wealth. For example, with a greater need for climate change finance, that will increase the value of innovation in that field.
    - Changes in *information* and our perceptions: for example, regarding the value of selectivity of aid[3] which may have led to the Millennium Challenge Corporation; or new information regarding climate change.
    - *Competition* can prompt innovation as per the mantra "innovate or die" (the World Bank, for example). This can also lead to an interest of new entrants to *signal* their arrival and their innovativeness, which is arguably occurring amongst new donors in the sovereign debt context.[4]
    - Changes in *supply*: there are changing costs of delivering innovation. For example, Kevin Davis explained that he was particularly interested in the use of corporate finance instruments to study development finance (e.g., instrument terms such as collective action clauses and contingent capital, or the spillover of terms from private to public transactions or vice versa). Further, there are changes in technology, as evidenced by KIVA and disintermediation, for example. Regulatory changes are also relevant, such as the enabling exemptions from US securities laws for KIVA or data policies at the World Bank.
    - *Diffusion*: for example, network effects can lead to learning of externalities, can create reliance on precedent, can create comfort with past instruments and can develop social networks.

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[3] See A.C. Burnside and D. Dollar, Aid, Policies, and Growth, World Bank Policy Research Working Paper No. 569252 (Jun. 1997).

[4] See, for instance, regarding Mexico and the adoption of collective action clauses, A. Gelpern and M. Gulati, *Public Symbol in Private Contract: A Case Study*, 84 WASH. L. REV. 1627 (2006).

d) Finally, we can examine the *impact* of innovations, as there is a lot of interest in results. However, it is difficult to separate the question of how to monitor and evaluate the innovations and their impacts from the determination of which innovations are worthwhile to focus on. Philipp Dann's colleagues at the Schumpeter Research Group, University of Giessen suggest we should focus on legal criteria for evaluation, whereas philosophers, for example, might take an approach based on legitimacy or compatibility with goals.

Kevin Davis concluded by noting that as lawyers, we are particularly interested in the role of law in all of this, with regards to: new legal instruments and changes in legal instruments; the ways in which law can be an enabling tool; and law as a criteria for evaluating innovation.

4. *Open Discussion*

Benedict Kingsbury commented that the IILJ is very focused on the GAL ideas referred to by Philipp Dann, as are many of the experts in attendance, which included NYU Law's Richard Stewart, who has worked on climate change, and other groups in the North Atlantic region, such as those in Rome (Lorenzo Casini), Geneva (Laurence Boisson de Chazournes), Heidelberg (Matthias Goldmann and Philipp Dann). However, there is a need for developing country representation and the workshop conveners had attempted that at this workshop, as was evident from the composition of the room.

Rani Mullen questioned what is driving the trend towards increased value of aid funding and what we mean by *value* of aid. **Annalisa Prizzon** indicated that value for money is a big topic in DFID and ODI, and noted that ODI is looking into partner (recipient) country perspectives and priorities. Regarding tied aid, she noted that there is little evidence regarding countries moving away from tied aid, but they are more focused on ownership.

Jean Touchette, from an OECD perspective, indicated that Annalisa's presentation of the landscape was accurate and agreed that the picture is certainly getting more complicated. He noted that a review of the factors affecting ODA is sobering as the aid effectiveness principles that have been developed over the last fifty years are being abandoned. **Annalisa Prizzon** noted that partners are looking to leverage on other sources of development finance and have a stronger voice in negotiations, given increasing competition between aid providers. She also noted that non-DAC funds have motives that represent DAC-like motives in the past (e.g., China's interests in minerals in Africa).

5. *Martin Eifert, Humboldt University – "The concept of innovation and its (difficult) application to development finance law"*

Innovation has become a magic word in modern societies. Its connotations of creativity and progress raise the aspirations of modern society and carry the fundamental belief that current problems can be solved by future solutions. Research of innovation attempts to transform magic into something practical. Eifert stated that he was not an expert on development finance, but on public law and innovation and law in general. Eifert's general claim was that while there is a large volume of research on innovation and also on the role that law might play in driving innovations or safeguarding against innovations, the concept of innovation had remained largely connected to market processes and remained external to the law. He suspected that innovation policy may be applied to instruments that open up new markets, and that an overall governance approach should not interfere with innovative developments but rather make the public sector responsive to the dynamics.

Perspectives on innovation:

1. *Schumpeter*: innovation is the new combination of resources in business, ranging from new products to new methods of production or organizing business, from the exploitation of new markets to changes in the value chain.
2. Focus on *technological innovations*: creates path dependency and confirms that there is no single method of innovative research.
3. *Social embedment*: the focus shifted to institutional links between science as a source of invention, emerging technologies and their diffusion as innovation
4. *No consolidation theory*: no consolidated or dominant methodology on innovative research.
5. *Law and innovation*: law matters in every aspect of innovation, e.g., protection of intellectual property/innovators and competition law. Three roles for law in innovation:
    a. should keep society open for innovation;
    b. should prevent unacceptable risks of innovations; and
    c. should help instigate innovations in order to achieve policy goals.

Innovation in the field of development finance is far more complex than in technology, given, e.g., the heterogeneity of the relevant actors. But we can still utilize general ideas.

Different mechanisms:

1. *Public sector*: innovation vs. reform. All development finance innovation is subject to public accountability and the public sector is the driver of many innovations in this realm. The erosion of old forms of ODA raises the question of how much of development finance should be "marketized".
2. *Philanthropic*: there exists a "market of empathy" and this outweighs any other interest.

3. *Markets*: reflected in new capital market instruments and the interest in opening up new markets. Instruments must be compatible with the new market, as reflected by numerous failed attempts by states to introduce innovations that did not work in the particular country.
4. *Blending mechanism*: as discussed by Annalisa Prizzon.

Governance options:

Refinement, intuitive responsibilities and radical project orientation are common underlying trends which fuel innovation in development finance, but which play out in different ways in the different arenas.

1. *Innovation as a new paradigm*: From an outsider perspective, innovation in finance has not only technically multiplied the sources and actors but also shaped the perception of a dawn of a new era.
2. *Comprehensive cooperation as an unrealistic option*? Support of developing countries seems to be far too important for trial and error, and far too complex to be put into effect through myriads of individual projects.
3. *Managing the interplay*: The more realistic modest approach would not aim at integrating the various innovative instruments. An overall approach would not interfere with the innovative processes but rather try to manage the interplay.

In sum, it seems to make sense to analyze aspects of the current developments in terms of innovation. The best field for applying experience from innovation research is the opening-up of new markets. The governance structure should rather focus on mechanisms to keep all actors informed and to make public actors responsive to the change. But taken as a whole, innovation in development finance seems to be too innovative for current innovation theory.

6. Open Discussion

Matthias Goldmann challenged the clichéd notion that law is not as innovative as other sectors of society because it relies on consent, political processes, etc. Goldmann suggested that there are many examples of innovations in private law, e.g., corporate structures, and we need to focus on private law and how that ties to public law. **Martin Eifert** generally agreed that private law is more innovative, but innovation in the private sector is often driven by factors other than law.

Kevin Davis commented that innovation theory in development finance seems to be focused on questions of public and private (market or philanthropic) actors, but the reality is more complex as "blending" mechanisms are not at the periphery, but at the core. The motives of actors are not easily compartmentalized. So can innovation theory better explain the

blended/mutated cases? **Martin Eifert** responded that there is lot of research on what the state can do and this research is most easily transferred to development finance. He noted further that blended instruments depend on low transaction costs.

Philipp Dann noted that he liked this typology a lot (splitting up public, private, philanthropic mechanisms), and that it was helpful in clearing the field. He further questioned whether it would not be better if public lenders were in a more market-driven environment, and what would be the "dark side" to this? **Martin Eifert** responded that this can be observed at the national level. One of the major questions has always been what appropriate government structure matches public accountability and market mechanisms.

SESSION 2 – WORLD BANK INNOVATION IN FINANCING INSTRUMENTS

1. *Devesh Kapur, University of Pennsylvania – "Creative ways to amplify World Bank financial flows"*

The focus of this paper was on the International Bank for Reconstruction and Development (IBRD) and how its capital could be increased. International Development Association (IDA) supply and demand has decreased, and most of the world's poor are now located in middle income countries; thus, the focus of the paper was on the IBRD rather than the IDA.

The IBRD is a relatively minor player, representing only about 1.5-2% of ODA. Since 1990, its lending amount has been largely flat, except in 2008 when it doubled. But this is expected to come back down. The IBRD is exemplary as an intermediary. For instance, it can borrow at great rates and it is thus a pity that it has not been exploited more. The reason for this is constraints on its lending, many of which are legal in nature.

Regarding governance, countries that want more money in the IBRD do not have power in the World Bank. Kapur's paper addressed this fundamental tension.

The key financial parameter of any financial institution is its leverage. Callable capital mattered a lot in early decades of the IBRD (e.g., with respect to ratings), but since the 1980s, it matters much less. If you go through various scenarios if the callable capital of the bank were to ever be called in, it would be a nuclear option and the Bank would cease to exist. Thus, the IBRD focuses on its debt to equity ratio. This leads to the fundamental question of how the Bank generates its net income. Administrative expenses decrease net income. The "gold-plating" done in the 1990s to respond to criticisms have increased administrative expenses, through layers of protection from civil society. Borrowers pay for this in (i) increased transaction costs and (ii) reduced net income, meaning less lending ability. Further, transfers from net income for good causes (e.g., funding for the Palestinian Authority)

decrease net income, and these costs are borne by all shareholders of the Bank, not specific countries with corresponding political interests.

Possible ways to increase the lending ability of the IBRD is to reduce administrative expenses or to re-think the pricing of global power. A resulting proposal, presented as a thought experiment, is an auction of the shares of the Bank.

2. *Philipp Dann, University of Giessen – "World Bank Program-for-Results financing: Central but timid instrument for the 'Age of Choice'"*

The new lending instrument of the World Bank, Program-for-Results (P4R) financing, was introduced in February 2012 and represents a major change for the World Bank as this is the first time in thirty years that the Bank has devised a new lending instrument.

The paper made two main claims: (i) the substantive claim was that this new instrument is certainly a major innovation that will most likely be adopted by other lending agencies; (ii) the methodological claim was that law is an essential tool to design and evaluate this new instrument.

Description of the Instrument:

a) Supports programs which have already been planned by the applicable partner government.
b) Disbursements are based on results and linked to meeting indicators.
c) Provides for implementation support and capacity building.
d) No application of the World Bank's safeguard policies but uses the partner country's systems.

Context - What Led to the Instrument:

a) Reasons of political economy:
    - The changing landscape and competition for emerging nations.
    - Donor demand for results and effectiveness (e.g., the Paris Declaration).
b) Reflects the Bank's ability and willingness to adopt to change:
    - More than other international organizations, the World Bank has the institutional structures to adapt.
    - This was due to influential management with few veto players and fairly broad consensus on the mission.
c) Role of law; law as a medium to design and structural change:
    - Bank policies are pretty clear regarding the general aims, procedures, etc.
    - Risk management plays a key role in P4R (e.g., no sunset clause, limited early volume of projects).

Evaluation – Legal Advantages and Disadvantages:

a) Methodological instrument: law as a yardstick to evaluate P4R
    - World Bank law, international law, comparative law.
    - Principles of development cooperation law.
b) Flexible, but risking social and environmental standards?
    - World Bank has the legal obligation to ensure human rights are respected, but the World Bank law on P4R does not appear to reflect this appropriately.
c) Serving the capable, but leaving behind the orphans and the principles of development?
    - World Bank has a legal obligation to ensure poverty reduction is achieved.
    - World Bank law capacity support rules are too vague.

Conclusions:

a) Practice of P4R is brand new so cases before the Inspection Panel will be crucial.
b) The Bank lacks confidence in using law. P4R is a good example of how the World Bank is able to adapt to change and use law as a driver, but it uses law in a more principled manner and does not apply the force of the law in a way to support its case.
c) This new innovation is fascinating and merits further examination.

3. *Laurence Boisson de Chazournes, University of Geneva / Senior Emile Noël Fellow, New York University School of Law, Discussant*

Devesh Kapur's presentation took a historical view, and it appeared that his wish was for the World Bank to become more relevant. But is World Bank relevance tied to level of financing or knowledge? World Bank lending should also be assessed from its co-financing element and its new role as an institutional broker on big development projects. This is tied to notions of "international public good". Regarding administrative costs, we also need to consider the disadvantages of reduction. The World Bank also has a knowledge role in the field of development. Further, this would reduce the World Bank's checks and balances (e.g., the Inspection Panel). Co-financing is one way to reduce administrative costs but retain checks and balances.

Regarding Philip Dann's paper, she noted that it is correct that we do not yet have an assessment of P4R, but in line with the new (BRICS') development spirit of non-interference and doing business with the state as it exists, P4R represents a fundamental switch. It works under the assumption that country systems are adequate. While the World Bank has always had a patchwork approach, the switch represented by P4R will have effects for other relationships of World Bank, and it will need to put in place its own institutions for this. But there remain issues of accountability, in that there is an open question of how the domestic

systems will be accountable to the international community. There will be a role for the World Bank Inspection Panel in this determination.

She further noted that Devesh Kapur had highlighted the need for reform, and agreed that it was true that the World Bank is at a turning point. Philipp Dann had highlighted that there have been some institutional reforms, but we have to differentiate between legal and policy reforms. To go forward, the World Bank needs to change its identity.

A cautious note was offered to Philipp Dann: we can have different principles, as the BRICS do not have the same principles as those laid out by Philipp Dann. She concluded her remarks by noting that she was not sure that there are common principles in the field of development finance.

4. Open Discussion

David Gartner posed two questions. He asked Devesh Kapur if the premise of his solution (auction of shares) fit with the BRICS. He asked Philipp Dann if he had highlighted more of a supply-driven (donors) story, as opposed to a demand-driven (recipients) story.

Devesh Kapur did not see a BRICS development bank going anywhere as it needs to be large, and it will only be large if China puts in a lot of money. The others will not have a Chinese-dominated bank. But emerging powers want multilateral development banks to adapt or they may exit. Thus, the current powers will either keep control of an irrelevant institution or lose a bit of control over a relevant institution.

Philipp Dann noted that P4R is supply and demand driven: donors demand results and effectiveness (indicators), but use of country systems and removal of safeguards demand came from recipients. In response to Laurence Boisson de Chazournes, he agreed that this instrument represents a fundamental switch, from the World Bank being not just an external actor, but also an internal actor. He also agreed with her skepticism about this switch—in 2005, the World Bank had introduced the use of country systems, but it was a bad experience, so it was surprising that the Bank is using such a mechanism again to safeguard substantive standards. Regarding the rhetoric of principles, in *principle*, he agreed with Laurence Boisson de Chazournes: there is a danger in principles. He understood the term "principles" in this area as referring to principles of process regarding how development cooperation is structured.

SESSION 3: *WORLD BANK INNOVATION IN NON-FINANCING INSTRUMENTS AND BORROWER APPROACHES*

1. *Michael Riegner, University of Giessen – "Innovation at the 'Knowledge Bank': the role of law"*

Innovation thrives on knowledge and the global knowledge society has contributed innovations in development. In 1996, the World Bank declared itself to be a "Knowledge Bank" and in 1999, the World Development Report proposed to look at problems in development in a new way, from the perspective of knowledge. The report asserted that knowledge, not finance, is key to development in Third World countries. The Bank has had institutional reforms to embark on this paradigm to become a knowledge and information hub. Michael Riegner's paper concerned the neglected legal aspects in this reform. The paper posited two questions: (1) how legal governance of knowledge in the World Bank can contribute to innovation in developing countries; and (2) what legal innovations in the World Bank law are required for governance of knowledge to enable these innovations. Two types of innovation were dealt with in this paper: innovation though law and innovation in law.

The main arguments would be: (1) the shift in a finance paradigm to knowledge paradigm is a major cause for innovation in the law of governance in the World Bank. Legal innovation is not always about new ways of delivering finance, but it can also be about new ways of governing knowledge; and (2) this legal governance knowledge can, and should, contribute to innovation in developing countries but it needs to provide a more coherent, effective and legitimate framework which systematically addresses the risks and chances of knowledge in development. To this end, the paper proposed to reconstruct development cooperation law as a legal order of knowledge; in other words, the law of development finance needs to also become the law of development knowledge.

There are two opposing views of knowledge and of knowledge in development that law needs to take into account. The first is the *affirmative view*, held by many practitioners in the World Bank, which focuses on the positive role of knowledge. Knowledge for development needs to be given by international institutions because the market and states lack the incentives to provide this global public good. This view can be found in the World Bank's recent knowledge strategy document which views knowledge as the Bank's comparative advantage and identifies the role of the Bank as a knowledge producer, knowledge customizer, and knowledge connector. In fulfilling these roles, the World Bank spends on activities, often funded by trust funds (not by net income), and efforts to strengthen the governance of knowledge within and outside of the institution.

The opposing view posits *three major criticisms to this affirmative view*. The first asserts that the World Bank does not know enough and doubts the ability of a large hierarchical

bureaucracy to produce innovative knowledge, to capture sufficient local information, and to transfer global knowledge in a way capital can be transferred. The second critique asserts that the World Bank knows too much. This critique comes from a post-colonial school of thought which views knowledge as power, and holds that centralized control over knowledge can potentially infringe equality. The third critique argues that the relationship between knowledge and politics is insufficient; either there is too much politics in a seemingly scientific, objective knowledge product, or there is not enough politics in the sense that bureaucratic expertise depoliticizes development and limits political self-determination or collective autonomy. Taken together, these criticisms resonate with recent scholarship on international public authority or the recent global administrative law literature on indicators.

This paper proposes that rules of development cooperation laws in treaties and secondary laws should not only govern financial transfers, but they should also function as a legal order governing the production and diffusion of knowledge and innovation. Some key features of law development knowledge are:

- The applicable law of development institutions already has rules on knowledge; rules on lending have structural rules on knowledge on allocation decisions, and rules on non-lending related knowledge activities.
- The rules apply different modes of governance: where lending is governed by more direct regulations, knowledge is often governed more indirectly through incentives or the creation of enabling organization environment.
- The law of development knowledge performs two different functions which react to both the affirmative and critical views of the knowledge in development: (1) to enable and stimulate knowledge production and innovation; and (2) to address the risks of knowledge governance and thus perform a limiting and legitimating function, providing mechanisms for participation and contestation, and enabling an epistemic ownership by the beneficiaries of development.

How are these ideas applied to the law of the Knowledge Bank? World Bank law has seen innovation which already makes it a law of knowledge development. They apply to different categories of legal rules, e.g. mandate, instrument, participation and transparency.

First innovation: mandate and powers. In looking at the role of the World Bank in global governance of knowledge, the first question for us as lawyers concerns the legal mandate and power the Bank has with respect to knowledge activities. The lending-focused Articles of Agreement were not formally amended in order to enable the Bank to carry out knowledge activities. Instead, the Bank makes more use of the few explicit knowledge powers such as the publication of reports and technical assistance, and relies on implied powers (secondary laws) for knowledge activities not covered in the explicit rules. Innovation here can take the form of institutional empowerment that enables and legitimates knowledge activities. However, there are limits to this empowerment. In-house knowledge activities may become dysfunctional; in

that situation, it might be better to interpret the World Bank's mandate to stimulate external actors which are better placed or more structured.

Second innovation: use of instruments. The second innovation is in the use of instruments to diffuse knowledge and stimulate innovation. Firstly, the Bank uses lending to fund research and knowledge-sharing; it increasingly uses lending as a vehicle to increase knowledge and capacity building, and it has intensified the regime of impact evaluation, which is potentially transforming lending into experiments and innovation. Secondly, beyond lending, the World Bank has codified knowledge products, to produce/diffuse knowledge in developing countries, e.g. through technical assistance. In 2003, the World Bank defined a "Core Knowledge Product", a total of nine at this moment, which includes technical assistance and economic and sector work, as well as those identified as global public goods, such as R&D, reports, and data, e.g. the World Development Report and the World Development Indicators. These knowledge products are subject to common rules of quality assurance and impact assessment to measure how they contribute to knowledge production and innovation in developing countries. This formalization makes knowledge more manageable and governable. Formalization also identifies legally relevant exercises of international public authority to local autonomy, thus should be subject to limiting and legitimating legal framework. Unilateral rankings like the Doing Business Index qualifies as an exercise of public authority, and is thus potentially subject to requirements as discussed in the GAL literature on indicators, such as participation and ownership.

On participation and ownership, it must be noted that knowledge governance is controlled by the World Bank's management which produces the forms of the Bank's knowledge products. However, there are reasons to encourage participation by states and affected individuals in certain knowledge activities. More input from different actors can enhance responsiveness, improve the quality of a knowledge product, and increase acceptance of the impact, thus potentially diffusing knowledge. In addition, if knowledge predetermines policy, so that it may be said to be an exercise of public authority, then collective and individual autonomy may require those subjected to the knowledge to have a say in its generation and use. This kind of epistemic ownership can be based on the Bank's political mandate to be impartial in knowledge activities. Based on an analysis of the existing mechanism for participation and ownership, there is still room to improve participation. There are hardly any rules in both the country-level and global-level authorities on this matter. Economic sector work should be oriented towards the Borrower's development strategy, which can be used to steer the Bank's knowledge activities. Yet, there are no specific legal rules regulating procedures and actors in participation, either by civil societies or borrower governments. On the global level, there is only a practice that gives the Board of Directors representing member countries the possibility to participate in knowledge activities and discuss knowledge products such as the World Development Report. However, this is a piece-meal activity which does not guarantee scientific quality and political direction. Thus, it is worth considering a scholarly proposal that

knowledge instruments which amount to an exercise of international public authority be specifically mandated by the political organ of the organization. Absent sufficient rules on participation, mechanisms of review and transparency become more relevant. One example of such a mechanism might be evaluation by an independent evaluation group which is not available to individuals, such as the Inspection Panel which has scrutinized preparatory work of projects, but remains limited to projects.

In light of this situation, much hope is placed on the Open Knowledge-Open Data and Access to Information policy, enacted in 2010, which makes most Bank documents and knowledge available to the general public. This does not only provide transparency but also provides the flow of knowledge to states, citizens and agencies for public scrutiny. Openness can enhance epistemic ownership and contribute to innovation. As President Zoellick stated, "one of the reasons we threw open the doors to our data was that we recognize that we don't have a monopoly on innovation."[5]

Conclusion:

The enabling and legitimating functions of law are not too different from the innovation theory. Innovation does not only mean invention but also requires diffusion and acceptance. Such acceptance also depends on the perceived legitimacy of the process in which innovative knowledge is generated. By providing legitimacy to the global governance of knowledge, law can make the greatest contribution to innovation.

2. *Marie von Engelhardt, University of Giessen – "The World Bank's engagement with fragile states: law in the service of development"*

Official Development Assistance (ODA) constitutes the largest resource flow to fragile states (characterized by weak capacities, poor governance, political instability, and conflict). More poor people live in fragile states today than in non-fragile states: a trend which will continue to increase. Against this background, traditional ODA needs innovation to tackle state fragility more effectively. The World Bank has been at the forefront of this innovation, not only in terms of its risk-averse business model, approaches and instruments for those in unstable and weak capacities environment, but it has also adopted rules of procedures to disburse ODA to fragile states. In this context, it uses law as a tool to consolidate innovation. Her paper concerned this legal innovation.

Marie von Engelhard suggested that innovation may be seen as a necessary response to the specific challenge posed by fragile states. At the same time, the notion of "fragile states" exposes the social construction of Western security interests and an overly-generalized phrase

[5] World Bank, *World Bank announces winners of first "apps for development" competition* (Apr. 14, 2011) *available at* http://go.worldbank.org/UZFH24TQI0.

for development challenges for extremely different states. The legal innovations that are based on such an ambivalent concept often amount to selective bending of rules that were designed to protect the sovereignty of the recipient in order to facilitate engagement in several fragile states where the Bank has most influential shareholder support.

Proposal. Against this background, Marie von Engelhardt proposed that law can provide a normative yardstick for the processes and procedures through which innovation occurs, and for judging the equity of its consequences.

Marie von Engelhardt outlined two examples of legal innovations at the World Bank in dealing with fragile states:

1. The first example concerns the deeply political question of how the Bank deals with fragile states. The Bank needs a government to give consent as a basis of the Bank's engagement. Sometimes the government cannot be identified, such as in post-conflict situations, in UN-administered territories, and territories with unresolved status like Gaza and South Sudan. In response to this problem, the World Bank adopted Operational Policy on Development Cooperation and Conflict (OP 2.30) in 2001, which is an internally binding law, concerning principles of the World Bank's involvement in conflict-affected states. Under this policy, when there is no government in power, a request from the international community can substitute for government consent. It also permits the World Bank to engage with territories outside of the member states if it is considered to benefit the organization as a whole. On that basis, the Bank has also engaged in UN-administered territories like Kosovo and East Timor as well as Gaza. However, this procedure is formulated by vague terms with no decision-making criteria attached. This could be interpreted to leaving room for abuse and selective application. Meanwhile, this procedure modifies the rules for the Bank to operate in the most needy countries.

2. The World Bank faces challenges arising from the fact that the fragile states have very weak capacities. Capacity constraints in the fragile states prevent swift engagement because the government lacks capacity to comply with requirements to receive aid. In response, the World Bank now operates under an emergency procedure for these fragile states. By invoking this emergency procedure, the Bank reduces procedural requirements and postpones material requirements like safeguards. This can enhance the speed, flexibility and simplicity of the operation.

   If the World Bank wanted to use the emergency procedure as a quasi-default option for fragile states, it would have to repeatedly justify that the emergency still persists. The new policy contained in the Operational Policy of the World Bank on investment lending incorporates this fast-track, proactive approach in the Bank's most important lending instruments, providing it as an alternative rather than an exception applicable in clearly-

defined situations, including fragility. This is an important innovation which recognizes explicitly for the first time that fragility requires some form of differential treatment.

The World Bank's innovation begins to show a pattern where government ownership is qualified in line with apparent effectiveness of the government, while on the other hand, obligations of the government are increasingly adapted with the capacity constraints. This is done through an interpretation of the World Bank's mandate, authorized by the Executive Directors, and formalized into internal rules. But this leaves a large room of discretion.

Critical look. The very notion of fragile states, which relates with weak statehood, has always existed, but has now risen to the top of international agenda. If fragility is not that new, why have fragile states suddenly received so much attention, and who has the interest to make fragile states a key priority and trigger for innovation? The notion of fragile states is a social construction which groups together very different states because they seem to pose severe development challenges or challenges to Western security interests. The emergence of the notion of fragile states in the World Bank has to be seen in a broader context of the role of states in development. Currently, the focus has been on effectiveness of state institutions through the concept of good governance. Fragile states serve as the opposite of good governance. But the international community has also seen the rise of humanitarian movements since the 1990s and the World Bank has to demonstrate its relevance in light of changing policy priorities. The Bank was suddenly asked to contribute to post-conflict situations, such as in Bosnia and Kosovo. The focus on the fragile states really came in after 9/11 when weak statehood was identified as a security problem. The World Bank established a task force on low-income countries under stress, and this was the beginning of the fragile states agenda.

Since the most important Bank shareholders determine what constitutes a "fragile state", the legal innovations in dealing with fragile states benefit some fragile states but not all. Being determined as a fragile state could be a disadvantage or an advantage in dealing with the Bank. Now half of the ODA is concentrated in just seven countries, top among them are Afghanistan, Iraq and Pakistan.

Proposed role of law. In light of this situation, law may not have a role since it will only introduce a differentiated standard of statehood. However, if the innovations occur through the medium of law, this might at least ensure that the innovations are not only disguised political decisions. Rather, these legal innovations would have to fulfill certain requirements. The World Bank's Articles of Agreement already provides procedural and material safeguards for the internal innovation rules. Procedural safeguards can be seen through the adoption of an innovation based on the rules governing amendment and interpretation. Internal rule-making should also meet the requirements of participation and transparency. Lawyers could also contribute by clarifying the rules, which would lessen the room for abuse. Although discretion

is sometimes warranted, a minimum degree of transparency about when and how rules are applied to different countries should be met. If legal innovations are supposed to enhance the Bank's involvement in weak capacity environments, they should be applicable without discrimination among all potential recipients in similar situations. This derives from the principle of like treatment for like cases. It would be difficult to argue that the Bank has an obligation to treat all states alike. However, it is required by its statute to take decisions impartially and without discrimination on political grounds.

These sporadic legal innovations should be consolidated into a more consistent structured regime for fragile states in development. In doing so, lawyers can contribute in how obligations are adapted in a particular need of a different weak capacity environment. Even if there could be room for discretion, it should not be discriminatory.

3. *Vikram Raghavan, World Bank, Discussant*

Opening with the caveat that his remarks were not given in his official capacity, **Vikram Raghavan** stated that it was important to define the bases that permit the bank to engage in a country on the request of the international community. In particular, the *travaux préparatoires* of OP 2.30 reveal that the Bank's General Counsel at the time was asked what was to be done about countries like Somalia and Afghanistan. The General Counsel had advised that the Bank may not operate in a territory without member's approval and if there is no government, a request by the international community would suffice. However, the caveats were that the request must not be for a loan, must be submitted by a well-represented community including the UN agencies, and must have the prior approval of the Board, where all Bank members are represented. The General Counsel had given a pragmatic interpretation of a 40-year-old statute, and we cannot say there that he had in mind the interest of any particular country. **T**he statutes of IDA and IBRD also acknowledge the idea that there are territories which might not have functioning governments.

He also highlighted the debates around the status of OP 2.30 in the legal architecture of the Bank. Some argue that under the Vienna Convention on the Law of Treaties, it is binding as an interpretation of the Articles of Agreement. But some argue that it is just a policy document, not hard law, not a legal opinion thus not binding. OP 2.30 itself does not strictly classify countries between conflict and fragility; it introduces an operational classification but it does not enjoin the bank as a matter of law on how to engage with these countries. Some part of it codifies Bank jurisprudence, but the rest does not rise to the status of Articles as a matter of law that binds the Bank.

OP 2.30 gives a lot of flexibility to the Bank to implement it, but does not depart from the rule of law and the existing legal architecture of the Bank. In the Bank Articles, there is no distinction between member states; all are eligible to borrow. But in the 1970-80s, a number

of countries "graduated" from the Bank (that is: they reached a certain level of development, measured by per capita income GDP, having capital market and other economic institutions enabling them to progress economically without Bank aid), so this innovation was not required by the Articles; rather, it was formulated by a legal opinion. A similar thing happened with regard to the Bank's treatment of conflict and fragile situations. He suggested that at this time, it may be best not to codify these differentiations on definitions of fragility and conflict territories, which also creep from definitions given by donor countries.

He suggested that Michael Riegner may wish to consider the Bank's new framework, the Reimbursable Advisory Service (RAS). The RAS was the Bank's new operational tool to engage with countries through technical assistance, where the Bank acts as an advisor or paid consultant. This has been implemented also in fragile state situations. This framework poses some legal challenges, such as immunity from suit.

4. Open Discussion

Michael Riegner responded to Vikram Raghavan's last comment by noting that the RAS had become more important to particular countries (mainly the BRICS). In the 2011 Knowledge for Development Report, it was still a minor issue but has now seemed to become more important. He intended to develop his paper by conducting further research on this and on the codified knowledge of the Bank; Riegner noted that there seems to be a lot of flux on how the Bank formalizes its knowledge products.

Tim Büthe's comments were directed to the first session and to **Michael Riegner**'s presentation. Büthe noted that knowledge production was an important move for the World Bank, in order to answer the concern of the BRICS on the Western post-Second World War development assistance model. There was no immediate monetary value that could be assigned to the technical assistance. Legal expertise had limited potential to improve the situation. There might be rules that can be imposed that would push an economist to come up with proper valuing for this issue, but law itself does not have much to contribute beyond providing a framework for it. **Michael Riegner** responded that the governance model that law employs is less a matter of regulating knowledge in the way that capital is regulated, but by constructing knowledge as a manageable package of information. In this way, the Bank can subject knowledge to rules similar to the way in which we treat monetary flows. So law can play a role: not directly, but more in providing framework of incentives and other contexts.

On the presentations in Session 2, **Lorenzo Casini** commented that from the comparative administrative law and global administrative law perspectives, the World Bank is a prime example of how to make an impact on the domestic legal context, particularly in participatory rights. The use of participatory rights in order to develop the law has not been stressed enough. The question is why. **Philipp Dann** responded that we have to distinguish between

participation in how a project is framed, and participation in the general law-making of the Bank. On the general law-making, the World Bank has in practice a way to consult, but the rules are not formalized in internal law-making procedures. There should be a formalization including who can be consulted or not. On participation in concrete projects, it depends on the extent to which the project at hand carries certain risks for people or the environment. In high-risk projects, there are extensive rules of participation. The problem is the difference between the law on the books and the law in action. The law on the books looks good. But in reality, we see how little these participatory rights have been respected and have been very difficult to implement. The real problem is compliance with the rules of participation.

Devesh Kapur asked **Michael Riegner** what the actual meaning of "knowledge" was in his research. The notion of the World Bank as the "Knowledge Bank" might not be accurate. When the Bank was established, the way knowledge was thought about was more tacit. It has changed. In prior times, knowledge was embedded in the expertise of the Bank's employees in different sectors. But later, employees in the knowledge sector were mostly economists. Their own experience of a practical sector is much weaker, so they need to produce "thick research" to justify a project. We need to make it clear whether the knowledge subject to this research is a tacit form of knowledge or the "thick-paper" form of knowledge. **Michael Riegner** responded that there are different types of knowledge (tacit and implicit). The World Bank uses a very wide notion of knowledge, including data and information which are not necessarily identified as "knowledge". The reason why knowledge becomes important in the Bank is because it is a result of governance in an institutional context. It is influenced by certain management decisions (tacit knowledge), country's needs, and several other factors. Generally, the notion of knowledge must be differentiated to assess what legal instrument is the most suitable and how to use tacit knowledge in the most efficient way.

Devesh Kapur asked **Marie von Engelhardt** why the Bank should be involved in situations involving fragile states. It should be the role of other agencies, such as the UNDP. **Marie von Engelhardt** answered that the issue of whether the Bank has a comparative advantage in engaging with fragile states is very important. At the same time, UNDP's comparative advantage should also be questioned considering the World Bank has the advantage of having an apolitical mandate, which is important in this situation. Currently, UN agencies have increased cooperation with the World Bank in dealing with fragile states, and vice versa. This is an example of how fragility is seen as a global public good.

Rani Mullen addressed her question to the panel in Session 2 on whether IDA lending has peaked and the demand for it has decreased. The distinction between middle income and low-income countries is problematic if it is applied in a state-level. An example of this is India, one of the Bank's biggest borrowers with large pockets of poverty. There might be an interest of not graduating from the IDA funding so that the funding can be used for the poor subdivisions of the country. One participant noted that India's access to the IDA post-2014 was not determined yet. India would receive transitional support after graduating from the

IDA. The Bank's legal architecture only allows engagement to a country as a whole, not to its specific divisions.

Rani Mullen also asked **Philipp Dann** whether he thought that there was any political will to change within the World Bank even if the Bank is institutionally well set-up. **Philipp Dann** responded that the thesis that the World Bank is institutionally well set-up resulted from a comparison with the UN system and other international organizations on development finance. The World Bank is better structured and more reactive to changes in delivering aid. It might not be a perfect international player, but in comparison with other organizations, it is able to react.

SESSION 4 – CORRUPTION/RULE OF LAW

Benedict Kingsbury opened this session by noting that it provided the opportunity to examine two major themes in development finance: the anti-corruption agenda and the rule of law agenda. This session would not seek to establish a deep connection or contrasts between the two themes and the field of development finance. Rather, these two agendas were important because they were affected by, and also affecting, the field of development finance.

1. *Kevin Davis, New York University School of Law – "Anti-corruption in development banking"*

The focus of this paper was on innovation and the evaluation of innovation, focusing on the World Bank's sanction process, particularly those involving corrupt practices. The World Bank's sanction process provides a mechanism to debar firms involved in fraudulent activities and corrupt practices. The motivation leading to the making of this paper related to the rise of efforts to regulate foreign corrupt practices abroad and the Bank's major role in the field of transnational corruption. The sanction process is an innovation by the World Bank. It is important to know whether an innovation is a success and how to measure it.

- **What is the innovation?**
  a) The World Bank can debar firms which engaged in fraudulent and corrupt practices, including bribery in any aspect of the Bank's projects.
  There have been some high-profile debarment cases, such as the Siemens case which was also prosecuted by the US Department of Justice and Munich prosecutors, as well as held liable by the SEC. In addition to paying a total of US$ 1.6 billion worth of sanction, Siemens also had one of its subsidiary debarred by the World Bank and agreed to pay US$100 million in contribution to fund administered by the World Bank for anti-corruption activities. More recently, Alstom has been debarred for three years

and paid US$ 9.5 million. Another example was Oxford University Press had one of its subsidies debarred and had to pay US$500,000 in penalty. However, the number of debarment cases is not that high. Last year, there were only a total of 62 debarments, only 18 of which involved corrupt practices. These 18 cases actually only involved 4 4 separate cases since often the individuals and the companies are debarred separately.

b) The sanction process starts with an investigation by the Integrity Vice Presidency which acted as the police, investigator, and prosecutor. If the case has merits, it is then forwarded to the Evaluations Officers who will recommend sanction. If the sanction is contested, the second tier review is the Sanction Board, which is a 7-member body with personnel from outside the Bank. The Sanction Board looks like a quasi-judicial proceeding with rules on admitting evidence, hearings, reasoned and published decisions. In a sense, the World Bank has set up its own mini legal system involving investigation, prosecution, adjudication and ultimately sanctioning.

c) There are two ways to avoid the sanction process and formal, public sanction: (1) Voluntary Disclosure Program where the firm agrees to disclose information, conduct an internal investigation, and agree to a compliance program, and (2) Settlement Agreement (e.g. Alstom and Siemens).

- **What are the claims in this paper?**

a) The sanction process is an innovation since it can be replicated by other development banks and extended beyond fraudulent and corrupt practices to cover other kinds of misconduct. Therefore, it fits the definition of an innovation. The sanction process is a "regulatory innovation" whereas the World Bank in a very legalistic fashion tries to regulate the conduct of private firms around the world, not only trying to regulate the borrowing countries. The possible motivation behind this innovation is the World Bank's efforts to stay relevant in a world where their influence is diminishing. Through the sanction process, the World Bank is trying to leverage the relatively small amount of capital it provides to borrowing countries to influence a broad range of activities.

b) This kind of innovation in development finance is difficult to evaluate. There are two major questions: (1) what are the criteria to evaluate? (2) even if the criteria are set, it is still hard to establish a causal link between what the World Bank does with its sanction process and any anti-corruption outcome.

(1) Identifying the appropriate criteria

- The focus has been placed on whether the sanction process is compatible with "lawyers' values", which are effectiveness (to deter corruption), efficiency (cost), and due process (rule of law or norms of global administrative law: fairness which include transparency, independence, rationality, and reason-giving).

- There are some inherent tensions between these criteria. For example, there is a tension between cost and fairness whereas the formality of these proceedings makes it much fairer but increases the overall cost. After all, running an entire legal system in addition to the banking operation increases transaction cost. Another tension is between transparency and independence with cost and efficiency. For example, the voluntary disclosure program decreases the cost of the proceeding but the sanctions and the compliance program imposed under this program are neither transparent to outsiders nor reviewed directly by an independent body such as the Sanctions Board. This becomes a compromise: cost effective on the one hand, limited independent review and transparency on the other hand.

(2) If there is a set of criteria, how are they applied?

- For those with a development background, the aforementioned evaluation criteria should not be the main focus. Rather, the focus should be placed on the result of this program, such as what it does to the quality of governance in the borrowing country or even how it affects poverty reduction. However, it is hard to evaluate this kind of process in these terms. There is also a tension between having a full-blown fair process and having fund left-over to be added to the development fund for the borrowing countries.
- Another concern is that if the Bank starts penalizing firms that are less than completely honest in their operations, it is actually penalizing the most vulnerable members of the global society. If the firms that have unique capability in a development project cannot participate because of their corruption issues, then the project is disadvantaged. This is to some extent contrary to the interest of development. There is a potential tension between good governance and promotion of development. Given this situation, the World Bank should employ a value-judgment and consider whether a zero-tolerance policy on corruption is preferred for development.
- There is also the legitimacy issue on whether the World Bank is the most appropriate body to conduct the sanction process. Is it an impartial body or an instrument of the Western economies? Are members of the Integrity Vice Presidency likely to be independent of the home-country of the firms and the host-country?

c) The next question is whether there is a causal link between the sanction process and a particular outcome in anti-corruption efforts. It is hard to assess because the role of the Bank in this field is limited. The amount of "Bank projects" is declining so the amount of business that firms stand to lose from the Bank is also declining. This renders the World Bank's sanction less threatening. On the other hand, the World Bank has indirect effects through the cross-debarment mechanism with other multilateral development banks and through referral of its investigative findings to national

authorities. Any effect of this process is likely seen through the indirect channels and becomes difficult to trace. In addition, this is a crowded area where many other actors aspire to sanction transnational corrupt practices, such as the US and UK authorities through their foreign corrupt practices acts, and also the national authorities of the home and host countries. This makes it hard to tract the effect of each anti-corruption effort.

d) Ultimately, this paper talked about the World Bank as a global anti-corruption agency. Is it a good thing? It is hard to know, just as hard as making the value judgments of whether there should be a global anti-corruption agency, whether there is legitimacy in the process, and whether there is any empirical support to the causal effect of this innovation.

2. *Michael Woolcock, Harvard Kennedy School/World Bank — "The Missing Middle: Reconfiguring Rule of Law Reform as if Policies and Process Mattered"*

Programs like Justice for the Poor were established in response to efforts to engage the point of views of the users of the justice system, not only the Bank's point of view on how a legal system is supposed to be. Legal reform is usually associated with funds to build the legal system: for example, funds to build a court house. However, the actual problem with the legal system faced by the people might be a lot more modest, such as fair dealings with the government on health care, land transactions, assistance in reporting domestic violence cases, etc. The rule of law is one of the few issues in development that enjoy endorsement from all relevant parties, including the North and South institutions, yet it has a track record of non-accomplishment.

There are two dominant narratives in legal reform: (1) the problem of "legal transplant" where we cut-and-paste legal reform programs and use a template of legal reasoning of one particular country to introduce it to another, and (2) "legal empowerment" in the past 10-15 years where there has been more direct engagement with rural populations to help them become a more active claimants and political actors in exercising their rights and obligations of citizenship.

This draft paper sought to argue that there is a "missing middle". The broader task is how to raise credibility, capability and accessibility of legal institutions in the context of intensifying legal pluralism. In a plural society, issues such as relationships with other people and how they engage with the environment as well as the state are very important. Those who are in active engagement with these communities recognize that these are serious issues that need to be handled better.

The World Bank's sensibility to the rule of law is different in a big country (that is, where the Bank needs the country more than it needs the Bank, like Indonesia or the BRICS), and in a small country (that is, where the relationship is entirely reversed, like Liberia or Sierra

Leone). In the latter, the Bank country offices have a huge discretionary power. This is not always apparent through the documents of the Bank or its websites. Therefore, to conduct studies on the World Bank and its decision making, it is important to know how the Bank operates in different societies and how negotiations play out in those different places. Based on a decade of work in this field in different countries, like in northern Kenya where the notion of property rights and the notion of land ownership are alien to them, the solutions of having a stronger property rights and stronger administrative codes will not work. The legal problems reside in different planes of existence, not just on how to word the different contracts on property rights.

The first key lesson in the paper is that *the legitimacy of the change process has been central*. The stand of law and development critique is right on the pushback of the cut-and-paste legal reform. This cut-and-paste approach is not just culturally insensitive or unable to square off the political context. The history and concept of how rules evolve and become law is important to see how external agents can play a role in this process. To understand what constitutes legitimacy in that place requires big commitment and understanding to that place, investing time and energy, engaging directly with the society, which is hard to do for lawyers. It is also hard to find people who are willing to do that.

The second part of the paper provided a richer sense of how effective the justice system has been. *Reading legal history is important to understand how legal reform in a particular place should be conducted*. Being a good technically-trained lawyer is not enough. These lawyers need to also go through all the suffering and reality in those places. Sensibility on how the legal institutions came to and should be will prevent a mere cut-and-paste reform.

The third aspect that is missing is the notion of *sub-national legal institutions*. The Bank deals with international actors or governments, or it conducts legal empowerment to the village level. But the real missing middle is the sub-national level in between where citizens experience the states or each other. At the moment, the focus is on the upper level or the village level, almost nothing in the middle. The World Bank needs to rethink the role of international actors in this context.

The question is why, despite the critique, there has not been much change on the Bank's approach to legal reform. Part of it is due to cultural prejudices against long-term work to understand legal systems in their own terms. Another part of it is that the legal reform system does not change. That is why the court houses are still being built despite the questionable impact of that same approach in a different place. Under a time crunch, the system simply cannot do anything else other than the procurement-friendly, by-the-book approach rather than to actually change to the functionality of the systems.

To conclude, what the World Bank can and should be doing as an international actor is as follows:

a) *The World Bank should be involved in this kind of discussion because it can exercise its countervailing power*. For example, in Papua New Guinea and Sierra Leone, villagers who are used to dealing with customary law as the custodian owner of the land have to deal with the biggest mining companies. Customary laws are not set up to deal with this situation where is no level playing field. The World Bank is likely the only agency in the world that has the profile, political power, and resources to be able to provide a non-token pushback to create a level playing field in these situations.
b) *The World Bank can use its convening power*. Other actors respect the Bank's calls for meetings. These meetings can be used to provide processes to negotiate decisions on legal reform.
c) *The World Bank's key contribution can be in the form of knowledge and data*.
d) *The World Bank also has the time horizon*. The fastest time period to get a standard deviation improvement in the rule of law is twenty years. The longest is forever since the trajectory actually goes down. There is no NGO or elected government that has the time horizon like the World Bank.

3. *Jean Touchette, OECD, Discussant*

Jean Touchette agreed with Kevin Davis that the World Bank's sanctions process is a key issue in development finance since bilateral agencies look to the World Bank for guidance and policy advice on anti-corruption, diagnostic, procurement, and public financial management. The agencies need to clean up internally before pointing fingers to others, i.e. the borrowing countries, on the issue of corruption. The sanctions process is a key feature for a more accountable agencies.

He also stated that there is no other choice of actions despite the tension between anti-corruption efforts and promotion of development, and the concerns that anti-corruption measures would penalize the poor if the World Bank is enforcing its sanctions regime strongly. Corruption leads to lesser-quality infrastructures and delivery of goods and services. Enforcing these efforts will lead to better investment in the long term. The cost of engaging in corruption should outweigh the cost of accountability. The Bank also needs credibility in front of its partners and recipient countries. However, it is recognized that evaluation of the result of anti-corruption activities, and in general evaluations of rule of law and governance activities, is very difficult to do. It is very difficult to measure and explain anti-corruption activities as opposed to more concrete programs such as building clinics, schools, etc.

He commended Michael Woolcock's paper for highlighting the importance of local participation and ownership in designing reform. There is a need to focus on the political dynamics and a participatory approach in designing rule of law programs. What the donor agencies have done in designing these programs is dealing with government officials which act as the supply side of accountability. If there is no demand of accountability, there will be no motivation for the supply side to respect rule of law, human rights, etc. Therefore, there

needs to be an equilibrium between working with the government, civil society, the parliament, as well as national audit agencies.

He identified the common link between the two papers which is the question of how to evaluate the success of reform and innovation. This is an issue that bilateral agencies have avoided to deal with because supporting good governance in recipient country is not as interesting to taxpayers and politicians. The most concrete results are those that come from the least transformative activities.[6] At the expense of long-term transformational results, there is this pressure for short-term and concrete results, which are not necessarily the best kind of result.

4. Open Discussion

Katharina Pistor commented on **Kevin Davis**'s point on whether the World Bank should conduct a robust anti-corruption regime. There is an endogenous process if an institution wishes to engage in an activity. If an organization starts to engage in governance, it cannot ignore its own governance due to the shareholder and legitimacy issues. So it cannot avoid dealing with corruption in its own spheres. **Katharina Pistor** then pointed out to **Michael Woolcock** that as a lawyer, contextualizing is indeed important. But there are certain structures that render it difficult to conduct these contextualizations. The World Bank has been focused on scaleability, thus it is difficult to conduct the in-depth study as suggested by his paper. So the question becomes: under what kind of institutional context can the contextualization be more productively done?

Devesh Kapur commented on **Kevin Davis**'s paper that the World Bank's international competitive bidding is a crucial feature of the Bank. It is costly but favored because it makes the process seem cleaner. However, when an institution has many good goals, it overcrowds itself. Countries now borrow less for infrastructure from the Bank. They would rather borrow from others who have less scrutiny. So, there is still significant corruption in infrastructure overall even though there is less corruption in the Bank's projects. **Devesh Kapur** continued by asking **Michael Woolcock** to place his remarks in the context of the growth of contemporary social science. The Bank recruits from primarily American institutions where a certain type of social science is practiced and privileged. This kind of social science does not necessarily value context.

James Gathii pointed out to **Kevin Davis** that another innovation in management of development assistance is the phenomenon of the placing of funds in individual countries to a hired accounting firm which manages the fund and has veto power over government spending

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[6] See Andrew Natsios, "The Clash on Counter-bureaucracy in Development, The Clash of the Counter-bureaucracy and Development," July 2010. Revised 07-13-2010, available at www.cgdev.org/content/publications/detail/1424271 (the programs that are most transformational, such as increasing good governance and anti-corruption, are the least measurable).

and firms which have been involved in corruption. In Kenya, the tension is between the accounting firm, which is the agent of the donor fund, and the government bureaucrats who oppose the involvement of these firms. In some countries, these firms actually run the budgeting capacity. He suggested to **Michael Woolcock** that missing in this conversation of legal reform is the agency of the people. Local innovation might be the way forward, rather than having the World Bank or other foreign donors-installed programs.

In response to Kevin Davis's paper, **Rani Mullen** suggested that there seems to be an inherent tension within multilateral development banks whose reason of being is to give assistance to the poorest. Very often, the poorer countries have severe governance issues which make them prone to corruption. There is a tension between the existence of severe governance issue and the need (and internal pressures) to lend money to these poor communities.

The panelists subsequently gave their general answers to the questions. **Michael Woolcock** saw that the World Bank started this community-specific research, such as Justice for the Poor, ten years ago, and the program is still growing and surviving. Success for the Bank in legal reform is not when it is doing a big project, but rather when the government itself starts to do something that is doable and thinkable without the push from the Bank. For example: when the Government of Indonesia asked the Bank to be part of a team that was trying to reconfigure rules and system at the local government level as well as their rules on inclusivity, this is when the World Bank feels like it has an impact.

Kevin Davis commented to **Michael Woolcock** that in the ideal world, the World Bank will hand funds to country directors to be used as they please and to conform to their actual needs in accordance with local situations. It is also a challenge to the idea of law; the idea of the practice in this field is to be governed by generalized rules previously determined, not as needed by different situations. A reflection is necessary on whether there needs to be that much law in the field of development finance. On his paper, he stressed that the paper was made to highlight potential tensions in the World Bank's sanction process as a form of innovation. In the face of that kind of indeterminacy, it will be difficult to have objective evaluations of the innovation.

SESSION 5 – SOVEREIGN BORROWING

1. *Anna Gelpern, American University Washington College of Law, "Between contract and statute in sovereign debt"*[7]

Anna Gelpern discussed the *UNCTAD Principles for Responsible Sovereign Lending and Borrowing*. Gelpern suggested that this instrument was primarily an agenda-setting tool at the current stage. Gelpern suggested that we need more institutional study regarding different actors' interests in innovation and reform in sovereign lending.

Big problems in sovereign debt space that initiate reform initiatives:

a) Legal: unenforceable debt, non-dischargeable debt, fragmented restructuring.
b) Economic: time inconsistency, incentives to over-borrow, debt overhang.
c) Political: borrowing legitimacy, political autonomy, restructuring accountability.

Innovators in this space:

a) International organizations: UNCTAD, UNDESA, IMF, development banks.
b) National government institutions: e.g., Norway (domestically and through UNCTAD funding), France (as the Paris Club secretariat), national courts and tribunals.
c) 'G' groupings: G7, G20, G24, G77.
d) Civil society.
e) Market actors.

Innovations in this space:

a) Treaty: IMF's Sovereign Debt Restructuring Mechanism (SDRM).
b) Contract: Collective Action Clauses (CACs), CACs Bis, CACs Plus.
c) Customary international law: e.g., on odious debt.
d) Institutional: ad hoc and standing arbitration, audits, the Paris Club, judicial decisions.
e) Codes of conduct: e.g., the UNCTAD Principles for Responsible Sovereign Lending and Borrowing.

How to evaluate:

a) Some of this innovation is anti-innovation and pre-empts more radical reform.
b) Competition to control reform: e.g., codes of conducts as path to or preempting bankruptcy.
c) Competition to preempt reform.

[7] See, as background reading, A. Gelpern, Hard, Soft, and Embedded: Implementing Principles on Promoting Responsible Sovereign Lending and Borrowing (Nov. 2012), available at: http://www.iilj.org/newsandevents/documents/gelpernbackground.pdf.

- CACs, codes of conduct vs. SDRM
- Paris Club, Heavily Indebted Poor Countries (HIPC), Multilateral Debt Relief Initiative (MDRI) vs. odious debt

d) Competition for constituents, resources, ideas, credit.

Who benefits? How to evaluate?

a) Gelpern suggested that we cannot evaluate simply by looking at the form of innovation; rather it depends on the applicable development objective.
b) Institutional study: shifting constituents, agents, alliances, channels of accountability.
c) Reconsider attachment to form.

2. *Matthias Goldmann, Max Planck Institute for Comparative Public Law and International Law, "Sovereign debt and fiscal policy innovation"*

Matthias Goldmann discussed what happens before we get to a sovereign debt crisis, regarding questions of sovereign debt and fiscal policy innovation. Goldmann presented three theses:

a) Good fiscal policy is characterized by "public reasoning".
b) Problems of the past have to do with a lack of public reasoning.
c) Innovations in fiscal policymaking should promote public reasoning.

Goldmann laid out a theory of *public reasoning*. Goldmann argued that democracy fosters public reasoning and related elements of accountability, transparency, free speech and value pluralism (impartiality). Goldmann argued in favor of fiscal policy innovation that promotes public reasoning. Procedurally, fiscal transparency can, for example, reduce state bankruptcies so that they understand the terms of the loans that they undertake. Goldmann made reference to the IMF fiscal transparency program in this regard. Substantively, Goldmann suggested that we need rules on state borrowing to prevent self-interest and short-sightedness of politicians. Goldmann also suggested that we need to bring all relevant information and voices into the discussion to foster public reasoning.

Goldmann concluded that public reasoning is a meaningful, yet controversial, concept of democracy that can guide our thinking about fiscal policy. It stands for a move from substance to deliberation. Goldmann noted that the UNCTAD Principles for Responsible Sovereign Lending and Borrowing are certainly useful in this regard.

3. *Katharina Pistor, Columbia Law School, "The innovation that wasn't: sovereign debt contracts and the structure of global finance"*

Katharina Pistor presented her paper on sovereign debt contractual provisions. Pistor's conclusion was that the same contractual provisions mean different things in different contexts. Contexts can help predict outcomes. Contexts are highly structured, domestically and internationally. The system has attempted to create contracts that are more legally binding, e.g., to shift risks, but we cannot purge all uncertainty from the system. This is the *law of finance paradox*, an element of which is the following: You need law to build large scale financial systems, including sovereign debt markets, but if you enforce all contracts as written *ex ante*, you will blow up the system. So a typical response is to suspend the full force of the law, but this is done selectively and mostly on the periphery as opposed to the core of the system.

Pistor provided an anecdote of how this plays out in reality. At a conference in Madrid a few years ago, after the financial crisis, a Finance Minister indicated that he was completely puzzled by capital markets. He appeared to be confused regarding a straight-forward sovereign debt contract. But the confusion was not over the contract terms; rather, it was over who would stand in for the debt of the Eurozone members and who would be the last man standing. This exposed the structure of the Eurozone and raised questions of who is at the core and who is at the periphery. The key takeaway from the European crisis was that there will be more forceful enforcement of contractual provisions at the periphery and more flexibility at the core.

Pistor made the broader claim that financial innovation (e.g., collective action clauses (CACs)) is often a signaling device to the market that such countries are jointly in a crisis, for example, but that each player knows its respective role. But CACs are not the same as mutualization; it depends on the context.

Pistor did not equate innovation with *progression* – it just means something is different than before. Further, innovation is not *invention*, but rather just marginal change. It is not a fundamental shift in moral hazards and how we might allocate risk in global financial systems. Regarding credible commitments, Pistor challenged the assumption that the major problem in sovereign default is cheating and fraud; rather, empirical studies show that uncertainty is at least as important.

Pistor concluded that when looking at changes in contracting or regimes, the important question to ask is how does the innovation change underlying hierarchical structures of financial systems and how elastic the commitments will be in a time of crisis.

4. Open Discussion

Devesh Kapur asked what the fundamental change had been in sovereign debt contracts (structure and enforcement) between the Latin American and European crises. **Katharina Pistor** felt that there had been no fundamental change in the contracting sense, but rather the real important change was within the Eurozone which suggested that risk would be allocated throughout the system and there could be an ultimate back-stopper. **Anna Gelpern** suggested that it depended on which Latin American crisis you are referring to. Between the 1980s and 2010, there was a big shift in doctrinal structure in terms of enforcement; plus accounting and regulatory changes. The other market shift is the globalization of domestic debt. **Matthias Goldmann** noted that it also important to consider monetary issues which are closely related to debt issues. **Katharina Pistor** agreed.

Philipp Dann asked whether there is any way to legally formalize this core/periphery distinction. **Katharina Pistor** responded that it is inherent in the system, but the risk needs to be randomized. **Kevin Davis** indicated that, as a contract law professor, this proposal troubled him. **Anna Gelpern** suggested that this is the regulatory perspective and we also need to think about what the core and periphery look like. She noted that we already have a distinction based on risk. She suggested that we cannot rethink sovereign debt without rethinking the broader financial system.

SESSION 6 – PRIVATE PHILANTHROPIC FINANCING AND GOVERNANCE

1. Tim Büthe, Duke University – "Private aid flows"

Development aid has been subject to significant critique on two main fronts: deductively for its perverse consequences and empirically for producing few traceable improvements in development outcomes despite billions of spending. Tim Büthe and his collaborators started researching private aid originating in the U.S. in 2004. The research examines private aid in the form of small donations by private individuals, collected and allocated by humanitarian and development NGOS.[8] The research does not focus on foundation grants, business charitable giving or volunteer time.

The research project analyzed the allocation of private aid in health, education, water, sanitation and hygiene (WASH) and emergency aid, and tried to explain its variations. The

[8] A fuller discussion is contained in T. Büthe with S. Major and A. de Mello de Souza, *The Politics of Private Foreign Aid: Humanitarian Principles, Economic Development Objectives, and Organizational Interests in the Allocation of Private Aid by NGOs,* 66 INT'L ORG. 571 (2012).

research team surveyed the largest, most important not-for profit, operational, U.S.-based[9] NGOs working in the four sectors. The research project involved 48 NGOs and gathered detailed, disaggregated data from 40 of them in 2001. The research tested three perspectives from international relations to explain variations in allocation:

Humanitarian hypothesis: This tested the extent to which allocation is driven by objective recipient need, operationalized through development indicators (GDP per capital, HDI, Physical Quality of Life index, HPI, share of population living below $1/day, share of population living below local poverty line, natural disasters). The research found that, consistently across measures of recipient need, private aid flows are allocated to a very significant degree to countries with the greatest need for it. This was compared to U.S. Government allocation for which there was nowhere near as significant a correlation except in the case of natural disasters.

Development hypothesis: This tested the extent to which allocation is driven by the likely efficiency and effectiveness of outcomes, operationalized through measures of expected effectiveness and efficiency including control of corruption as measured by the World Bank, the International Country Risk Guide, Transparency International, the absence of civil war, inter-state war, the absence of political instability and political violence. The research found no statistically significant relationship; for example, it does not appear that the level of corruption in a country has any statistically significant effect on the allocation of aid when compared with GDP and other indicators contained in the humanitarian hypothesis which remain statistically significant. U.S. Government and U.S. private aid have the same results against this hypothesis.

Aid allocation as a fundraising strategy: This tested the extent to which allocation is driven by the instrumental pursuit of material resources and growth of the organizations, operationalized through measures of subjective perceptions of need contained in an index of 25,463 qualitatively analyzed New York Times stories. There was no evidence of this having an effect on allocations of private aid, however there was an effect on government aid that is substantively large and weakly significant.

This study concluded that there is strong and robust support for the humanitarian hypothesis but little for development or fundraising hypothesis in explaining variations in allocations of U.S. private aid. This demonstrates that norms can outweigh material and organizational incentives. The authors argue that further research is warranted into public policy approaches that encourage private donating.

[9] Or fundraising in the U.S.

2. *David Gartner, Arizona State University – "Innovative financing and global health"*

Alongside the shift from north-south to south-south cooperation, there has been a shift away from states as driving the innovation in aid to hybrid entities that involve states, the private sector, civil society, and inter-governmental organizations and foundations. There are key institutions within global health that may have implications for other sectors and particularly for innovations in governance. This paper examines three mechanisms – IFFIm, UNITAID and the Advanced Market Commitment (AMC) – to analyze their emergence, approaches and impact.

IFFIm had Gordon Brown as its champion and was established shortly after the Millennium Summit with the aim of leveraging financial markets to achieve the MDGs, particularly by financing vaccinations. IFFIm's governance was entirely private, involving seven individuals with financial experience. IFFIm was greatly successful in finding access to capital at relatively low rates (in the initial period it had AAA ratings due to the AAA ratings of donors and the World Bank who managed the funds). Over the last ten years, IFFIm has had 18 bond issues of $3.6 billion and provided two-thirds of the funding for the Global Alliance for Vaccines and Immunization (GAVI; now the GAVI Alliance). However, it produced limited market impact. The focus was on raising money, not leveraging the pharmaceutical or medical industry.

UNITAID was born of the French G8 Presidency. When President Chirac could not achieve sufficient support for a Financial Transactions Tax (FTT), he looked for more modest ideas and came up with an airline ticket tax that had limited financial impact while creating a big effect on a health sector. UNITAID focused on leveraging market impact for AIDS, TB and Malaria drugs and was successful in dramatically reducing prices through strategic and leveraged interventions. The initiative has multi-stakeholder governance with governments from north and south, civil society from north and south, and foundation representatives. Non-state actors played a significant role in its design and effectiveness.

The AMC was advocated by economists including Michael Kramer at Harvard and championed by the Italian Government in partnership with the Gates Foundation. The scheme focused on incentives for research and development into neglected diseases. The Gates Foundation wanted quick success so they chose a vaccine that already existed as the first focus – pneumococcal – and so the initial intention of incentivizing focus on neglected diseases did not occur. The governance body includes foundations and northern governments but not civil society or southern governments.

All three schemes were inspired by the Millennium Summit, motivated by the MDGs and Gleneagles financing commitments and influenced by the interest of donor governments in leveraging finance without drawing on existing government budgets. They had different market impacts (high for UNITAID, low for AMC and middle case for IFFIM). This

differential impact has to do with Champions (UK and the City of London is less open to taxation; France the reverse), and to do with the participation of non-state actors in governance.

These provide lessons in terms of the kind of aid that can provide sustainability and market impact (UNITAID). The experience of UNITAID shows that some dimension of FTT might be useful if it has multi-stakeholder governance. This analysis raises questions about accountability, the role of non-state actors and feedback mechanisms that can lead to changes in the design of schemes. These innovations relate to broader changes we see in global health such as vertical funds. More independent, participatory and results focused financing is succeeding in these sectors and could be borrowed by other sectors and the World Bank.

Discussion

Matthias Goldman questioned the relationship between participation and both dimensions of accountability and effectiveness and whether or not the INGO research reflected a division of labor amongst government and INGOs. **Kevin Davis** suggested using the World Bank's CPIA[10] in regressions and noted that Büthe *et al*'s research focused on private donations through intermediaries and that the conclusions may not apply to dis-intermediated kinds of donations. **Laurence Boisson de Chazournes** highlighted that the health sector is characterized by the particular role that the private sector plays in terms of R&D and as the driving force for innovative mechanisms. Distinguishing tax from other market mechanisms, she suggested that we can draw parallels with climate change where assessments have shown that market mechanisms are very costly and it increasingly seems that tax will be more effective. **Julia Sattelberger** raised the point that there may be differences in Büthe *et al*'s results if other DAC donor countries were analyzed, particularly in countries where there was stronger government support to the aid effectiveness agenda. **Mariana Mota Prado** wondered if the World Bank would stay away from some of the areas raised by Gartner or would try to incorporate innovations and compete with these initiatives. **Jean Touchette** asked about the constraints for scaling up and replicating the hybrid mechanisms particularly within a very complex health aid architecture.

In response to questions, **Tim Büthe** clarified that the research on INGOs contains no evidence that U.S.-based private aid organizations are making allocation decisions based on the U.S. Government's allocations. Moreover, he did not believe there are strong theoretical reasons to expect big differences in results in other DAC countries, as the aid effectiveness agenda was a strong driver of discussion in the aid community in the U.S.

[10] See more detail on the Country Policy and Institutional Assessment: http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/IDA/0,,contentMDK:21378540~menuPK:2626968~pagePK:51236175~piPK:437394~theSitePK:73154,00.html and http://data.worldbank.org/indicator/IQ.CPA.SOCI.XQ.

In response to the discussion, **David Gartner** expanded on the effect of competition on the World Bank, and the role of initiatives such as GAVI in pioneering performance based financing. There has been enormous adaptation by the World Bank in the past decade in response to vertical funds including results-based programming, transparency, and a pivot from health to infrastructure in which inter-institutional competition plays a part. On participation, he noted that the independent financing models are showing the most promise and that these also have the most inclusive participation. Schemes under the UN are the least participatory and seem to be having the least impact. The initiatives within the World Bank appear to present a middle case. Multi-stakeholder processes with civil society actors from north and south, at the global and local level seem to be the most promising. In response to comments on different forms of financing, **David Gartner** suggested that there is a plausible argument that tax is the most sustainable form of finance as it is not contingent on the ratings of donors or locked into contract.

SESSION 7 – NEW FINANCIERS: CHINA AND INDIA

1. *Roselyn Hsueh, Temple University – "Who wins? China wires Africa: the cases of Angola and Nigeria"*

In Roselyn Hsueh's absence, **Benedict Kingsbury** provided a short summary of her paper. The paper builds on Hsueh's earlier work comparing the regulation of the telecommunications and textiles sectors in China.[11] Her new work looks at China's role in Africa, specifically in Angola and Nigeria. Hsueh and her co-author, Michael Byron Nelson (Wesleyan), study the role of Chinese telecommunications companies[12] and their relationship to the Chinese Government's political and economic strategy in Nigeria and Angola.

Angola is a big market for China. Chinese companies are investing in projects that benefit the Angolan Government. There is a strategic interest for China in undertaking those projects, especially where there is a state-state agreement. The authors suggest that the involvement of Chinese companies has mixed motives but is linked very much to resource access in a kind of barter between supply of oil in return for Chinese investments that they do not cash out.

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[11] ROSELYN HSUEH, CHINA'S REGULATORY STATE: A NEW STRATEGY FOR GLOBALIZATION, (Cornell University Press, 2011).

[12] The players from the Chinese side of this in the telecommunications sector are the infrastructure telecommunications providers – the state-owned enterprise of Zhong Xing Telecommunication Equipment Co Ltd (ZTE), a private company with significant government influence called Huawei and a partnership between Alcatel and the Shanghai Government - Alcatel Shanghai Bell (ASB). Also includes the operators of telecoms – Unicom and China Mobile.

China's strategic interests in Nigeria are not linked to natural resources but to establishing a position in the Nigerian consumer market. The Nigerian government has been able to offer access to mobile phone and the Internet as a form of patronage that grows their political power. Overall, China seems to gain from goodwill in helping development, and generating links to political elites. These are big picture gains but not anything out of the ordinary from what other countries do in order to achieve benefits through their bilateral relations and trade relations.

2. *James T. Gathii, Loyola University Chicago – "Making technology transfers a key component of resource extraction and construction contracts in Africa"*

China's funding of the African Union HQ – the tallest and best-looking building in Addis Ababa – is highly symbolic. China's presence in Africa raises important questions that need to be examined from the point of view of African governance. China's presence has led to an increase in trade concentrated in a certain number of countries – Angola, Nigeria and Sudan. These countries are resource-rich and have many governance problems. There is often discussion of donors going into countries with good governance and rule of law. In Africa, that is defied by huge volumes of trade between resource-seeking countries like China and countries with poor governance. The trade flows involve exporting minerals to China and importing Chinese textiles and low quality manufacturing goods.

The question is how resource-rich poor countries can leverage their resources to lay a foundation for transforming their economies from resource dependency. A second issue is how to increase their benefit from infrastructural development – even the AU HQ was constructed with 80 per cent Chinese labor and mostly materials from China. Resource-rich countries should pursue productivity-enhancing technology and skills transfer arrangements with China in exchange for their resources, as China did from Japan in the 1970s. There are different arrangements that African governments can institute to ensure that the design and execution of projects (architecture, engineering, service provision) can benefit local providers. By 2012 China's global contract engineering contracts stood at $991.1 billion. There have been many exchanges of oil and minerals for construction projects (R41 Contracts or "the Angolan model"). African countries should pursue innovation-seeking investments and not remain content with resource and market seeking investments. Chinese companies bring opportunities for transfers of technological capabilities and skills to African firms, and can subsidize science and technology education. African countries could also benefit in value addition, as well as from experience in and access to global value chains. African countries can look to experiences such as the Korean High Speed Rail Car Project, in which the Korean Government insisted on doing the project 50/50 and has since become a big exporter of railways.

The ball is in the court of African governance to leverage resources to make sure these ideas can be effectuated. These ideas are contained in most countries' *Vision 2020* documents, which discuss diversifying from agricultural or resource dependent economies. This is supported at the regional level in Africa's Manifesto for Science, Technology, and Innovation and at the international level in the Istanbul Plan of Action for LDCs.

For China to do this would be to realize its goals of mutual benefit and reciprocity. China currently uses legal instruments like bilateral investment treaties that are lock, stock, and barrel replicas of Western-style BITs.

There are significant governance challenges in these kinds of changes. For example, the time horizon for politicians is short term but some of these ideas only work in the long term. But there are signs of change, including new national governance regimes for oil and gas (Uganda and Kenya). However, civil society has not had a seat at the table in the negotiation of the deals and there larger questions related to environmental or other impacts.

3. *Rani Mullen, College of William and Mary/Centre for Policy Research – "India's development assistance: Will it change the global development finance paradigm?"*

Increasing attention to the emerging donors such as India is justified by the growth in their programs. Four of the G7's ODA programs are now equal or smaller than BRICS development cooperation programs. The Government of India's development cooperation has grown rapidly, especially over the past decade. To date there is little known about the program as India is not an OECD DAC member and does not report publicly on its lending. Yet in 2012, the Indian Government did report that about 7,000 crore rupees (1.3 billion USD) was budgeted for ODA in 2013-4. This is comparable to Austria's ODA budget and higher than 4 of the 23 DAC countries.

ODA from countries such as India is increasing at a time when development aid (as defined by DAC) by OECD countries fell by 4 per cent in real terms in 2012 following a 2 per cent fall in 2011. Despite this, non-DAC donors remain a small percentage of overall development finance.

India's development cooperation has a different historical framework to the OECD DAC donors. India started lending in 1949, two years after independence. India first provided grants to Burma and Nepal, and then created a program called ITECH in 1964 to provide training for foreign bureaucrats, technical assistance, study abroad, and tours of India. From the beginning the focus was on the commonality of colonial experience, partnership in economic development, and respect for sovereignty.

Innovation in Indian development assistance includes its distinct self-perception and terminology (e.g., use of the term partnership), non-adherence to DAC or other regional and global norms, demand driven selection, lack of conditionality, approaches to reporting, monitoring and evaluation, and decentralized management.

Indian has three forms of development cooperation: grants managed by the Development Partnership Administration within the Ministry of External Affairs (MEA), training and technical assistance managed by ITEC, again within the MEA, and lines of credit managed by Exim Bank. Exim raises funds on the international debt market and therefore is not constrained by Indian budget limits and can avail greater funds from private sector to support development partnerships.

Indian grants and loan programs have committed 320 billion rupees between 2000/01-2013/14. Major recipients include Afghanistan (where India is the fifth largest donor) and Bangladesh. Countries in the region are the largest recipients of grants. This is not the case with lines of credit that are offered to a diversity of countries outside the region and currently over 50% of lines of credit are going to countries in Africa. Since lines of credit were initiated they have increased tremendously and are now close to 10 billion USD. Officially the Indian Government only reports the interest rate it subsidizes on lines of credit as aid; however the Indian Government talks about lines of credit as a form of development assistance. India is looking at the Chinese model in Africa and modeling itself on that to get a foothold in the African market.

4. *David Malone, Rector of the United Nations University, Discussant*

There is a near complete disorientation of Western countries from the levels of actual success in the developing world and the emergence of developing countries as meaningful actors in international relations. There has been a cognitive dissonance in Western aid officials about the current pace of change. We can see that Western aid agencies and their relationships to their own governments are being instrumentalized in the service of trade promotion in the same way as we get very excited about when it happens with China. In a way, the West is engaged in a race to the bottom with China.

You can argue that Brazil is now part of the Asian supply chain and struggles against the distortions this creates in its own economy. Brazil's aid program is in a state of disarray; launched under President Lula with strong government support, the current President is very skeptical of its effectiveness. Brazil's program is therefore at a moment of reflection and redesign.

It is important to note that while Nigeria is tremendously open to China as a trade partner there is considerable irritation in Nigerian political circles for China referencing its

partnership with South Africa, especially on geo-strategic and economic issues, not BRICS+N. Not very long ago there was a blast from a very senior Nigerian official on the op-ed page of the Financial Times against Chinese financial colonization.[13] The Chinese aid program has its own limitations; it may be welcomed when building a big building but may not get performance on other agreements in return. Moreover, the aid program is very unpopular within China.

India's aid program is very tied up in geo-strategic concerns, including funding neighbors that border China. Aside from the immediate neighborhood, the Indian model is very different to the Chinese one. The Government is working on bilateral relations and then expecting the Indian private sector to follow. There is not as direct a connection between the private sector development in Africa and the Indian Government. India shows respect for sovereignty overseas and will not attach conditions relating to democratization into its development assistance. However it was the first and very significant donor to the UN democracy fund. In a sense, it is using multilateral avenues to promote democracy, rather than bilateral relations.

Discussion

David Gartner noted the potential gap in both papers of a regional governance focus. **Matthias Goldman** highlighted what else is needed beyond technology transfer, particularly to deal with Dutch disease – for example sovereign wealth funds. **Marie von Engelhardt** asked about the balance between mutual benefit and demand as driving the Indian aid program. **Tim Buthe** remarked on the fragmentation across the BRIC programs due to a lack of coordination and the potential for China and Brazil to support countries in pushing back against western donors and thereby equalizing power relations to an extent. **Laurence Boisson de Chazournes** asked whether or not China would favor a sub-regional approach in Africa to reduce negotiating costs and whether or not this kind of approach was likely to happen with India based on their state-to-state approach. **Phillip Dann** asked if there was really any innovation in these approaches to development assistance.

In response to the discussion, **James Gathii** suggested that China could learn from the EU's Economic Partnership Agreements (EPA) process about negotiating in blocks. He noted that proposals in the paper are targeted to the problem of "Dutch disease" by looking at the potential to bring capacity across borders regionally. He remained ambivalent about whether or not there is innovation; there may be innovations in the African context as adaptations from other countries. At the transactional level there is the possibility to innovate in the law of contract by adding clauses of third party beneficiary rights to enforce when governments fail.

In response to the discussion, **Rani Mullen** noted that regional cooperation exists in grants but not exclusively. India has had relationships with African Commonwealth countries going

[13] L. Sanusi, *Africa must get real about Chinese ties*, FINANCIAL TIMES, March 11 2013, available at http://www.ft.com/intl/cms/s/0/562692b0-898c-11e2-ad3f-00144feabdc0.html#axzz2QcwAG7AG.

back decades. She remarked that mutual benefit underpins the development partnership but the difference is that partnerships are initiated through demand from the other country. What is innovative in India's program is the south-south partnership view and how they came about – initiated in country, fewer overheads, and a lack of conditionality. Indian officials see the new version of lines of credit as innovative, although it may look very similar to what China has done.

SESSION 8 – INNOVATIVE STATE ACTIVITIES AND PUBLIC-PRIVATE PARTNERSHIPS

1. *Michael Trebilcock, University of Toronto Faculty of Law – "Infrastructure public-private partnerships in the developing world: lessons from recent experience"*

Infrastructure investments yield very significant social rates of return, generating growth and productivity gains. The developing world has significant infrastructure deficits that create major constraints to manufacturing and trade. The most recent estimates for Africa are that it requires 50 per cent of the continent's GDP to meet infrastructure gaps; more than double the current rate of investment. In infrastructure financing, government has relied on traditional procurement processes – tenders for infrastructure construction. The private sector has always played a role, typically in the form of one off, time-limited contracts. Infrastructure is then often operated by SOEs and financed through highly regressive government subsidies.

In shifting to public-private partnerships (PPP), a number of things change. These constitute ongoing, long-term relationships as opposed to one-off transactions. The role of tax subsidies is reduced as the private party seeks to recoup its investment through service charges. The last twenty years has seen dramatic growth in infrastructure sector PPPs in developing countries. Between 1990 and 2011, 43 per cent of projects were in the energy sector, 29 per cent in transport, 14 per cent in water and sewage, and 14 per cent in telecommunications. By region, Latin America dominated through the 1990s but the more recent growth has been in South and East Asia. 59 per cent of PPPs have occurred in upper middle-income countries, 37 per cent in lower middle-income countries and only 4 per cent in low-income countries.

The key to a PPP is a contractual arrangement that bundles a range of related functions or vertical integrations. This reduces coordination costs and provides attractive incentives. Performance of PPPs based on recent surveys is positive on quality of service and productivity. Strikingly, 40 per cent of these arrangements are renegotiated after the initial contract - typically within two years. Most result in improved terms for the private party. There is competitive bidding to win the contract but once it is signed, there is a bilateral

monopoly.[14] Some developing country governments have undertaken institutional reforms to try and minimize this risk of bilateral opportunism post contract negotiation but it can never be completely negated.

2. *Mario Schapiro, FGV Law School (with co-author David Trubek, University of Wisconsin Law School) – "Innovation and finance in the political economy of Brazil: the role of BNDES"*

BNDES is the domestic Brazilian development bank and the most important domestic source of private financing in Brazil. The main claim of this paper is that despite having experienced a learning process in which the bank developed new tools to foster innovation, BNDES' institutional practice remains concentrated in financing its traditional clients: big companies in consolidated sectors such as natural resources.

Brazil's development has relied on its public sector for growth and on the public bank as an instrument of development policy. The 1950s saw the creation of a system of state-owned banks and many state-owned enterprises (SOEs). The model shifted in the 1990s with a series of market-oriented reforms including privatization of state-owned companies (privatizing around 140 SOEs). Despite privatization, state owned banks, and particularly BNDES, continue to play a key role in the Brazilian economy providing the main source of external corporate finance to the Brazilian private sector.

In the 1990s and 2000s, under pressure to develop new tools to support innovation, BNDES developed four main tools:

- *Angel investing*: partnerships with technological institutes and grants to promote the development of new products;
- *Venture capital*: equity investments coupled with share governance established through share holder agreements that give BNDES a seat on the board;
- *Inducing the venture capital industry*: BNDES participates on the investment committee of venture capital funds it assists; and
- *Flexible banking*: loan contracts that include non-binding performance criteria, staged disbursement and constant BNDES monitoring.

While investments in innovation have increased substantially in recent years, BNDES' overall operations have grown even faster so that this area remains a very small proportion of total disbursements. The most significant clients of BNDES are commodity export sectors selling to China. The strategy of supporting national champions can be seen in BNDES becoming a minority shareholder in commodities companies including holding 11.5 per cent of Valepar –

[14] For more on bilaterally dependent contractual relationships between the parties see: Oliver E. Williamson, *The Logic of Economic Organization*, 4 J.L. ECON. & ORG.65, 71 (1988).

an iron ore company. This constitutes a division between the drive to support innovation and the fact that the most important clients of the bank continue to be the major players in the commodity sector.

There are four explanations for this division: a tendency to favor incumbents, risk aversion and portfolio maximization, the Bank's role in macro-economic stabilization and recovery from the financial crisis, and a lack of demand for innovation finance.

This is a study of how an institution can develop innovation including legal innovation (new legal tools were created to deal with this start up funding and venture capital) but when you look at the amount of start up business it is very limited. The next stage of research is to see if BNDES facilitates innovation within traditional businesses. The theory here is that these relatively small investments are crucial to the development of the country and a way to avoid the resources trap or just being part of the Asian supply chain.

3. *Gaston Pierri, University of Alcala – "Development policy, innovation and law in Latin America: Argentine, Brazilian and Chilean conditional cash transfer programs in comparative perspective"*

Conditional cash transfers (CCTs) are a development policy innovation in Latin America aimed at reducing poverty and inequality. The debt crisis, austerity, recessions, and high poverty characterized Latin America in the 1980s. In the 1990s and 2000s there were democratic and market-based reforms. This created the field for the state to play a new role in lowering long-term unemployment through industrial and social policy.

Law creates the space for ongoing cooperative mechanisms and encourages this new technology – for example, in Argentina, Brazil, and Chile social rights are protected under the national constitution. New policy demands that law becomes more flexible and open to those affected by the law. CCT programs favor the poor without compromising economic performance. As such they present an innovation that is a good fit with the free market rule instituted in the 1990s and with the idea of the new developmental state pursuing an inclusionary model of development.

CCT programs in Brazil, Chile, and Argentina share characteristics of responsibility between the beneficiary and the state, high targeting, and low costs. These programs still do not cover the whole population living in poverty in these countries. Brazil's family grants are well targeted, covering 85 per cent of the poorest population and 100 per cent of the indigent population. Despite these efforts, there has been no discernible impact on inequality.[15] These countries lack an effective tax distribution system and government investment remains low;

[15] The World Bank and IADB claim that there is a big impact on inequality but there are no numbers to back this analysis up.

both factors which may have more impact than the existing CCT programs. Ongoing research needs to address the transformative potential of CCT programs and whether or not they are just cosmetic.

4. *Dudi Rulliadi, Melbourne Law School — "Guarantee fund in Indonesian public-private partnership (PPP): international design as domestic innovation"*

This paper focuses on how the Indonesian state innovates to attract development finance and a particular feature of PPPs – institutionalizing fiscal incentives through guarantees. Indonesia established a guarantee fund to increase the value of government guarantees and thereby make PPPs more attractive. The guarantee fund was deployed to reduce risk while the state was in a process of reform.

For the period 2010-2014, the Government of Indonesia estimated it can only provide 35% of the approximately 140 billion USD needed for infrastructure investment. This situation renewed interest in attracting PPPs. However, the Government wanted to avoid a repeat of private sector suits against the government in the wake of the Asian Financial Crisis (AFC). The Guarantee Fund is a separate entity removed from the state budget and managed by non-bureaucrats, set up in 2007.

Historically, PPPs in Indonesia had sector-specific institutionalization without a cross-sectorial legal framework. There was a focus on opening up sectors, but a lack of law addressing procurement or competition. Legal development was supported under the strong influence of the multilateral development banks after the AFC.

Indonesia built off the model of the World Bank guarantee fund to create the Indonesia Infrastructure Guarantee Fund (IIGF), enhancing and expanding the World Bank model by modification under contract. In 2007, the GOI formalized the IIGF as a separate legal entity removed from the state budget and managed by non-bureaucrats. Under this mechanism, instead of receiving a unilateral letter of guarantee from the Government, the private sector in a PPP gets an agreement signed by itself, the IIGF and the government. The terms are clearer and the guarantee is therefore more flexible and effective as a risk management tool. The Government deals with the private sector through contract and can claim back a compensation payment if the Government Agency has defaulted – it operates like subrogation.

Through the IIGF, state authority over infrastructure has been decentralized towards a market mechanism in Indonesia. PPPs are based on the neoliberal view that the private sector can deliver services or infrastructure more effectively. Indonesia's guarantee fund also delegates the financial management to the private sector. While being a state-owned enterprise, the IIGF is designed by the World Bank to depoliticize infrastructure and further enhance privatization of infrastructure in Indonesia.

5. *Mariana Mota Prado, University of Toronto, Discussant*

Firstly, we need to ask what is a PPP? What kind of innovation are we talking about? In doing so, we can challenge Michael Trebilcock's view that a concession is a PPP and instead advocate the distinction we follow in Brazil that a concession is as a contract for provision of public services whereas a PPP is a form of partnership. The innovative part of the PPP is the contractual arrangement where there is bundling, risk transfer, and private capital.

Secondly, we can look to other types of innovations to deal with shortcomings and problems identified with PPPs – what is happening in Indonesia is not isolated, it is also occurring in Brazil through the Estruturadora Brasileira de Projectos (EBP), a company created after the PPP law to assist private entities in the design of PPP projects.

Other themes include the potential for tensions between evaluating development financing law on the basis of its virtues in legal terms and evaluating it on the basis of development outcomes. How is development financing law being used to transmit and impose principles or exercise of expertise? Is the state consenting to certain principles? We can also focus on the role of law in innovation – as forms of regulatory or legal innovation or as a channel for innovation, or an enabling or inhibiting environment for innovation. Furthermore, we need to always ask whose interests are served by particular innovations?

On the PPP in Brazil, what kind of innovations are in PPPs? Concession is not necessarily PPP. She suggested that the paper should focus on the unique forms of innovations such as the private bundling and how there is more private capital coming in. On this point, Michael Trebilcock does not agree on excluding concession altogether. Perhaps the more relevant difference should be on the arrangement of private sectors in existing projects and new projects. If in existing infrastructures the government enters into a management contract to manage the contract more effectively, this is not a new project.

She pointed out that the paper excludes privatization. After the privatization in Brazil, the concession continued but the state-owned partner becomes a private company. Concession is often brought in to the PPP concept, particularly in Brazil, because there is a private sector providing a service but there is no innovation in this area. What is actually referred as PPP in Brazil is elaborated in the 2004 PPP Statute regulating new contractual arrangements that can be folded into concessions. Therefore, the difference is between traditional concessions and PPP concessions. She suggested that the paper should narrow down the concept of PPP to what is happening in Latin America since 2004. As a note, in Indonesia, PPP had been a familiar concept but was not consolidated prior to the 2005 PPP Law. What were the consolidations? What happens in Indonesia is not isolated, in Brazil, there is also a company which design PPP projects, a partnership between BNDES and eight other banks. They offer expertise to design the complicated PPP contracts. It is a performance-based incentive: the company will not receive a fee if the design is not accepted by the government.

She subsequently discussed the return of government in PPP schemes. Brazil recently won the bid for the World Cup. In order to address the challenges that came, the government has declared that soccer stadiums are now operating under concessions. The concessions are actually recycled, where previously the state has withdrawn from this kind of projects (stadium, renewing airports, etc) but it has now resumed its roles. The government is back in the picture to attract investment through innovative PPP schemes.

She also questioned where there could be more innovations on PPP. One of the options could be how to regulate PPP projects with sub-national entities. For example, the State of Minas Gerais adopted the PPP concept before the 2004 PPP Law was enacted in Brazil. Ironically, the law now disallows them to work with the existing structure.

On PPP in Indonesia, Mariana Mota Prado identified the main proposition of the paper to be how global institutional formulas are adapted to local needs. But we need to inquire what the actual problems that drive the separation of the guaranteeing entity are. A few possibilities are: (1) opportunism of the government, (2) dysfunctional institutions where bureaucracy does not work as fast as the private sector, (3) lack of human capital, where once you create a new entity, you can actually hire new people and set up different kinds of incentives and start anew.

Some concerns about the Guarantee Fund mechanism included the issue of how to manage the risk through a market mechanism. She suggested that the paper should elaborate more on this notion of market mechanisms. The correlation of PPP and the BIT debate is also relevant. BITs have been designed in such a way that it provides too much guarantee with private investors so developing countries do not have a leeway in renegotiating contract terms. Who will be setting up this renegotiation in this context? The IIGF will only expedite the disbursement of guarantee. There has to be a structure concerning who defines the breach of contract and other important terms. If that structure is not there, the private sector can capture this gap very quickly. On this point, **Dudi Rulliadi** explained that the work of the IIGF is simply as a guarantor of the obligations of the public sector in the contract. If the public sector defaults, then the IIGF steps in. Because of this particular role, the IIGF can influence the public sector by educating them with good governance since the IIGF also always chase the public sector to pay back. The government assigned the role to IIGF to also initiate reform in the public sector, to not make policies that would adversely affect the projects.

On BNDES, **Mariana Mota Prado** agreed that BNDES has not been an agenda-setter in Brazil; rather, it has become an agenda-follower whereas it disburses money according to the government's agenda. It also has not been a "knowledge bank" in that it has not set up the duty to try actively discussing what is good for development. Why has it not expanded its role? Several possibilities are: (1) the high cost, (2) the middle-level bureaucrat who is not accepting of change, and (3) by keeping BNDES's funding to existing clients, the government can use it to retain political support from those existing actors.

On Conditional Cash Transfer (CCT) and the developmental state, she highlighted the need to identify where the innovation is. The paper discussed CCT as an innovative policy, but CCT is not being packaged as a development strategy. It will be interesting to see the political dynamics relating to why the government does not make a stance to use CCT to further development. She also suggested that the paper should address the point that the new developmental state is different than the old developmental state wherein they are promoting a new concept of development (akin to the Human Development Index formula: money + education + health equals development) versus just economic growth. The new developmental state addresses the demand side while the old one addresses the supply side. The new one responds to the electoral pressures while the old one responds to government directives (like BNDES as a follower). She asserted that there might be a tension in the relationship between the old and the new developmental state. An example of the tension is why Brazil finances big infrastructure projects while borrowing money to finance Conditional Cash Transfer. Does it mean that the old model should be eliminated or maintained?

5. *Open Discussion*

Tim Büthe highlighted the potential tension between **Michael Trebilcock** and **Mario Schapiro and David Trubek's** paper, where the former argues the importance of investment in large, long-term infrastructure projects while the latter criticizes the BNDES for engaging in large, long-term projects.

Lorenzo Casini commented that one of the problems of this project is in defining terms; not only of defining innovation but also defining PPP. When the term PPP is used in Europe, it would be about infrastructure. But if we move to the global level along the lines of what **David Gartner** discussed in Session 6 in the context of global health, the kind of public-private partnership is different. In addition, the reason for having the public intervention is that sometimes the private regime calls for intervention. For example, the reason for having this public intervention in the Brazilian World Cup projects is that the private party (FIFA) needed public endorsement, not only public money. This example highlights the importance to have this public-private interaction beyond the investment context.

James Gathii suggested that there should be a continuum from the old to new innovations, including those which can be replicated. Perhaps this panel showed that there is a continuum, that the new is always foreshadowed by what had existed before.

David Trubek asserted that on PPP, the important question is not whether the investment is good or bad, but it is a relative question of where the country should put their focus in funds. In response to **Mariana Mota Prado**, the government is ambivalent, which is why the BNDES does not seem to do a lot: because it is under pressure from the existing industries to

support them and it depends on the existing industries. It is not that the bank is failing to follow, but the government is also sending ambivalent signals.

Mario Schapiro in response to **Mariana Mota Prado** asserted that there is a difference in traditional concessions (regulation by cost) and concessions in the 1990s (regulation by price-cap) on the one hand, and PPP on the other, where it uses the concession framework but involving services, therefore the government is more actively involved. On BNDES, the problems are (1) it might be captured by vested interest, (2) there is no political incentive for the government to innovate if compared to the need to achieve short-term results, and (3) the profitability of big companies are more stable than start-up innovative companies, so the middle-level bureaucrats tend to support the big companies. This is relevant because the BNDES bonus depends on the profitability of projects, so the middle-level bureaucrats have incentives to support these traditional companies.

With regard to CCT, **Gaston Pierri** agreed that there is an open question about the definition of innovation. The CCT program still has the old definition of poverty and inequality, so it is not completely a new HDI-like approach. The CCT started in the 1980s as part of the World Bank policy for poverty reduction. This is also part of the Washington Consensus agenda. That is why there is some doubt whether this program is part of the old development but with new cosmetics.

SESSION 9 – CONCLUSIONS

Kevin Davis began his concluding remarks by noting that he was optimistic about producing a possible publication from the workshop, whether as a journal or an edited volume. He referred to previous IILJ publications as a possible model for such a workshop publication. There may be scope for publishing within the Oxford University Press series on *Law and Global Governance*. There were important and relevant questions, as well as points made during the workshop that needed to be taken into account. Among these were:

- Are these innovations? It is better to question rather than to assume. Are they novel and can be replicated? They could be more like customization or reform like in the Indonesian case discussed in Session 8.
- There is the question of the role of law, relating to whether the law actually matters in this subject. How serious should we take the rules that govern the capital nature of the World Bank? The question of role of law has been the recurring theme in this conference.
- Lastly, the "cause and consequences" analysis should also be part of the discussion.

In his concluding remarks, **Philipp Dann** thanked all participants for the presentations and conversations in a subject that resembled a journey in the revival of law and development.