EMİNE NUR ÖZTÜRK ALTERNATIVE DISPUTE RESOLUTION MECHANISMS AND COMPLIANCE IN INTERNATIONAL FINANCIAL INSTITUTIONS Bilkent University 2019

ALTERNATIVE DISPUTE RESOLUTION MECHANISMS AND COMPLIANCE IN INTERNATIONAL FINANCIAL INSTITUTIONS

A Master's Thesis

by
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Ankara

July 2019

To my family

ALTERNATIVE DISPUTE RESOLUTION MECHANISMS AND COMPLIANCE IN INTERNATIONAL FINANCIAL INSTITUTIONS

The Graduate School of Economics and Social Sciences
of
İhsan Doğramacı Bilkent University

by

EMİNE NUR ÖZTÜRK

In Partial Fulfillment of the Requirements for the Degree of
MASTER OF ARTS

THE DEPARTMENT OF
POLITICAL SCIENCE AND PUBLIC ADMINISTRATION
İHSAN DOĞRAMACI BİLKENT UNIVERSITY
ANKARA

July 2019

I certify that I have read this thesis and have found that it is fully adequate, in scope and in quality, as a thesis for the degree of Master of Political Science and Public Administration.

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ABSTRACT

ALTERNATIVE DISPUTE RESOLUTION MECHANISMS AND COMPLIANCE IN INTERNATIONAL FINANCIAL INSTITUTIONS

Öztürk, Emine Nur

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Supervisor: Assoc. Prof. Dr. Çerağ Esra Çuhadar

July, 2019

The relationship between compliance, accountability and good governance is important in terms of the mission and role of International Organizations in global order. Although these concepts are closely related to each other, the existing literature focuses mostly on the key components of the good governance, accountability and compliance with an institution centric way. In general, relationship between compliance, accountability and good governance has been also discussed theoretically. To elaborate on these significant concepts in practice, this study investigates the role of Alternative Dispute Resolution (ADR) tools in dispute resolution as part of the compliance process in IFIs by examining the initiation, implementation and monitoring of the ADR tools in compliance and dispute resolution process. The IFIs use ADR tools in compliance review and dispute resolution as part of their accountability mechanism since ADR methods are effective tools to protect accountability of the IFIs by complying with international rules, standards and regulations including social and environmental standards. IFIs have also provided detailed information on how their ADR mechanisms work in their websites and reports. Multilateral Development Banks (MDBs) have reflected the importance of compliance review function for accountability mechanism. However, the role of ADR tools of different IFIs in compliance process has not been adequately analyzed. Considering this gap, the following research questions direct

this study: How compliance processes have been initiated or conducted?, How results have been implemented?, How monitoring and evaluation of the implementation has been done? and (iv) What is the role of ADR tools in resolving the dispute?. By explaining the role of ADR tools in IFIs and selecting cases from IFIs, this study aimed to find answers for these questions which contributed to understand how compliance, accountability and good governance are related to each other in ADR mechanisms of the IFIs. Finally, the main findings of the study were reflected in conclusion section in relation to the role of the ADRs in compliance review and dispute resolution of the IFIs, which is in line with their forms, goals and missions addressing accountability and good governance.

Keywords: Accountability, Alternative Dispute Resolution (ADR), Compliance, Good Governance, International Financial Institutions (IFIs).

ÖZET

ULUSLARARASI FİNANS KURULUŞLARINDA ALTERNATİF UYUŞMAZLIK ÇÖZÜMÜ MEKANİZMALARI ve UYUM

Öztürk, Emine Nur

Siyaset Bilimi Yüksek Lisans Programı

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Uyum, hesapverebilirlik ve iyi yönetişim arasındaki ilişki uluslararası kuruluşların rolü ve misyonu açısından küresel düzende önemlidir. Uyum, hesapverebilirlik ve iyi yönetişim konseptleri birbirleri ile yakın şekilde ilgili olmasına karşın, mevcut literatür çoğunlukla bu konseptlerin temel öğelerine kurum özelinde odaklanmaktadır. Ayrıca, uyum, hesapverebilirlik ve iyi yönetişim arasındaki ilişki genellikle teorik açıdan ele alınmaktadır. Bu mühim kavramlara uygulamada daha ayrıntılı baktığımızda, bu çalışma Alternatif Uyuşmazlık Çözümü (AUÇ) araçlarının, uluslararası finans kuruluşlarındaki uyum sürecinin parçası olarak, uyum ve anlaşmazlık çözme sürecindeki rolünü araştırmaktadır. Bu amaçla, bu çalışmada AUÇ araçlarının anlaşmazlık çözmede nasıl uygulandığı ve takip edildiği ele alınmaktadır. Uluslararası finans kuruluşları AUÇ araçlarını uyum ve anlaşmazlık çözümü süreçlerinde hesapverebilirlik mekanizmasının bir parçası olarak kullanmaktadır çünkü AUÇ yöntemleri ile uluslararası finans kuruluşlarının çevresel ve sosyal standartlarını da içeren uluslararası kurallara, standartlara ve düzenlemelere uyularak, uluslararası finans kuruluşlarının hesapverebilirliğini korumada AUÇ yöntemleri etkili araç olmaktadır. Uluslararası finans kuruluşları kendi bünyelerindeki AUÇ mekanizmalarının nasıl çalıştığına dair internet sitelerinde ve hazırladıkları raporlarda kapsamlı şekilde bilgi sağlamaktadır. Çok

taraflı kalkınma bankaları uygunluk gözden geçirme sürecinin hesapverebilirlik mekanizması için önemini yansıtmaktadır. Bununla birlikte, AUÇ araçlarının uyum kapsamında birbirinden farklı uluslararası finans kuruluşlarındaki rolü yeterli düzeyde analiz edilmemiştir. Bu açığı göz önünde tutarak, şu araştırma soruları bu çalışmayı yönlendirmektedir: AUÇ araçları kullanılarak uluslararası finans kuruluşlarının çevresel ve sosyal standartlarını da içeren uluslararası kurallara, standartlara ve düzenlemelere uyum süreci nasıl başlamaktadır? Sürecin sonuçları nasıl hayata geçirilmektedir? Uygulama süreci nasıl takip edilmektedir ve değerlendirilmektedir? ve AUÇ araçlarının anlaşmazlıkların çözülmesi sürecindeki rolü nedir?. AUÇ araçlarının uluslararası finans kuruluşlarındaki rolünü açıklayarak ve uluslararası finans kuruluşlarından vaka örnekleri seçerek, bu çalışma uluslararası finans kuruluşlarında kullanılan AUÇ araçları kapsamında uyum, hesapverebilirlik ve iyi yönetişim arasında nasıl bir ilişki olduğunu anlamaya katkı sağlayan sorulara cevap bulmayı amaçlamıştır. Son olarak, bu çalışmanın temel sonuçları kapanış bölümünde, uluslararası finans kuruluşlarındaki AUÇ araçlarının uyumluluğun gözden geçirilmesinde ve anlaşmazlık çözmedeki rolü yansıtılmıştır. AUÇ araçlarının bu kapsamdaki rolü uluslararası finans kuruluşlarının hesapverebilirliğine ve iyi yönetişimine hitap eden hedefleri ve misyonları ile uyumludur.

Anahtar Kelimeler: Alternatif Uyuşmazlık Çözümü, Hesapverebilirlik, İyi Yönetişim, Uluslararası Finans Kuruluşları, Uyum.

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ABBREVIATIONS

ADR : Alternative Dispute Resolution

IO : International Organization

IFI : International Financial Institution

MDB : Multilateral Development Bank

WTO : World Trade Organization

ICSID : International Center for Settlement of Investment Disputes

WBG : World Bank Group

EIB : European Investment Bank

ADB : Asian Development Bank

AfDB : African Development Bank Group

EBRD : European Bank for Reconstruction and Development

IFC : International Financial Corporation

MIGA : Multilateral Investment Guarantee Agency

IADB : Inter-American Development Bank

IDA : International Development Association

IBRD : International Bank for Reconstruction and Development

UNCTAD : United Nations Conference on Trade and Development

UNCITRAL : United Nations Commission on International Trade Law

UNESCAP : The Economic and Social Commission for Asia and the Pacific

CAO : Compliance Advisor Ombudsman

FAO : Food and Agriculture Organization of the United Nations

IMF : International Monetary Fund

OECD : Organisation for Economic Co-operation and Development

ITUC : International Trade Union Confederation

ACP **:** African, Caribbean and Pacific Group of States

MFN **:** Most Favoured Nation

GATT **:** The General Agreement on Tariffs and Trade

SAI **:** Social Accountability International

BOT **:** Build-Operate-Transfer

EU **:** European Union

EC : European Commission

ILO **:** International Labor Organization

REP **:** Rajamandala Electric Power

PPP **:** Public Private Partnership

EPR **:** Emergency Preparedness and Response

COMESA **:** Common Market for Eastern and Southern Africa

CHAPTER I

INTRODUCTION

This thesis argues that it is necessary to understand the role of Alternative Dispute Resolution tools, which are becoming increasingly important in dispute resolution and compliance process as well as accountability and good governance, in International Financial Institutions' compliance with international rules, standards and regulations through specific case analysis. Thus, this study aims to understand the role of Alternative Dispute Resolution (ADR) tools in compliance and dispute resolution processes by examining case studies from different International Financial Institutions (IFIs). For that purpose, this study focuses on how ADR tools have been used to resolve disputes and comply with (i) rule-based international trade system as observed in WTO case and (ii) social and environment policies in the IFI-financed projects carried out by two institutions of the WBG, IFC and MIGA. Thus, the particular focus of this thesis is how initiation, implementation and monitoring processes of ADR tools are structured in compliance review. After analyzing these processes, the performance of the ADR tools in dispute settlement and compliance has also been discussed, specifically to see whether these tools helped the settlement of the dispute at hand. To examine the role of ADR tools in IFIs' compliance process comprehensively, the following four research questions direct this study:

(i) How compliance processes have been initiated or conducted in the IFIs?

(ii) How results have been implemented by the IFIs?

(iii) How monitoring and evaluation of the implementation has been done?

(iv) What is the role of ADR tools in resolving the dispute?

With all these questions, good governance, accountability and compliance have been addressed in IFIs by dwelling on their relationships.

International organizations (IOs), particularly those responsible for the areas of development assistance and finance, have embraced good governance as a key variable in their operations and decision making processes since the beginning of the 1990s. Even though good governance has distinct connotations, in essence it is built upon accountability, transparency and inclusive participation (Wouters & Ryngaert, 2004). Accountability, on the other hand, as one of the main pillars of good governance, rests upon compliance, enforcement, answerability as well as transparency (Ebrahim & Weisband, 2007). Although accountability has different facets for various organizations, the International Financial Institutions (IFIs)[1] have well-specified elements for accountability. One of the main tools for accountability in the IFIs is the compliance review process, purporting to guarantee that IFIs' operations are in line with international rules, standards and regulations and their operational guideline. ADR mechanisms have been used as one of the main means of ensuring compliance. The design of accountability mechanism assumes that effective compliance processes strengthen the accountability of the IFIs, and this will contribute to good governance. While good governance is a phenomenon with broad ramifications for both states and IOs, this thesis concentrates on a specific aspect of good governance and aims to understand the role of ADR tools in compliance and dispute resolution processes of the IFIs.

[1] Types of IFIs mainly include Multilateral Development Banks, Bretton Woods Institutions, Regional Development Banks, Bilateral Development Banks and Agencies and Other Regional Financial Institutions.

As the IFIs are designed to uphold transparency, answerability, compliance and enforcement in their decision-making and implementation processes; accountability serves as one of the main pillars of good governance within the IFIs. To further institutionalize the accountability process, the IFIs set up compliance review step in their operation cycle. Compliance review processes aim to ensure that the states, investors, and other stakeholders of the IFIs are in compliance with international rules, standards and regulations including social and environmental standards, and the results of ADR tools. As part of their accountability mechanism, the IFIs have been using ADR tools in compliance review and dispute resolution.

To clarify main concepts of this study, I will briefly discuss common definitions of good governance, accountability, compliance, and ADR mechanisms by revealing the interlinkages between them both in general terms and specifically within the IFI context.

Good governance has been defined as "the organization of collective action through institutions defining means, aims and rules" by Murphy (2002). Since economic reform programmes failed during 1990s due to the lack of strong and accountable institutions as well as an effective regulatory framework. This situation points to the increase in states' regulator role; however, it also provides civil and political rights for non-state actors (Murphy, 2002). In this respect, Okoth-Ogendo has defined good governance as accountability of the state to civic activism, active state-society relations, and most importantly constitutional order based on those values (Okoth-Ogendo, 1995). The UN and the EU have also described good governance by underlining human rights and the rule of law with a particular focus on legal realm (Boutros-Ghali, 1992).

Good governance, for states, has been defined as being legitimate, efficient, and largely advocated by citizens and a strong civil society. In the light of the recent developments, the rule of law, accountability, and transparency can be considered core elements of good governance. Good governance by IOs is similar to national or local good governance. Governance principles such as transparency, accountability, efficiency and participatory governance reflect universal values and so they can be applicable to any polity or organization. However, good governance requirements have been recently considered to be relevant for international institutions as well. As IOs' decisions are becoming more binding on countries, individuals and enterprises, all stakeholders expect to see more accountable governance in IOs. In 2002, International Law Association (ILA) Committee prepared a report discussing the principle of good governance in IOs. According to this report, good governance in IOs can be defined with six elements: Transparency in both the decision-making process and the execution of institutional and operational decisions; participatory governance; access to information open to all those possibly concerned or impacted by the decisions at stake; well-functioning of the international civil service; sound financial management, and reporting and assessment mechanisms (Wouters & Ryngaert, 2004). According to Weisband and Ebrahim (2007), accountability has been defined with four main dimensions, which are transparency, answerability or justification, compliance, and enforcement. In essence, compliance is acting in line with the outcomes of hard and soft laws and international best practices. The recurring theme in the good governance and accountability definitions is transparency in decision making and implementation. As transparency is one of the key pillars of accountability, this implies that accountability becomes the core element of good governance.

Compliance is one of the key pillars of accountability. It can be defined as implementation of the results of adjudication through courts and alternatives to adjudication. The alternatives to adjudication defined as Alternative Dispute Resolution (ADR) mechanisms. ADR tools can be described as any method of resolving disputes outside the court system by reaching a mutually satisfactory outcome between two parties. As definition indicates, there are multitute of ADR tools such as negotiation, mediation, conciliation, consultation, ombuds(man), panel, and arbitration. The different forms of ADR generally fall into two categories: binding and non-binding.

In non-binding ADR methods, the parties to the dispute settle their problems in a voluntary manner, in some cases with the involvement of a neutral third party such as a mediator or facilitator. This form mainly comprises of negotiation, mediation, conciliation, consultation, and ombudsman as well as joint fact-finding, information sharing and facilitated dialogue. In non-binding ADR, disputants have full control over their dispute. They can walk away from the process when they want. In binding ADR methods, disputants voluntarily agree to meet together with a neutral, third-party arbitrator who essentially has the role of judge and jury. This form is more like adjudication where third party makes a decision for the disputants which is binding over them. When the parties agree to use binding tools, they must comply with the resolution that arbitrator produces. Binding tools include panel and arbitration.

IFIs frequently use both binding and non-binding ADR tools in their compliance review and dispute resolution processes as complementary and intermediary tools in order to ensure that the stakeholders are in full compliance with international rules, standards and regulations including social and environmental

standards and ADR results. These tools use dialogue methods in conflict resolution and after a number of advantages such as preserving long term relations and improving accountability. To illustrate how IFIs conduct ADR tools in compliance review process, I will first elaborate on ADR mechanisms in prominent IFIs.

World Bank Group (WBG) essentially benefits from ADR mechanisms mainly through arbitration and mediation (i) to settle investment disputes, corporate governance disputes, and (ii) to comply with environmental, social and governance standards. More importantly, states have preferred ICSID as a forum for investor-state dispute resolution in most international investment treaties and in various investment legislation and agreements. ICSID prefers using binding ADR tools in dispute resolution process.

The World Trade Organization (WTO), serving as the main body to resolve international trade disputes, has a well-functioning dispute settlement system to deal with trade disputes via consultation -if necessary negotiation, mediation, panel and arbitration (Bingham, 2009).

The two institutions within the UN-system, the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Commission on International Trade Law (UNCITRAL) have been resolving the trade and investment disputes through both binding and non-binding ADR tools. The UNCTAD investment dispute settlement navigator also contains an extensive and regularly updated collection of treaty-based international arbitrations between countries and investors in Cairo Regional Center for International Commercial Arbitration (CRCICA), the International Chamber of Commerce (ICC), the International Center for Settlement of Investment Disputes (ICSID), London Court of International

Arbitration (LCIA), Moscow Chamber of Commerce and Industry (MCCI), the Permanent Court of Arbitration (PCA) and Stockholm Chamber of Commerce (SCC) (UNCTAD, 2018).

Good governance, despite being complex and multi-faceted, requires well-embedded accountability and compliance. According to the OECD's definition, the major characteristics of good governance are participatory, consensus-oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive decisions and following the the rule of law. This definition places accountability at the core of the good governance, while compliance has been considered as one of the main pillars of accountability, and therefore, compliance has been examined in framework of the good governance in this study.

The concept of compliance in the IFIs context can be described in three aspects. First, the IFIs can solve the commercial disputes (i) between two states or (ii) investors and states through ADR mechanisms, and countries comply with the results of these mechanisms. Second, the IFIs need to consider how to comply with its own policies in context of project financing. Operationally, investors need to comply with social and environment policies in order to be eligible for IFI funding (Lewis, 2018). Third, domestic regulations can comply with international rules, standards and regulations through IFIs generated standards and best practices (von Stein, 2010).

Recently, ADR mechanisms, used also heavily in collaborative governance, have been preferred by the IOs including the IFIs in conflict resolution processes in addition to sanction based compliance methods. Two key phenomena can help explain the rise in the usage of ADR mechanisms. First, these mechanisms are based

on consensual and interest-based dispute resolution (Ansell, 2012). Second, countries expect more accountability from IOs' works in terms of IOs' enforcement capacity on countries for compliance (Woods, 2001). If IOs can improve their accountability by providing efficient compliance process for the states and investors, this will have a positive effect on their credibility in the eyes of the stakeholders. In this respect, ADR mechanism can strengthen the credibility of IOs as the effective tools of compliance process. To indicate the role of ADR tools in dispute resolution and compliance process, I will dwell on specific IFIs' usage of ADR mechanisms in settlement and compliance.

This study begins with a comprehensive literature review on good governance, accountability, compliance, importance of the accountability and compliance standards for the IFIs, and ADR mechanisms as part of the compliance and accountability function of the IFIs. Secondly, I explain the usage of non-binding ADR methods in compliance processes of three IFIs: WTO, IFC and MIGA. While there are various ADR tools, these mechanisms fall broadly into two categories: binding and non-binding. This thesis focuses solely on non-binding types of the ADR tools because of limited data availability, which is the case for especially binding tools. In chapter III, IV and V, specific cases will be discussed to shed light on the role of ADR mechanisms in compliance process. In chapter VI, the findings of this study will be discussed by focusing on the performance of ADR methods in resolution process in concluding part of thesis.

CHAPTER II

LITERATURE REVIEW

In this section, good governance, accountability and compliance concepts will be discussed in relation to ADR, which refers to any tool other than trials to help settle disputes in an amicable way in IFIs.

2.1 Good Governance

Although a thorough and consistent definition of good governance has not been observed in the literature, some scholars, IOs, and particular IFIs have delved into this notion in line with the changes within the international system. Good governance has been mainly defined as being legitimate, effective, and largely supported by citizens and a strong civil society. In the light of the recent developments, the rule of law, accountability and transparency can be envisaged as the key components of good governance in states (Johnston, 2018). Diamond puts forward that well-established civil society is significant for good governance and four key pillars have underpinned the active civil society. Similar to Johnston's point, these four elements are stated as the capacity of the state, commitment to the public good, transparency and rule of law. Diamond concludes that once these elements of good governance function properly, they can prompt improvements both in political progress and investment climate (Diamond, 2018). Besides Johnston and Diamond, Naveed underlines that some IFIs like World Bank Group, IMF, Asian

Development Bank and UNDP, have adopted similar approaches by emphasizing four key elements of good governance in portraying their own good governance themes (Naveed, 2015).

Different IOs have also defined governance from their perspectives. According to OECD, good governance is "characterised by participation, transparency, accountability, rule of law, effectiveness, equity," (OECD, 2018) whereas IMF figures out that good governance "refers to the management of government in a manner that is essentially free of abuse and corruption, and with due regard for the rule of law" (IMF, 2007).

From the perspective of World Bank Group, good governance can be defined by focusing on the process which indicates the role of power in allocating the economic and social resources for the economic development (World Bank Group, 2018a). In essence, the Bank expounds good governance as providing an effective management for boosting sustainable economic and social development. Thanks to good governance, countries can have a more effective policy-making and so improve financial progress, social development and institutional framework, and come up with robust institutions. However, capacity of the governments in preparation of their plans and strategies, which is important for efficient allocation of resources and implementation of well-grounded policies, has impinged upon their performance in pursuing these goals (World Bank Group, 2018b). WBG has also introduced prerequisites of good governance as borrowing conditions (Wouters & Ryngaert, 2004). For the United Nations Development Programme, governance is defined with operationalization of the monetary, executive and political power in order to resolve the problems of the state. It consolidates instruments, procedures and organizations,

through which people evince their concerns, use their legal rights, fulfil their responsibilities and settle their disputes both individually and collectively.

The content of good governance in IOs has different manifestations in line with the mandate of the IO. IOs with political mandate promote human rights and rule of law whereas IOs with economic and financial mandate foster macroeconomic reforms and development finance. In that vein, while the content of good governance in financial institutions has been based on good macro-economic governance in countries, which is related to the capacity of countries to implement the macro economic reforms and effectively manage the development assistance, good governance has been essentially described with human rights and rule of law in political organizations.

To illustrate, as stated in previous paragraph, WBG, described good governance in a solely economic way since good order paves the way for robust investment climate and efficient resource allocation. WBG has argued that many developing countries have passed up the benefits of inclusive economic growth due mainly to the weak governments and ineffective public administrations. WBG's social and environmental standards for its investment projects have also contributed to the consolidation of global governance system with increasing public authority led by international institutions (Dann & Michael, 2018). Besides WBG, IMF, as another pioneer IFI, has also paid attention to openness in monitoring of economic and financial policies of member countries, while assessing the economic policies of the countries. To that end, IMF strived for redressing the balance between openness -as one of the key pillars of good governance- and confidentiality -as the requirement for international banking and market sensitive information-. On the contrary, the European Union (EU) has colligated good governance with human rights and the rule

of law in its development assistance programmes since the first usage of good governance in 1991. In addition to the EU, United Nation (UN) has also implicitly described good governance with a particular focus on the rule of law, democracy and human rights. Despite these mandate-oriented differences, the key principles are still the same for each country. In this context transparency, accountability and participation are increasingly becoming at the centre of good governance both in financial institutions and political organizations.

The elements of good governance in states do not necessarily differ from good governance for IFIs since governance principles such as transparency, accountability, efficiency and participatory governance indicate the common values of global order and could be valid for any polity or organization. However, considering the important impact of IFIs' decisions on countries, individuals and enterprises, International Law Association (ILA) Committee[2] prepared a report discussing the principle of good governance in the context of IOs' structures in 2002. According to this report, good governance in IOs can be defined with five elements: (i) Transparency in both the decision-making process and the implementation of institutional and operational decisions, (ii) participatory governance, (iii) access to information by all potentially concerned or affected people from the decisions at stake, (iv) well-functioning of the international civil service and (v) sound financial management and reporting and evaluation mechanisms.

I will also dwell on the evolution of good governance in some IFIs in order to elucidate the roots and main pillars of governance. This could also shed light on the relationship between (i) governance and (ii) accountability and compliance with

[2] In May 1996, the International Law Association (ILA) established a Committee on the Accountability of International Organizations.

ADR. To do this, I will elaborate on the literature on good governance by WBG, IMF, WTO, ADB and UNDP. Although UNDP is not categorized as IFI, IFIs are significant development partners of UNDP in context of Sustainable Development Goals (SDGs). Thus, governance structure of the UNDP will be also briefly added to this section.

Good governance in IFIs -IOs with economic and financial mandate- passed through different stages. Yet, these cycles evolved around accountability, transparency and participatory governance. At the initial stage in 1990s after the cold war, when the good governance concept was first introduced to the IFIs, good governance was construed as a prerequisite for borrowing. But in the last two decades, good governance became an indespensible pillar of economic growth and sustainable development efforts. In the last two decades, the issue of good governance has given considerable attention to achieving sustainable economic development in international financial governance (Rittich, 2005).

WBG was the first IO to refer to good governance once African development crisis erupted in 1989. WBG ascribed this crisis to weak governance in African countries by underlining importance of good governance in borrowing countries. However, WBG was accused of lack of transparency and accountability due to negligence of its duty in providing development lending in the review of the IFIs by Meltzer Commission in 2000. WBG was actually expected to provide loans only for the purpose of development and poverty alleviation like the Asian Development Bank, the African Development Bank and the Inter-American Development Bank. In line with this goal, IFC and MIGA were also aimed to be repealed and WBG was envisaged as a grant-making anti-poverty agency. These profound alterations would

also culminate in more effective and accountable governance (Wouters & Ryngaert, 2004).

Although WBG was severely criticized in terms of lack of accountable governance, it achieved to make progress in implementation of good governance standards in IFIs. To that end, WBG founded the Department of Institutional Integrity to scrutinize the allegations of corruption, and an audit committee. It built up an Inspection Panel dealing with the claims from individuals affected by non-compliance with World Bank Group policies and procedures based mainly on environmental standards. WBG's policy actions indicate that most elements of the good governance reflected in ILA's report have been preserved by the WBG. WBG puts emphasis on participatory governance and transparency in fulfilling its responsibilities (Wouters & Ryngaert, 2004). IFC and MIGA, as WBG institutions, have used also Compliance Advisor Ombudsman (CAO) mechanism in order to enhance their accountability and governance structures. CAO, independent from IFC and MIGA management, has been acting as an ombudsman, taking complaints from people adversely affected from IFC or MIGA funded projects and initiating to resolve their problems through ADR methods including mediation, joint fact-finding, information sharing and facilitated dialogue. They decide which ADR mechanism is most appropriate to handle the case. In this manner, individuals who are negatively influenced from the project can complain to the CAO as part of the CAO's ombudsman function.

Before 1990s, IMF claimed that it was a technical institution, which is accountable for only its members. In that vein, IMF did not prefer publishing its documents publicly by claiming the documents' confidentiality. However, openness was critical for good governance and IMF took measures to enhance its transparency.

In this respect, IMF commenced information disclosure in 1994 with the systematic release of reports on recent economic developments, which are background documents to Article IV Consultations and Policy Framework Papers. In 2001, IMF's Executive Board settled Independent Evaluation Office (IEO) so as to strengthen the IMF's external credibility by undertaking objective and independent evaluation of the Fund in a transparent manner. Independent evaluation of the organization actually serves for the two main objectives: accountability and learning from experience. First, evaluation paves the way for collecting the information from the previous steps and helps Fund learn from internal and external pressure. Second, having an independent evaluation within the Fund increases IMF's political power and credibility in the eyes of public. Although IMF reinforced its good governance by being more transparent and introduction of the IEO, all these attempts are concerned with its own governance. Actually, IMF does not carry out any actions to foster good governance addressing IMF's decision-making process including voting system and IMF's quotas, and the impact of the IMF's activities on local communities. These deficiencies have adverse effects on two main elements of good governance, participatory governance and well-functioning of the international civil service, as reported by ILA in 2002 (Wouters & Ryngaert, 2004).

Like IMF, WTO did not proclaim its documents on its website since it paid attention to properly maintaining negotiating positions between states. However, document restriction explicitly hampered transparency and public information. Therefore, the General Council of the WTO to some extent removed the constraint on documents in 2002. Another major development in WTO's good governance was the foundation of the Dispute Settlement Mechanism (DSM) in 1995. DSM pioneered the rule of law in international economic and financial organizations. More

importantly, WTO contributed to the stability of global economy with the establishment of the DSM considering that the dispute settlement is at the core of the multilateral trading system. The WTO's procedure stresses the rule of law, and it makes the trading system safer and more predictable. In line with the WTO's mission in global trade system, all states have the right to apply for the DSM in case of any trade dispute. The DSM is basically designed by hinging on well-defined rules, with concrete timetables for terminating a case. Keeping transparency, following rule of law and participatory governance have a significant role in resolving the disputes.

The Asian Development Bank also puts emphasis on accountability, participation, predictability and transparency as the core elements of good governance. The Bank considered the establishment of effective accountability mechanisms in order to check the efficiency of public officials. Public and private partnership is promoted in several areas in line with participation. Predictability requires a fair environment for the resolution of financial disputes, effective public policies and laws. Furthermore, transparency reinvigorates consciousness of the public for governmental policies, rules, laws and regulations. Access to information illuminates governmental policies, which may ultimately improve economic activities in the private sector and mitigates corruption in public sector (Asian Development Bank (ADB), 2018).

The UNDP as well embraces accountability, transparency, participation, rule of law and inclusiveness as fundamental elements of good governance. Taken together, they guarantee the economic, social and political preferences and fair distribution of growth. UNDP mainly describes governance in three aspects, administrative, political, and economic. Administrative governance is the procedure of policy implementation. Political governance is the way of management to build up

strategy. Economic governance is defined with administrative procedure affecting a country's economic performance and its relationships with other economies (Naveed, 2015).

2.2 Accountability

Accountability is adopted as one of the key pillars of the good governance. As Lindberg argues, the core of this concept has based mainly on John Locke's theory of the superiority of representational democracy, stating that accountability becomes feasible providing that the governed are separated from the governors (Lindberg, 2009). Still, we see the similar pattern of accountability in principal-agent relation with regard to transmission of power. In the last ten years the concept of accountability has been extended to IOs as well. Another change occurred in terms of the responsibility for IOs' conducts. As the legal personality of IOs entails a responsibility for their conduct, the relationships of the IOs with their member states, other IOs and third parties were more focused, and the facets of the accountability increased. Also, since IOs expand their roles and activities in vast number of areas of international life, states, other IOs, and third parties can sort out the conflicts among them via IOs (Suzuki & Nanwani, 2005). Therefore, if the accountability of the IOs has not been improved adequately, stakeholders can lack an objective and global platform to resolve their disputes. This can imply that accountability has played a significant role for the IOs to sustain and improve their credibility in the eyes of all stakeholders.

Definition of accountability varies among scholars, institutions and areas, yet there still exists a common approach. Schedler examines the different sub-types of accountability and conceptualizes accountability in terms of answerability and

enforcement (Schedler, 1999). Weisband and Ebrahim find that global accountability has four main items, which are transparency, answerability or justification, compliance and enforcement (Ebrahim & Weisband, 2007). Accountability in the context of IFIs can be explained through IOs' responsibilities emanating from the legal personality of IOs and their role in protecting the rights of citizens and communities in IFI-funded projects in line with the social and environmental policies.

In the first aspect, according to Suzuki and Nanwani, IOs' legal entity becomes to some extent enforcement mechanism on third parties. However, members do not have to comply with IOs' decisions. IOs also aim at maintaining public order and improving global governance in line with their legal entity. In this respect, their legal personality requires responsibility for their conduct. With these developments, the relationships of an IO with its members, other IOs, and third parties have gained importance. Various forms and ranges of accountability in IOs have also emerged from these relations (Suzuki & Nanwani, 2005).

Considering the IOs' diverse fields of expertise, accountability may take different meanings. As the first report of the ILA's Committee of Accountability of IOs stated, accountability is not a common notion having an homogeneous application since the inflexible approach has not been congruent with intricacies of international system. Contrary to the uniform structure, accountability is versatile and has a range of facets, with different levels of consequences including monitoring, evaluation and sanctions.

With the expansion of the IOs' roles in international activities, IOs need to take more responsibility for their interactions with other stakeholders especially non-state entities such as individuals and non-governmental organizations. To achieve a

comprehensive participation in IOs, they have also developed accountability tools to use them in practice. Similar to Suzuki and Nanwani, Burall and Neligan argue that accountability needs to be thought in the light of a more comprehensive responsibility, which points to developing policies and procedures, forming mission and values, and evaluating performance with regard to IOs' goals and responsibilities (Burall & Neligan, 2005).

These developments culminated in the establishment of inspection functions or accountability mechanisms for multilateral development banks (MDBs) and other IFIs, allowing third parties to complain about negligence of a bank's internal policies and procedural requirements like dispute resolution in trade and investment areas or compliance with environmental and social standards in implementing IFI funded projects. Since Alternative Dispute Resolution mechanisms play a key role in compliance and dispute resolution process in IFIs, they will be analyzed under the compliance concept in the following part of the chapter.

2.3 Compliance and ADR Mechanisms

Compliance can be defined as the implementation of the results of adjudication through courts and alternatives to adjudication in alternative dispute resolution process. ADR is comprised of any method of resolving disputes outside the court system by reaching a mutually satisfactory solution between two parties. In this thesis, compliance term is envisaged that member states and their nationals, specifically legal persons established under the member state's laws and regulations act in accordance with international rules, standards and regulations set forth by the IFIs.

Considering the rise in conflicts in international area in recent years, Bingham (2009) states that IOs can resolve international disputes through participatory and consensual approach, which may significantly contribute to maintaining their accountability via reconciliation. This approach is named alternative dispute resolution, as part of the collaborative governance, and it can provide benefits for all stakeholders in global community with constructing more transparent governance. Moreover, she also emphasizes the significant role of ADR mechanisms, in the context of the settlement of the international disputes, by stating that ADR can be the sole form of governance for international disputes due to absence of the single authoritative sovereign judiciary. All international tribunals are founded via an agreement of nations to submit to their jurisdiction; they are all types of mediation and arbitration for this purpose. Prominent examples include the Court of Arbitration for Sport, the North American Free Trade Agreement, the World Trade Organization, and the International Court of Justice. Besides these instances, the European Union conducts national and regional projects to build ADR practice both through the courts and independent from the courts, yet in pursuance of the justice system, for civil and commercial disputes.

Bingham (2009) also suggests that, in the last decades, IOs use ADR mechanisms particularly to handle the civil and commercial disputes including investment, trade and development disputes, as these tools possess a number of advantages by using dialogue method in conflict resolution, preserving long term relations and improving accountability. In this respect, IFIs frequently use both binding and non-binding ADR tools in their compliance review and dispute resolution processes in order to ensure that the stakeholders are in full compliance with international rules, standards and regulations including social and

environmental standards and ADR results. When complainants apply to the non-binding tools or binding tools due to non-compliance with environmental and social rules or procedures, the process starts at relevant units of the IFIs by bringing together the complainants, respondents and other related stakeholders like NGOs. ADR tools possess a number of advantages because they use the dialogue based methods in conflict resolution. Thus, this process contributes to preserving long term relations and improving accountability since they are used in transparent and participatory manner.

2.3.1 Features of the ADR

ADR tools can be described as informal compared to litigation since they are more flexible in terms of process. Parties could choose their method and suitable timelines to resolve their conflicts rather than legal procedures having binding effects on two sides. Besides that, other stakeholders that are excluded from the formal system like courts could also participate in the resolution process led by ADR mechanisms. Thanks to inclusive participation and transparency in resolution and compliance process, ADR is more likely to preserve the long term relationships between disputants (Ngombane, 2014).

Some disputes are multi-party disputes including governments, public interest groups or non-governmental organizations, private companies and individuals. Under this circumstance, ADR is one of the most appropriate platforms to discuss and resolve the interconnected conflicts by providing a direct communication platform for a plenty of decision-makers. While the third party is selected by the designated authority in litigation, the third party is determined by the conflict parties in ADR tools. The third party can meet with two sides separately rather than restricted

timelines which should work for both sides of the conflict. Third party helps parties improve their relationships, increase communication by using effective problem resolution techniques that satisfy both parties (Moore, 2014).

Litigation could also require more time to terminate disputes and this could bring about more expensive resolution process than ADR tools. Since ADR processes may be cheaper and faster than litigation, the transaction costs of dispute resolution are reduced (Mnookin, 1998). Thanks to inexpensiveness of the ADR processes, disadvantaged groups benefit more from ADR tools in dispute resolution process (Ngombane, 2014).

2.3.2 Types of ADR

As definition of ADR implies, there are multitude of ADR tools such as negotiation, mediation, conciliation, consultation, ombuds(man), panel, arbitration and med-arb. The different forms of ADR generally fall into two categories, binding and non-binding.

In non-binding ADR form, the parties to the dispute settle their problems in a voluntary manner, in some cases with the involvement of a neutral third party. There is a variety of different non-binding ADR mechanisms used in IOs, which are negotiation, mediation, conciliation, consultation and ombuds. On the other hand, in binding ADR form, disputants do not have control over the decisions of a neutral third-party arbitrator who essentially has the role of judge and jury; this form involves some manner of adjudication. When the parties agree to use binding tools, they must comply with the resolution that arbitrator produces. There are also a range of binding tools as such panel, panel review and arbitration.

Negotiation is a process where parties jointly seek an agreement without the intervention of a third party to achieve an outcome with respect to their differences (Katz & McNulty, 2019). It is voluntary and contributes to maintenance of long term relationships. The success of the negotiation hinges to a large extent on the endeavors of the disputants for resolution. In some cases, resolution process can fail since two parties could differ from each other in terms of power and level of knowledge (Ngombane, 2014). Negotiation has been conducted in different ways. Therefore, it can take place regarding a wide range of issues between two or more parties in forums. The results of the negotiation can also have impact on parties' nations and global order as well as parties themselves (Cheldelin, Druckman, & Fast, 2003).

Mediation, which is informal and non-binding process, in which negotiation is supervised by an impartial third party, mediator. Mediator is selected by the two sides of the dispute in order to identify participants' issues and interests, assess all options and compromise on the best solutions (Derezotes, 2013). The role of mediator is to consider all views and facilitate negotiations and promote disputants to reach an agreement. Parties of the dispute and mediator sign mediation confidentiality agreement since participants need to ensure the confidentiality of the process in order to reveal their positions and other sensitive points (Taylor, 2019). Similar to other non-binding tools, mediation is a voluntary process (Ngombane, 2014).

Parties often achieve resolution through the sharing of information and considering each party's concerns (Massachusetts Supreme Judicial Court/Trial Court Standing Committee, 2019). Information sharing could be considered as part of the mediation process. In this process, mediator conduct information exchange

with all parties or one party/some parties. Put another way, process can be confidential or open to all parties. Mediators could prefer the format for information sharing (Moore, 2014).

Similar to mediation, conciliation is an informal, flexible, confidential and interest based process in which two sides voluntarily seek consensus building with the help of a conciliator (Dispute Resolution Hamburg, 2019). Like mediator, the impartial conciliator only facilitates the conciliation process while the disputants make the effort to settle their conflict. However, while conciliator plays an active role in the dispute resolution process like proposing a solution to settle the dispute, mediator assists the parties to arrive at a mutual solution by themselves during the mediation process (Paris Centre of Mediation and Arbitration, 2019). The process is so flexible that parties can determine the timing, structure and content of the conciliation proceedings (Ngombane, 2014). Sometimes, conciliation is known as "directive mediation" or "formulator-mediator" as opposed to "facilitative-mediation".

In consultation, parties discuss their conflict to find a satisfactory solution through the bilateral consultations between them (Australian Government Department of Foreign Affairs and Trade, 2019). Consultation process can occur without third party or with third party. Third party consultant aims at facilitating dispute settlement process to settle social conflicts and improve relationships. As distinct from broader category of conflict resolution practice, consultation can help the usage of main ADR tools as such mediation rather than being a key tool in settlement process (Cheldelin, Druckman, & Fast, 2003).

As far as, ombuds is concerned, it is another commonly used ADR form. Ombuds is more like a conflict consultant or coach. According to some scholars, there is no commonly agreed definition of terms used to describe ombudsman procedures like informal resolution, conciliation, mediation, and settlement (Creutzfeldt & Gill, 2018). However, ombudsman schemes can be described as a flexible tool to facilitate the dispute resolution process. Therefore, as part of the dispute resolution processes, ombudsman schemes are able t o provide a number of alternatives to disputing parties. This can comprise of information giving, conciliation, mediation, use of experts, adjudicative approaches and, in some cases, use of formal methods. The nature of the conflict and the regulatory or statutory context in which the scheme operates will determine the exact processes and general structure of the ADR scheme (Gill, Williams, Brennan, & Hirst, 2018). IFC and MIGA's CAO mechanism has fulfilled the ombudsman role to resolve the conflicts between parties by selecting appropriate ADR tools.

Facilitation is a process in which a neutral third party helps a group work together more effectively to identify issues and solutions, provide a coordinated discussion between multi-party groups and reach a consensus by providing process leadership (Derezotes, 2013). Although mediation and facilitation differ in terms of their goals and methods, the dialogue facilitator can contribute to the ultimate success of mediation by engaging the parties (Pilar Vaile-ADR Explained, 2019).

In joint fact-finding (JFF), a neutral third party is chosen by the parties first to receive information and listen to arguments from the parties to a factual or technical disagreement. Then, he/she may investigate the issues in dispute himself or herself, and lastly reports to the parties with findings of fact and recommendations based on those findings. The fact-finding process is informal and the neutral's

recommendations are non-binding. The parties use these findings and recommendations to help settle their dispute through direct or assisted negotiation (The Interior Board of Land Appeals (IBLA), 2018). In this manner, JFF, which can be considered as *mediation within mediation*, is an attempt to settle a sub-conflict about facts in an effort to cope with the overall conflict (Schultz, 2019). JFF is a consultative public engagement strategy which has been generally used to settle disputes in controversial environment, energy and social policy issues (Adler, 2019).

Arbitration in which the parties of a dispute try to compromise by a formal agreement has been conducted by arbitrator. Arbitrator aims to resolve the disputes and make an arbitral award by considering arbitration hearing. Award has been subject to recognition and enforcement proceedings; therefore, it is binding on each side (Ngombane, 2014).

These different models of the ADR can be combined. To illustrate, consultation can be defined as the pre-negotiation function to improve the relations between parties. Having boosted the parties' communication thanks to consultation, mediation can be used to analyze and de-escalate the conflict. It can be inferred that different third party interventions could have positive impact on different stages of a dispute resolution process (Fisher & Keashly, 1991). This positive effect can also be observed in ADR mechanisms of the IFIs. To illustrate, WTO members can complement two different ADR tools, which are consultation and panel, in some dispute resolution processes (Ngombane, 2014).

Panel mechanism, a quasi-judicial body in order to resolve disputes between two or more parties, is often binding like arbitration. It has been established in case of any request for panel review. However, it differs from arbitration in terms of the

number of panelists. Panelists, who are neutral and experienced in a wide range of areas from finance to biotechnology, have been appointed by arbitration and mediation organizations like mediation centers and arbitration courts. As for the IOs and IFIs, panel has been observed especially in WTO cases in case of failure of the consultation process between disputants. Panels are comprised of three or at most five members, yet they are temporary. New panels are built up for each dispute. Panelists assess the cases in terms of their factual and legal aspects and prepare a report about their findings on complainants' claims and actions' compliance with WTO rules (Ngombane, 2014).

As an illustration of both binding and non-binding ADR tool, mediation and arbitration have been combined in med-arb process. An impartial third party, who is selected, helps parties resolve their conflicts. Process starts with mediation and parties try to reach a mutually satisfied outcome. If parties cannot compromise, third party undertakes the role of arbitrator to settle the dispute. Unlike win-win solution of the mediation process, arbitration gives rise to win-lose solution. Since the neutral is the same person in mediation and arbitration processes, neutral has the information on dispute's details during arbitration. Therefore, both resources and time are efficiently used in med-arb process. Generally this process does not culminate in binding results, and this situation can prevent parties from explaining their views on dispute (Cheldelin, Druckman, & Fast, 2003).

2.3.3 ADR Mechanisms in IFIs

The IFIs have been mostly implementing negotiation, consultation, mediation and conciliation as non-binding ADR mechanisms in dispute resolution field and in compliance review processes. These institutions have also been using panels and

arbitrations as binding ADR tools in general. To understand how IFIs have been implementing these ADR mechanisms in dispute resolution and compliance review, in the next section I examine dispute resolution and compliance processes through binding and non-binding tools in particular IFIs including WTO, IFC and MIGA, ICSID, EIB and other Multilateral Development Banks (MDBs).

2.3.3.1 ADR in World Trade Organization (WTO)

For the resolution of the trade disputes between states, World Trade Organization (WTO) can be listed as one of the prominent IOs. Although court and tribunal have been considered the main tools of dispute resolution, WTO actively uses non-binding and binding ADR mechanisms as well, respectively consultation and panel, in order to sort out trade disputes and comply with the rules-based trade system. Disputes usually emanate from the violation of an agreement or commitment that has been made in WTO.

The most prominent non-binding ADR mechanism used in WTO is consultation. Compliance by all members to their obligations under the WTO Agreement requires an effective dispute settlement mechanism in order to preserve the rules based trade system. When a complainant applies to the Dispute Settlement Mechanism of WTO, due to any trade dispute, consultations are initiated to resolve the conflict by discussing the controversial matters between parties at the first stage of the dispute resolution process. During consultations, there is no third party. (WTO, 2018b). Consultations occur in Geneva and they are confidential. If consultations fail to produce a satisfactory solution within 60 days, parties could apply to the panel. Even if consultations fail, parties could still find a mutually agreed solution at a later stage of the proceedings. WTO Secretariat does not

participate in the consultations and content of consultations is closed to any panel subsequently conducted. Other WTO members could also attend the consultation process if complainant country demands their participation. Ultimately, the aim is to find solutions for problems without litigation and through a voluntary ADR process.

If the consultation stage fails and complainant clearly states that they could not reach a mutually agreed solution through consultation, the complaining country can ask for a panel to be appointed. Thus, a panel examines the correctness of the complainant's claim that the respondent has acted inconsistently with its WTO obligations (WTO, 2018d). At this stage, both parties accept any rulings of a panel as binding.

The Dispute Settlement Body (DSB) has sole competence to establish "panels" of experts to consider the case, and to acknowledge or deny panels' findings or the outcomes of an appeal. It monitors the implementation of the rulings and suggestions of a panel, and has the authority to allow retaliation when a nation does not comply with a ruling (WTO, 2018b).

A panel's final product is a panel report, consisting of a descriptive part and findings. The descriptive part summarizes the key legal arguments and counter-arguments and factual statements regarding the case. The findings section shows a panel's final conclusion to accept or reject the complainant's claim and the reasoning of a panel's conclusion in the light of facts, evidence and arguments of the parties (WTO, 2018d). If a panel concludes a violation of an obligation, which can also be defined as non-compliance with WTO rules, the report contains a recommendation that addresses the problematic aspects of the challenged measure. A panel may also suggest possible ways for implementation. The responding party is obliged to make

sure that the challenged measure is fully compatible with WTO rules. Panel process has certain deadlines that need to be followed. If the non-compliant countries do not follow these deadlines, the WTO allows complainants to implement countervailing sanctions to the non-compliant countries (WTO, 2018d).

2.3.3.4 ADR Mechanisms in International Financial Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA) of the World Bank Group (WBG)

Having an eminent role in crowding-in private finance, IFC and MIGA especially work with the private sector in developing countries to achieve sustainable growth. To do so, IFC offers a wide variety of financial products such as credits for private sector projects in developing countries. With the aim of improving the environmental and social outcomes of IFC and MIGA financed projects, these organizations receive and evaluate the complaints of project-affected communities. Projects' stakeholders are often governments, state-owned enterprises, investors and non-government organizations (communities).

Compliance, Advisor and Ombudsman (CAO) is the independent accountability mechanism for the IFC and MIGA. The CAO tries to resolve the complaints of project-affected communities in order to improve social and environmental outcomes of the projects. To that end, CAO has essentially three key functions: (i) Dispute resolution (formerly Ombudsman), (ii) compliance investigation and (iii) advisory to the World Bank Group senior management. Acting as an ombudsman, CAO helps parties find alternative ways for figuring out the issues of concern rather than court mechanism. In the dispute resolution process, CAO does not use judgmental language and impose solutions to come up with solutions for the problems. Rather, CAO helps the parties have a prominent role in pinpointing and

implementing their own solutions (Compliance Advisor Ombudsman, 2018). According to Reif, CAO proposes mediation, negotiation, facilitated dialogue or conciliation to reach mutually agreeable solutions (Reif, 2004). CAO partners comprising of usually professional mediators can also help the dispute resolution process by communicating with local people thanks to their cultural and linguistic skills and to be viewed as independent outsiders.

Dispute Resolution function of the CAO examines complaints due to the environmental and social impacts emanating from IFC and MIGA projects. These complaints, coming from project-affected communities due to environmental and social effects of the IFC and MIGA projects, are evaluated under the IFC and MIGA Sustainability Framework (Compliance Advisor Ombudsman, 2018). This framework indicates IFC and MIGA's strategic commitment to sustainable development. It fosters sound environmental and social practices, induces transparency and accountability in doing business (IFC, 2019a). Under this function, the CAO works with the local communities and the project operators in order to devise a mutually agreeable framework to address the issues of concern. This avenue employs a widespread set of ADR tools including mediation, negotiation, joint fact-finding, information sharing and facilitated dialogue. Within this function CAO acts as an independent third party that convenes the process rather than an entity delivering justice. The ultimate objective here is to help the affected communities and project companies achieve a practical, effective, sustainable and mutually satisfying solution to the dispute (Compliance Advisor Ombudsman, 2018). However, CAO can also come to the conclusion that parties may not devise a collaborative solution to the conflict. Under any circumstances, CAO sends the case to the CAO compliance to understand whether the details of the case meet the IFC's

and MIGA's eight environmental and social performance standards (Compliance Advisor Ombudsman, 2018). CAO, itself, has a monitoring mechanism whereby it would always inform IFC or MIGA management regarding the contacts with complainants and affected parties, and periodically make a report for the Boards about its activities (Compliance Advisor Ombudsman, 2018).

The second key function of the CAO is to initiate compliance investigations in order to examine whether the IFC and MIGA projects comply with relevant policies, performance standards, guidelines and procedures. The compliance investigation is conducted by independent experts. Negotiating with stakeholders, experts review documents, conduct interviews, and observation of project activities and outcomes. CAO could hold meetings with stakeholders to monitor compliance process. If the cases comply with the rules, CAO will terminate the investigation process. If the cases are not in compliance with the rules, CAO monitors the investigation process until reckoning that the project complies with environmental and social standards (Compliance Advisor Ombudsman, 2018). CAO prepares compliance investigation report to reflect the findings on compliance process.

To manage the environmental and social risks of IFC clients, their projects must comply with a number of environmental, social, and governance standards in addition to sound financial and business criteria. These standards include eight performance pillars which are: (i) Assessment and Management of Environmental and Social Risks and Impacts, (ii) Labor and Working Conditions, (iii) Resource Efficiency and Pollution Prevention, (iv) Community Health, Safety, and Security, (v) Land Acquisition and Involuntary Resettlement, (vi) Biodiversity Conservation and Sustainable Management of Living Natural Resources, (vii) Indigenous Peoples and (viii) Cultural Heritage (IFC, 2012b).

Focusing on sharing of information and facts and inclusion of key parties with these key roles, CAO mainly aims to assist in orchestrating the conflict resolution process in line with the goal of ADR tools.

2.3.3.5 ADR Mechanisms in International Center for Settlement of Investment Disputes (ICSID)

ICSID is another IFI providing impartial and independent ADR. The issues that are raised to the ICSID should be about any legal dispute stemming directly from an investment between an ICSID member country – or its subdivision— and any natural or legal person national of another ICSID member. ICSID implements both binding and non-binding ADR tools to resolve disputes between states, and between investors and states. These disputes could arise out of violation of the international rules, standards and regulations on foreign investments or investment treaties. Investment liberalization and investor protection have been included in all investment agreements; therefore, international investment law aims to eliminate obstacles to foreign investment and protect foreign investments against host government's action. Violation of investment law could emanate from less favorable treatment to foreign investor in comparison with domestic investor, host state's non-compliance with international minimum standards of fair and equitable treatment, direct expropriations of property by the host state through legislative or administrative measures and prohibiting the performance requirements in investment treaties which measure the contribution of foreign investment to further environmentally and socially sustainable development.

While conciliation and investor-state mediation are the non-binding tools used in order to resolve disputes and comply with international rules, standards and

regulations on foreign investment (ICSID, 2018a), arbitration is the binding tool to resolve disputes and ensure compliance with international rules.

Conciliation within ICSID seeks to bring the parties to agreement on mutually acceptable terms in case of any legal dispute emanating from investment. To functionalize conciliation process, Conciliation Commission is structured, and this Commission organizes sessions with the parties. Written and oral procedures are used in sessions. Commission can hear each party separately in the process due to the flexible structure of conciliation. Commission may demand relevant documents, call for witnesses, conduct visits and issue recommendations to help the parties resolve their dispute. At the closure of the proceedings, the results of the sessions have been reflected through a Report (ICSID, 2018b). The Commission can reflect one of these options in the report: declining jurisdiction; recording the parties' failure to reach an agreement; recording a party's failure to appear or participate in the proceeding; or recording the parties' agreement. If the parties do not reach a mutually agreed upon resolution, recommendations are non-binding. Thus, dispute resolution process and compliance with international rules fail (Thomas, 2019).

Before the report is published, the Commission notifies the parties if it considers that no arrangement between the parties exists or if the party does not achieve to appear or participate in the process (Conciliation Rule 30(2)). Following this notice, the Commission closes the process or determines that it has no jurisdiction or if the parties have agreed on a mutually satisfactory outcome. The Report must be issued within 60 days after closing the proceedings (Conciliation Rule 31). A Report reflecting the parties' agreement may include the details related to the terms and conditions of such agreement providing that the parties demand. The Report must record any agreement by the parties with respect to the use of

information obtained during the proceeding (Conciliation Rule 32(2)). ICSID can publish the report with the consent of the parties (Conciliation Rule 33(3)) (ICSID, 2018b).

Mediation offers a party-driven approach to dispute settlement in ICSID in investor-state disputes. It mainly aims to settle disputes between the investor and the state due to the violation of rules, and ultimately comply with international rules, standards and regulations on foreign investment. The function of the mediator is to promote negotiations between the parties by assisting each of the sides in defining their interests, overcoming obstacles to settlement and establishing feasible solutions with the parties. A legislative context intended for mediation in the investment-state environment provides the Investor-State mediation rules with a useful starting point for investors interested in investment mediation (ICSID, 2018c).

The mediation method is rather flexible as it should be adapted to the requirements of the parties, the conditions of the conflict and the possible participation of non-controversial parties. In connection with arbitration, the parties can choose mediation as an autonomous procedure either prior, during or after the arbitration. Some multilateral treaties require a mediation procedure before the arbitration is established. Nevertheless, mediation may be carried out in parallel to an arbitration procedure under ICSID, subject to a written agreement between the parties. In practice, while the mediation is under way, arbitration may remain in accordance with a party contract. It is therefore mainly the parties' responsibility to decide when mediation could help resolve some or all of its dispute issues. (ICSID, 2018c). By a binding decision a mediator does not resolve the conflict between the sides. The mediator will, instead, assist the parties in identifying tailored settlement options that may be the compensation payment or other actions to be carried out in

accordance with their settlement contract by the parties. The parties ultimately decide to conclude a settlement agreement and to define its scope and conditions. If, in accordance with ICSID Rule 43 (2), the sides achieve an amicable settlement via mediation, it could be included in the court award. The solution would then benefit from an ICSID-unique streamlined enforcement mechanism (ICSID, 2018c).

ICSID also offers arbitration as a useful alternative to traditional techniques for resolving investment conflicts, as it avoids the inconveniences of national court litigation. Parties could choose their arbitrators themselves. ICSID arbitration provides standard clauses and rules of procedure, institutional support for the conduct of proceedings and non-frustration of proceedings. It also facilitates the award's recognition and enforcement. Main aim of this process is to comply with international investment law and improve investment climate with the aim of attracting more international investment. Arbitration tribunal's role is to settle a dispute in line with the rules of law, if the parties have agreed previously. If there is no agreement, the tribunal's decision needs to be based on the state party's law, including its rules on the conflict of laws and the applicable rules of international law (ICSID, 2006).

Tribunal may deal with jurisdiction, liability, damages and requests for provisional measures or preliminary objections (ICSID, 2006). The award of the tribunal is binding on all parties to the proceeding. The award itself is in the force of final judgement of a court in a member state. Therefore, if a party fails to comply with the outcomes of an award, the other party may seek to enforce the obligations through legal channels. Each member state must recognize and enforce the award. However, ICSID does not have a formal role in recognition and enforcement of an award. In case of a non-compliance, ICSID contacts with the non-complying party to

request information about the actions taken or planned to comply with the award (ICSID, 2006).

2.3.3.6 ADR Mechanisms in European Investment Bank

EIB, as one of the world's biggest multilateral borrower and lender in the world, aims to achieve success in taking corporate responsibility through a good administration. To do this, EIB endeavors to improve its accountability framework by providing stakeholders the right to complain about any EIB stakeholder. Rather than litigation, a complaints mechanism exists within EIB where individuals, organizations or corporations who are impacted adversely by EIB activities can complain. The complaints should be related to the actions that EIB has undertaken incorrectly, unfairly, or unlawfully. These can emanate from a wide range of factors that do not comply with EIB's mission of good administration: (i) mistakes in project preparation processes, (ii) social and environmental effects of a project, (iii) failure in involvement of affected communities, minorities and vulnerable groups, (iv) malfunction in effective project implementation, (v) lack of access to information, (vi) flawed procurement procedures, (vii) inadequacy in managing the human resources issues, customer relations and any other aspect of the planning, implementation, or impact of EIB projects (EIB, 2018b).

In 2008, EIB and the European Ombudsman signed a Memorandum of Understanding (MoU) which paved the way for the two stage complaints process and resulted in a common understanding of purpose and consistency of application across its internal and external parts. Any member of the public can apply to a two-tier procedure in case of any complaint. As the first stage, there will be an internal process. The Complaints Mechanism Division (EIB-CM), which is operationally

independent from the EIB's other departments, will seek a solution and may advise the EIB on corrective action. At the second stage, if the EIB-CM does not come to a solution in the internal process, the complaint can be sent to the European Ombudsman as the fully independent EU body. This action has been described as the external process. In terms of transparency, all complaints are kept confidential.

If a complaint is deemed admissible, it has been registered and the process follows the internal complaint handling structure. To conduct the initial assessment, the EIB may use a multitude of tools, including review of existing EIB documentation or external information, ADR tools such as meetings with EIB staff, complainants, and other relevant parties, and fact-finding visits to project sites. This stage ends with an Initial Assessment Report. This report outlines suggested course of action to address the risks stemming from possible breach of applicable legal and regulatory frameworks, from shortfalls in project performance or from possible lack of adequate safeguards on environmental, social and governance principles.

If the collaborative resolution can be reached before the Initial Assessment Report is drawn up, the EIB-CM will receive formal agreement from the project stakeholders to start a mediation process. Mediations will typically take place between complainants/applicants, on the one hand, and the EIB and/or project proponents and/or national governments, on the other. Any party may, at any time, interrupt or end the mediation process (EIB, 2018b).

The process of collaborative resolution seeks resolution by building understanding and trust among parties. The process may involve (i) facilitation of information sharing which facilitates better understanding of project's impacts and complainants' concerns; (ii) dialogue/negotiation promoting dialogue to achieve a

mutually accepted solution; (iii) joint fact-finding helping project stakeholders compromise on the issues to be investigated, the participation of the parties, the degree of independency required, the method to be used and what to do with the results, and to proceed with the joint investigation/fact-finding; (iv) formal mediation managing a more formal and complex process to succeed conciliation with a view of problem solving in case of distrust and confrontation giving rise to severe deterioration of the relationship between parties.

If this process culminates in sustainable solutions, within the defined timelines, the process is successfully closed. Otherwise, a compliance review suggestion or other particular EIB action may follow. A report of the findings will be prepared in both instances.

Provided that the initial assessment stage results with a need for further EIB-CM intervention, the EIB-CM conducts an initial compliance review to find out whether (i) the complaint points to non-compliance with EIB relevant provisions; (ii) outcomes are not consistent with the desired impact of the EIB relevant provisions and (iii) EIB relevant provisions are not able to handle the issues raised by the complaint. This investigation helps the EIB-CM form an independent and reasonable opinion. At the end of this stage, a Conclusion Report, which promotes compliance with EIB provisions, has been issued (EIB, 2018b).

2.3.3.7 ADR Mechanisms in Other Multilateral Development Banks (MDBs)

In addition to the IFC, MIGA and EIB, other MDBs including, African Development Banks (AfDB), Asian Development Bank (ADB), European Bank for Reconstruction and Development (EBRD); Inter-American Development Bank (IADB); and other institutions of World Bank Group, IDA and IBRD have been

using ADR tools in ‘Compliance Review’ function of their accountability mechanisms. Compliance Review Panels/Inspection Panels mainly investigate whether there is non-compliance with MDBs’ operational policies and procedures that affect or may affect local people directly, materially, and adversely. Project affected people that could not resolve their disputes with MDBs’ management previously can find an opportunity to sort their problems out thanks to these compliance review mechanisms.

Having determined non-compliance of the project with Banks’ own policies and procedures through eligibility criteria, the Compliance review panel/Inspection panel is been conducted. Preparing the Terms of Reference for Panel, investigation process is commenced with site visit and makes recommendations to the Board of Directors to ensure project compliance, including remedial changes in the scope or implementation of the project. The findings of a panel are recorded in draft and final reports and these reports are issued to the Board. The Compliance Review Panel monitors the execution of its suggestions and any corrective measures adopted by the Board of Directors (AFDB, 2018; ADB, 2018; EBRD, 2018; Accountability Counsel, 2018). The implementation process has been monitored by preparing other special reports. In this respect, experts, government officials, staff of executing and implementing agencies and co-financier have mostly visited the project sites and resettlement sites to meet the affected persons to prepare their monitoring reports with the aim of finalizing the compliance process. In terms of the role of ADR mechanisms, it can be inferred that there is an active negotiation process which improves the relations between local people affected by the harm of the project and other stakeholders. The parties of the dispute can understand each other more efficiently with the help of these dialogues based on active participation of all related

parties. In some cases, which are different from compliance review panels and observed in Problem Solving Function of EBRD, ADB and AfDB, it is aimed at restoring dialogue between the parties by resolving the underlying issues led to the complaint or grievance through a bunch of non-binding tools such as independent fact-finding, mediation, conciliation, dialogue facilitation, investigation or reporting. This process promotes participation of all relevant parties to the resolution process (ADB, 2018; AFDB, 2018; Accountability Counsel, 2018; EBRD, 2018).

In this chapter, compliance, accountability and good governance relationship has been identified as nested concepts. Good governance has been defined by the OECD (2001) through its relationship to accountability, which suggests that accountability is one of the key components of good governance. Johnston (2018) underlined the importance of strong, open and active civil society in defining good governance concept. Second, accountability is conceptualized as enforcement, answerability, compliance, and transparency based on Schedler (1999) and Weisband and Ebrahim (2007). In this context, compliance, closely associated with accountability, has been described as implementation of the results of adjudication through courts and alternatives to adjudication in dispute resolution process. The alternative ones are in general conceptualized as ADR mechanisms, any method of resolving disputes outside the court system by reaching a consensus between two parties.

ADR tools are described and categorized under two groups as binding and non-binding. While ADR tools are comprised of different methods and targets to settle the conflict and comply with international rules, standard and regulations including environmental and social standards, they can function as a subset of the broader category of interactive dispute resolution process (Cheldelin, Druckman, &

Fast, 2003). Similar to this structure, binding and non-binding ADR mechanisms are used as complementary tools in IFIs' dispute resolution mechanisms and compliance review functions. In this respect, parties benefit from non-binding ADR tools like negotiation, joint fact-finding, dialogue facilitation and information-sharing during the mediation. For instance, in the WTO case discussed in the next chapter regarding the Regime for the Importation, Sale and Distribution of Bananas, the dispute was ultimately resolved through implementation of multiple tools including panel, consultation, and trade sanctions.

The literature review indicates that the research on the interrelation between governance, accountability, and compliance is limited. The research on this interrelationship concentrates mainly on theoretical aspects, and the existing literature is institution-centric. As literature review also indicates while there is a rich literature on key pillars of good governance, accountability mechanisms and compliance review functions in IFIs, the role of ADR tools in dispute resolution and compliance process has been inadequately discussed by addressing the details on initiation of compliance process, implementation of results and monitoring and evaluation of the implementation process in ADR tools. This brings a gap in the literature on the role of ADR methods in compliance taking into account the peculiarities of the mandates and tools of different IFIs. In this respect, the next three chapters will begin with selected case studies from IFIs discussing how ADR processes function as mechanisms of compliance and accountability and then good governance in an integrative approach, where the similar and conflicting aspects of implementation of ADR tools at various IFIs.

2.4 Methodology of the Study

This is an exploratory study with an inductive approach, where three non-binding ADR cases from International Financial Institutions are assessed with three questions to help understand the role of ADR processes as part of the compliance mechanism in the IFIs. Cases which are solved with non-binding ADR tools have been chosen since there is not enough data and information for the cases settled with the binding ADR tools and coherence and consistency between selected case studies should be guaranteed for a healthy comparison. Coherence and consistency in this setting means that either binding ADR tools or non-binding ADR tools should be compared in selected cases in order to make a valid and reasonable comparison across the tools and institutions. This is because, the cases from IFC and MIGA, as part of the WBG, have been examined to understand the role of ADRs in compliance review function of the MDBs.

"Structured and focused comparative case study" method has been used in the case study to elucidate the role of ADR tools in dispute resolution processes of the IFIs. The method is structured since there are focused research questions reflecting the research objective, and these questions are used for each case under study to guide and standardize data collection process. Thanks to this process, systematic comparison has been conducted and the findings of three cases have been aggregated. The method is considered focused since it only addresses certain aspects of the bounded cases examined. The requirements for structure and focus apply equally to individual cases because additional cases may be added later (George & Bennett, 2005; Kaarbo, 1996).

In this thesis, three cases have been selected to systematically examine the same research questions in each case. So, in all three cases, the non-binding ADR methods including consultation, negotiation and mediation have been observed in order to indicate their impacts on the compliance process. ADR processes have been analyzed with four focused questions: (i) How the compliance process is initiated, (ii) how the results from ADR processes are implemented, (iii) how the implementation is monitored and evaluated and (iv) what is the role of ADR tools in resolving the dispute?. In doing so, cases indicate the function of the ADR mechanisms in compliance with standards and rules and dispute resolution processes.

2.4.1 Case Study Selection Process

I selected cases from three IFIs, which are WTO, IFC and MIGA. Focusing on different IFIs having divergent intrinsic conditions and different enforcement capacity of each IFI, I analyzed various dispute types, comprising of labor, trade, investment and project finance disputes, with diverse actors in dispute resolution and compliance process. The cases in this study illustrate that WTO attempted to resolve a trade dispute among states, that IFC dealt with a dispute between a labor union and an investor related to one of its project finance operations, and that MIGA addressed a dispute between a local community and an investor as part of one of its guarantee operations. Eventually, the bargaining power of the parties and IFIs' organizational structures have been different in these cases. Nevertheless, these three cases are controlled for using similar non-binding ADR tools which adopt participatory and consensual approach. This allows for an investigation of variation in compliance, implementation and monitoring processes of non-binding tools holding constant the type of ADR tools used in dispute resolution process.

The following cases are selected for in-depth analysis (see table 1): (i) Consultations in WTO to resolve the dispute on “Regime for the Importation, Sale and Distribution of Bananas”, (ii) mediation by CAO in IFC to settle the dispute on “Assan Aluminyum – Labor Rights Concerns” and (iii) mediation of both CAO and IFC in resolving the dispute on “Rajamandala Hydropower Project”. See Table 1 for further details of the cases.

Table 1: Cases

Case # 1 WTO	Case # 2 IFC (WBG)	Case # 3 MIGA (WBG)
ADR Mechanism: Consultation *Bilateral consultations between parties without participation of third party* **Dispute on**: Regime for the Importation, Sale and Distribution of Bananas **Complainant(s)**: Guatemala, Honduras, Mexico and the United States, St. Lucia, Costa Rica, Colombia, Dominican Republic, Venezuela and Nicaragua **Respondent**: European Communities **Outcome:** Non-binding tool is not successful, yet it contributed to settlement of the dispute. Agreement reached with a binding tool.	**ADR Mechanism**: CAO-Mediation and Negotiation *Information sharing, facilitated dialogue and joint fact-finding through IFC due diligence* **Dispute on**: Assan Aluminyum – Labor Rights Concerns **Complainant**: TURK-IS **Respondent**: Assan Aluminyum **Outcome**: Agreement reached with a non-binding tool. Successful.	**ADR Mechanism**: CAO-Mediation and Negotiation *Joint fact-finding, information sharing and facilitated dialogue* **Dispute on**: Rajamandala Hydropower Project **Complainant:** Land owner(s) **Respondent:** Rajamandala Electric Power (REP) Company **Outcome**: Agreement reached with a non-binding tool. Successful.

CHAPTER III

CASE STUDY I: WORLD TRADE ORGANIZATION IN THE BANANA DISPUTE BETWEEN EUROPEAN COMMUNITIES and US & LATIN AMERICAN COUNTRIES

a) Background of the Dispute

The European Communities adopted a common market structure for import and licensing[3] of bananas in 1993. The common market structure brings preferential arrangements[4] for African, Caribbean and Pacific (ACP) countries' producers all over the European common market. The Latin American countries, as the main banana growers, and the US, which hosts large-scale banana exporting companies, complained at the WTO, on the grounds that the European Communities banana regime is not compatible with the provisions of the international trade laws in order to remove the preferential trade treatment and complex licensing requirements imposed by the European Communities.

While the banana dispute goes before the adoption of common market structure by the European Communities, the decision to introduce a common market structure with preferential treatment to certain countries renewed the unresolved commercial concerns.

[3] Import licensing is a procedural administration, requiring that the appropriate administrative body be presented with the request or other paperwork as a previous condition of import of products.
[4] A trade deal between countries mitigating tariffs for certain products to the countries who sign the agreement. While the tariffs are not eliminated, they are less than countries not party to the agreement.

This episode of banana dispute started with a joint letter by Guatemala, Honduras, Mexico and the United States dated September 28, 1995. The complainants requested consultations with the European Communities, raising that the European Communities common market organization for banana regime appeared to be inconsistent with certain articles of the General Agreement on Tariffs and Trade, the Agreement on Import Licensing Procedures, and the General Agreement on Trade in Services. These countries also claimed that they had been adversely affected by the European Union's (EU) complex quota, tariff, and licensing requirements. Following the European Communities acceptance of the consultations with the requesting parties, the consultations started. Then, St. Lucia, Costa Rica, Colombia, Dominican Republic, Venezuela, and Nicaragua joined the consultations in October 1995. All the countries except St. Lucia and Dominican Republic are non-ACP countries (WTO, 2012a).

The consultations eventually could not yield mutually satisfactory results. The complainants, mainly the US, introduced countervailing trade measures approved by the WTO. The parties also applied to binding ADR tools. Four different Panels were set up over the course of the dispute. Despite the trade measures and binding and non-binding ADR mechanisms, the dispute could not have been settled for over a decade. Finally, the parties agreed on a comprehensive solution to the various banana-related disputes in December 2009.

The European Communities adopted a common market structure for bananas in July 1993 to replace national banana market policies in member countries. Under the "EU Banana Regime" preferential arrangements for ACP bananas were extended under a new import regime that encompassed the entire European Community. In the pre-common market era, some European Communities countries imposed tariffs on

Latin American banana exports, while others were not (Guyomard, Laroche, & Le Mouel, 1999). The common EU banana regime was designed to operate on the basis of an annual ACP banana quota for duty-free export to the EU, and an annual quota for from Latin American bananas subject to a tariff (Mlachila, Cashin, & Haines, 2010).

The European Union's banana policy has been modified several times in response to the non-ACP banana exporters' reaction about European Communities within the WTO, since EU has designed its banana import policy by favoring banana imports from ACP countries. As a result, five distinct periods emerged. These are: i) pre-1993 period before the common market organization of bananas, ii) 1993-1998 period where the EU set country specific allocations to the ACP countries, iii) 1999-2001 period, which the EU set a total ACP quota without any country specific measures, iv) 2002-2005 period, during which the EU is given transition time for the banana regime, and v) post-2006 period, where the EU dismantled the banana quotas and transition to a tariff-only import policy.

The 1993 banana regulation set a quantity reserved solely for ACP banana imports, and allocated licenses reflecting past sales, thereby limiting the exports of Latin American growers and US companies' intermediary role in transportation and sales. However, the WTO found the 1993 banana regulation illegal as it fails to eliminate discrimination vis-à-vis third-country operators and instructed the EU to revise the rules (European Union, 2000).

In response to WTO's ruling, the EU substituted the country specific quotas for overall ACP quota. However, the new regime too was deemed illegal by the WTO in 1999. Then, the dispute escalated into a trade war between the US and the

EU. The US imposed significant duties to certain European products (Barkham, 1999). However, these sanctions did not manage to end the dispute. The US, the EU, and Latin American countries struggled to reach a mutually satisfying agreement. The banana dispute was entangled with other trade issues among these entities (Devereaux, Lawrence, & Watkins, 2006).

The US and the EU settled their trade war in 2001. The US agreed to drop the countervailing tariffs to the EU exports imposed in 1999 as a retaliatory measure to EU's banana policy. In return, the EU agreed to dismantle its banana import policy that favored banana imports from ACP countries; reduce the banana quota to be imported from ACP and increase the banana quota imported from Latin American countries. The EU further agreed to remove all quotas by 2006 (Josling, 2003). This settlement implies that the EU has switched to a tariff-only system by the beginning of 2006, with a WTO waiver authorizing tariff preferences for ACP countries until the end of 2007. Following the expiration of WTO's waiver, Latin American countries and the European Union agreed on a comprehensive package to settle all banana related disputes in December 2009.

The economic dynamics of banana production and trade suggest that the large exporters and the large importers are concentrated. The Latin American countries are the largest exporters of banana, supplying almost 75% of global export volume, and the US and the EU are the main importers approximately covering 55% of total import volume (FAO, 2017).

Banana import policies have become entrenched and had strong and direct ties with foreign policy. Furthermore, the banana trade reflected the divergent commercial traditions of the importers and the direction of trade is determined

mostly by patterns of preferential trade. Banana constituted a significant chunk of export revenues and hard currency earnings of key exporters. Latin American and Caribbean producers had different cost structures. Therefore, banana trade regimes have become highly contentious for these countries (Paggi & Spreen, 2003). Since the ACP countries are former colonies of the European countries, banana trade preferences were viewed as part of foreign policy and development aid policy (Mlachila, Cashin, & Haines, 2010).

The composition of the EU banana imports suggests that at the beginning of the common market period, where ACP countries have specific allocations, the Latin American countries exports to the EU declined while the ACP countries gained market share. Following the transition to a tariff-only system, the Latin American exports increased (Guyomard, Le Mouel, Levert, & Lombana, 2004). However, the ACP countries are not a single monolithical bloc. These countries have rather divergent cost structures and efficiency schemes. While the country specific quotas for ACP countries helped less efficient Caribbean countries against the relatively more efficient West African ACPs, following the repeal of country specific quotas the West African ACPs, especially Cameroon and Cote d'Ivoire raised their exports to the EU and gained market share at the expense of Caribbean ACPs (FAO, 2017). Yet, from a holistic perspective, as a result of three decade long preferential market access, the ACP producers could charge higher export prices and implicitly benefited from income transfers from the EU (Mlachila, Cashin, & Haines, 2010). If the EU has opted for a quota free import structure, this regime could have created a significant advantage for low cost-high efficiency producers of the Latin America. However, a system imposing strict restrictive measures benefited the ACP countries

at the expense of the Latin American producers and the US-based marketing and distribution companies (Devereaux, Lawrence, & Watkins, 2006).

The complex quota, tariff and licensing requirements transferred a significant part of Latin American growers' market share and US companies' business in the EU to European and ACP entities (Devereaux, Lawrence, & Watkins, 2006). As a direct result of this, over the course of banana dispute, the Latin American countries, with lower cost structures and higher capacity to produce and exports, would look for the elimination of quotas that allocate a portion of EU banana imports to ACP countries. The US, with its large distribution companies would press to remove import licensing requirements that limit the ability of US companies to gain market share. The European Communities, on the other hand, were negotiating to maintain some preference for the ACP countries as part of their development policy.

b) The Role of ADR in the Settlement of the Banana Dispute

While the banana trade dispute is a multifaceted and complex one in which parties employed a series of different ADR tools, this case study only covers the consultations amongst the Latin American producers, the US, and the EU.

Eventually, the outcome of the banana trade dispute was reached through not only by these consultations, but also by the binding ADR tools, high-level trade negotiations and certain trade related sanctions that led to a short-lived trade war between the two major global economic actors.

The specific banana dispute started with Guatemala, Honduras, Mexico and the United States' joint letter to the WTO dated September 28th, 1995, requesting consultations with the European Communities. The complainants raised that the European Communities common market organization for banana regime instituted

through the Regulation 404[5] appeared to be inconsistent with the General Agreement on Tariffs and Trade 1994, the Agreement on Import Licensing Procedures, and the General Agreement on Trade in Services. The complainants claimed that they had been adversely affected by the EU's complex quota, tariff and licensing requirements. The specific articles invoked refers to extension of unlawful trade preferences through tax measures and quantitative restrictions to some countries, which creates undue harm on third parties, limitations to market access, unlawful preferential treatment to some service providers, and unfair and inequal provision of import licenses (WTO, 2012a). The complainants specifically raised the issue that as per the international trade law, the EC can not discriminate in particular between ACP and Latin American banana exporters (FAO, 2003).

In 1995, an ACP country exporting banana to the EU with preferential market access conditions, St. Lucia, informed the complainants and the EC about its request to join the consultations on the EC's banana export regime. While doing so, St. Lucia invoked Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, which provides that special attention should be paid to the particular problems and interests of members of developing countries during the consultations. Saint Lucia cited the very high share of the banana exports in its agricultural exports and noted that any modifications to the EC banana regime, which may significantly reduce the provisions in favor of Saint Lucia, could jeopardize its access to the sole export market and give rise to a disastrous situation and economic collapse (WTO, 2018e).

[5] Regulation 404 is the official name of the EC's – then EU's—common market organization for bananas.

Colombia, as a non-ACP country supplying banana to the EC under non-preferential arrangements, transmitted its request to join the consultations citing that being one of the largest banana exporters, Colombia has had a substantial commercial interest in EC's banana regime. Dominican Republic, an ACP country exporting banana to the EU with preferential market access conditions, also requested to join the consultations. After Colombia, Nicaragua, a non-ACP EC banana exporter, requested to join the consultations on the grounds that as the banana industry is a major source of hard currency earnings and significant source of employment, and that the EU has been the only market for Nicaraguan banana exports for almost a decade. Venezuela and Costa Rica also requested to join later in 1995 (WTO, 2018e). Following the EC's acceptance of the initial consultations proposal and the general consensus on including the third parties requested to join the consultations, the process started. With the participation of a large number of stakeholders, the process has become a multilateral negotiation.

The consultation mechanism at the WTO was initiated as the parties started joint consultations at the WTO headquarters in Geneva amongst the representatives of the diplomatic missions to WTO and on the margins of high level Ministerial meetings amongst the country representatives.

As a direct result of the nature of this ADR mechanism, and the nature of parties to the dispute –sovereign entities— the WTO's role is limited to transmitting the official requests and documents among the parties, providing necessary venues, and inform the rest of membership about the status of the consultations. The discussions are held confidentially, the parties do not disclose any written documents or commitments as part of this process. The banana dispute was resolved at the end through a multilateral international agreement in December 2009 (De Melo, 2011).

Nevertheless, while consultations were going on, the complainant parties applied for the binding ADR tools and introduced counterveiling trade measures over the course of the dispute. It is safe to note that the consultation mechanism did not yield any concrete result, and they did not help resolve the conflict. The key milestones were achieved through binding ADR tools, which is arbitration, and trade sanctions on the basis of WTO rulings.

Since countries applied to consultations and panel mechanisms at different times, some countries' panel process started before others' consultation process. Costa Rica, Colombia, Honduras, Peru and Venezuela requested a panel to examine the EU's new banana trade regime in 1993. The complainants specifically raised that the allocation of quota licenses to distribution companies were unfair and incompatible with the international trade law. Bananas I and Bananas II panels were established. These panels found EU's Banana Trade Regime illegal and discriminatory. These panels helped create the ensuing Banana Framework Agreement of 1994 (Josling, 2003).

By early 1996, Ecuador, Guatemala, Honduras, Mexico and the US complained to the WTO about the EU banana trade regime. As part of this complaint, Bananas III panel established and by May 1997, the panel found that the EU's banana trade regime is inconsistent with the WTO rules because of quota, licensing and unfair trade preferences. In response to this ruling, the EU adopted a new banana import regime. However, the US and Ecuador complained about this newly adopted regime and Bananas IV panel established. The WTO granted authorization to the US and Ecuador to apply sanctions to the EU products. By November 2001, the EU, the US and Ecuador agreed on the suspension of sanctions

provided that the EU started to apply a tariff-only trade regime with ACP countries assigned a global quota, with a strict timetable (De Melo, 2011).

As part of this agreement, by January 2005, the EU announced the new tariff of 230 Euros per tonne for the non-ACP banana imports – the rate for ACP bananas was 75 Euros per tonne. In Spring 2005, Latin American producers requested arbitration on the grounds of unfair market access, and the 2005 panel ruled that the EU's tariff-only regime did not maintain market access to the MFN suppliers. Upon this ruling, the EU proposed a new tariff rate of 187 Euros per tonne in September 2005. The EU and the supplier countries conducted consultations and no mutually satisfactory solution could be reached. In December 2005, at the end of Hong Kong Ministerial Meeting, the dispute is referred to a facilitator to reach a solution within 18 months. Over the course of 2006 and 2007 the Latin American countries and the US filed new complaints and requested new panels specifically complaining about the duty-free quota for ACP bananas. Further consultations were conducted.

Finally by December 2009, Geneva Agreement on Trade in Bananas was signed. This agreement brought a comprehensive solution to the various banana related disputes, and explicitly stipulates that this specific dispute started with consultation request settled with the entry into force of the Geneva Agreement. Accordingly, the EU moved to a tariff-only trade regime for bananas, accepted a declining path for banana tariffs and modified the banana tariff schedule to reflect the agreement. This tariff schedule was certified by the WTO (WTO, 2012b).

The WTO does not have an official monitoring tools for the consultation mechanism. However, the relevant parties can invoke decisions, agreements, and

ADR mechanism results to request further action both from the WTO and from the other parties.

Trade disputes are generally directly related with a party violating a rule or principle of international trade law, and many disputes have multi-stage solutions with multiple decisions. In case of non-compliance, the complainants can invoke those decisions and treaties. These decisions and treaties constitute the legal basis and operational backbone of retaliatory trade sanctions allowed by the WTO.

In the banana case, the final outcome is a result of multiple tools. Even though this dispute was settled with an international agreement, the tariff schedule, which is the core of the settlement, announced by the EU has been certified by the WTO, any non-compliance may lead to legally binding dispute settlement or WTO allowing retaliatory sanctions. However, so far none of these measures are invoked.

c) Assessment of the ADR

Countries firstly requested consultation process to settle the dispute. Consultation process were conducted in two stages. At first, Guatemala, Honduras, Mexico and the United States applied to consultation by putting forward that the European Communities common market organization for banana regime did not comply with certain articles of the General Agreement on Tariffs and Trade, the Agreement on Import Licensing Procedures, and the General Agreement on Trade in Services as well as negative impacts of EU's complex quota, tariff and licensing requirements. Then, St. Lucia, Costa Rica, Colombia, Dominican Republic, Venezuela, and Nicaragua also participated in consultations. Actually, parties could not reach a mutually satisfactory resolution in consultation process of the formal

dispute settlement; yet, they could discuss their positions and interests in a confidential way.

A through analysis of the case and the structure of WTO reveals that the key factors may explain why the consultations led to unsatisfactory results. First, as consultation is a country-driven mechanism, it does not envisage any circuit breaker role for the WTO. Second, the WTO could not act as the enforcer of the agreements emerged as a result of consultations. Third, as the principle of sovereignty applies to disputes amongst multiple sovereign entities, WTO does not have any independent measures to enforce international trade rules. It needs to build a coalition or consensus among the members. However, the costs associated with being part of such coalition might be high especially if the opposing end of the coalition has high clout in international economy. In this case, the economic clout of the European Union is far more large than that of the Latin American countries. This limited the Latin American countries efforts to create a large enough impact to enforce the EU a satisfactory agreement. However, the involvement in the US changed the balance and facilitated the agreement.

Panel mechanism was also conducted by WTO. In this respect, four different panels were requested by countries. Panel I and II helped create the ensuing Banana Framework Agreement of 1994. After the Banana Framework Agreement, the Latin American countries were still unsatisfied with the results continued to apply to ADR tools within the WTO. The specific case elaborated in this thesis comes after the conclusion of the Banana Framework Agreement. After the consultation started in 1995 broke, complainants requested Panel III. As a result of Panel III, EU adopted a new banana regime that involves a global quota to all ACP countries –previous regime involves in country specific ACP quotas. However, since the countries

complained about this new regime, Panel IV was activated. As a result, the WTO granted authorization to the US and Ecuador to apply sanctions to the EU products.

In addition to consultation and panel processes, the EU started trade negotiations with Peru and Columbia in 2007. Later, six Central American countries, including Costa Rica, El Salvador, Honduras, Guatemala, Nicaragua and Panama also participated in this negotiation process. These trade agreements were also part of the Association Agreements, which was based on free trade area between EU and Central American countries. Cooperation and political dialogue were the key pillars of Association Agreements (Anania, 2010). From 2007 to the end of 2009, countries negotiated their positions in order to maximize their gains and ultimately came up with mutually satisfactory results. The parties reached an agreement and concluded Geneva Agreements on Trade in Bananas in December 2009. This agreement results in a comprehensive solution to the various banana related disputes, and explicitly stipulates that this specific dispute started with consultation request settled with the entry into force of the Geneva Agreement. In accordance with this agreement, the EU began to implement a tariff-only trade regime for bananas, accepted a declining path for banana tariffs and altered the banana tariff schedule to reflect the agreement. This tariff schedule was certified by the WTO. Considering the background of Geneva Agreement, trade agreements were negotiated during two years between countries. Since this process culminated in a binding agreement, it contributed to dispute resolution process.

While the ADR tools, especially the binding ones, have helped achieve some milestones in the banana dispute, the actual solution emanated mostly from political negotiations and material sanctions supported by the WTO rulings. The approval by the WTO brought legality and acceptance to the sanctions and deterred the EC to

introduce retaliatory measures. Therefore, while the role of the consultations was pretty limited in the resolution of banana case, the binding mechanisms and WTO's approval for sanctions paved the way for the conclusion of the banana dispute.

CHAPTER IV

CASE STUDY II: INTERNATIONAL FINANCE CORPORATION IN THE LABOR RIGHTS DISPUTE BETWEEN ASSAN ALUMINYUM and TÜRK-İŞ

a) Background of the Dispute

A Turkey-based aluminum sheet, coil, and foil manufacturer, Assan Aluminyum, requested to borrow from IFC to finance its USD 150 million investment program. TÜRK-İŞ, a Turkish labor union, complained to the IFC's Office of the Compliance Advisor Ombudsman (CAO) in 2008 on the grounds that the company limits workers' right to freedom of association and collective bargaining. IFC, as part of its due diligence evaluation on Assan's investment project, conducted a social and environmental assessment of the proposed project, and instituted an Environmental and Social Action Plan for corrective actions. IFC then undertook mediation process with factual analysis and facilitated dialogue, between the labor union and the borrower company Assan Aluminyum. The company complied with the corrective action requirements, and by April 2010, the IFC certified the compliance with a report. IFC committed USD 60 million to the project– half in A-loans and half in syndicated B-loans (IFC, 2008).

The company initiated an investment program of USD 150 million to modernize, upgrade and expand Assan Aluminyum's current capacity of 30 000 tons per year (tpa) by 79000 tpa and enhance the effectiveness and productivity of the plant. The total cost of the project , including acquisition of Assan Aluminyum, was

estimated at USD 197 million, with IFC being asked to arrange up to 60 million dollars, , including a syndicated loan of up to USD 30 million (IFC, 2008). TÜRK-İŞ mainly accused Assan of three issues: (i) employer's anti-unionization practices, (ii) employee intimidation and dismissal due to labor union membership, and (iii) systemic hindrance of organizing activities and collective bargaining.

To elaborate the details on TÜRK-İŞ's complaint, Metal-Is, an affiliate union of the TÜRK-İŞ, started organization activities at this factory in 2005. In order to conduct collective bargaining, the labor union obtained a certificate of competency[6] by having more than half of workers of the company in the union; however, the company contested the certificate at the court in 2005. Then, the union re-obtained the certificate of competency on October 2nd, 2007. Following the re-issuance of the certificate, the union requested collective bargaining negotiations by October 22nd, 2007. The company again filed a suit against the union on October 26th, 2007 to demand the revoking of the certificate. At the time of TÜRK-İŞ's application to IFC's complaining mechanism, the litigation of Assan was not concluded (Compliance Advisor Ombudsman, 2008). The union claimed that the employer consistently obstructed collective bargaining agreement of the workers and that some of the long standing union members had been dismissed to intimidate the existing and potential union members. According to the union, these measures had forced some of the union members to resign and certain potential members chose not to enroll in the union (Compliance Advisor Ombudsman, 2008). Since IFC, as a Multilateral Development Bank (MDB), is responsible to deal with the concerns of people affected from projects in order to enhance social and environmental outcomes of the IFC-financed projects, the complaint of TÜRK-İŞ was addressed by IFC in the

[6] If a labor union obtains more than half of workers within the company, that specific labor union has the right to conduct collective bargaining.

light of environmental and social standards. In addition to the IFC's standards, according to International Labor Standards on freedom of association, organizing and structuring workers and employers' rights are required for sound collective bargaining and social dialogue. Therefore, if the workers' rights for collective bargaining are violated through illegal actions, International Labor Organization standards and other supervisory mechanisms help resolve these difficulties (ILO, 2019). Similar to the International Labor Standards, Turkish Labor Law also protects union rights of the workers. Accordingly, if an employment contract is terminated owing to union membership or participation in union activities, the dismissed workers are paidunion compensation (Turkish Labor Law, 2019). Compatibility between Turkish Labor Law and IFC's standards also acted as a strong incentive for mediation process.

MDBs were initially established to unlock the potential of developing countries through financing socially productive investments in an environment where private capital is limited. However, over time, the MDBs gained another mandate, and MDB lending has become a tool for policy change and promoting internationally agreed best practices and standards. In order to commit high quality social and environmental standards, and implement those standards in projects financed, each MDB created a safeguard framework. These safeguards delineate roles and responsibilities of the banks and the borrowers, and set forth certain requirements in preparation and implementation of the lending activities (World Bank Group, 2015).

IFC, as part of the MDB system, strives to create development impact through private sector engagement. IFC's activities cover (i) direct investments; (ii) investments implemented through financial intermediaries or subsidiaries, or (iii) advisory services. While these activities are focused mainly on creating development

impact through fostering private sector, an important aspect of positive development outcomes is to promote environmental and social sustainability through these activities. For this purpose, the IFC has adopted the Policy on Environmental and Social Sustainability and developed a series of performance standards in order to create a comprehensive set of guidelines for the environmental and labor standards of IFC-invested companies. The Policy on Environmental and Social Sustainability shows IFC's commitment to environmental and social sustainability and delineates the roles and responsibilities of the institution, intermediaries, and borrowers/end-users (IFC, 2012a).

The performance standards provide clients with guidance in identifying project risks and effects and are designed to help prevent, reduce and handle these risks and effects. Regardless of the investment type the IFC requires all clients to apply the performance standards to manage environmental and social risks and impacts. The policy, performance standards and guidelines for the performance standards as a whole are referred to as IFC Sustainability Framework. The framework, while setting forth IFC's strategic commitment to sustainable development, constitutes an integral component of IFC's risk management and compliance strategy (IFC, 2012b).

In order to get IFC financing, the client must meet the following eight performance standards. These are entitled as (i) Assessment and Management of Environmental and Social Risks and Impacts, (ii) Labor and Working Conditions, (iii) Resource Efficiency and Pollution Prevention, (iv) Community Health, Safety, and Security, (v) Land Acquisition and Involuntary Resettlement, (vi) Biodiversity Conservation and Sustainable Management of Living Natural Resources, (vii) Indigenous Peoples and (viii) Cultural Heritage (IFC, 2012b).These standards are

designed to help the clients manage and improve their environmental and social performance. Each standard describes a set of desired outcomes in line with the key objectives of the standard and sets out specific requirements to help clients get the desired outcomes through means that are “appropriate to the nature and scale of the activity and commensurate with the level of environmental and social risks” (IFC, 2012a).

The borrower has the sole responsibility to execute the project in line with the performance standards and manage the environmental and social risks and impacts consistent with these standards. The framework also authorizes IFC to ensure that the business activities financed through IFC lending are implemented in a way satisfying the requirements of performance standards. To ensure compliance with these standards, the IFC conducts due diligence, monitoring, and supervision, if necessary. Consequently, the outcome of the environmental and social due diligence in a proposed project is a key input in approval and sets the key components of the environmental and social aspects of the conditions attached to the financing (IFC, 2012a).

The Assan Aluminyum dispute is directly related to the performance standard II : Labor and Working Conditions. This standard aims to protect the fundamental rights and freedoms of the workers. These rights and freedoms are identified by a series of ILO conventions. The key driving factor of this standard is establishing and maintaining a sound management- worker relationship with fair treatment of workers and robust occupational safety and health conditions (IFC and SAI, 2010).

This specific performance standard aims to

- promote the fair treatment of workers, their non-discrimination and equal opportunity.
- establish, maintain and improve the relationship between employees and management.
- encourage compliance with national labor and employment laws.
- protect workers, including vulnerable categories of workers such as children, migrant workers, third-party workers and the supply chain workers of the client.
- promote safe and safe working conditions and workers' health.
- prevent the use of forced labour (IFC, 2012b).

The standard brings certain requirements to the clients regarding the human resources policies, working conditions and terms of employment, worker's organizations, non-discrimination, retrenchment, and grievance mechanism. As this case is mainly related to workers' organization and collective bargaining procedures, this section only focuses on those aspects of this particular performance standard. It requires that the client respects the existing collective bargaining agreements. Provided that such an agreement does not exist or do not address working conditions and terms of employment, the client is obliged to provide reasonable working conditions and terms of employment (IFC and SAI, 2010).

The client is obliged to follow the domestic regulations that recognize the rights of workers to create and to join workers' associations without interference and to collectively bargain. In case of the existence of domestic regulations that limit workers' organizations or associations, the client is forbidden to limit employees to develop alternative mechanisms to express their grievances and protect their rights in

the work place. The client is also forbidden to exert direct or indirect influence of control of these mechanisms (IFC, 2012b).

This performance standard also prohibits discouraging workers from electing worker representatives, forming or joining workers' organizations, or from bargaining collectively. As part of this standard, the customer will not discriminate against or repress employees involved or seeking to engage in such organisations and collective bargaining (IFC, 2012a).

While the performance standard II constitutes a significant step to ensure IFC clients' compliance with the international best practices in labor, the International Trade Union Confederation (ITUC) claims that the performance standard system has certain gaps. The ITUC cites that IFC relies heavily on self-reporting by clients rather than direct monitoring. To bridge this gap, labor unions and civil society organizations play a vital role and act as independent verifiers. However, union activity is restricted in some countries in which IFC heavily invests. IFC's procedures of information further complicate the issue of monitoring and verification. IFC procedures require investment notices go online thirty day before the board meeting for approval. The time constraint limits the ability of the union to react to proposed investments. This risk may be starker especially in problematic investments where the civil society organization needs to carry out an investigation and report to IFC in the early stages of the loan preparation during which the precise terms and conditions for the loan are negotiated (ITUC, 2011).

Turkey has already been trying toimprove the fundamental rights and freedoms of the workers since 1995. The labor union system created by the post-1980 coup period was restrictive and authoritarian. Although the system allows

collective labor agreements, strikes, and lockouts, the regulations had blanket restrictions and served to the purpose of government controlling industrial relations structure. Starting with 1995, these restrictive provisions were replaced with more liberal rules that are aligned with international standards, especially after the ratification of the ILO's Convention No. 87 on Freedom of Association and Protection of the Right to Organize. As part of Turkey's accession process to the EU, a series of labor relations reforms have been carried out. These reforms aim at adopting the ILO standards and aligning labor regulations with the European acquis (Ministry of Labour and Social Security, 2013).

Collective bargaining agreement system has also been legally defined and delineated. In order to negotiate for collective bargaining agreements, the labor unions should clear two thresholds: (i) industry threshold and (ii) workplace threshold. The industry threshold requires that the labor union should recruit a predetermined percentage of total workers in a given industry. This hurdle was an integral part of the law text and it is set as 1% of the total workers in a given industry. The workplace threshold stipulates that the labor union should recruit at least majority of the workers in a given workplace. Labor unions surpass these two hurdles can claim certification of competence. The certification is granted by the Ministry of Labor and Social Security, open to legal appeal at the court (Law of Collective Bargaining and Trade Unions, 2012).

Collective bargaining starts after the clearance of the hurdles and conclusion of the legal appeal processes, if any. Labor regulations strictly define the details of the collective bargaining. Bargaining period is set as 60 days. If no mutually acceptable solution emerges, government appoints an official mediator. Provided that

the official mediation fails, the union must call for a strike (Law of Collective Bargaining and Trade Unions, 2012).

The national law and IFC's performance standards are compatible with each other. In this case, litigation process related to the union's certification of competence and decision of the court affected CAO's decision-making process.

b) The Role of ADR in the Settlement of the Dispute

IFC has been using dispute resolution/ombudsman function of CAO to find a mutually agreed solution to the conflicts emanating from IFC-funded projects. In this respect, CAO helps the parties come to agreement by mutual concession in dispute resolution process. CAO typically offers mediation, joint fact-finding, information sharing and facilitated dialogue for dispute settlement.

In this case, the IFC's involvement was through a mediation which also included joint fact-finding, facilitated dialogue, and information sharing in the dispute between the labor union and the borrower company Assan Aluminyum. Over the due diligence process, the IFC communicated both with the labor representatives and the management and helped the parties settle their differences in an amicable way. The lending decision to the Assan Aluminyum comes with certain strings in the Environmental and Social Action Plan directly addressing the labor union's concerns. The IFC structured the loan disbursement as enforcement and monitoring mechanism.

The process with ADR methods started with a letter dated September 22nd, 2008 by TÜRK-İŞ (Confederation of Turkish Trade Unions) President to the Compliance Advisor Ombudsman (CAO) of the IFC and MIGA. In the letter, the labor union invoked the IFC performance standard II: Labor and Working

Conditions, noted the IFC's commitment to the labor union rights and freedoms—i.e. rights to organize, strike, and conduct collective bargaining arrangements. The issues raised in the complaint covered Assan's attitudes towards anti-unionization, employee bullying and dismissal because of labor union membership, and persistent inhibition of collective bargaining rights. The labor union cited the IFC loan talks and called for CAO's intervention to resolve this conflict (Compliance Advisor Ombudsman, 2008).

More specifically, the union asserted that the employer persistently impeded the collective bargaining agreement of the workers. Assan also fired veteran union members so as to daunt other members. Union claimed that some union members were coerced to resign and potential members were compelled not to be affiliated with the union (Compliance Advisor Ombudsman, 2008).

In fact, the complainant requests CAO to ensure the involvement of IFC in the ongoing dispute between the labor union and Assan Aluminyum. The labor union leverages IFC's involvement as a mediator in the settlement of the dispute. In this sense, this case constitutes an example of how an IFI's involvement in a project facilitates the dispute settlement process, and how other parties can make use of IFI's involvement to advance their claims.

Upon the receipt of the labor union's letter, the CAO first conducted an eligibility review, and the application was deemed eligible for assessment on October 27th, 2008 (Compliance Advisor Ombudsman, 2009). The IFC's involvement with the company was at an early stage, when the IFC has not yet concluded its due diligence. Therefore, the CAO notified the IFC about the claims of the labor union. According to the CAO's Complaint Conclusion Report, CAO's decision to forward

the complaint information to the IFC helped the IFC to address the concerns of the labor union as part of its own environmental and social appraisal procedure (Compliance Advisor Ombudsman, 2010). In this case the main burden of joint fact-finding, evaluation, processing, enforcement and monitoring lied with the IFC.

For fact-finding, IFC, as part of its environmental and social appraisal, organized site visits to the Dilovasi, Tuzla, and Assan Galvaniz plants. IFC reviewed "environmental and workplace monitoring data, environmental permits, and documents on environmental management and procedures, human resources management, occupational health and safety policy and procedures, emergency preparedness protocols, training programs and the social responsibility program". IFC also conducted a third party labor assessment at the Assan Aluminyum's manufacturing plants. This third party assessment covers all aspects of IFC's Performance Standard on Labor and Working Conditions –i.e. management-worker relations, workers right to unionize, effectiveness of grievance mechanisms. IFC's facilitated dialogue took place between stakeholders. The assessment has been done through individual and group interviews with management representatives, workers and worker representatives (Compliance Advisor Ombudsman, 2009). All parties shared information about their positions regarding the dispute by touching particularly onthe reasons behind the complaint.

In line with the lending procedures, the IFC, after conducting the due diligence, prepared an Environmental and Social Review Summary and based on the factual findings of the review agreed with Assan Aluminyum on an Environmental and Social Action Plan. According to the Environmental and Social Review Summary, the management noted that each employee has the right to join a labor union, and it claimed that labor union membership has declined since 2005 to the

extent that union membership is below the threshold at which an employer is required by Turkish law to negotiate a collective bargaining agreement (IFC, 2009a).

Despite these claims, the management agreed to enhance the freedom of association within the plant, and to this end the company committed to implement the Environmental and Social Action Plan with a specified timetable. The table below shows the relevant aspects of the Environmental and Social Action Plan agreed in the mediation process (IFC, 2009b).

Table 2: Environmental and Social Action Plan

Action	Completion Indicator	Timeline	Implementation
Assan will guarantee that its Human Resources Policy makes reference to the right of freedom of association. The policy will be released at all plants, specifying rights and duties as an Assan employee and management staff.	Revised Policy provided to IFC and evidence presented that it has been released in every plant.	Condition of disbursement	Implemented and Monitored
Assan will make sure that its Human Resources Policy acknowledges that the Company is an employer of equal opportunity and does not take decisions about employment based on their personal characteristics not linked to inherent employment conditions.	Revised Policy provided to IFC and evidence presented that it has been released in every plant.	Condition of disbursement	Implemented and Monitored
Assan will make visible in the workplace standardized statements of core labor standards, in a way that employees can readily understand.	Evidence of publication presented to IFC.	Condition of disbursement	Implemented and Monitored
Assan will train all staff on Human Resources Policy and rights and responsibilities of Assan staff. This will comprise of material on the right of freedom of association.	(i) Training done at all plants. (ii) Labor Audit to verify presence of freedom of association undertaken by a third party.	(i) April 31st , 2009 (ii) July 31st , 2009	Implemented and Monitored

con'd

Assan will guarantee that worker representatives are elected by employees in all plants. (i) Train workers on workers representatives' rights and responsibilities. (ii) Election of worker representative in Dilovası plant.	(i) Assan presents the training program done. (ii) Present election records and description of election process.	(i) July 31st, 2009 (ii) December 31st, 2009	Implemented and Monitored

Source: Adapted from (IFC, 2009b), (IFC, 2019b)

Considering the complaints raised by Turk İş, the Environmental and Social Action Plan functioned as the final result of mediation efforts of IFC.

In this case, the CAO adopted a collaborative approach and requested the involvement of IFC, as the latter was in the early stage of its lending decision. This decision helped IFC and the client address the issues raised in the complaint systematically. After the completion of the due diligence, the project cycle and the worker rights related issues were monitored by both IFC and the CAO (Compliance Advisor Ombudsman, 2010). Ensuring that the implementation of Environmental and Social Action Plan is on track, IFC Board also approved the USD 30 million project in May 2009, and the loans were provided in April 2010.

The Environmental and Social Action Plans have had well defined action items with completion indicators and detailed timelines. These action items were IFC lending requirements that Assan Aluminyum has agreed to fulfill (Compliance Advisor Ombudsman, 2009). This was important in the successful implementation.

In May 2009, the IFC and CAO shared the Environmental and Social Action Plan and its requirements with the complainants. Although the complaint was closed in November 2009, CAO continued to monitor the implementation of the action items in the Environmental and Social Action Plan. Moreover, as part of this monitoring process, IFC issued a Performance Standard II Labor Assessment Report.

This report was a follow-up assessment of the client and evaluated the client's compliance with the Environmental and Social Action Plan and IFC's Performance Standard II: Labor and Working Conditions (Compliance Advisor Ombudsman, 2010). The disbursement plan of the loan is sequenced in such a way that actual disbursements are conditional to the fulfillment of specific obligations stipulated in the action plan. Some obligations of the plan go beyond the disbursement date and this also helps the monitoring process.

IFC was conducting loan negotiations with the company when TÜRK-İŞ complained to CAO about the violation of workers' collective bargaining. Taking this into account, IFC also dwelled on concerns over the labor rights during the loan negotiations. IFC helped the parties resolve the dispute on workers' rights while guaranteeing the borrower was in compliance with the environmental and social standards. Most important, the loan disbursement was formed as the monitoring and enforcement mechanism of dispute settlement.

In order to bridge the gaps in the implementation of performance standard II and to help the clients and IFC staff improve the performance in relation to this standard, IFC launched Performance Standard II Handbook for Labor and Working Conditions. Designed as a practical reference toolkit, this handbook set forth the *raison d'être* of the performance standard II and provides the common non-acceptable practices and potential solutions in this area (IFC and SAI, 2010). By doing so, IFC sets concrete examples of compliant behavior, clarifies specific actions to be taken in order to improve accountability, and makes itself more accountable to its clients, while ensuring compliance and good governance by its clients.

c) Assessment of the ADR

In this case, parties resolved the dispute on labor rights through involvement of both CAO mechanism and IFC. In general, CAO has been the sole actor of dispute settlement in IFC. However, when the labor union complained about Assan's infringement on workers' rights, IFC was negotiating the parties' obligations based on the terms of loan with the company. Obligations of the loan negotiation were binding on the parties. Therefore, the IFC could incorporate the concerns over the labor rights into the loan negotiations and helped the parties settle the dispute while ensuring that the borrower is in compliance with the environmental and social standards. This result has implied that the enforcement power of loan negotiations in IFC-supported projects was very instrumental in the successful resolution of the conflict. Eventually, CAO's effective and timely coordination with IFC contributed to conflict resolution process since Assan Company needed to comply with the actions in Environmental and Social Action Plan due to significance of IFC's financial incentives for Assan Company's investment plan.

IFC's environmental and social standards were also compatible with Turkish Labor Law; thus, TÜRK-İŞ benefited from IFC's involvement in this case as a leverage to obtain employees' rights stemming from the domestic labor regulation, and to commence mediation process.

After CAO identified Assan's violation of the fundamental rights and freedoms of the workers as part of performans standards, IFC and CAO mediated between Assan and the labor union. Mediation process included information sharing, dialogue facilitation, and joint fact-finding. All of these complemented each other.

IFC and CAO also effectively monitored Assan's progress to comply with performance standard II, Labor and Working Conditions. Environmental and Social Action Plan (ESAP) was the main monitoring tool being comprised of three concrete subjects: (i) action with a particular focus on the human resources policies, (ii) completion indicators including various evidences and (iii) timeline based on condition of disbursement. This structure facilitated the follow-up phase to monitor the ADR tools' results thanks to its clear design.

CHAPTER V

CASE STUDY III: MULTILATERAL INVESTMENT GUARANTEE AGENCY IN THE RAJAMANDALA PROJECT DISPUTE BETWEEN LANDOWNERS and RAJAMANDALA ELECTRIC POWER (REP) COMPANY

a) Background of the Dispute

Rajamandala Hydropower Project is a build-operate-transfer style power plant development and operation project. Japan Bank for International Cooperation (JBIC) and Mizuho Bank Ltd. co-financed the project, while MIGA extended USD 200 million guarantee for 19 years to cover the non-shareholder loans of these two institutions. The dispute stems from the adverse effects of tunnel construction on a local paddy field as part of Rajamandala project. CAO helped parties to the dispute, which are the company vs. the landowners, by mediating the dispute settlement process through negotiation, information sharing, factual assessments and a training session to improve communication and cooperation between the parties. The company and the land owners as a result of the negotiations agreed on the sale of land to the company (MIGA, 2014).

A local youth organization applied to CAO in May 2016 to complain about the tunnel construction's adverse effects on landowners' fields on behalf of a local family in Bantarcaringin Kampong of Rajamandala in West Java, Indonesia. Although the local company and four landowners were the actual parties to the dispute, one of the landowners communicated with the local youth organization,

which was a non-governmental organization. All landowners participated in the dispute resolution process. The complainants put forward that tunnel constructions associated with the Rajamandala project had adverse effects on the local family's paddy field, which was located above the tunnel. The complainants alleged that cement spills and water drainage associated with the tunnel construction had left the land drier and less productive. CAO found the complaint eligible in June 2016 and initiated the process (Compliance Advisor Ombudsman, 2016).

Rajamandala project was considered as one of the public-private partnership projects (PPPs). PPPs enabled the governments to provide necessary infrastructure with limited direct financial outlays. Adequate risk transfer from the government to the private sector is a key requirement if the PPPs are to deliver high-quality and cost-effective services to consumers and the government (European Commission, 2004). In PPP contracts, the private partner builds a facility in line with the standards agreed with the public entity. Following the construction, the private partner manages the facility for a given period of time, which is known as concession period. After concession period, the private partner transfers the facility to government or private sector partners. While there are different forms of PPPs, in general these projects are design-build-operate-finance type schemes, where the governments are the main purchasers of the services provided by these facilities. Some forms of the PPPs imply ownership of the facility by the private sector partner; however, in most, widely used models, the private partner is obliged to transfer the facility to the government after the completion of the concession period. A typical example of the latter is facilities built through build-operate-transfer (BOT) model. In a build-operate-transfer model, the private sector designs and builds an asset, operates it, and then transfers it to the government when the operating contract ends, or at some other

preset time. The private partner may subsequently rent or lease the asset from the government (IMF, 2004).

By participating in a project financing venture, each project sponsor pursues a clear objective, which differs depending on the type of the sponsor. Industrial sponsors see the initiative as upstream or downstream integrated or in some way as linked to their core business. Contractors develop, build, or run plants. Contractors may keep the facility at the end of the concession period or they develop and build the facility and then transfer it to industrial sponsors. Financially, the contractors provide equity or subordinated debt to the business entity established to build and operate the facility. Public sponsors (central or local government, municipalities, or municipalized companies) aim to provide the service at the lowest possible cost and their involvement in the project centers on social welfare. Financial investors provide senior debt finance to the business entity to get a risk adjusted return. The debt finance can be gathered by direct bank financing or issuance of debt securities (Gatti, 2012).

The hydropower project consists of the development and operation of a 47 megawatt run-of-the-river hydropower plant near Bandung on Java Island in a build-operate-transfer basis. Total contract value of the project was USD 150 million, financed with an equity of USD 40 million and debt of USD 110 million (MIGA, 2013).

The company responsible for designing, building, and operating the facility is Rajamandala Electric Power (REP). REP is jointly owned by KPIC Netherland B.V, which is a wholly owned subsidiary of Kansai Electric Power Co., Inc (Kansai) and PT Indonesia Power (IP), which is a subsidiary of PT Perusahaan Listrik Negara

(PLN). Kansai holds a 49% stake in REP, and IP owns the remaining 51%. In terms of equity contribution, this ownership structure translates into USD 20.4 million by Kansai and USD 19.6 million by IP (Compliance Advisor Ombudsman, 2016).

The project's contract period was set as 30 years with the construction period consisting of 33 months. Construction started in October 2014. Following the completion of the construction, the plant started to generate electricity to be purchased by the Indonesian state-owned power generation company as part of the power purchase agreements. The operation of the project were to be jointly conducted by REP and IP, with advisory from Kansai. The power plant generates electricity through utilizing the steep drop between two existing dam-type power stations. The run-of-the-river hydropower plant[7] does not require large structure such as a dam. Therefore it can be built with lower project cost, with relatively limited environmental and social impact (MIGA, 2013).

The project is financed with a capital structure of 25% equity and 75% of debt, and of the USD 110 million total debt, JBIC provided approximately USD 66 million loan with the remaining USD 44 million financed by Mizuho Bank, Ltd. MIGA issued guarantees of up to USD 200 million covering the loans by JBIC and Mizuho Bank Ltd. to the Rajamandala project. The coverage was for a period of up to 19 years including against the risks of expropriation, war, and civil disturbance, and breach of contract (MIGA, 2014).

While issuing guarantees, MIGA conducted environmental and social reviews. In line with the lending procedures, the MIGA, after conducting the due diligence, prepared an Environmental and Social Review Summary. In this respect,

[7] This plant harvests the energy from flowing water to generate electricity due to the lack of a large dam and reservoir.

MIGA assessed projects against eight performance standards in environmental and social review similar to IFC. These standards address: (i) assessment and management of environmental and social risks and impacts, (ii) labor and working conditions, (iii) resource efficiency and pollution prevention, (iv) community, health, safety, and security, (v) land acquisition and involuntary resettlement, (vi) biodiversity conservation and sustainable management of living natural resources, (vii) indigenous peoples, and (viii) cultural heritage. These standards guide MIGA clients to manage and improve their social and environmental performance, while fully integrated into the MIGA's decision making processes[8].

Environmental and Social Review Summary of the Rajamandala Hydropower Project indicated that the project was assessed against the following performance standards (PS): (PS I) Social and Environmental Assessment and Management Systems, (PS II) Labor and Working Conditions, (PS III) Pollution, Prevention and Abatement, and (PS IV) Community Health, Safety & Security. The summary document also cited that (PS V) Land Acquisition and Involuntary Resettlement did not apply as all land acquisition was conducted on a willing seller-willing buyer principle with no involuntary resettlement and/or economic displacement (MIGA, 2013). (PS VII) Indigenous Peoples and (PS VIII) Cultural Heritage did not apply either since the project did not impinge upon the indigenous territories and communities, and unknown archeological, cultural heritage or paleontological sites do not exist in site.

This dispute was to a large extent related to (PS IV) Community, Health, Safety and Security. Accordingly, the Environmental and Social Review Summary

[8] These standards and their objectives, desired outcomes and recommended measures are the same as the IFC's performance standards; therefore, a thorough discussion of these standards will be skipped here.

set forth key factors that mitigated the risks related to the (PS IV) Community, Health, Safety and Security. The summary specifically cites that the population in the Cisameng Sub-Village and Bentacaringin Sub-Village, which are located in the Project's area of influence between the intake and outlet is estimated to be less than 500. More accurate baseline information will be available on the population following completion of the supplemental social impact assessment. REP has prepared a community grievance mechanism to receive, process and track resolution any complaints from affected communities for construction and operations phases.

The policies and processes for emergency preparedness and response ("EPR") will be created and integrated with the ESMS for the construction as well as operation stages as a requirement for the guarantee agreement. The EPR policies and procedures for the operations phase should identify the roles of responsible parties when anticipated output (operational or emergency) threatens life, assets, or financial activities downstream, including (i) types of emergencies/contingencies, both natural and man-made (e.g. earthquakes, flooding, hurricanes, extraordinary flows, etc), (ii) direct area of influence in case of extraordinary flows, (iii) an early warning system for emergency situations, as well as operational unusual and/or maintenance planned releases, and (iv) community/third party communication and emergency identification/evacuation training.

Community consultation was conducted in November 2011. The key concerns that arose in the course of the consultation included: job opportunities, suitable compensation for land acquisition, community, health and safety throughout construction phase, hydro-geologic impacts to irrigation water, need for direct socialization at the project site, safety of transmission lines, water quality, and

damage to public infrastructure. The visit to MIGA's site confirmed that local government authorities continued socialization with affected people.

b) The Role of ADR in the Settlement of Dispute

Similar to IFC, MIGA used dispute resolution/ombudsman function of the CAO to resolve the conflict. In this respect, CAO helped the parties have a prominent role in pinpointing and implementing their own solutions. CAO applied the non-binding ADR method to resolve the disputes through an amicable settlement. Actually, negotiation, joint fact-finding, information sharing and facilitated dialogue processes led by CAO contributed to the ultimate success of CAO's mediator role by engaging the parties in this case.

The Rajamandala Hydropower Project is another example of mediation by CAO also including joint fact-finding, facilitated dialogue, and information sharing between the parties. Thanks to CAO's role in dispute resolution, four landowners and the company effectively negotiated and reached a mutually agreed solution.

The CAO-sponsored training and ensuing institutionalized communication channels between the community and the company further solidified better dialogue, facilitated amicable settlement, and prevented the emergence of a new community related dispute. The CAO's involvement as a neutral third-party confidence-builder and facilitator helped strengthen the dialogue between the parties, foster company-community relations, and precipitated the resolution of the dispute.

CAO as a mediator conducted the joint fact-finding process by listening the arguments from landowners and company regarding the paddy field. Then, CAO investigated the issues in dispute, and reported to the parties with findings of fact and recommendations based on those findings. Parties to the dispute, the independent

experts under the CAO mechanism of the IFC and MIGA and relevant stakeholders shared information and negotiated in order to solve their disputes and comply with social and environmental standards. Upon the receipt of the complaint and deemed that it is eligible for CAO's further action, the office of the CAO conducted an assessment of the issues in August 2016. This was a joint fact-finding and information sharing process. The assessment aimed at clarifying the key issues to be resolved, generate better understanding concerns raised by the complainants, gather information on how other stakeholders see the contentious issues, and determine whether a voluntary dispute resolution was possible. Providing a coordinated discussion between multi-stakeholders thanks to the CAO's dialogue facilitator role, this assessment was conducted through reviewing MIGA's project documentation, holding calls and meetings with complainants, the project team and the company staff and visiting the project site and affected village (Compliance Advisor Ombudsman, 2016).

The assessment process revealed that the construction of a tunnel as part of the project affected four landowners whose lands were above the tunnel. One of these land parcels was further impacted by concrete during construction. The landowners claimed that water aas drained from their land with the construction and the productivity in the land reduced as a result of limited water supply. Furthermore, among these four landowners, two families were still considering potential sale of their land parcels located above the tunnel (Compliance Advisor Ombudsman, 2016).

The complainants also raised concerns about the company's responsiveness to the community's concerns, such as noise and traffic disturbances, impacts on the local road, or availability of work opportunities for community members. The

company and its contractors were accused of responding to concerns only slowly and after protests, hurting a peaceful and harmonious life in the community.

During the assessment, the complainants and the company agreed to engage in a voluntary dispute resolution process facilitated by CAO to negotiate the issues raised in the complaint. CAO convened the first joint meeting in August 2016, where the parties agreed on two key action items to address during the dispute resolution process:

- Addressing the remaining land problems by direct negotiations between the business and the property owners
- Working together on improving communication between the company and the communities.

The company and the two land owners and their families successfully conducted direct negotiations and agreed on the sale of the land in question effectively addressing the first agreed action item of the dispute resolution process. CAO provided support during the negotiation process to help the parties address their respective concerns about the terms of the settlement. To address the second action item, a joint training workshop was held by CAO in October 2016 to strengthen communication between the company and its host community. The purpose of the workshop was to build the parties' capacities to resolve conflict in a collaborative manner, as well as to design and agree on a framework for continued communication and collaboration. Workshop participants identified existing challenges that played a role in preventing communication and collaboration between the two parties. An action plan was agreed at the end of the workshop committing the parties to:

- Strengthen the community's organization, including through awareness raising, training, and the creation of a forum for dialogue.
- Improve company's internal coordination and improve cooperation with other relevant parties, such as the local government and partner companies.
- Hold joint monthly meetings on the occasion of Friday Prayer (Compliance Advisor Ombudsman, 2017).

To ensure the implementation of the negotiated agreements, land sale agreements were completed and the local families got paid. The continuous dialogue aspect of the settlement was monitored by CAO on the basis of self-reports from the local community. The parties reported that since the conclusion of the training and the beginning of the monthly meetings, communication and collaboration between them improved substantially (Compliance Advisor Ombudsman, 2017).

The CAO played a catalyst role in helping parties garner support for effective representation from both the community and the company. In addition to the directly affected parties, local leaders of the community were encouraged to get involved in the process, including government representatives and religious leaders. On the company side, several employees, including representatives of management, participated in the process. For the training, a representative of a project contractor, who has regular interactions with the community, also participated (Compliance Advisor Ombudsman, 2017).

c) Assessment of the ADR

In this case, the parties resolved the Rajamandala Project dispute concerning paddy fields through the mediator role of CAO mechanism. After landowners complained about the adverse effects of the tunnel on their fields, CAO found the

complaint eligible and initiated its assessment process. This process included only non-binding ADR tools in dispute resolution, which are negotiation, joint fact-finding, and dialogue facilitation. Like the previous case that involved CAO mediation, it was successfully resolved through non-binding ADR tools like dialogue and mediation. During MIGA's project documentation, the complainants raised a wide range of concerns including employment opportunities, appropriate compensation for land acquisition, community, health and safety during construction phase, hydro-geologic impacts to irrigation water, need for direct socialization at the project site, safety of transmission lines, water quality, and damage to public infrastructure. It is important to state that CAO's dispute resolution function has considered the findings of MIGA's on-site visits for the project preparation, while assessing the concerns of landowners in the dispute resolution.

After the CAO put forward the tunnel's detrimental effects on the paddy fields, CAO conducted joint meetings with the participation of company representatives and landowners. During these meetings, CAO promoted company and landowners to share information regarding their concerns and positions for the dispute through direct negotiations between them. CAO, as a dialogue facilitator, also strengthened the communication between company and communities (landowners their families, government representatives and religious leaders) by organizing a workshop. This workshop contributed to improving company's coordination between its departments and cooperation with other relevant parties including local governments and partner companies. All these initiatives indicated CAO's critical roles using non-binding ADR tools in the dispute resolution process. Besides, participation rate of stakeholders has been considerably high in the process thanks to the inclusive approach in the use of ADR tools. All parties negotiated to

cope with the concerns of landowners and to come up with concrete solutions such as selling the lands and conducting the workshops.

In monitoring process, self reports of the local community were the tools to follow up the impacts of workshops on collaboration between parties and continuity of the dialogue. CAO could observe whether the dialogue for settlement has been enhanced and so the results of ADR tools have been effectively implemented.

Similar to IFC, MIGA used CAO mechanism effectively to resolve disputes between the company and the landowners. In Rajamandala Hydropower Project, where MIGA extended a guarantee, the CAO mediated between the parties through joint fact-finding by considering the results of MIGA's on-site visits during due diligence. CAO, as a dialogue facilitator, helped the local community build capacity to better communicate with the company. Thanks to the institutionalized communication channels, compliance and monitoring were easier. However, unlike the Assan Aluminyum case, the CAO got involved in the Rajamandala project after MIGA extended the guarantee. As the guarantee was irrevocable, the financial incentives to comply with the MIGA rules were limited. However, the client is an international company working in many other emerging market and developing countries and may need to request MIGA guarantee again. Therefore, the company has strategic incentives to comply with the environmental and social standards in order to make sure that the company's reputation at MIGA remained untarnished and the company could request another MIGA guarantee in next round of its ordinary course of business.

CHAPTER VI

CONCLUSION

Governance has been a recurring theme in IOs as their decisions have far-reaching consequences for countries, individuals, and investors. Good governance has multiple pillars, including transparency, accountability, efficiency, and participatory governance. IFIs designed compliance review functions to sustain the accountability for their actions. However, the research on the interrelation among governance, accountability, and compliance is scarce. The research on this interrelationship focuses mainly on theoretical aspects, and the existing literature is institution-centric. As literature review also shows that while there is a rich literature on key pillars of good governance, accountability mechanisms and compliance review functions in IFIs, the role of ADR tools in dispute resolution and their contribution to the compliance process has been inadequately discussed. ADR tools are instrumental for the initiation of compliance process, implementation of results and monitoring and evaluation of the implementation process. Therefore, we need to better understand the role of ADR methods in the compliance process taking into account the peculiarities of the mandates and context in different IFIs and hence, this thesis focused mainly on how non-binding ADR mechanisms function in compliance, accountability and then good governance in an integrative approach, where the similar and conflicting aspects of implementation of ADR tools at various IFIs.

This study aimed at better understanding the role of non-binding ADR tools in dispute resolution as part of the compliance process in IFIs. To that end, I conducted a comparative case study by focusing on the implementation of various ADR tools in three different IFIs. The IFIs provided details to indicate how they use available non-binding ADR tools in conflict processes. One of the significant findings of this comparative case study is that although non-binding ADR tools have been used in all off the cases, the dispute resolution and compliance processes have been different from each other. This could emanate mainly from the type of the conflicts (labor, trade, investment, project finance), IOs' different organizational structures such as mandate, type of the parties to the disputes (states/public institutions, commercial legal persons, natural persons), and IOs' ADR capacities and capabilities. Trade disputes between sovereign entities are settled in WTO case, the disputes related to project finance between labor union and investor or a local community and investor are resolved in IFC and MIGA cases respectively. Therefore, nature of the actors in these disputes are also different from each other. The difference among the nature of actors translates well into the capabilities and bargaining power of the parties as well. The profit seeking private investors being highly dependent on IFI funding in the short-term are more amenable to the IFI dictated rules. That is why sovereign states ignored the WTO intervention and rather negotiated a better deal for themselves. This study shows that non-binding ADR mechanisms, which are based on the active participation of all stakeholders in dispute resolution process and voluntary, are significant to generate compliance with rules-based international order, to foster accountability, and good governance in international economic and financial organizations especially if they are implemented effectively. If the parties of the dispute lose their credibility for the

IFIs' accountability and transparency, IFIs can tarnish their critical roles and images as the confident problem solver in international relations. Another contribution of this study is to illuminate the similarities and differences across IFIs in compliance through ADR. However, the conclusions of this study are arguably limited to these three cases from three IFIs and open sources readily available. In two of the cases where CAO was involved, the outcome and implementation of the negotiated agreement was successful. In the WTO case, however, non-binding ADR was not by itself successful in generating an agreement and implementation.

This study shows that ADR processes in WTO, IFC and MIGA have some similarities with respect to the role of ADR tools to promote their accountability mechanism and all stakeholders to actively participate in the resolution process. IFIs used multiple ADR tools to complement each other. However, these IFIs differ on some points including filing an initial complaint, implementation and monitoring mechanisms of ADR tools.

The implications of this research suggest that the WTO, IFC and MIGA use ADR tools in compliance review and dispute resolution as part of their accountability mechanism. In IFC and MIGA cases, the ADR methods worked as effective tools to protect accountability of the IFIs by complying with social and environmental standards. In WTO case, we contemplate that consultation process could to some extent contribute to dispute settlement process. However, it is observed in all cases that the good governance is highly correlated to performance of accountability mechanism; therefore, IFIs need to build up accountability mechanisms working efficiently.

WTO, in resolving the banana dispute between the European Communities and US & Latin American Countries, upholds the international trade law. IFC/CAO, in resolving the labor rights dispute between Assan and Labor Unions, ensures the full implementation of its own performance standards, which is part of soft law. MIGA/CAO, in resolving the paddy field dispute in Indonesia, ensures that the parties comply with the environmental, social and governance standards of the World Bank Group (WBG).

ADR mechanisms had an important role in dispute resolution and compliance review of the IFIs by incorporating relevant parties into the resolution and compliance processes. Selected cases articulated that WTO, IFC, and MIGA have been using ADR tools through different procedures in filing an initial complaint, implementation, and monitoring stages of the ADR tools. As such, in each case the ADR process was started by a different step. In the WTO's banana case the relevant countries applied through their diplomatic representative at the WTO.Whereas, at the IFC's dispute on labor rights the complainant labor union directly applied to the CAO. In the paddy field dispute in Indonesia, MIGA initiated the process after a civil society organization sent a letter. Nevertheless, in all cases the dialogue-based dispute resolution facilitated the information sharing process between parties and contributed to reducing the non-compliance with international rules, standards and regulations including internationally accepted environmental and social standards.

As for the implementation of the ADR mechanisms, the IFC and MIGA have more control over the process than WTO, as these institutions extend funding to at least one party to the dispute. This was a major factor to support the negotiation process with incentives. However, the WTO only provides a venue and does not exert much influence over the specific steps to be taken to resolve the dispute. In the

labor rights dispute at the IFC, the CAO conducted a fact finding mission and facilitated the dialogue between the parties to the dispute, and acted as a mediator. In the paddy field dispute at the MIGA, the CAO similar to the IFC case, helped build negotiation capacity to the complainant and undertook the role of the mediator and brought together the parties to settle the dispute. On the other hand, in the banana case the WTO only provided a venue to the consultation parties and provided the list of panelists to be selected.

In monitoring the implementation of the ADR tools, the IFC and MIGA incorporated an elaborate monitoring structure into the disbursement of loan or regular review of the guarantee. At the WTO, the members are expected to comply with the consultation or panel resultswithout such monitoring body. The WTO does not have any direct enforcement tool on countries because the sovereignty principle strictly applies. In order to overcome this challenge, the WTO allows other countries to implement countervailing sanctions to the non-compliant party. In the banana case, following the European Communitiesact against the WTO ruling, the WTO's Dispute Settlement body gave a free hand to complainant parties to implement countervailing trade measures to enforce the resolution.

The ADR tools do not abide by a single procedure at the IFIs. The dispute resolution process could be initiated either through binding or non-binding tools., During the dispute resolution process the relevant parties could ask for other complementary measures. The banana dispute at the WTO was initially started with the non-binding ADR tool of consultation; however, within due course, as the complainant parties believed that the consultations would not yield a quick result, they turned to binding ADR tool of panel which was initiated simultaneously. On the other hand, in the labor rights dispute at the IFC and paddy field dispute at the

MIGA, the parties did not apply for binding ADR tools. In WBG, binding tools can be also used, if necessary. Yet, binding tools and non-binding tools are not implemented simultaneously.

The ADR tools can be more effective in case of complementarity between various methods of the ADR. In the WTO case, regarding the Regime for the Importation, Sale and Distribution of Bananas, the final outcome was achieved through implementation of multiple binding and non-binding tools. WTO examined the EU's new banana trade regime through panels, while the relevant parties also conducted consultations and implemented trade sanctions to foster compliance. The results of the panels indicated that EU's banana trade regime was not consistent with the WTO rules. While consultations did not provide the parties with enforcement and monitoring mechanisms, international agreement and the tariff schedule announced by the EU was certified by the WTO, any non-compliance may lead to legally binding dispute settlement or WTO allowing retaliatory sanctions also helped dispute resolution process.

In processes led by CAO, mediation process involves multiple dispute resolution techniques including negotiation, information sharing, joint fact-finding and facilitated dialogue. These were all used in IFC and MIGA cases. The tools are adjusted according to the needs of the case. On the other hand, in WTO consultation, there is less technical specialization in the dispute resolution process. Disputants are left to themselves without much guidance on the dispute resolution techniques. To elaborate on CAO's role in IFC and MIGA, CAO as a mediator conducted joint fact-finding process by listening to arguments from the parties to the disagreement on labor rights and paddy field. Then, CAO investigated the issues in dispute, and reported to the parties with findings of fact and recommendations based on those

findings. Thanks to CAO's facilitated dialogue, parties of the dispute, the independent experts under the CAO mechanism of the IFC and MIGA and relevant stakeholders shared information and negotiated in order to solve their disputes and comply with social and environmental standards. In Assan Aluminyum case, the IFC was negotiating the terms of loan with the company when the labor rights issues were raised. The IFC incorporated the concerns over the labor rights into the loan negotiations and helped the parties settle the dispute while ensuring the borrower is in compliance with the environmental and social standards. The borrowing process is designed in a way acted as a monitoring and enforcement mechanism. In Rajamandala Hydropower Project, where MIGA extended a guarantee, the CAO mediated between the parties through joint fact-finding by dwelling on the results of MIGA's on-site visits for the project preparation. However, unlike the Assan Aluminyum case, the CAO started assessing the Rajamandala project after MIGA extended the guarantee. As the guarantee was irrevocable, the financial incentives to comply with the MIGA rules were constrained. CAO also catalyzed talks as a dialogue facilitator and helped the local community build capacity to better communicate with the company. With the institutionalized communication channels, compliance and monitoring became easier.

In IFC and MIGA cases, we can speculate that companies preferred complying with the environmental and social standards since they can request to benefit from MIGA guarantees and IFC funding later. This can be categorized as a repeated game. However, like banana dispute, sovereign states may not comply with WTO's decisions in dispute resolution process since they do not have any incentives emanating from WTO's structure.

The effectiveness of the ADR tools in implementation process and monitoring the results of implementation did not depend solely on forms of ADR tools, which are binding and non-binding, despite the binding results of the arbitration mechanisms in IFIs due to enforcement of arbitration awards. While arbitration mechanisms in IFIs and panel in WTO do have binding and well-monitored results, as observed particularly in the structure of CAO mechanism under IFC and MIGA, the results of the mediation, equally worked efficiently to prevent non-compliance and resolve disputes, despite non-binding tools were used with limited enforceability. However, it is worth to note that in IFC and MIGA, the implementation of the loan and the guarantee agreements were tied to the resolution of the disputes, and this facilitated the settlement of the dispute. In the WTO's consultation and panel mechanisms in the banana case did not fully resolve the dispute until the US intervened and implemented trade sanctions against the European Communities. In cases where the dispute involved multiple sovereign states and where the IFI did not have enforcement of performance standards, non-binding ADR methods by itself was not enough to generate a negotiated agreement.

We can speculate that IFC and MIGA have also differed from WTO in terms of sharing information on cases. WBG is more transparent for third parties requesting details of the cases than WTO. This circumstance could to some extent have negative impacts on accountability of the WTO.

The results could lead to further research on understanding the main motivation factors for selection of the ADR tools and assessing the efficiency of the ADR tools in compliance processes. The further studies can also evaluate the enforcement processes of ADRs to understand whether they have enforcement power or not. All these topics can be beneficial to understand how to implement ADR

mechanisms more effectively in order to resolve disputes and achieve a well-structured, efficient and effective compliance process.

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