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Conference Report: Innovation in Governance of Development Finance: Causes, Consequences and the Role Of Law

By *Maninder Malli**

Introduction

On April 8-9, 2013, a workshop on innovation in the techniques and governance of development finance was held at New York University, School of Law in New York City, bringing together over thirty academics, practitioners and other experts in the field from across the world. The workshop examined the causes and consequences of innovation in development finance and the implications for law and public policy, including the role of law in innovation and the adequacy and significance of innovation in development finance law and governance. This report provides a synopsis of the workshop discussions.¹

The workshop was co-hosted by Professors **Kevin Davis** and **Benedict Kingsbury** of the Institute of International Law and Justice, New York University, School of Law and Professor **Philipp Dann** of the Schumpeter Research Group, University of Giessen. The organizers structured the workshop around the following thematic sessions:

- 1) Big picture perspectives on fundamental themes.
- 2) World Bank innovation in its financing instruments.
- 3) World Bank innovation in non-financing instruments and borrower approaches.
- 4) Issues of corruption and the rule of law.
- 5) Sovereign borrowing.
- 6) Private philanthropic flows.
- 7) New financial sources, including China and India.
- 8) Innovative State activities, with a focus on public-private partnerships.

The workshop focused not just on innovative financial flows themselves, although there were certainly elements of that, but also on how changing patterns of development finance were generating questions of governance. The workshop situated these concepts within the context of the purposes of development finance.

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1 Draft papers (accessible via the password "innovate"), a more detailed conference report and video of some sessions are available at <http://www.iilj.org/newsandevents/InnovationinGovernanceofDevelopmentFinance.asp> (last accessed on 5 December 2013).

1. Big Picture Perspectives on Fundamental Themes

The initial session established a framework for the workshop. The hypothesis of the workshop was that innovation entails both a distinctive phenomenon and one that can be examined through distinctive analytical tools. The types of enquiries that can be made in this area include describing the innovations, examining the impact of innovations and proposing new innovations.

Annalisa Prizzon of the Overseas Development Institute² provided a thorough overview of how the development finance landscape had evolved over the last ten years and what it is going to look like going forward. Official development aid (ODA) is likely to decrease in relative importance, apart from the poorest countries. Other sources of financing, such as domestic taxation, soft loans, private cross-border flows and philanthropy, are increasing in relative importance. Prizzon identified a number of emerging trends in aid delivery:

- i. Demand for making ODA more accountable to tax-payers has led to an increased focus on results³, value for money and transparency.
- ii. Greater risk aversion by country members of the OECD's Development Assistance Committee (DAC) (i.e., the world's major donor countries) and the consequent rising importance of non-DAC donors.
- iii. Greater focus on support for the private sector.
- iv. Greater recipient country selectivity.

Martin Eifert of Humboldt University brought a unique, non-development finance, perspective to the workshop. He discussed the concept of *innovation*, generally, and its difficult application to development law. Eifert's general claim was that while there is a large volume of research on innovation, generally, and on the role that law might play in driving innovations or safeguarding against innovations, the concept of innovation has remained largely connected to market processes and external to the law. He suspected that innovation policy may be applied to instruments that open up new markets and that an overall governance approach should not interfere with innovative developments, but rather make the public sector more responsive to these dynamics.

2. World Bank Innovation in Financing Instruments

The second session focused on innovation in the World Bank Group's financing instruments.

Devesh Kapur of the University of Pennsylvania presented a cogent argument in favor of increasing the capital of the International Bank for Reconstruction and Development (IBRD – the middle-income finance branch of the World Bank). Kapur noted that International Development Association (IDA – the lower income branch) supply and demand has decreased, as most of the world's poor are now located in middle income countries. Kapur presented a

2 See also H. Kharas and A. Rogerson, *Horizon 2025: Creative Destruction in the Aid Industry*, Overseas Development Institute (2012).

3 See, for example, Dann's discussion regarding World Bank Program-for-Results financing, *infra*.

number of interesting proposals for increasing the lending ability of the IBRD, including reducing administrative expenses and potentially auctioning the shares of the Bank (as a way to re-think the pricing of global power).

Philipp Dann discussed the World Bank's new results-based lending instrument – Program-for-Results (PforR)⁴. PforR was introduced in February 2012 and represents a major change for the World Bank, as this is the first time in thirty years that the Bank has devised a new lending instrument. Dann made two primary claims: the *substantive* claim was that this new instrument is certainly a major innovation that will most likely be adopted by other lending agencies; and the *methodological* claim was that law is an essential tool in the design and evaluation of this new instrument.

Structural and policy reform in the World Bank was a prevailing theme of the workshop. **Laurence Boisson de Chazournes** of the University of Geneva suggested that the World Bank is indeed at a turning point. While there have been some institutional reforms, we have to differentiate between legal and policy reforms. To progress, the presenters felt that the World Bank needs to consider changes to its overall identity. PforR represents a fundamental switch, most notably in its reliance on recipient country systems for fiduciary, environmental and other safeguards. Co-financing is another method for the Bank to possibly reduce administrative costs but retain safeguards.

3. World Bank Innovation in Non-Financing Instruments and Borrower Approaches

Shifting to non-financing innovation in the World Bank, **Michael Riegner** of the University of Giessen discussed the application of innovation and law in the World Bank's role as a 'Knowledge Bank'.⁵ Since the mid-1990s, the Bank has undertaken a number of institutional reforms to embark on this paradigm to become a knowledge and information hub. Riegner's main arguments were that: (1) the shift from solely a finance paradigm to the knowledge paradigm is a major cause for innovation in the governance model of the World Bank; and (2) this legal/governance knowledge can, and should, contribute to innovation in developing countries – but to do so it needs to provide a more coherent, effective and legitimate framework which systematically addresses the application of knowledge in development.

Marie von Engelhardt, also of the University of Giessen, discussed the role of law in the World Bank's engagement with fragile States. She asserted that traditional ODA needs innovation to tackle State fragility (and the varying conditions these situations entail) more effectively. The World Bank has been at the forefront of this innovation, not only in terms of its risk-averse business model, approaches and instruments for States with unstable and weak capacity environments, but it has also adopted rules and procedures to disburse ODA to fragile

4 See Program-for-Results: The World Bank's New Financing Instrument, available at: http://siteresources.worldbank.org/PROJECTS/Resources/40940-1244163232994/6180403-1340125811295/PforR_Overview_March2013.pdf (last accessed on 5 December 2013.).

5 See D. Kapur, The "Knowledge" Bank, Center for Global Development (2006), available at: http://www.cgdev.org/doc/books/rescuing/Kapur_Knowledge.pdf (last accessed on 5 December 2013.).

States. In this context, the Bank uses its internal law as a tool to consolidate innovation. **Vikram Raghavan**, a World Bank lawyer who specializes in fragile and conflict States, followed with a succinct summary of the development of the Bank's internal law⁶ on fragile States and the practical and interpretive issues that have resulted from these innovative provisions.

4. Corruption and Rule of Law

The fourth session continued the theme of World Bank innovation, focusing on broader issues of corruption and the rule of law.

Kevin Davis presented a paper on innovation and the evaluation of innovation in the field of anti-corruption. The World Bank's innovative sanctions system⁷ is an administrative process for sanctioning firms and individuals found to have engaged in corrupt, fraudulent, collusive, coercive or obstructive practices in connection with Bank-financed projects. This system provides parties alleged to have engaged in a sanctionable practice a level of due process before a decision on sanctions, if any, is imposed. Davis raised the specter of the World Bank as a global anti-corruption agency. He noted that we must make value judgments as to whether there should be a global anti-corruption agency. More specifically, there are questions as to the legitimacy of the sanctions process and whether there is any empirical support for the causal impact of this innovation on corruption.

Michael Woolcock of Harvard University and the World Bank discussed the World Bank's efforts to promote the rule of law. He asserted that such efforts have focused on (i) the 'legal transplant' of templates from particular countries as reform programs for developing countries, and (ii) the direct engagement with and 'legal empowerment' of rural populations to help them become more active claimants and political actors in exercising their rights and obligations of citizenship (e.g., the *Justice for the Poor* program⁸). Woolcock argued that there is a 'missing middle', which would link institutional reforms with citizenry empowerment. The broader task is to raise credibility, capability and accessibility of legal institutions in the context of intensifying legal pluralism.

6 See, primarily, World Bank Operational Policy 2.3 – Development Cooperation and Conflict (dated Jan. 2001, last rev. Apr. 2013).

7 For more information see The World Bank Sanctions System at: <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTOFFEVASUS/0,,menuPK:3601066~pagePK:64168427~piPK:64168435~theSitePK:3601046,00.html> (last accessed on 5 December 2013).

8 For more information, see The World Bank, Justice for the Poor (J4R) Program at: <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/EXTJUSFORPOOR/0,,menuPK:3282947~pagePK:149018~piPK:149093~theSitePK:3282787,00.html> (last accessed on 5 December 2013).

5. Sovereign Borrowing

The fifth session shifted the focus from the World Bank to innovations in sovereign borrowing.

Anna Gelpern of the American University Washington College of Law discussed the *UNCTAD Principles on Promoting Responsible Sovereign Lending and Borrowing*⁹ which are an innovative set of best practices for sovereign borrowing and lending. Gelpern remained skeptical of this instrument's impact to date, asserting that it is primarily an agenda-setting tool at this stage. Gelpern suggested that we need more institutional study regarding different actors' interests in innovation and reform in sovereign lending.

Matthias Goldmann of the Max Planck Institute for Comparative Public Law and International Law presented a theory of *public reasoning* in the context of sovereign debt. He argued in favor of fiscal policy innovation (including sovereign borrowing) that promotes public reasoning. Procedurally, fiscal transparency can, for example, reduce State bankruptcies if sovereign borrowers better understand the terms of the loans that they undertake. Substantively, Goldmann suggested that we need rules on State borrowing to prevent self-interest and short-sightedness of politicians

Katharina Pistor of Columbia Law School presented a paper on sovereign debt contractual provisions. Pistor's conclusion was that the same contractual provisions typically mean different things in different contexts. Contexts can help predict outcomes. Pistor made the broader claim that financial innovation (such as the collective action clause – CAC¹⁰) often represents a signaling device from sovereign borrowers to the market with respect to economic circumstances. Pistor concluded that when looking at changes in contracting regimes, the important question to ask is how the innovation changes underlying hierarchical structures of financial systems and how elastic the commitments will be in a time of crisis.

6. Private Philanthropic Financing and Governance

The sixth session entailed two presentations relating to private philanthropic sources of development finance. As noted earlier by Annalisa Prizzon, there has been a relative increase in the importance of these financial flows for development.

Tim Büthe of Duke University broadly discussed private aid flows. Büthe and his collaborators started researching private aid originating in the U.S. in 2004. Their research examines private aid in the form of small donations by private individuals, collected and allocated by humanitarian and development NGOs.¹¹ Notably, their study concluded that there is

9 UNCTAD Principles on Promoting Responsible Sovereign Lending and Borrowing (2012), available at: http://unctad.xiii.org/en/SessionDocument/gdsddf2012misc1_en.pdf (last accessed on 5 December 2013).

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

11 A fuller discussion is contained in T. Büthe with S. Major and A. de Mello de Souza, *The Politics of Private Foreign Aid: Humanitarian Principles, Economic Development Objectives, and Organizational Interests in the Allocation of Private Aid by NGOs*, Int'l Org. 66 (2012), p 571.

strong and robust support for the hypothesis that allocation is driven by objective recipient need, operationalized through development indicators. The research found that, consistently across measures of recipient need, private aid flows are allocated, to a very significant degree, to countries with the greatest need.

David Gartner of Arizona State University presented his fascinating work on innovative financing in the field of global health. Gartner notes that, alongside the shift from ‘North-South’ to ‘South-South’ cooperation, there has been a shift away from States as driving the innovation in aid to hybrid entities that involve States, the private sector, civil society, and inter-governmental organizations and foundations. Gartner’s paper examines three mechanisms – the International Finance Facility for Immunisation (IFFIm), UNITAID and the Advanced Market Commitment (AMC) – to analyze their emergence, approaches and impact.

7. New Financiers: China and India

This session sought to distill some of the underlying perspectives of India and China, two rising economic powers with large populations, as growing foreign aid donors and investors.

In the absence of **Roselyn Hsueh** of Temple University, Benedict Kingsbury presented a short summary of Hsueh’s paper which builds on her earlier work comparing the regulation of the telecommunications and textiles sectors in China.¹² Hsueh’s new work looks at China’s role in Africa, specifically in Angola and Nigeria. Hsueh and her co-author, Michael Byron Nelson (Wesleyan University), study the role of Chinese telecommunications companies and their relationship to the Chinese Government’s political and economic strategy in Nigeria and Angola. Overall, China appears to gain tangible goodwill from the financial support to these countries and by generating links to political elites.

James Gathii of Loyola University Chicago discussed the need to make technology transfers a key component of resource extraction and construction contracts in Africa. The question is how resource-rich poor countries can leverage their resources to lay a foundation for transforming their economies away from resource dependency. A second issue is how to increase infrastructural development. Gathii argues that resource-rich countries should pursue productivity-enhancing technology and skills transfer arrangements with China, for example, in exchange for their resources.

Rani Mullen of the College of William and Mary outlined emerging trends in India’s development assistance, which, overall, has grown rapidly, especially over the past decade. Innovation in Indian development assistance includes its distinct self-perception and terminology (e.g., use of the term *partnership*), non-adherence to DAC or other regional and global norms, demand driven selection, lack of conditionality, unique approaches to reporting, monitoring and evaluation and decentralized management.

David Malone, Rector of the United Nations University, added additional color to the rise of South-South development cooperation. India’s aid program is very tied up in geo-

12 Roselyn Hsueh, *China’s Regulatory State: A New Strategy for Globalization* (2011).

strategic concerns, including funding neighbors that border China. Aside from the immediate neighborhood, the Indian model is very different to the Chinese one. The Indian government is working on bilateral relations and then expecting the Indian private sector to follow. Compared to China, there is not as direct a connection between the private and public sector in India.

8. Innovative State Activities and Public-Private Partnerships (PPPs)

The final session of the workshop peered inside States to assess certain innovations that are driving development and governance of development. The role of the home State should not be underestimated in these discussions which tend to focus on the role of donor States and institutions. Annalisa Prizzon noted in her framing discussion that the most important source of development finance in emerging and developing countries has been and will continue to be taxation and domestic financial deepening.

Michael Trebilcock of the University of Toronto described the lessons learnt from infrastructure PPPs in the developing world. The last twenty years have seen dramatic growth in infrastructure sector PPPs in developing countries. Infrastructure investments yield very significant social rates of return, generating growth and productivity gains. Such PPPs constitute ongoing, long-term relationships as opposed to one-off transactions.

Mario Schapiro of FGV Law School (with co-author **David Trubek**, University of Wisconsin) discussed innovation in BNDES, the domestic Brazilian development bank and the most important domestic source of private financing in Brazil. The main claim of their paper is that despite having experienced a learning process in which the bank developed new tools to foster innovation, BNDES' institutional practice remains concentrated in financing its traditional clients – big companies in consolidated sectors such as natural resources.

Gaston Pierri of the University of Alcalá provided a comparative analysis of cash transfer programs in Latin America. Conditional cash transfers (CCTs) are a development policy innovation which makes welfare program payments conditional upon the recipients' actions, such as enrolling children into schools, attending regular doctors' check-ups or receiving vaccinations. CCT programs in Argentina, Brazil and Chile share characteristics of responsibility between the beneficiary and the State, high targeting and low costs.

Dudi Rulliyadi of Melbourne Law School described how Indonesia innovates to attract development finance through a particular feature of its PPPs – institutionalizing fiscal incentives through *guarantees*. Indonesia established a guarantee fund to increase the value of government guarantees and thereby make PPPs more attractive. The guarantee fund was deployed to reduce risk while the State was in a process of reform.

Conclusion

The organizers and the participants generally expressed that the workshop was a great success. We can note three principal takeaways:

- i. We need to ask whether these mechanisms are in fact *innovations*. It is better to question rather than to assume. Are these mechanisms novel and can they be replicated? Alternatively, they might simply reflect customization or reform.
- ii. There is the question of the role of *law*, relating to whether the law actually matters in this subject. For example, how seriously should we take the rules that govern the capital structure of the World Bank? The question of the role of law was the main recurring theme of the conference.
- iii. Lastly, we need to remain focused on the *causes and consequences* of these innovations. In many ways, the workshop reflected the resurgence of interest in *law and development*, in particular with respect to sources, instruments, delivery, actors and governance. There is a strong connection between this discipline and global administrative law (GAL), of which many leading experts, including Benedict Kingsbury and Richard Stewart of NYU, were in attendance at the workshop. Lastly, the variety of speakers and topics of presentation (e.g., economics, political science and law) revealed the truly inter-disciplinary nature of the study of law and development.