Bridging the Accountability Gap Between the Universal Rights Regime and the Regime of Multilateral Development Financing Institutions

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On 20 September 2019, the United Nations (U.N.) Office of the High Commissioner for Human Rights released the draft of its Benchmarking Study of Development Finance Institutions' Safeguards and Due Diligence Frameworks Against the U.N. Guiding Principles on Business and Human Rights. Both studies focus on the human rights liabilities of multilateral development finance institutions (MDFIs) and equally recommend the adoption of Human Rights Due Diligence Frameworks in MDFI operations. However, they differ in that the Benchmarking Study assumes the human rights liability of MDFIs, while this Note seeks to establish such an obligation. *See* U.N. Office of the High Commissioner for Human Rights, Benchmarking Study of Development Finance Institutions' Safeguards and Due Diligence Frameworks Against the U.N. Guiding Principles on Business and Human Rights (20 September 2019), *available at* https://www.ohchr.org/Documents/Issues/

I. INTRODUCTION 1087
A. Background of the Study
B. Thesis Statement
C. Legal Issues
II. THE NATURE OF MULTILATERAL DEVELOPMENT FINANCING INSTITUTIONS AS THE NEXUS OF THEIR RESPONSIBILITY TO RESPECT, PROTECT, AND FULFILL HUMAN RIGHTS OBLIGATIONS 1097
A. Major Multilateral Development Financing Institutions
B. Character of Multilateral Development Financing Institutions in International Law
C. The Regime of Multilateral Development Financing Institutions
III. THE CONFLICT BETWEEN THE PROHIBITED POLITICAL ACTIVITY CLAUSE IN THE CONSTITUENT INSTRUMENTS OF MULTILATERAL DEVELOPMENT FINANCING INSTITUTIONS AND THEIR HUMAN RIGHTS OBLIGATIONS UNDER CUSTOMARY INTERNATIONAL LAW 1131
A. History and Evolving Meanings of the Prohibited Political Activity Clause and Its Inconsistency with Human Rights Obligations
B. Resolving the Contesting Values of Non-Intervention and Human Rights in the Operations of Multilateral Development Financing Institutions
C. Areas of Vulnerability and Attendant Human Rights Obligations Under Customary International Law
IV. ACCOUNTABILITY, THE UNIVERSAL RIGHTS REGIME, AND MULTILATERAL DEVELOPMENT FINANCING INSTITUTIONS 1150
A. Accountability Gap in the Regime of Multilateral Development Financing Institutions
B. Domestic Courts as Fora for the Protection of Human Rights in Relation to the Regime of Multilateral Development Financing Institutions
V. RECOMMENDATIONS FOR EFFICIENT AND EFFECTIVE HUMAN RIGHTS ENFORCEMENT IN THE REGIME OF MULTILATERAL DEVELOPMENT FINANCING INSTITUTIONS 1176

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A. Recommendations for the Adoption of Human Rights Due Diligence Frameworks in the Operations of Multilateral Development Financing Institutions
B. Recommendations for Retaining the in Limine Litis Character of Immunity Claims
ANNEX 1183

I. INTRODUCTION

> *We have to rely on getting drinking water from the company. But they* [*do not*] *give us enough.*
>
> — Patel Budha Ismail Jam[1]

A. Background of the Study

The idea of States pooling funds to aid in the rehabilitation and development of other States followed on the heels of the devastation caused by the Second World War, along with the vision of creating an international economic system[2] constituting "two pillars to support the edifice of world peace and prosperity."[3] The model was replicated in regional communities, with each institution citing substantially similar development goals as their primary

1. EarthRights International, Tata Mundra Client Stories: Patel Budha Ismail Jam, *available at* https://earthrights.org/wp-content/uploads/tata_mundra_client_stories-1.pdf (last accessed Jan. 30, 2022) [https://perma.cc/SWA7-AW4T].

2. Kirsten Jeanette M. Yap, Bretton Woods Institutions and International Human Rights Law, at 11 (2004) (unpublished J.D. Thesis, Ateneo de Manila University School of Law) (on file with the Ateneo Professional Schools Library) (citing Frieder Roessler, *Law, De Facto Agreements and Declarations of Principle in International Economic Relations*, 21 GERMAN Y.B. INT'L L. 27 (1978); 4 ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW: THE INTERNATIONAL MONETARY SYSTEM 14-15 (2d ed. 1984); EDWARD S. MASON & ROBERT E. ASHER, THE WORLD BANK SINCE BRETTON WOODS 102 (1973); & Michael P. Malloy, *Shifting Paradigms: Institutional Roles in a Changing World*, 62 FORDHAM L. REV. 1911, 1911 (1994)).

3. Yap, *supra* note 2, at 12 (citing *Bretton Woods Agreements Act: Hearings Before the Comm. on Banking and Currency on H.R. 2211*, 79th Cong. 106 (1945) (statement of Harry Dexter White, U.S. Treasury Department)).

purpose[4] to produce an international financing environment characterized by the existence of seemingly benevolent, multi-state entities with development objectives. These qualities define Multilateral Development Finance Institutions (MDFIs).

MDFIs are financial institutions incorporated generally by national governments[5] and whose

> *raison d'être* ... is to engage where the market fails to invest sufficiently. [MDFIs] engage particularly in countries with restricted access to domestic and foreign capital markets. They [specialize] in loans with longer maturities and other financial products which are appropriate for financing long term infrastructure projects.[6]

While some definitions limit the work of MDFIs to private sector transactions,[7] for purposes of the subsequent discussion, both public and

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4. *See, e.g.*, Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Dec. 3, 2007, 2016 O.J. (C 202) 1 [hereinafter EU Charter]; Protocol No. 5 on the Statute of the European Investment Bank, 2016 O.J. (C 202) 251 [hereinafter EIB Charter]; Agreement Establishing the Inter-American Development Bank, 389 U.N.T.S. 69 (entered into force Dec. 30, 1959) [hereinafter IADB Charter]; Agreement Establishing the African Development Bank, 510 U.N.T.S. 3 (entered into force Sept. 10, 1964) [hereinafter AfDB Charter]; Agreement Establishing the Asian Development Bank, 571 U.N.T.S. 123 (entered into force Aug. 22, 1966) [hereinafter ADB Charter]; Agreement Establishing the African Development Fund, 1197 U.N.T.S. 13 (entered into force June 30, 1973) [hereinafter ADF Charter]; Agreement Establishing the European Bank for Reconstruction and Development (EBRD), 1646 U.N.T.S. 97 (entered into force Mar. 28, 1991) [hereinafter EBRD Charter]; & Asian Infrastructure Investment Bank (AIIB), *Articles of Agreement of the Asian Infrastructure Investment Bank* (Dec. 25, 2015) [hereinafter AIIB Charter].

5. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, DEVELOPMENT CO-OPERATION REPORT 2014: MOBILISING RESOURCES FOR SUSTAINABLE DEVELOPMENT 61 (2014).

6. Dirk Willem te Velde & Michael Warner, Use of Subsidies by Development Finance Institutions in the Infrastructure Sector, at 1, *available at* https://cdn.odi.org/media/documents/pb2-0712-dfis.pdf (last accessed Jan. 30, 2022) [https://perma.cc/V7L9-36RZ].

7. *See, e.g.*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 5, at 61 & Velde & Warner, *supra* note 6, at 1.

private sector transactions are considered to be within the official competencies of MDFIs.

Benevolence and development attracted active state participation in the MDFI machinery. Most, if not all, States are members of at least one MDFI.[8] The funding from these institutions has gained significance in low-income economies.[9] In the course of their operations, however, several problems have arisen. On the one hand, the MDFI regime has allowed international resource transfers and facilitated some measure of economic growth and/or development in areas needing financial allocations.[10] On the other hand, the inherent unequal structures of many MDFIs, and their oppressive debt systems, have made MDFIs prime exemplars in the neo-colonial, neo-imperialist debate.[11] The problem is compounded by the fact that there is no single MDFI regime.[12] Each institution operates within the particular scope of its conferred jurisdiction, rarely, if at all, overlapping with other institutions of the same nature.[13] Thus, there is difficulty in International Law in defining a set of rules that would definitively govern them. This difficulty is most pronounced in the area of International Human Rights Law (IHRL).[14] Behind this problem is the recognition that MDFIs can and do violate Human Rights (HR) as they relate with other subjects and objects of International Law.

Multilateral Development Financing Institutions have refused to participate in the Human Rights agenda in at least three ways — *first*, they claim that they do not have hard law HR obligations; *second*, they invoke the

8. OECD iLibrary, Annex B. Country Factsheets: DAC Providers' Use of the Multilateral Development System, *available at* https://www.oecd-ilibrary.org/sites/d02af5f1-en/index.html?itemId=/content/component/d02 af5 f1-en#figure-d1e7742 (last accessed Jan. 30, 2022) [https://perma.cc/RB7Z-BC4V].

9. SIGRUN I. SKOGLY, THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND 2 (2001).

10. MIRIAM CAMPS & CATHERINE GWIN, COLLECTIVE MANAGEMENT: THE REFORM OF GLOBAL ECONOMIC ORGANIZATIONS 255-317 (1981).

11. *See* Jyrki Käkönen, *The World Bank: A Bridgehead of Imperialism*, 5 INSTANT RES. PEACE & VIOLENCE 150 (1975) & Prince Williams Odera Oguejiofor, *The Interrelationships Between Western Imperialism and Underdevelopment in Africa*, 6 ARTS SOC. SCI. J. 112 (2015).

12. *See* Ulrich Pfister & Christian Suter, *International Financial Relations as Part of the World-System*, 31 INT'L STUD. Q. 239 (1987).

13. *Id.*

14. SKOGLY, *supra* note 9, at 1-9.

Prohibited Political Activity Clauses of their constituent instruments; and *third*, they plead their immunities. In light of institutions insisting on their independence and immunity to fulfill their mandate, and an international community seeking accountability and the development of measures towards Human Rights ends, which should prevail?

In April 2008, for example, the International Finance Corporation (IFC), a member of the World Bank Group (World Bank) primarily engaged in private sector financing through direct investments and advisory services,[15] granted a U.S.$450 million loan for the Tata Mundra project, which would have had a tenure of 20 years.[16] The project was approved despite known risks that it "would cause significant harm to surrounding communities[.]"[17] The massive, coal-fired Tata Mundra Powerplant and Adani Plant (Tata Mundra Plants) were built near coastal fishing communities[18] and are alleged to have caused serious environmental damage leading to a significant decrease in catch-yield for the fisherfolk, an increase in illnesses, and potable water problems in the area.[19] In 2011, several problems in finding viable sources for coal resulted in significant losses for the Tata Mundra Plants, which the company passed on to consumers.[20] On the verge of collapse,[21] the Tata Mundra project reneged on its promise to bring electricity to poor Indian communities, negatively

15. Articles of Agreement of the International Finance Corporation art. I, *opened for signature* May 25, 1955, 264 U.N.T.S. 117 (entered into force July 20, 1956) [hereinafter IFC Charter]. The purpose of the IFC is "to further economic development by encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas, thus supplementing the activities of the International Bank for Reconstruction and Development." *Id.*

16. EarthRights International, Budha Ismail Jam, et al v. IFC: An Indian Fishing Community Takes on the World Bank, *available at* https://earthrights.org/case/budha-ismail-jam-et-al-v-ifc/#timelineff69-1a905f26-f4b6 (last accessed Jan. 30, 2022) [https://perma.cc/C7X4-H7LW].

17. *Id.*

18. Complaint by Plaintiffs, Apr. 23, 2015, at 6-8, *available at* https://earthrights.org/wp-content/uploads/ifc_tata_mundra_complaint-1.pdf (last accessed Jan. 30, 2022) [https://perma.cc/Y4ZH-DRQ6], *in* Jam, et al. v. International Finance Corp., Civil Action No. 15-612 (JDB) (D.D.C. 2015) (U.S.) [hereinafter Complaint by Plaintiffs].

19. *Id.* at 18-19. *See also* EarthRights International, *supra* note 1, at 2.

20. Complaint by Plaintiffs, *supra* note 18, at 17.

21. *Id.* at 18.

affecting the health, livelihood, and overall lifestyle of the people living there.[22]

Similar conduct on the part of the IFC was observed in the financing of the *Uy Metsa Botnia* (Botnia) mega pulp mill, which operates by the River Uruguay along the border of Uruguay and Argentina.[23] The IFC pushed for the disbursement of some U.S.$370 million to Botnia despite (a) a legal battle between the border-States on negotiation and control along the border; (b) the finding by the Compliance Advisor/Ombudsman (CAO) that the project violated the IFC's procedural norms and safeguards pertaining to social and environmental compliance; and (c) protests by key stakeholders.[24] In the end, the International Court of Justice (ICJ) declared that Uruguay violated its obligation to inform and negotiate with Argentina on the use of natural resources pertaining to the River Uruguay, in addition to setting some exceptions on the adequacy of IFC-approved environmental and social impact assessment reports.[25]

These are not isolated cases. They permeate MDFI operations around the world. Yet, MDFIs have been virtually untouchable in both the domestic and international sphere. Their charters grant them immunities premised on the stunting effect of litigation in development work[26] and allow them to reject Human Rights obligations under the Prohibited Political Activity Clause, which is generally worded as follows —

> SECTION 10. Political Activity Prohibited. The Bank and its officers shall [neither] interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their

22. *Id.* at 18-25.

23. Centro de Derechos Humanos y Ambiente (CEDHA), International Court of Justice Rules on Uruguayan Botnia Case: World Bank's IFC, Nordea, Calyon and Finnvera Complicit in Violations of International Law, *available at* https://www.banktrack.org/article/international_court_of_justice_rules_on_uruguayan_botnia_case (last accessed Jan. 30, 2022) [https://perma.cc/8U7S-C7FU] (citing Case Concerning Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14 (Apr. 20) [hereinafter CEDHA]).

24. *Id.*

25. *Pulp Mills on the River Uruguay*, 2010 I.C.J. at 67-68, ¶ 149.

26. Jam v. Intern. Finance Corp., 139 S. Ct. 759, 771 (2019) (U.S.).

> decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.[27]

Notwithstanding the claim of incompetency to take on Human Rights obligations, many writers have discussed the Human Rights liabilities of the World Bank and similar institutions.[28] Much of the argument for imposing Human Rights obligations upon the World Bank draws from its character as a Specialized Agency of the United Nations (UN).[29] As a Specialized Agency of the UN, it is bound by the provisions of the UN Charter to respect, protect, and fulfill Human Rights.[30] The argument, however, hardly translates to the protection and enforcement of Human Rights by MDFIs which are not

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27. Articles of Agreement of the International Bank for Reconstruction and Development art. IV, § 10, *opened for signature* Dec. 27, 1945, 2 U.N.T.S. 39 [hereinafter IBRD Charter]. *See also* Yap, *supra* note 2, at 23-33.

28. *See* Sedfrey M. Candelaria, *The Philippines and the IMF: Anatomy of a Third World Debt*, 36 ATENEO L.J. 16 (1992); Rachelle R. Guinto, A Probe on the IMF and Its Conditionality: Impact on Philippine Sovereignty, Social Responsibility, and Liability of the IMF and the Philippines (2000) (unpublished J.D. thesis, Ateneo de Manila University School of Law) (on file with the Ateneo Professional Schools Library); Anthony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and the Third World*, 32 N.Y.U. J. INT'L L. & POL. 234 (2000); James Thuo Gathii, *Human Rights, the World Bank and the Washington Consensus: 1949-1999*, 94 AM. SOC'Y INT'L L. 144 (2000); SKOGLY, *supra* note 9; MAC DARROW, BETWEEN LIGHT AND SHADOW: THE WORLD BANK, THE INTERNATIONAL MONETARY FUND AND INTERNATIONAL HUMAN RIGHTS LAW (2003); Yap, *supra* note 2; Lovely-Ann C. Carlos, Are International Financial Institutions Bound by Human Rights Law? (2004) (unpublished J.D. thesis, Ateneo de Manila University School of Law) (on file with the Ateneo Professional Schools Library); Simon Caney, *The Responsibilities and Legitimacy of Economic International Institutions*, *in* LEGITIMACY, JUSTICE AND PUBLIC INTERNATIONAL LAW (Lukas H. Meyer ed., 2009); & Deborah Miriam dela Hoz Sobrepeña, The Accountability of International Financial Institutions and Their Agents Under the United Nations Convention Against Corruption (2012) (unpublished J.D. thesis, Ateneo de Manila University School of Law) (on file with the Ateneo Professional Schools Library).

29. SKOGLY, *supra* note 9, at 63-92. *See also* Daniel D. Bradlow, *The World Bank, the IMF, and Human Rights*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 47 (1996) & Motoko Aizawa, et al., *International Financial Regulatory Standards and Human Rights: Connecting the Dots*, 15 MANCHESTER J. INT'L ECON. L. 2 (2018).

30. SKOGLY, *supra* note 9, at 99-106; Yap, *supra* note 2, at 84-91; & Carlos, *supra* note 28, at 68-89.

attached to the UN system. This becomes problematic in light of growing diversity among MDFIs, with one such example being the rise of Regional Multilateral Development Banks (MDBs).

Furthermore, it is one thing to be liable for Human Rights obligations, and another to be accountable therefor. To be liable means to have an obligation in law to act or not to act in accordance with a given set of standards.[31] It is, generally, substantive in character.[32] To be accountable means to answer for violations of obligations imposed, focusing more on the matter of imputation and remedies.[33] The confluence of these factors results in responsibility.[34]

MDFIs generally hold themselves accountable through internal accountability mechanisms. For example, in September 2020, the Board of Executive Directors of the World Bank established the World Bank Accountability Mechanism, which has since been tasked to amplify transparency and clarity in the World Bank's procedures for investigation and

31. Emeka Duruigbo, *Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges*, 6 NW. U. J. INT'L HUM. RTS. 222, 224-25 (2008) (citing Special Representative of the Secretary-General, *Promotion and Protection of Human Rights*, ¶ 60, Commission on Human Rights, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) & Special Representative of the Secretary-General, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, ¶ 33, Human Rights Council, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007)).

32. *Id.*

33. Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should Be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers*, 51 HARV. INT'L L.J. 113, 116 (2010).

34. JAMES R. CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 539-42 (8th ed. 2012) (citing Spanish Zone in Morocco Claims (Gr. Brit. v. Sp.), 2 RIAA 615, 641; Case Concerning the Factory at Chorzów (Claim for Indemnity) (Ger. v. Pol.), Jurisdiction, 1927 P.C.I.J. (ser. A) No. 9, at 21 (July 26); The Factory at Chorzow (Claim for Indemnity) (Ger. v. Pol.), Merits, 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13); Corfu Channel (U.K. v. Alb.), Merits, Judgment, 1949 I.C.J. 6, 4 & 23 (Apr. 9); Application of the Convention for the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43, 115 (Feb. 26); & United States Diplomatic and Consular Staff in Tehran (U.S. v. Ir.), 1980 I.C.J. 3, 29 (May 24)).

dispute resolution in bank-funded development projects.[35] The matter of actually holding MDFIs accountable, however, has rarely been touched on, relegated mostly as recommendations appended to studies narrating the possible causes of action for MDFIs' liabilities.[36] The claims of immunity by MDFIs have proven to be significant hurdles in resolving "the issue of redress possibilities" in cases of their Human Rights violations.[37]

There is great interest in understanding the role of MDFIs in a changing world. They are vital institutions in development, and yet their free reign has run counter to their express mandates and to the norms and principles that bind them.

As illustrated, institutional responsibility for Human Rights violations is an enduring issue in International Law. It has been established that MDFIs can and do violate Human Rights.[38] In disclaiming responsibility for what MDFIs perceive to be "political" matters, they have failed to promote true and wholistic improvement in the lives of key stakeholders, specifically the "bearers of human rights, environmental rights, climate change rights, [and] indigenous peoples' rights[.]"[39] Certainly, the pursuit of development

35. Diane Desierto, et al., The 'New' World Bank Accountability Mechanism: Observations from the ND Reparations Design and Compliance Lab, *available at* https://www.ejiltalk.org/the-new-world-bank-accountability-mechanism (last accessed Jan. 30, 2022) [https://perma.cc/FTH8-HQ72].

36. *See, e.g.*, SKOGLY, *supra* note 9, at 196.

37. *Id.*

38. *See* Ibrahim F. I. Shihata, *Human Rights, Development, and International Financial Institutions*, 8 AM. U. J. INT'L L. & POL'Y 27 (1992) [hereinafter Shihata, Development]; David Gillies, *Human Rights, Governance, and Democracy: The World Bank's Problem Frontiers*, 11 NETH. Q. HUM. RTS. 3, 24 (1993); & Nidhi Modani, *Human Rights and Financial Institutions: Pinning the Responsibility*, 3 KATHMANDU SCH. L. REV. 116 (2013).

39. Diane Desierto, SCOTUS Decision in Jam et al. v. International Finance Corporation (IFC) Denies Absolute Immunity to IFC...with Caveats, *available at* https://www.ejiltalk.org/scotus-decision-in-jam-et-al-v-international-finance-corporation-ifc-denies-absolute-immunity-to-ifc-with-caveats (last accessed Jan. 30, 2022) [https://perma.cc/RN5M-FME2]. *See also* Adam McBeth, *A Right by Any Other Name: The Evasive Engagement of International Financial Institutions With Human Rights*, 40 GEO. WASH. INT'L L. REV. 1101 (2009).

necessitates a measure of accountability that is not self-serving nor anchored on the expectancy of morality among impersonal institutions.[40]

There is a human cost to unchecked power. This is a reality that the strictest constitutions and the most elaborate declarations of rights and accountabilities have recognized. And yet, victims, both alone and in community with others, have inadequate means of redress. This Note is a venture into discovering identities not only of quarries, but also of the powerful institutions that antagonize them, in the hopes that a new world order emerges in the realm of MDFIs and IHRL.

B. Thesis Statement

This Note expounds on the question of the Human Rights responsibilities of MDFIs and argues that MDFIs have hard law Human Rights obligations by working on the following premises:

First, MDFIs are International Organizations (IOs) and, thus, subjects of International Law, which are limited in their actions by, at least, customary international law (CIL). *Second*, MDFIs are economic institutions with obligations to properly disburse and account for the funds they control in accordance with sovereign values, including, most especially, Human Rights obligations. *Third*, MDFIs are development-oriented bodies whose work is guided by the standards of the integrated Right to Development, which properly includes the respect, protection, and fulfillment of Human Rights.

The Author respectfully submits that the Prohibited Political Activity Clauses embedded in the founding documents of MDFIs do not bar MDFIs from recognizing and complying with their Human Rights obligations.

First, the purpose of and the protections afforded by the Prohibited Political Activity Clause accrue to the benefit of borrowing Member States and have been improperly cited by MDFIs as justification for their rejection of Human Rights concerns. *Second*, the current interpretation of the provision expands the power of MDFIs beyond the contemplation of their charters. *Third*, the systemic integration of the Prohibited Political Activity and Purpose Clauses of MDFIs leads to the conclusion that the discharge of Human Rights obligations takes primacy.

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40. Jessica Evans, *Abuse-Free Development: How the World Bank Should Safeguard Against Human Rights Violations*, 107 AM. SOC'Y INT'L L. PROC. 298 (2013).

It is further submitted that the immunity claims of MDFIs cannot be pleaded in instances where they have acted beyond their conferred powers — that is, they are not immune for *ultra vires* acts.

First, there is an accountability gap in the regime of IOs, in general, and MDFIs, in particular. The internal mechanisms of MDFIs are not potent enough to hold MDFIs to account for their Human Rights violations in the absence of injunctive or adjudicative powers against the institutions they police. With the exception of the Court of Justice of the European Union-General Court (CJEU-GC) in relation to the European Investment Bank (EIB), there is no international tribunal empowered to render judgments on claims made against MDFIs for their violation of Human Rights obligations. The progress of Human Rights litigation before national courts is stunted by varying modes of avoidance in handling MDFI-related cases, with pronounced proclivity for upholding the immunity of MDFIs. It is argued that these claims of immunity are inutile against excesses in the use of sovereign powers for the reasons hereafter submitted. *Second*, the nature of the grant of immunity to MDFIs is functional and is properly limited by their constituent instruments. Thus, when MDFIs act beyond their express and implied powers, these acts cannot be considered as falling within their immunities. Violations of Human Rights obligations are *ultra vires* acts of MDFIs, and are, therefore, not subject to the protections afforded by their Immunity Clauses. *Third*, the principle of *lex specialis* could not have contemplated the carving out of Human Rights exceptions in the discharge of MDFIs' charter mandates. Human Rights violations of MDFIs are, thus, actionable before judicial bodies.

C. Legal Issues

In resolving the tension between the existence, mandate, and undertakings of MDFIs in their operational activities, on one hand, and the liability and accountability of the international community for Human Rights obligations, on the other, the current Note addresses these primary legal questions: *First*, do MDFIs have hard law Human Rights obligations? *Second*, which should prevail between the Prohibited Political Activity Clauses in MDFIs' constituent instruments and their Human Rights obligations? *Third*, can MDFIs plead their immunities when they are being held responsible for Human Rights violations that result from their transactions?

II. THE NATURE OF MULTILATERAL DEVELOPMENT FINANCING INSTITUTIONS AS THE NEXUS OF THEIR RESPONSIBILITY TO RESPECT, PROTECT, AND FULFILL HUMAN RIGHTS OBLIGATIONS

> *Our responsibility is much greater than we might have supposed*[ ] *because it involves all mankind.*
>
> — Jean-Paul Sartre[41]

A. Major Multilateral Development Financing Institutions

MDFIs were born out of the necessity to rebuild and rehabilitate a world torn apart by war.[42] For example, the creation of the International Bank for Reconstruction and Development (IBRD) and the IMF signaled a paradigm shift in the way the world economy was conceived and ordered.[43] Following the logic of a community of nations pooling funds for mutual aid and development, other regional MDFIs came into being.

There are at least 30 MDFIs currently operating around the world.[44] The majority of MDFIs are MDBs, which are defined as "international institutions

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41. JEAN-PAUL SARTRE, EXISTENTIALISM AND HUMAN EMOTIONS 37 (1965).

42. Yap, *supra* note 2, at 11-12.

43. CAMPS & GWIN, *supra* note 10, at 256-61.

44. *See* Asian Development Bank, Multilateral Organizations, *available at* https://www.adb.org/about/multilateral-organizations (last accessed Jan. 30, 2022) [https://perma.cc/94VY-BJE5]. These include:

(1) African Development Bank;
(2) Arab Bank for Economic Development in Africa;
(3) Asian Development Bank;
(4) Asian Infrastructure Investment Bank;
(5) Black Sea Trade and Development Bank;
(6) Caribbean Development Bank;
(7) Central American Bank for Economic Integration;
(8) Council of Europe Development Bank;
(9) Development Bank of Central African States;
(10) Development Bank of Latin America;
(11) East African Development Bank;
(12) Economic Cooperation Organization Trade and Development Bank;
(13) Eurasian Development Bank;
(14) European Bank for Reconstruction and Development;
(15) European Investment Bank;
(16) Inter-American Development Bank Group;
(17) International Finance Facility for Immunisation;
(18) International Fund for Agricultural Development;

that provide financial assistance, typically in the form of loans and grants, to developing countries in order to promote economic and social development."[45]

B. Character of Multilateral Development Financing Institutions in International Law

1. Multilateral Development Financing Institutions as International Organizations

a. Definition of an International Organization

Article 2 (a) of the International Law Commission's (ILC) 2011 Draft Articles on the Responsibility of International Organizations (DARIO) defines an IO as "an organization established by a treaty or other instrument governed by [I]nternational [L]aw and possessing its own international legal personality. [IOs] may include as members, in addition to States, other entities[.]"[46] This definition requires further discussion.

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(19) International Investment Bank;
(20) Islamic Development Bank;
(21) Nederlandse Financieringsmaatschappij voor Ontwikkelingslanden NV;
(22) New Development Bank;
(23) Nordic Investment Bank;
(24) OPEC Fund for International Development;
(25) West African Development Bank; &
(26) World Bank Group.
See Lars Engen & Annalisa Prizzon, A Guide to Multilateral Development Banks, *available at* https://cdn.odi.org/media/documents/12274.pdf (last accessed Jan. 30, 2022) [https://perma.cc/2W3Z-JZCB].

45. Rebecca Nelson, Multilateral Development Banks: Overview and Issues for Congress, at 1, *available at* https://fas.org/sgp/crs/row/R41170.pdf (last accessed Jan. 30, 2022) [https://perma.cc/G6SQ-N9ZC].

46. International Law Commission, *Draft Articles on the Responsibility of International Organizations*, art. 2 (a), U.N. Doc. A/CN.4/L.778 (May 30, 2011) [hereinafter DARIO]. This definition is similar to the articulation of Jean Combacau and Serge Sur of the *Droit International Public*, which provides, "[T]he international organization will be defined as a group with permanent vocation, composed essentially of States, constituted by them on the basis of a convention, generally multilateral, endowed with its own organs, and having powers of attribution."

EDWARD CHUKWUEMEKE OKEKE, JURISDICTIONAL IMMUNITIES OF STATES AND INTERNATIONAL ORGANIZATIONS 232 (2018) (citing JEAN

i. Established by Treaty or Instrument Governed by International Law

The first consideration is that IOs are incorporated by treaties or other instruments of International Law.[47] It serves well to point out the dichotomy between a treaty and other International Law instruments. On the one hand, the Vienna Convention on the Law of Treaties (VCLT) states that a "'[t]reaty means an international agreement concluded between States in written form and governed by International Law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation[.]"[48] On the other hand, the lesser known 1986 Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations (VCLT-IO) defines

> 'treaty' [as] an international agreement governed by [I]nternational [L]aw and concluded in written form:
>
> between one or more States and one or more [IOs]; or
>
> between [IOs], whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation[.][49]

The latter definition has no binding effect and is, at most, persuasive, expressing some consensus on the subject tackled. The instrument was not ratified by enough States to enter into force.[50] This notwithstanding, it sheds light on the necessity of qualifying the constituent instruments that birth IOs as either treaties or International Law instruments. The VCLT definition does

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COMBACAU & SERGE SUR, DROIT INTERNATIONAL PUBLIC 706 (5th ed. 1994)).

47. Olufemi Elias, *Who Can Make Treaties?*, *in* THE OXFORD GUIDE TO TREATIES 97 (Duncan B. Hollis ed., 2020).

48. Vienna Convention on the Law of Treaties art. 2 (1) (a), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

49. United Nations Conference on the Law of Treaties Between States and International Organizations or Between International Organizations, *Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations*, art. 2 (1) (a), U.N. Doc. A/CONF.129/15 (Mar. 21, 1986).

50. Kristina Daguirdas, *How and Why International Law Binds International Organizations*, 58 HARV. INT'L L.J. 325, 326 (2016).

not limit its application to instruments concluded by and between States,[51] recognizing that there are instances when constituent instruments of IOs are signed by other IOs.[52] Thus, the constituent instruments of IOs created by non-State actors are subject to the provisions of the VCLT.

To quash any doubt as to the applicability of the VCLT to constituent instruments of MDFIs, the practice has been for States to incorporate in treaty form those organizations which have been created through other means and/or by non-State actors.[53]

Creation by treaty or other instrument means that the body of International Law likewise governs the relationship of International Law actors under the constituent instruments. That is to say, for example, that the body politic consenting to the creation of these institutions cannot renege on its obligations thereunder, except as otherwise provided in such instruments.[54] It also means that agreements between States which are governed by domestic law/s are excluded from the denomination of a "treaty," and, consequently, from the application of the VCLT and other rules of International Law.[55]

These preliminaries are important in the exposition of this Note, with the legal theory being that the interpretation of the constituent instruments of MDFIs would lead to the conclusion that they are liable and accountable for Human Rights obligations.

The VCLT — having been established as applicable to constituent instruments of IOs, of which MDFIs are a subset — provides a legally binding framework as the foundation of the inquiry. Similarly, as these treaties and instruments exact obligations from their different subjects, the application of

51. VCLT, *supra* note 48, art. 5. Article 5 provides that the VCLT "applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization." *Id.*

52. *See, e.g.*, IFC Charter, *supra* note 15 & United Nations Industrial Development Organization, G.A. Res. 2152 (XXI), U.N. Doc. A/RES/2152(XXI) (Nov. 17, 1966).

53. OKEKE, *supra* note 46, at 232.

54. CRAWFORD, *supra* note 34, at 377.

55. *Id.* at 369.

the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts[56] and the DARIO[57] are put in issue.

ii. Including as Members States or Other Institutions

As bodies created by treaty or other instrument, IOs are composed of entities with treaty-making capacities — States and other IOs.[58]

The treaty-making capacity of States is an attribute of their enjoyment of "the fullest personality in International Law."[59]

The competence of IOs to enter into treaties was recognized in *Reparations for Injuries*,[60] albeit circumscribed by their constituent instruments or by interpretations thereof.[61] As a matter of general proposition, the capacity of an IO to enter into international agreements, such as treaties, may be expressly or impliedly conferred by its constituent instrument.[62]

In creating IOs, therefore, States and other IOs engage in what Professor Dan Sarooshi, an expert in International Law, has termed "conferrals of sovereign powers."[63] IOs are, thus, users of sovereign powers, which suggests that (a) they may act only within their specific mandates as defined by the States that create them;[64] and (b) the discharge of their mandates is inextricably linked to what States can and cannot do.[65] The scope, limitations, and consequences of an IO's exercise of sovereign powers were extensively discussed by Sarooshi in his typology of conferrals of powers to IOs.[66] It is his

56. International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts*, G.A. Res. 56/83, Annex, U.N. Doc. A/56/10, art. 2 (2001) [hereinafter ARSIWA].

57. DARIO, *supra* note 46.

58. Elias, *supra* note 47, at 98.

59. JOAQUIN G. BERNAS, S.J., INTRODUCTION TO PUBLIC INTERNATIONAL LAW 71 (2009).

60. Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 178-79 (Apr. 11).

61. CRAWFORD, *supra* note 34, at 179-80.

62. *Id.*

63. DAN SAROOSHI, INTERNATIONAL ORGANIZATIONS AND THEIR EXERCISE OF SOVEREIGN POWERS 18-27 (2008).

64. CRAWFORD, *supra* note 34, at 179-83.

65. Daguirdas, *supra* note 50, at 327.

66. *See generally* SAROOSHI, *supra* note 63.

thesis that a determination of the kind of conferral of power to an entity answers the question of "what sovereign values [IOs] should ... seek to achieve and use when they exercise sovereign powers."[67]

iii. Possessing International Legal Personality

The DARIO's definition of IOs assumes the existence of their separate and distinct legal personality.[68] There are conceivable instances, however, when an IO has no such independent personality.[69] The matter of legal personality is a primordial consideration in questions that require a rendezvous with International Law, involving, as it does, the "[possession of] international rights and obligations and having the capacity (a) to maintain its rights by bringing international claims[,] and (b) to be responsible for its breaches of obligation by being subjected to such claims."[70]

Senior Counsel for the World Bank Group, Mr. Edward Chukwuemeke Okeke, makes an important distinction between legal personality and legal capacity, stating, "[l]egal capacity derives from legal personality. Personality is the status of an entity within a legal system, and capacity is the scope of rights and obligations that inure to that person or entity within a legal system."[71]

The first theory governing the legal personality of IOs is that the same is conferred by the will of the founders and is, therefore, consensual in nature.[72] The second theory precipitates from *Reparations for Injuries*, which holds that such organizations are international persons, that they are subjects of international law, and that they can possess international rights and duties.[73] Moreover, an international organization would not be able to "carry out the intentions of its founders if it was devoid of international personality."[74]

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67. *Id.* at 2 (emphasis omitted).

68. CRAWFORD, *supra* note 34, at 167-69.

69. *Id.* at 166.

70. *Id.* at 115 (citing *Reparations for Injuries*, 1949 I.C.J. at 174 & Special Rapporteur on the Law of Treaties, *First Report on the Law of Treaties*, 2 Y.B. I.L. Comm'n 27, 31-37, U.N. Doc. A/CN.4/144 (Mar. 26, 1962) (by Sir Humphrey Waldock)).

71. OKEKE, *supra* note 46, at 245.

72. CRAWFORD, *supra* note 34, at 168-69.

73. *Reparations for Injuries*, 1949 I.C.J. at 179.

74. *Id.*

The above exposition was denominated as the Objective Personality view and provides, as criteria for the legal personality of an IO, the following:

> (1) a permanent association of states, or other organizations, with lawful objects, equipped with organs;
>
> (2) distinction, in terms of legal powers and purposes, between the organization and its member states; and
>
> (3) the existence of legal powers exercisable on the international plane and not solely within the national systems of one or more states.[75]

The substance and extent of the power of IOs to act on the international legal plane — their legal capacity — are defined by their constituent instruments,[76] governed, as they are, by the principle of specialty, which means that "they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them."[77] Stated differently, "the rights and duties [of an IO] must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."[78] This legal capacity is an operationalization of the organization's legal personality.[79]

The possession of an independent legal personality under International Law not only defines legal capacity to create international relations and to bring claims before international bodies. It also functions as a metric for holding an entity and/or those that compose it liable for violations of the international legal order. As earlier illustrated in Sarooshi's typology, the resolution of whether IOs and/or their constituent States are responsible for internationally wrongful acts depends heavily on the type of conferral of power and the distinct legal personalities of these organizations.[80]

As herein illustrated, the constitutions, powers, purposes, and consequences of IOs are nebulous and properly contested. Be that as it may, and considering the penultimate purpose of this current exercise to hold MDFIs liable for certain acts and omissions, the definition under the DARIO would suffice.

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75. CRAWFORD, *supra* note 34, at 169.

76. *Advisory Opinion on the Use of Nuclear Weapons*, 1996 I.C.J. at 16, ¶ 25 (July 8).

77. *Id.*

78. *Reparations for Injuries*, 1949 I.C.J. at 180.

79. OKEKE, *supra* note 46, at 245.

80. SAROOSHI, *supra* note 63, at 101–07.

From the demonstrations thus far, there is hardly any question that MDFIs are IOs. The constituent instruments of all the major MDFIs take the form of treaties.[81] Their membership is composed of States.[82] Therefore, they are also users of sovereign powers, a characteristic primarily exemplified by their control of government funds[83] and by their purpose to discharge certain sovereign functions (i.e., economic development, public infrastructure, and delivery of public utilities).[84] Finally, MDFIs have independent legal personality under International Law because they are generally characterized as more or less permanent associations of

81. IBRD Charter, *supra* note 27; IFC Charter, *supra* note 15; International Development Association, Articles of Agreement (Effective September 24, 1960), *available at* https://thedocs.worldbank.org/en/doc/2a209939e876fdcd0d957036daebff6e-04100011960/original/IDA-Articles-of-Agreement-English.pdf (last accessed Jan. 30, 2022) [https://perma.cc/YY75-RJ4P] [hereinafter IDA Charter]; Multilateral Investment Guarantee Agency, Convention Establishing the Multilateral Investment Guarantee Agency, *available at* https://www.miga.org/sites/default/files/archive/Documents/MIGA%20Convention%20February%202016.pdf (last accessed Jan. 30, 2022) [https://perma.cc/GDB6-M8UG] [hereinafter MIGA Convention]; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, entered into force Oct. 14, 1966, 575 U.N.T.S. 159 [hereinafter ICSID Convention]; EIB Charter, *supra* note 4; IADB Charter, *supra* note 4; AfDB Charter, *supra* note 4; ADB Charter, *supra* note 4; & AIIB Charter, *supra* note 4.

82. IBRD Charter, *supra* note 27, art. II, § 1; IFC Charter, *supra* note 15, art. II, § 1; IDA Charter, *supra* note 81, art. II, § 1; MIGA Convention, *supra* note 81, art. IV; ICSID Convention, *supra* note 81, art. I (2); EU Charter, *supra* note 4, arts. 3 & 308; IADB Charter, *supra* note 4, art. II, § 1; AfDB Charter, *supra* note 4, art. 3; ADB Charter, *supra* note 4, art. 3; & AIIB Charter, *supra* note 4, art. 3.

83. IBRD Charter, *supra* note 27, art. II; IFC Charter, *supra* note 15, art. II, §§ 2-5; IDA Charter, *supra* note 81, arts. I & V, § 1; MIGA Convention, *supra* note 81, arts. 5-10; ICSID Convention, *supra* note 81, art. 17; EU Charter, *supra* note 4, arts. 308 & 309; IADB Charter, *supra* note 4, art. II, §§ 1A-4; AfDB Charter, *supra* note 4, arts. 5-7 & 9; ADB Charter, *supra* note 4, arts. 4-8; & AIIB Charter, *supra* note 4, arts. 5-8.

84. IBRD Charter, *supra* note 27, arts. I & III, § 1; IFC Charter, *supra* note 15, art. I; IDA Charter, *supra* note 81, art. II, § 2; MIGA Convention, *supra* note 81, arts. 2 & 11-12; ICSID Convention, *supra* note 81, art. 6; EU Charter, *supra* note 4, art. 309; IADB Charter, *supra* note 4, art. I, § 2 & III, § 1; AfDB Charter, *supra* note 4, arts. 1-2; ADB Charter, *supra* note 4, pmbl. & arts. 2 & 8; & AIIB Charter, *supra* note 4, arts. 1, 2, & 9.

States, having *prima facie* lawful purposes[85] and being equipped with organs.[86] MDFIs also have distinct powers and functions under their respective constituent charters, which they exercise within the context of their relationship with their constituent States, and within the framework of the international legal order.[87]

Notwithstanding the settled character of MDFIs as IOs, tension arises in the dissection of the implications of such a conclusion on the nuances of institutional consequences that specifically attach to MDFIs.

b. Implications of Being an International Organization on Privileges and Immunities

i. Sources of Immunity

Privileges and immunities are granted to IOs as a direct consequence of their mandates.[88] Thus, in order to properly discharge their duties, they require "minimum standards of freedom and legal security for their assets,

85. IBRD Charter, *supra* note 27, arts. I & III, § 1; IFC Charter, *supra* note 15, art. I; IDA Charter, *supra* note 81, art. II, § 2; MIGA Convention, *supra* note 81, arts. 2 & 11-12; ICSID Convention, *supra* note 81, art. 6; EU Charter, *supra* note 4, art. 309; IADB Charter, *supra* note 4, arts. I, § 2 & III, § 1; AfDB Charter, *supra* note 4, arts. 1-2; ADB Charter, *supra* note 4, pmbl. & arts. 2 & 8; & AIIB Charter, *supra* note 4, arts. 1, 2, & 9.

86. IBRD Charter, *supra* note 27, art. V; IFC Charter, *supra* note 15, art. IV; IDA Charter, *supra* note 81, art. VI; MIGA Convention, *supra* note 81, arts. 30-38; ICSID Convention, *supra* note 81, arts. 4-16; EIB Charter, *supra* note 4, arts. 6-12; IADB Charter, *supra* note 4, art. VIII; AfDB Charter, *supra* note 4, art. 4; ADB Charter, *supra* note 4, arts. 26-35; & AIIB Charter *supra* note 4, arts. 21-31.

87. IBRD Charter, *supra* note 27, art. VII, §§ 2-3; IFC Charter, *supra* note 15, art. VI, §§ 2-3; IDA Charter, *supra* note 81, art. VIII, §§ 2-3; MIGA Convention, *supra* note 81, art. 1; ICSID Convention, *supra* note 81, art. 18; EIB Charter, *supra* note 4, arts. 7 & 16; IADB Charter, *supra* note 4, art. XI, §§ 2-3; AfDB Charter, *supra* note 4, arts. 51-52; ADB Charter, *supra* note 4, art. 49; & AIIB Charter, *supra* note 4, art. 45.

88. *See generally* OKEKE, *supra* note 46 & THE CONVENTIONS ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS AND ITS SPECIALIZED AGENCIES: A COMMENTARY (August Reinisch ed., 2016).

headquarters, and other establishments, and for their personnel and accredited representatives of member states."[89]

These privileges and immunities spring from a variety of sources. They are commonly embodied in treaties,[90] the national law of the host State,[91] and CIL.[92]

Treaties creating IOs contain agreements regarding "norms and rules that regulate [States'] behavior toward each other and toward the [IOs]."[93]

The Charter of the IBRD states — "To enable the Bank to fulfill the functions with which it is entrusted, the status, immunities[,] and privileges set forth in this Article shall be accorded to the Bank in the territories of each member."[94] In some cases, the immunities granted in constituent instruments are detailed in other treaties entered into by States and IOs. For instance, while the UN Charter already granted immunities to the UN, the details thereof were set out in the 1946 Convention on the Privileges and Immunities of the United Nations (General Convention)[95] and in the 1947 Convention on the Privileges and Immunities of the Specialized Agencies (Specialized Agencies Convention).[96]

It has been argued that constituent treaties of IOs and subsequent treaties entered into by them with States and other IOs are the sole source of their privileges and immunities.[97] This is a principal point of contention for non-Member States who interact with the IO, by virtue of the maxim *pacta tertiis nec nocent nec prosunt*.[98] While the enjoyment of privileges and immunities by IOs has become more contentious in the recent decade,[99] it is widely accepted

89. CRAWFORD, *supra* note 34, at 171.

90. *Id.* at 172.

91. CRAWFORD, *supra* note 34, at 172.

92. *Id.* at 173.

93. OKEKE, *supra* note 46, at 265.

94. IBRD Charter, *supra* note 27, art. VII, § 1.

95. Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 1 U.N.T.S. 4 [hereinafter General Convention].

96. Convention on the Privileges and Immunities of the Specialized Agencies, Nov. 21, 1947, 33 U.N.T.S. 261 [hereinafter Specialized Agencies Convention].

97. *Id.* at 266.

98. *Id.* (citing VCLT, *supra* note 48, art. 34).

99. *See, e.g.*, *Jam*, 139 S.Ct. at 771-72.

that, at the very least, the constituent instruments of these organizations are the *primary* sources thereof.[100]

In practice, however, both Member and non-Member States relating with any IO have domestic mechanisms to regulate their activities. These regulations almost always contain grants of immunities and privileges, whether in general or in relation to specific IOs.

Still, in some jurisdictions, national legislation on the privileges and immunities of IOs is superfluous, in light of constitutional provisions on the incorporation of international agreements as part of the law of the land.[101] In the Philippines, for example, treaties are incorporated into the national legal system through concurrence thereto by the Senate.[102] This is the reason why the Philippine Supreme Court readily and immediately cites treaties and conventions relating to privileges and immunities in deciding cases involving IOs.[103] In the appreciation of international agreements providing such privileges and immunities, the Philippine Supreme Court has attempted to harmonize treaty provisions with national legislation, sometimes derogating from the explicit language of the former.[104] What is important to note at this juncture are the various modes by which an IO acquires and exercises its privileges and immunities. National laws which recognize the legal personality and capacity of IOs and the consequent grants of immunities and privileges within their borders take prime importance in non-Member States, which grant some form of corporal existence thereto. That is to say, in cases where an IO seeks to perform acts within a non-Member State, the status of its acts in relation to that State, whether *vires* or *ultra vires*, depends almost exclusively on the powers granted to it by legislative fiat.[105]

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100. OKEKE, *supra* note 46, at 268.

101. BERNAS, *supra* note 59, at 60-61.

102. PHIL. CONST. art. VII, § 21.

103. *See* World Health Organization v. Aquino, G.R. No. L-35131, 48 SCRA 242, 248-49 (1972). This is unlike the situation in the United States, where the International Organizations Immunities Act is the primary source of law in the determination of the privileges and immunities enjoyed by International Organizations. 22 U.S.C. 288.

104. *See* Liang v. People, G.R. No. 125865, 323 SCRA 692 (2000) & Department of Foreign Affairs v. NLRC, G.R. No. 113191, 262 SCRA 39 (1996).

105. OKEKE, *supra* note 46, at 279-81.

This generally consensual theory on privileges and immunities within State-IO relations[106] is muddled by the question of "whether [IOs] enjoy immunity on the basis of [CIL]."[107]

The issue is resolved by looking into the membership of the IO as an indication of *usus*. For IOs of general membership, the proposition that there is, in custom, an entitlement to "such privileges and immunities as are necessary for the fulfilment of the purposes of the organization, including immunity from legal process and from financial controls, taxes[,] and duties"[108] seems acceptable, flowing, as it does, from the fact of acceptance by Member States substantially representative of the community of nations, and thus fulfilling the necessities of *usus*, *diuturnitas*, and *opinio juris*.[109] In finding that CIL may arise from the practice of States granting privileges and immunities to IOs, questions of applicability to non-Member States once again come to fore, especially in situations outside the contemplation of the earlier discussion on special grants of legal personality. Phrased differently, could an IO claim immunity within a non-Member State which has not recognized such nor allowed the organization to operate within its borders? The answer to such a question would certainly require a historical analysis of the State's practice giving rise to the claim. It could be that the non-Member State has persistently objected to the grant of such immunities and privileges to IOs.[110]

Another way of tackling the problem is to ask whether immunity "is an attribute of the international personality of an [IO] under [CIL?]"[111] Perhaps. On the one hand, there is authority lending credence to the proposition that the grant of privileges and immunities to IOs has a purposive character intimately linked to their mandate and functions.[112] On the other, disciples of the Scalian school of statutory interpretation would argue that privileges and immunities must be explicitly granted.[113] The practice has remained consistent with this latter school, only to be expanded by the doctrine of implied powers.

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106. BERNAS, *supra* note 59, at 3.

107. OKEKE, *supra* note 46, at 269.

108. RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 467 (i) & Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, 1989 I.C.J. 177, at 192-96 (Dec. 15).

109. CRAWFORD, *supra* note 34, at 24-27.

110. *Id.* at 27.

111. OKEKE, *supra* note 46, at 272.

112. *Id.* at 272. *See also Jam*, 139 S.Ct. at 776 (J. Breyer, dissenting opinion).

113. OKEKE, *supra* note 46, at 266.

The consensus seems to be that IOs do enjoy immunities, whether sourced from treaties, national laws, or CIL, the more salient concern being the scope of such immunities.

ii. Scope of Immunity

To say that immunities are functional in scope means that the acts of IOs are beyond judicial reach if such acts are done in pursuit of their mandates. This is a consequence of the very purpose of IOs' enjoyment of immunity — to retain their independence from States. On the one hand, *World Bank Group v. Wallace*[114] explained that

> [i]t is part of the original agreement that in exchange for admission to the [IO], every member state agrees to accept the concept of collective governance. As a result, no single member can attempt to control the institution, which may occur if domestic courts apply local and variegated conceptions of implied and constructive waiver.[115]

On the other hand, *Broadbent v. Organization of American States (OAS)*[116] holds that "[i]nternational officials should be as free as possible, within the mandate granted by the member states, to perform their duties free from the peculiarities of national politics."[117] During the discussions on the General Convention by the UN General Assembly, it was noted that the IO should not "possess privileges and immunities which are greater than those necessary for its efficient organization."[118]

Generally, IOs enjoy immunities to the extent that their acts fall "within the scope of [their] official activities."[119] What remains unsettled, however, is whether the performance of official acts should be viewed in isolation from other standards set by International Law, or whether such acts must likewise align with the norms and principles of International Law. *Mukoro v. European*

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114. World Bank Group v. Wallace, 1 R.C.S. 207 (Can.).

115. *Id.* at 249, ¶ 93.

116. Broadbent v. Organization of American States (OAS), 628 F.2d 27 (D.C. Cir. 1980) (U.S.).

117. *Id.* at 34.

118. OKEKE, *supra* note 46, at 293 (citing U.N. GAOR, 1st sess., at 452 (Feb. 13, 1946)).

119. OKEKE, *supra* note 46, at 306 (citing Mukoro v. European Bank for Reconstruction and Development (EBRD), 107 I.L.R. 604 (Employment Appeal Tribunal, England 1994)).

Bank for Reconstruction and Development (EBRD)[120] espouses the isolationist approach, saying that the selection of staff by an IO falls squarely within official activities, which cannot be inquired into by the judiciary, regardless of any allegations that the acts were done in violation of the right against racial discrimination.[121] In that same case, the tribunal acknowledged that

> jurisdictional immunity 'may produce severe disabilities in respect of fundamental rights, it can only be justified by an overriding public policy or interest. In the case of an [IO] ... immunity from suit and legal process may be justified on the ground that it is necessary for the independence and neutrality from control by or interference from the host state and for the effective and uninterrupted exercise of its multinational functions through its representatives.'[122]

On the contrary, Judge James R. Crawford of the ICJ makes an interesting observation in the operations of IOs — "[A] trend may be developing whereby national courts are willing to deny immunity with respect for claims for denial of justice before administrative tribunals internal to the organization, due to the circumstantial inconsistency of the immunity with other supervening principles of International Law."[123] The European Court of Human Rights' (ECHR) decisions in *Waite & Kennedy v. Germany*[124] and *Beer & Regan v. Germany*[125] involved labor disputes.[126] The applicants in these cases claimed rights as employees of the European Space Agency (ESA) and similarly cited the violation of their due process rights by the ESA Appeals Board.[127]

The ECHR, however, held that no such violations occurred either in the national systems of Germany, nor in the internal processes of the ESA.[128] Implicit in the Decision of the ECHR was the view that the "maintenance of

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120. Mukoro v. European Bank for Reconstruction and Development (EBRD), 107 I.L.R. 604 (Employment Appeal Tribunal, England 1994).

121. OKEKE, *supra* note 46, at 306 (citing *Mukoro*, 107 I.L.R.).

122. OKEKE, *supra* note 46, at 306-07 n. 83 (citing *Mukoro*, 107 I.L.R.).

123. CRAWFORD, *supra* note 34, at 175.

124. Waite & Kennedy v. Germany, 1999 Eur. Ct. H.R. 6, Judgment (Feb. 18, 1999).

125. Beer & Regan v. Germany, 1999 Eur. Ct. H.R. 13, Merits, Judgment (Feb. 18, 1999).

126. *Id.* at 9 & *Waite & Kennedy*, 1999 Eur. Ct. H.R. at 11.

127. *Waite & Kennedy*, 1999 Eur. Ct. H.R. 6 & *Beer & Regan*, 1999 Eur. Ct. H.R. at 13.

128. *Beer & Regan*, 1999 Eur. Ct. H.R. at 15 & *Waite & Kennedy*, 1999 Eur. Ct. H.R. at 16-17.

[ ] immunity could not be reflexive"[129] and that acts of IOs were subject to review, especially in cases resulting from the failure of the internal processes of IOs to meet the standards set by International Law.[130]

Therefore, based on these ECHR decisions, and with all due respect for the honorable *Mukoro* tribunal, the Author submits that the broader interests of justice and the Rule of Law must be upheld over near-absolute claims of immunity.

iii. Nature of Immunity of International Organizations in Comparison with State Immunity and Diplomatic Immunity

The joint exposition on the immunities enjoyed by the IO itself and the derivative immunities enjoyed by its agents[131] has caused some confusion in the discussions of the immunity of IOs. Verily, a great number of cases discussing the immunity of IOs have been premised upon the acts of their officials and agents. Hence, the Author engages in a multi-level exposition of the similarities and differences devolving upon Diplomatic Immunity, State Immunity, and the immunity of IOs, with differential approaches towards cases of derivative immunity of IOs *per se* and the derivative immunity of IOs' officials and agents.

In *Amaratunga v. Northwestern Atlantic Fisheries Organization*,[132] the Supreme Court of Canada noted that "the prevailing view at present is that no rule of [CIL] confers immunity on [IOs]. [IOs] derive their existence from treaties and the same holds true for their rights to immunities[,]"[133] while "States enjoy immunity from the jurisdiction of other States as a matter of [CIL]."[134] Notwithstanding the seemingly settled matter of the alignments and incongruencies between the immunities enjoyed by States and IOs, Judge Crawford has observed the limited practice among some States of restricting the immunity granted to IOs according to limitations traditionally pertaining to state immunity.[135]

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129. CRAWFORD, *supra* note 34, at 175.

130. *Beer & Regan*, 1999 Eur. Ct. H.R. at 13.

131. *See, e.g.*, OKEKE, *supra* note 46, at 348–53.

132. Amaratunga v. Northwestern Atlantic Fisheries Organization, 3 S.C.R. 866 (Can. 2013).

133. OKEKE, *supra* note 46, at 354 (citing *Amaratunga*, 3 S.C.R. ¶¶ 28–29).

134. OKEKE, *supra* note 46, at 354.

135. *Id.* at 175.

This was the principal tension in *Jam v. International Financial Corporation*, where the Supreme Court of the United States (SCOTUS), through Mr. Chief Justice John Roberts, opined that such immunity cannot be held in absolute terms,[136] given the shift to limited immunities granted to States.[137] In fine, the *Jam* Court held that the IFC may be sued for its commercial activities, considering that the grant of immunity attached to them, at least in the United States of America (United States), makes particular reference to the immunity provision for States.[138]

The case was decided following the *acta jure imperii/acta jure gestionis* dichotomy instead of by using the functional immunity analysis.

Jam precipitated from a damages and injunction suit brought by Indian fisherfolk against the IFC for acts committed in Gujarat, India.[139] The IFC resisted the claim by pleading immunity from suit under Section 288a (b) of the International Organizations Immunities Act (IOIA).[140] The SCOTUS ruled against this general claim for immunity, finding that the grant of immunity to the IFC was tethered to the immunity of States,[141] and adopting the restrictive theory of foreign sovereign immunity against the IFC,[142] thereby reversing the dismissal of the case by the appellate and district courts.[143]

The dichotomy between purely sovereign acts and sovereign commercial transactions[144] is otherwise known as the Theory of Restrictive Foreign Sovereign Immunity, which holds that "foreign governments are entitled to immunity only with respect to their sovereign acts, not with respect to commercial acts."[145] The main concern here is whether the acts done by IOs within and even outside their legal capacities may be proper subjects of a

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136. *Id.*

137. *Id.* at 3-4.

138. *Id.* at 15.

139. *Id.* at 2.

140. OKEKE, *supra* note 46, at 1 (citing 22 U.S.C. § 288a (b)).

141. *Jam*, 139 S.Ct. at 763.

142. *Id.* at 9-11.

143. *Id.* at 15.

144. *Jam*, 139 S.Ct. at 766.

145. *Id.* (citing Letter *from* Jack B. Tate, Acting Legal Adviser, Dept. of State, *to* Acting Attorney General Philip B. Perlman (reprinted in 26 Dept. State Bull. 984–85) (May 19, 1952) (on file with Author)).

Restrictive Theory analysis, as the resolution of this issue translates into the nature and extent of *vires* acts of an IO and the consequent immunities and privileges enjoyed thereby.

In a ruling that denied the Republic of Indonesia immunity from suit arising from contractual breach, the Philippine Supreme Court held that the Restrictive Theory of Immunity means that "the immunity of the sovereign is recognized only with regard to public acts or acts *jure imperii*, but not with regard to private acts or acts *jure gestionis*."[146] The Restrictive Theory is a diversion from the original conception of State actions on the international legal plane, thusly, "[i]n the absence of a treaty or other unambiguous agreements regarding controlling legal principles, courts ... will generally refrain from examining the validity of ... acts of a governmental character done by a foreign state within its own territory and applicable there."[147] The rationale for the rule was explained in this wise — "In the case of foreign States, the rule is derived from the principle of the sovereign equality of States, as expressed in the maxim *par in parem non habet imperium*. All States are sovereign equals and cannot assert jurisdiction over one another."[148]

In its current formulation, an act of a foreign State is beyond the review powers of another State if the said foreign State was acting in its sovereign capacity.[149] When, however, the foreign State is engaged in commercial acts that have "sufficient nexus with the" State,[150] then the acts are subject to the determination of rights and obligations by the appropriate organ of the host State.[151] The Restrictive Theory has been codified in the UN Convention on Jurisdictional Immunities of States and Their Property.[152]

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146. Republic of Indonesia v. Vinzon, G.R. No. 154705, 405 SCRA 126, 131 (2003).

147. RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 443 (1).

148. *Republic of Indonesia*, 405 SCRA at 131 (citing Sanders v. Veridiano II, G.R. No. L-46930, 162 SCRA 88, 96 (1988)).

149. CRAWFORD, *supra* note 34, at 84 (citing Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711 (1976) & Malewicz v. City of Amsterdam, 362 F. Supp. 2d 298, 314 (D.D.C. 2005)).

150. *Jam*, 139 S.Ct. at 766.

151. *Id.*

152. G.A. Res. A/59/38, annex, United Nations Convention on Jurisdictional Immunities of States and Their Property (Dec. 2, 2004). The Convention is not yet in force, but it serves as evidence of "international consensus on state immunity." CRAWFORD, *supra* note 34, at 490.

Considering the foregoing, a question arises — "[i]s the *acta jure imperii/acta jure gestionis* dichotomy applicable in discussing the scope of immunities claimed and the courses of action taken by MDFIs?" It is not.

The appeal to the Restrictive Theory is improper because while MDFIs exercise sovereign powers, their undertakings cannot fall under the categories of acts *jure imperii* or *jure gestionis* since their actions rarely fall within the definitions of strictly sovereign or strictly commercial acts. This line of argumentation recognizes the separate and distinct legal personality of MDFIs.[153] They are neither extensions of their Member States, nor are their acts imputable directly to States under the regime of state responsibility.[154]

Echoing Mr. Justice Stephen Breyer, it would be well to note that the activities of MDFIs enjoy a level of complexity that cannot be simplified by the taxonomy proposed in *Jam*.[155] On the one hand, the capacity to enter into contracts, the capacity to acquire and dispose of property, and the capacity to institute legal proceedings in pursuance of their mandates[156] are "powers that can also be exercised by private citizens"[157] and which fall within the category of "commercial activities."[158] On the other, these organizations also operate to "[fulfill] uniquely sovereign objectives"[159] to promote economic growth and foreign investment, facilitate international trade, and aid in the

153. SAROOSHI, *supra* note 63, at 101-07.

154. *Id.* at 51, 63, 64, 101, 103, 105, & 107.

155. *Jam*, 139 S.Ct. at 778 (J. Breyer, dissenting opinion).

156. *See, e.g.*, IBRD Charter, *supra* note 27, art. VII, §§ 2-3; IFC Charter, *supra* note 15, art. VI, §§ 2-3; IDA Charter, *supra* note 81, art. VIII, §§ 2-3; MIGA Convention, *supra* note 81, art. 1; ICSID Convention, *supra* note 81, art. 18; EU Charter, *supra* note 4, art. 308; IADB Charter, *supra* note 4, art. XI, §§ 2-3; AfDB Charter, *supra* note 4, arts. 51-52; ADB Charter, *supra* note 4, art. 49; & AIIB Charter, *supra* note 4, art. 45.

157. *Jam*, 139 S.Ct. at 778 (J. Breyer, dissenting opinion) (citing Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614 (1992)).

158. *Jam*, 139 S.Ct. at 778 (J. Breyer, dissenting opinion).

159. *Id.* (citing *Republic of Argentina*, 504 U.S. at 614).

development of peoples.[160] Therefore, they are also acting *jure imperii*.[161] While MDFIs are users of sovereign powers,[162] their exercise thereof is incomparable to the discharge of similar powers by States because, unlike States, their mandates are formed through the consensus of a community of nations and are not exercised for the benefit of a single sovereignty or identifiable sovereignties.[163]

Thus, the inapplicability of the doctrine is apparent in the *raison d'être* of the grant of immunities to States and to IOs in general, and to MDFIs in particular. State immunity draws from the recognition in International Law of the independence and equality of States,[164] and of the resulting disturbance in the peace of nations, should a contrary rule apply.[165] The grant of immunities and privileges and the general recognition of an IOs' capacity to act are sourced from the consent given by States, as expressed through the IO's constituent instrument.[166] The incongruity of the resulting framework as it relates to MDFIs was succinctly put in this wise —

> [T]he exception to the immunity of MDBs under their charter cannot be equated with the commercial activities exception to the restrictive State immunity because the distinction between *acta jure imperii* and *acta jure gestionis*, which is the fulcrum of the doctrine, cannot be properly applied to the activities of these [IOs]. If the distinction were applicable, then such activities where the MDBs are amenable to suit would surely be characterized as *acta jure imperii* because they are 'sovereign' or charter-based functions of the organization. Thus, it is absurd to apply the doctrine of restrictive State immunity to [IOs]. The rationale for restrictive State immunity is that fairness demands that if States decide to enter the market arena, they should do so under the same conditions as other participants in the market ... However, because an [IO] carries out activities that if engaged in by States would be

160. *See, e.g.*, IBRD Charter, *supra* note 27, arts. I & III, § 1; IFC Charter, *supra* note 15, art. I; IDA Charter, *supra* note 81, art. II, § 2; MIGA Convention, *supra* note 81, arts. 2 & 11-12; ICSID Convention, *supra* note 81, art. 6; EU Charter, *supra* note 4, arts. 308 & 309; IADB Charter, *supra* note 4, arts. I, § 2 & III, § 1; AfDB Charter, *supra* note 4, arts. 1-2; ADB Charter, *supra* note 4, pmbl. & arts. 2 & 8; & AIIB Charter, *supra* note 4, arts. 1, 2, & 9.

161. *Jam*, 139 S.Ct. at 778 (J. Breyer, dissenting opinion).

162. SAROOSHI, *supra* note 63.

163. CRAWFORD, *supra* note 34, at 24-27.

164. OKEKE, *supra* note 46, at 347.

165. *Republic of Indonesia*, 405 SCRA at 131.

166. OKEKE, *supra* note 46, at 351.

> considered commercial should not detract from the principle of functional necessity that underpins the immunity of [IOs].[167]

The only time where a State may properly tether an IO's immunity in a manner solely determined by the wisdom of its legislature is when it grants powers to an IO of which it is not a member.[168] However, when the grant of immunity is done in the discharge of a treaty obligation to do so, then the State has little legroom and must grant privileges and immunities in accordance with the strict language of the treaty, lest the State violate its obligations thereunder.[169] Therefore, as it pertains to State Immunity and to the immunity of IOs *per se*, the divergent provenance of immunities enjoyed militates against the applicability of certain theories attendant to either upon the other entity.

A second layer to the debate involves the immunities enjoyed by IOs *per se* in comparison with Diplomatic Immunity. The genesis of IOs' privileges and immunities can be traced to analogies made with Diplomatic Immunity.[170] In its original conception, IOs' partaking in the sovereign powers of their constituent States justified the grant of privileges and immunities to the said institutions.[171] Diplomatic Immunity originates from State Immunity because diplomats share in the power of their sovereigns and act on their behalf.[172] Indeed, it has been observed that "[i]n the actual operation of the doctrine of State immunity, many categories of persons, institutions, agencies, instrumentalities, and properties have enjoyed the benefit of immunities in the name or on behalf of the State."[173] It has been said that

> [i]n traditional inter-State diplomacy, the relationship is a bipartite one between the sending State and the receiving State. However, in diplomacy within an international organization, the relationship is a tripartite legal position which involves the sending State, the international organization and the host State in whose territory the representative of the sending State or

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167. *Id.* at 362-63.

168. *Id.* at 279-82.

169. *Jam*, 139 S.Ct. at 778 (J. Breyer, dissenting opinion).

170. OKEKE, *supra* note 46, at 348 (citing Josef L. Kunz, *Privileges and Immunities of International Organizations*, 41 AM. J. INT'L L. 842 (1947) & LINDA S. FREY & MARSHA L. FREY, THE HISTORY OF DIPLOMATIC IMMUNITY 539 (1999)).

171. *See generally* Kunz, *supra* note 170.

172. OKEKE, *supra* note 46, at 68.

173. *Id.* at 67 (citing Sompong Sucharitkul, *Immunities of Foreign States Before National Authorities*, 149 RECUEIL DES COURS, 87, 96 (1976)).

> the international organization and its personnel enjoy the legal status conceded to them.[174]

The third set of discussion points refers to the similarities and differences between the immunities enjoyed by the officers and agents of IOs and those enjoyed by diplomats. The immunities of officials and agents of IOs and diplomatic immunities have intersected on the conceptual plane, and these intersections have become instrumental in producing the regime of immunities known today.[175] The UN General Convention provides, "Officials of the United Nations shall ... be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity ..."[176] The Vienna Convention on Diplomatic Relations (VCDR) couches a similar grant by way of exception, providing that no immunity from civil and administrative process may protect a diplomat's professional and/or commercial acts, and acts "outside his official function."[177] The proposal earlier made to explain pronounced similarities between Diplomatic Immunity and the immunity of IOs *per se* holds true for the commonalities observed between Diplomatic Immunity and the immunity enjoyed by the officials and agents of IOs. A stark contrast between these concepts, however, lies in the principle of national discrimination pertaining to immunities enjoyed by diplomats in reference to their home States, providing that "nationals and permanent residents of the receiving State do not enjoy certain privileges and immunities in their home State."[178] This is not the case for officials and agents of IOs, who enjoy privileges and immunities afforded to them inside and outside their home States.[179] Be that as it may, the consequences of the derivative nature of both Diplomatic Immunity and the immunities of IOs' officials and agents further exhibits the propriety of analogously treating one as against the other, especially for purposes of determining the acceptability of immunity claims.

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174. *Preliminary Report on the Second Part of the Topic of Relations Between States and International Organizations by Mr. Abdullah El-Erian*, [1977] 2 Y.B. Int'l L. Comm'n 139, 152, ¶ 64, U.N. Doc. A/CN.4/304 and Corr.1.

175. Alison Duxbury, *Intersections Between Diplomatic Immunities and the Immunities of International Organizations*, *in* DIPLOMATIC LAW IN A NEW MILLENNIUM ch. 17 (Paul Behrens ed., 2017).

176. General Convention, *supra* note 95, art. 18 (a).

177. Vienna Convention on Diplomatic Relations art. 31 (1) (c), *signed* Apr. 18, 1961, 500 U.N.T.S. 95 [hereinafter VCDR].

178. OKEKE, *supra* note 46, at 351 (citing VCDR, *supra* note 177, art. 38).

179. OKEKE, *supra* note 46, at 351.

One way of tackling the intersecting immunities of IOs, IO officials and agents, and diplomats is to dissect their enjoyment thereof under the lenses of immunities *ratione materiae* and immunities *ratione personae*. While these doctrines have been invoked in relation to diplomats and States, the above exposition has already established the viability of the use of analogous frameworks in the discussion of IOs' immunities.

Immunity *ratione materiae* operates to protect from suit acts done in the performance of sovereign or charter mandates,[180] while immunity *ratione personae* is "status-based immunity that protects the individual from suit while still in office,"[181] attaching to the position or office as opposed to the performance of certain acts.[182] In this regard, immunity *ratione personae* is also *ratione temporis*.[183] Immunities *ratione materiae* and *ratione personae* "are not mutually exclusive,"[184] as, in many cases, they are sides of the same coin.[185]

From this perspective, it can be said that IOs enjoy immunity *ratione materiae* because they may not be sued for all official acts during, and even after, their existence. The idea is a reframing of the earlier finding that IOs have functional immunities, that is, they are not suable for acts done in accordance with their mandates.[186] It is more difficult to say that IOs have immunity *ratione personae* because of the lack of practice from which such a conclusion can be made. In theory, however, a case can be made that when IOs lose the mandate of all, or substantially all, of their Member States, then they are no longer in a position to claim immunity. The rhetoric of immunity *ratione personae* is more properly applied to officials and agents of IOs, the latter deriving their immunities from the fact of appointment.[187] Thus, upon the expiration of their terms or removal from office, agents and officials of IOs are no longer immune for acts done while and after holding office, except those which were discharged during tenure under official mandates.[188] Thus, IOs'

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180. *Id.* at 68.

181. *Id.*

182. *Id.*

183. *Id.* at 69.

184. *Id.*

185. OKEKE, *supra* note 46, at 69.

186. *Id.* (citing R., Ex Parte Pinochet v. Bartle, 1999 UKHL 17, 3 (1999)).

187. OKEKE, *supra* note 46, at 69.

188. *Id.*

officials and agents clearly enjoy immunities that are conjunctively *ratione materiae* and *ratione personae*.

From the above exposition, it can be seen that the immunity of IOs has historically and conceptually hued more closely to immunities enjoyed by diplomats. It was earlier established that this is not a coincidence, but a direct result of their being users of sovereign powers who, in the discharge of the same, enjoy varying degrees of protections in order for them to be able to fulfill their duties independently from the forum State.[189] However, it is argued in subsequent sections of this Note that this independence secured by immunity does not and cannot rise to levels that would otherwise violate the obligations of all International Law actors. Further, the discussion herein highlights the difficulties faced in the promotion of the Rule of Law in IO regimes. At least for diplomats, there exists a measure to hold them accountable for *ultra vires* acts — they may be sued civilly and administratively in forum States, and/or they may be held fully accountable in their home States.[190] There is no such measure in the case of IOs when they violate the standards of conferrals made unto them.

c. Implications of Being an International Organization on Obligations Under Customary International Law

Constituent instruments and treaties entered into by and for IOs are the primary (some say exclusive) source of norms and principles that devolve upon them.[191] Judge Crawford's suggestion that the "circumstantial inconsistency of ... immunity with other supervening principles of International Law"[192] may result in the denial of such claims for protection[193] implies that other sources of International Law, to wit — CIL, the general principles of law recognized by civilized nations, and judicial decisions and the teachings of the most highly qualified publicists of the various nations[194] — also serve norm-creating functions for IOs.

Are IOs bound by CIL? The matter seems to have been answered by the ICJ when it opined that "[IOs] are subjects of International Law and, as such,

189. SAROOSHI, *supra* note 63, at 101–07.

190. VCDR, *supra* note 177, arts. 31 & 38.

191. OKEKE, *supra* note 46, at 266.

192. CRAWFORD, *supra* note 34, at 175.

193. *Id.*

194. Statute of the International Court of Justice art. 59, Apr. 18, 1946, 33 U.N.T.S. 993 [hereinafter ICJ Statute].

are bound by any [obligation] incumbent upon them under general rules of International Law, under their constitutions[,] or under international agreements to which they are parties."[195] However, *WHO-Egypt* leaves much to be desired. Neither law, state practice, nor the practice of IOs in 1980 could have provided basis for the pronouncement.[196] More importantly, the Opinion failed to expound on the meaning and extent of "general rules of International Law,"[197] nor was there any indication as to when and how IOs are so bound.[198] It has been argued that

> IOs, like states, are not bound by treaties without their consent, subject to some very narrow exceptions that apply to states and IOs alike. It means that IOs, like States, are bound by *jus cogens* rules. And it means that IOs, like States, are bound by general [I]nternational [L]aw — but only as a default matter. Like States, IOs may contract around such default rules, except to the extent that individual IOs lack the capacity to do so because of their limited authorities.[199]

The conclusion is based on the view that IOs have vertical and horizontal relationships with States. "The vertical relationship suggests that IOs are appropriately characterized as vehicles through which states operate. The horizontal relationship, by contrast, suggests that IOs are states' peers on the international plane."[200] The argument is that since IOs act as States' agents in particular areas, they cannot bind their principals in a way that will violate the latter's International Law obligations. It is likewise argued that as peers of States, IOs share some characteristics with nascent States, at least in the manner by which they take on international obligations.[201] Pursued to its logical limit

> the argument that States should not be able to evade their international obligations by joining with other States to establish an IO does successfully explain why certain international rules bind IOs. It explains why *jus cogens*

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195. Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73, 89 ¶ 37 (Dec. 20) [hereinafter WHO-Egypt Advisory Opinion].

196. Daguirdas, *supra* note 50, at 326-32.

197. WHO-Egypt Advisory Opinion, 1980 I.C.J. ¶ 37.

198. Daguirdas, *supra* note 50, at 327.

199. *Id.* at 327.

200. *Id.*

201. *Id.* at 357-72.

> binds IOs and why general [I]nternational [L]aw binds IOs as a default matter.[202]

The premise of these arguments, while convincing, suffers from a failure of characterization by generalizing the nature of the relationships between States and IOs and the purpose of the immunities they enjoy. An IO is not the agent of a State in every instance, as is clear in Sarooshi's typology.[203] An IO may, at times, have no fiduciary duties to its Member States to uphold obligations of the latter in areas beyond the competence granted to it by its charter.[204] The arguments also fail to appreciate the separate and distinct legal personality of IOs.[205] "An [IO] is not the sum of its Member States. [It] possesses its own international personality, separate and apart from that of its Member States."[206]

Be that as it may, the suggestions that "what [S]tates can do directly by treaty, they can do indirectly through an IO[, a]nd what [S]tates cannot do directly by treaty, they cannot do indirectly through an IO[,]"[207] and that States cannot grant unto their creations the power to perform acts which they cannot themselves do — *nemo plus juris transfere potest quam ipse habet*[208] — are certainly appealing especially in a climate of palpable anxiety regarding the immense power of IOs and the limited ways by which they may be held accountable.[209]

The additional suggestion made here is that IOs, specifically MDFIs, are bound by CIL because they are users of sovereign powers and are therefore limited in their action by sovereign values, which are most profoundly expressed in custom. Alignment with sovereign values should be the concern of any IO because "the exercise of public powers ... can only be considered an exercise of sovereign powers when this is in accord with sovereign values,

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202. *Id.* at 357. *See also* OSS Nokalva v. European Space Agency, 617 F.3d 756, 764 (3d Cir. 2010) (U.S.).

203. SAROOSHI, *supra* note 63, at 27–32.

204. *Id.* at 100–01.

205. *Reparations for Injuries*, 1949 I.C.J. at 179.

206. OKEKE, *supra* note 46, at 359. *Contra OSS Nokalva*, 617 F.3d & *Jam*, 139 S.Ct.

207. Daguirdas, *supra* note 50, at 345.

208. *Id.* at 336 (citing Olivier De Schutter, *Human Rights and the Rise of International Organisations: The Logic of Sliding Scales in the Law of International Responsibility*, *in* ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS BY INTERNATIONAL ORGANISATIONS 51 (Jan Wouters, et al. eds., 2010)).

209. Daguirdas, *supra* note 50, at 330.

otherwise the exercise of public powers is something entirely distinct from the exercise of sovereign powers and can even be considered as a violation of sovereignty."[210]

Thus, while IOs are separate and distinct entities from their Member States, the separate legal personality of IOs exists only after the fact of conferral.[211] At the point of conferral, the limits to sovereignty found in International Law must be determined in order to fully articulate the consequences of transfers of sovereign powers to IOs. Put negatively, the creation of an IO does not remake the sovereignty of constituting States into *tabula rasa*, and the powers transferred are corralled by, at least, CIL. Furthermore, the imposition upon IOs of CIL obligations that develop after constitution is not inconsistent with their separate and distinct personality because, at that point, they are not being asked to take on the CIL obligations by virtue of their contingency with States, but are instead being made to discharge these obligations as subjects of International Law.[212] CIL, after all, is addressed to the international community as a whole.[213]

In conclusion, the idea that IOs are bound by International Law has been interpreted to mean at least compliance with CIL. This suggestion is based on a reading of the *WHO-Egypt Advisory Opinion* and a study of the relationships between IOs and their Member States.[214] It has also been argued that CIL limits the exercise of sovereign powers by States, and, consequently, when these powers are transferred to IOs, the same limits cannot be breached unless by exceptions in the constituent instrument of the IO.[215] Otherwise, an IO risks a confrontation with sovereign values attaching upon it as a user of sovereign powers, thereby causing a crisis of legitimacy for the IO.

In the final analysis, a proper reckoning with the reality of MDFIs must concede to their character as IOs in relation to their being economic actors in the global market because while the fact of being an IO provides some answers as to why and how MDFIs are liable (i.e., they are users of sovereign powers

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210. SAROOSHI, *supra* note 63, at 10.

211. *Id.* at 21.

212. *See Reparations for Injuries*, 1949 I.C.J. at 179.

213. CRAWFORD, *supra* note 34, at 23-30.

214. WHO-Egypt Advisory Opinion, 1980 I.C.J. ¶ 37.

215. Daguirdas, *supra* note 50, at 327.

and are beholden to sovereign values), it is by looking at their special nature as economic institutions that some light is shed on what their obligations are.

Properly framed according to the current inquiry, it is concluded that all the aforementioned implications flowing from the fact of being an IO follow as a matter of course in the operations and management of MDFIs, to wit — MDFIs have privileges and immunities; they are capacitated to act within the bounds of their conferred powers and consequently bind their Member States to their actions by some power-sharing mnemonic; and their actions are limited by some control mechanisms, the details of which are expounded on by looking into what sovereign values must be exemplified by MDFIs from their nature as economic institutions and developmental entities. These consequences are seminal in the discussion of MDFIs' responsibilities for Human Rights violations because it is the main argument of this Note that the sovereign values devolving upon MDFIs properly include Human Rights obligations and accountability therefor.

2. Multilateral Development Financing Institutions Are Economic Actors

One of the major functions of MDFIs is to facilitate international resource transfers.[216] It is their primary object to administer, maintain, account for, and disburse the funds under their control for the purposes stated in their constituent instruments and subject to the limitations and procedures provided therein.[217] This is a common function of MDFIs.[218] Surely, some nuance in the process exists for each specific MDFI for all varieties of transactions they enter into. However, MDFIs rarely, if at all, detract from this common functionality.[219] These mandates are discharged by granting loans and entering into investment agreements with States and private enterprises, depending on the limitations of the MDFI's specific charter.

Confrontation with the definitional characteristics of economic institutions is hardly a simple exercise. Different fields employ "economic institutions" to pertain to various phenomena — from the abstract forces that make up the market, to the bureaucratic machinery that facilitates resource

216. CAMPS & GWIN, *supra* note 10, at 255.

217. *Id.*

218. *See, e.g.*, IBRD Charter, *supra* note 27, arts. III & IV; ADB Charter, *supra* note 4, arts. 8-15; & AIIB Charter, *supra* note 4, pmbl. & arts. 9-15.

219. Pierre Francotte, *The Role of the International Financial Institutions*, INT'L FIN. L. REV., Volume No. 11, Issue No. 8, at 13.

allocation.[220] In the legal arena, "economic institution" refers to an entity charged with the regulation, allocation, and general management of resources and/or resource transfers.[221] Within this broad definition fall banks, government agencies, public and private corporations, and IOs.[222]

In reviewing the economic activities of MDFIs, it has been observed that

> [t]he powers of the ... World Bank to require governments to reform are significant. They do not lend large proportions of global development financing[,] but the timing of their loans gives them considerable leverage because they lend at times when governments have few alternative sources of finance. In spite of this advantage, it is easy to overstate their power and influence.
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> ...
>
> The ... World Bank deploy a mixture of technical advice and coercive power in bargaining with borrowing governments. Each institution can variously lend or withhold resources, disburse[,] or suspend payments, and impose various forms of conditions. Yet the institutions can successfully deploy this power only where they find and work with sympathetic interlocutors.[223]

Therefore, there are at least three formal actors in MDFI operations involving loans or investments. For public sector transactions, the actors are the MDFI, the borrowing Member State, and State-owned or non-State entities involved in project implementation. For private sector transactions, the key actors are the MDFI, the borrowing enterprise, the guaranteeing Member State, and entities involved in project implementation. In almost all cases of development financing by MDFIs, however, supposed indirect beneficiaries have been largely excluded in the legal framework, notwithstanding the fact that they bear many of the consequences these undertakings introduce. Their formal participation therein is limited to the consultation phase and the monitoring and evaluation phase. It is doubted, therefore, whether MDFIs properly discharge their duty to "ensure that the proceeds of any loan are used only for the purposes for which the loan was

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220. *See generally* DANIEL W. BROMLEY, SUFFICIENT REASON: VOLITIONAL PRAGMATISM AND THE MEANING OF ECONOMIC INSTITUTIONS 105 (2006). *See also* Michael Moran, *Economic Institutions*, *in* THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS 144-62 (Sarah A. Binder, et al., eds., 2008).

221. CAMPS & GWIN, *supra* note 10, at 255-317.

222. BROMLEY, *supra* note 220.

223. NGAIRE WOODS, THE GLOBALIZERS: THE IMF, THE WORLD BANK, AND THEIR BORROWERS 71 & 82 (2006).

granted, with due attention to considerations of economy and efficiency."[224] This is because from the perspective of MDFIs, the duty to monitor these loans and investments is discharged in favor of creditors against borrowers (both of whom have the capacity to hold these institutions to account through the judicial process),[225] and not in favor of the supposed beneficiaries.

3. Multilateral Development Financing Institutions are Developmental Bodies

a. Schizophrenia and Disintegration of the Right to Development in the Practice of States and Multilateral Development Financing Institutions

How may the slight, but apparent, divergence in the practices of States and MDFIs be explained? It could be that the meaning of development is not merely a historical fact, but a political one as well. A survey of the voting power of a random sampling of developed and developing nations[226] across MDFIs shows that least developed nations have greater voting power in Regional MDBs as compared to the Bretton Woods Institutions.

224. IBRD Charter, *supra* note 27, art. III, § 5 (b). *See also* IADB Charter, *supra* note 4, art. III, § 9 (b); AfDB Charter, *supra* note 4, art. 17 (1) (h); ADB Charter, *supra* note 4, art. 14 (xi); & AIIB Charter, *supra* note 4, art. 13 (9).

225. *See* IBRD Charter, *supra* note 27, art. VII, § 3; IADB Charter, *supra* note 4, art. XI, § 3; AfDB Charter, *supra* note 4, art. 52; ADB Charter, *supra* note 4, art. 50; & AIIB Charter, *supra* note 4, art. 46.

226. World Population Review, Developed Countries List 2019, *available at* http://worldpopulationreview.com/countries/developed-countries (last accessed Jan. 30, 2022) [https://perma.cc/68AF-TLXW] & World Population Review, Third World Countries 2019, *available at* http://worldpopulationreview.com/countries/third-world-countries (last accessed Jan. 30, 2022) [https://perma.cc/9KU5-KZF7].

Figure 1. Survey of Voting Power of Developed and Developing Countries in Major MDFIs[227]

	WORLD BANK	EIB	IADB	AfDB	ADB	AIIB
Germany	3.96%	16.11%	1.89%	4.05%	3.75%	4.20%
Japan	7.88%	N/A	5.00%	5.39%	12.75%	N/A
United States	15.68%	N/A	30.00%	6.49%	12.75%	N/A
Central African Republic	0.07%	N/A	N/A	0.07%	N/A	N/A
Philippines	0.43%	N/A	N/A	N/A	2.20%	1.09%
Venezuela	0.86%	N/A	3.40%	N/A	N/A	N/A

These voting powers translate into influence on MDFIs' policies, including their interpretation of development. There have been studies that show that the integrated view of development is a prominent concern of developing nations.[228] This concern led to the adoption of the UN

227. World Bank, International Bank for Reconstruction and Development Subscription and Voting Power of Member Countries, *available at* http://pubdocs.worldbank.org/en/795101541106471736/IBRDCountryVotingTable.pdf (last accessed Jan. 30, 2022) [https://perma.cc/M297-99RR]; EIB, THE GOVERNANCE 5 (2015); IADB, Capital Stock and Voting Power, *available at* https://www.iadb.org/en/about-us/capital-stock-and-voting-power%2C1352.html?fbclid=IwAR0e6UE-tPpJRylRIIXKA5fWlfgJb1NeOfAZzMWVfKBy7VgZKNtC3wqv8w (last accessed Jan. 30, 2022) [https://perma.cc/HBD6-K3C9]; AfDB, Distribution of Voting Power by Executive Director — June 2009, *available at* https://www.afdb.org/en/documents/document/distribution-of-voting-power-by-executive-director-june-2009-17108?fbclid=IwAR2uC3dbDKe33wwc9mrkFVwHQWPbkYaKKXgoGHKY4icOY9eyKH9sUQ3nSJE (last accessed Jan. 30, 2022) [https://perma.cc/YH6U-5E7G]; ADB, ANNUAL REPORT 2018: WORKING TOGETHER FOR A PROSPEROUS, INCLUSIVE, RESILIENT, AND SUSTAINABLE ASIA AND THE PACIFIC 64 (2018); & AIIB, Members and Prospective Members of the Bank, *available at* https://www.aiib.org/en/about-aiib/governance/members-of-bank/index.html (last accessed Jan. 30, 2022) [https://perma.cc/958K-D6AN].

228. *See, e.g.*, Sedfrey M. Candelaria, State Responsibility and International Financial Obligations: A Case Study of the International Monetary Fund Stand-By

Declaration on the Right to Development despite resistance from industrialized countries.[229] Thus, the meaning of the Right to Development generated by ideas from developing countries in congruence with the greater influence they exert in Regional MDBs explains why Regional MDBs are more accepting of the goals set out in the international development paradigm. It also explains, in part, MDFIs' resistance to the adoption of Human Rights standards in their operations. Developing nations have opined that they cannot begin to think of other aspects of the Human Rights agenda without first dealing with economic barriers thereto.[230] The ideological collision between MDFIs' initial conception that Human Rights are divisible[231] and the pervasive thinking among developing countries that rights are hierarchical (with economic rights on top)[232] leads to a situation where full integration of rights within the framework of the Right to Development becomes almost impossible. This, however, fails to account for the fact that the staunchest refusals to include Human Rights standards in MDFI operations come from the Bretton Woods institutions, where the influence of developed countries, especially those who insist on Human Rights compliance elsewhere, is most pervasive. The answer, unsurprisingly, is a legal one. Mr. Ibrahim Shihata and other leaders of the World Bank have already outlined the failure of their constituent instruments to capture the Human Rights agenda.[233] This is unlike, for example, the EIB, which is unique in this regard because it is co-existent with the greater European community under a charter that

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Arrangements with Developing Country Members, at 134 (Dec. 1989) (unpublished LL.M. thesis, University of British Columbia) (on file with the University of British Columbia Library); Adil Najam, et al., *Climate Negotiations Beyond Kyoto: Developing Countries Concerns and Interests*, 3 CLIMATE POL'Y 221 (2003); BILL ADAMS, GREEN DEVELOPMENT: ENVIRONMENT AND SUSTAINABILITY IN A DEVELOPING WORLD (3d ed. 2008); JANNA MILETZKI & NICK BROTEN, AN ANALYSIS OF AMARTYA SEN'S DEVELOPMENT AS FREEDOM (1st ed. 2017); & Sakiko Fukuda-Parr, *The Human Development Paradigm: Operationalizing Sen's Ideas on Capabilities*, 9 FEMINIST ECON. 301 (2003).

229. Candelaria, *supra* note 228, at 134.

230. *Id.* at 122 (citing Rhoda Howard, *The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa*, 5 HUM. RTS. Q. 467 (1983).

231. Candelaria, *supra* note 228, at 117.

232. *Id.* at 122 (citing Howard, *supra* note 230).

233. Ibrahim F.I. Shihata, *The World Bank and Human Rights: An Analysis of the Legal Issues and the Records of Achievements*, 17 DENV. J. INT. L. & POL'Y 39, 40-48 (1988) [hereinafter Shihata, Human Rights] & Shihata, Development, *supra* note 38.

recognizes Human Rights as central to its mission.[234] It has been argued, however, that the constituent instruments of the Bretton Woods institutions and other similar MDFIs are enough to embrace within their meanings the full realization of the Right to Development.[235] It is, instead, the limited interpretation of these instruments that has led to the schizophrenic and disintegrated approach to the Development-Human Rights framework.[236]

Thus, from the given paradigm, it can hardly be argued that the framers of MDFIs' constituent instruments did not understand development to encompass justice or Human Rights. Verily, the VCLT instructs that "the relevant international rules governing interpretation are those comprising the corpus of [CIL] as it existed at the time of [treaty conclusion.]"[237] Indeed, many of the major MDFIs were created even before global consensus was reached on the intersection of development and Human Rights,[238] but that consensus served only to denominate realities that were already extant even before they were recognized — justice, peace, and equality for all are not ideals of the new era. These are norms and principles that have been articulated by the philosophies of St. Thomas Aquinas,[239] Immanuel Kant,[240] John Locke,[241] and other philosophers who wrote on such rights. Even assuming that these

234. EU Charter, *supra* note 4 & EIB Charter, *supra* note 4. *See also* EIB, The EIB Approach to Human Rights, *available at* https://www.eib.org/en/press/news/business-and-human-rights.htm (last accessed Jan. 30, 2022) [https://perma.cc/KY9D-7BVJ].

235. Yap, *supra* note 2, at 63-73.

236. *Id.* at 49.

237. *Id.* at 64 (citing VCLT, *supra* note 48, art. 4).

238. The pre-1986 IFIs are: the World Bank, 1944; the IFC, 1956; the IDA, 1960; the ICSID, 1966; the EIB, 1984; the IADB, 1959; the AfDB, 1964; and the ADB, 1966. IBRD Charter, *supra* note 27; IFC Charter, *supra* note 15; IDA Charter, *supra* note 81; ICSID Convention, *supra* note 81; EIB Charter, *supra* note 4; IADB Charter, *supra* note 4; AfDB Charter, *supra* note 4; & ADB Charter, *supra* note 4.

239. THOMAS AQUINAS, TREATISE ON LAW (Richard J. Regan trans., 2000).

240. IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE (John Ladd trans., 1999).

241. Katrina Monica C. Gaw, Bridging the Gap Between Business and Human Rights in Investment Treaty Arbitration: Parameters for Filing Host State Counterclaims for Investor Violations of Human Rights, at 40 (2018) (J.D. thesis, Ateneo de Manila University) (on file with the Professional Schools Library, Ateneo de Manila University) (citing Ed Bates, *History*, *in* INTERNATIONAL HUMAN RIGHTS LAW 19 (Daniel Moeckli, et al. eds., 2013)). The Author referred to the original manuscript of Atty. Gaw's thesis for this Note.

norms and principles of human and institutional relations were far from the minds of the framers of MDFIs' constituent instruments, the state of law at the time of their creation had already recognized the integrated Right to Development in the UN Charter, the UDHR, the ICCPR, and the ICESCR.[242] Again, assuming *arguendo* that the framers failed to account for these instruments, interpretation aided by the subsequent practice of both States and MDFIs — albeit, to a lesser degree in the case of the latter — would lead to the conclusion that the integrated form of the Right to Development has been accepted as persuasive — even controlling — in the operations of MDFIs.

To the credit of MDFIs, they have put up measures to ensure that vulnerable sectors have some semblance of protection when they fund projects.[243] In fact, MDFIs are setting gold standards for due diligence efforts and good governance among various institutions,[244] although the Author takes

242. *See* U.N. CHARTER art. 55; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 28, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; Candelaria, *supra* note 228, at 123-24 (citing Karel de Vey Mestdagh, *The Right to Development: From Evolving Principle to "Legal" Right: In Search of Its Substance*, *in* INTERNATIONAL COMMISSION OF JURISTS, DEVELOPMENT, HUMAN RIGHTS, AND THE RULE OF LAW: REPORT OF A CONFERENCE HELD IN THE HAGUE ON 27 APRIL – 1 MAY 1981 (1st ed. 1981)).

243. *See, e.g.*, McBeth, *supra* note 39, at 1134 & 1139.

244. *See* Samantha Balaton-Chrimes & Kate Macdonald, The Compliance Advisor Ombudsman for IFC/MIGA: Evaluating Potential for Human Rights Remedy, at 73, *available at* http://corporateaccountability.squarespace.com/s/NJM17_CAO.pdf (last accessed Jan. 30, 2022) [https://perma.cc/MT47-CF45] & Inclusive Development International, World Bank Group Implicated in Illegal Seizures of Indigenous Land in Cambodia and Laos, Communities Call for Bank's Help to Get Their Land Back, *available at* https://www.inclusivedevelopment.net/cambodia/world-bank-group-implicated-in-illegal-seizures-of-indigenous-land-in-cambodia-and-laos-communities-call-for-banks-help-to-get-their-land-back (last accessed Jan. 30, 2022) [https://perma.cc/GXX7-V9NL]. *Contra* Kate Woodsome, *Audit Slams World Bank Agency*, AL JAZEERA, Jan. 12, 2014, *available at* https://www.aljazeera.com/indepth/features/2014/01/audit-slams-world-bank-agency-20141127472234513.html (last accessed Jan. 30, 2022) [https://perma.cc/4DRV-AWX5]; & Sophie Edwards, *IFC Still Failing to Track Impact of Investments on Local Communities, Reports Say*, DEVEX, Mar. 17, 2017,

exception to their failure to adopt Human Rights due diligence frameworks to their fullest extent. The issue of whether it matters for MDFIs to use Human Rights language in their operations[245] has been resolved in the affirmative,[246] on the ground that "[t]he philosophy that underlies human rights law ... — that the treatment of every human being should comply with certain standards that derive from inherent human dignity and are a matter of entitlement — potentially disappears if human rights language is regarded as mere words, interchangeable with other labels."[247]

In conclusion, the umbrella of Human Rights is contemplated in the creation of development institutions because there can be no genuine development of peoples if their rights are violated. From a legal standpoint, there is an understanding in the community of nations that development involves, as its minimum standard, access to resources. This is not limited to tangible resources, but a whole slew of capacities necessary for a life well-lived — freedom of action, freedom from fear, and freedom of conscience, among others. In short, Human Rights.

C. The Regime of Multilateral Development Financing Institutions

MDFIs are a class of their own within the International Law paradigm, being the cross-section of International Institutional Law, International Economic Law, International Development Law, and IHRL. It was shown that MDFIs are IOs, economic institutions in particular,[248] with development objectives.

Foremost, MDFIs as IOs are users of sovereign powers.[249] Their capacities, rights, duties, obligations, and privileges are functions of and are intimately and ultimately linked to the character of power transmission from sovereign States and sovereign peoples.[250] This means that they are subject to sovereign values.[251] In the discussion on the nature of MDFIs as economic institutions, it was shown that accountability for the disbursement of funds and institutional

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available at https://www.devex.com/news/ifc-still-failing-to-track-impact-of-investments-on-local-communities-reports-say-89821 (last accessed Jan. 30, 2022) [https://perma.cc/2WN5-GDXG].

245. *See generally* McBeth, *supra* note 39, at 1103.

246. *Id.* at 1156.

247. *Id.* at 1103.

248. *See generally* BROMLEY, *supra* note 220.

249. SAROOSHI, *supra* note 63.

250. *Id.*

251. *Id.* at 10.

integrity are among the sovereign values that devolve upon MDFIs.[252] Thus, one such sovereign value that devolves upon MDFIs is the duty to respect, protect, and fulfill Human Rights, which entails the integration of at least the first generation of Human Rights (i.e., economic, social, political, and cultural rights, within the operational framework of MDFIs).[253] Amidst growing concerns for climate change, the reframing of the Right to Development has also thrown environmental rights into the mix.[254] Therefore, MDFIs have hard law obligations to discharge Human Rights responsibilities. The nexus of liability is found in general International Law by virtue of their status as subjects thereof.[255] It is also seen in the specific law of contracts and agreements entered into by MDFIs by virtue of the doctrine of stipulations *pour autrui*. The same is likewise grounded on a purposive understanding of their charters interpreted with the aid of evolving perspectives on the Right to Development.[256]

These conclusions notwithstanding, MDFIs continue to approach Human Rights obligations as trade-offs in the development agenda, despite evidence showing that they carry these obligations by virtue of their place in the international order. MDFIs present a case of International Law subjects refusing to discharge the demands of the very regime that birthed them. The Author theorizes that this attitude of MDFIs is the confluence of two other avoidance mechanisms — *first*, MDFIs read the Prohibited Political Activity Clauses in their constituent instruments in isolation; and *second*, MDFIs plead their immunities when asked to account for Human Rights violations. The subsequent Parts discuss these mnemonics of denial *in seriatim*.

III. THE CONFLICT BETWEEN THE PROHIBITED POLITICAL ACTIVITY CLAUSE IN THE CONSTITUENT INSTRUMENTS OF MULTILATERAL DEVELOPMENT FINANCING INSTITUTIONS AND THEIR HUMAN RIGHTS OBLIGATIONS UNDER CUSTOMARY INTERNATIONAL LAW

> *Poets and beggars, musicians and prophets, warriors and scoundrels, all creatures of that unbridled reality [ ] have had to ask but little of imagination, for our crucial problem has been a lack of conventional means to render our lives believable … The*

252. *See* Desierto, et al., *supra* note 35.

253. SKOGLY, *supra* note 9, at 99-106.

254. *See* Desierto, *supra* note 39.

255. WHO-Egypt Advisory Opinion, 1980 I.C.J. ¶ 37.

256. Yap, *supra* note 2, at 63-73.

> *interpretation of our reality through patterns not our own, serves only to make us ever more unknown, ever less free, ever more solitary.*
>
> — Gabriel García Márquez[257]

Between the Principle of Non-Intervention codified in Prohibited Political Activity Clauses versus Human Rights obligations, which should prevail? Stated otherwise, will the integration of Human Rights standards in development loan or investment agreements between MDFIs and States and corporations violate the Principle of Non-Intervention and, ultimately, the constituent instruments of MDFIs?

What does the Prohibited Political Activity Clause in MDFIs' constituent instruments say and how has the clause been used by MDFIs to evade liability for Human Rights obligations?

The Author argues that in weighing the values between the Prohibited Political Activity Clause and Human Rights obligations, the scales must tip in favor of the latter because (1) the Prohibited Political Activity Clause exists for the benefit of borrowing States to dissuade MDFIs from looking into their political affairs in the granting of loans, but it does not preclude MDFIs from setting Human Rights standards during the projects' implementation phases; (2) Human Rights obligations under CIL limit the exercise of sovereign powers by all subjects of International Law, and the current reading of the Prohibited Political Activity Clause expands the scope of powers of MDFIs beyond their contemplations; and (3) the systemic integration of the Prohibited Political Activity and the Purpose clauses of MDFIs' constituent instruments militates against an interpretation that would otherwise lead to the aiding or abetting of borrowing States' or debtor institutions' violations of their own Human Rights obligations.

After establishing that MDFIs have hard law Human Rights obligations, which they cannot evade by citations of the Prohibited Political Activity Clause of their constituent instruments, the Author undertakes to highlight certain Human Rights obligations which MDFIs have constantly evaded or, worse, violated. Thus, this Note identifies areas of vulnerability in MDFI operations and determines which Human Rights obligations pertain thereto. The Part ends with a showing that MDFIs have violated the Right to a

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257. Gabríel Garcia Márquez, Nobel Laureate in Literature, *The Solitude of Latin America*, Nobel Lecture at Stockholm, Sweden (Dec. 8, 1982) (transcript *available at* https://www.nobelprize.org/prizes/literature/1982/marquez/lecture (last accessed Jan. 30, 2022) [https://perma.cc/9PTE-9R58]).

Healthy Environment, the Right Not to be Displaced, and the Right to Self-Determination, and Free, Prior and Informed Consent.

Finally, this Note looks at a possible framework for the integration of Human Rights obligations in MDFI operations by particular reference to the UN Guiding Principles on Business and Human Rights.

A. History and Evolving Meanings of the Prohibited Political Activity Clause and Its Inconsistency with Human Rights Obligations

In its current formulation, the Prohibited Political Activity Clause forbids interference by one member in the political affairs of another, as well as any influence by one member over the decisions of another caused by the political character of the members concerned.[258] The model was replicated by other

258. IBRD Charter, *supra* note 27, art. IV, § 10.

MDFIs with little variation,[259] representing a codification of the Principle of Non-Intervention into the institutional law of MDFIs.[260]

The Principle of Non-Intervention is founded on the sovereignty of States,[261] it has been expressed in various International Law instruments,[262]

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259. *See* ADB Charter, *supra* note 4, art. 36; IADB Charter, *supra* note 4, art. VIII, § 5 (f); AfDB Charter, *supra* note 4, art. 38; & AIIB Charter, *supra* note 4, art. 31. It is curious to note that no such provision exists in the EU Charter in reference to the EIB, *or* in the charter of the EIB. EU Charter, *supra* note 4 & EIB Charter, *supra* note 4. The ADB Charter, for example, states —

> Article 36
>
> PROHIBITION OF POLITICAL ACTIVITY: THE INTERNATIONAL CHARACTER OF THE BANK
>
> 1. The Bank shall not accept loans or assistance that may in any way prejudice, limit, deflect[,] or otherwise alter its purpose or functions.
> 2. The Bank, its President, Vice-President(s), officers and staff shall not interfere in the political affairs of any member, nor shall they be influenced in their decisions by the political character of the member concerned. Only economic considerations shall be relevant to their decisions. Such considerations shall be weighed impartially in order to achieve and carry out the purpose and functions of the Bank.
> 3. The President, Vice-President(s), officers[,] and staff of the Bank, in the discharge of their offices, owe their duty entirely to the Bank and to no other authority. Each member of the Bank shall respect the international character of this duty and shall refrain from all attempts to influence any of them in the discharge of their duties.

ADB Charter, *supra* note 4, art. 36.

260. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar v. U.S.), Merits, Judgment, 1986 I.C.J. 107-08, ¶ 205 (June 27).

261. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/Res/2625 (XXV) (Oct. 4, 1970).

262. Convention on Rights and Duties of States art. 8, *signed* Dec. 26, 1933, 165 L.N.T.S. 19; U.N. CHARTER art. 2 (7); Charter of the Organization of American States arts. 3 & 19, *signed* Apr. 30, 1948, 119 U.N.T.S. 3; Peaceful and Neighbourly Relations Among States, G.A. Res. 1236 (XII), U.N. Doc. A/RES/1236 (XII) (Dec. 14, 1957); VCDR, *supra* note 177, art. 41; Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 36/103, U.N. Doc. A/RES/36/103 (Dec. 9, 1981); VCLT, *supra* note 48, pmbl.; G.A. Res. 2625 (XXXV), *supra* note 261; & Charter of Economic Rights and Duties of

and it has been discussed in international case law.[263] It is closely related to the doctrine of *par in parem non habet imperium*, and to the jurisdictional immunities of States.[264] According to *Military and Paramilitary Activities in and Against Nicaragua*, there are two elements which characterize intervention: (1) "there must be an 'intervention' by one state in the affairs of another;"[265] and (2) "the intervention must bear on matters in which each State is permitted, by the principle of state sovereignty, to decide freely."[266] It has been said that "the essence of intervention is coercion."[267] Therefore, in its current formulation, the Principle of Non-Intervention attaches to coercive acts of States, and its applicability turns upon the peculiarities of each case, under the general proposition that if there is willful compliance or a reasonable window for resistance, then the principle will not apply.[268]

As earlier discussed, the Principle of Non-Intervention operates within the MDFI machinery through the Prohibited Political Activity Clause. There have been several instances when this particular provision has been put in issue.

The earliest contestation occurred when the UN General Assembly resolved to empower the UN Secretary-General to enter into consultations with the IBRD with a view to withholding aid from South Africa and Portugal for their colonial and apartheid policies.[269] Against this backdrop, the IBRD

States, G.A. Res. 3281 (XXIX), U.N. Doc. A/RES/3281 (XXIX) (Dec. 12, 1974).

263. Spanish Zone of Morocco Claims (Gr. Brit. v. Sp.), 2 R.I.A.A. 615 (Perm. Ct. Arb. 1924); *Corfu Channel*, 1949 I.C.J. at 17; *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. at 14; & Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Ug.), Merits, Judgment, 2005 I.C.J. 168, ¶¶ 164-65 (Dec. 19).

264. *See* Maziar Jamnejad & Michael Wood, *The Principle of Non-Intervention*, 22 LEIDEN J. INT'L. 345 (2009); Marcelo Kohen, *The Principle of Non-Intervention 25 Years After the Nicaragua Judgment*, 25 LEIDEN J. INT'L. 157 (2012); Chen Yifeng, *The Customary Nature of the Principle of Non-Intervention: A Methodological Note*, 2 RENMIN CHINESE L. REV. 319, 340 (2014); & Gordon Graham, *The Justice of Intervention*, 13 REV. INT'L STUD. 133 (1987).

265. Jamnejad & Wood, *supra* note 264, at 347 (citing *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. at 97-98, ¶ 205).

266. *Id.*

267. Jamnejad & Wood, *supra* note 264, at 348.

268. *Id.*

269. *Consultation with the International Bank for Reconstruction and Development: Report of the Secretary-General*, 1967 U.N. JURID. Y.B. 108, 108, U.N. Doc.

claimed that forcing it to comply with the UN General Assembly resolutions on Portugal[270] and South Africa[271] would cause it to violate its own charter, specifically citing the Prohibited Political Activity Clause.[272] The UN Legal Department submitted its reservation to the IBRD's position on the ground that the prohibitive mantle of the provision did not extend to matters involving International Law and was confined only to matters internal to the State,[273] a position that hued closely to distinctions made between domestic and international affairs in discussions of the Principle of Non-Intervention.[274]

A second reckoning came ten years later, when the United States legislated a directive for its representative on the World Bank's Executive Board to oppose disbursements made in favor of countries with "a consistent pattern of gross human rights violations."[275] Although the IBRD's Legal Department opined that the Prohibited Political Activity Clause likewise "contemplates the activities of the executive directors,"[276] it was quick to add that the Bank's system did not provide for a mechanism to invalidate politically motivated policy decisions of executive directors.[277] These events informed the many

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ST/LEG/SER.C/5 (citing Question of Territories Under Portuguese Administration, G.A. Res. 2184 (XXI), U.N. Doc. A/RES/2184 (Dec. 12, 1966) & The Policies of Apartheid of the Government of the Republic of South Africa, G.A. Res. 2202 (XXI), U.N. Doc. A/RES/2202 (XXI) (Dec. 16, 1966) [hereinafter Consultation with the IBRD]). *See also* Samuel A. Bleicher, *UN v. IBRD: A Dilemma of Functionalism*, 24 INTL. ORG. 31 (1970).

270. G.A. Res. 2184 (XXI).

271. G.A. Res. 2202 (XXI).

272. Consultation with the IBRD, 1967 U.N. JURID. Y.B. at 115.

273. *Id.* at 116.

274. Dominic McGoldrick, *The Principle of Non-Intervention: Human Rights*, *in* THE UNITED NATIONS AND THE PRINCIPLES OF INTERNATIONAL LAW: ESSAYS IN MEMORY OF MICHAEL AKEHURST 86 (Vaughan Lowe & Colin Warbrick eds., 1994).

275. Hassane Cissé, *Should the Political Prohibition in the Charters of International Financial Institutions be Revisited?: The Case of the World Bank*, *in* WORLD BANK LEGAL REVIEW: INTERNATIONAL FINANCIAL INSTITUTIONS AND GLOBAL LEGAL GOVERNANCE 72 (Hassane Cissé, et al. eds., 2012).

276. *Id.*

277. *Id.* (citing Shihata, Human Rights, *supra* note 233, at 45-46).

scholarly works on the Human Rights obligations of the World Bank that followed them.[278]

The tide seems to have changed during the tenure of a radical Senior Vice President and General Counsel of the World Bank who campaigned against the broad view of the Prohibited Political Activity Clause and the limited ways the Bank has engaged with the Human Rights agenda by virtue thereof,[279] convinced that the Bank's development agenda was incomplete without considering Human Rights, and that the Prohibited Political Activity Clause did not preclude the incorporation of the Human Rights framework in the Bank's operations.[280] This was later taken to mean that the Prohibited Political Activity Clause permits, but does not mandate, the consideration of Human Rights in the Bank's work.[281] Little change has been observed since. The

278. Cissé, *supra* note 275, at 71 (citing Victoria E. Marmorstein, *World Bank Power to Consider Human Rights Factors in Loan Decisions*, 13 J. INT'L. L. & ECON. 113 (1978); John D. Ciorciari, *The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement*, 33 CORNELL INT'L L.J. 331 (2000); SKOGLY, *supra* note 9; Dana L. Clark, *The World Bank and Human Rights: The Need for Greater Accountability*, 15 HARV. HUM. RTS. J. 205 (2002); Korinna Horta, *Rhetoric and Reality: Human Rights and the World Bank*, 15 HARV. HUM. RTS. J. 227 (2002); DARROW, *supra* note 28; BAHRAM GHAZI, THE IMF, THE WORLD BANK GROUP AND THE QUESTION OF HUMAN RIGHTS (2005); & Margot E. Salomon, *International Economic Governance and Human Rights Accountability*, *in* CASTING THE NET WIDER: HUMAN RIGHTS, DEVELOPMENT AND NEW DUTY-BEARERS 153 (Margot E. Salomon, et al. eds., 2007)).

279. Robert Dañino, Legal Opinion on Human Rights and the Work of the World Bank, ¶¶ 9-17, *available at* https://opil.ouplaw.com/view/10.1093/law-oxio/e215.013.1/law-oxio-e215-regGroup-1-law-oxio-e215-source.pdf (last accessed Jan. 31, 2022) [https://perma.cc/NB8F-TE5V]. Note that this Legal Opinion was not adopted by the Board of Directors of the World Bank. Cissé, *supra* note 275, at 73 n. 75.

280. Robert Dañino, *The Legal Aspects of the World Bank's Work on Human Rights*, 41 INT'L L. 21, 21 (2007).

281. Cissé, *supra* note 275, at 74 (citing Ana Palacio, *The Way Forward: Human Rights and the World Bank*, DEV. OUTREACH, Volume No. 8, Issue No. 2, at 35-37).

World Bank and other MDFIs continue to levy the provisions of their charters[282] against calls to have greater Human Rights accountability.[283]

B. Resolving the Contesting Values of Non-Intervention and Human Rights in the Operations of Multilateral Development Financing Institutions

The Author submits that Human Rights accountability is a weightier consideration in resolving the tension between the Prohibited Political Activity clause and the general and specific mandates of MDFIs to respect, protect, and fulfill Human Rights because the provisions on non-intervention in MDFIs' constituent instruments were not meant to preclude the Human Rights considerations in MDFI operations. The failure to integrate Human Rights in MDFI operations has resulted in the aiding or abetting of violations of other obligations under International Law, and the market credibility of MDFIs is ultimately tested against their Human Rights compliance.

1. Purpose of and Protections Afforded by the Prohibited Political Activity Clause

Sir Ian Brownlie, a recognized luminary in the field of International Law, observed that the Principle of Non-Intervention found in the UN Charter is "inoperative when a treaty obligation is concerned."[284] This is based on the

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282. Letter *from* Charles E. De Leva, Chief Environmental and Social Standards Officer, World Bank Group, *to* Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, et al. (June 7, 2019) (*available at* https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=34732 (last accessed Jan. 30, 2022) [https://perma.cc/3HBD-PGWB]).

283. *See, e.g.*, Philip Alston, United Nations Special Rapporteur on Extreme Poverty and Human Rights, *Rethinking the World Bank's Approach to Human Rights*, Keynote Address to the Nordic Trust Fund for Human Rights and Development Annual Workshop on "The Way Forward" at The World Bank, Washington D.C. (Oct. 15, 2014) (transcript *available at* https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15275&LangID=E (last accessed Jan. 30, 2022) [https://perma.cc/TPM4-L337]).

284. McGoldrick, *supra* note 274, at 88 (citing IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 553 (4th ed. 1990) (citing U.N. CHARTER art. 2 (7))). Article 2, Paragraph 7 of the UN Charter provides —

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall

logic that the Principle of Non-Intervention seeks to protect States from the intervention of other actors in matters falling exclusively within the ambit of domestic affairs. Thus, when a State limits itself by contracting treaty obligations or participating in the formation of custom, then those matters submitted to treaty or custom are now brought within the competence of International Law.[285] With this, the question of whether States may plead the Principle of Non-Intervention against the actions of an IO or another State seeking the enforcement of treaty or customary obligations under IHRL has been answered in the negative on the ground that "[Human Rights] obligations ... are such that the matter of [Human Rights] protection is no longer regulated[,] 'in principle,' by the [State]."[286]

The above observations allow two conclusions: (1) that the Principle of Non-Intervention is an injunction against active coercion of action or omissions that fall within the exclusive competence of a State; and (2) that the Principle of Non-Intervention is one that must be pleaded by holders of sovereign rights against other subjects of International Law.

Without more, the language of the Prohibited Political Activity Clauses in the constituent instruments of MDFIs is meant to protect States from the involvement of MDFIs in their affairs.[287] They also serve to enjoin MDFIs from considering the political character of governments when approving membership, loans, or investments.[288] Nowhere in the history, purpose, or language of these provisions, however, has there been an injunction for MDFIs to consider Human Rights obligations, unless the position is taken that Human Rights are within the sphere of the political affairs of each nation.[289] That proposition may be true to some degree. If one looks into the margins of discretion that International Law leaves to States in detailing the *manner* by

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> not prejudice the application of enforcement measures under Chapter VII.

Id.

285. McGoldrick, *supra* note 274, at 85 & 93.

286. *Id.* at 86 (citing Egon Schwelb, *The Law of Treaties and Human Rights*, *in* TOWARDS WORLD ORDER AND HUMAN DIGNITY: ESSAYS IN HONOR OF MYRES S. DOUGLES 262-90 (W. Michael Reisman & Burns H. Weston eds., 1976)).

287. Consultation with the IBRD, 1967 U.N. JURID. Y.B. at 115.

288. *Id.*

289. *See* IBRD Charter, *supra* note 27, art. IV, § 10; ADB Charter, *supra* note 4, art. 36; IADB Charter, *supra* note 4, art. VIII, § 5 (f); AfDB Charter, *supra* note 4, art. 38; & AIIB Charter, *supra* note 4, art. 31.

which each government will comply with obligations, then, to that extent, Human Rights are political.[290] Based on positions taken by MDFIs in relation to their Human Rights obligations, however, they would have it that even the *fact* of compliance is a matter left to governments — an affront to the philosophy underlying Human Rights, that they limit sovereign capacities.[291] The suggestion that Human Rights obligations are domestic affairs likewise goes against settled jurisprudence on the matter, to wit —

> The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends on the development of international relations ... it may well happen that, in a matter which ... is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to a State is limited by the rules of international law.[292]

Thus, in interpreting the Prohibited Political Activity Clauses of their charters, MDFIs must take care not to broaden them to mean that they do not have Human Rights obligations. That conclusion is not supported by the language, history, and purpose of such provisions.[293] The propriety of this argument is made more salient by looking at alignment with Human Rights as a minimum standard of action discharged by *both* MDFIs and States within the framework of International Law, which is thus beyond the competence of the intervention rhetoric.

MDFIs are also the wrong parties to plead non-intervention. The Prohibited Political Activity Clause does not translate to MDFIs' capacity to speak on behalf of prospective borrowers on matters of possible intervention. The language of the Prohibited Political Activity Clause reveals an intent for it to be raised by borrowers against the decisions of MDFIs, but not by MDFIs themselves when they are being compelled to comply with their own Human Rights obligations. Elsewise stated, MDFIs are preempting borrower States by deciding for themselves that such borrowers will deem Human Rights

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290. McGoldrick, *supra* note 274, at 108.

291. See CRAWFORD, *supra* note 34, at 84 (citing *Alfred Dunhill of London, Inc.*, 425 U.S. at 711 & *Malewicz*, 362 F. Supp. 2d at 314).

292. *Id.* at 86 (citing Nationality Decrees Issued in Tunis and Morocco on Nov. 8th, 1921, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 27 (Feb. 7)).

293. *See* IBRD Charter, *supra* note 27, art. IV, § 10; ADB Charter, *supra* note 4, art. 36; IADB Charter, *supra* note 4, art. VIII, § 5 (f); AfDB Charter, *supra* note 4, art. 38; & AIIB Charter, *supra* note 4, art. 31.

compliance as interventionist. While the position has been taken that many clients of MDFIs still consider "the very mention of [Human Rights as] inflammatory language,"[294] the same should not preclude efforts towards progressive compliance with MDFIs' own Human Rights obligations. In fine, MDFIs would do well to empower their clients by not usurping their capacities to determine for themselves their obligation and ability to comply with Human Rights standards.

Furthermore, the language of the Prohibited Political Activity Clause is properly limited to retroactivity. This means that while MDFIs are not allowed to consider the Human Rights track record of a potential borrower or the status of its government by virtue of the directive not to "interfere in the political affairs of any member; nor ... be influenced in their decisions by the political character of the member or members concerned,"[295] they are not proscribed from including Human Rights measures as prospective conditions for loans or investments. While the language of the opening phrase of the directive and the Monitoring Clause[296] would seem to enjoin the consideration of political matters even in the evaluation of projects, the use thereof to reject Human Rights obligations suffers the same failure of characterization that is inherent in the view that Human Rights obligations are political questions.[297]

To properly interpret the scope of the Prohibited Political Activity Clause, one must view it under the discursive framework of bargaining power. Recall that the fears sought to be allayed by the insertion of these provisions are against the use of these economic mechanisms to further one or the other

294. Cissé, *supra* note 275, at 75 (citing James D. Wolfensohn, *Some Reflections on Human Rights and Development*, *in* HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL ENFORCEMENT 19 & 21 (Philip Alston & Mary Robinson eds., 2005)).

295. *See* IBRD Charter, *supra* note 27, art. III, § 10.

296. *Id.* § 5 (b); IADB Charter, *supra* note 4, art. III, § 9 (b); AfDB Charter, *supra* note 4, art. 17 (1) (h); ADB Charter, *supra* note 4, art. 14 (xi); & AIIB Charter, *supra* note 4, art. 13 (9). For example, the Monitoring Clause in the IBRD Charter provides that "[t]he Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, *with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations*." IBRD Charter, *supra* note 27, art. III, § 5 (b) (emphasis supplied).

297. *Id.*

agenda.[298] Indeed, and as earlier discussed, there is evidence to show that the policy frameworks of some MDFIs advance the interests of one or the other shareholder.[299] It was also observed that in many instances, MDFI funding is sought at opportune times, giving borrowers little choice but to accede to otherwise questionable demands.[300] Whether the interests being advanced align with Human Rights standards is a matter that must be determined on a case-to-case basis. What the Author seeks to show here is the context under which the Prohibited Political Activity Clause may be properly invoked, primarily by borrowing States, and then by MDFIs themselves. When, for example, a borrowing State is asked by an MDFI to comply with Human Rights standards in accordance with the manner by which the same is done by a creditor State, then the borrowing State may invoke the protective mantle of the Prohibited Political Activity Clause. When, however, an MDFI imposes compliance with Human Rights obligations as a condition for loan approval and disbursement, without more, then no violation of constituent instruments occurs because these matters properly devolve upon both the MDFI and the borrowing State by virtue of the status of the obligations as CIL.

This finds support in the ultimately consensual nature of development loan or investment agreements with MDFIs.[301] *Ceteris paribus*, no coercion is exerted by MDFIs in imposing Human Rights conditions on loans and investments.[302] If the borrowing State deems itself unable to comply, then it must, perforce, seek funding elsewhere.[303] This situation hardly suggests cruelty and anti-development agenda against borrowing States who are likely to be desperate for the funding MDFIs can give. On the contrary, the imposition of Human Rights considerations is more consistent with the overall goal to achieve the wholistic development of peoples, ultimately upholding

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298. *See* IBRD Charter, *supra* note 27, art. IV, § 10.

299. Lisa Martin, *International Economic Institutions*, *in* THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS 668 (Roderick Arthur William Rhodes, et al. eds., 2008) (citing Daniel L. Nielson & Michael J. Tierney, *Delegation to International Organizations: Agency Theory and World Bank Environmental Reform*, 57 INT'L ORG. 241 (2003); Ngaire Woods, *Governance in International Organizations: The Case for Reform in the Bretton Woods Institutions*, *in* 9 INTERNATIONAL MONETARY AND FINANCIAL ISSUES FOR THE 1990S 81-106 (1998); & Strom C. Thacker, *The High Politics of IMF Lending*, 52 GLOBAL POL. 38 (1999)).

300. WOODS, *supra* note 223, at 71 & 82.

301. CRAWFORD, *supra* note 34, at 168-69.

302. *But see* Jamnejad & Wood, *supra* note 264, at 348.

303. *See generally* McBeth, *supra* note 39, at 1134 & 1139.

the mandate of MDFIs to pursue the Right to Development.[304] The absurdity of an opposite interpretation is illustrated herein. For example, a borrowing State with a terrible Human Rights track record approaches an MDFI for funding. The MDFI grants the loan but imposes a condition upon the borrowing State to improve its Human Rights compliance, but it refuses the condition. Will the MDFI be justified in disallowing the grant of the loan? Under the position currently held by MDFIs, the borrowing State may claim discrimination or interference by the MDFI.[305] However, under the framework being proposed here — that Human Rights considerations are not covered by the Prohibited Political Activity Clause — then a position that the borrowing State is not entitled to the loan becomes more legally defensible. The argument in favor of retaining the current appreciation of the Prohibited Political Activity Clause is much weaker when MDFIs fail to consider Human Rights when lending to or investing in private corporations that have no claim against intervention, except insofar as the same concerns its rights under the laws of its host State or States, or those which are considered *erga omnes*.[306]

Therefore, when MDFIs discharge their Human Rights obligations by imposing Human Rights conditions or by monitoring or evaluating according to Human Rights standards, they are not interfering in the affairs of their borrowers, *per se*, because compliance with the demands of Human Rights, in general, and the Right to Development, in particular, is a standard imposed by International Law that has already been consented to by States as a limit to their sovereign capacities.

2. Human Rights Obligations as Limits to the Exercise of Sovereign Powers

MDFIs are independent from their Member States, and they are more than the sum of their memberships.[307] The same, however, cannot be said of the powers they exercise. When MDFIs exercise sovereign powers, they do not do so of their own accord, having no independent source of sovereignty other than that transferred to them by their Member States.[308] That is to say, the sovereign powers of MDFIs are composite matters, primarily drawn from the

304. Yap, *supra* note 2, at 63–73.

305. OKEKE, *supra* note 46, at 351 (citing VCDR, *supra* note 177, art. 38).

306. *See* Case Concerning the Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Bel. v. Sp.), Judgment, 1970 I.C.J. 3 (Feb. 5).

307. OKEKE, *supra* note 46, at 356.

308. CRAWFORD, *supra* note 34, at 167–69.

sovereignty of transferring States.[309] This is unlike the situation in state recognition, for example, where a nascent State has sovereignty of its own, which need only be recognized by the international community in order for it to exercise the same on the international plane.[310] The powers exercised by MDFIs are *transferred* to them by Member States. This Note delves deeper into that relationship and examines the power dynamic itself to arrive at the conclusion that MDFIs are not bound by International Law merely because their Member States are so bound. Rather, they are bound thereby because the very powers that they discharge are so limited.

Thus, when MDFIs insist that they do not have Human Rights obligations because of the Prohibited Political Activity Clause, and, by virtue of such rejection, participate in one or the other form of Human Rights violations, they are expanding their powers beyond the contemplation of their constituent instruments. A disclaimer of Human Rights obligations carries with it the assumption that it is exempt from the very limitations which International Law has imposed upon the use of sovereign powers by both States and IOs.

Therefore, when MDFIs accept the fact that they do have the duty to respect, protect, and fulfill Human Rights,[311] they operate in material consistency with the powers transferred to them, and will certainly not be in breach of the Prohibited Political Activity Clause by instead complying with their own Human Rights obligations under general International Law and under their own specific charters.[312]

3. Towards a Systemic Integration of the Prohibited Political Activity and Purpose Clauses in Constituent Instruments of Multilateral Development Financing Institutions

It has been pointed out that States remain bound by their Human Rights obligations under treaties and CIL even when acting as members of MDFIs.[313]

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309. SAROOSHI, *supra* note 63, at 101-07.

310. *Id.* at 134-36 & 143-51.

311. SKOGLY, *supra* note 9, at 99-106; Yap, *supra* note 2, at 84-91; & Carlos, *supra* note 28, at 68-89.

312. *Id.*

313. Cissé, *supra* note 275, at 75 (citing Siobhán McInerney-Lankford, *International Financial Institutions and Human Rights*, *in* INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW 239 & 265 (Daniel D. Bradlow & David B. Hunter eds., 2010)).

Thus, there have been calls for MDFIs to embody "'international policy coherence,' which demands 'coherence across policies governing different issues, as well as coherence in terms of their engagement with and participation in international organizations and processes.'"[314] This closely resembles the Principle of Systemic Integration, which reads the general principles of International Law into instruments of International Law in a campaign against fragmentation.[315] Let it be noted, as well, that the Purpose Clauses of MDFIs uniformly cite development as the primary goal of such institutions.[316] It was earlier established that this developmental purpose includes the integration of Human Rights into MDFIs' operations.[317] Therefore, it seems curious that MDFIs have remained defensive when being held to account for Human Rights obligations, especially considering the directive in their charters that they shall be guided in their decisions by their Purpose Clauses.[318]

It is submitted that the Prohibited Political Activity Clause should be interpreted in consonance with the Purpose Clause of MDFIs by rejecting a reading of the former that ultimately rejects the demands of the latter. Stated otherwise, the Purpose Clause takes primacy over the Prohibited Political Activity Clause in order for MDFIs to achieve policy coherence, to avoid fragmentation, and to avoid falling privy to possible violations of IHRL.

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314. Cissé, *supra* note 275, at 75 (citing McInerney-Lankford, *supra* note 313, at 239 & 265).

315. International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, U.N. Doc. A/CN.4/L.682, 114, ¶ 220 (2006) [hereinafter Fragmentation of International Law].

316. *See* IBRD Charter, *supra* note 27, art. I (i); IFC Charter, *supra* note 15, art. I; IDA Charter, *supra* note 81, art. I; MIGA Convention, *supra* note 81, pmbl.; EIB Charter, *supra* note 4, art. 2; IADB Charter, *supra* note 4, art. I, § 1; AfDB Charter, *supra* note 4, art. 1; ADB Charter, *supra* note 4, art. 1; & AIIB Charter, *supra* note 4, art. 1.

317. SKOGLY, *supra* note 9, at 99–106.

318. *See, e.g.*, IBRD Charter, *supra* note 27, art. I (i); IFC Charter, *supra* note 15, art. I; IDA Charter, *supra* note 81, art. I; MIGA Convention, *supra* note 81, pmbl.; EIB Charter, *supra* note 4, art. 2; IADB Charter, *supra* note 4, art. I, § 1; AfDB Charter, *supra* note 4, art. 1; ADB Charter, *supra* note 4, art. 1; & AIIB Charter, *supra* note 4, art. 1.

MDFIs have put up various measures to meet the demands of the development agenda.[319] While these measures arguably protect Human Rights in some respects, they continue to fail in that goal by restricting the application of the full breadth of IHRL, instead giving particular reverence to the Prohibited Political Activity Clause.[320] Thus, the policies of MDFIs that seek to respect, protect, and fulfill Human Rights[321] are incoherent with the broader IHRL framework. There is also marked incongruity between these policies, the integrated Right to Development, and the staunch refusal to admit Human Rights obligations. In fine, the situation has resulted in the fragmentation of rules governing MDFIs' operations — a less than ideal situation for a market player that relies heavily on its credibility and integrity for smooth operations. A systemic reading of the Prohibited Political Activity Clause should therefore, at the very least, admit as exceptions thereto Human Rights obligations under CIL in order that MDFIs may fully and finally embrace the whole plethora of rights, duties, and obligations secured under the IHRL framework.[322] Reading it in this manner would, for example, clarify for MDFIs the contours of the Right to Free, Prior, and Informed Consent in opposition to the haphazard framework currently in existence. Integration of MDFIs into the IHRL framework also gives teeth to these policy thrusts. Once MDFIs shift their paradigms to reject the absoluteness of the Prohibited Political Activity Clause and recognize their Human Rights liabilities, they then become accountable, not only by virtue of their internal rules, but also under the strictures of International Law, which gives them greater incentive to comply therewith — very much unlike the recommendatory nature of the *status quo*.[323]

Finally, an integrated approach to Human Rights by MDFIs would also allow them to recognize the CIL and treaty obligations of their Member States.

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319. *See, e.g.*, WORLD BANK, ENVIRONMENTAL AND SOCIAL FRAMEWORK (2017); IFC, *Policy on Environmental and Social Sustainability* (Jan. 1, 2012); & AIIB, *Risk Management Framework* (Apr. 2019).

320. McGoldrick, *supra* note 274, at 86 (citing Egon Schwelb, *The Law of Treaties and Human Rights*, *in* TOWARDS WORLD ORDER AND HUMAN DIGNITY: ESSAYS IN HONOR OF MYRES S. DOUGLES 262-90 (W. Michael Reisman & Burns H. Weston eds., 1976)).

321. SKOGLY, *supra* note 9, at 99-106.

322. *See* Cissé, *supra* note 275, at 75 (citing McInerney-Lankford, *supra* note 313, at 239 & 265).

323. *See generally* WORLD BANK, ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 319; IFC, *Policy on Environmental and Social Sustainability*, *supra* note 319; & AIIB, *Risk Management Framework*, *supra* note 319.

Turning a blind eye to Human Rights has, in many instances, led to MDFIs' participation in Human Rights crises. They have, for example, funded regimes which perpetrated environmental degradation,[324] unlawful expropriation,[325] and gender-based sexual violence.[326] A case could be made that certain omissions by these institutions, including the failure to consider Human Rights standards, give rise to responsibility under International Law for aiding or abetting the borrowing State's violations of its Human Rights obligations under treaty law or CIL.[327] Blindness to Human Rights resulting in Human Rights violations also gives rise to an MDFI's own liability for failing to discharge its duty to ensure the integrity of disbursements and to progressively achieve development.[328]

In the final analysis, MDFIs cannot hide behind the protective mantle of the Prohibited Political Activity Clause when made to account for Human Rights violations. Foremost, the language, history, and purpose of the provision[329] decry any interpretation that would allow a State or an IO to renege on its Human Rights obligations, the matter having been lifted by treaty or State practice out of contemplation for the internal affairs of a State. Another reason for the exclusion of Human Rights obligations from the operation of the Prohibited Political Activity Clause is the fact that many of these are customary obligations which properly limit not only States' sovereign

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324. CEDHA, *supra* note 23.

325. Earth Rights International, Maxima Acuña-Atalaya v. Newmont Mining Corp.: A Family's Struggle Against One of the World's Biggest Mining Companies, *available at* https://earthrights.org/case/maxima-acuna-atalaya-v-newmont-mining-corp/#documentsff69-1a905f26-f4b6 (last accessed Jan. 30, 2022) [https://perma.cc/EM92-YZQE].

326. World Bank, DRC: World Bank Suspends Disbursements for Civil Works for the High-Priority Roads Reopening and Maintenance (ProRoutes) Project, *available at* https://www.worldbank.org/en/news/statement/2017/11/27/drc-world-bank-suspends-disbursements-for-civil-works-for-the-high-priority-roads-reopening-and-maintenance-proroutes-project (last accessed Jan. 30, 2022) [https://perma.cc/8X8J-P4KQ].

327. SAROOSHI, *supra* note 63, at 103.

328. *Id.* at 101.

329. *See* IBRD Charter, *supra* note 27, art. IV, § 10; ADB Charter, *supra* note 4, art. 36; IADB Charter, *supra* note 4, art. VIII, § 5 (f); AfDB Charter, *supra* note 4, art. 38; & AIIB Charter, *supra* note 4, art. 31.

capacities,[330] but also the exercise of sovereign powers by MDFIs.[331] Thus, MDFIs cannot read into the Prohibited Political Activity Clause a justification for omissions to discharge such obligations because doing so would be expanding the potency of the provision far beyond the contemplation of its codification. Finally, MDFIs' blindness to Human Rights, as propelled by the current interpretation of the Prohibited Political Activity Clause, has led to their aiding or abetting violations of borrower States' own obligations, with such omissions likewise giving rise to MDFIs' own responsibility.

C. Areas of Vulnerability and Attendant Human Rights Obligations Under Customary International Law

This Section puts the above conclusions in perspective. "Human Rights obligations under CIL" is a phrase which invokes the expanse of state practices on matters affecting their relations with individuals.[332] In the case of MDFIs, and IOs in general, it might be inaccurate to impose upon them obligations under CIL which are beyond their capacities to discharge. The exposition hereunder utilizes the inductive approach to determine, at least, the most vital CIL obligations of MDFIs.

The proclivity of MDFIs towards funding disasters is well-documented.[333] Resistance against and recovery following natural disasters serve as the areas

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330. *See* CRAWFORD, *supra* note 34, at 84 (citing *Alfred Dunhill of London, Inc.*, 425 U.S. at 711 & *Malewicz*, 362 F. Supp 2d at 314).

331. *See* IBRD Charter, *supra* note 27, art. II; IFC Charter, *supra* note 15, art. II, §§ 2-5; IDA Charter, *supra* note 81, art. I & art. V, § 1; MIGA Convention, *supra* note 81, arts. 5-10; ICSID Convention, *supra* note 81, art. 17; EU Charter, *supra* note 4, arts. 308 & 309; IADB Charter, *supra* note 4, art. II, §§ 1A-4; AfDB Charter, *supra* note 4, arts. 5-7 & 9; ADB Charter, *supra* note 4, arts. 4-8; & AIIB Charter, *supra* note 4, arts. 5-8.

332. *See* Cissé, *supra* note 275, at 75 (citing McInerney-Lankford, *supra* note 313, at 239 & 265).

333. *See, e.g.*, Vivek Maru, *The World Bank Shouldn't Hide When It Funds Projects That Harm Communities*, WASH. POST, May 9, 2018, *available at* https://www.washingtonpost.com/news/posteverything/wp/2018/05/09/the-world-bank-shouldnt-hide-when-it-funds-projects-that-harm-communities (last accessed Jan. 30, 2022) [https://perma.cc/JAB2-CQC3]; Bruce Rich, The World Bank's Legacy of Environmental Destruction: A Case Study, *available at* https://www.opendemocracy.net/en/oureconomy/the-world-banks-legacy-of-environmental-destruction-a-case-study (last accessed Jan. 30, 2022) [https://perma.cc/BZG8-MTM6]; Thomas L. Lichenstein, The World Bank's Environmental Disasters, *available at*

where the impact of MDFIs (or a lack thereof) is most apparent. Stories and statistics, though grueling, are not at all surprising. Majority of MDFIs engagements are in mining, oil exploration, and infrastructure.[334] In fact, the IFC invests in projects "expected to have 'diverse, irreversible, or unprecedented' social and environmental effects."[335]

These projects require the resettlement of communities, which are often Indigenous Cultural Communities,[336] with MDFI's producing an adverse impact on human rights in at least three vulnerable areas: the environment, Indigenous Peoples, and displacement.

Growing vulnerabilities and lowered resistance to natural disasters require MDFIs to institute mechanisms to address their own responsibilities and to guarantee certain rights recognized by international law, including the right to a healthy environment; the right to self-determination and to free, prior, and informed consent; and the right against involuntary displacement.

Jurists and scholars have ably argued the place of the Rights pertinent to the abovementioned fields of human interaction with States and users of sovereign powers in International Law.[337] The burden of the Author, therefore, is not to establish these entitlements as CIL, but to make an

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https://www.heritage.org/environment/report/the-world-banks-environmental-disasters (last accessed Jan. 30, 2022) [https://perma.cc/U9RQ-SARN]; & Bretton Woods Project, What Are the Main Criticisms of the World Bank and IMF?, at 6-9, *available at* https://www.brettonwoodsproject.org/wp-content/uploads/2019/06/Common-Criticisms-FINAL.pdf (last accessed Jan. 30, 2022) [https://perma.cc/4TFE-PFJC].

334. *Id.*

335. Ben Hallman & Roxana Olivera, Gold Rush: How the World Bank is Financing Environmental Destruction, *available at* http://projects.huffingtonpost.com/worldbank-evicted-abandoned/how-worldbank-finances-environmental-destruction-peru (last accessed Jan. 30, 2022) [https://perma.cc/JA8K-JSY2].

336. McBeth, *supra* note 39, at 1101.

337. *See generally* PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW (2003); DEVELOPMENT-INDUCED DISPLACEMENT AND RESETTLEMENT: NEW PERSPECTIVES ON PERSISTING PROBLEMS 125-98 (Irge Satiroglu & Narae Choi eds., 2015); MICHÈLE MOREL, THE RIGHT NOT TO BE DISPLACED IN INTERNATIONAL LAW (2014); MARIA VICTORIA CABRERA ORMAZA, THE REQUIREMENT OF CONSULTATION WITH INDIGENOUS PEOPLES IN THE ILO: BETWEEN NORMATIVE FLEXIBILITY AND INSTITUTIONAL RIGIDITY (2017); & S. JAMES ANAYA, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES (2009).

exposition as to what these rights and obligations mean for their holders and bearers, respectively. The concern here is the specific content of MDFIs' Human Rights obligations under CIL, viewed from the perspective of development subjects, considering the earlier establishment of the entitlement of these peoples to the protections of IHRL and the concomitant duties of MDFIs in relation thereto. What do these duties entail? It is answered here.

Thus far, this Note has addressed two issues regarding the relationship of MDFIs with IHRL: whether MDFIs have hard law obligations to respect, protect, and fulfill Human Rights; and, whether these obligations stand in marked opposition to the Prohibited Political Activity Clauses of MDFIs.

IV. ACCOUNTABILITY, THE UNIVERSAL RIGHTS REGIME, AND MULTILATERAL DEVELOPMENT FINANCING INSTITUTIONS

> *Any victim would understandably yearn to stop such horrors, even at the cost of granting immunity to those who have wronged them. But this is a truce at gunpoint, without dignity, justice*[,] *or hope for a better future. The time has passed when we might talk of peace versus justice. There cannot be one without the other.*
>
> — Ban Ki-Moon, Secretary General of the United Nations (2007-2016)[338]

The previous Parts have shown that MDFIs are users of sovereign powers and are bound by International Law obligations to respect, protect, and fulfill Human Rights as a consequence of their being users of sovereign powers with development purposes. A teleological interpretation of their constituent instruments leads to the conclusion that they cannot continue ignoring Human Rights concerns without risking a crisis of legitimacy. In this Part, the Author seeks to establish a framework of rights enforcement against MDFIs. Towards that end, the dismal state of remedial frameworks for Human Rights violations of MDFIs will be shown. It is also argued that the extant relation between International Law and domestic judicial bodies has the potential to become the foundation for holding MDFIs liable for Human Rights violations. However, this potential is stunted by the antiquated virility of MDFIs' claims of immunity and domestic tribunals' competencies and qualifications to grapple with International Law issues. There are two discursive approaches to the problem presented here: *first*, to surface the limitations of MDFIs' use of sovereign powers; and *second*, to anchor the denial of MDFIs' immunity from Human Rights litigation upon a systemic

338. UN Secretary General Ban Ki-moon, The Age of Accountability, *available at* https://www.un.org/sg/en/content/sg/articles/2010-05-27/age-accountability (last accessed Jan. 30, 2022) [https://perma.cc/F6MK-HP6M].

integration of MDFIs' constituent instruments with the core Human Rights instruments.

The Part concludes that recognizing the jurisdiction of domestic tribunals over MDFIs' violations of Human Rights obligations is the most viable means of realizing the demands of the Respect-Protect-Fulfill Paradigm of IHRL.

A. Accountability Gap in the Regime of Multilateral Development Financing Institutions

When the perpetrator of Human Rights violations against *Individual A* is *MDFI B* in partnership with his State or with a private entity, where should he go to exact liability against *MDFI B* for its distinct responsibility? The ICJ's jurisdiction would not allow the case to pass even the preliminary stages, considering that the tribunal only has Advisory jurisdiction over a limited number of MDFIs.[339] Even if the Advisory jurisdiction of the ICJ is invoked, still, *Individual A* remains without personality to bring suit, except only through his State under the principles of diplomatic protection. It is doubted whether the State would ventilate such claim, considering that it may, in this case, have participated in the violations and/or be materially interested in the development loan or investment agreement as guarantor. Again, assuming *arguendo* that the ICJ will grant personality upon the persuasiveness of *Judgment No. 2867 of the ILO*,[340] *Individual A* may still find himself without adequate redress because the jurisdiction invoked does not carry with it the power to make reparations. Neither may the claim be brought directly to the Human Rights Treaty Bodies, except only when *MDFI B* is a signatory to the instrument of creation. *Individual A* may, of course, choose to invoke the internal accountability mechanism of *MDFI B*, but for reasons articulated in the immediately preceding Section, that system may likewise prove inutile.

The point being made is that there is hardly any mechanism in International Law that is appropriate to litigate individual or communal claims for violations of Human Rights obligations by MDFIs. The above narration of *Individual A*'s search for an appropriate forum before which his claims may be brought serves to highlight the accountability gap in the regime of MDFIs.

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339. U.N. CHARTER art. 96 (2).

340. Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization Upon a Complaint Filed Against the International Fund for Agricultural Development, Advisory Opinion, 2012 I.C.J. 10 (Feb. 1).

1. Existing Accountability Mechanisms for Multilateral Development Financing Institutions

a. Internal Accountability Mechanisms of Multilateral Development Financing Institutions

The issue sought to be resolved in this Part is whether the extant mechanisms are enough to discharge the accountability standards under the Universal Rights regime.

Unlike business entities, which are merely encouraged to engage in Human Rights due diligence,[341] MDFIs, as users of sovereign powers, have greater accountability. When they conduct due diligence studies, such as social impact studies and environmental impact assessments,[342] they do so in recognition of their duties under their charters to pursue the development of peoples.[343] Decision-making with the aid of due diligence reports, however, is merely front-end accountability. Front-end accountability addresses the concerns relating to *possible* Human Rights impacts of projects,[344] while

341. U.N. Office of the High Commissioner for Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, princ. 4, [ST/]HR/PUB/11/4 (2011).

342. *See, e.g.*, WORLD BANK, ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 319; INTERNATIONAL FINANCE CORPORATION, IFC SUSTAINABILITY FRAMEWORK: POLICY AND PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY, ACCESS TO INFORMATION 4 (2012) [hereinafter IFC SUSTAINABILITY FRAMEWORK]; Strategy and Policy Department, Safeguard Policy Statement, OM Section F1/BP, *available at* https://www.adb.org/sites/default/files/institutional-document/31483/om-f1-20131001.pdf (last accessed Jan. 30, 2022) [https://perma.cc/SA84-TDQ7] [hereinafter ADB Safeguard Policy]; & AIIB, *Environment and Social Framework*, at 3 (Feb. 2019) [hereinafter AIIB Environment and Social Framework].

343. IBRD Charter, *supra* note 27, art. I (i); IFC Charter, *supra* note 15, art. I; IDA Charter, *supra* note 81, art. I; MIGA Convention, *supra* note 81, pmbl.; EIB Charter, *supra* note 4, art. 2; IADB Charter, *supra* note 4, art. I, § 1; AfDB Charter, *supra* note 4, art. 1; ADB Charter, *supra* note 4, art. 1; & AIIB Charter, *supra* note 4, art. 1. *See also* WORLD BANK, ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 319; IFC SUSTAINABILITY FRAMEWORK, *supra* note 342; ADB Safeguard Policy, *supra* note 342; & AIIB Environmental and Social Framework, *supra* note 342.

344. Barry Friedman & Maria Pnomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1877, & 1907 (2015). Front-end accountability has four elements:

(1) There are rules and policies in place before officials act[;]

back-end accountability concerns itself with remedies available when there is a breach.[345] Much of the available scholarship on MDFIs' Human Rights obligations has concerned itself with the institutions' compliance with primary rules under IHRL.[346] In earlier Parts of this Note, the Author has likewise attempted to make his contribution thereto.

However, rarely has back-end accountability been properly engaged with in the operations of MDFIs. What happens when, despite several studies and favorable due diligence reports, MDFI-funded projects still violate the rights of certain individuals or groups of people? Worse, what happens when MDFIs continue projects which have been flagged as having negative and severe Human Rights impacts? Towards resolving the issue earlier posed and the related questions thereto, the following discussion will concentrate on back-end accountability.

In the review of cases decided under the auspices of the internal accountability mechanisms of MDFIs for third party claims, the Author focuses on the latest completed investigations, as they are believed to be the best and updated expressions of MDFIs' operational ideologies.

b. External Accountability Mechanisms of Multilateral Development Financing Institutions

The refusal to color attempts at addressing social, economic, cultural, and environmental concerns with Human Rights rhetoric could be an act of self-preservation. One of the prime reasons for the reluctance to adopt clearly defined Human Rights frameworks among MDFIs is the "floodgates"

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(2) These rules and policies are transparent, meaning the public is able to find out what they are[;]
(3) There are opportunities for the public to provide input before the rules and policies go into effect[; and]
(4) [To] the extent possible there is an effort to ensure that the rules and policies do more good than harm, often through some technique like cost-benefit analysis.

Barry Freidman, Strengthening Policing Through Democratic Governance, at 1, *available at* https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/59dfa32aa803bb57bb93316c/1507828522861/Policing+Project+2-pager_8.21.17.pdf (last accessed Jan. 30, 2022) [https://perma.cc/94NM-2K4T].

345. Freidman & Pnomarenko, *supra* note 344, at 1871 & 1903.

346. *See, e.g.*, Candelaria, *supra* note 28; Anghie, *supra* note 28; Gathii, *supra* note 28; DARROW, *supra* note 28; & Caney, *supra* note 28.

theory.[347] It has also been argued that adopting a Human Rights approach to MDFI operations will stunt the capacities of MDFIs and will serve as a regulatory chill to the benevolent work that MDFIs do.[348] "[What is] ironic about the [ ] flood-of-litigation argument is that [MDFIs seem] to be worried about lawsuits from the very individuals and communities whom [they are] intended to benefit."[349] Indeed, the suggestion that Human Rights serves as a regulatory chill for MDFIs is well-taken, for it is the nature of Human Rights obligations to serve as control mechanisms to the exercise of sovereign powers. If the proposition goes on to say that MDFIs will be unable to fulfill their mandates by virtue of the impositions of IHRL and the subjection to judicial review, then their mandates should be properly revisited because any indication that an IOs' work can only be pursued upon the risk of grave and lasting Human Rights damage should have no place in the international legal order.

Be that as it may, and in order to mollify MDFIs' anxiety that their recognition of Human Rights obligations would lead to the stunting of their development work, the Author presents, a brief case study of the European Investment Bank (EIB).

The EIB functions under the greater EU paradigm and, as such, is limited in its actions by the EU Charter, including its provisions on Human Rights. It also has general competence to impose Human Rights measures in its activities and is under the judicial review authority of the Court of Justice of the European Union-General Court (CJEU-GC).[350]

Thus, on 8 January 2019, non-governmental organization ("NGO") ClientEarth filed a case against the EIB before the CJEU-GC.[351] ClientEarth cited as its causes of action (a) the alleged violations of environmental law in the financing of the Curtis Biomass Power Generation Plant Project;[352] and (b) the violation of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental

347. *See* Reply Memorandum of Defendant, at 10, Jam v. International Finance Corporation, 172 F. Supp. 3d 104 (D.D.C. 2016) (No. 15-612 (JDB)).

348. *Id.*

349. Brief of Amici Curiae Center for International Environmental Law, Accountability Counsel, et al., *Jam*, 139 S. Ct. 759 (2019) (No. 17-1011).

350. EU Charter, *supra* note 4 & EIB Charter, *supra* note 4.

351. ClientEarth v. European Investment Bank, Judgment, Case T-9/19 ECLI:EU:T:2021:42 (CJEU Jan. 27, 2021).

352. *Id.*

Matters resulting from the European Investment Bank Complaints Mechanism's refusal to conduct an internal review of the environmental impacts of the project.[353] Speaking about the case, a representative from the NGO said,

> 'This case shines a light on the lack of transparency in the European Investment Bank's approach to funding projects, some of which have a huge environmental impact.[']
>
> 'Despite using public money, the EIB provides only minimal information about its funding decisions and refuses to subject those decisions to the scrutiny required by EU law, including the Aarhus Regulation.'
>
> 'We hope a positive judgment will open the way for NGOs to hold the EIB to account on its funding of all kinds of projects which affect the environment, such as those with a significant climate impact.['][354]

The case may well turn on several other factors, except on the matter of the Bank's immunity because its charter recognizes the review powers of the CJEU-GC over the measures it adopts.[355] In this regard, the EIB is unique

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353. *Id.* (citing Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447). *See also* ClientEarth, ClientEarth Takes EIB to Court over Failure to Review Financing, *available at* https://www.clientearth.org/clientearth-takes-eib-to-court-over-failure-to-review-financing (last accessed Jan. 30, 2022) [https://perma.cc/YQD5-AW7H].

354. *Id.*

355. EIB Charter, *supra* note 4, art. 28 (5). The provision states —

> Article 28
>
> (*ex Article 30*)
>
> 5. The Court of Justice of the European Union shall, within the limits hereinafter laid down, have jurisdiction in disputes concerning measures adopted by organs of a body incorporated under Union law. Proceedings against such measures may be instituted by any member of such a body in its capacity as such or by Member States under the conditions laid down in Article 263 of the Treaty on the Functioning of the European Union.

Id.

Article 263 of the EC Charter referred to above provides —

> Article 263
>
> (*ex Article 230*)
>
> The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the

among other MDFIs because its operations are tethered to the law of the EU, and its acts and omissions are subject to judicial review. Therefore, it is surprising that *ClientEarth v. EIB*[356] is the first case in the EIB's and the CJEU-GC's histories where a referral for annulment was raised by third parties against the financing decisions of the Bank and which ultimately asked the Court to declare that compliance with environmental laws was an obligation of the EIB.[357]

In the final analysis, the Author humbly conjectures that the case study of the limited EIB-related litigation before the CJEU-GC,[358] coupled with the pronounced alignment of the EIB with the general Universal Rights regime, and the specific Human Rights regime of the EU,[359] reveals that neither the recognition of Human Rights obligations nor the availability of judicial

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> European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.
>
> ...
>
> Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.
>
> ...
>
> The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

EU Charter, *supra* note 4, art. 263.

356. *ClientEarth*, Case T-9/19 ECLI:EU:T:2021:42.

357. ClientEarth, *supra* note 353.

358. *Id.*

359. *See* EIB, Business and Human Rights: Summary Proceedings of the Debate Facilitated by the European Investment Bank, *available at* https://www.eib.org/attachments/documents/eib-human-rights-report.pdf (last accessed Jan. 30, 2022) [https://perma.cc/5P9R-D484] & EIB, The EIB Approach to Human Rights, *available at* https://www.eib.org/en/press/news/business-and-human-rights.htm (last accessed Jan. 30, 2022) [https://perma.cc/3EA3-WKH9].

mechanisms for redress of MDFI violations automatically translates to an onslaught of crippling litigation.

iii. The Challenges to National Courts as External Mechanisms of Accountability

Professor August Reinisch, a recognized expert on International Law and the law on IOs, lists the methods which national courts employ in order to decline the exercise of their jurisdiction over IOs, or what he calls "Avoidance techniques."[360] These avoidance techniques include:

(1) Non-recognition as a legal person under domestic law[361] — The Court denies to hear the case upon the theory that the IO has no personality to sue or be sued under its legal system because it has not been conferred domestic personality,[362] since domestic personality is determined by domestic law.[363]

(2) Non-recognition of a particular act of an IO[364] — National Courts will disclaim, on behalf of IOs, its *ultra vires* acts, thereby resulting in the non-attributability of the act which prompted litigation upon the IO.

(3) Invocation of the Act of State doctrine[365] and the appeal to the *acta jure imperii/jure gestionis* dichotomy[366] — Courts limit their own competencies when IOs use sovereign powers, taking the same as akin to state actions under the Principle of Sovereign Equality.[367] However, a court will not decline to hear a case where the allegation is made that the subject matter thereof precipitated from purely commercial transactions.[368]

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360. AUGUST REINISCH, INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS 35 (2004). *See also* August Reinisch, *Accountability of International Organizations According to National Law*, 36 NETH. Y.B. INT'L L. 119 (2005).

361. *Id.*

362. *Id.* at 38.

363. *Id.* at 46.

364. *Id.* at 70.

365. *Id.* at 85.

366. REINISCH, *supra* note 360, at 87.

367. *Id.* at 89–90.

368. *Id.* at 92.

(4) Reliance on the Political Question doctrine[369] — It is the position of some courts that relations with IOs are matters of foreign relations.[370]

(5) Determination that the court lacks adjudicative power[371] — National Courts, generally speaking, tend to leave to International Law what is claimed thereunder,[372] thereby dismissing cases against IOs for lack of subject matter jurisdiction, and citing, rather substantially, the fact that their capacities and competencies are guided solely by the development of law within their respective jurisdictions.[373] National courts also dismiss cases against IOs on the grounds that they have no jurisdiction over either the person or properties of IOs, or that the hand of the judicial process has been cut by the factual circumstance of an IO's absence within a court's jurisdiction or the lack or removal of its properties from judicial reach.[374]

(6) Judicial deference to an exclusively competent forum[375] — This technique reads similarly to the Doctrine of Primary Jurisdiction and applies especially in cases involving the employees of IOs. In many cases, courts make deference to the internal administrative tribunals of these IOs.[376]

(7) Securing against harassment suits[377] — The seventh avoidance technique concerns the plaintiffs' or complainants' standing to sue IOs,[378] and makes material the necessity of the sufficiency of nexuses between the IOs and claimants or plaintiffs.

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369. *Id.*

370. *Id.* at 94 (citing Soucheray et al. v. Corps of Engineers of the United States Army et al., 483 F. Supp. 352, 356 (WD Wisconsin 1979) (U.S.)).

371. *Id.* at 100.

372. REINISCH, *supra* note 360, at 117-20.

373. *Id.*

374. *Id.*

375. *Id.* at 103.

376. *See, e.g.*, *Waite & Kennedy*, 1999 Eur. Ct. H.R.; *Beer & Regan*, 1999 Eur. Ct. H.R.; *Mukoro*, 107 I.L.R.; & Bertolucci v. European Bank for Reconstruction and Development, 1997 U.K.E.A.T. 276.

377. REINISCH, *supra* note 360, at 126.

378. *Id.* at 124.

(8) Court's determination of an IO's privileges and immunities.[379]

It is important to note that these techniques do not necessarily operate independently of each other, and are often pleaded and employed in combination. No judgment passes on the propriety of these techniques, except to the extent that they have been improperly invoked to protect IOs from being held accountable for acts done in contravention of obligations under International Law. These challenges to the capacity of national courts to adjudicate claims against IOs apply with much vigor when it comes to cases against MDFIs.

After a review of these mechanisms, and after once more turning to the dilemma of *Individual A* seeking to hold *MDFI B* liable for violations of its Human Rights obligations resulting in material damage to *Individual A*, the question is once again posed — where should *Individual A* go? The Author submits four ways of attacking the matter:

First, by bringing a case against MDFIs for their direct violations of their Human Rights obligations. On the one hand, domestic courts generally have jurisdiction *ratione materiae* over claims arising from Human Rights violations.[380] On the other hand, courts likewise have jurisdiction *ratione personae* over MDFIs by virtue of the latter's operations within their territories, coupled with general obligations to recognize or confer domestic legal personality — whether arising from the incorporation or transformation of treaties granting MDFIs legal personality, or from domestic legislation, as in the case of the United States.[381] Subsequent claims of immunity may then be surmounted by a showing that the acts and/or omissions of MDFIs are *ultra vires* and are not within the contemplation of MDFIs' functional immunities. Only then may issues of attribution, breach of obligations, and reparations be tackled.

Second, MDFIs may be answerable for their failure to give access to justice. This path will likewise follow the rudiments of the earlier discussion on non-immunity before state courts, but will require a different burden of proof upon the claimant. The "Denial of Justice" route targets the adequacy of internal accountability mechanisms to protect Human Rights. Taking this route will necessitate exposition and exhaustion of internal redress mechanisms of MDFIs.

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379. *Id.* at 127.

380. *See* OKEKE, *supra* note 46, at 69.

381. *Id.*

Third, non-State, non-governmental claimants may also bring a case before international bodies, depending on the gravity of violations. Possible causes of action include the State's liability for direct Human Rights violations, the State's responsibility for allowing the entry and continuance of MDFI operations which lead to Human Rights violations, and/or the State's failure to secure the Right to Access to Justice. In these instances, MDFIs are admittedly absent. However, it is hoped that these actions will at least result in mounting pressure against MDFIs to be more accountable in their operations.

From this review of the extant and possible mechanisms for holding MDFIs to account for their Human Rights violations, the Author submits that the system of national courts is most immediate and efficient. However, it is not without its challenges as shown above. Thus, the Author will undertake an exposition on the first proposition, reserving the other suggestions — including the possibility of creating a separate international tribunal to hear and decide cases against MDFIs, in particular, and IOs, in general — for further studies.

B. Domestic Courts as Fora for the Protection of Human Rights in Relation to the Regime of Multilateral Development Financing Institutions

1. Overcoming the Threshold Issue of Jurisdiction

The avoidance techniques which MDFIs and national courts employ to foreclose further litigation occur in the initial stages of the proceedings and bear on issues of jurisdiction as the fulcrum of a court's power to hear and decide a case.[382] Overcoming the issue of jurisdiction is a condition *sine qua non* to determining immunity.[383] Verily, immunity operates to protect its holder from judicial reach that would otherwise touch it were it not for the grant of immunity.[384] Elsewise stated, it is not necessary to adjudicate questions of immunity if, in the first place, the court has no jurisdiction either over the subject matter of the case or the person of the MDFI. These techniques may be classified according to the character of jurisdiction they seek to oust (i.e., jurisdiction *ratione materiae* or jurisdiction *ratione personae*).

382. REINISCH, *supra* note 360, at 37.

383. *See* BERNAS, *supra* note 59, at 60-61.

384. *Id.*

a. Jurisdiction Ratione Materiae

Avoidance techniques targeting jurisdiction *ratione materiae* include the invocation of the *ultra vires* doctrine; the Act of State doctrine and the *acta jure imperii/jure gestionis* dichotomy; the Political Question doctrine and the Principle of Non-Justiciability; and the lack of adjudicatory power.

i. Towards a Nuanced Understanding of the *Ultra Vires* Doctrine

The propriety of transplanting the *ultra vires* doctrine from corporation law to institutional law of IOs is not doubted — in fact, it is the bedrock of the current inquiry. The development thereof in corporate contract law rests on two principles: (1) that corporations are creatures of the State and are creatures of limited powers;[385] and (2) that corporations can validly act only through the facility of the Board of Directors and through authorized agents.[386] In a similar manner, IOs, like MDFIs, are creatures of States with pre-determined purposes expressed in their constituent instruments, which properly limit their use of sovereign powers.[387] IOs may likewise only act through the imprimatur of a governing body, officers, and authorized agents. However, the form which the doctrine has taken in Reinisch's contemplation of international institutional law[388] is only one type of *ultra vires* act (i.e., acts beyond the Purpose Clause).

ii. On Political Question, Non-justiciability, and Vested Rights

Recall that the Political Question doctrine and the Principle of Non-Justiciability preclude courts from interfering with matters of policy, with due regard for the separation of powers that generally permeate the system of governance of the majority of States.[389] The SCOTUS' listing of what may constitute policy questions in *Baker v. Carr*[390] gives some guidance as to what may properly fall outside the court's jurisdiction by appeal to the Political Question doctrine or the Principle of Non-Justiciability.[391]

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385. CESAR L. VILLANUEVA & TERESA S. VILLANUEVA-TIANSAY, PHILIPPINE CORPORATE LAW 177 (2013 ed.).

386. *Id.*

387. *Id.*

388. *See* REINISCH, *supra* note 360, at 342.

389. REINISCH, *supra* note 360, at 93 (citing Baker v. Carr, 369 U.S. 186, 217 (1962)).

390. *Baker*, 369 U.S. at 217.

391. *Id.*

It would seem that a viable test is to ask whether the actuations of the State or the user of sovereign powers have breached the threshold of determining rights, duties, and obligations to enforce and/or implement the same. Thus, while courts are unable to pass judgment upon the wisdom of substantive law, they are not precluded from determining whether the rights granted thereunder are respected. Consequently, the broad interpretation of the phrase "Political Question" must submit to the limitations guaranteed as vested rights, which, in most cases, follow the negotiation of international agreements. For example, courts would do well to refrain from disturbing the negotiation of loan agreements between States and MDFIs or corporations and MDFIs. However, upon the conclusion thereof, these agreements vest rights not only between the parties, but also in relation to third-party beneficiaries, which are, as a general proposition, actionable. In *Lutcher, SA v. Inter-American Development Bank*,[392] the Court of Appeals for the District of Columbia held that a borrower of an MDFI has a cause of action against the latter for the tortious act of lending to a competitor.[393]

Following the Court's reasoning in *Lutcher, SA* and its progeny,[394] it is submitted that development loan or investment agreements, once executed, embody vested rights far-removed from a question of policy. Parties must discharge the obligations thereunder in good faith, and each one holds a cause of action against the other in case of breach. Furthermore, since these development loan or investment agreements seek to provide material benefits to development subjects, these subjects are likewise empowered to bring a case for breach of general and contractual obligations by MDFIs. As an epilogue to the question of policy and non-justiciability, the focus is directed at Human Rights obligations. In the earlier discussion on the Prohibited Political Activity Clause, it was established that compliance with Human Rights obligations under CIL is no longer discretionary upon subjects of International Law, the same having been constituted as a limitation to the exercise of sovereign prerogative.

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392. Lutcher, SA v. Inter-American Development Bank, 382 F. 2d 454 (D.C. Cir. 1967) (U.S.).

393. *Id.* at 457.

394. Atkinson v. Inter-American Development Bank, 156 F. 3d 1335 (D.C. Cir. 1998) (U.S.).

iii. Disclaimer of Subject Matter Jurisdiction in Cases Involving International Law

In *Kiobel v. Royal Dutch Petroleum Co.*,[395] the SCOTUS was faced with the daunting task of determining whether alleged Human Rights violations by Royal Dutch Petroleum Co., perpetrated in Nigeria against Nigerians, fell within the contemplation of the United States' Alien Tort Statute (ATS), which provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the *law of nations or a treaty of the United States*."[396] In the end, the *Kiobel* Court decided against the extraterritorial application of the ATS[397] after reviewing the content and extent of the phrase "law of nations" during the 1700s.[398] From that review it concluded that the phrase "law of nations" in the ATS does not embrace the Human Rights abuses presented in the case,[399] further clarifying that in order to invoke the United States' jurisdiction under the ATS, it is necessary that "claims touch and concern the territory of the United States, [and] they must do so with sufficient force to displace the presumption against extraterritorial application."[400] In concurring with the majority, Mr. Justice Breyer opined that jurisdiction under the ATS may be had

> where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor ... for a torturer or other common enemy of mankind.[401]

Mr. Justice Breyer's suggestion lists what, in International Law, is referred to as Principles of Jurisdictional Competence of States,[402] to wit — the territorial principle,[403] the nationality principle,[404] the passive personality

395. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (U.S. 2013).

396. *Id.* at 1663 (citing Alien Tort Claims Act, 28 U.S.C. § 1350).

397. *Kiobel*, 133 S. Ct. at 1669.

398. *Id.* at 1666-67.

399. *Id.*

400. *Id.* at 1669.

401. *Id.* at 1671 (J. Breyer, concurring opinion).

402. CRAWFORD, *supra* note 34, at 456.

403. *Id.* at 458.

404. *Id.* at 459.

principle,[405] the protective principle,[406] and the effects doctrine.[407] What the SCOTUS rejected in *Kiobel* was the Principle of Universal Jurisdiction,[408] relying upon the lack of sufficient nexus between the United States and the acts done in Nigeria against Nigerians.[409]

The SCOTUS once more declined to exercise universal jurisdiction when it echoed the restrictions in *Kiobel* in *Jesner v. Arab Bank, PLC*,[410] where it held that it was unable to find corporate liability against Arab Bank[411] for allegedly financing Hamas and other terrorist groups.[412] The Court rejected the call therein to determine whether the law of nations has developed towards holding corporate entities accountable for their hand in terrorist activities.[413]

The Philippine Supreme Court has faced similar uncertainties over its capacity to decide the applicability of international norms in cases brought before it. Unlike the SCOTUS, however, it is more willing to determine the metes and bounds of International Law as the same applies to claims made by citizens. It has, for example, used the UDHR, the ICESCR, and the ICCPR to hold that the Revolutionary Government of 1986 conducted illegal searches and seizures during the period of transition.[414] In a case involving the right of a prospective extraditee to post bail, the Philippine Supreme Court took note of "[t]he modern trend in [Public International Law that puts primacy] on the worth of the individual person and the sanctity of human rights."[415] More recently, in *Saudi Arabian Airlines (Saudia) v. Rebesencio*,[416] the Court rejected Saudi Arabian Airlines' submission that it was justified in incorporating a

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405. *Id.* at 461.

406. *Id.* at 462.

407. *Id.*

408. CRAWFORD, *supra* note 34, at 467.

409. *Kiobel*, 133 S. Ct. at 1663.

410. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (U.S. 2018).

411. *Id.* at 1408.

412. *Id.* at 1394.

413. *Id.* at 1413 n. 1 & *Jesner*, 138 S. Ct. at 1414 (J. Gorsuch, concurring opinion). *Contra Jesner*, 138 S. Ct. at 1427 (J. Sotomayor, dissenting opinion) & Sosa v. Alvarez- Machain, 542 U.S. 692 (2004).

414. Republic v. Sandiganbayan, G.R. No. 104768, 407 SCRA 10, 51 & 56 (2003).

415. Government of Hong Kong Special Administrative Region v. Olalia, Jr., G.R. No. 153675, 521 SCRA 470, 481 (2007).

416. Saudi Arabian Airlines (Saudia) v. Rebesencio, G.R. No. 198587, 746 SCRA 140 (2015).

discriminatory clause against its female flight attendants, considering that it was not precluded by the laws of Saudi Arabia, which governed the contract.[417] Writing for the majority, Justice Leonen opined that Saudi Arabian Airlines' policy was against the Convention on the Elimination of Discrimination Against Women, making the same void not only based on the laws of the Philippines, but also under International Law.[418]

Reconciling the divergence in judicial attitudes is not had by looking merely at the facial differences of the SCOTUS and the Philippine Supreme Court in terms of constitution, jurisdiction, and governing laws. The Author submits that the principal differences in the line of cases cited rest upon the principles of jurisdiction in International Law, such that in *Kiobel* and *Jesner*, the SCOTUS found itself without any power to adjudicate rights and obligations arising from acts which they perceived as distant, both physically and legally, from the United States. To the mind of the SCOTUS, the acts alleged to have given rise to litigation in *Kiobel* and *Jesner* did not happen in the United States,[419] did not involve American nationals,[420] did not constitute harm against American nationals abroad,[421] did not affect the internal or external security of the United States,[422] and did not constitute acts inimical to the United States.[423] On the contrary, the matters under which the Supreme Court of the Philippines decided under the auspices of IHRL involved acts that were either done in the Philippines, involved Filipino citizens, and/or affected Filipino nationals even when done abroad.

Therefore, the challenge of Human Rights litigation under these circumstances continues to follow the contours of procedural prescription recognized in International Law, such that claims against MDFIs must be framed in a way that will not oust the court of material jurisdiction, specifically that one or the other nexus of jurisdiction applies to a case. Under this paradigm, *Jam* presents a curious case of the Court doing all but admitting jurisdiction over claims from Indian citizens arising from "negligence, negligent supervision, public nuisance, private nuisance, trespass, and breach

417. *Id.* at 179.

418. *Id.* at 172 & 184.

419. CRAWFORD, *supra* note 34, at 458.

420. *Id.* at 459.

421. *Id.* at 461.

422. *Id.* at 462.

423. *Id.*

of contract"[424] in relation to a project situated in Gujarat, India, the resolution of the case having gone straight into a decision on the issue of immunity,[425] diverting from the rulings in *Kiobel* and *Jesner*.

b. Jurisdiction Ratione Personae

The primary avoidance techniques causing the ouster of a court's jurisdiction *ratione personae* are the non-recognition of legal personality, the lack of standing to sue, and the claim that venue is improperly laid.

i. Relevance of Issues on Non-recognition of Legal Personality

The issue of non-recognition of legal personality hardly presents itself as relevant for Member States. Whether monist or dualist, Member States generally have the obligation to recognize the legal personality of IOs of which they are members within their territories, lest they incur international responsibility for breach of treaty obligations.[426]

An IO's legal personality under domestic law will, however, be a threshold issue in instances where the State, through its judiciary, is asked to recognize the domestic legal personality of an IO of which it is not a member. In these cases, the courts would be justified in refusing to exercise jurisdiction. Against this backdrop, scholars have argued for the sourcing of an IO's legal personality in CIL.[427] In earlier discussions, it was shown that immunities and privileges may attach to an IO by way of custom, depending on the generality of its membership. Similar reasoning may be employed to benefit an IO whose legal personality is being doubted by virtue of the absence of a specific clause in its constituent instrument obligating the conferment of domestic legal personality. This proposition, however, has not gained ground in state practice against IOs of which another IO is not a member, the general principle of *res inter alios acta alteri nocere non debet* still taking precedence.[428] This was a primordial issue in *Arab Monetary Fund v. Hashim*,[429] where the House of Lords of England was asked to reverse an appellate court's finding that the Arab Monetary Fund (AMF) had no personality to sue its former Director-General for embezzlement before the English courts, England not being a party to any

424. *Jam*, 172 F. Supp. 3d at 108.

425. *Id.* at 108-12.

426. REINISCH, *supra* note 360, at 41.

427. *Id.* at 46.

428. *Id.*

429. Arab Monetary Fund v. Hashim (No. 3), 1 All ER 871 (Eng., 1991).

instrument obligating the recognition of the AMF's domestic legal personality, and there being no legislation to that effect.[430] Notwithstanding the House of Lords' own finding that the AMF had no entitlements under International Law to be recognized as a legal person before English courts,[431] the Court still reversed the Appellate Court's dismissal of the case[432] on the ground that the AMF was incorporated under the law of the United Arab Emirates and was therefore entitled to legal personality under English law as a foreign corporation under ordinary private international law rules.[433] Following the decision of the House of Lords in England, Mr. Jawad Mahmoud Hashim moved to Arizona, where he filed for insolvency before the State's Bankruptcy Court.[434] The AMF opposed the insolvency proceedings, prompting Mr. Hashim to once more raise the defense that the AMF had no legal personality in the United States.[435] Following the House of Lords' reasoning, the Bankruptcy Court ruled that the AMF had legal personality as a foreign corporation under the private international law rules of the United States.[436]

Viewed from the perspective of Human Rights litigation, jurisdiction *ratione personae* over MDFIs is rooted in the general obligation to recognize or confer domestic legal personality on these institutions. The matter of non-Member States is a *de minimis* problem for MDFIs because there is generally an injunction in their constituent instruments from transacting with non-Members.[437]

ii. Standing as Victims of Human Rights Violations and Third-Party Beneficiaries

On the one hand, MDFIs' constituent instruments generally recognize the capacity of their creditors to sue them for transactions "arising out of or in connection with the exercise of [their] powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities."[438] There is

430. REINISCH, *supra* note 360, at 40 (citing *Arab Monetary Fund*, 1 All ER at 877).

431. *Id.* at 872.

432. *Id.* at 871.

433. *Id.* at 872.

434. In re Hashim, 188 BR 633 (Bankr. Court, D. Arizona, 1995).

435. *Id.* at 637.

436. *Id.* at 649.

437. *See, e.g.*, IBRD Charter, *supra* note 27, art. III, § 1 (a) & ADB Charter, *supra* note 4, art. 11.

438. ADB Charter, *supra* note 4, art. 50, ¶ 1.

also a line of jurisprudence from the United States which empowers borrowers to bring suit in instances where the constituent instruments of MDFIs fail to clarify the personality of possible plaintiffs.[439] On the other hand, "members or persons acting for or deriving claims from members"[440] may not bring suit against MDFIs.[441]

Standing to sue is among the more pressing concerns for victims of Human Rights violations perpetrated by MDFIs. Their standing may be premised upon two principles: *first*, that they have standing to sue MDFIs as victims of Human Rights violations. The right to sue thereby arises from the wrongful act done by the MDFI. *Second*, victims of MDFIs' Human Rights violations have standing as third-party beneficiaries of the development loan or investment agreement under the doctrine of stipulations *pour autrui*, which guarantees unto them the right to redress for breach of obligations thereunder.

iii. The Laying of Venue

There are jurisdictional issues pertaining to adjudicatory power over the person and/or property. Verily, if the Court is unable to reach the person by its compulsory processes, the case may well be dismissed upon a lack of jurisdiction *in personam* or even upon a claim of *forum non conveniens*. In this regard, MDFIs' constituent instruments commonly stipulate restrictions on the choice of venue, in this or in a similar manner: "Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities."[442] Another iteration is found in the ADB Charter —

> [A]ctions may be brought against the Bank in a court of competent jurisdiction in the territory of a country in which the Bank has its principal or a branch office, or has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.[443]

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439. *See Lutcher, SA*, 382 F. 2d; Atkinson v. Inter-American Development Bank, 156 F. 3d 1335 (D.C. Cir. 1998) (U.S.); & Mendaro v. World Bank, 717 F. 2d 610 (D.C. Cir. 1983) (U.S.).

440. IBRD Charter, *supra* note 27, art. VII, § 3.

441. *Id. See also* ADB Charter, *supra* note 4, art. 50, ¶ 2.

442. IBRD Charter, *supra* note 27, art. 7, § 3 & IFC Charter, *supra* note 15, art. VI, § 3.

443. ADB Charter, *supra* note 4, art. 50, ¶ 1 & AIIB Charter, *supra* note 4, art. 46.

Thus, there is a need to determine, at the first instance, whether the MDFI has a branch, office, or agent within the jurisdiction of the court. By way of general proposition, an MDFI will have actual or representational presence in project areas. As earlier discussed, the manner by which these development loan and investment agreements operate often leave the implementation of the project in the hands of the borrower. They do not have physical and/or representational presence in project areas for the purposes of implementation, and there may be instances when MDFIs, as corporate entities, never step foot within the territory of their borrowers. Be that as it may, the duty to ensure the proper use of loan proceeds entails the appointment and/or sending of representatives to project areas for purposes of evaluation,[444] therefore making the project area an appropriate venue for suit.

Having resolved jurisdictional issues, the Note now turns on the question of immunity.

2. Human Rights Violations as *Ultra Vires* Acts and the Functional Immunities in the Regime of Multilateral Development Financing Institutions

In *Lutcher, SA*, the IADB's claim of immunity was rejected upon the Appellate Court's permissive reading of Article XI, Section 3 of the IADB Charter,[445] which provided that "[a]ctions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities."[446] Specifically for this case, the Court interpreted it to mean that a borrower may sue the IADB for lending money to a competitor and an alleged failure to conduct a promised market study prior to making further loan engagements.[447]

In *Mendaro v. World Bank*,[448] the Court ruled that the Bank was immune[449] from a sexual harassment and gender discrimination suit brought against the Bank itself and some of its ranking officers and agents.[450] The Court reasoned that a similar provision to that interpreted in *Lutcher, SA* found in

444. IBRD Charter, *supra* note 27, art. III, § 5 (b).

445. *Lutcher, SA*, 382 F. 2d at 457.

446. IADB Charter, *supra* note 4, art. XI, § 3.

447. *Lutcher, SA*, 382 F. 2d at 457 & 460.

448. Mendaro v. World Bank, 717 F. 2d 610 (D.C. Cir. 1983) (U.S.).

449. *Id.* at 621.

450. *Id.* at 612.

the IBRD Charter[451] should be read in accordance with the Purpose and Immunity Clauses of the constituent instrument, as well as upon the general theory of functional immunity.[452] It then went on to limit the broad interpretation of *Lutcher, SA* to mean that the exception to immunity found in Article VII, Section 3 of the IBRD Charter should be tested against the benefits derived from non-immunity, as against the liabilities derived from immunity in relation to the achievement of the Bank's goals,[453] to wit —

> Since the purpose of the immunities accorded [to] international organizations is to enable the organizations to fulfill their functions, applying the same rationale in reverse, it is likely that most organizations would be unwilling to relinquish their immunity without receiving a corresponding benefit which would further the organization's goals. *Thus, most waivers are probably effected when an insistence on immunity would actually prevent or hinder the organization from conducting its activities. A nonspecific waiver such as that contained in [Article VII, Section 3] should be more broadly construed when the waiver would arguably enable the organization to pursue more effectively its institutional goals*. However, when the benefits accruing to the organization as a result of the waiver would be substantially outweighed by the burdens caused by judicial scrutiny of the organization's discretion to select and administer its programs, it is logically less probable that the organization actually intended to waive its immunity. Thus, limitations on immunity that subject the organization to suits which could significantly hamper the organization's functions are inherently less likely to have been intended, and a court's interpretation of the provision in dispute should start with that in mind.[454]

This was dubbed as the "*Mendaro Test*." The test was later applied in *Atkinson v. Inter-American Development Bank*[455] to thwart an attempt to garnish the salaries of an IADB employee on the ground that no benefit accrues to the Bank by allowing such garnishment, but it instead makes an unnecessary imposition.[456] In *African Development Bank v. Acholla*[457] the Court of Appeal of Kenya ruled that an employee cannot sue the AfDB for breach of

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451. IBRD Charter, *supra* note 27, art. VII, § 3.

452. *Mendaro*, 717 F. 2d. at 616.

453. *Id.* at 617.

454. *Id.*

455. Atkinson v. Inter-American Development Bank, 156 F. 3d 1335 (D.C. Cir. 1998) (U.S.).

456. *Id.* at 1338-39.

457. African Development Bank v. Acholla, Civ. App. No. 135 of 2002, July 3, 2015 (C.A. Kenya).

employment contract and resultant damages,[458] agreeing with the rulings of the courts of other jurisdictions to the effect that the immunities of an IO, like the AfDB, are inherently functional in nature.[459] Thus, the AfDB was immune from employment-related claims because a different interpretation would be to the detriment of AfDB's independence in pursuing its goals.

The case law of the Philippines on the matter has not grown extensively since *Department of Foreign Affairs*. To recall, the Supreme Court of the Philippines decided in *Department of Foreign Affairs* that the ADB may not be sued for alleged labor-only contracting.[460] It cited the case of *World Health Organization v. Aquino*,[461] specifically the finding that under both International Law and the Philippines' "system of separation of powers that diplomatic immunity is essentially a political question and courts should refuse to look beyond a determination by the executive branch of the government, and where the plea of diplomatic immunity is recognized and affirmed by the executive branch of the government,"[462] concluding that the ADB has been granted diplomatic status and is independent from municipal law.[463] Furthermore, it invoked the authority of its ruling in *Southeast Asian Fisheries Development Center-Aquaculture Department v. National Labor Relations Commission*[464] where it traced the entitlement of an IO to immunity to the need for independence and impartiality in the performance of its functions.[465] While the Court had affirmed the consistency of IOs' and MDFIs' immunity with diplomatic immunity, it also pronounced that the ADB was acting *jure imperii* when it entered into the service contracts subject of the case.[466] In

458. *Id.*

459. *Id.* (citing *Mukoro*, 107 I.L.R.; *Bertolucci*, [1997] U.K.E.A.T.; *Broadbent*, 628 F.2d; *Mendaro*, 717 F. 2d.; Tononoka Steels Ltd v. The Eastern and Southern Africa Trade and Development Bank [2000] 2 E.A. 536 (Ken.); East African Development Bank v. Blueline Enterprises Limited, Civ. App. No. 110 of 2009, Dec. 22, 2011 (C.A. Tanz.); & Re: International Tin Council, [1994] I.C.R. 897 (U.K.)).

460. *Department of Foreign Affairs*, 262 SCRA at 40.

461. World Health Organization v. Aquino, G.R. No. L-35131, 48 SCRA 242 (1972).

462. *Id.* at 248.

463. *Department of Foreign Affairs*, 262 SCRA at 44-45.

464. Southeast Asian Fisheries Development Center-Aquaculture Department v. National Labor Relations Commission, G.R. No. 86773, 206 SCRA 283 (1992).

465. *Id.* at 288.

466. *Department of Foreign Affairs*, 262 SCRA at 47 (citing The Holy See v. Rosario, Jr., G.R. No. 101949, 238 SCRA 524 (1944)).

closing, the Court cited the procedure for a State or IO to claim sovereign or diplomatic immunity — that is, to secure an executive endorsement.[467]

In contrast to *Department of Foreign Affairs*' use of the *acta jure imperii/jure gestionis* dichotomy, the Court, in *Liang v. People*,[468] instead followed tradition in deciding cases of diplomatic immunity which pit official and unofficial acts against each other, citing the ADB Headquarters Agreement and the VCDR to decide the case.[469] In the end, the Court reversed the hasty dismissal of the case on the ground that

> courts cannot blindly adhere and take on its face the communication from the [Department of Foreign Affairs ("DFA")] that [Liang] is covered by any immunity. The DFA's determination that a certain person is covered by immunity is only preliminary which has no binding effect in courts.
>
> ...
>
> [Criminal acts] could not possibly be covered by the immunity agreement because our laws do not allow the commission of a crime ... in the name of official duty. The imputation of theft is *ultra vires* and cannot be part of official functions. It is well-settled principle of law that a public official may be liable in his personal private capacity for whatever damage he may have caused by his act done with malice or in bad faith or beyond the scope of his authority or jurisdiction.[470]

Admittedly, *Liang* involved a Bank employee, as opposed to the earlier cases cited, which involved the Bank *per se*. This could explain the more straightforward disposition of the *Liang* Court.

The SCOTUS' decision in *Jam* is a diversion from the growing litany of domestic and foreign cases that would otherwise resolve MDFIs' claims of immunity using the functional approach, choosing instead to classify the IFC's acts as either sovereign or commercial. What is more, an incisive look into the

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467. *Department of Foreign Affairs*, 262 SCRA at 49.

468. Liang v. People, G.R. No. 125865, 323 SCRA 692 (2000).

469. *Id.* at 695-96 (citing Republic of the Philippines & Asian Development Bank, Agreement Between the Asian Development Bank and the Government of the Republic of the Philippines Regarding the Headquarters of the Asian Development Bank, art. XII, § 45 *available at* https://www.adb.org/sites/default/files/institutional-document/32422/files/adb-phil-agreement.pdf (last accessed Jan. 30, 2022) [https://perma.cc/ZN7Q-6EDA] & VCDR, *supra* note 177).

470. *Liang*, 323 SCRA at 695-96.

logic of the *Jam* majority reveals a failure to account for the treaty obligation to grant certain privileges and immunities to the IFC,[471] focusing instead on the IOIA as the source of such immunities.[472] There is a blanket denial of immunity for IOs' acts *jure gestionis*. Thus, all IOs claiming immunity from the judicial and administrative processes of the United States through the IOIA must henceforth subject themselves to the *acta jure imperii/jure gestionis* dichotomy. However, a review of treaty provisions granting IOs legal personality and legal capacity, as well as immunities and privileges related thereto, shows that the grants cover all that is necessary for them to fulfill their functions.[473] This is not to say, however, that their competencies, immunities, and privileges are absolute. Since these grants are purposive in character, a determination of the grants' character and scope must likewise arise from a functional analysis. As a matter of general proposition, therefore, IOs are capacitated and thus immune for all acts performed within their respective mandates, subject, of course, to the provisions of their constituent instruments. Had the *Jam* Court employed the *Mendaro Test* to determine whether the IFC's exception from immunity for alleged Human Rights violations would be more in keeping with the IFC's mandate, then the case would have been a crystallizing moment for the doctrine pronounced and consistently affirmed by the Court of Appeals for the District of Columbia. Perhaps it was a matter of framing. Be it noted that the crux of the *Mendaro Test* is purposive benefit for the IO. Recall also that the petitioners in the case brought suit against the IFC for "negligence, negligent supervision, public nuisance, private nuisance, trespass, and breach of contract"[474] — veritable causes of action that would have been recognized as an exception to immunity under the doctrine of *Lutcher, SA*. But, the IO-centric *Mendaro Test* would have it that the IFC would not reap any benefits from being held accountable under these causes of action. This conclusion, however, is heir to the limited view of the IFC's and MDFIs' purposes. Hardly anyone acquainted with the standards of the development agenda would rally against a proposition that development financers must ensure that they do not fund disasters.

In any case, what may be concluded from this brief review of National Courts' jurisprudence on MDFIs, with the exception of *Jam*, is that the normative trajectory of the immunity of MDFIs, in particular, and IOs, in

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471. *See generally Jam*, 139 S.Ct.

472. *Id.* at 10–12.

473. OKEKE, *supra* note 46, at 237–42 & 300–12. *See, e.g.*, IFC Charter, *supra* note 15, art. VI, § 1.

474. *Jam*, 172 F. Supp. 3d at 108.

general, moves towards an understanding that the same is functional in nature. What Professor Reinisch posed as a question in 2004 — whether looking at IOs' acts as functional and non-functional would clarify the scope of their immunities[475] — is affirmatively resolved in this Note, with affinity, however, towards the more exacting taxonomy of *vires* and *ultra vires* acts. This engagement of that concept which grew out of corporation law makes clear two realities that devolve upon MDFIs — that they are creatures of States, and consequently creatures of International Law; and that they are users of sovereign powers.

The Author concludes from the preliminaries established above that MDFIs cannot plead their immunities when they are being held to account for their alleged violations of Human Rights obligations under CIL — whether by act or omission, and whether through public or private transactions — because such violations constitute *ultra vires* acts of the institution.

3. Developing Rules for Attribution of Responsibility

The idea of holding international organizations responsible for internationally wrongful acts is a threshold issue before delving into the specific mechanisms for holding MDFIs liable for Human Rights violations. Among the notable provisions of the DARIO are: the responsibility of an international organization for its internationally wrongful acts,[476] the eminence of international law in determining responsibility and breach,[477] the reference to the rules of international organizations as sources of law,[478] the circumstances precluding wrongfulness,[479] and the contents of the international responsibility of international organizations.[480] These articles intersect to produce a framework of accountability for international organizations. However, the DARIO has yet to fulfill its promise. It is currently taking an arduous path towards full acceptance.

The narrative of the DARIO began in 2011, when the International Law Commission (ILC) adopted it during its 63d session and forwarded the same

475. REINISCH, *supra* note 360, at 365.

476. DARIO, *supra* note 46, art. 3.

477. *Id.* arts. 1 (2) & 5.

478. *Id.* art. 2 (b).

479. *Id.* arts. 20-25 & 51-57.

480. *Id.* arts. 28-40.

to the UN General Assembly for consideration.[481] The UN General Assembly noted the draft articles and decided to include the same in the agenda for its 69th Session.[482] During the 69th Session, the UN General Assembly once again noted the draft articles and requested the UN Secretary General to solicit further comments and guidance on the draft articles, thereafter including the discussion in its 72nd Session.[483] In compliance with the directive, the UN Secretary General filed his report,[484] and several actors registered their comments with the General Assembly.[485] At the conclusion of the 72nd Session of the UN General Assembly, however, the DARIO was again noted and set for discussion for the 75th Session in 2020.[486]

Why is the DARIO lingering in the limbo of benign notations despite the fact that several scholars have capably argued how it can be used in ordering international relations?[487] The situation is wholly inconsistent with the

481. Responsibility of International Organizations, G.A. Res. 66/100, annex, U.N. Doc. A/RES/66/100 (Dec. 9, 2011).

482. *Id.* ¶¶ 3-4.

483. Responsibility of International Organizations, G.A. Res. 69/126, U.N. Doc. A/RES/69/126 (Dec. 10, 2014).

484. U.N. Secretary-General, *Responsibility of International Organizations: Compilation of Decisions of International Courts and Tribunals*, 75th Session of the General Assembly, U.N. Doc. A/72/81 (Apr. 24, 2020) & U.N. Secretary General, *Responsibility of International Organizations: Comments and Information Received from Governments and International Organizations*, 75th Session of the General Assembly, U.N. Doc. A/72/80 (Aug. 3, 2020).

485. U.N. GAOR, 72d sess., 15th plen. mtg., ¶¶ 20-53 (Oct. 13, 2017) & U.N. GAOR, 72d sess., 30th plen. mtg., ¶ 30 (Nov. 10, 2017).

486. Draft Resolution on the Responsibility of International Organizations, 72d sess., U.N. Doc. A/C.6/72/L.22, ¶ 1 (Nov. 6, 2017). The agenda item will be considered at the 75th session in 2020. U.N. General Assembly of the United Nations, Sixth Committee (Legal) — 72d session: Responsibility of International Organizations (Agenda Item No. 87), *available at* https://www.un.org/en/ga/sixth/72/int_organizations.shtml (last accessed Jan. 30, 2022) [https://perma.cc/9CKT-EQXY]).

487. *See, e.g.*, Mirka Möldner, *Responsibility of International Organizations — Introducing the ILC's DARIO*, 16 MAX PLANCK U.N.Y.B. 281 (2012) & Valerie Leung, Applying the Draft Articles on the Responsibility of International Organizations: Making International Organizations Accountable (2016) (unpublished LL.D thesis, University of Ottawa Faculty of Law) *available at* https://pdfs.semanticscholar.org/49de/f2335bf283e2e9b3d841c87fd36d7981b3c3.pdf (last accessed Jan. 30, 2022) [https://perma.cc/FX7N-87GS]).

growing anxiety of the community of nations in their transactions with international organizations and the realization that IOs have violated and are capable of violating International Law.[488]

The most veritable challenge to the evolution of the international responsibility of IOs, particularly MDFIs, is the scarcity of practice on the matter, which is, perhaps, a direct result of the dearth of third-party, independent mechanisms to actually hold MDFIs accountable;[489] and where they exist, the proverbial claim of immunity bars further discussion on the matter. The above survey of external accountability mechanisms available to victims of MDFIs is a testament to the challenge posed to the adoption and full implementation of the DARIO.

V. RECOMMENDATIONS FOR EFFICIENT AND EFFECTIVE HUMAN RIGHTS ENFORCEMENT IN THE REGIME OF MULTILATERAL DEVELOPMENT FINANCING INSTITUTIONS

> *When* [*you are*] *working on development issues, optimism is not always based on rational analysis, often it is a moral choice.*
>
> — Jim Yong Kim, President of the World Bank Group (2012-2019)[490]

A. Recommendations for the Adoption of Human Rights Due Diligence Frameworks in the Operations of Multilateral Development Financing Institutions

Further concretizing the submission that Human Rights standards are integral parts of MDFI operations, the Author recommends that in order for MDFIs to properly discharge their obligations, they must adopt Human Rights Due Diligence Frameworks modeled from the UN Guiding Principles on Business and Human Rights. Although the UN Guiding Principles on Business and

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488. *See* Daguirdas, *supra* note 50, at 330; & Komala Ramachandra & Erika Lennon, *How the World Bank Can Stop Funding Disaster*, NATION, Mar. 21, 2019, *available at* https://www.thenation.com/article/world-bank-jam-ifc-cao (last accessed Jan. 30, 2022) [https://perma.cc/7SRY-9YGQ].

489. *Report of the International Law Commission on the Work of Its Sixty-Third Session*, [2011] 2 Y.B. INT'L L. COMM'N 46, U.N. Doc. A/CN.4/SER.A/2011/Add.1 (Part 2) & U.N. GAOR, 72d sess., 15th plen. mtg., *supra* note 485, ¶¶ 20-24, 29, & 42-43.

490. Greg Keller, *5 Things to Know from World Bank's Kim*, CHI. TRIBUNE, Sept. 24, 2015, *available at* https://www.chicagotribune.com/sns-bc-us--world-bank-five-things-to-know-20150924-story.html (last accessed Jan. 30, 2022) [https://perma.cc/V7KN-CA93].

Human Rights are primarily addressed to States and business entities,[491] the appropriateness of adopting such frameworks for MDFIs lies in the fact that in the exercise of their sovereign powers, MDFIs operate very much like business entities. Granting loans, making investments, and referring to their Member States as "clients" are but a few examples of the ways MDFIs operate like businesses without being businesses.

Principle 16 of the UN Guiding Principles on Business and Human Rights instructs, as a first step towards Human Rights alignment, the expert-guided drafting and subsequent publication of a policy commitment towards meeting Human Rights responsibilities that is approved and endorsed by senior management; expresses the Human Rights expectations from personnel, clients, and partners; and guides operational policies.[492] A model instrument for MDFIs' policy commitment is provided for as part of this Note's Annex.

The Author also recommends the incorporation of the existing assessment and planning frameworks of MDFIs under a Human Rights Due Diligence Framework which should be able to "identify and assess [Human Rights] risks[;] prevent and mitigate adverse [Human Rights] impacts[; and,] account for how it addresses [Human Rights] impacts."[493] The adoption of a Human Rights Due Diligence Policy following the framework is likewise recommended. One of the key provisions for the Human Rights Due Diligence Policy is one that ensures the objectivity of the report. It is suggested that the provision reads:

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491. U.N. Office of the High Commissioner for Human Rights, *supra* note 341, pmbl.

492. *Id.* princ. 16.

493. CIDSE, Human Rights Due Diligence: Policy Measures for Effective Implementation, at 3, 7, & 9, *available at* https://www.business-humanrights.org/sites/default/files/documents/HRDD_EN_Final.pdf?fbclid=IwAR1HOFx_Z_-M1OOMfW85WqFHjbbSBR1D9i3_pEkaILpwUAdvp1yICznpmgo (last accessed Jan. 30, 2022) [https://perma.cc/9JML-Y9AL].

> A project proposed for Bank financing requires:
>
> (1) An independent screening by the Bank;
>
> (2) A Human Rights Impact Assessment to be conducted at the expense of the borrower by an independent and qualified expert or civil society group with Human Rights competency;
>
> (3) A process of free, prior, and informed consultation with the affected population or communities at each stage of the project, and particularly during project preparation, to fully identify their views and ascertain their broad community support for the project;
>
> (4) The preparation of a Human Rights Impact Plan or a Human Rights Impact Planning Framework; and
>
> (5) Disclosure of the draft Human Rights Impact Plan or a Human Rights Impact Planning Framework.
>
> The level of detail necessary to meet the requirements specified in paragraph (b), (c), and (d) is proportional to the complexity of the proposed project and commensurate with the nature and scale of the proposed project's potential effects on Human Rights, whether adverse or positive.[494]

With the adoption of a Human Rights Due Diligence Policy, MDFIs' internal accountability mechanisms will now be able to take cognizance of varying levels of Human Rights violations across MDFIs' operations. This clarifies for MDFIs, clients, and target populations not only the Human Rights considerations of MDFIs, but their Human Rights *responsibilities* as well.

It is also recommended that MDFIs' choice-of-law provisions in their standard terms and conditions refer to International Law as the governing law, viz. —

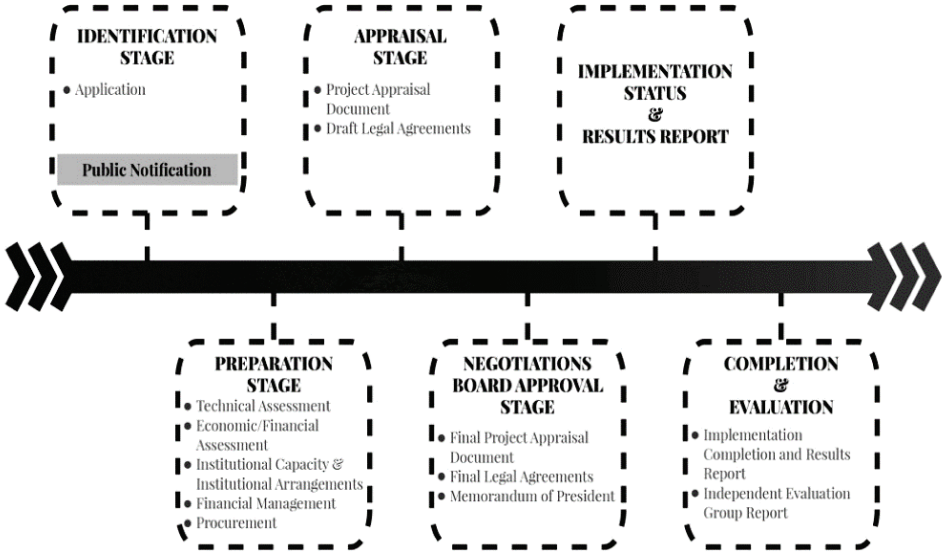
> The law to be applied by the arbitral tribunal shall be public international law, the sources of which shall be taken for these purposes to include:
>
> (1) the Agreement Establishing the Bank and any relevant treaty obligations that are binding reciprocally on the parties;

494. World Bank, Operational Manual, OP 4.10 – Indigenous Peoples, OP/BP 4.10, *available at* https://ppfdocuments.azureedge.net/1570.pdf (last accessed Jan. 30, 2022) [https://perma.cc/CUJ8-HZLR].

> (2) the provisions of any international conventions and treaties (whether or not binding directly as such on the parties) generally recognized as having codified or ripened into binding rules of customary law applicable to states and international financial institutions, as appropriate;
>
> (3) other forms of international custom, including the practice of states and international financial institutions of such generality, consistency and duration as to create legal obligations; and
>
> (4) applicable general principles of law.[495]

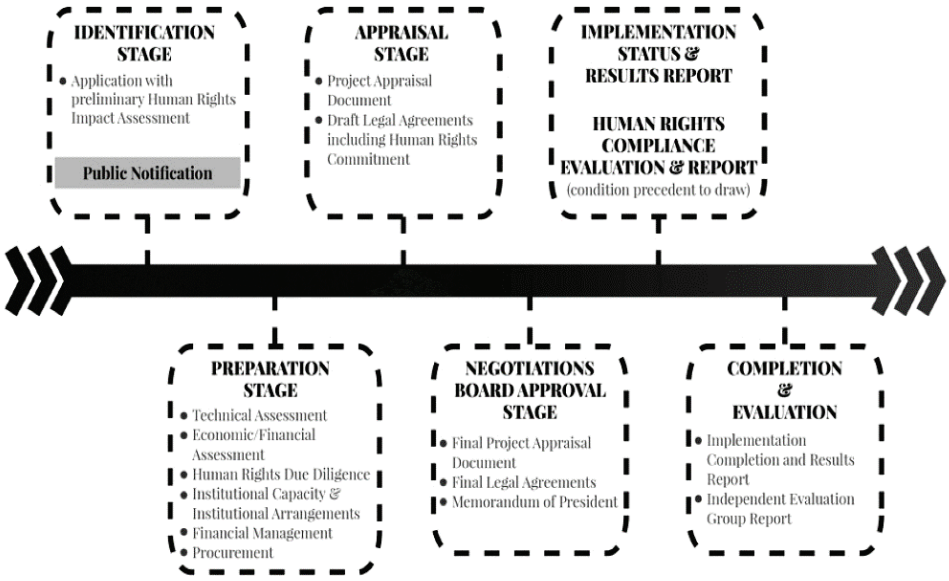
A place for Human Rights Due Diligence frameworks within the temporal milieu of MDFIs' project cycles can be demonstrated through a comparison of the current and proposed models, viz. —

Figure 2. Current Project Cycle of Multilateral Development Financing Institutions



495. EBRD, Standard Terms and Conditions, art. VIII, § 8.04 (b) (6) (Dec. 1, 2012).

Figure 3. Proposed Project Cycle of Multilateral Development Financing Institutions with the Integration of Human Rights Due Diligence



B. Recommendations for Retaining the in Limine Litis Character of Immunity Claims

There is difficulty in procedural law to adjudicate claims of immunity *in limine litis*. The problem is at once apparent when looking into the jurisprudence of the ICJ to the effect that claims for sovereign immunity may not be as easily thwarted by the mere allegation of a violation of *jus cogens* norms. In that case, the tribunal makes a judgment call on whether to let the case proceed, with substantial reservations made on behalf of the party claiming immunity, or to dismiss the case at the risk of allowing damage to go without redress.[496] However, there is also a provision in the ICJ Statute which guarantees putative victims of internationally wrongful acts some measure of redress upon a showing that the circumstances justify the grant thereof to preserve the parties' respective rights.[497] This provision was taken to mean that the Court may, without litigating the entirety of the claims, adjudge provisional measures for redress upon a *prima facie* showing that one or both parties are entitled to the

496. *See generally* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168 (Dec. 19).

497. ICJ Statute, *supra* note 194, art. 41.

protection of their rights pending final judgment over the case.[498] In the domestic sphere, some semblance of practice on the matter has grown from contestations of claims of immunity by the head of State in light of allegations of Human Rights violations. In the Philippines, for example, there is an evolving practice by the Court to make a *prima facie* determination of the entitlement of victims of Human Rights violations to protection under the Rules on the Writ of *Amparo*.[499] The cases decided under the Rule show a growing proclivity on the part of the Court to make a preliminary determination of the fact of violation and the possible ways that the implicated state agents may be responsible, to the end that the petitioner in an *Amparo* case may have his rights protected without necessarily attributing responsibility therefor.[500] Thus, the Court, in a way, recognizes both the petitioners' entitlement to protection upon a *prima facie* showing, by way of substantial evidence, of violations of rights and the defendants' claim of immunity *ratione personae* or *ratione materiae*.[501] In these instances, the Court has justified the continuation of the case upon the theory that immunity is not violated thereby because the issuance of the writ does not entail civil, criminal, or administrative liability. The goal in the issuance thereof is for the protection of a victim's rights.

Thus, the Author recommends the adoption of a test, which entails a *prima facie* determination of Human Rights violations without determining responsibility therefor. It requires the courts to receive evidence on the alleged violations and to decide, in essence, whether proceeding with a full-blown trial will ultimately help the MDFI achieve its goals. It reads similar to the *Mendaro Test*. Unlike the *Mendaro Test*, however, the test proposed here makes a wholistic determination of the benefits accruing to the MDFI, in particular, and the MDFI regime, in general. In fine, the courts must ask: Will the continuance of the case, by the rejection of the MDFI's claim of immunity,

498. Avena and Other Mexican Nationals (Mex. v. U.S.), Order, 2003 I.C.J. 77, ¶ 42 (Feb. 5).

499. RULE ON THE WRIT OF AMPARO, A.M. No. 07-9-12-SC (Oct. 16, 2007).

500. *Id.* §§ 14 & 15.

501. *See* Secretary of National Defense v. Manalo, G.R. No. 180906, 568 SCRA 1 (2008); Rubrico v. Macapagal-Arroyo, G.R. No. 183871, 613 SCRA 233 (2010); Roxas v. Macapagal-Arroyo, G.R. No. 189155, 630 SCRA 211 (2010); Saez v. Macapagal-Arroyo, G.R. No. 183533, 681 SCRA 678 (2012); In the Matter of the Petition for the Writ of Amparo and Habeas Data in Favor of Noriel Rodriguez, G.R. No. 191805, 696 SCRA 390 (2013); Burgos v. Macapagal-Arroyo, G.R. Nos. 183711-13, 621 SCRA 481 (2010); & Lozada, Jr. v. Macapagal-Arroyo, G.R. Nos. 184379-80, 670 SCRA 545 (2012).

be more beneficial for the MDFI? This determination must of course be guided by the finding in this Note that Human Rights accountability leads, as a matter of general proposition, to greater legitimacy for MDFIs.

In closing, the issues resolved in this Note are rooted in the dichotomous paradigm under which MDFIs operate. Ultimately, the ideas that MDFIs have no Human Rights obligations, or that even if they do, their constituent instruments exempt them therefrom, or that they are unequivocally immune from Human Rights suits, precipitate from a perspective which views Human Rights, and ultimately human lives, as development trade-offs — one for the many, liberty *or* prosperity. This Note is a campaign for MDFIs to lift the firmament of global cooperation on development with the conjunctive, "And" so that the pursuit thereof may bring, fully and finally, liberty *and* prosperity.

ANNEX

Model Instrument for Human Rights Policy Commitment[502]

Human Rights Policy-0.00

May 2020

Human Rights are universal, inherent, inalienable, and indivisible. They are essential means and ends in the Sustainable Development Agenda. The Bank recognizes its responsibility to respect, protect, and fulfill Human Rights in its own operations and asks its clients to do the same. The Bank adopts a Human Rights-oriented policy guided by the standards set forth therefor in International Law.

(1) The Bank respects and upholds at all times the International Human Rights codified in the UN Declaration of Human Rights, the Core Human Rights instruments, and declared to be part of Customary international Law.

(2) In addition to preventing and mitigating adverse impacts on Human Rights from its activities and associated relationships, the Bank commits to contribute positively to Human Rights through its development work.

(3) The Bank is committed to respecting the Human Rights of its officers, agents, and staff. It fully respects the rights of workers, such as freedom of association and the effective recognition of the right to collective bargaining; elimination of all forms of forced or compulsory labor; effective abolition of child labor; and the elimination of discrimination with respect to employment and occupation. Towards these ends, the Bank commits to provide measures to assert these rights by

    (a) means of dissemination and access of information and training;

    (b) promoting a culture of awareness of and respect for human rights;

502. Rabobank Group, Global Standard on Sustainable Development, *available at* https://www.rabobank.com/en/images/sustainability-policy-framework.pdf (last accessed Jan. 30, 2022) [https://perma.cc/CC9L-KYME].

(c) providing access to grievance mechanisms, which are in line with Human Rights principles, through which complaints and disputes can be resolved effectively.

(4) The Bank commits to carry out reasonable and appropriate Human Rights due diligence regarding material human rights risks within its operations, and further commits to the creation and full implementation of a Human Rights Due Diligence Framework characterized by independence, adequacy, and sensitivity to all Human Rights, especially Environmental Rights, Indigenous Peoples Rights, and the Rights of Internally Displaced Persons.

(5) The Bank insists that its suppliers, contractors, and other partners respect Human Rights. The Bank commits to monitor its partners' compliance with Human Rights standards by active screening and monitoring.

(6) The Bank expects its clients, suppliers, contractors, and other partners to uphold the human rights commitment set out in this policy.

(7) The Bank commits to make a positive contribution to society in the territories of its Member States, committing further to consider the recommendations of the United Nations, the European Union, or any other International Organization towards the respect, protection, and fulfillment of Human Rights.

(8) The Bank will not undertake any transactions that may conflict with Human Rights and commits to ensure that its borrowers progressively improve their Human Rights track records.