

American University International Law Review

Volume 25 | Issue 3

Article 4

2010

Multilateral Development Banks and the Human Right Responsibility

Leonardo A. Crippa

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/auilr>



Part of the [Human Rights Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Crippa, Leonard A. "Multilateral Development Banks and the Human Right Responsibility." *American University International Law Review* 25, no.3 (2010): 531-577.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *American University International Law Review* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

MULTILATERAL DEVELOPMENT BANKS AND HUMAN RIGHTS RESPONSIBILITY

LEONARDO A. CRIPPA*

INTRODUCTION	532
I. DEFINING MDBS	533
II. INTERNATIONAL PERSONALITY	536
A. SUBJECTS OF LAW	536
1. Public International Law	537
2. International Human Rights Law	539
B. MDBS AS SUBJECTS OF LAW	541
1. MDBs Are International Intergovernmental Organizations	543
2. MDBs Are not Non-State Actors	544
III. INTERNATIONAL RESPONSIBILITY	545
A. INTERNATIONAL HUMAN RIGHTS LAW OBLIGATIONS	545
1. Obligation to Respect Human Rights	545
2. Obligation to Adopt Domestic Measures	547
3. Obligation to Redress Human Rights Violations	548
4. Other Obligations	549
B. CONTEMPORARY RESPONSIBILITY RULES	549
C. MDBS AND INTERNATIONAL RESPONSIBILITY	550
1. Responsibility of MDBs Before International Tribunals	553

* Leonardo A. Crippa is an international law scholar and practitioner. He holds a J.D. from Universidad Nacional de Tucuman, Argentina and a LL.M. degree from American University. As the Center for Justice and International Law's Staff Attorney, he litigated several human rights cases within the Inter-American Human Rights System. Currently as the Staff Attorney of the Indian Law Resource Center, the author analyses multilateral development banks' policies, and continues to practice international law within the United Nations and Inter-American Human Rights System. He is also the author of papers and articles on constitutional law, international law, and multilateral development banks' policies. The opinions expressed in this article are those of the author alone.

IV. MDBS' APPROACHES WITH REGARD TO HUMAN RIGHTS ISSUES	556
A. OPERATIONAL POLICIES ON INDIGENOUS PEOPLES.....	559
1. Property Rights to Land and Natural Resources	561
2. Right to Self-Determination and Self-Government.....	564
3. The Question of Free, Prior, and Informed Consent	565
B. INSPECTION MECHANISMS.....	567
1. The Right to an Effective Remedy	571
CONCLUSION	576

INTRODUCTION

This article analyzes whether international tribunals can find Multilateral Development Banks (“MDBs”) liable for human rights violations that occur in developing countries as a result of projects financed by these MDBs. It seeks to address the gap under international law concerning direct responsibility of MDBs, as well as to provide legal approaches for the progressive development of an applicable international legal framework. It is not within the scope of this article to analyze legal approaches towards: state responsibility for MDBs’ wrongful acts before international tribunals;¹ human rights responsibility before political bodies;² or direct responsibility of MDBs before domestic courts.³

Part I briefly addresses the meaning of the term “Multilateral Development Banks” since international law does not define it. Part II identifies the general rules concerning legal personality under international law. In particular, it develops legal approaches pertaining to the personality of MDBs. Part III discusses the existing

1. See generally August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, in NON-STATES ACTORS AND HUMAN RIGHTS 37, 78-82 (Philip Alston ed. 2005) (analyzing the issue of state responsibility for non-state activities as a means to protect human rights violated by those activities).

2. See, e.g., U.N. H.R. Comm. as established by Article 28 of the Int’l Covenant on Civil and Pol. Rts.; Comm. on Econ., Soc. & Cultural Rts. as determined by the U.N. Econ. & Soc. Council [ECOSOC], Res. 1985/17 (28 May 1985).

3. See generally Reinisch, *supra* note 1, at 87-89 (discussing the part that domestic courts play in enforcing human rights as against non-state actors).

rules of international law concerning responsibility, as well as legal approaches regarding ways to attribute responsibility to MDBs when they cause wrongful acts.

Part IV focuses on the approaches developed by MDBs regarding human rights protection. MDBs have established operational policies regarding particular themes in order to underline safeguard measures. They have also created internal inspection mechanisms as a means to assure their compliance with those operational policies because of human rights concerns. In this regard, the notion of an effective remedy under international human rights law will play a critical role in determining the ineffectiveness of MDBs' approaches from a human rights viewpoint. Part V concludes that a gap exists in international law because there is no mechanism for holding MDBs responsible for human rights violations that have occurred as a result of projects that they financed.

I. DEFINING MDBS

MDBs are international organizations created by states or regions, and charged with fostering economic and social development, either in the public or private sector.⁴ In this regard, they constitute a particular category of International Financial Institutions ("IFIs"). The most influential MDBs operating in developing countries throughout the Americas are the International Bank for Reconstruction and Development ("IBRD") (which is part of the World Bank),⁵ the International Finance Corporation ("IFC"),⁶ and the Inter-American Development Bank ("IADB").⁷

MDBs arise out of state-created constituent instruments often referred to as Articles of Agreement.⁸ MDBs' Articles of

4. See, e.g., World Bank, Multilateral Development Banks, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20040614~menuPK:41699~pagePK:43912~piPK:44037~theSitePK:29708,00.html> (last visited Mar. 30, 2010) (listing four regional development banks and explaining that both developed and developing countries may be members of the development banks).

5. World Bank, <http://www.worldbank.org> (last visited Mar. 30, 2010).

6. International Financial Corporation [IFC], <http://www.ifc.org> (last visited Mar. 30, 2010).

7. Inter-American Development Bank [IADB], <http://www.iadb.org> (last visited Mar. 30, 2010).

8. See, e.g., World Bank, Articles of Agreement,

Agreements are 'treaties' per the legal meaning given to that term as reflected in Article 2 of the Vienna Convention on the Law of Treaties ("Vienna Convention") of 1969.⁹ The majority of the provisions of the Vienna Convention represent the codification of pre-existing rules of customary international law, but some provisions also reflect a progressive development of the law.¹⁰ According to Article 5, the Vienna Convention applies to MDBs' Articles of Agreements because they are treaties constituting international organizations.¹¹

States act collectively through the MDB structure. As multilateral institutions, MDBs are exclusively comprised of and governed by states.¹² Their membership is open only to states, although membership is not restricted to those states that create a specific MDB. For instance, according to the IADB's Articles of Agreement, the original members are members of the Organization of American States ("OAS"), but the membership is also open to non-regional countries that are members of the International Monetary Fund if admitted by the Bank and under the rules of the Bank's board of directors.¹³

<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/BODEXT/0,,contentMDK:50004943~menuPK:64020045~pagePK:64020054~piPK:64020408~theSitePK:278036,00.html> (last visited Mar. 30, 2010) (providing the organizational framework for each group).

9. See Vienna Convention on the Law of Treaties art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter Vienna Convention] ("For the purposes of the present Convention: (a) 'treaty' 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.").

10. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 580 (6th ed. 2003).

11. See Vienna Convention, *supra* note 9, art. 5 ("The present Convention 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.").

12. See Robert T. Coulter, Leonardo A. Crippa & Emily Wann, *Principles of International Law for Multilateral Development Banks: The Obligation to Respect Human Rights* 8 & n. 22 (Indian Law Resource Ctr., Washington, D.C., 2009), available at <http://www.dar.org.pe/documentos/cartas/2009-01%20Principles%20Memo%20FINAL%20ENG.pdf>.

13. Inter-Am. Dev. Bank (IADB), Agreement Establishing the Inter-American Development Bank art. II, § 1, Apr. 8, 1959, 10 U.S.T. 3029, 389 U.N.T.S. 69 [hereinafter IADB Establishing Agreement].

MDBs decision-making organs are comprised of representatives from each MDB member state. For instance, according to the IADB's Articles of Agreement, all the power of the Bank is vested in the Board of Governors, which can delegate functions to the Board of Executive Directors.¹⁴ Each of these organs is exclusively made up of representatives of member states.¹⁵ A member state's voting rights in the decision-making organs depend on how much the country is contributing to the Bank's capital stock.¹⁶

MDBs work toward the economic and social development of developing member countries, and universal MDBs, like those within the World Bank, operate in developing member countries around the world.¹⁷ Regional MDBs operate in specific regions of the world,¹⁸ such as the IADB in Latin-American developing countries. According to the IADB's Articles of Agreement, the Bank's purpose is to contribute to the development of the regional developing member countries, individually and collectively.¹⁹

Finally, MDBs execute their mandates by focusing on the public and/or private sector. On one hand, the IADB and the World Bank

14. *See id.* art. VIII, § 2 (prohibiting the Board of Governors from delegating certain tasks to the Board of Executive Directors, including the powers "to admit new members" and "authorize the conclusion of general agreements for cooperation with other international organizations").

15. *See id.* art. VIII, § 3 (requiring that the executive directors "be persons of recognized competence and wide experience in economic and financial matters but . . . not be governors").

16. JOHN RUTHRAUFF, AN INTRODUCTION TO THE WORLD BANK, INTER-AMERICAN DEVELOPMENT BANK, AND THE INTERNATIONAL MONETARY FUND 6 (Elizabeth Zechmeister ed., 1997).

17. *See, e.g.*, International Bank for Reconstruction and Development, Articles of Agreement art. 1, Feb. 16, 1989, available at <http://siteresources.worldbank.org/EXTABOUTUS/Resources/ibrd-articlesofagreement.pdf> [hereinafter IBRD Articles of Agreement] ("The purposes of the Bank are: (i) To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less developed countries.")

18. Regional MDBs include the Inter-American Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, and the African Development Bank.

19. IADB Establishing Agreement, *supra* note 13, art. I, § 1.

mainly carry out their operations and projects in the public sector,²⁰ provided that their purposes are to accelerate the development of developing member countries. On the other hand, the IFC focuses exclusively on private enterprises located in member countries.²¹

II. INTERNATIONAL PERSONALITY

Whether MDBs can be held liable for the international human rights violations of their financed projects depends on whether they fit into the existing liability rules under international law. These rules apply to legal personalities. This Part considers whether MDBs possess legal personality under international law.

A. SUBJECTS OF LAW

An entity has a legal international personality, in an original or derivative fashion, when legal rights and obligations under international law apply to that entity. Without question, states are the original subjects of international law, as they are the foundation of the international legal framework. A state's international personality is not only original but also necessary for the international legal system because the creation of other subjects of international law depends on states' consent,²² among other factors. For that reason, other subjects of law—that is, other entities to which international law applies—possess a derivative legal international personality.²³

20. *See generally id.* art. I, § 1; IBRD Articles of Agreement, *supra* note 17, art. I.

21. *See* Articles of Agreement of the International Finance Corporation art. 1, May 25, 1955, 7 U.S.T. 2197, 264 U.N.T.S. 117 [hereinafter IFC Articles of Agreement] (“The purpose of the Corporation is to further economic development by encouraging the growth of productive private enterprises in member countries, particularly in the less developed areas, thus supplementing the activities of the [IBRD] . . .”).

22. MONCAYO VINUESA GUTIÉRREZ POSSE, DERECHO INTERNACIONAL PÚBLICO (PUBLIC INTERNATIONAL LAW) 15-16 (Zavalía ed. 1999).

23. *See id.* (explaining that states have original personality and that the legal personality of international organizations is derived from the purpose for which states created them); *see also* Sascha Rolf Lüder, *The Legal Nature of the International Criminal Court and the Emergence of Supranational Elements in International Criminal Justice*, 84 INT'L REV. RED CROSS 79, 80 (2002), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/59KDCL/\\$File/079-092_Luder.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/59KDCL/$File/079-092_Luder.pdf) (asserting that states have international organizations derive their personality from the states that created them).

Scholars have identified several elements as crucial to determining legal personality under international law. These elements are: (1) the “capacity to make claims in respect to breaches of international law”; (2) the “capacity to make treaties and agreements valid on the international plane”; and (3) the “enjoyment of privileges and immunities from national jurisdictions.”²⁴

1. Public International Law

In public international law there is an on-going debate about who are the proper subjects of international law. On the one hand, there is an outlook that suggests that only states have an international personality. On the other hand, there is a broader viewpoint that advocates for a more comprehensive approach and supports the idea that, apart from states, there are other entities with international legal personalities. Under the latter view, there are certain entities that might be considered subjects of international law, such as individuals, non-self-governing peoples, and belligerent and insurgent communities.²⁵ A growing consensus—evidenced by the jurisprudence of the International Court of Justice (“ICJ”), various Vienna Conventions, and a developing public international law treaty—asserts that international organizations are subjects of international law.

First, the ICJ has treated the United Nations as a subject of international law. In the *Reparations* advisory opinion of 1949, the Court stated that the United Nations “was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane.”²⁶ Since that opinion, the debate about the

24. BROWNLIE, *supra* note 10, at 57; *see also* Menno T. Kamminga, *The Evolving Status of NGOs Under International Law: A Threat to the Inter-State System?*, in NON-STATES ACTORS AND HUMAN RIGHTS, *supra* note 1, at 93, 94-95 (Philip Alston ed. 2005) (applying a slight modification of Brownlie’s approach in order to analyze to the status of NGOs under international law).

25. *See* LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 483 (June 27) (stating that states parties to treaties can commence international proceedings on behalf of their nationals); *see also* BROWNLIE, *supra* note 10, at 57-67 (suggesting different entities that have international legal personalities).

26. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 179 (Apr. 11) [hereinafter U.N. Service

legal personality of international organizations has evolved considerably. Indeed, thirty years later, in the 1980 *WHO* opinion, the Court established that “[i]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.”²⁷

Second, the Vienna Convention refers to international organizations. Article 5 states that the “Convention 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.”²⁸ Article 2(1)(i) provides that “[f]or the purposes of the present Convention: . . . ‘international organization’ means an intergovernmental organization.”²⁹ Three other Vienna conventions use the same legal definition and take the same approach: the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character,³⁰ the Vienna Convention on Succession of States in Respect of Treaties,³¹ and the Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations.³²

Finally, a developing treaty is also adopting the same position with regard to the legal personality of international organizations. The International Law Commission (“ILC”), responsible for elaborating the Draft Convention on Responsibility of International

Reparations].

27. Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73, 89-90 (Dec. 20).

28. Vienna Convention, *supra* note 9, art. 5.

29. *Id.* art. 2(1)(i).

30. Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character art. 1(1)(1), Mar. 14, 1975, 11 I.L.M. 499 (not yet in force).

31. Vienna Convention on Succession of States in Respect of Treaties art. 2(1)(n), Aug. 23, 1978, 17 I.L.M. 1488.

32. Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations art. 2(1)(i), Mar. 21, 1986, 25 I.L.M. 543 (“1. For the purposes of the present Convention: . . . ‘(i) ‘international organization’ means an intergovernmental organization . . .”).

Organizations, has defined international organizations under Article 2 as “an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.”³³

2. *International Human Rights Law*

There are two subjects of law clearly identified under the governing rules of international human rights law:³⁴ the states parties and individuals. On one hand, states parties of human rights treaties are subjects of the law. They have been embodied with a passive personality, provided that they have assumed obligations towards the protection of the fundamental rights of those individuals who are subject to their jurisdiction. Regional human rights treaties clearly determine such personality, including the American Convention on Human Rights (“American Convention”), the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”), and the African Charter of Human and Peoples’ Rights (“African Charter”).³⁵

33. U.N. Int’l L. Comm’n, *Responsibility of International Organizations: Titles and Texts of the Draft Articles 1, 2 and 3 Adopted by the Drafting Committee*, art. 2, U.N. Doc. A/CN.4/L.632 (June 4, 2003) [hereinafter U.N. Int’l L. Comm’n, *Draft Articles 1, 2 and 3*].

34. See generally Organization of African Unity (OAU), African Charter on Human and Peoples’ Rights art. 45, June 27, 1981, 1520 U.N.T.S. 217 [hereinafter African Charter]; OAU, Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights art. 3, July 11, 2003, available at <http://www.achpr.org/english/women/protocolwomen.pdf> [hereinafter Protocol to African Charter]; Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms art. 32, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention]; Organization of American States (OAS), American Convention on Human Rights arts. 41, 44, 45, 62.3, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention].

35. See American Convention, *supra* note 34, art. 1 (assuming an obligation “to respect the rights and freedoms” under the American Convention, and to refrain from discrimination); European Convention, *supra* note 34, art. 1 (“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”); African Charter, *supra* note 34, art. 1 (“The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.”). By assuming obligations to protect such rights, each convention gives its

On the other hand, individuals and groups have also been granted international personality. They possess an active personality since the above-mentioned Conventions entitle them to certain human rights. But their capacity is limited to the possibility of submitting claims against states parties, not against other entities.³⁶ They do not possess the capacity to make claims regarding breaches of rules concerning anything other than international human rights law, nor do they possess the capacity to make treaties and agreements valid on the international plane. Instead, they must submit their claims to the individual complaint procedure mechanisms before human rights treaty-bodies, and through which they can make only friendly settlements with the offending states.³⁷ Finally, neither individuals nor groups enjoy privileges and immunities from national jurisdictions.

The foundational rule suggests that only states, as subjects of international law, have a passive personality. As a result, only states can be found responsible for human rights violations based on non-compliance with assumed human rights obligations. The main human rights treaties—the actual legal basis for the regional systems—are all based on this legal perspective.

respective states parties passive personality.

36. Regional human rights treaties clearly establish such capacity. *See, e.g.*, American Convention, *supra* note 34, art. 44 (“Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.”); European Convention, *supra* note 34, art. 34 (“The Court may receive applications from any person, non-governmental organisation [sic] or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”); African Charter, *supra* note 34, art. 55(1) (“Before each Session, the Secretary of the Commission shall make a list of the Communications other than those of States Parties to the present Charter and transmit them to the members of the Commission, who shall indicate which Communications should be considered by the Commission.”).

37. *See* American Convention, *supra* note 34, art. 48(1)(f) (“When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows: . . . The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention.”).

B. MDBS AS SUBJECTS OF LAW

On the international plane, there is neither a legal definition for MDBs nor a legal approach with which to understand their international personality, or more specifically, their passive personality under international human rights law. Consequently, these issues will be analyzed in light of the existing approaches and definitions concerning international intergovernmental organizations. This analysis will provide a framework for addressing MDBs as international organizations.

The following questions, as pointed out earlier, should be answered in a positive fashion in order to assert MDBs' legal personality: (1) whether their constituent instruments are governed by international law; (2) whether they can make claims regarding breaches of international law; (3) whether they can celebrate treaties and agreements valid on the international plane; and (4) whether they enjoy privileges and immunities from national jurisdictions.

First, MDBs' constituent instruments are governed by international law. According to Article 5 of the Vienna Convention, MDBs' Articles of Agreements are governed by the Vienna Convention since they are treaties constituting international organizations. Moreover, the interpretation of the constituent instruments as treaties are governed by the rules of interpretation reflected in the Vienna Convention.³⁸

Second, MDBs do have the capacity to make claims in respect of breaches of international law. Generally speaking, according to the *Reparations* opinion issued by the ICJ, international organizations such as the United Nations have the capacity to bring an international claim against a state (whether a member or non-member) for damages resulting from that state's breach of its obligations towards the Organization.³⁹ In accordance with growing opinion, the "capacity to espouse [international] claims thus depends (1) on the existence of legal personality and (2) on the interpretation of the constituent instrument in the light of the purposes and functions of

38. See MAC DARROW, BETWEEN LIGHTS AND SHADOW: THE WORLD BANK, THE INTERNATIONAL MONETARY FUND AND INTERNATIONAL HUMAN RIGHTS LAW 116-22 (2003) (citing Articles 31 and 32 of the Vienna Convention as the "fundamental rules of interpretation").

39. U.N. Service Reparations, *supra* note 26.

the particular organization.”⁴⁰ It is clear that MDBs, as international organizations, do possess an international legal personality. Therefore, the discussion leans towards the interpretation of MDBs’ constituent instruments in light of their purposes and functions. In this regard, the governing rules embodied in Articles 31 and 32 of the Vienna Convention play a critical role since they were “developed through centuries of state practice, judicial precedents and scholarly work.”⁴¹ Additionally, it is important to scrutinize the designs and purposes of the constituent instruments of MDBs.⁴² It is natural to conclude that, by virtue of their legal personality and the purposes and functions of their Articles of Agreement, MDBs are capable of bringing claims regarding breaches of international law.

Third, MDBs also have the capacity to make treaties and agreements valid at the international level. The treaty-making power of an international organization depends on the terms of their constituent instrument.⁴³ Articles of Agreement do not prevent MDBs from entering into international treaties and agreements. Indeed, some MDBs have already entered into agreements with other international organizations. For instance, the World Bank has a Relationship Agreement with the U.N. Economic and Social Council (“ECOSOC”).⁴⁴

Finally, MDBs enjoy privileges and immunities from national jurisdictions. Privileges and immunities are recognized in customary international law; however, according to legal authorities, “there is as yet no general agreement on the precise content of the customary law concerning the immunities of international organizations.”⁴⁵ Apparently, agents of “international organizations are immune from legal process in respect of all acts performed in their official capacity.”⁴⁶ However, with regard to MDBs and according to their

40. BROWNLIE, *supra* note 10, at 654.

41. DARROW, *supra* note 38, at 120 & n.37.

42. *Id.* at 121.

43. BROWNLIE, *supra* note 10, at 651.

44. DARROW, *supra* note 38, at 124. While the World Bank and ECOSOC work together, the two organizations carefully delineate the “scope for cooperation” under the agreement. *Id.*

45. BROWNLIE, *supra* note 10, at 652.

46. *Id.* (remarking that the degree to which agents enjoy immunity differs, and that courts address their immunity by referring to principles of diplomatic immunity, or from principles relating to the functions that the agents carry out for

corresponding Articles of Agreement, their agents do enjoy privileges and immunities within the territory of each member state.⁴⁷ Moreover, the privileges and immunities in question refer to immunity from legal processes in the context of agents acting in their official capacity.⁴⁸

1. *MDBs Are International Intergovernmental Organizations*

MDBs are international intergovernmental organizations since they are comprised of and governed by member states. As stated in Part I, MDBs are created by the consensus of states, and they are governed by the collective decisions adopted by the decision-making organs exclusively comprised of member states' representatives. Moreover, MDBs themselves expressly regulate their "relations with other organizations" under their Articles of Agreement.⁴⁹

States act collectively as international organizations through MDBs. Indeed, MDBs are acting as "surrogates" for states in some of their activities because the states are their "lords and masters."⁵⁰ In addition, because MDBs are international organizations that possess a legal personality independent from their member states, the states can collectively carry out acts based on MDBs' constituent instruments and mandates. Accordingly, while recognizing the international personality of the United Nations, an international organization, the ICJ concluded in the *Reparations* opinion that the

their respective organizations).

47. See, e.g., IBRD Articles of Agreement, *supra* note 17, art. VII, § 1 ("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.").

48. See *id.* art. VII, § 8(i) (granting immunity to "[a]ll governors, executive directors, alternates, officers and employees of the Bank" for official acts, absent explicit waivers of that immunity).

49. See, e.g., IADB Establishing Agreement, *supra* note 13, art. XIV, § 2 (allowing the Bank to regulate the flow of information between itself and other organizations); see also IBRD Articles of Agreement, *supra* note 17, art. V, § 8 ("Relationship to Other International Organizations"); IFC Articles of Agreement, *supra* note 21, art. IV, § 7 ("Relations with other International Organizations").

50. See Philip Alston, *The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, in NON-STATES ACTORS AND HUMAN RIGHTS, *supra* note 1, at 3, 29.

United Nations has “a large measure of international personality and the capacity to operate upon an international plane.”⁵¹

2. *MDBs Are not Non-State Actors*

Although there is no legal definition of the term ‘non-state actor’ under international law, MDBs should not be considered as such since they are international organizations through which states act collectively. For some scholars, the term ‘non-state actor’ refers to armed opposition groups in a domestic context that act independent of states, such as rebel groups, irregular armed groups, insurgents, dissident armed forces, guerrillas, and liberation movements.⁵² For others, ‘non-state actors’ are all the actors—aside from state agents—“that operate at the international level and are potentially relevant to international relations.”⁵³ Finally, a third position considers ‘non-state actors’ as those affected people “who have no contractual relationship with [MDBs] but whose living conditions are directly or indirectly affected by the bank-financed operation.”⁵⁴ Based on these various positions, there is neither a clear definition nor uniform use of the term non-state actor by legal authorities.

Whatever the prevailing definition that international law may follow, MDBs should not be considered ‘non-state actors’. As asserted above, it is clear that MDBs are international intergovernmental organizations comprised and collectively governed by states. Furthermore, MDBs do not fit into the category of ‘non-state actors,’ regardless of the prevailing definition, because they often comprise groups that do not naturally align their interests with human rights issues, and that would not claim to be following relevant rules of international human rights law.⁵⁵

51. U.N. Service Reparations, *supra* note 26, at 179.

52. See generally Alston, *supra* note 50, at 14-19.

53. *Id.* at 15 (quoting Bas Arts, *Non-State Actors in Global Governance: Three Faces of Power* 5 (Max Planck Project Group on Common Goods, Bonn, Working Paper 2003/4, 2003), available at <http://edoc.mpg.de/175439> (follow “2003_4.pdf” hyperlink at bottom of page).

54. Daniel D. Bradlow, *Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*, 36 GEO. J. INT’L L. 403, 411 (2005).

55. Alston, *supra* note 50, at 29.

III. INTERNATIONAL RESPONSIBILITY

The law of responsibility is generally considered in relation to states because of their original and necessary legal personality at the international level. However, it encompasses a wide range of questions that must be considered along with the question of legal personality.⁵⁶ Apart from states, other subjects of law, such as international organizations, can be found responsible according to international responsibility rules. For this purpose, the human rights obligations and the responsibility rules are analyzed in detail below, including their connection with MDBs' acts.

A. INTERNATIONAL HUMAN RIGHTS LAW OBLIGATIONS

In determining the international responsibility of MDBs, the human rights obligations need to be identified prior to addressing the breach of those obligations. Within the Inter-American System on Human Rights ("Inter-American System"), these obligations are clearly reflected in the American Convention and have been well-developed by the Inter-American Court on Human Rights ("Inter-American Court"). These obligations include: (1) to respect human rights; (2) to adopt domestic measures; and (3) to redress human rights violations.⁵⁷ Although these obligations were established considering state parties' compliance, *mutatis mutandis* they are suitable for application to international organizations such as MDBs.

1. *Obligation to Respect Human Rights*

Generally, human rights treaties establish the obligation to respect all the rights they recognize in favor of all individuals under states' jurisdiction. This obligation is enshrined in various international instruments.⁵⁸ For instance, the American Convention clearly states that

56. BROWNIE, *supra* note 10, at 419.

57. American Convention, *supra* note 34, arts. 1(1), 2, 63(1).

58. *See, e.g.*, American Convention, *supra* note 34, art. 1; OAS, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights art. 1, Nov. 17, 1988, O.A.S.T.S. No. 69; U.N. Charter art. 55(c); Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural

[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.⁵⁹

The obligation to respect human rights constitutes the most important duty undertaken by states under international human rights law. According to the Inter-American Court in *Velasquez Rodriguez*, this obligation refers to two duties: (1) the duty to respect human rights protected by the human rights treaty; and (2) the duty to ensure the exercise of those rights to every person subject to state jurisdiction.⁶⁰ The Court used the same analysis in later decisions. For example, in the *Awás Tingni* case, the Court concluded that the American Convention obligated the state “to organize public power so as to ensure the full enjoyment of human rights by the persons under its jurisdiction.”⁶¹

It is clear that MDBs’ acts can infringe on the obligation to respect human rights by directly violating those rights or by being complicit in a state violation. In this regard, the nature of an entity’s compliance with this obligation will differ according to not only the right at stake, but also the entity that is called to comply with it. For instance, on the one hand, the obligation to respect the right to basic primary education is an obligation that must be fully fulfilled by the state.⁶² On the other hand, MDBs “may . . . have obligations not to

Rights art. 2(2), Dec. 16, 1966, 993 U.N.T.S. 3; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, G.A. Res. 45/158, art. 7 (Dec. 18, 1990); International Convention on the Elimination of All Forms of Racial Discrimination pmbl., G.A. Res. 2106 (XX) (Dec. 21, 1965); European Convention, *supra* note 34, art. 1; Council of Europe, European Social Charter, Oct. 18, 1961, 521 U.N.T.S. 89; African Charter, *supra* note 34, art. 1; League of Arab States, Arab Charter of Human Rights art. 3, Sept. 15, 1994.

59. American Convention, *supra* note 34, art. 1, § 1.

60. Case of *Velásquez-Rodríguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 165-66 (July 29, 1988).

61. Case of the *Mayagna (Sumo) Awás Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 154 (Aug. 31, 2001).

62. ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 151 (2006).

act in a way that prevents a borrowing state from fulfilling its obligations to provide such education.”⁶³ The ECOSOC has emphasized that international intergovernmental organizations, which here include MBDs, have the obligation to take measures that are in line with their member states’ human rights obligations.⁶⁴

2. *Obligation to Adopt Domestic Measures*

The obligation to adopt domestic measures is critical when adjusting domestic law to accepted international human rights standards. In this regard, Article 2 of the American Convention provides that

[w]here the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.⁶⁵

This obligation is directly related to the legislative branch of the government. In the *Hilarie and Benjamin* case, the Inter-American Court noted that states infringe upon this obligation not only by adopting legislative measures that are not in accordance with the standards established by human rights treaties, but also by failing to enforce laws that protect the rights guaranteed under the treaties.⁶⁶ According to the Court, these acts would likewise violate Article 2 of the American Convention.⁶⁷

MDBs’ acts can also be subject to the obligation to adopt domestic measures. MDBs can infringe on it by being complicit in a state violation of human rights or by forcing or otherwise causing states to violate human rights. This is particularly true, for instance, when

63. *Id.*

64. U.N. Econ. & Soc. Council (ECOSOC), *Procedural Decisions*, ¶ 515, U.N. Doc. E/1999/22 (1999) [hereinafter *Procedural Decisions*] (encouraging international intergovernmental organizations to enact “policies and programmes which promote respect for [human] rights”).

65. American Convention, *supra* note 34, art. 2.

66. Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago, Inter-Am. Ct. H.R. (ser. C) No. 94, ¶ 113 (June 21, 2002).

67. *Id.*

MDBs finance projects for borrowing states concerning the adoption of new domestic legislation that is not in accordance with accepted international human rights standards.

3. *Obligation to Redress Human Rights Violations*

The obligation to redress human rights violations emerges once a court has determined the state's international responsibility because of concrete human rights violations. For instance, Article 63(1) of the American Convention provides that

[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.⁶⁸

The obligation in question is well-established in customary international law, which has been developed by international human rights law. In *De la Cruz-Flores*, the Inter-American Court stated that "Article 63(1) of the American Convention contains a norm of customary law that is one of the fundamental principles of contemporary international law on State responsibility."⁶⁹ In this regard, the Court highlighted that an unlawful act, attributable to a state, creates international responsibility for that state's violation of international law; as a result, the state is obligated to prevent the violation from continuing any further, as well as to address any consequences and harms that arise out of that violation.⁷⁰

MDBs can be challenged regarding the observance of the obligation to redress human rights violations. MDBs' acts can infringe on that obligation by being complicit in a state violation of human rights. For instance, MDBs' acts breach this obligation by providing financing to borrowing states that have been condemned by international tribunals due to human rights violations without first requiring that those states redress such violations prior to receiving

68. American Convention, *supra* note 34, art. 63.

69. Case of *De la Cruz-Flores v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 115, ¶ 139 (Nov. 18, 2004).

70. *Id.*

financing. The ECOSOC clearly called upon the World Bank “to pay enhanced attention in their activities to respect for economic, social and cultural rights, including . . . facilitating the development of appropriate remedies for responding to violations” of those rights.⁷¹

4. *Other Obligations*

In addition to the main human rights obligations, when applying and interpreting human rights treaties, international tribunals have construed other states’ duties, such as the obligation to prevent, investigate and punish human rights violations. In *Velasquez Rodriguez*, the Court determined that states have a legal duty to prevent human rights violations, as well as to engage in meaningful investigations of the violations committed within their jurisdiction in order to identify those responsible and impose a proper punishment.⁷²

According to *Velasquez Rodriguez*, the state can be found responsible for human rights violations resulting from illegal acts not directly imputable to it because of the state’s failure to take steps to prevent human rights violations.⁷³ In imputing responsibility for human rights violations to states, the Court established as decisive whether a human rights violation has been perpetrated with the government’s support, or whether the government has allowed the act to occur without preventing it or punishing those responsible.⁷⁴ Given that MDBs can contribute to the state violation of human rights by funding projects that affect human rights protected by international law, these obligations can also relate back to MDBs acts via the due diligence approach.

B. CONTEMPORARY RESPONSIBILITY RULES

Other sources for state responsibility exist outside of the international human rights obligations discussed above. The ILC has codified the principles of international law governing state responsibility under the Articles on the Responsibility of States for

71. *Procedural Decisions*, *supra* note 64, ¶ 515.

72. Case of Velásquez-Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 174 (July 29, 1988).

73. *Id.* ¶ 172.

74. *Id.* ¶ 173.

Internationally Wrongful Acts.⁷⁵ According to the ILC, the essential elements for the establishment of state responsibility are: (1) a breach of an international obligation of the state; and (2) the attribution of that breach to the state under international law.⁷⁶ This is the natural consequence of the principle that “[e]very internationally wrongful act of a State entails the international responsibility of that State.”⁷⁷

These essentials of state responsibility have been applied by international tribunals when determining states’ responsibility for human rights violations. In this regard, it is important to take into account the human rights obligations discussed earlier in this Part. For instance, with respect to the first element for the establishment of state responsibility, the Inter-American Court highlighted in *Velasquez Rodriguez* that Article 1(1) of the American Convention plays a critical role when considering the human rights obligations of States Parties, provided that it obligates them to respect the rights recognized in the Convention.⁷⁸ Regarding the second essential point of state responsibility, the Court pointed out that “[a]ny impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State.”⁷⁹ Moreover, the Court clarified that “under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.”⁸⁰

C. MDBS AND INTERNATIONAL RESPONSIBILITY

There is a gap in the international legal framework with regard to the attribution of direct responsibility to international organizations

75. In 2001, the ILC adopted the Articles on the Responsibility of States for Internationally Wrongful Acts, which were later submitted to the U.N. General Assembly in its 2001 session. The General Assembly commended them to the attention of governments. *See generally* Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83 (Dec. 12, 2001) (outlining responsibility, attribution, consequences, and reparations for wrongs performed by states).

76. *Id.* art. 2.

77. *Id.* art. 1.

78. Case of *Velásquez-Rodríguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 164 (July 29, 1988).

79. *Id.*

80. *Id.* ¶ 170.

such as MDBs for human rights violations that take place in developing countries as a result of MDB-financed projects. As a result of this jurisdictional gap, MDBs are not subjects of international law in this context, and international tribunals thus cannot hold MDBs accountable for infringing human rights violations. That is to say, the law of responsibility does not address states' collective acts under the guise of MDBs. The existing rules are based on states' responsibility, given their individual non-compliance with human rights treaty-obligations. Hence, whenever MDBs commit wrongful acts that result in human rights violations, international human rights tribunals only hold the underlying state responsible, and not the MDB.

There is a need to create new legal standards directly applicable to MDBs, in order to fill the jurisdictional gap in the existing international legal framework. At present, MDBs are only subject to the legal restraints of their own mandates as established by their constituent instruments. These instruments do not include human rights standards or obligations as they exist today. As a matter of fact, the World Bank's Articles of Agreement were signed in 1944 prior to both the U.N. Charter and the Universal Declaration of Human Rights. Consequently, MDBs operate under a situation of lawlessness.

The new legal standards directly applicable to MDBs should be based on currently prevailing international human rights law principles. They should address, *inter alia*: MDBs' wrongful acts that directly violate human rights; MDBs' wrongful acts that are complicit in a state violation of human rights; MDBs' actions that cause or force states to violate human rights; and MDBs' wrongful acts that facilitate or make possible private violations of human rights.

The European Court of Human Rights ("European Court") has developed legal approaches for holding MDBs accountable for wrongful acts and acts that result in human rights violations, and has provided guidance for the creation of standards more generally. In the *Waite & Kennedy* case, the Court addressed the question of jurisdictional immunity of international organizations.⁸¹ According to

81. See generally *Waite v. Germany*, App. No. 26083/94, Eur. Ct. H.R. (1999) (determining the human rights compatibility of grants of jurisdictional immunity to

the Court, States would circumvent the purposes of the European Convention of Human Rights by giving certain competencies to international intergovernmental organizations and then granting them immunity for exercising those competencies if the States were thereby relieved of their own accountability.⁸² In the *Matthews* case,⁸³ while confirming its previous reasoning,⁸⁴ the Court added that member States' responsibility continues after the transfer of competences to international intergovernmental organizations, which is not prohibited under the Convention since the rights thereunder continue to be 'secured.'⁸⁵

Because states currently are ultimately responsible for MDBs' wrongful acts, states should seriously pursue MDBs' direct responsibility for the purpose of preventing or limiting their own individual responsibility before international tribunals. Indeed, the ECOSOC recommended that obligations under the Convention should be considered in all aspects of a member state's negotiations with international financial institutions, in order to ensure that Convention rights are not undermined.⁸⁶

The direct attribution of responsibility to MDBs can be achieved by changing the existing rules on the law of responsibility to encompass MDBs' direct responsibility for human rights violations that occur as a result of projects that they have financed. In so doing, the international legal framework will be developed progressively in accordance with the existing circumstances surrounding the influence of MDBs in developing countries.

international organizations).

82. *Id.* ¶ 67.

83. *See generally* *Matthews v. United Kingdom*, App. No. 24833/94, Eur. Ct. H.R. ¶ 31 (1999) (concerning "whether the United Kingdom can be held responsible under the Article 1 of the Convention for the absence of elections to the European Parliament in Gibraltar, that is, whether the United Kingdom is required to 'secure' elections to the European Parliament notwithstanding the Community character of those elections").

84. *Id.* ¶¶ 31-35 (finding that, because contracting States retain responsibility for securing rights within the European Convention, the United Kingdom was responsible for the violation of those rights).

85. *Id.* ¶ 32.

86. ECOSOC, *Conclusions and Recommendations, Jordan*, ¶ 28, U.N. Doc. E/C.12/1/Add.46 (2000).

1. *Responsibility of MDBs Before International Tribunals*

The attribution of responsibility to MDBs may be justified on several grounds. As stated in Part II, MDBs do possess an international legal personality, and are therefore capable of possessing rights and obligations under international law.⁸⁷ One of the derivative features of this personality is the capacity to bear international responsibility in certain cases.⁸⁸ Responsibility is a natural corollary of possessing rights and duties under international law.

MDB responsibility can be justified on general principles of international law.⁸⁹ These principles “derive from common rules drawn from the major legal systems of the world, which are appropriate for application in the international community.”⁹⁰ General principles of international law serve as a particularly dynamic source of law that has a significant value in those spheres in which there is not yet enough state practice to crystallize into customary international law.⁹¹

Moreover, the principle that international organizations may be held internationally responsible has developed firmly into a rule of customary international law.⁹² According to legal authorities, “[t]he element of ‘practice’ is evidenced by the practice of international organizations and states, and the element of *opinio juris* is clearly evidenced by the overwhelming opinions of writers and the decisions of international institutions.”⁹³ It is important to highlight that

87. See generally U.N. Service Reparations, *supra* note 26, at 179 (concluding that the United Nations possesses international legal personality and may make claims against states).

88. See BROWNLIE, *supra* note 10, at 419 (“In international relations . . . the invasion of the legal interest of one subject of the law by another legal person creates responsibility in various forms . . .”).

89. Cf. MOSHE HIRSCH, THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS TOWARDS THIRD PARTIES: SOME BASIC PRINCIPLES 9 (1995) (attributing international responsibility to states based on general principles of international law).

90. *Id.* at 37.

91. *Id.*

92. *Id.* at 9.

93. *Id.* at 9-10 (citations omitted).

international law governs the international character of an international organization's wrongful acts.⁹⁴

The ILC has also codified the principles of international law governing the responsibility of international organizations under the Draft Articles on the Responsibility of International Organizations. These principles should play a critical role when considering the responsibility of MDBs as international organizations. According to the ILC, the essentials of the responsibility of international organizations are: (1) a breach of an international obligation by the international organization and (2) attribution of that breach to an international organization under international law.⁹⁵ As stated earlier, with respect to state responsibility, these essentials are the necessary corollary of the principle that “[e]very internationally wrongful act of an international organization entails the international responsibility of the international organization.”⁹⁶

International organizations such as MDBs are responsible for the acts of their agents and organs when acting in that capacity. Accordingly, international legal principles support the notion that “[t]he conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law whatever position the organ or agent holds in respect of the organization.”⁹⁷

In the *Loizidou* case, the European Court established responsibility through agents as a governing principle with regards to international organizations.⁹⁸ Though this principle was established concerning state responsibility, *mutatis mutandis* it is suitable for the application in the sphere of international organizations such as MDBs. As an international organization, the international responsibility of an MDB

94. INT'L L. ASS'N. COMM. ON ACCOUNTABILITY OF INT'L ORGS., REPORT OF THE SEVENTY-FIRST CONFERENCE 27 (2004) (dismissing as relatively unimportant the way in which the “internal legal order” of an international organization might characterize that organization's act).

95. U.N. Int'l L. Comm'n, *Draft Articles 1, 2 and 3*, *supra* note 33, art. 3(2).

96. *Id.* art. 3(1).

97. U.N. Int'l L. Comm'n, *Responsibility of International Organizations - Titles and Texts of the Draft Articles 4, 5, 6, and 7 Adopted by the Drafting Committee*, art. 4, U.N. Doc. A/CN.4/L.648 (May 27, 2004).

98. *Loizidou v. Turkey*, App. No. 15318/89, Eur. Ct. H.R. ¶ 52 (1996).

is thus compromised by the acts of its agents and organs outside the territory of the state in which it is based.

According to the ILC, “[t]here is a breach of an international obligation by an international organization when an act is not in conformity with what is required by that obligation.”⁹⁹ International obligations arise not only from treaties but also from other sources of international law as enunciated in Article 38 of the ICJ Statute, especially from unwritten law such as customary international law and general principles.¹⁰⁰ For instance, many human rights obligations arising out of the Universal Declaration of Human Rights have crystallized in binding rules of customary international law.¹⁰¹ Additionally, the ECOSOC can intervene where there are patterns of systematic gross human rights violations even though there is no treaty violation.¹⁰²

Finally, international tribunals can be embodied with jurisdiction over MDBs in order to directly determine their human rights responsibility via amendments to central human rights treaties and the creation of new legal standards. According to contemporary treaty law rules, international tribunals can exercise jurisdiction over contracting parties, since they have ratified human rights treaties and accepted their contentious jurisdiction.¹⁰³ Since MDBs possess a distinct legal personality under international law, they are capable of becoming parties of the concerned human rights system if the rules are changed to allow them to satisfy the indicated requirements.

If it is concluded that MDBs cannot meet the formal requirements for granting jurisdiction to international tribunals, a ‘functional treaty succession’ from states parties to the concerned MDB may be performed.¹⁰⁴ Indeed, such succession existed with respect to the

99. U.N. Int’l L. Comm’n, *Responsibility of International Organizations - Titles and Texts of the Draft Articles 8-16 Adopted by the Drafting Committee*, art. 8, U.N. Doc. A/CN.4/L.666/Rev.1 (June 1, 2005).

100. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter ICJ Statute].

101. CLAPHAM, *supra* note 62, at 86.

102. Alston, *supra* note 50, at 39.

103. *See, e.g.*, American Convention, *supra* note 34, art. 62 (declaring that state parties to the American Convention are subject to the binding jurisdiction of the Inter-American Court of Human Rights once they ratify the Convention and declare their recognition of that jurisdiction).

104. *See, e.g.*, Vienna Convention on Succession of States in Respect of

succession relationship between European Community and its Member States under the General Agreement on Tariffs and Trade.¹⁰⁵ According to the European Court of Justice, under the European Economic Community Treaty, “the Community has assumed the powers previously exercised by Member States in the area governed by the General Agreement, [and thus] the provisions of that agreement have the effect of binding the Community.”¹⁰⁶ Consequently, this functional succession could be relevant with respect to states that may transfer their human rights obligations to international inter-governmental organizations such as MDBs.

IV. MDBS' APPROACHES WITH REGARD TO HUMAN RIGHTS ISSUES

MDBs are part of larger international organizations in which human rights protection, as established by their constituent charters, plays a critical role in guiding the actions of their organs and agents. For instance, the World Bank's parent organization is the United Nations. The World Bank is a specialized agency of the United Nations by virtue of the agreement entered into with the ECOSOC¹⁰⁷ in accordance with related Articles of the U.N. Charter.¹⁰⁸ The U.N. Charter expressly calls for the universal respect of human rights and

Treaties, Aug. 23, 1978, 1946 U.N.T.S. 3 (describing the ways in which one state succeeds another in treaty obligations).

105. Reinisch, *supra* note 1, at 83.

106. International Fruit Co. et al. v. Produktschap voor Gruenten en Fruit (Joined Cases 21-24/72), 1972 E.C.R. 1219, 1227.

107. Agreement between the United Nations and the International Bank for Reconstruction and Development art. 1(2), Apr. 15, 1948, 109 U.N.T.S. 341 (“The Bank is a specialized agency established by agreement among its member Governments and having wide international responsibilities, as defined in its Articles of Agreement, in economic and related fields within the meaning of Article 57 of the Charter of the United Nations. By reason of the nature of its international responsibilities . . . the Bank is, and is required to function as, an independent international organization.”).

108. See U.N. Charter, art. 57 (stating that specialized agencies are those intergovernmental organizations operating in conjunction with the United Nations and pursuant to Article 63 of the Charter). Article 63(2), in turn, provides that ECOSOC “. . . may co-ordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations.” *Id.* art. 63(2).

fundamental freedoms without discrimination,¹⁰⁹ as well as for cooperation with the United Nations for the achievement of this purpose.¹¹⁰ As such, the World Bank should adopt the obligation to respect the human rights purposes and principles of the Charter of its parent organization.¹¹¹

There is no express provision in MDBs' constituent instruments preventing their involvement with human rights issues. The so called 'political prohibition' cannot be used as a valid 'legal' excuse to avoid international human rights obligations.¹¹² The 'political prohibition' doctrine was construed based on a restrictive interpretation of Article IV, Section 10 of the IBRD and Article 5, Section 6 of the International Development Association ("IDA") Articles of Agreement. Interpreting these provisions in 1990, the World Bank's General Counsel stated that they exclude political considerations and prohibit the Bank from taking non-economic considerations into account.¹¹³

The World Bank itself has recognized the interconnection between its operations and human rights protection. The outgoing World Bank General Council released a legal opinion in January 2006, recognizing that the balance has now shifted in favor of protecting human rights.¹¹⁴ Furthermore, the General Counsel concluded that

109. *Id.* art. 55(c)

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: . . . (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Id.

110. *Id.* art. 56.

111. See DARROW, *supra* note 38, at 125 (describing the explicit obligation that the Bank has to follow the decisions of the U.N. Security Council, and the resulting implicit obligation to follow the U.N.'s lead with respect to human rights violations).

112. CLAPHAM, *supra* note 62, at 143.

113. See generally Ibrahim F.I. Shihata, *Issues of "Governance" in Borrowing Members – The Extent of Their Relevance under the Bank's Articles of Agreement*, in IBRAHIM F. I. SHIHATA, *THE WORLD BANK LEGAL PAPERS* ch. 10 (2000).

114. See generally ROBERTO DANINO, *GENERAL COUNSEL OF THE WORLD BANK, LEGAL OPINION ON HUMAN RIGHTS AND THE WORK OF THE WORLD BANK* (Jan. 27, 2006) (on file with author) ("The World Bank's objectives and activities are deeply supportive of the substantive realization of human rights.").

the Articles of Agreement allow the Bank to acknowledge the human rights dimensions of its policies and operations.¹¹⁵

This legal opinion constitutes a clear progressive evolution from the pre-existing restrictive legal interpretation of the World Bank's approach to human rights. According to the World Bank's General Counsel, the opinion "is 'permissive': allowing, but not mandating, action on the part of the Bank in relation to human rights."¹¹⁶ It makes "the state of the law" clear and permits the Bank to properly update its internal legal stance according to the current international legal order.¹¹⁷

The World Bank has also recognized the benefits of its involvement with the human rights obligations of its member states. According to a recent statement of the current World Bank General Council in October 2006, "[t]he World Bank's role is a facilitative one, in helping [its] members realize their human rights obligations."¹¹⁸ If the World Bank views its role in this way, then respecting human rights obligations should not create negative externalities.¹¹⁹

MDBs have developed operational policies on specific themes, but they do not reflect accepted international human rights related standards. There is no doubt that MDBs "choose their own definitions and standards of human rights, influenced by but rarely based directly on internationally agreed standards."¹²⁰ These decisions respond to what is politically acceptable within and among an MDB's member states.¹²¹ For instance, the IADB has adopted an Operational Policy on Indigenous Peoples that does not reflect the

115. *Id.* ¶ 25.

116. Ana Palacio, *The Way Forward: Human Rights and the World Bank* (2006), available at <http://go.worldbank.org/RR8FOU4RG0>.

117. *Id.*

118. *Id.*

119. *Id.* (asserting that consideration of human rights obligations "would not be the basis for an increase in Bank conditionalities, . . . an obstacle for disbursement, [or an] increase [to] the cost of doing business").

120. U.N. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Interim Report on the Promotion and Protection of Human Rights*, ¶ 53, U.N. Doc. E/CN.4/2006/97 (2006) (prepared by John Ruggie) [hereinafter U.N. H.R. & Transnat'l Corp. Rep.].

121. *Id.*

existing international standards on the collective rights of indigenous peoples.¹²²

MDBs have also developed inspection mechanisms for accountability purposes. Some scholars note that, “[I]legally, these mechanisms have turned out to be effective forums in which adversely affected persons can raise claims that relate to their rights as indigenous people or as involuntarily resettled people.”¹²³ But from an international human rights law perspective, they are not effective in addressing human rights violations resulting from their financed-projects. The U.N. Secretary-General’s Special Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises has also found these mechanisms to be ineffective.¹²⁴

This Part provides guidance for the ongoing discussions on whether MDBs’ operational policies reflect international human rights standards, as well as whether MDBs’ inspection mechanisms are effective. First, this Part identifies well-accepted international standards regarding the collective rights of indigenous peoples, which should contribute to the progressive development of the existing operational policies on indigenous peoples. Next, this Part identifies the essentials of the right to an effective remedy as established under international human rights law as critical factors to be considered when determining the effectiveness of MDBs’ inspection mechanisms from an international law point of view.

A. OPERATIONAL POLICIES ON INDIGENOUS PEOPLES

MDBs have developed operational policies on specific themes, such as indigenous peoples. These policies apply to the “design, appraisal, and/or implementation of [MDB] operations, funded in whole or part by [their] loans or grants.”¹²⁵ For instance, the IADB

122. See generally INDIAN L. RES. CTR., COMENTARIOS AL BORRADOR DE POLÍTICA OPERATIVA SOBRE PUEBLOS INDÍGENAS PUBLICADO POR EL BANCO INTERAMERICANO DE DESARROLLO, July 29, 2005, available at <http://www.indianlaw.org/main/resources/mdb>.

123. Bradlow, *supra* note 54, at 410.

124. See U.N. H.R. & Transnat’l Corp. Rep., *supra* note 120, ¶ 53 (explaining that, despite some work in the right direction by transnational corporations, protections are still incomplete and lack uniformity).

125. Bradlow, *supra* note 54, at 422.

adopted the 'Operational Policy on Indigenous Peoples' ("OP-765") on February 22, 2006; the World Bank adopted the 'Revised Operational Policy and Bank Procedure on Indigenous Peoples' ("OP/BP 4.10") on May 10, 2005; and the IFC adopted 'Performance Standard 7 Indigenous Peoples' on April 30, 2006.

Some of the themes addressed through MDBs' operational policies were already well-established in international human rights law. For instance, when applying human rights treaties the supervisory bodies considered the rights of indigenous peoples extensively, especially within the Inter-American System.¹²⁶ The human rights standards developed by the supervisory bodies are particularly relevant when considering the rights of indigenous peoples vis-à-vis MDB financed-projects, especially extractive industry projects.

A number of human rights law principles specifically protect the rights of indigenous peoples.¹²⁷ These rights deal with several issues of relevance for the well-being of indigenous peoples as distinct peoples. With respect to extractive industry projects on indigenous lands financed by MDBs, the most important rights include property rights to land and natural resources and the right to self-determination. Additionally, as a procedural guarantee, the free, prior, and informed consent of indigenous peoples plays a critical role in ensuring states' compliance with the duty to respect the aforementioned rights. These rights are of a collective nature, and are critical for the survival of indigenous peoples' government and society. The U.N. Declaration on the Rights of Indigenous Peoples states that "indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples."¹²⁸

126. See generally INDIAN L. RES. CTR., COMENTARIOS AL BORRADOR DE LA POLÍTICA OPERATIVA SOBRE PUEBLOS INDÍGENAS PUBLICADO POR EL BANCO INTERAMERICANO DE DESARROLLO (2005).

127. See, e.g., U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, pmbl., U.N. Doc A/RES/61/295 (Sept. 13, 2007) ("[I]ndigenous peoples are equal to all other peoples.")

128. See *id.*; see also OAS, Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples, art. VI(1), GT/DADIN/doc.301/07 (Apr. 27, 2007) (containing draft language that eventually ended up in the U.N. Declaration).

The following sections of this Part address the question of the international standards on the collective rights of indigenous peoples as developed by human rights instruments and supervisory bodies, in order to identify and determine their extension. MDBs should not only consider these internationally well-established standards when drafting their operational policies, but they should also use them when investigating and making recommendations to their Boards of Directors on specific projects through their inspection mechanisms.

1. Property Rights to Land and Natural Resources

Indigenous peoples' property rights to land and natural resources are critical in assuring their physical and cultural survival as distinct peoples within existing nation-states. According to political leaders, "[w]ithout their land base, [indigenous peoples] may be able to survive as individuals in the dominant economy and culture of their [non-indigenous] neighbors, but they will not be able to survive and prosper as distinct peoples with distinct cultures and traditions."¹²⁹ It is clear that "governments throughout the Americas, led by Europeans and their descendants, have sought to expropriate, allot, and control [indigenous] land and resources as a means of assimilating [indigenous peoples]."¹³⁰ Consequently, legislation and policies built on the presumption of European superiority over native culture are no longer sustainable.

A number of rules of international human rights law protect indigenous peoples' property rights to land and natural resources. First, international treaty law rules guarantee the protection of indigenous peoples' property rights to land and natural resources, including the International Labor Organization ("ILO") Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries.¹³¹

129. See generally Armstrong Wiggins, *Indian Rights and the Environment*, 18 YALE J. INT'L L. 345, 348 (1993) (discussing the rights of Indian tribes in Central and South America) [hereinafter Wiggins, *Indian Rights and the Environment*].

130. *Id.*

131. See International Labor Organization, Convention concerning Indigenous and Tribal Peoples in Independent Countries, art. 14(1), ILOLEX C169 (June 27, 1989).

The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the

Second, international customary law rules protect indigenous peoples' right to lands and natural resources. In this regard, it is important to note that the U.N. Declaration on the Rights of Indigenous Peoples contains several rules of customary international law on indigenous issues. For instance, Article 26 of the U.N. Declaration on the Rights of Indigenous Peoples affirms that indigenous peoples have ownership, development, use, and control rights over lands and resources that the people have traditionally owned, occupied, or used, and that the state should give legal recognition to these rights.¹³²

Third, general principles of international law also protect indigenous peoples' collective property rights to lands. Numerous national constitutions in Latin American countries have a specific provision related to such recognition and protection, including Argentina, Bolivia, Guatemala, Ecuador, Mexico, Nicaragua, Panama, Paraguay, and Peru.¹³³ Even the United States appears to concede the importance of these property rights. In a statement at the OAS, the U.S. affirmed that "[i]ndigenous peoples should have the collective right to lands that they own or occupy, including sub-surface resources. States should give legal recognition to such lands and resources and this recognition should be conducted with due

peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

Id.; see also *id.* art. 15(1) (addressing the right of indigenous people to the natural resources on their land).

132. See U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 127, art. 26 (requiring that the state respect the indigenous peoples' traditional customs and system of land ownership).

133. CONSTITUCION DE ARGENTINA art. 75.17; REPUBLICA DEL BOLIVIA CONSTITUCION DE 2009 art. 171; REPUBLICA DE GUATEMALA CONSTITUCION DE 1985 CON LAS REFORMA DE 1993 arts. 67-68; REPUBLICA DEL ECUADOR CONSTITUCIONES DE 2008 art. 84.2; CONSTITUCION POLITICA DE LOS ESDADOS UNIDOS MEXICANOS art. 27.VII, *as amended*, Diario Oficial de la Federacion [D.O.], 5 de Febrero de 1917, (Mex.); CONSTITUCION POLITICA DE LA REPUBLICA DE NICARAGUA [Cn.] art. 89, La Gaceta [L.G.] 9 January 1987, as amended by Ley No. 330, Reforma Parcial a la Constitucion Política de la Republica de Nicaragua, Jan. 18, 2000, L.G. Jan. 19, 2000; CONSTITUCION POLITICA DE LA REPUBLICA DE PANAMA art. 123; REPUBLICA DE PARAGUAY CONSTITUCION POLITICA DE 1992 art. 64; CONSTITUCION POLITICA DEL PERU 1993 CON LAS REFORMAS DE 1995, 2000, 2002, 2004, Y 2005 (HASTA OCTUBRE) art. 89.

respect to the customs, traditions, and land tenure systems of indigenous peoples.”¹³⁴

Finally, international human rights treaty bodies have strongly recognized the rights of indigenous peoples to their land and natural resources. For example, the Inter-American Court has developed consistent case law on this matter by recognizing indigenous peoples’ collective property rights to lands.¹³⁵ In the *Awas Tigni* case, the Court acknowledged that “[a]mong indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community.”¹³⁶ Consequently, the Court concluded that Article 21 of the American Convention also protects the collective nature of indigenous peoples’ property rights to land.¹³⁷

The U.N. Special Rapporteur on Indigenous Peoples has also clearly proclaimed indigenous peoples’ permanent sovereignty over their natural resources, including sub-surface resources. According to the Special Rapporteur, it “might properly be described as a collective right by virtue of which the State is obligated to respect, protect, and promote the governmental and property interests of indigenous peoples (as collectivities) in their natural resources.”¹³⁸ The Special Rapporteur acknowledged that, “in the absence of any

134. United States Delegation, Remarks at the Tenth Meeting of Negotiations in the Quest for Points of Consensus of the OAS Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples: Principles on the Rights of Indigenous Peoples, ¶ 5, OEA/Ser.K/XVI, GT/DADIN/doc.295/07, corr. 1 (Apr. 27, 2007) [hereinafter Principles on the Rights of Indigenous Peoples].

135. See *Sawhoyamaxa Indigenous Community v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 222 (Mar. 29, 2006) (finding that denial of land rights to the Sawhoyamaxa is detrimental to the community’s values); *Yakye Axa Indigenous Community v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 157-58 (June 17, 2005) (remarking that the right to live in ancestral territory flows from the right to life); *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶¶ 104, 139 (Aug. 31, 2001) (accepting the Commission’s argument that the failure to adopt measures protecting the land and resources of the Awas Tingni violated Articles 1 and 2 of the Convention).

136. See *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149.

137. *Id.* ¶ 148.

138. U.N. Special Rapporteur, Erica-Irene A. Daes, *Indigenous Peoples’ Permanent Sovereignty over Natural Resources*, ¶ 40, E/CN.4/Sub.2/2004/30 (July 13, 2004).

prior, fair and lawful disposition of the resources, indigenous peoples are the owners of the natural resources on or under their land and territories.”¹³⁹ The Special Rapporteur further recognized that, “[i]ndigenous peoples, if deprived of the natural resources pertaining to their lands and territories, would be deprived of meaningful economic and political self-determination.”¹⁴⁰

Accordingly, there is a clear duty to respect the aforementioned indigenous property rights. The Inter-American Court defined this duty as including two obligations. First, states have a positive obligation to demarcate and title indigenous lands.¹⁴¹ Second, states have a negative obligation to prevent their agents or third parties from acting in ways that might affect the indigenous territory.¹⁴²

2. *Right to Self-Determination and Self-Government*

The right to self-determination also plays a critical role in assuring the involvement of indigenous peoples’ government in the decision-making process regarding projects that might affect their collective interests, such as land and natural resources. The right to self-determination includes the right to self-government, which implies the collective right to exercise full authority over land and natural resources. Private and governmental outsiders must be prepared to respect the authority and decisions stemming from the relevant indigenous customary law and decision-making institutions.

Generally speaking, international conventions have established the right to self-determination of peoples.¹⁴³ In particular, indigenous peoples’ right to self-determination is recognized by international human rights law principles, such as the principles established under the ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries.¹⁴⁴ Additionally, the U.N. Declaration on

139. *Id.* ¶ 54.

140. *Id.* ¶ 58.

141. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 153.

142. *Id.*

143. *See, e.g.*, ICCPR, *supra* note 58, art. 1 (granting universally the right to self-determination, and specifically addressing the right to engage in different forms of development and to pursue various “means of subsistence”).

144. *See* Convention Concerning Indigenous and Tribal Peoples in Independent Countries, *supra* note 131, art. 7 (affirming the rights of indigenous people to

the Rights of Indigenous Peoples recognizes indigenous peoples' right to self-determination¹⁴⁵ and self-government.¹⁴⁶ Finally, the U.N. Declaration on the Rights of Indigenous Peoples also establishes the right of indigenous peoples to participate in decision-making processes dealing with matters that might affect their collective interests.¹⁴⁷

Some states have adopted the same approach. According to the United States, states should recognize "that indigenous peoples have the collective right to self-determination within the nations in which they reside," which means the right to self-government in matters relating to their internal affairs, including economic activities, land and resource management, and the environment.¹⁴⁸

Based on the above, it is clear that the right to self-determination of indigenous peoples is a collective right deeply connected with property rights to land and natural resources. By virtue of these rights, indigenous peoples should participate in the decision-making process related to projects that might affect their collective interests. Consequently, the concerned indigenous people must be consulted by the corresponding state agency when reviewing instruments for environmental assessment dealing with extractive industry projects financed by MDBs and developed on indigenous lands.

3. *The Question of Free, Prior, and Informed Consent*

Prior to the approval of any extractive industry project financed by MDBs within indigenous lands, the corresponding environmental state agency has to consult with the potential project-affected

direct and control their own development).

145. See U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 127, art. 3. This instrument represents the most updated legal statement on indigenous self-determination as it was recently adopted by the U.N. General Assembly on September 13, 2007. *Id.*

146. See *id.* art. 4 ("Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.").

147. See *id.* art. 18 ("Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.").

148. Principles on the Rights of Indigenous Peoples, *supra* note 134, ¶ 3.

indigenous community as early as possible. When seeking indigenous peoples' consent, the consent must include all of the following factors: (1) "free", in the sense that the consent should be given without coercion, duress, bribery, or any threat or external manipulation; (2) "prior", in that the consent should be given before each decision-making stage in the project's planning and implementation; and (3) "informed", meaning that the consent should be given only after the project-affected indigenous community has been provided with all material information related to the project in an appropriate language and format.¹⁴⁹ It is important to emphasize that free, prior, and informed consent ("FPIC") is a procedural guarantee—not a substantial right—recognized in favor of indigenous peoples whose land and natural resources might be affected by extractive industry projects. Therefore, it does not act as a substitute for substantive rights in play, such as property rights to land and natural resources, and the right to self-determination.

FPIC has relevant legal effects in the context of processes created for environmental assessment purposes. This is true because it recognizes: (1) the prerogative of indigenous peoples to prohibit, control, or authorize projects to be developed within their lands and territories or related to their natural resources; and (2) the prerogative of indigenous peoples to prohibit, control, or authorize projects that will not take place within their land, but might substantially affect their land, territories and natural resources, or might otherwise affect their human rights.¹⁵⁰

International human rights law principles clearly establish the importance of FPIC of indigenous peoples with regards to land and natural resource rights. The U.N. Declaration on the Rights of Indigenous Peoples states that "[s]tates shall consult and cooperate in

149. See Armstrong Wiggins, Staff, Indian Law Resource Center, Address at U.N. Permanent Forum on Indigenous Issues: Indigenous Peoples' Right of Free Prior and Informed Consent with Respect to Indigenous Lands, Territories and Resources (Jan. 17-19, 2005); see also Armstrong Wiggins, Moderator, Free Prior Informed Consent For Indigenous Peoples and Local Communities: A Briefing for World Bank Executive Directors (June 14, 2004) available at http://www.bicusa.org/Legacy/FPIC_briefing_documents.pdf.

150. See Wiggins, *Indian Rights and the Environment*, supra note 129, at 348-349 (observing that, although Indians may eventually threaten their home environments in much the same way that others do, Indian communities have "successfully fought to keep the regions green").

good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”¹⁵¹ Furthermore, according to Article 15(2) of ILO Convention 169, states “shall establish or maintain procedures through which they shall consult [indigenous] peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.”¹⁵²

Finally, human rights supervisory treaty bodies have also recognized the critical role of FPIC in assuring the respect of indigenous peoples’ substantial rights. The Inter-American Commission on Human Rights stated in the *Dann* case that states should take the necessary steps to ensure recognition of the communal property rights of the indigenous people, and to ensure that such rights were not waived without FPIC.¹⁵³

Based on the above, the corresponding state agency must carry out a special consultation considering the appropriate indigenous community’s native language, customary law, and self-determined decision-making institutions. Only by virtue of such consultation and the project-affected indigenous community’s involvement can the state agency’s project be deemed to have been implemented in accordance with the collective rights and procedural guarantees of international human rights law.

B. INSPECTION MECHANISMS

MDBs have created inspection organs for internal ‘accountability’ purposes. For instance, the World Bank created the Inspection Panel in 1993,¹⁵⁴ the IADB shaped the Independent Investigation

151. U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 127, art. 32(2).

152. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, *supra* note 131, art. 15(2).

153. *Mary & Carrie Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report 75/02, ¶ 131 (2002).

154. Bradlow, *supra* note 54, at 409.

Mechanism in 1994,¹⁵⁵ and the IFC established the office of the Compliance Advisor/Ombudsman in 1999.¹⁵⁶ Through these inspection organs it is possible to hold MDBs accountable for actions that cause or threaten to cause serious harm to affected complainants, and actions that are inconsistent with MDBs' own operational policies and procedures.¹⁵⁷ It is important to highlight that they did so not because of their own political will, but rather as a result of a considerable demand for accountability from project-affected people.¹⁵⁸

These inspection mechanisms do not effectively address human rights violations because they do not match the right to an effective remedy under international human rights law. Furthermore, even if these mechanisms do resolve human rights issues related to an MDB financed-project, such an outcome only benefits the specific project-affected people—not others in the same situation. On the contrary, the decisions adopted by human rights treaty bodies benefit other people in circumstances similar to those addressed in individual cases. This is true not only because of the *erga omnes* concept governing international human rights law,¹⁵⁹ but also in light of the fact that apart from the condemned state, other state parties of the human rights system are starting to comply with those decisions even if they are not the condemned party of the concrete case.¹⁶⁰

155. *Id.* at 420.

156. *Id.* at 432.

157. *Id.* at 408.

158. *Id.* (observing that many non-state actors viewed “MDBs’ ability to escape accountability [as] incompatible with the principles of good governance being advocated by the [banks] themselves”).

159. THE INTER-AMERICAN COURT HAS ADDRESSED THE QUESTION OF THE *ERGA OMNES* OBLIGATIONS BY STATING THAT THE PRINCIPLE OF EQUALITY AND NON-DISCRIMINATION, WHICH CONSTITUTES A *JUS COGENS* NORM, “ENTAILS OBLIGATIONS *ERGA OMNES* OF PROTECTION THAT BIND ALL STATES AND GIVE RISE TO EFFECTS WITH REGARD TO THIRD PARTIES, INCLUDING INDIVIDUALS.” ADVISORY OPINION 18/03, JURIDICAL CONDITION AND RIGHTS OF THE UNDOCUMENTED MIGRANTS, INTER-AM. CT. H.R. (SER. A) NO. 18, ¶ 110 (SEPT. 17, 2003).

160. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court Of Justice], 14/06/2005, “*Simón, Julio Héctor y otros s/ privación ilegítima de la libertad*” (Arg.); Juzgado Federal de Buenos Aires, 19/03/2004, “*Suarez Mason, Guillermo y otros s/homicidio agravado, privación ilegal de la libertad agravada*” (Arg.) (taking into account the Inter-American Court’s decision in the *Case of Barrios Altos v. Peru* concerning impunity laws); *see also* CSJN, 7/04/95, “*Girolodi Horacio David y Otro S/Recurso de Casación*” (Arg.) (stating that the

The organs charged with carrying out the inspection are not independent from the MDBs themselves. Indeed, because of the fact that the mechanisms are internal—not external from the MDBs themselves—the inspection organs have to report to the decision-making body. Nevertheless, there is a growing opinion that these mechanisms are ‘independent’ based on their independence from the organization’s management, as well as their reporting requirements.¹⁶¹

These inspection organs do not constitute international tribunals specialized in human rights law, and they therefore do not adjudicate legal issues. Generally speaking, international tribunals possess contentious and advisory competence concerning legal issues,¹⁶² and are comprised of judges.¹⁶³ Therefore, their decisions are final for,¹⁶⁴ and legally binding on, the parties of the case.¹⁶⁵ On the other hand, MDBs’ inspection organs do not meet all these requirements. First, they do not have jurisdictional functions since they are allowed to

Inter-American Court’s jurisprudence “must serve as a guide” for the interpretation of treaty law insofar as the Argentine state recognizes the Inter-American Court’s jurisdiction to adjudicate in all cases concerning the interpretation and application of the American Convention on Human Rights).

161. See Bradlow, *supra* note 54, at 410-11 (noting that MDBs report to the member-state authorities with decision making power).

162. See, e.g., European Convention, *supra* note 34, art. 32(1) (“The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33 [Inter-State cases], 34 [Individual applications] and 47 [Advisory opinions].”).

163. For example, the Inter-American Court on Human Rights consists of seven judges. According to Article 4(1) of its Statute: “The Court shall consist of seven judges . . . elected in an individual capacity from among jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions under the law of the State of which they are nationals or of the State that proposes them as candidates.” OAS, Statue of Inter-American Court on Human Rights, art. 4(1), O.A.S. Res. 448 (IX-0/79) (Oct. 1979).

164. See, e.g., ICJ Statute, *supra* note 100, art. 60 (“The judgment is final and without appeal.”).

165. This is the case with the ICJ’s decisions on legal disputes. Article 59 of the ICJ Statute provides that “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.” *Id.* Thus, it would appear, the object of Article 59 is simply to prevent legal principles accepted by the Court in a particular case from being binding on other States or in other disputes.

process only requests submitted by project-affected individuals for the purpose of inspecting MDBs' compliance with operational policies and procedures.¹⁶⁶ Second, they do not consist of judges. Many of their current decision-makers are not attorneys, and they are not required to have a prior judicial experience in domestic jurisdictions.¹⁶⁷ Finally, their decisions are neither final nor binding since their reports on submitted claims are meant to inform MDBs' executive directors whether the MDBs have complied with operational policies.¹⁶⁸ Thus, since these reports are not judgments themselves, they cannot be considered final or legally binding from a technical viewpoint.

The inspection organ's reports regarding complaints do not constitute case law concerning human rights. Some scholars believe that the "inspection mechanisms are slowly beginning to provide data and precedents that can influence the evolution of international human rights law."¹⁶⁹ Since the inspection organs are not international tribunals, their reports do not constitute judicial decisions—a subsidiary means for the determination of rules of law according to the ICJ Statute¹⁷⁰ (which lists all the sources of international law).¹⁷¹ Consequently, the reports in question can be regarded neither as authoritative evidence of the state of the law,¹⁷² nor as judicial precedents concerning human rights.

166. See World Bank, Res. No. IBRD 93-10 (Resolution Establishing the Inspection Panel) ¶ 12, Sept. 22, 1993 [hereinafter World Bank Inspection Panel] ("The [Inspection] Panel shall receive requests for inspection presented to it by [a party] . . . affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank . . .").

167. For example, members of the World Bank Inspection Panel are required only to have certain independence of the World Bank's Management, as well as knowledge on the World Bank's operations. See *id.* ¶ 4.

168. This is the case of the World Bank Inspection Panel's report. See *id.* ¶ 22 (requiring that Panel reports address the Bank's success in complying with its policies and procedures).

169. Bradlow, *supra* note 54, at 410.

170. See ICJ Statute, *supra* note 100, art. 38(1)(d) (allowing the Court to use judicial decisions as a secondary and additional interpretational source when hearing disputes that come before it).

171. BROWNIE, *supra* note 10, at 5.

172. *Id.* at 19 (stressing that judicial decisions, the only "subsidiary" source of law mentioned in Article 38(1)(d) of the ICJ Statute, are not even themselves a formal source of international law). That the ICJ Statute does not mention other

These inspection organs do not make the final decisions on the issues addressed under their inspection function capacity. In fact, at the conclusion of their inspections, they submit only a written report with findings and recommendations to MDBs' decision-makers regarding the financed-project under investigation. This is the case in the World Bank,¹⁷³ IADB¹⁷⁴ and IFC.¹⁷⁵ Generally speaking, the Board of Directors and the President of the concerned MDB are the final decision-makers who decide whether and how to proceed with the MDB-financed project in question.

There is no organ in charge of supervising the implementation of the decisions taken by the MDBs' boards of directors, including the inspection organs in question. As a matter of fact, most of these inspection organs lack the authority to supervise the implementation of the decision-makers' decisions or remedial actions on their submitted reports—only the IFC's inspection organ has been given such power.¹⁷⁶ Furthermore, the World Bank itself has expressly prohibited its inspection organ from monitoring action plans concerning implementation. According to the World Bank, “[t]he Board should not ask the [Inspection] Panel for its view on other aspects of the action plans nor would [sic] it ask the Panel to monitor the implementation of the action plans.”¹⁷⁷

1. *The Right to an Effective Remedy*

The elements of the right to an effective remedy are critical factors to be considered when analyzing the ineffectiveness of MDBs' inspection mechanisms from an international law point of view. In

sources of “subsidiary” international law is telling.

173. See Bradlow, *supra* note 54, at 417 (stating that once the investigation is complete, the Inspection Panel submits its report to the Executive Directors and the President of the Bank).

174. See *id.* at 423 (stating that at the end of the investigation carried-out within the Independent Investigation Mechanism, the Panel submits its findings and recommendations in a written report to the Board of Executive Directors and to the President).

175. See *id.* at 436 (asserting that the findings of the Compliance Advisor/Ombudsman are presented to the President of the World Bank Group in a report).

176. *Id.* at 461.

177. World Bank, *1999 Clarification of the Board's Second Review of the Inspection Panel*, Recommendation 16 (Apr. 20, 1999).

particular, the elements should be considered when evaluating complaints that project-affected people file before investigative organs in order to assess whether those people are provided with prompt, judicial, and effective protection in cases involving human rights violations. The right to an effective remedy has at least two elements: (1) an effective and prompt remedy must exist, and (2) that remedy must meet the procedural requirements of due process of law.

The right to an effective remedy is one of the most important rights recognized under international human rights law. Based on its indissoluble interconnection with the due process of law, the right to an effective remedy plays a critical role in assuring a prompt, judicial, and effective protection of substantial legal rights recognized in national constitutions and human rights treaties. As stated earlier, MDBs' inspection mechanisms do not provide such protection.

The main regional human rights treaties, such as the American Convention and the European Convention, recognize the right to an effective remedy as a fundamental right.¹⁷⁸ Moreover, the right has been recognized so extensively and so frequently in international treaties and other instruments that it must be considered as customary international law. For example, the Universal Declaration of Human Rights, which reflects customary law on human rights, states the right to an effective judicial remedy in Article 8.¹⁷⁹ Similarly, the U.N. Declaration on the Rights of Indigenous Peoples, which provides the most recent statement on the international law of the

178. See American Convention, *supra* note 34, art. 25 (providing that all persons have a right to "simple and prompt" or "any other effective" recourse for violation of other rights under the Convention, and obligating states to ensure that such recourse is made available within the legal framework of the state); European Convention, *supra* note 34, art. 13 ("Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.").

179. See Universal Declaration of Human Rights, *supra* note 67, arts. 8, 10 (stating that "[e]veryone has a right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law," and that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him").

rights of indigenous peoples, includes a right to an effective judicial remedy in Article 40.¹⁸⁰ The American Declaration on the Rights and Duties of Man also contains a provision on effective judicial remedies,¹⁸¹ and the Inter-American Court has determined that the American Declaration expresses the human rights obligations that all members of the OAS, including the United States, have assumed as parties to the OAS Charter.¹⁸²

The notion of the right to an effective remedy depends on the nature of the violation to be addressed by means of a legal claim. It refers to the adequacy and effectiveness of a remedy within a certain legal system. According to the Inter-American Court, “[a]dequate domestic remedies are those which are suitable to address an infringement of a legal right.”¹⁸³ In addition, the Court opined that an effective remedy is a remedy “capable of producing the result for which it was designed.”¹⁸⁴ Therefore, according to this notion, a remedy needs to be not only adequate but also effective at protecting legal rights.

180. See U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 127, art. 40 (granting to indigenous peoples the right to prompt and fair legal remedies, and providing further that legal processes take into account “the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights”).

181. See American Declaration on the Rights and Duties of Man, arts. XXIV, XVIII (adopted by the Ninth International Conference of American States (March 30 - May 2, 1948), OAS Res. 30, OAS Doc. OEA/Ser.L./V./I.4, rev. (1965)) (stating that “[e]very person has the right to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon” and that “[e]very person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights”).

182. See Advisory Opinion OC-10/89, Interpretation of the American Declaration of the Rights and Duties of Man, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶¶ 35-45 (July 14, 1989); *James Terry Roach & Jay Pinkerton v. United States*, Case 9647, Inter-Am. C.H.R., Annual Report 1986-1987 ¶¶ 46-49 (1987) (holding that the United States bound itself to OAS instruments on human rights); *Rafael Ferrer-Mazorra et al. v. United States*, Case 9903, Inter-Am. C.H.R., Report No. 51/01 (2001) (holding a violation of articles I, II, XVIII, XXV of the American Declaration due to the detention of Cuban refugees).

183. *Case of Velásquez-Rodríguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 64 (July 29, 1988).

184. *Id.* ¶ 66.

In addition, the remedy must provide a prompt judicial decision in addressing whether there was a violation of a legal right. According to the European Court, three factors should be considered when determining the reasonableness of the time required to carry out a proceeding: (1) the complexity of the case, (2) the procedural activity of the interested party, and (3) the conduct of the judicial authorities.¹⁸⁵ The Inter-American Court has followed the same analysis,¹⁸⁶ and determined that is necessary to do a comprehensive analysis of the entire proceedings before domestic courts as an overall assessment.¹⁸⁷

Procedural guarantees such as the ‘amparo’ and *habeas corpus* are considered prompt remedies, since they are meant to provide a judicial determination of the right at issue in a reasonable time and without unnecessary delays. According to the Inter-American Court, the *amparo* “is a simple and prompt remedy designed for the protection of all of the rights recognized by the constitutions and laws of the States Parties and by the Convention.”¹⁸⁸ In this regard, *habeas corpus* (‘amparo of freedom’) is but one of its components and, as embodied in the Convention and in the legal systems of the States Parties, it functions as an independent remedy to protect the personal freedom of those who are being detained or who have been threatened with detention.¹⁸⁹

There is no consensus among regional human rights systems on whether the deciding body should be an actual court. As a matter of fact, while the American Convention requires the intervention of a “competent court or tribunal,”¹⁹⁰ the European Convention only calls for a “national authority,” which does not necessarily mean a court or tribunal.¹⁹¹ But, the European Court stated that if independent

185. Vernillo v. France, Eur. Ct. H.R., ¶ 30 (1991); Motta v. Italy, Eur. Ct. H.R., ¶ 16 (1991); Ruiz-Mateos v. Spain, Eur. Ct. H.R. art. I, ¶¶ 30-54 (1993).

186. Genie Lacayo Case v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 30, ¶ 77 (Jan. 29, 1997).

187. Suárez-Rosero v. Ecuador, Inter-Am. Ct. H.R. (ser. C) No. 35, ¶ 73 (Nov. 12, 1997).

188. Advisory Opinion 8/87, Habeas Corpus in Emergency Situations, Inter-Am. Ct. H.R. (ser. A) No. 8, ¶ 32 (Jan. 30, 1987).

189. Advisory Opinion 9/87, Judicial Guarantees in States of Emergency, Inter-Am. Ct. H.R. (ser. A) No. 9, ¶¶ 33-34 (Oct 6, 1987).

190. See American Convention, *supra* note 34, art. 25(2).

191. See European Convention, *supra* note 34, art. 13.

scrutiny of the claim need not be provided by a judicial authority, the national authority should be equipped with the “powers and guarantees” necessary to provide effective remedies to complainants.¹⁹²

Nevertheless, according to the governing principles in the Inter-American System, the rights considered by virtue of the remedy must be subject to a final judicial determination. Article 25 of the American Convention is entitled “Right to Judicial Protection,” and clearly requires the intervention of a “competent court or tribunal for protection against acts that violate [peoples’] fundamental rights,” and further imposes upon states the duty “to develop the possibilities of judicial remedy.”¹⁹³ Indeed, there is consistent case law that interconnects the right to an effective remedy with due process of law guarantees, based on the general obligation of States Parties to respect the rights protected by the Convention.¹⁹⁴

A remedy can become ineffective because of several related factors, including: procedural requirements; internal conditions prevailing in the country;¹⁹⁵ a lack of reasoned decisions by the deciding body on the merits of the claim;¹⁹⁶ a lack of independence of the deciding body;¹⁹⁷ and a lack of a complete, serious, and impartial investigation of the acts.¹⁹⁸ The Inter-American Court has

192. *Chahal v. United Kingdom*, Eur. Ct. H.R., ¶ 152 (1996) (finding the remedies at issue ineffective where the national authority’s—the Home Secretary—decision could not be reviewed by another authority, only took into account risk and national security concerns, and failed to provide adequate procedural safeguards, such as the right to counsel).

193. American Convention, *supra* note 34, art. 25.

194. *See generally* *Case of Velásquez-Rodríguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 189 (July 29, 1988); *Fairen Garbi & Solís Corrales*, Inter-Am. Ct. H.R. (ser. C) No. 2, ¶ 90 (June 26, 1987); *Godínez Cruz v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 3, ¶ 93 (June 26, 1987).

195. *See generally* *Velásquez-Rodríguez*, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 80 (determining that procedural requirements can make the remedy of habeas corpus ineffective, provided that it was powerless to compel the authorities, represented a danger to those who invoke it, and it was not impartially applied).

196. *See* *Case of Carranza v. Argentina*, Case 10.087, Inter-Am. C.H.R., Report No. 30/97, ¶ 73 (1997) (stating that the logic of every judicial remedy indicates that the deciding body must specifically establish the truth or error of the claimant’s allegation).

197. *See* *Chahal*, Eur. Ct. H.R., ¶¶ 151-53.

198. *See* *Juan Carlos Abella v. Argentina*, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, ¶ 243 (1997) (establishing that Argentina failed to carry out an

added other possibilities, for example: when practice has shown the ineffectiveness of a remedy; when judicial power lacks the necessary independence to render impartial decisions or the means to carry out its judgments; or in any other situation that constitutes a denial of justice, such as when there is an unjustified delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy.¹⁹⁹

In spite of its legal recognition and external factors, a remedy could be considered effective if it truly can establish if there was a violation of a legal right. The Inter-American Court stated that “for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress.”²⁰⁰ In doing so, the Court emphasized the relevance of the element of effectiveness when considering if a certain remedy meets the applicable standards concerning the right to an effective remedy as set forth in the American Convention.

Based on the above, according to well-established principles of international human rights law, the right to an effective remedy implies a prompt, judicial and effective remedy capable of adequately leading to the determination of the rights in question.

CONCLUSION

The international legal framework needs to address the fact that human rights violations are taking place in developing countries as a result of projects financed by MDBs. It is clear that MDBs do possess distinct legal personality and that they operate on the international and domestic planes by virtue of projects financed for borrowing countries. However, the existing rules on the law of responsibility render MDBs immune from liability for wrongful acts that result in human rights violations. These rules need to be adjusted to reflect the on-going complex violations of rights protected by international human rights law.

immediate and exhaustive investigation in the place where the incident took place).

199. Advisory Opinion 9/87, *Judicial Guarantees in States of Emergency*, Inter-Am. Ct. H.R. (ser. A) No. 9, ¶¶ 34-41 (Oct 6, 1987).

200. *Id.* ¶ 24.

2010]

MULTILATERAL DEVELOPMENT BANKS

577

International human rights law must evolve according to the need for protection of minorities and vulnerable groups located in developing countries, especially indigenous peoples. Indeed, the human rights responsibility of MDBs is critical for the survival and well-being of indigenous peoples whose collective interests are affected by MDB-financed projects developed on their lands and territories. It is particularly true in respect of extractive industries projects, which are meant to explore and exploit the natural resources located on indigenous land.

Finally, the existing gap under international law needs to be filled with new rules in order to govern the human rights responsibility of MDBs. In this regard, the different sources of international law can play a critical role in establishing new standards. Treaty rules can promptly lead to an agreeable solution of the issue at hand by the main actors: states and MDBs as international organizations.