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### Multilateral Development Banks, Their Member States and Public Accountability: A Proposal

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# **Multilateral Development Banks, Their Member States and Public Accountability: A Proposal<sup>1</sup>**

Daniel D. Bradlow<sup>2</sup>

## *Abstract*

*More than 25 years ago the multilateral development banks (MDBs) began establishing independent accountability mechanisms (IAMs), such as the World Bank's Inspection Panel, to address concerns about MDB accountability to those communities and groups who were harmed by their decisions and actions. This essay argues that these mechanisms need updating. In the interests of promoting new and creative thinking about these mechanisms, it makes an ambitious two-part proposal designed to improve the efficacy of the IAMs, while also respecting the sovereignty of their member states and protecting an appropriate level of immunity for the MDBs. First, the MDBs should jointly create a super- IAM that can receive requests for investigations from people who allege that they have been harmed by the failure of any MDB to comply with its own policies and procedures. Second, the MDB stakeholders should create an independent fund, financed by contributions from individuals, corporations, foundations, states and international organizations, that can provide support to communities and individuals who the super-IAM found were harmed by a non-compliant MDB-funded project.*

One of the most significant developments in international affairs since the Second World War has been the expanding role of international organizations. They were designed to act with restraint, out of respect for the sovereignty of their member states, and in support of their member state's efforts to promote international peace and security, international economic cooperation and promote human welfare.<sup>3</sup> However, some of them are now actively engaged in performing such functions in their member states as peacekeeping; managing refugee camps; reviewing the performance of national financial sectors; financing and monitoring the implementation of development projects and programmes; giving policy advice and providing technical assistance.<sup>4</sup> This means that these organizations are making decisions that are directly affecting the lives of the citizens of their member states.

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<sup>3</sup>JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL ORGANIZATIONS LAW (3<sup>rd</sup> ed. 2015).

<sup>4</sup>*id.*

This evolution in their operations has implications for the relationship between individual international organizations and their member states and for their accountability to those who are affected by their operations.

The multilateral development banks (MDBs) provide a good illustration of these changes in the role of international organizations. They have evolved from institutions focused on merely funding specific projects into entities involved in a range of development financing and advisory activities in their member states. They have also become leaders in formulating, interpreting and applying standards for dealing with the environmental and social impacts of development projects. Consequently, their decisions are directly affecting the societies in which the projects and programmes they fund are located. These developments have raised concerns about how those communities or groups that are adversely affected by their operations can hold the MDBs accountable for their decisions and their impacts.

This essay will discuss how the MDBs<sup>5</sup> -- the World Bank Group, the African, Asian, and Inter-American Development Banks and more recently the European Bank for Reconstruction and Development, Asian Infrastructure Investment Bank and the New Development Bank – are dealing with the issue of accountability. It will argue that, although the MDBs have been leaders in promoting international organizational accountability, their mechanisms of accountability are not keeping up with the evolution in their operations. In the interests of promoting new and creative thinking about these issues, it will also make an ambitious proposal for how the MDBs jointly can more effectively meet the accountability challenge that they face while also respecting the sovereignty of their member states and protecting an appropriate level of immunity for the MDBs.

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<sup>5</sup>These are the most prominent MDBs and the most significant either globally or in their regions. Consequently, they are the focus of this article. For more information on these banks *see generally* THE WORLD BANK GROUP, <https://www.worldbank.org/> (last visited May 11, 2019); THE AFRICAN DEVELOPMENT BANK, <https://www.afdb.org/en/> (last visited May 11, 2019); THE ASIAN DEVELOPMENT BANK, <https://www.adb.org/> (last visited May 11, 2019); THE INTER-AMERICAN DEVELOPMENT BANK, <https://www.iadb.org/en/> (last visited May 11, 2019); THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT BANK, <https://www.ebrd.com/home/> (last visited May 11, 2019); THE ASIAN INFRASTRUCTURE INVESTMENT BANK, <https://www.aiib.org/en/index.html> (last visited May 11, 2019); THE NEW DEVELOPMENT BANK, <https://www.ndb.int/> (last visited May 11, 2019). For more information on the international law relating to the MDBs *see generally* DANIEL D. BRADLOW & DAVID HUNTER, INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW (2010). However, it is important to note that there are other MDBs, such as the Islamic Development Bank and sub-regional MDBs like the Corporación Andina de Fomento and the East African Development Bank.

The paper is divided into two parts. The first part will provide some background on the MDBs and their current approach to accountability. The second part discusses the proposal for improving MDB accountability.

### *Background on the MDBs*

The oldest MDB, the International Bank for Reconstruction and Development (IBRD or Bank), was created at the Bretton Woods conference in 1944 and opened for business in 1946.<sup>6</sup> It has been the model for all the MDBs created thereafter. Consequently, the points made below are applicable to all the MDBs listed above, even though the discussion focuses on the IBRD, which is the largest part of the World Bank Group.

When a state<sup>7</sup> joins the IBRD it is authorized to buy a certain number of shares in the Bank. The number of shares is determined by a formula that takes into account the size of the country's economy and its contribution to the global economy. The member state is only required to pay a small portion of the price of each share and to commit to provide the rest of the price if called upon to do so. Each member state's vote depends on the number of shares that it owns. This means that the Bank operates with a weighted voting system in which the member states do not have equal votes.<sup>8</sup>

At the time of its creation, the IBRD was a bold innovation in global finance. There had never been an institution like it. Consequently, there was considerable uncertainty about how effectively it would function. The first source of uncertainty was that the member states were sovereign states but they were joining an organization which would operate on the basis of weighted voting and not on the principle of the sovereign equality of states. This suggested that a state could find itself bound by a decision or action that it had specifically opposed.<sup>9</sup>

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<sup>6</sup> Articles of Agreement of the International Bank for Reconstruction and Development, July 22, 1944 [IBRD Articles of Agreement].

<sup>7</sup>Only sovereign states that are members of the International Monetary Fund can join the IBRD. See Art II (1), IBRD Articles of Agreement

<sup>8</sup>Daniel D. Bradlow, *International Law and the Operations of the International Financial Institutions*, in INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW 1 (2010).

<sup>9</sup>EDWARD S. MASON & ROBERT E. ASHER, *THE WORLD BANK SINCE BRETTON WOODS* (1973); DEVESH KAPUR, JOHN P. LEWIS AND RICHARD WEBB, *THE WORLD BANK: ITS FIRST HALF CENTURY* (1997).

The drafters of the Bank's Articles of Agreement sought to assure member states that the Bank would respect their sovereignty by stipulating that its staff would operate in a fair and objective way. They were specifically prohibited from being influenced by the political character of the member state and were instructed that their decision-making should only be based on economic considerations, which should be evaluated impartially.<sup>10</sup> The Articles also stipulate that the IBRD staff owe their loyalty to the Bank and that they cannot show any favour to any individual state.<sup>11</sup> These arrangements suggested that the Bank would focus their loan conditions on the economic and financial aspects of the projects they were funding and would defer to the borrower's decisions, which many states saw as part of their sovereign prerogatives, regarding the project's social, political, cultural and environmental implications.

A second source of uncertainty related to the fact that the IBRD would be operating within the territory of each of its member states. This created a risk that each member state could assert its jurisdiction over the Bank and interfere with its operations.<sup>12</sup> In other words, member states could use their sovereignty to undermine the multinational character and mission of the Bank and interfere with its ability to protect its rights as a creditor. In order to protect against this risk, the Articles granted the IBRD full immunity from the jurisdiction of its member states unless the Bank specifically waived its immunity.<sup>13</sup>

Over time, confidence in the IBRD and the other MDBs grew and these concerns were allayed. Slowly their role began expanding beyond merely providing finance for infrastructure projects in qualifying member states. They also began providing policy advice, technical assistance and funding for a broad range of development activities. They also began playing a more active role in the design and implementation of the projects and programmes that they financed. Their more active role created the possibility that their decisions could directly impact, and therefore cause harm to, the communities and social groups affected by their operations.<sup>14</sup>

These developments coincided with a growing general awareness of the need for project sponsors to account for all the significant social and environmental impacts of their projects.<sup>15</sup>

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<sup>10</sup> Article IV (10), IBRD Articles of Agreement.

<sup>11</sup> Article V (5)(c), IBRD Articles of Agreement.

<sup>12</sup> Klabbers, *supra* note 1.

<sup>13</sup> Article VII, IBRD Articles of Agreement.

<sup>14</sup> Kapur, Lewis and Webb, *supra* note 9; Bradlow, *supra* note 8.

<sup>15</sup> Daniel D. Bradlow, *Development Decision Making and the Content of International Development Law* 21 South African J. Human Rights 47-85 (2005) available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=788070](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=788070).

This means that they should assess these impacts in advance and should address them in their project design, implementation and management plans. It also means that their funders should make sure that the project sponsors have adequately assessed and addressed all these impacts before they commit to funding the projects. This pushed the MDBs to assume an active role in overseeing their borrowers' assessments of the social and environmental impacts of the projects that they funded. They also formulating more detailed operational policies and procedures (OPPs) to help their borrowers and staff understand each particular MDB's approach to these issues.<sup>16</sup>

The MDBs faced a challenge when they took on this new role. There were only a few universally accepted principles that were applicable to these environmental and social issues. The most accepted requirement was that each project sponsor must conduct an environmental and social impact assessment (ESIA) before deciding to undertake the project.<sup>17</sup> However, there were not internationally agreed and universally accepted standards on how to allocate the costs and benefits associated with the identified impacts. Historically, this decision was viewed as a sovereign prerogative.

It is important to note that there are international legal standards that are widely accepted and are applicable to the management of some of these issues. For example, almost all the MDB member states have signed and ratified international human rights conventions.<sup>18</sup> These conventions stipulate what rights individuals have. They also make clear that the ultimate obligation to respect, protect and promote human rights rests with the state. However, they are stated in general terms and they do not clarify how the responsibilities to deal with human rights in a particular project or transaction should be managed. They also do not address, with any specificity, how these responsibilities should be shared between the state, the borrower, the

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<sup>16</sup> The World Bank, *Policies and Procedures: Operations Manual* <https://policies.worldbank.org/sites/ppf3/Pages/Manuals/Operational%20Manual.aspx> (last visited on May 11, 2019).

<sup>17</sup> See David. B. Hunter, *International Law and Public Participation in Policy-Making at the International Financial Institutions*, in INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW 199 (2010); DAVID HUNTER, JAMES SALZMAN, DURWOOD ZAEKLE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY (5<sup>th</sup> ed., 2015).

<sup>18</sup> See United Nations, *Human Rights*, <https://www.un.org/en/sections/issues-depth/human-rights/> (last visited on May 11, 2019); Office of the High Commissioner for Human Rights (OHCHR), *The Core International Human Rights Instruments and their Monitoring Bodies*, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (last visited on May 11, 2019); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

project sponsor, and the funder in a particular project or transaction. This means, in effect, that each state, each borrower, each project sponsor and each funder must exercise its own discretion in determining whether to support a particular project, based on their assessment of the social and environmental impacts and how they will be managed. It also means that there is a high risk in complex projects with substantial social and environmental impacts that key project decision makers will be accused of making decisions that are not compliant with the applicable international standards. This is because the decisions are unavoidably being made in conditions of imperfect knowledge and they are inherently controversial.

It is therefore not surprising that the MDBs' engagement with these environmental and social issues generated tension between their rich member states and borrower member states.<sup>19</sup> The former group were strong advocates for implementing high environmental and social standards in MDB-funded projects. It should be noted that it was easy for these states to take this position because they do not borrow from the MDBs and so the MDBs would not be applying these standards to their projects.

The borrower member states who would have to assume the burden of complying with whatever standards the MDBs adopted were more cautious. They argued that it was their sovereign prerogative to decide how much environmental and social risk they would assume in their development projects and how they would allocate and manage these risks. They also contended that, pursuant to their Articles, the MDBs were required to only consider economic factors in their decision-making. They maintained that managing environmental and social issues requires making political judgements and so should be treated by the MDBs as political concerns. This meant that, from their perspective, the MDBs were exceeding their mandates by commenting on these issues.

This tension was exacerbated by the advocacy of both local and international civil society groups who opposed certain projects on environmental and social grounds. Since there was no obvious forum in which these groups could take their concerns and have them addressed on

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<sup>19</sup> Most of the MDBs divide their member states into categories indicating which states are eligible to borrow from the MDB and which are not. For example, the World Bank Group divides member states into different groups for purposes of determining eligibility to borrow based on GNI per capita: in general, member states with an annual GNI per capita below US\$12055 (2017 dollars) are eligible to borrow from the World Bank Group and those with an annual GNI per capita above US\$12056 (2017 dollars) are not eligible to borrow. *See*, World Bank Country and Lending Groups, <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups> (last visited on May 13, 2019).

their merits, they tended to take their campaigns to the media and to lobby their own countries' governments, politicians and World Bank Executive Directors. As a result, these campaigns became politicized and the source of serious reputational risk for the World Bank. This was demonstrated in the 1980s by the handling of such controversial World Bank projects as the Narmada Dam in India and road projects in the Amazon area of Brazil.<sup>20</sup>

To its credit, the World Bank responded creatively to this challenge by establishing the Inspection Panel.<sup>21</sup> This was the first mechanism in an international organization which non-state actors can utilize to hold the organization directly accountable for the consequences of its conduct.

The Inspection Panel is an independent three-member panel that is authorized to investigate complaints from any two or more people who claim they have been harmed or threatened with harm by the failure of the World Bank to comply with its OPPs. They are independent of the management of the Bank. Panel members are appointed for one non-renewable five-year term by the Bank's Board of Executive Directors (the Board) and they report directly to the Board. In addition, they can only be fired for cause by the Board.

The Panel is authorized to receive any request for an investigation from any two or more persons who allege that they have been harmed or threatened with harm by the Bank's failure to comply with its own OPPs. The Board decides whether to approve the request and authorize the Panel to investigate, based on a recommendation from the Panel. If the investigation is improved, the Panel, after conducting an independent investigation, submits its findings to the Board, which can accept or reject these findings. The Board will publicly release the Panel report and the management's response to the report after its deliberations on the report. The management is expected to develop an action plan for addressing any issues of non-compliance identified by the Panel.

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<sup>20</sup> Bradford Morse & Thomas R. Berger, *Sardar Sarovar- Report of the Independent Review*, INTERNATIONAL ENVIRONMENTAL LAW RESEARCH CENTRE, <http://ielrc.org/Content/c9202.pdf> (last visited on May 12, 2019); BRUCE REICH, *THE WORLD BANK AND THE POLITICS OF ENVIRONMENTAL DESTRUCTION* (2013)

<sup>21</sup>The World Bank Inspection Panel was established on Sept. 22, 1993, by IBRD Res. No. 93-10 and IDA No. Res. 93-6 of the Bank's Board, as reviewed, clarified and supplemented by the Board on October 17, 1996 in the "Review of the Resolution Establishing the Inspection Panel – 1996 Clarification of Certain Aspects of the Resolution", and April 20, 1999 in the "1999 Clarification of the Board's Second Review of the Inspection Panel"; IBRAHIM F. I. SHIHATA, *THE WORLD BANK INSPECTION PANEL: IN PRACTICE* (2<sup>nd</sup> ed., 2000); Daniel Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, 34(3) VIRGINIA J. INT'L LAW (1994).



It is important to note that the Panel only investigates the compliance of the Bank staff with the OPPs and does not look into the conduct of the borrower or of any other actor in the project. Since the Panel does not investigate its member states, it does not implicate their sovereignty.

After the World Bank established the Inspection Panel, the other MDBs created their own independent accountability mechanisms (IAMs)<sup>22</sup>. They all have the same basic approach to independence and to investigating non-compliance by their staff with the applicable OPPs.<sup>23</sup> Over time, cooperation between the IAMs has grown. They have now formed a network that meets once a year to share information and experiences.<sup>24</sup> As part of this meeting, they also meet with a counterpart network that consists of civil society groups that have an interest in these mechanisms.

More than 25 years have passed since the first IAM was established. Consequently, there has been sufficient time to assess the IAMs' strengths and weaknesses.<sup>25</sup>

The most obvious contribution of the IAMs is that they provide a means for holding those with authority accountable for the way in which they exercise their authority.<sup>26</sup> Thus, they have

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<sup>22</sup>See, for example, THE AFRICAN DEVELOPMENT BANK- INDEPENDENT REVIEW MECHANISM (IAM), <https://www.afdb.org/en/independent-review-mechanism/> (last visited on May 12, 2019); THE ASIAN DEVELOPMENT BANK- ACCOUNTABILITY MECHANISM, <https://www.adb.org/site/accountability-mechanism/main> (last visited on May 12, 2019); THE INTER-AMERICAN DEVELOPMENT BANK- INDEPENDENT CONSULTATION AND INVESTIGATION MECHANISM, <https://www.iadb.org/en/mici/independent-consultation-and-investigation-mechanism> (last visited on May 12, 2019); THE ASIAN INFRASTRUCTURE INVESTMENT BANK- PROJECT-AFFECTED PEOPLE'S MECHANISM, <https://www.aiib.org/en/policies-strategies/operational-policies/policy-on-the-project-affected-mechanism.html> (last visited on May 12, 2019); THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT- PROJECT COMPLAINT MECHANISM, <https://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism.html> (last visited on May 12, 2019).

<sup>23</sup> However, in addition to investigating compliance with the applicable OPPs, the IAMs at the other MDBs – but not the Inspection Panel – also undertake dispute resolution. This means that they use their good offices to deal with disputes between affected communities and the MDB's borrower. These dispute resolution procedures are entirely voluntary.

<sup>24</sup>INDEPENDENT ACCOUNTABILITY MECHANISMS NETWORK, <http://independentaccountabilitymechanism.net/> (last visited on May 12, 2019).

<sup>25</sup> This paper will not focus on their substantive work which would require an analysis of their cases, which is beyond the scope of this paper. For examples of cases in which Inspection Panel has produced benefits for requesters see, Chapter 3 and 4 relating to the Jamuna Bridge project and the Uganda Hydropower project in THE WORLD BANK, ACCOUNTABILITY AT THE WORLD BANK: THE INSPECTION PANEL (2003). But cases before the Inspection Panel do not always bring satisfactory results for requesters- see DANA CLARK, JONATHAN A. FOX AND KAY TREAKLE, DEMANDING ACCOUNTABILITY: CIVIL SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL (2003)..

<sup>26</sup>D. Bradlow and A. Naude Fourie, *The Operational Policies and Procedures of the World Bank and the International Finance Corporation: Creating Law-Making and Law Governed Institutions*, 10 International Organizations Law Review 3 (2013)

encouraged the management and staff of the MDBs to place greater emphasis on complying with their institution's OPPs as a way of demonstrating that they are exercising their decision-making authority responsibly. This is sometimes expressed in the World Bank as "Panel-proofing" a project.<sup>27</sup> This increased focus on OPP-compliance should help ensure that the MDBs are performing their mandates as effectively as possible.

The IAM's also contribute to the MDBs learning all the lessons that they can from their operations. In this regard, the IAMs offer the MDBs a unique opportunity. They are the only entity within the MDBs whose work is initiated by groups or communities that have been adversely affected by the projects that the MDBs fund. Consequently, they are able to offer the MDBs unique insights into their operations and the impact they have at a community level. It is important to recognize in this regard, that in many cases, the cause of the MDB staff's failure to comply with the OPPs is that they are operating in complex environments with imperfect knowledge. As a result, the risk that, despite acting with great professional responsibility and judgement, they will make decisions that turn out to be sub-optimal, is not insignificant. The lessons learned function of the IAMs helps reduce this risk. It also helps the Bank staff and management learn how well their OPPs are functioning and to identify any weaknesses in the OPPs. The IAMs therefore should help the MDBs ensure that their OPPs are fit for purpose.

Third, the IAMs contribute to making the MDBs more transparent. In order for the IAMs to function effectively, it is necessary that the banks make their OPPs publicly available. As a result, it is easier for outside stakeholders to learn more about the way in which the MDBs operate. In fact, in recent years, some MDBs have engaged in extensive public consultations about their OPPs.<sup>28</sup>

The IAMs are also facing some challenges. The first is that the tension that the IAMs created between borrower and creditor member states has persisted.<sup>29</sup> This is due in part to borrower

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<sup>27</sup>Jonathan A. Fox, *The World Bank Inspection Panel: Lessons from the First Five Years*, 6(2) GLOBAL GOVERNANCE 279, 310 (2000).

<sup>28</sup>The World Bank, Environmental and Social Framework, <http://documents.worldbank.org/curated/en/383011492423734099/pdf/114278-WP-REVISED-PUBLIC-Environmental-and-Social-Framework.pdf> (2017); THE WORLD BANK- PROJECTS AND OPERATIONS: ENVIRONMENTAL AND SOCIAL FRAMEWORK, <https://www.worldbank.org/en/projects-operations/environmental-and-social-framework> (last visited on May 12, 2019).

<sup>29</sup>See, for example, A. Ebrahim and S. Herz, *Accountability in Complex Organizations: World Bank Responses to Civil Society* Working Paper 08-027, Harvard Business School, (2007) available at: [https://www.hbs.edu/faculty/Publication%20Files/08-027\\_18c99232-358f-456e-b619-3056cb59e915.pdf](https://www.hbs.edu/faculty/Publication%20Files/08-027_18c99232-358f-456e-b619-3056cb59e915.pdf)

states' ongoing concerns that the IAMs are unwittingly contributing to undermining their sovereignty and that they are causing problems for their governments. One reason is that complaints to the IAMs can lead to the requesters getting additional project benefits that are not available to communities and groups that have been adversely affected by non-MDB funded projects. Another is a concern that the government's political opponents may use the IAMs to embarrass the government. This issue is important for the efficacy of the IAMs because one of their key contributions should be that they help to depoliticize disputes arising from MDB funded projects.

There are two reasons to think that these tensions may now be more amenable to resolution. The first is that in a recent US Supreme Court case, Jam v IFC,<sup>30</sup> the Court ruled that, at least in US courts, international organizations have the same restricted immunity as states. The decision leaves many unanswered questions about the scope of MDB immunity and so increases the risk of litigation against MDBs with a presence in the US or in states that may choose to adopt a similar approach. This means that borrower countries now face the real possibility that their MDB-funded projects could end up in foreign courts, with unpredictable and potentially embarrassing outcomes. Based on the limited available jurisprudence<sup>31</sup> and international human rights standards, the best way for them to avoid this unfortunate possibility is for the MDBs to provide those adversely affected by their operations with a meaningful remedy that courts could view as equivalent to a judicial remedy.

The second, is that because of climate change, there is a growing appreciation around the world of the importance of accounting for the environmental and social impacts of projects.<sup>32</sup> Consequently, there should be increased willingness from all states to have the MDBs, which are generally seen to have state of the art OPPs, comply with these standards.

Another important and complex challenge pertains to the situation in which the IAM's investigation confirms that the relevant MDB has failed to comply with the applicable OPPs and that this has caused harm. In this case, the MDB management develops an action plan that

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<sup>30</sup>Jam v. International Finance Corp., 586 U. S. \_\_\_ (2019).

<sup>31</sup>See for instance, Waite and Kennedy v. Germany, App. No. 26083/94 Eur. Ct. H.R. (1999).

<sup>32</sup>See for instance, Network for Greening the Financial System, *First Comprehensive Report: A Call for Action- Climate change as a Source of Financial Risk*, [https://www.banque-france.fr/sites/default/files/media/2019/04/17/ngfs\\_first\\_comprehensive\\_report\\_-\\_17042019\\_0.pdf](https://www.banque-france.fr/sites/default/files/media/2019/04/17/ngfs_first_comprehensive_report_-_17042019_0.pdf) (last visited on May 12, 2019).

is intended to correct or mitigate the harm caused by the MDB.<sup>33</sup> However, the cost of implementing this plan in effect is either paid by the borrower or the other borrowing member states even though the problem was caused by the MDB. The reason is that, unless the borrower pays for the implementation itself, the MDB's action plan will be financed either by increasing the size of the borrower's loan or, by the MDB itself paying the costs. In either case these resources will be drawn from the MDB's existing pool of available funds thereby diminishing the amount available to other borrowing member states. Unfortunately, under existing arrangements it is hard to avoid this situation because there is no other readily available pot of money that can assist the adversely affected community.

A fourth challenge for the IAMs is that in recent years the MDBs have increased the scale of their collaborations with each other.<sup>34</sup> As a result, there are now more projects that are being jointly funded by two or more MDBs. In many cases, these projects are governed by the OPPs of the project's lead MDB. This create sa risk that more than one IAM could receive a request for investigation from an affected community. In principle, each IAM will only investigate compliance with its own MDB's operational policies. The different IAMs might, therefore, either base their investigations and findings on different OPPs or on their own views of the lead MDB's OPPs. Either approach will increase the risk of inconsistent findings being made by the different IAMs in jointly funded projects.

The IAMs, the MDBs and their member states need to address these challenges without unduly restricting the MDBs ability to implement their mandates or undermining either the member states' sovereignty or the accountability of the MDBs. The next section discusses a proposal that achieves these objectives.

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<sup>33</sup>See THE WORLD BANK INSPECTION PANEL, <https://www.inspectionpanel.org/> (last visited on May 12, 2019); ANDRIA NAUDE FOURIE, THE WORLD BANK INSPECTION PANEL CASEBOOK (2014).

<sup>34</sup>See African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank Group, International Fund for Agricultural Development, Islamic Development Bank Group and the World Bank Group, *Multilateral Development Banks: Working together for more Effective Development Cooperation*, <https://www.adb.org/sites/default/files/mdb-brochure.pdf> (last visited on May 12, 2019); *Development Banks Working Together to Optimize Balance Sheets*, THE WORLD BANK (Dec. 22, 2015) <http://www.worldbank.org/en/news/press-release/2015/12/22/development-banks-optimize-balance-sheets>; *Multilateral Development Banks (MDBs) Announced a Joint Framework for Aligning their Activities with the Goals of the Paris Agreement*, THE WORLD BANK (Dec. 3, 2018) [http://www.worldbank.org/en/news/press-release/2018/12/03/multilateral-development-banks-mdbs-announced-a-joint-framework-for-aligning-their-activities-with-the-goals-of-the-paris-agreement?CID=CCG\\_TT\\_climatechange\\_EN\\_EXT](http://www.worldbank.org/en/news/press-release/2018/12/03/multilateral-development-banks-mdbs-announced-a-joint-framework-for-aligning-their-activities-with-the-goals-of-the-paris-agreement?CID=CCG_TT_climatechange_EN_EXT).

## *A Proposal for Improving MDB Accountability*

In brief, the first part of this two-part proposal is for all the MDBs to create one combined IAM that has the authority to receive requests for investigations from people who allege that they have been harmed by the failure of any MDB to comply with its own policies and procedures. The second part is to create an assistance fund that can provide support to help communities and individuals who are found by the IAM to have been harmed by a non-compliant MDB-funded project. Each aspect of this proposal is discussed in more detail below.

### *One IAM for all MDBs*

The proposal is that there should be one “super-IAM” (S-IAM) that can serve all the MDBs.<sup>35</sup> This S-IAM, which would be created by agreement between all participating MDBs, would be free-standing which means that it would be independent of all the MDBs. Since it would provide an accountability service to all the MDBs, each of them would contribute to its budget on a pro-rata basis according to the number of cases arising from each participating MDB. The MDB boards of directors would all vote to approve the members of the S-IAM. Each MDB would agree to second staff to it for a stipulated period, for example-three years.

This S-IAM would operate according to similar compliance review procedures as all the currently functioning IAMs. This means that it would be authorized to accept requests for investigation from any two or more persons who allege that they have been harmed or threatened with harm because of the failure of the MDB or MDBs funding a particular project to comply with the applicable OPPs. The S-IAM would determine for itself the eligibility of the request and, if found eligible, would investigate the issues raised in the request based on the applicable OPPs. The reports of the investigation would be submitted to the Board of Executive Director of the relevant MDB. The board would be required to either accept the findings of the S-IAM and ensure that the management develops an action plan that is designed to resolve the

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<sup>35</sup> All the existing IAMs except the World Bank Inspection Panel offer requesters the possibility of engaging in a voluntary dispute resolution process or a compliance review. This proposal only deals with compliance review. In principle, the proposal is compatible with either leaving each institution free to conduct its own dispute resolution process or with incorporating a dispute resolution process into the “super-IAM”. However, the appropriate structuring of a dispute resolution process in an IAM is a complex issue and it is not possible to do it justice within the space constraints of this paper. Consequently, dispute resolution is not discussed in this paper. See, Joshua M. Javits, *Internal Conflict Resolution at International Organizations*, 28(2)ABA J. LAB. & EMP. L.223-253 (2015) for more information on dispute resolution in an IAM.

cases of non-compliance identified in the report or to issue a public explanation of their reasons for rejecting the findings. As is the practice in almost all the current IAMs, the report would also be made available to the requesters at the same time as it is provided to the relevant board. The S-IAM would also monitor the implementation of the action plan in order to ensure that it in fact resolves the problems that it identified in its investigation report.

It is not unprecedented for one review mechanism to have the authority to deal with cases applying the rules of different international organizations. The ILO Administrative Tribunal is authorized to decide cases based on the human resource policies of each of the organizations that have accepted its authority to hear employment disputes. Currently, 57 organizations have agreed to use the ILO Administrative Tribunal for this purpose.<sup>36</sup>

This S-IAM offers a number of advantages. First, it clearly demonstrates that the MDBs are offering those who have been harmed by non-compliant projects a meaningful alternative to a judicial remedy. This should help reduce the risk of litigation created by the Jam v IFC case and thereby also help preserve the appropriate level of immunity for the MDBs. Second, because the S-IAM is gathering information from investigations at all the MDBs, it will develop a rich database of information on the implementation of the OPPs of the MDBs. This will contribute to the lessons learned function of the IAMs. The additional knowledge about how to assess and manage the social and environmental impacts should lead to improvements in the design and implementation of MDB funded projects and the formulation and interpretation of their OPPs. Third, it would mitigate the risk of inconsistent decisions in cases of jointly funded projects.

The S-IAM will have some costs. Most significantly, there is a cost associated with the fact that the IAM will not be located in any MDB. This means that it will lose the familiarity with the MDB that the current IAMs can gain from interacting with the MDB staff and management on a regular basis. There are two factors that suggest that this cost may not be significant. The first is that the staff of the S-IAM will be officials seconded from the various MDBs. Consequently, they will understand their own MDB well and so can help educate and inform the members of the S-IAM about the culture and operating practices of the MDB. In addition, many of the

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<sup>36</sup> For information on the ILO Administrative Tribunal, *see*: THE ILO ADMINISTRATIVE TRIBUNAL, <https://www.ilo.org/tribunal/lang--en/index.htm> (last visited on May 12, 2019).

members of the current IAMs do not serve on a full-time basis and so do not interact on a regular basis with the staff and management. In addition, since they only serve for a fixed term and only after not being employed in any capacity by the MDB for a set period before appointment, they are unlikely to have great familiarity with the MDBs staff and management when they join the IAM. They are also unlikely to develop it during their tenure.

A second potential cost is that the S-IAM will have a large number of cases and will therefore need a large budget and staff. There is no doubt that the S-IAM will need a larger staff and more resources than any one of the currently existing IAMs. However, it is reasonable to expect that the S-IAM will need a smaller staff than the sum of the total staff at the existing IAMs. The reason is that the S-IAM will have a full-time panel. The current arrangements at the IAMs involve part-time panel members. Thus, a smaller number of S-IAM panel members than the sum of the current total of IAM members should be possible. It is also possible that the more effective learning process that the S-IAM offers all the MDBs could result in less cases of non-compliant projects brought to the S-IAM than the total being brought to the current IAMs.

While the S-IAM will be larger than that at any of the existing IAMs, it will not result in a large permanent bureaucracy. The S-IAM staff will consist of panellists who have been appointed for fixed non-renewable terms and experts who are seconded for fixed periods of time from the various MDBs. Thus, the staff will all be temporary and will work with the expectation that they will be returning to their home MDB. It is important to note that the creation of the S-IAM need not lead to additional financial costs for each MDB. The reason is that the creation of the S-IAM, will allow each MDB to shut down its own IAM and use the funds for the S-IAM.

#### *An Assistance Fund*

The second part of this proposal is that that all the stakeholders in the MDBs should create an independent Assistance Fund (the Fund) that can accept contributions from individuals, corporations, foundations, states and international organizations. This Fund will provide assistance to communities that the S-IAM finds have been harmed by an MDB's failure to comply with the applicable OPPs. All the categories of potential contributors have expressed an interest in promoting both accountability at the MDBs and concern for the groups that have been harmed by the MDBs' failure to comply with their OPPs. Consequently, they should be willing to contribute to a Fund that is independent of the MDBs, and that can assist individuals

and communities who the S-IAM has found were harmed by the relevant MDB's failure to comply with its own OPPs. Any award made by this Fund will not require a finding that any particular party is to blame for the harm that they have suffered. Instead, it will be premised merely on the finding that they have suffered harm and need assistance.

It is important to note that independent international funds that can raise funds from both state and non-state actors to support specific purposes are not unprecedented. The following international funds allow for contributions by non-state actors: The Trust Fund for Victims at the International Criminal Court allows for individuals to contribute to the Trust Fund;<sup>37</sup> The Global Alliance for Vaccines and Inoculations (GAVI) accepts contributions from states, foundations, civil society organizations(CSOs), corporations, and individuals<sup>38</sup>; the Global Fund to Fight AIDS, TB and Malaria allows states, corps, foundations, and CSOs to contribute;<sup>39</sup> and the Global Partnership for Education accepts contributions from governments, international organizations, foundations and the private sector.<sup>40</sup>

The Fund, will be overseen by a Board of Directors. The board members will participate in their individual capacity and will be elected by all contributors to the Fund. The Board will outsource the investing of the corpus of the Fund and the management of its financial transactions to a fund manager.

The Board will also receive all requests for assistance. Any requester who submitted a request for investigation to the S-IAM and was found to have been harmed by the non-compliance of the relevant MDB will be eligible to file a request with the Fund. The request for assistance would include a copy of the report of the S-IAM finding that the requester has suffered harm because of the failure of the MDB to comply with its own OPPs and a motivation for the

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<sup>37</sup>See DONATIONS TO THE TRUST FUND FOR VICTIMS, <https://www.trustfundforvictims.org/en/your-support/make-a-donation> (last visited on May 12, 2019); Also see, Frederick Megret, *Justifying Compensation by the International Criminal Court's Victims Trust Fund: Lessons from Domestic Compensation Schemes*, 36 BROOK. J. INT'L L. (2010). For a more sceptical view see, David Scheffer, *The Rising Challenge of Funding Victims' Needs at the International Criminal Court*, JUST SECURITY (Dec. 3, 2018) <https://www.justsecurity.org/61701/rising-challenge-funding-victims-international-criminal-court/>.

<sup>38</sup>See FUNDING THE GLOBAL ALLIANCE FOR VACCINES AND INOCULATIONS (GAVI), <https://www.gavi.org/investing/funding/> (last visited on May 12, 2019).

<sup>39</sup>See FUNDING MODEL: THE GLOBAL FUND TO FIGHT AIDS, TB AND MALARIA, <https://www.theglobalfund.org/en/funding-model/> (last visited on May 12, 2019).

<sup>40</sup>See FUNDING THE GLOBAL PARTNERSHIP FOR EDUCATION, <https://www.globalpartnership.org/funding> (last visited on May 12, 2019).



amount of assistance being requested. In no case, can the request exceed the amount that the requesters would have received under the relevant MDB's OPPs. The decision to provide assistance will be made by the Fund's Board. In determining the amount of assistance, the Board will consider the severity of the harm suffered, and the amount of funds available that year for assisting requesters.

The rationale for the Fund is that it is not inherently unreasonable for a society to decide that since a particular project will produce benefits for the whole society over time, the social, environmental, economic, and financial costs of the project should be shared by the whole society. However, a problem arises when there has been a finding that a non-compliant MDB has contributed to the costs falling disproportionately on a particular group or community in the society. In this case, there is a basis for the international community providing the group or community with special assistance to deal with its "disproportionate" share of the costs.

The Fund enables the requesters to receive this assistance while avoiding the problems that would arise if the funds used to assist the affected group were contributed only by the relevant MDB. As indicated above, this could mean that the funds are ultimately paid by the borrower through an increase in the size of its loan or by the other borrower member states through reduced availability of financing. After all, this would be another way of imposing a disproportionate cost on one group of stakeholders in the MDBs.

### *Conclusion*

This paper has argued that the world in which the MDBs must operate has changed dramatically since the first MDBs were created. They now have detailed OPPs to deal with the social and environmental impacts of their operations that inform interested stakeholders about how they can expect the MDBs to deal with these impacts. In addition, based on international law and the evolving case law, the MDBs need to provide those who claim they have been harmed by the failure of the MDBs to act in compliance with these OPPs with a meaningful means of holding these MDBs accountable for their own failings. It therefore proposes that the MDBs create a super-IAM to replace their individual IAMs. This S-IAM would be authorized to receive and investigate claims from any of the MDBs. Its findings would be binding on the relevant MDB unless the board of that MDB provides a specific public explanation for their rejection of the findings.

In addition, in order to ensure that any community or group who has been harmed by the non-compliant acts of the relevant MDB is assisted to address its harm and that the assistance does not come at the expense of the relevant MDB's member states, the MDBs should create an independent Assistance Fund. The Fund should be authorized to receive contributions from any state or non-state actor. It should only be able to provide assistance in cases where there has been a finding of MDB non-compliance.

If the MDBs implement these two proposals, they will have created a structure that respects the sovereignty of their member states and the rights of all project affected groups and communities. It will also provide the basis for courts and member states governments to provide MDBs with an appropriate level of immunity.