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## International Financial Institutions and Their Human Rights Silent Agenda: A Forward-Looking View on the “Protect, Respect and Remedy” Model in Development Finance

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# **INTERNATIONAL FINANCIAL INSTITUTIONS AND THEIR HUMAN RIGHTS SILENT AGENDA: A FORWARD-LOOKING VIEW ON THE “PROTECT, RESPECT AND REMEDY” MODEL IN DEVELOPMENT FINANCE**

ANTONIO MORELLI\*

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## I. INTRODUCTION

The international community is still in the early stages of integrating a human rights regime into development finance to protect individuals and communities. This Article focuses on the progressive engagement of international financial institutions (IFIs)<sup>1</sup> with human rights law and policies, which is filling the endemic binary gap between investment prerogatives and social and environmental concerns. It conceptualizes and categorizes the field of development finance and human rights while simultaneously paving the way forward by providing guidelines for all relevant stakeholders.

The rapid evolution of multilateralism – particularly with regard to IFIs – generated a legal and governance gap in human rights protection. This is a fundamental challenge facing the 2030 sustainable development agenda,<sup>2</sup> given IFIs' dual goal of ending extreme poverty and promoting shared prosperity.<sup>3</sup> On the occasion of the launch of the new U.N. agenda at the seventieth session of the U.N. General Assembly in New York in 2015, Pope Francis directly appealed to international financial agencies to undertake a deeper engagement with sustainable development in order to topple poverty,

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1. See generally Daniel D. Bradlow, *International Law and the Operations of the International Financial Institutions*, in *INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW* 1, 1–3 (Daniel D. Bradlow & David B. Hunter eds., Kluwer Press, 2010) (defining IFIs through the listing of examples of certain IFIs and discussing the ways in which the dual character of IFIs is relevant to international law); Marc Uzan, *The Process Towards the New International Financial Architecture*, in *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* 408, 421–23 (Jean-Marc Coicaud & Veijo Heiskanen eds., U.N. Univ. Press, 2001) (stating the importance of the World Bank and the IMF and detailing how they, along with other IFIs, influence policy in order to positively influence the world economy).

2. See G.A. Res. 70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development*, at 1–4 (Oct. 21, 2015) (establishing the vision and goals set by the United Nations in the 2030 sustainable development agenda).

3. See World Bank Group (WBG), *Ending Poverty and Sharing Prosperity, Global Monitoring Report 2014/2015*, 35–36 (2015) (showing the dichotomy formed between a focus on human rights and a focus on “ending extreme poverty and promoting shared prosperity” by stating that especially in developing countries, economic growth may best be fostered in part through increasing labor and productivity).

exclusion, and dependence around the world.<sup>4</sup>

Analyzing development finance through the lens of human rights fosters an understanding of how IFIs have incorporated new goals and targets in their mandate, progressively embracing a broader concept of development up to and including the idea of sustainable and inclusive development. The launch of the U.N. Sustainable Development Goals<sup>5</sup> in 2015 was a prelude to two major events in development finance that shaped IFIs' mandate in line with sustainability and inclusion. First, the World Bank's October 2018 operationalization of the Environmental and Social Framework (ESF) within its policies set a new environmental and social risks management strategy to improve development outcomes, in line with other development institutions.<sup>6</sup> Second, the 2019 decision of the US Supreme Court on immunities and responsibilities of international organizations in *Jam v. International Finance Corp.* potentially altered IFIs' status under international law and their exposure to liability before domestic courts.<sup>7</sup> Consistent with this path, notwithstanding their original economic mandate, IFIs have adopted a silent agenda on human rights that mirrors the global effort to move toward sustainability.

This Article uses lessons from the fields of business and human rights policy development to examine the most salient aspects of development finance under the lens of the "Protect, Respect and Remedy" model.<sup>8</sup> The U.N. Business and Human Rights model sought

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4. See Pope Francis, Holy See, Address at the U.N. General Assembly (Sept. 25, 2015) ("The International Financial Agencies are [*sic*] should care for the sustainable development of countries and should ensure that they are not subjected to oppressive lending systems which, far from promoting progress, subject people to mechanisms which generate greater poverty, exclusion and dependence.").

5. See G.A. Res. 70/1, *supra* note 2, at 14 (listing the seventeen goals of the 2030 Agenda for Sustainable Development).

6. See World Bank Group, *Environmental and Social Framework*, 15–16 (Apr. 13, 2017) (giving an overview of the World Bank's Environmental and Social Framework and stating its objectives).

7. See *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 771–72 (2019) (holding that international development banks do not hold absolute immunity from suit under United States law, opening organizations like IFIs to suit depending on the activity in which they are engaging).

8. See John Ruggie (Special Representative of the U.N. Secretary-General), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, at 1, U.N. Doc. A/HRC/17/31

to address specific corporate issues in relation to their impact on human rights.<sup>9</sup> It constituted a framework for differentiated but complementary responsibilities comprising three essential pillars: first, the state's duty to protect against human rights abuses by third parties, which lies at the heart of international human rights law; second, the corporate responsibility to respect human rights, based on international rules and social expectations of the business sector; and third, the need for access to remedies (i.e., judicial redress for abuses.)<sup>10</sup> Business corporations, as economic subjects, have unique responsibilities, especially in fragile contexts where the insufficiency of domestic governance undermines human rights' protection.<sup>11</sup> The three pillars together create a complementary framework in which each supports the others in the endeavor of furthering sustainability.

*Mutatis mutandis*, applying the Protect, Respect and Remedy model to development finance, seeks to reduce adverse human rights consequences of governance misalignments in developing contexts.<sup>12</sup> Based on the business and human rights experience, it is possible to use lessons from corporate social responsibility to create a conceptual and policy framework common to all relevant stakeholders.<sup>13</sup> The

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(Mar. 21, 2011) [hereinafter *Guiding Principles on Business and Human Rights*] (explaining the three pillars of the "Protect, Respect and Remedy" Framework: (1) "the State duty to protect against human rights abuses"; (2) "the corporate responsibility to respect human rights"; and (3) "the need for greater access by victims to effective remedy").

9. See *id.* at 3–4 (stating that the Guiding Principles on Business and Human Rights were created after substantial research and investigation conducted into human rights abuses by businesses, leading to the eventual creation of the "Protect, Respect and Remedy" Framework).

10. *Id.*

11. See *id.* at 13 (commenting that a business' obligation to respect human rights exists independently of states' human rights obligations and goes above a business's compliance with national law, intertwining a state's obligations and choices whether or not to comply with their obligations to human rights with a business's responsibility to do the same).

12. See John Ruggie (Special Representative of the U.N. Secretary-General), *Protect, Respect and Remedy: A Framework for Business and Human Rights*, at 1, 6, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) [hereinafter *Protect, Respect and Remedy*] (stating that the three pillars foster a supportive community between government, business, and society which helps to align social policies of all three against the governance gaps which allow for human rights abuses).

13. See R.R. Baxter, *International Law in "Her Infinite Variety"*, 29 INT'L & COMP. L.Q. 549, 561–63 (1980) (suggesting that voluntary guidelines which leave

model is intended to have cumulative effects on each of the three pillars in order to more effectively combine business needs with human rights prerogatives.<sup>14</sup>

The proposed methodology aims to shed light on a sphere of international law that is still blurred by an undefined perimeter by providing an assessment of social and environmental rights in development finance, improving the theoretical framework, and strengthening IFIs' processes for its empirical success. IFIs can make a unique contribution by providing a systemic response that addresses governance gaps in multilateral cooperation at both the international and domestic levels. Though they do not have a political mandate or coercive powers, they do have – given their economic scope and the decentralized nature of the international community – a key role in leading the 2030 sustainable agenda and setting expectations and aspirations while bringing together all relevant stakeholders.<sup>15</sup> Not only does this Article provide a unique perspective on the recent developments state of the art in development finance and human rights, it also strikes a balance between these two opposite but conterminous fields in line with the U.N. sustainable development agenda.

The remainder of the Article sets forth a multi-part analysis of how

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room for legislation may create a framework that can apply to states, corporations, and the international community at large, leading to the positive human rights changes desired); LINDA SENDEN, *SOFT LAW IN EUROPEAN COMMUNITY LAW* 212–16 (2004) (stating that corporate codes of conduct relating to human rights may be a starting point for firmer universal frameworks in the future); Gustaaf M. Borchardt & Karel C. Wellens, *Soft Law in European Community Law*, 14 *EUR. L. REV.* 267, 309–12, 314–15 (1989) (detailing the ways in which soft law guidelines may pave the way for frameworks of law, binding on all parties, which encourage the development of human rights regulations); Tadeusz Gruchalla-Wesierski, *A Framework for Understanding “Soft Law”*, 30 *MCGILL L.J.* 37, 85–86 (1984) (introducing sanctions as a way in which international organizations may influence states' compliance with human rights obligations and codes of conduct).

14. *Guiding Principles on Business and Human Rights*, *supra* note 8, at 13 (“These Guiding Principles . . . could serve as a useful basis for building a cumulative positive effect that takes into account the respective roles and responsibilities of all stakeholders.”).

15. See G.A. Res. 70/1, *supra* note 2, ¶¶ 6–7, 11–13 (stating that the 2030 Agenda for Sustainable Development aims to create a new approach to sustainable development while reaffirming previous conference outcomes to work towards its ambitious goals).

to achieve this balanced framework. Part I defines states' duty to protect, analyzing developing countries' challenges and IFIs' limitations in furthering a human rights agenda vis-à-vis states' domestic jurisdiction and sovereign prerogatives. Part II describes IFIs' obligations under human rights law, tracing the evolution of the rights-based approach to development to the new ESF of the World Bank implemented in fall 2018. Part III identifies access to remedies for human rights violations in IFI-financed projects, analyzing quasi-judicial and judicial mechanisms available to affected people and the effect of *Jam v. International Finance Corp.* The alignment of the three pillars demonstrates that despite being economic institutions, IFIs are furthering a silent human rights agenda as they pursue their global challenge of ending poverty and promoting shared prosperity through sustainable solutions.

## II. STATES' DUTY TO PROTECT

The first pillar of the Protect, Respect and Remedy model is states' duty to protect human rights.<sup>16</sup> Sovereign states are the entities primarily subject to international law.<sup>17</sup> However, some of them lack the institutional capacity to build a sound framework for human rights protection.<sup>18</sup> Imbalances in domestic regulation are particularly evident in the dichotomy between countries that are members of the Organisation for Economic Co-operation and Development (OECD) and those that are not; in the latter, domestic standards of legal protection may align poorly with the international agenda.<sup>19</sup> Indeed,

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16. *Guiding Principles on Business and Human Rights*, *supra* note 8, at 4.

17. See Andrea Bianchi, *The Fight for Inclusion: Non-State Actors and International Law*, in *FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA* 39, 40–41 (Ulrich Fastenrath et al. eds., Oxford Univ. Press, 2011) (stating that while multiple types of entities have now become recognized under the international legal regime, the regime primarily recognizes states “as the bearers of rights and obligations”).

18. See *Protect, Respect and Remedy*, *supra* note 12, ¶ 14 (emphasizing that developing countries may not have the resources to implement a human rights regime and ensure its enforcement against transnational firms doing business in their territory).

19. See WORLD BANK ORGANIZATION & ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *INTEGRATING HUMAN RIGHTS INTO DEVELOPMENT: DONOR APPROACHES, EXPERIENCES, AND CHALLENGES* 110–12 (2d ed. 2013) (indicating that despite efforts which have been taken to aid states which

especially in developing countries, where governance structures are in the process of stabilizing, the rule of law tends to be weak and corruption tends to be prevalent.<sup>20</sup> An effective response should aim to reduce this gap. From this perspective, states' duty to protect is bi-dimensional, involving both law and policy.<sup>21</sup>

This section focuses on every country's duty to respect human rights based on general principles of international law and human rights agreements that have been domestically ratified. In the context of development finance, borrowing countries often encounter systemic problems in complying with their duty to protect.<sup>22</sup> For this reason, international organizations often serve as vehicles for furthering human rights at the domestic level as they assist domestic institutions with compliance mechanisms.<sup>23</sup> Depending on the income level defined in internal graduated policies, there are different levels of support that IFIs can provide to each client.<sup>24</sup> However, due to their

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are not members of the OECD, it appears that the frameworks which may be introduced are unable to be properly implemented, holding those countries back from maintaining a sustainable human rights regime).

20. See *Protect, Respect and Remedy*, *supra* note 12, ¶ 16 (stating that as of 2006, corporate human rights violations occurred at a disproportionately higher rate in lower income countries, countries either in or coming out of conflict, and countries where there is a weak rule of law).

21. See David M. Trubek et al., "Soft Law," "Hard Law," and European Integration: Toward Theory of Hybridity, U. WIS. L. SCH. LEGAL STUD. RES. PAPER SER., Nov. 2005, at 1–3 (recognizing that the regimes of "hard" and "soft" law may work best together in order to reduce the gap in domestic standards of legal protection between developed and developing countries); see also Kerstin Jacobsson, *Between Deliberation and Discipline: Soft Governance in EU Employment Policy*, in *SOFT LAW AND GOVERNANCE AND REGULATION: AN INTERDISCIPLINARY ANALYSIS* 81, 81, 85–88 (Ulrika Mörth ed., 2004) (introducing the Open Method of Coordination (OMC) as a new form of soft law that focuses on the political aspect of enforcement via cooperation, peer pressure, and peer governance to spur development of social policies across nations in an ongoing process).

22. See *Ending Poverty and Sharing Prosperity*, *supra* note 3, at 63, 67–68 (stating the vulnerability of low-income developing countries to economic shock when they do not have a properly autonomous economy in place).

23. See, e.g., *Integrating Human Rights into Development*, *supra* note 19, at 111 (stating that DFID and UNDP have each participated in poverty reduction strategies directly in Uganda).

24. See *id.* at 219–26 (explaining the ten principles IFIs should use when working to support human rights in their client countries).



economic mandate, IFIs, encumbered by a formalistic approach, have often been prevented from interfering with domestic political affairs.<sup>25</sup>

#### A. INTERNATIONAL MODELS FOR DEVELOPING COUNTRIES

States have a general duty to protect people in their jurisdiction against human rights abuses.<sup>26</sup> Under the international law of treaties, universal and regional human rights conventions require states, through binding or nonbinding formulas, to take all necessary steps to reach such a level of protection, including preventing, investigating, and punishing abuse and providing access to redress.<sup>27</sup>

The U.N. Guiding Principles on Business and Human Rights define states' duty to protect as a "standard of conduct."<sup>28</sup> Under this

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25. *E.g., id.* at 149–50 (stating that IFIs such as the World Bank, the African Development Bank, the Inter-American Development Bank, the Islamic Development Bank, and the International Finance Corporation (IFC) are required by their founding documents not to interfere in their member countries' politics).

26. *Guiding Principles on Business and Human Rights, supra* note 8, at 6 (stating that one of the Foundational Principles of the Guiding Principles on Business and Human Rights is that states have an obligation to protect against human rights abuses).

27. *See* Philip Alston, *The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, in *NON-STATE ACTORS AND HUMAN RIGHTS* 3, 20, 22–23 (Philip Alston ed., 2005) (discussing international personality and comparing the "moral" obligations of international organizations to those of states when it comes to human rights perspectives); *see also* Larry Catá Backer, *Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order*, 18 *IND. J. GLOBAL LEGAL STUD.* 751, 775–76 (2011) (stating that although one of the three pillars of the Protect, Respect and Remedy Framework is that states have an obligation to protect human rights, there are also obligations on non-state actors required by the framework); Bianchi, *supra* note 17, at 54 (stating that a new approach to corporate responsibility for human rights abuses is on the rise wherein states would be responsible for holding their corporate entities accountable for such abuses using their international authority as states); Anthony Clark Arend, *Do Legal Rules Matter? International Law and International Politics*, 38 *VA. J. INT'L L.* 107, 129 (1998) (providing that states and the structure of international law are "mutually-constitutive": the states' interactions create the structure of international law, which goes on to shape the identities of the states that themselves influence the way states act in the international theater).

28. *See* Justine Nolan, *Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights*, 30 *UTRECHT J. INT'L & EUR. L.* 7, 7–8 (2014) (positing that states have long had the responsibility of protecting human rights based upon international treaties and codes of conduct produced by the United

definition, a state's responsibility under human rights law is at stake only whenever an international wrongful act is attributable to it. On one hand, states should enact and deploy preventive and remedial measures, including appropriate policies, legislation, regulations, and adjudication. On the other hand, states should promote formal and substantial understanding of the rule of law in order to further equality before the law and apply it fairly through solid domestic governance and institutions. This is the way to secure, in turn, accountability, legal certainty, predictability, and transparency. Whenever a state fails to take necessary measures to prevent, investigate, punish, and redress abuses in its territory, it can be held internationally responsible.<sup>29</sup>

Operationalizing states' duty to protect can be particularly difficult in developing countries, where substantial procedural bottlenecks can hinder domestic stability and local capacity.<sup>30</sup> In order to address and

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Nations such as the Guiding Principles on Business and Human Rights); David Bilchitz, *A Chasm Between "Is" and "Ought"? A Critique of the Normative Foundations of the SRSG's Framework and Guiding Principles*, in HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 111–14 (David Bilchitz & Surya Deva eds., 2013) (arguing that if states have the obligation to prevent human rights abuses within their territory, and that obligation extends to the prevention of human rights abuses by third parties, then all third parties are thereby inherently obligated to prevent human rights abuses); see also Robert C. Blitt, *Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance*, 48 TEX. INT'L L. J. 33, 35, 42, 60 (2012) (advocating that the Guiding Principles do not go far enough in merely providing that states have a duty to protect human rights, and that while they are a good starting point for corporations to build forward from in order to actually minimize human rights abuse, corporations should aim higher with the aid of states).

29. See *Report of the International Law Commission to the General Assembly on the Work of its Fifty-Third Session*, [2001] 2 Y.B. Int'l L. Comm'n 49, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Pt. 2) (stating that conduct may be attributable to a State if three conditions are met under Article 9 of the Draft Articles on responsibility of States for Internationally Wrongful Acts).

30. See generally Amber Pariona, *What is a Developing Country?*, WORLDATLAS (Apr. 25, 2017), <https://www.worldatlas.com/articles/what-is-a-developing-country.html> ("The most widely accepted definition of a developing country is one that has low levels of industrialization and fares poorly on the Human Development Index (HDI). A low HDI score means that the citizens of a particular country have lower life expectancy, lower educational attainment, lower per capita incomes, and higher fertility rates than found in other countries"); *Who are the Developing Countries in the WTO?*, WTO, [https://www.wto.org/english/tratop\\_e/devel\\_e/d1who\\_e.htm](https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm) (last visited Apr. 25,

support the economic, environmental, and social imbalances of developing countries, the United Nations supports developmental aid and cooperation through governments and specialized financial institutions, such as IFIs.<sup>31</sup>

## B. INTERNATIONAL ORGANIZATIONS' SUPPORT TO DEVELOPING COUNTRIES

The role of international organizations (IOs) is critical in building effective, durable solutions in the realms of security, growth, and equity, which lie at the heart of sustainable development.<sup>32</sup> First, IOs play a major role in regime change at the domestic level.<sup>33</sup> They represent a channel of influence that connects the international sphere with the national one.<sup>34</sup> Second, they often serve an important role in ensuring compliance.<sup>35</sup>

States' ability to comply with international rules depends primarily on the capacity of each actor with respect to its knowledge, institutions, and financial resources.<sup>36</sup> Since states are often unable to

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2020) (stating that in the World Trade Organization, member states will identify whether they are “developing” or “developed,” but their identification may be challenged by other member states).

31. G.A. Res. 70/1, *supra* note 2, ¶¶ 44–45, 55.

32. *See generally*, Tom M. Franck, *Fairness to Persons: The Democratic Entitlement*, in FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 133, 136–39 (Oxford Univ. Press 1995) (discussing the principle of democratic entitlement and the ways in which international organizations provide oversight and accountability throughout the development process).

33. *See id.* (outlining how the standards of international system impact the national governance).

34. *See* Ronald B. Mitchell, *Compliance Theory: An Overview*, in IMPROVING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL LAW 7 (1996), *reprinted in* DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 373, 373 (4th ed. 2011) (explaining that international bodies may engage with states in negotiations regarding the treaty obligations with which the state may comply).

35. *See* Jacob Werksman & Kirk Herbertson, *The Aftermath of Copenhagen: Does International Law Have a Role to Play in a Global Response to Climate Change?*, 25 MD. J. INT'L L. 109 (2010), *reprinted in* DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY (4th ed. 2011) (detailing the various ways in which international organizations provide support to states to ensure compliance).

36. Mitchell, *supra* note 34, at 375.

comply on their own, promotion of, and assistance with, compliance is key in securing the effectiveness of the agreements they are part of.<sup>37</sup> From a constructivist perspective, IOs play a crucial role in assisting countries domestically and shaping their behavior in line with international standards.<sup>38</sup>

IOs' techniques for furthering compliance with international agreements entail a cyclical process.<sup>39</sup> They aim at raising awareness, promoting and monitoring implementation, providing assistance, and measuring and reporting performance.<sup>40</sup> With IOs' support, compliance evolves through a "managerial" approach that seeks to further improve states' performances related to the underlying issue covered by the constituency agreement or IOs' further regulations.<sup>41</sup> This mirrors a constructivist assumption that the social nature of the international system is more effective than a sanctioning system, as it allows internalization of international norms at the domestic level. Likewise, constructivism holds that systems based on punitive enforcement mechanisms are rarely available and workable.<sup>42</sup> Therefore, through compliance, it is possible to provide member states with a sound framework for observing their international obligations.<sup>43</sup>

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37. See *id.* (calling for a "more cooperative approach to ensuring compliance").

38. See Peter H. Sand, *Institution-Building to Assist Compliance with International Environmental Law: Perspectives*, 56 HEIDELBERG J. INT'L L. 774, 776–79 (1996) (mentioning various examples of treaty management); see also Stanley Hoffmann, *International Law and the Control of Force*, in THE RELEVANCE OF INTERNATIONAL LAW: ESSAYS IN HONOR OF LEO GROSS 21, 36–38 (Karl W. Deutsch & Stanley Hoffman eds., 1968) (exploring methods by which international organizations encourage states to see that treaty compliance is in their best interest).

39. Jacobsson, *supra* note 21, at 81.

40. See Werksman & Herbertson, *supra* note 35, at 109 (demonstrating how the compliance mechanisms work in a Multilateral Environmental Agreement).

41. See Kal Raustiala, *Compliance & Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT'L L. 387, 407–08 (2000) (finding a managerial approach better furthers the goals of the agreement than a punitive enforcement mechanism).

42. Within a constructivist frame of analysis, Thomas Franck's theory of legal legitimacy upholds that norms emanated through a fair process, which allocate resources in an equitable fashion, through an equal law-making process, are key drivers for ensuring compliance. See generally THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990); see also THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995).

43. See *id.* (explaining that the "social nature of the international system" allows a compliance mechanism to work effectively).

The managerial approach to compliance undertakes a cooperative problem-solving approach tailored to eliminate or mitigate problems related to the functional areas covered under the agreements of each IO.<sup>44</sup> This approach is grounded on three factors: (1) as treaties are based on the consent of the contracting parties, thus embedding national interests, states will likely respect them; (2) with the support of organizational structures and procedures, it is possible to enhance flexibility and political consensus; and (3) it furthers an efficiency-based rationale for future compliance, as states will more likely comply with the standards of the organizations they belong to.<sup>45</sup> This approach enhances a transparent system of knowledge and information about the policy-related and normative progress of each IO member state.<sup>46</sup> The agreement defines the operational and procedural aspects of a transparent information system.<sup>47</sup> Adequacy, accuracy, availability, and accessibility of information are key factors for enhancing cooperation between all relevant actors with respect to the topical areas covered by the organization, and transparency allows for better coordination and synergies.<sup>48</sup>

Moreover, IOs monitor and report domestic situations in order to secure states' performance.<sup>49</sup> In the field of international environmental law, the OECD has developed an independent review

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44. See *id.* (articulating that such an approach encourages compliance).

45. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 4–5, 7 (Harvard Univ. Press 1995) (finding that states are more likely to comply with treaty obligations when authoritative rules and regulations govern compliance procedure).

46. See *id.* at 126 (noting that such a system allows for elaboration of treaty norms).

47. See *id.* at 125 (describing international organizations as “creature[s] of law,” and explaining that their various functions and limitations are identified in treaties).

48. See Daniel D. Bradlow & David B. Hunter, *Conclusion: The Future of International Law and International Financial Institutions*, in *INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW* 389, 392 (Daniel D. Bradlow & David B. Hunter eds., 2010) (noting organizational involvement allows for greater transparency and communication with regard to international legal obligations). See generally *id.* at 22–24.

49. See Robert O. Keohane & Lisa L. Martin, *The Promise of Institutional Theory*, 20 INT'L SEC. 39, 45–46 (1995) (explaining that international organizations provide certain functions which serve, in part, to make up for the lack of a central enforcement mechanism).

mechanism to monitor the implementation of international environmental agreements in its member states.<sup>50</sup> It entails monitoring followed by reports and recommendations for each country.<sup>51</sup> Similarly, regional trade agreements include monitoring mechanisms.<sup>52</sup> For example, the North American Free Trade Agreement created a trilateral mechanism, integrated by representatives of each member state, which investigates trade-related environmental matters.<sup>53</sup>

The International Labour Organization provides a Committee of Experts that works closely with member states, reviewing and reporting findings and ultimately improving their performance.<sup>54</sup> Similarly, the International Monetary Fund (IMF) has mechanisms for cooperating closely with domestic governments and reviewing their economic performance.<sup>55</sup> Moreover, the OECD and the World Trade Organization promote systematic reviews of an array of policies of its member states, from capital movements and transactions to environmental standards.<sup>56</sup>

The problem of enforcement capacity is particularly evident when there is a lack of proper technical, administrative, and financial means.

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50. Kal Raustiala, *Reporting and Review Institutions*, in D. Zaelke, et al. MAKING LAW WORK 227 (2005), reprinted in DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 393, 395 (4th ed. 2011).

51. *Id.* at 395–96.

52. *Id.* at 396.

53. *Id.*

54. See INT'L L. ORG., MONITORING COMPLIANCE WITH INTERNATIONAL LABOUR STANDARDS: THE KEY ROLE OF THE ILO COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS 9–10 (2019), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_730866.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_730866.pdf) [hereinafter MONITORING COMPLIANCE] (discussing the ILO's Committee of Experts within its supervisory system, which serves to analyze the application of labor standards).

55. See Abram Chayes et al., *Managing Compliance: A Comparative Perspective*, in ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH ENVIRONMENTAL ACCORDS 41, 44 (Harold Jacobson & Edith Brown Weiss eds., 1998) (noting that these organizations often take actions that would be cost prohibitive for domestic governments to incentivize compliance).

56. See Raustiala, *supra* note 49, at 395–96 (noting that the OECD conducts independent reviews of its member countries); see also *id.* at 41–42 (distinguishing formal dispute resolution processes from parallel processes, which better promote cooperation).

International organizations, and particularly IFIs (the World Bank, IMF, and many others), offer technical assistance to develop compliance with regard to every issue.<sup>57</sup> In developing countries, capacity building is paramount in promoting the implementation of international agreements and policies.<sup>58</sup> Assistance is generally conditional on improving domestic performance.<sup>59</sup> For instance, the Climate Fund of the Framework Convention on Climate Change, the Montreal Protocol multilateral fund, and the Global Environmental Facility provide technical and financial mechanisms to facilitate compliance in developing countries.<sup>60</sup>

In the environmental field, financial and technological support for countries in need promote implementation of the provisions of agreements.<sup>61</sup> Article 4.5 of the United Nations Framework Convention on Climate Change provides that developed countries are required to promote and facilitate financial and technological assistance to developing countries in order to support compliance capacity.<sup>62</sup>

### C. DEVELOPING COUNTRIES IN DEVELOPMENT FINANCE

The classifications of “developed” and “developing” apply to a state in a precise moment and are subject to the changing dynamics of growth and development.<sup>63</sup> The classification process is flexible and

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57. Hunter et al., *supra* note 34, at 410–11 (illustrating various implementation assistance strategies).

58. See Chayes et al., *supra* note 54, at 53 (highlighting the importance of addressing inadequacies that hinder compliance).

59. See *id.*

60. See *id.*; see also Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1855 (2002) (focusing on the analysis of substantive content of international provisions).

61. See Joyeeta Gupta, *Legitimacy in the Real World: A Case Study of the Developing Countries, Non-Governmental Organizations, and Climate Change*, in THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS 482, 490 (Jean-Marc Coicaud & Veijo Heiskanen eds., U.N. Univ. Press, 2001) (pointing that the developed nations were expected to assist the developing nations financially and technologically for proper implementation of agreements).

62. United Nations Framework Convention on Climate Change art. 4, ¶ 5, May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

63. See Jac C. Heckelman et al., *Crossing the Threshold: An Analysis of IBRD Graduation Policy* 3 (World Bank Dev. Research Grp., Policy Research Working

holistic; it is a forward-looking exercise that allows assessment of the profiles of IFIs' member states as they evolve.<sup>64</sup> For this reason, IFIs use graduated policies to identify countries that are eligible to be borrowers.<sup>65</sup>

Under World Bank regulations, depending on countries' level of advancement they are eligible to borrow from either the International Bank for Reconstruction and Development (IBRD) or the International Development Association (IDA).<sup>66</sup> In order to provide affordable financing solutions tailored to countries' needs, the IBRD provides loans to middle-income developing countries, while the IDA provides loans and grants to the world's poorest countries.<sup>67</sup> According to the IBRD graduated policy, countries remain eligible as borrowers until they are able to sustain their development process and long-term growth without further recourse to bank financing.<sup>68</sup> Thus, the IBRD takes a holistic approach that takes into consideration not only the income level of a country but also the institutional development and capital-market access of those within it.<sup>69</sup> Domestic sovereign wealth, market creditworthiness, institutional development, and a resilience grade are the main indicators used by the IBRD to determine whether a country is ready to be graduated or de-graduated.<sup>70</sup> Similarly, in order to determine members' eligibility, the

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Paper No. 5531, 2011), <https://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-5531> (explaining how differing levels of development can be indicative of a state's achievements, as well as its eligibility for borrowing from financial institutions).

64. *See id.* at 3–4 (outlining the criteria underlying the development classification process).

65. *See id.* at 4 (explaining that the graduation process of development status acts as milestones for assessing financial management and lending).

66. *See id.* at 2 (discussing the link between a state's development graduation and its eligibility for borrowing).

67. *See* World Bank, *Review of IDA's Graduation Policy*, at 2, Doc. No. 103835 (Mar. 1, 2016), <http://documents.worldbank.org/curated/en/605191468191042391/Review-of-IDA-s-graduation-policy> (explaining that states may remain vulnerable to relapse even after surpassing IDA's operational cutoff).

68. Heckelman et al., *supra* note 62, at 2.

69. *See id.* at 3 (identifying a country's level of development and overall economic situation and a country's capacity to sustain long-term development without further recourse to the World Bank's financial resources as the two key factors to the policy).

70. *See id.* at 9–10 (detailing how the indicators differ between the two samples



IDA applies technical criteria and carefully evaluates the status of its members.<sup>71</sup> First, the IDA graduation policy takes into account the complete absence of creditworthiness, along with a concept of relative poverty, measured by gross national income (GNI) per capita below its operational cutoff, which corresponds to US\$1,215.<sup>72</sup> Moreover, the IDA takes into account a series of other indicators related to poverty and shared prosperity, human development, climate vulnerability, and domestic revenue mobilization.<sup>73</sup> Thus, under World Bank graduation policies, each country's performance is tracked to ensure informed and accurate graduation decisions.<sup>74</sup>

#### D. HUMAN RIGHTS AND THE WORLD BANK'S "POLITICAL PROHIBITION"

IFI operations may take place in the context of a difficult domestic scene in which the human rights protection framework may be hindered. Because IFIs have a purely economic mandate, they may not intervene in the internal political affairs of states. The IBRD's Article of Agreements includes a "political prohibition" that requires avoiding any sort of interference with the political affairs of member states in order to preserve the principle of domestic jurisdiction.<sup>75</sup>

In September 2015, the U.N. Special Rapporteur on extreme

used in the World Bank's study, pointing that shocks of banking crises reduced the likelihood of graduating by about 1.2 for Sample 1 and 1.5 for Sample 2 ).

71. See World Bank, *supra* note 66, at 2 (including absence of creditworthiness and the concept of relative poverty as the underlying principles).

72. See *id.*; see also Anton Dobronogov et al., *Moving Up the Ladder: An Analysis of IDA Graduation Policy* 14 (World Bank Group, Policy Research Working Paper No. 9208, 2020), <https://openknowledge.worldbank.org/handle/10986/33582>.

73. See World Bank, *supra* note 66, at 7 (outlining the variety of indicators in Table 2 of the report).

74. See *id.* at 3 (explaining that in the World Bank Group context, some countries are classified as "gap" countries, whereby these countries receive their allocation on blended terms, resulting in higher reflows to the IDA).

75. Articles of Agreement of the IBRD art. 4, § 10, Dec. 27, 1945, 60 Stat. 1440, 2 U.N.T.S. 134 [hereinafter IBRD Articles of Agreement] ("The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.").

poverty and human rights, Philip Alston, described the World Bank as a “human rights–free zone” – an anachronistic and inconsistent interpretation of its mandate.<sup>76</sup> Constrained by the formalistic approach of its Articles of Agreement, the Bank is prevented from piercing the veil of states’ political sovereignty.<sup>77</sup> According to Alston’s critique, the Bank’s “political prohibition” impedes embracing human rights as a universal value and aligning with corresponding legal obligations.<sup>78</sup>

The Bank’s “political prohibition” is founded on the principle of domestic jurisdiction, which defines the boundaries between the national and international spheres.<sup>79</sup> Since the beginning of the modern international community, the enlargement of international law – with the growing pervasiveness of international organizations – has intruded on states’ sovereignty by means of the obligations each state has undertaken internationally.<sup>80</sup> Domestic jurisdiction is a corollary principle of states’ sovereignty. It recognizes the exclusive competence of a state within its territory over all matters subject to legislative, executive, and judicial powers, without external limitations.<sup>81</sup> Article 2(7) of the U.N. Charter regulates domestic jurisdiction with a view toward peaceful cooperation between states.<sup>82</sup>

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76. OHCHR, “*The World Bank is a Human Rights-Free Zone*” – UN Expert on Extreme Poverty Expresses Deep Concern (Sept. 29, 2015), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16517&LangID=E>.

77. See Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, 2, 5, U.N. Doc. A/70/274 (Aug. 4, 2015) (explaining that as a result of the “political prohibition,” the World Bank is unable to engage with or assist member countries with human rights obligations).

78. *Id.* at 6.

79. HANS KELSEN, *THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS: WITH SUPPLEMENT 769-70* (2000) (“Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state. . . .”).

80. See *id.* at 770–71 (arguing that the basic idea that matters are solely within the domestic jurisdiction of a state is “erroneous”).

81. U.N. Charter art. 2, ¶ 7; see Satvinder S. Juss, *Nationality Law, Sovereignty, and the Doctrine of Exclusive Domestic Jurisdiction* 9 FLA. J. INT’L L. 219, 224–27 (1994) (stating that “sovereignty is directly linked to the independence of States and as such espouse the doctrine that it cannot be subject to any external interference”).

<sup>82</sup> U.N. Charter art. 2, ¶ 7 (“Nothing contained in the present Charter shall authorize

It excludes a priori U.N. intervention on issues covered by domestic jurisdiction, except those related to the Security Council's role in the maintenance of international security pursuant to Chapter VII of the U.N. Charter.<sup>82</sup> As a result, preservation of peace, an absolute, intangible principle, sets the limits for the invocation of domestic jurisdiction.<sup>83</sup> Today, increasing global challenges have resulted in a growing interplay between the domestic and international spheres. The expansion of human rights doctrines, along with the intensification of interstate commerce and trans-boundary issues (such as those related to the climate and environment), has required a global response.<sup>84</sup>

With the evolution of international law with respect to interference with sovereignty, human rights protection is in line with new principles that tend to give priority to global concerns.<sup>85</sup> An overall reasonableness test should be applied to balance sovereign prerogatives and human rights imperatives. This idea has increasingly been realized as a human rights dimension of development finance, as IFIs continue to fulfill an important role in assisting member states to

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the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”).

82. U.N. Charter arts. 39–51.

83. See Kelsen, *supra* note 78, at 769–70 (citing the Summary Report of the 16th meeting of Committee I/i (U.N.C.I.O. Doc. 976, I/i/40, P. 1)); see also LELAND M. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 67–68 (3rd ed. 1969) (comparing the narrow, technical interpretation against the layman's interpretation of intervention into domestic jurisdiction); FREDERIC L. KIRGIS, JR., INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING 892–93 (2d ed. 1993) (explaining that the domestic jurisdiction system fell short of creating an international bill of rights and did not set the stage for a meaningful human rights effort).

84. See R.P. Singh, *Globalization and Human Rights*, in APPLIED ETHICS AND HUMAN RIGHTS: CONCEPTUAL ANALYSIS AND CONTEXTUAL APPLICATIONS 318, 320–22 (Shashi Motilal ed., 2010) (explaining how the rise of globalization has “challenged the nation/state territorial sovereignty, the institutional autonomy[,] and shrinking of the concepts of space and time”).

85. See Josh Delbrueck, *International Protection of Human Rights and State Sovereignty*, 57 IND. L.J. 567, 571–72 (1982) (explaining that the General Assembly established that the “principle of nonintervention does not apply to questions of human rights violations” without discrimination on the basis of race, sex, or nationality).

meet their international human rights commitments.<sup>86</sup> In this respect, IFIs play a fundamental role in domestic legal systems, acting as a sort of compensatory bridge between the international and local levels.<sup>87</sup> Consequently, IFIs' advisory support of member states is effective, coherent guidance in domestic policies and it furthers legal and institutional capacity building, thus fostering a state's duty to protect.

### III. IFIS' OBLIGATION TO RESPECT HUMAN RIGHTS

IFIs' obligation to respect human rights is the second pillar in the Protect, Respect and Remedy model for bridging the gap between development finance and human rights.<sup>88</sup> IFIs' engagement in human rights protection exists independently of states' duty to protect.<sup>89</sup> There is a distinction, therefore, between the rules of international law

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86. See Klaus Decker et al., *Human Rights and Equitable Development: "Ideals", Issues and Implications* 16–21 (World Dev. Rep., Working Paper, 2005) (detailing the development of human rights from the traditional visions to the convergence of human rights); SANAÉ FUJITA, THE WORLD BANK, ASIAN DEVELOPMENT BANK AND HUMAN RIGHTS: DEVELOPING STANDARDS OF TRANSPARENCY, PARTICIPATION AND ACCOUNTABILITY 41 (2013) (explaining that the World Bank did not use the term "human rights" until the mid-1990s); Frank Biermann et al., *Studying the Influence of International Bureaucracies: A Conceptual Framework*, in *MANAGERS OF GLOBAL CHANGE: THE INFLUENCE OF INTERNATIONAL ENVIRONMENTAL BUREAUCRACIES* 37, 53 (Frank Biermann & Bernd Siebenhüner eds., 2009) (suggesting that the scope of governmental regulation of activities increases with more resources); Barry Herman, *The Politics of Inclusion in the Monterrey Process*, in *THE POLITICS OF PARTICIPATION IN SUSTAINABLE DEVELOPMENT GOVERNANCE* 153, 155–57, 175 (Jessica F. Green & W. Bradnee Chambers eds., U.N. Univ. Press 2006) (stating that the Monterrey Process led to codification of soft issues like rights of children and gender equality in the 2015 Millennium Declaration of the General Assembly); ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 140–41 (2006) (detailing U.S. legislation that provides assistance to countries "other than those whose governments engage in [a] pattern of gross violations of internationally recognized human rights"); Ibrahim F.I. Shihata, *Human Rights, Development, and International Financial Institutions*, 8 AM. U. INT'L L. REV. 27, 29–30 (1992) (opining that the World Bank is viewed as an "agency for economic development" that has reached issues such as population, education, health, and social security).

87. See Decker et al., *supra* note 86, at 19–21 (detailing the convergence of human rights and the shifts in development thinking).

88. *Guiding Principles on Business and Human Rights*, *supra* note 8, at 13–15.

89. *Id.* at 13.

regarding states' responsibility and the rules for IFIs' commitments and obligations.<sup>90</sup>

This section analyzes the context in which IFIs operate, their activities, and the risks they face in the human rights sphere. IFIs evolved from being spectators to being actors in the promotion of human rights in developing countries.<sup>91</sup> In the international legal framework, the evolution of scholarly debate on human rights and development finance has reflected the rise of a rights-based approach to development.<sup>92</sup> A human rights agenda has gained greater resonance in business models and development finance and IFIs' governance has evolved.<sup>93</sup> The recent launch of the ESF represents the tip of the spear

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90. *Id.* at 6–22.

91. See Adam McBeth, *A Right by any Other Name: The Evasive Engagement of International Financial Institutions Within Human Rights*, 40 GEO. WASH. INT'L L. REV. 1101, 1102–03 (2008) (suggesting IFIs have drastically changed their view on human rights taking a more positive role).

92. United Nations Development Group, *The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies*, at 1–2 (2003), <https://unsdg.un.org/resources/human-rights-based-approach-development-cooperation-towards-common-understanding-among-un> [hereinafter *HRBA*] (following a trend that began in previous decades, by the end of 1990s, the United Nations began to mainstream human rights in its programs and policies, developing a “common understanding” of a human rights–based approach grounded on six main principles: (1) universality and inalienability, (2) indivisibility, (3) inter-dependence and inter-relatedness, (4) equality and non-discrimination, (4) participation and inclusion, and (6) accountability and the rule of law).

93. See Siobhán McNerney-Lankford & Hans-Otto Sano, *Human Rights Indicators in Development: An Introduction*, 3–4, IBRD Doc No. 57884 (2010) (discussing the promotion of human rights standards in international development); see also McBeth, *supra* note 91, at 1102, 1114–19 (providing the actions of the World Bank to demonstrate IFIs' evolved attitude towards human rights); PETER UVIN, HUMAN RIGHTS AND DEVELOPMENT 122 (2004) (defining the rights-based approach to development as a new paradigm adopted by agencies); Canan Gunduz, *Human Rights and Development: The World Bank's Need for a Consistent Approach* 3, 17–19 (Dev. Stud. Inst., Working Paper Series, Paper No. 04-49, 2004) (noting the World Bank's integration of human rights language to define goals of development); AMARTYA SEN, DEVELOPMENT AS FREEDOM 10 (1999) (including political freedoms, economic facilities, social opportunities, transparency guarantees, and protective security as the five distinct types of freedom). See generally, J. Herman Burgers & Rob Kroes, *Introduction Item: Social Transformation and Human Rights*, in HUMAN RIGHTS IN A PLURALIST WORLD: INDIVIDUALS AND COLLECTIVITIES 167–68 (Jan Berting et al. eds., 1990) (arguing that to “understand the development and implementation of human rights . . . it is

in the mainstreaming of human rights in the context of IFIs.<sup>94</sup>

The evolution of the U.N. agenda toward sustainability enhanced development policies and practices with respect to human rights, individuating duty bearers and rights holders.<sup>95</sup> A substantial conception of human rights became embedded in development finance paradigms, promoting transparency, empowerment, participation, and non-discrimination.<sup>96</sup>

In line with the 2030 sustainable agenda, IFIs play a crucial role in strengthening the system of multilateral cooperation with respect to environmental and social standards, providing broad representation, clear mandates, and effective tools.<sup>97</sup> They provide backing for international and domestic governance that aim for a better balance between development and preservation of the environment, promoting more justice, cohesion, and equality among societies and peoples.<sup>98</sup>

#### A. IFIS: ACTORS OR SPECTATORS IN THE HUMAN RIGHTS FRAMEWORK?

To analyze human rights in development finance, it is important to define the role and scope of IFIs in the international development framework. IFIs' mission can be seen as the dual goal of ending extreme poverty and fostering economic growth through shared prosperity.<sup>99</sup> While there is no doubt that the human rights dimension

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necessary to study the power and exchange relationships behind the rhetoric of human rights”).

94. See *Environmental & Social Framework*, *supra* note 6, at 1–2 (highlighting the World Bank's increased focus on financing projects with a human rights aspect).

95. See, e.g., *HRBA*, *supra* note 92, at 2–3 (noting how “[p]rogrammes of development cooperation contribute to the development of the capacities of duty-bearers . . . and of ‘right-holders’”).

96. See McInerney-Lankford & Sano, *supra* note 93, at 31 (highlighting the “identifiable convergence around principles,” including transparency, empowerment, participation, and non-discrimination).

97. See U.N. Secretary-General, *Roadmap for Financing the 2030 Agenda for Sustainable Development*, 20–39 (July 4, 2019), <https://www.un.org/sustainabledevelopment/wp-content/uploads/2019/07/UN-SG-Roadmap-Financing-the-SDGs-July-2019.pdf> [hereinafter *Roadmap*] (outlining the engagement strategy between the UN and various IFIs).

98. See, e.g., McInerney-Lankford & Sano, *supra* note 93, at 3–4 (describing the widespread and multi-faceted concept of development).

99. See, e.g., Articles of Agreement of the IMF art. 1, § 2, July 22, 1944, 60 Stat.

is pertinent to the general goals of development finance, how to remove the obstacles between these two spheres of international law is still in question.<sup>100</sup>

From an historical perspective, after the collapse of the Bretton Woods system<sup>101</sup>, Bretton Woods institutions continued to function actively in the international community.<sup>102</sup> Nevertheless, the evolution of international relations, with the increasing significance of sustainability, has triggered new challenges to the point that the Washington-based system of development finance seems to be in question.<sup>103</sup> In this framework, can fundamental values of the

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1401, 2 U.N.T.S. 39 (providing that one of the purposes of the International Monetary Fund is “[t]o facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy”); *IBRD Articles of Agreement*, *supra* note 74, art. 1, §§ 1–3 (explaining the purposes of the International Bank for Reconstruction and Development).

100. See Bradlow, *supra* note 1, at 201 (describing one perspective on the aims of social and environmental policies of IFIs); see also Uzan, *supra* note 1, at 429 (contemplating the role of public interest within the context of growing IFIs); Franck, *supra* note 32, at 413–14, 436 (highlighting the influence of wealth disparity on various perspectives on development goals).

101. See DAVID M. ANDREWS, *ORDERLY CHANGE: INTERNATIONAL MONETARY RELATIONS SINCE BRETTON WOODS* 9–10, 13–15 (David M. Andrews ed. 2011) (providing necessary background related to the Bretton Woods system).

102. See *id.* at 9–10 (describing the continued importance of the Bretton Woods instrumentalities).

103. See, e.g., Phillip R. Trimble, *Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy*, 95 MICH. L. REV. 1944, 1944–46 (1997) (outlining the effect that transnational institutions have on US national sovereignty); see also Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 STAN. L. REV. 959, 959–60 (2000) (book review) (describing how “legal principles of sovereignty” have shifted since World War II); ENRIQUE R. CARRASCO, *FUNDAMENTALS OF INTERNATIONAL FINANCE AND DEVELOPMENT: WHAT YOU NEED TO KNOW* 68 (2015) (examining the extent to which the Bretton Woods Institutions are obligated to consider “human rights and the environment in their operations”); DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE* 281 (1995) (describing the role equity in political institutions plays in the formation of a “cosmopolitan democratic community”); POLITY PRESS & OPEN UNIV., *THE TRANSFORMATION OF DEMOCRACY?: GLOBALIZATION AND TERRITORIAL DEMOCRACY* 16, 21 (Anthony G. McGrew ed., 1997) (providing a framework for understanding the contemporary debate surrounding the “democratization of world order”); Oscar Schachter, *The Decline of the Nation-State and its Implications for*

international community serve as the beacon for evolution? In particular, what is the role of human rights in the sphere of development finance?

The evolution of the legal landscape pertaining to fundamental rights protection in development finance, along with the economic expansion of capital and financial markets, has generated a legal vacuum in global governance, especially with regard to protection of common goods.<sup>104</sup> Since the rise of the rights-based approach in international development, states and IFIs have strived to include sustainable solutions in developmental investments through policies and projects.<sup>105</sup>

IFIs' mission has evolved to serve a broader concept of development.<sup>106</sup> Since the 1970s and 1980s, the growth of economic relations has been connected to respect for human rights obligations, as recognized by the Commission on Human Rights in 1977<sup>107</sup> and by the U.N. General Assembly through the Declaration on the Right to Development of 1986.<sup>108</sup> While not formally labeling it a "rights-based

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*International Law*, 36 COLUM. J. TRANSNAT'L L. 7, 8–12 (1997) (outlining the impact that global capitalism has had on individual state authority).

104. See Uzan, *supra* note 1, at 409–10 (stating that “[t]he emerging consensus reaffirms a world economy based on free market mechanisms . . . buttressed by sound national financial systems and by good public and corporate governance”).

105. See UNDP, *Human Rights in UNDP: Practice Note*, 15 (Apr. 2005), [https://www.un.org/ruleoflaw/files/HRPN\\_English.pdf](https://www.un.org/ruleoflaw/files/HRPN_English.pdf) [hereinafter UNDP] (describing the human rights-based approach to development and nothing the desire for “[d]evelopment interventions . . . [to] become more sustainable, through the explicit emphasis on accountability in decision-making and participation”).

106. See *e.g.*, *id.* (highlighting the evolution of the debate on human rights in international development); see also Decker et al., *supra* note 86, at 16–21 (summarizing the history and convergence of human rights and development); Mary Dowell-Jones, *Financial Institutions and Human Rights*, 13 HUM. RTS. L. REV. 423, 464–67 (2013) (providing a summary of the changes in the guiding principles of various financial institutions); UVIN, *supra* note 93, at 60–61 (analyzing how rights-based approaches to development have caused people to reframe their thinking surrounding development strategies and methods).

107. Comm'n on Human Rights, Econ. and Soc. Council, Rep. on the Thirty-Third Session, U.N. Doc. E/CN.4/1257, supp. no. 6, at 74–75 (Feb. 21, 1977) (noting, among other preambulatory and operative clauses, that “the full implementation of economic . . . rights is of crucial importance for the real and meaningful enjoyment of civil and political rights”).

108. See G.A. Res. 41/128, annex, at 186–87 (Dec. 4, 1986) (laying out the UN General Assembly's perspective on the “right to development”).



approach,” the European Union has since the 1990s played a major role in the mainstreaming of human rights content in its trade and cooperation policies, through a positive and constructive approach, to promote sustainable development, peace, and stability.<sup>109</sup>

In this evolution, the international agenda has been to promote human rights principles in multilateral forums, setting the pace for the evolution of core values in the international community.<sup>110</sup> Today, the U.N. Sustainable Development Goals, along with other instruments, are determining the rules of the game in which IFIs are tasked to play a major role, with a constant balance between social long-term objectives and short-term market needs.<sup>111</sup>

Given the complexity and dynamics of development finance, it is important to shed light on several critical aspects of reducing or compensating for governmental gaps related to human rights. Besides the moral imperative, as former senior vice president and general counsel Roberto Dañino said, human rights are progressively becoming an explicit and integral part of the World Bank’s work.<sup>112</sup>

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109. See Marise Cremona, *Human Rights and Democracy Clauses in the EC’s Trade Agreements*, in *THE EUROPEAN UNION AND WORLD TRADE LAW: AFTER THE GATT URUGUAY ROUND 105–08* (Nicholas Emiliou & David O’Keeffe eds., 1996) (pointing out the increased frequency of human rights and democracy clauses in the European Community’s various trade agreements); see also Eibe Riedel & Martin Will, *Human Rights Clauses in External Agreements of the EC*, in *THE EU AND HUMAN RIGHTS 723, 723, 740* (Philip Alston ed., 2000) (commenting on the incorporation of human rights clauses into European agreements).

110. See G.A. Res. 70/1, *supra* note 2, ¶¶ 3, 8, 19 (including the promotion of human rights in the 2030 Agenda for Sustainable Development).

111. See Hassane Cissé, *Should the Political Prohibition in Charters of International Financial Institutions be Revisited?* in 3 *THE WORLD BANK LEGAL REVIEW: INTERNATIONAL FINANCIAL INSTITUTIONS AND GLOBAL LEGAL GOVERNANCE* 59, 72–73, No. 65371 (Hassane Cissé et al. eds., 2012) (describing how the increased focus on human rights has caused the World Bank to reexamine its perspective on various issues); see also Uzan, *supra* note 1, at 418–19 (emphasizing the interaction between short and long-term economic goals, and the need to address both through sound national and international policies); HORATIA MUIR WATT, *ASPECTS ÉCONOMIQUES DU DROIT INTERNATIONAL PRIVÉ: RÉFLEXIONS SUR L’IMPACT DE LA GLOBALISATION ÉCONOMIQUE SUR LES FONDEMENTS DES CONFLITS DE LOIS ET DE JURIDICTIONS* 43 (2005) (outlining the need for balance between legal regulations and market flexibility); Kirgis, *supra* note 83, at 920, 961 (explaining the importance of creating space for both national and international economic development).

112. Robert Dañino, *The Legal Aspects of the World Bank’s Work on Human*

*Mutatis mutandis*, the same considerations can be applied to other developmental organizations. With the rights-based approach to development, along with human development, challenges in international development have changed and the mission of IFIs has progressively broadened.<sup>113</sup>

IFIs have indirectly engaged in the human rights debate, embracing social and environmental rights and thus silently overcoming their “political prohibition.”<sup>114</sup> Piloting new approaches to speed up operational delivery, the World Bank sought to improve sustainability through an array of initiatives, including flexible political and regulatory instruments to be implemented in its operations.<sup>115</sup> With the development of the new ESF, the Bank took into consideration not only risk and return in its investment strategies but also the impact of its projects and policies.<sup>116</sup>

#### B. THE WORLD BANK’S SAFEGUARD POLICIES AND THE NEW ENVIRONMENTAL AND SOCIAL FRAMEWORK

As the World Bank has evolved on a path of commitment to human rights, it has moved through the years from a passive to an active role in respecting and promoting them.<sup>117</sup> The concrete results of this can be seen in the evolution of the Bank’s Safeguard Policies, which resulted in the recent approval of the ESF, the Bank’s larger reform

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*Rights*, 41 INT’L LAW. 21, 24 (2007) (“I strongly believe that an objective assessment of the work of the Bank leads inevitably to the conclusion that it has made a substantial positive contribution to the realization of human rights, and will increasingly continue to do so.”).

113. See Decker et al., *supra* note 86, at 20 (describing the “convergence of human rights and development”).

114. Daniel D. Bradlow & Claudio Grossman, *Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF*, 17 HUM. RTS. Q. 411, 430–32 (1995) (“[w]ith each new interpretation of its developmental mandate, the Bank has . . . narrowed its interpretation of the scope of political prohibition.”).

115. See *Environmental and Social Framework*, *supra* note 6, at 1–3 (presenting the World Bank’s initiatives related to the promotion of sustainable development).

116. See *id.*, at 1–6 (evaluating the development initiatives put forth by the World Bank by analyzing the social and environmental risks of the programs, among other things).

117. See Dañino, *supra* note 112, at 22–24 (emphasizing how the World Bank’s mandate has evolved over time).

effort to improve and streamline its work.<sup>118</sup>

Since the early 1980s, civil society has increasingly strived to secure sustainability in international development. In the development finance context, this phenomenon has led to the advancement of human and environmental protection in IFIs' policies and projects.<sup>119</sup> Following this trend, the World Bank began working in the 1980s on internal operational policies to guide its staff. This process led to the approval and then the implementation of the first Safeguard Policies in 1998.<sup>120</sup> From the beginning, Safeguard Policies intended to protect people and the environment from the adverse effects of Bank-financed operations have operated even *in absentia* of domestic protection in the borrower country's legal systems.<sup>121</sup> They set standards and procedures that apply both to the borrower and the Bank in its investment projects and lending program.<sup>122</sup> Specifically, they were

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118. See Cristina Passoni et al., *Empowering the Inspection Panel: The Impact of the World Bank's New Environmental and Social Safeguards*, 49 N.Y.U. J. INT'L L. & POL. 921, 922–23, 926 (2017) (illustrating the effects of the World Bank's social safeguard policies).

119. See Elchin Amirbayov (Vice-President and Rapporteur, Azerbaijan), *Report of the Human Rights Council on its Ninth Session*, 9, 43–44, U.N. Doc. A/HRC/9/28 (Dec. 2, 2008) [hereinafter *2008 Report*] (advocating for the financial and technological support for the Special Rapporteur to carry out its mandate on protecting human rights); OECD Secretary-General, *Conflict and Fragility: Do No Harm: International Support for Statebuilding*, 55, 107, 110–11 (2010) [hereinafter *Do No Harm*] (discussing the role of Donor Countries in state building with an emphasis on protecting human rights and the environmental sustainability measures coupled with growth for investors and labor workers); Jomo Kwame Sundaram & Anis Chowdhury, *Introduction: Governance and Development, in IS GOOD GOVERNANCE GOOD FOR DEVELOPMENT?* 15, 20–21 (Jomo Kwame Sundaram & Anis Chowdhury eds., 2012) (noting the challenges developing countries face when donor countries attach governance quality indicators and policy presumptions as a condition for receiving development aid); Nolan, *supra* note 28, at 7, 8–9 (identifying the developing narrative on corporate responsibility for respecting human rights, the inadequacies of international human rights law and state-centric frameworks to redress corporate rights violations, and the NGOs that fill the gaps to protect workers).

120. BRETTON WOODS PROJECT, SAFEGUARD POLICIES AND PERFORMANCE STANDARDS (Sept. 22, 2009), <https://www.brettonwoodsproject.org/2009/09/art-565324/>.

121. *Id.*

122. See *id.* (noting the safeguard policies in ten key environmental and social policies classified under the following rubric: (1) environmental assessment, (2) natural habitats, (3) pest management, (4) indigenous peoples, (5) involuntary

tailored to identify, avoid, and minimize harms to people and the environment, awakening the sensibility of borrowing governments with regard to environmental and social risks as they receive funds for development projects.<sup>123</sup>

The safeguards affirmed their role in the IBRD's and IDA's operations as a cornerstone of their support for the effective realization of the twin goals of ending extreme poverty and promoting shared prosperity.<sup>124</sup> Despite not formally engaging with human rights, the Bank sought to provide broader protection in its financed operations to affected people who are particularly vulnerable to financial investment prerogatives.<sup>125</sup> Safeguards have often been used as an

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resettlement, (6) forestry, (7) safety of dams, (8) projects on international waterways, (9) projects in disputed areas, and (10) cultural property.)

123. See David B. Hunter, *Civil Society Networks and the Development of Environmental Standards at International Financial Institutions*, 8 CHI. J. INT'L L. 437, 439–42 (2008) (discussing the environmental assessments of projects before financing projects and its key features) (noting the relevant provisions of The Universal Declaration of Human Rights and International Covenant on Civil and Political Rights form an International Bill of Rights); see e.g., François Gianviti, *Economic, Social, and Cultural Rights and the International Monetary Fund*, in NON-STATE ACTORS AND HUMAN RIGHTS 113, 113–14 (Philip Alston ed., 2005) (noting the relevant provisions of The Universal Declaration of Human Rights and International Covenant on Civil and Political Rights form an International Bill of Rights); Annie Petsonk, *Legal Obligations and Institutions of Developing Countries: Rethinking Approaches to Forest Governance*, in 3 THE WORLD BANK LEGAL REVIEW: INTERNATIONAL FINANCIAL INSTITUTIONS AND GLOBAL LEGAL GOVERNANCE, 293, 313–16, Doc No. 65371, (Hassane Cissé et al. eds., 2012) (reviewing the Coalition for Rainforest Nations efforts to compensate nations for reducing emissions from deforestation in the Reducing Emissions from Deforestation in Developing Countries program as an effective tool to foster the idea that protecting against deforestation can be economically beneficial for developing countries); Dowell-Jones, *supra* note 106, at 437–38 (highlighting how the Equator Principles Financial Institutions committed to ensuring “that borrowers have conducted and environmental and social impact assessment of the proposed project” to mitigate against the negative effects on human rights and the environment from international project finance).

124. WBG, *Review and Update of the World Bank's Safeguard Policies: Environmental and Social Framework (Proposed Third Draft)*, at 1, 7, Rep. No. 107175, (July 20, 2016), <http://documents.worldbank.org/curated/en/748451469107442841/pdf/107175BR-R2016-0145-IDA-R2016-0198-Box396279B-PUBLIC.pdf> [hereinafter *ESF Third Draft*].

125. See Bradlow, *supra* note 1, 15 n.55 (noting that the Bank's considerations of human rights and its support for members to fulfill human rights obligations may be

alternative tool to fill the legal vacuum of domestic systems, which might leave unprotected critical spheres of human rights law, such as land expropriation, labor rights, and environmental requirements.<sup>126</sup> Likewise, 1) the field of social corporate responsibility, 2) the states' duty to protect, and 3) the corporate responsibility to respect are constructs that together provide effectiveness in fragile domestic legal systems, identifying duty bearers and rights holders.<sup>127</sup>

In 2016, the World Bank approved the new ESF, which was then implemented in October 2018.<sup>128</sup> It aimed to renew its safeguards and embed a broader protection for environmental and social rights while furthering inclusion and participation.<sup>129</sup> The ESF applies to all new World Bank investment project financing, while existing projects

based on assessment of the economic impact).

126. See WBG, *Guidance Note for Borrowers – ESS5: Land Acquisition, Restrictions on Land Use and Involuntary Resettlement*, at 14–15, 21–22 (June 2018),

<http://documents.worldbank.org/curated/en/294331530217033360/pdf/ESF-Guidance-Note-5-Land-Acquisition-Restrictions-on-Land-Use-and-Involuntary-Resettlement-English.pdf> [hereinafter *ESF Guidance Note 5*] (requiring the Bank's Borrowers to develop a framework compatible with the Environment and Social Standards on land acquisition, restrictions on land use and involuntary resettlement to protect the human rights of those who are physically displaced as a result of project finance).

127. See OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, 1, 10–14 (2012), [https://www.ohchr.org/Documents/publications/hr.puB.12.2\\_en.pdf](https://www.ohchr.org/Documents/publications/hr.puB.12.2_en.pdf) [hereinafter *Corporate Responsibility*] (discussing the relevance of human rights to states and business and obligation corporations have to respecting human rights); see also Ana Čertanec, *The Connection Between Corporate Social Responsibility and Corporate Respect for Human Rights*, 10 DANUBE 103, 107 (2013) (explaining how the duty to respect, protect and fulfill human rights transitioned from being solely applicable to states, to being applied to non-state actors that are subject to international law and the international legal order).

128. See WBG, *World Bank Board Approves New Environmental and Social Framework* (Aug. 4, 2016), [https://www.worldbank.org/en/news/press-release/2016/08/04/world-bank-board-approves-new-environmental-and-social-framework?cid=ECR\\_E\\_NewsletterWeekly\\_EN\\_EXT](https://www.worldbank.org/en/news/press-release/2016/08/04/world-bank-board-approves-new-environmental-and-social-framework?cid=ECR_E_NewsletterWeekly_EN_EXT) [hereinafter *World Bank Board*] (reporting that the Bank approved a new Environmental and Social Framework, expanding the protections for people and the environment for Bank-financed projects).

129. See Passoni et al., *supra* note 118, at 922 (recognizing the goal of the Bank's review of its environmental and social safeguard policies was to modernize and enhance efficiency for the Bank and Borrowers).

continue to apply the previous Safeguards Policies.<sup>130</sup> The two systems will run in parallel for an estimated seven years.<sup>131</sup>

The ESF consists of a due diligence process that is key to addressing human rights-related challenges in development finance operations while mitigating the adverse impact of policies and projects.<sup>132</sup> It ensures its political sustainability through the harmonization of market dynamics and social needs.<sup>133</sup> With this internal reform, the Bank created a systematic regulation, within a single framework, that embraces a plurality of instruments: (i) the Bank's Vision for sustainable development; (ii) the Environmental and Social Policy for Investment, with requirements that apply to the Bank; (iii) Environmental and Social Standards, with requirements that apply to borrowers; and (iv) the Bank Directive on Addressing Risks and Impacts on Disadvantaged or Vulnerable Individuals or Groups.<sup>134</sup>

The ESF is the result of an intra-institutional model of rulemaking that combines the interests of different stakeholders within the sustainable development debate.<sup>135</sup> Indeed, it is the result of an intense negotiation process between civil society organizations, the Bank, and its borrowers.<sup>136</sup> On the one hand, civil society, along with donor

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130. See WBG, *Environmental and Social Policies*, <https://projects.worldbank.org/en/projects-operations/environmental-and-social-policies> (last visited June 19, 2020) (noting the duration of the Environmental and Social Framework, which is to begin on October 1, 2018); Passoni et al., *supra* note 118, at 923 (noting that for the first seven years the Environmental and Social Framework will run parallel to the existing safeguards).

131. *Id.*

132. See *Environmental and Social Framework*, *supra* note 6, at 3–7 (noting the Bank's objectives and principles for the Environmental and Social Standards and the Bank's commitment to conduct due diligence on all projects supported by Investment Project Financing).

133. See *id.* at 91–92 (recognizing the Bank's support for developing domestic capital and financial markets).

134. See *Environmental and Social Policies*, *supra* note 130 (discussing what constitutes the Bank's Environmental and Social Framework).

135. See Giedre Jokubauskaite, *The World Bank Environmental and Social Framework in a Wider Realm of Public International Law*, 32 LEIDEN J. INT'L L. 457, 459 (2019) (analyzing how the Environmental and Social Framework reforms differed from the traditional template of interstate law-making because the reforms were the result of a global deliberation bringing together different stakeholders).

136. See WBG, *Archive of Environmental and Social Framework (ESF): Guidance Notes Comment Period Web Page 2017*,

countries, pushed for a more stringent regulation, while on the other hand borrowers advocated for their sovereign freedom in using developmental aid and investments, striving to elude the imposition of conditions.<sup>137</sup>

The result was a compromise that establishes a cooperative relationship between the Bank and its borrowers.<sup>138</sup> The ESF sets out the requirements for client countries with regard to the identification and assessment of environmental and social risks related to the Bank's projects.<sup>139</sup> The application of these standards seeks to enhance the twin goals, directly benefiting the environment and local populations.<sup>140</sup> This strategy recognizes that developing economies need to grow through sustainability in order to mitigate fundamental threats to development.<sup>141</sup> First, it seeks to lower carbon emissions in

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<http://pubdocs.worldbank.org/en/186931549556754791/ESF-Guidance-Notes-Comments-Web-Page-2017-archive.pdf> (last visited June 19, 2020) [hereinafter *ESF Guidance Notes Comment Period*] (presenting the various draft guidance notes from organizations and stakeholders on the Environmental Social Standards of the Bank); *Letter to the World Bank on the Environmental and Social Standards Guidance Notes*, HUMAN RIGHTS WATCH, <https://www.hrw.org/news/2017/12/04/letter-world-bank-environmental-and-social-standards-guidance-notes> (last visited June 21, 2020) [hereinafter *Letter to the World Bank*] (expressing concerns for the draft Guidance Notes for Borrowers).

137. See Bradlow, *supra* note 1, at 202–04 (discussing how the participants in the policy-making process engage with the Bank and the various conflicts over the administrative process of negotiations develop and are subsequently resolved).

138. See *Environmental and Social Framework*, *supra* note 6, at 2 (noting that the Bank will collaborate with Borrowers to address national development priorities through cooperative relationships with Borrowers, donors, and other international organizations).

139. See *id* at x, n.6 (identifying when Environmental and Social Standard ESS1 is applicable to Bank Investment Project Financing and the four important points the ESS1 establishes).

140. See ESF Third Draft, *supra* note 124, at 1, 7 (presenting the Bank's overarching goals to end extreme poverty and promote shared prosperity and the methods the Bank will use to achieve these goals).

141. See U.N. DEP'T OF INT'L ECON. & SOC. AFFAIRS, WORLD ECONOMIC AND SOCIAL SURVEY 2013: SUSTAINABLE DEVELOPMENT CHALLENGES, at xvii, U.N. Doc. ST/ESA/344, U.N. Sales No. E.13.II.C.1 (2013), <https://sustainabledevelopment.un.org/content/documents/2843WESS2013.pdf> [hereinafter WORLD ECONOMIC AND SOCIAL SURVEY] (showing that the sustainable development of cities will require local and national authorities to cooperate on public infrastructure projects).

order to decarbonize and invest in resilience.<sup>142</sup> Second, it seeks empowerment of all people who participate in and benefit from the development process and promotes inclusion and equality.<sup>143</sup> In this way, through an identification and assessment of environmental and social risk, the new framework makes important advances in areas such as transparency, non-discrimination, public participation, and accountability for the benefit of the environment and citizens.<sup>144</sup>

The launch of the ESF operationalized these principles into practical project-level applications within the framework of the Bank's Articles of Agreement.<sup>145</sup> This allowed both the Bank and borrowers to undertake a deeper commitment to sustainable development by sharing reciprocal responsibilities.<sup>146</sup> Inasmuch as these standards will be binding on borrowers, the Bank seeks to further commit to environmental and social rights in development contexts by enhancing the capacity of borrower countries' systems.<sup>147</sup> However,

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142. See *Environmental and Social Framework*, *supra* note 6, at 1 (emphasizing the importance of addressing climate change in sustainable development for long-term economic growth and stability in developing countries).

143. See *id.* at 1–2 (highlighting the importance of social development and inclusion for the Bank's objective of achieving sustainable development, and defining what inclusion means in this context).

144. See *id.* at ix (stating that the Bank aims to support Borrowers to reduce poverty and increase prosperity sustainably by applying the Environmental and Social Standards).

145. See *id.* at 2 (noting the Bank's aspirational and potential broader impact on sustainable development by applying the Environmental and Social Framework standards).

146. See Michael M. Cernea & Julie K. Maldonado, *Challenging the Prevailing Paradigm of Displacement and Resettlement: Its Evolution, and Constructive Ways of Improving it*, in *CHALLENGING THE PREVAILING PARADIGM OF DISPLACEMENT AND RESETTLEMENT: RISKS, IMPOVERISHMENT, LEGACIES, SOLUTIONS* 13–14 (Michael M. Cernea & Julia K. Maldonado eds., 2018) (discussing the Bank's changes to the development-caused forced displacement and resettlement policy that ended the out-sourcing of resettling to local authorities, which resulted in the Bank providing direct support and oversight of resettlement projects as integral to development projects).

147. See WBG, *Guidance Note for Borrowers – ESS1: Assessment and Management of Environmental and Social Risks and Impact*, 1–2, (June 28, 2018), [documents.worldbank.org/curated/en/142691530216729197/ESF-Guidance-Note-1-Assessment-and-Management-of-Environmental-and-Social-Risks-and-Impacts-English.pdf](https://documents.worldbank.org/curated/en/142691530216729197/ESF-Guidance-Note-1-Assessment-and-Management-of-Environmental-and-Social-Risks-and-Impacts-English.pdf) [hereinafter *ESF Guidance Note 1*] (identifying the Bank's objective to “promote improved environmental and social performance, in ways which recognize and enhance Borrower capacity).



they do not impose general legal obligations on states, as international agreements do, since they create legal effects only through the implementation of financing agreements.<sup>148</sup>

Even though the ESF falls in the category of internal administrative law of an international organization, it has a major impact on development governance.<sup>149</sup> Tailored from a functional perspective, the new standards derive their legal force from their impact on the Bank and its borrowers.<sup>150</sup> From a formalist perspective, the Bank maintained aspirational language with regard to human rights, which was heavily criticized by civil organizations during the consultation phase.<sup>151</sup> As the Bank does not have a political mandate because of the prohibition in its Articles of Agreement, it maintains its formal commitment to human rights as a general aspiration.<sup>152</sup> In this regard, the Bank has been criticized for having a “soft” vision statement that may result in basic respect for human rights eventually falling outside its institutional mandate.<sup>153</sup> Paradoxically, this would suggest that respect for human rights could even be inconsistent with the Bank’s Articles of Agreement.<sup>154</sup> Nonetheless, the Bank has furthered human

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148. See Jokubauskaite, *supra* note 135, at 457 (discussing how the Banks Environmental and Social Framework safeguard aims to protect the public and environment from the negative effects of development financing).

149. See JOSE ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 273–74, 276, 316–17, 319 (2005) (exploring how international organizations play a role in the development of modern international treaties); Arend, *supra* note 27, at 129 (analyzing the role of institutions in the constructivist view of mutually-constitutive relationships between structure and actor, which alter the identity and interests of states by the states’ participation in institutions).

150. See Kerry Rittich, *Functionalism and Formalism: Their Latest Incarnations in Contemporary Development and Governance Debates*, 55 U. TORONTO L.J. 853, 857 (2005) (explaining that functionalism relies on “the allocation of legal entitlements and responsibilities among different, social, legal, and political institutions”).

151. See *id.* at 863–64 (illuminating that the formalist approach to development only includes rule on the protection of property, contracts, and basic human safety); Human Rights Watch, *Human Rights Watch Submission: World Bank’s Second Draft Environmental and Social Framework*, <https://www.hrw.org/news/2017/12/04/letter-world-bank-environmental-and-social-standards-guidance-notes> (last visited June 21, 2020), [hereinafter *Human Rights Watch Submission*].

152. See *id.* (recommending moving away from merely aspirational language).

153. *Id.*

154. See *id.*

rights protection through tailored standards in the fields of environment and biodiversity conservation, labor, resettlement, indigenous people, and public participation.<sup>155</sup> This way, using a functionalist methodology, the Bank was able to expand its mandate from the original scope of its Articles of Agreements, embracing a more socially oriented-approach in its operations that grants transparency and accessibility.<sup>156</sup> In other words, it has furthered a silent agenda of human rights through environmental and social standards, in line with the new U.N. sustainable development agenda.

#### IV. ACCESS TO REMEDIES

Access to remedies is the third pillar of the tripartite model used in this Article to assess human rights protection in development finance. It promotes an understanding of IFIs' level of accountability and, in turn, paves the way for securing substantive justice in the developmental context.

Accountability of IOs must be considered a “multifaceted phenomenon,” according to the definition given by the International Law Association.<sup>157</sup> Effective remedies for human rights violations play an important role in development finance.<sup>158</sup> Indeed, access to

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155. See *Environmental and Social Standards (ESS)*, THE WORLD BANK, [www.worldbank.org/en/projects-operations/environmental-and-social-framework/brief/environmental-and-social-standards](http://www.worldbank.org/en/projects-operations/environmental-and-social-framework/brief/environmental-and-social-standards) (last visited June 21, 2020) (developing ten environmental and social standards on the following key topics: (1) assessment and management of environmental and social risks and impacts, (2) labor and working conditions, (3) resource efficiency and pollution prevention and management, (4) community health and safety, (5) land acquisition and restrictions on land use and involuntary resettlement, (6) biodiversity conservation and sustainable management of living natural resources, (7) indigenous peoples/sub-Saharan African historically underserved traditional local communities, (8) cultural heritage, (9) financial intermediaries, and (10) stakeholder engagement and information disclosure).

156. See JOEL OESTREICH, *POWER AND PRINCIPLE: HUMAN RIGHTS PROGRAMMING IN INTERNATIONAL ORGANIZATIONS* 80–81 (2007) (explaining that through a change in management structure and the model of accepting development projects, the Bank has been able to pursue projects that meet its mission of development while also promoting human rights goals).

157. Franklin Berman et al., *Final Report of the International Law Association Berlin Conference (2004): Accountability of International Law Organizations*, 1 INT'L ORGS. L. REV. 221, 225–26 (2004).

158. See Press Release, United Nations Gen. Assembly, Preventative Measures,

remedies constitutes the closing element of the model in both its legal and policy dimensions.<sup>159</sup> First, this principle involves providing a forum to investigate, punish, and redress human rights violations in order to provide substantive justice in development finance.<sup>160</sup> Second, providing access to remedies does not mean that all allegations result from real abuses or that all complaints are *bona fide*.<sup>161</sup> As expectations for adjudication of human rights are expanding, this analysis explores remedies to secure substantive justice at the national and international levels.

This section focuses on quasi-judicial and judicial remedies in the development finance context that are available to those who are harmed in the course of IFIs' projects. The former rely on Internal Accountability Mechanisms, which are quasi-judicial bodies internal to IFIs but independent. Even if this mechanism is accessible by individuals, it lacks full effectiveness.<sup>162</sup> Indeed, it relies on

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Accessible Remedies Required to Address Myriad Human Rights Violations, Experts Tell Third Committee During Interactive Dialogues, U.N. Press Release GA/SHC/4206 (Oct. 17, 2017) (explaining that effective remedies are necessary to prevent and resolve human rights abuses that impede achievement of the Sustainable Development Goals, equitable distribution of development benefits, and global stability).

159. See *Access to Remedy*, UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER, <https://www.ohchr.org/EN/Issues/Business/Pages/AccessToRemedy.aspx> (last visited June 21, 2020) (describing how access to remedies is central throughout the Guiding Principles for effective implementation of the Protect, Respect, and Remedy framework).

160. *Guiding Principles on Business and Human Rights*, *supra* note 8 (explaining that countries must provide forums for the prevention, investigation, punishment, and redress of human rights abuses in their jurisdictions through policies, legislation, regulations, and adjudication).

161. John Gerard Ruggie, *Protect, Respect, and Remedy: The UN Framework for Business and Human Rights*, in INTERNATIONAL HUMAN RIGHTS LAW: SIX DECADES AFTER THE UDHR AND BEYOND 519, 534 (Mashood A. Baderin & Manisuli Ssenyonjo eds., 2010).

162. See Celine Tan, *Mandating Rights and Limiting Mission Creep: Holding the World Bank and the International Monetary Fund Accountable for Human Rights Violations*, 2 HUM. RTS. & INT'L LEGAL DISCOURSE 79, 92, 94–97, 101 (2008) (explaining that the asymmetrical structure of decision-making, the lack of legitimacy in creating organizational structures, and the lack of transparency in the implementation of processes limits the effectiveness of internal accountability mechanisms because the structures grant too much discretionary power that undermines true accountability).

organizations' internal rules and is not always accessible by social communities.<sup>163</sup> The latter solution, judicial remedies, is needed to mitigate IFIs' immunity before national courts.<sup>164</sup> These systems need

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163. See David Hunter & Lori Udall, *The World Bank's New Inspection Panel: Will It Increase the Bank's Accountability?*, CTR. INT'L ENVTL. LAW, <https://www.ciel.org/wp-content/uploads/1994/04/issue1.pdf> (last visited July 4, 2020) (describing how the internal operations and structure give too much discretionary power to the Executive Directors before allowing public access, which undermines the goals of transparency and accessibility); see also Enrique R. Carrasco, Wesley Carrington & HeeJin Lee, *Governance and Accountability: The Regional Development Banks*, 27 BOS. U. INT'L L.J. 1, 5, 43–46, 51 (2009) (providing an examples of how internal accountability mechanisms are limited by potential conflicts of interest when members of the organization are also on the body overseeing complaints and investigations, which could subvert the purpose of the mechanism); IBRAHIM F.I. SHIHATA, *THE WORLD BANK INSPECTION PANEL: IN PRACTICE* 205, 207–09 (2nd ed. 2001) (explaining that access to remedies can be limited by restrictive conditions of parties eligible to bring claims and by allotting discretionary judgment to executive staff to grant investigations on complaints by parties otherwise not eligible); Tan, *supra* note 162, at 88–89, 101–02 (explaining that even with sustainable internal accountability mechanisms, they are not effective without enforcement, and the role of the enforcement bodies is generally limited to a supervisory one); August Reinisch, *The Immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals*, 7 CHINESE J. INT'L L. 285, 291–92 (2008) [hereinafter Reinisch, *Immunity of International Organizations*] ) (pointing out the need for “reasonable alternative means” as expressed by the European Court of Human Rights in its 1999 Waite and Kennedy judgment on jurisdictional immunity of international organizations); Suzuki Eisuke, *The Review and Repudiation of Judgments of International Administrative Tribunals*, 7 ASIAN Y.B. OF INT'L L. 175, 205–07 (199) (explaining the immunities and privileges of international organizations and their agents as a “functional protection under international law” while being mainly subject to the organization's own internal laws); Richard J. Oparil, *Immunity of International Organizations in United States Courts: Absolute or Restrictive?*, 24 VAND. J. TRANSNAT'L L. 689, 696–97 (1991) (explaining how, because international courts have found international organizations immune from suits pertaining to employee relationships as well as internal administrative issues, international organizations enjoy broad immunity from courts, making accountability a mainly internal process); Steven C. Nelson, *Alternatives to Litigation of International Disputes*, 23 INT'L LAW. 187, 191 (1989) (explaining that the involvement of governments in the activities of international organizations provides another level of immunity from other measures of accountability).

164. See Eisuke Suzuki, *Responsibility of International Financial Institutions Under International Law*, in *INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW* 97, 100 (Daniel D. Bradlow & David B. Hunter eds., 2010) (reinforcing that administrative tribunals need a statutory grant to adjudicate tort claims against IFIs).

to be implemented *ratione materiae* and *ratione personae*,<sup>165</sup> respectively, in order to have non-state parties' claims heard whenever human rights obligations are at stake.<sup>166</sup> This solution needs to be tailored on the basis of the principles of immunity and the responsibilities of international organizations because IFIs are shielded before domestic jurisdictions.<sup>167</sup>

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165. Because of the nature of the relevant subject matter (*ratione materiae*), and the IOs' position in international law (*ratione personae*), access to remedy must be assessed through the lens of the principles of immunities and responsibilities.

166. *Id.* at 100.

167. See Rutsel Silvestre J. Martha, *Attribution of Conduct After the Advisory Opinion on the Global Mechanism*, in RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS: ESSAYS IN MEMORY OF SIR IAN BROWNLIE 275, 280 (Maurizio Ragazzi ed., 2013) (underscoring the legal immunity of international organizations from actions by their specialized entities as long as that separate entity holds its own "legal personality" in either international or domestic jurisdictions); see also 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, 405–06 (2005) (describing the ways in which organizational immunity through lack of domestic jurisdiction and restricted international jurisdiction limits the parties that can hold an international organization responsible, which has left impacted nonstate parties that do not have a contractual relationship with the organization without recourse); Eisuke Suzuki & Suresh Nanwani, *Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks*, 27 MICH. J. INT'L L. 177, 179–80 (2005) (explaining how international law surrounding the legal privileges and immunities for international organizations must change as their role in international activities changes to impact more nonstate parties); Hunter & Udall, *supra* note 163 (advocating that the World Bank's current internal efforts at accountability have failed due to lack of transparency and lack of involvement by other actors); Dana Clark, *Understanding the World Bank Inspection Panel*, in DEMANDING ACCOUNTABILITY: CIVIL-SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL 1, 1–2 (Dana Clark, Jonathan Fox & Kay Treakle eds., 2003) (pointing out that previous criticisms of the World Bank's transparency and accountability measures relied on the need for internal responsibility for effective implementation of social policies); Jonathan A. Fox & L. David Brown, *Introduction*, in THE STRUGGLE FOR ACCOUNTABILITY: THE WORLD BANK, NGOS, AND GRASSROOTS MOVEMENTS 12–13 (Jonathan A. Fox & L. David Brown eds., 1998) (describing how internal effort measures with only discretionary mechanisms for accountability fail to create effective and accessible channels for change, especially when, under international law, developments banks can only be held accountable by member states); Mahnoush H. Arsanjani, *Claims Against International Organizations: Quis Custodiet Ipsos Custodies*, 7 YALE J. WORLD PUB. ORD. 131, 163–65 (1981) (providing that the doctrine of organizational immunity in national courts, while needed to protect organization from improper influence in their work, is not absolute and is dependent on various factors); Bennett Freeman, *Business and Human Rights:*

### A. LEGAL RESPONSIBILITY OF IFIS

The operations and decisions of IFIs may cause violations of international human rights law as a direct consequence of the implementation of programs and operations within client countries.<sup>168</sup> International accountability arises as a result of this “adverse impact.”<sup>169</sup> In other words, a level of accountability applies to all direct and indirect contacts of IFIs with affected individuals in their projects.<sup>170</sup> Since individuals cannot pledge their rights institutionally as states do,<sup>171</sup> international law leaves the door open to debate.

The phenomenon of legal responsibility must be analyzed as a balance between institutional prerogatives and respect for the principles of due process.<sup>172</sup> Under the fundamental principle of due

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*Advancing the Agenda, Report on Wilton Park Conference WP05/33* 4–5 (Oct. 11, 2005) (urging governments to use their power in their dealings with IFIs to prioritize human rights by ensuring safeguards in the negotiation, planning, and execution of development projects.); Jonathan Fox, *Introduction: Framing the Inspection Panel*, in *DEMANDING ACCOUNTABILITY: CIVIL-SOCIETY CLAIMS AND THE WORLD BANK INSPECTION PANEL* xiii (Dana Clark, Jonathan Fox & Kay Treakle eds., 2003) (“Before the contested construction of the World Bank’s minimum social and environmental standards and the creation of the Inspection Panel, the World Bank was a ‘lawless institution,’ insofar as it was insulated from any legal responsibility to people directly affected by its actions.”).

168. See Tan, *supra* note 162, at 86 (providing examples of how projects from IFIs can violate international human rights law, such as the creation of environmental damage through infrastructure projects and the infringement on the political rights of citizens through loan conditions).

169. See Bradlow, *supra* note 1, at 1–3 (describing how the implementation of the World Bank Inspection Panel led to the ability of harmed parties to hold IFIs accountable).

170. See Arsanjani, *supra* note 166, at 134–35 (identifying the various parties who might be harmed by an international organization’s activities, including citizens, governments, other organizations, and the organization’s own members).

171. See Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 *YALE L.J.* 2277, 2292 (1991) (explaining that, under the traditional assumption that international law exclusively regulates relations between nations, an individual cannot bring a claim under international law; rather, it must be done by the individual’s nation on his behalf).

172. See David B. Hunter, *International Law and Public Participation in Policy Making at the International Financial Institutions*, in *INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW* 216, 219–220 (Daniel D. Bradlow & David B. Hunter eds., 2010) (explaining that the right to due process is established within international law, and that even when there is no access to judicial review, the right to due process must be protected and guaranteed through the establishment

process, everyone is entitled to have his or her claim adjudicated by a fair and impartial judge.<sup>173</sup> This principle, which underpins the substantive right to a remedy, is expressly set out in Article 10 of the Universal Declaration of Human Rights and Article 14 of the International Covenant on Civil and Political Rights; it reflects a general customary norm.<sup>174</sup> Nonetheless, since IFIs are protected by the principle of immunity, due process could elude people harmed by IFI-financed projects.<sup>175</sup> Therefore, it is necessary to find an adequate alternative venue in which claimants can seek fair remedial actions in order to fulfill substantive justice in development finance operations.

From the beginning, international organizations were created as supra-national subjects of international law that were intended to enjoy legal personality.<sup>176</sup> This view has been enshrined in international jurisprudence since a 1949 opinion of the International Court of Justice (ICJ).<sup>177</sup> Moreover, with regard to the rights and obligations of IFIs, the ICJ, in its advisory opinion pertaining to the WHO and Egypt in 1951,<sup>178</sup> specified that international organizations are bound by all duties deriving from general rules of international law under their constituent treaties and internal rules, or under the

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of an institutional framework by international organizations themselves).

173. See Steven Herz, *Rethinking International Financial Institution Immunity*, in INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW 146, 149–50 (Daniel D. Bradlow & David B. Hunter eds., 2010) (“[C]onsensus is emerging that under international human rights law one has a fundamental right to have their legal claims adjudicated by an independent and impartial court or tribunal.”); Arsanjani, *supra* note 166, at 174–75 (reasoning that now that the right to due process is included in the Universal Declaration for Human Rights, international organizations must implement procedures to comply with this principle of due process). See generally G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 10 (Dec. 10, 1948) (stating the right of people to fair and impartial hearings before independent and impartial tribunals).

174. Reinisch, *Immunity of International Organizations*, *supra* note 163, at 150.

175. See Herz, *supra* note 172, at 149–50 (discussing the Bank’s response of limiting responsibility with regard to obligations under ILO conventions).

176. See James E. Hickey, Jr., *The Source of International Legal Personality in the 21st Century*, 2 HOFSTRA L. & POL’Y SYMP. 1, 3, 5 (1997) (defining legal personality for international organizations).

177. See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 178 (Apr. 11) (outlining the necessity for international personality for international organizations).

178. *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*, Advisory Opinion, 1980 I.C.J. 73 (Oct. 10, 1962).

international agreements to which they are parties.<sup>179</sup> In other words, not only does the principle of specialty divide international organizations by their functions and purposes, it also preserves the autonomy and effectiveness of each organization.<sup>180</sup>

This system has given rise to concerns about protecting those interests not included in an organization's charter.<sup>181</sup> With regard to IFIs, which are economic subjects with no political mandate,<sup>182</sup> the system described here leaves a legal vacuum such that obligations protected under international human rights law cannot be enforced. Therefore, even though IFIs enjoy legal personality under international law, they claim independence from being subject to liability under international law.

The rationale for this model dates back to the historic period in which the Bretton Woods institutions – namely the IMF and the World Bank – were created.<sup>183</sup> These institutions were conceived in a purely state-centric international community in which they could be held accountable only to their member states through their internal governance mechanisms.<sup>184</sup> Jurisdictional immunity was conceived as a way to preserve the organizations' prerogatives in the face of third-party influences.<sup>185</sup>

The evolution of the international legal system resulted in a historic change in the conception of the international community.<sup>186</sup> The

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179. See Gianviti, *supra* note 123, at 113 (explaining the duties of parties to the International Covenant on Economic, Social and Cultural Rights).

180. Suzuki, *supra* note 163, at 96–97 (“The principle of speciality supports organizational effectiveness.”).

181. See Bradlow, *supra* note 1, at 233 (discussing IFIs' interpretations of charters).

182. See *IBRD Articles of Agreement*, *supra* note 74, art. 4, § 10 (describing that political activity is prohibited by the Bank and its officers).

183. See Tan, *supra* note 162, at 80, 115 (stating the Bretton Woods institutions were conceived in 1944).

184. See Bradlow, *supra* note 1, at 208, 212 (critiquing the application of state-centric perspective of environmental and social standard development to IFIs' standard development process); Bradlow, *Private Complaints and International Organizations*, *supra* note 166, at 405 (explaining how international organizations are held accountable to their member states).

185. See Brilmayer, *supra* note 170, at 2292 (contemplating how the structure of human rights claim remedies only benefit the state and not the individual).

186. See Schacter, *supra* note 103, at 10–13 (outlining changes in the international



classic international community was conceived as a state-based legal entity, but the modern international community saw the rise of new actors, as individuals, along with the reinforcement of global concerns about legal protection of common goods and human rights.<sup>187</sup> Especially in the aftermath of World War II, protection of individuals emerged in the international legal framework as a result of the consolidation of democratic values and human dignity worldwide.<sup>188</sup> However, despite the evolution of the international legal system, IFIs retained their original architecture, which lacked an effective mechanism for securing substantive justice.<sup>189</sup>

For this reason, the independence of IFIs in the implementation of their activities seems to have grown beyond the limits that originally inspired the drafters.<sup>190</sup> On the verge of sustainability, the increasing impact of international finance on human rights obligations required evolution toward a more programmatic approach to access to remedies.<sup>191</sup>

To analyze access to remedies in development finance, it is necessary to take into account the independence and effectiveness of IFIs vis-à-vis the values protected by individual rights and due process. This analysis will identify a forum competent to grant judicial review as well as alternative relief to affected parties, with a focus on the Internal Accountability Mechanisms of IFIs and available judicial remedies.

## B. INTERNAL ACCOUNTABILITY MECHANISMS IN THE

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legal system).

187. See *id.* at 10–13 (discussing the influence of social advocacy non-governmental bodies on developments on international law).

188. See August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, in *NON-STATE ACTORS AND HUMAN RIGHTS 38* (Philip Alston ed., 2005) (describing the change in perception of individuals in the international legal landscape).

189. See Hunter, *Civil Society Networks and the Development of Environmental Standards at International Financial Institutions*, *supra* note 123, at 468 (identifying a critique of IFC's failure to incorporate appropriate human rights standards).

190. Tan, *supra* note 162, at 193–94 (“[e]xpand the scope of their operations beyond what their initial founders envisaged”).

191. See McBeth, *supra* note 91, at 1101, 1116, 1118 (noting the progress in the interpretation of the World Bank mandate and how the new interpretation demands a new approach to remedies).

## DEVELOPMENT FINANCE CONTEXT

This section explores the quasi-judicial mechanisms available at the international level to redress human rights violations in the development finance context. International organizations' duty to provide access to a remedy for violations can be complied with through judicial or quasi-judicial channels.<sup>192</sup> In the field of human rights, this fact has been enshrined in the jurisprudence of the European Court of Human Rights mainly through two decisions, *Beer and Reagan v. Germany* and *Waite and Kennedy v. Germany*.<sup>193</sup> When judicial solutions are not available, claimants should have access to reasonable alternative means to effectively protect their rights.<sup>194</sup>

In the development finance context, IFIs have established Internal Accountability Mechanisms (IAMs) to promote accountability through an independent authority.<sup>195</sup> They are quasi-judicial bodies that provide a forum for people claiming to have been adversely affected in development finance operations.<sup>196</sup> Based on the archetype of the World Bank's Inspection Panel<sup>197</sup> established in 1993, IAMs are internal bodies within IFIs that were created as a mechanism to allocate responsibility and provide a legal remedy for complainants' harm.<sup>198</sup>

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192. See Reinisch, *Immunity of International Organizations*, *supra* note 163, at 286 (noting that remedies must be provided through judicial or quasi-judicial channels due to immunity).

193. See *Beer and Reagan v. Germany*, App. No. 28934/95, 1 (Feb. 18, 1999); *Waite and Kennedy v. Germany*, 1999-I Eur. Ct. H.R. 393 (holding that there are other options for applicants to obtain remedies for labor disputes besides judicial channels).

194. See Reinisch, *Immunity of International Organizations*, *supra* note 163, at 286, 292 (discussing the implications of the holdings of *Beer and Reagan* and *Waite and Kennedy*).

195. See August Reinisch & Jakob Wurm, *International Financial Institutions Before National Courts*, in *INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW* 103, 111 (Daniel D. Bradlow & David B. Hunter eds., 2010) (noting that staff members usually need to pursue employment claims through internal mechanisms due to immunity clauses); Bradlow, *supra* note 1, at 393 (exploring how IAMs can strengthen accountability).

196. Reinisch, *Immunity of International Organizations*, *supra* note 163, at 286.

197. Int'l Bank for Reconstruction and Development Res. 93-10, at 1 (Sept. 22, 1993).

198. See Bradlow, *supra* note 1, at 232 (defining IAMs with respect to IFIs).

These mechanisms operate in compliance with internal policies and procedures of the organization that authorize them to issue decisions but not reparations.<sup>199</sup> In other words, in most cases, IAMs are fact-finding bodies with no authority to prevent or end human rights abuses.<sup>200</sup> Whether this is an effective mechanism for providing a remedy depends on whether the institution voluntarily complies with IAMs' decisions.<sup>201</sup> For instance, the World Bank's Inspection Panel is tasked to report to the Board of Executive Directors, which ultimately holds decision-making power.<sup>202</sup> Any violation falling outside internal constitutions and agreements is not subject to this mechanism, thus undermining the panel's effectiveness.<sup>203</sup>

In addition to the new ESF of the World Bank, very few IFIs make explicit commitments to upholding and protecting human rights.<sup>204</sup> The institutions that do, such as the Overseas Private Investment Corporation and the European Investment Bank, fail to provide guidance notes or ensure that enforceable policies are integrated into project design.<sup>205</sup> Therefore, though IAMs can be considered an

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199. See Tan, *supra* note 162, at 102 (highlighting that the purpose of recommendations from the Inspection Panel is “to review Bank procedures in light of non-compliance rather than to provide for reparations for harm done”).

200. See *id.* at 106 (discussing the shift of responsibility for policing human rights to IFIs).

201. See Alston, *supra* note 76, at 12 (noting that there is a difference between adopting human rights policy and enforcing said policy).

202. Shihata, *supra* note 163, at 276 (“[t]he Board would “always retain [the] final decision-making power” . . . The Panel shall submit its report to the Executive Directors and the President.”).

203. See Bradlow, *supra* note 1, at 29 (discussing limitations of inspection panels).

204. See Alston, *supra* note 76, at 10–11 (noting that the current safeguards put forth by the World Bank contain no explicit human rights policies).

205. VIOLET BENNEKER ET AL., CIEL, GLASS HALF FULL: THE STATE OF ACCOUNTABILITY IN DEVELOPMENT FINANCE § 3.6 (2016), [https://www.ciel.org/wp-content/uploads/2016/01/IAM\\_DEF\\_WEB.pdf](https://www.ciel.org/wp-content/uploads/2016/01/IAM_DEF_WEB.pdf) (assessing the necessity to have rights-compatible standards to measure IFIs' performance in order to have rights-compatible outcomes of complaints processes); see also David B. Hunter, *International Law and Public Participation in Policy Making at the International Financial Institutions*, in INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW 216, 231 (Daniel D. Bradlow & David B. Hunter eds., 2010) (assessing the discretion of the Overseas Private Investment Corporation in waiving the applicability of the environmental and social policies on specific projects).

important innovation, they may be ineffective in providing due process to affected people in IFI-financed operations.<sup>206</sup> People filing complaints have been the targets of threats, intimidation, and criminal charges at a domestic level, frustrating access to and the effectiveness of IAMs.<sup>207</sup> Private parties seeking remedies for breach of international obligations with respect to human rights should still advocate indirectly through their governments or seek a remedy before domestic courts if their right of due process is frustrated on an international level.<sup>208</sup> This omission makes reform of the system necessary to provide effective remedies that satisfy the due process principle.<sup>209</sup> With this regard, the enhanced scope of the new ESF reflect a positive step toward a broader empowerment of the Inspection Panel to hold the Bank accountable for social and environmental harm, while protecting a wider group of people.<sup>210</sup>

In the twenty-seven years of work since the institution of the Inspection Panel, IAMs have functioned as a sword of Damocles in IFIs' operations, producing important advances.<sup>211</sup> First, they have

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206. See B.S. Chimni, *IFIs and International Law: A Third World Perspective*, in *INTERNATIONAL FINANCIAL INSTITUTIONS & INTERNATIONAL LAW* 31, 45–47 (Daniel D. Bradlow & David B. Hunter eds., 2010) (describing the limitations of states in enforcing human rights policies).

207. VIOLET BENNEKER ET AL., CIEL, GLASS HALF FULL: THE STATE OF ACCOUNTABILITY IN DEVELOPMENT FINANCE § 3.6 (2016), [https://www.ciel.org/wp-content/uploads/2016/01/IAM\\_DEF\\_WEB.pdf](https://www.ciel.org/wp-content/uploads/2016/01/IAM_DEF_WEB.pdf) (“A recent report by Human Rights Watch documents the reprisals, threats, intimidation and baseless criminal charges faced by some complainants who have sought to use the Inspection Panel and the CAO.”).

208. See Suzuki & Nanwani, *supra* note 166, at 214 (discussing panels requirement to proceed with claims through management or local remedies before taking to the international level).

209. See Hunter, *Civil Society Networks and the Development of Environmental Standards at International Financial Institutions*, *supra* note 123, at 460 (illustrating the World Bank's hesitation to add human rights language to its policies).

210. In order to hold the Bank accountable for environmental and social harm, the Inspection Panel must be able to establish a link between the Bank's duties and its requirements. As the new ESF expanded the thematic coverage of the internal safeguards, the Inspection Panel can hold the Bank accountable for a wider array of cases and with regard to a wider group of people. See Cristina Passoni, Ariel Rosenbaum, Eleanor Vermunt, *Empowering the Inspection Panel: The Impact of the World Bank's New Environmental and Social Safeguards*, 49 N.Y.U. J. INT'L L. & POL. 921, 940 (2017).

211. See Peter L. Lallas, *Citizen-Driven Accountability: The Inspection Panel and*

secured broader participation and accountability for better development outcomes.<sup>212</sup> Second, they have furthered a progressive agenda for human rights protection, which mirrors the new ESF toolkit, allowing the World Bank's Inspection Panel to offer redress for a broader array of rights.<sup>213</sup>

### C. JUDICIAL MECHANISMS

Whenever IAMs are unavailable or ineffective, affected people in IFI-financed projects may seek remedies through domestic courts.<sup>215</sup> The analysis of access to a remedy through judicial mechanisms involves policy and legal considerations; there is a delicate balance between IFIs' immunities and responsibilities under international law.<sup>216</sup>

The immunity of IFIs is the result of the need for international organizations to have their functional necessity secured in order to safeguard their independence and effectiveness.<sup>214</sup> This protects them against undue external interference or political judgments as they pursue their objectives.<sup>215</sup> Analyzing international organizations' privileges and immunities at the domestic level sheds light on the level of accountability these institutions have before domestic courts. The experience of the United States is a relevant case study, as it hosts in its territory the headquarters of several multilateral organizations,

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*Other Independent Accountability Mechanisms*, 107 ASIL PROC. 308, 312 (2013) (outlining important advances made by the Panel).

212. See *id.* at 313–14 (identifying core missions of citizen-led IAMs).

213. See Cristina Passoni, Ariel Rosenbaum, Eleanor Vermunt, Empowering the Inspection Panel: The Impact of the World Bank's New Environmental and Social Safeguards, 49 N.Y.U. J. INT'L L. & POL. 921, 926 (2017).

<sup>215</sup> See August Reinisch & Jakob Wurm, *International Financial Institutions Before National Courts*, in INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW 103, 104-07 (Daniel D. Bradlow & David B. Hunter eds., 2010)

<sup>216</sup> See José E. Alvarez, International Organisations and the Rule of Law, 14 N. Z. J. PUB. AND INT'L L. 3, 5 (2016); see generally AUGUST REINISCH, INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS (2000) (analyzing empirical data regarding legal interpretation techniques and judicial decisions on international organizations' immunities).

214. BB/SC ADD SOURCE

215. See Josef L. Kunz, *Privileges and Immunities of International Organizations*, 41 AM. J. INT'L L. 828, 836 (1947).

some of which are IFIs;<sup>216</sup> additionally, U.S. domestic courts have influence internationally.<sup>217</sup>

In the U.S. legal system, the International Organizations Immunities Act of 1945 (IOIA) defines international organizations' immunities from suit before U.S. courts to be as broad as those protections enjoyed by foreign governments.<sup>218</sup> Therefore, when the Act was passed foreign governments generally had absolute immunity, this protection extended to international organizations.<sup>219</sup> Over time, exceptions to the principle of absolute immunity of foreign sovereigns have been introduced in the international community,<sup>220</sup> including in the United States, which enacted the Foreign Sovereign Immunities Act of 1976 (FSIA).<sup>221</sup> This law allows domestic courts to hear some categories of lawsuits—those that relate to foreign governments' actions that are not quintessentially sovereign in nature.<sup>222</sup> However, the U.S. domestic legal system did not explicitly clarify whether FSIA provisions regarding “restrictive immunity” applied to international

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216. The Washington-based IFIs are the World Bank Group, the International Monetary Fund, and the Inter-American Development Bank.

217. See, e.g., Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1854–55 (1998) (demonstrating the transition of the Ninth Circuit's application of an interest-balancing test into an internationally-used standard for determining whether a nation's exercise of prescriptive jurisdiction is reasonable).

218. See 22 U.S.C. § 288 (defining international organization as a “public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities”).

219. See, e.g., Kunz, *supra* note 218, at 830–32 (illustrating the increase in grants of diplomatic privileges to European and South American organizations in the early 20th century); Aaron I. Young, *Deconstructing International Organization Immunity*, 44 GEO. J. INT'L L. 311, 314 (2013); Gordon H. Glenn et al., *Immunities of International Organizations*, 22 VA. J. INT'L L. 247, 251–52 (1982) (discussing legislative intent under the International Organizations Immunities Act).

220. Young, *supra* note 222, at 339 (explaining that the restrictive immunity will be unnecessary for international organizations that are commercial in nature).

221. 28 U.S.C. § 1602 (2020).

222. See *Saudi Arabia v. Nelson*, 507 U.S. 349, 360–61 (1992) (applying the absolute theory of foreign sovereign immunity to find that Saudi Arabia's exercise of police powers against Americans was a quintessentially sovereign act and thus unreviewable under the FSIA).

organizations as well.<sup>223</sup> Based on the jurisprudential application of domestic statutes, U.S. courts generated an asymmetry between foreign sovereigns' immunities and international organizations' immunities—in most cases, the latter retained the benefit of absolute protection.<sup>224</sup> Thus, through a literal interpretation of the statute, judicial hermeneutics set the standards of protection of international organizations higher than those for sovereign governments.<sup>225</sup>

Case law demonstrates how IOs' functional necessity has been expanded beyond its literal scope, resulting in absolute immunity *de facto*. For instance, in *Loughran v. United States*, the United States Court of Appeals for the D.C. Circuit (D.C. Circuit) upheld the absolute immunity of the IMF from all judicial process in the United States.<sup>226</sup>

Similarly, in 1980 in *Broadbent v. Organization of American States*, the D.C. Circuit affirmed dismissal of a suit against the Organization of American States by former employees.<sup>227</sup> The court stated, on the basis of a literal and historical interpretation of the statute, that the FSIA did not explicitly amend the IOIA. Indeed, the plain text of the IOIA, along with its legislative history, gives to the Executive Branch, and particularly to the U.S. President, the responsibility for limiting immunities of IOs.<sup>228</sup> As a result, it was held that the concept of restrictive immunity of foreign states did not apply to IOs.<sup>229</sup> The D.C.

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223. See Young, *supra* note 222, at 320; see also Joseph W. Dellapenna, *Refining the Foreign Sovereign Immunities Act*, 9 WILLAMETTE J. INT'L L. & DISP. RESOL. 57, 114 (2001) (explaining that the legislative history of the IOIA does not clarify whether Congress intended for the statute to confer immunity as foreign governments enjoyed it in 1945 or as it has evolved in the decades since).

224. See Young, *supra* note 223, at 321–351 (describing a circuit split in whether international organizations carried the same immunities as foreign sovereigns).

225. See Steven Herz, *International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity*, 31 SUFFOLK TRANSNAT'L L. REV. 471, 495–97 (analyzing the jurisprudential practice of granting absolute immunity to IOs based on a static interpretation of the IOIA).

226. See *Loughran v. United States*, 317 F.2d 896, 898–99 (D.C. Cir. 1963) (recognizing that the Fund shall enjoy immunity unless it explicitly waives such immunity).

227. *Broadbent v. Org. of Am. States*, 628 F.2d 27, 28, 33–36 (D.C. Cir. 1980).

228. *Id.* at 31–32.

229. *Id.* at 32 n.20 (“[International] organizations do not regularly engage in commercial activities.”).

Circuit arrived at analogous conclusions in *Mendaro v. World Bank* in 1983; it did not apply the FSIA regulation in a case concerning internal administrative affairs of organizations.<sup>230</sup>

As a result of such broad immunity, the only way for an IFI to be brought before a domestic court and have a judgment on the merits entered against it is for there to be a waiver of the organization's immunity.<sup>231</sup> That is what happened in *Osseiran v. International Finance Corp.* and *Concesionaria DHM v. International Finance Corp.*<sup>232</sup> Beyond the U.S. scenario, it is notable that an exception to the broad immunity granted by IFIs is represented by the European Investment Bank, whose founding documents do not preclude the possibility of it being sued before national courts or before the European Court of Justice.<sup>233</sup>

Independence from domestic courts is the result of the implementation of domestic law.<sup>234</sup> Put differently, states agree to IFIs' immunity through a variety of instruments – constituent agreements, headquarters agreements, or customary international law.<sup>235</sup> Unlike those of other international organizations, most IFIs' constituent agreements provide specific limitations for immunity, in light of the economic mandate of these institutions.<sup>236</sup> The “borrowers' exception” allows the organizations to be sued before domestic courts

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230. See *Mendaro v. World Bank*, 717 F.2d 610, 619–20 (D.C. Cir. 1983).

231. See *id.* at 20–21 (noting that the FSIA confers immunity “except to the extent that [IOs] expressly waive their immunity for the purpose of any proceedings or by the terms of any contract”) (emphasis added).

232. See, e.g., *Osseiran v. Int'l Fin. Corp.*, 498 F. Supp. 2d 139, 143–46 (D.D.C. 2007); *Concesionaria DHM v. Int'l Fin. Corp.*, 307 F. Supp. 2d. 553, 557–58 (S.D.N.Y. 2004).

233. Consolidated Version of the Treaty on the Functioning of the European Union art. 28, Jul. 6, 2016, 2016 O.J. (C 202) 264 [hereinafter TFEU].

234. See, e.g., *Medellin v. Texas*, 552 U.S. 491, 526 (2008) (demonstrating independence of domestic courts by requiring that a non-self-executing treaty may only have domestic effect if it was passed through Congress and signed by the President).

235. See Kristina Daugirdas, *How and Why International Law Binds International Organizations*, 57 HARV. INT'L L.J. 325, 332 n.34, 359–60.

236. See Yohei Okada, *The Immunity of International Organizations Before and After Jam v. IFC: Is the Functional Necessity Rationale Still Relevant?*, 72 QUESTIONS OF INT'L L. 29, 34–35 (2020) (comparing immunity provisions in the U.N. Charter with the World Bank and IFC's Articles of Agreement).



by private parties in all those cases in which they act like borrowers.<sup>237</sup> This system is aimed at respecting the creditworthiness of international capital markets, as it was specified by the D.C. Circuit in *Lutcher S.A. Celulose e Papel v. Inter-American Development Bank* and *Atlantic Tele-Network v. Inter-American Development Bank*.<sup>238</sup>

Given the lack of clarity in the U.S. legal system regarding privileges and immunities, in some circumstances U.S. courts have interpreted IOs' privileges and immunities in the light of the FSIA.<sup>239</sup> Specifically, in *Rendall-Seranza v. Nassim*, the United States District Court for the District of Columbia concluded that the IOIA should be read in light of the FSIA, applying new standards in foreign sovereigns' immunity.<sup>240</sup> The court found that "[a]lthough Congress enacted the IOIA in 1945, when foreign governments enjoyed broad immunity, presumably it knew how to revise the IOIA when the immunity of foreign governments was diminished with the passage of the FSIA."<sup>241</sup>

In *Atkinson v. Inter-American Development Bank*, the D.C. Circuit found that IOs are immune from suit and any form of judicial process and that Congress provided no guidance on whether Congress intended to incorporate subsequent changes applicable to foreign sovereigns into interpretation of the IOIA.<sup>242</sup> The court pointed out that foreign sovereign immunity falls under political action and, particularly, the U.S. President has authority over IOs' privileges, including the possibility of limiting their scope in commercial activities.<sup>243</sup>

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237. See Reinisch & Wurm, *supra* note 195, at 123–24 (discussing cases that narrowly interpreted the borrowing exception to the immunity).

238. See, e.g., *Lutcher S.A. Celulose e Papel v. Inter-Am. Dev. Bank*, 382 F.2d 455, 458 (D.C. Cir. 1967); *Atl. Tele-Network v. Inter-Am. Dev. Bank*, 251 F. Supp. 2d 126, 128, 130–32 (D.D.C. 2003); *Scimet v. African Development Bank*, Court of First Instance of Brussels, 14 Feb. 1997, 128 I.L.R. 582.

239. See, e.g., *Rendall-Speranza v. Nassim*, 932 F. Supp 19, 23 (D.D.C. 1996)

240. *Id.* at 19, 21, 23–24.

241. *Id.* at 24.

242. See *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1341 (D.C. Cir. 1998) (stating that the IOIS provided no explicit guidance on whether Congress intended to incorporate the IOIA subsequent changes to the law governing the immunity of foreign sovereigns so the power rests with the president).

243. *Id.* at 1341.

More recently, in 2010 in *OSS Nokalva v. European Space Agency*, the U.S. Court of Appeals for the Third Circuit progressively evolved toward a restrictive interpretation that IOs' immunities should be adapted to those of foreign sovereigns.<sup>244</sup> The court applied the canon of statutory interpretation that a statute generally adopts the legal standards in place at the time the law is enacted, which include subsequent amendments and modifications of the statute.<sup>245</sup> The court found that "nothing in the statutory language or legislative history suggests that the IOIA provision delegating authority to the President to alter the immunity of international organizations precludes incorporation of any subsequent change to the immunity of foreign sovereigns."<sup>246</sup>

The legal framework pictured hitherto leaves a gap in the international legal system – obligations arising from international law that are not covered by a convention signed by the organization or provided for in a contract under which the IFI is a borrower are not legally protected or regulated.<sup>247</sup> As a result, individuals whose fundamental rights are affected by development finance operations have no remedy before domestic courts.<sup>248</sup> Because human rights lie at the heart of the U.N. architecture,<sup>249</sup> such people should constitute the

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244. See *OSS Nokalva, Inc. v. European Space Agency*, 617 F.3d 756, 764 (3d Cir. 2010) (concluding that ESA is not entitled to immunity as it stood for foreign sovereigns in 1945).

245. See *id.* at 763 (describing the court's persuasion from the well-established rules of statutory interpretation through which it is understood that congress intended the IOIA to incorporate subsequent changes to the immunity enjoyed by foreign governments).

246. *Id.* (citing the Senate committee report described in Atkinson).

247. See Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 38 VA. J. INT'L L. 56, 65 (1995) (providing that an international organization has no right to self-determination, but does have a right conterminous with obligations as set out in its constituent instrument).

248. See *id.* at 93–94 (stating that the court must first satisfy itself that the plaintiff has not alleged a violation of international law, only then may it proceed with the functional necessity doctrine which shields international organizations from judicial scrutiny); McInerney-Lankford & Sano, *supra* note 93, at 3–4 (discussing the incorporation of human rights considerations).

249. U.N. Charter art. 1, ¶ 3 ("The Purposes of the United Nations are: . . . to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect

“most compelling reason” for which IFIs should be held responsible for their violations.<sup>250</sup>

In the development finance legal debate, recourse to domestic courts has been discouraged in order to avoid exposing IFIs to a multiplicity of different legal systems around the world and an explosion of lawsuits.<sup>251</sup> Nonetheless, as the international agenda evolved new standards of protection, especially in the field of environmental torts and human rights violation, the topic of IOs’ immunity was recently scrutinized by the U.S. Supreme Court.<sup>252</sup>

In 2015, communities affected by a coal-fired power plant – the Tata Mundra project, financed by the IFC of the WBG – filed suit in federal court in Washington, D.C.<sup>253</sup> In March 2016, the United States District Court for the District of Columbia decided that the IFC, since it was under the WBG umbrella, was entitled to absolute immunity. Therefore, it dismissed the case,<sup>254</sup> reaffirming that there is an absolute shield for international organizations pursuant to the 1998 case *Atkinson v. Inter-American Development Bank*.<sup>255</sup> The case was appealed, and in June 2017 the D.C. Circuit affirmed, agreeing that the IFC could not be sued.<sup>256</sup> Notwithstanding the unanimous decision of the panel, in a concurring opinion, Judge Cornelia Pillard suggested that the D.C. Circuit reconsider the *Atkinson* for private claimants.<sup>257</sup>

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for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”)

250. Herz, *supra* note 175, at 162.

251. See Reinisch & Wurm, *supra* note 163, at 123 (explaining IFIs do not have broad jurisdictional immunity).

252. See *Jam*, 139 S. Ct. at 759 (finding that the immunity international organizations as foreign governments enjoy under FSIA is not absolute).

253. See generally *Tata Mundra Coal Power Plant*, EARTH RIGHTS INT’L, <https://earthrights.org/tata-mundra-coal-power-plant/> (last visited June 20, 2020) (explaining the procedural history and the claim brought against the IFC).

254. *Jam*, 139 S. Ct. at 759 (granting the motion to dismiss).

255. *Atkinson*, 156 F.3d at 1339–40 (stating IOs enjoy absolute immunity).

256. *Jam v. Int’l Fin. Corp.*, 860 F.3d 703, 708 (D.C. Cir. 2017) (affirming the lower courts ruling); see *Indian Fishing Community Asks U.S. Supreme Court to Hear Case Challenging World Bank Group Immunity*, EARTH RIGHTS INT’L, [earthrights.org/media/Indian-fishing-community-asks-u-s-supreme-court-hear-case-challenging-world-bank-group-immunity/](https://earthrights.org/media/Indian-fishing-community-asks-u-s-supreme-court-hear-case-challenging-world-bank-group-immunity/) (last visited Apr. 26, 2020) (stating the Court of Appeals for the District of Columbia ruled that IFC could not be sued).

257. *Jam*, 139 S. Ct. at 759.

This system would pierce the absolute immunity veil of IFIs and would establish public accountability of IFIs under international human rights law.

## V. CONCLUSION

The current debate on development finance and human rights has evolved through the 2030 agenda for sustainable development, which has mainstreamed sustainability and inclusion in IFIs' policies and projects.<sup>258</sup> Since the creation of the Bretton Woods institutions in 1944, the architecture of IFIs has evolved tremendously.<sup>259</sup> They constitute one of the major channels for combining markets' short-term needs and policies' long-term objectives.<sup>260</sup> Stalled for years in legal formalism and political misalignments, the human rights agenda has silently evolved in development finance, shaping operations of IFIs despite the "political prohibition" that says they should not be involved with politically sensitive topics such as human rights at a domestic level.<sup>261</sup>

This Article proposes a conceptual and policy framework to bridge the gap between development finance and human rights, demonstrating that human rights lie at the heart of the global challenge of IFIs moving toward sustainable development. The analysis takes into account governance needs of both IFIs and borrowing countries

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258. See HRBA, *supra* note 92, at 1–2 (explaining that programs of development cooperation contribute to the development of the capacities of duty-bearers); McInerney-Lankford & Sano, *supra* note 93, at 3–4 (identifying principles that are of importance); *Roadmap*, *supra* note 97, at 20–39 (discussing the 2030 agenda and what it calls for concerning IFI's).

259. See Trimble, *supra* note 103, at 1969 (tracking the change created by the Bretton Woods Institute and World Trade Organization).

260. See Cissé, *supra* note 111, at 72–73 (discussing the Bank's developments to assist in the promotion of social, economic, and cultural rights, and their increasing willingness to address human rights issues); Uzan, *supra* note 1, at 418–19 (debating medium-term initiatives); Watt, *supra* note 111, at 43; Kirgis, *supra* note 83, at 892 (stating that human rights have always been the basic goal of the UN).

261. See *IBRD Articles of Agreement*, *supra* note 74, art. 4, § 10 (affirming the Bank is not to interfere with the political affairs of any member and only economic considerations should be relevant to the Bank's decisions); OHCHR, *supra* note 75 (stating the World Bank is a human rights-free zone); Alston, *supra* note 76, at 2, 4 (articulating that the Bank's Articles of Agreement would normally prohibit it from promoting political rights).

while preserving international legal prerogatives in order to examine the current status of human rights in development finance operations and pave the way forward.

Applying the Protect, Respect and Remedy model in a development finance context aims to encourage investments in a human rights-sensitive framework, correcting imbalances in this field. Development finance operations touch an array of subjects and stakeholders, from governments to business actors, from civil society to local populations. The proposed model is intended to guide the main stakeholders involved in development projects and policies and reduce human rights violations in development finance. Lessons from the business and human rights fields serve as useful templates for advancing new standards in development finance and analyzing the effectiveness of results without weighing down financial policy objectives.

The model seeks to address institutional misalignments between the development finance sector and human rights through a common conceptual and policy framework for the actors involved, including both state and non-state actors. In that way, it combines human rights prerogatives with the traditional economic mandate of IFIs. Moreover, it suggests a systemic way to fill the governance gap between the scope of IFIs' activities and their capacity to manage adverse consequences, addressing governance gaps in human rights at the international and domestic levels.

The Protect, Respect and Remedy model comprises three essential and complementary pillars.<sup>262</sup> First, it focuses on human rights protection at the state level, analyzing it in the context of developing countries, in conjunction with IFIs' prerogative of supporting domestic governance through accountability, clarity, predictability, and transparency.<sup>263</sup> Second, it evaluates how human rights are treated in IFIs' policies and projects, especially in light of the World Bank's new Environmental and Social Framework.<sup>264</sup> Third, it assesses the remedies available to affected individuals through quasi-judicial and judicial mechanisms – Internal Accountability Mechanisms and

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262. See *Guiding Principles on Business and Human Rights*, *supra* note 8, at 4.

263. See *id.*

264. See *id.*

domestic courts, respectively.<sup>265</sup> These three pillars combined build a more solid architecture for governance of IFIs with a forward-looking view of development finance and human rights.

Human rights constitute the *fil rouge* that allows tailoring governance paradigms in development finance to the 2030 agenda for sustainable development.<sup>266</sup> IFIs' engagement with human rights corresponds with the recent operationalization of environmental and social standards in development finance and a deeper accountability through quasi-judicial and judicial solutions.<sup>267</sup> First, the World Bank's launch of the Environmental and Social Framework in October 2018 established a new policy strategy to enable the Bank and its borrowers to better manage environmental and social risks and improve development outcomes.<sup>268</sup> Second, the 2019 U.S. Supreme Court's decision in *Jam v. International Finance Corp.* redefined international organizations' responsibilities before domestic courts.<sup>269</sup>

Development finance goals of reducing poverty and enhancing shared prosperity would be better furthered if effective human rights protections and remedies were available. Giving voice to people who ultimately bear the effects of IFIs' policies and programs by providing them with the tools to seek judicial protection and redress would not only secure inclusion in development finance but also enhance respect for human rights. Only in this way will IFIs be able to cope with their challenge of building a solid commitment to human rights in borrowing countries.

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265. *See id.*

266. *See* G.A. Res. 70/1, *supra* note 2, at 1–4 (presenting the 2030 Agenda as a plan of action for people, planet, and prosperity).

267. *See* Ending Poverty and Sharing Prosperity, *supra* note 3, at 35–36 (discussing the World Bank's engagement in economic growth); *Environmental and Social Framework*, *supra* note 6, at 15–16 (highlighting a plan to achieve environmental and social outcomes consistent with the Environmental and Social Standards); *Jam*, 139 S. Ct. at 771–72.

268. *See* *Environmental and Social Framework*, *supra* note 6, at 15–16 (discussing the borrower's responsibilities for assessing managing and monitoring environmental and social risks and impacts).

269. *See* *Jam*, 139 S. Ct. at 759.