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

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ABSTRACT

Multilateral Development Financing Institutions have refused to participate in the Human Rights agenda in at least two ways — first, they have rejected their Human Rights obligations by invoking the Prohibited Political Activity Clauses of their constituent instruments. Second, they have refused to be held accountable by pleading their immunities. Thus, this Work addresses the primary legal questions: Which should prevail between the Prohibited Political Activity Clauses and International Human Rights Law? Can MDFIs plead their immunities when they are being held responsible for Human Rights violations?

This Work submits that the Prohibited Political Activity Clauses do not bar MDFIs from discharging their Human Rights obligations. First, the purpose of and the protections afforded by the Prohibited Political Activity Clause accrue to the benefit of borrowing Member States and is improperly cited by MDFIs. The current interpretation of the provision expands the power of MDFIs beyond the contemplation of their charters. Finally, the systemic integration of the Prohibited Political Activity and Purpose Clauses of MDFIs lead to a conclusion that the discharge of Human Rights obligations takes primacy.

It is submitted that National Courts have jurisdiction over cases of Human Rights violations perpetrated by MDFIs and that they are not immune for ultra vires acts. National Courts have jurisdiction ratione materiae over claims arising from MDFIs’ acts or omissions which result to the violation of HR obligations, and cannot be ousted by claims of immunity because these claims do not stand against the functional nature of such immunity. The violation of Human Rights are ultra vires, and are not subject to the protections afforded by their Immunity Clauses.

By way of recommendation, the Work recommends the adoption of a Human Rights Due Diligence framework. The Work also proposes that National Courts develop a test in order to properly adjudicate at the onset the propriety of immunity claims without ignoring the in limine litis character of the procedural aspects pertaining to such claims.
In closing, the issues resolved in this Work are rooted in the dichotomous paradigm, under which MDFIs operate. Ultimately, the ideas that MDFIs are exempt them from discharging Human Rights obligations, or that they are unequivocally immune from Human Rights suits, precipitate from a perspective which views Human Rights, and ultimately human lives, as development trade-offs — one for the many, liberty or prosperity. This Work is a campaign for MDFIs to lift the firmament of global cooperation on development with the conjunctive, “And” so that the pursuit thereof may bring about, fully and finally, liberty and prosperity.
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   E. Significance of the Study
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II. BRIDGING THE ACCOUNTABILITY GAP BETWEEN THE UNIVERSAL RIGHTS REGIME AND THE REGIME OF MULTILATERAL DEVELOPMENT FINANCING INSTITUTIONS
   This Chapter answers the question: Will the integration of Human Rights standards in development loan or investment agreements between MDFIs and States and corporations violate the Principle of Non-Intervention, and ultimately the constituent instruments of MDFIs?

   A. History and Evolving Meanings of the Prohibited Political Activity Clause and Its Inconsistency with Human Rights Obligations
      This Section lays down the preliminaries of the inquiry — what does the Prohibited Political Activity Clause in MDFIs’ constituent instruments say and how has the clause been used by MDFIs to evade liability for Human Rights obligations? In answering this question, the Proponent undertakes a review of statements made by leaders of MDFIs, State authorities, and scholars in determining the meaning of the Prohibited Political Activity Clause as it relates specifically to IHRL, surfacing in the process the tension between the provision and Human Rights.

   B. Resolving the Contesting Values of Non-Intervention and Human Rights in the Operations of Multilateral Development Financing Institutions
      The Proponent argues that in the weighing of values between the Prohibited Political Activity Clause and Human Rights obligations, the scale must tip in favor of the latter.
1. Purpose of and Protections Afforded by the Prohibited Political Activity Clause

The Prohibited Political Activity Clause exists for the benefit of borrowing States to dissuade MDFIs from looking into their political affairs in the granting of loans, but it does not preclude MDFIs from setting Human Rights standards during the projects’ implementation phases.

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

Human Rights obligations under CIL limit the exercise of sovereign powers by all subjects of International Law and the current reading of the Prohibited Political Activity Clause expands MDFIs’ scope of power beyond its contemplations.

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

The systemic integration of the Prohibited Political Activity and the Purpose clauses of the MDFIs’ constituent instruments militates against an interpretation that would otherwise lead to the aiding or abetting of a borrowing States’ or debtor institutions’ violation of its own Human Rights obligations.

C. Conclusions on the Primary Rules on Human Rights Devolving Upon Multilateral Development Financing Institutions

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

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

The Chapter has also established the trend in case law for aligning the immunity of MDFIs with diplomatic immunity because of these actors’ shared characteristic of being users of sovereign powers. The Proponent has likewise shown how violations of Human Rights obligations, being *ultra vires* acts, are not within the ambit of protections of MDFIs’ immunity provisions.
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A. Accountability Gap in the Regime of Multilateral Development Financing Institutions

In this Section the Proponent demonstrates the lack of accountability mechanism in the MDFI regime vis-à-vis IHRL through a hypothetical example.

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

The Proponent argues that the National Courts are capable of hearing and deciding Human Rights litigation involving MDFIs.

1. Overcoming the Threshold Issue of Jurisdiction Ratione Materiae
   a. Towards a Nuanced Understanding of the Ultra Vires Doctrine
      The Proponent argues that the functional nature of the immunities granted to MDFIs lends itself more adaptable to the vires/ultra vires analysis rather than the jure imperii/jure gestionis characterization.
   b. On Political Question, Non-justiciability, and Vested Rights
      It is argued that the Political Question doctrine cannot be used to avoid Human Rights litigation, Human Rights having been removed from the competence of policy questions.
   c. Disclaimer of Subject Matter Jurisdiction in Cases Involving International Law
      The Proponent conducts a review of case law revealed inconsistent judicial attitudes towards International Law, observing therefrom the near-possibility of catalytic changes in judicial philosophy.


In this Section, it is shown that Human Rights violations are ultra vires acts of the third type, being contrary to law and public policy and are not covered by the immunity clauses of MDFIs.

C. Rights Without Remedies and Challenges to Immunity in the Regime of Multilateral Development Financing Institutions
IV. CONCLUSIONS ON THE ACCOUNTABILITY GAP AND HOLDING MULTILATERAL DEVELOPMENT FINANCING INSTITUTIONS LIABLE FOR HUMAN RIGHTS VIOLATIONS

A. Primary Rules on the Human Rights Obligations of Multilateral Development Financing Institutions

B. Secondary Rules on the Accountability of Multilateral Development Financing Institutions for Breach of Human Rights Obligations

V. RECOMMENDATIONS FOR EFFICIENT AND EFFECTIVE HUMAN RIGHTS ENFORCEMENT IN THE REGIME OF MULTILATERAL DEVELOPMENT-financing Institutions

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

B. Recommendations for Preserving the in Limine Litis Character of Immunity Claims in Human Rights Litigation Involving Multilateral Development Financing Institutions
Paghaya. Deep weeping. Pag-haaaa-ya. The wail is in the middle syllable. For some, a stifled exhalation; for others, a near-scream, but always the breath travels the full distance from the groin to the gut, welling up to the throat. It is a weeping that is not about this or that moment. It has a history as long as the distance covered by that breath.

— Merlinda Bobis*

To victims of Human Rights violations, this is a work in translation, meant to communicate to powerful institutions paghaya — the weeping of a people. It is also one meant for translation, not into any other language, but into action. May we no longer hear of homes being inundated, of families being displaced, of men and women being laid down before the altars of “development.” This is for you.

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CHAPTER I: INTRODUCTION

A. Background of the Study

“We have to rely on getting drinking water from the company. But they [do not] give us enough.”

— Patel Budha Ismail Jam

The idea of States pooling funds to aid in the rehabilitation and development of other States came on the heels of the devastation of the Second World War, with a vision of creating an international economic system constituting “two pillars to support the edifice of world peace and prosperity.” The model was replicated in regional communities, each institution citing substantially similar development goals as their primary purpose, birthing an international financing environment characterized by the existence of seemingly benevolent, multi-state entities with development objectives.


Multilateral Development Financing Institutions are financial institutions incorporated, generally, by national governments and whose “raison d’être ... is to engage where the market fails to invest sufficiently. [MDFIs] engage particularly in countries with restricted access to domestic and foreign capital markets. They [specialize] in loans with longer maturities and other financial products which are appropriate for financing long term infrastructure projects.”

The funding from these institutions have gained significance in low-income economies. In the course of their operations, however, several problems arose. On the one hand, the MDFI regime has allowed international resource transfers and facilitated some measure of growth and development. On the other hand, the unequal structures of many MDFIs, and their oppressive debt systems have made MDFIs prime exemplars in the neo-colonial, neo-imperialist debates. The problem is compounded by the fact that there is difficulty in International Law to define a set of rules that would definitively govern MDFIs. This difficulty is most pronounced in the area of International Human Rights Law. Behind this problem is a recognition that MDFIs can and do violate Human Rights as they relate with other subjects and objects of International Law.

In April 2008, for example, the International Finance Corporation, a member of the World Bank Group primarily engaged in private sector financing through direct investments and advisory services, granted a

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10. SKOGLY, supra note 7, 1-9.

US$450,000,000 loan for the Tata Mundra project. The approval for the project was granted despite known risks that “would cause harm to surrounding communities.” The Tata Mundra Powerplant and Adani Plant were built near coastal fishing communities and are alleged to have caused serious environmental damage leading to decrease in catch-yield, an increase in illnesses, and potable water problems in the area. In 2011, the Tata Mundra Plants experienced problems in finding viable sources for coal, resulting in significant losses, which the company passed on to consumers. The Tata Mundra project is on the verge of collapse, reneging on its promise to bring electricity to poor Indian communities, negatively affecting the health, livelihood, and overall lifestyle of the people there.

A similar conduct of the IFC was observed in the financing of the Uy Metsa Botnia mega pulp mill which operates along the River Uruguay. The IFC pushed for the disbursement of some US$370,000,000 to Botnia despite (a) a legal battle between the border-States on negotiation and control along the border, (b) the Compliance Advisor/Ombudsman’s finding that the project violated IFC’s procedural norms and safeguards pertaining to social and environmental compliance, and (c) protests by key stakeholders. In the end, the International Court of Justice declared that Uruguay violated its obligation to inform and negotiate with Argentina in the use of natural resources.

13. Id.
15. Id. at 18-19. See also Earth Rights International, supra note 1, at 1.
17. Id. at 18.
18. Id. 18-25.
20. CEDHA, supra note 19.
pertaining to the River Uruguay and made some exceptions to the adequacy of IFC-approved environmental and social impact assessment reports.\(^{21}\)

These are not isolated cases. They permeate MDFI operations around the world. Yet, MDFIs have been virtually untouchable both in the domestic and international sphere. Their charters grant them immunities premised upon the stunting effect of litigation in development work,\(^{22}\) and allow them to reject Human Rights obligations under the Prohibited Political Activity Clause.\(^{23}\)

Notwithstanding the claim of incompetence to take on Human Rights obligations, many writers have discussed the Human Rights liabilities of the World Bank and similar institutions.\(^{24}\) Much of the argument for imposing Human Rights obligations upon the World Bank draw from its character as a Specialized Agency of the United Nations,\(^{25}\) bound by the provisions of the UN Charter.\(^{26}\) The argument, however, hardly translates to the protection and enforcement of Human Rights by MDFIs which are not attached to the UN system. This becomes problematic in light of the growing diversity in MDFIs, specifically, the rise of Regional Multilateral Development Banks.

MDFIs generally hold themselves accountable through internal accountability mechanisms.\(^{27}\) With the pronouncement in *Jam v.*


\(^{22}\) *Jam v.* International Finance Corp., 586 U.S. _, at 4-6 (2019).


\(^{26}\) *Skogly, supra* note 7, at 99-106; & Yap, *supra* note 2, at 84-91.

\(^{27}\) See, e.g., World Bank Inspection Panel [Inspection Panel], About the Inspection Panel, available at https://inspectionpanel.org/about-us/about-inspection-panel (last accessed Apr. 30, 2020); &
International Financial Corporation,\textsuperscript{28} the Supreme Court of the United States provides an opportunity for a deeper reckoning on the matter. The premise of Jam is that MDFIs have been granted immunity from suit which is similar to that enjoyed by State entities in order to perform its functions.\textsuperscript{29} Thus, such immunity cannot be held in absolute terms,\textsuperscript{30} considering the shift to limited immunities granted to States.\textsuperscript{31} In fine, the Jam Court held that MDFIs, specifically the IFC, may be sued for its commercial activities, considering that the grant of immunity attached to them, at least in the United States, makes particular reference to the immunity provision for States.\textsuperscript{32}

Justice Breyer dissented and opined that the decision stunts the IFC’s pursuit of its objectives, saying that MDFIs’ activities are inherently commercial in nature.\textsuperscript{33} There is also discussion of the unfair situation that results from the Decision, where the sovereign of a Member State questions the collective action of all other Member States.\textsuperscript{34} In concluding, Justice Breyer talks of the benevolent nature of MDFIs, and accountability as an internal matter subject to conscience. Beneath this undercurrent of benevolence and development lies the issue of holding MDFIs accountable beyond some moral compulsion on the part of impersonal institutions to abide by Human Rights standards.\textsuperscript{35}

Thus, MDFIs have refused to participate in the Human Rights agenda in at least two ways — first, they have rejected their Human Rights obligations by invoking the Prohibited Political Activity Clauses of their constituent instruments. Second, they have refused to be held accountable by pleading

\textsuperscript{29} Id., 586 U.S. at 15.
\textsuperscript{30} Id.
\textsuperscript{31} Id. at 3-4.
\textsuperscript{32} Id. at 15.
\textsuperscript{33} Id. at 1 (J. Breyer, dissenting opinion).
\textsuperscript{34} Id. at 15.
their immunities. In light of institutions insisting on their independence and immunity to fulfill their mandate and an international community seeking accountability and developing measures towards Human Rights ends, which should prevail?

**B. Legal Issues**

In resolving the tension between the existence, mandate, and undertakings of MDFIs and the accountability of the international community for Human Rights obligations, the current work addresses the primary legal questions:

*First*, Which should prevail between the Prohibited Political Activity Clauses in MDFIs’ constituent instruments and their Human Rights obligations under Customary International Law?

*Second*, Can MDFIs plead their immunities when they are being held responsible for Human Rights violations that result from their transactions?

**C. Thesis Statement**

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

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

It is further submitted that the immunity claims of MDFIs cannot be pleaded in instances where they act beyond their conferred powers — that is, they are not immune for *ultra vires* acts. The immunity enjoyed by MDFIs is more akin to diplomatic immunity rather than State immunity because their charters define their capacities and, consequently their *ultra vires* acts. The nature of the grant of immunity to MDFIs is functional and is properly limited
by their constituent instruments and when MDFIs act beyond their express and implied powers, these acts cannot be considered as falling within their immunities. The violation of Human Rights obligations are *ultra vires* acts of MDFIs, and are, therefore, not subject to the protections afforded by their Immunity Clauses.

**D. Object of the Study**

The Thesis aims to:

*First*, dissect the MDFI regime as it aligns with International Law obligations on accountability and the goals of the international community towards developing accountable institutions.

*Second*, understand the nature of MDFIs and their relation to International Law actors to properly delineate liability, accountability, jurisdiction, and enforcement in cases where they are being held responsible for Human Rights violations.

*Third*, develop guidelines for holding MDFIs responsible for violations of International Law obligations, specifically Human Rights violations that occur due to their failure to monitor grants and/or transactions.

**E. Significance of the Study**

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

Institutional responsibility for Human Rights violations is an enduring issue in International Law. It is established that MDFIs can and do violate Human Rights. In disclaiming responsibility for what MDFIs perceive to be “political” matters, they have failed to promote true and wholistic improvement in the lives of key stakeholders, specifically “bearers of human

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rights, environmental rights, climate change rights, [and] indigenous peoples’ rights.”37 Certainly, pursuit of development necessitates a measure of accountability that is not self-serving nor anchored on expectancy of morality among impersonal institutions.38

Much of the literature has focused on either liability or accountability, or has conflated the two concepts in an effort to establish either. This Thesis focuses on a certain area in the gradient of problems in Human Rights protection and enforcement within the context of MDFIs.

Resolving these matters will enable victims of Human Rights violations to bring actions against MDFIs to judicial bodies, whether individually, collectively, or through their States. The legal answers to the above questions also clarify for MDFIs the substantive and remedial scope and limitations of their Human Rights obligations. Understanding the extent of their liability and the manner by which they can be made responsible for Human Rights violations catalyze and dictate changes within the operational machinery and the overall governance of MDFIs — systemic changes that are long overdue. In the final exposition, this Thesis finds a definitive characterization and enunciation of the ever-elusive MDFI regime, so that they may become true pillars of “prosperity and world peace.”39

F. Scope and Limitation

The primary concern of this Thesis are claims brought by non-State, third parties against MDFIs. The Thesis will focus mainly on claims brought by indirect beneficiaries of grants — those for whom development is sought through the engagement of the public or private sector. It is not, for example, very much focused on claims brought by State actors, whether Member or non-Member of MDFIs. It is likewise impartial towards suits brought under allegations of contractual breach between MDFIs and the direct beneficiaries


of aid, i.e. States, private corporations, or public-private partnerships or the employment contracts entered into by MDFIs. This is because, unlike in non-State, third-party claims, other transactional relations have some form of political or legal remedies, although also largely contested.40

G. Methodology

This Work invokes the Principle of Systemic Integration in International Law to reconcile certain conflicting norms in the operation of MDFIs. The Principle finds its roots in the 1979 Vienna Convention on the Law of Treaties, which states that “any relevant rules of International Law applicable in the relations between the parties”41 shall be considered in resolving conflicts in the application and/or interpretation of treaty provisions.42 “[T]he principle of systemic integration goes further than merely [restating] the applicability of general international law in the operation of particular treaties. It points to a need to take into account the normative environment more widely.”43 Disciples of the Principle of Systemic Integration seek to resolve issues of fragmentation which occur “when International Law is understood as a decentralized set of rules.”44 Fragmentation contemplates two situations: first, “a party to two treaties can comply with one rule only thereby failing to comply with another rule,”45 and second, when a treaty “frustrate[s] the goals of another treaty without there being any strict incompatibility between their provisions.”46 Thus, “when tribunals fail to apply non-treaty international law, such as IHRL, when these prove relevant to the dispute, they fail to properly

40. KAREL WELLENS, REMEDIES AGAINST INTERNATIONAL ORGANISATIONS (2004 ed.).
42. Id.
43. Id. at 209, ¶415.
45. Id. at 61.
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harmonize the various systems of international law, and contribute to fragmentation.”\textsuperscript{47} The campaign against fragmentation seeks to avoid crises of stability and inequality in the international legal system.\textsuperscript{48}

In employing the Principle of Systemic Integration this Work becomes heir to the “practice of human rights bodies to adopt readings of human rights conventions that look for their \textit{effet utile} to an extent perhaps wider than regular treaties,”\textsuperscript{49} and the practice of interpreting “[certain] treaties establishing international institutions ... in ‘constitutional’ terms.”\textsuperscript{50}

The Work operationalizes the Human Rights obligations of MDFIs within the context of both public and private sector transactions, which circularly bleed into matters of conferrals of sovereign powers to and functions, legitimacy, and \textit{vires} acts of MDFIs. In this effort to operationalize obligations, the Proponent shall follow a qualitative research paradigm.

\textbf{H. Organization of the Thesis}

This Thesis discusses both primary and secondary rules that are incumbent upon the MDFI regime. It is divided into five Chapters:

Chapter I gives a background of the study.

Chapter II concentrates on the defensibility of MDFIs’ citation of the Prohibited Political Activity Clause to preclude the discharge of Human Rights obligations.

Chapter III presents the ways of reconciling IHRL and the law of MDFIs, especially in relation to claims of immunity.


\textsuperscript{49} \textit{Id.} at 216, ¶428.

\textsuperscript{50} \textit{Id.}
Chapter IV presents the findings and conclusions of the Proponent.

Chapter V concludes the Thesis with recommendations for the incorporation of Human Rights Due Diligence frameworks in the operations of MDFIs.
CHAPTER II: THE CONFLICT BETWEEN THE PROHIBITED POLITICAL ACTIVITY CLAUSE IN THE CONSTITUENT INSTRUMENTS OF MULTILATERAL DEVELOPMENT FINANCING INSTITUTIONS AND THEIR HUMAN RIGHTS OBLIGATIONS

Poets and beggars, musicians and prophets, warriors and scoundrels, all creatures of that unbridled reality ... have had to ask but little of imagination, for our crucial problem has been a lack of conventional means to render our lives believable ... The interpretation of our reality through patterns not our own, serves only to make us ever more unknown, ever less free, ever more solitary.

— Gabriel García Márquez

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

During the nascent stages of the IBRD’s creation, the apprehension towards the Bank’s activities becoming interventionist projects were raised. To allay the fears of intervention, the drafting committees introduced the Prohibited Political Activity Clause. In its current formulation, the Prohibited Political Activity Clause reads,

SECTION 10. Political Activity Prohibited. 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. 54

The model was replicated by other MDFIs with little variation. 55 The Prohibited Political Activity Clause is a codification of the Principle of Non-Intervention, which, in general terms,

forbids all States or groups of States to intervene[,] directly or indirectly[,] in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely ... Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. 56

The Principle of Non-Intervention is founded on the sovereignty of States, 57 and has been expressed in various International Law instruments 58 and discussed in international case law. 59 It is in close relation with the

54. IBRD Charter, supra note 23, art. IV, § 10.
55. ADB Charter, supra note 4, art. 36; IADB Charter, supra note 4, art. VIII, § 5 (f); AfDB Charter, supra note 4, art. 38; & AIIB Charter, supra note 4, art. 31.
57. G.A. Res. 2625 (XXXV), Declaration on principles of international law concerning friendly relations and cooperation among States in accordance with the Charter of the United Nations (Oct. 4, 1970).
doctrine of *par in parem non habet imperium*. According to *Military and Paramilitary Activities in and against Nicaragua*, there are two elements which characterize intervention: (1) “there must be an ‘intervention’ by one state in the affairs of another;” and, (2) “the intervention must bear on matters in which each State is permitted, by the principle of State sovereignty, to decide freely.” It has been said that “the essence of intervention is coercion.” Therefore, in its current formulation, the Principle of Non-Intervention attaches to coercive acts of States, and its applicability turns upon whether there is willful compliance or reasonable window for resistance.

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

The earliest contestation happened when the UN General Assembly resolved to empower the UN Secretary General to enter into consultations with the IBRD with a view to withholding aid from South Africa and Portugal for their colonial and apartheid policies. The IBRD claimed that forcing it to comply with the UN General Assembly resolutions on Portugal and South Africa would cause it to violate its own charter, specifically citing the Prohibited Political Activity Clause. The UN Legal Department submitted

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62. *Id.*


64. *Id.*


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


its reservation to the IBRD’s position on the ground that the prohibition does not extend to matters involving International Law and are only confined to matters internal to the State.\(^6^9\)

A second reckoning came when the United States directed its representative to the World Bank’s Executive Board to oppose disbursements made in favor of countries with “a consistent pattern of gross human rights violations.”\(^7^0\) Although the IBRD’s Legal Department opined that the Prohibited Political Activity Clause likewise “contemplates the activities of the executive directors,”\(^7^1\) it was quick to add that the Bank’s system did not provide for a mechanism to invalidate politically motivated policy decisions of executive directors.\(^7^2\) These events informed the scholarly works on the Human Rights obligations of the World Bank that followed them.\(^7^3\)

The tide changed during the tenure of a radical Senior Vice President and General Counsel of the World Bank who campaigned against the broad view of the Prohibited Political Activity Clause and the limited ways the Bank has engaged with the Human Rights agenda,\(^7^4\) convinced that the Bank’s


\(^7^1\) Cissé, *supra* note 70, at 72.

\(^7^2\) Shihata, Human Rights, *supra* note 70, at 45-46.


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development agenda is incomplete without considering Human Rights and that the Prohibited Political Activity Clause does not preclude the incorporation of the Human Rights framework in the Bank’s operations.\textsuperscript{75} This was later taken to mean that the Prohibited Political Activity Clause permits, but does not mandate, the consideration of Human Rights in the Bank’s work.\textsuperscript{76} Little change has been observed since. The World Bank and other MDFIs continue to levy the provisions of their charters\textsuperscript{77} against calls to have greater Human Rights accountability.\textsuperscript{78}

\section*{B. Resolving the Contesting Values of Non-Intervention and Human Rights in the Operations of Multilateral Development Financing Institutions}

The Proponent submits that Human Rights accountability is a weightier consideration in resolving the tension between the Prohibited Political Activity clause and the IHRL because the provisions on non-intervention in MDFIs’ constituent instrument was not meant to preclude the Human Rights considerations in MDFI operations, the failure to integrate Human Rights in MDFI operations has resulted in the aiding or abetting the violations of other obligations under International Law, and MDFIs’ market credibility is ultimately tested against their Human Rights compliance.

\subsection*{1. Purpose of and Protections Afforded by the Prohibited Political Activity Clause}

Sir Ian Brownlie, a recognized luminary in International Law, observed that the Principle of Non-Intervention found in the UN Charter is “inoperative

\begin{itemize}
\item[77.] Letter from Charles E. De Leva, Chief Environmental and Social Standards Officer, World Bank Group, to Working Group on the issue of human rights and transnational corporations and other business enterprises, et al. (June 7, 2019) \textit{(available at https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=34732 (last accessed Apr. 30, 2020)).}
\end{itemize}
when a treaty obligation is concerned.” This is based on the logic that the Principle of Non-Intervention seeks to protect States from the intervention of other actors on matters falling exclusively within the ambit of domestic affairs. Thus, when a State limits itself by contracting treaty obligations or participating in the formation of custom, then those matters submitted to treaty or custom are now brought within the competence of International Law.

Thus, States may not plead the Principle of Non-Intervention against the actions of an IO or another State seeking the enforcement of treaty or customary obligations because “[Human Rights] obligations ... are such that the matter of [Human Rights] protection is no longer regulated[,] ‘in principle,’ by the [State].”

The language of the Prohibited Political Activity Clauses are meant to protect States from the involvement of MDFIs in their affairs. They also serve to enjoin MDFIs from considering the political character of governments in approving membership, loans, or investments. Nowhere in the history, purpose, or language of these provisions is there an injunction for MDFIs to consider Human Rights obligations, unless the position is taken that Human Rights are within the sphere of the political affairs of each nation. That proposition may be true to some degree. If one looks into the margins of discretion that International Law leaves to States in detailing the manner by which each government will comply with obligations, then, to that extent, Human Rights are political. However, based on positions taken by MDFIs in relation to their Human Rights obligations, they would have it that even the fact of compliance is a matter left to governments — an affront to the philosophy underlying Human Rights, that they limit sovereign capacities. The suggestion that Human Rights obligations are domestic affairs, likewise goes against settled jurisprudence on the matter, that “the right of a State to

79. Ian Brownlie, Principles of Public International Law, 553 (4th ed., 1990 (citing U.N. Charter art. 2 (7)).
83. Id.
84. McGoldrick, supra note 80, at 108.
use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to a State is limited by the rules of international law.”

Thus, in interpreting the Prohibited Political Activity Clauses, MDFIs cannot broaden it to mean that they do not have Human Rights obligations. That conclusion is not supported by the language, history, and purpose of such provisions. The propriety of this argument is made more salient by looking at alignment with Human Rights as a minimum standard of action discharged by MDFIs and States within the framework of International Law, hence beyond the competence of the intervention rhetoric.

MDFIs are also the wrong parties to plead non-intervention. While an injunction is set against them through their charters, the same does not translate to a capacity to speak on behalf of prospective borrowers on matters of possible intervention. The language of the Prohibited Political Activity Clause reveals an intent for it to be raised by borrowers against the policy decisions of MDFIs, but not by MDFIs themselves when they are being compelled to comply with their own Human Rights obligations. While the position has been taken that many clients of MDFIs still consider “the very mention of [Human Rights as] inflammatory language,” the same should not preclude efforts towards progressive compliance with MDFIs’ own Human Rights obligations.

Furthermore, the language of the Prohibited Political Activity Clause is properly limited to retroactivity. Meaning, while MDFIs are not allowed to consider the Human Rights track-record of a potential borrower or the status of its government by virtue of the directive not to “interfere in the political affairs of any member; nor ... be influenced in their decisions by the political character of the member or members concerned,” they are not proscribed from including Human Rights measures as prospective conditions for loans or

85. *Id.* at 86 (citing Nationality Decrees Issued in Tunis and Morocco on Nov. 8th, 1921, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 27 (Feb. 7)).
investments. While the language of the opening phrase of the directive and the Monitoring Clause would seem to enjoin the consideration of political matters in the evaluation of projects, the use thereof to reject Human Rights obligations suffer the same failure of characterization that is inherent in the view that Human Rights obligations are political questions.

To properly interpret the scope of the Prohibited Political Activity Clause, one must view it under the discursive framework of bargaining power. Recall that the fears sought to be allayed by the insertion of these provisions is against the use of these economic mechanisms to further one or the other agenda. Indeed, and as earlier discussed, there is evidence to show that the policy frameworks of some MDFIs advance the interests of one or the other shareholder. It was also observed that in many instances, MDFI funding is sought at opportune times, giving borrowers little choice but to accede to otherwise questionable demands. What the Proponent seeks to show here is the context under which the Prohibited Political Activity Clause may be properly invoked, primarily by borrowing States, and then, by MDFIs themselves. When, for example, a borrowing State is asked by an MDFI to comply with Human Rights standards in accordance with the manner by which the same are done by a creditor State, then the borrowing State may invoke the protective mantle of the Prohibited Political Activity Clause. When, however, an MDFI imposes compliance with Human Rights obligations as a condition for loan approval and disbursement, without more, then no violation of constituent instruments occur because these matters properly devolve upon both the MDFI and the borrowing State by virtue of the obligations’ status as CIL.

88. IBRD Charter, supra note 23, art. III, § 5 (b); IADB Charter, supra note 4, art. III, § 9 (b); AfDB Charter, supra note 4, art. 17 (1) (h); ADB Charter, supra note 4, art. 14 (xi); AIIB Charter, supra note 4, art. 13 (9).


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

The absurdity of an opposite interpretation is illustrated thusly — a borrowing State with a terrible Human Rights track-record approaches an MDFI for funding. The MDFI grants the loan but imposes a condition upon the borrowing State to improve its Human Rights compliance, but it refuses the condition. Will the MDFI be justified in disallowing the grant of the loan? Under the position currently held by MDFIs, the borrowing State may claim discrimination or interference by the MDFI. However, under the framework being proposed here, a position that the borrowing State is not entitled to the loan becomes legally defensible.

Therefore, when MDFIs discharge their Human Rights obligations by imposing Human Rights conditions or monitoring or evaluating according to Human Rights standards, they are not interfering in the affairs of their borrowers, *per se* because compliance with the demands of Human Rights are standards imposed by International Law and have already been consented to by States as limits to their sovereign capacities.

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

MDFIs are independent from their Member States and they are more than the sum of their membership.91 However, the same cannot be said of the powers they exercise. When MDFIs exercise sovereign powers, they do not do so on their own accord, they do not have an independent source of sovereignty other than those transferred to them by their Member States. This is unlike the

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situation in State recognition, for example, where a nascent State has a sovereignty of its own, which need only be recognized by the international community in order for it to exercise the same on the international plane.\textsuperscript{92} The powers exercised by MDFIs are \textit{transferred} to them by Member States. This postulate delves deeper into that relationship and looks at the power dynamic itself and concludes that MDFIs are not bound by International Law because their Member States are so bound, they are bound thereby because the very powers that they discharge are so limited.

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

Therefore, when MDFIs accept the fact that they do have Human Rights obligations, it operates in material consistency with the powers transferred to them.

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

It has been pointed out that States remain bound by their Human Rights obligations under treaties and CIL even when acting as members of MDFIs.\textsuperscript{93} Thus, there have been calls for MDFIs to embody ‘‘international policy coherence,’ which demands ‘coherence across policies governing different issues, as well as coherence in terms of their engagement with and participation in international organizations and processes.’’\textsuperscript{94} Let it be noted,

\begin{itemize}
\item \textsuperscript{92} \textit{James R. Crawford, Brownlie’s Principles of Public International Law} 134-36 & 143-51 (8th ed., 2012).
\item \textsuperscript{93} \textit{Cissé, supra note 70, at 75 (citing Siobhán McInerney-Lankford, International Financial Institutions and Human Rights, in International Financial Institutions and International Law 239 & 265 (Daniel D. Bradlow & David B. Hunter eds., 2010)).}
\item \textsuperscript{94} \textit{Cissé, supra note 70, at 75 (citing McInerney-Lankford, supra note 93, at 239 & 265).}
\end{itemize}
as well, that the Purpose Clauses of MDFIs uniformly cite development as the primary goal of these institutions.  

It is submitted that the Purpose Clause takes primacy over the Prohibited Political Activity Clause in order for MDFIs to achieve policy coherence, avoid fragmentation, and not be privy to possible violations of IHRL.

MDFIs have put up various measures to meet the demands of the development agenda. However, these measures continue to fail in that goal by restricting the application of the full breadth of IHRL, instead giving particular reverence to the Prohibited Political Activity Clause. Thus, MDFIs policies which seek to respect, protect, and fulfill Human Rights are incoherent with the broader IHRL framework. A systemic reading of the Prohibited Political Activity Clause should fully embrace the whole plethora of rights, duties, and obligations secured under the IHRL framework. Integration of MDFIs into the IHRL framework also gives teeth to these policy thrusts. Once MDFIs shift their paradigms to reject the absoluteness of the Prohibited Political Activity Clause and recognize their Human Rights liabilities, they then become accountable, not only by virtue of their internal rules, but also under the strictures of International Law, giving them greater incentive to comply therewith.

The blindness to Human Rights has led to MDFIs’ participation in Human Rights crises. They have, for example, funded regimes which perpetrated environmental degradation, unlawful expropriation, and

95. IBRD Charter, supra note 23, art. I (i); IFC Charter, supra note 11, art. I; Articles of Agreement of the International Development Association, art. I, 439 U.N.T.S. 249 (entered into force Sep. 24, 1960); Convention establishing the Multilateral Investment Guarantee Agency, pmbl., 1508 U.N.T.S. 99 (entered into force Apr. 12, 1988); EIB Charter, supra note 4, art. 2; IADB Charter, supra note 4, art. I, § 1; AfDB Charter, supra note 4, art. 1; ADB Charter, supra note 4, art. 1; & AIIB Charter, supra note 4, art. 1.

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

97. CEDHA, supra note 19.

gender-based sexual violence.\textsuperscript{99} Human Rights blindness resulting in Human Rights violations also give rise to an MDFI’s own liability for failing to discharge its duty to ensure the integrity of disbursements and to progressively achieve development.\textsuperscript{100}

In the final analysis, MDFIs cannot hide behind the protective mantle of the Prohibited Political Activity Clause when made to account for Human Rights violations. Foremost, the language, history, and purpose of the provision decry any interpretation that would allow a State or an IO to renge on its Human Rights obligations, the matter having been lifted by treaty or State practice out of the contemplation of internal affairs of a State. Another reason for the exclusion of Human Rights obligations from the operation of the Prohibited Political Activity Clause is the fact that these are customary obligations which properly limit, not only States’ sovereign capacities, but also the exercise of sovereign powers by MDFIs. Thus, MDFIs cannot read into the Prohibited Political Activity Clause a justification for omissions to discharge Human Right obligations because doing so would be expanding the potency of such provision beyond the contemplation of its codification. Finally, MDFIs’ blindness to Human Rights propelled by the current interpretation of the Prohibited Political Activity Clause has led to their aiding or abetting violations of borrower States’ own obligations, which omissions likewise give rise to MDFIs’ own responsibility.

\textbf{C. Conclusions on the Primary Rules on Human Rights Devolving Upon Multilateral Development Financing Institutions}

This Chapter established that Human Rights obligations cannot be negated by the Prohibited Political Activity Clause because these are matters that are outside the sphere of competence of domestic affairs. It likewise showed that MDFIs’ Human Rights obligations under CIL necessitates the development of Human Rights Due Diligence Frameworks.


\textsuperscript{100}. \textit{Id.} at 101.
At least in some areas of rights enforcement, MDFIs have taken initial steps. The World Bank has, for example, incorporated in its policies the requirement for an Environmental Assessment to be undertaken by the borrower.\(^{101}\) It has also incorporated in its policies the respect for the “dignity, [Human Rights], economies, and cultures of Indigenous Peoples,”\(^{102}\) and consequently requires its borrowers “to engage in a process of free, prior, and informed consultation.”\(^{103}\) It also requires social assessment and an Indigenous Peoples Plan or Indigenous Peoples Planning Framework from its borrower as part of project preparation,\(^{104}\) and provides guidance for when Indigenous Peoples need to be relocated.\(^{105}\) The Bank cross-references its policy on the relocation of Indigenous Peoples with its policy on Involuntary Resettlement, which requires the preparation of a Resettlement Plan or a Resettlement Policy Framework preceded by consultations and to be immediately followed by the provision of compensation, as well as support and assistance to DIDR subjects.\(^{106}\)

These notwithstanding, there remains a failure among MDFIs to acknowledge that the steps being undertaken have any relation to the Universal Rights regime. The IFC, for instance, holds that its Sustainability Framework is enough to address the Human Rights risks in the course of doing business.\(^{107}\) This was the dilemma that rattled the international community when IFC still disbursed development funds to Botnia, notwithstanding significant contestations regarding the environmental and social assessments submitted in relation to the Pulp Mills project\(^{108}\) — What happens when, despite evident responsibility for Human Rights, MDFIs continue to operate in violation of these obligations?

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103. *Id.*
104. *Id.* ¶6.
105. *Id.* ¶20 & 21.
CHAPTER III: ACCOUNTABILITY, THE UNIVERSAL RIGHTS REGIME, AND MULTILATERAL DEVELOPMENT FINANCING INSTITUTIONS

Any victim would understandably yearn to stop such horrors, even at the cost of granting immunity to those who have wronged them. But this is a truce at gunpoint, without dignity, justice, or hope for a better future. The time has passed when we might talk of peace versus justice. There cannot be one without the other.

— Ban Ki-Moon, Secretary General of the UN (2007-2016)\textsuperscript{109}

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

This Section begins with a hypothetical case of Human Rights violation perpetrated against \textit{Individual A} by various actors in International Law. Generally speaking, the violation of \textit{Individual A}’s Human Rights by his own State has civil, criminal, and administrative dimensions which are actionable before his National Courts. If the judicial tribunals of \textit{Individual A}’s State fail, then a claim may be made before Human Rights Treaty Bodies.\textsuperscript{110} \textit{Individual A} may likewise call upon the Permanent Court of Arbitration to settle the dispute involving Human Rights violations upon agreement with the perpetrator.\textsuperscript{111}

If the perpetrator of Human Rights violations against \textit{Individual A} is another State, then \textit{Individual A}’s State may bring an action against the perpetrator State before the ICJ\textsuperscript{112} under the principles of diplomatic protection.\textsuperscript{113} The perpetrator State and the home State may alternatively bring

\begin{itemize}
  \item \textsuperscript{111} PCA, \textit{Permanent Court of Arbitration Optional Rules for Arbitration Between International Organizations and Private Parties}, art. I (July 1, 1996).
  \item \textsuperscript{112} Statute of the International Court of Justice, art. 59, Apr. 18, 1946, art. 36, 33 U.N.T.S. 993.
\end{itemize}
their cases before the PCA.\textsuperscript{114} When the claim is made by \textit{Individual A} against a person for violation of Rights, then he may invoke the powers of his National Court. If the allegation is for the perpetration of genocide, crimes against humanity, war crimes, or crimes of aggression, the same may be brought before the International Criminal Court (“ICC”).\textsuperscript{115} National Courts would also be the prime enforcers of \textit{Individual A}’s Human Rights against corporate entities. But in case the corporate entities enjoy privileges under bilateral investment treaties with arbitration clauses, then the liability arising from Human Rights violations by the corporation against \textit{Individual A} may be adjudicated by the investment tribunal as a host State counterclaim, following the decision in \textit{Urbaser v. Argentina}.\textsuperscript{116}

However, when the perpetrator of Human Rights violations against \textit{Individual A} is \textit{MDFI B} in partnership with his State or with a private entity, where should he go to exact liability against \textit{MDFI B} for its distinct responsibility? The ICJ’s jurisdiction would not allow the case to pass even the preliminary stages, it having only Advisory jurisdiction over a limited number of MDFIs.\textsuperscript{117} Even if the Advisory jurisdiction of the ICJ is invoked, still, \textit{Individual A} remains without personality to bring suit, except only through his State under the principles of diplomatic protection. Again, assuming \textit{arguendo} that the ICJ will grant personality upon the persuasiveness of \textit{Judgment No. 2867 of the ILO},\textsuperscript{118} \textit{Individual A} may still find himself without adequate redress because the jurisdiction invoked does not carry with it the power to make reparations. Neither may the claim be brought directly to the Human Rights Treaty Bodies, except only when \textit{MDFI B} is a signatory to the instrument of creation.

There is hardly any mechanism in International Law, which is appropriate to litigate individual or communal claims for MDFIs’ violations

\begin{enumerate}
\item \textsuperscript{114} 1907 Convention for the Pacific Settlement of International Disputes, art. 41, Oct. 18, 1907, 2 AJIL Supp. 43 (1908).
\item \textsuperscript{116} Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, Judgment (Dec. 8, 2016). \textit{See} Gaw, \textit{supra} note 44.
\item \textsuperscript{117} U.N. \textit{CHARTER} art. 96 (2).
\item \textsuperscript{118} \textit{Judgment No. 2867} of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, 2012 I.C.J. 10 (Feb. 1).
\end{enumerate}
of Human Rights obligations. The above narration of Individual A’s search for an appropriate forum serves to highlight the accountability gap in the regime of MDFIs.

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

1. Overcoming the Threshold Issue of Jurisdiction Ratio Materiae

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

a. Towards a Nuanced Understanding of the Ultra Vires Doctrine

The propriety of transplanting the ultra vires doctrine from corporation law to institutional law of IOs is not doubted — in fact, it is the bedrock of the current inquiry. The development thereof in corporate contract law rests on two principles: (1) that corporations are creatures of the State and are creatures of limited powers\textsuperscript{119} and (2) that corporations can validly act only through the facility of the Board of Directors and authorized agents.\textsuperscript{120} In a similar manner, IOs, like MDFIs, are creatures of States having pre-determined purposes expressed in their constituent instruments, which purposes properly limit their use of sovereign powers. IOs may, likewise, only act through the imprimatur of a governing body, officers, and authorized agents. However, the form which the doctrine has taken in Reinisch’s contemplation of international institutional law\textsuperscript{121} is only one type of ultra vires act, i.e. acts beyond the Purpose Clause.

The application of the ultra vires doctrine under corporation law takes three forms: (1) an act is ultra vires when done beyond the powers and capacities of the corporation;\textsuperscript{122} (2) an act is ultra vires when done by

\textsuperscript{119}. CESAR L. VILLANUEVA & TERESA S. VILLANUEVA-TIANSAY, PHILIPPINE CORPORATE LAW 177 (2013 ed.).

\textsuperscript{120}. Id.

\textsuperscript{121}. See AUGUST REINISCH, INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS 342 (2004).

\textsuperscript{122}. VILLANUEVA & VILLANUEVA-TIANSAY, supra note 119, at 177.
corporate officers and agents in excess or without the authority of the corporation;\textsuperscript{123} and, (3) an act is \textit{ultra vires} when, though done with full corporate powers and authority, the act itself is contrary to law or public policy.\textsuperscript{124} \textit{Ultra vires} acts of the first type, generally, do not result in the disclaimer of responsibility by the corporation upon consideration of public policy and the application of the principles of estoppel.\textsuperscript{125} In the second type of \textit{ultra vires} acts, the result is, as suggested, the nullity or unenforceability of the contract against the corporation and the personal liability of the responsible agent or officer.\textsuperscript{126} In \textit{ultra vires} acts of the third type, the corporation is not empowered to disclaim the act and the courts instead use the \textit{ultra vires} character of the act as the foundation of corporate liability for damage caused.\textsuperscript{127} Therefore, it is doubted whether the suggestion that acting \textit{ultra vires} would result in the obliteration of contractual obligations in all cases. It is more proper to limit that effect to \textit{ultra vires} acts of the second type, but is improperly invoked in \textit{ultra vires} acts of the first and third type upon consideration of sound public policy and the demands of justice. Violations of Human Rights obligations under CIL are \textit{ultra vires} acts of the third type and are, therefore, actionable following the typology earlier presented.

\textbf{b. On Political Question, Non-justiciability, and Vested Rights}

Recall that the Political Question doctrine and the Principle of Non-Justiciability precludes courts from interfering with matters of policy, with due regard to the separation of powers that generally permeate the system of governance of the majority of States.\textsuperscript{128} The SCOTUS’ listing of what may constitute policy questions in \textit{Baker v. Carr},\textsuperscript{129} gives some guidance as to what may properly fall outside the court’s jurisdiction by appeal to the Political Question doctrine or the Principle of Non-Justiciability.

\begin{itemize}
\item \textsuperscript{123} Id. at 178.
\item \textsuperscript{124} Id. at 179.
\item \textsuperscript{125} Id. at 235-39.
\item \textsuperscript{126} Id. at 179-83.
\item \textsuperscript{127} Id. at 240-41.
\item \textsuperscript{128} REINISCH, supra note 121, at 93 (citing Baker, 369 U.S. at 217).
\item \textsuperscript{129} Baker v. Carr, 369 U.S. 186, 217 (1962).
\end{itemize}
It would seem that a viable test is to ask whether the act has breached the threshold of determining rights, duties, and obligations to enforcing and/or implementing the same. Thus, while courts are unable to pass judgment upon the wisdom of substantive law, it is not precluded from determining whether the rights granted thereunder are respected. Consequently, the broad interpretation of the phrase “Political Question” must submit to the limitations guaranteed as vested rights, which, in most cases, follow the negotiation of international agreements. For example, courts would do well to refrain from disturbing the negotiation of loan agreements between States and MDFIs or corporations and MDFIs. However, upon the conclusion thereof, these agreements vest rights, not only between the parties, but also in relation to third-party beneficiaries, which rights are, as a general proposition, actionable. In *Lutcher, SA v. Inter-American Development Bank*, the Court of Appeals for the District of Columbia held that a borrower of an MDFI has cause of action against the latter for the tortious act of lending to a competitor.

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

131. *Id.* at 457.
c. **Disclaimer of Subject Matter Jurisdiction in Cases Involving International Law**

In *Kiobel v. Royal Dutch Petroleum Co.*, the SCOTUS determined whether alleged Human Rights violations by Royal Dutch Petroleum Co. perpetrated in Nigeria against Nigerians fall within the contemplation of the United States’ Alien Tort Statute, which provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” In the end, the *Kiobel* Court decided against the extraterritorial application of the ATS after reviewing the content and extent of the phrase “law of nations” during the 1700s. From that review it concluded that the phrase “law of nations” does not embrace the Human Rights abuses presented in this case, further clarifying that in order to invoke the United States’ jurisdiction under the ATS, it is necessary that “claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.”

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

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134.  Id. at 1663 (citing Alien Tort Claims Act, 28 U.S.C. § 1350).
136.  Id. at 1666-67.
137.  Id.
138.  Id. at 1669.
140.  Id. at 1408.
141.  Id. at 1394.
The Philippine Supreme Court has faced similar uncertainties. However, unlike the SCOTUS, it is more willing to determine the metes and bounds of International Law as it applies to claims made by citizens. It has, for example, used the UDHR, the ICESCR, and the ICCPR to hold that the Revolutionary Government of 1986 conducted illegal searches and seizures during the period of transition. In a case involving the right of a prospective extraditee to post bail, the Philippine Supreme Court took note of “[t]he modern trend in [Public International Law that puts primacy] on the worth of the individual person and the sanctity of human rights.” More recently, in *Saudi Arabian Airlines (Saudia) v. Rebesencio*, the Court rejected Saudi Arabian Airline’s submission that it is justified in incorporating a discriminatory clause against its female flight attendants considering that the same is not precluded by the laws of Saudi Arabia, which governs the contract. The Court opined that Saudi Arabian Airline’s policy was against the Convention on the Elimination of Discrimination Against Women making the same void, not only upon the laws of the Philippines, but also under International Law.

The challenge of Human Rights litigation under these circumstances continue to follow the contours of procedural prescription recognized in International Law, such that claims against MDFIs must be framed in a way that will not oust the court of material jurisdiction. Under this paradigm, *Jam* presents a curious case of the Court all but admitting jurisdiction over claims from Indian citizens arising from “negligence, negligent supervision, public nuisance, private nuisance, trespass, and breach of contract” relating to a project situated in Gujarat, India, the resolution of the case having gone straight into deciding the issue of immunity, diverting from the rulings in *Kiobel* and *Jesner*.

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146. *Id.* at 179.
147. *Id.* at 172 & 184.
149. *Id.* at 108-12.

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

In *Mendaro v. World Bank*, the Court ruled that the Bank is immune from a sexual harassment and gender discrimination suit brought against the Bank itself and some ranking officers and agents. The Court reasoned that a similar provision as that interpreted in *Lutcher, SA* found in the IBRD Charter should be read in accordance with the Purpose and Immunity Clauses of the constituent instrument, as well as upon the general theory of functional immunity. It then went on to limit the broad interpretation of *Lutcher, SA* to mean that the exception to immunity found in Article VII, Section 3 of the IBRD Charter should be tested against the benefits derived from non-immunity as against the liabilities derived from immunity in relation to achievement of the Bank’s goals *viz* —

> Since the purpose of the immunities accorded [to] international organizations is to enable the

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150. *Lutcher, SA*, 382 F. 2d at 457.
151. IADB Charter, *supra* note 4, art. XI, § 3.
152. *Lutcher, SA*, 382 F. 2d at 457 & 460.
154. *Id.* at 621.
155. *Id.* at 612.
158. *Id.* at 617.
organizations to fulfill their functions, applying the same rationale in reverse, it is likely that most organizations would be unwilling to relinquish their immunity without receiving a corresponding benefit which would further the organization’s goals. Thus, most waivers are probably effected when an insistence on immunity would actually prevent or hinder the organization from conducting its activities. A nonspecific waiver such as that contained in [Article VII, Section 3] should be more broadly construed when the waiver would arguably enable the organization to pursue more effectively its institutional goals. However, when the benefits accruing to the organization as a result of the waiver would be substantially outweighed by the burdens caused by judicial scrutiny of the organization’s discretion to select and administer its programs, it is logically less probable that the organization actually intended to waive its immunity.\textsuperscript{159}

This was dubbed as the “Mendaro Test.” The test was later applied in \textit{Atkinson v. Inter-American Development Bank}\textsuperscript{160} to thwart an attempt to garnish the salaries of an IADB employee on the ground that no benefit accrues to the Bank by allowing such garnishment, but instead makes an unnecessary imposition.\textsuperscript{161} In \textit{African Development Bank v. Acholla}\textsuperscript{162} the Court of Appeal of Kenya ruled that an employee cannot sue the AfDB for breach of employment contract and resultant damages,\textsuperscript{163} agreeing with the rulings of the courts of other jurisdictions to the effect that the immunities of an IO, of which the AfDB is one, are inherently functional in nature.\textsuperscript{164} Thus, the AfDB

\begin{flushleft}
\textsuperscript{159} \textit{Id.}
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\textsuperscript{160} \textit{Atkinson v. Inter-American Development Bank, 156 F. 3d 1335 (D.C. Cir. 1998).}
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\textsuperscript{161} \textit{Id. at 1338-39.}
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\textsuperscript{163} \textit{Id.}
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is immune from employment-related claims because an otherwise different interpretation would be to the detriment of AfDB’s independence in pursuing its goals.

The case law of the Philippines on the matter has not grown extensively since *Department of Foreign Affairs v. NLRC*.165 To recall, the Supreme Court of the Philippines decided in *Department of Foreign Affairs* that the ADB may not be sued for alleged labor-only contracting.166 It cited the case of *World Health Organization v. Aquino*,167 specifically the finding that “diplomatic immunity is essentially a political question and courts should refuse to look beyond a determination by the executive branch of the government, and where the plea of diplomatic immunity is recognized and affirmed by the executive branch of the government,”168 and concluded that the ADB has been granted diplomatic status and is independent from municipal law.169 Furthermore, it invoked the authority of its ruling in *Southeast Asian Fisheries Development Center-Aquaculture Department v. National Labor Relations Commission*170 where it traced the entitlement of an IO to immunity to the need for independence and impartiality in the performance of its functions.171 While the Court had affirmed the consistency of IOs’ and MDFIs’ immunity with diplomatic immunity, it also pronounced that the ADB was acting *jure imperii* when it entered into the service contracts subject of the case.172 In closing, the Court cited the procedure for a State or IO to claim sovereign or diplomatic immunity, that is to secure an executive endorsement.173

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166. *Id.* at 40.
168. *Id.* at 248.
169. *Department of Foreign Affairs*, 262 SCRA at 44-45.
171. *Id.* at 288.
172. *Department of Foreign Affairs*, 262 SCRA at 47 (citing *Holy See, The v. Rosario, Jr.* 238 SCRA 524 (1944)).
173. *Department of Foreign Affairs*, 262 SCRA at 49.
In contrast to Department of Foreign Affairs’ use of the *acta jure imperii/jure gestionis* dichotomy, the Court, in *Liang v. People*[^174^], followed instead the tradition in deciding cases of diplomatic immunity which pits official and unofficial acts against each other, citing the ADB Headquarters Agreement and the VCDR to decide the case.[^175^] In the end, the Court reversed the hasty dismissal of the case on the ground that

[Criminal acts] could not possibly be covered by the immunity agreement because our laws do not allow the commission of a crime ... in the name of official duty. The imputation of theft is *ultra vires* and cannot be part of official functions. It is well-settled principle of law that a public official may be liable in his personal private capacity for whatever damage he may have caused by his act done with malice or in bad faith or beyond the scope of his authority or jurisdiction.[^176^]

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

The SCOTUS’ decision in *Jam* was a diversion from the growing litany of domestic and foreign cases that would otherwise resolve MDFIs’ claims of immunity using the functional approach, choosing instead to classify IFC’s acts as either sovereign or commercial. What is more, an incisive look into the logic of the *Jam* majority reveals a failure to account for the treaty obligation to grant certain privileges and immunities to the IFC,[^177^] focusing instead on the International Organizations Immunity Act as the source of such immunities.[^178^] There is a blanket denial of immunity for IOs’ acts *jure gestionis*. Thus, all IOs claiming immunity from the judicial and

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[^175^]: *Id.* at 695-96 (citing ADB Headquarters Agreement, *supra* note 200, art. XII, § 45 & VCDR, *supra* note 58).
[^176^]: *Liang*, 323 SCRA at 695-96.
[^177^]: See generally *Jam*, 586 U.S.
[^178^]: *Id.* at 10-12.
administrative processes of the United States must, henceforth, subject themselves to the acta jure imperii/ jure gestionis dichotomy. However, a review of treaty provisions granting IOs legal personality and legal capacity, as well as immunities and privileges related thereto, shows that the grants cover all that is necessary for them to fulfill their functions.\textsuperscript{179} This is not to say, however, that their competencies, immunities, and privileges are absolute. Since these grants are purposive in character, a determination of the grants’ character and scope must likewise arise from a functional analysis.

As a matter of general proposition, therefore, IOs are capacitated and, thus, immune, for all acts performed within their respective mandates, subject, of course, to the provisions of their constituent instruments. Had the \textit{Jam} Court employed the \textit{Mendaro Test} to determine whether IFC’s exception from immunity for alleged Human Rights violations would be more in keeping with the IFC’s mandate, then the case would have been a crystallizing moment for the doctrine pronounced and consistently affirmed by the Court of Appeals for the District of Columbia. Perhaps it was a matter of framing. Be it noted that the crux of the \textit{Mendaro Test} is purposive benefit for the IO. Recall also that the petitioners in the case brought suit against the IFC for “negligence, negligent supervision, public nuisance, private nuisance, trespass, and breach of contract”\textsuperscript{180} — veritable causes of action that would have been recognized as an exception to immunity under the doctrine of \textit{Lutcher, SA}. But, the IO-centric \textit{Mendaro Test} would have it that the IFC would not reap any benefits from being held accountable under these causes of action. This conclusion, however, is heir to the limited view of the IFC’s, and MDFIs’, purposes. Hardly anyone acquainted with the standards of the development agenda would rally against a proposition that development financers must ensure that they do not fund disasters.

In any case, what may be concluded from this brief review of National Courts’ jurisprudence on MDFIs, with the exception of \textit{Jam}, is that the normative trajectory of the immunity of MDFIs, in particular, and IOs, in general, moves towards an understanding that the same is functional in nature. What Professor Reinisch posed as a question in 2004 — whether looking at IOs’ acts as functional and non-functional would clarify the scope of their

\textsuperscript{179} OKEKE, \textit{supra} note 91, at 237-42 & 300-12. See, e.g., IFC Charter, \textit{supra} note 11, art. VI, § 1.

\textsuperscript{180} \textit{Jam}, 172 F. Supp. 3d at 108.
immunities\textsuperscript{181} — is affirmatively resolved in this Work, with affinity, however, towards the more exacting taxonomy of \textit{vires} and \textit{ultra vires} acts. This engagement of that concept that grew out of corporation law makes clear two realities that devolve upon MDFIs — that they are creatures of States, and consequently creatures of International Law; and, that they are users of sovereign powers.

This Writer concludes that MDFIs cannot plead their immunity when they are being held to account for their alleged violations of Human Rights obligations under CIL — whether by act or omission, and whether through public or private transactions — because such violations constitute \textit{ultra vires} acts of the institution.

\textbf{C. Rights Without Remedies and Challenges to Immunity in the Regime of Multilateral Development Financing Institutions}

In this Chapter the Proponent makes his contribution to the growing body of criticism against the lack of accountability mechanism in the regime of MDFIs.

Human Rights violations are \textit{ultra vires} acts of the third type, being contrary to law and public policy. It was also argued that the Political Question doctrine cannot be used to avoid Human Rights litigation, Human Rights having been removed from the competence of policy questions. A review of case law revealed inconsistent judicial attitudes towards International Law, observing therefrom the near-possibility of catalytic changes in judicial philosophy.

The Chapter has also established the trend in case law for aligning the immunity of MDFIs with diplomatic immunity because of these actors’ shared characteristic of being users of sovereign powers. The Proponent has likewise shown how violations of Human Rights obligations, being \textit{ultra vires} acts, are not within the ambit of protections of MDFIs’ immunity provisions.

\textsuperscript{181} REINISCH, \textit{supra} note 121, at 365.
CHAPTER IV: CONCLUSIONS ON THE ACCOUNTABILITY GAP AND HOLDING MULTILATERAL DEVELOPMENT FINANCING INSTITUTIONS LIABLE FOR HUMAN RIGHTS VIOLATIONS

The power to do good goes almost always with the possibility to do the opposite, and as a professional economist, I have had occasions in the past to wonder whether the [World] Bank could not have done very much better.

— Amartya Sen182

This work was undertaken with the passion of the Global South, coupled with the sobering balm of the extensive literature written on the subject of IOs, IHRL, accountability, and MDFIs. It dealt with two main issues: (1) Whether the Prohibited Political Activity Clauses in the constituent instruments of MDFIs bar the discharge of those obligations; and, (2) Whether MDFIs are immune from Human Rights litigation arising from their own breach of obligations. The findings are summarized here.

A. Primary Rules on the Human Rights Obligations of Multilateral Development Financing Institutions

It was shown here that MDFIs’ invocation of the Prohibited Political Activity Clause when asked to account for Human Rights is improper. It was established that the purpose of the Prohibited Political Activity Clause is to protect borrowers from discrimination, and is, therefore, only properly invoked by them. Further, the language of the provisions does not allow MDFIs to consider the Human Rights track-record of prospective borrowers when considering loan or investment applications. However, it does not preclude MDFIs from prospectively participating in the Human Rights agenda. It was also established that the Prohibited Political Activity Clause does not constitute a bar to Human Rights compliance because the discharge of customary Human Rights obligations has been removed from the competence of domestic affairs. Thus, when MDFIs impose Human Rights standards in their lending and investment activities, they are not violating their charters because they are not intervening in the internal affairs of the State. Furthermore, the Proponent made a submission for the systemic integration of the Prohibited Political Activity and Purpose Clauses of MDFIs’ constituent

instruments. Towards that end, the Proponent argued that the demands of the integrated Right to Development includes the taking on by MDFIs of Human Rights obligations.

**B. Secondary Rules on the Accountability of Multilateral Development Financing Institutions for Breach of Human Rights Obligations**

Chapter III introduced Individual A whose rights were theoretically violated by various actors. In each of those instances, Individual A was able to find a mechanism for redress, except in the case where the perpetrator was an MDFI.

The Proponent established that the nuanced understanding of the *ultra vires* doctrine leads to the conclusion that damages resulting from *ultra vires* acts in violation of law or public policy are within the adjudicative competence of National Courts. It was also shown that the fact that the rights sought to be vindicated herein are vested rights and have the character of International Law removes them from the operation of the Political Question doctrine and the Principle of Non-Justiciability. The Proponent has likewise established from a review of jurisprudence that the trajectory of law is towards the direction of holding MDFIs liable for Human Rights violations according to the *vires* and *ultra vires* framework. It was shown here how the effectivity of that framework lies in its recognition of the fundamental characteristics of MDFIs.

In the final analysis, this Work proved what the strictest constitutions and the most elaborate declarations of rights and accountabilities have recognized — that there is human cost to unbridled power. Despite a finding the MDFIs can and do violate Human Rights, victims remain without adequate redress. This Work ventured into sourcing the Human Rights obligations of MDFIs and the manner by which they may be held to account therefor. The resolution of these legal issues clarifies the substantive and remedial scope and limitations of MDFIs’ Human Rights obligations, finally recommending catalytic changes within their operational machinery and overall governance. This Thesis found a characterization and enunciation of the MDFI regime, so that they may become true pillars of prosperity and world peace.
CHAPTER V: RECOMMENDATIONS FOR EFFICIENT AND EFFECTIVE HUMAN RIGHTS ENFORCEMENT IN THE REGIME OF MULTILATERAL DEVELOPMENT FINANCING INSTITUTIONS

When [you are] working on development issues, optimism is not always based on rational analysis, often it is a moral choice.
— Jim Yong Kim, President of the World Bank (2012-2019)183

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

The Proponent recommends that MDFIs adopt Human Rights Due Diligence Frameworks. Although the UN Guiding Principles on Business and Human Rights are primarily addressed to States and business entities,184 the appropriateness of adopting such framework for MDFIs lies in the fact that in the exercise of their sovereign powers MDFIs operate very much like business entities. Granting loans, making investments, and referring to their Member States as “Clients,” are but a few examples of the ways MDFIs operate like businesses.

Principle 16 of the UN Guiding Principles on Business and Human Rights instruct, as a first step towards Human Rights alignment, the expert-guided drafting and subsequent publication of a policy commitment towards meeting Human Rights responsibilities that is approved and endorsed by senior management; expresses the Human Rights expectations from personnel, clients, and partners; and guides operational policies.185 A model instrument for MDFIs’ policy commitment is provided for as part of this Work’s annex.


185. Id. princ. 16.
The Proponent also recommends the incorporation of the existing assessment and planning frameworks of MDFIs under a Human Rights Due Diligence Framework which should be able to “identify and assess [Human Rights] risks[,] prevent and mitigate adverse [Human Rights] impacts[,] and account for how it addresses [Human Rights] impacts.” The adoption of a Human Rights Due Diligence Policy following the framework is likewise recommended. One of the key provisions for the Human Rights Due Diligence Policy is one that ensures the objectivity of the report. It is suggested that the provision reads:

A project proposed for Bank financing requires:

(a) An independent screening by the Bank;

(b) A Human Rights Impact Assessment to be conducted at the expense of the borrower by an independent and qualified expert or civil society group with Human Rights competency;

(c) A process of free, prior, and informed consultation with the affected population or communities at each stage of the project, and particularly during project preparation, to fully identify their views and ascertain their broad community support for the project

(d) The preparation of a Human Rights Impact Plan or a Human Rights Impact Planning Framework; and

(e) disclosure of the draft Human Rights Impact Plan or a Human Rights Impact Planning Framework.

The level of detail necessary to meet the requirements specified in paragraph (b), (c), and (d) is proportional to the complexity of the proposed project.

and commensurate with the nature and scale of the proposed project’s potential effects on the Human Rights, whether adverse or positive.\textsuperscript{187}

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

\textbf{B. Recommendations for Preserving the in Limine Litis Character of Immunity Claims in Human Rights Litigation Involving Multilateral Development Financing Institutions}

There is difficulty in procedural law to adjudicate claims of immunity \textit{in limine litis}. In the domestic sphere, some semblance of practice on the matter has grown from contestations of claims of immunity by the head of State in light of allegations of Human Rights violations. In the Philippines, for example, there is evolving practice by the Court to make a \textit{prima facie} determination of victims of Human Rights violations’ entitlement to protection under the Rules on the Writ of Amparo.\textsuperscript{188} The cases decided under the Rule shows that the Court can make a preliminary determination of the fact of violation and the possible ways that the implicated State agents may be responsible, to the end that the Petitioner in an \textit{Amparo} case may have his rights protected. Thus, the Court, in some way, recognizes both the entitlement to protection of the Petitioner upon a \textit{prima facie} showing, by way of substantial evidence, of violations of rights and the Defendants’ claim of immunity.\textsuperscript{189} In these instances, the Court justified the continuation of the case upon the theory that immunity is not violated thereby because the issuance of

\begin{footnotesize}
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\item \textsuperscript{187} OP/BP 4.10, \textit{supra} note, 102\textsuperscript{¶}6.
\item \textsuperscript{188} \textsc{Rule on the Writ of Amparo}, A.M. No. 07-9-12-SC (Oct. 16, 2007).
\item \textsuperscript{189} \textit{See} Secretary of National Defense v. Manalo 568 SCRA 1 (2008); Rubrico vs. Macapagal-Arroyo, 613 SCRA 233 (2010); Roxas vs. Macapagal-Arroyo, 630 SCRA 211 (2010); Saez vs. Macapagal-Arroyo, 681 SCRA 678 (2012); In the Matter of the Petition for the Writ of Amparo and Habeas Data in Favor of Noriel Rodriguez, 696 SCRA 390 (2013); Burgos vs. Macapagal-Arroyo, 621 SCRA 481 (2010); & Lozada, Jr. vs. Macapagal-Arroyo, 670 SCRA 545 (2012).
\end{itemize}
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the writ does not entail civil, criminal, or administrative liability. The goal in the issuance thereof is for the protection of a victim’s rights.

Thus, the Proponent recommends the adoption and development in National Courts’ jurisprudence of a test, which entails a *prima facie* determination of Human Rights violations of MDFIs without determining responsibility therefor. It requires the courts to receive evidence on the alleged violations and decide, in essence, whether proceeding with full-blown trial will be to the ultimate benefit of helping the MDFI achieve its goals. The proposed test makes a wholistic determination of the benefits accruing to the MDFI, in particular, and the MDFI regime in general. In fine, the courts must ask: Will the continuance of the case, by the rejection of the MDFI’s claim of immunity, be more beneficial for the MDFI? This determination must of course be guided by the finding in this Work that Human Rights accountability lead, as a matter of general proposition, to greater legitimacy for MDFIs.

In closing, the issues resolved in this Work are rooted in the dichotomous paradigm, under which MDFIs operate. Ultimately, the ideas that MDFIs are exempt them from discharging Human Rights obligations, or that they are unequivocally immune from Human Rights suits, precipitate from a perspective which views Human Rights, and ultimately human lives, as development trade-offs — one for the many, liberty *or* prosperity. This Thesis is a campaign for MDFIs to lift the firmament of global cooperation on development with the conjunctive, “And” so that the pursuit thereof may bring about, fully and finally, liberty *and* prosperity.
ANNEX

Model Instrument for Human Rights Policy Commitment

Human Rights Policy - 0.00

August 2019

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

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

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

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

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

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

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

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

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

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

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

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