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**Contextualizing Development: Indigenous Rights-based Approach by Multilateral  
Development Banks**  
**Andrew Sefufan Simamora<sup>1</sup>**

**Abstract**

*Indigenous peoples, as the most marginalized groups in all societies, are the ones most affected by development projects due to their small numbers, which precludes them from expressing their opposition or disapproval of a development plan. Their existing circumstances and needs are frequently overlooked in favor of the perceived benefits of a development plan, which is often decided without their knowledge or input even though evidence indicates that the failure to obtain their free, prior, and informed consent (FPIC) has resulted in unsustainable development projects.*

*Multilateral Development Banks (MDBs) have started adopting investment policies in accordance with UNDRIP, as the main international legal instrument on the protection of indigenous rights, which emphasizes the importance of FPIC. The prioritization of FPIC in the MDBs' policies addresses the criticisms levelled at the MDBs, namely that their policies are a "one-size-fits-all" approach that fails to take into account the specific needs of different indigenous peoples. This paper concludes that these policies have ultimately exerted an influence on the behavior of countries and private sectors, which have been compelled to comply with international law leveraging the power of lenders. This, in turn, has established prescriptive multilateral dialogue which extends the applicability of MDBs' policies even to projects not funded by them, thereby reinforcing the legitimacy of UNDRIP in the context of international development and beyond.*

**Keywords:** *Indigenous rights, multilateral development banks, sustainable development.*

**A. INTRODUCTION**

1. Background

The protection and promotion of indigenous peoples' rights over their lands, territories, resources, and self-determination (indigenous rights) continue to face a range of violations due to activities associated with development and the

extraction of resources.<sup>2</sup> This is despite the fact that the impediment of indigenous peoples to the exercise of their cultures and the fostering of their economic opportunities is often a significant factor in the failure of development plans. The interdependence between indigenous rights and development is evident when

<sup>1</sup> Master of Laws (LL.M.) in Public International Law (Stockholm University, Sweden), Bachelor of Laws (S.H.) (Padjajaran University, Indonesia), <https://orcid.org/0009-0006-1242-0223>, [andrewsefufan@gmail.com](mailto:andrewsefufan@gmail.com).

<sup>2</sup> Office of the United Nations High Commissioner for Human Rights, 'Indigenous Peoples and the United Nations Human Rights System' (August 2013), 4 <<https://www.ohchr.org/sites/default/files/Documents/Publications/fs9Rev.2.pdf>>, accessed 24 July 2023.

one considers the potential knock-on consequences that threats to these indigenous rights may have on the development agenda itself. This relationship is explicitly acknowledged in the Preamble of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which states that ‘respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.’

As is the case with all other humans, indigenous peoples are entitled to the freedoms that are necessary to sustain life in the world. These freedoms were previously outlined by Franklin D. Roosevelt in what has become known as the four essential human freedoms. These include the freedom of speech and expression, freedom of religion, freedom from want, and freedom from fear.<sup>3</sup> In light of the dichotomy that exists within international human rights law, where one area focuses on the protection of civil and political rights, while another set pertains to the safeguarding of economic and social rights, the freedom from wants and the freedom from fear assume particular relevance in the context of development, which is the focus of this article. These two freedoms relate to the fulfilment of economic and social rights.

Furthermore, these two interrelated freedoms form a human security that protects vulnerable individuals from threats and dangers posed by their environment. “Freedom from want” means the fulfilment of basic needs like food, shelter, and

development, while “freedom from fear” refers to identity needs and physical and personal safety.<sup>4</sup> Human security is broadly linked to the state of the global economy, development, and globalization.<sup>5</sup> In other words, human security represents a fundamental element in the formation of a strong connection between the advancement of development and human rights.

As prominent promoters of social and economic development, Multilateral Development Banks (MDBs) have a close relationship with the promotion and protection of human rights in achieving their purpose to provide financial assistance for investment projects and policy-based loans, especially in the developing countries<sup>6</sup> where the majority of the world’s indigenous peoples live.<sup>7</sup> Even in developed countries which consistently place in the top rankings of the United Nations Development Programme’s Human Development Index (HDI), the indigenous peoples still lag behind the non-indigenous peoples in life expectancy, educational attainment, and income.<sup>8</sup> In this regard, human security of the indigenous peoples may also depend on the compliance from the MDBs with international human rights instruments that protect indigenous peoples as one of the most vulnerable and marginalized groups in any society.<sup>9</sup>

International Law Association (ILA), one of the most influential organizations in international law and indigenous rights,<sup>10</sup> endorses foreign investors to refrain from investing in projects that might violate the rights of indigenous peoples as well as

<sup>3</sup> Franklin Delano Roosevelt, ‘The State of the Union Address to Congress’ (gilderlehrman.org, 6 January 1941) <<https://www.gilderlehrman.org/sites/default/files/inline-pdfs/Four%20Freedoms%20Speech%201941.pdf>> accessed 10 July 2023.

<sup>4</sup> Robert J. Hanlon and Kenneth Christie, *Freedom from Fear, Freedom from Want: An Introduction to Human Security* (University of Toronto Press 2016), p. 4-6.

<sup>5</sup> Gerd Oberleitner, ‘Human Security: A Challenge to International Law?’, (2005), *Global Governance vol. 11 Issue (2)*, p. 185, 188.

<sup>6</sup> Congressional Research Service, ‘Multilateral Development Banks: Overview and Issues for Congress’ (February 2020), p. 1-2, <<https://crsreports.congress.gov/product/pdf/R/R41170>> accessed 21 July 2023.

<sup>7</sup> Erica-Irene A. Daes, Australian Human Rights Commission, ‘The Impact of Globalization on Indigenous Intellectual Property and Cultures’ (Lecture co-

hosted by HREOC and Aboriginal and Torres Strait Islander Services, Sydney, 25 May 2004) <<https://humanrights.gov.au/about/news/speeches/impact-globalization-indigenous-intellectual-property>> accessed 20 Mar 2024.

<sup>8</sup> Martin Cooke et. al., ‘Indigenous well-being in four countries: An application of the UNDP’s Human Development Index to Indigenous Peoples in Australia, Canada, New Zealand, and the United States’ (2007) 7 *BMC International Health and Human Rights*

<sup>9</sup> Hanlon and Christie (n 4), p. 55.

<sup>10</sup> Timo Koivurova, Federico Lenzerini, and Siegfried Wiessner, ‘The Role of the ILA in the Restatement and Evolution of International and National Law Relating to Indigenous Peoples’ in Katja Karjalainen, Iina Tornberg, and Aleksi Pursiainen (eds), *International Actors and the Formation of Laws* (Springer 2022), p. 101-2.

exercise their influence on host countries.<sup>11</sup> It can be argued that MDBs are expected to exercise their influence in making sure that countries implement the rules and standards contained in UNDRIP through their investment decisions and policies which could trigger adjustments from the national laws of countries in need of financial assistance. Given that very few of the provisions set out in UNDRIP have attained the status of customary international law,<sup>12</sup> domestic laws are crucial in filling the obligation gaps in the implementation of UNDRIP.

By situating human rights conventions like UNDRIP as an end in themselves and investment instruments as a means to an end,<sup>13</sup> it is then thought-provoking to analyze the possibility of using institutionally generated investment policies by MDBs as a means of implementing UNDRIP in relation to sustainable development goals.

## 2. Method and Purpose

This article aims to provide analysis through a doctrinal approach regarding the significance of MDBs' investment policies in influencing the behavior of countries in treating their indigenous communities as well as the behavior of private sectors in supporting it. The analysis will be based on relevant international standards, practices of countries and private sectors, and the writings of legal scholars concerning indigenous rights and the law-making processes in international law. Furthermore, it is essential to inquire into the relevance of indigenous peoples' participation in the international development agenda.

## 3. Delimitation and Outline

This article will provide analysis that focuses more on the fulfilment of economic and

social rights of the indigenous peoples in relation to sustainable development goals. Thus, the fulfilment of their civil and political rights, while no less important and still linkable to development, will not be addressed.

Discussion in this article will be divided into two subsequent chapters that build on this Chapter 1. The relationship between sustainable development goals and the promotion and protection of indigenous rights will be discussed in Chapter 2, while the analysis of the inclusion of an indigenous rights-approach in international development standards as a result of MDBs investment practices will be provided in Chapter 3. Lastly, the whole discussion will be concluded in Chapter 4.

## B. FILLING TWO NEEDS WITH ONE DEED: INDIGENOUS PEOPLE'S PARTICIPATION IN SUSTAINABLE DEVELOPMENT

Scrutinizing the synergy between MDBs and indigenous peoples is pertinent to explore how much of a role the non-state actors play in achieving sustainable development goals which indeed emphasize the importance of multi-stakeholder partnerships between private, public, and civil society actors.<sup>14</sup> Even though the 2030 Agenda for Sustainable Development adopted by the UN General Assembly only mentions indigenous peoples explicitly in two goals, namely Goal 2 on Zero Hunger and Goal 4 on Quality Education,<sup>15</sup> countries are still encouraged to draw on contributions from indigenous peoples in their regular and inclusive reviews of the progress of their sustainable development implementation.<sup>16</sup>

Involving indigenous peoples is a form of bottom-up approach, which is an

<sup>11</sup>International Law Association (79<sup>th</sup> Conference) Resolution No. 3: Committee on the Implementation of the Rights of Indigenous Peoples (Online 29 November-13 December 2020).

<sup>12</sup>Federico Lenzerini, 'Implementation of the UNDRIP around the world: achievements and future perspectives. The outcome of the work of the ILA Committee on the Implementation of the Rights of Indigenous Peoples' (2019) *The International Journal of Human Rights* Vol. 23 Issue (1-2), p. 51, 52.

<sup>13</sup>José E. Alvarez, *The Public International Law Regime Governing International Investment* (The Hague Academy of International Law 2011), p. 62.

<sup>14</sup>Oscar Widerberg et. al., 'Multi-stakeholder partnerships for the SDGs: is the "next generation" fit for purpose?' (2023), *International Environmental Agreements* Vol. 23 Issue (2), p. 165, 166.

<sup>15</sup>United Nations General Assembly Resolution No. 70/1 (25 September 2015) UN Doc A/RES/70/1.

<sup>16</sup>Ibid [79].

essential component of participatory development strategy which includes a greater number of actors in development planning and project design.<sup>17</sup> This approach seeks micro-level solutions to poverty by directly involving those who are actually experiencing such poverty and disadvantage from the early stages. Such engagement will create a sense of community ownership, commitment, and accountability to the development projects because they're given the opportunity to voice their concerns.<sup>18</sup> It consequently strengthens the views of poor and marginalized people, especially in this case the indigenous peoples, which should have been the target of the projects being built and designed in the first place.

Failure to engage indigenous peoples in a development strategy through their Free, Prior, and Informed Consent (FPIC) has been shown to complicate government's development strategy, as evidenced in the case of Belo Monte Hydropower Dam in Brazil.<sup>19</sup> Not only did the Brazilian government violate the human rights of their indigenous peoples, it had also hampered the dam construction which took more than four decades to complete since its first planning in 1975, especially after the World Bank, the initial majority funder of the project, pulled out of funding it.<sup>20</sup>

A similar case occurred in Guatemala in the early 2000s when the Guatemalan government awarded a mining project called Marlin Mine to the private sector in the wake of its new mining law which was designed to attract foreign investment. The International Finance Corporation (IFC), the private sector arm of the World Bank Group, provided the first loan for the project despite protests and intense criticisms from indigenous communities.<sup>21</sup>

Those protests and critics were later suppressed by armed troops and silenced by the criminalization of indigenous communities who are still experiencing the social and environmental impacts of the Marlin Mine even after it eventually closed in 2017.<sup>22</sup> This case demonstrates that sustainable development cannot be achieved without proper consultation with the affected indigenous communities. Besides, short-lived projects are not worth the suffering that the indigenous communities have endured as a result of those projects.

A review of the cases studied by the Inspection Panel in its report, which focuses on the projects funded by the World Bank Group and their impact on indigenous peoples, reveals that the primary issue pertains to the inadequacies observed in the preparation stage of the projects. The cases under examination were the result of the investigations conducted by the Inspection Panel between its establishment in 1993 and 2016 in countries across the Africa, Americas, Asia, and Oceania. These shortcomings in the preparation stage include a lack of consideration for indigenous peoples during the screening phase, inadequate consultation procedures, and the inability to communicate effectively in the native language of the affected indigenous peoples.<sup>23</sup> Ultimately, these shortcomings stem from a failure to obtain FPIC through the provision of transparent project designs and comprehensive environmental and social impact assessments to the affected indigenous peoples.

The challenge of securing FPIC from the affected indigenous peoples cannot be overlooked. It mainly hinges on the efficacy of communication during the consultation

<sup>17</sup>Michael Riegner, 'The Law of Multilateral Development Banks' in Birgit Peters and Eva Julia Lohse, *Sustainability through Participation?* (Brill 2023), p. 441.

<sup>18</sup>Md Shahidulla Kaiser, 'Are Bottom-Up Approaches in Development More Effective than Top-Down Approaches?' (2020), *Journal of Asian Social Science Research Vol. 2 Issue (1)*, p. 91, 94-5.

<sup>19</sup>Anthony Hall and Sue Branford, 'Development, Dams and Dilma: the Saga of Belo Monte' (2012) 38(6) *Critical Sociology*, p. 851, 853.

<sup>20</sup>Jacquelyn Amour Jampolsky, 'Activism is the New Black! Demonstrating the Benefits of International Celebrity Activism through James Cameron's Campaign against the Belo Monte Dam' (2012), *Colorado Journal of International Environmental Law & Policy Vol. 23 Issue (1)*, p. 227, 243.

<sup>21</sup>Amanda M. Fulmer, Angelina Snodgrass Godoy, and Philip Neff, 'Indigenous Rights, Resistance, and the Law: Lessons from a Guatemalan Mine' (2008), *Latin American Politics and Society Vol. 50 Issue (4)*, p. 91, 93-4.

<sup>22</sup>Nina Lakhani, 'Fighting a huge monster': mine battle in Guatemala became a playbook for polluters' *The Guardian* (San Miguel Ixtahuacán, 18 Aug 2023) <<https://www.theguardian.com/environment/2023/aug/18/fighting-huge-monster-mine-battle-guatemala-playbook-polluters>> accessed 21 Aug 2023.

<sup>23</sup>The Inspection Panel, 'Indigenous Peoples' (Emerging Lessons Series No. 2, October 2016), p. 25-32.

phase, where all parties must have a mutual understanding. The Allain Duhangan Hydropower Project in India, in which the IFC is involved, serves as a case in point. The local communities were not provided with the Environmental and Social Impact Assessments of the project in a language they understood, namely Hindi, until years of protests and objections from them. This resulted in the postponement of the commencement of the project.<sup>24</sup> The key takeaway from this case is that project sponsors must refrain from assuming FPIC on the part of the affected local communities, without first establishing a clear and mutual understanding of the project in question, including its potential impacts. In the absence of such an understanding, the project may be delayed or even fail to meet the needs of the people, while the project sponsors stand to gain financially.

The aforementioned examples support the assertion that MDBs and indigenous peoples have certain power to determine the trajectory and ultimate outcome of a country's development strategy. If the two are not in alignment, then the planned development will not be effective and may result in adverse social and environmental consequences for society. Although indigenous peoples may find it very challenging, if not impossible, to prevail against well-funded MDBs, it remains worthwhile to resist destructive development projects. This resistance can serve as a counterhegemonic tool for indigenous peoples to craft their own bottom-up form of globalization<sup>25</sup> in hope that governments and the international community will provide support, so that their resistance would not be futile, and their human rights would not continue to be violated.

The MDBs play a significant role in influencing the development of domestic legislation of a country. This influence can have a positive or negative impact, as evidenced by the liberalization of the Philippines' mining laws during the late 1980s and the early 1990s, which was influenced by the Asian Development Bank (ADB). The enactment of the Philippines' Mining Act aimed to increase foreign direct investment in the nation's mineral resources by providing certain incentives to attract foreign investors.<sup>26</sup> At the micro level, however, such a mining-based development paradigm failed to alleviate poverty among the affected communities in the Philippines because it had been pursued without properly involving all groups and individuals in society to address the underlying social, economic, and environmental problems that caused conflicts between them and the mining companies.<sup>27</sup> With hindsight, had participatory development been the basis for the amendment, those conflicts could have been avoided or at least minimized by the Philippine government.

The importance of participation from many parties in development is also stressed in Goal 17 on Partnerships for the Goals. This last goal is considered as the bridge for achieving all other goals in the 2030 Agenda for Sustainable Development because it calls for deeper and more coordinated global partnerships between various actors which will ensure the consistency of the policies at the domestic and international levels.<sup>28</sup> In this case, participation of indigenous peoples in decision-making processes forms a procedural component which defines the social dimension of sustainability that also protects the enjoyment of their rights.<sup>29</sup> It facilitates the integration between

<sup>24</sup> Compliance Advisor Ombudsman, 'Complaint regarding Allain Duhangan Hydropower Project Himachal Pradesh, India' (Assessment Report, March 2004), p. 9-13.

<sup>25</sup>Fulmer, Godoy, and Neff (n 21), p. 97.

<sup>26</sup>William N. Holden & R. Daniel Jacobson, 'Mining amid armed conflict: nonferrous metals mining in the Philippines' (2007), *The Canadian Geographer Vol. 51 Issue 4*, p. 475, 479-81.

<sup>27</sup>Ibid, p. 493-7.

<sup>28</sup>Sinan Küfeoğlu, *Emerging Technologies: Value Creation for Sustainable Development* (Springer 2022), p. 497-8.

<sup>29</sup>Riegner (n 17), p. 450.

indigenous and scientific knowledge systems as a result of the dialogue established between indigenous peoples, civil societies, governments, development partners, and other stakeholders involved. Successful complementarity between these two knowledge systems has been linked to effective climate change adaptation strategies, mitigation and remediation of the risks associated with natural hazards, and maintenance of global biodiversity.<sup>30</sup> In other words, participatory development positions indigenous peoples as active agents of change in the decision-making processes which benefits not only them in terms of respecting and protecting their human rights, but also the international community by ensuring the achievement of all sustainable development goals.

Therefore, considering the significant influence that MDBs hold over domestic laws, the inclusion of indigenous peoples in their operations would put human security at the heart of development paradigms to achieve 'humane global governance', an idea coined by Richard Falk, which aims to minimize violence, enhance human rights, protect the environment, and promote social justice.<sup>31</sup> In addition to the normative dimension of humane global governance, Falk also highlighted the practical dimension of this idea which comprises administration, implementation of norms, and institutionalized collaboration.<sup>32</sup> It can be deduced that the desired world order in accordance with the principles of humane global governance could be achieved through global-scale collaboration between international institutions and governments that is based on human security enforced domestically by governments. Thus, this global-scale collaboration helps realize both development agenda and protection of indigenous rights.

### C. LET THE RIGHT ONES IN: INCORPORATING INDIGENOUS RIGHT-BASED POLICIES

A review of the legal instruments adopted by MDBs reveals that the phrase 'sustainable development' first appeared in the founding treaty of the New Development Bank (NDB) in 2014<sup>33</sup> which was also incorporated in the founding treaty of the Asian Infrastructure Investment Bank (AIIB) in 2015,<sup>34</sup> in which it is put as one of their respective purposes. However, there is no mention of human rights in any MDBs' founding treaties, let alone concern for the indigenous peoples. It is only after continuous negative publicity in the banking sector for financing environmentally and socially damaging projects that MDBs started to reject the idea that they should only make investment decisions based on economic factors because in practice, economic factors and human rights issues are inextricably linked.<sup>35</sup>

The World Bank was the first MDB to incorporate indigenous-rights standards in its operational policy for financing major projects in 1982.<sup>36</sup> Its operational policy kept getting updated and revised until in 2016, the World Bank adopted the Environmental and Social Framework as its main mandatory requirements in relation to the projects it finances.<sup>37</sup> Out of ten standards set forth in the World Bank's Environmental and Social Framework, Standard 7 is specifically dedicated to protect indigenous rights. It requires borrowers to assess the impacts of the projects towards indigenous peoples, provide appropriate consultation strategy to include them in the process according to their FPIC, and establish a grievance mechanism that is culturally appropriate

<sup>30</sup>Giorgia Magni, 'Indigenous knowledge and implications for the sustainable development agenda' (2017), *European Journal of Education Vol 52 Issue 4*, p. 437, 443-4.

<sup>31</sup>Richard Falk, *(Re)Imagining Humane Global Governance* (Routledge 2014), p. 3.

<sup>32</sup>*Ibid*, p. 40.

<sup>33</sup>Agreement on the New Development Bank (adopted 15 July 2014, entered into force 3 July 2015) 3126 UNTS.

<sup>34</sup>Asian Infrastructure Investment Bank Articles of Agreement (adopted 29 June 2015, entered into force 25 December 2015) 3218 UNTS.

<sup>35</sup>Martina Guidi, 'The protection of indigenous peoples' concerns in World Bank-funded projects' in Giorgio Sacerdoti (et.al.) (eds.), *General Interests of Host States in International Investment Law* (Cambridge University Press 2014), p. 238.

<sup>36</sup>*Ibid* 240.

<sup>37</sup>International Bank for Reconstruction and Development, 'The World Bank Environmental and Social Framework' (2017) <<https://thedocs.worldbank.org/en/doc/837721522762050108-0290022018/original/ESFFramework.pdf>>, accessed 29 Aug 2023.

and accessible to them for resolving complaints and concerns over noncompliance with the standards. Independent grievance or accountability mechanisms like this could ensure transparency of development projects and participation of indigenous peoples.

An example of the successful implementation of the World Bank's Environmental and Social Framework within a domestic context is the adoption of Environmental and Social Management Framework for Geothermal Energy Upstream Development Project developed by two Indonesian state-owned enterprises called PT Sarana Multi Infrastruktur (Persero) and PT Geo Dipa Energi (Persero), in collaboration with the World Bank.<sup>38</sup> This framework requires that every investment in Indonesian geothermal power development project in an area where indigenous peoples are identified through the screening process shall prepare an Indigenous Peoples Plan (IPP) to ensure their participation in planning, implementation, and evaluation as well as to establish procedures for grievance mechanisms in the project. Those two state-owned enterprises will assess the impacts and benefits that the projects may have on the affected indigenous peoples. FPIC shall be obtained from these peoples before a project can commence. In this manner, every project will receive broad community support throughout each stage of its development.

This type of implementation is particularly important following the criticisms against the MDBs' policies, which have been perceived to be put in place to ease criticisms of MDBs from civil society organizations and domestic legislatures. The "one-size-fits-all" approach adopted by MDBs has been identified to be conceptually and

practically flawed because the policies only apply to projects funded by MDBs which bypass existing national frameworks, and thus have minimal impacts on most of the projects which are not funded by MDBs. Moreover, sole reliance on the borrower governments' compliance to implement the policies could jeopardize the relevance and involvement of MDBs, given that the borrower governments have the option to pursue alternative sources of funding for their projects that are not subject to the policies adopted by MDBs.<sup>39</sup>

Norm-based models of international law posit that countries do not comply with international law solely in consequentialist pursuit of predetermined self-interest. Rather, their behavior is influenced by principled ideas constructed through interaction with internal and external groups or institutions which are considered the agents of internalization or norm entrepreneurs.<sup>40</sup> In the context of this article, the interaction between countries, MDBs, and indigenous peoples can create a norm which will be internalized in the domestic legal systems of countries to achieve compliance with international law because it is also in line with their interests.

The implementation of the World Bank's Environmental and Social Framework by the two Indonesian state-owned enterprises through their own framework illustrates that, in addition to countries, the World Bank Group also exerts a significant influence over private sectors (non-state actors). As a result, all Indonesian geothermal power development projects are now expected to comply with the World Bank's policies, even those which are not funded by it.

The adoption of the Performance Standards provides further evidence of this

<sup>38</sup>PT Sarana Multi Infrastruktur (Persero) & PT Geo Dipa Energi (Persero), 'Environmental and Social Management Framework' (2022) <[https://ptsmi.co.id/cfind/source/files/ess/geudp-esmf-ver4\\_november-2022.pdf](https://ptsmi.co.id/cfind/source/files/ess/geudp-esmf-ver4_november-2022.pdf)>, accessed 14 Apr 2024.

<sup>39</sup> Chris Humphrey, 'Time for a new approach to environmental and social protection at multilateral development banks' (Briefing Paper, April 2016)

<<https://odi.org/en/publications/time-for-a-new-approach-to-environmental-and-social-protection-at-multilateral-development-banks/>>, accessed 17 Dec 2024.

<sup>40</sup>Oona A. Hathaway, 'Between Power and Principle: An Integrated Theory of International Law' (2005), *The University of Chicago Law Review* Vol. 72 Issue 2, p. 469, 481-3.

influence. This instrument was adopted by the private sector arm of the World Bank Group, namely International Finance Corporation (IFC), as its operational policy in financing private sector projects which is substantially based on the World Bank's Environmental and Social Framework.<sup>41</sup> This instrument comprises eight Performance Standards, with Performance Standard 7 explicitly encouraging private sectors to provide opportunity for indigenous peoples to participate in and benefit from the project-related activities since these activities may assist them in achieving their aspirations for economic and social development.

Furthermore, IFC's Performance Standards formed the basis for the development of Equator Principles which are adhered to by the majority of financial institutions around the world in regulating project finance.<sup>42</sup> Equator Principles outline due diligence obligations that the borrowers shall undertake prior to the signing of loan agreement with lenders, with one of the principles (i.e., Principle 5) requiring borrowers to demonstrate effective stakeholder engagement. Under this principle, the protections afforded to the indigenous peoples shall be equivalent to those set out in other international standards.<sup>43</sup> As such, the existence of IFC's Performance Standards and Equator Principles have practically extended the reach of international law regarding the protection of indigenous peoples in most project financing undertaken by private sectors.

By this means, the World Bank Group has a potential to shape countries' domestic laws as well as corporate policies with respect to the protection of the indigenous rights. It exemplifies the bottom-up form of globalization which

ideally involves the indigenous peoples from the project design stage, utilizing indigenous knowledge and preferences or priorities to ensure socio-cultural compatibility and sustainability.<sup>44</sup> As a result, the World Bank Group's standards enforce and strengthen the applicability and legitimacy of Article 32 of UNDRIP which acknowledges the right of indigenous peoples to determine and develop priorities and strategies for development or use of their possessions by requiring countries and private sectors to consult and cooperate in good faith with indigenous peoples to obtain their FPIC. These standards extend beyond the mere participation of the indigenous peoples for the purpose of project implementation. It is important to ensure that the indigenous peoples have a voice during the development stage as well because focusing solely on participation during the project implementation stage will only lead to a bias towards the interests of investors.

At the regional level, regional MDBs also extend the influence that has been established by the World Bank Group through the adoption and implementation of their respective operational policies. For instance, the right of indigenous peoples to direct the course of their development is explicitly recognized in the Safeguard Requirements 3 of the Safeguard Policy Statement adopted by the ADB in 2019.<sup>45</sup> The distinctive feature of this ADB's Safeguard Policy Statement is its explicit reference to UNDRIP as part of its key policy issues and considerations in enhancing consultation and participation that are based on FPIC, which distinguishes it as the only MDB to do so.<sup>46</sup>

Inter-American Development Bank (IDB) also adopted an Environmental and

<sup>41</sup>International Finance Corporation, 'Performance Standards on Environmental and Social Sustainability' (2012) <<https://www.ifc.org/content/dam/ifc/doc/2010/2012-ifc-performance-standards-en.pdf>> accessed 1 Sep 2023.

<sup>42</sup>Hanlon and Christie (n 4), p. 195.

<sup>43</sup>Douglas Sarro, 'Do Lenders Make Effective Regulators? An Assessment of the Equator Principles on Project Finance' (2012), *German Law Journal* Vol. 13 Issue 12, p. 1522, 1528-1530.

<sup>44</sup>Guidi (n 35), p. 247.

<sup>45</sup>Asian Development Bank, 'Safeguard Policy Statement' (Policy Paper, June 2009) <<https://www.adb.org/sites/default/files/institutional-document/32056/safeguard-policy-statement-june2009.pdf>> accessed 6 Sep 2023.

<sup>46</sup>Jessica Rosien, *Understanding the Asian Development Bank's Safeguard Policy* (Oxfam Australia 2010), p. 21.

Social Policy Framework that is almost like a carbon copy of the World Bank's Environmental and Social Framework, except in Standard 9 where IDB's framework deals with gender equality, while the World Bank's framework regulates financial intermediaries.<sup>47</sup> Like the World Bank's framework, IDB's framework incorporates quite similar requirements regarding indigenous peoples in its Standard 7.

European Investment Bank (EIB), the lending arm of the European Union, requires that all projects affecting indigenous peoples (regardless positively or negatively) shall comply with paragraphs 30 to 59 of Standard 7 of EIB's Environmental and Social Standards.<sup>48</sup> The requirements are arguably distinct from those of other MDBs, particularly in their comprehensive approach, which is divided into several subsections. The requirements commence with the process of screening and reporting of any presence of indigenous peoples, followed by assessment of potential impacts, meaningful consultation with indigenous peoples to reach an agreement on mitigation, compensation, and benefit-sharing as a result of project-related activities based on FPIC from the indigenous peoples. In addition to the establishment of a grievance mechanism and the project's monitoring system, public authorities are required to play an active role in the projects to ascertain their compliance with the level of consent given to the project activities by the indigenous peoples concerned.

On the other hand, NDB adopted rather narrow requirements regarding indigenous peoples in its Environment and Social Standard 3 which does not explicitly mention anything about FPIC.<sup>49</sup> Nonetheless, NDB's framework still

captures its essence by requiring borrowers to involve indigenous peoples since the initial phase of the projects, including in decision-making process.

Without strong and legitimate engagement in decision-making, those policies from MDBs will only accord with the superficial appearance of participation from indigenous peoples.<sup>50</sup> The implementation of a consultation process based on FPIC will enable the tailoring of a development project that is beneficial to indigenous peoples in a culturally appropriate manner. This approach addresses the criticism that MDBs' policies are a "one-size-fits-all" approach that does not take into account the specific needs of individual projects. This is the situation with African Development Bank (AfDB), which, in contrast to other MDBs, lacks any clear regulations. There are at least no accessible instruments that regulate participation of indigenous peoples in the development projects funded by AfDB. These uncertainties could jeopardize peace and human security of indigenous peoples affected by the projects funded by AfDB because potential funding recipients cannot understand their obligations and affected indigenous peoples don't have any clues and realistic expectations about their participation in any AfDB-funded projects.<sup>51</sup>

Nevertheless, it can be seen that the adoption of Environmental and Social Framework by the World Bank has broadened the notion of sustainability and expands the possibilities for using domestic legal systems, which in turn strengthen the sovereignty of countries in the field of sustainability standards. The proliferation of the World Bank's policies into most regional MDBs' policies has created global

<sup>47</sup>Inter-American Development Bank, 'Environmental and Social Policy Framework' (September 2020) <<https://www.iadb.org/en/mpas>> accessed 7 Sep 2023.

<sup>48</sup>European Investment Bank, 'Environmental and Social Standards' (2 February 2022) <<https://www.eib.org/en/publications/eib-environmental-and-social-standards>> accessed 23 Oct 2024.

<sup>49</sup>New Development Bank, 'Environment and Social Framework' (Version 2016 V4, 11 March 2016) <<https://www.ndb.int/wp-content/uploads/2017/02/ndb-environment-social-framework-20160330.pdf>> accessed 7 Sep 2023.

<sup>50</sup>Fulmer, Godoy, and Neff (n 21), p. 98.

<sup>51</sup>Daniel D. Bradlow and Megan S. Chapman, 'Public Participation and the Private Sector: The Role of Multilateral Development Banks in the Evolution of International Legal Standards' (2011), *Erasmus Law Review Vol. 4 Issue. 2*, p. 91, 108.

standards for social and environmental sustainability in development finance which leaves borrowing countries with little choice but to accept the standards and eventually diffuse them into their domestic systems.<sup>52</sup> Several cases explained in the previous chapter show that without the help of MDBs, it's difficult for the governments in the countries to realize their agenda. So, MDBs could reasonably utilize this power by requiring funding recipients to respect and protect indigenous rights in particular and human rights in general. Human security of indigenous peoples is encapsulated in the participation right. The MDBs' policies have internationalized this participation right by requiring funding recipients to obtain consent from indigenous peoples and involve them in the process of assessment and decision-making process.<sup>53</sup>

The fragmentation of international law has enabled the MDBs to become an interpretive community who share a common approach to interpretation due to their identity and shared understandings.<sup>54</sup> The practice of international development depends on dominant legal interpretive communities like MDBs which always attempt to ensure that their specialized expertise and normative orientation remain the dominant paradigm in the development area by cooperating with governments and private sectors to support their normative visions.<sup>55</sup>

It is apparent that MDBs have looked to one another in developing and implementing social and environmental standards despite a certain degree of regional and institutional variance, thus setting quite similar public participation requirements to their public and private sector clients.<sup>56</sup> The growing relevance of MDBs in world politics has contributed to

the norm-creation processes that led to the formation of soft laws which give flexibility to international law. The flexibility character of soft laws has proven to be more effective in encouraging and implementing human rights compliance<sup>57</sup> because it can be concluded and implemented by non-state actors, among other things. Even the United Nations used the avenue of a soft law document instead of an international treaty to allow active participation of non-state actors, including the indigenous peoples themselves, in concluding the UNDRIP.<sup>58</sup> Explicit reference to international legal instruments like UNDRIP in MDB's standards has influenced and contributed to the development of international law on indigenous peoples' participation in development projects through the precedents and interpretation they create during their engagement in the development projects.<sup>59</sup>

This phenomenon follows the definition set out by the "reflexive law" category, which was coined by a German sociologist, Gunther Teubner, in which the law-making process relies on regulated autonomy in establishing social systems. The legal control in this regime is indirect and abstract.<sup>60</sup> In relation to the discussions in this article, the frameworks and policies adopted by MDBs have established self-regulating systems through norms of organization and procedure without having precisely defined formal rules. The norms are spread and implemented through two main correlated pathways which begin when MDBs start copying and adapting significant portions of each other's frameworks or policies, known as legal transplant, and multi-country efforts of legal cooperation and standardization

<sup>52</sup>Ibid, p. 437-8.

<sup>53</sup>Riegner (n 17), p. 443.

<sup>54</sup>Michael Waibel, 'Interpretive Communities in International Law' in Andrea Bianchi, Daniel Peat, and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015), p. 147-51.

<sup>55</sup>Ibid, p. 161-2.

<sup>56</sup>Bradlow and Chapman (n 51), p. 92.

<sup>57</sup>Felipe Gómez Isa, 'The Role of Soft Law in the Progressive Development of Indigenous Peoples' in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen, and John Cerone (eds), *Tracing the Roles of Soft Laws in Human Rights* (OUP 2016), p. 191.

<sup>58</sup>Ibid 194.

<sup>59</sup>Bradlow and Chapman (n 51), p. 120.

<sup>60</sup>Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983), *Law & Society Review Vol. 17 Issue 2*, p. 239, 254-255.

which result in integration and harmonization due to similar legal approach.<sup>61</sup> The integration and harmonization created is further strengthened by private sectors adopting a similar approach.

Prescriptive multilateral dialogue established among MDB's, countries, private sectors, and indigenous peoples has strengthened UNDRIP's legitimacy by bringing about a convergence of understanding of indigenous peoples' rights, therefore, also building legal obligation or expectation that these rights will be upheld. This is not to say that MDB's policies can be taken in its entirety as articulating customary international law, but that the documents represent core precepts that are widely accepted and, to that extent, are indicative of customary international law concerning indigenous peoples.<sup>62</sup>

#### D. CONCLUSION

Defending indigenous rights is not an anti-development act, but rather a pro-development way to tame the development agenda so that it does not focus solely on profits, but also a sustainable future. Short-term development projects do not justify the long-term negative consequences that indigenous communities may face. Therefore, FPIC as well as active participation from indigenous peoples in the decision-making process of development projects is of the essence in achieving sustainable development goals.

Resistance from indigenous peoples has forced MDBs to create an unprecedented array of available instruments to utilize in preventing the recurrence of past violations of indigenous rights. These instruments contain more or less similar standards that countries and private sectors must meet as prerequisites for project funding by the MDBs. Consequently, these procedural requirements adopted by MDBs gain

support from multiple countries and private sectors that internalize them into their respective investment laws and policies.

Consequently, regulations governing development finance that take into account the rights of indigenous peoples have started to become increasingly aligned with the principles set forth in UNDRIP and other related international norms, thereby enhancing their legitimacy in international law. Interaction between MDBs, countries, and private sectors has indirectly affected one another in developing indigenous rights-based approaches in international development to achieve sustainable peace and human security.

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<sup>61</sup>Tseming Yang & Robert V. Percival, 'The Emergence of Global Environmental Law' (2009), *Ecology Law Quarterly* Vol. 36, p. 615, 626-627.

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